RELIGIOUS EXEMPTIONS

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I. INTRODUCTION

The United States Constitution grants religious freedoms to its citizens. These religious freedoms can come into tension with the laws of the United States, in particular, public accommodation laws. The recent *Masterpiece Cakeshop* decision highlights the prevalence of these conflicts and the importance of these religious exemptions cases.[1] Religious exemptions are often viewed as "carve outs"

1. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1719 (2018).

to laws and policies. These exemptions enable individuals, organizations, or businesses to be exempt from–or, in other words, to not be subject to–a law or policy if they believe that the law or policy violates their religious beliefs.[2] Grounded in the First Amendment, the ministerial exception and statutory exemptions like the Religious Freedom Restoration Act ("RFRA") create exemptions for organizations based on their religious beliefs to exclude certain individuals from membership (for example, members of the lesbian, gay, bisexual, and transgender ("LGBT") community) and refuse services to certain individuals (for example, in healthcare, housing, and baked goods). This creates tension between public accommodations laws designed to ensure equal access to non-public forums and organizational policies that exclude members based on their gender or sexual orientation. To decide if a public accommodations law violates the constitutional freedom of religion, the Court evaluates whether–typically under the Religious Freedom Restoration Act ("RFRA")–the enforcement of a religiously neutral law against an individual "substantially burdens the individual's religious exercise and is not the least restrictive way to further a compelling government interest"[3] or whether the ministerial exception applies, which "precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers."[4] This article examines how the Court resolves the tension between ensuring religious freedoms for its citizens and maintaining other guaranteed rights and protections.

Part II of this article examines religiously based exceptions to public accommodation laws by tracing its development through four major cases involving public accommodations laws. Part III reviews the ministerial exception. Part IV explores cases where private businesses have religiously based complaints against state and federal statutes. Finally, Part V discusses religious exemptions to providing health care and housing. Taken together, these four parts illustrate both the history of exceptions to public accommodation laws and the future of where religiously based exceptions to public accommodation laws may be headed.

II. RELIGIOUSLY BASED EXCEPTIONS TO PUBLIC ACCOMMODATIONS

The Supreme Court preserves a group's right to exclude unwanted members, even in contravention to a state public accommodation law, if under RFRA the enforcement of a religiously neutral law against an individual "substantially burdens the individual's religious exercise and is not the least restrictive way to

2. Movement Advancement Project & National Center for Transgender Equality, *Religious Refusals in Health Care: a Prescription for Disaster*, MOVEMENT ADVANCEMENT PROJECT, 1, March 2018, http://www.lgbtmap.org/file/Healthcare-Religious-Exemptions.pdf.

3. E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 581 (2018).

4. Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C., 565 U.S. 171, 188 (2012).

further a compelling government interest" or, if under the ministerial exception the law concerns the employment relationship between a religious institution and its ministers.[5] Before RFRA was enacted, however, the Court found that a group could exclude members based on freedom of expression and association. Interestingly, the test developed in these freedom of expressive association cases uses a similar balancing test as that employed by RFRA to determine the acceptability of religious exemptions. Three core cases established tests for determining whether public accommodations laws impermissibly infringe on a group's freedom of association: *Roberts v. United States Jaycees*;[6] *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*;[7] and, *Boy Scouts of America v. Dale*.[8] In the employment context, the Court has also found that a religious organization may exclude members based on religious criteria. Those cases, discussed after the freedom of association cases, explored the limits and tests of the ministerial exception.

A. ROBERTS V. UNITED STATES JAYCEES

Although *Roberts v. United States Jaycees* does not involve religious liberty claims directly, this case–like the others in this section–represents the Supreme Court's handling of exemptions to public accommodation laws. The United States Jaycees, a national nonprofit membership corporation whose mission is to "promote and foster the growth and development of young men's civic organizations in the United States," did not allow women and older men to be regular members of the association.[9] Women and men older than thirty-five could be associate members without voting power or the ability to hold local or national office.[10] However, the Minneapolis and St. Paul chapters of the Jaycees in 1974 and 1975, respectively, admitted women as regular members in violation of the national organizations bylaws.[11] The national organization then sanctioned the two chapters for violating the organization's bylaws for about ten years.[12] The United States Jaycees challenged the constitutionality of the Minnesota Human Rights Act ("HRA"), which forbade discrimination on basis of sex in "places of public accommodation," insofar as it required the Minnesota chapters to admit women.[13] The Court rejected the argument that Jaycees received the heightened protection afforded to intimate associations, reserving an intimate association analysis for cases involving marriage, childrearing, cohabitation, and other

5. *Id*.
6. 468 U.S. 609 (1984).
7. 515 U.S. 557 (1995).
8. 530 U.S. 640 (2000).
9. 468 U.S. at 613 (1984).
10. *Id*. at 613.
11. *Id*. at 614.
12. *Id*.
13. *Id*. at 612-616.

situations of a similarly personal character.[14] The Court also reasoned that the Jaycees did not have distinctive characteristics that safeguarded highly personal relationships from state regulations like Minnesota's HRA, due to its few membership requirements and inclusion of nonmembers of both genders in activities.[15]

In ruling against the Jaycees, the Court in *Roberts v. United States Jaycees* implicated the state's interest in combating gender discrimination and laid the foundation for the modern freedom of association test. The Court conceded that Minnesota's regulation of the Jaycees' activities implicated First Amendment expressive rights,[16] but found that the infringements on the "right to associate for expressive purposes . . . may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[17] The Court decided that Minnesota's interest in eradicating gender discrimination constituted a compelling governmental interest unrelated to suppression of expression.[18] Minnesota used the least restrictive means to achieve its compelling interest, because there was "no basis in the record for concluding that admission of women as full voting members [would] impede the organization's ability to engage in these protected activities or to disseminate its preferred views."[19] Thus, the Supreme Court rejected the Jaycees' argument that the HRA unconstitutionally abridged their right to expressive association.[20]

Roberts thus established the major consideration in this line of cases: the balance between public accommodations policies and the constitutional right not to associate. In cases that followed *Roberts*, such as *Rotary International v. Rotary Club of Duarte* and *New York State Club Association v. City of New York*,[21] the Court made clear that organizations with public characteristics cannot generally invoke their association rights to exempt themselves from complying with public accommodation statutes.[22] However, the court has created an exception in some circumstances by allowing organizations to exempt themselves from complying

14. *See id*. at 618-21 (noting that family relationships, an example of intimate association, "are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the association, and seclusion from others in critical aspects of the relationship," which the Jaycees lack).

15. *See id*. at 620-21.

16. *Id*. at 626-27. The Court found that the Jaycees "regularly engage[d] in a variety of civic, charitable, lobbying, fundraising, and other activities worthy of constitutional protection under the First Amendment."

17. *Id*. at 623.

18. *See id*.

19. *See id* at 626-27.

20. *Id*. at 612.

21. *See, e.g*., New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988); Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).

22. Note, however, that in *New York State Club Ass'n*, 487 U.S. at 12, the Court stated for the first time in dicta that it would be possible for a group engaged in expressive association to prevail against a state public accommodations law.

with public accommodation statutes when compliance conflicts with the organization's religious beliefs.[23]

B. HURLEY V. IRISH-AMERICA GAY, LESBIAN, AND BISEXUAL GROUP OF BOSTON

After *Roberts*, the Court further developed the case law around exemptions to public accommodation laws by considering the tension between speech and public accommodation. *Hurley v. Irish-American Gay, Lesbian,* and *Bisexual Group of Boston* considered for the first time whether a public accommodation law impermissibly infringed on association rights integral to maintaining a speaker's message when it protected LGBT individuals.[24] The Court avoided applying the *Roberts* test by framing the issue as one of speech rather than association.[25] The Irish-American Gay, Lesbian, and Bisexual Group of Boston ("GLIB") sued the South Boston Allied War Veterans Council ("the Council"), claiming the Council violated a Massachusetts public accommodations statute by preventing GLIB from marching in the Council's public St. Patrick's Day Parade under GLIB's own separate banner.[26]

The Court concluded that parades represent a form of symbolic speech,[27] or a public message and spectacle that clearly involved expression.[28] Specifically, the Court classified the parade itself as speech of the Council, rather than as a place of public accommodation, separate and distinct from the speech taking place within it.[29] As such, the Court determined that every participating group in a parade changes the message of the private organizers' speech.[30]

The Council argued that they excluded certain groups with sexual themes to formalize the fact that "the Parade expresses traditional religious and social values."[31] The Court found that the Council's decision to include some groups and exclude others was a form of speech to reflect their values and was protected by the First Amendment. Courts after *Hurley*, however, generally distinguished *Hurley* on its facts and continued to apply the *Roberts* balancing test.[32] However, it should be noted the Court asserted that the Council's actions would survive even a *Roberts* analysis: "Assuming the parade to be large enough and a source of benefits (apart from its expression) that would generally justify a mandated access provision, GLIB could nonetheless be refused admission as an expressive contingent with its own message."[33] *Hurley* illustrates a situation in which the

23. See Part III.
24. 515 U.S. 557 (1995); Darren Lenard Hutchinson, *Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 90 (1998).
25. Hutchinson, *supra* note 24, at 90.
26. *See* 515 U.S. at 561 (1995).
27. *See id*. at 568.
28. *Id*.
29. Hutchinson, *supra* note 24, at 90.
30. *See Hurley*, 515 U.S at 572-73.
31. *Id*. at 562.
32. Hutchinson, *supra* note 24, at 104.
33. *Hurley*, 515 U.S. at 580-81.

Court sought to resolve tension between public accommodation laws and freedom of speech and found that the rights to freedom of speech were so strong that an exemption to the public accommodation laws should be created.

C. BOY SCOUTS OF AMERICA V. DALE

Unlike *Hurley*, in which the Supreme Court considered–but rejected–the application of a public accommodation law to ensure the inclusion of LGBT individuals,[34] *Boy Scouts of America v. Dale* was the first case in which the Court expressly held that compliance with an antidiscrimination law would violate a group's right to expressive association in a public accommodation.[35]

In *Dale*, an assistant scoutmaster was expelled from the Boy Scouts for being openly gay, and brought suit demanding re-admittance under New Jersey's public accommodation statute.[36] The New Jersey Supreme Court held that the public accommodation law did not violate the Boy Scouts' First Amendment right of expressive association because Dale's inclusion would not significantly affect members' ability to carry out their purposes.[37] The state court determined that New Jersey had a compelling interest in eliminating the "destructive consequences of discrimination from society," and that its public accommodation law abridged no more speech than necessary to accomplish its purpose.[38] Finally, the court distinguished *Hurley* on the ground that *Dale*'s reinstatement did not compel the Boy Scouts to express any message.[39]

The Supreme Court reversed, holding that the forced reinstatement of Dale violated the Boy Scouts' right to expressive association by interfering with the "Scouts' choice not to propound a point of view contrary to its beliefs."[40] The Court began its analysis by examining whether the Boy Scouts engaged in expressive association.[41] Specifically, the Court found that the Boy Scouts engaged in expressive activity when the adult leaders "inculcate[d] [youth members] with the Boy Scouts' values - both expressly and by example."[42] Thus, the leadership's stance against homosexuality rendered the position a protected part of the Boy Scouts' expressive message.[43] The Court further affirmed the freedom to not associate by finding that the government cannot force a group to admit members if

34. *Id.*
35. Boy Scouts of America v. Dale, 530 U.S. 640 (2000).
36. *Id.* at 644-45.
37. *Id.* at 646-47.
38. *Id.* at 647.
39. *Id.*
40. *Id.* at 654.
41. *Id.* at 648
42. *Id.* at 649-50.
43. *Id.* at 655. The Court explained that "[t]he First Amendment's protection of expressive association is not reserved for advocacy groups." *Id.* at 648. Even if groups do not associate for the express purpose of transmitting a message, they are protected so long as they "engage in some form of expression, whether it be public or private." *Id.* Thus, the Boy Scouts would be protected even if it discouraged its leaders from disseminating views on sexual issues, and whether or not all the members agreed with the group's policy. *Id.*

said inclusion impedes the group's ability to advocate public or private viewpoints.[44]

Next, the Court addressed whether the forced inclusion of Dale would significantly impact the ability of the Boy Scouts to advocate its public or private message.[45] The Court found *Hurley* instructive because the presence of GLIB would have "interfered with the parade organizers' choice not to propound a particular point of view," just as the presence of a gay scoutmaster would interfere with the Scouts' choice not to espouse a particular viewpoint.[46] The Court noted that it defers to the association and the nature and impairments to its expression.[47] The Boy Scouts asserted "that homosexual conduct [was] inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms 'morally straight' and 'clean,"' and that the organization did "not want to promote homosexual conduct as a legitimate form of behavior."[48] The Court concluded that the forced reinstatement of Dale, an openly gay individual and activist, would impair the Boy Scouts' ability to advocate its viewpoint that homosexuality is not a legitimate form of behavior.[49]

Thus, *Dale* added additional criteria to the *Roberts* test by requiring courts to initially evaluate whether a group is engaged in expressive association.[50] The Court has not yet recognized preventing discrimination against LGBT individuals as a compelling state interest in the context of the First Amendment.[51] While these cases do not all implicate the Religion Clauses, they are often relied upon in public accommodation cases as they illustrate cases in which the court has struggled to balance the interests of insuring expressive association and protecting public accommodation laws. Courts face a similar dilemma in cases with religious liberty.

D. CHRISTIAN LEGAL SOCIETY V. MARTINEZ

This case was decided as an exemption case in which the organization–the Christian Legal Society–sought an exemption from a school-wide nondiscrimination policy. In *Christian Legal Society v. Martinez*, the University of California, Hastings College of Law denied the school's Christian Legal Society ("CLS") status as a Registered Student Organization ("RSO") because CLS did

44. *Id*. at 655-56.
45. *See id*. at 653.
46. *Id*. at 654.
47. *Id*. at 653.
48. *Id*. at 651-52 (internal quotation marks omitted).
49. *See id*. at 655-56.
50. Erica L. Stringer, *Has the Supreme Court Created a Constitutional Shield for Private Discrimination Against Homosexuals? A Look at the Future Ramifications of* Boy Scouts of Am. v. Dale, 104 W. VA. L. REV. 181, 191 (2001).
51. *See* Sara A. Gelsinger, Comment, *Right to Exclude or Forced to Include? Creating A Better Balancing Test for Sexual Orientation Discrimination Cases*, 116 PENN. ST. L. REV. 1155, 1173 (2012).

not abide by the nondiscrimination policy of the RSO program.[52] The CLS is a national organization of law students and attorneys who are Christian.[53] In order to join, members had to sign a "Statement of Faith" and conduct themselves according to the principles set forth by the statement.[54] One of the principles required members to abstain from homosexual conduct. In addition, CLS excluded members who were not Christian.[55] CLS sued Hastings, arguing that the denial of RSO status violated its freedom of speech and expressive association.[56] The Supreme Court held that Hastings' denial of CLS's status as an RSO did not violate CLS's freedom of speech or expression by applying the public forum doctrine to all claims brought against the school.[57] The Supreme Court applied a public forum analysis to both the speech and expressive association claims, marking a shift from the *Dale* framework.[58] The Court found that Hastings's nondiscrimination policy was reasonable and viewpoint neutral.[59]

First, the Court applied lesser scrutiny in limited public forums to both the freedom of speech and expressive association claims because it found it anomalous to apply two different frameworks if both claims arose from the same context.[60] Because the claims were intertwined, the Court analyzed both claims under less scrutiny instead of applying two different standards.[61] Second, the Court expressed concern that strict scrutiny would invalidate that State's ability to reserve limited public forums for certain groups.[62] Finally, the Court reasoned that the case should be analyzed under the limited public forum framework because CLS was not forced to accept members.[63] The Court distinguished *Martinez* from cases that "involved regulations that compelled a group to include unwanted members, with no choice to opt out."[64] By applying to the RSO program, CLS was seeking resources from the State, which the Court characterized as "dangling the carrot of subsidy, not wielding the stick of prohibition" as in *Dale* where inclusion was forced.[65] Thus, the Court distinguished *Martinez* as a case where inclusion was not forced and resolved the case by applying a reasonableness test to the RSO policy.

The Court's decision in *Martinez* is significant because it marked a shift in analysis of speech and expressive association claims, showing the Court's

52. *See* Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 672-73 (2010).
53. *See id.* at 672.
54. *Id.*
55. *See id.*
56. *See id.* at 673.
57. *See id.* at 683.
58. *See id.* at 680.
59. *See id.* at 697.
60. *See id.* at 680-82.
61. *See id.*
62. *See id.*
63. *See id.* at 682.
64. *Id.*
65. *Id.* at 683.

preferred approach. Here, the Court essentially treated a freedom of association claim as a freedom of speech claim. In doing so, the Court applied a limited public forum analysis, which required the Court to inquire into only the reasonableness of the policy. Since the *Martinez* decision, many cases involving freedom of speech and expressive association have been resolved using the limited public forum framework and a mere reasonableness test. More importantly, it showed the Court was may being to protect nondiscrimination policies even at the expense of the religiously motivated.

III. THE MINISTERIAL EXCEPTION

A. HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL V. E.E.O.C.

Another case reflecting the Court's stance on the balance between nondiscrimination and religiously motivated is its recent recognition of the ministerial exemption. In *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, the Supreme Court recognized a ministerial exception for the first time in the Religion Clauses of the Constitution.[66] This exception may allow religious organizations to bar any employment discrimination suits brought by any employee considered a "minister."[67] In *Hosanna-Tabor*, a teacher sued her employer for unlawful dismissal under the Americans with Disabilities Act after being fired.[68] The Supreme Court held that the Establishment and Free Exercise Clauses of the First Amendment prevented her from bringing an employment discrimination suit against her employer.[69] The Court reasoned that because she was a "minister" under the ministerial exception's definition, her employer could use the ministerial exception as an affirmative defense in employment suits.[70]

While the Court did not set out an explicit standard to define which employees qualify as ministers, it did discuss a few factors lower courts could consider when determining whether an employee is a minister, such as an employee's title, level of religious training, leadership role in faith, and performance of religious duties.[71] However, Justices Thomas, Alito, and Kagan's concurrences all set out different standards and factors to determine an employee's status as a minister.[72]

After the Court's decision in *Hosanna-Tabor*, the breadth of *Hosanna-Tabor* has remained unclear as lower courts rule on who is a minister and which organizations may use the ministerial exception. In *Dias v. Archdiocese of Cincinnati*, a female employee brought claims of pregnancy discrimination and breach of contract after being fired for being pregnant out of wedlock and through artificial

66. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 188 (2012).
67. *See id.*
68. *See id.* at 179.
69. *See id.* at 193-94
70. *See id.* at 194.
71. *See id.* at 190-92.
72. *See id.* at 197-201.

insemination.[73] The court found that the employee was not a minister under the ministerial exception and thus allowed her to retain her causes of action under Title VII.[74] And, in *Sterlinski v. Catholic Bishop of Chicago*, the court found that the ministerial exception applied to a music director who supervised all music at liturgical celebrations.[75] Thus, lower courts have relied on the factors laid out in *Hosanna-Tabor* to determine whether an employee qualifies as a minister under the ministerial exception, but they have not come to consensus as to which factors and to what degree to rely on *Hosanna-Tabor*'s majority decision.

Despite the flexibility offered by the majority decision in *Hosanna-Tabor*, lower courts have also been careful not to apply an overly broad reading of the *Hosanna-Tabor* factors. In *Richardson v. Northwest Christian University*, the court found that the ministerial exception did not apply to a nonprofit Christian university because the employee bringing suit "was not tasked with performing any religious instruction and she was charged with no religious duties such as taking students to chapel or leading them in prayer."[76] Thus, the ministerial exception seems to provide religious institutions some, but not unlimited, room to discriminate against their employees for reasons typically prohibited by anti-discrimination and employment laws.

B. E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.

Following *Hosanna-Tabor*, it is unclear how broadly courts will apply the ministerial exception. However, more and more parties are relying on the ministerial exception to avoid liability in claims of discrimination. In a recent Sixth Circuit case, *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc*., a transgender woman brought claims of sex discrimination against her employer after she was fired for dressing like a woman.[77] The employer argued that it qualified for the ministerial exception to Title VII and that enforcing Title VII against it would violate its religious beliefs under the Religious Freedom Restoration Act ("RFRA").[78] The Sixth Circuit found that discrimination on the basis of transgender status is discrimination on the basis of sex, relying on the Supreme Court ruling in *Price Waterhouse v. Hopkins*.[79]

The court reasoned that the employee would not have been fired if she were a cisgender woman who complied with the dress code, and thus the employee's sex motivated the employer to fire her.[80] In addition, the court held that the employer cannot raise the ministerial exception as an affirmative defense because, though

73. *See* Dias v. Archdiocese of Cincinnati, No. 1:11-CV-00251, 2012 WL 1068165, at *1 (S.D. Ohio Mar. 29, 2012).
74. *See id*. at *8.
75. *See* Sterlinski v. Catholic Bishop of Chicago, 203 F. Supp. 3d 908, 914-16 (N.D. Ill. 2016).
76. Richardson v. Northwest Christian Univ., 242 F. Supp. 3d 1132, 1145 (D. Or. 2017).
77. *See* E.E.O.C. v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 568 (6th Cir. 2018).
78. *See id*. at 567, 581.
79. *See id*. at 574.
80. *See id*. at 575.

the employer need not be a church or diocese to qualify for the exception, the employer must have clear and obvious religious characteristics, and the employer in the case had virtually no religious characteristics.[81] The court also found that the employee was not a minister under the ministerial exception in accordance with *Hosanna-Tabor* factors.[82] Briefs for this case have been submitted to the Supreme Court as of the publishing of this article. It is likely that any Supreme Court ruling in this case will impact the Court's balance of anti-discrimination claims and freedom of religious exercise claims, in addition to the interpretations of Title VII, RFRA, and the ministerial exception.

IV. PRIVATE BUSINESSES' RELIGION-BASED COMPLAINTS AGAINST STATE AND FEDERAL STATUTES

A. BURWELL V. HOBBY LOBBY STORES, INC.

A landmark case on religious exemptions claims by private businesses is *Burwell v. Hobby Lobby Stores, Inc*.[83] In *Hobby Lobby*, a private business refused to offer contraceptive coverage to their female employees based on the business owners' personal religious beliefs.[84] Although the Court did not reach the constitutional question, instead deciding the case under the RFRA statute, *Hobby Lobby* is indicative of how the Court may decide future religious exercise claims.

The Court held that business corporations are within the RFRA's definition of "persons," and thus can "exercise religion" under the Act.[85] Therefore, Hobby Lobby is exempt from the Patient Protection and Affordable Care Act ("ACA"), which requires employers with fifty or more full-time employees to offer "a group health plan or group health insurance coverage" that provides "minimum essential coverage," including contraceptive methods, sterilization procedures, and patient education and counseling.[86] Hobby Lobby[87] objected to four of the mandated methods of contraception based on their religious convictions.[88] The parties thus sought an exemption from the mandate,[89] arguing that corporations were "persons" under the RFRA and that the mandate burdened their "exercise of religion."[90]

81. *See id*. at 582.
82. *See id*. at 582-83.
83. *See generally* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).
84. *See id*. at 2759.
85. *See id*. at 2768-69.
86. *See id*. at 2762, 2768, 2775.
87. The two for-profit corporations cases, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), and Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013), were consolidated into Burwell v. Hobby Lobby Stores, Inc. after the grant of certiorari. Both corporations raised the same objection.
88. *See Hobby Lobby Stores, Inc*., 134 S. Ct. at 2765.
89. *See id*. at 2763-66.
90. *See id*. at 2765.

In her dissent, Justice Ginsburg raised the concern that employers might use religious beliefs as an excuse for discrimination. She noted religious freedom challenges brought in the past by a restaurant that objected to serving African-American patrons, a business that did not want to hire women who did not have their husbands' consent to work outside the home, and a photography studio that wished to avoid photographing a same-sex wedding (*Elane Photography, L.L.C. v. Willock,*[91] which will be discussed in the next section).[92] The majority decision downplayed those concerns by acknowledging "the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction," but stated its decision "provides no such shield."[93]

Hobby Lobby centered on an enduring legal debate: whether to treat for-profit corporations as the property of shareholders,[94] which thus could not "exercise religion," or as a social institution created by law to provide certain social benefits in the long-term,[95] which could have religious beliefs and moral principles. This debate has the potential to split courts in the practical implementation of the *Hobby Lobby* opinion. Both businesses in *Hobby Lobby* are closely-held corporations and their shareholders and directors practice the same religion.[96] A lower court would have difficulty in deciding what religious values a corporation holds in situations where the corporation has a large shareholder base with different religious beliefs. A lower court may exempt the corporation's discrimination from the law based on the religion of the majority shareholders; however, controlling shareholders in closely-held corporations owe fiduciary duties to minority shareholders requiring pursuit of share value.[97] On its face, the *Hobby Lobby* opinion could have expansive impact, but with a closer analysis of the practical difficulties created, *Hobby Lobby* may be limited to the facts in which a closely-held company where controlling shareholders both serve the function of the executive board and practice the same religion. Therefore, the Court's decision is arguably limited to the facts of internal unanimity.

B. ELANE PHOTOGRAPHY, L.L.C. V. WILLOCK

Elane Photography, L.L.C. v. Willock was the most high-profile case on religious exemptions and discrimination before *Hobby Lobby* and *Masterpiece Cakeshop*.[98] While the business in *Elane Photography* did not claim that its expressive association rights had been violated, the analysis of the New Mexico

91. See *discussion* infra*, Part III B*.
92. *See Hobby Lobby Stores, Inc*., 134 S. Ct. at 2804-05.
93. *Id*. at 2783.
94. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264-65 (1992).
95. *Id*. at 265.
96. *Id*. at 2774.
97. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 26 (Del. Ch. 2010).
98. Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013).

Supreme Court tracked the overlap in speech and expressive association analysis and indicated the direction that courts might have taken in applying expressive association jurisprudence to private businesses.

In *Elane Photography*, a photography business refused to photograph a commitment ceremony between two lesbians because the owner was personally opposed to same-sex marriage.[99] In response, the couple sued the company for failing to comply with New Mexico's Human Rights Act ("HRA"), which prohibits places of public accommodation from discriminating against individuals on the basis of their sexual orientation.[100] After concluding that the photography business was subject to the HRA because it "offers its services to the public, thereby increasing its visibility to potential clients,"[101] the New Mexico Supreme Court found that the HRA did not violate "free speech guarantees because the [HRA] does not compel Elane Photography to either speak a government-mandated message or to publish the speech of another."[102] While Elane Photography could post on their website that they oppose same-sex marriage, they were still required to comply with the HRA as a public accommodation.[103]

The indistinct line between ideology and conduct complicates the rights and obligations of small businesses. As the New Mexico Supreme Court reasoned in *Elane Photography*, "the [HRA] applies not to Elane Photography's photographs but to its business operation . . . while photography may be expressive, the operation of a photography business is not."[104] Because Elane Photography operates like a public accommodation, its provision of services "can be regulated, even though those services include artistic and creative work."[105] Thus, in providing services to the general public, a business owner's refusal of a customer based on characteristics protected by the HRA does not violate said business' association rights. Serving customers does not restrict what the business says, nor does it force the business to say anything.[106] The *Elane Photography* court decided that conveying clients' messages did not constitute compelled speech because Elane Photography conveys only a "message-for-hire" instead of its own messages.[107] The concept of businesses serving as conduits of client speech could allow courts to enforce public accommodations laws against businesses offering services to the general public by lowering the level of protection given to speech distinct from that of the business itself.[108]

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99. *Id*. at 59.
100. *Id*. at 60.
101. *Id*. at 59.
102. *Id*.
103. Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013).
104. *Id*. at 68.
105. *Id*. at 66.
106. *Id*. at 65.
107. *Id*. at 66, 72.
108. *See* Susan Nabet, Note, *For Sale the Threat of State Public Accommodations Laws to the First Amendment Rights of Artistic Businesses*, 77 BROOK. L. REV. 1515, 1516 (2012).

Even if the New Mexico Supreme Court had found that Elane Photography engaged in expressive association, the judges may have come to the same conclusion. While for-profit corporations certainly can exercise First Amendment speech and association rights, "if [a] group engages in expressive association, constitutional protections are only implicated if the government action would significantly affect the group's ability to advocate public or private viewpoints."[109] When a for-profit business serves as a mere conduit for others or relates a message for hire, even the Supreme Court acknowledges the low risk that others will assume that the speaker endorses those messages.[110] Thus, even if *Elane Photography* were engaging in expressive association, it would not receive exhaustive First Amendment protection. Following *Elane Photography*, many people were curious whether the Supreme Court would line with the *Elane Photography* decision in similar cases like *Masterpiece Cakeshop*. Unfortunately, the Court did not send a particularly clear message in its narrow ruling of *Masterpiece Cakeshop*.

C. MASTERPIECE CAKESHOP LTD. V. COLORADO CIVIL RIGHTS COMMISSION

After the Supreme Court turned down the request to review New Mexico Supreme Court's decision of *Elane Photography* in 2014, the public was hoping to see the Court address the tangled debate about free speech, religious exercise and equal treatment in the public square in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[111] The case arose from an encounter in 2012, when Charlie Craig and David Mullins went to Masterpiece Cakeshop to order a cake to celebrate their upcoming wedding.[112] Jack Phillips, the owner of the bakery and a devout Christian, refused the couple's request because he was not willing to design custom cakes that conflicted with his religious beliefs.[113] The Colorado Civil Rights Commission ruled that Phillips had violated Colorado Anti-Discrimination Act ("CADA") and told him that, if he wanted to make cakes for opposite-sex weddings, he would have to do the same for same-sex wedding.[114] After a Colorado court upheld that ruling, Phillips appealed to the U.S. Supreme Court.[115]

Phillips raised two constitutional claims: First, applying CADA in a way that would require him to create a cake for a same-sex wedding would violate his First Amendment right to free speech by compelling him to exercise his artistic

109. 16A AM. JUR. 2D *Constitutional Law* § 581 (2015).

110. *See* James M. Gottry, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV 961, 989 (2011) (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661-62 (1994)).

111. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

112. *Id*. at 1724.

113. *Id*.

114. *Id*. at 1726.

115. *Id*. at 1727.

talents to express a message with which he disagreed.[116] Second, requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion, also protected by the First Amendment.[117] Phillips claimed that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation, which had a significant First Amendment speech component and implicates his deep and sincere religious beliefs.[118] The customers' rights to goods and services became "a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs."[119]

The Court avoided ruling broadly on the intersection of anti-discrimination laws and rights to free exercise. It did not rule on the "freedom of speech" argument, and merely stated that because at that time Colorado did not allow gay marriages in the state, "there is some force in the argument that the baker was 'not unreasonable' in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State."[120] In the majority opinion, Justice Kennedy acknowledged that while religious and philosophical objections to gay marriage are protected under the First Amendment, "it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[121]

Instead of adjudicating whether the baker's behavior violates the law, the majority opinion turned on the argument that the Colorado Civil Rights Commission failed to give neutral and respectful consideration of the baker's claims in all the circumstances of the case.[122] Justice Kennedy cited the comments of one commissioner, who said religion had been used to justify all kinds of discrimination throughout history, including slavery and the Holocaust.[123] Kennedy said those comments disparaged Philip's religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical.[124] Therefore, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.[125]

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116. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1726 (2018).
117. *Id*.
118. *Id*. at 1728.
119. *Id*.
120. *Id*.
121. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018).
122. *Id*. at 1729.
123. *Id*.
124. *Id*.
125. *Id*. at 1731.

In her concurrence, Justice Kagan, joined by Justice Breyer, warned lower courts that discrimination against messages is not religious discrimination.[126] Justice Thomas wrote separately to say that the case should have been decided on free-speech grounds.[127] Justice Gorsuch joined this opinion as well, signaling his openness to this broader claim.[128] In her dissent, Justice Ginsburg said she did not see a problem with the proceedings of the Colorado Civil Rights Commission: Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it, and she saw "no reason why the comments of one or two Commissioners should be taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins."[129]

The decision in *Masterpiece Cakeshop* provides limited guidance for lower courts facing similar cases by basing its ruling on a very narrow ground–that the Colorado Civil Rights Commission treated Phillips unfairly by being too hostile to his sincere religious beliefs during its consideration of the case. The majority opinion stated that determination of "the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power" required an adjudication "in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach," and *Masterpiece Cakeshop* does not meet such requirement. As Justice Kennedy said, "in this case the adjudication concerned a context that may well be different going forward." Therefore, "the outcome of cases like this in other circumstances must await further elaboration in the courts."[130]

V. RELIGIOUS EXEMPTIONS TO PROVIDING HEALTHCARE AND HOUSING

Besides religious exemptions for private businesses, religious exemptions have developed in healthcare and housing law as well. In healthcare, religious exemptions permit healthcare providers to refuse providing healthcare services that violate their religious or moral beliefs.[131] Religious exemptions for healthcare providers first became prevalent in response to *Roe v. Wade* in 1973. A few months after *Roe v. Wade*, Congress passed a law stating that institutions and individuals providing healthcare and receiving federal funds cannot be required to perform abortions or sterilizations if these procedures are contrary to the institution's or individual's religious beliefs.[132] Since then, a number of state statutes

126. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1733 (2018).
127. *Id*. at 1741-48.
128. *Id*.
129. *Id*. at 1751.
130. *Id*. at 1732.
131. *See, e.g*., 42 U.S.C. § 300a-7(b)-(e); 42 U.S.C. § 238n; *see generally*, GUTTMACHER INST. STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES 2-3 (2014), archived at http://perma.cc/66-QB-FAVN.
132. *See* 42 U.S.C. § 300a-7; Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J. L. & GENDER 177, 186 (2015).

have delineated which institutions may refuse to provide abortions, whether individual providers, pharmacists, or institutions may refuse to provide contraception, and whether individual providers and institutions may refuse to provide sterilization.[133]

Religious exemptions for healthcare providers have emerged at the forefront again with regard to providing healthcare for LGBT, particularly transgender, people.[134] Section 1557 of the Patient Protection and Affordable Care Act prohibited discrimination on the basis of sex in federally funded and federally administered health programs.[135] In 2016, HHS issued a rule clarifying that Section 1557's ban on discrimination based on sex included discrimination based on gender identity.[136] However, subsequent cases at the district court and circuit court levels have made the rule's legality unclear.[137] Religiously-based hospitals have relied on sterilization-exemption laws to deny transgender people access to transition-related treatments, such as sex reassignment surgeries and various hormone treatments.[138] Mississippi currently permits healthcare providers to decline providing any treatment to transgender individuals,[139] and three other states are considering similar laws.[140]

133. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2154 (2009) (exempting pharmacies, hospitals, and health professionals from facilitating or participating in the provision of an abortion, abortion medication, emergency contraception or any medical device intended to inhibit or prevent implantation of a fertilized ovum on moral or religious grounds); CAL. HEALTH & SAFETY § 123420(c) (West Supp. 2014) (exempting only nonprofit hospitals, facilities, or clinics organized or operated by a religious corporation or other religious organization from providing abortions for moral, ethical, or religious reasons); FLA. STAT. § 381.0051 (2012) (exempting any individual from providing contraceptive or family planning service, supplies, or information for religious or medical reasons); MASS. GEN. LAWS, 112 § 12I (2018) (exempting privately controlled hospitals or health facilities from providing abortions for religious or moral principles). Some states previously required pharmacists to dispense emergency contraceptives in spite of sincerely held religious beliefs, but federal courts have struck down these laws as violations of the Free Exercise and Equal Protection Clauses. *See* Menges v. Blagojevich, 451 F. Supp. 2d 992, 1002, 1005 (C.D. Ill. 2006); Stormans Inc. v. Selecky, 844 F. Supp. 2d 1172, 1199-1200 (W.D. Wash. 2012).

134. *See* MOVEMENT ADVANCEMENT PROJECT AND NAT'L CTR. FOR TRANSGENDER EQUALITY, RELIGIOUS REFUSALS FOR HEALTHCARE: A PRESCRIPTION FOR DISASTER 7-8 (2018).

135. ACA § 1557(a).

136. 81 Fed. Reg. 31375 (2016).

137. *See* Flack v. Wis. Dept. of Health Servs., 328 F.Supp.3d 931(W.D. Wis. 2018); Franciscan Alliance, Inc. v. Burwell, 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016); Tovar v. Essential Health, Civil No. 16-100, 2018 U.S. Dist. LEXIS 160605, at *18-19 (D. Minn. 2018).

138. *See* Minton v. Dignity Health, Case No. CGC 17-558259, 2018 Cal. Super. LEXIS 38, at *1 (Cal. Sup. Ct. 2018); *see also* Claudia Buck & Sammy Caiola, "Transgender patient sues Dignity Health for discrimination over hysterectomy denial," THE SACRAMENTO BEE (April 20, 2017), https://www.sacbee.com/news/local/health-and-medicine/article145477264.html.

139. *See* H.B. 1523, 2016 Leg., 135th Sess. (Miss. 2016).

140. *See* H.B. 1206, 2018 Leg., 71st Gen. Assemb., Reg. Sess. (Colo. 2018); H.B. 372, 2018 Leg., Reg. Sess. (Ky. 2018); S.B. 1250, 2017 Leg., 56th Leg., Reg. Sess. (Okla. 2018).

A. THE CHURCH, COATS SNOWE, AND WELDON AMENDMENTS

After *Roe v. Wade* recognized a fundamental right to privacy that protected women's right to abortion,[141] Congress enacted statutory protections (the Church, Coats-Snowe, and Weldon Amendments) for healthcare providers who refuse to perform abortions for primarily religious reasons.[142] Congress passed the Church Amendments in 1974, protecting individuals and entities from being denied federal funding for refusing to perform abortions or sterilizations based on religious beliefs or moral convictions.[143] Federal funding also may not be contingent on the entity making its facilities or personnel available for performing abortions or sterilizations.[144] Entities receiving federal funds may not discriminate against individuals who choose not to perform abortions or sterilizations in employment or any other employment-related privileges.[145] Most significantly, the Church Amendment affirmed that "no individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the [Secretary of Health and Human Services]."[146]

In 1996, Congress enacted the Coats-Snowe Amendment. The Coats-Snowe Amendment forbids government entities that receive federal financial assistance from discriminating against any health care entity that refuse to undergo, require, or provide training for abortions; perform abortions; or provide referrals for such training or abortion.[147] Governments additionally may not deny a legal status (such as a license or certificate) or financial assistance to a health care entity due the accrediting agency requiring a health care entity to perform or train to perform abortions.[148] Congress passed another similar provision in 2005 under the Weldon Amendment, which restricts access to HHS appropriations for state/local governments, federal agencies, and programs that discriminate against health care entities on the basis of whether the health care entity performs, pays for, or provides coverage or referrals for abortions.[149]

1. New Proposed Regulation: Protecting Statutory Conscience Rights in Health Care

Under the Trump administration, the Department of Health and Human Services proposed a rule on January 26, 2018 called "Protecting Statutory

141. *See* Roe v. Wade, 410 U.S. 113, 154 (1973).
142. *See* 42 U.S.C. § 300a-7; 42 U.S.C. § 238n; H.R. Con. Res. 4818, 108th Cong., 118 Stat 2809, Title V—General Provisions (2004).
143. *See* 42 U.S.C. § 300a-7.
144. *See id.*
145. *See id.*
146. *See id.*
147. *See* 42 U.S.C. § 238n.
148. *See id.*
149. *See* H.R. Con. Res. 4818, 108th Cong., 118 Stat 2809, Title V—General Provisions.

Conscience Rights in Health Care."[150] This proposed rule would uphold and expand the types of healthcare providers protected under the Church, Coats-Snowe, and Weldon Amendments, and would widen the scope of abortion-related religious exemptions.[151] For example, the proposed rule explicitly defines "referral" as "including the provision of any information (including but not limited to name, address, phone number, email, or website) by any method (including but not limited to notices, books, disclaimers, or pamphlets online or in print)."[152] The proposed rule also provides an expansive list of entities that qualify as health care entities, including postgraduate physician training programs, laboratories, provider-sponsored organizations, third-party administrator, and any other kind of health care organization, facility, or plan.[153] Additionally, the proposed rule defines "assist in the performance" of a health service as participating in "any activity with an *articulable connection* to a procedure, health service or health service program, or research activity."[154]

The proposed rule's new definitions broaden the scope of people, entities, and exemptions protected by the Church, Coats-Snowe, and Weldon Amendments. Actions previously permitted in certain states due to ambiguous definitions are explicitly restricted under the new rule. For example, Iowa currently requires healthcare providers to take "all reasonable steps to transfer the patient to another health care provider" even when there is an objection based on "religious beliefs, or moral convictions."[155] The proposed rule's new definition of "referral" means that the Coats-Snowe and Weldon Amendments would override Iowa's statute because "transfer[ing] the patient to another health care provider" would constitute a "referral" that entities have a right to refuse to provide.[156] This proposed rule highlights the Trump administration's commitment to widening conscience-based protections for the purpose of protecting religious freedoms.[157]

Laws permitting and protecting healthcare providers who refuse to provide health services due to religious beliefs or moral convictions have disproportionately affected LGBT people and women. Two recent cases, discussed below, involving a transgender man being denied gender confirmation surgery and a woman being denied reproductive surgery serve as examples of the impact of expanded religious exemptions.

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150. *See* Protecting Statutory Conscience Rights in Healthcare, 83 Fed. Reg. 3880, 3923 (proposed January 26, 2018).

151. *See id*. at 3887-89.

152. *See id*. at 3894.

153. *See id*. at 3893.

154. *See id*. at 3892 (emphasis added).

155. IOWA CODE ANN. § 144D.3(5) (2012).

156. IOWA CODE ANN. § 144D.3(5); *see* 42 U.S.C. § 238n; H.R. Con. Res. 4818, 108th Cong., 118 Stat 2809, Title V—General Provisions; 83 FR 3880, 3924.

157. *See* 83 Fed. Reg. 3880, 3881.

2. Minton v. Dignity Health

Evan Minton, a transgender man, was scheduled to receive a hysterectomy on September 2016 at Mercy San Juan Medical Center ("MSJMC"), a healthcare service provider owned by Dignity Health.[158] Minton sought a hysterectomy as part of his gender transition and treatment for gender dysmorphia.[159] Two days before the procedure, Minton notified MSJMC personnel that he is transgender.[160] The hospital canceled the appointment the next day.[161] MSJMC permits physicians to perform hysterectomies for patients with diagnoses other than gender dysphoria.[162] MSJMC is a Catholic hospital that follows its sincerely-held belief in Catholic doctrine in its provision of medical care and thus denied Minton a hysterectomy.[163] Minton's surgeon and Dignity Health helped him obtain his surgery three days later at a non-Catholic Dignity Health hospital.[164] Minton brought suit, alleging that Dignity Health violated the Unruh Act by denying medical services for Minton on the basis of his gender identity.[165]

3. Chamorro v. Dignity Health

Rebecca Chamorro was a pregnant woman scheduled to give birth by cesarean section.[166] Since Chamorro did not want more children, following the birth of this child, she looked into tubal ligation procedures to potentially undergo immediately after her Cesarean Section.[167] Mercy Medical Center in Redding (MMCR) refused to permit Chamorro's obstetrician from performing tubal ligation due to its sterilization policy and the Ethical Religious Directives for Catholic Health Services (the "ERD's").[168] The ERD's prohibit "direct sterilization," which is defined as sterilization for the purpose of contraception and is viewed as "intrinsically evil."[169] Rebecca Chamorro, and Physicians for Reproductive Health sued Dignity Health, alleging that Dignity Health violated the Unruh Act by denying medical services for Chamorro on the basis of sex.[170] Protections permitting healthcare providers to refuse providing abortions, sterilizations, and other health

158. *See* Complaint for the Petitioner at 2, Minton v. Dignity Health, Case No. CGC 17-558259, 2018 Cal. Super. LEXIS 38.

159. *See id*.

160. *See id*.

161. *See id*.

162. *See id*.; Memorandum for Defendant at 1, *Minton*, Case No. CGC 17-558259, 2018 Cal. Super. LEXIS 38.

163. *See* Memorandum for Defendant at 2, *Minton*, Case No. CGC 17-558259, 2018 Cal. Super. LEXIS 38.

164. *See id*.

165. *See* Complaint for the Petitioner at 2, *Minton*, Case No. CGC 17-558259, 2018 Cal. Super. LEXIS 38.

166. *See* Complaint for Plaintiff at 1, Chamorro v. Dignity Health, Case No. CGC 15-549626.

167. *See id*.

168. *See id*.

169. *See id*. at 2-3.

170. *See id*. at 11-12.

services for religious or moral reasons has created tension with non-discrimination laws and access to healthcare.

B. REFUSALS TO FILL PRESCRIPTIONS

Adding to the tension between religious freedom and reproductive rights, some pharmacies and pharmacists have denied women access to emergency contraceptives based on moral or religious objections.[171] However, most states do not have laws regulating these disputes. Of the states that have legislated in this area, eight states explicitly require pharmacies to provide emergency contraception to patients,[172] and six states have laws permitting pharmacies to refuse to provide emergency contraception on religious or moral grounds.[173]

The most instructive jurisprudence in this area arises in the state of Washington. In *Stormans, Inc. v. Selecky*, the court held that the State Board of Pharmacy's rules requiring pharmacies to stock and deliver all lawfully prescribed medications to patients were neutral and generally applicable, and therefore religious exercise claims were to be decided on a rational basis standard of review.[174] Operatively, the rules require pharmacies to stock and dispense emergency contraceptives, despite moral or religious objections of the owners.[175] The rules, however, do not require individual pharmacists to provide emergency contraceptives if doing so would conflict with the individual's beliefs.[176] A pharmacy may accommodate an objecting pharmacist by making another pharmacist available in person or by telephone.[177] The court found the rules were facially neutral, as they "make no reference to any religious practice, conduct, or motivation."[178] The court also found the rules operated neutrally, as they prohibit any refusal to dispense medication, whether the refusal is motivated by religion or any other reason.[179] The court found neutrality is not negated "even though a group motivated by religious reasons may be more likely to engage in the proscribed conduct."[180] Similarly, the court found the rules were generally applicable because they were not substantially under-inclusive.[181] The court reasoned that the exceptions to the rules, such as a customer's inability to pay, were narrow and merely allowed a pharmacy to maintain its business.[182] Because the court was deciding

171. *Pharmacy Refusals 101*, NAT'L WOMEN'S L. CTR. (Dec. 28, 2017), https://nwlc.org/resources/pharmacy-refusals-101/.

172. These states are: California, Illinois, Maine, Massachusetts, Nevada, New Jersey, Washington, and Wisconsin. *Pharmacy Refusals 101*, *supra* note 171.

173. These states are: Arizona, Arkansas, Georgia, Idaho, Mississippi, and South Dakota. *Pharmacy Refusals 101*, *supra* note 171.

174. *See* Stormans, Inc. v. Selecky, 586 F.3d 1109, 1109 (9th Cir. 2009).

175. *See id.* at 1116-17.

176. *Id.* at 1116.

177. *Id.*

178. *Id.* at 1130.

179. Stormans, Inc. v. Selecky, 586 F.3d 1109, 1131 (9th Cir. 2009).

180. *Id.*

181. *Id.* at 1134

182. *Id.* at 1134-1135.

on an appeal from a preliminary injunction, the court remanded to the district court to determine whether the rules were rationally related to a legitimate government purpose.[183]

After a twelve-day bench trial, the district court found that the rules were neither neutral nor generally applicable and did not survive a strict scrutiny analysis.[184] The case was again appealed to the Ninth Circuit and proceeded as *Stormans, Inc. v. Wiesman*.[185] The court again held that the rules were both facially neutral and neutral in operation, and were generally applicable.[186] The court concluded, "[t]he rules are rationally related to Washington's legitimate interest in ensuring that its citizens have safe and timely access to their lawful and lawfully prescribed medications."[187]

Although the case was denied certiorari, Justice Alito, with whom Justice Roberts and Justice Thomas joined, dissented from the denial.[188] The dissent signaled those Justices' beliefs that *Stormans, Inc. v. Wiesman* should have been decided by the Supreme Court and that "the impetus for the adoption of the regulations was hostility to pharmacists whose religious beliefs regarding abortion and contraception are out of step with prevailing opinion in the state."[189] Justice Alito opined that the rules were under-inclusive, because they allow pharmacies to decline to fill prescription for financial reasons, including non-acceptance Medicaid or Medicare.[190] In this respect, Justice Alito found the exemptions to be quite broad and in conflict with *Church of Lukumi Babylu Aye, Inc. v. City of Hialeah*,[191] which established the state cannot allow secular refusals while prohibiting religious refusals.[192] Moreover, Justice Alito emphasized that the pharmacy's practice of referring those in need of emergency contraception to another nearby facility did not "pose a threat to timely access to lawfully prescribed medications."[193] According to Justice Alito, this further suggested the regulations improperly conflicted with religious freedoms.

A similar conflict also arose in Illinois, but the court decided the issue without reaching the constitutional question of free exercise.[194] In *Morr-Fitz v. Quinn*, the court found that the "executive branch decided to make Plan B available over any pharmacist's religious concerns, while the legislative branch decided to protect health care personnel and health-care facilities from having to provide health care

183. *Id*. at 1138.
184. Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1074 (9th Cir. 2015).
185. *Id*.
186. *Id*.
187. *Id*. at 1084.
188. Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016) (cert. denied).
189. *Id*. at 2433.
190. *Id*. at 2439.
191. 508 U.S. 520 (1993).
192. *Stormans*, 136 S. Ct. at 2433.
193. *Id*. at 2435.
194. *See* Morr-Fitz, Inc. v. Quinn, 976 N.E.2d 1160 (Ill. App. Ct. 2012).

against their conscience or religious beliefs."[195] In this inter-branch conflict, the legislature prevailed, allowing the court to avoid addressing whether the administrative rules violated the free exercise clause.[196]

C. WALSH V. FRIENDSHIP VILLAGE

Religious freedoms often conflict with the rights of the LGBT community in the area of housing. Mary Walsh and Beverly Nance, an aging lesbian couple in Missouri, were recently denied housing at a senior community on the basis that its "Cohabitation Policy" defines marriage as "the union of one man and one woman, as [it] is understood in the Bible."[197] The couple first filed a complaint with the federal Department of Housing and Urban Development, which they later withdrew to pursue recourse in federal courts.[198] Their case is now in its initial stages before the United States District Court for the Eastern District of Missouri.[199] The complaint alleges that the senior community, Friendship Village, discriminated on the basis of sex in violation of the federal Fair Housing Act and the Missouri Human Rights Act.[200] The complaint states that, "each Plaintiff was denied housing at Friendship Village because of her own sex (female) and because of the sex of her spouse (female), because if either Plaintiff had been married to a man, they would not have been denied housing."[201] The complaint further alleges that the "Cohabitation Policy" discriminates on impermissible sex-based stereotypes, namely that a woman's spouse should be a man.[202]

This case has generated a fair amount of publicity and its trajectory is important, particularly in light of recent developments in the field. New York Times journalist Paula Span asks, "[i]f a baker can refuse to make a wedding cake for a gay couple (and have the Supreme Court agree, albeit on narrow grounds), can a [senior community] refuse admission to Mary Walsh and Beverly Nance?"[203] Decisions, like this one, of the courts in the next year will shape the expansiveness of the *Masterpiece Cakeshop* decision.

VI. CONCLUSION

Justice Alito wrote, "[i]f the [*Stormans, Inc. v. Wiesman* decision] is a sign of how religious liberty claims will be treated in the years ahead, those who value

195. *Id.* at 1171.
196. *Id.* at 1176.
197. *Id.*
198. *Id.* at 12.
199. *See id.*
200. *Id.* at 15-19.
201. *Id.* at 15, 17.
202. Complaint at 16-18, Walsh v. Friendship Village of South County (E.D. Mo. 2018) (No. 1), 2018 WL 3569178.
203. Paula Spann, *A Retirement Community Turned Away These Married Women*, N.Y. TIMES (Aug. 17, 2018), https://www.nytimes.com/2018/08/17/health/lgbt-discrimination-retirement.html.

religious freedom have great cause for concern."[204] At the same time, Mary Walsh and Beverly Nance are shocked and angry at the possibility they will not be able to age with dignity in a community of their friends and peers. This conflict of fundamental rights will continue to surface in the following years, as the Trump administration has infused a renewed sense of religious liberty into the public. For instance, discrimination on the basis of sexual orientation is rampant in senior housing facilities, and LGBT organizations have often argued that there are not enough protections for LGBT seniors. However, the explicit and blatant refusal of Mary Walsh and Beverly Nance poses the question as to whether this is discrimination at all.[205] And, as made clear in the arguments presented in *Hobby Lobby* and the Court's decision in that case, the Court has shifted from analyzing exemption cases as free speech and association claims to now analyzing similar cases under free exercise claims. Even though the Court has used the free exercise analysis to reach narrow decisions, as was the case in Masterpiece *Cakeshop*, this trend still suggests a growing jurisprudence of potential conflict between religious liberty and access to services and accommodations. It is likely there will be more occasions for the courts to flesh out this question in the coming years.

204. Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016) (cert. denied).

205. Paula Spann, *A Retirement Community Turned Away These Married Women*, N.Y. TIMES (Aug. 17, 2018), https://www.nytimes.com/2018/08/17/health/lgbt-discrimination-retirement.html.