

## All Employers Must Wash Their Speech Before Returning to Work: The First Amendment & Compelled Use of Employees' Preferred Gender Pronouns

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# ALL EMPLOYERS MUST WASH THEIR SPEECH BEFORE RETURNING TO WORK: THE FIRST AMENDMENT & COMPELLED USE OF EMPLOYEES' PREFERRED GENDER PRONOUNS

Tyler Sherman\*

## INTRODUCTION

Under an ordinary gloss, it is easy to limit the First Amendment's Free Speech Clause to its black-letter text. Taken purely at face value, the Free Speech Clause only prohibits the government from making laws "abridging the freedom of speech."<sup>1</sup> The text makes no other direct mention of speech rights, guarantees, or proscriptions.<sup>2</sup> However, the First Amendment has a history that is far from literal.<sup>3</sup> Indeed, the ink of the Bill of Rights had scarcely been dry for eight years when President John Adams signed the Alien and Sedition Acts of 1798 into law.<sup>4</sup> Accordingly, although the First Amendment is oft understood to merely protect the right to speak freely, it also protects complementary, if textually nonliteral, freedoms.<sup>5</sup> Equally important First Amendment freedoms include the freedom from being coerced to express the government's message and the freedom to not say anything at all.<sup>6</sup> This Note examines these implicit freedoms in the context of municipal "pronoun laws," specifically those of New York City and Washington, D.C., which require private

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<sup>1</sup> U.S. CONST. amend. I.

<sup>2</sup> *Id.*

<sup>3</sup> Irene L. Kim, *Defending Freedom of Speech: The Unconstitutionality of Anti-Paparazzi Legislation*, 44 S.D. L. REV. 275, 279 (1999).

<sup>4</sup> *Id.* (describing the constitutional crisis surrounding the Sedition Act in particular). The Sedition Act was clearly a law abridging the freedom of speech, outlawing all unlawful assembly, spoken discourse, and publication critical of the federal government. Mere criticism of the government became tantamount to treason. *Id.*

<sup>5</sup> Charlotte S. Alexander, *Workplace Information-Forcing: Constitutionality and Effectiveness*, 53 AM. BUS. L.J. 487, 498–99 (2016).

<sup>6</sup> *Id.* (describing additional speech rights extending from the First Amendment).

employers to use the preferred gender pronouns of their employees.<sup>7</sup> Rather, because the First Amendment protects the right not to speak a message with which you disagree,<sup>8</sup> this Note focuses on the First Amendment implications of such pronoun laws, and whether they represent an unconstitutional instance of compelled speech.

Pronoun laws, as the term is used here, minimally affect the speech rights of the speaker. As the New York and Washington, D.C., laws indicate, they are primarily formulated as anti-discrimination statutes, meant to curb hostility and harassment in the workplace.<sup>9</sup> The laws necessitate use of an employee's *preferred* pronoun, essentially coming into effect only when an employee establishes a preference.<sup>10</sup> Nonetheless, in requiring employers to use pronouns which they might otherwise be fundamentally opposed to using, the pronoun laws clearly compel some manner of expressive conduct.<sup>11</sup>

Given the current, vitriolic politicization of gender issues on the contemporary juridical battlefield—such as the political furor surrounding “bathroom bills” and policies that command that individuals must use restrooms in accordance with the gender they were assigned at birth<sup>12</sup>—it would be little surprising if an employer covered by a pronoun law brought a First Amendment challenge against it. The question, though, is what would result? In answering that question, this Note suggests that the pronoun laws do not unconstitutionally compel speech.

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<sup>7</sup> See D.C. Mun. Regs. tit. 4, § 808.1 (2006); N.Y.C., N.Y., ADMIN. CODE § 8-101, -102(23) (2016).

<sup>8</sup> See generally *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that a state law that required school children to say the Pledge of Allegiance violated the First Amendment).

<sup>9</sup> New York City's law, for example, is generally applicable to all employers and employees regardless of gender identity, and a simple mistaken use of a pronoun other than the employees' preferred pronoun does not constitute a violation of law. NYC COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION: LOCAL LAW NO. 3 (2002); N.Y.C. ADMIN. CODE § 8-102(23) (2016), available at [https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/GenderID\\_InterpretiveGuide2015.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/GenderID_InterpretiveGuide2015.pdf) [<https://perma.cc/5DAE-4UCF>].

<sup>10</sup> See *id.* at 4.

<sup>11</sup> *Id.*

<sup>12</sup> For examples of political and legal controversies stirred by policies restricting bathroom use along male/female gender lines, see Robert Barnes & Moriah Balingit, *Supreme Court Takes Up School Bathroom Rules for Transgender Students*, WASH. POST (Oct. 28, 2016), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-takes-up-school-bathroom-rules-for-transgender-students/2016/10/28/0eece4ea-917f-11e6-a6a3-d50061aa9fae\\_story.html?utm\\_term=.b9cc087ba25e](https://www.washingtonpost.com/politics/courts_law/supreme-court-takes-up-school-bathroom-rules-for-transgender-students/2016/10/28/0eece4ea-917f-11e6-a6a3-d50061aa9fae_story.html?utm_term=.b9cc087ba25e) [<https://perma.cc/WDT6-TU42>]; Michael Gordon et al., *Understanding HB2: North Carolina's Newest Law Solidifies State's Role in Defining Discrimination*, CHARLOTTE OBSERVER (Mar. 26, 2016, 11:00 AM), <http://www.charlotteobserver.com/news/politics-government/article68401147.html> [<https://perma.cc/YF5M-6DHC>]; *G.G. v. Gloucester County School Board*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/cases/gg-v-gloucester-county-school-board> [<https://perma.cc/N763-4KYZ>] (last visited Oct. 13, 2017).

Although a red-letter day arrived with the United States Supreme Court's landmark decision in *West Virginia State Board of Education v. Barnette*,<sup>13</sup> which ultimately ruled unconstitutional the government's ability to compel individuals to express support for a government-mandated message,<sup>14</sup> the government may still constitutionally compel speech,<sup>15</sup> or the accommodation of others' speech,<sup>16</sup> and expression in a motley assortment of ways.<sup>17</sup> Some are quite significant. For instance, the federal government's ability to compel law schools to permit military recruiters access to campus equal to that of nonmilitary recruiters, lest the school lose federal funding;<sup>18</sup> or, the ability of state governments to compel physicians, twenty-four hours before performing an abortion, to inform the mother about the nature of the procedure, the health risks of both childbirth and abortion, as well as the likely gestational age of the unborn child.<sup>19</sup> Others are important, but inoffensive to our understanding of First Amendment values; for example, requirements that new cars' showroom stickers display safety information,<sup>20</sup> or that food packages display nutritional content.<sup>21</sup>

To be sure, as *Barnette* and its progeny recognize, the First Amendment right *not* to speak is equal to the protection of speech in the affirmative sense.<sup>22</sup> The right to refrain from expressing a message with which one disagrees strikes down to the core of our nation's constitutional and republican ethics.<sup>23</sup> And though few cases are as extreme as *Barnette*, where the state of West Virginia compelled students to recite the Pledge of Allegiance in order to foster American values,<sup>24</sup> compelled speech ultimately implicates the extent and substance of government power.<sup>25</sup> Compelled speech thus brings the same concerns as government circumscription of affirmative expression.

In light of the concerns surrounding compelled speech, this Note outlines the various considerations that courts have taken into account when upholding instances of compelled speech or accommodation of another's speech.<sup>26</sup> For example, whether

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<sup>13</sup> 319 U.S. 624 (1943).

<sup>14</sup> *Id.* Specifically, the Court ruled unconstitutional the government's ability to force students to salute the flag and recite the Pledge of Allegiance. *Id.* Such, wrote the Court, unjustly invaded "freedom of mind." *Id.* at 637.

<sup>15</sup> *See generally* *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006).

<sup>16</sup> *See generally* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>17</sup> Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 541 (2012).

<sup>18</sup> *Rumsfeld*, 547 U.S. 47.

<sup>19</sup> *Casey*, 505 U.S. at 881–87.

<sup>20</sup> Keighley, *supra* note 17, at 541.

<sup>21</sup> *Id.*

<sup>22</sup> *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

<sup>23</sup> *Id.*

<sup>24</sup> *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>25</sup> *See generally id.*

<sup>26</sup> Courts have looked, with varying degrees of skepticism, at whether *actual* speech or expression is required or, for instance, whether speakers are forced to "alter [their] own

the government itself has compelled a specific message,<sup>27</sup> or whether speakers have a reasonable opportunity to disassociate from the compelled message, signifying they disagree with it.<sup>28</sup> For those considerations and others explored in this Note, pronoun laws do not violate the First Amendment.

Part I of this Note briefly outlines the New York City and Washington, D.C., pronoun laws, describing their implementation, contents, and the penalties for violating them. Part II places compelled speech in context, outlining the history of seminal compelled speech cases. It also describes the principal legal foundations that support the U.S. Supreme Court's "freedom of mind" notion as the ultimate standard against compelled speech.

Because no case has expressly litigated the compelled use of gender pronouns, Part III explores how lower courts have examined similar anti-discrimination laws in compelled speech cases, and how they have applied the U.S. Supreme Court's compelled speech precedent. Part III uses lower courts' application of the compelled speech doctrine to argue that pronoun laws are not unconstitutional because they ultimately do not prevent the speaker from expressing her own message. Part IV very briefly forwards an alternative argument. Even if courts cannot uphold the pronoun laws under the compelled speech doctrine, the laws can be upheld as general anti-discrimination laws given a "listener's" interest in dignity and freedom from harassment.

### I. THE LAWS IN QUESTION

Over the past decade, public entities like major municipalities, school districts, and public universities across the United States have codified statutes, adopted resolutions, or issued guidelines that mandate employers, teachers, and other officials use, or at least respect, the preferred gender pronouns (essentially, linguistic parts of speech used to identify individuals) of employees, students, and others.<sup>29</sup> In 2006, the nation's capital became one of the first localities to do so,<sup>30</sup> explicitly mandating that employers use employees' preferred gender pronouns.<sup>31</sup> Indeed, Washington, D.C., amended its municipal regulations to make "[d]eliberately misusing an individual's preferred name, form of address or gender-related pronoun" unlawful.<sup>32</sup>

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message." *Cressman v. Thompson*, 798 F.3d 938, 964 (10th Cir. 2015) (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986)).

<sup>27</sup> See, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53, 64 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (Apr. 7, 2014).

<sup>28</sup> See, e.g., *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006).

<sup>29</sup> See, e.g., School District of Philadelphia, Policy No. 252: Transgender and Gender Non-Conforming Students (2016), <https://www.philasd.org/src/wp-content/uploads/sites/80/2017/06/252.pdf> [<https://perma.cc/9LHF-QTWM>]; see also OHIO UNIVERSITY, UNIVERSITY POLICY 12.021: STUDENT NAMES (2015), <https://www.ohio.edu/policy/12-021.html> [<https://perma.cc/MA29-9EZE>].

<sup>30</sup> 53 D.C. Reg. 8751, 8755 (Oct. 27, 2006).

<sup>31</sup> *Id.*

<sup>32</sup> D.C. Mun. Regs. tit. 4, § 808.2 (2006). The Washington, D.C., Commission on Human

Similarly, New York City's Human Rights Law (NYCHRL)<sup>33</sup> prohibits discrimination in employment, public accommodations, and housing on the basis of gender.<sup>34</sup> Although the NYCHRL does not plainly mention gender *pronouns*, the New York City Commission on Human Rights issued legal guidance explaining that “[i]ntentional or repeated refusal to use an individual’s preferred name, pronoun or title” is a violation of the NYCHRL.<sup>35</sup>

## II. THE LAW AND HISTORY OF COMPELLED SPEECH

Firstly, this Part discusses First Amendment protections that extend beyond freedom of speech as it is commonly understood. Secondly, it discusses various instances in which the U.S. Supreme Court has either struck down or upheld instances of compelled speech. This Note will establish the fact that the right *not* to speak is equally as fundamental as the freedom to do so. However, the doctrine of compelled speech is unwieldy, and it is not always clear what speech may permissibly be compelled, or what “kind” of speech deserves protection. Thus, no truly comprehensive test or doctrine for compelled speech exists, and courts have applied relevant precedent with varying results.

Moreover, before anything else, it is critical to note that government compelled speech is not, by any means, a novel phenomenon. In fact, it is ubiquitous.<sup>36</sup> The government requires tobacco and alcohol industries to display health warnings on cigarette and alcohol packaging,<sup>37</sup> employers to post notice of working conditions and employee rights under the Fair Labor Standards Act,<sup>38</sup> subpoenaed witnesses to testify in court,<sup>39</sup> and citizens and businesses alike to file taxes and other government documents.<sup>40</sup>

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Rights, if it is found that a respondent engaged in a discriminatory practice, can issue fines. D.C. Mun. Regs. tit. 4, § 200 (1999).

<sup>33</sup> Codified at N.Y.C., N.Y., ADMIN. CODE § 8-101 (2016).

<sup>34</sup> N.Y.C., N.Y., ADMIN. CODE § 8-101, -102(23) (2016).

<sup>35</sup> NYC COMM’N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION: LOCAL LAW NO. 3 (2002); N.Y.C. ADMIN. CODE § 8-102(23) (2016). The Commission’s administrative decisions have the force of law. N.Y.C., N.Y., ADMIN. CODE § 8-125(a) (2016). When the Commission finds a violation of the NYCHRL, it has the power to issue fines of up to \$250,000. N.Y.C., N.Y., ADMIN. CODE § 8-126 (2016).

<sup>36</sup> See Keighley, *supra* note 17, at 541.

<sup>37</sup> *Id.* (describing examples of government-compelled speech).

<sup>38</sup> *Workplace Posters*, U.S. DEP’T OF LABOR, [https://www.dol.gov/general/topics/posters/\[https://perma.cc/BH3C-CTX5\]](https://www.dol.gov/general/topics/posters/[https://perma.cc/BH3C-CTX5]) (last visited Oct. 13, 2017) (listing statutorily required workplace notice provisions).

<sup>39</sup> Samuel G. Brooks, Note, *Confession and Mandatory Child Abuse Reporting: A New Take on the Constitutionality of Abrogating the Priest-Penitent Privilege*, 24 BYU J. PUB. L. 117, 133 (2009) (describing subpoenas in criminal proceedings and tax disclosures as circumscriptions of the right to remain silent that do not offend the First Amendment).

<sup>40</sup> *Id.* (describing examples of government-compelled speech).

*A. The Right Not to Speak*

It is common knowledge that the First Amendment prohibits the government from “abridging the freedom of speech,”<sup>41</sup> but inasmuch as the First Amendment protects the freedom of speech generally, the Amendment is not limited to its literal text; corollary rights fall under its comprehensive reach.<sup>42</sup> For instance, the freedom from being compelled to express a government-mandated message, the freedom from being forced to accommodate or subsidize the speech of another, and the right *not* to speak at all.<sup>43</sup> The fundamental, well-nigh inexorable force of the First Amendment is that it protects the *voluntary* expression of ideas, shielding the individual who wishes to speak when another—the government—would have them remain silent.<sup>44</sup> Thus, because the First Amendment protects *voluntary* expression, it necessarily protects a “concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.”<sup>45</sup>

American jurisprudence has long recognized that forcing individuals to express ideas with which they disagree, or at least ideas which they themselves did not decide were worthy of expression, poses a threat to liberty and freedom of expression equal to the threat posed by direct limitations on speech; indeed, it is an uncontroversial argument that laws that compel speech “pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.”<sup>46</sup> Given the American connection to values of individualism and self-determination,<sup>47</sup> it is little surprising that laws or policies mandating the announcement of a particular message are seen as equally contrary to the constitutional guarantees extending from the First Amendment.<sup>48</sup> Thus, arguably, the difference between compelled speech and compelled silence is not of major constitutional concern, at least to the extent that both may constitute a major constitutional infirmity.

Accordingly, the U.S. Supreme Court has invalidated laws compelling individuals to express a message other than the individual’s own, initiating the compelled

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<sup>41</sup> U.S. CONST. amend. I.

<sup>42</sup> Alexander, *supra* note 5, at 498–99 (citing *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) and *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988)).

<sup>43</sup> *Id.*

<sup>44</sup> Jonathan H. Adler, *Compelled Commercial Speech and the Consumer “Right to Know,”* 58 ARIZ. L. REV. 421, 432 (2016) (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985)).

<sup>45</sup> *Id.* (emphasis added) (quoting *Harper*, 471 U.S. at 559).

<sup>46</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

<sup>47</sup> *See id.*

<sup>48</sup> *Id.*

speech doctrine with the seminal 1943 case *West Virginia State Board of Education v. Barnette*, the facts of which constitute a particularly striking example of compelled speech.<sup>49</sup> Following the West Virginia State Legislature's approval of statutes requiring all West Virginia schools to introduce courses in American civics and "the [C]onstitutions of the United States . . . for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism,"<sup>50</sup> the Board of Education adopted a resolution mandating that saluting the American flag and reciting the Pledge of Allegiance become "a regular part of the program of activities in the public schools."<sup>51</sup> Refusal to comply was "insubordination," dealt with through expulsion of the student, whom the Board would have considered unlawfully absent, opening up the parent to criminal prosecution.<sup>52</sup> In an opinion delivered by Justice Jackson, the Court struck down the resolution,<sup>53</sup> reasoning, in part: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>54</sup>

*Barnette* overturned *Minersville School District v. Gobitis*,<sup>55</sup> which the Court had decided only three years prior.<sup>56</sup> The overturning of *Gobitis* remains an astonishing action, if only because the facts of the case are remarkably similar to those of

<sup>49</sup> 319 U.S. 624 (1943).

<sup>50</sup> *Id.* at 626 n.1 (quoting W. VA. CODE § 1734 (Supp. 1941)).

<sup>51</sup> *Id.* at 626 (citation omitted). In relevant part, the order stated:

Therefore, be it RESOLVED, That the West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag . . . now becomes a regular part of the program of activities in the public schools, . . . and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute, . . . [and] that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly.

*Id.* at 628 n.2 (citation omitted).

<sup>52</sup> *Id.* at 629.

<sup>53</sup> *Id.* at 624.

<sup>54</sup> *Id.* at 642. Justice Jackson's statement is fitting, for it was a family of Jehovah's Witnesses who challenged the Board's resolution, believing that God's law is superior to that of temporal governments and that they must refrain from pledging faith to any earthly institution. For a more detailed history of *Barnette*, see Sarah Barringer Gordon, *What We Owe Jehovah's Witnesses*, HISTORYNET (Jan. 27, 2011), <http://www.historynet.com/what-we-owe-jehovahs-witnesses.htm> [<https://perma.cc/4DHP-PNG5>]. It is an interesting historical note that Jehovah's Witnesses were, in part, opposed to the salute because, at the time, Jehovah's Witnesses were persecuted in Nazi Germany for refusing to show fealty to Adolf Hitler via the stiff-arm "Heil Hitler" salute. *Id.* Coincidentally, before the Court decided *Barnette*, other parents had raised concerns that the stiff-armed gesture then used to salute the flag was "too much like Hitler's." 319 U.S. at 627.

<sup>55</sup> 310 U.S. 586, 591 (1940).

<sup>56</sup> *Id.*

*Barnette*.<sup>57</sup> The Minersville, Pennsylvania, Board of Education required students and teachers alike to salute the American flag as part of a daily exercise.<sup>58</sup> Walter Gobitis, a Jehovah's Witness, brought suit after his children were expelled for refusing to salute the flag on religious grounds.<sup>59</sup> Justice Frankfurter, writing for the majority, upheld the school board's policy,<sup>60</sup> holding that the Constitution does not preclude "legislation of general scope not directed against doctrinal loyalties of particular sects."<sup>61</sup> The Court openly embraced the very indoctrination over which Justice Jackson in *Barnette* would later exhibit apprehension,<sup>62</sup> concluding that it was a permissible government action to alter students' minds, and thereby engender national unity and "evoke in them appreciation of the nation's hopes and dreams."<sup>63</sup>

In *Barnette*, Justice Jackson waxed poetic about the lofty functions of the First Amendment, reasoning that the government may not intrude upon students' self-rule, lest it erode "freedom of mind" or "invade[] the sphere of intellect and spirit" that the First Amendment protects.<sup>64</sup> As scholars have noted, however, Jackson never explicitly defined "freedom of mind."<sup>65</sup> Nevertheless, Jackson railed against Frankfurter's *Gobitis* opinion, writing that "the flag salute is a form of utterance" and that sustaining the statutorily compelled flag salute would be akin to holding that the Bill of Rights does not protect an individual from being forced to "utter what is not in his mind."<sup>66</sup> Moreover, though he did not explicitly define freedom of mind, Jackson did go on to write that American government rests on the consent of the governed, and that governments cannot compel that consent by way of a compulsory Pledge of Allegiance.<sup>67</sup> Government is meant to be "controlled by public opinion, not public opinion by [government]."<sup>68</sup>

Clearly, then, *Barnette* showed that Justice Frankfurter's conception of First Amendment prohibitions against compelled speech was not long for this world. Indeed, not only did the Court overturn *Gobitis*,<sup>69</sup> but it reaffirmed *Barnette*'s core principles thirty-four years later in *Wooley v. Maynard*.<sup>70</sup> Chief Justice Burger wrote

<sup>57</sup> *See id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 592.

<sup>60</sup> *Id.* at 586.

<sup>61</sup> *Id.* at 594.

<sup>62</sup> *See id.* at 597–98; *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>63</sup> *Gobitis*, 310 U.S. at 597.

<sup>64</sup> *Barnette*, 319 U.S. at 637, 642.

<sup>65</sup> *See, e.g.,* Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 332 n.6 (2008) (noting that the Court never fully explained what it meant by "freedom of mind" or how exactly that freedom was violated).

<sup>66</sup> *Barnette*, 319 U.S. at 632, 634.

<sup>67</sup> *See id.* at 641–42; Sacharoff, *supra* note 65, at 343.

<sup>68</sup> *Barnette*, 319 U.S. at 641.

<sup>69</sup> *Id.* at 632–34.

<sup>70</sup> 430 U.S. 705 (1977).

the majority opinion invalidating a New Hampshire statute mandating that license plates bear the state's motto "Live Free or Die."<sup>71</sup> The New Hampshire law made it a misdemeanor to obscure the motto.<sup>72</sup> The Maynards, who were Jehovah's Witnesses like the families in *Barnette* and *Gobitis*, considered the motto offensive to their religious beliefs,<sup>73</sup> and covered the motto on their license plate.<sup>74</sup> Mr. Maynard was cited for covering the motto.<sup>75</sup>

In striking down the statute, the Court affirmed the principle that the "freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."<sup>76</sup> In doing so, the Court bolstered the equivalency of the right to speak and the right not to, directly stating: "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"<sup>77</sup> The Court lent no serious doctrinal credence to the difference between the passive act of displaying the state motto on a license plate and being compelled to affirmatively act and salute the flag.<sup>78</sup> Rather, it concluded that the difference is only one of degree; the underlying unconstitutionality remains.<sup>79</sup> Citing *Barnette*, the Court held that the relevant point is not, generally speaking, the seriousness of the infringement,<sup>80</sup> but the fact that the State "invade[d] the sphere of intellect and spirit" that the First Amendment protects.<sup>81</sup> Regardless of whether most people agree with New Hampshire's message, the First Amendment protects individuals' freedom to hold an opinion different from the government's or the majority's and to refuse to promote an idea that they find morally repugnant.<sup>82</sup> Where a State's interest is to essentially disseminate ideology, that interest cannot outweigh an individual's right to avoid becoming a "courier" of that ideology.<sup>83</sup>

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<sup>71</sup> *Id.* at 717.

<sup>72</sup> *Id.* at 707.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 707–08.

<sup>75</sup> *Id.* at 708.

<sup>76</sup> *Id.* at 714.

<sup>77</sup> *Id.* (quoting *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

<sup>78</sup> *Id.* at 715.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* (quoting *Barnette*, 319 U.S. at 642).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 717. One of the government interests that New Hampshire forwarded as support for the law was the promotion of appreciation of history, individualism, and state pride. *Id.* at 716. Though innocuous enough, the Court ruled that the asserted interest was not ideologically neutral. *Id.* at 717. There were other, more legitimate, means by which New Hampshire could facilitate an appreciation of history and state pride without coercing citizens into carrying the message against their will. *Id.*

The Court's invalidation of laws compelling speech did not stop with individuals, however, for First Amendment rights regularly intersect with one another. Three years before *Wooley*, the Court invalidated a right-of-reply statute in *Miami Herald Publishing Co. v. Tornillo*.<sup>84</sup> The Florida statute in question required any newspaper that attacked "the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office,"<sup>85</sup> to publish, at the request of the candidate and free of cost, any reply the candidate may make to the attack.<sup>86</sup> Although the Court conceded that Florida's asserted government interest in ensuring the public had access to a wide variety of diverse viewpoints may be a valid one, a fundamental constitutional issue endured.<sup>87</sup> Unless the right-of-reply mechanism is purely consensual, the government is left to compel newspapers to provide candidates access.<sup>88</sup> Such coercion, reasoned Chief Justice Burger writing for the majority, is an invalid penalty based upon the newspaper's content.<sup>89</sup>

Chief Justice Burger went on to reason that the statute both compelled and suppressed speech.<sup>90</sup> The statute suppressed speech in that newspapers have limited print space, and so, when forced to make space for a candidate's reply, they are left with less space to print something they would have preferred.<sup>91</sup> Moreover, suppressive costs are associated with printing a reply, and editors may choose to avoid the statutory requirements altogether by not covering the issue at all.<sup>92</sup> The latter type of suppression directly acts against Florida's asserted interest of diversifying publicly available information, essentially acting as invalid, content-based suppression based on a newspaper's particular political coverage.<sup>93</sup>

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<sup>84</sup> 418 U.S. 241 (1974).

<sup>85</sup> *Id.* at 244 n.2 (citation omitted).

<sup>86</sup> *Id.* at 244. In addition to the reply itself, a newspaper would have to publish a candidate's reply in "as conspicuous a place and in the same kind of type as the matter that calls for such reply." *Id.* at 245 n.2 (citation omitted). Failure to comply with the right-of-reply provision constituted a first-degree misdemeanor. *Id.*

<sup>87</sup> *Id.* at 253–54.

<sup>88</sup> *Id.* at 254.

<sup>89</sup> *Id.* at 256.

<sup>90</sup> *See id.* at 256–57; *see also* Sacharoff, *supra* note 65, at 345–46 (explaining Chief Justice Burger's reasoning in detail).

<sup>91</sup> *Tornillo*, 418 U.S. at 256.

<sup>92</sup> *Id.* at 256–57.

<sup>93</sup> *See id.* Content-based restrictions are seen as especially heinous and fundamentally contrary to First Amendment principles. For an explanation of content-based restrictions on free speech, see 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 3:1 (2016) ("Content-based laws generally trigger heightened scrutiny . . . and when heightened scrutiny is applied, the odds are quite high that the law will be struck down."). *See generally* Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199 (1994) (explaining that the government is powerless to restrict expression because of its particular message, idea, or content).

The cases described in detail above constitute far from the entire list of the Court's compelled speech decisions.<sup>94</sup> However, they serve to establish the basic doctrinal concerns that the Court has grappled with. *Tornillo* and *Wooley* at least represent the fact that in compelled speech cases, the Court is often left with the task of disentangling two distinct speakers—the individual and the government.<sup>95</sup> And it is abundantly clear, to say the least, that the compelled speech doctrine is nebulous at best.<sup>96</sup> Justice Jackson's poetic, philosophical “freedom of mind” and “sphere of intellect and spirit” have never been explicitly defined,<sup>97</sup> and it is not always clear when speech is actually compelled, or when such compulsion is invalid.<sup>98</sup> Nor is it always clear what level of scrutiny must be applied or what kind of government interest is required to support the regulation of speech.<sup>99</sup> The interests of the speaker and the government must be adjusted and balanced under a compelled speech doctrine,<sup>100</sup> and determining when a government interest renders an otherwise unconstitutional regulation permissible is a difficult challenge. As discussed in Part III, lower courts have often been left to make sense of the clunky, indefinite doctrine and patchwork precedent, with varying results.<sup>101</sup>

### III. THE FIRST AMENDMENT IN THE BUSINESS CONTEXT: HOW LOWER COURTS MAY APPLY THE COMPELLED SPEECH DOCTRINE TO PRONOUN LAWS

At the time of this writing, no case has explicitly litigated the mandated use of preferred gender pronouns. However, relevant anti-discrimination cases implicating the First Amendment have cropped up across the United States.<sup>102</sup> Many have been particularly newsworthy, including, for instance, bakeries in Colorado and Oregon,<sup>103</sup>

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<sup>94</sup> For other compelled speech cases that appeared before the Court, see, for example, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572–73 (1995), in which the Court invalidated a Massachusetts public accommodation law, that required a parade organization to include a lesbian, gay, and bisexual group in its St. Patrick's Day parade. *Id.* The Court concluded that the organization's First Amendment rights were violated when it was forced to accommodate another's speech within its own expressive activity. *Id.*; see also *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (holding that the Solomon Amendment, which conditioned law schools' receipt of federal funds on their providing military recruiters with the same access as nonmilitary recruiters, did not unconstitutionally compel law schools to speak a government-mandated message).

<sup>95</sup> Sacharoff, *supra* note 65, at 348.

<sup>96</sup> See *id.* at 331.

<sup>97</sup> See *id.* at 331 n.6; *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637, 642 (1943).

<sup>98</sup> See generally Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147 (2006).

<sup>99</sup> See Alexander, *supra* note 5, at 504–08 (describing the standards of review used by the Court in deciding compelled speech and First Amendment cases).

<sup>100</sup> Sacharoff, *supra* note 65, at 346.

<sup>101</sup> See *infra* Part III.

<sup>102</sup> See, e.g., *infra* notes 103–04.

<sup>103</sup> Sarah Larimer, *Baker's Faith-Based Appeal Fails*, WASH. POST, Aug. 16, 2015, at C2.

and a pizza shop in Indiana that declined to cater same-sex weddings.<sup>104</sup> In more ways than one, the cases track what can be separated into two branches of compelled speech jurisprudence. On the one hand, there is a pure *Barnette* track, proscribing the government from requiring individuals to speak the government's message.<sup>105</sup> On the other, vis-à-vis *Tornillo*, the second branch essentially holds that not only is the government prohibited from compelling individuals to speak the government's message, but neither can the government coerce individuals into "host[ing] or accommodat[ing] another speaker's message."<sup>106</sup>

*A. Pronoun Laws and the First Branch: Compelled Expression of the Government's Message*

Taken at face value, employers seeking to extricate themselves from the pronoun laws in New York City and Washington, D.C., could argue that the laws violate both branches of the compelled speech doctrine.<sup>107</sup> For one, actual speech is required in that employers are compelled to use the pronouns at the behest of the government,<sup>108</sup> thus arguably falling under the auspices of the first branch. Secondly, employers are compelled to use the preferred pronouns of *another speaker*,<sup>109</sup> arguably falling under the *Tornillo* branch.

However, it is not clear that courts will ever accept such an argument because, to date, some lower courts have generally been disinclined, if not altogether opposed, to First Amendment arguments against anti-discrimination laws.<sup>110</sup> Courts' unwillingness to invalidate anti-discrimination laws under the First Amendment is not particularly surprising. After all, if taken plainly, federal anti-discrimination laws like Title VII already intrude upon other First Amendment rights like freedom of association.<sup>111</sup> One

<sup>104</sup> *Pizzeria in Gay Protests Reopens*, L.A. TIMES, Apr. 11, 2015, at A17.

<sup>105</sup> James M. Donovan, *Half-Baked: The Demand by For-Profit Businesses for Religious Exemptions from Selling to Same-Sex Couples*, 49 LOY. L.A. L. REV. 39, 75 (2016).

<sup>106</sup> *Id.* (citation omitted); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000); *see also* *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 581 (1995).

<sup>107</sup> *See* Donovan, *supra* note 105, at 75–76 (noting that business owners seeking exemption from anti-discrimination laws that require them to serve same-sex couples could argue that such laws violate both branches of the compelled speech doctrine).

<sup>108</sup> *See* D.C. Mun. Regs. tit. 4, § 808 (2006); NYC COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION: LOCAL LAW NO. 3 (2002); N.Y.C. ADMIN. CODE § 8-102(23) (2016).

<sup>109</sup> *See* D.C. Mun. Regs. tit. 4, § 808 (2006); NYC COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON GENDER DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION: LOCAL LAW NO. 3 (2002); N.Y.C. ADMIN. CODE § 8-102(23) (2016).

<sup>110</sup> *See, e.g.*, *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 802–03 (9th Cir. 2011), *cert. denied*, 565 U.S. 1260 (2012).

<sup>111</sup> *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (2012) (making it unlawful for any employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,

would rightly face disdain for arguing against the substantial justice, both moral and political, that the Civil Rights Act works, but history is not yet beyond a time when one can easily conceive of an employer who would choose not to hire potential employees based upon the color of their skin or because of their sexual orientation.<sup>112</sup> As obviously distasteful as blatant racism is to any reasonable person, outside of the employer-employee context, it remains an employer's First Amendment right not to associate with others based upon their race or other intimate characteristics.<sup>113</sup> Nor can the government force an employer to associate otherwise in his personal life.<sup>114</sup>

To wit: First Amendment freedoms are already abridged, if only incidentally, by anti-discrimination laws.<sup>115</sup> Thus, if the compelling government interest behind federal laws like Title VII<sup>116</sup> can be applied to anti-discrimination laws such as those of New York City or Washington, D.C., then the constitutional claim may fall flat to begin with. It is not unreasonable to expect employers, already subject to the anti-discrimination principles of Title VII, to abide by what is an altogether small burden on speech.<sup>117</sup> Unlike in *Barnette* or *Wooley*, no government message is manifestly appended to requiring the use of an employee's preferred gender pronoun.<sup>118</sup>

Apart from the weight of historical disenfranchisement, requiring employers to use employees' preferred pronouns is little different from barring employers from refusing to hire a qualified applicant on the basis of their race.<sup>119</sup> The government is not eroding an employer's "freedom of mind" or "invad[ing] the sphere of intellect and spirit," for no government message is required in place of the employer's.<sup>120</sup>

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because of such individual's race, color, religion, sex, or national origin"); *Crawford v. Willow Oaks Country Club, Inc.*, 66 F. Supp. 2d 767, 770 (E.D. Va. 1999) (discussing freedom of association and employment discrimination in the context of private clubs).

<sup>112</sup> See, e.g., Max Jaeger, *Lawyers Sue Times, CNN, Fox News for Racial Discrimination*, N.Y. POST (Apr. 26, 2017, 11:59 PM), <http://nypost.com/2017/04/26/mainstream-media-outlets-sued-for-racial-discrimination/> [https://perma.cc/8L8X-FDTU].

<sup>113</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250–51 (1964).

<sup>114</sup> See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–20 (1984); see also *Eccles v. Nelson*, 919 So. 2d 658, 661 (Fla. Dist. Ct. App. 2006), cert. denied, 939 So. 2d 92 (Fla. 2006).

<sup>115</sup> See generally *Crawford*, 66 F. Supp. 2d at 770 (stating in part that the First Amendment freedom of association rights of private clubs do not extend to discharge of an employee whom they had willingly hired, and thus willingly associated).

<sup>116</sup> Namely, ending discrimination while vindicating "personal dignity." See *Heart of Atlanta Motel*, 379 U.S. at 250; see also *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 220 (E.D.N.Y. 2006) (noting that Title VII's purpose of eliminating employment discrimination is generally a "compelling government interest").

<sup>117</sup> See D.C. Mun. Regs. tit. 4, § 808 (2017); NYC COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON GENDER DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION: LOCAL LAW NO. 3 (2002); N.Y.C. ADMIN. CODE § 8-102(23) (2016).

<sup>118</sup> Cf. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

<sup>119</sup> See, e.g., *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015).

<sup>120</sup> But see *Barnette*, 319 U.S. at 637, 642.

Both the Washington, D.C., law and the NYCHRL are generally applicable and only kick in when an *employee* expresses a preferred pronoun, not when the government demands it.<sup>121</sup> The pronoun laws, therefore, do not violate the first branch of the compelled speech doctrine.

*B. Pronoun Laws and the Second Branch: Compelled Accommodation of the Speech of Another*

The second branch of the compelled speech doctrine is more difficult to overcome in the case of mandated use of an employee's preferred pronouns. As noted, the government cannot force an individual to "host or accommodate another speaker's message."<sup>122</sup> The argument that that is precisely what the pronoun laws do is more reasonable than an argument that required use of someone's pronouns is a government mandated message. In *Elane Photography v. Willock*,<sup>123</sup> however, the Supreme Court of New Mexico, ruling on a photographer's First Amendment right to refuse to photograph a same-sex couple's wedding, rejected a similar argument.<sup>124</sup> In relevant part, Plaintiff Willock, planning to commit to her female partner, contacted Elane Photography to hire a photographer for a commitment ceremony.<sup>125</sup> Elane Huguenin, the company's lead photographer, responded, informing Willock that the company only photographed "traditional weddings."<sup>126</sup> Willock then filed a complaint against Elane Photography with the New Mexico Human Rights Commission, alleging that the company had discriminated against her on the basis of her sexual orientation.<sup>127</sup> Under New Mexico law, specifically the New Mexico Human Rights Act, it is unlawful to refuse to serve a client on the basis of sexual orientation.<sup>128</sup>

In its defense, Elane Photography argued that the "NMHRA compels it to speak in violation of the First Amendment by requiring it to photograph a same-sex commitment ceremony, even though it is against the owners' personal beliefs."<sup>129</sup> On the whole, the Supreme Court of New Mexico was unwilling to accept Elane Photography's First Amendment defense.<sup>130</sup> Citing *Barnette* and *Wooley*, the court easily dispensed with the first branch of the compelled speech doctrine, reasoning that though Elane Photography read the cases to mean that the government cannot compel

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<sup>121</sup> See D.C. Mun. Regs. tit. 4, § 808 (2017); NYC COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON GENDER DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION: LOCAL LAW No. 3 (2002); N.Y.C. ADMIN. CODE § 8-102(23) (2016).

<sup>122</sup> *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006).

<sup>123</sup> 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

<sup>124</sup> *Id.* at 59.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 60.

<sup>127</sup> *Id.*

<sup>128</sup> N.M. STAT. ANN. §§ 28-1-1, -1-7 (2008); *see also Elane Photography*, 309 P.3d at 62.

<sup>129</sup> *Elane Photography*, 309 P.3d at 63.

<sup>130</sup> *Id.* at 72.

people “to engage in unwanted expression,” the cases are narrower than such a reading allows.<sup>131</sup> *Barnette* and *Wooley* involved situations in which speakers were compelled to “speak the government’s message.”<sup>132</sup> Accordingly, the court concluded that the NMHRA does not require Elane Photography to speak or display any government message.<sup>133</sup>

Nor, reasoned the court, does the NMHRA require the business to take photographs; the law only mandates “that if Elane Photography operates a business as a public accommodation, it cannot discriminate against potential clients based on their sexual orientation.”<sup>134</sup> The court expounded upon the idea that the laws in *Barnette* and *Wooley* served little purpose other than to promote a government message, and that failing to salute a flag or state motto did not bring individual speakers into conflict with the rights of others.<sup>135</sup> Here, however, Elane Photography’s alleged right not to serve same-sex couples is not only in direct violation of the NMHRA, but conflicts with Willock’s right to obtain services free from “humiliation and dignitary harm.”<sup>136</sup>

In this vein, as to the second branch of the doctrine, Elane Photography argued that, (1) as an expressive service, it should receive the same deference that the parade organization in *Hurley*<sup>137</sup> received; and (2) if required to photograph same-sex weddings, *her* approval of those weddings would be implied, even when she does not wish to convey that message.<sup>138</sup> The court was again unwilling to accept Elane Photography’s compelled speech argument.<sup>139</sup> Not only has the U.S. Supreme Court generally found most anti-discrimination laws to be constitutional,<sup>140</sup> but Elane Photography is a commercial entity, not a privately organized parade.<sup>141</sup> Even if the business has expressive elements, the law applies to Elane Photography as a public accommodation, not to the merits of the actual photographs or an expressed belief.<sup>142</sup>

Moreover, the court was distrustful of the argument that, were Elane Photography required to shoot same-sex weddings, then “observers will believe that it and its owners approve of same-sex marriage.”<sup>143</sup> Although perception was a factor that the U.S. Supreme Court considered in *Hurley*,<sup>144</sup> Elane Photography is distinct from

<sup>131</sup> See *id.* at 63–64.

<sup>132</sup> *Id.* at 63 (emphasis added) (quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006)).

<sup>133</sup> *Id.* at 64.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> See 515 U.S. 557, 557 (1995); see also *supra* note 94 and accompanying text.

<sup>138</sup> *Elane Photography*, 309 P.3d at 65.

<sup>139</sup> *Id.*

<sup>140</sup> See, e.g., *id.* at 65–66 (citing *Hurley*, 515 U.S. at 572).

<sup>141</sup> *Id.* at 66.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 68–69.

<sup>144</sup> See 515 U.S. at 575.

the parade organization.<sup>145</sup> Indeed, the court dismissed Elane Photography's argument, concluding that, practically speaking, for-hire businesses are not generally assumed to share or endorse the views of their clients.<sup>146</sup> Besides, under the NMHRA, Elane Photography, as well as its owners, do not lose their First Amendment rights to express their political and religious beliefs.<sup>147</sup> In the court's words, "Elane Photography is free to disavow, implicitly or explicitly, any messages that it believes the photographs convey," and it "may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable anti-discrimination laws."<sup>148</sup>

*C. The Constitutionality of Pronoun Laws Under an Elane Photography Analysis*

Using reasoning similar to that of the Supreme Court of New Mexico, it works no innovation upon the First Amendment to conclude that "compelled" use of employees' preferred pronouns is not a violation of the First Amendment. On the first track of the compelled speech doctrine, as noted above, neither Washington, D.C.'s nor New York City's pronoun law commands a government message.<sup>149</sup> Comparably to the NMHRA's provision that businesses holding themselves out as public accommodations cannot discriminate against protected classes of people, only individuals who fall under the definitions—i.e., employers—as laid out in the statutes are compelled to use the pronouns.<sup>150</sup> Neither city's pronoun law requires them, in their private lives, to express a message against their "freedom of mind."<sup>151</sup> Again, *Wooley* and *Barnette* prevent the government from compelling individuals to "speak the Government's message."<sup>152</sup>

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<sup>145</sup> *Elane Photography*, 309 P.3d at 68 (distinguishing *Elane Photography* from *Hurley*).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 70.

<sup>148</sup> *Id.* Here, the court cited *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006). The court implied that, like in *Rumsfeld*, where law schools were compelled only to provide access to military recruiters, there is nothing in the vein of a government-supplied message or position that Elane Photography is compelled to endorse. *Elane Photography*, 309 P.3d at 70. Many law schools, after *Rumsfeld*, openly published letters explaining their opposition to military policy. *Id.* Elane Photography is likewise able to publicly disavow same-sex marriage, even as they provide public services on an equal basis.

<sup>149</sup> See D.C. Mun. Regs. tit. 4, § 808.1 (2006); NYC COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION: LOCAL LAW NO. 3 (2002); N.Y.C. ADMIN. CODE § 8-102(23) (2016).

<sup>150</sup> See, e.g., NYC COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION: LOCAL LAW NO. 3 (2002); N.Y.C. ADMIN. CODE § 8-102(23) (2016).

<sup>151</sup> See *id.*

<sup>152</sup> *Rumsfeld*, 547 U.S. at 60.

True, in *Elane Photography*, on a literal level there was no required “speech.”<sup>153</sup> In the case of pronoun laws, literal speech is required, at least whenever an employee expresses a preference for a particular pronoun.<sup>154</sup> But both the NYCHRL and Washington, D.C.’s law are anti-discrimination laws, which, as the Supreme Court of New Mexico conceded, have largely been held constitutional.<sup>155</sup> Anti-discrimination laws have critical functions that extend beyond a purpose to “promote the government-sanctioned message.”<sup>156</sup> Furthermore, much as the NMHRA did not require *Elane Photography* to take photographs at all,<sup>157</sup> let alone photographs depicting or supporting same-sex marriage, neither New York City nor Washington, D.C., mandates that an employer or other covered official express support for, or even acknowledgment of, gender nonconformity.<sup>158</sup> Both laws essentially, and only, mandate that, if individuals act as employers or other covered classes, they cannot “[i]ntentional[ly] or repeated[ly] refus[e] to use an individual’s preferred name, pronoun or title”<sup>159</sup> because such discriminatory harassment establishes a hostile work environment.

The second branch of the compelled speech doctrine presents greater difficulty. For, unlike in *Elane Photography*, where businesses holding themselves out as public accommodations were only prohibited from discriminating against protected classes, here, as noted, actual speech is required.<sup>160</sup> Also, the required speech is literally based upon the preference of another individual.<sup>161</sup> Clearly, employers, in being required to use the preferred pronouns of employees, are being compelled to accommodate another’s speech. Nonetheless, as in *Elane Photography*, employers

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<sup>153</sup> See *Elane Photography*, 309 P.3d at 59 (explaining that the conduct at issue was refusal of service to a same-sex couple, not traditional “speech”).

<sup>154</sup> See, e.g., D.C. Mun. Regs. tit. 4, § 808.2(a) (2006) (requiring employers to use an employee’s preferred pronoun).

<sup>155</sup> *Elane Photography*, 309 P.3d at 65. Specifically, the court stated: “Antidiscrimination laws have important purposes that go beyond expressing government values: they ensure that services are freely available in the market, and they protect individuals from humiliation and dignitary harm.” *Id.* at 64.

<sup>156</sup> *Id.*; see, e.g., *Daniel v. Paul*, 395 U.S. 298, 307–08 (1969) (explaining that Title VII’s function was to remove the “daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public”).

<sup>157</sup> *Elane Photography*, 309 P.3d at 64.

<sup>158</sup> See, e.g., D.C. Mun. Regs. tit. 4, § 808 (2006); NYC COMM’N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION: LOCAL LAW NO. 3 (2002); N.Y.C. ADMIN CODE § 8-102(23) (2016).

<sup>159</sup> NYC COMM’N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION: LOCAL LAW NO. 3 (2002); N.Y.C. ADMIN CODE § 8-102(23) (2016).

<sup>160</sup> See *Elane Photography*, 309 P.3d at 68 (stating that NMHRA applies to *Elane Photography*’s business decision not to offer services to protected classes of people).

<sup>161</sup> *Id.* at 70 (“[T]he allocation of work time is a matter of personal preference, not compelled speech, and it is not constitutionally protected.”).

are likely to own or manage *commercial* entities. Even if the service that the business provides is expressive, the act of employing an individual, and maintaining a nonhostile workplace, is not.<sup>162</sup> Employment, in and of itself, is not an expressive act,<sup>163</sup> and mandated use of pronouns, unlike the accommodation law at play in *Hurley*,<sup>164</sup> does not fundamentally change the nature of an expressive act.<sup>165</sup> The laws in question apply to business or employment operations, not an act comparable to the parade in *Hurley*.<sup>166</sup>

Much like the Supreme Court of New Mexico, we should also be skeptical of arguments that observers, such as customers, will believe that employers support the use of nontraditional pronouns or gender conformity simply because they use an employee's particular pronoun. Just as the court ruled in *Elane Photography*, employers do not lose their own First Amendment rights to free expression under either New York City's or Washington, D.C.'s human rights law. Employers and other covered individuals remain free to express their political, religious, and other opinions.<sup>167</sup> They are free to post signs declaring their religious or political support for traditional gender norms, they remain free to post disclaimers on their website, and they even remain free to engage in conversation with customers in order to explain their beliefs.<sup>168</sup> All that is mandated under the human rights laws, however, is that they do not remain free to harass employees by intentionally and repeatedly refusing to use a preferred pronoun.<sup>169</sup>

#### IV. CONTEXTUAL CONSTITUTIONAL CONSIDERATIONS

Throughout this Note, there have been several mentions of the typical contextual considerations that courts have undertaken when examining cases of compelled speech.<sup>170</sup> Like the *Barnette* track of cases implies, courts may consider whether the government itself has compelled a specific message,<sup>171</sup> or whether the public at large

<sup>162</sup> See *id.* at 65.

<sup>163</sup> See *id.* (“The fact that these services may involve speech or other expressive services does not render the NMHRA unconstitutional.”).

<sup>164</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 557 (1995) (describing initially the Massachusetts public accommodations law at issue).

<sup>165</sup> See *id.* at 559.

<sup>166</sup> See *id.*

<sup>167</sup> *Elane Photography*, 309 P.3d at 70. The court stated *Elane Photography* “may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws.” *Id.*

<sup>168</sup> See, e.g., *id.* at 69 (stating that a business may disavow third-party messages by posting its own signs).

<sup>169</sup> See, e.g., D.C. Mun. Regs. tit. 4, § 808.2(a) (2006) (stating that deliberately misusing an individual's preferred pronoun may constitute evidence of unlawful harassment and hostile environment).

<sup>170</sup> See *supra* Parts II & III (discussing the law and history of compelled speech and the First Amendment in the business context, respectively).

<sup>171</sup> See *Elane Photography*, 309 P.3d at 63. See generally *W. Va. St. Bd. of Educ. v.*

will misattribute the compelled speech as being expressly supported by the speaker.<sup>172</sup> Courts may also consider the type of space where the speech takes place,<sup>173</sup> or whether speakers have an actual opportunity to disassociate from the compelled speech.<sup>174</sup> This Note suggests that where the government itself has not mandated an ideological message, the latter question is more important. In instances of compelled speech, do compelled “speakers” have an opportunity to disassociate from the speech? This is not only because it is a consideration upon which courts have relied on to a significant degree,<sup>175</sup> but also because of the underlying foundation of the compelled speech doctrine as a whole—“freedom of mind.”<sup>176</sup> That is to say, the dissociative inquiry here is the critical question because the compelled-speech concern is less the required action of speaking, and more the concern that speakers will be forced to “alter [their] own message” without recourse.<sup>177</sup>

Contrary to the concept put forward above and suggested in *Elane Photography*,<sup>178</sup> there is an entirely valid argument to be made that we cannot practically expect private employers to post signs in their establishments announcing their support for traditional gender roles. Further, it is not an altogether unreasonable question to ask whether employers with deeply held beliefs—religious, political, or otherwise—should have to resort to doing so in the first place. But the contrary point outweighs the argument. It seems that the point is not so much the *methods* by which an employer can disassociate themselves, as much as whether there is a bona fide, reasonable opportunity to do so.<sup>179</sup> No legal test is going to turn on whether an employer or other compelled speaker has the option of posting signs.<sup>180</sup> Rather, the lynchpin in compelled speech for whether a compelled speaker has a bona fide opportunity

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Barnette, 319 U.S. 624, 641 (1943) (questioning whether a public program may compel youth to unite).

<sup>172</sup> See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 576–77 (1995) (reasoning that, in the context of a parade, in which individuals are considered to be part of the expressive whole, compelled inclusion of an LGBTQ group is more likely to be perceived as part of the parade’s message).

<sup>173</sup> See, e.g., *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 96 (1980) (Powell, J., concurring) (“[O]ur decision is limited to the type of shopping center involved in this case.”).

<sup>174</sup> See, e.g., *id.*; *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006); *Hurley*, 515 U.S. at 557 (considering the practicability of disavowing connection to the compelled inclusion of an LGBTQ group in a parade).

<sup>175</sup> See *supra* notes 94, 173 and accompanying text.

<sup>176</sup> *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

<sup>177</sup> *Cressman v. Thompson*, 798 F.3d 938, 964 (10th Cir. 2015) (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 16 (1986)).

<sup>178</sup> 309 P.3d 53, 70 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014) (suggesting that *Elane Photography* could simply post disclaimers in its store or on its website).

<sup>179</sup> See, e.g., *Hurley*, 515 U.S. at 576–77 (considering the practicability of disavowing connection to the compelled inclusion of an LGBTQ group in a parade).

<sup>180</sup> *But see Elane Photography*, 309 P.3d at 69 (stating that persons may disclaim sponsorship of specific messages by virtue of state law).

to disavow the speech is arguably contextual, turning on something of a time, place, and manner consideration.<sup>181</sup>

Additional U.S. Supreme Court precedent is relevant here. In *PruneYard Shopping Center v. Robins*, the Court rejected a similar argument, upholding a state law requiring a shopping center to allow other individuals' expressive activities on its property.<sup>182</sup> In relevant part, a group of high school students set up a table in the courtyard of PruneYard shopping center in Campbell, California, seeking to request support for their opposition to a United Nations resolution against "Zionism."<sup>183</sup> The students disseminated pamphlets and asked patrons to sign petitions, which would be sent to the President of the United States and Members of Congress.<sup>184</sup> The record before the Court indicated that the students' activity was peaceful, and PruneYard's patrons did not object.<sup>185</sup> PruneYard's security instructed the students to leave.<sup>186</sup> The students brought suit, seeking to enjoin PruneYard from denying them access for the purpose of distributing their petitions.<sup>187</sup>

Justice Rehnquist delivered the opinion of the Court, ultimately upholding the decision of the Supreme Court of California, which had held that the California Constitution protects reasonably exercised speech and petition in shopping centers, even if the shopping centers are privately owned.<sup>188</sup> PruneYard drew comparisons

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<sup>181</sup> See, e.g., *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (considering the public nature of a shopping mall, the likelihood that customers will associate pamphleteers' message with the proprietors, and the ability of the proprietor to disavow the pamphleteers' speech). For a discussion of time, place, and manner restrictions, see *United States v. Albertini*, 472 U.S. 675, 688–89 (1985) (reasoning that neutral regulations that incidentally burden speech or govern the time, place, or manner of expression are to be examined in terms of their general effect); see also *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984) (further discussing permissible time, place, and manner restrictions).

<sup>182</sup> *PruneYard*, 447 U.S. 74 (holding that appellants had not demonstrated a burden on their First and Fourteenth Amendment rights).

<sup>183</sup> *Id.* at 77.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 78, 88. In part, the California Supreme Court's decision was based off of the size and purpose of PruneYard. *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341, 346–47 (Cal. 1979). The issue in the case was not the property or privacy rights of a singular homeowner or the owner of a small retail establishment. *Id.* Instead, PruneYard was a large shopping center. *Id.* at 342. Thus, the court held that a small number of orderly individuals soliciting signatures and handing out pamphlets, under "reasonable regulations" established by the shopping center, did not have a substantial effect on business operations or PruneYard's property rights. *Id.* at 347. The public interest in peaceful speech outweighed the owner's property interest. *Id.* It is worth pointing out that California's state constitution contains an *express* and *affirmative* guarantee of freedom of speech, ultimately more broad—at least on its face—than the United States Constitution's negative prohibition that the government may

to *Wooley*, arguing that the State could not compel a private property owner to use his property as a forum of speech for others, and that the State cannot constitutionally require an individual to participate in the distribution of an ideological message for the purpose that it will be observed by the public.<sup>189</sup> In upholding the ruling, Justice Rehnquist rejected PruneYard's comparison.<sup>190</sup> Firstly, he wrote, in *Wooley* the government itself mandated the message, required that it be posted on property, used "as part of his daily life," and forbade covering it up.<sup>191</sup> Secondly, PruneYard is distinguishable from the speaker in *Wooley*.<sup>192</sup> By choice of the owner, PruneYard is not limited to personal use; instead, it is a shopping center open to the public.<sup>193</sup> Nor does the State dictate any *specific* message.<sup>194</sup> Not only is there no risk of discrimination based on a particular message, but patrons are unlikely to assume that the views of the individuals passing out pamphlets are those of the owner.<sup>195</sup> PruneYard, said Rehnquist, could expressly disavow any support for the message by simply posting signs disclaiming any sponsorship, and that the speakers are communicating their own message as permitted by law.<sup>196</sup>

The Court reached an analogous result in *Rumsfeld v. Forum for Academic & Institutional Rights*, in which the Court upheld as constitutional the Solomon Amendment, which denied federal funding to higher education institutions that refused to permit military recruiters access to campus and students equal to the access of other recruiters.<sup>197</sup> An association of law schools and law faculty brought suit, arguing, in part, that allowing access to the military recruiters would be seen as an indication that they found nothing objectionable about the military's policies, when they actually did.<sup>198</sup> The Court, citing *PruneYard*, rejected the argument.<sup>199</sup> Nothing about military recruiting, wrote Chief Justice Roberts, indicates that the law schools support the military's policy, and nothing in the Solomon Amendment restricts the schools or faculty from speaking freely about the Amendment or the military's policies.<sup>200</sup>

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not abridge freedom of speech. Compare CA. CONST. art. 1, § 2(a), with U.S. CONST. amend. I.

<sup>189</sup> *PruneYard*, 447 U.S. at 86–87.

<sup>190</sup> *Id.* at 87.

<sup>191</sup> *Id.* (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> 547 U.S. 47 (2006).

<sup>198</sup> *Id.* at 52. Specifically, the association objected to the military's then-valid policy of prohibiting homosexuals from serving in the military. *Id.* Generally, under the policy individuals were not eligible for military service if they had engaged in homosexual acts, married a person of the same sex, or stated that they were a homosexual. *Id.* at 52 n.1.

<sup>199</sup> *Id.* at 65.

<sup>200</sup> *Id.*

Any argument that employers do not have the opportunity to disavow the use of employees' preferred pronouns should be similarly rejected. It is true, of course, that pronoun laws should be distinguished from the laws at play in *Rumsfeld*, *PruneYard*, and *Elane Photography*. As noted earlier, the pronoun laws compel actual speech, unlike in the previously mentioned cases.<sup>201</sup> But, accepting that the U.S. Supreme Court and lower courts alike have applied a contextual test to the question of whether compelled speakers have a legitimate opportunity to disavow the speech, such that their minds remain "free," then it becomes a disingenuous argument to say that, under the pronoun laws, employers cannot disavow the use of preferred gender pronouns.

For, under the contextual considerations that courts have taken into account, the employment context is not distinguishable enough, to any significant degree, from the context of a law school or shopping center. That is not to imply significant commonality in function, though. Obviously, law schools, shopping centers, and retail establishments are vastly different enterprises. Rather, the point is that courts have implicitly focused both on the *space* and the *means* available to dissociate from compelled speech. For instance, Justice Rehnquist, in *PruneYard*, pointed out the public nature of the shopping center,<sup>202</sup> stating that it is a business establishment where the public can come and go as they please.<sup>203</sup> Justice Rehnquist addressed the easy means by which PruneYard's owner could disassociate himself from the activities of the pamphleteers, saying it would be a simple matter to post signs renouncing support for anything that they said, and that they were communicating as permitted by law.<sup>204</sup>

*Rumsfeld*, too, discussed the ability to disassociate from the compelled speech.<sup>205</sup> Although Chief Justice Roberts ultimately concluded that the Solomon Amendment did not actually regulate speech or inherently expressive conduct, he concluded that there was little likelihood that law students would not appreciate the difference between the recruiter's speech and the law school's mere facilitating of recruiters' access.<sup>206</sup> In doing so, Chief Justice Roberts compared *Rumsfeld* to a previous case, in which the Court held that "high school students can appreciate the difference between speech a school sponsors and speech the school permits because [they are] legally required to do so."<sup>207</sup> In other words, the law school and faculty members

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<sup>201</sup> In *Rumsfeld* in particular, the Court found that the Solomon Amendment in question did not actually regulate or compel *speech*. See *id.*

<sup>202</sup> Justice Rehnquist also pointed out that it was the *choice* of the owner to hold PruneYard out as a shopping center open to the public, rather than limiting for private purposes. 447 U.S. 74, 87 (1980). Quite conceivably, had the owner held the property for private purposes, the result would have been quite different, without ever reaching the Supreme Court. *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> See generally 547 U.S. at 47–48.

<sup>206</sup> *Id.* at 65.

<sup>207</sup> *Id.* For the case that Chief Justice Roberts discusses, see *Board of Education of the Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226 (1990).

were free to speak otherwise, having a legitimate opportunity to disavow the military's policies, and there was little likelihood that anyone would associate merely facilitating access for recruiters with the law school's own message.<sup>208</sup>

Taking into account similar considerations, then, it is clear that private enterprises like restaurants, retail stores, and other service establishments are able to disassociate from the compelled use of employees' pronouns.<sup>209</sup> Contextually, privately owned businesses open to the public are not dissimilar enough from a public accommodation like a shopping center such that patrons would think mere compliance with the law is support for a particular ideological message.<sup>210</sup> Nor, to make the same point, is compliance with anti-discrimination law dissimilar enough from compliance with the Solomon Amendment such that the required use of pronouns would convolute the speaker's own message beyond the point of distinguishability.<sup>211</sup> Indeed, both *Rumsfeld* and *PruneYard* put great faith in the ability of the public to distinguish support for a message from compliance with the law.<sup>212</sup>

There is no reason here to discount the ability of the public to distinguish between compliance with the law and support for gender nonconformance. A distinct, but still relevant example, is compliance with health codes and notice regulations. For example, in restaurants and other retail food service enterprises, signs requiring employees to wash their hands before returning to work are already posted in places such as bathrooms and kitchens.<sup>213</sup> It is fair to say that it is common knowledge that state or municipal law requires restaurants to post the signs. Moreover, it is common knowledge that restaurants and other food service businesses are subject to health inspection and health and safety laws.<sup>214</sup> When a restaurant prominently displays a health grade in the window, visible to patrons as they enter, the public is easily able to determine that it is by law that a restaurant must post the health grade.<sup>215</sup> The constitutionality of such laws is hardly in question, even when—comparable to the license plate statute in *Wooley*—some health grade laws directly prohibit obscuring the sign, divesting the owner of a legal means to disavow the government mandated message.<sup>216</sup> Yet, patrons intuitively do not transpose the government's message for the establishment's.<sup>217</sup>

The compelling interest in sanitation, and informing potential patrons about health risks, obviously outweighs any serious constitutional challenge to health-related sign

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<sup>208</sup> *Rumsfeld*, 547 U.S. at 65.

<sup>209</sup> *Cf. id.*; *PruneYard*, 447 U.S. at 87.

<sup>210</sup> *PruneYard*, 447 U.S. at 87.

<sup>211</sup> *Cf. Rumsfeld*, 547 U.S. at 65.

<sup>212</sup> *Id.*; *PruneYard*, 447 U.S. at 87–88.

<sup>213</sup> *See, e.g.*, CAL. HEALTH & SAFETY CODE § 113953.5 (West 2007).

<sup>214</sup> *See, e.g.*, N.Y.C., N.Y., HEALTH CODE tit. 24, § 81.51 (2017).

<sup>215</sup> *See id.*

<sup>216</sup> *See, e.g., id.*; *cf. Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

<sup>217</sup> *Cf. Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006); *PruneYard*, 447 U.S. at 87–88.

posting laws, which at most have de minimis effect on speech.<sup>218</sup> And, in fairness, health laws, as opposed to issues like gender equality and sexuality, are hardly politically charged.<sup>219</sup> But the point is not the politicization of the speech, but whether, contextually, private establishments have the space and the means to disavow the pronoun laws' required speech.<sup>220</sup> It seems that they do.<sup>221</sup>

To follow on the previously posed example, because handwashing signs are already posted in bathrooms and in kitchens, and health grades in windows, it seems of minimal conceivable burden to—by *choice*—post a sign disavowing the use of preferred pronouns and stating that the particular establishment does not subscribe to a government (or employee's) "message," but fully complies with the law. Moreover, as noted before, nothing in the pronoun laws restricts what private employers may say about the pronoun laws, or even what they may say about gender identity in general, so long as the employer's speech does not create a hostile work environment.<sup>222</sup> Thus, both because the pronoun laws do not restrict what employers may say *about* the pronoun laws, and because there is small likelihood that the public and patrons will assume compliance with the law is the employer's personal message, private employers have the *space* to disavow the mandated message.<sup>223</sup>

Finally, on much the same virtues as the space for speech, private employers have the *means* to disavow the mandated speech.<sup>224</sup> Though, again, no legal test should turn on the simple ability to post a sign, private employers remain free to do

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<sup>218</sup> Compare *PruneYard*, 447 U.S. at 87 (upholding a state law requiring a shopping center to allow other individuals' expressive activities on its property because the messages were not dictated by the state and the center could disavow any sponsorship of the message), with *Wooley*, 430 U.S. at 717 (holding that the government cannot mandate an individual to post specific government-sponsored messaging on private property for the purpose that it be seen by the public).

<sup>219</sup> See, e.g., Curtis M. Wong, *Indiana's Memories Pizza Reportedly Becomes First Business to Reject Catering Gay Weddings*, HUFFINGTON POST (Apr. 1, 2015, 12:16 PM), [http://www.huffingtonpost.com/2015/04/01/indiana-pizza-gay-couples\\_n\\_6985208.html](http://www.huffingtonpost.com/2015/04/01/indiana-pizza-gay-couples_n_6985208.html) [https://perma.cc/5BVL-TK3S].

<sup>220</sup> Cf. *PruneYard*, 447 U.S. at 87.

<sup>221</sup> Cf. *id.*

<sup>222</sup> D.C. Mun. Regs. tit. 4, § 808.2 (2006). Granted, there are some additional restrictions on what an employer may say, in that employers may not disclose the gender of an employee to others (specifically if the employee is transgender), may not ask questions of a personal nature about an employee's gender, or otherwise send communications in such a way that would alter the conditions of employee's employment and constitute harassment or create a hostile workplace. *Id.* However, this Note would still argue that the additional restrictions are little different from other labor laws prohibiting workplace harassment, and that they do not compel speech in the same way as the pronoun-use provision.

<sup>223</sup> This Note uses "space" not to denote a physical state of available area, but rather a permitted margin of variation, or, in other words, the *latitude* that private employers have to speak their own message, disavowing anything the government requires. Cf. *PruneYard*, 447 U.S. at 87.

<sup>224</sup> See *id.*

so. There is no legal provision preventing employers from posting disclaimers. And unlike the parade organization in *Hurley*, employers are not acting in a context where it would be imprudent or difficult to do so.<sup>225</sup> The constitutional question could turn differently if the pronoun law was overbroad, forbidding *any* speech or conduct about gender pronouns. But, as it stands, the law is narrowly tailored to its anti-discriminatory goal, going so far, in fact, as to give great deference to employers.<sup>226</sup> Indeed, Washington, D.C.'s pronoun law specifically enumerates that, in any legal action under the law, the totality of the circumstances is to be considered, taking into account whether the misuse of a pronoun was repeated, humiliating, and threatening, or a mere utterance.<sup>227</sup> Thus, employers easily have the means available by which to disavow their support for nontraditional use of gender pronouns, while simultaneously signaling their compliance with law.

In sum, there are laws that have clearly left neither the space nor means to disavow a compelled message.<sup>228</sup> One need only look at *Barnette*, where students were compelled to physically salute the flag or face expulsion, without the latitude to speak against the message, or a means to do so that would not also result in expulsion.<sup>229</sup> Here, however, there is no such lack of space or means. The pronoun laws in question are tailored to their purpose, limiting neither the space given to employers to speak against the law, nor the means *by which* they can do so.<sup>230</sup>

#### V. AN ALTERNATIVE: ANTI-DISCRIMINATION LAWS AND THE LISTENER INTEREST

The Supreme Court of New Mexico is not alone in its belief in *Elane Photography* that anti-discrimination laws serve legitimate purposes beyond expressing government values.<sup>231</sup> As mentioned above, instances of courts' unwillingness to accept

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<sup>225</sup> Though it seems hyperbolic, this Note uses the repeated example of physical sign posting because it is an apt, easy-to-implement illustration of a means-based measure that private employers may take to disavow a message with which they disagree, but with which they are legally compelled to display. Moreover, it is a reoccurring theme in U.S. Supreme Court precedent. *See, e.g.*, *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006); *see also PruneYard*, 447 U.S. at 87. The use of the example of signposting, however, by no means delimits the available methods by which an employer can disavow the use of non-traditional pronouns. So long as employers' communication does not establish harassment, they are free to use other methods. For instance, they could post a message on their website. Employers could also simply express their personal opinion to patrons who inquire.

<sup>226</sup> D.C. Mun. Regs. tit. 4, § 808.1 (2006).

<sup>227</sup> *Id.*

<sup>228</sup> *See, e.g.*, *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>229</sup> *Id.* at 626, 629.

<sup>230</sup> Admittedly, this brings up a difficult-to-answer question. How far can an employer go in speaking against the pronoun laws, or gender nonconformity in general, before that too constitutes a hostile workplace, thereby chipping away at the purpose of the law?

<sup>231</sup> *Elane Photography, LLC v. Willock*, 309 P.3d 53, 64 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

First Amendment arguments against anti-discrimination laws are evident.<sup>232</sup> Indeed, a Colorado case, *Craig v. Masterpiece Cakeshop, Inc.*, reaches a consonant result.<sup>233</sup> The facts reflect a familiar pattern. The plaintiffs, a gay couple, visited Masterpiece bakery to order a cake for their wedding.<sup>234</sup> Defendant Phillips informed them that he could not create a wedding cake for a same-sex wedding due to his religious beliefs.<sup>235</sup> The couple left and later filed charges with the Colorado Civil Rights Division, alleging discrimination based on sexual orientation in violation of the Colorado Anti-Discrimination Act (CADA).<sup>236</sup>

Although the court did not reach the narrow question of whether the act itself of baking a cake for a same-sex wedding was inherently expressive conduct, in which case Masterpiece's First Amendment rights may be at issue,<sup>237</sup> the court did reason that CADA was neutral and generally applicable.<sup>238</sup> Thus, the court stated that only rational basis scrutiny applied,<sup>239</sup> in which case CADA was rationally related to Colorado's asserted interest in eliminating discrimination in public accommodations, overcoming any First Amendment concerns.<sup>240</sup> Much like the Supreme Court of New Mexico, though, the court here ruled that baking and selling a wedding cake to customers on a nondiscriminatory basis "does not convey a celebratory message about same-sex weddings likely to be understood by those who view it."<sup>241</sup> If anything, said the court, the message was likely to be attributed to the customer.<sup>242</sup> More to the point, however, is the court's statement that the U.S. Supreme Court has consistently held that states have a compelling interest in eliminating discrimination and that statutes such as CADA serve to further the stated interest.<sup>243</sup>

Thus, there is a deeper principle than First Amendment protections alone that runs through the cases discussed above. And even if all of the above is invalid on pure compelled speech grounds, the law could be upheld simply on the anti-discrimination principle put forth by the Colorado Court of Appeals in *Masterpiece* and the Supreme Court of New Mexico in *Elane Photography*—the state has a compelling interest in

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<sup>232</sup> See *supra* notes 110–14 and accompanying text.

<sup>233</sup> 370 P.3d 272 (Colo. App. 2015), *cert. granted*, 85 U.S.L.W. 3593 (U.S. June 26, 2017) (No. 16-111).

<sup>234</sup> *Id.* at 276.

<sup>235</sup> *Id.* Phillips did, however, inform the couple that he would bake and sell them any other baked good. *Id.*

<sup>236</sup> *Id.* at 277.

<sup>237</sup> *Id.* at 288.

<sup>238</sup> *Id.* at 293.

<sup>239</sup> *Id.* at 289, 293.

<sup>240</sup> *Id.* at 293–94.

<sup>241</sup> *Id.* at 286.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 293 (citing *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987) (holding that the government has "a compelling interest in eliminating discrimination against women in places of public accommodation"))).

anti-discrimination laws that go “beyond expressing government values.”<sup>244</sup> For, “they ensure that services are freely available in the market, and they protect individuals from humiliation and dignitary harm.”<sup>245</sup>

Anti-discrimination laws generally are thus worthy of an examination in the context of compelled speech. This Part, therefore, very briefly argues in support of pronoun laws, as well as the idea that U.S. Supreme Court precedent supports a different, “listener” interest in speech cases where rights are in conflict. As is apparent from the line of cases discussed, at least in the gender and sexuality context, there is often conflict between the First Amendment rights of religious organizations and anti-discrimination legislation like that seen in Colorado, New Mexico, and New York City.<sup>246</sup> If so, assuming employers cite religious or political objections, then even in light of all of the above, does not compelled speech under pronoun laws violate a speaker’s “freedom of mind,” the very concept to which Justice Jackson devoted so much space in *Barnette*?<sup>247</sup>

Although this Note has spoken at length about the employers’ ability to retain their freedom to speak against the pronoun laws, in a sense we are still forced to answer in the affirmative. Because not only do the pronoun laws compel speech, but if Justice Jackson is to be believed, then the laws do invade the employer’s freedom of mind by that very act. Is, then, a state’s basic anti-discrimination principle enough to withstand the fairly considerable decline of religious freedom arguments upheld under the First Amendment? The answer is yes, for the reasons stated by the courts in the cases above.<sup>248</sup>

But there is another justification in compelled speech cases as well, one that is distinct from the speaker. That is to say, the *listener*. Rather than focusing on a speaker’s “freedom of mind” argument against compelled speech, we can focus also on a listener interest. Specifically, “a neutral and detached viewpoint from which to decide which speaker in compelled speech cases should prevail.”<sup>249</sup> As one commentator has noted, listeners, typically the public, have fundamental interests in hearing information from a variety of sources, free from government distortion.<sup>250</sup> At base, the listener interest is an adequate, succinct explanation for the implicit First Amendment

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<sup>244</sup> *Elane Photography, LLC v. Willock*, 309 P.3d 53, 64 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 70–71; see *Masterpiece Cakeshop*, 370 P.3d at 293–94; NYC COMM’N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION: LOCAL LAW NO. 3 (2002); N.Y.C. ADMIN. CODE § 8-102(23) (2016).

<sup>247</sup> See generally *Barnette*, 319 U.S. 624 (1943).

<sup>248</sup> *Elane Photography*, 309 P.3d at 72–73, 75; see *Masterpiece Cakeshop*, 370 P.3d at 288, 291–92.

<sup>249</sup> Sacharoff, *supra* note 65, at 335.

<sup>250</sup> *Id.* at 334.

prohibition against compelled speech in general.<sup>251</sup> Because, as *Barnette* and *Wooley* suggest, government-compelled speech dilutes the pool of information available to listeners.<sup>252</sup> In other words, government-compelled speech violates the First Amendment because the government becomes the ultimate “editor” of everything the listener hears.<sup>253</sup> Quite contrary to the aims of the First Amendment, the government harms listeners by “amplif[ying] its own message through the mouths of unwilling citizens, giving listeners a mix of information skewed to the government viewpoint.”<sup>254</sup> That distortion eventually has the effect of interfering, not only with practical enterprises like deciding how to vote or discovering what information is actually true, but also with basic autonomy and deciding how to live.<sup>255</sup>

A substantially similar kind of listener interest supports the pronoun statutes in New York City and Washington, D.C. As suggested earlier, employers are already subject to some abridgment of their First Amendment rights under anti-discrimination laws like the Civil Rights Act.<sup>256</sup> An abridgment for which the justification is the rights of individuals like people of color or women who could otherwise be discriminated against.<sup>257</sup> Specifically, the Court has upheld major anti-discrimination legislation, such as Title II of the Civil Rights Act, to “vindicate ‘the deprivation of personal dignity’” that accompanies discrimination.<sup>258</sup> Indeed, Justice Brennan wrote of that vindication, that the “stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.”<sup>259</sup>

By every stretch of the imagination, this justification for the anti-discrimination laws is a profound listener interest. As opposed, though, to the “neutral,” outside listener—i.e., the public—at play in *Barnette*, *Wooley*, and *Tornillo*, in anti-discrimination contexts, the listener is far from neutral, because they face indignity and harm.<sup>260</sup> In *Wooley*, for instance, the neutral, outside listener has an interest in undiluted information, where the Maynards are forced to display a government-authored

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<sup>251</sup> *Id.*

<sup>252</sup> *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). *See generally* *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>253</sup> Sacharoff, *supra* note 65, at 333.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 374.

<sup>256</sup> *See, e.g., Crawford v. Willow Oaks Country Club, Inc.*, 66 F. Supp. 2d 767, 769–70 (E.D. Va. 1999) (discussing freedom of association and employment discrimination in the context of private clubs).

<sup>257</sup> *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964).

<sup>258</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (quoting *Heart of Atlanta Motel*, 379 U.S. at 250).

<sup>259</sup> *Id.*

<sup>260</sup> *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 248 (1974); *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943).

message.<sup>261</sup> The listener, however, is otherwise uninvolved in the conflict between the speech of the government and the rights of the Maynards, thus remaining neutral.<sup>262</sup> In effect, in ruling based upon the notion of “freedom of mind” and an abhorrence for a government that can unilaterally “prescribe what shall be orthodox in politics . . . or other matters of opinion,” courts have applied a balancing test between the government message and the listener’s neutral interest in undiluted information.<sup>263</sup> In *Barnette*, *Wooley*, and *Tornillo*, the balance rightly tipped in favor of the listener interest in undiluted information.<sup>264</sup>

Anti-discrimination cases, like *Elane Photography*, which implicate compelled speech, however, were not decided on a neutral listener interest; rather, they were arguably decided on a dignitary listener interest.<sup>265</sup> Indeed, the Supreme Court of New Mexico stated in *Elane Photography* that not only did New Mexico’s Human Rights Act not unconstitutionally impose a government message, but it had the purpose of protecting individuals from discrimination, and thus, from “humiliation and dignitary harm.”<sup>266</sup>

Where cases of compelled speech involve anti-discrimination statutes like the pronoun laws of New York City and Washington, D.C., the case could turn on the weight of dignitary harm and the compelling interest the state has in ending discrimination.<sup>267</sup> That is to say, where there is a clear state interest in ending discrimination, and without the law in place, dignitary harm likely results to the listener, then the law may yet be constitutional.

If not on the grounds of pure compelled speech doctrine, then this Note posits that pronoun laws are constitutional under U.S. Supreme Court precedent upholding anti-discrimination laws on the basis that they defend individual dignity. Employees protected by the pronoun laws clearly have a listener interest in being addressed consonantly with their gender identity.<sup>268</sup> And as the recipient of their employer’s speech, employees are subject to the unique harm that results if consistently harassed in a manner that devalues their identity.<sup>269</sup> And though the employer’s “freedom of mind” may be affected as a result, the “stigmatizing injury” to the listener employee surely outweighs any incidental chilling of the employer’s speech. The laws have an important purpose that “go beyond expressing government values.”<sup>270</sup> They vindicate

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<sup>261</sup> *Wooley*, 430 U.S. at 715; *see also* Sacharoff, *supra* note 65, at 399.

<sup>262</sup> Sacharoff, *supra* note 65, at 399.

<sup>263</sup> *Barnette*, 319 U.S. at 637, 642.

<sup>264</sup> *Wooley*, 430 U.S. at 717; *Tornillo*, 418 U.S. at 256–57; *Barnette*, 319 U.S. at 642.

<sup>265</sup> *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53, 64–65 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

<sup>266</sup> *Id.* (emphasis added).

<sup>267</sup> *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964).

<sup>268</sup> Sacharoff, *supra* note 65, at 333–35.

<sup>269</sup> *Id.* at 333–34.

<sup>270</sup> *Elane Photography*, 309 P.3d 53 at 64.

“the deprivation of personal dignity”<sup>271</sup> that complements discrimination and harassment in the workplace.

#### CONCLUSION

Since Justice Jackson’s poetic opinion in *Barnette*, the notion that the First Amendment prohibits the government from requiring an individual to speak the *government’s* message has remained a principle equal in consequence to the prohibition on laws curbing speech in the affirmative sense.<sup>272</sup> That government might become puppet master is a threat equal to government as censor; both distort the total pool of information available to citizens, and impugn upon individuals’ right to decide for themselves.<sup>273</sup> Indeed, the foundation of the compelled speech doctrine remains the principle of “freedom of mind.”<sup>274</sup>

This Note has focused on exceptions to this golden rule of American constitutionalism, however. Specifically, this Note has focused on pronoun laws—laws that require employers to use the preferred gender pronouns of their employees. In doing so, it has concluded that pronoun laws are constitutionally valid. But it has not done so lightly. Pronoun laws, however slight the abridgment of speech may be, compel individuals to accommodate the message of another. Although the effect of the pronoun laws on the speaker is minimal, the difference between being compelled to use an employee’s preferred pronoun and being compelled to salute the United States flag is naturally only one of degree.

Despite this conclusion of validity, however, during the writing of this Note, the U.S. Supreme Court granted certiorari in *Craig v. Masterpiece Cakeshop*.<sup>275</sup> Because this Note relied, in part, on the factually similar *Craig* and *Elane Photography v. Willock*,<sup>276</sup> the Court’s decision could naturally affect the analysis leading to the conclusion that pronoun laws are constitutionally valid. With the recent confirmation of conservative Justice Neil Gorsuch to the Court,<sup>277</sup> it is possible the Court may

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<sup>271</sup> *Heart of Atlanta Motel*, 379 U.S. at 250 (quoting S. REP. NO. 88-872, at 16 (1964)).

<sup>272</sup> See *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256–57 (1974).

<sup>273</sup> Sacharoff, *supra* note 65, at 333–34.

<sup>274</sup> *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

<sup>275</sup> 370 P.3d 272 (Colo. App. 2015), *cert. granted*, 85 U.S.L.W. 3593 (U.S. June 26, 2017) (No. 16-111).

<sup>276</sup> *Elane Photography, LLC v. Willock*, 309 P.3d 53, 64 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

<sup>277</sup> Ed O’Keefe & Robert Barnes, *Senate Confirms Neil Gorsuch to Supreme Court*, WASH. POST (Apr. 7, 2017), [https://www.washingtonpost.com/powerpost/senate-set-to-confirm-neil-gorsuch-to-supreme-court/2017/04/07/da3cd738-1b89-11e7-9887-1a5314b56a08\\_story.html?utm\\_term=.7ad2c54089b9](https://www.washingtonpost.com/powerpost/senate-set-to-confirm-neil-gorsuch-to-supreme-court/2017/04/07/da3cd738-1b89-11e7-9887-1a5314b56a08_story.html?utm_term=.7ad2c54089b9) [<https://perma.cc/7235-SMU8>]; see also David Savage, *Gorsuch Is Already Pushing the Supreme Court Right on Religion, Guns and Gay Rights*, L.A. TIMES (June 29, 2017, 4:00 PM), <http://www.latimes.com/politics/la-na-pol-gorsuch-court-20170628-story.html> [<https://perma.cc/5VP9-F53V>].

take a strong stance on First Amendment protection.<sup>278</sup> The Court may well overrule the Court of Appeals of Colorado and conclude that public accommodations laws requiring business owners to provide services for same-sex weddings, against their asserted religious convictions, violates the First Amendment.

Nonetheless, because *pronoun laws* do not unreasonably infringe upon a speaker's—employer's—ability to denounce the laws, because the government itself has not mandated a specific ideology, and because the laws affect a space outside of private life, the social justice they work is not unconstitutional. To be sure, balancing the rights of speakers and listeners in cases of compelled speech is a complex, careful task. The test and the result alike are far from perfect. And laws which compel speech should not escape close constitutional scrutiny. But, as the analysis above shows, pronoun laws themselves also serve a traditionally constitutional anti-discrimination purpose, and ought be found constitutional if ever they are challenged.

As this Note also shows, the particular margins of compelled speech doctrine have never been explicitly defined, leaving courts to sort out individual cases as best they can. However, future scholarship should continue to examine the hodgepodge of precedent and consider those constitutional boundaries themselves, as well as new and evolving compelled speech claims that may inevitably arise.

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<sup>278</sup> See, e.g., Tejinder Singh, *Judge Gorsuch's First Amendment Jurisprudence*, SCOTUS BLOG (Mar. 7, 2017, 11:16 AM), <http://www.scotusblog.com/2017/03/judge-gorsuchs-first-amendment-jurisprudence/> [<https://perma.cc/9A47-Y8MT>].