



Winter 2018

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### **Recommended Citation**

Mark A. Strasser, *What's FAIR for Conscientious Objectors Subject to Public Accommodations Laws*, 48 N.M. L. Rev. 124 (2018).  
Available at: <https://digitalrepository.unm.edu/nmlr/vol48/iss1/4>

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# WHAT'S FAIR FOR CONSCIENTIOUS OBJECTORS SUBJECT TO PUBLIC ACCOMMODATIONS LAWS

Mark A. Strasser\*

## INTRODUCTION

Weddings are big business, and those celebrating a same-sex union may wish to engage the services of a baker, a photographer, or a florist.<sup>1</sup> Some vendors with strongly held religious beliefs do not wish to be seen as endorsing same-sex unions, however, and refuse to provide such services, public accommodation laws notwithstanding.<sup>2</sup> Various courts have been forced to address the conditions, if any, under which the right not to speak protected by the First Amendment to the United States Constitution immunizes such vendors from sanction. Thus far, state courts have consistently rejected the proposition that the right not to speak requires such an exemption to be granted, although the courts have differed in their reasoning. This is an area in First Amendment law in great need of clarification, at least in part because so much hangs in the balance. Given the diversity of beliefs in this country, the recognition of a robust right to refuse to engage with other community members so as to avoid a possible imputation of endorsement could further balkanize an increasingly fractured nation.

Part I of this Article discusses the First Amendment protections of the right not to speak. While that right has been recognized, its contours are much less clear than many appreciate. Part II discusses some recent cases in which vendors have refused to provide wedding services for individuals marrying a same-sex partner, local law notwithstanding. While the reach of First Amendment guarantees requires further clarification, these cases fall clearly outside of the range of cases recognized by the Court as receiving that constitutional protection. The Article concludes that while the Court must do a better job explaining the reach of the First Amendment, the recognition of the claimed rights at issue in these cases has no basis in current constitutional law and would be disastrous as a matter of public policy.

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1. See Loren F. Selznick, *Running Mom and Pop Businesses by the Good Book: The Scope of Religious Rights of Business Owners*, 78 ALB. L. REV. 1353, 1361 (2014–2015) (discussing “business owners of faith who provide wedding related services, such as photographers, cake bakers, [and] florists”).

2. Caroline Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 249 (2015) (“Every objecting baker, florist, and photographer who refuses to provide services for a same-sex ceremony resists sending a particular message, namely, ‘I endorse or condone same-sex weddings.’”).

## I. THE RIGHT NOT TO SPEAK

The United States Supreme Court has addressed the right not to speak in several cases. The Court takes the right seriously and affords it constitutional protection. Nonetheless, the Court's jurisprudence has evolved in important ways, requiring previous cases to be understood in a particular light and making the jurisprudence far less robust than might originally have been thought.

### A. Saluting the Flag

*West Virginia State Board of Education v. Barnette*<sup>3</sup> is the seminal case in the right not to speak jurisprudence.<sup>4</sup> At issue was a Board of Education requirement that students salute the flag while saying: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all."<sup>5</sup> A student's refusal to salute the flag and say the pledge could result in his expulsion.<sup>6</sup>

This West Virginia requirement put Jehovah's Witnesses in a difficult position because of their interpretation of a commandment found in Exodus. The commandment reads: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them."<sup>7</sup> Because the Witnesses "consider . . . the flag . . . an 'image' within this command[.]. . . they refuse to salute it."<sup>8</sup> But this meant that Jehovah Witness children who wished to act in accord with their religious beliefs by refusing to salute the flag might thereby put themselves<sup>9</sup> and their parents in legal jeopardy.<sup>10</sup>

Jehovah's Witness parents with children in the public schools challenged the West Virginia requirement.<sup>11</sup> The Court noted that at issue was "a compulsion of

3. 319 U.S. 624 (1943).

4. Peter J. Jenkins, *Morality and Public School Speech: Balancing the Rights of Students, Parents, and Communities*, 2008 B.Y.U. L. REV. 593, 600 (2008) ("[T]he Free Speech Clause of the First Amendment protects students from being compelled to subscribe to an opinion. The seminal Supreme Court opinion on this issue [is] *Barnette*. . ."); David M. Ranscht, *Guidance from an Unlikely Source: Why a Hollywood Satire Can Help Resolve the Circuit Split Over Whether Mandatory Graphic Cigarette Package Warning Labels Violate the First Amendment*, 62 DRAKE L. REV. 267, 295 (2013) ("Compelled-speech jurisprudence utilizes strict scrutiny to evaluate challenges arising when the government effectively tells speakers what they must say. The seminal case in this area is *West Virginia State Board of Education v. Barnette*. . ."); Elyse Stiner, *The Diminishing Free Speech Rights of Military Chaplains in the Aftermath of Repealing "Don't Ask Don't Tell"* 1 U. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 227, 257 (2011) ("The seminal case regarding compelled speech is *West Virginia Board of Education v. Barnette*.").

5. *Barnette*, 319 U.S. at 628–29.

6. *Id.* at 629 ("Failure to conform is 'insubordination' dealt with by expulsion.").

7. *Id.* (citing Exodus, ch. 20, verses 4–5).

8. *Id.*

9. *Id.* ("[T]he expelled child is 'unlawfully absent' and may be proceeded against as a delinquent.").

10. *Id.* ("His parents or guardians are liable to prosecution, and if convicted are subject to fine not exceeding \$50 and jail term not exceeding thirty days.").

11. *Id.* ("Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement of these laws and regulations against Jehovah's Witnesses."). See also *Barnette v. W. Va.*

students to declare a belief.”<sup>12</sup> The difficulty posed by this forced declaration of belief was not that students were asked to utter certain words but that “the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind.”<sup>13</sup> The Court struck down the requirement,<sup>14</sup> reasoning: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>15</sup>

The Court was careful to cabin the right it was recognizing, noting that “[t]he freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual.”<sup>16</sup> Where such conflicts occur, the State may be forced “to determine where the rights of one end and those of another begin.”<sup>17</sup> However, in this case, the right of others to participate in the ceremony would not be affected merely because Jehovah’s Witnesses were exempted from the requirement.<sup>18</sup>

One confusing aspect of *Barnette* involved the Court’s rationale. When the Court suggested that public officials are prohibited from “prescrib[ing] what shall be orthodox in politics, nationalism, religion, or other matters of opinion or forc[ing] citizens to confess by word or act their faith therein,”<sup>19</sup> the Court was not entirely clear about what the officials were forcing citizens to confess. While the Witnesses believed that saluting the flag would inappropriately put the law of man over the Law of God,<sup>20</sup> it was not clear that the officials viewed the salute that way or that the public did either.<sup>21</sup> Certainly, a student saluting the flag while reciting the Pledge involves some kind of expression,<sup>22</sup> although individuals might disagree about the content of that expression, for example, whether by saluting the flag one was

State Bd. of Educ., 47 F. Supp. 251, 252 (S.D. W. Va. 1942) (“This is a suit by three persons belonging to the sect known as ‘Jehovah’s Witnesses’, who have children attending the public schools of West Virginia, against the Board of Education of that state.”), *aff’d*, 319 U.S. 624 (1943).

12. *Barnette*, 319 U.S. at 631.

13. *Id.* at 633.

14. *Id.* at 642 (“[T]he action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”).

15. *Id.*

16. *Id.* at 630.

17. *Id.*

18. *Id.* at 630 (“But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so.”).

19. *Id.* at 642.

20. *Cf. id.* at 629 (“The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government.”).

21. *Cf. Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D. W. Va. 1942) (“[F]rom our point of view, we see nothing in the salute which could reasonably be held a violation of any of the commandments in the Bible or of any of the duties owing by man to his Maker.”); *see also* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 601 (1940) (“[B]y this law the state seeks to coerce these children to express a sentiment which, *as they interpret it*, they do not entertain, and which violates their deepest religious convictions.” (Stone, J., dissenting) (emphasis added)), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

22. *See Barnette*, 319 U.S. at 632 (“There is no doubt that, in connection with the pledges, the flag salute is a form of utterance.”).

undermining the Witnesses' beliefs by affirming the superiority of man-made law over God's law<sup>23</sup> or, instead, was merely affirming one's patriotism.

### B. Promulgating the State Motto

The next in this line of cases, *Wooley v. Maynard*,<sup>24</sup> not only did not clarify this issue but added additional elements of possible confusion. At issue was a New Hampshire law requiring "noncommercial vehicles [to] bear license plates embossed with the state motto, 'Live Free or Die.'"<sup>25</sup> Another law prohibited individuals from obscuring letters or numbers on the license plate<sup>26</sup> including the state motto.<sup>27</sup>

George and Maxine Maynard, Jehovah's Witnesses, considered the state motto repugnant to their religious beliefs and began covering it up.<sup>28</sup> Maynard was charged with and convicted of covering up the motto and eventually served jail time for doing so.<sup>29</sup> The Maynards filed in federal court to enjoin enforcement of the New Hampshire statute against them.<sup>30</sup> The District Court found in favor of the Maynards.<sup>31</sup>

The Supreme Court held that a state may not "require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."<sup>32</sup> New Hampshire's requiring George Maynard to have the state motto "Live Free or Die" unobscured on his license plate forced him "as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable."<sup>33</sup> Because the New Hampshire statute "in effect require[d] that appellees use their private property as a 'mobile billboard' for the State's ideological message—or suffer a penalty,"<sup>34</sup> the Court found that the New Hampshire law

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23. See Paul M. Frazier, *The Stubborn Child of Frazier v. Winn: How and Why Some Parental Consent Requirements Are Unconstitutional*, 33 WHITTIER L. REV. 209, 213 (2011) (explaining that according to the Jehovah's Witnesses' understanding "[a]ny profession of loyalty to man-made government must also acknowledge Jehovah God as the object of their supreme devotion and allegiance").

24. 430 U.S. 705 (1977).

25. *Id.* at 707.

26. *Id.* ("Another New Hampshire statute makes it a misdemeanor 'knowingly (to obscure) . . . the figures or letters on any number plate.'") (citing N.H. REV. STAT. ANN. § 262:27-c (Supp. 1975)).

27. *Id.* ("The term 'letters' in this section has been interpreted by the State's highest court to include the state motto.") (citing *State v. Hoskin*, 295 A.2d 454 (N.H. 1972)).

28. *Id.* at 707–08.

29. *Id.* at 708 ("Maynard informed the court that, as a matter of conscience, he refused to pay the two fines. The court thereupon sentenced him to jail for a period of 15 days. He has served the full sentence.").

30. *Id.* at 709.

31. *Maynard v. Wooley*, 406 F. Supp. 1381, 1389 (D. N.H. 1976) ("[D]efendants are enjoined from arresting and prosecuting plaintiffs at any time in the future for covering over that portion of their license plates that contains the motto 'Live Free or Die.'"), *aff'd*, 430 U.S. 705 (1977).

32. *Wooley*, 430 U.S. at 713.

33. *Id.* at 715.

34. *Id.*

violated First Amendment guarantees.<sup>35</sup> Here, the Court suggested that individuals could not be forced by the state to use their private property to promulgate a message with which they disagreed.<sup>36</sup>

Yet, the Court offered an additional rationale that was more clearly connected to the right not to speak recognized in *Barnette*. The *Wooley* Court explained: “The right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”<sup>37</sup> While admitting that “[c]ompelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate”<sup>38</sup> the Court believed that “the difference [was] essentially one of degree.”<sup>39</sup> The New Hampshire law could not pass muster because the State had “invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”<sup>40</sup> But the right not to have the sphere of intellect and spirit invaded by the State required further explication. Was the difficulty that the Maynards were forced to affirm the message on the plate? In his dissent, Justice Rehnquist addressed that concern, arguing that “[t]he State has not forced appellees to ‘say’ anything; and it has not forced them to communicate ideas with nonverbal actions reasonably likened to ‘speech.’”<sup>41</sup> In this case, there was “no affirmation of belief.”<sup>42</sup>

Just as the First Amendment protected *Barnette*, “[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.”<sup>43</sup> Further, as had been true in *Barnette*, it did not matter that most people did not find the contested practice objectionable.<sup>44</sup> Instead, “where the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.”<sup>45</sup> Here, the Court’s focus was not on whether the Maynards were forced to affirm something that they did not believe but on whether they were forced to promulgate a message of the State with which they disagreed.

An individual may have different reasons to oppose being forced to carry a state message that she rejects. She might object to being used that way even when it

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35. *Id.* (“The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.”).

36. See Robert Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association*, 2005 SUP. CT. REV. 195, 210 (2005) (“This suggests that *Wooley* is not so much about George Maynard’s First Amendment interest in not being forced to speak as it is about his First Amendment interest in not having his property appropriated to subsidize government speech.”).

37. *Wooley*, 430 U.S. at 714 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

38. *Id.* at 715.

39. *Id.*

40. *Id.* (citing *Barnette*, 319 U.S. at 642).

41. *Id.* at 720 (Rehnquist, J., dissenting).

42. *Id.* at 721 (Rehnquist, J., dissenting).

43. *Id.* at 715.

44. See *id.* (“The fact that most individuals agree with the thrust of New Hampshire’s motto is not the test; most Americans also find the flag salute acceptable.”).

45. *Id.* at 717.

is absolutely clear to everyone that she disagrees with the message. Or, she might fear that onlookers would wrongly infer that she agrees with the message. As Justice Rehnquist pointed out in dissent, if the difficulty were that individuals might wrongly attribute the state motto to the Maynards, the “appellees could place on their bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto ‘Live Free or Die’ and that they violently disagree with the connotations of that motto.”<sup>46</sup> Thus, were the only difficulty that the Maynards feared that others would mistakenly attribute to them endorsement of the state motto, there were ways other than obscuring the license plate to avoid that mistaken attribution of viewpoint.

*Wooley* and *Barnette* are analogous in some important respects. In each case, the state was prescribing particular words that had to be expressed.<sup>47</sup> Further, those words were in conflict with beliefs that the individuals actually held.<sup>48</sup>

Yet, the cases are not analogous in other respects. In *Barnette*, the Court suggested that the child was required to affirm particular beliefs,<sup>49</sup> whereas in *Wooley* the Court did not suggest that the motto on the license plate forced the Maynards to affirm certain beliefs.<sup>50</sup> If the evil addressed in *Barnette* only involved preventing the State from forcing individuals to make affirmations that they did not believe, then *Barnette* would not control the result in *Wooley*.<sup>51</sup>

The harm imposed in *Wooley* was arguably greater than the harm imposed in *Barnette* in at least one respect. While the pledge and salute at issue in *Barnette* were to be part of the regular program in the schools,<sup>52</sup> there was no suggestion that it had to be done frequently throughout the day. In contrast, the *Wooley* Court noted that the “state measure . . . forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”<sup>53</sup> Perhaps the harms in *Barnette* and *Wooley* were related but distinct. In *Barnette*, the State required an affirmation of something disbelieved, whereas in *Wooley* the State required unwilling individuals to be promulgators of a state message throughout the day or, at least, whenever their car was in public.

It is unclear whether the difficulty posed in *Wooley* was that onlookers would wrongly attribute a view to the Maynards or, instead, that the state was

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46. *Id.* at 722 (Rehnquist, J., dissenting).

47. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (“*Wooley*, however, was a case in which the government itself prescribed the message, . . . .”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

48. See *Barnette*, 319 U.S. at 629; *Wooley*, 430 U.S. at 707 (“The Maynards consider the New Hampshire State motto to be repugnant to their moral, religious, and political beliefs.”).

49. See *Barnette*, 319 U.S. at 633.

50. See *Wooley*, 430 U.S. at 721 (Rehnquist, J., dissenting).

51. See *id.* at 721 (Rehnquist, J., dissenting) (“[H]aving recognized the rather obvious differences between these two cases, the Court does not explain why the same result should obtain.”).

52. See *Barnette*, 319 U.S. at 626.

53. *Wooley*, 430 U.S. at 715.

requiring the Maynards to be a mobile billboard for a message crafted by the state.<sup>54</sup> The former interpretation of *Wooley*, although possible, seems less persuasive<sup>55</sup> both because the message on the plate would more likely be attributed to the state than the Maynards<sup>56</sup> and because any misattribution of message could be corrected by affixing the bumper sticker suggested by Justice Rehnquist.<sup>57</sup>

### C. Hosting the Speech of Others

The Court explained its decision in *Wooley* more fully in *PruneYard Shopping Center v. Robins*,<sup>58</sup> although a little background is necessary to see how *Wooley* was even implicated. Fred Sahadi owned the PruneYard Shopping Center.<sup>59</sup> The Shopping Center had a policy that no one was permitted to engage in expressive activity unrelated to the center's commercial purposes.<sup>60</sup>

Some high school students set up a card table in a central courtyard at the mall seeking to promote opposition to a United Nations resolution against Zionism.<sup>61</sup> The California Supreme Court held that the students' right to engage in this form of expression was protected by the California Constitution.<sup>62</sup> At issue was whether the mall owner's First Amendment right not to speak was violated by the state requirement that he permit individuals to present a message with which he disagreed.<sup>63</sup>

The mall owner argued that the *Wooley* Court had concluded that "a State may not constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."<sup>64</sup> But the *PruneYard* Court explained that in *Maynard* "the government itself prescribed the message, [and] required it to be displayed openly on appellee's personal property that was used

54. See Mark Strasser, *Ignore the Man Behind the Curtain: On the Government Speech Doctrine and What It Licenses*, 21 B.U. PUB. INT. L.J. 85, 122 (2011) ("One cannot tell whether the constitutional worry was that individuals were required to convey the state's message against their will . . . or whether, instead, the Court was worried that the messenger would be wrongly thought to agree with the message.").

55. See Steven H. Shiffrin, *What Is Wrong with Compelled Speech?*, 29 J.L. & POL. 499, 505 (2014) ("In *Wooley v. Maynard*, it is doubtful that anyone thinks a motorist subscribes to the motto 'Live Free or Die' merely because the governmental slogan appears on his license plate.").

56. Mark Strasser, *Passive Observers, Passive Displays, and the Establishment Clause*, 14 LEWIS & CLARK L. REV. 1123, 1131 (2010) (suggesting that "the views exhibited on the license plate were much more likely to be attributed to the state than to the Maynards").

57. See *supra* note 46.

58. 447 U.S. 74 (1980).

59. *Id.* at 77 ("The PruneYard is owned by appellant Fred Sahadi.").

60. *Id.* ("The PruneYard is open to the public for the purpose of encouraging the patronizing of its commercial establishments. It has a policy not to permit any visitor or tenant to engage in any publicly expressive activity . . . that is not directly related to its commercial purposes.").

61. *Id.*

62. *Id.* at 78 ("The California Supreme Court [held] . . . that the California Constitution protects 'speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.' It concluded that appellees were entitled to conduct their activity on PruneYard property.") (citing *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980)).

63. *Id.* at 85 ("Appellants finally contend that a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others.").

64. *Id.* at 86–87.

‘as part of his daily life. . . .’<sup>65</sup> In contrast, in this case, “the shopping center . . . is not limited to the personal use of appellants[,] . . . [but] is instead a business establishment that is open to the public to come and go as they please.”<sup>66</sup> In addition, “[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner.”<sup>67</sup> Further, in case the owner was worried that the views might falsely be attributed to him, he could “expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand.”<sup>68</sup> The mall owner “could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.”<sup>69</sup>

In *Wooley*, the possibility that the Maynards could disclaim the message did not suffice to save the state law from invalidation, which suggests that the state prescribing the message and requiring its dissemination were among the factors convincing the Court that the statute could not stand.<sup>70</sup> In *PruneYard*, where the state was neither prescribing the message nor requiring the dissemination of any particular content, the ability of the mall owner to engage in self-help and disclaim sponsorship helped save the California requirement from invalidation.<sup>71</sup>

#### D. Hosting State Employers and Disclaiming Messages

One issue involves clarifying which individual is making a clearly identifiable message, e.g., opposition to a United Nations resolution. A different issue involves whether a particular activity in fact communicates a message, a matter that was analyzed in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*.<sup>72</sup>

At issue in *FAIR* was a congressional requirement (the “Solomon Amendment”<sup>73</sup>) that “[i]n order for a law school and its university to receive federal funding, the law school must offer military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access.”<sup>74</sup> At the time, the military barred those with a same-sex orientation from serving.<sup>75</sup> This put law schools with policies banning orientation discrimination in a

65. *Id.* at 87.

66. *Id.*

67. *Id.* See also Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847, 857 (2011) (“[T]he character of the shopping center as a commercial establishment open to the public meant that observers would probably not identify the views expressed by the students with those of PruneYard’s owner.”).

68. *PruneYard*, 447 U.S. at 87. See also Stern, *supra* note 67, at 857 (“PruneYard could dispel any danger that someone might misinterpret a speaker’s views as PruneYard’s own simply by posting a disclaimer of such a connection.”).

69. *PruneYard*, 447 U.S. at 87.

70. See *supra* note 33 and accompanying text.

71. See *supra* note 69 and accompanying text.

72. 547 U.S. 47 (2006).

73. See *id.* at 51.

74. *Id.* at 55.

75. *Id.* at 52 n.1 (“Under this policy, a person generally may not serve in the Armed Forces if he has engaged in homosexual acts, stated that he is a homosexual, or married a person of the same sex.”).

difficult position. If they allowed the military to interview on-campus, they would be permitting an employer who flouted their nondiscrimination policy to use their facilities. FAIR, “an association of law schools and law faculties,”<sup>76</sup> challenged the Solomon Amendment “because it forced law schools to choose between exercising their First Amendment right to decide whether to disseminate or accommodate a military recruiter’s message, and ensuring the availability of federal funding for their universities.”<sup>77</sup>

The Court explained that the “Solomon Amendment neither limits what law schools may say nor requires them to say anything.”<sup>78</sup> But the Court’s claim was not entirely accurate in that the amendment required law schools to “offer military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access.”<sup>79</sup> That meant that if law schools “send e-mails or post notices on bulletin boards on [a non-military] employer’s behalf,”<sup>80</sup> then they “must also send e-mails and post notices on behalf of the military.”<sup>81</sup> That said, however, the Government “does not dictate the content of the speech at all, which is only ‘compelled’ if, and to the extent, the school provides such speech for other recruiters.”<sup>82</sup>

The FAIR Court explained that any speech required of the law schools, for example, “[t]he U.S. Army recruiter will meet interested students in Room 123 at 11 a.m.,”<sup>83</sup> would merely be “incidental to the Solomon Amendment’s regulation of conduct.”<sup>84</sup> Not only did the Congress refuse to specify the particular content that had to be included in any communications when the law schools were fulfilling the requirement that military employers be given equal access, but there was “nothing in this case approaching a Government-mandated pledge or motto that the school must endorse.”<sup>85</sup>

When referring to the Government-mandated pledge or motto, the FAIR Court was referring to *Barnette* and *Wooley*.<sup>86</sup> But by contrasting what was at issue in FAIR with what had been issue in *Barnette* and *Wooley* by saying that the former, unlike the latter, involved the absence of a mandated pledge or motto that had to be endorsed implies that the difficulty posed in *Wooley* was that the Maynards had to endorse “Live Free or Die” rather than that they had to be a mobile billboard for the State. However, the FAIR Court also described *Wooley* as involving New Hampshire’s “forcing a Jehovah’s Witness to display the motto ‘Live Free or Die,’”<sup>87</sup> so it was not clear whether the Court believed that being forced to display the motto

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76. *Id.* at 52.

77. *Id.* at 53.

78. *Id.*

79. *Id.* at 55.

80. *Id.* at 61.

81. *Id.*

82. *Id.* at 62.

83. *Id.*

84. *Id.* at 62.

85. *Id.*

86. *See id.* (“This sort of recruiting assistance, however, is a far cry from the compelled speech in *Barnette* and *Wooley*.”).

87. *Id.*

was in effect a forced endorsement or whether, instead, the Court did not believe that New Hampshire was requiring the Maynards to affirm the motto.

The *FAIR* Court reasoned that “[t]he compelled-speech violation in . . . [other] cases, . . . resulted from the fact that the complaining speaker’s own message was affected by the speech it was forced to accommodate.”<sup>88</sup> Here, however, because “[a] law school’s recruiting services lack the expressive quality of a parade, . . . its accommodation of a military recruiter’s message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.”<sup>89</sup> The law schools disagreed, noting that “if they treat military and nonmilitary recruiters alike in order to comply with the Solomon Amendment, they could be viewed as sending the message that they see nothing wrong with the military’s policies, when they do.”<sup>90</sup> But the Court was unpersuaded, suggesting that law students, like high school students, “can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy.”<sup>91</sup> Further, it was not as if law schools were precluded from expressly disavowing the military policy—“nothing in the Solomon Amendment restricts what the law schools may say about the military’s policies.”<sup>92</sup> In *FAIR*, because the government was not dictating a particular message and because law schools were free to disavow the message that they thought might wrongly be attributed to them, the government was not running afoul of First Amendment guarantees.

Not only were law schools free to express their disagreement with military policy, but the Court rejected that law schools were engaging in expressive conduct by hosting military recruiters. That the law schools believed that such activity was “expressive” was not dispositive—the Court itself had to “consider whether the expressive nature of the *conduct* regulated by the statute brings that conduct within the First Amendment’s protection.”<sup>93</sup>

The *FAIR* Court rejected that “conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”<sup>94</sup> Instead, the Court “extend[s] First Amendment protection only to conduct that is inherently expressive.”<sup>95</sup> Conduct is inherently expressive when no accompanying speech is necessary to explain it—“[t]he fact that . . . explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection. . . .”<sup>96</sup>

The messages, including the time and place that the military would meet with students seeking employment, were inherently expressive.<sup>97</sup> But that inherently expressive statement did not itself speak to the law school message that the

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88. *Id.* at 63.

89. *Id.* at 64.

90. *Id.* at 64–65.

91. *Id.* at 65.

92. *Id.*

93. *Id.*

94. *Id.* at 65–66 (citing *United States v. O’Brien*, 391 U.S. 367, 376 (1968)).

95. *Id.* at 66.

96. *Id.*

97. *Id.* at 62.

Government was allegedly trying to change, namely, the school's position on the military policy. One could not tell what view, if any, the school had about the military's discriminatory policy from a school announcement that military representatives will be in room 123 for their scheduled appointments.

Prior to the passage of the Solomon Amendment, "law schools 'expressed' their disagreement with the military by treating military recruiters differently from other recruiters."<sup>98</sup> However, the mere fact of differential treatment would not alone be enough to establish the intended message—such "actions were expressive only because the law schools accompanied their conduct with speech explaining it."<sup>99</sup> For example,

[a]n observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.<sup>100</sup>

By the same token, a law school choice to permit the military to interview on campus might be interpreted in a variety of ways. It might mean that while the law school disagrees with the military's discriminatory policy, the law school (or, perhaps, the university as a whole) cannot afford to do without the federal funding that would be lost were the school to refuse to host the military recruiters on campus. Or, it might mean that the school agrees with the military policy. Or, it might mean that while the school has no opinion about the military policy, it wants to maximize employment opportunities for its students. Or, it might mean something else.

*FAIR* is important because it limits what qualifies as expressive conduct for First Amendment purposes. It was not enough that the law schools believed that their doing something (permitting the military to interview on campus) communicated a message that they did not wish to send. Nor was it enough that their doing something else (prohibiting the military from interviewing on campus) might have communicated a different message. If the alleged message could only be understood with explanatory speech accompanying it, then the requirement that the school do something that it did not want to do was not in violation of First Amendment guarantees because the required conduct was not itself sufficiently expressive to trigger the relevant guarantees. Further, merely because the policy regulating conduct might incidentally require law schools to speak would not trigger First Amendment guarantees.

While *Barnette* and *Wooley* both stand for the proposition that the First Amendment protects the right not to speak under certain conditions, those conditions need to be spelled out more fully. Both of the cases involved government-prescribed speech, so their applicability in contexts where the government is not specifying contents of others' speech is an open question. It is simply unclear whether an important aspect of the right not to speak jurisprudence is that an individual is being

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98. *Id.* at 66.

99. *Id.*

100. *Id.*

asked to expressly affirm something contrary to his or her belief. Nor is it clear whether an important part of that analysis involves whether the activity would be understood by others (without further explanatory statement) as an affirmation.

Subsequent cases like *PruneYard* and *FAIR* emphasize ways in which one can avoid the misattribution of endorsement through disavowal. Even where one does not expressly disavow a particular position, one can assume that the public will take into account background law when attributing endorsement. If one is a mall owner in a state requiring such owners to permit individuals to express political or social views on site, then the public will not assume that views expressed at the mall are endorsed by the mall owner. A law school that is required to permit the military to interview students on campus will not be assumed to agree with military policy.

The First Amendment protects inherently expressive conduct, but the public must be able to understand the conduct's message without explanatory speech accompanying it. Where explanatory speech is necessary, the activity itself is likely not triggering First Amendment protection. Where the public does not understand the message without accompanying explanatory language, a challenged regulation is unlikely to be construed as forcing one to change one's message if only because the explanatory language (which would have been necessary anyway) can make clear what one does or does not believe. Further, regulations of conduct incidentally affecting speech need not thereby trigger First Amendment guarantees.

## II. VENDORS AND CONSCIENTIOUS OBJECTION TO PROVIDING WEDDING-RELATED SERVICES

Recently, a number of vendors have refused as a matter of conscience to provide services to same-sex couples who wished to celebrate marriage or commitment ceremonies. Because these vendors did not approve of same-sex marriage, they believed that their providing photos, flowers, or a cake would have communicated a message that they did not wish to communicate. Courts in differing jurisdictions have sought to determine whether First Amendment guarantees preclude the imposition of sanctions against such vendors, even when those refusals are in violation of local law.

### A. Photographic Services

At issue in *Elane Photography, LLC v. Willock*<sup>101</sup> was whether a commercial photographer violated the New Mexico public accommodations law by refusing to provide photographic services to a same-sex couple.<sup>102</sup> While the two women denied service in this case sought to have their commitment ceremony rather than their wedding photographed, the New Mexico Supreme Court decided to “use the terms ‘wedding’ and ‘commitment ceremony’ interchangeably”<sup>103</sup> and analyzed the question as if the photographer had refused to photograph a same-sex wedding.<sup>104</sup>

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101. 2013-NMSC-040, 309 P.3d 53.

102. *Id.* ¶ 1.

103. *Id.* ¶ 7 n.1.

104. *See id.* ¶ 15 (“Elane Photography is primarily a wedding photography business. It provides wedding photography services to heterosexual couples, but it refuses to work with homosexual couples under equivalent circumstances.”).

The first question was whether the public accommodations law even covered the photographer in question. Because the photographer offered services to the public, the photographer was subject to that antidiscrimination law.<sup>105</sup> Indeed, the studio did not even contest that its services were subject to the public accommodations statute.<sup>106</sup>

Elane Photography claimed that it did not violate the New Mexico Human Rights Act because it did not discriminate on the basis of sexual orientation but, rather, it was simply acting in light of its religious beliefs against same-sex marriage.<sup>107</sup> After all, “it would have taken portrait photographs and performed other services for same-sex customers, so long as they did not request photographs that involved or endorsed same-sex weddings.”<sup>108</sup> Further, the studio would have refused to take a photo of heterosexuals if such a photo would have suggested endorsement of same-sex marriage. For example, the studio “would have declined the request even if the ceremony was part of a movie and the actors playing the same-sex couple were heterosexual.”<sup>109</sup>

The New Mexico Supreme Court was “not persuaded by Elane Photography’s argument that it does not violate the NMHRA because it will photograph a gay person (for example, in single-person portraits) so long as the photographs do not reflect the client’s sexual preferences.”<sup>110</sup> Once the court determined that the photographer’s refusal constituted orientation discrimination under the law, the question then became whether the studio’s First Amendment rights precluded application of the NMHRA against it in this particular context.<sup>111</sup>

Elane Photography claimed that it would be forced to say something contrary to belief if forced to photograph same-sex weddings.<sup>112</sup> Because photography is an expressive art form<sup>113</sup> and because Elane Photography “creates and edits photographs for its clients so as to tell a positive story about each wedding it photographs,”<sup>114</sup> Elane Photography claimed that it would be in an impossible

105. *See id.* ¶ 6 (“‘Public accommodation’ is defined in the NMHRA 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.’”) (citing N.M. STAT. ANN. § 28-1-2(H) (2011)). *See also id.* (“a business that elects not to offer its goods or services to the public is not subject to the NMHRA”).

106. *Id.* ¶ 1 (“Elane Photography . . . does not contest its public accommodation status under the NMHRA.”).

107. *Id.* ¶ 14 (“Elane Photography argues that it did not violate the NMHRA because it did not discriminate on the basis of sexual orientation when it refused service to Willock.”).

108. *Id.*

109. *Id.* (quoting transcript of Commission’s January 28, 2008 hearing at 125).

110. *Id.* ¶ 19.

111. *See id.* ¶ 1 (“The questions presented [include] . . . whether this application of the NMHRA violates either the Free Speech or the Free Exercise Clause of the First Amendment to the United States Constitution. . . .”).

112. *Id.* ¶ 21 (“Elane Photography argues that the NMHRA compels it to speak in violation of the First Amendment by requiring it to photograph a same-sex commitment ceremony, even though it is against the owners’ personal beliefs.”).

113. *Id.* ¶ 23 (“Elane Photography observes that photography is an expressive art form and that photographs can fall within the constitutional protections of free speech.”).

114. *Id.*

position, because “the company and its owners would prefer not to send a positive message about same-sex weddings or same-sex marriage.”<sup>115</sup>

Elane Photography read the governing case law to stand for the proposition that “the government may not compel people ‘to engage in unwanted expression.’”<sup>116</sup> But the New Mexico Supreme Court offered a narrower reading of *Wooley* and *Barnette* that merely precluded the government from “prescrib[ing] what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>117</sup> The difference in the two interpretations was important because the New Mexico Human Rights Act did “not require Elane Photography to recite or display any message.”<sup>118</sup> Indeed that law did “not even require Elane Photography to take photographs,”<sup>119</sup> but merely “mandate[d] that if Elane Photography operates a business as a public accommodation, it cannot discriminate against potential clients based on their sexual orientation.”<sup>120</sup>

The New Mexico Supreme Court likened Elane Photography to the law schools in *FAIR*.<sup>121</sup> Not only was Elane (like the law schools) not forced to express the government’s approved message,<sup>122</sup> but Elane Photography could publicize its own position by posting a disclaimer that it did not approve of same-sex marriage.<sup>123</sup>

Suppose that Elane Photography did not wish to do what the New Mexico Supreme Court said that it could do, namely, publicize its opposition to same-sex unions. Even so, the public still would be unlikely to mistakenly attribute approval of same-sex unions to the studio. First, as was analogously true in *FAIR*, the public would not know Elane Photography’s view on same-sex unions one way or the other from the fact of its having photographed the ceremony in question,<sup>124</sup> especially given the public accommodations law. Perhaps the studio approved of same-sex marriage. Perhaps the studio disapproved of same-sex marriage, but nonetheless provided the service because of the law.<sup>125</sup> Or, perhaps the studio needed the work. Further, the public would not know what to make of Elane Photography’s not having

115. *Id.*

116. *Id.* ¶ 27.

117. *Id.* (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* ¶ 29 (“Elane Photography’s argument here is more analogous to the claims raised by the law schools in *Rumsfeld*.”). See also Shiffirin, *supra* note 55, at 509 (“The *FAIR* case speaks loudly against the photographer’s claim in *Willcock*.”).

122. *Elane Photography*, 2013-NMSC-040, ¶ 31 (“[T]he NMHRA 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.” (citing N.M. STAT. ANN. § 28-1-7(F) (2011))).

123. *Id.* ¶ 3 (“They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws.”).

124. Mark Strasser, *Speech, Association, Conscience, and the First Amendment’s Orientation*, 91 DENV. U. L. REV. 495, 528 (2014) (“Because it would be unlikely for an observer to impute a particular view to the photographer, the United States Supreme Court would reject that this would be a case of compelled speech, just as the *FAIR* Court rejected that law schools were being compelled to speak.”).

125. Corbin, *supra* note 2, at 276 (“But just because the photographer has communicated something, it does not mean it is her approval of same-sex marriage.”).

photographed such ceremonies—perhaps the studio was taking a religious stand against such unions or perhaps the studio was taking no such stand but simply had not been asked to take the photographs. It is not as if the photographs themselves are routinely published or displayed to the public, because they are for the clients and the clients' friends and family,<sup>126</sup> so the public would likely not be thinking about the studio's views one way or another. The studio, itself, chose the photos used to advertise its services to the public, and the public accommodations law did not require that the studio include photos of same-sex couples within its advertising.<sup>127</sup> In short, the studio's taking the photographs would not itself have communicated a message in support of same-sex unions and the studio's failure to take photos would not itself have communicated opposition to such unions. The studio could have included explanatory language that would have communicated the desired message, but that was also true of the law schools in *FAIR*.

Elane Photography was not exempted from the New Mexico Human Rights Act because of the artistic nature of photography<sup>128</sup>—the New Mexico court explained that Elane Photography's "provision of services can be regulated, even though those services include artistic and creative work."<sup>129</sup> While the studio had not wanted to portray same-sex unions in a positive light, an analogous point might have been made about the law schools who had not wanted to portray the military in a positive light by permitting them to interview on-campus. While both Elane Photography and the law schools understood which messages they wanted to send and which messages they did not want to send, the contents of those messages would not have been understood by the public without explanation.

If those who engage in creative or artistic work are exempted from public accommodations laws, then such laws will not apply to a whole host of people. Many individuals use judgment and creativity in their jobs,<sup>130</sup> and many individuals provide artistic or expressive services.<sup>131</sup> Recognition of such an exemption would severely dilute if not destroy the efficacy of public accommodations law.<sup>132</sup>

The *Elane Photography* court recognized that there would be important implications if businesses were permitted to refuse service to those whom the businesses do not wish to endorse. For example, "a photographer who was a Klan member [could] refuse to photograph an African-American customer's wedding, graduation, newborn child, or other event if the photographer felt that the photographs would cast African-Americans in a positive light or be interpreted as

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126. *Elane Photography*, 2013-NMSC-040, ¶ 42 ("Elane Photography does not routinely publish for or display its wedding photographs to the public. Instead, it creates an album for each customer and posts the photographs on a password-protected website for the customers and their friends and family to view.").

127. *Id.* ¶ 43 ("[W]hen Elane Photography displays its photographs publicly and on its own behalf, rather than for a client, such as in advertising, its choices of which photographs to display are entirely its own. The NMHRA does not require Elane Photography to either include photographs of same-sex couples in its advertisements or display them in its studio.").

128. *Id.* ¶ 52 ("There are no cases from either New Mexico jurisprudence or that of the United States Supreme Court that would compel a conclusion that the NMHRA violates Elane Photography's freedom of speech because it is engaged in a creative and expressive profession.").

129. *Id.* ¶ 35.

130. See Strasser, *supra* note 124, at 524–25.

131. *Id.* at 525.

132. *Id.*

the photographer's endorsement of African-Americans."<sup>133</sup> Examples in addition to those provided by the New Mexico court readily come to mind—photographers could refuse to photograph events involving individuals of other faiths to avoid putting those individuals in a positive light.<sup>134</sup> In short, permitting the exemption in this case might seriously undermine public accommodations laws as a general matter.<sup>135</sup>

## B. Baked Goods

Just as photographers might claim to have sincere objections to endorsing same-sex unions, bakers might do so as well. *Craig v. Masterpiece Cakeshop, Inc.* involved the refusal of Jack C. Phillips, the owner of Masterpiece Cakeshop,<sup>136</sup> to provide Charlie Craig and David Mullins with a cake to celebrate their same-sex wedding.<sup>137</sup> However, Phillips "advis[ed] Craig and Mullins that he would be happy to make and sell them any other baked goods."<sup>138</sup>

The Colorado public accommodations law precludes discriminating *inter alia* on the basis of sexual orientation.<sup>139</sup> Just as was true in *Elane Photography*, the fact that Masterpiece Bakeshop was a place of public accommodation was not contested in this case.<sup>140</sup> Just as was true in *Elane Photography*, the business in this case claimed not to be discriminating on the basis of orientation but, instead, to be acting in light of its opposition to same-sex marriage.<sup>141</sup> The Colorado court rejected the bakery's denial that it was engaging in orientation discrimination.<sup>142</sup>

133. *Elane Photography*, 2013-NMSC-040, ¶ 56.

134. Jennifer Ann Abodeely, Comment, *Thou Shall Not Discriminate: A Proposal for Limiting First Amendment Defenses to Discrimination in Public Accommodations*, 12 SCHOLAR 585, 589 (2010) ("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.")

135. See Recent Case, *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), 127 HARV. L. REV. 1485, 1489 (2014) ("The court believed an opinion permitting such a refusal would effectively 'undermine all of the protections provided by antidiscrimination laws,' and thus the court could not condone a holding that exempted commercial photographers from the NMHRA.") (citing *Elane Photography*, 2013-NMSC-040, ¶ 56).

136. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. App. 2015), *cert. denied sub nom. Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016).

137. *Id.* ("Craig and Mullins visited Masterpiece, a bakery in Lakewood, Colorado, and requested that Phillips design and create a cake to celebrate their same-sex wedding. Phillips declined, telling them that he does not create wedding cakes for same-sex weddings because of his religious beliefs.")

138. *Id.*

139. See COLO. REV. STAT. § 24-34-601 (2017).

140. *Craig*, 370 P.3d. at 277 ("Masterpiece and Phillips admitted that the bakery is a place of public accommodation.")

141. *Id.* at 279 ("Masterpiece asserts that its refusal to create the cake was 'because of' its opposition to same-sex marriage, not because of its opposition to their sexual orientation.")

142. *Id.* at 283 ("CADA [Colorado Anti-Discrimination Act] prohibits places of public accommodations from basing their refusal to serve customers on their sexual orientation, and Masterpiece violated Colorado's public accommodations law by refusing to create a wedding cake for Craig's and Mullins' same-sex wedding celebration.") See also *In the Matter of: Melissa Elaine Klein Aaron Wayne Klein*, 2015 WL 4868796, at \*19 ("This case is not about a wedding cake or a marriage. It is about a

The question then became whether forcing the Masterpiece Cakeshop to make the wedding cake would involve forcing it to speak against its will.<sup>143</sup> The Cakeshop believed that “wedding cakes inherently convey a celebratory message about marriage,”<sup>144</sup> and so forcing it to make such a cake would force it to endorse a wedding that it did not wish to endorse. But some of the reasons undercutting the persuasiveness of Elane Photography’s claim that it was being forced to speak against its will applied with equal force to undercut the similar claim of Masterpiece Bakeshop. Here, too, the public would not know Masterpiece Cakeshop’s view of same-sex marriage from its having chosen to create such a cake in a state with an anti-discrimination law. Perhaps it supported same-sex unions. Perhaps not. So, too, the public would not have known the Cakeshop’s view of same-sex marriage from its failure to provide such a cake. Perhaps it was expressing opposition to same-sex marriage or perhaps it had so many orders that it could not take another one.

Suppose that Craig and Mullins had accepted Phillips’ offer to provide other baked goods, perhaps because they decided that they wanted cupcakes instead. Would the message communicated by Masterpiece Cakeshop’s provision of cupcakes be support for same-sex marriage (because it was providing baked goods for the celebration), opposition to same-sex marriage (because cupcakes rather than a cake were provided), or no message (because as far as the public knew Craig and Mullins might have wanted cupcakes all along or because the public would not have known in the first place what the Cakeshop had or had not provided)?

The Colorado appellate court rejected that a bakery’s preparing a wedding cake for same-sex customers would express a message of approval of same-sex marriage.<sup>145</sup> Instead, the public might well impute to the bakery a desire to follow the law rather than express a position on same-sex marriage.<sup>146</sup> The court did not address whether its position would have been different had the couple wanted something in particular written on the cake.<sup>147</sup> Yet, it seems likely that just as the public would have attributed the wedding cake’s celebratory message to the

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business’s refusal to serve someone because of their sexual orientation. Under Oregon law, that is illegal.”).

143. *Craig*, 370 P.3d at 283 (“Masterpiece argues that wedding cakes inherently convey a celebratory message about marriage and, therefore, the Commission’s order unconstitutionally compels it to convey a celebratory message about same-sex marriage in conflict with its religious beliefs.”).

144. *Id.*

145. *Id.* at 286 (“[T]he act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings likely to be understood by those who view it.”).

146. *Id.* (“[W]e conclude that a reasonable observer would understand that Masterpiece’s compliance with the law is not a reflection of its own beliefs.”).

147. *Id.* at 288 (“We note, again, that Phillips denied Craig’s and Mullins’ request without any discussion regarding the wedding cake’s design or any possible written inscriptions.”). *See also* Jacquelyn Cooper, *Modern Day Segregation: States Fighting to Legally Allow Businesses to Refuse Service to Same-Sex Couples Under the Shield of the First Amendment*, 15 RUTGERS J. L. & RELIGION 413, 418 (2014) (“The undisputed evidence is that Phillips categorically refused to prepare a cake for the complainants’ same-sex wedding before there was any discussion about what that cake would look like. Therefore, the respondents’ claim that they refused to provide a cake because it would convey a message supporting same-sex marriage was specious.”).

customer rather than to the bakery,<sup>148</sup> the same point might be made even if the cake included writing. If “Happily Ever After,” or “In Sickness and in Health,” or even “‘Til Death Do Us Part,” were written on the cake, would the public really impute particular beliefs to the baker rather than to those commissioning the cake?

The oral and written advocacy taking place at the shopping center in *PruneYard* would likely not be attributed to the mall owner<sup>149</sup> even though it was speech rather than expressive conduct. There would be even less reason to impute to the baker any views at all. Further, the Colorado anti-discrimination law, like the Solomon Amendment, did not require that businesses endorse particular views or even include specified contents on anything that they created. The Colorado law merely required that businesses not discriminate.

The Masterpiece Cakeshop facts illustrate why it is so difficult to attribute particular views to businesses. Some observers would have attributed a pro-same-sex marriage view by Masterpiece Cakeshop’s willingness to supply baked goods for a same-sex wedding; others would have attributed an anti-same-sex marriage view by its refusal to supply a cake for such a wedding, and others might have attributed still other views. Without an accompanying explanation, the public would not know what to think, even if guesses might be made.

The point is not to question the sincerity of a view distinguishing between wedding cakes and other baked goods. But that a view is sincerely held does not alone confer First Amendment protection on practices associated with those beliefs, as law schools sincerely disagreeing with the prior military policy might well attest.

### C. Flowers

*State v. Arlene’s Flowers, Inc.*<sup>150</sup> involved a florist’s refusal to sell flowers to an individual for his same-sex marriage,<sup>151</sup> notwithstanding the Washington antidiscrimination law precluding discrimination on the basis of sexual orientation in public accommodations.<sup>152</sup> Robert Ingersoll had been a long-time patron of the business before,<sup>153</sup> but the owner, Barronelle Stutzman, “told Ingersoll that she would be unable to do the flowers for his wedding because of her religious beliefs.”<sup>154</sup> She did, however, refer him to other florists who might be willing to provide the floral arrangements.<sup>155</sup>

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148. *Craig*, 370 P.3d at 286 (“[T]o the extent that the public infers from a Masterpiece wedding cake a message celebrating same-sex marriage, that message is more likely to be attributed to the customer than to Masterpiece.”).

149. *See supra* note 68 and accompanying text.

150. 389 P.3d 543 (Wash. 2017).

151. *Id.* at 548 (“Stutzman and her public business, Arlene’s Flowers and Gifts, refused to sell wedding flowers to Robert Ingersoll because his betrothed, Curt Freed, is a man.”).

152. *See* WASH. REV. CODE ANN. § 49.60.215 (West 2008).

153. *Arlene’s Flowers*, 389 P.3d. at 549 (“By the time he and Freed became engaged, Ingersoll had been a customer at Arlene’s Flowers for at least nine years, purchasing numerous floral arrangements from Stutzman and spending an estimated several thousand dollars at her shop.”).

154. *Id.*

155. *Id.* (“Stutzman asserts that she gave Ingersoll the name of other florists who might be willing to serve him.”).

Stutzman said that she would be unwilling to make an arrangement, even if that merely meant “replicat[ing] a prearranged bouquet from a picture book of sample arrangements.”<sup>156</sup> She would have been willing to “sell[] bulk flowers and ‘raw materials’” to the couple so that someone else could arrange them.<sup>157</sup> However, she believed that if she were to have made the arrangement, she would have been using “imagination and artistic skill to intimately participate in a same-sex wedding ceremony.”<sup>158</sup>

Stutzman’s argument is distinguishable from the previously discussed claim that vendors did not want to be viewed as endorsing same-sex unions. Even if Stutzman were certain that no one would wrongly accuse her of supporting same-sex marriage, e.g., because she had taken great pains to make her views known, she still might wish not to invest her personal energies in helping others have a same-sex wedding. Further, she was not merely saying that she refused to go above and beyond the call of duty by using her special talents to create a unique artistic creation for a same-sex wedding—she was also unwilling to copy a prearranged bouquet.

Her belief that she would be “intimately participat[ing] in a same-sex wedding ceremony”<sup>159</sup> by replicating an arrangement found in a picture seems overstated, although perhaps she instead was suggesting that provision of flowers would constitute an endorsement.<sup>160</sup> She admitted that “selling flowers for an atheistic or Muslim wedding would not be tantamount to endorsing those systems of belief,”<sup>161</sup> although she did not explain why one would be an endorsement and the other would not. Her idiosyncratic approach to when the provision of floral arrangements would constitute an endorsement underscores why the public would simply not know whether a message was being sent or what it would be (absent additional explanatory language) where a floral arrangement was provided for a wedding.

Suppose that Stutzman had sold the couple loose flowers, perhaps because a family member had wanted to arrange them.<sup>162</sup> Members of the public might have (wrongly) imputed endorsement of same-sex marriage to her because of her willingness to sell flowers for use at a same-sex wedding.<sup>163</sup>

Stutzman seemed less concerned about what others might think<sup>164</sup> and more worried about how she herself interpreted what her participation would mean. Her adamant refusal to invest personal skills or energies suggests that she feared being

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156. *Id.* at 550.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* (“She believes that participating, or allowing any employee of her store to participate, in a same-sex wedding by providing custom floral arrangements and related customer service is tantamount to endorsing marriage equality for same-sex couples.”).

161. *Id.*

162. *See supra* note 153 and accompanying text.

163. *See Arlene’s Flowers*, 389 P.3d at 550 (“She draws a distinction between creating floral arrangements—even those designed by someone else—and selling bulk flowers and ‘raw materials,’ which she would be happy to do for Ingersoll and Freed.”).

164. *See supra* notes 153 and 160 and accompanying text.

sullied.<sup>165</sup> But if the fear of being sullied justifies a refusal to do business, then we might expect many people in a variety of contexts to offer such a justification for refusing to provide goods or services. Almost anyone could argue (perhaps even sincerely) that he or she feared being sullied by doing business with a member of a disfavored group.<sup>166</sup> So, too, almost anyone could argue (perhaps even sincerely) that he or she had reservations about employing his or her own efforts to aid “those” people (whoever those people might be).

Stutzman’s argument that she was not engaging in orientation discrimination but was instead simply refusing to support same-sex marriage was rejected.<sup>167</sup> The court also rejected that her message of non-support for same-sex marriage would have been understood by the public<sup>168</sup>—a refusal might be based on a religious view or, instead, a lack of sufficient supplies or personnel.<sup>169</sup>

If Stutzman had wanted to communicate her lack of support of same-sex marriage, she could have posted a sign. Presumably, Ingersoll would have gone elsewhere.<sup>170</sup> Of course, it would not be surprising if Ingersoll would have become a regular customer elsewhere and would have refused to make non-wedding-related purchases at Arlene’s Flowers.<sup>171</sup> Nor would it have been surprising if other customers had decided to take all of their business elsewhere if the floral shop’s policy were well-known.<sup>172</sup>

The point here is not that an individual should be entitled to discriminate as long as she makes her discriminatory policy publicly known,<sup>173</sup> but merely to suggest that some businesses might be reluctant to post such signs even if such a posting would remove or significantly decrease the likelihood that such a vendor would even

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165. Cf. Marc R. Poirier, *The Cultural Property Claim Within the Same-Sex Marriage Controversy*, 17 COLUM. J. GENDER & L. 343, 414 (2008) (“Traditionalists are concerned about signal distortion or (less politely) pollution and contagion.”).

166. Cf. Cooper, *supra* note 147, at 429 (discussing “religious leaders, who believed they were sullied by associating with the ‘wrong’ people”).

167. *Arlene’s Flowers*, 389 P.3d at 553 (“[W]e reject Stutzman’s proposed distinction between status and conduct fundamentally linked to that status.”).

168. *Id.* at 557 (“The decision to either provide or refuse to provide flowers for a wedding does not inherently express a message about that wedding.”).

169. *Id.* (“Accordingly, an outside observer may be left to wonder whether a wedding was declined for one of at least three reasons: a religious objection, insufficient staff, or insufficient stock.”).

170. See Andrew Koppelman, *Greenawalt and the Place of Religion: Comment on the McElroy Lecture, University of Detroit Mercy School of Law, March 16, 2016*, 93 U. DET. MERCY L. REV. 369, 377 (2016) (“If free speech allows Elane Photography to signal its opposition to such marriages, that would probably suffice to persuade gay customers—at least, those who are not spoiling for a fight—to look elsewhere with no formal change in the antidiscrimination law.”).

171. See *Arlene’s Flowers*, 389 P.3d at 549 (noting that the couple felt hurt that their business was no longer “good business” for the floral shop).

172. Cf. *id.* at 550 (“Aside from Ingersoll and Freed, she has served gay and lesbian customers in the past for other, non-wedding-related flower orders.”).

173. But see generally Jennifer Gerarda Brown, *Facilitating Boycotts of Discriminatory Organizations Through an Informed Association Statute*, 87 MINN. L. REV. 481 (2002) (advocating that organizations publicly announcing their own exclusionary policies be afforded a safe harbor under public accommodations statutes).

be asked to provide services for a same-sex wedding.<sup>174</sup> Not only might such businesses not be asked to provide services that the businesses would refuse to provide in any case, but they might also not be asked to provide services that the businesses did want to provide.

Arlene's Flowers' claim, if recognized, might mean that vendors would be free to refuse to provide services for disfavored individuals or, perhaps, disfavored customs or practices whenever the vendor felt misgivings about investing personal energies in the provision of such services. Perhaps it is true that in many instances others would be willing to provide the needed services,<sup>175</sup> although part of the point of public accommodation laws is that businesses holding themselves open to the public should not be free to discriminate in this way.

### III. CONCLUSION

Various vendors have claimed the right not to provide wedding-related services to same-sex couples, local law notwithstanding, because of the First Amendment right not to endorse something in which they do not believe. But there are several reasons why no such First Amendment right exists. The First Amendment right not to speak is less robust than commonly thought, especially when the State is not prescribing the content of the message at issue. Further, when the public does not understand the message unless further explanation is offered, the "message" itself likely does not trigger First Amendment guarantees.

Public accommodation laws are of growing importance because the Nation seems to be growing increasingly fractured along a variety of fault lines. This is not the time to gut such laws merely because some individuals have sincere reservations about providing services for members of disfavored groups. The claimed right not to speak in these vendor cases has no basis in the First Amendment as currently understood. Further, recognition of such a right would do great harm and lead to further tearing of the social fabric, a result that no one should applaud.

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174. *Cf. id.* at 489 (noting that the Boy Scouts lost some public support when their exclusionary policies became known).

175. *But cf.* Georgia Chudoba, *Conscience in America: The Slippery Slope of Mixing Morality with Medicine*, 36 SW. U. L. REV. 85, 90 (2007) ("California currently has a law requiring that emergency services be provided to a patient 'for any condition in which the person is in danger of loss of life, or serious injury or illness, at any health facility . . . that maintains and operates an emergency department.'").