Freedom of Expressive Association and Discrimination on the Basis of Sexual Orientation

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I. Introduction

According to the United States (U.S.) Supreme Court, "[t]he Constitution guarantees freedom of association . . . [to be] . . . an indispensable means of preserving other individual liberties."[1] The right of expressive association secures both the "right to associate for the purpose of engaging in those activities protected by the

1. Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion"[2]—and a "commensurate right to choose with whom one will not associate."[3] Thus, the Supreme Court safeguards an organization's exclusion of certain individuals from membership (for example, members of the lesbian, gay, bisexual, and transgender ("LGBTQIA+") community) as a means of expressive association.[4] This causes tension with public accommodations laws designed to ensure equal access to non-public forums, and organizational policies that exclude members based on their sexual orientation. To decide if a public accommodations law violates the constitutional freedom of expressive association, the Court evaluates whether the presence of a person protected by the public accommodations law "affects, in a significant way, the group's ability to advocate public or private viewpoints."[5]

This Article examines how the Court applies this standard. Part II articulates the doctrine of expressive association by tracing its development through three major cases involving public accommodations laws. Part III explores the application of modern expressive association law to for-profit businesses that discriminate against certain customers based on their sexual orientation. Finally, Part IV discusses the development of expressive association jurisprudence in cases where public schools with nondiscrimination policies declined to officially recognize religious student groups that excluded members based on their religious beliefs or sexual orientation.

II. FIRST AMENDMENT CHALLENGES TO STATE PUBLIC ACCOMMODATIONS LAWS

The Supreme Court preserves a group's right to exclude unwanted members, even in contravention to a state public accommodation law, if: (1) the group is engaged in private expressive association[6] and (2) the inclusion of the putative members would impair the group's ability to express its views.[7] 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*;[8] *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*;[9] and *Boy Scouts of America v. Dale*.[10]

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2. *Id.*

3. Ann H. Jameson, Roberts v. United States Jaycees*: Discriminatory Membership Policy of a National Organization Held Not Protected by First Amendment Freedom of Association*, 34 CATH. U. L. REV. 1055, 1055 (1985).

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

5. *See, e.g.*, *Dale*, 530 U.S. at 648 (internal citations omitted).

6. *Id.*

7. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 622–23 (1984).

8. *Id.* at 609.

9. Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston, 515 U.S. 557 (1995).

10. *Dale*, 530 U.S. 640 (2000).

A. *ROBERTS V. UNITED STATES JAYCEES*

Roberts v. United States Jaycees[11] implicated states' interest in combating gender discrimination and laid the foundation for the modern freedom of association test. In *Roberts*, the U.S. Jaycees[12] challenged the constitutionality of the Minnesota Human Rights Act ("MHRA"), which forbade discrimination on the 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 the Jaycees received the heightened protection afforded to intimate associations, reserving intimate association analysis for cases involving marriage, child rearing, cohabitation, and other 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 the MHRA, due to its minimal membership requirements and inclusion of nonmembers of all genders in activities.[15]

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 MHRA unconstitutionally abridged their right to expressive association.[20]

Roberts established the major consideration in this line of cases: the balance between public accommodations policies and the constitutional right not to

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11. *Roberts*, 468 U.S. 609.

12. *Id.* at 612 ("United States Jaycees . . . is a nonprofit membership corporation . . . . The objective . . . as set out in its bylaws, is to pursue such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations . . . .") (quotation omitted).

13. *See id.* at 614–16.

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 lacked).

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. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

18. *See id.*

19. *See id.* at 626–27.

20. *Id.* at 628-29.

associate. In cases that followed *Roberts,* such as *Rotary International v. Rotary Club of Duarte* and *New York State Club Ass'n v. City of New York*, the Court made clear that organizations with public characteristics cannot generally invoke their association rights to avoid compliance with public accommodation statutes.[21]

B. *HURLEY V. IRISH-AMERICAN GAY, LESBIAN, & BISEXUAL GROUP OF BOSTON*

In *Hurley*, the Supreme Court 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 non-heterosexual individuals.[22] The Court avoided applying the *Roberts* test by framing the issue as one of speech rather than association.[23] In *Hurley*, 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 the 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.[24]

The Court cited cases that implicate both First Amendment concerns and parades, concluding that parades represent a form of symbolic speech, or a public message and spectacle that clearly involves expression.[25] 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.[26] As such, the Court determined that every participating group in a parade changes the message of the private organizers' speech.[27]

LGBTQIA+ individuals could march anywhere in the parade under any approved banners, or with any approved groups.[28] However, by requiring the Council to include GLIB as a separate marching group, the Massachusetts courts impermissibly rendered the Council's speech itself—the parade—a "public accommodation."[29] This requirement violated the First Amendment because a speaker must be free to choose the content of their own message.[30] *Hurley* indicates that individuals cannot use a public accommodations law to associate with a group in order to compel a speaker to alter their message when non-association is

21. *See, e.g.*, Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545–46 (1987); N. Y. State Club Ass'n v. New York, 487 U.S. 1, 13–14 (1988). Note, however, that in *N.Y. 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.

22. Darren Lenard Hutchinson, *Accommodating Outness:* Hurley, *Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 90 (1998).

23. *Id.*

24. *See* Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston, 515 U.S. 557, 560–61 (1995).

25. *See id.* at 568–69.

26. Hutchinson, *supra* note 22, at 90.

27. *Hurley,* 515 U.S. at 572–73.

28. *Id.* at 572.

29. *Id.* at 573.

30. *Id.* at 573.

integral to maintaining the integrity of the speaker's chosen message. Thus, in *Hurley* the Court considered exclusion itself to be speech, rather than a means to effectuate speech. As such, the case affects the application of *Roberts* to groups with exclusionary policies integral to the speech at issue. Courts after *Hurley*, however, generally distinguished *Hurley* on its facts and continued to apply the *Roberts* balancing test.[31] Still, in *Hurley*, 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."[32]

C. *BOY SCOUTS OF AMERICA V. DALE*

In *Hurley*, the Supreme Court considered whether a public accommodation law could be used to ensure the inclusion of individuals regardless of their sexual orientation;[33] in contrast, *Dale* was the first case in which the Court held that compliance with an anti-discrimination law would violate a group's First Amendment right to expressive association in a public accommodation.[34]

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.[35] 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.[36] 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."[37] Finally, the New Jersey Supreme Court distinguished its decision from *Hurley* on the ground that Dale's reinstatement did not compel the Boy Scouts to express any message.[38]

The U.S. 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."[39] The Court began its analysis by examining whether the Boy Scouts engaged in expressive association.[40] Specifically, the Court found that the Boy Scouts engaged in expressive activity when adult leaders "inculcate[d] [youth members] with the

31. Hutchinson, *supra* note 22, at 104.
32. Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston, 515 U.S. 557, 580–81 (1995).
33. *Id.* at 559.
34. Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).
35. *Id.* at 644–45.
36. *Id.* at 647.
37. *Id.*
38. *Id.*
39. *Id.* at 654.
40. *Dale*, 530 U.S. at 648.

Boy Scouts' values—both expressly and by example."[41] Thus, the leadership's stance against homosexuality rendered the position a protected part of the Boy Scouts' expressive message.[42] The Court further affirmed the freedom to not associate by finding that the government cannot force a group to admit members if said inclusion impedes the group's ability to advocate public or private viewpoints.[43]

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.[44] 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.[45] The Court noted that it defers to the association as to the nature and impairments of its expression.[46] 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."[47] 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.[48]

Dale added additional criteria to the *Roberts* test by requiring courts to initially evaluate whether a group is engaged in acts of expressive association.[49] The Court has not yet recognized preventing discrimination against LGBTQIA+ individuals as a compelling state interest in the context of the First Amendment.[50]

Dale reflects the state of the law as of 2024 regarding the effect public accommodation statutes have on private organizations. *Hurley* informs the analysis of

41. *Id.* at 649–50.

42. *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, even if not all the members agreed with the group's policy. *Id.* at 655.

43. *Id.* at 655–56.

44. *See id.* at 653.

45. *Id.* at 654.

46. *Dale*, 530 U.S. at 653.

47. *Id.* at 650–51.

48. *See id.* at 655–56.

49. 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).

50. *See* Sara A. Gelsinger, *Right to Exclude or Forced to Include? Creating A Better Balancing Test for Sexual Orientation Discrimination Cases*, 116 PENN ST. L. REV. 1155, 1172–73 (2012); *see also* 303 Creative LLC v. Elenis, 600 U.S. 570, 592 (2023) (reiterating prior holdings that public accommodations laws are not "immune" from a constitutional analysis and stating that "[w]hen a state public accommodations law and the Constitution collide, there can be no question which must prevail").

infringements on freedom of association, to the extent that the association's exclusion of individuals directly implicates the association's speech. The interaction of speech and association doctrines resulted in courts taking different approaches to expressive association claims.

III. FIRST AMENDMENT CHALLENGES BY PRIVATE BUSINESSES

A. *BURWELL V. HOBBY LOBBY STORES, INC.*

In 2014, one of the most impactful developments in expressive association jurisprudence came from the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc*.[51] A landmark case, *Hobby Lobby* centered around private businesses that refused to offer contraceptive coverage to their employees based on the owners' personal religious beliefs.[52] Although the Court did not reach the constitutional question, instead deciding the case under the Religious Freedom and Restoration Act ("RFRA"),[53] *Hobby Lobby* is indicative of how the Court may decide future freedom of association claims. The Court held that business corporations are within the RFRA definition of "persons," and thus can "exercise religion" under the Act and be exempted 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.[54] The for-profit corporations cases[55] were consolidated into *Hobby Lobby* after the grant of certiorari.[56] Both corporations objected to four of the statutorily mandated methods of contraception based on their religious convictions.[57] The parties thus sought an exemption from the mandate,[58] arguing that corporations were "persons" under RFRA and that the mandate burdened their "exercise of religion."

Hobby Lobby centered on an enduring legal debate: whether to treat for-profit corporations as the property of shareholders[59] which thus could not "exercise religion," or as social institutions created by law to provide certain social benefits in the long-term,[60] which could have religious beliefs and moral principles. Corporations are persons that enjoy a legal identity separate and distinct from the natural persons associated with them, but a corporation cannot take any action

51. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).
52. *Id*. at 701.
53. *Id*. at 683.
54. *See id*. at 696–97, 707–08, 719.
55. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122 (10th Cir. 2013); Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Hum. Servs., 724 F.3d 377, 381 (3d Cir. 2013).
56. Sebelius v. Hobby Lobby Stores, Inc., 571 U.S. 1067 (2013).
57. *Hobby Lobby Stores*, 573 U.S. at 701–03.
58. *Id*. at 701.
59. Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163, 1176–77, 1177 n.53 (2022).
60. *Id*. at 1177.

without being used by human beings to achieve desired ends,[61] which leads to the current debate on who can act lawfully on behalf of the corporation to exercise religion.

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.[62] 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 close corporations owe fiduciary duties to minority shareholders requiring pursuit of share value.[63] On its face, the *Hobby Lobby* opinion could have expansive impact, but with a closer analysis of the practical difficulties created, the most defensible case is one in which a closely-held company had controlling shareholders that 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, LLC V. WILLOCK AND JIAN ZHANG V. BAIDU.COM INC.*

Elane Photography, LLC v. Willock, the most high-profile case before *Hobby Lobby*, characterized the issue as one involving pure speech rights, rather than expressive association rights.[64] The business in *Elane Photography* claimed that its freedom of expression rights were violated because photographs are "inherently expressive," but the New Mexico Supreme Court rejected this argument.[65] At the same time, the court acknowledged the overlap in speech and expressive association analyses and indicated the direction that courts will take in applying expressive association jurisprudence to private businesses.[66]

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.[67] In response, the couple sued the company for failing to comply with New Mexico's Human Rights Act ("NMHRA"), which prohibits places of public accommodation from discriminating against individuals on the basis of their sexual orientation.[68] After concluding that the photography business was subject to the NMHRA because it "offers its services to the public, thereby increasing its visibility to potential clients,"[69] the New Mexico

61. Lyman Johnson & David Millon, *Corporate Law After* Hobby Lobby, 70. BUS. LAW. 1, 9 (2015).
62. *Hobby Lobby Stores*, 573 U.S. at 717.
63. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 26 (Del. Ch. 2010).
64. Elane Photography, LLC v. Willock, 309 P.3d 53, 63 (N.M. 2013).
65. *Id.* at 68.
66. *Id.*
67. *Id.* at 59–60.
68. *Id.* at 60.
69. *Id.* at 59.

Supreme Court found that the NMHRA did not violate "free speech guarantees because the [NMHRA] does not compel Elane Photography to either speak a government-mandated message or to publish the speech of another."[70] While Elane Photography could post on their website that they oppose same-sex marriage, they were still required to comply with the NMHRA as a public accommodation.[71]

The business in *Elane Photography* did not claim that the NMHRA violated its expressive association rights. As mentioned previously, *Dale* added additional criteria to the *Roberts* test that required courts to evaluate whether an organization is engaged in expressive association.[72] In the matter of *Sweetcakes by Melissa*, decided after *Hobby Lobby*, the Commissioner of the Oregon Bureau of Labor and Industries concluded that the respondents, acting on behalf of the bakery, violated Oregon's public accommodations laws by refusing to make a wedding cake for a same-sex couple because of respondents' religious beliefs.[73] The language of Oregon's public accommodations law focuses on the discriminatory effect that accompanies certain speech "published, circulated, issued or displayed" on behalf of a place of public accommodation.[74] The Commissioner found respondents' participation in three subsequent incidents, two interviews, and their posting of a note demonstrated "prospective intent" to discriminate against same-sex couples.[75] *Sweetcakes by Melissa* followed the *Elane Photography* line of cases as focused on speech claims over religion claims.

The indistinct line between ideology and conduct, however, complicates expressive association jurisprudence, especially in the case of small businesses. Professor Joan Howarth argued that in *Dale* the Court "issued a loose invitation to use identity-based exclusion (no homosexuals allowed) as a proxy for belief (we oppose homosexuality) . . . [thus] blurr[ing] any distinction between the ideological position of being anti-homosexuality, and the exclusion of homosexuals."[76] In *Martinez*, however, the Court unambiguously rejected the proposition that conduct equated to belief protected under freedom of association

70. *Elane Photography, LLC*, 309 P.3d at 59.

71. *Id.*

72. *See* discussion *supra* Section II(C).

73. Melissa Elaine Klein, 34 Boli 102, 120 (Or. Bureau of Lab. & Indus., July 2, 2015). The statute, OR. REV. STAT. ANN. §ORS 659A.409, provides, in pertinent part: "it is an unlawful practice for any person acting on behalf of any place of public accommodation as defined in ORS 659A.400 to publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of . . . sexual orientation[]. . . ." OR. REV. STAT. ANN. § 659A.409 (West, Westlaw through 2023 Reg. Sess. of the 82d 1st Legis. Assemb.).

74. *Klein*, 34 Boli at 122.

75. *Id.* at 119.

76. Joan Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. DAVIS L. REV. 889, 899–900 (2009).

principles.[77] Certain courts, like the New Mexico Supreme Court, have drawn further distinctions between acts of association and expressive association. As the Court reasoned in *Elane Photography*, "[T]he [NMHRA] 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."[78] Thus, in providing services to the general public, a business owner's refusal of a customer based on characteristics protected by the NMHRA does not violate said business's association rights. Serving customers does not restrict what the business says, nor does it force the business to say anything.[79]

The courts may find that public accommodation laws do not limit or force statements upon places of public accommodation, which can include small businesses like Elane Photography, because these businesses do not convey their own messages. In *Elane Photography*, the state district court maintained that the business did not convey the message of the state but served as "a conduit or an agent for its clients."[80] The New Mexico Supreme Court decided that conveying clients' messages did not constitute compelled speech because Elane Photography conveys only a "message-for-hire."[81] The concept of businesses serving as conduits of client speech, born of the Supreme Court's decision in *Turner Broadcasting System, Inc. v. FCC*,[82] 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.[83]

Not all courts, however, agree with the New Mexico Supreme Court's broad extension of *Turner* to businesses, like Elane Photography, that consciously make decisions to formulate products in a specific manner. In *Jian Zhang v. Baidu.com Inc.*, for example, a group of New York residents sued one of China's largest companies, Baidu Inc., which operates an internet search engine, for blocking U.S. articles and other information concerning the "Democracy movement in

77. *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 688–89 (2010). The Court noted that permitting student groups to exclude because of belief but not because of status "would impose on [the school] a daunting labor. How should the Law School go about determining whether a student organization cloaked prohibited status exclusion in belief-based garb?" *Id.* at 688.

78. Elane Photography, LLC v. Willock, 309 P.3d 53, 68 (N.M. 2013).

79. *Id.* at 65.

80. Elane Photography, LLC v. Willock, No. CV-2008-06632, 2009 WL 8747805, at *25 (N.M. Dist. Ct. Dec. 11, 2009).

81. *Elane Photography*, 309 P.3d at 66, 72.

82. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 629 (1994) ("Once the cable operator has selected the programming sources, the cable system functions, in essence, as a conduit for the speech of others, transmitting it on a continuous and unedited basis to subscribers.").

83. *See* Susan Nabet, *For Sale: the Threat of State Public Accommodations Laws to the First Amendment Rights of Artistic Businesses*, 77 BROOK. L. REV. 1515, 1516–17 (2012) ("If a customer wishes to hire an artist to provide artwork or other similarly expressive services for a cause with which the artist does not agree, the artist may be compelled by a state public accommodations law to express an idea, or associate himself with an idea, with which he does not agree on pain of civil sanctions.").

China."[84] After finding that search engine results constituted a protected form of speech, the Southern District of New York explicitly declined to apply *Turner*'s conduit analysis to Baidu to lower the level of First Amendment protection afforded to its search engine.[85] The Court reasoned:

> [I]t is debatable whether any search engine is a mere "conduit" given the judgments involved in designing algorithms to choose, rank, and sort search results. But whether or not that proposition is true as a general matter, it is plainly not apt here, as Plaintiffs' own allegations of censorship make clear that Baidu is more than a passive receptacle or conduit for news, comment, and advertising. As Plaintiffs themselves allege, for example, Baidu purposely designs its search engine algorithms to exclude any pro-democracy topics, articles, publications, or multimedia coverage.[86]

Essentially, the purposeful design of specific products to express the perspective of the company, namely the algorithm underlying the search engine, precluded the district court from viewing the Baidu search engine as a mere conduit for the speech of its customers. The New Mexico Supreme Court could have analyzed Elane Photography's actions in exactly the same way.[87]

Even if the New Mexico Supreme Court had found that Elane Photography engaged in expressive association, the judges may have still ruled against them. 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."[88] 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.[89] Thus, even if Elane Photography were engaging in expressive association, it would not receive exhaustive First Amendment protection because the required inclusion of specific groups would not infringe on the business's own limited message, in light of the public's understanding of the business as a mere conduit for the messages of others. If, however, Elane Photography had not been viewed as a conduit, then the New Mexico

84. Jian Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433, 434–35 (S.D.N.Y. 2014).

85. *Id*. at 439.

86. *Id*. at 440–41 (internal quotations and citations omitted).

87. *Cf*. Nabet, *supra* note 83, at 1533 ("If Huguenin actively formed the content of the photograph through her artistic manipulation of the medium, then the photograph likely contained her own expressive interpretation of the scene. Thus, Huguenin was probably not merely a conduit for her clients' messages, as the district court found.").

88. 16A AM. JUR. 2D *Constitutional Law* § 581 (2023).

89. *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)).

Supreme Court may have decided the case in the same manner as the *Jian Zhang* court. In *Jian Zhang*, the court did not classify Baidu as a mere conduit and found that any interference with its search engine algorithms to allow certain searches unacceptably compelled the company to express a message with which it disagreed.[90]

The compelled speech rationales of *Dale* and *Hurley* do not readily extend to businesses that supply services to the public that are separate and distinct from the expression of their owners, as seen in *Elane Photography*. Thus, small business owners cannot easily rely on cases like *Hurley* or *Dale* to avoid compliance with anti-discrimination provisions based on freedom from association arguments. Cases like *Jian Zhang*, however, indicate a potential split of authorities in applying the conduit analysis in *Turner* to for-profit businesses. Courts will continue to overlap in expressive association and speech analyses because the first prong of the expressive association analysis (whether the company is engaged in expressive association) dovetails with speech in determining whether the company's message was compelled or merely served as a conduit to express another's message. *Jian Zhang* and *Elane Photography* indicate that the resolution of both analyses will likely turn on whether the company uniquely influenced the goods or services provided to the consumer to reflect the company's own message.

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

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court reversed the Colorado Civil Rights Commission's finding that a small business owner violated the state's public accommodations law by refusing to bake a cake for a gay couple's wedding celebration.[91] The small business owner, Jack Phillips, sought to "honor God through his work at Masterpiece Cakeshop," the bakery which he owns and operates.[92] Acknowledging this goal, the Court found that "creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs."[93]

In 2012, Charlie Craig and Dave Mullins, a gay couple, approached Phillips and requested that Phillips bake them a cake for their wedding reception.[94] Although Phillips offered to bake other cakes for Craig and Mullins, he refused to bake them a cake for their wedding.[95] Craig and Mullins subsequently filed a discrimination complaint with the Colorado Civil Rights Division, arguing that Phillips violated the state's public accommodations law.[96] Ultimately, the

90. *Jian Zhang*, 10 F. Supp. 3d at 441.
91. Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1723–24 (2018).
92. *Id.* at 1724 (internal citations omitted).
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 1725. The statute, the Colorado Anti-Discrimination Act ("CADA"), provides, in relevant part, that it is a "discriminatory practice and unlawful for a person . . . to refuse, withhold from, or deny to an individual or a group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods,

Colorado Civil Rights Commission determined that Phillips' business was subject to the public accommodations law, that Phillips' actions constituted prohibited discrimination, and that preparing a wedding cake is not a form of protected speech under the First Amendment.[97] The Colorado Court of Appeals upheld the Commission's decision.[98] However, the Supreme Court reversed, centering its opinion on a finding that the Commission did not give "neutral and respectful consideration" to Phillips and his religious beliefs.[99] The Court determined that because the Commission demonstrated "impermissible hostility" towards Phillips' beliefs, the Commission's finding could not stand under the First Amendment.[100]

Although the majority in *Masterpiece Cakeshop* did not rule on Phillips' freedom of expression claims, Justice Thomas' concurrence discussed the claims at length, relying on the teachings of *Hurley* and *Dale*.[101] Thomas unequivocally stated that Phillips' conduct, "creating and designing custom wedding cakes," is "expressive" conduct.[102] Thus, Thomas argued that Colorado's public accommodations law, "[b]y forcing Phillips to create custom wedding cakes for same-sex weddings," "alter[ed] the expressive content of his message."[103] Accordingly, the First Amendment would bar the state from requiring Phillips to make a cake for weddings that conflict with his religious beliefs.[104] Additionally, and relevant to the above discussion regarding for-profit businesses serving as "mere conduit[s]," Thomas argued that for-profit companies' expressive conduct does not receive reduced First Amendment protections.[105] Instead, Thomas explicitly rejected the state court's finding that Masterpiece's status as a for-profit bakery reduces the harm caused by compliance with the public accommodations law.[106] Thomas

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services, facilities, privileges, advantages, or accommodations of a place of public accommodation. Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1725 (2018). (citing COLO. REV. STAT. ANN. § 24-34-601(2)(a) (West, Westlaw through 2023 1st Extra. Sess. of the 74th Gen. Assemb.)).

97. Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1726 (2018).

98. *Id*. at 1726–27 (referencing Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015)).

99. *Id*. at 1729.

100. *Id*. at 1729, 1731; *see also id*. at 1732 ("Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided.").

101. *Id*. at 1741–42 (2018) (Thomas, J., concurring) (citing Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston, 515 U.S. 557 (1995); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000)).

102. *Id*. at 1742; *see also id*. at 1743 ("Although the cake is eventually eaten, that is not its primary purpose. . . . The cake's purpose is to mark the beginning of a new marriage and to celebrate the couple.").

103. Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1743–44 (2018) (internal citations omitted).

104. *Id*. at 1744. In finding that Phillips's actions were expressive conduct under the First Amendment, Thomas argued that the state's public accommodations law should be subject to strict scrutiny. However, since the state court did not address whether the law would survive such an analysis, Thomas does not write on the issue. *Id*. at 1745–46.

105. *Id*. at 1745.

106. *Id*. ("[T]his Court has repeatedly rejected the notion that a speaker's profit motive gives the government a freer hand in compelling speech.").

highlighted that Phillips operated his business in a manner that "routinely sacrifice[d] profit" in order to represent his Christian faith, distinguishing the bakery from other for-profit businesses who prioritize "maximizing profits" over "communicat[ing] a message."[107] While Thomas did not explicitly discuss the low risk of the public assuming a business endorses messages it is hired to express, his concurrence suggested that such an argument—when used to justify reduced First Amendment protections—would fail. Specifically, Thomas argued that the state court erred by suggesting that Phillips "could simply post a disclaimer, disassociating Masterpiece from any support for same-sex marriage."[108] Thomas made clear that the First Amendment is not satisfied by a state government requiring "speakers to affirm in one breath what that which they deny in the next."[109]

D. *303 CREATIVE, LLC V. ELENIS*

Even though *Masterpiece Cakeshop* did not squarely address the intersection of expressive conduct and First Amendment protections for business owners with religious beliefs, the Court returned to the issue with its decision in *303 Creative, LLC v. Elenis*.[110] In *303 Creative*, the Court once again considered Colorado's public accommodations law and its application to for-profit businesses' expressive conduct—this time the expressive conduct of a website designer, Lorie Smith. Smith, a graphic designer and website builder, sought to expand her website design services to include wedding websites.[111] While Smith decided that she would provide her services to customers regardless of their race, religion, sex, or sexual orientation, she knew that she would not provide her wedding website services to same-sex couples, as same-sex marriages conflict with her religious beliefs.[112] Fearing sanctions under the state public accommodations law, Smith sought a preliminary injunction to prevent Colorado from "forcing her to create wedding websites celebrating marriages that defy her beliefs."[113] A federal district court ruled against Smith, and the decision was upheld by the Tenth Circuit Court of Appeals.[114] In their review, the Supreme Court quickly determined that Smith's future conduct, the creation of websites, would qualify as "pure speech" for purposes of the First Amendment.[115] They also determined that the websites, despite being created for someone else, would involve her speech.[116] As such,

107. *Id.*

108. *Id.* (claiming the argument would "justify any law compelling speech").

109. Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1745 (2018) (citing Pacific Gas & Elec., 475 U.S. 1, 16 (1986)).

110. 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

111. *Id.* at 579.

112. *Id.* at 580.

113. *Id.*

114. *Id.* at 583.

115. *Id.* at 587 ("It is a conclusion that flows directly from the parties' stipulations. They have stipulated that Ms. Smith's websites promise to contain 'images, words, symbols, and other modes of expression.'").

116. 303 Creative LLC v. Elenis, 600 U.S. 570, 588 (2023).

Smith's "speech" by way of the websites she creates would qualify for First Amendment protection.[117]

In its analysis, the Court drew comparisons to *Hurley* and *Dale*, in which states attempted to require individuals to adjust their speech in a manner that ran contrary to their beliefs.[118] It found that, in *303 Creative*, Colorado sought to put Smith in a similar position: either Smith would have to speak as the State demanded or she would be subject to sanctions for "expressing her own beliefs."[119] The majority opinion argued that accepting the alternative—requiring creative artists, who accept payment for artistic expressions, to speak on a topic if the topic somehow implicates a customer's protected trait—would "allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty."[120] The Court made clear that speakers, or other expressive creatives, do not "shed their First Amendment protections by employing the corporate form to disseminate their speech."[121] In other words, "the First Amendment extends to all persons engaged in expressive conduct, including those who seek profit (such as speechwriters, artists, and website designers)."[122]

Importantly, even in light of these inherent conflicts between public accommodations laws and business owners' religious beliefs, the Court maintains that public accommodations laws are not themselves *per se* unconstitutional.[123] However, as previously held in *Hurley* and *Dale*, public accommodations laws must comply with the First Amendment's requirements and cannot be used to compel expressive activity.[124]

IV. FIRST AMENDMENT CHALLENGES WHEN EXCLUSIONARY RELIGIOUS STUDENT GROUPS ARE EXCLUDED BY NONDISCRIMINATION POLICIES

Applying expressive association jurisprudence in a public school context has proven challenging to the extent that, as in *Dale*, forced association implicates the group's ability to convey its message. The line between speech analysis and association analysis, particularly in the public school context, blurs when courts attempt to reconcile the separate analysis for each type of claim. The basic scenario presents itself as follows: a school either denies recognition to or revokes

117. *Id.*

118. *Id.* at 588–89 (citing Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston, 515 U.S. 557 (1995); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000)).

119. *Id.* at 589.

120. *Id.*; *see also id.* at 590 ("Countless other creative professionals too, could be forced to choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so.").

121. *Id.* at 594.

122. 303 Creative LLC v. Elenis, 600 U.S. 570, 600 (2023).

123. *Id.* at 591–92.

124. *Id.* at 592 (citing Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston, 515 U.S. 557 (1995); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000)) ("When a state public accommodations law and the Constitution collide, there can be no question which must prevail.").

recognition from a religious student group on the grounds that the student group discriminates against other students in a way that violates the school's nondiscrimination policy.[125] The excluded religious student group then challenges the school in court, alleging that the school violated its freedoms of speech and expressive association.[126] Courts created unpredictable resolutions when adjudicating cases similar to this scenario due to the variety of doctrinal options available. For a period of time, courts considered two factors to decide whether religious student groups successfully alleged a violation of their rights to speech and expressive association: first, whether the government action regulated conduct or speech; and second, whether a public forum speech analysis applied to the expressive association claim.

As to the first consideration, courts review governmental regulation of *conduct* using the test established in *United States v. O'Brien*.[127] The Supreme Court reviews governmental regulation of *speech* using the public forum doctrine, which provides that the extent to which the government can place restrictions on speech depends, in part, on the public nature of the forum where the speech takes place.[128] As to the second consideration—the application of the public forum doctrine to speech and expressive association claims—the Supreme Court demonstrated their preferred approach in the landmark case *Christian Legal Society v. Martinez*.[129]

The following Section will provide an overview of the legal framework used in analyzing speech and expressive association claims. It will include a dissection of *Christian Legal Society v. Martinez*, the most important case involving these types of claims and a subsequent examination of lower courts' application of *Martinez*.

A. LEGAL FRAMEWORK FOR ANALYZING SPEECH AND EXPRESSIVE ASSOCIATION CLAIMS IN PUBLIC SCHOOLS

1. Speech Claims

Because the separate analyses for speech and association claims become indistinct when courts attempt to reconcile the two (particularly in the public school context), it is important to consider how courts deal with speech claims when evaluating association claims. In considering whether a nondiscrimination policy violates a group's First Amendment right to free speech, even in the public school setting, courts first inquire whether the policy regulates conduct, rather than speech. Different standards govern the regulation of conduct and the regulation of speech. Courts review actions that regulate conduct using the test established

125. *See, e.g.*, Christian Legal Soc'y v. Martinez, 561 U.S. 661, 670–73 (2010); Christian Legal Soc'y v. Walker, 453 F.3d 853, 857–58 (7th Cir. 2006); Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 848 (2d Cir. 1996).

126. *See, e.g.*, *Martinez*, 561 U.S. at 661.

127. United States v. O'Brien, 391 U.S. 367 (1968); *see* discussion *infra* Section IV(A)(1).

128. *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797 (1985).

129. *Martinez*, 561 U.S. at 680–82.

in *United States v. O'Brien*.[130] *O'Brien* dictates that government regulation of conduct is valid, even if it incidentally restricts speech, so long as: (1) the regulation is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the government interest is unrelated to the suppression of free expression; and (4) the incidental restriction on the alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[131]

When the government regulates speech directly *and* that regulation implicates expressive association concerns, courts debate over which standard to apply in the public school setting. In a case purely dealing with speech, courts must (1) identify the nature of the forum to determine the extent to which the government may limit access to that forum and (2) assess whether the justifications for exclusion from the relevant forum satisfy the requisite constitutional standards.[132]

Public forum doctrine provides the substantive standards by which courts determine when the government, in regulating public property, may place limitations on speech.[133] Forum analysis divides public property into three basic categories.

First, traditional public forums are those places "which by long tradition or by government fiat have been devoted to assembly and debate," and include public parks and public streets.[134] Public accommodations cases like *Roberts*, *Hurley*, and *Dale* implicate traditional public forums.[135] Speech restrictions in traditional public forums must satisfy strict scrutiny. Thus, the government must show that its restriction is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[136]

Second, the government creates designated public forums when it opens public properties not traditionally regarded as public forums to the public for expressive activity.[137] As in traditional public forums, speech restrictions within designated public forums are subject to strict scrutiny.[138]

Third, there is public property that is not, by tradition or designation, a forum for communication, which is examined under a different standard.[139] The State,

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130. *O'Brien*, 391 U.S. at 377. Regulated conduct does not come under First Amendment protection simply because "the person engaging in the conduct intends thereby to express an idea." *Id.* at 376. Rather, First Amendment protection is extended only to regulated conduct that is inherently expressive. Rumsfeld v. Forum for Acad. & Inst. Rts., Inc., 547 U.S. 47, 65–66 (2006).

131. *O'Brien*, 391 U.S. at 377.

132. *Cornelius*, 473 U.S. at 797.

133. Christian Legal Soc'y v. Martinez, 561 U.S. 661, 679 (2010).

134. Perry Educ. Ass'n v. Perry Loc.al Educators' Ass'n, 460 U.S. 37, 45 (1983).

135. *See* Roberts v. U.S. Jaycees, 468 U.S. 609 (1984); Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston, 515 U.S. 557 (1995); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000). In *Dale*, the Court explained that "the definition of 'public accommodation' has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts." *Dale*, 530 U.S. 640, 657.

136. *Perry*, 460 U.S. at 45.

137. *Martinez*, 561 U.S. at 679 n.11; *Perry*, 460 U.S. at 45.

138. *Perry*, 460 U.S. at 46.

139. *Id.*

as a property owner, is not obligated by the First Amendment to guarantee access to public property and has the power to reserve it for its lawfully dedicated purpose.[140] Any regulation of speech required for the State's use of such property must simply be reasonable and not because public officials disagree with the speaker.[141]

2. Expressive Association Claims

When cases implicate both speech and association rights, as in the public school context, courts have applied speech analysis, particularly the forum inquiry, to varying degrees. Courts resolving expressive association claims since *Dale* have taken three different approaches, each rooted in a different doctrine.

In one approach, courts have declined to apply forum analysis, instead following the Supreme Court's decisions in *Roberts*, *Hurley*, and *Dale*, which established the framework to determine whether restrictions on expressive association are constitutionally permissible. Under *Dale*, restrictions on expressive association occur if (1) an organization engages in expressive association; and (2) the state action significantly affects the group's ability to advocate its viewpoints.[142] However, these restrictions are permissible if the state has a compelling interest that justifies the infringement.[143] Most courts have followed *Dale* when presented with an expressive association challenge.[144]

Taking another approach, courts have adopted the public forum doctrine used in the speech context to resolve expressive association claims.[145] Essentially, these courts first identify the nature of the forum to determine the extent to which the government may limit access to that forum, and then they assess whether the justifications for exclusion from that forum satisfy the requisite constitutional standards.[146]

In 2010, the Supreme Court made clear its preferred approach when deciding *Christian Legal Society v. Martinez*, a case involving an expressive association challenge brought by a religious student group.[147] In *Martinez*, the Supreme Court applied forum analysis to both the group's speech and expressive association claims. The next section of this Article examines *Martinez* and the Court's analysis.

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140. *Id.*

141. *Id.*

142. Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).

143. *Id.*

144. *See, e.g.*, Christian Legal Soc'y Chapter of the S. Ill. Univ. Sch. of L. v. Walker, 453 F.3d 853, 861–64 (7th Cir. 2006); Boy Scouts of Am. v. Wyman, 335 F.3d 80, 88–91 (2d Cir. 2003); State Troopers Fraternal Ass'n of N.J., Inc. v. New Jersey, 585 F. App'x 828, 831 (3d Cir. 2014); Nat'l Ass'n for the Advancement of Multijurisdictional Prac. v. Berch, 773 F.3d 1037, 1047 (9th Cir. 2014).

145. *E.g.*, Truth v. Kent Sch. Dist., 542 F.3d 634, 645, 649 (9th Cir. 2008).

146. *E.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797 (1985).

147. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661 (2010).

B. *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*: THE SUPREME COURT'S APPROACH

The Christian Legal Society ("CLS") is a nationwide association of legal professionals and law students who share a common faith in the Christian religion.[148] CLS maintains chapters at law schools across the country to "nurture and encourage Christian law students."[149] CLS chapters affiliated with the national organization must adopt bylaws that require members to sign a "Statement of Faith" and to conduct their lives in accordance with the prescribed principles.[150] Any students who do not sign the "Statement of Faith" may still attend CLS meetings and activities as nonmembers; however, they cannot stand for election, teach Bible studies, or vote for officers, on chapter business, or on amendments to the chapter's constitution.[151] Among the prescribed principles required of members is the belief that sexual activity should not occur outside of marriage between a man and a woman.[152] As such, CLS excludes anyone who "advocates [for] or unrepentantly engages in" sexual activity outside of marriage between a man and a woman,[153] including anyone who engages in "unrepentant homosexual conduct."[154] Moreover, CLS excludes students who hold religious convictions different from the "orthodox Christian tenants" contained in the Statement of Faith.[155]

In *Christian Legal Society v. Martinez*, the University of California, Hastings College of the Law ("Hastings") denied CLS official recognition in its "Registered Student Organization" ("RSO") program.[156] Through its RSO program, Hastings extends official recognition to student groups and provides institutional support for their activities, including funding and access to campus communications.[157] In order to be recognized in the RSO program, a student group must abide by certain conditions, including a nondiscrimination policy that requires student groups to accept all comers.[158] Hastings rejected CLS's application for RSO status because CLS's bylaws did not comport with the nondiscrimination policy by excluding students based on religion and sexual orientation.[159]

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148. *CLS Law Student Ministries: What is the Christian Legal Society?*, CHRISTIAN LEGAL SOC'Y, https://perma.cc/PKR6-KY66.

149. *Id.*

150. *Martinez*, 561 U.S. at 672.

151. Petition for Writ of Certiorari at 6–7, *Martinez*, 561 U.S. 661 at 688 n.18; *see also Walker*, 453 F.3d at 858.

152. *Martinez*, 561 U.S. at 672; Petition for Writ of Certiorari, *supra* note 151, at 8; *see also Walker*, 453 F.3d at 858.

153. Petition for Writ of Certiorari, *supra* note 151, at 8.

154. *Martinez*, 561 U.S. at 672; *see also* Petition for Writ of Certiorari, *supra* note 151, at 8.

155. Petition for Writ of Certiorari, *supra* note 151, at 7; *Martinez*, 561 U.S. at 672.

156. *Martinez*, 561 U.S. at 672–73.

157. *Id.* at 669–70.

158. *Id.* at 670–71 ("School-approved groups 'must allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status and beliefs.'" (alteration in original)).

159. *Id.* at 672–73.

CLS sued, arguing that its exclusion from the RSO program violated its freedoms of speech and expressive association.[160] Although the district court analyzed CLS's speech and expressive association claims under a variety of doctrinal frameworks,[161] it held that Hastings' nondiscrimination policy passed constitutional muster.[162] The Ninth Circuit summarily affirmed the district court, concluding that Hastings' all-comers membership policy for student groups was reasonable and viewpoint neutral because it applied to all student groups.[163]

In a five-four decision, the Supreme Court upheld the Ninth Circuit's affirmance of the district court's decision.[164] The majority concluded that public forum analysis should apply equally to CLS's speech and expressive association claims.[165] The Court refused to treat CLS's speech and expressive association claims separately, under different levels of scrutiny, because the claims were "intertwined," since "*who* speaks on [CLS's] behalf . . . colors *what* concept is conveyed."[166]

1. The Supreme Court's Public Forum Analysis in *Martinez*

The Court subjected the claims in *Martinez* to the lesser scrutiny of a limited public forum analysis, agreeing that the restrictions on CLS's freedoms of speech and expressive association passed constitutional scrutiny if Hastings' all-comers policy was viewpoint neutral and reasonable in light of the purposes of the RSO

160. *Id.* at 673.

161. *See* Christian Legal Soc'y v. Kane, No. C 04–04484 JSW, 2006 WL 997217, at *6–24 (N.D. Cal. May 19, 2006), *aff'd* 319 Fd. App'x. 645 (9th Cir. 2009), *aff'd sub nom.*, *Martinez*, 561 U.S. 661 (2010). With respect to CLS's free speech claim, the court concluded that Hastings' nondiscrimination policy regulated conduct (discrimination) and not speech, thereby triggering the test established in *O'Brien* to determine whether Hastings violated First Amendment speech protections. *Id.* at *7–8. It then held that Hastings' enforcement of its nondiscrimination policy satisfied *O'Brien*, and thus did not unconstitutionally infringe on CLS's freedom of speech. *Id.* at *9–10. The district court held, in the alternative, that even if Hastings' policy regulated speech and not conduct, it still passed constitutional muster under the Supreme Court's forum analysis. *Id.* at *10. After determining that Hastings' RSO program was a limited public forum, the court concluded that it was viewpoint neutral and reasonable in light of the purposes of the forum. *Id.* at *10–14. Moving to CLS's expressive association claim, the district court reasoned that "[t]he Court in *Healy* indicated that the appropriate measure for evaluating whether justifications for a restriction on student organizations would . . . pass constitutional muster is the *O'Brien* test," which it had previously concluded was satisfied in this case. *Id.* at *14–17. The court then asserted that even if *Dale* supplied the applicable framework for the expressive association inquiry, Hastings' denial of recognition here was constitutional. *Id.* at *20. First, it was undisputed that CLS engaged in expressive association. *Id.* Second, the court concluded that CLS had not demonstrated that Hastings' denial of recognition would significantly affect CLS's ability to advocate its viewpoint. *Id.* at *23. Third, the court concluded that even if there was some infringement on CLS's expressive association, Hastings' compelling interest in protecting its students from discrimination provided sufficient justification. *Id.* at *24.

162. *Id.* at *24.

163. *Kane*, 319 Fd. App'x. at 645–46.

164. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 698 (2010).

165. *Id.* at 680.

166. *Id.*

forum.[167] First, the Court reasoned that the justifications for applying lesser scrutiny in limited public forums are equally pertinent for restrictions on both speech and expressive association.[168] The Court explained that when speech and expressive association claims "arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association."[169] Second, the Court asserted that strict scrutiny "would, in practical effect, invalidate a defining characteristic of limited public forums—[that] the State may 'reserv[e] [them] for certain groups.'"[170] Finally, the Court concluded that this case "fits comfortably within the limited-public-forum" framework.[171] Unlike in *Dale* and other forced inclusion cases, CLS was not compelled to include unwanted members; rather, CLS effectively sought a "state subsidy" in the form of official recognition and its concomitant benefits.[172]

2. The Supreme Court's Scrutiny of the Policy's Scope and Rationale in *Martinez*

Having concluded that CLS operated in a limited public forum, the Court held that Hastings's all-comers policy was both reasonable in light of the purposes of the RSO forum and viewpoint neutral.[173] The Court found Hastings's justifications were reasonable for several reasons. First, the Court agreed that the all-

167. *Id.* at 680, 690, 697.

168. *Id.* at 680.

169. *Id.* at 680–81.

170. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 681 (2010) (second and third alterations in original) (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

171. *Id.* at 682.

172. *Id.* The Court's decision in *Rumsfeld v. Forum for Academic & Inst. Rts. (FAIR)* is instructive here. 547 U.S. 47 (2006). In *FAIR*, an association of law schools challenged the constitutionality of the Solomon Amendment, which required the Department of Defense to deny federal funding to institutions of higher education that prohibited military representatives' access to and assistance for recruiting purposes. *Id.* at 51–53. The law schools in FAIR objected to the presence of military recruiters on campus because of their opposition to the military's "Don't Ask, Don't Tell" policy, which they viewed as conflicting with their nondiscrimination policies. *Id.* at 52. The Solomon Amendment presented the law schools with a choice: "[e]ither allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds." *Id.* at 58. The Court held that the Solomon Amendment did not violate the schools' freedoms of speech or expressive association. *Id.* at 69. The Court emphasized that military recruiters are "outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association." *Id.* "The Solomon Amendment neither limits what law schools may say nor requires them to say anything. . . . It affects what law schools must do—afford equal access to military recruiters—not what they may or may not say." *Id.* at 60. Similarly, Hastings' RSO program, as subject to its nondiscrimination policy, neither limits what student groups may say nor requires them to say anything. Rather than forcing CLS to accept unwanted members, Hastings merely denied CLS access to its RSO program. The Court explained that "[i]n diverse contexts, our decisions have distinguished between policies that require action and those that withhold benefits," concluding that "[a]pplication of the less-restrictive limited-public-forum analysis better accounts for the fact that Hastings, through its RSO program, is dangling the carrot of subsidy, not wielding the stick of prohibition." *Id.* at 682–83.

173. *Martinez*, 561 U.S. at 690, 697.

comers policy ensured that all students could take advantage of the opportunities afforded by RSOs.[174] Second, the policy helped Hastings enforce the written terms of its nondiscrimination policy "without inquiring into an RSO's motivation for membership restrictions."[175] Third, the Court reasoned that Hastings "reasonably adheres to the view that an all-comers policy, to the extent it brings together individuals with diverse backgrounds and beliefs, encourages tolerance, cooperation, and learning among students."[176] Fourth, the Court noted that the all-comers policy, which subsumed state-law proscriptions on discrimination, represented the school's "decision 'to decline to subsidize with public monies and benefits conduct of which the people of California disapprove.'"[177] Finally, the Court emphasized that the all-comers policy "is all the more credit-worthy in view of the 'substantial alternative channels that remain open for [CLS-student] communication to take place.'"[178]

The Court did not thoroughly discuss its determination that the all-comers policy was viewpoint neutral. After the majority stated that an all-comers policy, on its face, was "textbook viewpoint neutral,"[179] the Justices explained that such a policy was reasonable in effect. Further, the Court found that even if a regulation differentially impacted exclusionary groups, the regulation would be constitutionally permissible as long as the State did not target conduct on the basis of its expressive content.[180] The Court further explained the all-comers requirement was justified without reference to the content or viewpoint of the regulated speech because the policy governed the act of rejecting would-be group members, without reference to the reasons motivating such behavior.[181]

3. The *Martinez* Dissent

In his dissent, Justice Alito warned "the consequence of an accept-all-comers policy is marginalization" of religious groups that often cannot agree to admit members who do not share the same faith and beliefs.[182] Justice Alito also worried that the majority's result did not comport with the Court's holding in *Healy v. James*. In *Healy*, the administration of Central Connecticut State College

174. *Id.* at 687–88.

175. *Id.* at 688. The Court explained that requiring Hastings to distinguish, in every instance of membership restrictions, between exclusion on the basis of a student's belief and exclusion on the basis of a student's status "would impose on Hastings a daunting labor." *Id.*

176. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 689 (2010) (internal quotation omitted).

177. *Id.* at 689–90 (quoting Brief for Respondent at 35, *Martinez*, 561 U.S. 661).

178. *Id.* at 690 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 53 (1983)).

179. *Id.* at 694–95.

180. *Id.* at 696; *see also* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.").

181. *Id.* at 696.

182. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 741 (2010) (Alito, J., dissenting).

denied official recognition to a chapter of the Students for a Democratic Society ("SDS"), a national group known for civil disobedience and violent activities.[183] The *Healy* Court held that the denial of recognition, which precluded SDS from using campus communications and facilities for meetings, infringed on the group's freedom of association.[184] Other courts relied on *Healy* to protect the associational rights of unpopular student groups.[185]

In his dissent, Justice Alito maintained that *Healy* should control the outcome of *Martinez*.[186] The majority, however, held that *Healy* merely stood for the proposition that an access restriction in a university-created limited public forum must be viewpoint neutral.[187] In *Healy*, "the president of the college explicitly denied the student group official recognition *because of* the group's viewpoint;" in *Martinez*, "Hastings denied CLS recognition not because the school wanted to silence the viewpoint that CLS sought to express through its requirements, but because CLS, insisting on preferential treatment, declined to comply with the open-access policy applicable to all RSOs."[188]

C. BEYOND *MARTINEZ:* APPLICATION

Since the Supreme Court handed down its decision in *Martinez*, a number of freedom of expressive association cases have been brought against public schools and analyzed using the Court's holding in *Martinez*, with *Alpha Delta Chi-Delta Chapter v. Reed* standing as a prime example. In *Reed*, a Christian sorority and fraternity at San Diego State University brought suit against the University for refusing to officially recognize the organizations due to their religious requirements for membership which conflicted with the University's nondiscrimination policy.[189] After determining that San Diego State's student organization program was a limited public forum and thus subject to *Martinez*, the Ninth Circuit analyzed whether San Diego State's requirement that student groups follow the nondiscrimination policy was, "(1) reasonable in light of the purpose of the forum; and (2) viewpoint neutral."[190] The court ultimately found the University's nondiscrimination policy reasonable and "creditworthy," as San Diego State allowed the organizations to have alternate avenues of communication through the use of campus facilities, access to all the non-university electronic resources mentioned

183. Healy v. James, 408 U.S. 169, 170–76 (1972).

184. *Id.* at 181–82.

185. *See, e.g.*, Gay Student Servs. v. Tex. A&M Univ., 737 F.2d 1317, 1326–28 (5th Cir. 1984); Gay All. of Students v. Matthews, 544 F.2d 162, 164–67 (4th Cir. 1976).

186. *Martinez*, 561 U.S. at 718, 720–21 (Alito, J., dissenting).

187. *Id.* at 683–85. The Court explained that "a public educational institution exceeds constitutional bounds . . . when it 'restrict[s] speech or association simply because it finds the views expressed by [a] group to be abhorrent.'" *Id.* (quoting *Healy*, 408 U.S. 169, 187–88 (1972)).

188. *Id.* at 684 n.15.

189. Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 796 (9th Cir. 2011).

190. *Id.* at 798.

by the Supreme Court in *Martinez*, and access to new methods of communication such as social media.[191]

The plaintiffs argued that the University's nondiscrimination policy was not viewpoint neutral and *Martinez* did not apply because the University's policy prohibited "only *certain* membership requirements, such as those based on race, gender, or religion, rather than prohibiting all membership requirements. . . . The more limited nondiscrimination policy at issue in this case . . . discriminates on the basis of viewpoint because it allows secular belief-based discrimination while prohibiting religious belief-based discrimination."[192] The plaintiffs also argued that requiring them to accept non-Christians into their groups would impact their freedom of speech by "forc[ing] them to say what they do not want to say."[193] The Ninth Circuit rejected this argument, stating that if San Diego State were compelling the organizations to include non-Christians, the argument would have merit, but in this case, just as in *Martinez*, the withholding of benefits—not the compelling of action—is a reasonable form of nondiscrimination policy.[194] San Diego State's nondiscrimination policy was therefore found to be viewpoint neutral.[195]

V. CONCLUSION

Expressive association jurisprudence evolved tremendously to reach its current state under *Martinez* and *303 Creative*. Particularly where an organization's speech rights overlap with its association rights, the Court has evolved from considering the cases exclusively in terms of speech or association to a sort of hybrid in *Martinez*. This trend may continue in the context of applying expressive association rights to for-profit businesses that choose to discriminate against particular customers based on sexual orientation. For businesses to exercise expressive association rights as a means to evade public accommodation laws, courts will require private businesses to demonstrate that they actually engage in expression, separate and distinct, from their customers. This unique challenge may produce a split of authorities regarding when a business specifically influences its products so that it expresses a message itself. However, as *303 Creative* demonstrates, this also may be easier for businesses than previously thought.

191. *Id*. at 799.
192. *Id*. at 800.
193. *Id*. at 802.
194. *Id*. at 802–03.
195. Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 803 (9th Cir. 2011).