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The Return of Boy Scouts of America v. Dale

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THE RETURN OF *BOY SCOUTS OF AMERICA V. DALE*

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ABSTRACT

In 2000, the Supreme Court's decision in Boy Scouts of America v. Dale *seemed to upend the law of freedom of association. Fears surfaced that the right of expressive association would be "an easy trump of any antidiscrimination law"—and perhaps other regulations of conduct. Organizations from schools to employers, social service providers to unions, could mount constitutional claims against the inclusion of individuals unwanted because of their sex, sexuality, race, disability, or beyond.*

Instead, lower courts read Dale *narrowly. Expressive associational rights would, it seemed, be bound by the facts of the case. Freedom of association would not override equality under the law.*

The ground, however, is now shifting. This essay identifies a rapid and dramatic resurgence of expressive association claims. In a series of decisions, courts have begun to read Dale *as broadly as commentators once feared. Indeed, they have gone further still, taking the right to expressive association far beyond its foundations in the membership of non-profit, non-commercial groups. Employers, commercial entities, and social service providers have notched recent wins on expressive association claims. Several decisions conclude that an employer becomes expressive simply by articulating a desire to discriminate. Others deny a state interest in requiring nondiscrimination in employment on the ground that dissenting employees can work elsewhere—a proposition that would dismantle all of labor and employment law.*

The essay offers some tentative explanations of the recent successes of expressive association claims. It predicts that the Supreme Court's compelled speech opinion in 303 Creative, LLC v. Elenis *will further fuel expansion. The*

* Professor of Law, University of Texas School of Law. I delivered these remarks as a reply to Professor Carlos Ball's 2023 Childress Lecture at St. Louis University School of Law and benefitted from comments from Andy Koppelman, Kyle Velte, Katie Eyer, David Cruz, and James D. Nelson. An enormous thank you to Ryan Brooks, Sam Jordan, Susie Lee, Adam Kosmicki, Christine Hall, Paige Hume, David Miller, Brody Shea, Beatrice Connaghan, Aimen Salem, Alyssa Savage, Morgan Schmidt, Isabella Dixon, Kateri Busiek, Brian Ahle, Nicole Beachboard, and the staff of the SLU Law Journal for their organizational and editorial work. My deepest gratitude goes to Brandon Charnov for his tremendous research assistance into the post-*Dale* law of expressive association.

essay concludes with a call to scholars to pay attention to the lower courts, where doctrinal siloes no longer hold and the antiregulatory agenda of the conservative legal movement is fast developing.

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INTRODUCTION

In 2000, the Supreme Court decided *Boy Scouts of America v. Dale*, a case that—like 2023's *303 Creative v. Elenis*—pitted First Amendment interests against equality under the law.[1] The Boy Scouts had argued that the Constitution protected their right to discriminate in membership.[2] Mandated inclusion of a gay man as a scoutmaster, they said, necessarily interfered with the group's ability to express its own message (or stay silent) about homosexuality. The Supreme Court agreed.[3]

Its decision threatened to upend the law of freedom of association. First, the definition of an expressive association seemed to dramatically broaden. The Court instructed lower courts to defer to an organization's claim to expressive identity, even if it had been generated in preparation for litigation.[4] Second and similarly, the question of whether an antidiscrimination law significantly burdened expression seemed to be left up to the organization itself to decide.[5] Finally, the Court muddied the level of scrutiny. The opinion can be read to give expressive associations a presumptive out from antidiscrimination law, to require strict scrutiny of any such law, or to demand a balance between associational interests and governmental goals.[6]

Fears surfaced that the right of expressive association would be "an easy trump of any antidiscrimination law"[7]—and perhaps other regulations of conduct. Organizations from schools to employers, social service providers to unions, could mount constitutional claims against the inclusion of individuals unwanted because of their sex, sexuality, race, disability, or beyond. But this dystopia did not materialize.

Instead, lower courts read *Dale* narrowly.[8] Expressive associational rights would, it seemed, be bound by the facts of the case. Freedom of association would not override equality under the law.

The ground, however, is now shifting. This essay identifies a rapid and dramatic resurgence of expressive association claims. In a series of decisions, courts have begun to read *Dale* as broadly as commentators once feared.[9] Indeed, they have gone further still, taking the right to expressive association far

1. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); 303 Creative, LLC v. Elenis, 600 U.S. 570 (2023).

2. *Dale*, 530 U.S. at 640.

3. *Id*.

4. *Id.* at 648. *Cf.* City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989) (noting that the Supreme Court's cases had protected the right of expressive association of "groups organized to engage in speech").

5. *Dale*, 530 U.S. at 653-56.

6. *Id.* at 658-59.

7. *Id.* at 701–02 (Souter, J., dissenting).

8. *See infra* Part II.

9. *See infra* Part III.

beyond its foundations in the membership of non-commercial, non-profit groups. Expressive association is seeping into commercial and employment relations.[10] Yet, with rare exceptions, scholars have overlooked this development.[11]

The essay offers some tentative explanations for why expressive association claims are succeeding now. It sketches a few areas of future development and predicts that the Supreme Court's compelled speech opinion in *303 Creative, LLC v. Elenis* will fuel the expansion of a right to discriminate in the name of expressive association. It concludes with a call that scholars pay attention to developments in the lower courts where doctrinal siloes no longer hold and where the antiregulatory agenda of the conservative legal movement is fast developing.

I. *BOY SCOUTS OF AMERICA V. DALE*

In *Boy Scouts of America v. Dale*, for the first time, the Supreme Court decided that the right to expressive association trumped the state's interest in equality.[12] Prior to *Dale*, the law of expressive association rested on a trilogy of decisions involving the application of antidiscrimination law to men-only civic groups. Beginning with *Roberts v. U.S. Jaycees* in 1984, the Supreme Court elaborated a right of expressive association in membership organizations.[13] While safeguarding some autonomy over membership, it made clear that the right to associate does not mean "that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of

10. *See infra* Part III.A. and III.B.

11. Katie Eyer, *Anti-Transgender Constitutional Law*, VAND. L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4627458 [https://perma.cc/7R88-PAZ8] (identifying freedom of association claims as a growing area of constitutional litigation against transgender equality in particular).

12. *Dale*, 530 U.S. at 659 ("The 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."). Some might count *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), which sided with a parade organizer that excluded a gay rights group in contravention of a public accommodations law. But that unanimous opinion did "not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade" but rather concerned the group as a parade unit "carrying its own banner" and thus was decided on grounds of compelled speech—the forced inclusion of that banner—rather than based on expressive association. *Id.* at 572. For a critical account arguing that *Hurley* is pivotal to the ongoing success of campaigns against sexual orientation antidiscrimination laws, see Kate Redburn, *The Equal Right to Exclude: Compelled Expressive Commercial Conduct and the Road to* 303 Creative v. Elenis, 112 CAL. L. REV. (forthcoming 2024) (draft on file with author).

13. 468 U.S. 609, 622 (1984) ("[I]mplicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").

inclusion and exclusion is protected by the Constitution."[14] Only "serious burdens" imposed by the government on that process would merit scrutiny.[15]

The Court routinely concluded that antidiscrimination laws left ample room for organizations to speak and pursue their civic, social, and political goals.[16] Even in the case of the U.S. Jaycees, an organization dedicated to advancing young men's interests, the Court determined that the admission of women as full members would not impair its "civic, charitable, lobbying, fundraising, and other activities" or ability to "disseminate its preferred views."[17] The Court rejected assertions from schools, employers, and unions that antidiscrimination laws violated their expressive associational interests.[18]

This line of doctrine was called into question in a dispute between the Boy Scouts and James Dale, a volunteer assistant scoutmaster and gay man expelled by the organization because of his sexual orientation.[19] Dale had sued under New Jersey's public accommodations statute, which prohibits sexual orientation discrimination.[20] In its defense, the Scouts argued that the mandated inclusion of an unwanted member violated its freedom of expressive association.[21]

The New Jersey Supreme Court rejected this argument in an opinion accurately reflecting then-governing doctrine. It acknowledged that the Scouts organization "expresses a belief in moral values and uses its activities to encourage the moral development of its members."[22] But an anti-gay message

14. N.Y. State Club Ass'n. Inc. v. City of New York, 487 U.S. 1, 13 (1988).

15. *Roberts*, 468 U.S. at 626.

16. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987) ("Rotary Clubs engage in a variety of commendable service activities that are protected by the First Amendment. But the Unruh Act does not require the clubs to abandon or alter any of these activities.").

17. *Roberts*, 468 U.S. at 627.

18. Runyon v. McCrary, 427 U.S. 160, 175–76 (1975) ("[T]he Court has recognized a First Amendment right 'to engage in association for the advancement of beliefs and ideas . . . ' . . . From this principle it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle."); Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) ("[R]espondent argues that application of Title VII in this case would infringe constitutional rights of . . . association. Although we have recognized that the activities of lawyers may make a 'distinctive contribution . . . to the ideas and beliefs of our society,' . . . respondent has not shown how its ability to fulfill such a function would be inhibited by" antidiscrimination law); Ry. Mail Ass'n v. Corsi, 326 U.S. 88, 93–94 (1945) ("Appellant first contends that [the law prohibiting racial discrimination by labor organizations] interfere[s] with its right of selection to membership.… We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race.").

19. *Dale*, 530 U.S. at 645.

20. *Id*.

21. *Id.* at 648.

22. Dale v. Boy Scouts of Am., 160 N.J. 562, 613 (N.J. 1999), *rev'd* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

(to the extent the Scouts could show one) was not the motivation for associating. Indeed, excluding members solely because of their sexual orientation seemed "inconsistent with Boy Scouts' commitment to a diverse and 'representative' membership."[23] The presence of a gay Scout leader, the court concluded, would not "affect in any significant way existing members' ability to carry out" the Scouts' purposes of instilling values and community among the nation's boys.[24]

In reversing this decision, the Supreme Court turned the law of expressive association on its head. A three-pronged test emerged.[25] First, the Court significantly broadened the category of expressive associations. To seek constitutional protection, it said, "associations do not have to associate for the 'purpose' of disseminating a certain message" but "must merely engage in expressive activity that could be impaired."[26] Here, the Court insisted on deference to the association's "assertions regarding the nature of its expression."[27] Under this standard, it seemed, any association could take a position and count as expressive.

Second, forced inclusion of a member had to "significantly burden" the organization's ability to advocate its viewpoints.[28] At first blush, this second prong might appear both rigorous and consistent with prior precedent, but again, the Court deferred to the association as to its "view of what would impair its expression."[29] The Court then qualified this reasoning by protesting (perhaps too much): "[t]hat is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message."[30]

Finally, the Court muddied the level of scrutiny. It rejected the intermediate scrutiny used for regulations of expressive conduct and seemed to endorse something like a balancing test.[31] But it conducted no such analysis.[32] The opinion can be read in at least three conflicting ways: to give expressive associations a presumptive out from antidiscrimination law, to require strict

23. *Id*. at 618.

24. *Id.* at 615 (quoting *Rotary Club*, 481 U.S. at 548).

25. *Id*.

26. *Dale*, 530 U.S. at 655.

27. *Id.* at 653, 655.

28. *Id.* at 653.

29. *Id.*

30. *Id.*

31. *Id.* at 658 (indicating that "after finding a compelling state interest," a court should "examine whether or not the application of the state law would impose any 'serious burden' on the organization's rights of expressive association").

32. *Id.* at 659 (simply concluding that "[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").

scrutiny of any such law, or to demand a balance between associational interests and governmental goals.[33]

Applying this test, the Court found the Boy Scouts to be expressive due to their goal to "instill" values in young people through scoutmasters who "inculcate" these values "both expressly and by example."[34] It reasoned that the mere presence of James Dale, who the opinion referred to alternately as "an avowed homosexual" and as a "gay rights activist," would force the Scouts to communicate a message of toleration of gay people.[35] It then concluded that the state's interest in nondiscrimination in public accommodations could not outweigh the associational interests of the Scouts.[36]

II. RETRENCHMENT POST-*DALE*

Dale was expected to lead to a major expansion of freedom of expressive association. In dissent, Justice Stevens warned that "the right of free speech effectively becomes a limitless right to exclude for every organization, whether or not it engages in any expressive activities."[37] With trepidation, some scholars noted that the Court's deferential approach meant "an expressive association claim is available to any entity that wants to discriminate at any time for any purpose."[38] With delight, others welcomed a future in which non-commercial organizations had an absolute right to discriminate in accordance with their values.[39] Commentators agreed that at minimum, antidiscrimination laws could expect to face, and often give way before, numerous constitutional challenges.[40]

33. Green v. Miss U.S. of Am., LLC, 533 F. Supp. 3d 978, 997-98 (D. Or. 2021) (noting the absence of clarity as to why the balancing test had favored the Boy Scouts and suggesting yet another option, i.e., that the Court found the state's interest in prohibiting sexual orientation discrimination less than compelling).

34. *Dale*, 530 U.S. at 649-50.

35. *Id.* at 653, 655-56.

36. *Id*. at 680.

37. *Id.* at 695 (Stevens, J., dissenting).

38. Andrew Koppelman, *Signs of the Times:* Dale v. Boy Scouts of America *and the Changing Meaning of Nondiscrimination*, 23 CARDOZO L. REV. 1819, 1821–22 (2002); *see also* Erwin Chermerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL OF RTS. J. 595, 596 (2001); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 811-12 (2001); David McGowan, *Making Sense of* Dale, 18 CONST. COMM. 121, 172-73 (2001); Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1603-04 (2001).

39. David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83, 88, 126 (2001); Richard A. Epstein, *Free Association: The Incoherence of Antidiscrimination Laws*, NAT'L REV., Oct. 9, 2000, at 38, 40 ("Rightly understood, *Dale* forces us to confront the multiple forms of forced private association that have been staples of the New Deal and the Great Society'' including Title VII of the 1964 Civil Rights Act).

40. *E.g.*, Bernstein, *supra* note 39, at 126; Chemerinsky & Fisk, *supra* note 38, at 617 ("[B]ecause of its ruling in *Dale*, it will be much more difficult for the Court in the future to stop any group that wants to discriminate based on race, or any other characteristic, from doing so.").

A motley crew of organizations took *Dale* on its face. Entities from biker groups to taverns argued for an expressive associational right against all manner of regulation.[41] Fraternities, sororities, the Christian Legal Society, and other student groups emerged as regular claimants, but they rarely prevailed.[42] Courts drew a series of lines that limited the bounds of association, reverting as much as they could to pre-*Dale* doctrine.

Disagreements over *Dale*—and a tendency to read it narrowly—emerged immediately in a series of cases involving the Boy Scouts. The Scouts had been labeled an expressive association and arguably freed to discriminate against gay people. But the lower courts took the Supreme Court to leave two central questions unanswered: first, did the inclusion of all gays, or only gays publicly advocating views different from the Scouts, unduly burden its associational rights and, second, did *Dale* apply to all members or only those in leadership positions?[43] On both questions, courts tended to deny the Scouts additional victories.[44]

Identity was understood as different from advocacy. Thus, an organization could exclude a "gay activist" for publicly interfering with its message. But a gay person with no history of advocacy need not alter the organization's message.[45] In cases beyond the Scouts, this line of analysis would prove important to evaluating burdens on an organization's speech.[46] Courts also recognized the heightened risks to an association's expression where antidiscrimination law applied to leadership positions.[47] By contrast, the

41. *E.g.*, LCN Enters. v. City of Asbury Park, 197 F. Supp. 2d 141, 151-52 (D.N.J. 2002) (holding that the city was justified in canceling a motorcycle convention out of reasonable concerns for public safety).

42. *E.g.*, Every Nation Campus Ministries at San Diego State Univ. v. Achtenberg, 597 F. Supp. 2d 1075, 1078-79, 1099-1100 (S.D. Cal. 2009); Beta Upsilon Chi v. Machen, 559 F. Supp. 2d 1274, 1275, 1280 (N.D. Fla. 2008); Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of New York, 443 F. Supp. 2d 374, 375, 397 (E.D.N.Y. 2006); Truth v. Kent Sch. Dist., No. C03-785P, 2004 WL 7339618, at *1, *14 (W.D. Wash. 2004).

43. Boy Scouts of Am. v. Wyman, 335 F.3d 80, 88–91 (2d Cir. 2003).

44. *See, e.g.*, *id.* at 99. *But see* Boy Scouts of Am., S. Fla. Council v. Till, 136 F. Supp. 2d 1295, 1308 (S.D. Fla. 2001) (reading *Dale* to include "the right to exclude homosexuals as members or leaders in the organization" albeit in a decision where that reading was not significant to the decision).

45. Boy Scouts of Am. v. D.C. Comm'n on Hum. Rts., 809 A.2d 1192, 1201–02 (D.C. 2002) (holding that the *Dale* Court "meant something of legal significance by coupling 'avowed homosexual' with—or distinguishing it from—'gay activist'" and the Scouts need not admit complainant, who was at least as "activist" as the *Dale* plaintiff); Chi. Area Council of Boy Scouts of Am. v. City of Chi. Comm'n on Hum. Rels., 748 N.E.2d 759, 767 (Ill. App. 2001) (finding that "[l]ike the complainant in *Dale*," the plaintiff was an advocate for gay rights).

46. Barrett v. Fontbonne Acad., No. NOCV2014-751, 2015 WL 9682042, at *8 (Mass. Super. Dec. 16, 2015) (noting that both advocacy and job duties that include presenting the institutional views were key to *Dale*).

47. *Id*. (describing "leadership role" and "responsibility" in *Dale*).

inclusion of unwanted individuals in positions unrelated to delivering the institutional message—like accountants and food service—would not detract from the group's expression.[48]

For nearly two decades after *Dale*, courts largely rejected associational claims. They often concluded the complaining organization did not constitute an expressive association.[49] Sometimes, this was because the entity had never taken a public stance on any issue of political, social, or cultural importance.[50] At others, the organization made "[c]onclusory assertions of unspecified expressive association,"[51] or the complaint came from a "sham organization" created for litigation.[52]

The commercial-noncommercial line also did work. Justice O'Connor's influential concurrence in *Roberts* had drawn a line between predominantly expressive associations and commercial enterprises.[53] As she noted, "[t]he Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State."[54] *Dale* also had expressly distinguished commercial transactions of a business, subject to antidiscrimination law, from the expressive activities of non-profit membership organizations, eligible for protection from such laws.[55] The opinion did not dwell on the Scouts' non-commercial status, but Justice O'Connor had provided the fifth vote.[56] Even advocates of libertarian ideals typically hesitated to read *Dale* to permit commercial entities, let alone for-profit businesses, to claim a right to

48. *Chi. Area Council of Boy Scouts of Am.*, 748 N.E.2d at 767.

49. *E.g.*, Villegas v. Gilroy, 363 F. Supp. 2d 1207, 1219 (N.D. Cal. 2005) (holding that a motorcycle club was not an expressive organization).

50. Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435, 444 (3d Cir. 2000) (regarding university rescission of a fraternity's status as a recognized student organization).

51. Wal-Mart v. Turlock, No. 1:04-CV-5278 OWW DLB, 2005 WL 8176346, at *6 (E.D. Cal. June 1, 2005) (holding that Save Mart, a Wal-Mart competitor, is not an expressive association simply because it opposes the development of a Wal-Mart superstore).

52. *E.g.*, Taverns for Tots v. Toledo, 341 F. Supp. 2d 844, 851-52 (N.D. Ohio 2004).

53. *Roberts*, 468 U.S. at 635–36 (O'Connor, J., concurring in part and concurring in judgment) ("[A]n association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas."); *see also* IDK, Inc. v. Clark Cnty., 836 F.2d 1185, 1195 (9th Cir. 1988) (adopting commercial-expressive distinction for expressive association doctrine and concluding escort services are not "predominantly" expressive).

54. *Roberts*, 468 U.S. at 634 (O'Connor, J., concurring in part and concurring in judgment).

55. *Dale*, 530 U.S. at 648, 656-57; *see also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 572 (1995).

56. *Dale*, 530 U.S. at 642.

discriminate.[57] And so, in the years following *Dale*, courts routinely rejected any notion that commercial actors fit the definition of "expressive association."[58]

Even when an entity was deemed an expressive association, courts would usually find only an incidental effect on its freedom of association.[59] The notion of less-than-substantial burdens operated in two ways. First, as under the *Robert*s trilogy, courts concluded that organizations could achieve their expressive goals notwithstanding the application of antidiscrimination law to their membership.[60] For example, the inclusion of a male student with long hair did not substantially burden the expression of a private school devoted to "developing the educational

57. A few commentators expressed support for extending the protections of *Dale* to the commercial setting. *See, e.g.*, Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 139-43 (2000) (arguing that commercial businesses are expressive and concluding that *Dale* "rightly opens Pandora's Box" to permit free association to trump antidiscrimination); Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917, 1927 n.49 & 1930 n.66 (2001) (arguing that commercial enterprises can be expressive and that one should err toward more protection of expression in the commercial setting rather than strict application of a line between commercial and non-commercial); Martin H. Redish & Christopher R. McFadden, *Huac, the Hollywood Ten, and the First Amendment Right of Non-Association*, 85 MINN. L. REV. 1669, 1704 (2001) (arguing that a private business is unlikely to apply ideological tests to hiring, but if it does, it should have First Amendment rights of non-association). *But see generally* Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515 (2001) (defending the commercial-noncommercial line but arguing that expressive activities of some "hybrid" commercial-expressive entities should receive protection).

58. *See, e.g.*, Jacoby & Meyers, LLP v. Presiding Just. of the First, Second, Third, and Fourth Dep'ts, App. Div. of the Sup. Ct. of the State of N.Y., 118 F. Supp. 3d 554, 573 (S.D.N.Y. 2015) (holding that a law firm whose primary activity is commercial and not expressive does not constitute an expressive association); DeWalt Prods., Inc. v. City of Portland, No. 3:14-cv-1017-AC, 2016 WL 6089718, at *15 (D. Or. Oct. 17, 2016) (holding that a customer base of fans of the same musical genre does not constitute an expressive association); Amato v. Elicker, 534 F. Supp. 3d 196, 210 (D. Conn. 2021) (holding that a restaurant is not an expressive association); Wine & Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36, 50 (1st Cir. 2005) (observing that commercial entity attempting to persuade that prohibitions on certain liquor licensees engaging in franchise relationships "impinge on its First Amendment right to associate" was not an expressive association); *see also* James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 464 (2015) ("Although the Supreme Court has never explicitly endorsed the distinction between expressive associations and commercial associations, that basic dichotomy is commonly accepted in the law.").

59. *See, e.g.*, Players, Inc. v. City of New York, 371 F. Supp. 2d 522, 545-47 (S.D.N.Y 2005) (holding that a smoking ban does not harm the expressive association of a social club intended to perform and attend live plays); Bray v. City of N.Y., 346 F. Supp. 2d 480, 488 (S.D.N.Y. 2004) (holding that the threat of police seizing bicycles at a mass cycling event does not prevent the cycling organization's ability to express its views).

60. *See, e.g.*, Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 148 (2d Cir. 2007) (holding that the university's "refusal to subsidize the Fraternity's activities does not constitute a substantial imposition on the group's associational freedom").

and spiritual life of its students."[61] Likewise, the admission of a disabled person with a guide dog to a detox program would not impede the "expression of Christian tenets" by the religious organization running the program.[62]

Second, courts distinguished direct bans on discrimination in membership from lesser impediments or indirect inducements to alter membership. Many of these cases involved student groups suing public universities for conditioning the use of meeting space, official recognition, or other resources on agreeing to nondiscrimination rules.[63] Courts tended to hold that so long as cities, states, and schools did not "purport to prohibit" discrimination in the membership of expressive associations, they could refuse to fund those groups' activities out of the public fisc.[64] Student groups and organizations that sought to discriminate had to adapt to fewer resources and a lack of official public support.[65]

By the end of the decade, two Supreme Court decisions—*Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)* and *Christian Legal Society v. Martinez*—further dampened enthusiasm for expressive association claims.[66] In 2006, the Court took up an expressive association challenge brought by an association of law schools (FAIR) against federal legislation denying university-wide funding if they refused to host military recruiters on campus.[67] Because at that time the armed services discriminated on the basis of sexual orientation, the law schools contended that the inclusion of recruiters impeded

61. Gorman v. St. Raphael's Acad., No. 2001-4821, 2002 WL 31455570, at *9–11 (R.I. Super. Oct. 24, 2002); *see also* Lahmann v. Grand Aerie of Fraternal Ord. of Eagles, 121 P.3d 671, 682–85 (Or. App. 2005) (holding that requiring a fraternal order with gendered membership to consider women would not "significantly (or even modestly) impair the Eagles' broad-based" goals of "liberty, truth, justice, equality, for home, for country, and for God").

62. Stevens v. Optimum Health Inst., 810 F. Supp. 2d 1074, 1092–94 (S.D. Cal. 2011).

63. *See, e.g.*, Beta Upsilon Chi v. Machen, 559 F. Supp. 2d 1274 (N.D. Fla. 2008) (involving denial of official recognition to Christian fraternity which discriminated based on religion); Christian Legal Soc'y. Chapter of Univ. of Cal. v. Kane, No. C 04–04484 JSW, 2006 WL 997217 (N.D. Cal. Apr. 17, 2006) (distinguishing between compelled membership and conditions on resources); Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790 (9th Cir. 2011) (same).

64. Evans v. City of Berkeley, 129 P.3d 394, 401–02 (Cal. 2006) (involving city resources conditioned on nondiscrimination).

65. Boy Scouts of Am. v. Wyman, 335 F.3d 80, 91 (2d Cir. 2003) (removing Boy Scouts of America from the state charitable giving campaign "is neither direct nor immediate" in effect and "does not rise to the level of compulsion" of membership); Christian Legal Soc'y v. Eck, 625 F. Supp. 2d 1026, 1032 (D. Mont. 2009) ("[T]he non-discrimination policy burdens Plaintiffs' expressive activity, if at all, in only an incidental manner . . . other than financial support, CLS has full use of the law school facilities as well as its channels of communication."). *But see* Christian Legal Soc'y v. Walker, 453 F.3d 853, 862–64 (7th Cir. 2006) (holding, contrary to other courts, that withdrawal of official organization status from student group violated the group's right of expressive association).

66. Rumsfeld v. F. for Acad. and Inst. Rts., Inc., 547 U.S. 47, 69-70 (2006); Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 669 (2010).

67. *FAIR*, 547 U.S. at 51.

their own message of nondiscriminatory values.[68] In rejecting this claim, the Court emphasized that an organization cannot make out a constitutional claim "simply by asserting" that association "would impair its message."[69] It found no effect on associational rights where recruiters were "outsiders," rather than "members," and where students and faculty remained "free to associate to voice their disapproval of the military's message."[70] Then, in 2010, *Christian Legal Society* threw cold water on burgeoning lawsuits from student groups.[71] Like many lower courts, the Court held that the Constitution allows a school to "condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization's agreement to open eligibility for membership and leadership to all students."[72] These decisions confirmed that the lower courts had properly understood *Dale*'s reach.

The losing streak of expressive association claims largely continued. Courts resolved (and rejected) claims under the first and second prongs of *Dale*'s framework. In 2009, Andrew Koppelman and Tobias Wolff observed that although the "logic of the *Dale* opinion" made colorable all kinds of claims, it "leads to such silly results that the lower federal courts have refused to believe it."[73] Eventually, fewer and fewer cases cited to *Dale*.

And so the law of expressive association seemed "well-settled."[74] Associations needed some genuinely expressive end to claim constitutional protection. In rare instances, mandated inclusion of members might unduly burden an entity's ability to express its message. But more indirect limitations left ample room for expression of views.

III. RESURGENCE OF EXPRESSIVE ASSOCIATION

Today, however, litigants are newly pressing for associational rights in contexts of employment, social service provision, and for-profit business. They urge courts to erase lines between commercial-noncommercial, for-profit and non-profit, and voluntary groups and the workplace. Increasingly, albeit still in a small number of cases, they succeed.

A. Employers

The most significant expansion has been to allow organizations to exclude unwanted employees, rather than unwanted members. In the past five years,

68. *Id*. at 52.
69. *Id.* at 69.
70. *Id.* at 69-70.
71. *Christian Legal Soc'y*, 561 U.S. at 668.
72. *Id.* at 668, 698.
73. ANDREW KOPPELMAN & TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE?: HOW THE CASE OF BOY SCOUTS OF AMERICA V. JAMES DALE WARPED THE LAW OF FREE ASSOCIATION 49, xii (2009).
74. *Id.* at xi.

federal courts have decided ten suits attempting to expand the right to expressive association to employment organizations; five have been successful.[75]

2018 saw the first such decision. *Our Lady's Inn v. City of St. Louis* involved two plaintiffs, Our Lady's Inn, a non-profit crisis pregnancy center providing housing to pregnant women, and the Archdiocesan elementary schools.[76] The object of their suit was a St. Louis ordinance prohibiting employment discrimination based on an individual's pregnancy or other reproductive decisions.[77] Both argued that the Constitution grants a right to restrict employment to individuals whose reproductive decisions align with employer values.[78]

The federal district court agreed, but it offered no justification for expanding *Dale* to employment.[79] Applying the three prongs of *Dale*, it first held that both plaintiffs qualified as expressive associations. Our Lady's Inn clearly communicated its pro-life mission to its residents, and the Archdiocesan schools engaged in the instruction of youth and the inculcation of Catholic, pro-life values.[80] Second, the court said, the forced inclusion of employees who do not share Our Lady's commitment against abortion would significantly affect its ability to encourage women to forgo abortion.[81] Likewise, the presence of teachers who do not adhere to the values of the Catholic Church in their personal lives would hinder the schools' ability to advocate their viewpoints to students.[82] Finally, the ordinance did not hold up to strict scrutiny, because the city had not

75. These claims are multiplying so quickly that several opinions were issued as I was drafting this piece in fall 2023. For cases granting expressive association claims, see Bear Creek Bible Church v. Equal Employment Opportunity Comm'n, 571 F. Supp. 3d 571 (N.D. Tex. 2021); Our Lady's Inn v. City of St. Louis, 349 F. Supp. 3d 805 (E.D. Mo. 2018); Slattery v. Hochul, 61 F.4th 278 (2d Cir. 2023); Darren Patterson Christian Acad. v. Roy, No. 123CV01557DDDSTV, 2023 WL 7270874, at *1 (D. Colo. Oct. 20, 2023). I also count New Hope Family Services, Inc. v. Poole, 966 F.3d 145, 149 (2d Cir. 2020), as a case granting an employer claim. I discuss it in the context of social service provision. For decisions rejecting such claims, *see* McMahon v. World Vision, Inc., No. C21-0920JLR, 2023 WL 8237111 (W.D. Wash. Nov. 28, 2023); Billard v. Charlotte Cath. High Sch., No. 3:17-cv-00011, 2021 WL 4037431 (W.D.N.C. 2021); Starkey v. Roman Archdiocese of Indianapolis, Inc., 496 F. Supp. 3d 1195 (S.D. Ind. 2020); CompassCare v. Cuomo, 465 F. Supp. 3d 122 (N.D.N.Y. 2020); Restaurant Law Ctr. v. City of New York, 360 F. Supp. 3d 192 (S.D.N.Y. 2019). An additional claim was dismissed for lack of standing, not on the merits, and is on appeal. Union Gospel Mission of Yakima. v. Ferguson, No. 1:23-CV-3027-MKD, 2023 WL 5674119, *8 (E.D. Wash. Sept. 1, 2023).

76. *Our Lady's Inn*, 349 F. Supp. 3d at 812-13.

77. *Id*. at 809.

78. *Id*. at 814.

79. *Id.* at 822.

80. *Id.* at 821.

81. *Id.* at 821-22.

82. *Id.*

shown that people making reproductive health decisions were "historically disadvantaged."[83]

A set of challenges to a near-identical New York state law soon followed. Several crisis pregnancy centers filed suit, as did First Bible, a church that operates a school with 350 students and a recreational and sports program for youth and adults.[84] All sought to discriminate against employees and volunteers based on their reproductive decisions inconsistent with the institutional values.[85] Typical was the argument of non-profit crisis pregnancy center, Evergreen, that New York's law unconstitutionally prevented it "from disassociating itself from employees who, among other things, seek abortions" or have extramarital sex.[86]

Here, the district court sided with the state, finding no undue burden on associational rights. It drew on the distinction between identity and advocacy. It admitted that the organizations may "be forced to associate with" employees who do not share or may take actions contrary to institutional views.[87] But "nothing in the statute requires Plaintiffs to permit their employees to advocate positions contrary to their anti-abortion, pro-marriage, religious agenda."[88] Indeed, the employers "could fire an employee who advised a patient to have an abortion, use birth control, engage in sex outside of marriage to a person of the opposite sex, or declared that God did not exist"—or who publicly advocated such positions.[89]

Both decisions concluded that the employer retained significant freedom. The statute did not impose direct limits on the core expressive activity of the organizations; it neither "prevent[s] employers from speaking on the issue and explaining the views and standards of the organization" nor "prevent[s] employers from advocating for their views to the general public."[90] The law, moreover, did not regulate volunteers who did much of the advocacy for the crisis pregnancy centers.[91] And the ministerial exception already meant the selection of leaders of these religious groups was likewise shielded from governmental interference.[92]

83. *Id.* at 822.

84. *CompassCare*, 465 F. Supp. 3d at 133-34, 136, 138; Slattery v. Cuomo, 531 F. Supp. 3d 547, 556 (N.D.N.Y. 2021).

85. *CompassCare,* 465 F. Supp. 3d 122 at 133*; Slattery,* 531 F. Supp. 3d at 558.

86. *Slattery*, 61 F.4th at 283-84.

87. *CompassCare*, 465 F. Supp. 3d at 148–49.

88. *Id.* at 148.

89. *Id.*

90. *Slattery*, 531 F. Supp. 3d at 565-66.

91. *CompassCare*, 465 F. Supp. 3d at 147-48.

92. *Id*. at 148 (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190-91 (2012)).

In *Slattery v. Hochul*, the Second Circuit reversed.[93] Like the *Our Lady's Inn* district court, this three-judge panel provided little explanation for expanding a constitutional right to expressive association to employer-employee relations. It said simply, "[c]ompelled hiring, like compelled membership, may be a way in which a government mandate can affect in a significant way a group's ability to advocate public or private viewpoints."[94] The court then deferred to the employer as to the burden on its ability to express its views.[95] It accepted both that every employee had to be "a reliable advocate" of the employer's views and that their conduct in their personal lives would send a contrary message.[96] The court credited the view that the mere presence of a woman who has had an abortion undermines her employer's ability to speak an anti-abortion message. Last, the court held that the interests of the employer outweighed the state interest.[97] Employees, it said, can find other employment. They can be required to answer intrusive questions about their reproductive lives.[98] But the employer cannot continue to express its view if it must refrain from discrimination based on reproductive choices.[99]

This rather stunning conclusion undermines the state interest in any antidiscrimination law. It will always be the case that, at least in theory, employees can exit and seek work from a firm that doesn't discriminate based on sex, pregnancy, race, or other traits. Antidiscrimination law necessarily rejects the libertarian premise that the appropriate remedy for discrimination is to seek employment elsewhere. *Slattery* instead embraces it.

The Second Circuit's decision also overlooks the significant inequality between workers and employers. Management has power and resources beyond those of individual workers. Many people will not be able to easily move on as they discover their employer has views that govern their personal lives. They instead will have to conform their reproductive lives to the religious views of the institution. The Second Circuit turns this imbalance on its head. The court treats antidiscrimination law as inherently coercive without considering the

93. *Slattery*, 61 F.4th at 278. *CompassCare* remains on appeal, but the outcome seems preordained.

94. *Id.* at 288 (quoting *New Hope Fam. Servs., Inc.*, 966 F.3d at 149).

95. *Id.* ("The right to expressive association allows Evergreen to determine that its message will be effectively conveyed only by employees who sincerely share its views.").

96. *Id*.

97. *Id.* at 289-90.

98. *Id.* at 288 ("To decide whether someone holds certain views—and therefore would be a reliable advocate—Evergreen asks whether that person has engaged or will engage in conduct antithetical to those views.").

99. *Id.* at 290.

many tools that employers have to ensure consistency with messaging—from training to disciplinary rules to scripts for interaction with clients.[100]

In 2023 in *Darren Patterson Christian Academy v. Roy*, a district judge in Colorado followed the Second Circuit's lead.[101] There, a private preschool challenged the requirements for participating in Colorado's new Universal Preschool Program on expressive association grounds (as well as speech and free exercise).[102] The state program required schools to agree not to discriminate based on religion, sex, sexual orientation, and gender identity, among other traits.[103] While maintaining that "its doors are open to students and families of all faiths and backgrounds," the school argued that it had a right to exclude employees who do not share its "Christian worldview."[104] Citing *Slattery*, the district court agreed and concluded that nondiscrimination in hiring would significantly burden the school's expression.[105] It reasoned that the school could not "be made to associate with a person or group espousing contrary views" or disagreeing with its mission as a condition of participation in a state program and thus granted the plaintiff's motion for a preliminary injunction.[106] Note that this decision not only brings the right of expressive association into employment, but also determines that the employer's right is violated by indirect inducements to nondiscrimination. The lawsuit did not involve a law mandating inclusion of members as in *Dale* and other successful claims, but rather participation in a voluntary funding program.

Expressive association also was successfully invoked against Title VII of the Civil Rights Act, the touchstone of equality in the workplace. In 2021, in *Bear Creek Bible Church v. EEOC*, the court granted expressive association rights to Braidwood Management, a for-profit management company that refused to employ LGBTQ people or tolerate gender non-conforming conduct.[107] Braidwood claimed that Title VII, which forbids employers from discriminating on the basis of sex, sexual orientation, and gender identity, violated its right to expressive association.[108] The government argued that the

100. Samuel R. Bagenstos, *Consent, Coercion, and Employment Law*, 55 HARV. C.R.-C.L. L. REV. 409, 414 (2020) (noting how the Supreme Court often "employs multiple inconsistent visions of choice" that emphasize employee options while disregarding employer choice).

101. No. 123CV01557DDDSTV, 2023 WL 7270874, at *1, *3 (D. Colo. Oct. 20, 2023).

102. *Id*. (noting that the school also sought to discriminate against students, particularly by enforcing policies requiring pronouns, restroom use, and dress codes based on sex assigned at birth, but the analysis of the associational interest goes only to hiring).

103. *Id.*

104. *Id.* at *3.

105. *Id*. at *15.

106. *Id.*

107. Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 587-88 (N.D. Tex. 2021), *aff'd in part, vacated in part, rev'd in part sub nom* Braidwood Mgmt., Inc. v. EEOC*,* 70 F.4th 914 (5th Cir. 2023).

108. *Id.* at 589-90, 608.

business did not operate for an expressive purpose, but rather had the goal of selling goods and services for profit.[109]

The sum total of this employer's expression was its violation of antidiscrimination law. Recalling *Dale*'s instruction that "[t]he First Amendment's protection of expressive association is not reserved for advocacy groups," the district court said, "for-profit businesses like Braidwood may pursue a right of association claim."[110] It determined that these "Christian" for-profit businesses were engaged in overt expression.[111] They did not hire or employ individuals who engage in "homosexual conduct or gender non-conforming behavior" and denied benefits to same-sex spouses.[112] The employer's objection to the law made the entity expressive and compliance with the law then unconstitutionally burdened that expression.

The court then skipped over the question of whether the business's expression was substantially burdened by the Civil Rights Act. It never discussed whether the inclusion of unwanted employees would significantly affect Braidwood's ability to advocate its viewpoint. Instead, it went directly to compelling interest.[113] Lifting from the company's brief, the court said only:

> For the same reasons that Defendants do not have a compelling interest in forcing an organization to retain, as a scoutmaster, a member who is a gay rights activist, Defendants do not have a compelling interest in forcing [for-profit religious employers] to hire and retain individuals that engage in conduct that is contrary to the employers' expressive interests.[114]

The analysis elides any distinction between non-profit membership organizations and for-profit employers.

These decisions represent significant departures from earlier precedent. First and fundamentally, they export expressive association into the workplace. They turn the labor contract into an association expressive of (employer) values. Second, the analysis in these cases tends to apply to *all employees*. Courts once acknowledged that, even within membership organizations dedicated to expression, leadership and advocacy roles bounded expressive associational rights. This recent set of cases avoids any such contextual analysis. Once deemed an expressive association, an entity may discriminate with regard to any role within the organization—from the most important to the most menial. Third, at the far edge of this phenomenon, *Darren Patterson* treats conditions on funds as

109. Bear Creek Bible Church v. EEOC, No. 4:18-CV-00824-O, 2021 WL 5052661, at *27 (N.D. Tex. Oct. 31, 2021).

110. *Bear Creek Bible Church*, 571 F. Supp. 3d at 615.

111. *Id*.

112. *Id*.

113. *Id*. at 611.

114. *Id.* at 616.

the equivalent of a direct requirement of nondiscrimination—effectively rejecting a long line of precedent.[115]

To be sure, this trend is not uniform. Most courts still refuse to apply *Dale* to the employment context.[116] But many of these decisions are being appealed.[117] The new association cases, although few in number, are extreme in their interpretation of the right of expressive association.

B. Businesses and Social Service Providers

Increasingly, litigants press arguments for an expressive associational right to refuse service to certain customers. Their claims have largely met skepticism. But several recent wins signal a new judicial willingness to widen expressive association to relations between social service providers and recipients and between for-profit businesses and their customers.

Since the mid-2010s, wedding vendors have raised expressive association in challenges to public accommodations laws.[118] Courts so far have rejected such arguments, primarily on the grounds that these businesses do not constitute expressive associations.[119] For example, after the owners of a farm and wedding rental venue denied their premises to a same-sex couple, New York's highest court noted that the business lacked many of the attributes necessary for constitutional protection: "Liberty Ridge is not a member organization, a non-profit organization or a religious entity" and was not "organized for specific expressive purposes" but "for the purpose of making a profit through service contracts with customers."[120] The Washington Supreme Court came to the same conclusion with regard to a florist shop, observing that "the Supreme Court has

115. *See* notes 63–72 and accompanying text.

116. McMahon v. World Vision, Inc., No. C21-0920JLR, 2023 WL 8237111, at *17-19 (W.D. Wash. Nov. 28, 2023) (differentiating employment from membership decisions and distinguishing *Slattery v. Hochul* because World Vision's "'very mission' is not to oppose or discourage same-sex marriage" such that applying antidiscrimination law as regards an employee in a same-sex marriage did not require it "to employ someone who acts against its 'very mission'"); Starkey v. Roman Archdiocese of Indianapolis, Inc., 496 F. Supp. 3d 1195, 1209 (S.D. Ind. 2020) (refusing to apply *Dale* to a Catholic school that fired a guidance counselor who was in a same-sex marriage because *Dale* is limited to a non-employment context); Billard v. Charlotte Cath. High Sch., No. 3:17-cv-00011, 2021 WL 4037431, at *23 (W.D.N.C. 2021) (refusing to apply *Dale* to a Catholic school that fired a substitute drama teacher for supporting gay marriage, because "[t]he Boy Scouts of America expressly acknowledged that their organization would have been subject to any employment laws which prevented discrimination based on sexual orientation.").

117. Billard v. Charlotte Cath. High Sch., Docket No. 22-01440 (4th Cir. Apr 25, 2022); CompassCare v. Hochul, Docket No. 22-00951 (2d Cir. Apr 29, 2022); Union Gospel Mission of Yakima v. Ferguson, Docket No. 23-2606 (9th Cir. Oct 06, 2023).

118. *See, e.g.*, Gifford v. McCarthy, 137 A.D.3d 30, 2, 41-42 (N.Y. App. Div. 2016).

119. In other contexts, courts came to similar conclusions. Pinter v. City of New York, 976 F. Supp. 2d 539, 565 (S.D.N.Y. 2013) (determining that customer-retailer relation is non-expressive in context of challenge to arrest for prostitution at video store).

120. *Gifford*, 137 A.D.3d at 41-42.

never held that a commercial enterprise, open to the general public, is an 'expressive association' for purposes of First Amendment protections."[121] Lines between commerce and expression, for-profit and not-for-profit enterprises, held.

Courts distinguished between, on the one hand, the tie between expressive associations and their members and, on the other, the "economic relationship between proprietor and customer, a relationship that is not clothed with a significant level of constitutional protection."[122] Customers come "for the limited purposes of obtaining goods and services."[123] Even more so than the recruiters in *FAIR*, customers do not become members of an association; their conduct, identity, and speech do not reflect on the business or alter its message.[124]

Indeed, in *Telescope Media Group v. Lucero*, although it was otherwise sympathetic to the plaintiff wedding vendors, the Eighth Circuit observed that their expressive associational claim was "really a disguised free-speech claim."[125] Because the businesses would provide non-wedding-related services to anyone, "serving, speaking to, and otherwise associating with gay and lesbian customers is not the harm they seek to remedy."[126] Even if a for-profit business were eligible for constitutional protection, serving same-sex customers would not impede the ability of its owners to communicate their own views of marriage.[127]

But one case—again from the Second Circuit—calls into question the application of antidiscrimination law to social service providers. In *New Hope Family Services v. Poole*, a Christian foster and adoption agency claimed that New York's antidiscrimination law violated its right to expressive association.[128] The core of its objection was to "[i]ncluding unmarried or same-

121. State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1235–36 (Wash. 2019).

122. Emilee Carpenter, LLC v. James, 575 F. Supp. 3d 353, 376–77 (W.D.N.Y. 2021) ("[T]here are good reasons for a distinction, even if the commercial transaction involves 'expressive' goods or services."); Telescope Media Grp. v. Lindsey, 271 F. Supp. 3d 1090, 1122 n.33 (D. Minn. 2017) ("The Court highly doubts that the relationship between a public accommodation and a customer could be considered 'expressive association.'").

123. *Gifford*, 137 A.D.3d at 41–42.

124. *FAIR*, 547 U.S. at 49 (noting that equal access does not make military recruiters "members of the school's expressive association").

125. Telescope Media Grp. v. Lucero, 936 F.3d 740, 760 (8th Cir. 2019).

126. *Id*.

127. *Telescope Media Grp.,* 271 F. Supp. 3d at 1122 n.33. Many courts further held that the antidiscrimination law was narrowly tailored to a compelling state interest, and thus passed strict scrutiny. *E.g.*, *Emilee Carpenter,* 575 F. Supp. 3d at 379-80 (holding that New York has a "compelling interest in ensuring that individuals, without regard to sexual orientation, have equal access to publicly available goods and services"). It was only in 2019 that a federal court first sided with a wedding vendor in its free speech claims. *E.g.*, *Telescope Media Grp.,* 936 F.3d at 760.

128. 966 F.3d 145, 149 (2d Cir. 2020).

sex couples" in its adoption and foster programs.[129] The trial court dismissed these claims because New Hope was not being forced to hire employees or being restricted from voicing its beliefs favoring "adoptions by married heterosexual couples."[130] The Second Circuit reversed.[131]

It is important to underscore that New Hope's expression was its very objection to antidiscrimination law. The district court had concluded that the law only worked a "slight impairment" on the organizational expression, but the court of appeals thought this conclusion "premature."[132] For the court of appeals, the organization's articulation of a desire to discriminate made it expressive. To reach this conclusion, the court of appeals focused not on the relationship between New Hope and unwanted couples seeking to adopt, but rather on the relationship of New Hope to its employees.[133] The imposition on the employer-employee relationship did not come, the court admitted, in the form of compelled admission of members (or, by analogy, hiring of employees).[134] Nonetheless, it said, the requirement of nondiscrimination toward social service recipients made "association with New Hope 'less attractive'" to people who want to promote adoption only to married heterosexual couples through their work—that is, employees who want to discriminate.[135]

This circular reasoning allowed the court to sidestep the question of whether a social service provider's relationship with customer itself creates an expressive association, but its analysis leads to the same result. By the logic of *New Hope*, any regulation of the obligations of an entity to its customers may make that employer "less attractive" to employees who share the employer's values and prefer the status quo.[136] That is, people who want to act out discriminatory views may hesitate to accept work at an organization that must offer its services to all comers. The Second Circuit, moreover, indicated openness to the idea of finding associational interests specific to adoption and foster services.[137] It said, "[w]hile such couples may not be seeking the sort of affiliation with New Hope generally associated with membership organizations, neither is theirs the 'chance encounter[ ]' of dance-hall patrons."[138] Finding a plausible expressive

129. *Id*. at 178.

130. *Id.* at 176, 179.

131. *Id.* at 180 (deciding that "the expressive association claim does not fail as a matter of law on the pleadings" and that there was not sufficient evidence to determine whether New Hope would succeed).

132. *Id*. at 179.

133. *Id*.

134. *Id*.

135. *Id*.

136. *Id*.

137. *Id*. at 180.

138. *Id*. ("[T]he pleadings, viewed most favorably to New Hope, indicate that [the state agency] is requiring New Hope to associate with unmarried and same-sex couples for the purpose of providing services leading to adoption, an outcome that could tie New Hope, the couple, and an

association claim regarding interaction with customers itself is a significant departure from *Dale* and all prior precedent.

Two years later, expansion along several dimensions came in an unusual case. In *Green v. Miss USA*, a transgender woman sought to compete in the Miss USA pageant and argued that the state public accommodations law required the defendant to allow her to try out.[139] The district court engaged in what was the feared reading of *Dale*.[140] As *Dale* seemed to require, the court deferred to Miss USA's own representations of its expression—that "the concept of womanhood" is "limited to 'natural born' or 'biological' women."[141] It then deferred entirely on the question of what might impair that expression—having a transgender woman compete.[142] As in *Braidwood*, the court constructed an association dedicated to expression out of a for-profit corporation engaged in commercial activity.[143] The for-profit entity, akin to "a multi-level marketing business," escaped antidiscrimination law.[144]

On appeal, the Ninth Circuit panel sided with the pageant but split over the rationale. One judge would have sided with Miss USA on both speech and association grounds.[145] Another would have rejected both arguments.

adopted child together for months, or even years."). On remand, the trial court ruled in favor of New Hope on the grounds of compelled speech and, therefore, did not address the expressive association argument. *New Hope Fam. Servs., Inc*., 626 F. Supp. 3d at 583-84, 586 (granting summary judgment to plaintiff on the compelled speech claim).

139. Green v. Miss United States of Am., LLC, 533 F. Supp. 3d 978, 983 (D. Or. 2021), *aff'd on other grounds*, Green v. Miss United States of Am., LLC, 52 F.4th 773 (9th Cir. 2022). As the dissenting judge argued in the Ninth Circuit, the Miss USA Pageant is almost surely not a public accommodation given its levels of selectivity. 52 F.4th at 813-14 (Graber, J., dissenting) (observing that Miss USA "rigorously monitors its contestants to determine their eligibility" and is likely too selective to qualify as a public accommodation subject to state public accommodations law). Nevertheless, both the district court and the Ninth Circuit took up the pageant's constitutional arguments.

140. *Green*, 533 F. Supp. 3d at 998.

141. *Id*. at 997.

142. *Id.* at 996-97.

143. Judge VanDyke on the Ninth Circuit panel cast doubt on for-profit and commercial lines drawn most explicitly in Justice O'Connor's influential *Roberts* concurrence. *Green*, 52 F.4th at 804 (VanDyke, J., concurring) ("[A] concurrence is not binding on this court. . . . [t]he majority's opinion—which is binding on this court—is more protective of associational freedoms than the framework Justice O'Connor desired.").

144. *Green*, 52 F.4th at 818-20 (Graber, J., dissenting). *See also* Eyer, *supra* note 11, at 50-51 (noting that because *Braidwood* and *Green* were resolved on other grounds on appeal that they might be seen as "aberrational or idiosyncratic" but arguing that they are signs of growing interest in association that could have outsized impact on antidiscrimination law).

145. *Id.* at 805, 807 (VanDyke, J., concurring) (emphasizing both Green's transgender status and her identity as an "activist"). VanDyke reads *Dale's* third prong as holding that "the anti-discrimination interests behind a state's public accommodation laws are insufficient to justify a substantial intrusion on an organization's First Amendment rights"—no balancing occurs once a substantial intrusion is found.

The result is a majority opinion that purports to decide the case on compelled speech grounds. The court began by pointing to the Supreme Court's decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.[146] There, the Court also addressed a "peculiar" application of a public accommodations law, in that case to a parade.[147] While a pageant is much like a parade, the compelled speech in *Hurley* was the inclusion of the gay rights group's message—in the form of a banner.[148] What was "peculiar" about the way state law applied is that there was no dispute about whether LGBTQ people could participate in the parade—they could.[149] Instead, the compulsion of speech took the form of admitting a group marching behind its own banner.[150] The distinction between "mere presence" of gay people and their advocacy of a specific message was key.[151]

By contrast, the pageant identified no particular message that Green would deliver. It was her transgender identity that, Miss USA alleged, telegraphed a view of femininity that the pageant did not want to express.[152] Indeed, the pageant would have supervised and approved any message that Green would have delivered, as it does for all contestants.[153] The fact pattern of *Green* does not fit those previous instances, like *Hurley*, where the Court "limited the government's ability to force one speaker to host or accommodate another speaker's message."[154]

To paraphrase the Eighth Circuit, the panel's compelled speech analysis was a "disguised" freedom of association argument. Consider how closely the opinion tracks the *Dale* framework.[155] First, Miss USA is deemed to engage in expression through the composition of its membership. In its choice of contestants, the Pageant serves as an "important site[ ] for the construction of national feminine identity."[156] At root, this argument is not about compelled speech but rather the choice of members—as the court said, "who competes and succeeds in a pageant."[157] Second, the public accommodations law forces membership. Citing *Roberts*'s admonition that "[t]here can be no clearer

146. *Id.* at 785.

147. *Hurley*, 515 U.S. at 558.

148. *Id*. at 570

149. *Id*. at 572.

150. *Id.* at 570.

151. McGowan, *supra* note 38, at 122 ("[T]he Court has never held that personal characteristics such as race, gender, or sexual orientation are inherently expressive within the meaning of the speech clause.").

152. *Green*, 52 F.4th at 783.

153. *Green*, 533 F. Supp. 3d at 993 (discussing the ways that the pageant supervises and disciplines contestant speech).

154. *FAIR*, 547 U.S. at 63 (describing *Hurley* and other compelled speech cases this way).

155. *Green*, 52 F.4th at 806.

156. *Id.* at 788.

157. *Id.* at 780 (saying "who competes and succeeds in a pageant is how the pageant speaks").

example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire," the majority opinion concluded that "[f]orcing the Pageant to accept Green as a participant would fundamentally alter the Pageant's expressive message in direct violation of the First Amendment."[158] On this analysis, the infringement on "the Pageant's ability to express its collective point" was rooted in the inclusion of a particular person.[159]

More fundamentally, the pivot to for-profit commerce and to relations with recipients of services opens the door to turning the relationship between an entity and its customers into an expressive association. In dissent in *Green*, Judge Graber argued that the court's analysis would allow a defendant to "alter the nature of the business transaction by claiming that it has a discriminatory belief that it hopes to further through its business."[160] He offered a pair of provocative examples to illustrate the import of this expansion of expressive association. Under prior precedent, a white supremacist could not transform his bowling alley business "into an expressive entity by naming the building 'White Bowling,' claiming that Judge Graber intends to use the bowling alley to express his racist beliefs, and then turning away Black bowlers who hope to compete."[161] That, he argued, was not constitutionally protected, "[n]or [could] a militant feminist owner of a hotel chain, 'A Room of One's Own,' refuse to allow men to stay at her hotels and claim that her organization should receive heightened First Amendment protections because she hopes to further her beliefs with her business."[162] Under *Green*, their claims become plausible. Under *New Hope*, they would only need argue that the mandate of antidiscrimination law makes their workplace less attractive to employees who value turning away Black bowlers or denying rooms to men. Antidiscrimination laws would be made unconstitutional in all their applications.

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Across decisions siding with First Amendment claimants, we see a troubling tendency to find that the violation of the law—or desire to violate the law—itself is the expression that transforms an entity into an expressive association. Antidiscrimination laws then necessarily unduly burden its acting consistent with its goals. This reading of *Dale* leads to the absurd conclusion that "citizens are entitled to disobey laws whenever obedience would be perceived as endorsing some message."[163] Yet, as the Second Circuit once recognized (but

158. *Id.* at 783 (quoting *Roberts*, 468 U.S. at 623).

159. *Id.* at 785.

160. *Id.* at 819 (Graber, J., dissenting).

161. *Id.* at 819–20.

162. *Id.* at 820.

163. KOPPELMAN & WOLFF, *supra* note 73, at 50 (citing Cath. Charities of Diocese of Albany v. Serio, 859 N.E.2d 459 (N.Y. 2006)).

no longer seems to), "all anti-discrimination laws that govern organizations' membership or employment policies have a differential and adverse impact on those groups that desire to express through their membership or employment policies viewpoints that favor discrimination."[164]

IV. THE IMPACT OF THE ACTIVIST SUPREME COURT ON EXPRESSIVE ASSOCIATION

This Part offers some tentative explanations for the growing judicial acceptance of expressive association claims. Developments elsewhere in First Amendment doctrine have called into question some of the principles that once discouraged the extension of *Dale*. The Supreme Court's recent decision in *303 Creative, LLC v. Elenis* seems likely to spur lower courts to further embrace expressive association claims.[165] Although nominally within the doctrinal silo of compelled speech, the opinion's analysis is easily imported into liberty of association.

A. Why Now?

These decisions prompt an initial question: Why are we seeing the expansion of expressive association now? One way to approach an answer is to consider how the doctrinal landscape has changed between 2000 when *Dale* was decided and swiftly cabined and the 2010s when expressive association claims began to proliferate and, occasionally, prevail.[166]

First and most evidently, the Supreme Court has largely erased the lines between public and private, secular and religious, and non-profit and for-profit. Already in 2000 when *Dale* was decided, Martha Minow observed that these "three lines vital to our conception of constitutional, free enterprise democracy are rapidly fading, shifting, and criss-crossing."[167] But the past decade, it is fair to say, has seen these lines largely disappear. In particular, in *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court determined that a for-profit corporation could exercise religion under the Religious Freedom Restoration Act.[168] Then, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court unceremoniously extended the right to free exercise under the Constitution to a for-profit retail business.[169] The ideal of a moralized marketplace where businesses express and impose religious beliefs gained significant ground.[170]

164. *Wyman,* 335 F.3d at 93.

165. 600 U.S. 570 (2023).

166. *Dale,* 530 U.S. at 644; *Roberts*, 468 U.S. at 622, 626.

167. Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1061–62 (2000).

168. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 690 (2014).

169. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 638-39 (2018).

170. Elizabeth Sepper, *Symposium: More at Stake than Cake — Dignity in Substance and Process,* SCOTUSBLOG (June 5, 2018, 11:23 AM), https://www.scotusblog.com/2018/06/sympo

And so, instead of engaging in a contextual analysis of institutional power, the Court now treats for-profit entities as identical to non-profit organizations, schools as equivalent to churches, and commerce as equal to civic life. As Katie Eyer notes, "[b]ecause the Supreme Court has gradually eliminated so many of the bright-line rules that once would have forestalled such expressive association claims, much space remains for lower court judges…to protect discriminatory employers and commercial entities from antidiscrimination law."[171]

Second, the Court has shown itself to be unwilling to distinguish cleanly between, on the one hand, organizational leaders and, on the other, the many workers who do not speak on behalf of the institution or shape its mission. In this regard, the development of the so-called "ministerial exception" may be relevant. In *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, the Supreme Court first recognized the "ministerial exception" that grants a church the authority to hire and fire its ministers without governmental interference.[172] In principle, virtually everyone agrees that churches should be able to choose their leaders to align with their religious tenets, even biased ones.[173] But the Court took the doctrine much further. It held that churches do not need to articulate any religious reason for their employment decisions.[174] Nor did it limit the ministerial exception to those with leadership roles. Instead, a wide group of employees can be hired and fired at the discretion of, not only churches, but an array of religious institutions as well.[175]

Several decisions related to the right to expressive association seem to be building on the ministerial exception to create a troubling special category of religious associational rights. In *Our Lady's Inn*, for example, the district court mixed—or perhaps combined—the plaintiffs' association and free exercise claims. Its opinion reads: "Applying the principles of *Dale*, the Court finds that Our Lady's Inn is an expressive association entitled to protection under the free-exercise clause."[176] In *Darren Patterson Christian Academy* as well, the court's analysis of expressive association was part of a section addressing "religion

sium-more-at-stake-than-cake-dignity-in-substance-and-process/ [https://perma.cc/G4QM-BUWN].

171. Eyer, *supra* note 11, at 51.

172. 565 U.S. 171, 188 (2012).

173. *But see* Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965 (2007) (arguing against a constitutional ministerial exemption).

174. *Hosanna-Tabor*, 565 U.S. at 195.

175. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2066 (2020) (applying ministerial exception to elementary school teachers of non-religious subjects and indicating that the religious mission and handbook of the institution could decide which employees were ministers).

176. *Our Lady's Inn*, 349 F. Supp. 3d at 821.

clause claims."[177] It is not clear whether this organization reflected a lack of clarity in reasoning or meant to suggest a religion-specific associational right. These decisions, in practice, may give rise to a hybrid of religion and association, authorizing religious employers to discriminate not only against ministers, but against all employees.

Ironically, Chief Justice Roberts' majority opinion in *Hosanna-Tabor* had rejected as "untenable" the argument that the right to association should be the basis for shielding the church-minister relationship from antidiscrimination law.[178] Justice Alito's concurrence, however, did cite *Dale* and other "expressive-association cases" as instructive: "Religious groups are the archetype of associations formed for expressive purposes . . . ."[179] Employees' conduct outside of work as well as their speech within the organization, he suggested, could both interfere with a religious employer's "freedom to speak in its own voice."[180] In so doing, Justice Alito's concurrence could be read to endorse the application of the expressive association right beyond membership organizations and to the relation between employer and employee—at least where religious employers are concerned.

Third, the Court's recent First Amendment doctrine has been characterized by extreme deference to claimants, particularly religious institutions. Justice Alito's opinion in *Hobby Lobby* and his concurrence in *Little Sisters of the Poor v. Pennsylvania*, for example, both indicate that courts should play no role in determining whether a regulation—there, the contraceptive mandate—substantially burdens an employer's religion.[181] "It is not for us to say that their religious beliefs are mistaken or insubstantial."[182] Instead, it was for the employers to determine.[183] *303 Creative* shows a similar deference to the First Amendment claimant.[184] Lower courts are receiving regular signals from the high court that First Amendment claimants are not to be second-guessed.

B. What's Next?

The expressive association decisions that this essay discusses admittedly are few, and they might prove idiosyncratic. But wins are mounting, and *303 Creative, LLC v. Elenis*, a compelled speech case decided by the Supreme Court

177. *Darren Patterson Christian Acad.*, 2023 WL 7270874, at *14-15.

178. 565 U.S. 171, 189 (2012) (insisting that religious organizations are due "special solicitude").

179. *Id.* at 200–01 (Alito, J., concurring).

180. *Id.*

181. *Hobby Lobby*, 573 U.S. at 690; Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 591 U.S. 657, 693 (2020) (Alito, J., concurring).

182. *Hobby Lobby*, 573 U.S. at 725.

183. *Little Sisters of the Poor*, 591 U.S. at 693.

184. 303 Creative, LLC v. Elenis, 600 U.S. 570 (2023).

in 2023, will likely fuel additional claims to expressive association.[185] While compelled speech and expressive association involve separate doctrinal tests, they share affinities. Indeed, in several appeals, conservative legal movement actors now argue that *303 Creative* requires reversal of lower courts' rejection of expressive association claims.[186]

303 Creative holds the potential to affect analysis of all three prongs of the *Dale* framework. As to the first question—is an association expressive?—*303 Creative* eviscerates what is left of the commercial-noncommercial line. There, the Court took up the argument of a for-profit website designer that having to create a wedding website for a same-sex couple would compel her to speak a message in favor of same-sex marriage.[187] It agreed, holding that the state antidiscrimination law could not apply to the sale of custom or artistic goods and services by a for-profit retailer.[188] Citing *Dale*, the opinion chided the dissent for thinking that constitutional precedent endorsed limits on First Amendment protection for commercial or for-profit entities.[189] This outcome will only encourage enterprising lower courts seeking to locate expression in commercial and for-profit settings.

As to the second prong—the question of undue burdens on expression—*303 Creative* seems to accept that compliance with antidiscrimination law necessarily changes—that is, burdens—the message of those who would rather discriminate. *303 Creative* does not consider the availability of other alternatives for the web design company. It does not grapple with the impact on the business's ability to express its views or how the public understands and encounters its message—all important to thinking about how and when an organization is burdened in its expression.[190] Instead, the Court paints antidiscrimination law as forcing expression.[191] At points, the opinion goes so far as to describe antidiscrimination law as designed to "excis[e] certain ideas or viewpoints from public dialogue."[192]

185. *Id.*

186. *E.g.*, Supplemental Letter Brief on *303 Creative LLC v. Elenis* in Response to Court's October 3, 2022 Order, Emilee Carpenter, LLC v. James, Docket No. 22-75 (2d Cir. July 14, 2023); Rule 28(j) Notice of Supplemental Authority and Notification Required by the Court's April 21, 2023 Order, Billard v. Charlotte Catholic High School, Docket No. 22-01440 (4th Cir. June 30, 2023); Appellant's Opening Brief at 60, Union Gospel Mission of Yakima Washington v. Ferguson, Docket No. 23-2606 (9th Cir. Sept. 1, 2023).

187. *303 Creative*, 600 U.S. at 579–80.

188. *Id*. at 589–90, 593–94.

189. *Id*. at 600.

190. *Id.* at 629 (Sotomayor, J., dissenting) (describing the numerous ways in which "[p]etitioners remain free to advocate the idea that same-sex marriage betrays God's laws").

191. *Id.* at 570 ("As surely as Ms. Smith seeks to engage in protected First Amendment speech, Colorado seeks to compel speech Ms. Smith does not wish to provide.").

192. *Id.* at 588.

As to the third prong—or, more specifically, the weight of the state's interest in nondiscrimination—the Court affirms that eliminating discrimination in public accommodations is a compelling governmental interest, but then seems to give it little weight.[193] At minimum, the opinion in *303 Creative* makes it increasingly difficult for courts to skip over to balancing and to conclude that antidiscrimination law survives constitutional scrutiny, irrespective of the infringement on expressive association.[194]

Although the conservative legal movement won a significant expansion of the compelled speech doctrine in *303 Creative*, they seem unlikely to abandon the pursuit of associational freedom. At heart, some number of contemporary objections to antidiscrimination laws involve a purported right to disassociate from others—that is, to police the bounds of association. For example, in those cases where religiously affiliated foster agencies seek to work exclusively with prospective parents who subscribe to the same religious beliefs, the core of their concern seems to be controlling their associations, rather than any compulsion of speech or burden on religion.[195] Similarly, the various First Amendment arguments in *Union Gospel Mission of Yakima Washington v. Ferguson*, currently on appeal to the Ninth Circuit, are primarily rooted in association—that employment discrimination law "restricts the Mission's freedom to require non-ministerial employees to adhere to its beliefs on marriage and sexuality" and to fire "[e]mployees who reject, disagree, or live a life contrary to that faith."[196]

Expressive association also may have traction where other doctrines fall short. For example, even as the compelled speech doctrine has expanded, many courts have been hesitant to conclude that "acts of hiring, terminating, or continuing to employ persons are themselves expressive conduct that communicates its views."[197] As Katie Eyer has argued, freedom of expressive association decisions "could have truly radical (and negative) implications for

193. *Id*. at 594.

194. For an example of a court taking this approach to an expressive association claim, see *Carpenter*, 575 F. Supp. 3d at 375.

195. *E.g.*, Rogers v. U.S. Dep't of Health & Hum. Servs., 466 F. Supp. 3d 625, 635 (D.S.C. 2020) ("Miracle Hill works exclusively with prospective foster parents who subscribe to the evangelical Protestant Christian faith and expressly refuses to accept anyone who does not share its religious beliefs, including same-sex couples."); Maddonna v. U.S. Dep't of Health & Hum. Servs., 567 F. Supp. 3d 688, 701 (D.S.C. 2020) ("[O]nly Christians who attended Protestant churches were permitted to volunteer with Miracle Hill's foster program."); *New Hope Fam. Servs., Inc*., 966 F.3d at 178 ("New Hope maintains that requiring it to [i]nclud[e] unmarried or same-sex couples in [its] comprehensive evaluation, training, and placement programs and adoptive-parent profiles would change New Hope's message") (internal quotations omitted).

196. Appellants' Opening Brief at 50, Union Gospel Mission of Yakima Washington v. Ferguson, et al., Docket No. 23-2606 (9th Cir. Oct 6, 2023).

197. *Slattery*, 61 F.4th at 291.

anti-discrimination law" in the workplace.[198] Whereas employment antidiscrimination may not compel speech, it always affects association.

If the expansion of expressive associational rights continues, litigation is likely to reopen well-settled doctrine. We will see burgeoning claims from private schools seeking permission to discriminate against students and staff.[199] Likely targets are unmarried women who become pregnant, women with young children, people who become pregnant through IVF, LGBTQ people, and gender-nonconformists of all kinds.[200] As earlier cases demonstrate, religious discrimination also will be common. In particular, the conservative legal movement behind these cases has long sought to overturn *Christian Legal Society v. Martinez*. The resurgence of expressive association, and in particular the tendency to drop serious inquiry into the substantial burden, may favor student organizations seeking to exclude others on grounds of religion, sex, and sexual orientation. Notably, the rationale of expressive association could easily extend to race discrimination.[201] An expressive associational right with bite may not uniformly disfavor minorities, but it often will.[202]

CONCLUSION

With the benefit of hindsight, it now seems clear that in 2000, it was premature to claim that all expressive organizations had gained a constitutional right to select their members and employees free from government regulation. But that account now plausibly describes the law in the Second Circuit, and perhaps beyond.

The return of *Boy Scouts of America v. Dale*–and the realization of some of the most expansive and absurd ends of its logic—requires attention and analysis. That this moment is escaping notice brings to mind the scholarly neglect of the litigation against the contraceptive mandate as it moved through lower courts. Until the Supreme Court took *Hobby Lobby*, the radical and expansive

198. Eyer, *supra* note 11, at 51.

199. *E.g.*, Paulsen, *supra* note 57, at 1952 (predicting post-*Dale* that the "next 'wave' of freedom-of-expressive-association issues will concern hiring and admission policies of private schools").

200. Bernstein, *supra* note 39, at 83, 88, 130-31 (using several of these examples).

201. *E.g.*, Carpenter, *supra* note 57, at 1578 (arguing that Supreme Court cases rejecting associational claims for race discrimination in private school admission can be defended but "complying with the anti-discrimination law in the employment of instructors might present a different case"); Paulsen, *supra* note 57, at 1935-37 (arguing that the Court's decisions rejecting associational claims to engage in race discrimination in private schools do not rest on "sound legal analysis").

202. Westenbroek v. Fraternity, No. 23-CV-51-ABJ, 2023 WL 5533307, at *1 (D. Wyo. Aug. 25, 2023). The University of Wyoming chapter of the Kappa Kappa Gamma sorority voted to offer membership to Artemis Langford, a transgender woman. When dissenting sorority members sued, the trial court concluded that the sorority had expressive purposes for its membership selection and could not be required to exclude a member. *Id.* at *14.

arguments of the conservative legal movement may have seemed too off-the-wall to succeed. But what was once outlandish became doctrine. In short order, legal circles accepted the notion of a for-profit religious enterprise, and they swallowed an ideology of religious exemption that takes the mere assertion of religion to presumptively qualify for deregulation. The same shift in the Overton window—and our constitutional understanding—may be happening now with expressive association with potentially dire consequences for equality in civil society, the workplace, and the market.