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ARTICLE

FREEDOM OF EXPRESSION AND ARTISTIC PUBLIC ACCOMMODATIONS: THE RIGHT TO MANIFEST ONE'S INNER STATE

Locke Adair

I. INTRODUCTION

"Expression" is "the outer manifestation of an inner state."[1] "We the People" are protected by the First Amendment when the government tries to regulate our "inner state."[2] However, artistic business owners face a threat to their freedom of expression. Some courts have found that public accommodations laws may compel artists to express themselves in a way that violates their consciences. This paper is about all such artists who sell their artistic products or services and what the First Amendment requires when public accommodations laws are applied to them.

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."[3] This prohibition applies equally to state governments.[4] "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[5] Not only does the First Amendment protect the right to speak, but also the right to not speak. Supreme Court precedent makes clear that the right to speak freely includes the right to refrain from speaking.[6]

However, that right is not without its limits. "[A]n incidental burden on speech . . . is permissible . . . so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent

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[1] John Hospers, *Philosophy of Art*, ENCYCLOPEDIA BRITANNICA ONLINE (Mar. 14, 2019), https://www.britannica.com/topic/philosophy-of-art/Art-as-expression.

[2] U.S. CONST. amend. I.

[3] *Id.*

[4] Gitlow v. New York, 268 U.S. 652, 666 (1925); Edwards v. South Carolina, 372 U.S. 229, 235 (1963) ("It has long been established that these First Amendment freedoms [of speech, assembly, and petition] are protected by the Fourteenth Amendment from invasion by the States.").

[5] Texas v. Johnson, 491 U.S. 397, 414 (1989).

[6] *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

the regulation."[7] Accordingly, the Supreme Court has recognized that the First Amendment does not protect certain discriminatory conduct, even if such conduct is accomplished through speech.[8] For example, in *Harris v. Forklift Systems, Inc.*, Teresa Harris worked as a manager at an equipment rental company.[9] The president, Charles Hardy, "often insulted her because of her gender and often made her the target of unwanted sexual innuendos."[10] Harris sued the company, "claiming that Hardy's conduct had created an abusive work environment for her because of her gender."[11] Hardy argued that the insults and innuendos were protected speech.[12] However, the Court essentially ignored Hardy's First Amendment claim and held in favor of Harris.[13]

Much of the debate related to artistic services is whether a particular service is properly understood as "expression" or "conduct." For example, when a sculptor refuses to create and provide a sculpture for a gay couple's wedding, the sculptor may understand his refusal as a refusal to express support for same-sex marriages. But the gay couple may see the refusal of service as a discriminatory business practice, akin to employment discrimination. Conversely, when the sculptor crafts a one-of-a-kind sculpture for such an event, the sculptor may view his sculpture as an artistic expression of profound emotions and ideas; the customers, however, may see it simply as a provision of a bargained-for good. Courts need a rule that strikes the balance between preventing discriminatory conduct and protecting the freedom of expression.

Section II of this article describes public accommodations laws and how they may affect freedom of expression. Section III discusses how courts have defined "compelled speech" and how they have applied that doctrine to public accommodations laws. Section IV evaluates the various proposals and discusses the rule courts should apply when faced with this question. Section V presents a conclusion.

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[7] Rumsfeld v. Forum for Acad. & Institutional Rts., Inc., 547 U.S. 47, 67 (2006) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

[8] *See id.* at 62–63; *see also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

[9] *Harris*, 510 U.S. at 19.

[10] *Id.*

[11] *Id.*

[12] Brief for Respondent at 43, Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) (No. 92–1168).

[13] *Harris*, 510 U.S. at 23.

II. PUBLIC ACCOMMODATIONS LAWS

Places of public accommodation must be open to everyone.[14] This axiom is deeply rooted in the American legal system.[15] As early as the sixteenth century, innkeepers and common carriers were "obligated to serve all potential customers" under the common law.[16] This axiom became codified after the Civil War through state public accommodations statutes to protect black customers from discrimination by business owners.[17] The federal government also codified the common law obligation in the Civil Rights Act of 1875 and later in the Civil Rights Act of 1964; Title II of which provides: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin."[18]

"Public accommodations laws enforce the basic and fundamental right to be treated as an equal in American society."[19] "The 'fundamental object' of public accommodations laws is to prevent the 'deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'"[20] This "[p]rivate discrimination 'sap[s] the moral fiber of the Nation,'[21] and 'mars the atmosphere of a united and classless society in which this Nation rose to greatness.'"[22] Public accommodations laws "'send[ ] a clear message to . . . places of public accommodations' that they may not deny historically disadvantaged groups the 'equally effective and meaningful opportunity to benefit from all aspects of life in America.'"[23]

A. *Current Statutes and Ordinances*

Unlike the federal statute, twenty-three states and the District of Columbia include "sexual orientation" as a protected class in their public

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[14] Telescope Media Grp. v. Lucero, 936 F.3d 740, 763 (8th Cir. 2019) (Kelly, J., concurring in part).

[15] *Id.*

[16] *Id.* (citing Lombard v. Louisiana, 373 U.S. 267, 276–77 (1963) (Douglas, J., concurring)).

[17] *Id.*

[18] *Id.* (quoting 42 U.S.C. § 2000a(a)).

[19] *Id.* at 764.

[20] Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 935 (Ariz. 2019) (Bales, J., dissenting).

[21] *Telescope*, 936 F.3d at 764 (Kelly, J., concurring in part) (quoting 110 CONG. REC. 7379 (1964)).

[22] *Id.* (quoting 110 CONG. REC. 7399 (1964)).

[23] *Id.* (quoting 135 CONG. REC. 8506 (1989)).

accommodations laws.[24] Five states do not have public accommodations laws at all.[25] Seventeen states prohibit discrimination based on "marital status."[26] For example, the Colorado Anti-Discrimination Act includes both "sexual orientation" and "marital status" as protected classes:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, *sexual orientation*, *marital status*, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .[27]

Even in states where no statute forbids discrimination based on sexual orientation, cities within the state may have public accommodations ordinances that include "sexual orientation" as a protected class.[28] For example, while Arizona does not have a state public accommodations law prohibiting discrimination based on sexual orientation, the City of Phoenix has an ordinance that prohibits public accommodations from discriminating against a person based on "sexual orientation."[29]

There are various definitions of a "place of public accommodation" amongst different statutes and ordinances. Colorado defines a "place of public accommodation" in part as "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public."[30] Colorado goes on in the statute to list many other categories falling within Colorado's definition of a place of public accommodation.[31] Colorado does limit its definition by stating that a "'[p]lace of public accommodation' shall not include a church,

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[24] State Public Accommodation Laws, NAT'L CONF. OF ST. LEGISLATURES (April 8, 2019), https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx.

[25] *Id.* (listing Alabama, Georgia, Mississippi, North Carolina, and Texas as not having public accommodations laws as to nondisabled people).

[26] *Id.*

[27] COLO. REV. STAT. § 24-34-601(2)(a) (2014) (emphasis added).

[28] State Public Accommodation Laws, *supra* note 24.

[29] ARIZ. REV. STAT. § 41–1442(A) (LexisNexis 2010); PHX., ARIZ., CITY CODE § 18–4(B)(1) (2011); Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 898 (Ariz. 2019)).

[30] COLO. REV. STAT. § 24–34–601(1) (2014).

[31] *Id.*

synagogue, mosque, or other place that is principally used for religious purposes."[32]

New Mexico defines a place of public accommodation as "any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private."[33] Not all public accommodations laws define "a place of public accommodation" with limitations. California's public accommodations law provides:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in *all business establishments of every kind whatsoever*.[34]

"California courts have read 'business establishment' to embrace all commercial and non-commercial entities open to and serving the general public."[35]

B. *Compelled Speech in Places of Public Accommodations*

This raises a question as to *artistic* businesses refusing service in violation of public accommodations laws. Does the artist's constitutional right of free expression permit discrimination in violation of a public accommodations law? Does the First Amendment allow the government to compel artists to send messages in their art that violate their consciences? The Supreme Court skirted these questions in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.

In *Masterpiece*, Jack Phillips was a devout Christian and expert baker.[36] One of his beliefs was that "God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman."[37] Charlie Craig and Dave Mullins solicited Phillips's bakery, Masterpiece

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[32] *Id.*

[33] N.M. STAT. ANN. § 28-1-2(H) (2020).

[34] CAL. CIV. CODE § 51(b) (Deering 2016) (emphasis added).

[35] Pamela Griffin, *Exclusion and Access in Public Accommodations: First Amendment Limitations Upon State Law*, 16 PAC. L.J. 1047, 1053 (1985).

[36] Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1724 (2018).

[37] *Id.*

Cakeshop.[38] Craig and Mullins were a same-sex couple planning to marry.[39] Craig and Mullins requested one of Phillips's wedding cakes.[40] Phillips refused the customers, informing them that "he does not 'create' wedding cakes for same-sex weddings."[41] Phillips was willing to sell other goods, just not a custom wedding cake.[42] Phillips explained, "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into."[43]

The couple filed suit with the Colorado Civil Rights Commission.[44] The Commission found that Phillips violated the public accommodations law.[45] However, when the case reached the Supreme Court, it held that the Commission violated Phillips's constitutional rights by exhibiting religious animus as it decided the case, and the Court never answered the compelled speech question.[46]

Whether the First Amendment protects artistic public accommodations against forced expression is not a question restricted to bakeries. Numerous lower courts have dealt with artistic service providers who refused service to same-sex couples. A photographer has refused to shoot a same-sex wedding ceremony.[47] In order to lawfully turn away gay couples, videographers preemptively brought suit against the constitutionality of the public accommodations law as would be applied to the videographers.[48] A florist objected to providing flowers for a same-sex couple.[49] Calligraphers declined to create wedding invitations.[50]

Nor is this question unique to the United States. The United Kingdom has dealt with its share of cases. In *Lee v. Ashers Baking Company Limited*, a Christian baker was asked to bake a cake that would say "support gay

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Masterpiece*, 138 S. Ct. at 1724.

[43] *Id.*

[44] *Id.* at 1723.

[45] *Id.*

[46] *Id.* at 1723–24.

[47] Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶ 1, 309 P.3d 53, 59 (N.M. 2013).

[48] Telescope Media Grp. v. Lucero, 936 F.3d 740, 749–50. (8th Cir. 2019).

[49] State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1210 (Wash. 2019).

[50] *See* Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 900 (Ariz. 2019).

marriage."[51] The baker objected.[52] The court decided that the objection was against the message of the cake and not against the customer.[53] In finding for the baker, the court reasoned that "[t]he bakery would have refused to supply this particular cake to anyone, whatever their personal characteristics."[54]

American courts need guidance on this issue. Some courts do not interfere with the artist's "inner state."[55] Others force artists to express messages against their will.[56] Future cases are sure to arise. In the next case, perhaps, the government will compel a baker to artfully craft a wedding cake, a painter to depict a particular scene, or a violinist to perform. Artists must be free to manifest their inner state in a way that is consistent with who they are.

III. Public Accommodations Laws and Freedom of Expression

A. *Supreme Court Precedent Regarding Compelled Speech and Association*

The Supreme Court has clearly held that the First Amendment prohibits the government from both suppressing and compelling speech.[57] In *Wooley v. Maynard*, New Hampshire required drivers to bear a license plate with the words "Live Free or Die."[58] New Hampshire made it a crime to obscure those words on the license plate.[59] The Maynards considered "Live Free or Die" "repugnant to their moral, religious, and political beliefs."[60] Because of their beliefs, the Maynards covered up New Hampshire's motto on their license plate.[61] Mr. Maynard was arrested and fined multiple times because he refused to violate his conscience by displaying the message.[62] Mr. Maynard filed suit against the state of New Hampshire claiming the law was unconstitutional.[63]

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[51] Lee v. Ashers Baking Co. Ltd. [2018] 49 UKSC 843, 843 (appeal taken from N. Ir.).

[52] *Id.*

[53] *Id.* at 858–59.

[54] *Id.* at 859.

[55] *See Brush & Nib*, 448 P.3d at 926; *see also* Telescope Media Grp. v. Lucero, 936 F.3d 740, 758 (8th Cir. 2019).

[56] *See* Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶ 79, 309 P.3d 53, 77 (N.M. 2013); *see also* State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1237 (Wash. 2019).

[57] Wooley v. Maynard, 430 U.S. 705, 714 (1977).

[58] *Id.* at 707.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 707–08.

[62] *Id.* at 708.

[63] *Wooley*, 430 U.S. at 709.

The Court held that a state may not compel "an individual to participate in the dissemination of an ideological message by displaying it on his private property for the express purpose that it be observed and read by the public."[64] The Court reasoned that the First Amendment protects the right to refrain from speaking and that the state's interest did not outweigh the private interest.[65] Thus, the state could not compel the Maynards to speak the government's message.

Compelled speech collides directly with public accommodations laws where businesses want to refrain from expressing certain messages. The Supreme Court has stated, "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak."[66] However, when association with particular people or groups is said to express something in itself—as in so-called "expressive association" claims—some businesses might claim that any law forcing them to serve certain customers constitutes compelled association as well as compelled expression in violation of the First Amendment.

Courts have sometimes upheld public accommodations laws despite the First Amendment challenge. Businesses have tried and failed to get away with race discrimination in violation of civil rights acts through their freedom of association rights.[67] Other organizations have tried to discriminate based on gender or sexual orientation.[68] In *Roberts v. United States Jaycees*, a non-profit membership corporation prohibited the full membership of women.[69] The corporation was a public accommodation within the meaning of the state's public accommodations law.[70] The Court upheld the law as applied to the corporation, thus compelling the Jaycees to admit women as regular members.[71] The Court reasoned:

> [I]f enforcement of the Act causes some incidental abridgment of the Jaycees' protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes. As we have explained, acts of invidious

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[64] *Id.* at 713.

[65] *Id.* at 714–17.

[66] Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 801 (1988).

[67] *See generally* Watson v. Fraternal Ord. of Eagles, 915 F.2d 235 (6th Cir. 1990).

[68] *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 614 (1984); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).

[69] *Roberts*, 468 U.S. at 614.

[70] *Id.* at 626.

[71] *Id.* at 627.

> discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection.[72]

In another freedom of association case, however, the Court reached a different conclusion. In *Boy Scouts of America v. Dale*, the Boy Scouts revoked James Dale's membership when the Boy Scouts learned that he was "an avowed homosexual and gay rights activist."[73] "The New Jersey Supreme Court held that New Jersey's public accommodations law require[d] that the Boy Scouts readmit Dale."[74] In a five to four decision, the Supreme Court of the United States held that the application of the public accommodations law violated the Boy Scouts' First Amendment right of "expressive association."[75] The Court reasoned that the Boy Scouts engaged in expressive activity and that the forced inclusion of Dale would significantly affect the Boy Scouts' expression.[76] Dale argued that intermediate scrutiny articulated in *United States v. O'Brien* should apply.[77] The *O'Brien* test provides:

> [A] government regulation [of expressive conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[78]

The Court rejected Dale's argument and applied strict scrutiny because the "public accommodations law directly and immediately affects associational rights" protected by the First Amendment, as opposed to incidentally

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[72] *Id.* at 628 (citing Runyon v. McCrary, 427 U.S. 160, 175–76 (1976)).

[73] *Dale*, 530 U.S. at 644.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 653–59.

[77] *Id.* at 659.

[78] United States v. O'Brien, 391 U.S. 367, 377 (1968).

affecting those rights.[79] The Court distinguished *Roberts* because the addition of women in that case did not impose a serious burden on the male members' freedom of expressive association rights, since the Jaycees' organizational mission did not encompass any views on women or gender relations.[80] Thus, New Jersey was prohibited from compelling the Boy Scouts to reinstate Dale.[81]

The unanimous decision in *Rumsfeld v. FAIR* dealt with both the freedom of speech and expressive association.[82] In *Rumsfeld*, the Forum for Academic and Institutional Rights, Inc. ("FAIR") brought suit to prohibit the enforcement of the Solomon Amendment, a federal statute requiring law schools to permit campus entry for military recruiters or lose federal funding.[83] FAIR objected and argued that the Solomon Amendment violated their freedom of "expressive association."[84] FAIR also objected on compelled speech grounds because the Amendment required a choice between disseminating a military recruiter's messages or losing funding for the school.[85] Certain law schools did not want to disseminate military messages because they disagreed with the military's policy on homosexuals.[86]

The Court held that the Solomon Amendment did not violate law schools' freedom of association rights merely because it required some level of interaction with the recruiters.[87] The recruiters were not becoming "members of the school's expressive association."[88] The Court also held that the Solomon Amendment did not violate law schools' freedom of speech.[89] The Court reasoned that the Solomon Amendment regulated conduct, not speech.[90] The Court also said that even if the Amendment regulated expressive conduct, the Amendment would stand as applied to the law schools under the *O'Brien* test.[91] The Court said that the conduct regulated in the Solomon Amendment—denying campus entry to military recruiters—

79 *Dale*, 530 U.S. at 659.

80 *Id.* at 657–58.

81 *Id.* at 659.

82 Rumsfeld v. Forum for Acad. & Institutional Rts., Inc., 547 U.S. 47, 51 (2006).

83 *Id.* at 52.

84 *Id.* at 68.

85 *Id.* at 53.

86 *Id.* at 52.

87 *Id.* at 69.

88 *Rumsfeld*, 547 U.S. at 69.

89 *Id.* at 65.

90 *Id.*

91 *Id.* at 67–68.

was an activity that might be, but need not be, expressive; thus, it could be deemed "conduct," with any expressive element being merely incidental.[92]

Before *Rumsfeld*, the Supreme Court addressed the free speech issue in *Hurley v. Irish-American Gay*. In *Hurley*, the South Boston Allied War Veterans Council, a private nonprofit association, operated a yearly St. Patrick's Day parade.[93] A group of gay, lesbian, and bisexuals formed an organization ("GLIB") to "march in the parade as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals."[94] The operators of the parade refused to admit GLIB.[95] GLIB sued and alleged a violation of the state's public accommodations law, which provided that discrimination on the basis of sexual orientation was prohibited in "the admission of any person to, or treatment in any place of public accommodation, resort or amusement."[96] The Court held that applying this law to the Council would result in compelled speech because the content of the operators' message would have changed if the government compelled the owners to admit GLIB as a unit in the parade.[97] The Court noted that a parade is inherently expressive and that GLIB's parade unit was equally expressive and "formed for the very purpose of marching in it . . . to celebrate its members' identity as openly gay."[98] Thus, the "requirement to admit a parade contingent expressing a message not of the private organizers' own choosing violates the First Amendment."[99] Later in *Rumsfeld*, however, the Court distinguished *Hurley* because "schools are not speaking when they host interviews and recruiting receptions."[100] Further, the parade in Hurley had an "expressive quality" that was lacking in the school's recruitment services.[101]

A crucial point in these cases is the distinction between regulation of speech and regulations of conduct. The line between speech and conduct is not always clear. The Supreme Court protects conduct as speech if it satisfies the two conditions under the *Spence* test: (1) "[a]n intent to convey a particularized message was present," and (2) "in the surrounding circumstances the likelihood was great that the message would be understood

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[92] *Id.* at 66.

[93] Hurley v. Irish-Am. Gay, 515 U.S. 557, 560 (1995).

[94] *Id.* at 561.

[95] *Id.*

[96] *Id.* at 572 (quoting MASS. GEN. LAWS ch. 272, § 98 (1992)).

[97] *Id.* at 566.

[98] *Id.* at 568–70.

[99] *Hurley*, 515 U.S. at 566.

[100] Rumsfeld v. Forum for Acad. & Institutional Rts., Inc., 547 U.S. 47, 64 (2006).

[101] *Id.*

by those who viewed it."[102] However, *Hurley* acknowledged that the *Spence* test does not detect all protected expression.[103] In particular, the Court pointed out that *Spence*'s requirement of "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message' . . . would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[104]

After the Court found that both the GLIB unit and the parade itself were inherently expressive, the Court stated that the public accommodations law was "applied in a peculiar way."[105] This was because "[i]ts enforcement does not address any dispute about the participation of openly gay, lesbian, [and] bisexual individuals in various units admitted to the parade."[106] The problem was that GLIB wanted admission to carry its own banner.[107] The Court then reasoned that the parade may not be compelled to speak GLIB's message because this would have "the effect of declaring the sponsors' speech itself to be the public accommodation."[108] In a unanimous decision, the Court refused to compel the private parade owners to admit GLIB as a parade unit.[109]

Lower courts that face the question of whether artistic businesses must provide expressive services to an individual in a protected class look to *Wooley*, *Roberts*, *Dale*, *Rumsfeld,* and *Hurley* to form their opinions. However, courts have used those cases differently, resulting in a variety of holdings.

B. *Lower Court Opinions Applying the Freedom of Expression Right to Public Accommodations Laws*

1. Eighth Circuit: *Telescope Media Group v. Lucero*

In the Eighth Circuit case *Telescope Media Group v. Lucero*, the Larsen's were wedding videographers who used their "unique skill[s] to identify and tell compelling stories through video."[110] The Larsens alleged that they "gladly work with all people—regardless of their race, sexual orientation, sex,

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[102] Spence v. Washington, 418 U.S. 405, 410–11 (1974).

[103] *See Hurley,* 515 U.S. at 569.

[104] *Id.*

[105] *Id.* at 572.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 573.

[109] *Hurley*, 515 U.S. at 581.

[110] Telescope Media Grp. v. Lucero, 936 F.3d 740, 747 (8th Cir. 2019).

religious beliefs, or any other classification."[111] However, "the Larsens decline[d] any requests for their services that conflict[ed] with their religious beliefs."[112] Such services included any services that "contradict biblical truth; promote sexual immorality; support the destruction of unborn children; promote racism or racial division; incite violence; degrade women; or promote any conception of marriage other than as a lifelong institution between one man and one woman."[113] Accordingly, though the Larsens would "gladly work with all people," they limited their wedding video services to opposite-sex weddings in order to "affect the cultural narrative regarding marriage."[114] The Larsens sued to prevent Minnesota from enforcing its public accommodations law against them.[115] The Eighth Circuit held that Minnesota could not compel the videographers to create wedding videos for same-sex couples.[116]

The court largely based its reasoning on *Hurley*, stating that Minnesota had applied the public accommodations law in a content-based manner.[117] Thus, the court applied strict scrutiny.[118] In the court's analysis, the court stated, "*Hurley* is particularly instructive."[119] Public accommodations laws are "generally constitutional," but a "'peculiar' application that required speakers 'to alter the[ir] expressive content' was not."[120] The court said that the Court in *Hurley* "drew the line exactly where the Larsens ask us to here: to prevent the government from requiring their speech to serve as a public accommodation for others."[121]

The court also relied on *Dale*.[122] The court said, "*Dale* makes clear that once conduct crosses over to speech or other expression, the government's ability to regulate it is limited."[123] The majority opinion did not discuss *Rumsfeld* in its reasoning. However, the majority opinion did distinguish *Roberts*:

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111 *Id.* at 748.
112 *Id.*
113 *Id.*
114 *Id.*
115 *Id.* at 749.
116 *Telescope*, 936 F.3d at 758.
117 *Id.* at 753.
118 *Id.* at 754.
119 *Id.* at 755.
120 *Id.*
121 *Id.*
122 *Telescope*, 936 F.3d at 755.
123 *Id.*

> [T]he Supreme Court emphasized that an all-male social club had failed to show that a law requiring the admission of female members 'impose[d] any serious burdens on the male members' freedom of expressive association' or 'impede[d] the organization's ability to engage in . . . protected activities or to disseminate its preferred views.'[124]

In understanding *Roberts*, the Eighth Circuit said, "The unmistakable message is that antidiscrimination laws can regulate conduct, but not expression."[125]

2. New Mexico Supreme Court: *Elane Photography, LLC v. Willock*

The same issue arose in the New Mexico Supreme Court. In *Elane Photography, LLC v. Willock*, the co-owner and lead photographer of Elane Photography, LLC, was "personally opposed to same-sex marriage" and would "not photograph any image or event that violates her religious beliefs."[126] Vanessa Willock contacted Elane Photography to see if the company would be available to photograph her wedding to another woman.[127] The owner responded that "Elane Photography photographs only 'traditional weddings.'"[128] Willock replied, "Are you saying that your company does not offer your photography service to same-sex couples?"[129] The owner stated, "Yes, you are correct in saying we do not photograph same-sex weddings."[130] Willock sued Elane Photography "for discriminating against her based on her sexual orientation" in violation of the New Mexico public accommodations law.[131]

The Supreme Court of New Mexico held that the public accommodations law "does not violate Elane Photography's First Amendment right to refrain from speaking."[132] The court reasoned that the law did "not compel Elane Photography to speak the government's message," citing *Wooley*.[133] The

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[124] *Id.* at 756 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 626–27 (1984)).

[125] *Id.*

[126] Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶ 7, 309 P.3d 53, 59–60 (N.M. 2013).

[127] *Id.* at ¶ 7, 309 P.3d at 59.

[128] *Id.* at ¶ 7, 309 P.3d at 60.

[129] *Id.*

[130] *Id.*

[131] *Id.* at ¶ 9, 309 P.3d at 60.

[132] *Elane*, 2013-NMSC-040, at ¶ 57, 309 P.3d at 72.

[133] *Id.* at ¶¶ 24–27, 309 P.3d at 63–64.

court said that the holding in *Wooley* is narrow and applies to laws requiring someone to display the government's message.[134] The court analogized the case to *Rumsfeld* and stated, "Like the law in *Rumsfeld*, the [public accommodations law] does not require any affirmation of belief by regulated public accommodations; instead, it requires businesses that offer services to the public at large to provide those services without regard for race, sex, sexual orientation, or other protected classifications."[135]

The court reasoned that the law did "not compel Elane Photography to host or accommodate the message of another speaker" because it is a for-profit public accommodation.[136] The court understood that because "[t]he United States Supreme Court has never found a compelled-speech violation arising from the application of antidiscrimination laws to a for-profit public accommodation," that means that compelling someone to provide a "message-for-hire" does not constitute "host[ing] or accommodat[ing] the message of another."[137] The court went on to say that where the United States Supreme Court found public accommodations laws to be misapplied is when it is applied to "free-speech events such as privately organized parades and private membership organizations." [138] The court distinguished the photography business in that "Elane Photography . . . is an ordinary public accommodation, a 'clearly commercial entit[y]' that sells goods and services to the public."[139] The court distinguished the facts of *Hurley* and *Dale* by recognizing that "Elane Photography sells its expressive services to the public."[140] The court said, "The cases in which the United States Supreme Court found that the government unconstitutionally required a speaker to host or accommodate another speaker's message are distinctly different because they involve direct government interference with the speaker's own message, as opposed to a message-for-hire."[141]

Elane Photography tried to argue that the public accommodations law violated Elane Photography's freedom of expression rights.[142] The court rejected this argument and stated that because Elane Photography "is a public accommodation, its provision of services can be regulated, even though those

[134] *See id.* at ¶ 27, 309 P.3d at 64.

[135] *Id.* at ¶ 31, 309 P.3d at 65.

[136] *Id.*

[137] *Id.* at ¶¶ 33, 36, 309 P.3d at 65, 67.

[138] *Elane*, 2013-NMSC-040 at ¶ 33, 309 P.3d at 66 (citation omitted).

[139] *Id.* (alteration in original) (citation omitted) (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000)).

[140] *Id.* at ¶ 35, 309 F.3d at 66.

[141] *Id.* at ¶ 36, 309 F.3d at 66.

[142] *Id.* at ¶¶ 35, 39, 309 P.3d at 66–67.

services include artistic and creative work."[143] The court stated that it would be different "[i]f Elane Photography took photographs on its own time and sold them at a gallery, or if it was hired by certain clients but did not offer its services to the general public" because then the public accommodations law would not apply to Elane Photography.[144] The court recognized a difference between photographers offering services to a select few and Elane Photography producing photographs "for hire in the ordinary course of its business as a public accommodation."[145] The court further stated, "It may be that Elane Photography expresses its clients' messages in its photographs, but only because it is hired to do so."[146] Therefore, the court held that the public accommodations law could force the owner to express herself in a way that is inconsistent with her beliefs.[147]

3. Arizona Supreme Court: *Brush & Nib v. City of Phoenix*

The Arizona Supreme Court took a stance more in line with the Eighth Circuit. In *Brush & Nib Studio, LC v. City of Phoenix*, Duka and Koski were the sole member-owners of a for-profit limited liability company.[148] Duka and Koski were Christians.[149] They sought to operate their business consistent with their religious beliefs that "'God created two distinct genders in His image,' and that only a man and a woman can be joined in marriage."[150] Duka and Koski were also artists "specializing in creating custom artwork for weddings, events, special occasions, home décor, and businesses."[151] The owners had some products that were pre-made and some that were personally designed by the owners.[152] Though the owners "sell their products online through various media platforms," the owners conceded that the business is a public accommodation as defined by the Phoenix public accommodations ordinance.[153] The products at issue were custom invitations.[154] As in *Telescope Media Group*, the owners brought suit against

143 *Id.* at ¶ 35, 309 P.3d at 66.

144 *Elane*, 2013-NMSC-040 at ¶ 35, 309 P.3d at 66.

145 *Id.*

146 *Id.*

147 *Id.* at ¶¶ 54–57, 309 P.3d at 72.

148 Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 897 (Ariz. 2019).

149 *Id.*

150 *Id.* at 897–98.

151 *Id.* at 897.

152 *Id.*

153 *Id.* at 897, 899.

154 *Brush & Nib*, 448 P.3d at 897.

the City of Phoenix to prevent the city from enforcing their public accommodations ordinance against their artistic business in the future.[155]

Phoenix conceded that the public accommodations law does not require the artists "to create a custom invitation containing the statement, 'support gay marriage,' or symbols, such as the equal sign of the Human Rights Campaign."[156] But the City argued that the public accommodations law, even as applied to the artists' custom wedding invitations, "regulates conduct, not speech."[157] The City contended that refusing to create or sell custom wedding invitations for use in same-sex weddings was discriminatory conduct prohibited by the public accommodations law, and any expression (or silence) by the business or artist is merely incidental to that conduct.[158]

The Arizona Supreme Court held that Phoenix's public accommodations law as applied to the artists' custom wedding invitations violated the artists' free speech rights.[159] The court discussed the issue of whether the custom invitations constituted conduct or speech.[160] The court distinguished two forms of protected speech, "pure speech" and "conduct that is 'sufficiently imbued with elements of communication.'"[161] According to the court, the latter must pass the *Spence* test, while "pure speech" would be fully protected.[162] The court found that the invitations were "pure speech" because each invitation "contains their hand-drawn words, images, and calligraphy, as well as their hand-painted images and original artwork."[163] Additionally, the artists were "intimately connected with the words and artwork contained in their invitations."[164]

The court relied on *Hurley* to determine whether the public accommodations law would be upheld.[165] The court recognized that the Phoenix public accommodations law "is a facially content-neutral law that generally targets discriminatory conduct, not speech."[166] However, the court believed that the law, "as applied to Plaintiffs' custom wedding invitations,

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[155] *Id.* at 899.

[156] *Id.* at 900.

[157] *Id.*

[158] *Id.*

[159] *Id.* at 916.

[160] *Brush & Nib*, 448 P.3d at 905–12.

[161] *Id.* at 906 (quoting Texas v. Johnson, 491 U.S. 397, 404 (1989)).

[162] *Id.* at 906–07.

[163] *Id.* at 908.

[164] *Id.* (citing Hurley v. Irish-Am. Gay, 515 U.S. 557, 576 (1995)).

[165] *Id.* at 913 ("*Hurley* is instructive on this issue.").

[166] *Brush & Nib*, 448 P.3d at 914.

operates as a content-based law."[167] The court stated that the law, as in *Hurley*, declared the artists' "speech itself to be the public accommodation," and thus the court applied strict scrutiny.[168] The court said that the government "interest is not sufficiently overriding as to justify compelling Plaintiffs' speech by commandeering their creation of custom wedding invitations."[169] The court also said that "because the purpose of the Ordinance is to regulate conduct, not speech, regulating Plaintiffs' speech is not narrowly tailored to accomplish this goal."[170]

The inconsistent holdings in the lower courts demand guidance from the Supreme Court of the United States. The Supreme Court has provided key principles to follow. *Rumsfeld* upheld a public accommodations law where there was merely an incidental burden on expression.[171] Alternatively, *Hurley* demonstrated how a public accommodations law cannot be used to change the content of a public accommodation's message.[172] While the Supreme Court has provided insight for these types of cases, there are still questions demanding further analysis.

IV. ANALYSIS AND EVALUATION

A. *Judicial and Scholarly Commentary*

Justice Thomas provided his thoughts on the issue in his concurring opinion in *Masterpiece Cakeshop*.[173] He acknowledged that public accommodations laws generally regulate conduct.[174] Nevertheless, citing *Hurley*, Thomas recognized that public accommodations laws may be applied in a content-based manner where "the First Amendment applies with full force."[175] Thomas noted that "*Hurley* was an example of what [the Supreme Court] has termed 'expressive conduct.'"[176] "To determine whether conduct is sufficiently expressive, the Court asks whether it was 'intended to be communicative' and, 'in context, would reasonably be understood by the

[167] *Id.*

[168] *Id.* (quoting *Hurley*, 515 U.S. at 572–73).

[169] *Id.* at 914–15.

[170] *Id.* at 915.

[171] Rumsfeld v. Forum for Acad. & Institutional Rts., Inc., 547 U.S. 47, 67 (2006).

[172] *Hurley*, 515 U.S. at 581.

[173] Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1741 (2018) (Thomas, J., concurring in part).

[174] *Id.*

[175] *Id.* (citing *Hurley*, 515 U.S. at 573).

[176] *Id.* (citing *Hurley*, 515 U.S. at 568–69).

viewer to be communicative.'"[177] Thomas then noted that *O'Brien*'s intermediate scrutiny should "apply [where] the government would have punished the conduct regardless of its expressive component."[178] Otherwise, Justice Thomas said that strict scrutiny should apply.[179]

Applying the facts from *Masterpiece* to the law he laid out, Thomas said that the conduct was expressive partly because the artist "takes exceptional care with each cake that he creates—sketching the design out on paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding."[180] Further, he believed that a wedding cake in and of itself expresses support for the couple the cake is for.[181] Thomas states that intermediate scrutiny does not apply, because "[Colorado] is punishing [the baker] because he refuses to create custom wedding cakes that express approval of same-sex marriage."[182] Thus, Justice Thomas would apply strict scrutiny.[183]

In his recent law review article, Andrew Jensen has proposed a different test to address the issue.[184] Jensen believes, "Creating wedding cakes, even artistic, expensive, unique cakes is not necessarily expressive conduct."[185] Jensen laid out a two-prong test to determine whether an artistic wedding cake is protected under the First Amendment:[186] Creating an artistic wedding cake must either be historically protected as an inherently expressive medium or pass the *Spence* test.[187] Jensen said, "Unlike parades, paintings, or sculptures, which have been repeatedly protected, case law has not extended Free Speech Clause rights to cake makers, suggesting that it is not a traditionally protected category."[188] Jensen further reasoned that the conduct at issue in *Masterpiece* failed the *Spence* test because artistic wedding cakes in

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[177] *Id.* at 1742 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984)).

[178] *Id.* at 1746 (citing Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); *Clark*, 468 U.S. at 293).

[179] *Masterpiece*, 138 S. Ct. at 1745–46.

[180] *Id.* at 1742.

[181] *See id.* at 1743 n.2.

[182] *Id.* at 1746.

[183] *Id.*

[184] Andrew Jensen, Note, *Compelled Speech, Expressive Conduct, and Wedding Cakes: A Commentary on* Masterpiece Cakeshop v. Colorado Civil Rights Commission, 13 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 147, 156–58 (2018).

[185] *Id.* at 156.

[186] *Id.* at 156–58.

[187] *Id.*

[188] *Id.* at 157 (footnote omitted).

and of themselves do not have a particularized message.[189] Jensen supported his reasoning with the fact that the baker refused the same-sex couple service "before learning of their specifications and design preferences. Without knowing what words or designs would be incorporated, the cake would not be likely to convey any particular message."[190] Jensen does note, however, that the First Amendment would protect the baker if the couple requested a rainbow cake or something similar supporting gay rights on its face.[191]

Jensen misunderstood the expressiveness of artistically designed wedding cakes. His analysis assumes that artistic wedding cakes do not send a particularized message.[192] This is simply not true, because wedding cakes in and of themselves celebrate and promote the marriage of the couple, regardless of the design.[193] Specific words or symbols are not needed on a wedding cake for a reasonable observer to know whether the wedding cake displayed at a wedding conveys the particularized message of support for (or at least no objection to) the wedding.[194] Reasonable observers would understand the wedding cake to express support for the couple if it is a unique artistic creation that the couple chose to use and display to celebrate their wedding.[195] The cake would be uniquely designed for the wedding regardless of the customer's specifications or lack thereof. Therefore, the baker who provides a uniquely designed wedding cake for a gay couple is understood to be expressing support, whether or not the customer made specific requests of how to decorate the cake.

Authors Labdhi Sheth and Molly Christ provide yet a different perspective in their law review article.[196] They claim, "To resolve the freedom of speech claim, the Court must first determine whether baking a wedding cake is symbolic speech or a product in the marketplace."[197] Sheth and Christ proposed that an artistically designed cake is the expression of the customer and not the baker, reasoning that "[t]he customer chooses the type of cake, the occasion, the color of the frosting, and the words on the cake. Thus, the

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[189] *Id.*

[190] Jensen, *supra* note 184, at 157 (footnote omitted).

[191] *Id.* at 158.

[192] *See id.* at 157.

[193] Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1743 (2018) (Thomas, J., concurring in part).

[194] *Id.* at 1743 n.2.

[195] *Id.*

[196] Labdhi Sheth & Molly Christ, Comment, *Let Them Eat Cake: Why Public Proprietors of Wedding Goods and Services Must Equally Serve All People*, 52 LOY. L.A. L. REV. 211 (2018).

[197] *Id.* at 231.

customer's First Amendment rights are at issue. The baker is simply paid for a service and no observer reasonably understands a cake to be the baker's message."[198] Sheth and Christ proposed a broad rule that would remove all expression rights for business owners providing a service or product for compensation.[199]

However, their reasoning is flawed. The Supreme Court has expressly stated, "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak."[200] Again, the amount of specifications that a customer has for a wedding cake does not change the fact that the baker expresses himself through the cake within the customer's specifications. Sheth and Christ are also wrong about what a reasonable observer would understand about the cake. Observers would understand that a violinist playing at a wedding is in support of (or does not object to) the wedding. Similarly, observers would understand that the baker supports (or does not object to) the wedding when they see his uniquely designed wedding cake on display at a wedding. Therefore, it is highly likely that the Supreme Court would reject Sheth and Christ's proposed rule.

B. *Proposed Rule for Applying the Freedom of Expression*

The freedom of speech does not embrace every human activity.[201] The Supreme Court, however, has long recognized that First Amendment protection includes "symbolic speech" and "expressive conduct."[202] Generally, public accommodations laws do not infringe upon First Amendment rights.[203] But "there are no doubt innumerable goods and services that no one could argue implicate the First Amendment."[204] If the good or service is expressive, the First Amendment may be implicated.[205]

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[198] *Id.* at 232.

[199] *Id.* at 233–37.

[200] Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 801 (1988) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265–66 (1964)).

[201] *See* City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989).

[202] *See* Brown v. Louisiana, 383 U.S. 131, 142 (1966); Thornhill v. Alabama, 310 U.S. 88 (1940); Garner v. Louisiana, 368 U.S. 157, 201–02 (1961) (Harlan, J., concurring); Cowgill v. California, 396 U.S. 371, 371–72 (1970) (Harlan, J., concurring); Smith v. Goguen, 415 U.S. 566, 589 (1974) (White, J., concurring).

[203] Hurley v. Irish-Am. Gay, 515 U.S. 557, 572 (1995).

[204] Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1728 (2018).

[205] Rumsfeld v. Forum for Acad. & Institutional Rts., Inc., 547 U.S. 47, 65–66 (2006).

Rumsfeld suggested that the service must be "inherently expressive" to qualify for protection.[206]

If a court finds that there is no expression involved in the sale of a good or service, then the court may compel service without any further analysis. If a court finds that expression is involved, but the service would not inherently express the message the artist opposes, then the law will be upheld. In that case, the regulation of the expression is merely incidental.[207] A business owner claiming compelled speech because she is being forced to speak to customers as she rents them vehicles is an example of such a case. If a court finds that the applicable public accommodations law compels the business to provide a service that would inherently express the message the artist opposes, then the law would be deemed a content-based regulation compelling expression.[208] In that case, strict scrutiny would apply, and the public accommodations law would not stand as applied to the artist.[209] This raises a crucial question: Under what circumstances does a service inherently express a message the artist opposes?

The *Spence* test protects conduct as speech if two conditions are met: (1) "[a]n intent to convey a particularized message was present," and (2) "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[210] *Rumsfeld* characterized this as an inquiry into whether the conduct at issue was "inherently expressive."[211] *Hurley* recognized that if *Spence* is satisfied, there is protected expression.[212] But *Hurley* also recognized that in some circumstances, such as certain works of art or compositions of music, there might be protected expression, even if *Spence* is not satisfied.[213] This allows art to be fully protected by the First Amendment and deemed "inherently expressive" even without a "particularized message."[214] Therefore, a court may not use a public accommodations law to compel an artist to express support for something he opposes through his own artwork.[215]

For example, assume an ice sculptor opposes same-sex marriage. Each of his ice sculptures are one-of-a-kind; each sculpture is uniquely formed. He

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[206] *Id.* at 66.

[207] *See id.* at 67.

[208] *See Hurley*, 515 U.S. at 572–73.

[209] *See id.* at 575.

[210] Spence v. Washington, 418 U.S. 405, 410–11 (1974).

[211] *Rumsfeld*, 547 U.S. at 66.

[212] *Hurley*, 515 U.S. at 569.

[213] *Id.*

[214] *Id.*

[215] *See id.* at 572–73.

works closely with his customers to ensure that the sculpture accurately depicts what the customer wants. Usually, his sculptures are massive works of art displayed as the primary decorative piece. A gay couple requests a sculpture for their wedding. The sculpture will be the primary decorative piece for the couple's wedding ceremony. Before the couple mentions any specific design, the sculptor refuses to create the ice sculpture. The local public accommodations law prohibits discrimination on the basis of sexual orientation. The sculptor views his refusal as a way to invoke his freedom of expression rights.

A court should not allow the public accommodations law to compel the sculptor to create a unique, one-of-a-kind masterpiece that shows support for something the sculptor opposes.[216] In the context of the display at the event, the sculpture would have a particularized message related to the couple's wedding. The message would convey a celebration of gay marriage despite the fact that the couple did not have a chance to give any design specifications. The integral function of the sculpture, in and of itself, communicates some sort of support for (or at least no objection to) the gay wedding ceremony. There was no need for the sculptor to listen to any design specifications. The sculptor would have to create an ice-masterpiece that contributes to, promotes, and celebrates the same-sex wedding. The reasonable observer would understand that message through the sculpture's grand presence and intricate design. Therefore, providing the service would inherently express the message the sculptor opposes.

Admittedly, the sculptor is objecting to the message and discriminating against the couple. The sculptor is refusing a service to a gay couple that he would provide to a straight couple. While the sculptor may be discriminating against the couple based on their sexual orientation, he is simultaneously objecting to the content of his sculpture's message. As discussed above, in the context of the gay couple's wedding, a grand ice-masterpiece would express support for the event. The content of the sculptor's message is dependent upon who and what the sculpture is for. Because the sculpture is to be the primary decorative piece at a gay couple's wedding, the content of the sculpture supports the gay couple. Therefore, the law would be deemed content based as to the sculptor and would not be upheld.[217]

Although the creation of an ice sculpture is clearly expressive, not all services require such time and talent. Some goods are artfully designed by machines. Many goods have artistic or expressive wrappings. However, artistic wrappings alone do not give rise to First Amendment protection.

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[216] *See id.*

[217] *See id.* at 575.

For example, suppose a church orders one hundred chocolate bars from Hershey's to make s'mores for a church event. Hershey's refuses to sell chocolate bars to the church because (hypothetically) Hershey's is adamantly opposed to religion. Hershey's is in violation of the local public accommodations law. The question is whether making and selling mass-produced, pre-made chocolate bars inherently expresses the message Hershey's opposes or is mere conduct. A court may not even consider that the bars might be expressive. If that is the case, then the court must find that there was no regulation of expression, and the public accommodations law would stand.

However, it is arguable that the selling of the bars does have expressive qualities that could amount to "expressive conduct." Hershey's has an "intent to convey a particularized message" with "Hershey's" designed on the wrapper and on the bar itself. The particularized message is something like "this bar came from Hershey's" (or some other advertising message), and a reasonable observer at the church would understand that message.

Regardless of where a court lands on the expressiveness of a sale of Hershey's bars, the public accommodations law should be upheld as applied to Hershey's.[218] The regulation of expression is merely incidental. The key here is that, although the sale of the bars could be "inherently expressive" of some message, the message does not relate to Hershey's objection to religion. The message relates to advertising the Hershey's brand. Further, a reasonable observer would know that Hershey's did not artistically design or craft anything that is unique for the church event. Nor is the display of the bars an integral part of the event. Therefore, Hershey's may be compelled to sell their chocolate bars to the church.

Courts should determine whether a particular service merits First Amendment protection by thinking of expression as a spectrum. On the least-expressive end, there is the sale of pre-made, mass-produced items with expression unrelated to the business owner's objection, like the sale of Hershey's chocolate. On the most-expressive end, there is the sale and creation of an elaborate, custom-designed masterpiece expressing the very message the artist opposes. A court should ask whether the service is more like a uniquely designed sculpture created to express a particular message as an integral part of an event, or whether the service is more like the sale of pre-made, mass-produced chocolate bars that express something unrelated to the business's objection. Many artistic businesses can lean towards either end of the spectrum depending on the circumstances.

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[218] *See* Rumsfeld v. Forum for Acad. & Institutional Rts., Inc., 547 U.S. 47, 67 (2006).

For example, assume a baker opposes same-sex marriage. Every custom cake he makes is unique. A homosexual couple requests a small cake. The customers plan to take the cake to a gay rights event where there will be other non-descript desserts. Before the customers could discuss the type of cake, the baker refuses to serve the couple.

The baker refuses because of who the cake is for and not the message the cake would express. The cake might express that it is delicious or that bakers can be creative, but, whatever the message, it would not be about gay rights. Additionally, a reasonable observer would not understand the baker to be in support of gay marriage or gay rights just because the cake is present at the gay rights event. The cake is not an integral part of the event or on display in any particular way. The cake would essentially blend in with the other desserts (maybe even some Hershey's bars). Whether the service of creating the cake is expressive or not, the public accommodations law will likely be upheld because the law incidentally regulates expression.[219] The baker would have to bake the cake.

If, however, the context changes to a gay wedding and the cake is created and designed as the wedding cake, the service is more similar to the ice sculpture. A wedding cake is an integral part of the wedding.[220] Reasonable observers would understand the wedding cake to express support for the couple by the fact that it is a cake the couple chose to use to celebrate their wedding.[221] The cake would be uniquely designed for the wedding whatever its design. Therefore, the baker may refuse to provide a uniquely designed wedding cake for the gay couple.

Further, some cases may involve requests for certain words or symbols on a cake or other good. Among those cases, public accommodations laws may not apply at all. For example, a customer requests a small cake with the words "Support gay marriage." The customer plans to take the cake to a gay rights activist event where there will be other non-descript desserts. The baker refuses to put those words on the cake.

The baker is not discriminating against the customer but is only objecting to the message. The customer could be heterosexual. This case is different from the ice sculptor discriminating against the gay couple. The ice sculptor refused a service to the gay couple he would provide to a straight couple. But the baker would not provide a cake with the words "Support gay marriage" to anyone regardless of their personal characteristics.

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[219] *See id.*

[220] *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1743 (2018) (Thomas, J., concurring in part).

[221] *Id.* at 1743 n.2.

Courts need to apply a consistent rule when these issues arise. Determining where a particular service falls on the "expression spectrum" allows for courts to protect artists' rights to express themselves. This proposed rule also prevents discriminatory conduct where businesses only discriminate against the person receiving the service and do not object to what the service is expressing.

V. CONCLUSION

"Expression" is the outer manifestation of a person's inner state.[222] "We the People" are protected by the First Amendment when the government tries to regulate our inner state.[223] The Supreme Court recognizes this protection even for public accommodations owners, especially when their product or service constitutes an artwork.[224] An artist may not be forced to create a masterpiece that expresses a message the artist opposes. If a court finds that the applicable public accommodations law compels the artist to provide a service that would inherently express the message the artist opposes, the law cannot be applied to the artist.[225] This rule strikes the balance between preventing discriminatory conduct and protecting the People's rights to manifest their inner state.

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222 Hospers, *supra* note 1.

223 U.S. CONST. amend. I.

224 Hurley v. Irish-Am. Gay, 515 U.S. 557, 572–73 (1995); *see also* Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 926 (Ariz. 2019); Telescope Media Grp. v. Lucero, 936 F.3d 740, 758 (8th Cir. 2019).

225 *See Hurley*, 515 U.S. at 572–73.