THE UNACCOMMODATING NATURE OF ACCOMMODATIONS LAWS: WHY NARROWLY TAILORED EXEMPTIONS TO ANTIDISCRIMINATION STATUTES MAKE FOR A MORE INCLUSIVE SOCIETY

ABSTRACT

Many states have antidiscrimination laws that prohibit the refusal of services or participation in activities in places of public accommodations on the basis of sex, religion, race, and sexual orientation, among other things. Before the Supreme Court decided Obergefell v. Hodges*, and since then, there have been several cases in which same-sex couples allege violations of state public accommodations laws by wedding vendors who refused their business. The couples alleged discrimination on the basis of sexual orientation, but the vendors raised First Amendment defenses, primarily asserting their rights to free speech and the free exercise of religion. In each of these cases, the courts have found that wedding vendors' constitutional rights are outweighed by the competing constitutional rights of the same-sex couple and have compelled the vendors to comply with the state accommodations laws.*

This Note looks at two of the more recent cases addressing this issue as case studies evaluating the viability of constitutional rights in wedding vendor cases. The potential viability of a wedding vendor's hybrid rights claim, in which a free exercise claim is joined by a claim for another First Amendment freedom, such as free speech, provides the basis for a narrowly drawn religious exemption to state accommodations laws, as applied to wedding vendors and same-sex marriage festivities. By recognizing a narrowly drawn exemption, a state legislature can perpetuate the statutory protections against discrimination advanced by state accommodations laws while still safeguarding fundamental First Amendment freedoms. This delicate balance would protect citizens on both sides of this issue from being punished for their beliefs and actions, allowing for a more inclusive and free society.

INTRODUCTION

Same-sex marriage is now legal throughout the United States, and access to it is a constitutionally protected right.[1] Before the Supreme Court decided *Obergefell v. Hodges*, and since the decision, courts have evaluated cases addressing the tension between the rights of wedding vendors with a religious objection to same-sex marriage and those of same-sex couples who want to hire these vendors for their weddings.[2] The crux of these cases is that state antidiscrimination laws prevent discrimination in public accommodations on the basis of sexual orientation, with no distinction

1. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

2. *See* Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, 370 P.3d 272; Elane Photography, LLC v. Willock, 2013-NMSC-040, 309 P.3d 53.

between general discrimination and religiously motivated refusal.[3] Cases like this can be especially emotional for the parties for two reasons. First, these cases center around sexuality and religion, two topics that can be central to how individuals define themselves.[4] It can be difficult to see the outcome of such a case as just when a court decides that those who define themselves by their sexuality merit greater protections to the detriment of those who define themselves by their religious beliefs. Second, these cases evaluate certain art forms that may be incredibly expressive to the vendor himself, yet the courts have drawn a line in the sand, finding that the product of a business may be expressive, but the process leading to the product is not.[5] This seeming invalidation of an individual's belief about his self-run business, like a family-run photography business or bakery, for example, can be devastating.

The tensions between same-sex couples' protections and the religious liberties of wedding vendors are in line with several of the dissenting opinions in *Obergefell*, noting that the activist Court pursuing social change in such a way severely limits the public discourse on an issue.[6] Shutting the door to legislative advances in these areas necessarily silences those who object and flatly validates those who concur with the majority, leaving little room for mutual appreciation and middle ground.[7] Rather, dissenters may be branded with social stigma that once belonged to others who now have the law on their side.[8] And, unfortunately, this does not come with a chance for accommodations to be determined, according to Chief Justice Roberts.[9] These cases seem to be the manifestation of the concerns of Chief Justice

3. *See generally Craig*, 2013 COA 115, 370 P.3d 272; *Elane Photography*, 2013-NMSC-040, 309 P.3d 53.

4. *See Obergefell*, 135 S. Ct. at 2593 (stating that the Constitution protects the liberty of individuals to define and express themselves and that the same-sex marriage cases involve petitioners who want to exercise that liberty through "marrying someone of the same sex and having their marriages deemed lawful"); *id.* at 2607 (discussing advocacy of religious beliefs that are "so fulfilling and so central to their lives").

5. *Elane Photography*, 2013-NMSC-040, ¶ 41, 309 P.3d at 68.

6. *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting) ("Closing debate tends to close minds.").

7. *See id.*

8. *Id.* at 2626 ("By the majority's account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history . . . have acted to 'lock . . . out,' 'disparage,' 'disrespect and subordinate,' and inflict '[d]ignitary wounds' upon their gay and lesbian neighbors. These apparent assaults on the character of fairminded people will have an effect, in society and in court." (second and third alterations in original) (citation omitted) (quoting *id.* at 2601–04, 2606 (majority opinion))).

9. *Id.* at 2625 (Roberts, C.J., dissenting) (stating that the majority opinion cannot create accommodations for religious objectors, drawing a distinction between the states that must now issue same-sex marriage licenses and those that reached this conclusion before *Obergefell* was decided and worked accommodations through the legislative process).

Roberts and Justice Alito about the implications of the *Obergefell* decision on religious liberties.[10]

This Note proceeds in four parts. Part I summarizes *Craig* and *Elane Photography*, two recent cases addressing the rights of wedding vendors with religious objections to same-sex marriage. Parts II and III evaluate the likelihood of success of various constitutional defenses these vendors may raise in light of discrimination claims. Based on a hybrid rights analysis, Part IV proposes that a balancing test evaluating the governmental interests underlying these antidiscrimination laws and the rights of individuals could lead to a narrowly drawn religious exemption that would protect the rights of the religious objectors and same-sex couples alike.

I. RECENT WEDDING VENDOR CASES ADDRESSING FIRST AMENDMENT DEFENSES TO STATE ANTIDISCRIMINATION STATUTES

A. Craig v. Masterpiece Cakeshop, Inc.

The first major case after *Obergefell* in which a wedding vendor refused to participate in a same-sex wedding ceremony based on religious objections was *Craig v. Masterpiece Cakeshop, Inc.* In *Craig*, a bakery owner declined to make a wedding cake for a same-sex couple but offered to sell them any other baked goods the shop provided.[11] The couple sued under the Colorado Anti-Discrimination Act (CADA), which prohibits a person from refusing to serve someone in a place of public accommodation on the basis of sexual orientation.[12] The bakery asserted defenses based on the First Amendment of the U.S. Constitution, arguing that requiring the bakery to provide its services for a same-sex wedding ceremony violated the owner's rights to free speech and free exercise of religion.[13] The bakery also brought a hybrid rights claim, arguing that CADA should be subject to a strict scrutiny review, rather than the rational basis review outlined in *Employment Division, Department of Human Resources v. Smith*[14] for neutral laws of general applicability that limit First Amendment freedoms,

10. *Id.* ("The majority graciously suggests that religious believers may continue to 'advocate' and 'teach' their views of marriage. The First Amendment guarantees, however, the freedom to '*exercise*' religion. Ominously, that is not a word the majority uses." (citation omitted) (quoting *id.* at 2607 (majority opinion))); *id.* at 2642 (Alito, J., dissenting) ("Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. We will soon see whether this proves to be true." (citation omitted)).

11. Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, 370 P.3d 272.

12. *Id.* ¶¶ 25–27, 370 P.3d at 279–80.

13. *See id.* ¶¶ 55–110, 370 P.3d at 285–94.

14. 494 U.S. 872 (1990).

because the law infringed upon both the owner's free speech and his free exercise of religion rights.[15]

The Administrative Law Judge determined that, although the owner believed his participation in the wedding ceremony would displease God, CADA prevented the bakery owner from declining to bake the wedding cake for the same-sex couple.[16] The bakery appealed to the Civil Rights Commission, which affirmed the ALJ's decision and required the bakery to take remedial measures and submit quarterly compliance reports for two years.[17] The bakery further appealed the decision to state court, which affirmed, finding no sufficient defense, religious or otherwise, to the bakery's denial of service to the same-sex couple.[18]

In reaching its conclusion that the act of baking a cake is not a protected form of expression, the court in *Craig* relied on the notion that the First Amendment applies only to "inherently expressive" conduct,[19] noting also that the Supreme Court has specifically rejected the view that conduct should be protected under the First Amendment simply because an individual engages in that act with the intent to express something.[20] Yet, the Colorado court acknowledged that although the individual's intent is not the sole factor in determining whether the conduct is protected expression, it can contribute to such a finding when combined with a great likelihood that the message would be understood by observers.[21] The court also recognized that cakes, in some scenarios, may contain messages that might implicate First Amendment concerns, but did not evaluate that hypothetical in any great detail because Masterpiece Cakeshop had declined the couple's business before having any discussions with them over the cake's design.[22]

On these particular facts, without knowing what potential design would have been on the cake, the court determined that the bakery's participation in the wedding ceremony would "not necessarily lead an observer to conclude that the bakery supports its customer's conduct."[23] The determination that "it is unlikely that the public would understand Masterpiece's sale of wedding cakes to same-sex couples as endorsing a

15. *Craig*, ¶¶ 92–95, 370 P.3d at 292.

16. *Id.* ¶¶ 4, 7, 370 P.3d at 277.

17. *Id.* ¶ 8, 370 P.3d at 277. The remedial measures included staff training and alterations of the bakery's business policies.

18. *See id.* ¶ 25, 370 P.3d at 279.

19. *Id.* ¶ 52, 370 P.3d at 284 (quoting Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 66 (2006)).

20. *Id.* (citing *Rumsfeld*, 547 U.S. at 65–66).

21. *Id.* ¶ 53, 370 P.3d at 284–85.

22. *Id.* ¶ 71, 370 P.3d at 288.

23. *Id.* ¶ 69, 370 P.3d at 287.

celebratory message about same-sex marriage"[24] discounts the fact that people are often curious about particular vendors hired for weddings. It is common for those attending a wedding to observe the businesses that have participated, either out of curiosity about local businesses alone or even looking for amicable and competent vendors for their own ceremonies. This is demonstrated easily by the inclusion of vendor information on the ceremony program or throughout the venue. For instance, a ceremony program that states, "Thank you to the following vendors who helped us fulfill our dreams today," or something similar, may communicate, to some, a joyful participation on the part of the vendors that may not be accurate.

It is quite likely that, although interpretations of antidiscrimination statutes may require even religious objectors to participate in these ceremonies, these statutes do not automatically alter the attitudes of these vendors—it would be foolish to think otherwise. So, the message sent to wedding attendees is that a particular vendor might be amenable to working a same-sex marriage celebration, when, in fact, the vendor is merely complying with the law and would not be as excited about the particular event as another vendor could be.

Finally, the *Craig* court denied the free exercise prong of Masterpiece's hybrid rights claim. The court found that CADA's exemption of "places principally used for religious purposes" demonstrates the legislature's attempts to comply with free exercise doctrine.[25] This is important in the analysis because the Supreme Court has found that neutral and generally applicable laws do not require the balancing of interests that former free exercise cases required.[26] According to the court, these CADA exemptions are evidence of compliance with the free exercise doctrine,[27] presumably solely because these provisions would not apply to public accommodations typically used for religious purposes.

However, the court did not rely on the presence of these exemptions alone. It determined also that the law is generally applicable because it reaches religious and secular conduct, not imposing burdens in a "selective manner."[28] Further, the law is neutral because it is not hostile to religious character, according to the court, evidenced by the specific exemption based on religion.[29] Further, as Colorado courts have been skeptical of the

24. *Id.* ¶ 68, 370 P.3d at 287.

25. *Id.* ¶ 85, 370 P.3d at 290 (quoting COLO. REV. STAT. ANN. § 24-34-601 (West 2014)).

26. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 879 (1990).

27. *Craig*, ¶ 86, 370 P.3d at 290–91.

28. *Id.* ¶ 88, 370 P.3d at 291 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993)).

29. *See id.* ¶ 89, 370 P.3d at 291.

hybrid rights claims[30] mentioned in *Employment Division, Department of Human Resources v. Smith*, discussed in greater detail later in this Note, the *Craig* court declined Masterpiece's hybrid rights claim.[31] Finally, the *Craig* court clarified that, although CADA prohibits Masterpiece's denial of same-sex wedding business, it does not prohibit Masterpiece from "disassociat[ing] itself from its customers' viewpoints" by "posting a disclaimer in the store or on the Internet indicating that the provision of its services does not constitute an endorsement or approval of conduct protected by CADA."[32]

B. Elane Photography, LLC v. Willock

Throughout its decision, the *Craig* court relied heavily upon *Elane Photography, LLC v. Willock*, a New Mexico case in which a photographer declined to photograph a commitment ceremony for a lesbian couple.[33] As in *Craig*, the court in *Elane Photography* determined that the refusal to participate in the couple's ceremony constituted a violation of the applicable antidiscrimination statute.[34] Also, the *Elane Photography* court found that the photography business could use a disclaimer expressing its views but also its commitment to compliance with the antidiscrimination laws of the state, just as in *Craig*.[35]

The *Elane Photography* court reached a particularly ironic result in its linkage of one's status as a member of a protected class with the conduct associated with that status. For example, the court views the status of being homosexual as equivalent with, or at least closely related to, engaging in homosexual conduct, requiring the protection against discrimination based on sexual orientation.[36] However, the devout Christian might also argue that his status as a Christian is inseparable from his conduct, yet the court's decision legally divorces Christian status from Christian conduct by allowing only a disclaimer that his conduct does not mirror his sincerely held beliefs.[37]

Further, the court particularly mentioned that if it were to decide otherwise, the antidiscrimination laws would only protect the homosexual population "to the extent that they do not openly display their same-gender

30. *Id.* ¶ 94, 370 P.3d at 292 (noting that the Colorado appellate courts view the hybrid claims mentioned in *Smith* as mere dicta).

31. *Id.*

32. *Id.* ¶ 72, 370 P.3d at 288.

33. Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶ 7, 309 P.3d 53, 59–60.

34. *Id.* ¶ 11, 309 P.3d at 60.

35. *Compare Elane Photography*, 309 P.3d at 59, *with* Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, 370 P.3d 272.

36. *Elane Photography*, 2013-NMSC-040, ¶ 11, 309 P.3d at 61.

37. *See id.* ¶ 3, 309 P.3d at 59.

sexual orientation."[38] The court's realization of and attempt to rectify this problem immediately eliminated protection for religious objectors when they openly display and act upon their religious beliefs. The consequence of the court's refusal to recognize First Amendment protection, requiring a narrow exception to the law, is that while the religious may believe whatever they wish about same-sex marriage and mention it, they are not protected when they act upon these beliefs in the public forum. To the devout who feel their beliefs are so intimately tied to their actions, these divergent understandings seem to outline a distinction without a difference.

II. FIRST AMENDMENT FREE SPEECH AND EXPRESSIVE ASSOCIATION CLAIMS

The tension between individual liberty and antidiscrimination statutes as they apply to same-sex individuals is not new but has arisen in several forms over the last twenty years. For instance, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Supreme Court, relying on the constitutionally protected freedom of speech, found that a group of private citizens organizing a parade was not required to include a group of marchers that promotes a message the organizers do not want to convey.[39] Likewise, in *Boy Scouts of America v. Dale*, the Supreme Court held that the forced inclusion within an organization of an individual whose lifestyle contradicts the message the organization seeks to perpetuate violates the freedom of association.[40] The Supreme Court recognized the strength of constitutional defenses to violations of state public accommodations laws in *Hurley* and *Dale*.[41] While the freedom of speech and freedom of association defenses might apply in certain scenarios involving wedding vendors with religious objections to same-sex marriage, neither defense would be effective with regard to the facts of *Craig* or *Elane Photography*. Rather, these previous cases outline the gap that stands between religious liberties generally and the individuals that seek protection under them.

A. Hurley*'s Free Speech and* Dale*'s Expressive Association*

Hurley demonstrates the bounds of the freedom of speech as it relates to public accommodations laws.[42] Particularly, the Supreme Court held that the application of an antidiscrimination law in a way that would require an

38. *Id.* ¶ 17, 309 P.3d at 62.

39. 515 U.S. 557, 559, 581 (1995).

40. 530 U.S. 640, 644 (2000).

41. *Hurley* looks to the freedom of speech, 515 U.S. at 581, while *Dale* considers the meaning of the freedom of expressive association, 530 U.S. at 644.

42. *See Hurley*, 515 U.S. 557.

organization to include viewpoints it does not wish to espouse is a violation of the First Amendment.[43] The Supreme Court found that a parade is inherently expressive, countering the findings of the lower courts, because a group of people can travel to other places without expressing any message, which would not be a parade.[44] However, parades, according to the Court, are "public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration."[45]

In *Hurley*, an organization planning a city-wide parade in Boston refused to allow GLIB, a group of Irish-American gay, lesbian, and bisexual individuals, to march in the parade.[46] Historically, the parade was sponsored by the city itself but came under the control of a private organization in 1947, and each year since then the parade's organizers received proper permits for their activities from the city.[47] While the lower courts determined that the council had denied GLIB's petition for participation simply in light of the sexual orientation of the group's members and that there was no expressive aspect to the parade allowing for First Amendment protection,[48] a unanimous Supreme Court reversed.[49] The Supreme Court found that a parade is inherently expressive,[50] and therefore, an organizing group is within its First Amendment rights to determine who is to participate and what messages are to be promoted within its parade.[51]

Dale considers the implications of the freedom of expressive association in light of public accommodations statutes prohibiting discrimination on the basis of certain categories.[52] The respondent, James Dale, was a member of the Boy Scouts of America in his youth and later applied for adult membership in the organization.[53] Although the Boy Scouts of America initially approved his application and awarded him the position of assistant scoutmaster of a troop, the group revoked his membership after a newspaper published an article about his advocacy for

43. *Id.* at 559.

44. *Id.* at 568.

45. *Id.* (quoting SUSAN G. DAVIS, PARADES AND POWER: STREET THEATRE IN NINETEENTH-CENTURY PHILADELPHIA 6 (1986)).

46. *Id.* at 561.

47. *Id.* at 560.

48. *See id.* at 562–63.

49. *Id.* at 581.

50. *Id.* at 568–69.

51. *Id.* at 575 ("But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.").

52. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

53. *Id.* at 644.

gay teenagers, noting his position as copresident of the Lesbian/Gay Alliance.[54] The New Jersey Supreme Court found the membership revocation to be a violation of New Jersey's antidiscrimination laws, which prohibited "discrimination on the basis of sexual orientation in places of public accommodation."[55] In a 5–4 decision, the Supreme Court found that the Boy Scouts of America was within its rights as an organization to determine its members because its expressive association rights are protected under the First Amendment.[56]

Of particular note in this case is that the Boy Scouts of America did not have a specific tenet of its oath that addressed sexuality.[57] However, the Supreme Court relied on the organization's interpretation of "morally straight" and "clean" within the oath, which according to the Boy Scouts of America, entail a heterosexual lifestyle.[58] Chief Justice Rehnquist's opinion further clarified this point by stating "[t]he fact that the organization does not trumpet its views from the housetops, . . . does not mean that its views receive no First Amendment protection."[59] Rather, the opinion continues, "the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view."[60]

B. The Viability of Free Speech and Expressive Association Claims in Wedding Vendor Cases

The facts at issue in cases like *Craig* and *Elane Photography* are significantly different from those presented in *Hurley* and *Dale*, in which the First Amendment freedoms carried the day. Where *Hurley* involved a group organizing a parade and *Dale* involved a mission-oriented organization, the cases at issue here involve individual wedding vendors.[61] Hurley involved inherently expressive conduct, a parade, while the courts in *Craig* and *Elane Photography* have not recognized the expressive nature of providing services for a wedding ceremony.[62] Although the Supreme Court of New Mexico acknowledged that the photographs themselves have

54. *Id.* at 644–45.
55. *Id.* at 645–46.
56. *Id.* at 659.
57. *Id.* at 650.
58. *Id.*
59. *Id.* at 656.
60. *Id.* at 660.
61. *Compare id.* at 649, *and* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 560 (1995), *with* Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, 370 P.3d 272, *and* Elane Photography, LLC v. Willock, 2013-NMSC-040, 309 P.3d 53.
62. *Craig*, ¶¶ 59–62, 370 P.3d at 285–86; *Elane Photography*, 2013-NMSC-040, ¶¶ 40–43, 309 P.3d at 68.

an expressive aspect, it determined that there was no expressive quality in taking a photograph itself.[63] Without recognition that participation in a ceremony, even with the mere furnishing of services, constitutes expressive conduct, free speech and expressive association claims are not available to religious objectors.

An interesting wrinkle in this analysis, however, is the courts' recognition that vendors may post disclaimers that they do not agree with certain types of ceremonies, but that they will comply with state antidiscrimination laws.[64] In essence, the courts will allow those businesses with religious objections to engage in open hypocrisy.[65] However, the more important point is that the courts have tacitly endorsed the idea that participation in these ceremonies is expressive to at least some parts of the populous. By specifically stating that vendors may post such disclaimers, the courts have recognized that at least the vendors view their participation in these ceremonies as expressive of support and that members of the public may as well, including those who have observed a vendor's work at a same-sex marriage celebration and seek those services themselves. While the courts have denied that furnishing a service for a wedding is expressive itself, they have acknowledged that a disclaimer saying participation is not expressive of certain viewpoints is permissible.[66]

Potentially, the court could recognize a free speech protection for a wedding photographer that holds a religious objection to same-sex marriage but not for a similarly situated wedding baker. This would be a highly fact-dependent analysis, based on the level of participation of the respective wedding vendors. A wedding photographer is present throughout the wedding ceremony and festivities, participating in the day and documenting everything from intimate family moments to the marital vows themselves. A baker, on the other hand, engages in the same general process for a cake for a same-sex wedding as it would for a heterosexual wedding, barring any special requests for a message on the cake itself. The highly participatory nature of a wedding photographer's business is distinct from that of a cake baker in most circumstances, and could be afforded protection by the courts at some point, although this has not happened yet.[67] Similarly, the court could extend a free speech protection to a cake baker

63. *Elane Photography*, 2013-NMSC-040, ¶ 41, 309 P.3d at 68 ("While photography may be expressive, the operation of a photography business is not.").

64. *See Craig*, ¶ 72, 370 P.3d at 288; *Elane Photography*, 2013-NMSC-040, ¶ 3, 309 P.3d at 59.

65. *See Craig*, ¶ 72, 370 P.3d at 288 ("However, CADA does not prevent Masterpiece from posting a disclaimer in the store or on the Internet indicating that the provision of its services does not constitute an endorsement or approval of conduct protected by CADA.")

66. *Id.*; *Elane Photography*, 2013-NMSC-040, ¶ 3, 309 P.3d at 59.

67. *See, e.g.*, *Elane Photography*, 2013-NMSC-040, ¶ 41, 309 P.3d at 68 ("While photography may be expressive, the operation of a photography business is not.").

who is asked to participate more fully in a wedding ceremony by deviating from his standard process in order to create a treat with a celebratory message particular to the same-sex couple.

Even if the participation in a marriage celebration ultimately is deemed expressive and free speech claims may become available for all wedding vendors, or just those that meet a minimum level of participation in the marriage festivities to merit such protection, these vendors likely cannot rely upon an expressive association defense under Supreme Court precedent. The crux of the expressive association claims the Supreme Court has recognized is the participation of individuals within an expressive group.[68] Not only must the group perform an expressive function, but the inclusion of a particular individual must somehow contradict the expressive nature of the group itself.[69] In practice, this means that the ordered inclusion of photographs from a same-sex wedding within a photographer's blog or portfolio of work may trigger an expressive association claim, but it is unlikely that providing services for the wedding itself would qualify.[70]

In these earlier cases, the Supreme Court has upheld the exclusion of certain individuals within a group if the presence of the individuals may distract from or contradict the message the group seeks to promote, whether through free speech or expressive association claims.[71] However, the courts in *Craig* and *Elane Photography* denied that a wedding vendor's participation in a ceremony could be seen as an endorsement of that particular ceremony.[72] Perhaps, the court would say, the difference is that these wedding vendors operate a business, which is different than allowing a group to march in a parade with a different message or allowing a man to serve as a troop leader for Boy Scouts of America. However, the point is clear: the Supreme Court saw the possibility of observers believing a certain thing about an organization based upon the individuals with whom the organization is associated. Otherwise, the contradictory nature of the inclusion of James Dale as a Boy Scouts troop leader would not have been an issue.[73]

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68. *See generally* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

69. *See id.* at 655–56.

70. *See Elane Photography*, 2013-NMSC-040, ¶ 43, 309 P.3d at 68 ("We note that when Elane Photography displays its photographs publicly and on its own behalf, rather than for a client, such as in advertising, its choices of which photographs to display are entirely its own. The [public accommodations statute] does not require Elane Photography to either include photographs of same-sex couples in its advertisements or display them in its studio.").

71. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995); *Dale*, 530 U.S. 640.

72. Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, ¶ 64, 370 P.3d 272, 286; *Elane Photography*, 2013-NMSC-040, ¶ 47, 309 P.3d at 69–70 (noting that the public knows that photographers are hired to do a job and may not agree with various aspects of the wedding ceremony, major or minor).

73. *See Dale*, 530 U.S. at 655–56.

This could easily translate to the wedding vendor scenarios being evaluated by the courts. If a religious exception to the antidiscrimination statutes existed, a wedding vendor's participation within a same-sex wedding ceremony would signal to the community that the vendors' business serves same-sex couples, but the absence of same-sex clientele for other vendors might signal their invocation of a religious exemption. There is no reason to think, among the lay population that may not know the particulars of antidiscrimination laws, observers would not view a vendor's participation in a same-sex ceremony as tacit support and approval of the marriage. More clearly, in that scenario, it is possible to view the lack of same-sex clientele as a signal that these vendors do not support same-sex marriage and rely upon the protection of a religious exemption. Although this is a realistic possibility, the current law does not support this understanding.

III. FIRST AMENDMENT FREE EXERCISE OF RELIGION AND HYBRID RIGHTS CLAIMS

Perhaps the more direct defense would seem to be the Free Exercise Clause of the First Amendment, which prevents Congress from making any law prohibiting the free exercise of religion.[74] Although the cases before us involve state public accommodations statutes, the Free Exercise clause has been extended to states through the Fourteenth Amendment.[75] While the government cannot compel affirmation of a religious belief,[76] it likewise cannot punish an individual for expressing a religion the government determines to be false[77] or impose disabilities based on religious status.[78] However, this does not mean that the government cannot limit religious actions; rather, such laws and the burdens they impose on religious liberty must be appropriately justified.[79] Historically, the Court applied the *Sherbert* test, upholding laws limiting religious actions when the

74. U.S. CONST. amend. I.

75. *Id.* amend. XIV, § 1.

76. Torcaso v. Watkins, 367 U.S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.'").

77. United States v. Ballard, 322 U.S. 78, 86–88 (1944).

78. McDaniel v. Paty, 435 U.S. 618, 619 (1978) (pointing out that the Free Exercise Clause protects the "freedom to profess or practice that belief, even including doing so to earn a livelihood," implying that it also protects the freedom to profess or practice beliefs even if it is not just in pursuit of a livelihood (Brennan, J., concurring) (footnote omitted)).

79. Sherbert v. Verner, 374 U.S. 398, 403 (1963) ("[T]he Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles," even when the action is in line with the individual's religious beliefs. "The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order.").

governmental actions were justified by a compelling governmental interest.[80]

A. Smith*'s Free Exercise and the Circuit Split on Hybrid Rights Claims*

Altering the standard for free exercise of religion claims, the Supreme Court, in *Employment Division v. Smith*, determined that "valid and neutral law[s] of general applicability" do not constitute the type of infringement upon an individual's right to free exercise of religion that must be justified by a compelling governmental interest.[81] In *Smith*, an individual was denied unemployment benefits after being dismissed from his job because he had been fired for work-related misconduct—he had smoked peyote for religious purposes although Oregon law prohibited the knowing or intentional ingestion of a controlled substance, except by medical prescription.[82] In his majority opinion, Justice Scalia stated that the balancing test previously employed in cases like *Sherbert* was inapplicable to the present case because *Smith* involved a neutral and generally applicable law supposedly burdening only free exercise of religion, while the earlier cases involved "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."[83]

This is an important point because it allows the government to continue to regulate activity in a general manner without overwhelming concern that such regulations infringe on individual liberties. Further, according to Justice Scalia, the government's ability to enforce general prohibitions should not depend on "measuring the effects of a governmental action on a religious objector's spiritual development."[84] Free exercise claims are unlikely to be successful for wedding vendors because the neutral antidiscrimination laws are generally applied to discriminatory conduct under *Smith*, no matter the motivation behind it. Therefore, if the wedding

80. *Id.* at 403 (stating that the constitutional claims would fail if "any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate'" (quoting NAACP v. Button, 371 U.S. 415, 438 (1963))); Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 883 (1990) ("Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest.").

81. *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). "The 'compelling governmental interest' requirement . . . produces [in race-based laws and free speech contexts] equality of treatment and an unrestricted flow of contending speech [which are] constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly." *Id*. at 885–86.

82. *Id.* at 882–83.

83. *Id.* at 881.

84. *Id.* at 885 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

vendors seek a successful challenge to these laws, the better legal argument is one involving a hybrid rights claim.

In *Smith*, the Supreme Court made a distinction between the case at hand and prior hybrid rights cases in which the *Sherbert* test was used.[85] Particularly, Justice Scalia's opinion outlined that the earlier cases that used the compelling interest test were hybrid rights cases, dealing with issues of free exercise and at least one other First Amendment right, whereas *Smith* dealt with a potential free exercise claim alone.[86] This controversial determination has been interpreted in three ways by the federal courts of appeals to confront hybrid rights claims.[87] The Second, Third, and Sixth Circuits understand this passage to be dicta and reject hybrid claims outright.[88] The First and District of Columbia Circuits use an independent-claims approach in which a hybrid claim is appropriate only when the claim accompanying the Free Exercise claim would be successful on its own.[89] For example, the District of Columbia Circuit has found that an insufficient Free Exercise claim on its own cannot support a hybrid claim when coupled with another similarly lacking First Amendment claim.[90] Rather, the court allows hybrid claims only when the two First Amendment claims may be successful independently.[91]

Finally, the Ninth and Tenth Circuits employ a colorable claims test in evaluating hybrid rights claims[92]—a hybrid rights claim "at least requires a colorable showing of infringement of recognized and specific constitutional rights."[93] However, this test merely requires a fair probability, "but not a certitude, of success on the merits."[94] In *Swanson v. Guthrie Independent School District No. I-L*, the Tenth Circuit dismissed the supposed hybrid

85. *Id.* at 882 ("The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right.").

86. *Id.* at 881 ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.").

87. *See* Ryan S. Rummage, Comment, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 EMORY L.J. 1175, 1181 (2015).

88. *Id.* at 1190. Rummage argues this approach has merits in its easy disposal of frivolous claims, while also preventing litigants' free exercise claims from having any chance of success up against a valid and neutral law of general applicability because there is no balancing of interests if there is no understanding of the existence of hybrid rights claims. *Id.* at 1192.

89. *Id.* at 1193. Rummage argues this is the "weakest of the hybrid interpretations" because there would be no need for a hybrid rights analysis to begin with if the companion claim could win of its own merit. *Id.* at 1194.

90. Henderson v. Kennedy, 253 F.3d 12, 19 (D.C. Cir. 2001).

91. *Id.*

92. Rummage, *supra* note 87, at 1195. Rummage argues this to be the best interpretation of the hybrid rights discussion in *Smith*. *Id.* at 1196.

93. Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir. 1998).

94. Axson-Flynn v. Johnson, 356 F.3d 1277, 1295 (10th Cir. 2004).

claim of parents who wished to send their homeschooled children to public school part time, finding that "simply raising [a hybrid rights] claim is not a talisman that automatically leads to" deviation from the *Smith* test.[95] Rather, the companion claim must be a "colorable claim of infringement" upon the individual's rights.[96]

B. The Viability of Hybrid Rights Claims in Wedding Vendor Cases

Of the three approaches to hybrid rights claims, the colorable claims approach is the only interpretation of the hybrid rights doctrine that might give religious objectors a chance of success. These facts would never stand up in a court employing the dicta interpretation, naturally, as the claim itself is invalid in these jurisdictions.[97] Additionally, the independent claims approach could offer success on some fact patterns, but only in those cases with a failed free exercise claim and a different First Amendment claim that would be successful on its own—this is not the case in *Craig* or *Elane Photography*, as discussed in Part II.

The colorable claims approach is the only hope for fact patterns similar to *Craig* and *Elane Photography* in which the free exercise of religion is implicated alongside expressive conduct claims but is not strong enough for relief on its own, as this interpretation is the most lenient in finding a claim.[98] Unfortunately, the hybrid rights discussion in *Elane Photography* outlines the exact issue Ryan Rummage raises in his article—until the Supreme Court clarifies its stance on the hybrid rights doctrine, parties will not have a clear notion on how to raise and brief hybrid rights claims or if they should attempt it at all.[99] In *Elane Photography*, this problem manifested itself in a three-line hybrid rights explanation that was promptly dismissed by the New Mexico Supreme Court for failure to properly brief the issue.[100] Were the Supreme Court to clarify its stance on the hybrid rights doctrine, future cases like *Craig* and *Elane Photography* could allow

95. 135 F.3d at 696.

96. *Id.* at 700.

97. Although the *Craig* court ultimately dismissed the hybrid rights claim for failure to find expressive conduct triggering a companion claim to the free exercise claim, the court also recognized state precedent that would have pointed to a dicta interpretation of the hybrid rights doctrine. *See* Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, ¶ 94, 370 P.3d 272, 292.

98. Rummage, *supra* note 87, at 1198. Rummage quite adamantly distinguishes the finding of a valid claim and the finding of an exemption from the law at issue. He believes that the finding of a claim should be easier to do as it will only lead to the use of a balancing-of-interests test, which would then determine whether an exemption should be granted. *Id.* at 1199.

99. *Id.* at 1197.

100. Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶71, 309 P.3d 53, 75–76. The court, however, implies that it could evaluate a hybrid rights claim on a sort of sum-based approach, allowing two insufficient claims to demonstrate their combined vitality in a hybrid rights claim. *Id.*

for narrowly drawn exemptions to the valid and neutral laws of general applicability at issue.

Rummage's view on hybrid rights claims stemming from an expressive association companion claim implies that a coalition of vendors may have a colorable claim if the state forced the group to promote ideas that are disfavored by the group.[101] Theoretically, this could mean that vendors, prospectively, could organize to insulate themselves from court-ordered participation in marriage ceremonies for same-sex couples. As it stands, however, the vendors in the current cases operate individually and therefore cannot use expressive association as a companion claim in a hybrid rights case.[102]

However, a free exercise and free speech hybrid claim may be possible in wedding vendor cases even though the *Craig* and *Elane Photography* courts both denied the existence of expressive conduct.[103] While the courts did not acknowledge the participation in a wedding as expressive conduct condoning that marriage, they conceded that the antidiscrimination statutes at issue would not prohibit the use of a disclaimer, visible to the public, stating that the vendors' participation in such activities is only an act of compliance with the law and does not indicate the business's stance on same-sex marriage.[104] The proposed disclaimers communicate a message that is meant to counteract the impression that the vendors support the union because of their participation in the wedding. If the vendors' participation in the wedding festivities truly did not convey any message whatsoever to anyone, there would be no reason for the courts to suggest a disclaimer to counteract the impression communicated by their participation.[105] The discussion of disclaimers by the *Craig* and *Elane Photography* courts is an implicit recognition that there could be some expression involved in a vendor participating in a wedding. Based on this concession, the courts could recognize a free exercise and free speech hybrid claim in the future.

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101. Rummage, *supra* note 87, at 1209.

102. Expressive association claims involve the inclusion of members, traditionally, not the promotion of disfavored ideas. *See generally* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).

103. *See* Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, ¶ 73, 370 P.3d 272, 288; *Elane Photography*, 2013-NMSC-040, ¶ 3, 309 P.3d at 59.

104. *Craig*, ¶ 72, 370 P.3d at 288; *Elane Photography*, 2013- NMSC-040, ¶ 3, 309 P.3d at 59.

105. *See Craig*, ¶ 72, 370 P.3d at 288; *Elane Photography*, 2013-NMSC-040, ¶ 3, 309 P.3d at 59.

IV. NARROWLY DRAWN EXEMPTIONS TO PUBLIC ACCOMMODATIONS LAWS

At least indirectly, the courts have acknowledged there is some expressive content to a vendor's participation in wedding festivities[106]—it is not just a business transaction. Because of the presence of expressive conduct, these vendors with religious objections to same-sex marriage may be able to present hybrid rights claims, based on free exercise and free speech concerns, that could survive in a colorable claims jurisdiction. Rather than pointing to the wholesale inapplicability of antidiscrimination statutes to religious objectors to same-sex marriage, a successful hybrid rights claim highlights an opportunity for the creation of narrowly tailored exemptions to state antidiscrimination laws. Particularly, the exemption should allow for those wedding vendors with religious objections to same-sex marriage to refrain from participating in these ceremonies, although they would still be required to serve these individuals in other capacities.[107]

Rummage argues that there should be a three-step approach in determining whether a religious exemption is permissible: whether the action at issue is compelled or prevented by the law in question, whether the exemption would violate the Establishment Clause, and whether the proposed exemption would be injurious to another.[108] As to the first prong, accommodations laws attempt to prevent discrimination through the compulsion of certain acts of inclusion. The crux of these laws is their compulsion of activity, which means they should be more highly scrutinized than those that prohibit action, and an exemption is more appropriate where action is compelled rather than prohibited.[109]

In considering Establishment Clause concerns surrounding potential exemptions, the question should be whether the exemption would benefit the claimant, either economically or socially.[110] For instance, a religious exemption was withheld in *United States v. Lee*.[111] Lee believed, along with other Amish people, that it is a sin not to provide for your own elderly.[112] Accordingly, participation in the social security system, the man argued, was a violation of his right to free exercise. The Supreme Court

106. *See Craig*, ¶¶ 66–71, 370 P.3d at 287–88; *Elane Photography*, 2013- NMSC-040, ¶ 3, 309 P.3d at 65.

107. This is the approach the baker in *Craig* aimed to take when he declined to make the wedding cake but offered to sell the men any other product he provided. *Craig*, ¶ 3, 370 P.3d at 276.

108. Rummage, *supra* note 87, at 1212. This is the case because there is greater protection afforded when the government requires an individual to act.

109. *See id.*

110. *Id.* at 1218.

111. 455 U.S. 252 (1982).

112. *Id.* at 255.

disagreed[113] and properly withheld the exemption because it would have resulted in an economic benefit to the Amish people, which would violate the Establishment Clause.[114] In cases like *Craig* and *Elane Photography*, the desired religious exemption likely would impose a social burden on the claimants rather than an economic or social benefit, especially as same-sex marriage garners more support nationwide.[115] It should also be noted that the stigma resulting from a religious exemption likely would be comparable to that achieved by placing a "we will serve you, but we do not agree with you" disclaimer on the door of a business, as the Colorado and New Mexico courts have suggested would be permissible.[116] Additionally, there is no concern of an economic benefit to these objectors because they would be seeking an exemption that allows them to limit their business. Rather, it is the compelled provision of services to a same-sex wedding that would provide an economic boost to these wedding vendors, not the proposed exemption.

Understandably, the main issue in considering a religious exemption, even a narrowly drawn exemption, is whether the exemption harms the rights of another person. Indeed, this is the only issue presented in cases, like *Craig* and *Elane Photography*, in which the constitutional rights of one are at odds with the state-protected interests of others. Certainly, the government has an interest in preventing discrimination;[117] however, the government also has an interest in protecting the constitutional rights of all individuals, even when—and especially when—those rights include the ability to express beliefs contrary to those held by the majority of the country.[118] These cases show that under the present state of the law, the injury to one person, in the form of a burdened constitutional right, is preferred to the injury to the other, in the form of violations of statutory

113. *See id.* at 254–55.

114. *See* Rummage, supra note 87, at 1219.

115. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2626 (2015) (Roberts, C.J., dissenting).

116. *See* Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, ¶ 72, 370 P.3d 272, 288; Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶ 47, 309 P.3d 53, 69–70.

117. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) (finding a compelling interest in eradicating discrimination against women); Shaw v. Hunt, 517 U.S. 899 (1996).

118. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992) ("The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."); Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring) ("In my view, however, the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility.").

protections.[119] In other words, when someone enters the business world, he has given up his constitutional right to protection for his religious liberty.[120]

A particularly narrow exemption, strictly for religious objectors to same-sex marriage, would reduce the risk of potential injuries while still protecting religious liberty, at the cost of whatever social stigma may come. A general example of an acceptable exemption would be allowing vendors that are not the sole source of their product within their reasonable geographic market to refrain from participating in marriage ceremonies and receptions, although they cannot refuse to serve homosexuals, based on their sexuality, for other services. Such an exemption would not throw out the entire antidiscrimination statute as it applies to the religious objectors but would be recognized only in particular circumstances.[121] This means that, unless a vendor with a religious objection is the only provider in his reasonable market, vendors will not be compelled to participate in the same-sex wedding ceremonies with which they disagree. Where a religious objector chooses to serve a community as the sole provider of his particular services, he then chooses to risk compelled participation in the ceremonies to which he objects.

This example becomes more complicated when considering a location with multiple bakers, for instance, all of whom hold religious objections to same-sex marriage. However, the alternatives to providing any sort of exemption would be continuous litigation stemming from the religious objectors sticking to their beliefs by openly violating antidiscrimination laws or even vendors leaving the market entirely out of fear of persecution and prosecution for acting on their beliefs. A narrowly tailored exemption would reduce the risk of vendors leaving the market completely while still promoting the goals of both antidiscrimination statutes and constitutional religious protections. The question that remains is how to accomplish such an accommodating exemption.

Although a narrowly tailored exemption would seem to provide the best constitutional option for balancing the competing interests presented in cases like *Craig* and *Elane Photography*, it is unlikely the courts would

119. Rummage, *supra* note 87, at 1217 ("[T]he right to the free exercise of religion should not be invoked when it would amount to the injury of discrimination based on sexual orientation.").

120. *Id.* ("These cases make it clear: when someone enters the public business forum, the hybrid rights approach to the Free Exercise Clause cannot provide an exemption from an antidiscrimination statute.").

121. For instance, the baker in *Craig* was willing to provide services for the gay couple, although he was unwilling to bake their wedding cake. *Craig*, ¶ 3, 370 P.3d at 276. A narrow exemption allowing for the abstention from participating in the marriage celebrations of same-sex couples would permit this while still requiring the vendor to furnish other services to homosexual couples and individuals alike, like baking birthday cakes, for example. The question then remains whether the baking of an anniversary cake of this couple would fall within the exemption, and as it celebrates the union that is at issue with the religious objectors, it likely would.

pursue the creation of this exemption,[122] unless it became similarly activist in its approach as the majority in *Obergefell*, according to the dissenters.[123] Because this is unlikely, particularly so soon after the *Obergefell* decision, the task falls to the legislative branch to create a sufficient statutory exemption for the religious objectors burdened by the antidiscrimination statutes. Perhaps, though, through the exercise of establishing the appropriate exemption, the American people can once again engage in a "vibrant debate" of the issue, the loss of which Chief Justice Roberts lamented as the result of the *Obergefell* decision.[124] Perhaps the problem with the unaccommodating accommodations laws can be resolved with the creation of a more inclusive and understanding society, through open discussion and debate about appropriate religious liberty exemptions to antidiscrimination laws.

CONCLUSION

The Supreme Court decided *Obergefell* with a dignity analysis.[125] The majority found due process protections for same-sex couples based on an amalgam of Fourteenth Amendment cases that led the Court to conclude due process protects those characteristics and actions by which a person defines himself and determines his dignity.[126] Justice Kennedy further noted that when the "sincere, personal opposition" to same-sex marriage becomes the law of the land, the State then "demeans or stigmatizes those whose own liberty is then denied."[127] However, refusing any form of narrow religious exemption to accommodations laws for same-sex marriage dignifies same-sex couples explicitly at the cost of demeaning and

122. *See Smith*, 494 U.S. at 890 ("But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.").

123. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) (detailing that the majority "seize[d] for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question"); *id.* at 2627 (Scalia, J., dissenting) (describing that "[t]his practice of constitutional revision by an unelected committee of nine . . . robs the People of the most important liberty they asserted . . . and won in the Revolution of 1776: the freedom to govern themselves").

124. *Id.* at 2612 (Roberts, C.J., dissenting).

125. *See id.* at 2597 (majority opinion) (stating that the Due Process Clause "extend[s] to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs"); *id.* at 2600 ("The right to marry thus dignifies couples who 'wish to define themselves by their commitment to each other.'" (quoting United States v. Windsor, 133 S. Ct. 2675, 2689 (2013))).

126. *Id.* at 2597.

127. *Id.* at 2602.

stigmatizing religious objectors. The problem with the logic underlying the *Obergefell* holding is that it directly contradicts the system supporting and perpetuating its conclusion—same-sex couples must have access to marriage licenses because this affords them dignity, but those wedding vendors who identify themselves by their religious beliefs, which include an opposition to same-sex marriage, are denied such dignity to define their own lives and actions because they must, unequivocally, participate in a same-sex wedding if they are asked to do so.

A narrowly tailored exemption for these objectors, rather than a black and white consideration of permissible encroachments on rights, could protect the people on both sides of the issue. The *Sherbert* compelling interest test is an option for situations in which the competing interests are those of individuals, rather than a state interest burdening an individual's liberty.[128] In these wedding vendor cases, two individuals are protected by a state antidiscrimination statute and their opposition is protected under the First Amendment. A narrow exemption provides an avenue for the states to continue pursuing antidiscrimination ends while still respecting the religious liberty of individuals.

As Justice O'Connor proposed in her concurring opinion in *Smith*, even valid, neutral, and generally applicable laws can burden the free exercise rights of an individual indirectly because they "in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community."[129] Chief Justice Rehnquist recognized the importance of First Amendment protections for unpopular views such as those held by religious objectors to same-sex marriage: "[T]he fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view."[130] Rather than choosing to protect one right over another, in particular circumstances, it just may be possible to accommodate them all.

Sarah Jackson[*]

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128. So, while the exemption might be possible in cases like *Craig* and *Elane Photography*, the exemption was not permitted in *Lee*, notwithstanding the Establishment Clause concerns, because that case involved the individual's freedoms at odds with a state interest alone, rather than the rights and protections of another individual.

129. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 897 (1990) (O'Connor, J., concurring).

130. Boy Scouts of Am. v. Dale, 530 U.S. 640, 660 (2000).

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