WILL NONPROFIT RELIGIOUS ORGANIZATIONS WITHSTAND THE SEXUAL REVOLUTION IN LAW?

Travis Weber[*]

INTRODUCTION

While the legalization of same-sex marriage may be the most visible recent accomplishment of those seeking to reshape law based on a philosophy of individual sexual autonomy, these activists are working in other areas which don't draw as much public attention, despite their legal significance. One of these involves laws barring discrimination on the basis of sexual orientation and gender identity ("SOGI" laws), which impact, among other areas, public accommodations law.[1] While nonprofit religious entities are less likely than for-profit businesses to be immediately impacted by SOGI public accommodations laws in the context of same-sex marriage,[2] cracks are starting to appear in the traditional legal protections for the ability of nonprofit religious organizations to conduct themselves according to their beliefs with autonomy. Given this development, and the fact that the activists pushing for such laws show no sign that they want to respect the traditional consensus around exemptions and the legal status of nonprofit religious organizations,[3] anyone concerned about protecting religious nonprofits should be very uneasy.

Indeed, nonprofit organizations, their liability under public accommodations laws, and their constitutional defenses are only one segment of the larger cultural and legal trends at the intersection of religious liberty and same-sex marriage. This Article addresses the issues as follows. The first question is whether nonprofits are subject to public accommodations laws. Assuming they are, do they have First Amendment (or other) defenses against public accommodations SOGI

---

[*] Travis Weber (LL.M., International Law, Georgetown University Law Center; J.D., Regent University School of Law) is the Director of the Center for Religious Liberty at the Family Research Council.

[1] *See* Ryan T. Anderson, *Sexual Orientation and Gender Identity (SOGI) Laws Threaten Freedom*, HERITAGE FOUND. (Nov. 30, 2015), http://www.heritage.org/civil-society/report/sexual-orientation-and-gender-identity-sogi-laws-threaten-freedom (describing proposed pieces of federal and local law seeking to enforce antidiscrimination policies on the basis of SOGI in places of public accommodations).

[2] *See* Ryan T. Anderson & Robert P. George, *Liberty and SOGI Laws: An Impossible and Unsustainable 'Compromise*,' CNS NEWS (Jan. 21, 2016, 11:23 AM), http://www.cnsnews.com/commentary/ryan-t-anderson/liberty-and-sogi-laws-impossible-and-unsustainable-compromise-0 (stating that SOGI laws attempt to exempt nonprofits, preventing an immediate impact on nonprofits).

[3] *See id.* (explaining that LGBT activists want sexual orientation to have the same legal status as race, regardless of whether the religious exception is upheld).

laws? Will churches also be ensnared by these public accommodations laws? Additionally, how are these issues explained in the context of the broader conflict between religious liberty and the legal imposition of same-sex marriage?

I. WHAT IS THE RELATIONSHIP BETWEEN *OBERGEFELL*, SOGI LAWS, AND PUBLIC ACCOMMODATIONS LAWS?

In *Obergefell v. Hodges*, the Supreme Court held that states must issue licenses for same-sex marriages (and recognize such licenses from other states) on the same terms as marriages between men and women.[4] The holding binds the government with regard to marriage. It says nothing about what other actors must do, and does not require SOGI laws.[5]

SOGI laws add "sexual orientation" and "gender identity" to nondiscrimination laws as protected classes.[6] SOGI laws may affect the areas of employment, public accommodation, housing, and credit, among others.[7] SOGI laws bar those entities covered by them from discriminating on the grounds that someone is a member of a protected class.[8] Currently, in the area of public accommodations, twenty-two states protect against sexual orientation discrimination and nineteen protect against gender identity discrimination.[9] This is not even counting the many cities and local jurisdictions around the country that have enacted such protections in their public accommodations laws. And the Equality Act is pending at the federal level.[10]

Public accommodations laws generally bar entities with facilities open to the public from discriminating on the basis of protected classes (which sometimes include sexual orientation and gender identity).[11] Their definitions of what constitutes a public accommodation are often very broad, including not just businesses, but entities open to the public in any way.[12] In the eyes of those advocating for SOGI protections in public accommodations laws, they are doing for sexual orientation and

---

4 135 S. Ct. 2584, 2605, 2607–08 (2015).

5 *See id.* at 2608 (limiting the holding to the issue of marriage licenses without extending to the issue of SOGI laws).

6 Anderson, *supra* note 1.

7 *Id.*

8 *Id.*

9 *State Public Accommodation Laws*, NAT'L CONF. STATE LEGISLATURES (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx.

10 Equality Act, H.R. 3185, 114th Cong. (2015).

11 *See, e.g.*, Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp. of Bos., 515 U.S. 557, 561 (1995) (Massachusetts public accommodations law).

12 Daniel Koontz, *Hostile Public Accommodations Laws and the First Amendment*, 3 N.Y.U. J.L. & LIBERTY 197, 203 (2008).

gender identity what the civil rights advocates did for race protections; and in their minds, there are few, if any, distinctions—culturally, legally, or theologically.

However, it is the issue of same-sex marriage, culminating in its constitutionalization in *Obergefell*, that has implicated so many religious liberty claims. Without same-sex couples seeking same-sex wedding services from small business owners, the religious liberty claims of Barronelle Stutzman[13] and other similar business owners would not have been raised. Thus, while SOGI laws are the vehicle primarily used against nonprofits in the context of public accommodations, the issue of same-sex marriage has in part precipitated their use. While there are religious liberty claims that will arise separate from the issue of same-sex marriage, in both cases SOGI laws are used. Moreover, the Supreme Court's holding in *Obergefell* is a marker in the broader push on SOGI nondiscrimination, and gives momentum to the push for such laws.

Entities have been charged with discrimination on the basis of sexual orientation when they have refused to treat a same-sex marriage the same as a marriage between a man and a woman.[14] The entities have defended themselves by saying they are not treating the person differently because the person identifies as gay or has a certain sexual orientation, but, rather, they are only objecting to being complicit in a same-sex marriage they find immoral.[15] For example, florist Barronelle Stutzman had a customer who identified as gay, whom she happily served for years.[16] But when he asked her to be involved in his same-sex wedding, she refused.[17] However, the courts (a number of administrative tribunals and state courts) have largely refused to recognize this distinction.[18] Additionally, as part of their response in defending their ability to speak and act in accord with religious beliefs, which assert that marriage is only the union of a man and a woman, many religious entities have asserted free speech, freedom of association, and/or free exercise rights protected by the First Amendment.[19]

---

[13] *See State of Washington v. Arlene's Flowers | Ingersoll v. Arlene's Flowers*, ALLIANCE DEFENDING FREEDOM (Nov. 29, 2016), http://www.adfmedia.org/News/PRDetail/8608.

[14] Anderson, *supra* note 1.

[15] Anderson & George, *supra* note 2.

[16] Barronelle Stutzman, *Why a Friend is Suing Me: The Arlene's Flowers Story*, SEATTLE TIMES (Nov. 9, 2016, 4:23 PM), http://www.seattletimes.com/opinion/why-a-good-friend-is-suing-me-the-arlenes-flowers-story/.

[17] *Id.*

[18] Anderson, *supra* note 1.

[19] *See* Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995) (explaining the importance of the free speech defense raised); *see* Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000) (holding in favor of the freedom of association defense).

II. ARE RELIGIOUS NONPROFITS EVEN COVERED BY PUBLIC ACCOMMODATIONS LAWS?

The answer to the question posed by the heading above is: sometimes. It obviously depends on the definition of who is covered by the public accommodations statute at issue. These laws are often tailored and targeted toward businesses and profit-making entities, so the commercial aspect of an entity makes it more likely to be covered. However, the definition of entities and places covered often tends to be quite broad, covering any place open to the public and soliciting the public in any way, for profit or not.[20] Thus, simply not making a profit will usually not exempt an entity from often broadly drafted definitions of what is a public accommodation.

Many states have explicit statutory exemptions for private clubs, and religious nonprofits are usually better able to make a case for their private nature—which, if they can show, will often exempt them from the application of such laws. For instance, one Pennsylvania court found that parochial high schools run by the Catholic Church did not fall within the definition of a public accommodation.[21] The same court recently ruled that Catholic *colleges* do fall within the definition, however, for they were explicitly listed in the statute and did not have the same factors weighing against inclusion.[22]

Other statutes explicitly exempt certain religious nonprofits. New Jersey, for instance, exempts any club that is "in its nature distinctly private" or schools operated by bona fide religious institutions, but not private clubs in general.[23] One court ruled that this school exception even includes a substance abuse recovery program that is distinctly religious.[24]

On top of this, a number of states specifically exempt religious nonprofits from public accommodations requirements regarding same-sex marriage.[25] Thus, the statutory and judicial protections for nonprofit

---

[20] Koontz, *supra* note 12 at 203.

[21] Roman Catholic Archdiocese of Phila. v. Pennsylvania, 548 A.2d 328, 328, 330–31 (Pa. Commw. Ct. 1988).

[22] Chestnut Hill Coll. v. Pa. Human Relations Comm'n, No. 844 C.D. 2016, 2017 Pa. Commw. LEXIS 101, at *9–17, 20 (Pa. Commw. Ct. Apr. 7, 2017).

[23] N.J. STAT. ANN. § 10:5-5(*l*) (West, Westlaw through L.2017, c. 39 and J.R. No. 1).

[24] Wazeerud-Din v. Goodwill Home & Missions, Inc., 737 A.2d 683, 690 (N.J. Super. Ct. App. Div. 1999).

[25] CONN. GEN. STAT. ANN. § 46b-35a (West, Westlaw current with enactments of the 2016 Feb. Reg. Sess., 2016 May Spec. Sess., and 2016 Sept. Spec. Sess.) (covering "a religious organization, association or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association or society"); D.C. CODE § 46-406(e)(1) (LEXIS through Feb. 17, 2017) (covering "a religious society, or a nonprofit organization that is operated, supervised, or controlled by or in conjunction with a religious society"); IOWA CODE ANN. § 216.7 (West, Westlaw

entities in the face of SOGI laws are quite uneven and highly dependent on the jurisdiction.

The question of whether the Boy Scouts of America is a place of public accommodations illustrates the tenuous state of affairs of nonprofits. While multiple courts around the country have held that the Boy Scouts are not a place of public accommodations under a number of different statutes, the fact that the litigation had to occur at all, and the factor-specific inquiries which are often a part of such litigation, do not give much cause for comfort.

The Seventh Circuit held that Title II of the Civil Rights Act, which governs public accommodations, did not apply to the Boy Scouts "because it is not an 'establishment' that 'serves the public.'"[26] In doing so, the court outlined seven factors to determine whether an organization is a private club:

> (1) the genuine selectivity of the group; (2) the membership's control over the operations of the establishment; (3) the history of the organization; (4) the use of facilities by nonmembers; (5) the club's purpose; (6) whether the club advertises for members; and, (7) whether the club is nonprofit or for profit.[27]

---

through 2016 Reg. Sess. legislation) (excepting from the public accommodations law "[a]ny bona fide religious institution with respect to any qualifications the institution may impose based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose."); N.H. REV. STAT. ANN. § 457:37(III) (Westlaw through Ch. 330 of 2016 Reg. Sess.) (covering "a religious organization, association, or society, or any individual who is managed, directed, or supervised by or in conjunction with a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society"); N.Y. DOM. REL. § 10-b(1) (McKinney, Westlaw through L. 2016, Chs. 1 to 519) (covering "a religious entity . . . or a corporation incorporated under the benevolent orders law . . . or a not-for-profit corporation operated, supervised, or controlled by a religious corporation, or any employee thereof, being managed, directed, or supervised by or in conjunction with a religious corporation, benevolent order, or a not-for-profit corporation"); VT. STAT. ANN. tit. 9, § 4502(l) (LEXIS through 2015 Adjourned Sess.) (covering "a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society."); WASH. REV. CODE ANN. § 26.04.010(7)(b) (Westlaw through 2016 Reg. Sess. and First Spec. Sess.) (a religious organization "includes, but is not limited to, churches, mosques, synagogues, temples, nondenominational ministries, interdenominational and ecumenical organizations, mission organizations, faith-based social agencies, and other entities whose principal purpose is the study, practice, or advancement of religion").

[26] Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1278 (7th Cir. 1993) (quoting Title II); *see also* Vargas-Santana v. Boy Scouts of Am., No. 05-2080 (ADC), 2007 WL 995002, at *5 (D.P.R. Mar. 30, 2007) (holding that the Boy Scouts of America are not a place of public accommodations under Title II based on the U.S. Supreme Court's decision in *Dale*).

[27] *Welsh*, 993 F.2d at 1276.

Another court added an eighth factor to this list: "[t]he formalities observed by the club, e.g., bylaws, meetings, [and] membership cards."[28]

In addition, the Oregon,[29] Connecticut,[30] Kansas,[31] and California[32] Supreme Courts have held that the Boy Scouts did not fall within their respective state law's definition of providers of public accommodations. And more recently, a federal court concluded that a Boy Scouts council was a private club within the meaning of the Americans with Disabilities Act.[33] The Boy Scouts are a good example of how membership organizations "whose purpose is not closely connected to a particular facility" are usually exempt from public accommodations laws.[34] However, when the New Jersey Supreme Court held that the Boy Scouts were subject to that state's nondiscrimination law and not entitled to constitutional protections without even trying to tie them to a particular facility,[35] the Supreme Court had to take up the case and reverse.[36] The amount of litigation around the Boy Scouts also shows the tenuous state of affairs surrounding many other nonprofits and religious entities.

Some other cases involving religious nonprofits help shed light on this question too. In *Doe v. California Lutheran High School Association*, a state court held that a private Christian school was not a "business establishment" within the meaning of that term in the public accommodations provision of California's Unruh Civil Rights Act.[37] Not all nonprofits are automatically exempt from the law:

> [I]n light of the legislative history demonstrating that the Unruh Civil Rights Act was intended to *extend* the reach of California's prior public accommodation statute, the very broad 'business establishments' language of the Act reasonably must be interpreted to apply to the membership policies of an entity—even a charitable organization that

---

[28] United States v. Lansdowne Swim Club, 713 F. Supp. 785, 796–97 (E.D. Pa. 1989).

[29] Schwenk v. Boy Scouts of Am., 551 P.2d 465, 469 (Or. 1976).

[30] Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm'n on Human Rights & Opportunities, 528 A.2d 352, 360 (Conn. 1987).

[31] Seabourn v. Coronado Area Council, Boy Scouts of Am., 891 P.2d 385, 387 (Kan. 1995).

[32] Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 220 (Cal. 1998).

[33] Staley v. Nat'l Capital Area Council, 2011 U.S. Dist. LEXIS 61986, *20 (D. Md. June 9, 2011).

[34] Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1269 (7th Cir. 1993) (noting that regulation of a facility brings an entity more under the purview of public accommodations laws).

[35] *See* Dale v. Boy Scouts of Am., 734 A.2d 1196, 1230 (N.J. 1999) (Handler, J., concurring) (arguing that because the Boy Scouts of America operates in multiple locations, its activities need not be fixed to one location to qualify as a public accommodation).

[36] Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000).

[37] Doe v. Cal. Lutheran High Sch. Ass'n, 170 Cal. App. 4th 828, 838 (2009).

> lacks a significant business-related purpose—if the entity's attributes and activities demonstrate that it is the functional equivalent of a classic 'place of public accommodation or amusement.'[38]

However, membership organizations like the Boy Scouts (and the school at issue here) which are expressive associations with the purpose of instilling values (and which select members based on those values) are not "business establishments."[39] The challengers' dismissal for sexual misconduct "goes to the very heart of the reason for the existence of the school."[40] Even though the school "sells tickets to football games and other sporting events" and "sells concessions, T-shirts, and 'spirit items'" at these events, "holds fundraising auctions and golf tournaments[,] and . . . sells advertising space in yearbooks," these transactions "do not involve the sale of access to the basic activities or services offered by the organization," and do not make the school a "business establishment."[41]

More recently, Mt. Erie Christian Academy, a private, religious school in California, refused to admit a student with "two moms."[42] Though there does not seem to be a lawsuit in this case, it appears as though this situation could involve a claim of public accommodations discrimination, possibly pitted against constitutional claims, if the school is considered a place of public accommodations, though *Doe* would seem to dictate that the school is exempt from the Unruh act.[43]

As the Supreme Court observed in *Boy Scouts of America v. Dale*, "[a]s the definition of 'public accommodation' has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations . . . , the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased."[44]

Assuming a nonprofit falls within the definition of a public accommodation, can it still rely on constitutional rights to claim exemption from the law's purview?

---

38 *Id.* at 837 (quoting Curran v. Mount Diablo Council of the Boy Scouts, 952 P.2d 218, 236 (Cal. 1998)).

39 *Id.* (quoting *Curran*, 952 P.2d at 697).

40 *Id.* at 839.

41 *Id.*

42 David French, *Lesbian Parents Try to Force a Christian School to Educate Their Child*, NAT'L REV. (Sept. 29, 2015, 3:58 PM), http://www.nationalreview.com/corner/424802/lesbian-parents-try-force-christian-school-educate-their-child-david-french.

43 *Id.*

44 Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000).

III. CONSTITUTIONAL RIGHTS VS. PUBLIC ACCOMMODATIONS NONDISCRIMINATION LAWS: WHO WINS?

Assuming nonprofits are covered by SOGI nondiscrimination laws in the area of public accommodations, the question remains whether any First Amendment freedoms they are exercising will trump such public accommodations requirements.

Generally, and historically,[45] the answer is "yes"—through the First Amendment's free speech protections against being compelled to speak a certain message and freedom of association protections.[46] But the case-specific answer depends on a number of factors—primarily, how private and exclusive an organization is, and whether it is speaking a certain message and expressing certain ideas through its actions.

The Supreme Court has already ruled in two significant cases on the conflict between the First Amendment and SOGI public accommodations laws.

A. Free Speech (Compelled Speech)

In *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, the Supreme Court confronted the issue of whether the "South Boston Allied War Veterans Council, an unincorporated association of individuals elected from various South Boston veterans groups," was bound by Massachusetts public accommodations law prohibiting discrimination on the basis of sexual orientation to accept a group promoting homosexuality in its parade.[47] The state public accommodations law included "any place . . . which is open to and accepts or solicits the patronage of the general public and, without limiting the generality of this definition, whether or not it be . . . (6) a boardwalk or other public highway [or] . . . (8) a place of public amusement, recreation, sport, exercise or entertainment."[48] The lower courts ruled that the Council was bound by the public accommodations law, a finding which the Supreme Court characterized as follows:

> Although the state courts spoke of the parade as a place of public accommodations . . . , once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent

---

[45] I say "historically" because examination of the flimsy logic and reasoning in the federal court decisions constitutionalizing same-sex marriage leading up to *Obergefell* reminds one just how driven the federal judiciary is by cultural trends and "elite" public opinion. Given that federal judges are so influenced by their fellow "elites," I don't have much faith that the law will serve as a bulwark against the wave of public opinion in favor of SOGIs being driven by cultural worship of individual sexual autonomy.

[46] Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., 515 U.S. 557, 563, 573 (1995).

[47] *Id.* at 560.

[48] *Id.* at 561–62 (alterations in original).

> that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation.[49]

The Supreme Court rejected this notion, reasoning that the public accommodations statute is

> a piece of protective legislation that announces no purpose beyond the object both expressed and apparent in its provisions, which is to prevent any denial of access to (or discriminatory treatment in) public accommodations on proscribed grounds, including sexual orientation. On its face, the object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference.[50]

However,

> [w]hen the law is *applied to expressive activity* in the way it was done here, its apparent object is simply to *require speakers to modify the content of their expression* to whatever extent beneficiaries of the law choose to alter it with *messages of their own*. But in the *absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids*.[51]

Thus, the Court concluded the application of the public accommodations law infringed on the parade organizers' free speech, specifically the right under the compelled speech doctrine to control the content of their message and be free from being compelled to speak a certain message.[52]

Hurley will be helpful to show that (1) nonprofit organizations are engaging in expressive activity, and (2) the application of SOGI public accommodations laws requires them to modify their messages. It may be more difficult for some to show that the beneficiaries of SOGI laws are seeking to alter the message with "messages of their own." Yet if preventing such "discrimination" is not a "further, legitimate end," the speaker's rights should prevail. It must be noted that the Court observed this case was not about

> any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade. Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march.[53]

Rather,

---

[49] *Id.* at 572–73 (citations omitted).

[50] *Id.* at 578.

[51] *Id.* (emphasis added).

[52] *Id.* at 581.

[53] *Id.* at 572.

> the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner. Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade.[54]

Yet, many nonprofits will be able to show that forced inclusion of certain individuals does force them to change their message. If the individual they are forced to include expressly states a certain disagreeable message, the compelled speech claim is even stronger.

Oddly enough, *Hurley* was relied on to protect the autonomy of the National Education Association from having to admit an ex-gay group to its meeting, where it wanted to promote the support of the homosexual lifestyle.[55]

By being forced to include individuals living in ways they disagree with, nonprofits are being compelled to speak a certain message: "This lifestyle is okay." If the individual they are forced to include explicitly states a message they disagree with, they are being compelled even further. In a diverse society, people will disagree about a number of matters. They shouldn't be forced to agree with their fellow citizens, no matter how much agents of conformity want them to.

B. Freedom of Association (Expressive Association)

In *Boy Scouts of America v. Dale*, the Court confronted the issue of whether New Jersey's Law Against Discrimination ("LAD"), prohibiting sexual orientation discrimination in public accommodations, violated the nonprofit Boy Scouts organization's First Amendment rights.[56] The law, as applied, would bar the organization from removing from membership "an avowed homosexual and gay rights activist" on the grounds "that homosexual conduct is inconsistent with the values [the Boy Scouts organization] seeks to instill."[57] The public accommodations law was broad, and "include[d] places that often may not carry with them open invitations to the public, like summer camps and roof gardens."[58] However, "[i]n this case, the New Jersey Supreme Court went a step further and applied its public accommodations law to a private entity without even attempting to tie the term 'place' to a physical location."[59]

---

[54] *Id.* at 572–73 (citation omitted).

[55] *See* Parents & Friends of Ex-Gays, Inc. v. Gov't of the Dist. Office of Human Rights, 2008 CA 003662 P (MPA), at *7 (D.C. Super. Ct. June 26, 2009) (explaining that Massachusetts public accommodations law does not require parade organizers to include homosexuals in their parade).

[56] 530 U.S. 640, 644 (2000).

[57] *Id.*

[58] *Id.* at 657.

[59] *Id.*

The Supreme Court wasn't buying it. In cases like this and *Hurley*, the Court observed, "the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other."[60] However, "[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."[61] Making the Boy Scouts include an openly gay scout master "would significantly affect the Boy Scouts' ability to advocate public or private viewpoints"[62] by "forc[ing] the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[63] The Court "concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct," and thus held that the application of public accommodations law in this way was unconstitutional.[64]

In its opinion, the Court heavily relied on and noted similarities to *Hurley*,[65] as the forced inclusion of the openly gay scout master forced the Boy Scouts to change the message it was communicating. In both cases (one being about compelled speech and the other about expressive association), the important issue was control over one's speech, message, and expression (which can be communicated by one's conduct).

Not all nonprofits will be protected in this manner, however. As the organization is viewed as more generally open to the public and not communicating a specific message, it will be less able to assert constitutional rights against the application of public accommodations nondiscrimination laws.

In *Roberts v. United States Jaycees*, the Supreme Court held that the Jaycees, a nonprofit membership group, was bound by the state's broad public accommodations law preventing discrimination on the basis of sex. The Court reasoned that the group was large, unselective, and open to the public without a strong delineation between the activities of members and non-members—not small, intimate, or private enough to remove it from the purview of such laws with regard to freedom of intimate association.[66] The Court also rejected an expressive association claim, noting that the group had already opened itself up to women to some degree, and "Minnesota's compelling interest in eradicating

---

60 *Id.* at 658–59.
61 *Id.* at 659.
62 *Id.* at 650.
63 *Id.* at 653.
64 *Id.* at 659.
65 *Id.*
66 Roberts v. U.S. Jaycees, 468 U.S. 609, 621–22 (1984).

discrimination against its female citizens justifies" any infringement on the group's freedom of expressive association.[67]

Is this correct? Even assuming the Jaycees opened themselves up to the public to a larger degree, it seems this is the wrong result. Courts should more readily defer to private parties' claims about what infringes on their speech or religion in this important and sensitive area of First Amendment rights, rather than meddle in these matters. Indeed, they already do so in three areas.

First, under the First Amendment's "ministerial exception," the government cannot review the hiring and firing decisions of churches and religious organizations.[68] This exemption prohibits virtually any governmental or judicial interference with hiring or firing decisions for those to whom it applies.

Second, the First Amendment's church autonomy doctrine requires the government to stay out of deciding whether a religious doctrine is sincere or correct.[69] This doctrine, drawn from the First Amendment's Free Exercise and Establishment Clauses, provides that courts do not have jurisdiction to decide disputes which are simply ecclesiastical or related to religious doctrine.[70] Courts abstain from meddling in such religious decisions. In such cases, courts accept the religious authority's decision on the question of what the religion requires, and they don't wade into such matters to decide that question themselves.[71]

Third, in a free exercise analysis or when examining a claim under the Religious Freedom Restoration Act (RFRA), a court must accept at face value a claimant's showing of a sincere religious belief that the claimant asserts has been substantially burdened, instead of substituting the court's own judgments for that of the plaintiff on these points.[72] Moreover, the government often stipulates to such religious matters.[73]

---

[67] *Id.* at 621, 623.

[68] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 710 (2012).

[69] *See* Priests for Life v. U.S. Dep't of Health and Human Servs., 772 F.3d 229, 247 (D.C. Cir. 2014) (stating that it is not the court's role to determine the sincerity of an individual's religious belief).

[70] *See* Victor Schwartz & Christopher Appel, *The Church Autonomy Doctrine: Where Tort Law Should Step Aside*, 80 U. CIN. L. REV. 431, 453 (2011) (stating that churches have a First Amendment right to make decisions on ecclesiastical issues free from interference from civil authorities).

[71] *See id.* at 448–49 (explaining how the Court in *Watson v. Jones*, 80 U.S. 679 (1871), refused to intrude into the ecclesiastical matters of the Presbyterian Church).

[72] *Priests for Life*, 772 F.3d at 247 ("Plaintiffs are correct that they—and not this Court—determine what religious observance their faith commands.").

[73] *See* Eugene Volokh, *Religious Exemptions – A Guide for the Confused*, WASH. POST: VOLOKH CONSPIRACY (Mar. 24, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/24/religious-exemptions-a-guide-for-the-confused/?utm_term=.

These are wise reminders of the line between government intrusion and freedom as we consider freedom of association claims in the nondiscrimination context.

Unfortunately, the holding in *Jaycees* places the courts in the role of judging a group's beliefs—which, if the courts took on this role for churches, would even more seriously infringe on freedom. As Professor Jonathan Turley points out, Justice Stevens in his dissent in *Dale* felt comfortable standing in judgment of the Boy Scouts and determining that their belief in being "morally straight" and "clean" did not refer to homosexuality in any way.[74] Justice Stevens claimed, "[i]t is plain as the light of day that neither one of these principles—'morally straight' and 'clean'—says the slightest thing about homosexuality. Indeed, neither term in the Boy Scouts' Law and Oath expresses any position whatsoever on sexual matters."[75] The point is not whether one agrees with the Scouts; but, rather, who has the authority to determine the freedom of private citizens and groups in a free society. As Professor Turley observes, "[t]he Court has placed itself, and lower courts, as the ultimate arbiter of the importance of particular exclusionary principles to an organization . . . . It is a role that is pregnant with dangers for judicial bias and that leaves core speech and associational rights uncertain and fluid."[76]

However, the more a group can show it exists to primarily spread ideas (as opposed to provide services), along with its exclusivity and privacy in accord with the factors above, the more likely it will be protected in the face of sexual orientation discrimination claims.

One interesting note on *Hurley* and *Dale*: in both cases, those fighting to defend their constitutional right eventually voluntarily gave it up. In 2015, the Boy Scouts started allowing men living a gay lifestyle to serve as leaders (two years after it allowed the same for troops).[77] Notably, this is not even satisfactory to advocacy groups like the ALCU pushing the agenda of the sexual revolution, as they now want all religious groups affiliated with the Boy Scouts to be barred from using

---

4118c40a5ab4 (explaining that since courts do not have the discretion to determine whether one's religious beliefs are reasonable, they often must accept one's assertion of a sincerely held religious belief at face value).

[74] Jonathan Turley, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY 59, 70 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson eds., 2008) (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000) (Stevens, J., dissenting)).

[75] Boy Scouts of Am. v. Dale, 530 U.S. 640, 668–69 (2000) (Stevens, J., dissenting).

[76] Turley, *supra* note 74 at 70.

[77] Todd Leopold, *Boy Scouts Change Policy on Gay Leaders*, CNN (July 28, 2015, 9:16 AM), http://www.cnn.com/2015/07/27/us/boy-scouts-gay-leaders-feat/.

their own beliefs as a guide to selecting their Scout leaders.[78] And, in New York City, the council presiding over that city's St. Patrick's Day Parade voluntarily admitted a gay rights group marching under its own banners, after several years of pressure and boycotts by Mayor Bill de Blasio and gay rights groups.[79] While *Hurley* dealt with the parade in Boston, it settled the same issue for the NYC parade. The NYC parade committee is not compelled by law, and is aware it is not compelled, to do what it has now decided to do anyway—give in to pressure.[80] This is a reminder that while the law has an impact, cultural trends and forces matter too—perhaps more so in some ways.

C. Conflicts Involving Same-Sex Marriage

The conflict between the constitutional rights of nonprofits and a SOGI nondiscrimination claim in public accommodations provoked by a same-sex wedding has already manifested itself in at least one case.

In *Bernstein v. Ocean Grove Camp Meeting Association*, a religious association owned land used for religious purposes, but also land open to the public for general use, including a boardwalk pavilion which it opened to the public to host wedding ceremonies.[81] In 2007, the Association refused to conduct a same-sex wedding under the recently enacted civil union law in New Jersey, and the couple complained to the New Jersey Division of Civil Rights, which referred the case to an administrative law judge ("ALJ").[82] He found the Association fell under the definition of a public accommodation in New Jersey's Law Against Discrimination ("LAD"), and rejected the Association's free exercise, free speech, and freedom of association claims.[83] The Association appealed the ruling to the Director of the Division on Civil Rights of the New Jersey Attorney General's Office ("Director"), who affirmed the holdings

---

78 Lorenzo Liang, *Don't Clap Just Yet for the Boy Scouts*, ACLU (Aug. 10, 2015, 2:15 PM), https://www.aclu.org/blog/speak-freely/dont-clap-just-yet-boy-scouts.

79 Brian Fraga, *NYC's St. Patrick's Parade Will Feature Gay Groups, but Not Pro-Life Ones*, NAT'L CATH. REG. (Mar. 16, 2016), http://www.ncregister.com/daily-news/nycs-perverse-st.-patricks-parade-will-feature-gay-groups-but-not-pro-life.

80 *See* Debbie McGoldrick, *Gays to March in NYC Parade, with Cardinal Dolan as 2015 Grand Marshal*, IRISH CENT. (Sept. 2, 2014, 10:54 PM), http://www. irishcentral.com/news/irishvoice/gays-to-march-in-nyc-parade-cardinal-dolan-2015-grand-marshal (providing an example of the NYC parade allowing a gay-rights group to participate in the march).

81 Findings, Determination, and Order, Bernstein v. Ocean Grove Camp Meeting Ass'n, No. CRT 6145-09, at *2–3 (N.J. Div. Civ. Rights Oct. 22, 2012) [hereinafter Civil Rights Division Opinion].

82 *Id.* at *1, *3.

83 *Id.* at *3–4.

of the ALJ.[84] This is the final decision in the matter, and the case appears to have been concluded at this point.

The LAD has a broad definition of a public accommodation, though it does exempt any organization "which is in its nature distinctly private."[85] However, as the ALJ noted in his opinion, "[t]he LAD broadly defines public accommodation to include any 'boardwalk, or seashore accommodation; any auditorium, meeting place, or hall.'"[86]

The Director ruled that the pavilion was a place of public accommodation, finding that the Association (1) invited the general public in, (2) had close ties with the government through its application for property tax exemption (on the condition that it would open its pavilion to all members of the public equally as defined in New Jersey law) that it had submitted and had granted for years until these proceedings, and (3) is similar to the enumerated public accommodations.[87] He found that the Association "treated the [p]avilion differently than its chapels and other places of worship."[88] The Association did not open chapels and other places of worship to the public as it did the pavilion.[89] The Director distinguished this case from another in which a counseling program was run by a religious organization and held to not be a place of public accommodation, as it was intrinsically religious and the Association was not—because it was open to the public without much screening.[90] In the eyes of the state, the pavilion was open to the public without much oversight, and the fact that the Association was a religious organization did not automatically exempt it.[91] The Association could have received another type of tax exemption, which would not have triggered the nondiscrimination requirement, but the Director dismissed this argument, noting the Association had chosen the exemption at issue.[92]

The Director also rejected the Association's freedom of association claim, distinguishing *Dale* and *Hurley* on grounds that while they prohibited attempts to alter a speaker's message, here the Association

---

[84] *Id.* at *1.

[85] *Id.* at *6.

[86] Initial Decision, Bernstein v. Ocean Grove Camp Meeting Ass'n, No. CRT 6145-09, at *4 (N.J. Office Admin. Law Jan. 12, 2012) [hereinafter ALJ Opinion] (quoting N.J. STAT. ANN. § 10:5-5(*l*) (West, Westlaw through L.2017, c. 39 and J.R. No. 1)).

[87] Civil Rights Division Opinion, *supra* note 81, at *6.

[88] *Id.* at *9.

[89] *Id.*

[90] *Id.* at *9–10 (citing Wazeerud-Din v. Goodwill Home & Missions, Inc., 737 A.2d 683, 688 (App. Div. 1999).

[91] *Id.* at *7, 10 (noting that the venue was offered without mention of Ocean Grove's religious views, reservation fees were accepted with limitation, and solicitations put out by Ocean Grove showed that it only screened applications for availability).

[92] *Id.* at *9.

was "not being forced to include or adopt any message" of the couple seeking the civil union.[93] The Director argued,

> [i]n this case, the element of forced inclusion or forced speech that characterize associational rights cases is simply not present. [The Association] is not being compelled to accept an unwanted candidate as a leader, or even a member, in its organization. Nor are [the Association's] members being forced to associate with [the same-sex couple] on any level. [The Association] is not being forced to include or adopt any message of the [same-sex couple].[94]

The Director argued that "[u]nlike the parade in *Hurley*, there is nothing inherently expressive about the secular business activity of renting a boardwalk pavilion, particularly where, as here, [the Association] ordinarily approved all applications without questioning whether the use would conform to [the Association's] religious tenets."[95] Renting out the pavilion without inquiring into the religious beliefs of the renters and not being involved in the ceremony are activities "largely detached from associational expression or speech."[96]

But is this true?

As the ALJ pointed out, the Association asserted it had a "wedding ministry," but rented its space to all sorts of weddings between men and women—both Christian and non-Christian.[97] In the mind of the ALJ, the

> ceremonies might have been devoid of references to Christian doctrine, might have contained language or symbolism antithetical to Christian doctrine, and any passerby could stop to listen. The arm's length nature of the transactions gave respondent a comfortable distance from notions incompatible with its own beliefs. That same distance pertained to civil unions.[98]

Nevertheless, the compelled speech and freedom of association claims are weighty enough that the Association should have prevailed in this case. The problem with the current outcome is that it puts the judge in the position of deciding religious beliefs. If one's religion permits one to perform non-Christian weddings, but not same-sex weddings, that's not the judge's call. People of faith might even differ on this question for theological reasons, but it is still not the government's decision.

The Director relied on *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, in which the Supreme Court upheld a law that cut off funding to colleges that refused to permit military recruiters the

---

93 *Id.* at *11–12.

94 *Id.* at *12.

95 *Id.*

96 *Id.*

97 ALJ Opinion, *supra* note 86, at *5.

98 *Id.* at *6.

same access as other recruiters.[99] The schools were trying to exclude the military on the grounds that it did not meet their sexual orientation nondiscrimination policy due to the military's "Don't ask, don't tell" policy.[100] *FAIR* was an unconstitutional conditions case dealing with government funding, not tax exemption—in the military, moreover—an area in which Congress has significant constitutional power to legislate.[101]

First, the Court noted in that case, "a funding condition cannot be unconstitutional if it could be constitutionally imposed directly," and "[b]ecause the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds."[102] The same is hardly true here; the state of New Jersey can't impose its nondiscrimination requirements on the Association without any consideration of the constitutional issue.

Another significant point of distinction is that the schools in *FAIR* can still state their disagreement with the government's policy (a point which the Court relied on in concluding there was no unconstitutional restriction on free speech),[103] but statements about belief in the context of public accommodations laws will often be interpreted as an "intent to discriminate."[104] Thus, the Director's analogy is not sound.

FAIR is also distinguishable because the entire case hinged on a funding conditions issue, while here the tax exemption issue was only one aspect of this case. Here, as in *Dale* and *Hurley*, the primary issue is constitutional rights being pitted against nondiscrimination laws. The Court in *FAIR* said the message of the schools was not altered like that of the parade in *Hurley*, for "the schools are not speaking when they host interviews and recruiting receptions," and "[u]nlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive."[105] According to the Court, a parade is expressive, and recruiting access is not.[106] In the eyes of the Court, comparing recruiter access to *Dale* and *Hurley* "overstates the

---

99 Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 51, 70 (2006).

100 *Id.* at 52.

101 *Id.* at 52–53, 58–59.

102 *Id.* at 59–60.

103 *Id.* at 69–70.

104 *See, e.g.*, State v. Arlene's Flowers, Inc., 389 P.3d 543, 552–53 (Wash. 2017) (holding that a florist violated a state public accommodations law by declining to provide services for a same-sex wedding ceremony on the basis of her religious beliefs).

105 *Rumsfeld*, 547 U.S. at 64.

106 *Id.*

expressive nature" of recruiter access.[107] The Court in *FAIR* also noted the recruiting law does not force schools to accept members they did not desire, while the nondiscrimination law in *Dale* does. But the expressive quality of a wedding seems closer to a parade or membership organization than access to recruiters. There is more of an "acceptance" conveyed by the presence of a wedding party than campus recruiters.

The Director also relied on *Pruneyard Shopping Center v. Robins*, where the issue was whether a state constitutional free speech right, which permitted speech and petitioning on private shopping centers, caused a violation of the First Amendment free speech right to not be forced to support others' speech and the Fifth Amendment property right prohibiting taking of private property of the owner of the shopping center.[108] It involved a situation in which state free speech rights were more protective than federal free speech and property rights, which resulted in them being in conflict.[109] But it did not involve a situation pitting nondiscrimination laws against free speech rights, as in *Hurley, Dale,* and *Bernstein*. The state free speech rights being asserted in *Pruneyard* are different and arguably more important than the nondiscrimination principles in the LAD. Regardless, the shopping center in *Pruneyard* is large and contains many different entities on the premises.[110] The pavilion in *Bernstein* is small and the only entity involved is the Association. Is the Association in *Bernstein* really more similar to the shopping center, or to the Boy Scouts and the St. Patrick's Day Parade organizers? The latter seem more similar. In addition, the court in *Pruneyard* noted the property owner could post signs saying the message being communicated is not his.[111] But would that not still violate the LAD in *Bernstein*? It seems likely.

FAIR and *Pruneyard* are not more applicable to *Bernstein* than *Hurley* and *Dale*. The former involve funding conditions and a battle of free speech rights—neither of which are present in *Bernstein*—while the latter involve nondiscrimination laws being pitted against constitutional rights—exactly what *Bernstein* concerns. The average viewer is certainly more likely to mistake the same-sex wedding for the message of the religious organization on whose property it takes place, than a recruiter's message for the university's where they are present or a protestor's for that of the owner of the shopping plaza where he or she protests.

---

[107] *Id.* at 70.

[108] 447 U.S. 74, 76–77, 82 (1980).

[109] *See id.* at 79–81 (discussing how states can adopt more expansive constitutional protections than those in the federal Constitution, provided the expansive state protections do not infringe on federal constitutional rights).

[110] *Id.* at 83.

[111] *Id.* at 87.

Lastly, the Director rejected the free exercise claim on the grounds that the LAD was neutral and generally applicable.[112]

Even in this case, there is a conflation of sexual orientation status and same-sex marriage (or civil unions).[113] As Barronelle Stutzman's case described above shows, this is not true.[114]

Should the Association have sought tax exemption through its religious nature instead of the property exemption? It's a reasonable question, but the Association should still have prevailed in this case. It's practically a church; being closely associated with the United Methodist Church.[115] The voting members of its Board of Trustees must be either clergy or members of the United Methodist Church.[116] The Association also operated multiple religious institutions which it closely controlled.[117] In a prior case that arose in New Jersey on the question of whether the LAD applied to religiously-affiliated organizations which are places of worship, the Director had announced that the state "does not consider places of worship to be 'public accommodations,' and therefore the LAD provisions applicable to public accommodations have never been and would not now be applied to them."[118] Why did New Jersey not take the same position with respect to the religiously-affiliated organization here? After its litigation—which appears to not have proceeded beyond the administrative level—the Association discontinued offering its property to the public for wedding ceremonies.[119]

While this case only serves as one state administrative precedent on this issue, we can expect more conflicts between SOGI public accommodations laws and the constitutional rights of nonprofits to arise in the future. When they do, courts should find that such entities are protected under *Dale* and *Hurley*.

How else might nonprofits defend themselves, aside from asserting their First Amendment protections? The federal RFRA could offer a good defense, as would state RFRAs. What would be most helpful are laws offering clear exemptions for religious nonprofits like Mississippi's H.B.

---

[112] Civil Rights Division Opinion, *supra* note 81, at *14.

[113] *Id.* at *15.

[114] *See supra* notes 14–18 and accompanying text.

[115] Civil Rights Division Opinion, *supra* note 81, at *2.

[116] *2016 OGCMA Board of Trustees*, OCEAN GROVE CAMP MEETING ASS'N, http://www.oceangrove.org/board-of-trustees-1 (last visited Mar. 20, 2017).

[117] Civil Rights Division Opinion, *supra* note 81, at *2.

[118] Presbytery of N.J. of the Orthodox Presbyterian Church v. Florio, 830 F. Supp. 241, 246 (D.N.J. 1993).

[119] *See* Rob Spahr, *Lesbian Couple Discriminated Against by Ocean Grove Association, State Says*, NJ.COM (Oct. 24, 2012, 7:53 AM), http://www.nj.com/monmouth/index.ssf/2012/10/lesbian_couple_discriminated_against_by_ocean_grove_association_state_says.html.

1523;[120] these laws are needed in other states too. The First Amendment Defense Act would provide protections on the federal level.[121] Either these statutory defenses or constitutional protections will be helpful to nonprofits in the years ahead.

IV. WILL CHURCHES BE ENSNARED BY PUBLIC ACCOMMODATIONS LAWS?

Apart from nonprofit organizations generally, churches specifically could be ensnared in some legal scenarios involving same-sex marriage in the post-*Obergefell* era—an issue of concern to many pastors and laypeople alike. Specifically, the answer to the question of whether churches fall under the jurisdiction of public accommodations laws could affect whether they can be forced to permit same-sex marriages on their property and in their facilities.

While states may have a private club exemption, explicit mention of churches is less common, and states vary on the issue. Colorado, for example, exempts churches from its public accommodations law,[122] in contrast to other states that specifically include churches.[123] Other states' statutes are silent on the matter.[124] Logically, if private clubs or religious organizations are exempt, churches should be exempt. But cultural elites who increasingly do not understand religion may not understand the need for autonomy on the part of churches as much as they would see it as necessary for a private secular club (though it makes sense they would see a church as exempt if, for instance, schools operated by bona fide religious institutions are exempt, as in New Jersey).

Even when a particular public accommodations law does not expressly state whether churches fall under the purview of the law, a court or administrative authority may make the determination. For instance, in New Jersey, where the statute, the LAD, is silent, the Director of the Division of Civil Rights announced in one case that the

---

[120] H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016).

[121] H.R. 2802, 114th Cong. (2015).

[122] COLO. REV. STAT. § 24-34-601 (LEXIS through 2016 Second Reg. Sess.).

[123] HAW. REV. STAT. ANN. § 572B-9.5(a) (LexisNexis, LEXIS through 2016 Second Spec. Sess.) (permitting religious organizations to deny the use of their facilities for same-sex marriages on the basis of their religious beliefs). *But see* Gail Finke, *Religious Freedom in Hawaii*, CATH. EXCHANGE (Nov. 19, 2013), http://catholicexchange.com/hawaii-mammon-marriage (explaining that while the statute exempts clergy or religious societies from performing same-sex weddings, a church can lose this exemption when it operates its facility as a for-profit business). Hawaii's public accommodations law was challenged by a church before it contained this exemption, but was subsequently amended with this exemption. Emmanuel Temple v. Abercrombie, 903 F. Supp. 2d 1024, 1026–27 (D. Haw. 2012).

[124] N.J. STAT. ANN. § 10:5-5(*l*) (West, Westlaw through L.2017, c. 39 and J.R. No. 1) (listing no exceptions for churches).

state "does not consider places of worship to be 'public accommodations,' and therefore the LAD provisions applicable to public accommodations have never been and would not now be applied to them."[125] In another case, a court clarified that a church does not fall under Connecticut's public accommodations statute.[126]

Just in the last several months, administrative actions in several states have potentially implicated churches. The state of Iowa published guidance purporting to bring churches under the purview of its public accommodations law that prohibited discrimination on the basis of sexual orientation or gender identity.[127] The guidance states:

> DOES THIS LAW APPLY TO CHURCHES?
> Sometimes. Iowa law provides that these protections do not apply to religious institutions with respect to any religion-based qualifications when such qualifications are related to a *bona fide religious purpose.* Where qualifications are not related to a bona fide religious purpose, churches are still subject to the law's provisions. (e.g. a child care facility operated at a church or a church service open to the public).[128]

Though based on the exemption for religious institutions in these matters when tied to a "bona fide religious purpose," it is unclear how the state would define this term. If the Commission has the power to determine what this is, that is a problem. The guidance bans advertising in a discriminatory manner,[129] hostile or unwelcoming comments by churches (which implicates speech),[130] and restricting access to facilities in a discriminatory manner.[131]

Cornerstone World Outreach Church in Iowa has sent a demand letter to the state requesting that "[t]he Commission amend its published policy . . . to clarify that it will not apply Iowa Code § 216 against churches," and "publicly acknowledge that because . . . Cornerstone World Outreach, is a church, that . . . it will be exempt from enforcement action by the Commission in regards to Iowa Code § 216."[132] The Commission subsequently went public with a press release, stating that a revised version of the brochure had been

---

[125] Presbytery of N.J. of the Orthodox Presbyterian Church v. Florio, 830 F. Supp. 241, 246 (D.N.J. 1993).

[126] Traggis v. St. Barbara's Greek Orthodox Church, 851 F.2d 584, 586 (2d Cir. 1988).

[127] IOWA CIV. RTS. COMM'N, A PUBLIC ACCOMMODATIONS PROVIDER'S GUIDE TO IOWA LAW, http://www.adfmedia.org/files/SOGIPublicAccom.pdf.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] Letter from Chelsey Youman, Chief of Staff & Counsel, First Liberty Inst., to Kristin H. Johnson, Exec. Dir., Iowa Civil Rights Comm'n (July 5, 2016), http://firstliberty.org/wp-content/uploads/2016/07/Iowa-Civil-Rights-Commission-Demand-Letter.07.05.2016.pdf.

published, clarifying that "religious activities by a church are exempt from the Iowa Civil Rights Act."[133]

However, the revised brochure is not much better, stating:

> PLACES OF WORSHIP
> Places of worship (e.g. churches, synagogues, mosques, etc.) are generally exempt from the Iowa law's prohibition of discrimination, unless the place of worship engages in non-religious activities which are open to the public. For example, the law may apply to an independent day care or polling place located on the premises of the place of worship.[134]

While Cornerstone is currently not pursuing legal action, the Fort Des Moines Church of Christ also took issue with the guidance, and brought suit in federal court.[135] This litigation concluded when the church voluntarily dismissed its case after the court denied the church's request for a preliminary injunction.[136]

Also in the last several months, a similar issue arose in Massachusetts. The Massachusetts Commission Against Discrimination released guidance on its new gender identity requirements for public accommodations, in which it laid out the state's broad definition of a public accommodation, then described examples of places which had been found to be public accommodations, stating that even "a church could be seen as a place of public accommodation if it holds a secular event, such as a spaghetti supper, that is open to the general public."[137] It is understandable, and logical, that this type of intrusiveness would carry over into the realm of religious organizations, considering the commonplace lack of understanding of religion and what motivates it among government elites. But should the most religious institution (a church) be viewed as having less autonomy than private, secular clubs? The problem is a lack of understanding of how religion infuses all aspects of life—not just Sunday morning worship, but also spaghetti suppers.

---

[133] Press Release, Iowa Civ. Rts. Comm'n, Iowa Civil Rights Commission Releases Revised Sexual Orientation & Gender Identity Public Accommodations Brochure (July 8, 2016), https://icrc.iowa.gov/pressrelease/iowa-civil-rights-commission-releases-revised-sexual-orientation-gender-identity-public.

[134] IOWA CIV. RTS. COMM'N, *supra* note 127.

[135] William Petroski, *Churches Challenge State on Gender Identity Law*, DES MOINES REG. (July 5, 2016, 8:33 AM), http://www.desmoinesregister.com/story/news/politics/2016/07/05/church-sues-state-iowa-over-transgender-bathroom-rules/86700392.

[136] *Church Drops Lawsuit on Transgender Bathroom Issue*, DES MOINES REG. (Oct. 26, 2016, 3:44 PM), http://www.desmoinesregister.com/story/news/crime-and-courts/2016/10/26/church-drops-lawsuit-transgender-bathroom-issue/92788340.

[137] Mass. Comm'n Against Discrimination, Gender Identity Guidance (Sept. 1, 2016), https://web.archive.org/web/20160915014340/http://www.mass.gov/mcad/docs/gender-identity-guidance.pdf.

On October 11th, 2016, several Massachusetts churches filed suit against the state alleging their constitutional rights would be violated by the guidance, and asking the court to enjoin the state from enforcing it.[138] The state backed down and revised its guidance to protect churches from such liability[139] and the churches dismissed their suit.[140]

It should be noted that these public accommodations cases concern gender identity, but their logic could be applied to sexual orientation. If churches fall under the purview of public accommodations laws, it is possible that states could try to make them host same-sex weddings in their facilities.

Yet, apart from church liability, pastors have additional legal protections from being forced to officiate such ceremonies themselves.[141] Moreover, certain states protect clergy even though they do not protect churches. For instance, Hawaii specifically exempts pastors from being forced to perform same-sex marriages, even though it requires churches to open their facilities to them.[142]

While we can expect authorities to refrain from pursuing churches too much now, this may change in the near future. Churches will need to take steps to protect themselves against being forced to open their facilities to same-sex marriages. For instance, churches can establish additional and specific facilities usage policies allowing them to decline uses that are inconsistent with their faith. Model policies are available from legal assistance organizations such as Alliance Defending Freedom and First Liberty Institute.[143] Instead of retreating from the public square, churches and pastors should take the necessary steps to put protections in place so they can continue to take part in and minister to their local communities.

---

[138] *Massachusetts Churches File Suit to Challenge Law Forcing Them to Speak, Act Contrary to Their Faith*, ALL. DEFENDING FREEDOM (Oct. 11, 2016), http://www.adfmedia.org/News/PRDetail/10093.

[139] Mass. Comm'n Against Discrimination, Gender Identity Guidance 4 (revised Dec. 5, 2016), http://www.mass.gov/mcad/docs/gender-identity-guidance-12-05-16.pdf.

[140] *Massachusetts Churches Free to Serve Their Communities Without Being Forced to Abandon Beliefs*, ALL. DEFENDING FREEDOM (Dec. 12, 2016), http://www.adfmedia.org/News/PRDetail/10091.

[141] Travis Weber, *Can Pastors and Churches Be Forced to Perform Same-Sex Marriages?*, FAM. RES. COUNCIL, http://www.frc.org/clergyprotected, (last visited Jan. 26, 2017).

[142] *See supra* note 123 and accompanying text.

[143] ALL. DEFENDING FREEDOM, PROTECTING YOUR MINISTRY FROM SEXUAL ORIENTATION GENDER IDENTITY LAWSUITS (2015), http://www.adflegal.org/issues/religious-freedom/church/resources?_ga=1.109874181.1664735405.1485458796l; FIRST LIBERTY INST., RELIGIOUS LIBERTY PROTECTION KIT FOR CHURCHES (2016), https://firstliberty.org/wp-content/uploads/2016/02/RLA_CHURCHES.pdf.

V. NONPROFITS AND PUBLIC ACCOMMODATIONS LAW IN CONTEXT

Despite some concerns about public accommodations laws, generally, legal protections for pastors and churches are currently quite strong.[144] There is very minimal risk that a pastor will be forced to perform a same-sex marriage right now, and small risk that churches will be forced to host them.[145] To this date, no court has held a church to be a place of public accommodation.[146] However, other religious organizations, individuals, and schools are currently more vulnerable legally than both pastors and churches, and can be expected to be at the receiving end of the first challenges to religious liberty protections against being forced to perform or become complicit in same-sex marriages.

This fight doesn't currently lie at the doorstep of churches, but rather for-profits, and to some degree nonprofits.[147] And it's not just in the area of public accommodations. Recently, a Catholic High School was sued by a student in part because the school would not let him take another male student to a dance.[148] The basis of the suit did not include public accommodations,[149] but no doubt would have if there was a statute or local ordinance barring such discrimination in public accommodations. A number of religious schools have faced employment discrimination suits based on sexual orientation discrimination.[150] Some of these have dealt with same-sex marriage.[151] There are efforts to outlaw licensed counselors from even counseling someone toward a change in their sexual attractions; five states, the District of Columbia,

---

[144] Weber, *supra* note 141.

[145] There is a higher risk for churches than for pastors, because of the potential applicability of public accommodations laws. *Id.*

[146] *Iowa Law Threatens Churches, Through Definition as "Public Accommodation" and Speech Restrictions*, WAGENMAKER & OBERLY: BLOG (July 12, 2016), http://www.wagenmakerlaw.com/blog/iowa-law-threatens-churches-through-definition-%E2%80%9Cpublic-accommodation%E2%80%9D-and-speech-restrictions.

[147] *See supra* notes 20–24 and accompanying text.

[148] Complaint at 4–8, Sanderson v. Christian Brothers LaSalle High School, No. CT-003835-16 (Tenn. Cir. Ct. Sept. 20, 2016).

[149] *See id.* at 12–18 (arguing breach of contract, negligent and intentional inflictions of emotional distress, violation of title IX, negligent hiring, and negligent training).

[150] *See, e.g.*, Susan Berry*, Gay Teacher Files Federal Discrimination Lawsuit Against Catholic Schoo*l, BREITBART (July 1, 2015), http://www.breitbart.com/big-government/2015/07/01/gay-teacher-files-federal-discrimination-lawsuit-against-catholic-school; Michael Gordon*, Gay Teacher Who Lost His Job at Charlotte Catholic High Sues, Alleging Discrimination*, CHARLOTTE OBSERVER (Jan. 11, 2017, 10:15 AM), http://www.charlotteobserver.com/news/local/education/article125835989.html.

[151] Berry, *supra* note 150; Gordon*, supra* note 150.

and one U.S. city now ban such counseling.[152] The cultural forces and political movement to gut religious rights is in full swing. The Equality Act would bar RFRA from being used in the discrimination context.[153] Political battles over exemptions for religious organizations reveal how the battleground is changing. There was a furor over the Russell Amendment this past year in Congress, but all that did was offer protection consistent with Title VII religious exemptions covering religious nonprofits.[154] The mainstream press reacted the same way to a proposal in Georgia, which was quite moderate and would have primarily protected nonprofits,[155] as it did to more robust laws like the RFRA in Indiana.[156] When there is the same outcry against Title VII exemptions as there is against RFRA being applied to businesses, people either don't understand the issue, or they don't care to understand the issue. It appears to be the latter. The issue is not the law—where to draw the line between individual rights and governmental authority. The issue, rather, is that there is a philosophy of individual sexual autonomy which is driving these changes, and it is being implemented according to a modern, progressive, conformist worldview, and in a manner that will accept no compromise. Religious nonprofits, among others, must be on guard.

---

[152] *Cincinnati Imposes Massive Fines on Counselors Who Help Youth with Unwanted Gay Attractions*, LIFESITE (Dec. 8, 2015, 11:42 AM), https://www.lifesitenews.com/news/homosexual-activists-council-members-use-deception-to-vote-against-reparati.

[153] Equality Act, H.R. 3185, 114th Cong. (2015).

[154] *See* Amendment to H.R. 4909, 114th Cong. (2016), http://docs.house.gov/meetings/AS/AS00/20160427/104832/BILLS-114-HR4909-R000604-Amdt-232r2.pdf (offering religious organizations government protection against discrimination claims); Nico Lang, *Congress Just Killed Legislation Allowing LGBT Workers to Be Fired – But Anti-gay Discrimination Under Trump Is Here to Stay*, SALON (Dec. 1, 2016, 6:58 PM), http://www.salon.com/2016/12/01/congress-just-killed-legislation-allowing-lgbt-workers-to-be-fired-but-anti-gay-discrimination-under-trump-is-here-to-stay (noting that many Congress members were against the Act because it offered a very broad definition of the religious organizations which could be used to justify discrimination).

[155] *See* Free Exercise Protection Act, H.B. 757, 153d Gen. Assemb., 2015–2016 Reg. Sess. (Ga. 2016), https://www.documentcloud.org/documents/2771895-HB-757.html (providing protection to religious officials and organizations against discrimination claims for refusing to engage in activities that are inconsistent with their religious beliefs); *Opponents of Georgia Religious Bill Hail Veto, Urge Activism*, 90.1 FM WABE (Apr. 5, 2016), http://news.wabe.org/post/opponents-georgia-religious-bill-hail-veto-urge-activism (noting that Georgia governor vetoed the bill after its opponents held a rally).

[156] *See* Brian Eason, *Indy Looks to Limit 'Religious Freedom' Damage*, INDYSTAR (Mar. 27, 2015, 6:03 AM), http://www.indystar.com/story/news/politics/2015/03/26/indy-looks-limit-religious-freedom-damage/70516704 (noting that the city's largest convention threatened to relocate and some business owners began signing a petition to oppose the bill).

CONCLUSION

Nonprofit organizations, their liability under public accommodations laws, and their constitutional defenses are certainly one segment of the larger cultural and legal trends at the intersection of religious liberty and same-sex marriage—in which even churches are becoming involved. Are nonprofits subject to public accommodations laws? If so, do they have First Amendment (or other) defenses? The answer to the former will affect whether we have to address the latter. In the many cases where nonprofits are not public accommodations, they remain free (for now). But at least in some cases they may considered to be public accommodations. For them, the question of First Amendment defenses then arises. Do nonprofits have such defenses against requirements imposed by the constitutionalization of same-sex marriage? Some lower court and administrative cases appear to be answering in the negative, but the Supreme Court jurisprudence indicates the answer should be yes. While we have to wait and see how these constitutional cases play out, statutory provisions will likely be needed to supplement them too. In either case, they will need protections in the days ahead!