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Thou Shall Not Discriminate: A Proposal for Limiting First Amendment Defenses to Discrimination in Public Accommodations.

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COMMENT

THOU SHALL NOT DISCRIMINATE: A PROPOSAL FOR LIMITING FIRST AMENDMENT DEFENSES TO DISCRIMINATION IN PUBLIC ACCOMMODATIONS

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"[A]cts of invidious 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."[1]

I. INTRODUCTION—*ELANE PHOTOGRAPHY V. WILLOCK*

As an artist, Elaine Huguenin uses her camera to memorialize the important moments in her clients' lives.[2] Whether capturing the loving glance of a bride at her new husband or a high school senior's triumphant smile, Huguenin puts her heart into her work.[3] She views her photographs as a personal expression of herself and a way to communicate her ideas and feelings to the world.[4] For that reason, she will not take pic-

1. Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984).

2. Appeal from the Decision and Final Order of the New Mexico Human Rights Commission at 1–2, Elane Photography, LLC v. Willock, No. D-202-CV-200806632 (2d Jud. Dist. N.M. June 30, 2008), *available at* http://www.telladf.org/UserDocs/ElanePhotoAppeal.pdf. Elaine Huguenin and her husband Jon own Elane Photography, which is located in Bernalillo County, New Mexico. *Id.* at 1. The difference in spelling between "Elaine" Huguenin and "Elane" Photography is deliberate and not a typo.

3. *Id.* at 2.

4. *Id.*

tures of acts she does not condone, for example, individuals in the nude or macabre horror scenes.[5]

In addition to being a photographer, Huguenin is also a Christian who believes that marriage represents a sacred union between one man and one woman.[6] So when Vanessa Willock asked Huguenin to photograph her same-sex commitment ceremony, Huguenin felt she was within her rights to decline.[7] The Human Rights Commission of New Mexico disagreed, found Elane Photography guilty of discrimination, and ordered the company to pay $6637.94 for Willock's attorney's fees.[8] In its final order, the Commission declared that Elane Photography "discriminated against [Willock] because of sexual orientation in violation of Section 28-1-7(F) of the New Mexico Human Rights Act."[9]

Willock argued that Elane Photography is a public accommodation and, as such, cannot discriminate against her and her same-sex partner under New Mexico law.[10] By refusing to accept Willock's business because it would have to photograph a same-sex commitment ceremony, Elane Photography engaged in unlawful discrimination against Willock based on her sexual orientation.[11] The organization that defended Elane

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5. *Id.* at 2–3. Huguenin also refuses to photograph anything that would appear to condone abortion, pornography, unmarried cohabitation, polygamy, no-fault divorce, or same-sex marriage. *Id.* at 3.

6. *Id.* at 3–4.

7. Appeal from the Decision and Final Order of the New Mexico Human Rights Commission at 3–4, Elane Photography, LLC v. Willock, No. D-202-CV-200806632 (2d Jud. Dist. N.M. June 30, 2008), *available at* http://www.telladf.org/UserDocs/ElanePhotoAppeal.pdf. On September 21, 2006, Vanessa Willock emailed Elaine Huguenin, requesting pricing information and asking if Elane Photography would be willing to photograph Willock's lesbian commitment ceremony. *Id.* at 3. Huguenin responded with an email stating that her company only photographed "traditional" weddings. *Id.* When Willock wrote back seeking clarification as to whether Huguenin refused to offer her services to same-sex couples, Huguenin replied, "Yes, you are correct in saying we do not photograph same-sex weddings." *Id.* at 4.

8. Elane Photography, LLC v. Willock, HRD No. 06-12-20-0685, at 19 (Human Rights Comm'n of N.M. Apr. 4, 2008), *available at* http://media.npr.org/documents/2008/jun/photography.pdf.

9. *Id.*; *see also* N.M. STAT. ANN. § 28-1-7 (West 2009) (outlawing discrimination in public accommodations). It is an unlawful practice for:

> any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any person because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap, provided that the physical or mental handicap is unrelated to a person's ability to acquire or rent and maintain particular real property or housing accommodation.

§ 28-1-7.

10. *Elane Photography*, at 8.

11. *Id.* at 19.

Photography is the Alliance Defense Fund (ADF), a non-profit organization committed to "aggressively defend[ing] religious liberty."[12] Among the ADF's patron issues are "guarding the sanctity of human life," "protecting marriage and the family," and "defending religious freedom."[13] The ADF legal team's principal arguments were: (1) Elane Photography is not a public accommodation, and (2) Elane Photography's owners did not engage in discrimination based on sexual orientation.[14] Furthermore, the ADF also claimed that enforcement of the New Mexico Human Rights Act against Elane Photography's owners violated their rights to free speech and free exercise of religion.[15] In essence, the ADF argued that the state should not force Elane Photography's owners to participate in a ceremony that advances a view with which they disagree, in this case, same-sex marriage.[16]

Elane Photography presents a complicated case because it involves both an individual, Elaine Huguenin, and a business, Elane Photography. At issue in *Elane Photography* was an "unwritten company policy" that "Elane Photography would not photograph any image or event which was contrary to the religious beliefs of its co-owners [Elaine Huguenin and her husband, Jonathan Huguenin]."[17] The problem with having such a policy is that it takes an individual's rights to free speech and free exercise of religion and ascribes them to a business, which is subject to anti-discrimination laws that may at times burden those freedoms. To understand why the decision of the New Mexico Human Rights Commission should be affirmed on appeal, it is important to understand who (or what) exactly has First Amendment rights.

Elaine Huguenin, as an American citizen, has the right to attend whatever church she pleases, educate her family in the ways of her religion, and even take photographs expressing her religious beliefs without government interference.[18] Elane Photography, however, is considered a

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12. ADF: Purpose – Alliance Defense Fund – Defending Our First Liberty, http://www.alliancedefensefund.org/about/purpose (last visited Apr. 16, 2010).

13. ADF: Issues – Alliance Defense Fund – Defending Our First Liberty, http://www.alliancedefensefund.org/about/purpose (last visited Apr. 16, 2010).

14. Appeal from the Decision and Final Order of the New Mexico Human Rights Commission at 5, Elane Photography, LLC v. Willock, No. D-202-CV-200806632 (2d Jud. Dist. N.M. June 30, 2008), *available at* http://www.telladf.org/UserDocs/ElanePhotoAppeal.pdf.

15. *Id.* at 5–6 (arguing that the Commission's decision and order forced Elane Photography "to participate in and advance a viewpoint it would not do so absent government coercion by the Commission").

16. *Id.* at 5.

17. *Elane Photography*, at 4.

18. U.S. CONST. amend. I, § 1.

public accommodation under New Mexico law.[19] As a public accommodation, Elane Photography is subject to the New Mexico Human Rights Act, which protects individuals from discrimination based on sexual orientation or gender identity.[20] Therefore, Elaine Huguenin may espouse certain views, but under the laws of New Mexico, Elane Photography may not discriminate against customers based on Huguenin's beliefs.

One of the questions I will tackle in this Comment is to what extent do religious beliefs, associational rights, and the right to freely exercise one's conscience constitute defenses to those seeking to deny others access to public accommodations? If the facts of the case were different and Elane Photography refused to photograph a Jewish wedding or an interracial wedding, even if those unions *were* against Huguenin's faith, there would be no question that the business could not legally discriminate based on customers' race or religion.[21] Just as there are limits on free speech, there are limits on the free exercise of religion.[22] The law protects Huguenin's free exercise of religion and free speech as an individual, but the conduct of Elane Photography remains subject to state anti-discrimination laws and other federal and state regulations.

While the majority of this Comment focuses on discrimination challenges brought by members of the LGBT (lesbian, gay, bisexual, and transgender) community, access to public accommodations affects a much broader portion of society. Essentially anyone, from bikers in Texas,[23] to

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19. *Elane Photography*, at 16. The statutory definition of a public accommodation does "not exclude a business entity which is by its nature expressive and artistic." *Id.* at 15.

20. N.M. STAT. ANN. § 28-1-7 (West 2009).

21. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (upholding federal legislation prohibiting discrimination in public accommodations based on race); *cf.* Shawn Nottingham, *Louisiana Justice Who Refused Interracial Marriage Resigns*, CNN, Nov. 3, 2009, http://www.cnn.com/2009/US/11/03/louisiana.interracial.marriage (reporting the resignation of a Louisiana justice of the peace who famously refused to marry an interracial couple in 2009). Keith Bardwell claimed that "he was concerned for the children that might be born of the [interracial] relationship and that, in his experience, most interracial marriages don't last." Shawn Nottingham, *Louisiana Justice Who Refused Interracial Marriage Resigns*, CNN, Nov. 3, 2009, http://www.cnn.com/2009/US/11/03/louisiana.interracial.marriage. Facing national backlash and a discrimination lawsuit brought by one of the couples he refused to marry, Bardwell resigned his position as a justice of the peace. *Id.*

22. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) (holding that while the First Amendment grants the absolute freedom to believe, it does not permit absolute freedom to act); *cf.* Hayley Ellison, *Free Exercise of the Courtroom: Why Perpetrators of Religiously Motivated Violence Can No Longer Hide Behind the First Amendment*, 12 SCHOLAR 95, 104 (2009) (arguing for limitation of the free exercise defense in cases involving violence against parishioners, particularly women and children).

23. Tex. H.B. 1569, 81st Leg., R.S. (2009), *available at* http://www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB01569I.pdf. The proposed bill stipulates:

women seeking health care coverage for contraceptives,[24] to single mothers,[25] could become victims of discrimination based on business owners' religious views. My ultimate goal is to propose a solution that reconciles these competing interests—the freedom to run one's business without excessive government intrusion on the one hand, and the right of individuals to be free from discrimination on the other.

In order to illustrate the need for more legislation protecting citizens from discrimination in public accommodations and for limiting First Amendment justifications for such discrimination, I will discuss several current cases similar to *Elane Photography*. Part I of this Comment will present the relevant legal background and history of discrimination in public accommodations. Beginning with *Romer v. Evans* in 1995, this Comment will follow the modern history of the fight for LGBT equality. Part II will focus on the reasons why states should limit First Amendment justifications for discrimination and why states should prohibit discrimination in public accommodation based on sexual orientation and gender identity. Some states, like New Mexico[26] and California,[27] have already incorporated sexual orientation into their human rights statutes. Similar to employment anti-discrimination statutes,[28] these typically exempt religious organizations with ministerial positions from compliance. The most controversial cases are those involving individuals who are not ex-

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> A person [who] owns or operates a public accommodation may not restrict an individual from access or admission to the accommodation or otherwise prevent the individual from using the accommodation solely . . . because the individual: (A) operates a motorcycle; (B) is a member of an organization or association that operates motorcycles; or (C) wears clothing that displays the name of an organization or association.

Id.

24. Catholic Charities of Sacramento, Inc. v. Dep't of Managed Health Care, 85 P.3d 67, 89 (Cal. 2004) (upholding a California law requiring employers that provide health insurance prescription coverage for their employees to include contraceptives as part of the plan).

25. E.E.O.C. v. Fremont Christian Sch., 781 F.2d 1362, 1364 (9th Cir. 1986) (holding that a Christian school's policy of withholding health insurance from employees who were single mothers or otherwise not "heads of household" violated the Equal Pay Act and Title VII).

26. N.M. STAT. ANN. § 28-1-7 (West 2009).

27. CAL. CIV. CODE § 51(b) (West 2009).

28. *See* Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. § 3(a)(4)(A) (1st Sess. 2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3017ih.txt.pdf (excluding small businesses, tax-exempt private clubs, the military, and religious organizations from compliance with the proposed act to prohibit employment discrimination against gays and lesbians).

empt by statute but who still wish to exercise their religious or moral beliefs in the operation of their businesses or private organizations.[29]

The tension between religious freedom and free speech on the one hand and LGBT rights on the other is an issue that has bitterly divided the country in recent years. Same-sex marriage often takes center stage in the debate, but discrimination in public accommodations is becoming a hotly contested issue as well. On December 7, 2009, the Supreme Court granted certiorari to hear the case of *Christian Legal Society Chapter of University of California v. Kane*, a case involving a Christian student group's right to discriminate in choosing its members and officers based on their sexual orientation and religious views.[30] Members of the group sought to exclude others who did not share their Christian beliefs, which violated the University of California's anti-discrimination policy.[31] That case will be discussed in detail later on in this Comment, but, for now, it demonstrates that discrimination in public accommodations is a relevant issue for more than just the LGBT community.

II. LEGAL BACKGROUND—THE STATE OF PUBLIC ACCOMMODATIONS LAW TODAY

According to the Human Rights Campaign,[32] "Non-discrimination law in thirteen states and the District of Columbia bans discrimination based on sexual orientation and gender identity in public accommodations."[33] An additional seven states also ban discrimination based on sexual orien-

29. *See, e.g.*, Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 39 (D.C. Cir. 1987) (requiring a private Jesuit college to allow a LGBT student group the benefits of access to the school's facilities and services); Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, No. C 04-04484 JSW, 2006 WL 997217, at *1–2 (N.D. Cal. 2006) (upholding a university decision denying a religious student organization school funding because the organization discriminated in the selection of its members based on both religion and sexual orientation), *aff'd*, 319 Fed. Appx. 645 (9th Cir. 2009), *cert. granted sub nom.* Christian Legal Soc'y Chapter of Univ. of Cal. v. Martinez, 130 S.Ct. 795 (Dec. 7, 2009) (No. 08-1371); N. Coast Women's Care Med. Group, Inc. v. Benitez, 189 P.3d 959, 962 (Cal. 2008) (holding that doctors may not refuse treatment to an individual based on the doctors' religious opposition to that individual's sexual orientation).

30. *Christian Legal Soc'y*, 2006 WL 997217, at *1.

31. *Id.* at *3–4.

32. HRC — About Us, http://www.hrc.org/about_us/index.htm (last visited Apr. 16, 2009). The Human Rights Campaign (HRC) is a group that lobbies for lesbian, gay, bisexual, and transgender rights. *Id.* "HRC strives to end discrimination against LGBT citizens and realize a nation that achieves fundamental fairness and equality for all." *Id.*

33. HRC — Patient Non-Discrimination and State Public Accommodation Law, http://www.hrc.org/issues/12641.htm (last visited Apr. 16, 2010) (California, Colorado, Hawaii, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington).

tation, excluding discrimination based on gender identity.[34] The statute at issue in *Elane Photography* was the New Mexico Human Rights Act, which protects individuals from discrimination based on both their gender identity and sexual orientation.[35] The New Mexico statute defines a 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."[36] In New Mexico, it is unlawful for "any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any person because of race, religion, color, national origin, ancestry, sex, *sexual orientation, [or] gender identity*."[37]

California has a similar statute known as the Unruh Civil Rights Act.[38] According to the Unruh Civil Rights Act:

> All persons within the jurisdiction of [California] are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or *sexual orientation* are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.[39]

In contrast, Texas and twenty-nine other states offer no statutory protection for the LGBT community in the realm of public accommodations.[40] Interestingly, a bill that was left pending in the Texas legislature

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34. HRC — Patient Non-Discrimination and State Public Accommodation Law, http://www.hrc.org/issues/12641.htm (last visited Apr. 16, 2010) (Connecticut, Maryland, Massachusetts, Nevada, New Hampshire, New York, and Wisconsin).

35. N.M. STAT. ANN. § 28-1-7 (West 2009).

36. *Id.*

37. *Id.* (emphasis added).

38. CAL. CIV. CODE § 51 (West 2009).

39. *Id.* § 51(b) (emphasis added). The act extends protection not only to actual gay and lesbian Californians, but to any person perceived to be gay or lesbian and to any person perceived to be "associated with a person who has, or is perceived" to be gay or lesbian. *Id.* § 51(e)(5).

40. HRC — Patient Non-Discrimination and State Public Accommodation Law, http://www.hrc.org/issues/12641.htm (last visited Apr. 16, 2010) (Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming). It is worth pointing out, however, that not all members of the Texas legislature favor continued discrimination based on sexual orientation or gender identity. *See* HB 538 by Villarreal, http://www.equalitytexas.org/content.aspx?id=566 (last visited Apr. 16, 2010) (discussing legislation co-authored by Texas Representatives Mike Villarreal, Ellen Cohen, Alma Allen, Lon Burman, and Jessica Farrar, which would pro-

at the close of the last regular session proposes offering protection to motorcyclists against discrimination in public accommodations.[41] The relevant language of the proposed bill states:

> A person [who] owns or operates a public accommodation may not restrict an individual from access or admission to the accommodation or otherwise prevent the individual from using the accommodation solely: (1) because of the race, creed, sex, religion, or national origin of the individual; *or (2) because the individual (A) operates a motorcycle, (B) is a member of an organization or association that operates motorcycles, or (C) wears clothing that displays the name of an organization or association.*[42]

Despite the fact that some Texas legislators deem bikers worthy of more protection than gays and lesbians, the need for this law highlights the fact that discrimination in public accommodations is not a problem facing the LGBT community alone. Rather, discrimination in public accommodations is an issue with a broad impact on diverse members of society.

A. *Animus Is No Excuse—The Story of* Romer v. Evans

Although the Supreme Court decided *Romer v. Evans*[43] almost fifteen years ago, the case remains a helpful lens through which to view the fight for LGBT equality under the law.[44] Several cities, including Aspen, Boulder, and Denver, "enacted ordinances that listed 'sexual orientation' as an impermissible ground for discrimination, equating the moral disapproval of homosexual conduct with racial and religious bigotry."[45] In response to these ordinances, Colorado passed Amendment 2 in order to ban "all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexual persons."[46] The United States Supreme Court invalidated Amendment 2, finding it a violation of the Equal Protection Clause of the Fourteenth Amendment.[47]

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vide protection against discrimination in employment on the basis of sexual orientation or gender identity).

41. Tex. H.B. 1569, 81st Leg., R.S. (2009), *available at* http://www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB01569I.pdf.

42. *Id.* (emphasis added).

43. 517 U.S. 620 (1996).

44. AMY D. RONNER, HOMOPHOBIA AND THE LAW 11 (2005) (explaining that the decision's lasting significance is that it "created an equal protection rationale that could infiltrate diverse areas of law and help alleviate discrimination"). Thus, "the *Romer* reasoning provides a decent basis for future equal protection challenges to [discriminatory] laws." *Id.*

45. *Romer*, 517 U.S. at 646 (Scalia, J., dissenting).

46. *Id.* at 624 (majority opinion).

47. *Id.* at 632–35.

Justice Kennedy, writing for the majority, offered two reasons why Amendment 2 violated the Equal Protection Clause:

> First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.[48]

Thus, the Supreme Court found animus against a group to be no excuse for treating its members as second-class citizens.[49]

Scholars have recognized the historical significance of the *Romer* decision, noting that the case acknowledged "that the widespread animus against gays (which is *not* the same as moral objection to homosexual conduct) undermines, to an extent that is hard to determine, the credibility of such explanations. The constitutional status of laws that discriminate against gays, therefore, is uncertain after *Romer*."[50]

Of equal historical impact was Justice Scalia's dissent in *Romer*. Contrary to the majority opinion, Scalia insisted that all Amendment 2's drafters sought to do was to prevent homosexuals from receiving *preferential* treatment: "The amendment prohibits *special treatment* of homosexuals, and nothing more."[51] Rather than accepting the majority view that Amendment 2 was the product of animus toward homosexuals, Scalia contended that Amendment 2 was "rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."[52]

Scalia's dissent in *Romer* helps to frame the issue of discrimination in public accommodations. As I will demonstrate in the latter pages of this Comment, the discrimination that occurred in Colorado with the passage of Amendment 2 and in the cases that followed was anything but innocent action against a "politically powerful minority."

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48. *Id.* at 632.

49. *Id.* at 633–34.

50. ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 7 (2002). Subsequently, laws seeking to discriminate against the homosexual community will "always arouse suspicion that they rest on a bare desire to harm a politically unpopular group." *Id.* at 6.

51. *Romer*, 517 U.S. at 638 (Scalia, J., dissenting) (emphasis in original).

52. *Id.* at 636.

B. *Why Not a Federal Solution?*

In *Romer*, the majority explained why any federal solution would be inadequate to resolve the issue of discrimination in public accommodations. The Court pointed out that the Fourteenth Amendment does not grant Congress the power to disallow discrimination in public accommodations.[53] In the face of all this, the Court explained that "most [s]tates have chosen to counter discrimination by enacting detailed statutory schemes."[54] But notwithstanding the *Romer* majority's assertion that the federal government can do little in the realm of public accommodations, Title II of the Civil Rights Act of 1964 provides that "[a]ll 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."[55] Currently, there has been no amendment to add sexual orientation or gender identity to the list of protected classes under the federal Civil Rights Act.[56]

C. *Constitutional Defenses to Discrimination*

Individuals seeking to discriminate against others based on their sexual orientation or gender identity have advanced three main arguments. The first of these arguments is the First Amendment free exercise of religion argument. The second argument, the right to peaceably assemble, also has its roots in the First Amendment. Finally, the third argument comes from the right to free exercise of conscience, which has its origins in state statutes and, more recently, in federal legislation.[57]

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53. *Id.* at 627–28 (majority opinion).

54. *Id.* at 628.

55. 42 U.S.C. § 2000a(a) (2006).

56. *But see* Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (1st Sess. 2009), *available at* http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3017ih.txt.pdf (proscribing discrimination against LGBT people in employment); Military Readiness Enhancement Act of 2009, H.R. Res. 1283, 111th Cong. (1st Sess. 2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1283ih.txt.pdf (proposing a replacement for the military's "Don't Ask, Don't Tell" policy regarding homosexual servicemembers).

57. *See* Saundra Young, *White House Set to Reverse Health Care Conscience Clause*, CNN, Feb. 27, 2009, http://www.cnn.com/2009/POLITICS/02/27/conscience.rollback/index.html (explaining that under the Provider Refusal Rule, or the so-called "conscience clause," "workers in health-care settings—from doctors to janitors—can refuse to provide services, information or advice to patients on subjects such as contraception, family planning, blood transfusions and even vaccine counseling if they are morally against it").

i. Free Exercise of Religion—*Elane Photography v. Willock*

In its appeal from the lower court ruling, Elane Photography asserts several reasons for its refusal to photograph Willock's same-sex commitment ceremony.[58] Among those arguments is owner Elaine Huguenin's right to freely exercise her Christian faith under the First Amendment.[59] When Huguenin refused to accept Willock's request to obtain Elane Photography's services, Huguenin reasoned that she was simply exercising her right to express her religious beliefs as she pleased.[60] As evidence, Huguenin stated that she and her husband had an "unwritten" policy at Elane Photography to only photograph people and situations that comport with their views as Christians.[61] Refusing to photograph a same-sex commitment ceremony, Huguenin insists, is like refusing to photograph graphic horror scenes or pornographic acts.[62] She does not take pictures of those things, so why should she have to photograph a lesbian wedding she also believes is immoral?

ii. Free Association—*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston[63] provides an example of a situation where a free association argument may prevail against a public accommodations discrimination claim. In *Hurley*, the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) wanted to march with other groups in a St. Patrick's Day parade organized by the South Boston Allied War Veterans Council (Veterans Council).[64] The Veterans Council, however, objected to marching alongside GLIB in the parade.[65] GLIB brought suit, claiming that the Veterans Council discriminated against it based on its members' sexual

58. Appeal from the Decision and Final Order of the New Mexico Human Rights Commission at 5, Elane Photography, LLC v. Willock, No. D-202-CV-200806632 (2d Jud. Dist. N.M. June 30, 2008), *available at* http://www.telladf.org/UserDocs/ElanePhotoAppeal.pdf.

59. *Id.* at 6 (claiming that Elane Photography's refusal to photograph Willock's commitment ceremony was a form of religious expression protected by the First Amendment).

60. *Id.* at 3.

61. Elane Photography, LLC v. Willock, HRD No. 06-12-20-0685, at 4 (Human Rights Comm'n of N.M. Apr. 4, 2008), *available at* http://media.npr.org/documents/2008/jun/photography.pdf.

62. Appeal from the Decision and Final Order of the New Mexico Human Rights Commission at 2, Elane Photography, LLC v. Willock, No. D-202-CV-200806632 (2d Jud. Dist. N.M. June 30, 2008), *available at* http://www.telladf.org/UserDocs/ElanePhotoAppeal.pdf.

63. 515 U.S. 557 (1995).

64. *Id.* at 561.

65. *Id.*

orientation in violation of a Massachusetts law forbidding discrimination in public accommodations.[66] The U.S. Supreme Court reversed the Massachusetts Supreme Court's ruling in favor of GLIB, reasoning that:

> The state court's application . . . had the effect of declaring [the Veterans Council's] speech itself to be the public accommodation. Since every participating parade unit affects the message conveyed by the private organizers, the state court's peculiar application of the Massachusetts law essentially forced the [Veterans] Council to alter the parade's expressive content and thereby violated the fundamental First Amendment rule that a speaker has the autonomy to choose the content of his own message and, conversely, to decide what not to say.[67]

Had the Court forced the Veterans Council to include a group that espoused a view with which the Veterans Council disagreed, that would have altered the Veterans Council's speech and infringed upon its right to free speech and free association under the First Amendment.[68] The Supreme Court decided that the government cannot force a private group to alter its speech in order to endorse a message with which the group disagrees.[69]

Hurley may be distinguished from *Elane Photography* in that the Veterans Council was a private organization engaged in an act of free speech and association, whereas Elane Photography is a business that offers its services to the public. Since Elane Photography is not a church or a private club, nor does it engage in the sort of free assembly found in *Hurley*, it may not justify its discriminatory behavior under a free association or free speech argument.

iii. Implicit Right to Exercise One's Conscience—*North Coast Women's Care Medical Group v. Benitez*

In *North Coast Women's Care Medical Group v. Benitez*,[70] the Supreme Court of California weighed in on the issue of whether physicians could decline to provide certain types of medical services for religious reasons. In *Benitez*, a woman brought suit against the medical group that refused to help her become pregnant by intrauterine insemination because she was a lesbian.[71] The court established early on that "[a] medical group providing medical services to the public" is indeed considered a

66. *Id.*
67. *Id.* at 558.
68. *Hurley*, 515 U.S. at 558.
69. *Id.*
70. 189 P.3d 959 (Cal. 2008).
71. *Id.* at 964.

business establishment under the California Unruh Civil Rights Act.[72] After summarizing two recent U.S. Supreme Court holdings,[73] the California Supreme Court unanimously found in favor of Benitez, holding that "a religious objector has *no federal constitutional right* to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector's religious beliefs."[74]

The doctors responsible for treating Benitez claimed that their free speech and free exercise rights under the First Amendment were violated when they were sued for refusing to inseminate Benitez.[75] The court responded to this allegation by pointing out that while the doctors were free to "voice their objections" to the Unruh Civil Rights Act, they were not free to violate the act without facing consequences.[76] The court then quoted another California case lending practical support to its assertion:

> "For purposes of the [F]ree [S]peech [C]lause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose. Such a rule would, in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition."[77]

Thus, a law that simply demands obedience and not an affirmative showing of support may not necessarily trigger First Amendment protections. In *Benitez*, the court held that only obedience was required to abide by the Unruh Civil Rights Act.[78]

The California Supreme Court suggested a caveat of sorts for doctors seeking to avoid liability for refusing medical treatment on religious grounds. Justice Kennard, writing for the unanimous court, suggested that the "defendant physicians can avoid such a conflict [between their religious beliefs and the Unruh Civil Rights Act] by ensuring that every

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72. *Id.* at 965.

73. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (invalidating a city ordinance banning animal slaughter within city limits because the ordinance impermissibly targeted practitioners of Santeria); Employment Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872, 884 (1990) (concluding that a facially neutral and generally applicable law banning peyote use could be constitutionally applied to members of the Native American Church who sought to use the drug for sacramental purposes).

74. *Benitez*, 189 P.3d at 966 (emphasis in original).

75. *Id.* at 964.

76. *Id.* at 967.

77. *Id.* (quoting Catholic Charities of Sacramento, Inc. v. Dep't of Managed Health Care, 85 P.3d 67, 89 (Cal. 2004)).

78. *Id.*

patient requiring [intrauterine insemination] receives 'full and equal' access to that medical procedure through a North Coast physician lacking defendants' religious objections."[79] The court seemed to suggest that the medical group could have avoided a lawsuit merely by referring Benitez to a doctor who *did not* object to her sexual orientation. But, as discussed later on in this Comment, the utility of such a solution is limited and may not be an adequate solution to the problem of discrimination in public accommodations.

D. Heart of Atlanta v. United States *and the Civil Rights Act of 1964*

The First Amendment establishes a boundary beyond which the government may not intrude. Given the long history of discrimination in the United States, lawmakers realized that more protections were needed to guard against it. Congress passed the Civil Rights Act of 1964[80] in the wake of the lunch counter sit-ins and other demonstrations during the 1960s.[81] The act 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, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."[82] Following the passage of the Civil Rights Act of 1964, *Heart of Atlanta Motel, Inc. v. United States* affirmed the validity of the act as it applied to a motel operator in Georgia.[83]

In *Heart of Atlanta*, a motel operator argued that by forcing him to rent rooms to African-Americans, the government deprived him of the right to run his business as he pleased.[84] The Supreme Court upheld the congressional regulation prohibiting racial discrimination in public accommodations and Congress's finding that such discrimination had a "substantial and harmful effect" on interstate commerce.[85] Thus, the Court in *Heart of Atlanta* "upheld the [C]ommerce [C]lause section of the Civil Rights

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79. *Benitez*, 189 P.3d at 969.

80. 42 U.S.C. §§ 2000a–2000h-6 (2006).

81. GLORIA J. BROWNE-MARSHALL, RACE, LAW, AND AMERICAN SOCIETY: 1607 TO PRESENT 93 (2007).

82. Civil Rights Act of 1964 § 201, 42 U.S.C. § 2000a(a) (2006).

83. 379 U.S. 241, 261 (1964).

84. *Id.* at 243–44. The motel owner argued that the Civil Rights Act of 1964 exceeded Congress's power to regulate interstate commerce and that the motel was:

> deprived of the right to choose its customers and operate its business as it wishe[d], resulting in a taking of its liberty and property without due process of law and a taking of its property without just compensation; and, finally, that by requiring [the motel] to rent available rooms to Negroes against its will, Congress [subjected] it to involuntary servitude in contravention of the Thirteenth Amendment.

Id. at 244.

85. *Id.* at 258.

Act, finding that the motel did substantial interstate business when it accepted out-of-state guests."[86] The lasting significance of *Heart of Atlanta* is the fact that it empowered other minorities with the legal ammunition necessary to fight discrimination by privately owned businesses.[87]

Cases involving racial discrimination are still an issue today, with plaintiffs recently bringing lawsuits against several popular hotel and restaurant chains accused of discrimination against their customers.[88] While recent cases such as *Elane Photography* have not employed Commerce Clause reasoning, the guiding principles of the opposing parties are the same—one side asserts a business's right to choose its customers, and the other side asserts a right not to be subjected to discrimination.

I argue that discrimination based on sexual orientation, like racial discrimination, runs contrary to the cherished American ideals of justice and equality under the law. The spirit of *Heart of Atlanta* runs through the cases involving discrimination based on sexual orientation and gender identity. Just as business owners have no right to refuse service based on race, they should not be permitted to use their faith (or any other justification) as an excuse for discrimination against LGBT people.

III. First Amendment Defenses to Anti-Discrimination Statutes

For those states that are hesitant to embrace the LGBT community as a protected class in their statutes, a more palatable alternative might be found in limiting the effectiveness of First Amendment defenses to discrimination claims. In order to avoid confusion, public accommodation statutes must be clearly written, with their exceptions and exclusions plainly stated. There should be no question that a business like Elane Photography would be subject to such public accommodations laws since it is an establishment that offers its services to the public and does not fall under any of the common statutory exceptions, such as private clubs or religious institutions. To the extent that *individuals* engage in acts of speech, worship, or association, their rights to express their beliefs ought to be protected. But when that speech or conduct belongs to a business, the government has a compelling interest in eliminating such invidious discrimination.[89] Some business owners (like Elaine Huguenin) might

86. Gloria J. Browne-Marshall, Race, Law, and American Society: 1607 to Present 72 (2007) ("The decision resulted in the desegregation of privately owned businesses with clear connections to interstate commerce.").

87. *Id.* at 73.

88. *Id.* at 74 (discussing lawsuits brought against Cracker Barrel, Denny's, Waffle House, and the Adam's Mark hotel chain).

89. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984) (noting the government's compelling interest in eradicating discrimination in public accommodations).

view this as encroaching on their right to free exercise of religion, but I will show that prohibiting discrimination in public accommodations does not, in fact, violate business owners' First Amendment rights.

A. *Laws Regulate Conduct, Not Beliefs*

The *Romer* Court established that moral disapproval of a certain group is no excuse to deprive the group's members of their rights. Yet, animus against the LGBT community has not disappeared, as evidenced by the many conservative Christian advocacy groups that have emerged with a mission to combat "the gay agenda."[90] Many of these groups assert that any legislation benefitting LGBT people as a class stands in direct conflict with others' right to freely exercise their religion.[91] Since these groups' interpretation of religious text informs them that homosexuality is immoral, they believe that, based on their religious beliefs, they should be able to refuse service, medical treatment, employment, and other accommodations to LGBT people.[92]

It is not the place of the courts to question or validate anyone's religious views.[93] Laws serve to regulate individuals' conduct, not their beliefs.[94] This rule creates a distinction between what one has a right to

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90. *E.g.*, ACLJ: Marriage, http://www.aclj.org/Issues/Issue.aspx?ID=7# (last visited Apr. 16, 2010) ("The American Center for Law and Justice is working aggressively to ensure that marriage remains a core, societal institution that is not redefined to include anything more than a union between one man and one woman."); ADF: Same-Sex "Marriage" – Alliance Defense Fund – Defending Our First Liberty, http://www.alliancedefensefund.org/issues/TraditionalFamily/samesexmarriage.aspx (last visited Apr. 16, 2010) ("There is no more critical battle for our nation's future [than that over same-sex marriage]."); Stand up for Traditional Marriage! — Christian Coalition of America, http://www.cc.org/olcampaign/stand_traditional_marriage (last visited Apr. 16, 2010) ("[R]adical liberals and gay activists are working to overturn the will of the people [by overturning state constitutional amendments banning same-sex marriage].").

91. *See, e.g.*, Focus on the Family's Foundational Values, http://www.focusonthefamily.com/about_us/guiding-principles.aspx (last visited Apr. 16, 2010) ("Christians are called to proclaim the truth and beauty of God's design and the redemption of sexual brokenness in our lives and culture through Jesus Christ.").

92. *See* ADF: Same-Sex "Marriage" – Alliance Defense Fund – Defending Our First Liberty, http://www.alliancedefensefund.org/issues/TraditionalFamily/samesexmarriage.aspx (last visited Apr. 16, 2010) (claiming that Christians are being asked to compromise their beliefs in the workplace or face disciplinary action for "refusing to place foster children in homosexual households[,] asking to be excused from issuing abortion-inducing drugs, and many other . . . activities").

93. *See* Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."). Rather, the courts' job is to determine whether legal regulations place a "substantial burden on the observation of a central religious belief or practice . . . ." *Id.*

94. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

believe and what one has a right to do, in the sense that the former is essentially unlimited and the latter is subject to government regulation for the protection of all citizens.[95] In accordance with this principle, the Supreme Court has held that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest."[96] Laws such as the California Unruh Civil Rights Act or the New Mexico Civil Rights Act were not enacted with the intent to violate the religious views of certain individuals; instead they were put in place to provide protection and a legal remedy for people who face discrimination in the absence of such legal protections.

B. *Discrimination by Private Clubs Upheld in Certain Circumstances*

Some worry that acknowledging LGBT rights under the law is tantamount to forcing tolerance upon an unwilling populace. *Hurley*, however, demonstrated that the government has no right to force a private group to affiliate with others with different or conflicting views.[97] This result came in spite of a Massachusetts public accommodations law forbidding discrimination based on sexual orientation.[98] The Court justified its holding by distinguishing between the Veterans Council's rights under the First Amendment and GLIB's rights under the public accommodation

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95. *Id.* (explaining how conduct may be regulated without burdening essentially constitutional rights). The Court explained:

> In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a state may not, [by] statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a state may by general and nondiscriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.

Id.

96. Employment Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872, 886 n.3 (1990).

97. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 557 (1995) (upholding the right of the Veterans Council to decide *not* to allow gays and lesbians to join its parade).

98. *Id.* at 572 ("[T]he law today prohibits discrimination on the basis of 'race, color, religious creed, national origin, sex, sexual orientation . . . , deafness, blindness or any physical or mental disability or ancestry' in 'the admission of any person to, or treatment in any place of public accommodation . . . .'" (quoting MASS. GEN. LAWS. ANN. ch 272, § 98 (West 2009))).

law.[99] In cases involving private organizations, such as the Veterans Council in *Hurley* or the Boy Scouts in *Boy Scouts of America v. Dale*,[100] courts have allowed discrimination when inclusiveness would undermine the stated mission of an organization.[101] The courts have justified infringement upon a private club's expressive associational rights only when there exists a compelling interest in eliminating the discrimination at issue.[102]

C. *We Reserve the Right to Refuse . . . Medical Treatment?*

When discrimination takes place within the context of a public accommodation, such as a hospital, the results have been mixed, and many cases end up settling outside of the courtroom.[103] In his concurring opinion in

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99. *Id.* at 572–73. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.* at 579.

100. 530 U.S. 640, 644 (2000) (upholding the Boy Scouts of America's right to terminate a gay scout leader as an act of expressive association); *cf.* Annie Laurie Gaylor, *Boy Scouts of America Practices Discrimination*, FREEDOM FROM RELIGION FOUND., http://www.ffrf.org/news/timely-topics/boy-scouts-of-america-practices-discrimination/ (last visited Apr. 16, 2010) (explaining how, despite openly discriminating against homosexuals, the Boy Scouts of America operate with the assistance of publicly funded institutions, such as schools, state parks, and federal buildings); Jon Hurdle, *Scouts Group Sues City*, N.Y. TIMES, May 28, 2008, at A19, *available at* 2008 WLNR 10026998 (reporting that the Boy Scouts of America are suing the city of Philadelphia, which wants to evict the group from government-owned premises because of the Boy Scouts' anti-gay policies). Despite receiving financial benefits from government-funded entities, the Boy Scouts still assert that the organization is a private club with the right to discriminate against anyone whose beliefs or actions run contrary to the Boy Scouts' stated mission. Jon Hurdle, *Scouts Group Sues City*, N.Y. TIMES, May 28, 2008, at A19, *available at* 2008 WLNR 10026998; Mission & Vision Statements, http://www.scouting.org/about/annualreports/previousyears/2003/mission.aspx (last visited Apr. 16, 2010) ("The mission of the Boy Scouts of America is to prepare young people to make ethical and moral choices over their lifetimes by instilling in them the values of the Scout Oath and Law.").

101. Indeed, many proposed and existing discrimination statutes expressly exempt religious organizations and private clubs. *E.g.*, Civil Rights Act of 1964 § 701(b), 42 U.S.C. § 2000e(b) (2006) (exempting "bona fide private membership club[s]" from compliance); Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. § 3(a)(4)(A) (1st Sess. 2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3017ih.txt.pdf.

102. *See, e.g.*, Bd. of Dirs., Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) (concluding that the Rotary Club, a private club, must permit female membership, even though it might infringe upon the club's free association rights, because the government's compelling interest in eliminating discrimination against women outweighs the burden on the club).

103. *E.g.*, Joint Statement of the Parties upon Settlement of the Case at 1, Benitez v. N. Coast Women's Care Med. Group, et al., No. GIC 770165 (San Diego Sup. Ct. Sept.

North Coast Women's Care Medical Group v. Benitez, Justice Baxter pointed out an interesting problem that the majority did not address. The majority reasoned that in a group practice, it would be possible for one doctor to refer his or her patient to someone who would have no objection to treating the patient.[104] Thus, doctors would be able to conscientiously object to certain procedures, and patients would still be assured equal access to treatment. In his concurrence, Justice Baxter asked what should happen in the case of a sole practitioner who objected for religious reasons to treating a patient?[105] Justice Baxter suggested, "One might well conclude that, in that situation, application of the Unruh Civil Rights Act against the doctor would not be the means 'least restrictive' on religion of furthering the state's legitimate interest."[106] This leaves open the question of why a physician in a group practice should be allowed to discriminate, while a physician in a sole practice cannot.

The *Benitez* court made the critically important point that "compliance with a law regulating health care benefits is not speech."[107] While not binding in any New Mexico jurisdiction, this observation from the California Supreme Court, nonetheless, carries some interesting implications when the same reasoning is applied to a case like *Elane Photography*. What if obedience to the law *does* arguably require one to convey a symbolic message, such as that contained in a photograph? Could the New Mexico Supreme Court find that by forcing Elane Photography to convey a symbolic message with which Elaine Huguenin disagrees, Huguenin's free speech and free exercise rights will be violated? The next Part will explore these issues in greater depth and serve as a guide to courts and legislative bodies facing this complex and controversial legal issue.

IV. Free Exercise and Freedom from Discrimination

At this point in the analysis, the issue still remains—how should courts deal with a business that wants to practice what it claims is its owners' First Amendment right to free exercise of religion? Since there is a lack of cases directly on point here, it will be necessary to draw inferences from some of the cases already discussed, in addition to a few others. We know from *Hurley* and *Dale* that private entities that are self-defined with

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2009), *available at* http://data.lambdalegal.org/in-court/downloads/benitez_ca_2090929_joint-statement-upon-settlement.pdf (ending nine years of litigation over a medical practice's refusal to provide services to a lesbian couple).

104. *Benitez*, 189 P.3d at 969.

105. *Id.* at 971 (Baxter, J., concurring) (questioning "whether the state's interest in full and equal medical treatment would compel a physician in sole practice to provide a treatment to which he or she has sincere religious objections").

106. *Id.*

107. *Id.* at 967 (majority opinion) (citation omitted).

a certain mission may lawfully exclude individuals whose presence in the group would undermine that mission. In contrast, many state statutes prohibit businesses that are considered public accommodations, like the hospital in *Benitez*, from discriminating against patrons. But what about businesses like Elane Photography that are open to the public and wish to self-identify in a manner similar to a private club or religious institution?

A. Wilson v. Southwest Airlines *and the Right of Businesses to Self-Identify*

According to testimony from Elaine and Jonathan Huguenin, Elane Photography had an "*unwritten company policy* . . . that Elane Photography would not photograph any image or event that was contrary to the religious beliefs of its co-owners."[108] The New Mexico Human Rights Commission's fact findings indicated that Elane Photography also had a website containing information about Elaine Huguenin, including "her autobiography, her philosophy and her artistic approach to photography."[109] The facts do not indicate whether Elane Photography self-identified as a Christian business or whether Elaine Huguenin went into detail regarding her beliefs as a Christian woman on her business's website.[110] This observation leads to two interesting possibilities. If Elane Photography did not publicly identify itself as a Christian business, or identify its owners as Christians, it seems curious that Huguenin's religious beliefs would only come up when she sought to refuse service to someone based on those beliefs. If, on the other hand, Elane Photography did publicly identify itself as a Christian business, the next question is—may a business that self-identifies as a "Christian business" discriminate against its customers based on its *owners'* religious beliefs?

If Elane Photography or any other public accommodation identifies itself as a Christian business, it will likely run into the same problem Southwest Airlines encountered in *Wilson v. Southwest Airlines*.[111] As part of an attempt to boost business in the 1970s, Southwest implemented a winning marketing strategy projecting "an image of feminine spirit, fun, and sex appeal."[112] Fostering this image, Southwest chose to only hire attrac-

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108. Elane Photography, LLC v. Willock, HRD No. 06-12-20-0685, at 4 (Human Rights Comm'n of N.M. Apr. 4, 2008), *available at* http://media.npr.org/documents/2008/jun/photography.pdf (emphasis added).

109. *Id.* at 3.

110. *Id.*

111. 517 F. Supp. 292, 293 (N.D. Tex. 1981) (finding Southwest Airlines liable for sex discrimination in its policy of only hiring women as flight attendants and ticket agents).

112. *Id.* at 294. The initial promotion materials for Southwest included the slogan, "AT LAST THERE IS SOMEBODY ELSE UP THERE WHO LOVES YOU." *Id.*

tive females to work as flight attendants and ticket agents.[113] There is no doubt that this marketing campaign brought success to Southwest.[114]

Several men brought suit against Southwest because it refused to employ them based on their sex.[115] Southwest argued that female sex appeal was a bona fide occupational qualification for the jobs of flight attendant and ticket agent at Southwest.[116] The problem with Southwest's policy of only hiring young, sexy, female flight attendants and ticket agents was that Southwest failed to prove that men could not perform the same tasks with the same favorable results.[117] Not only did Southwest fail to offer proof that its customers preferred female flight attendants over males, Southwest was unable to prove that sex discrimination in hiring was integral to the future success of its business.[118]

The federal district court articulated a two-part test for determining the validity of discrimination based on sex: "(1) [D]oes the particular job under consideration require that the worker be of one sex only; and if so, (2) is that requirement reasonably necessary to the 'essence' of the employer's business."[119] Southwest ultimately failed the test because the court focused on "the particular service provided and the job tasks and functions involved" in running an airline, rather than the successful marketing campaign that gave rise to the alleged "need" to hire only beautiful women in the first place.[120] The court found that Southwest's goals of "attracting and entertaining male passengers" and "fulfilling customer expectations" were merely "tangential" to the essence of the job and the essence of the commercial airline business.[121] As the court explained, the test is "one of business necessity, not business convenience."[122] The bona fide occupational qualification, as the court made clear, is a narrow exception that applies in only very few circumstances.[123]

A business that self-defines as Christian will likely encounter the same problem—a court may find its self-identification a business *convenience* and not a business *necessity*. If Christianity is not the essence of the busi-

113. *Id.* at 295.

114. *Id.* ("The evidence was undisputed that Southwest's unique, feminized image played . . . an important role in the airline's success.").

115. *Id.* at 293.

116. *Wilson*, 517 F. Supp. at 293.

117. *Id.* at 300.

118. *Id.* at 304.

119. *Id.* at 299 (citations omitted).

120. *Id.* at 302 n.25.

121. Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 302 (N.D. Tex. 1981).

122. *Id.* at 303.

123. *Id.* at 304 ("[T]he [bona fide occupational qualification] exception should not be permitted to 'swallow the rule.'" (quoting Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J., concurring))).

ness or if being Christian is not necessary to enjoy the services provided by the business, then it seems that Christian self-identification, like Southwest Airlines' "sexy" self-identification, will necessarily fail as a defense to discrimination against non-Christian patrons. Furthermore, if a Christian business alleged that discriminating against certain groups constituted a business necessity, that claim would also fail.[124] For evidence, one need only look to the many religious businesses that are not merely surviving, but thriving by offering their goods and services to a broad customer base.[125] Allowing even a self-identified Christian business to discriminate would serve only one goal—to sanction and perpetuate the "invidious discrimination in the distribution of publicly available goods" that the government has a compelling interest to prevent.[126]

Thus, *Wilson* illustrates the problem that arises when a business tries to self-identify in a manner similar to a private club. In essence, Southwest tried to create an elite class of beautiful women who could work as flight attendants or ticket agents.[127] The court found, however, that the exclusion of men from those jobs did nothing to serve the ultimate goal of the business, which was getting passengers from point *A* to point *B* in the most safe, efficient, and convenient manner.[128] A business that attempts to self-identify on religious grounds will face the same legal problems as Southwest Airlines if it cannot surmount the high hurdle of justifying discrimination as a business necessity and *not* mere business convenience.

B. *Free Exercise and Discrimination on College Campuses*

It bears repeating that the law regulates conduct, not beliefs.[129] Sometimes laws that are enacted to protect certain groups of people will place a burden on First Amendment free exercise rights.[130] The government has a compelling interest in eradicating discrimination against all Ameri-

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124. As a matter of common sense, a commercial business would have a difficult time arguing that the survival of its enterprise depends on excluding certain groups of customers from the outset. Generally, businesses grow and thrive by attracting more customers, not by turning customers away.

125. The list of businesses that successfully maintain a religious image *without* discriminating against their customers is nearly endless. There are many businesses that are unapologetically and openly based in faith but do not discriminate.

126. Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984).

127. *Wilson*, 517 F. Supp. at 295.

128. *Id.* at 300.

129. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

130. *Cf.* Hayley Ellison, *Free Exercise of the Courtroom: Why Perpetrators of Religiously Motivated Violence Can No Longer Hide Behind the First Amendment*, 12 SCHOLAR 95, 123 (2009) (challenging the traditional application of the free exercise defense to shield religious groups, particularly minority groups, from tort liability for violence committed against members). Ellison explains:

cans.[131] Discrimination in public accommodations based on the victim's religious beliefs (or lack thereof) is already illegal,[132] and discrimination on other grounds (such as marital status, sexual orientation, or gender identity) is also illegal in many states.[133] The following two cases demonstrate how college campuses have dealt with the conflict between First Amendment free exercise rights and the right to be free from discrimination.

i. The Status of LGBT Student Groups on Private School Campuses—*Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*

The District of Columbia prohibits any educational institution from discriminating against individuals "based upon their actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, *sexual orientation*, *gender identity or expression*, familial status, family responsibilities, political affiliation, source of income, or disability . . . ."[134] This comprehensive statute helps to ensure that educational institutions will be open to all sorts of people and ideas by preserving student group access to vital university resources. With this in mind, two gay rights student groups sued Georgetown University for denying them "University Recognition," which would entitle them to the many benefits of registered organization status.[135] Georgetown felt it was justified in refusing to extend University Recognition to the student groups, since the groups presented a challenge to the religious beliefs upon which the university was founded.[136]

The Court of Appeals for the District of Columbia concluded that Georgetown did not have to grant the groups University Recognition and

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Particularly in minority religious communities, the risk of internal violence is greatly magnified by secrecy and exclusivity. In these cases, where the elements of bad conduct may be secularly judged for reasonableness without implicating the religious beliefs underlying the act itself, the legal system should not excuse violent behavior simply because it is religiously motivated.

Id. (footnotes omitted).

131. Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984).

132. Civil Rights Act of 1964 § 201(a), 42 U.S.C. § 2000a(a) (2006).

133. HRC — Patient Non-Discrimination and State Public Accommodation Law, http://www.hrc.org/issues/12641.htm (last visited Apr. 16, 2010).

134. D.C. CODE § 2-1402.41 (2009) (emphasis added).

135. Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 4 (D.C. Cir. 1987).

136. *Id.* at 4–5. Georgetown University is one of the oldest Roman Catholic institutions of higher learning in the United States. *Id.* at 6. The university's stated mission is: "Georgetown is committed to a view of reality which reflects Catholic and Jesuit influences." *Id.*

the university's attendant religious endorsement.[137] Instead, the court required Georgetown to afford the groups all of the tangible benefits springing from University Recognition, including access to facilities and services available to other recognized student groups on campus.[138] In justifying its holding, the court explained that while the D.C. Human Rights Act "does not seek to compel uniformity in philosophical *attitudes* by force of law, it does require equal *treatment*. Equality of treatment in educational institutions is concretely measured by the nondiscriminatory provision of access to 'facilities and services.'"[139]

Georgetown may be "the nation's oldest Catholic and Jesuit university,"[140] but it is also very much like a business.[141] If Georgetown University, a religious institution and a piece of American history itself, may not discriminate based on the core religious values upon which it was built, why may the owners of Elane Photography?

ii. The Status of Christian Student Groups on Public School Campuses—*Christian Legal Society Chapter of University of California v. Kane*

The Supreme Court recently granted certiorari to hear the Christian Legal Society's claim against California.[142] The Supreme Court only hears a very small percentage of the cases that petition for certiorari, so it is highly significant that it would decide to weigh in on this issue at this moment. The question presented in *Christian Legal Society Chapter of University of California v. Kane* is whether a public law school can be compelled to provide recognition and funding to an organization that openly discriminates against students based on religious affiliation and sexual orientation.[143] In order to become a registered student organization, the University of California Hastings College of the Law (Hastings) requires that student groups comply with the university-wide non-dis-

137. *Id.* at 5.

138. *Id.*

139. *Id.* (quoting D.C. CODE § 1-2520 (1987)) (emphasis in original).

140. Georgetown University: About Georgetown, http://www.georgetown.edu/about.html (last visited Apr. 16, 2010).

141. *See Board Approves Tuition Increases for 2010-2011*, GEORGETOWN.EDU, Mar. 1, 2010, http://explore.georgetown.edu/news/?ID=49130 (stating that Georgetown undergraduate tuition for the 2010-2011 term will be $39,768).

142. Christian Legal Soc'y Chapter v. Martinez, 130 S.Ct. 795, 795 (2009). This case positions the Court to resolve a circuit split over the issue of whether public schools can be compelled to fund discriminatory organizations.

143. Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, No. C 04-04484 JSW, 2006 WL 997217, at *1 (N.D. Cal. 2006), *aff'd*, 319 Fed. Appx. 645 (9th Cir. 2009), *cert. granted sub nom.* Christian Legal Soc'y Chapter of Univ. of Cal. v. Martinez, 130 S.Ct. 795 (Dec. 7, 2009) (No. 08-1371).

crimination policy.[144] The non-discrimination policy prohibits discrimination based on "race, color, religion, national origin, ancestry, disability, age, *sex or sexual orientation.*"[145]

One registered student organizations at Hastings is the Hastings Christian Legal Society (CLS).[146] In addition to requiring that every member of the organization sign a "Statement of Faith," the CLS also "bars individuals who engage in 'unrepentant homosexual conduct' or are members of religions that have tenets which differ from those set forth in the Statement of Faith from becoming members or officers."[147] After informing the CLS that its by-laws were not in compliance with the non-discrimination policy, Hastings withdrew its funding from the CLS.[148] The CLS filed suit, claiming, among other things, that its free exercise of religion rights were violated.[149]

Regarding the free exercise claim, the California district court made reference to the United States Supreme Court's holding in *Employment Division v. Smith* that "a neutral law of general application could prohibit conduct that was prescribed by an individual's religion and such law did not have to be supported by a compelling interest."[150] Furthermore, the court found that the non-discrimination policy at Hastings is a neutral policy of general applicability.[151] Finally, the court reiterated the point so many courts made before it—the regulation of discrimination on the basis of religion is *not* the same as regulating religious beliefs.[152] Thus, by insisting that student organizations comply with a non-discrimination policy in order to receive university funding, the university was not telling its students what to believe—it was merely setting boundaries for their conduct. Similarly, state anti-discrimination laws do not tell state citizens

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144. *Id.* at *2.

145. *Id.* (emphasis added).

146. *Id.*

147. *Id.* at *3. The "Statement of Faith" reads:

> Trusting in Jesus Christ as my Savior, I believe in:
>
> One God, eternally existent in three persons, Father, Son and Holy Spirit. God the Father Almighty, Maker of heaven and earth. The Deity of our Lord, Jesus Christ, God's only Son conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we received eternal life; His bodily resurrection and personal return. The presence and power of the Holy Spirit in the work of regeneration. The Bible as the inspired Word of God.

Id.

148. *Christian Legal Soc'y*, 2006 WL 997217, at *3.

149. *Id.* at *4.

150. *Id.* at *24 (citing Employment Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872, 885 (1990)).

151. *Id.*

152. *Id.*

how to think; rather, they merely serve to regulate citizens' conduct. The right to believe whatever one wants to believe is still a sacred right of each individual that the government cannot take away.

Whatever the Supreme Court decides, its ruling will have a profound impact on state schools throughout the country. Affirming the lower court's holding will mean that in order to obtain university funding, the Christian Legal Society will be required to open its membership to all students, "even if those individuals disagree with the mission of the group."[153] Allowing the Christian Legal Society to continue to discriminate will undermine the spirit of a public school education and the traditional status of universities as places where diverse opinions and ideas are shared in a non-threatening environment in which all are welcome.

V. CONCLUSION

State legislatures can help prevent conflict between business owners and their customers by enacting stronger, clearer, and more expansive public accommodations statutes. Ideally, these statutes could be modeled after the New Mexico,[154] California,[155] and Massachusetts[156] statutes, which include a broad range of protected categories, such as marital status, sexual orientation, and gender identity. In order to ensure that a public accommodation cannot circumvent the law simply by citing the free exercise rights of its owners, legislatures should clearly identify what exactly constitutes a public accommodation and what amounts to a religious or private entity (which *would* be allowed a First Amendment defense to discrimination claims). These measures will serve two important interests: (1) the rights of Americans to freely associate, express themselves, and practice religion will be protected, and (2) the general public will be free from arbitrary discrimination in the realm of public accommodations.

There are several pieces of legislation in the current 111th Congress that would establish protection for members of the LGBT community, including the Employment Non-Discrimination Act,[157] the Military Readiness Enhancement Act,[158] and the Domestic Partners Benefit and

153. Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, 319 Fed. Appx. 645, 645–46 (9th Cir. 2009).

154. N.M. STAT. ANN. § 28-1-7 (West 2009).

155. CAL. CIV. CODE § 51(b) (West 2009).

156. MASS. GEN. LAWS. ANN. ch 272, § 98 (West 2009).

157. H.R. 3017, 111th Cong. (1st Sess. 2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3017ih.txt.pdf.

158. H.R. Res. 1283, 111th Cong. (1st Sess. 2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1283ih.txt.pdf.

Obligations Act.[159] If these bills are signed into law, they will provide a much-needed remedy to American citizens who have faced the precise type of discrimination the government has a compelling interest to prevent.

On October 28, 2009, President Obama signed the National Defense Authorization Act for Fiscal Year 2010 into law.[160] This important law contains the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which carries strict penalties for committing a crime motivated by hatred of a certain group.[161] The Hate Crimes Prevention Act mandates that anyone who "willfully causes bodily injury" to someone "because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability" will face an enhanced sentence of up to ten years in prison.[162] The punishment could be elevated to life in prison if the offense results in death or if it involves kidnapping, attempted kidnapping, aggravated sexual abuse, attempted aggravated sexual abuse, or attempted killing.[163]

As the first major piece of federal LGBT rights legislation, the Hate Crimes Prevention Act has generated controversy from some religious groups alleging that it threatens speech.[164] But Attorney General Eric Holder "has said that any federal hate-crimes law would be used only to prosecute violent acts based on bias, not to prosecute speech based on controversial racial or religious beliefs."[165] Others contend that since murder and kidnapping are already illegal, a hate crimes law is at best redundant and at worst a statement that some murders are more egregious than others—and that some victims deserve more justice than others.[166]

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159. H.R. 2517, 111th Cong. (2d Sess. 2009), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=h111-2517.

160. H.R. 2647, 111th Cong. (1st Sess. 2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2647enr.txt.pdf.

161. Pub. L. No. 111-84, 123 Stat. 2190, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2647enr.txt.pdf.

162. *Id.* § 249(a)(1)(A).

163. *Id.* § 249(a)(1)(B).

164. *Obama Signs Hate Crimes Bill into Law*, CNN, Oct. 28, 2009, http://www.cnn.com/2009/POLITICS/10/28/hate.crimes/index.html ("Several religious groups have expressed concern that a hate crimes law could be used to criminalize conservative speech relating to subjects such as abortion or homosexuality.").

165. *Id.*

166. Jon Ward, *Obama Signs Hate Crimes Bill into Law*, WASH. TIMES, Oct. 29, 2009, at A8, *available at* 2009 WLNR 21559426. Opponents of the hate crimes law argue that "because the new law only adds harsher penalties for acts that are already illegal and subject to criminal prosecution, its main achievement is to move the nation toward the criminalization of politically incorrect speech." *Id.* Furthermore, Erik Stanley, senior

The controversy surrounding the Hate Crimes Prevention Act highlights the important distinction between laws regulating beliefs versus laws regulating conduct. Critics of the Hate Crimes Prevention Act argue that it unlawfully regulates belief because it punishes criminals more severely because of their motives for committing a certain crime.[167] In response, Congress offered a justification for why hate crimes warrant harsher punishment than other crimes not motivated by bias against an identifiable group:

> A prominent characteristic of a violent crime motivated by bias is that it devastates not just the actual victim and the family and friends of the victim, but frequently savages the *community sharing the traits that caused the victim to be selected.*[168]

In other words, hate crimes are worthy of distinction because they victimize an *entire group* of people in a community, not just one individual.[169]

Laws that permit business owners to discriminate can have a similar impact on members of the group facing discrimination.[170] In *Heart of Atlanta*, the Supreme Court upheld the constitutionality of the Civil Rights Act of 1964, finding that discrimination by public accommodators had a stifling effect on interstate commerce.[171] Put bluntly, when people fear for their safety and the safety of their families, they will be less likely to travel through areas where they feel unwelcome or unsafe.[172] Congress offered similar justifications for the Hate Crimes Prevention Act, finding that violent crimes motivated by bias substantially affect interstate commerce in several ways—by impeding the movement of members of the targeted group or forcing them to leave their communities out of fear of violence, by preventing them from obtaining the goods and services they need, and by hindering their ability to seek employment.[173]

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counsel for the Alliance Defense Fund, has stated, "'Bills of this sort are designed to forward a political agenda and silence critics, not combat actual crime.'" *Id.*

167. *Id.* (summarizing the views of critics of the hate crimes law who argue that the law punishes "politically incorrect speech").

168. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act § 4702(5) (emphasis added).

169. Matthew Shepard Foundation: Our Story Main Page, http://www.matthewshepard.org/site/PageServer?pagename=Our_Story_Main_Page (last visited Apr. 16, 2010).

170. *See* Elane Photography, LLC v. Vanessa Willock, HRD No. 06-12-20-0685, at 8 (Human Rights Comm'n of N.M. Apr. 4, 2008), *available at* http://media.npr.org/documents/2008/jun/photography.pdf (relating Vanessa Willock's testimony that she "was shocked, angered and saddened" to receive Huguenin's reply to her email inquiry). Willock testified that she "was also fearful, because she considered the opposition to same-sex [marriage] to be so blatant." *Id.* at 6.

171. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964).

172. *Id.* at 253.

173. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act § 4702(6).

Still, critics insist that legislation like the Hate Crimes Prevention Act threatens free exercise of religion.[174] This could not be further from the truth. The Hate Crimes Prevention Act explicitly states:

> Nothing in this division shall be construed to prohibit any constitutionally protected speech, expressive conduct or activities (regardless of whether compelled by, or central to, a system of religious belief), including the exercise of religion protected by the [F]irst [A]mendment to the Constitution of the United States and peaceful picketing or demonstration. The Constitution of the United States does not protect speech, conduct or activities consisting of planning for, conspiring to commit, or committing an act of violence.[175]

If the "speech" that critics of the Hate Crimes Prevention Act are worried about consists of beating someone to death because of his sexual orientation,[176] then perhaps the Hate Crimes Prevention Act *is* cause for concern. Otherwise, the Hate Crimes Prevention Act preserves the right to still think and believe freely. The role of the government is to step in when that thought or belief manifests itself through violent *conduct.*

A law that protects individuals from discrimination in public accommodations would have a similar form and effect as the Hate Crimes Prevention Act. Such a law would not be enacted for the purpose of burdening free exercise, but instead to promote free and equal access to public accommodations for all Americans. It would not require business owners to go out of their way to hire LGBT people, nor would it force them to change their mission statement or business philosophy. Such a law would merely prohibit business owners from denying potential customers access to goods and services based on their own personal prejudices, and it would promote the government's compelling interest in ending discrimination.

The struggle for equality does not have to be a "zero-sum game" with "one winner and one loser."[177] Recognizing the rights of certain disenfranchised groups does not mean that religious liberties must be sacri-

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174. Jon Ward, *Obama Signs Hate Crimes Bill into Law*, WASH. TIMES, Oct. 29, 2009, at A8, *available at* 2009 WLNR 21559426.

175. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act § 4710(6).

176. Matthew Shepard Foundation: Our Story Main Page, http://www.matthewshepard.org/site/PageServer?pagename=Our_Story_Main_Page (last visited Apr. 16, 2010) (describing the horrific murder of Matthew Shepard, an openly gay college student, in Wyoming in 1998).

177. Karla Dial, *Everyday Heroes*, CITIZENLINK, http://www.citizenlink.org/FOSI/homosexuality/hgeducation/A000009883.cfm (last visited Apr. 16, 2010) ("Clearly, when the pro-gay juggernaut collides with religious liberty, there will be one winner and one loser. This is a zero-sum game.").

ficed. The same principle that protects religious expression also protects LGBT people: that, as Americans, we should not have to deny who we are in order to receive equal treatment under the law.[178]

178. ADF: CLS, ADF Attorneys Available to Media Following Oral Argument at U.S. Supreme Court Monday - Alliance Defense Fund - Defending Our First Liberty, http://www.alliancedefensefund.org/news/story.aspx?cid=5271 (last visited Apr. 16, 2010).