IN THE NEW MEXICO SUPREME COURT

Elane Photography, LLC,

Petitioner/Appellant,

v. **No. 33,687**

Vanessa Willock,

Respondent/Appellee.

Brief of *Amici Curiae* Steven H. Shiffrin and Michael C. Dorf in Support of Respondent/Appellee, Vanessa Willock

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Table of Contents

STATEMENT REGARDING TRANSCRIPT CITATIONS

All citations to the transcript are to the Human Rights Commission Hearing Transcript ("Tr."), which is part of the Human Rights Commission record proper and does not contain record proper numbers.

Table of Cases

New Mexico Cases

Cases

New Mexico Statutes & Rules

Federal Statutes

Other Authorities

Statement of Compliance with Notice Requirement

All parties received timely notice of the intention of *Amici* to file this brief and indicated that they were not opposed.

Brief Statement of Pertinent Facts

Vanessa Willock contacted Elane Photography, LLC (co-owned by Elaine Huguenin, the photographer, and Jonathan Huguenin, the business manager [Tr. 96] (the "photographer" or the "Appellant"), to secure its services for a same-sex commitment ceremony. Willock hoped to have photographs as a memory of the day for family and friends, not for use in the newspaper or otherwise distributed to the public. [Tr. 39] By standard contract the company would own the copyright. *Id.* The company refused to offer its photographic services because it objected to same-sex ceremonies. [Tr. 18-19] Its refusal, according to Jonathan Huguenin, was based on the couple's understanding of the Bible [Tr. 89, 92] and his view that a family with a man and a woman at its core is the best way to order society for family and for child rearing. [Tr. 92] Accordingly he expressed a desire not to be associated with the message he thought was conveyed by the ceremony, namely that marriage need not be between a man and a woman. [Tr. 87, 91] Mr. Huguenin's objections were on religious and public policy grounds. He did not

express the view that same sex commitment ceremonies were not emotional loving, romantic, and joyful.

Elaine Huguenin testified that she approached weddings as a "silent observer – clicking on the moments which are fresh, real, and un-staged. . . . my desire is to create memories that are exactly what the bride and groom experienced." [Tr. 100-01] Mrs. Huguenin testified that her opposition to same-sex ceremonies was based on the Bible. [Tr. 112] She thought that photographing a commitment ceremony would be advocating for it, promoting it, and endorsing it [Tr. 110, 113] at least in part because the ceremony conveys the message that marriage need not be between a man and a woman. [Tr. 118] She testified that weddings communicated the general messages that couples loved each other and were committed to each other in the long term. In addition, she stated that if there were religious content in the ceremony, it suggested "beliefs that they stand by" and a basis of how they "make a lot of life decisions." [Tr. 128] When religion is part of the ceremony, she believed not that God affirms the ceremony, but that the couple sees God as a witness affirming what's going on. [Tr. 129] Like her husband, she did not maintain or contest that same sex commitment ceremonies are not emotional loving, romantic, and joyful.

Argument

I. Analysis of Facts and Summary of Argument

A. Analysis of Facts

The New Mexico Human Rights Act, as applied, requires Elaine Huguenin[1] to make her professionalism equally available, meaning that she must photograph a commitment ceremony in ways that capture the celebration's emotional, loving, romantic, and joyful aspects, but the record does not suggest it is any part of her views (including her religious or public policy views) that same sex commitment ceremonies do not contain these aspects.

Elaine Hugenin testified that photographing a commitment ceremony would be advocating for it, promoting it, and endorsing it at least in part because the ceremony conveys the message that marriage need not be between a man and a woman. Similarly, her husband expressed a desire not to be associated with the message he thought was conveyed by the ceremony, namely that marriage need not be between a man and a woman. To be sure, the couple in a same-sex commitment ceremony may well believe that marriage need not be between a man and a woman. In any event, they are proclaiming no such message at the ceremony. Rather they are proclaiming their commitment to each other.

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[1] More precisely, it forces the company to photograph the commitment ceremony according to professional standards.

Even more important, photographing the event does not endorse or advocate or promote beliefs that are contrary to the Biblical or public policy views of the Hugenin's. The photographs say nothing about the proper way to interpret the Bible and nothing about the need for a father and mother in child rearing. Telling the story of a commitment ceremony speaks to neither of those issues. The photographer in this case is simply not being compelled to produce speech she believes to be false or to distort the truth. See Alexander Solzhenitsyn, *Live Not By Lies,* Wash. Post, Feb. 18, 1974 at A26., *cited* in the brief of Amici Curiae, Cato Institute, Professor Dale Carpenter and Professor Eugene Volokh (hereinafter "Cato Institute"). Brief of Cato Institute at 7. Rather she would be photographing "exactly what the [couple] experienced." Tr. at 101. Far from requiring the photographer to produce false speech, the New Mexico Human Rights Act simply requires the company to provide its services equally whether its services are expressive or non-expressive. NMSA 1978, § 28-1-7(F).

B. Summary of Argument

Amici concur with Elane Photography, LLC, that photography may be a form of expression entitled to some First Amendment scrutiny, albeit not strict scrutiny. Compelling Appellant to offer its photographic services on a nondiscriminatory basis, however, does not violate the compelled speech doctrine of the First Amendment. There are two branches of the compelled speech doctrine that

Appellant believes to be relevant here.[2] With some exceptions: (1) The compelled speech doctrine does not permit government to require persons to affirm, carry, or produce messages that contradict their ideologies or to participate in a prescribed ritual affirming a government mandated orthodoxy; (2) It also does not permit government to engage in content discrimination that forces speakers engaged in communicating a message to include unwanted materials that unduly burden their messages. Compulsory non-discrimination is not compelled speech within the meaning of the First Amendment in this case because the photographer is not compelled to affirm, carry or produce a message that contradicts her Biblical views or her views about public policy. In addition, compulsory non-discrimination in this case does not involve content discrimination forcing the Photographer engaged in communicating a message to include unwanted materials. The New Mexico Human Rights Act is non-discriminatory on its face and as applied. The law does not approve or disapprove any message. The law does not tell the photographer how to photograph. The law simply insists that if photographic services are made available to the public, they must be made available on a non-discriminatory basis.

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[2] The Appellant rightly does not claim any support under the third branch of the compelled speech doctrine which prohibits in some circumstances forced monetary subsidies of ideologies opposed by the subsidizer. *See, e.g., Abood v. Detroit Bd. Of Educ.*, 431 U.S. 209 (1977).

The real question in this case is not whether the application of the New Mexico Human Rights Act violates compelled speech doctrine as it currently exists – it does not – the real question is whether existing doctrine can or should be extended beyond the confines of existing doctrine. *Amici* maintain that extending the compelled speech doctrine beyond its current confines is contrary to Supreme Court precedent and would unnecessarily compromise the goal of equal citizenship. The compelled speech doctrine does not dictate that persons are invariably free from engaging in unwanted speech. For example, persons may be compelled to be witnesses and to swear or affirm that their testimony is true; mandatory political disclosures are common including requiring candidates to affirm that they approve of a message from their campaign; persons can be forced to identify themselves to police officers in certain circumstances, doctors in some circumstances can be compelled to communicate messages to abortion patients.

Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 61-65 (2006)("*FAIR*") held that compelling law schools to send out e-mails advertising interviews of the military pursuant to a content-neutral law does not violate compelled speech doctrine even though the law schools did not want to engage in that speech and thought the military was involved in immoral recruiting practices. *FAIR* strongly indicates that compelled speech is permissible in this case since content discrimination is not present here as it was in *Hurley v. Irish-*

American, Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 579 (1995)(government not permitted to force inclusion of its approved message in a parade). As is developed in Section II, A, *infra*, FAIR is the most important decision for this case. Neither Appellant nor the *Amicus* briefs adequately deal with the decision. Appellant ignores the key facts of *FAIR* and settles for quoting phrases from the case wrenched from their factual setting; neither of the *Amicus* briefs even refers to the decision.

Even if precedent permitted, extending the compelled speech doctrine beyond its current framework to permit those who offer commercial speech services to routinely violate anti-discrimination law would be undesirable. Speech is routinely outlawed when it is an integral part of illegal conduct. Here the discriminatory refusal to engage in conduct whether expressive or non-expressive is the gravamen of the illegal conduct.

The New Mexico Human Rights Act is directed at discriminatory conduct whether or not it takes the form of speech. It applies to the hair dresser, the dress designer, the florist, the interior decorator, the master chef, and the photographer. All make artistic choices to make the wedding more attractive or to capture its story. But there is no basis to place a heavy hand on the scale in favor of the desire of a commercial speech enterprise not to engage in speech. Any other view would

lead to the conclusion that commercial speech enterprises could discriminate at will on the basis of race, sex, and religion in addition to sexual orientation.

Finally, Appellant wrongly suggests that the strict scrutiny standard applies to the content-neutral law in this case. Assuming that wedding photography is speech within the meaning of the First Amendment, however, it is hornbook law that the proper standard for a content-neutral law is the *O'Brien* test and that standard is easily satisfied here.

Sections II and III of this brief will go straight to the heart of the case by passing over the misplaced claim that New Mexico Human Rights Act as applied violates existing compulsory speech doctrine. The Appellant's efforts to squeeze the facts of this case into existing compelled speech doctrine will be taken up in Section IV.

II. The Holding and Principles of the FAIR Case Contradict Appellant's Claim and Extending the Compelled Speech Doctrine Beyond Its Current Framework to Permit Commercial Enterprises That Offer Speech Services to Routinely Violate Civil Rights Laws is Undesirable

A. Government Can Compel Speech in a Wide Variety of Circumstances, and the *FAIR* Case Shows That This Is One of Them

The briefs of Appellant and Cato communicate the impression that forcing an individual or an entity to engage in unwanted speech is absolutely forbidden by the First Amendment. To be sure, as *West Virginia v. Barnette,* 319 U.S. 624, 642

(1943)(compulsory flag salute), and *Hurley* (compulsory inclusion of marchers on the basis of their message) demonstrate, this is sometimes the case. At the same time, there is no "generalized right not to speak." *State v. Dawson,* 1999-NMCA-72, ¶ 20, 127 N.M. 472, 983 P.2d 421. Persons are often compelled to engage in unwanted speech and much of that speech would be protected if government had tried to censor it. Despite grand dicta to the contrary, the right to say something does not invariably correspond with the right not to say something. Persons are compelled to be witnesses in judicial and legislative proceedings, *Barenblatt v. United States,* 360 U.S. 109 (1959)(denying a First Amendment objection to giving testimony even when the testimony would threaten freedom of association). They are routinely compelled to swear or affirm that their testimony is true. *See, e.g.,* Rule 3-601 NMRA (conduct of trials). Persons can be forced to identify themselves to police officers in certain circumstances. *State v. Dawson, supra.* Although there are First Amendment limitations, mandatory political disclosures are common (see *Buckley v. Valeo, 424 U.S.* 424 U.S. 1, 60-74 (1976)) including requiring candidates to affirm that they approve of a message from their campaign, 2 U.S.C.A. § 441d. Physicians can be required to provide truthful information to patients about the risks of abortion. *Planned Parenthood of Southeastern Pennsylvania v, Casey,* 505 U.S. 833, 884 (1992); advertisers can be forced to

disclose information about their products or services. *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626 (1985).

Especially pertinent to this case, *Rumsfeld v. FAIR* approved compelling law schools to engage in speech they did not want to produce. 547 U.S. at 51-62, 70. In *FAIR,* the Solomon Amendment required the Department of Defense to deny federal funding to institutions of higher education that did not afford military recruiters the same access and assistance that they afford to other recruiters. *Id.* at 51. Although the Amendment enforced its mandate through a funding condition, the Court analyzed the case as if the government had directly ordered law schools to afford equal treatment to the military. *Id.* at 59-60. In order to provide equal assistance, law schools were forced to *advertise* the military interviews by sending e-mails to students and to post notices on bulletin boards. *Id.* at 61.

FAIR, an association of law schools and law faculties, brought suit contending among other things that the Amendment violated their rights under the compelled speech doctrine. *Id.* at 53. Chief Justice Roberts, writing for every member of the Court except Justice Alito who did not participate, flatly rejected FAIR's claim. Being forced to send e-mails to students and to post notices on bulletin boards on behalf of the military was characterized by the Court as a "far cry from the

compelled speech in *Barnette* and *Wooley*. . . .[3] There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse." *Id.* at 62.

FAIR shows that entities can be compelled to engage in unwanted speech. Contrary to Appellant's position (see BIC 25)(forcing the photographer to communicate the message that same sex couples conduct wedding like ceremonies violates the compelled speech doctrine), it shows that entities can be compelled to convey a message (in this case a factual message) they would prefer not to convey, so long as the government does not force them to affirm or be a courier for a governmentally approved ideological message with which they disagree and so long as the government does not impose a content-based requirement that unduly burdens a message the speaker intends to communicate through content discrimination.[4]

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[3] *Wooley v.* Maynard, 430 U.S. 705, 717 (1977)(forcing a motorist to be a forced courier of a government motto violates First Amendment)

[4] This latter principle which is developed in Section IV,B *infra* distinguishes McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) and *Riley v. National Federation of the Blind,* 487 U.S. 781 (1988). Both involved demands by the state for the inclusion of particular factual statements in messages, but the Court held in both cases among other things that the inclusion would unduly burden the messages. In *McIntyre,* the Court ruled that the prohibition on anonymous leafleting in candidate elections burdened speech at the core of the First Amendment (514 U.S. at 347) and would undermine an important shield from the tyranny of the majority. *Id.* at 347. In *Riley,* disclosure requirements placed on solicitations for charities were found to be imprecise, unduly burdensome, and not

The content-neutral Solomon Amendment is directed at conduct, expressive or non-expressive and happened to hit both. The Amendment as applied did not force the law schools to endorse military recruiting. It forced them to give non-discriminatory access and left them free to condemn discrimination by the military. At the same time, it forced the law schools to create unwanted factual speech that would have the effect of fostering through advertising the discriminatory recruitment policies of the military that it opposed. Yet, this unwanted speech was deemed to be outside the compelled speech doctrine altogether. The compelled speech in *FAIR* was understood to be a far cry from being forced to salute a government symbol against a person's will or being the forced courier of an ideological message selected by government. Rather the law schools were compelled to provide services to the military on a non-discriminatory basis whether those services took the form of conduct or speech.

The comparison of *FAIR* to this case is obvious. The content-neutral New Mexico Human Rights Act is directed at conduct, expressive or non-expressive, and happens to hit speech. It does not force the Appellant to endorse same sex commitment ceremonies, and it does not force them to endorse a policy that would permit a different ceremony, not performed in New Mexico, namely a same-sex

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narrowly tailored. 487 U.S. at 801. Unlike this case, both cases struck down provisions designed to interfere with a speaker's message; and neither *Riley* nor *McIntyre* involved the application of a content-neutral statute.

marital ceremony. As applied, because of the Photographer's professional standards, it does have the effect of forcing the Appellant to photograph such ceremonies in ways that make them look attractive to many in many respects, albeit not from a Biblical or public policy perspective. In the end, however, the New Mexico Human Rights Act compels commercial enterprises to provide services on a non-discriminatory basis whether those services take the form of conduct or speech. Commercial enterprises like Appellant are entitled to no greater rights than law schools.[5]

B. The Approach Taken in FAIR Is Correct and Extending the Compelled Speech Doctrine to the Speech of the Appellant Would Be Undesirable

Important to the analysis in *FAIR* was its understanding that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 62, *quoting Gibboney & Empire Storage & Ice Co.,* 336 U.S. 490, 502 (1949). In *FAIR,* the discriminatory conduct against the military lay in the refusal to advertise on its

[5] Perhaps because the Cato Institute recognizes that FAIR is contrary to its position, it does not try to distinguish the case and does not even cite it. As was developed in Section II, A & B *supra,* Appellant's attempts to enlist *FAIR* on its behalf cannot be defended.

behalf when the schools were advertising for other employers. Given that the law schools were not required to affirm a belief they did not share and given that the Amendment was directed at conduct, expressive or not expressive, the fact that the conduct took the form of expression was beside the constitutional point.

In other words, in this context, there is nothing strongly privileged about speech. If Elaine Hugenin were a hair dresser, a dress designer, a florist, an interior decorator, or a master chef (e.g., Katharine Kagel of Cafe Pasqual's or Martin Rios of Restaurant Martin), she would have the same objection and she could enlist lengthy *Amicus* briefs detailing how the artistic choices of these commercial actors enhanced the attractiveness of the ceremony itself. These artistic expressions are not ordinarily conceived of as speech within the meaning of the First Amendment, but that is the point. In this context, it is hard to see why speech deserves the kind of exalted privileged treatment for which Appellant is calling.

In addition, if the photographer can discriminate in this case, the same First Amendment analysis would permit speech enterprises to discriminate at will on the basis of race, sex, and religion in addition to sexual orientation. As Professor Eugene Volokh, attorney for the Cato Institute, Dale Carpenter, and himself, has previously written: "In the most recent discussion of Elane Photography v. Willock, a commenter asked: 'Imagine if instead of a gay couple it was an interracial couple. Would you still support Huguenin's refusal to photograph the

wedding? Or what if the couple were paraplegics and she had an 'aesthetic aversion' to photographing the disabled?' The question (at least as to race discrimination) comes up routinely in such cases. . . "The answer is 'of course.' . . . The desire to prevent race or disability discrimination should no[t] dissolve your right to be free from being compelled to speak." http://www.volokh.com/2009/12/16/the-first-amendment-and-the-race-discrimination-bogeyman/

C. The Arguments of Cato and Appellant to Extend Compelled Speech Doctrine to This Case are Unpersuasive

1. Finding for Respondent Would Not Lead to Untenable Results in Other Cases

The Cato Institute suggests that finding for Respondent would require writers to write press releases for political parties to which they are opposed (assuming a statute opposing political discrimination which does not exist in New Mexico) and to write press releases for religions they oppose such as Scientology, and for commitment ceremonies that they oppose. If we generously assume the existence of the kind of writers' enterprise that would meet the statutory requirements in holding its services out to the general public, the examples could run afoul of the kinds of arguments put forth in the Respondent's brief. Moreover, the Institute's imaginary hypotheticals are so far removed from reality that they cannot plausibly incite a fear of actual real world consequences. Even without

regard to those considerations, however, the first two cases are distinguishable from the third and all three are distinguishable from Appellant's situation.

Three factors are relevant here: (1) speech at the core of the First Amendment; (2) the distinction between public and private discourse; and (3) the potential for perceived endorsement. Compelling a writer to engage in speech for a political party he or she opposed forces the writer to engage in public discourse on political matters that are at the core of the First Amendment. Moreover, it is well known that those who work for political parties are committed to those parties, so there is the appearance of endorsement. Compelling a writer to write press releases for the Church of Scientology similarly compels the writer to engage in public discourse regarding religious speech, a subject matter similarly at the core of the First Amendment. *Amici* are unsure whether writing for a religious organization involves the appearance of endorsement, but it certainly could. Compelling a writer to produce press releases about a commitment ceremony compels the writer to engage in public discourse about a matter removed from the core of the First Amendment in a context that probably does not suggest endorsement of the ceremony, though to the extent it does, it would clearly be unconstitutional. It seems clear that compelling the political or religious speech is unconstitutional. Although producing press releases for a commitment ceremony is a more problematic case than that of Appellant's, given the permissible compelled

advertisements in FAIR, it is probably constitutional to apply a civil rights law to the writer.

By contrast with the three examples discussed, none of the three factors burden the Appellant in this case. If Appellant's photography is expression within the meaning of the First Amendment in this case, it is surely nowhere near the core of the First Amendment. *Snyder v. Phelps,* 131 S.Ct. 1207 (2011) (speech on matters of public concern is at the heart of the First Amendment); *New York Times v. Sullivan,* 376 U.S. 254 (1964)(speech on public issues is at the core of the First Amendment). Second, the photographer is not being compelled to engage in public discourse. *Snyder v. Phelps,* 131 U.S. at 1217 (fact that speech is on public land near public street is a positive factor supporting a First Amendment claim); *Dun and Bradstreet Inc., v. Greenmoss Builders, Inc.,* 472 U.S. 749 (1985)(plurality opinion of Powell, J.,)(limited distribution of speech is relevant to conclusion that it is not worthy of the same protection as more publicly distributed speech); The photographs made by the photographer would be displayed by a couple to family and friends, and any wider distribution of the photographs would be controlled by appellant's copyright. Third, photographing an event as part of a commercial enterprise is quite unlike politics; it does not communicate an endorsement.

The Cato Institute, however, suggests that a singer could be forced under a finding for a Respondent to sing at a commitment ceremony. Perhaps so, but

compelled participation in a ceremony in which one uses one's own voice especially to sing lyrics with content is not the same as being forced to photograph a ceremony as a "silent observer." [Tr. 100] Whether this distinction makes a difference can be left for another day.

2. Appellant's Speech is Not Unconstitutionally Burdened

Appellant argues that the New Mexico Human Rights Act burdens Appellant's speech in "four constitutionally significant ways." BIC 30[6] First, Appellant complains that it is forced to engage in compelled speech. *Id.* As discussed previously, however, the law constitutionally requires compelled speech in a wide variety of situations. Compelled speech is not in and of itself a sufficient condition to make out a First Amendment violation. Second, Appellant argues that compelling the photographer to spend time on this commitment ceremony takes away from time that could have been used photographing weddings. *Id.* This speculation assumes that there would be demand for a wedding during the relevant time period, that time could not be taken out during the editing period to shoot the wedding, and that the Appellant's business is otherwise closed down during editing periods. There is no testimony in the record to this effect. This argument could also

[6] Appellant argued that these considerations were relevant to the second branch of the compelled speech doctrine, but, as is discussed in Section IV, B *infra,* application of the New Mexico Human Rights Act in this case does not fit within that line of doctrine primarily because the Act is content-neutral.

be enlisted by a journalist testifying at length in a trial or legislative proceeding or called upon for jury service. It would also be true of a dress designer who is a writer on the side. It is certainly a far cry from confiscating the pages of a newspaper.

Third, Appellant argues that "requiring Elaine to create photographs communicating the story of a same-sex commitment ceremony would chill her speech, for 'she might well conclude that the safe course' is to stop creating expressive photographs for all weddings." *Id.* at 31. Before Appellant's paragraph has concluded, the chilling effect argument has been ratcheted up to suggest that the Photographer might cease photographing all events for fear of punishment. The latter argument would have more force if the New Mexico Human Rights Act swept beyond its prohibition of selected categories of discrimination, but comes nowhere near to prompting a fear of punishment outside its scope. Nor would it reasonably prompt a chilling effect on photographing weddings because same sex couples cannot get married in New Mexico. The only conceivable effect might be that it would chill the Photographer from working on commitment ceremonies, but there is no evidence in the record of heterosexual commitment ceremonies in New Mexico or of Appellant's involvement with them. Finally, there is no testimony in the record that the Appellant's speech will be chilled, and obviously counsel could have asked the question if Appellant's speech would in fact be chilled.

Appellant argues that because it is being forced to produce messages that are contrary to its beliefs, it would either be forced to appear to agree or forced to respond to make it clear that it does not agree. *Id.* at 31. This argument also fails. As previously argued, Appellant is not required under the Act to produce a message with which it disagrees because nothing in the record supports the view that it denies that commitment ceremonies are emotional, romantic, loving, and joyful occasions. Indeed, it is precisely because these emotions are present that Appellant could produce the photographs it does not want to produce. Nor does the fact of photographing a wedding or commitment ceremony suggest that a photographer approves of or endorses the event. As a result, there is no reasonable ground or even record support suggesting a compulsion to clarify the Appellant's views.

III. If a First Amendment Standard of Review Applies, the Appropriate Standard of Review is Found in *O'Brien*, not in Strict Scrutiny, and Appellant's Conduct is Not Protected Under *O'Brien*

The Court of Appeals argues that wedding photography is not expressive conduct within the meaning of the First Amendment. *Elane Photography v. Willock,* 2012 – NMCA- 086, ¶¶ 25-29, 284 P.2d 428. That wedding photography is distant from the core of the First Amendment, is similar to other areas of artistic

choice that are not within the scope of the First Amendment, is not a part of public discourse, is the product of a commercial enterprise that advertises its services to the public at large, and that neither branch of the compelled speech doctrine is violated (as *Amici* discuss in Section IV *infra*) are all factors suggesting to *Amici* that treating wedding photography as not expressive conduct is a supportable position. On the other hand, like painting and sculpture, photography has long been recognized as a form of artistic expression and that tradition and history could lead the Court to conclude that photography, even wedding photography, is expression within the meaning of the First Amendment. Either view favors the Respondent.

Assuming that wedding photography is expression within the meaning of the First Amendment is a far cry from the conclusion that Appellant is entitled to a high level of scrutiny in support of its discriminatory conduct. It is well established First Amendment law that intermediate scrutiny is the appropriate standard of review for a content-neutral restriction with an incidental impact on speech. *See, e.g., Turner Broadcasting v. FCC,* 520 U.S. 80, 89 (1997)(*Turner II)*; *Turner Broadcasting v. FCC,* 512 U.S. 622, 662-63 (1994) (*Turner I)*; *Ward v. Rock Against Racism,* 491 U.S. 781 (1989); *United States v. O'Brien,* 391 U.S. 367 (1968); *Emergency Coalition to Defend Educational Travel v. U.S. Department of the Treasury,* 545 F.3d 4, 12 (D.C. Cir. 2008); *City of Albuquerque v. Pangaea Cinema LLC,* 2012 NMCA – 075, ¶ 20, 284 P.3d 1090 (New Mexico and U.S.

constitutional provisions are the same, at least with respect to content-neutral restrictions). The New Mexico Human Rights Act is, of course content-neutral. It applies to those who sell perfume and jewelry, to those who rent ballrooms and tuxedos, to those who dress hair and take photographs. It mandates who shall be served and that they should be treated in a non-discriminatory way. It does not tell anyone what they shall say. It does not compel Appellant to photograph because the government agrees or disagrees with a particular message. It simply compels non-discrimination without regard to message.

Appellant argues that strict scrutiny is appropriate and relies on *Pacific Gas and Electric Co. v. Public Utilities Commission,* 475 U.S. 1 (1986) as authority. In *Pacific Gas,* the Public Utilities Commission ordered it to place a newsletter of a third party in its billing envelope. The Commission granted access to the entity authoring the newsletter because it had views different from those expressed by the utility company in its own political newsletter that was distributed in its billing envelope. There was nothing content-neutral about the Commission's order. It was manifestly content-based. In criticizing the order the Court noted that "it discriminates on the basis of the viewpoints of the selected speakers" and that access to the billing envelopes were limited to those who disagreed with the views of *Pacific Gas.* 475 U.S. at 12-13.

The Appellant also cites *Hurley* and *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000). It is true that *Hurley* did not apply *O'Brien,* but the Court there found that the ordinance as applied was content-based. *Hurley* dealt with a public accommodations law that was interpreted to apply to a parade. 515 U.S. at 573. The parade organizers excluded a Gay, Lesbian, and Bi-Sexual group from marching not because of their sexual orientation, but because of their message. The lower court held that the law prohibited the parade organizers from discriminating against this message. In other words, the law as interpreted promoted a particular message. *Hurley* condemned this form of content discrimination, concluding that government "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one . . . ." 515 U.S. at 579.

Dale also did not apply *O'Brien*, but that is because the scope of the anti-discrimination statute went beyond traditional commercial entities to include a membership organization. 530 U.S. at 657. This extension of public accommodations law "directly and immediately" affected associational rights. *Id.* at 659. Accordingly, *O'Brien* was ruled to be inapplicable. Indeed, *Dale* cited *Hurley* for the view that forced inclusion of marchers in the parade was akin to

violating freedom of association. *Id.* at 580, *citing* 515 U.S. at 580-81. Neither *Hurley* nor *Dale* support Appellant's position.[7]

The FAIR case, however, is more to the point. *FAIR* seems to suggest that if the Solomon Amendment had violated either branch of the compelled speech doctrine by singling out speech for special treatment, a *per se* violation would exist or an exacting standard of review would be in order. In the absence of a violation of either prong of the compelled speech doctrine, however, the Court applied *O'Brien.* There is no warrant for breaking new ground here. *O'Brien* clearly applies.

Since the government interest in this case is unrelated to expression, *O'Brien* simply requires that the government action in question furthers a substantial interest by means no greater than is essential to the furtherance of that interest. 391

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[7] Appellant's generalization of how the strict scrutiny standard works is defective. Citing *Hurley,* Appellant claims that the purpose for enacting the law is not the relevant purpose, but the particular interest in applying the law under the circumstances of the case. BIC 32-33. But this generalization ignores the context in *Hurley. Hurley* recognized the general anti-discrimination purpose of the law, but found that when a public accommodation law is stretched to include providing access in a parade to marchers promoting a gay and lesbian theme (the parade organizers did not exclude gays or lesbians *per se*), the "apparent object is simply to require speakers to modify the content of their expression . . . ." 515 U.S. at 578. *Hurley* provides no warrant for the general proposition that the state interest in preventing discrimination is not the appropriate interest to consider in evaluating a First Amendment claim. Indeed, a paragraph later, Appellant cites *Boy Scouts of America v. Dale* where even in applying strict scrutiny, the Court balanced the interest in preventing discrimination against the freedom of association. 530 U.S. at 658-59.

U.S. at 377. Although the language of the test suggests a demanding standard, in practice the test is not as demanding as it sounds. For example, the Court has stated that the "no greater than is essential language" does not import the "least restrictive alternative test." See *Ward, supra,* 491 U.S. at 798 (rejecting the least restrictive alternative test for time, place, and manner cases and stating that the time, place, and manner test is little different from the *O'Brien* test); *Clark v. Community for Creative Non-Violence,*468 U.S. 298, 299 (1984)(rejecting the least restrictive alternative test for *O'Brien* cases and time, place, and manner cases). Even if the *O'Brien* test had more teeth than it does, however, it is clearly satisfied here. The interests in anti-discrimination and equal citizenship are substantial. Applying the statute to all commercial enterprises including the Appellant's enterprise furthers that interest and the means chosen – preventing the discrimination – is perfectly tailored to the government objectives.

IV. Enforcement of the New Mexico Civil Rights Act In This Case Does Not Fall Within the Compelled Speech Doctrine as Currently Conceived

A. Because Government is not Requiring the Photographer to Affirm, Carry, or Produce a Message that Contradicts Her Ideology or Participate in a Prescribed Ritual Affirming a Government Mandated Orthodoxy, *Barnette, Wooley, and FAIR* do Not Support Appellant's Position

Appellant maintains that *West Virginia v. Barnette,* 319 U.S. 624, 642 (1943), *Wooley v.* Maynard, 430 U.S. 705, 717 (1977), and *Rumsfeld v. FAIR*, 547 U.S. 47,

61-65 (2006) recognize that the government may not compel an entity to engage in unwanted expression. [BIC 13] This reads more into *Barnette, Wooley*, and *FAIR* than is plausibly present. *Barnette* struck down a requirement of the West Virginia State Board of Education that children salute and pledge allegiance to the flag as applied to Jehovah's Witnesses. The Witnesses objected to this requirement because saluting a flag or pledging allegiance to a flag would force them to declare a belief in a graven idol, a belief they did not hold. The heart of *Barnette* was the view that, "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." 319 U.S. at 642. So *Barnette* spoke not merely against compelled "affirmation of a belief" (*id.*at 633) or compelling a schoolchild "to utter what is not in his mind." *Id.* at 634. *Barnette* set its face against the promotion of national unity through a mandatory ritual. *Id.* at 640-41. It insisted that a forced flag salute is ineffectual and smacks of the kind of totalitarian state the Bill of Rights was designed to avoid. *Id.*

It vastly overreads *Barnette* to claim that it opposes compulsion of unwanted speech in all circumstances. Unlike *Barnette,* the photographer is not being forced to give a rendering of scripture she opposes or to affirm that same sex commitment ceremonies are good public policy. Still less is she being forced to participate in a

ceremony that affirms a governmentally prescribed orthodoxy. Rather the law as applied requires her to apply her professional skills to record the expression, love and joy of *other* people.

Wooley v. Maynard also does not support the claim of Appellant or the contention of the Cato Institute that a ruling in favor of the appellant is largely controlled by it. Brief of Cato Institute at 3. Maynard had been prosecuted for covering up the motto "Live Free or Die" on his New Hampshire license plate. In finding for Maynard, the central concern of the *Wooley* Court was that Maynard was being forced to advertise a slogan that Maynard found "morally, ethically, religiously, and politically abhorrent." 430 U.S. at 713. The Court found the situation to be akin to *Barnette*: "As in *Barnette,* we are faced with a state measure which forces an individual, as part of his daily life indeed constantly while his automobile is in public view to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* at 715. The Court ruled that the "First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable." *Id. Wooley* stands for the proposition that persons cannot be compelled to be a courier for messages they

oppose.[8] It does not support a generalized right to be immunized from engaging in unwanted speech.

Cato argues that the logic of *Wooley* should extend to creation of messages as well as dissemination of messages, and that seems correct. Unlike *Wooley,* however, the photographer is not being compelled to produce a message with which she disagrees or to distribute her photographs to the public at large or to foster public adherence to Biblical or public policy views she opposes. She is being forced to provide her services on a non-discriminatory basis and produce photographs containing memories "that are exactly what the couple experienced." [Tr. at 100-01]

As is discussed in Section II,B, *supra,* far from supporting Appellant's contention that the compelled speech cases protect individuals or entities from having to engage in unwanted speech, *Rumsfeld v. FAIR* approved compelling law schools to engage in speech they did not want to produce. Snatching phrases here and there from *FAIR,* is no substitute for coming to grips with its facts and holding.

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[8] *Pacific Gas and Electric Co. v. Public Utilities Commission,* 475 U.S. 1 (1986) stands for the same proposition, but the First Amendment violation there was compounded with additional features. See Section II, B *infra.*

B. Because Government is Not Engaged in Content Discrimination, Let Alone Content Discrimination That Forces the Photographer to Include Unwanted Material in any Message She Is Engaged in Communicating, *Hurley, Tornillo, and Pacific Gas,* Do Not Support Appellant's Position

Appellant maintains that the statute as applied to Appellant violates the compelled speech doctrine because it runs afoul of *Hurley v. Irish-American, Gay, Lesbian, and Bisexual Group of Boston,* 515 U.S. 557 (1995), *Miami Herald Publishing Co v. Tornillo.,* 418 U.S. 241 (1974), and *Pacific Gas and Electric Co. v. Public Utilities Commission,* 475 U.S. 1 (1986). This contention is also wide of the mark.

As previously discussed in Section III, *Hurley* upheld a parade organizer's right to make the editorial choice to exclude a Gay, Lesbian, and Bi-Sexual group from marching in Boston's St. Patrick's Day Parade despite a public accommodations law. 515 U.S. 573, 579. As interpreted, the law prohibited the organizers from excluding the marchers, not because of their sexual orientation, but because of their sexually oriented message. The Court ruled that the government could not insert its preferred message into the parade and alter the parade's message. *Id.* at 573, 581.

Tornillo invalidated a content-based Florida statute that compelled newspapers to afford any political candidates it attacked to have a free right of reply in as conspicuous a space and in the same kind of type as the charges that

triggered the reply. The Court concluded that the statute imposed a penalty upon a newspaper for criticizing a candidate (418 U.S. at 256-257), and that the newspaper had a freedom of press right to be free from governmental dictation of the material that belonged in the press. *Id.* at 258.

In *Pacific Gas,* the Public Utilities Commission ordered it to place a newsletter of an antagonistic third party in its billing envelope. 475 U.S. at 4. In other words, in disregard of *Wooley,* the Commission tried to make PG&E be a forced courier of a government selected speaker with which the utility disagreed. In disregard of *Tornillo,* the Commission's content-based order had the effect of impermissibly burdening PG&E's planned expression. Objecting among other things to forcing the utility to carry speech with which it disagreed (*id.* at 7-8), to content-based imposition of a government selected speaker into PG&E's discourse (*id.* at 12, 20-21), and to the burden the order would place upon the speaker (*id.* at 13, 20-21), the plurality decreed that the Commission's order was unconstitutional. *Id.* at 20-21. More narrowly, concurring Justice Marshall objected that the government had redefined a property right in the utility's billing envelope "to burden the speech of one party in order to enhance the speech of another." *Id.* at 25.

Appellant's situation is readily distinguishable from this line of cases. Unlike, *Hurley,* where government tried to insert its preferred message into a

parade, the New Mexico Human Rights Act is not designed on its face or as applied to further a specific message. Its impact on the Photographer's speech is entirely incidental.

Unlike *Tornillo* where government engaged in content discrimination by triggering a forced response based on its criticism of political candidates, imposing a penalty for that criticism, and interfering with the speech with which the newspaper was engaged, the New Mexico Human Rights Act does not engage in content discrimination, let alone impose a penalty or interfere with a message with which the Appellant has already engaged.

Unlike *Pacific Gas* where government engaged in content discrimination by forcing it to include contrary messages in its billing envelope and forced the utility to be a courier of the message of a government selected speaker with which it disagreed, the New Mexico Human Rights Act is content-neutral and does not force the Appellant to be the courier of a government selected message.

Conclusion

The statute as applied to Elane Photography is constitutional. Appellant's claims to the contrary are primarily based on faulty factual assumptions and reliance on inapplicable precedent. There is no general constitutional right against compelled speech and no warrant for the claim that the company is compelled to violate its own views for several reasons. First, although the company is required

under New Mexico law to photograph the ceremony in a way that meets professional standards, conveying the joy, emotion, romance, and love within the ceremony, nothing in the record suggests that the company contests that same sex ceremonies lack these qualities and therefore, the compelled expression does not clash with the company's expressed beliefs. Second, wedding photographs do not convey any biblical message or any message about the ability of lesbians to properly raise children. Third, the actual joy, emotion, romance, and love that the photographer records is expressed by the participants and not by the photographer. The photographer is not asked to express these sentiments but merely to capture the speech of others (which also partly explains why the photographer may differ from the essayist or the singer).

Appellant's faulty factual assumptions are joined by reliance on inapplicable precedent. Every case that Appellant relies upon involved concerns about content discrimination or the imposition of specific content by government. In *Barnette* (flag salute), *Wooley* (motto), *Tornillo* (forced access to reply), *McIntyre* (forced inclusion of name in leaflet), *Riley* (burdensome forced disclosures of content) and *Pacific Gas* (forced access in billing envelopes for organization with a contrary message), the government action on its face necessarily triggered concerns about specific content. *Hurley* was less obvious because the statute on its face appeared to be content-neutral. Appellant trades on this, but steers clear of the Court's clear

understanding that the statute as applied was content-based because as applied the government interest was "promoting an approved message." 515 U.S. at 579.

The Appellant studiously does not come to grips with the *FAIR* case. This is understandable. The *FAIR* case demonstrates both that the proper standard here is not strict scrutiny and that pursuant to a content neutral statute, an entity can be forced to engage in speech assisting an organization that it thinks is involved in immoral activity. Both these propositions rob the Appellant's position of any vitality. The New Mexico Human Rights Act deserves to be vindicated.

Respectfully submitted,

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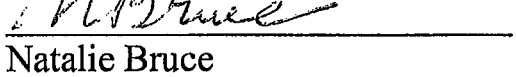

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