IN THE NEW MEXICO SUPREME COURT

Case No. 33,687

ELANE PHOTOGRAPHY, LLC,

Appellant-Petitioner,

v.

VANESSA WILLOCK,

Appellee-Respondent.

REPLY BRIEF OF PETITIONER ELANE PHOTOGRAPHY, LLC

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As required by Rule 12-213(G), we certify that this brief complies with the type-volume limitation of Rule 12-213(F)(3). According to Microsoft Office Word 2007, the body of this brief, as defined by Rule 12-213(F)(1), contains 4,393 words.

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I. Elane Photography Did Not Violate NMHRA.

Willock does not refute the two central premises of Elane Photography's argument why it did not engage in unlawful sexual-orientation discrimination: first, that the Huguenins, who would have provided other services to Willock [Tr.111, 115], did not decline her request because she is homosexual [Tr.84-85, 88, 111, 114, 118]; and second, that the Huguenins declined Willock's request solely because they did not want to create photographs conveying messages about marriage that conflict with their convictions. [Tr.87] Instead, Willock asserts that these uncontested facts constitute "direct evidence" of unlawful discrimination. [AB4-5] But such a message-based decision does not violate NMHRA.

As demonstrated by Willock's own case law, Elane Photography's policy of declining to create photographs conveying messages that contradict the Huguenins' understanding of marriage does not amount to "direct evidence" of sexual-orientation discrimination because it does not divide persons into groups "composed entirely and exclusively of members of the same [sexual orientation]." *See Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702, 715 (1978). After all, depending on the circumstances, that policy prohibits Elaine from photographing ceremonies involving heterosexuals (e.g., polygamous marriages), homosexuals, and bisexuals. [Tr.84, 87] Since this policy "can plausibly be

interpreted two different ways—one discriminatory and the other benign"—it "does not directly reflect illegal animus, and, thus, does not constitute direct evidence." *Hall v. U.S. Dep't of Labor*, 476 F.3d 847, 855 (10th Cir. 2007).

Willock next claims that "[s]ubjective motive is not germane" here. [AB 6] Yet this argument is belied by the statutory language, NMSA 1978, § 28-1-7(F) (prohibiting "mak[ing] a distinction" in offering service "because of" sexual orientation), and the case law Willock cites, *see Sonntag v. Shaw*, 2001-NMSC-015, ¶27, 130 N.M. 238, 22 P.3d 1188 (repeatedly referencing "discriminatory motive"). Moreover, Willock's own argument is her undoing on this point. In a specious attempt to disregard our hypothetical about an African American photographer and a KKK rally, she claims that "[m]embership in a group like the KKK is not a protected category." [AB6 n.2] But neither is participation in a same-sex commitment ceremony, and thus, as Willock admits, the relevant inquiry is whether "a public accommodation refused to do business with customers because of their race" or sexual orientation. *Id.*

Yet Willock cannot show that Elane Photography "refused to do business with" her because of her sexual orientation. The uncontested record shows that the Company serves homosexuals, and that in this instance the Huguenins' sole motivation was their desire not to express the messages about marriage that

Elaine's photographs would have conveyed. Such a message-based decision does not violate NMHRA.

II. Elane Photography Has Established Its Compelled-Speech Claim.

Elane Photography has shown that this application of NMHRA inflicts a compelled-speech violation by forcing the Company to create photographs conveying messages that conflict with its owners' beliefs. [BIC12-35] Willock, despite ignoring the relevant facts and mischaracterizing our arguments, has not proven otherwise.

A. The First Amendment Applies to this Application of NMHRA.

Willock's threshold argument is that the Legislature did not intend to "target" speech when it enacted NMHRA and thus "no constitutional scrutiny is required." [AB18-19] Her attempt to dismiss constitutional protections, however, obfuscates our arguments, ignores controlling U.S. Supreme Court precedent, and touts irrelevant cases.

As her premise, Willock mischaracterizes our position in at least two ways. First, she claims that Elane Photography seeks "a categorical exemption to NMHRA because it sells a service with an expressive dimension." [AB19] But the Company's First Amendment argument, as we have acknowledged, "would apply only to claims under the public-accommodation provision of the NMHRA" and, in any event, "would not entirely exempt from [that provision] a business that creates

and sells expression." [BIC34] We further explain in Section (II)(E) below the limitations inherent in our First Amendment claim. It is thus incorrect to claim that Elane Photography seeks a "categorical" exemption. Second, Willock suggests that Elane Photography contends that "[d]iscrimination"—by which she presumably means Elaine's refusal to create photographs telling the story of Willock's ceremony—is the "form of expression" at issue here. [AB17] This is untrue. Instead, the Company asserts that its pictures telling the story of a same-sex commitment ceremony—pictures that Willock does not deny this application of NMHRA would force Elaine to create—is the unconstitutionally compelled expression. [BIC16-17]

Willock's distortions of our arguments to the side, *Hurley* refutes her threshold attempt to dismiss constitutional protections simply because NMHRA does not "target" expression. The *Hurley* Court noted that the public-accommodation nondiscrimination law "d[id] not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572 (1995). But *Hurley* nevertheless found a compelled-speech violation because that *application of the law* required the public accommodation "to alter the expressive

content" of its speech. *Id.* at 572-73. *Hurley* thus teaches that regardless of NMHRA's general target, the First Amendment prohibits the government from applying it to compel unwanted expression, as the Commission's order threatens to do here.

Overlooking *Hurley*, Willock discusses cases that, unlike here, do not involve compelled expression of messages that conflict with an organization's beliefs. [AB19-23] While the entities in those cases—law firms, schools, and booksellers—regularly engage in expression, none of the cases presents what is at issue here: forcing an entity to engage in expression that conflicts with its owners' beliefs. *See Hishon v. King & Spaulding*, 467 U.S. 69, 78 (1984) (forcing a law firm to promote a woman—not requiring it to make unwanted legal arguments); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (forcing a private school to admit African-American students—not requiring it to teach certain "ideas or dogma"); *Arcara v. Cloud Books*, 478 U.S. 697, 705-07 (1986) (forcing a book store to close for illegal activity—not requiring it to sell unwanted books); *Nathanson v. Mass. Comm'n Against Discrimination*, No. 199901657, 2003 WL 22480688, at *5-7 (Mass. Super. Sept. 16, 2003) (forcing a female divorce attorney to represent men—not requiring her to advocate arguments she disagrees with); *cf. Legal Services Corp. v. Velazquez*, 531 U.S. 533, 546-49 (2001) (finding a First Amendment violation where the government prohibited a lawyer from raising an

argument). Willock's cases thus cannot overcome *Hurley*'s guidance that the government may not apply a public-accommodation nondiscrimination law to compel speech.

B. Elane Photography Has Established a Compelled-Speech Violation Because the Commission's Decision Requires the Company to Create Expression Conveying Messages That Its Owners Deem Objectionable.

Elane Photography has established the first type of compelled-speech claim by showing that this application of NMHRA would require the Company to create expression conveying messages that its owners deem objectionable. [BIC24-29]

Facts are critical here, for "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace[.]" *Hurley*, 515 U.S. at 567. Willock does not contest many undisputable facts that, when taken together, establish this compelled-speech violation. In particular, she does not dispute (1) that this application of NMHRA would force Elaine to create pictures telling a favorable and approving story of a same-sex commitment ceremony, (2) that those pictures are expression that communicate messages about marriage to their viewers, and (3) that the Huguenins disagree with the messages about marriage conveyed through those pictures. Willock's only contention on this point is that the expression conveyed through those pictures is not Elaine's. [AB1, 17, 27, 33] That is not true, as we have demonstrated [BIC21-24; AmiciResp.Br. 17-21]; but more importantly, proving that the expression is Elaine's is not necessary to establish

this type of compelled-speech violation. This violation occurs simply because the pictures are expression (regardless of whose expression they are), Elane Photography is required to create them, and the Huguenins disagree with the messages communicated through the pictures they create. *See Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977) (compelling the passive display of unwanted expression communicating a message that the displayer deemed objectionable); *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2734 n.1 (2011) ("Whether government regulation applies to creating, distributing, or consuming speech makes no difference.").

Since the facts that she overlooks weigh decidedly against her, Willock must manipulate the legal standard, asserting that this type of compelled-speech violation—which, according to her, is reflected in *Barnette*, *Wooley*, *Tornillo*, and *Pacific Gas*—occurs only when "the state imposes its chosen message upon unwilling adherents." [AB18, 23] But as Willock's own case law demonstrates, a state-chosen message is not required to establish a compelled-speech claim.

Neither *Tornillo* nor *Pacific Gas* involved "a state-chosen message." [AB26-27] In *Tornillo*, the challenged statute forced a newspaper that criticized a political candidate to print the candidate's reply, but it did not dictate the contents of the compelled message because the paper was compelled to print "any reply the candidate may make." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244

(1974). Nor did that statute favor one view, message, or ideology; it required papers of any political persuasion to print the replies of any criticized candidate—whether liberal, conservative, or somewhere in between. In *Pacific Gas*, the State required a business to circulate a nonprofit group's newsletter in its billing envelope. But the State, which wanted to promote a "variety of views," did not choose the messages of the newsletter. *Pacific Gas and Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 6, 12-13 (1986) (plurality). It allowed the nonprofit group "to discuss any issues it cho[se]," *id.* at 15, and "placed no limitation on what [the nonprofit group] could say." *Id.* at 6-7. Willock thus fails in her attempt to glean a state-chosen-message requirement from these cases.[1]

Establishing a compelled-speech violation thus does not depend on a state-chosen message, but instead on the government's invasion of "the sphere of intellect and spirit which it is the purpose of the First Amendment" to "reserve from all official control." *Wooley*, 430 U.S. at 715. [BIC27-28] Applying a state law, such as NMHRA, to compel the creation or expression of a message that the creator or disseminator deems offensive necessarily intrudes upon this intellectual sanctuary, regardless of who selected the compelled message. *See Hurley*, 515 U.S.

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[1] Willock cites *Cressman v. Thompson*, 871 F. Supp. 2d 1176 (W.D. Okla. 2012), for her argument that "forced dissemination of an ideological message chosen by the State" is a "key requirement." [AB30-31] But *Cressman* expressly recognized that "First Amendment protection does not hinge on the ideological nature of the speech involved." 871 F. Supp. 2d at 1183 n.15.

at 574-75 (involving a message selected by a private group). Requiring the creation of messages considered offensive by the creator demands active thought and intellectual engagement, and thus aggrieves the sphere of the mind at least as much as rote recitation (*Barnette*) or passive display (*Wooley*) of a disagreeable message. *See Brown*, 131 S. Ct. at 2734 n.1 (2011). [CatoBr. 11-13] Given that a state-chosen message is not required, and that this application of the law would inflict an intolerable invasion of the mind, Elane Photography should prevail.

Willock also argues that this type of compelled-speech claim must fail because Elane Photography cannot show that this application of NMHRA "would 'interfere' with the Company's own speech." [AB26] Elane Photography has shown an interference with its expression, as we demonstrate elsewhere. [BIC30-31; AmiciResp.Br. 29-32] More importantly, though, this category of compelled-speech violations, as *Wooley* illustrates, does not require an entity to show an additional impact on its speech. Compelling expression that an entity's owners deem personally objectionable and that they would not otherwise create necessarily affects its speech and invades its owners' mental autonomy. No further showing is needed here.

Willock next enlists *Rumsfeld* as support, arguing that because there the government could force law schools to send scheduling emails and flyers to apprise students of the military's recruitment efforts, here it can use NMHRA to

compel Elane Photography to create pictures conveying messages about marriage that conflict with the Huguenins' beliefs. [AB28-30] *Rumsfeld*, however, is inapposite. There, the law schools disagreed with a military policy, but they were not forced to communicate that policy in the emails or flyers discussing recruiting logistics. *Rumsfeld v. FAIR*, 547 U.S. 47, 60-62 (2006). Here, however, this application of NMHRA requires Elaine to create photographs expressing messages about marriage that conflict with her beliefs and thus directly implicates core compelled-speech concerns. For this and other reasons we have explained, *Rumsfeld* does not control here. [AmiciResp.Br. 14-16]

C. Elane Photography Has Established a Compelled-Speech Violation Because the Commission's Decision Requires the Company to Facilitate the Messages of Same-Sex Commitment Ceremonies.

Elane Photography has satisfied the second type of compelled-speech claim by showing that this application of NMHRA requires the Company to facilitate the messages of same-sex commitment ceremonies through the photographs it creates, and that this forced facilitation would affect the Company's own expression in constitutionally significant ways. [BIC29-32] In response, Willock asserts that this type of compelled-speech violation occurs only when "state compulsion forces a speaker to incorporate unwanted elements into its own message." [AB18, 23] Yet *Rumsfeld*, 547 U.S. at 63, plainly states the standard as we have described it. [BIC29]

Willock disputes *Hurley*'s relevance because, she claims, Elane Photography does not communicate its own expression when it creates photographs telling the story of a wedding. [AB31-33] She ignores the litany of facts bearing on this question and the case law that Elane Photography cites. [BIC2-5, 18-24] Rather than dealing with those facts and cases, she offers only one bald, undeveloped assertion—a version of which she repeats no less than four times—stating that the Company's customers "do not pay for the privilege of facilitating the company's" expression, but "for a service or product tailored to their needs." [AB1, 17, 27, 33] This contention fails on its face, however, because what Elane Photography offers its customers, and thus what its customers "pay for," is the creation of expression by a wedding photojournalist who tells the story of her customers' wedding day through the images and picture book she creates. [BIC2-4 (discussing facts); RP162-64] Elane Photography's customers thus do in fact pay to facilitate Elaine's expression; they pay for her to tell the story of their wedding day. [AmiciResp.Br. 17-21] Willock's attempt to distinguish *Hurley* on this basis therefore falls flat. Instead, as demonstrated here and at length elsewhere, *Hurley* dictates a ruling in Elane Photography's favor. [*Id.* at 24-29]

Willock next presses irrelevant passages from *Rumsfeld* and *PruneYard* into her service by disputing that Elane Photography's association with the expression that occurs at same-sex commitment ceremonies will create the impression that the

Huguenins "endorse[]" or "see nothing wrong with" the messages of that ceremony. [AB34 (quoting *Rumsfeld*, 547 U.S. at 64-65)] But in pressing this argument, Willock misses the point of ours: we contend that this application of NMHRA forces Elane Photography to use Elaine's artistic skills to create expression through her pictures that directly conveys favorable and approving marriage-related messages about same-sex unions. Our argument thus presents the forced creation of expression communicating messages disagreeable to its creator. In contrast, the portions of *Rumsfeld* and *PruneYard* that Willock cites here do not involve the compelled creation of expression, but a property owner who did not want to be associated with the expression of others on its premises. [AB34] Those cases thus do not control here.

D. Willock Does Not Satisfy Strict Scrutiny.

Willock acknowledges that strict scrutiny applies. [AB42] That analysis, as Supreme Court precedent demonstrates, begins by identifying the State's particularized interest in applying NMHRA under the circumstances. [BIC32-33, 45-46; AmiciResp.Br. 35-37] Here, the relevant state interest—a patently illegitimate one—is in requiring wedding photojournalists "to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it." *Hurley*, 515 U.S. at 578. [BIC32-33, 45-46; AmiciResp.Br. 35-37]

In response, Willock advocates for a broader government interest—ending discrimination against same-sex couples in "public commercial life" [AB42]—but that self-servingly-characterized interest is indefensible. Willock cannot characterize the government interest however she chooses. If she refuses to follow the Supreme Court's guidance and tie the state interest precisely to the specific facts, she must characterize the interest consistent with the public-accommodation provision's actual scope, which stretches far beyond "public commercial life" to prohibit "any establishment that provides or offers its services . . . to the public" from treating same-sex couples differently than opposite-sex couples. NMSA § 28-1-2(H). But this broadly framed interest, as we have shown, is not compelling because many public accommodations that offer services, such as county clerks and other government entities, treat opposite-sex couples differently than same-sex couples for myriad marriage-related purposes. [BIC46-47] This state-practiced differential treatment devastates any suggestion that the State considers this interest compelling.

Nor can Willock show that NMHRA is "aim[ed] precisely and exclusively" at—let alone is the least restrictive means of—ending discrimination without compromising the expressive autonomy of entities. [AB44] This application of NMHRA plainly demonstrates as much. Like the parade organizers in *Hurley*, Elane Photography does not refuse homosexuals because of their sexual

orientation, but merely declines to create photographs conveying stories that communicate messages contrary to its owners' views about marriage. Applying NMHRA to this message-based denial of services shows that the State uses that statute as a tool to compel unwanted expression that the creator considers profoundly disagreeable. The statute thus goes far beyond preventing discrimination; it inflicts unnecessary burdens on speech by forcing Elane Photography to alter its expression to accommodate Willock's demands.

Willock's heavy reliance on *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska 1994), is misplaced. [AB44] First, its rationale, when imported to the compelled-speech context, directly conflicts with *Hurley*. *See* 515 U.S. at 578-79. Second, its reasoning guarantees that strict scrutiny will *always* be satisfied, and therefore it is unsound and anomalous. *See Swanner*, 874 P.2d at 287 (Moore, C.J., dissenting). Third, the cited portions of *Swanner* analyzed claims under the Alaska Constitution, so it is not persuasive here.

E. Protecting Elane Photography's First Amendment Right Would Not Result in Widespread Exemptions to NMHRA.

Willock and her amici attempt to paint a cataclysmic picture of what might happen if this Court were to affirm Elane Photography's First Amendment rights. [AB36-39] But these arguments are overdone and, tellingly, ignore the limitations that we have already recognized are inherent in our compelled-speech claim. [BIC33-35]

The reach of this Court's ruling on Elane Photography's compelled-speech claim, and thus the precedential force of its decision, will be necessarily constrained by the circumstances of this case where (1) an entity offers as one of its services to create expression for clients, (2) a client requests that the entity create expression communicating messages contrary to the entity's convictions, (3) the law's application would force the entity to create the requested expression, (4) the forced creation of expression is central (rather than incidental) to the services compelled by the law's application, and (5) as in *Hurley*, the entity declined the client's request not because of the client's protected-classification characteristic, but because of the entity's desire not to communicate messages contrary to its convictions. Willock's and her amici's doomsday examples fall well outside of these parameters, and thus are irrelevant distractions.

We do, however, agree with Willock that our theory would not protect a business that brings already-created expression "to the store and sells it to the public" [AB38], because forcing a business to sell that work does not compel it to create unwanted expression. But we disagree with Willock about a painter who rejects customers because he does not want to "paint portraits of White people." [AB37-38] This painter, unlike Elane Photography or the parade organizers in *Hurley*, appears to discriminate against protected-class persons as such—without regard for the message communicated through his portraits. Thus, although it is

unclear based on these limited facts whether that painter will ultimately be protected by the First Amendment, that outcome by no means inexorably follows from ruling in the Company's favor.

F. Ruling against Elane Photography Would Engender Troublesome Consequences.

Ruling against Elane Photography would create precedent that overrides the First Amendment rights of all businesses that create expression for their customers, rendering them second-class entities that, unlike others, may be forced to compromise their expressive freedom. This result, as Willock admits, would force authors to write stories expressing messages at odds with their deep convictions. [AB36-37] It would similarly compel professional marketers, publicists, lobbyists, speech writers, film makers, newspapers, singers, painters, actors, and a host of others to create expression communicating messages contrary to their beliefs. Willock claims that some of these creators of expression will not offer their services to the public and thus will not be covered by NMHRA. [AB37] That might be true of some, but many do fall within NMHRA's scope and will be treated as mindless machines whose expression-creating skill may be co-opted through state coercion. Big Brother might have that degree of oppressive control in Orwell's world, but not in our constitutional republic.

Other troublesome implications would flow from denying Elane Photography's claims, as we discuss elsewhere. [AmiciResp.Br. 46-47]

III. Elane Photography May Assert a NMRFRA Violation As a Defense Even Though the Government Is Not a Party.

Willock does not attempt to defend the Court of Appeals' construction of NMRFRA's "private remedies" provision (Section 4), *see* NMSA 1978, § 28-22-4(A) (2000), an interpretation that we and our amicus have demonstrated is flawed. [BIC36-38; BecketBr. 14-23] Instead, Willock repeatedly appeals to NMRFRA's Section 3, which states that "[a] government agency shall not restrict a person's free exercise of religion." NMSA 1978, § 28-22-3 (2000). [AB9, 17] But this section does not help her because the government has restricted free-exercise rights through the Legislature's enactment of NMHRA, the Commission's application of it here, and the courts' affirmance of that application. [BIC39-40; BecketBr. 11, 20-21]

Willock overlooks the wealth of state-action cases that destroy her cramped reading of NMRFRA. [*See* BIC39; BecketBr. 21-23, 31-34] That statute intended to "restore" pre-*Smith* legal protections for the free exercise of religion, and the state-action cases show beyond any question that pre-*Smith* protections would have applied here (even though the government is not a party). This inescapable fact, combined with the most reasonable reading of NMRFRA's terms, confirms that NMRFRA applies here.

Willock argues that the requisite government restriction on free-exercise rights does not exist here because the Commission acted "as a tribunal." [AB10]

That is no matter. First, NMRFRA does not exclude adjudicatory government-agency action from its reach, NMSA 1978, § 28-22-2(B) (2000); and this Court has declined to manufacture an adjudication/rulemaking distinction where unsupported by the statutory language. *See Johnson v. New Mexico Oil Conservation Comm'n*, 1999-NMSC-021, ¶¶26-28, 127 N.M. 120, 978 P.2d 327. Second, state action—and thus a government-imposed restriction—exists through the above-mentioned actions of the Legislature, the Commission (even if acting as a tribunal), and the courts. [BIC39; BecketBr. 21-23, 31-34] *See State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶44, 130 N.M. 386, 25 P.3d 225 ("[S]tate action 'includes action of state courts and state judicial officials.'").

Willock also discusses precedent construing USRFRA. [AB12-13] But as we and our amicus have shown, that case law favors our (not Willock's) reading of NMRFRA. [BIC41-42; BecketBr. 5-12] Nor can Willock so cavalierly dismiss *In re Young*, 82 F.3d 1407 (8th Cir. 1996). *See Cromelin v. United States*, 177 F.2d 275, 277 (5th Cir. 1949) (A bankruptcy trustee is in "no sense an agent or employee or officer of the United States").

Elane Photography and its amicus have shown that absurd results flow from Willock's reading of NMRFRA. [BIC42-43; BecketBr. 34-36] Willock struggles mightily (yet unsuccessfully) to refute this on two grounds. [AB13-17]

First, she denies that the Commission may institute NMHRA proceedings. [AB13-15] But NMHRA explicitly provides that the Commission acting through its agents may file complaints. *See* NMSA 1978, § 28-1-10(A) (2005) ("[A] member of the commission who has reason to believe that discrimination has occurred may file with the human rights division of the labor department a written complaint[.]"). In this regard, then, the Commission (just like Willock) could have pursued a discrimination complaint against Elane Photography.

Second, Willock inaccurately asserts that NMHRA would not apply in any Commission-initiated action because the government would not be "the real party in interest." [AB15-17] It is questionable why real-party-in-interest status matters here, for by filing the complaint, the government clearly "restrict[s]" free-exercise rights. *See* Section 28-22-3. But in any event, the government would have a direct public interest in any Commission-initiated action, as demonstrated by case law discussing actions by the EEOC (an analogous federal agency). *See EEOC v. United Parcel Serv.*, 860 F.2d 372, 375-76 (10th Cir. 1988) ("EEOC may, but is not required to, act through an individual in order to vindicate the public interest").

One final point further illustrates the absurd results engendered by Willock's construction of NMRFRA: if a religiously restricted respondent in NMHRA proceedings is unable to raise a NMRFRA defense because the government is not a party, that respondent could simply defy the Commission's order; and when the

Commission or Attorney General institutes an enforcement action, *see* § 28-1-10(H) (Commission); NMSA 1978, § 28-1-12 (2005) (Attorney General); the respondent could raise NMRFRA as a defense in those proceedings. These senseless inefficiencies and incentives for procedural games additionally undermine Willock's position.

IV. Elane Photography Should Prevail on Its Federal Free-Exercise Claim.

Willock argues that Elane Photography cannot invoke a hybrid-rights claim because that doctrine is "defunct" following *CLS v. Martinez*, 130 S. Ct. 2971, 2995 n.27 (2010). [AB41] Yet the *CLS* Court did not even reference, let alone opine on, that doctrine.

Willock also argues that the case law we cite states that a hybrid-rights claim requires combining a free-exercise claim with "an independently sufficient claim." [AB41-42] That is not true. The Tenth Circuit has held that "the hybrid-rights exception to *Smith* [applies] where the plaintiff establishes a 'fair probability, or a likelihood,' of success on the companion claim." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295 (10th Cir. 2004). A "fair probability" of success is far different from "an independently sufficient claim."

CONCLUSION

For the foregoing reasons, Elane Photography respectfully requests the relief sought in its Brief-in-Chief.

Date: January 23, 2013

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We hereby certify that a true and correct copy of the foregoing Reply Brief of Petitioner Elane Photography, LLC, was sent via first-class mail to the following counsel of record this 23rd day of January, 2013:

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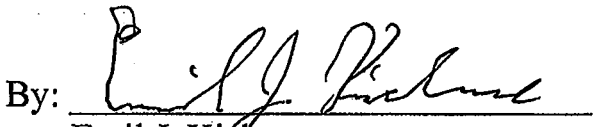
By: 
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