IN THE NEW MEXICO SUPREME COURT

Case No. 33,687

ELANE PHOTOGRAPHY, LLC,

Appellant-Petitioner,

v.

VANESSA WILLOCK,

Appellee-Respondent.

PETITIONER ELANE PHOTOGRAPHY, LLC's BRIEF IN RESPONSE TO AMICI CURIAE BRIEFS FILED IN SUPPORT OF RESPONDENT

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I. Elane Photography Did Not Violate NMHRA.

Amici Small Businesses attempt to distort, rather than refute, Elane Photography's arguments why the Company did not engage in unlawful sexual-orientation discrimination. [SBBr. 7-11][1] Elane Photography's position is simple: it declined Willock's request because the Huguenins did not want to create images expressing messages about marriage that conflict with their beliefs [Tr.87]; Elane Photography otherwise readily serves homosexuals where the expression that the customer asks the Company to create does not communicate messages that conflict with the Huguenins' beliefs [Tr.111, 115]; and therefore the Company does not discriminate because of their customers' sexual orientation. Contrary to Small Businesses' assertions, this is not an attempt to distinguish between Willock's conduct "and her status as a member of a protected class." [SBBr. 11] Rather, it hinges on whether the customer's request would require the business to create expression and whether the business declined that work because it did not want to create expression conveying messages contrary to its owners' beliefs. Nothing

[1] The following citations refer to the briefs filed in support of Willock: (1) "SBBr." refers to the Brief of New Mexico Small Businesses; (2) "ACLUBr." refers to the Brief of ACLU Foundation and ACLU of New Mexico; and (3) "LPBr." refers to the Brief of Law Professors Steven H. Shiffrin and Michael C. Dorf. The following citations refer to the briefs filed in support of Elane Photography: (1) "WPBr." refers to the Brief of Wedding Photographers; and (2) "CatoBr." refers to the Brief of the Cato Institute and Professors Eugene Volokh and Dale Carpenter.

about this expression- and message-focused standard is unworkable or suspect. On the contrary, a failure to heed it "would launch this Court headlong into an unconstitutional application of the NMHRA." [BIC11]

Unable to show that Elane Photography declined Willock's request because of her sexual orientation, Willock and Small Businesses try to erase NMHRA's "because of" requirement, asserting that the statute prohibits "both 'direct[]' and 'indirect[]' discrimination" [AB7 (alterations in original)] and thus is not concerned with motivations. [SBBr.12-13] But this argument warps NMHRA's plain language, which states that a public accommodation shall not "make a distinction, directly or indirectly, in offering or refusing to offer its services . . . because of . . . sexual orientation." NMSA 1978, § 28-1-7(F). The adverbs "directly" and "indirectly" modify the verb phrase "make a distinction"; they do not qualify the words "because of." Thus, while NMHRA prohibits a public accommodation from effectuating discrimination by making direct or indirect distinctions, a complainant must nevertheless show that the public accommodation made that direct or indirect distinction *because of* sexual orientation. Tellingly, none of the cases that Small Businesses cite applied a statute containing the "indirect[]" language at issue here. [SBBr.12-13 (citing four cases—*Gonzales*, *Hill*, *Murray*, and *Miller*—two of which are unpublished)]

The language of NMHRA's public-accommodation provision thus does not support disparate-impact claims. U.S. Supreme Court precedent is instructive. That Court has permitted disparate-impact claims only where the language of a nondiscrimination statute itself references the "effects" or results of an actor's conduct. *See Smith v. City of Jackson*, 544 U.S. 228, 236 (2005) (holding that Section 4(a)(2) of Age Discrimination in Employment Act (ADEA), much like Title VII, permits disparate-impact claims because the text of the statute "focuses on the effects of the action on the employee rather than the motivation for the action of the employer"). But where a statute does not speak to effects or results, the Court has declined to read in disparate-impact claims. *See id.* at 236 n.6 (noting that although Section 4(a)(2) of ADEA would support disparate-impact claims, Section 4(a)(1) *would not* because the it focuses on the "actions with respect to the targeted individual" and not on the effects or results of those actions); *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001) (holding that Title VI, which prohibits only intentional discrimination, does not support disparate-impact claims). Here, NMHRA does not mention effects or results, but rather predicates liability squarely on intent—that is, acting "because of" a protected characteristic. *See* § 28-1-7(F). Willock thus cannot resort to a disparate-impact claim here.

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

Elane Photography has shown that this application of NMHRA violates its compelled-speech rights by forcing the Company to create photographs telling the story of same-sex commitment ceremonies and conveying messages about marriage that conflict with the Huguenins' beliefs. [BIC12-35] Willock's amici resist this conclusion. But their arguments are inconsistent among themselves, occasionally contradictory to Willock's own, and even at times beneficial to Elane Photography. One constant nevertheless exists among Willock's amici's briefs. Like Willock, her amici barely invoke the Court of Appeals' misbegotten compelled-speech analysis, which, as we have demonstrated, erroneously patterned its reasoning after irrelevant expressive-conduct/symbolic-speech principles [BIC16-17], and quoted almost verbatim (without attribution) from a Supreme Court *dissent*. [CatoBr.18-19] Amici have thus sought firmer foundation elsewhere, but to no avail.

A. Expression Created for Profit on Behalf of Others Is Fully Protected Speech.

Willock and her amici, specifically Amici ACLU, attack expression by businesses for disfavored treatment and, in an inversion of our constitutional hierarchy, attempt to elevate legislatively enacted nondiscrimination laws above the First Amendment protection afforded to fully protected speech engaged in for profit. [ACLUBr. 9-14] ACLU claims that "[f]or over 150 years, the fundamental

principle of public accommodations law has been that when a business chooses to solicit customers from the general public, it relinquishes [its constitutional] autonomy over whom to serve." [ACLUBr. 9] Yet this argument rests on a flawed factual and legal premise.

Factually, ACLU's argument assumes that Elane Photography advocates for the right to exclude customers simply because of their statutorily protected characteristic. [ACLUBr. 14] We do not. The Company contends that the First Amendment allows it to decline a request to create expressive photographs that would convey messages contrary to its owners' beliefs. Our compelled-speech theory thus applies only where the application of a law compels an entity to create expression that would communicate this sort of message, and where the business is motivated by a desire not to express that message. It is thus abundantly clear that we do not argue for the right to refuse to serve protected-class customers for no better reason than an aversion to a protected characteristic.

Legally, ACLU's authority for its supposedly 150-plus-year "fundamental principle of public accommodations law" is found wanting. [ACLUBr. 9-10] Its argument rests on out-of-context quotes from non-controlling concurring Supreme Court opinions (as well as two other irrelevant decisions) in cases not presenting anything like the compelled-expression claim raised here. *See New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 19-20 (1988) (O'Connor, J.,

concurring) (analyzing a membership group's expressive-association claim that challenged a statute on its face in a case that did not involve compelled speech); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring) (analyzing a membership group's expressive-association claim that sought to exclude women simply because of their sex in a case that did not involve compelled speech); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 280-86 (1964) (Douglas, J., concurring) (arguing that Section 5 of the Fourteenth Amendment gives Congress authority to enact the federal Civil Rights Act of 1964); *Bell v. State of Md.*, 378 U.S. 226, 312-15 (1964) (Goldberg, J., concurring) (arguing that the Fourteenth Amendment itself prohibits racial discrimination in privately owned places of public accommodation); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 454 (1978) (affirming a law banning attorneys' in-person solicitation of clients); *Messenger v. State*, 41 N.W. 638, 639 (Neb. 1889) (*denying* racial-discrimination claim against barbershop for refusing to shave a black man in a case where the barbershop did not assert any constitutional defense). These irrelevant cases do not even remotely establish a "fundamental principle of public accommodations law" that would foreclose Elane Photography's compelled-speech claim.

Undeterred, ACLU presses on, arguing that the First Amendment does not protect a "photographer for hire" against an application of NMHRA that would

require her to create pictures expressing messages that conflict with her convictions. [ACLUBr. 12-13] But the fact that a photographer is paid to create expression does not disqualify her from First Amendment safeguards. "It is well settled that a speaker's rights are not lost merely because compensation is received; *a speaker is no less a speaker because he or she is paid to speak.*" *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 801 (1988) (emphasis added); *see also Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2665 (2011) (expression with "an economic motive" is protected speech). Nor is First Amendment protection lost simply because expression "takes place under commercial auspices." *Smith v. California*, 361 U.S. 147, 150 (1959). Indeed, ACLU acknowledges elsewhere in its brief that "speech does not lose its constitutional protection *whenever it is created* or sold *for profit.*" [ACLUBr. 11 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964)) (emphasis added)]

The apparently disqualifying factor, in ACLU's eyes, is that Elane Photography creates its expression at the "request" and "on behalf of" its customers. [ACLUBr. 12-13] But ACLU cites no precedent for this assertion, which is not surprising because Supreme Court precedent belies it. That Elane Photography is acting at the "request" of customers is not a disqualifying factor, for the First Amendment does not "require a speaker to generate, as an original matter, [the] item[s] featured in [its] communication." *Hurley v. Irish-American*

Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569-70 (1995) (discussing many examples); *see also Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) ("Although programming decisions [of a public broadcaster] often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts"). Nor are constitutional protections disabled because Elane Photography creates pictures telling the story of the day "on behalf of" its customers. The Supreme Court in *Riley* found that professional fundraisers, who were paid to speak their customers' message on their customers' behalf, were fully safeguarded by the compelled-speech doctrine. 487 U.S. at 795-98. Likewise, the Court in *Sullivan*, a case that ACLU cites, concluded that the New York Times was engaged in protected expression when it selected and printed a paid advertisement on behalf of its customer. 376 U.S. at 265-66; *see also Hurley*, 515 U.S. at 570 (discussing *Sullivan*). Hence, Elane Photography is not outside First Amendment aegis simply because it creates expression at the request and on behalf of its customers.

Moreover, through this argument, ACLU wrongly implies that Elaine is a mechanistic extension of her customers and does not contribute any expressive measure to the creation of her wedding photographs. This insinuation cannot be maintained on the undisputed record in this case, as we demonstrate at length in Section (II)(C)(1) below.

To salvage this argument, ACLU suggests that a business forfeits its First Amendment right against compelled speech when it markets its services to the public [ACLUBr. 8] or "agrees to take photographs on behalf of some customers from the general public." [ACLUBr. 12-13] Once again, no precedent supports either of these assertions. The flaw with the marketing argument is apparent on its face: it cannot be true that a business's exercise of its First Amendment right to market its services waives its First Amendment right against compelled speech. *See Sorrell*, 131 S. Ct. at 2659 (speech in aid of "marketing" is "a form of expression protected by the Free Speech Clause").[2] Nor does a business forfeit its constitutional rights by "agree[ing] to take photographs on behalf of some customers from the general public." [ACLUBr. 12-13] The "deci[sion] to exclude a message [the speaker] did not like from the communication it chose to make," regardless of its past speech on behalf of others, "is enough to invoke [the] right" against compelled speech. *Hurley*, 515 U.S. at 574.

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[2] Practically speaking, ACLU offers an empty alternative when it asserts that an entity can preserve its constitutional rights by not marketing to the public. [ACLUBr. 8] Under the broad statutory construction adopted by the Court of Appeals and not challenged here, *see Elane Photography, LLC v. Willock*, 2012-NMCA-086, ¶18, __ N.M. __, 284 P.3d 428, NMHRA's public-accommodation provision—which applies to any business that "provides . . . its services . . . to the public," NMSA 28-1-2(H), governs all businesses that put their name in the YellowPages, start a website, operate a physical storefront open to the public, or market themselves in any capacity. But a business must take at least some of these steps to survive. The option of cloistering their services is no alternative at all.

The ACLU, in short, wrongly believes that the government can regulate the marketplace free of constitutional restraints, thereby depriving business owners of their ability to challenge the constitutionality of state laws applied against them. But no constitutional principle transforms the marketplace, or anywhere else for that matter, into a "First Amendment Free Zone." *Cf. Board of Airport Comm'rs of Los Angeles v. Jews for Jesus*, 482 U.S. 569, 574 (1987). Business owners do not surrender their First Amendment rights at the marketplace gate.

In sum, then, despite its efforts, ACLU cannot relegate fully protected speech engaged in for profit beneath the demands of NMHRA.

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.

Like Elane Photography and Willock, Amici Law Professors separately address two types of compelled-speech violations. Law Professors' description of the first type of violation is not accurate, but to their credit, it is closer to Supreme Court standards than Willock's version. Law Professors argue that the first category of compelled-speech violations occurs when the government requires a business owner such as a photographer "to affirm, carry, or produce a message that contradicts her ideology." [LPBr. 25] Unlike Willock, Law Professors do not contend that this type of compelled-speech violation requires a state-chosen message, and thus their argument conflicts with Willock's own.

Law Professors acknowledge that "*Wooley* stands for the proposition that persons cannot be compelled to be a courier for messages they oppose." [LPBr. 27-28] They recognize that "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.'" [LPBr. 27 (quoting *Wooley v. Maynard*, 430 U.S. 705, 713 (1977))] And they admit, as we and our amici argue [RB6-9; CatoBr.11-13], that "the logic of *Wooley* should extend to creation of messages as well as dissemination of messages[.]" [LPBr. 28] This collection of concessions—specifically the admission that "persons cannot be compelled to be a courier for messages they oppose"—demonstrates that Law Professors support our argument that a compelled-speech violation under *Wooley* does not depend on whether the expression in the photographs is the Company's or its customers'. [RB6-7]

Law Professors thus go to the doorstep of admitting that this application of NMHRA violates the compelled-speech doctrine. The reason that Law Professors stop short is unsustainable. They claim that even though Elaine is required to create photographs conveying an approving and favorable story about a wedding-like same-sex commitment ceremony [LPBr. 3, 13, 31-32 ("[NMHRA] ha[s] the effect of forcing [Elane Photography] to photograph [same-sex] ceremonies in ways that make them look attractive")], Elaine is not compelled to "produce a

message that contradicts her Biblical views or her views about public policy" [LPBr. 5] because those photographs would "say nothing about the proper way to interpret the Bible and nothing about the need for a father and mother in child rearing." [LPBr. 4] That argument is baseless, so much so that Willock does not even assert it.

To begin with, this argument conflicts with the Supreme Court's directive that courts must "give deference to an [entity's] assertions regarding the nature of its expression." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000). Therefore, this Court should not countenance Law Professors' presumption to know the Huguenins' convictions and the messages communicated through Elaine's photographs better than the Huguenins do.

More fundamentally, though, this argument does not square with *Wooley*. The motorists in *Wooley* believed, based on their "moral[], ethical[], religious[] and political[]" views, that the State's motto—"Live Free or Die"—was objectionable and a message that they could not in good conscience convey. *Wooley*, 430 U.S. at 713. Even though that motto said nothing about morals, religion, ethics, or politics, the Court found that the Maynards had a constitutional right "to refuse to foster . . . an idea" they deemed "objectionable." *Id.* at 715. Likewise, here, the Huguenins believe, based on their religious and public-policy views, that an understanding of marriage other than the union of one man and one

woman is objectionable and a message that they cannot in good conscience create. [Tr.84-87, 92] Therefore, even though Elane Photography's pictures of a same-sex ceremony "say nothing about the proper way to interpret the Bible and nothing about the need for a father and mother in child rearing" [LPBr. 4], *Wooley* dictates that Elane Photography has a compelled-speech right not to create images expressing messages about marriage that the Huguenins consider objectionable. Consequently, Law Professors' feeble attempt to foreclose Elane Photography's compelled-speech claim on this ground is unavailing. This issue aside, *Law Professors' own characterization of the compelled-speech doctrine, as recounted above, demonstrates that Elane Photography should prevail.*

Law Professors and Willock occasionally suggest that a compelled-speech violation occurs only where the compelled expression conveys an ideological message. [LPBr. 11; AB30-31] But this is not true. As we have shown, Supreme Court precedent repeatedly proclaims that the rule against compelled speech "applies not only to expressions of value, opinion, or endorsement"—that is, ideological messages—"but equally to statements of fact the speaker would rather avoid[.]" *Hurley*, 515 U.S. at 573. [BIC25 (citing cases)] Moreover, expression lacking "serious value . . . is still sheltered from government regulation"; indeed, even "wholly neutral futilities come under the protection of free speech." *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) (alterations omitted). A wealth of

legal authority (recounted here and in our other briefs) thus undermines Law Professors' and Willock's attempts to impose an "ideological message" requirement on the compelled-speech doctrine. [BIC25; RB8 n.1; CatoBr. 6, 8] Yet even if such a requirement exists, Elane Photography surely satisfies it. For NMHRA would force Elaine to create photographs expressing messages about the basic definition of marriage and the sexual parity of couples who enter marriage-like unions—ideas of undoubtedly great public concern.

Law Professors also contend that Elane Photography's compelled-speech claim is barred by *Rumsfeld*'s decision to affirm a statute requiring law schools to send scheduling emails and flyers concerning the military's recruitment efforts. [LPBr. 10-13] But at least three important distinctions separate *Rumsfeld* from this case.

First, the law schools in *Rumsfeld* disagreed with a military policy—not with the logistical information in the emails and flyers apprising students about military recruitment opportunities. *Rumsfeld v. FAIR*, 547 U.S. 47, 60-62 (2006). In other words, the statute did not require law schools to communicate the policy that they considered offensive. Here, however, this application of NMHRA requires Elaine to create photographs expressing messages about marriage that conflict with her beliefs, and thus implicates core compelled-speech concerns. In other words, this application of NMHRA compels the Company to create messages that its owners

deem objectionable. *Rumsfeld* is thus very different from this case, and it "trivializes the freedom" against compelled expression to suggest that they are similar. *See id.* at 62.

Second, *Rumsfeld* recognized that the "[l]aw schools remain[ed] free under the statute to express whatever views they may have [had] on the military's [policy]," *see id.* at 60; likewise, Law Professors and Willock stress that Elane Photography is free to express its views about marriage. [AB28-29, 39; LPBr. 12] But because this case involves the compelled creation of messages with which the Huguenins disagree, and because *Rumsfeld* did not, Elane Photography's freedom to otherwise express its views does not obviate the compelled-speech violation. As the Supreme Court has stated, "if the government were freely able to compel speakers to propound . . . messages with which they disagree, protection of a speaker's freedom would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Hurley*, 515 U.S. at 575-76 (quotation marks and alterations omitted). The Huguenins' ability to otherwise express their views about marriage, then, is much beside the point.

Third, *Rumsfeld* (which involved a broad challenge to the statute as applied to all law schools) stressed that transmitting scheduling emails and flyers was "plainly incidental" to the statutory requirement that law schools must allow the military equal recruiting access to students. *Rumsfeld*, 547 U.S. at 62. The statute

there required the schools to afford the military equal access to recruit the schools' students; apprising the students of these recruitment visits through emails and flyers was clearly incidental to what the law demanded. In contrast, creating expressive photographs communicating messages about marriage through the story of a same-sex ceremony is central to this application of NMHRA. That is the heart of what Elane Photography must do to comply with the law under these circumstances; there is nothing else that the law demands here. Thus, for this and the other expressed reasons, *Rumsfeld*'s holding does not remotely foreclose Elane Photography's compelled-speech claim.

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] Law Professors (and others) attempt to refute this argument because they assert, first, that Elane Photography is not engaged in expression when it creates photographs for wedding ceremonies and, second, that Elane Photography must demonstrate that the government engaged in content discrimination. [LPBr. 29-31] Both of these arguments fall short.

1. Elane Photography Expresses Messages through Its Wedding Pictures.

Law Professors, Willock, and Willock's other amici repeatedly assert, but do not attempt to demonstrate, that Elane Photography is not engaged in expression when it creates photographs telling a wedding story. [AB1, 17, 27, 33; SBBr. 10; ACLUBr. 12-13; LPBr. 27, 32] In raising these arguments, they bury their heads in the sand, *entirely ignoring* the facts in the Brief-in-Chief, the record, and the Wedding Photographers' Amicus Brief establishing that wedding photojournalists like Elaine engage in expression by creating pictures—and arranging them in a picture book—that visually tell the story of the wedding day and communicate messages about marriage. [BIC2-5, 18-24; WPBr. 14-25; Tr.79, 84, 100-08; RP162-63; RP181, Supplemental Ex. I; RP183, Supplemental Ex. K] They also fail to address the long line of cases demonstrating that photographs typically constitute First Amendment-protected expression. [BIC18; WPBr. 8-9] This they must do, for facing these facts and cases will expose their baseless refusal to accept that compelled expression is at the center of this case.

That Elaine creates a picture book for all her customers [Tr.43, 108; RP164], and selects and arranges the edited images so that the book "tells the story of the day" [Tr.79] are particularly inconvenient facts for Willock and her amici. Those facts additionally display the Company's storytelling role. For in addition to the expressive choices permeating the picture-taking and -creation process—selecting

which images to capture, choreographing scenes, choosing which photographs to edit, and editing the selected images [BIC4-5 (recounting these facts)]—creating the picture book involves another layer of expression, in which Elaine acts as the author of an illustrated book telling the story of the wedding day. [WPBr. 24-25] Yet neither Willock nor her amici acknowledge, let alone account for, these powerful, undisputed facts.

Amici nevertheless claim that Elane Photography does not engage in expression because Elaine merely "record[s]" the customer's event. [LPBr. 27; SBBr. 10] This is inaccurate. Elane Photography does not offer simply to record the client's event; it proposes to tell the story of the day through pictures, with Elaine's photojournalistic voice narrating the tale. [RP162-63]

Nor did Willock seek a mere recording of her event. She sought an artistically skilled photographer and storyteller, choosing Elaine because, as Willock said, "I liked [her] work; Elaine does beautiful work." [Tr.16] If all Willock wanted was a mere recording of the ceremony, she could have mounted cameras with automated capabilities on a tripod; rather, she wanted a storyteller to tell a beautiful, idealized rendition of her important day. Indeed, her willingness to pay a minimum of $1,550—and Elane Photography's ability to charge that amount [RP164]—shows that Willock sought, and Elane Photography offered to provide, a skilled professional voice to tell the story of her ceremony. *See Mastrovincenzo v.*

City of New York, 435 F.3d 78, 96 (2d Cir. 2006) ("If a vendor charges a substantial premium . . . , such facts would bolster his claim that the items have a dominant expressive purpose.").

Willock and her amici also insist that Elane Photography "memorialize[s] the messages of customers," rather than "engag[ing] in [its] own expression." [AB37; LPBr. 32 ("The photographer . . . [asked] merely to capture the speech of others"); SBBr. 10 ("[C]lients' stories are their own acts of expression")] But it is illogical to suggest that the wedding photographs Elaine creates to tell the story of the day—and the photo book she creates—embody the customer's rather than Elaine's expression. [WPBr. 20-25] To begin with, different photojournalists asked to shoot the same event would capture the same scenes much differently. [WPBr. 11] That they each would create a collection of images conveying a unique version of the same ceremony underscores that the photographer (not the client) is the one engaged in expression. To further demonstrate the absurdity of suggesting that the pictures are the clients' (rather than Elaine's) expression, consider the many wedding pictures depicting scenes that the client is unaware of. Are these pictures the expression of the client? Of course not. [WPBr. 21] Or consider the photographs that, as part of recounting the story of the day, portray landscape scenes, details of the wedding site, or other inanimate objects. [WPBr. 16-17] Are these pictures the expression of the scenic overlook or the wedding cake depicted

in the images? Such a conclusion is inconceivable. These simple illustrations show that the wedding photographs are Elaine's expression (not the customer's). For it is Elaine who determines the story expressed in the pictures by selecting, choreographing, capturing, editing, and arranging those images for the purpose of beautifully communicating the story of the day. [BIC21-24; WPBr. 20-25] In short, when deciding whose expression is at issue, Elaine is the only logical candidate.

Furthermore, all these arguments denying that Elane Photography engages in expression are in tension with the wealth of case law, which we recount above and elsewhere, demonstrating that First Amendment-protected speech includes displaying the expression of others (*Wooley*), compiling and presenting the expression of others (*Hurley*, *Tornillo*, and *Forbes*), printing the expression of others (*Sullivan*), or speaking another's expression on their behalf (*Riley*). [BIC23-24; *supra* at 7-8] Because the Supreme Court has not hesitated to find protected speech in all these cases, this Court should likewise conclude that Elane Photography engages in protected speech here.

Finally, the distinction that Willock and her amici attempt to draw between a photographer who creates her own expression and a photographer who creates expression for others is an elusive one. [AB38; ACLUBr. 12] Willock and her amici admit that a photographer or painter who captures images of wedding scenes, edits them, and sells them are protected by the First Amendment. [AB38;

ACLUBr. 12] But they believe that a photographer or painter who does the same work for a client does not create First Amendment-protected expression. [AB38; ACLUBr. 12] The work and final product are identical, yet the First Amendment, we are told, secures the former but not the latter. Only results-driven advocacy—not law or logic—could support drawing such an arbitrary line.

2. This Application of NMHRA Discriminates against Speech Based on Its Content.

Elane Photography does not concede that this category of compelled-speech violations requires a litigant to establish that the government applied the law in a content-discriminatory manner. But assuming that such a requirement exists, the Company easily satisfies it.

This question is not a difficult one, for government-compelled expression necessarily entails content-based discrimination. The *Riley* Court thus held: "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider [that such situations involve] content-based regulation[s] of speech." 487 U.S. at 795. The same reasoning applies here. Elane Photography is forced to create expression that it would not otherwise produce. That necessarily alters the content of its expression, and thus this application of the NMHRA discriminates on the basis of content.

Law Professors (perhaps inadvertently) explain the content-based discrimination at issue here through their discussion of *Hurley*, stating:

> 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[.]"

[LPBr. 23] Similarly, here, Elane Photography declined to create photographs telling the story of Willock's commitment ceremony not because of her sexual orientation, but because of the messages about marriage that would have been conveyed through Elaine's pictures. The Commission, by applying NMHRA here, determined that the statute "prohibited [Elane Photography] from discriminating against this message. In other words, [NMHRA] as interpreted [would] promote[] a particular message. [And] *Hurley* condemn[s] this form of content discrimination[.]" [*See id.*]

This case presents another form of content-based discrimination, reminiscent of that in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Under the right-of-reply statute at issue here, a newspaper's decision to criticize a political candidate required that newspaper to speak on the other side of an issue—by printing the candidate's reply. That statute thus "exact[ed] a penalty on the basis of the content of [the] newspaper" and forced the newspaper to print views contrary to its own. *Id.* at 256. This application of NMHRA would similarly exact a penalty based on the content of Elane Photography's expression and require the Huguenins to express messages antithetical to their own. Specifically, because

Elane Photography chose to create pictures telling stories about marriages between one man and one woman, this application of NMHRA compels the Company to communicate opposing messages about marriage—by creating photographs that convey favorable and approving stories of wedding-like ceremonies between same-sex couples. Had Elane Photography not first engaged in marriage-related expression through her photography—say, for instance, if it had confined its photojournalistic services to sporting events—NMHRA would not have required the Company to create the photographs requested by Willock. This application of NMHRA thus constitutes content-based discrimination because, like the law in *Tornillo*, it is trigged by the content of Elane Photography's prior expression, and it compels the Company to create photographs expressing contrary messages about marriage that its owners deem objectionable.

Worse yet, this application of NMHRA discriminates on the basis of viewpoint. Viewpoint discrimination, a "more blatant" and "egregious form of content discrimination," occurs when the government favors or disfavors expression conveying "particular views . . . on a subject." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). Here, this application of NMHRA discriminates on the basis of viewpoint in at least two ways. First, NMHRA compels Elane Photography to create positive (rather than negative) messages about the photographed event. In other words, Elane Photography must

create photographs telling a favorable and approving story about a same-sex ceremony; it cannot create pictures that negatively portray that event—by, for example, mocking or satirizing it. Second, this application of NMHRA favors some views about marriage over others. The statute forces photojournalistic wedding photographers to create pictures conveying positive wedding stories that implicate a protected classification (like religion or sexual orientation), but not similarly favorable stories that are unrelated to those classifications. NMHRA therefore mandates that the Company create photographs telling favorable stories about same-sex ceremonies (which express messages about marriage that implicate a protected classification), but not polygamous or polyandrous ceremonies (which do not). This viewpoint discrimination deepens the constitutional concerns at issue here.

3. *Hurley* Requires a Ruling in Elane Photography's Favor.

Willock and her amici claim that *Hurley* is inapposite. [AB31-33; LPBr. 29] But *Hurley*, which exhibits at least eight point-by-point comparisons to this case, demands a ruling in Elane Photography's favor.

First, despite Willock's and her amici's contrary assertions, Elane Photography is a speaker similar to the parade organizers in *Hurley*. The parade organizers' speech there consisted of expression that originated with others and was packaged and presented as part of the organizers' own. *See Hurley*, 515 U.S.

at 574 (the organizers "select[ed] the expressive units of the parade from potential participants"). Similarly, here, even under Willock's and her amici's dismissive view of Elane Photography's role in creating expression, Elaine's expression (at the very least) consists of speech that originates with others, which she captures, edits, arranges, and repackages in her photojournalistic style to tell the story of the wedding day.

Second, the parade organizers did not forfeit First Amendment protection because they offered to consider, and generally accepted all, requests from members of the public to dictate aspects of the parade's message. *See id.* at 563 (noting the lack of "selectivity"); *Irish-American Gay, Lesbian & Bisexual Group of Boston v. City of Boston*, 636 N.E.2d 1293, 1298 (1994) ("[I]n essence, almost any individual or group would be admitted to the parade if they either apply or show up at the start of the parade and offer to make a contribution"), *rev'd by Hurley*, 515 U.S. 557. Nor did they forfeit constitutional security simply because the state courts could not readily detect an "expressive purpose" for their speech, *see Hurley*, 515 U.S. at 563-64, or because their expression did "not produce a particularized," *id.* at 574, or "succinctly articulable message." *Id.* at 569. Likewise, Elane Photography cannot be expelled from the First Amendment's safeguards for any of these reasons.

Third, the application of the nondiscrimination law in *Hurley* demanded compelled access to "a form of expression"—a parade. *Id.* at 568. Here too this application of NMHRA requires compelled access to a form of expression—Elaine's photojournalistic wedding photographs.

Fourth, *Hurley* reinforced the expressive nature of the parade and the presence of compelled expression by stressing that the parade participants (GLIB), whose message the organizers were required to facilitate, were themselves engaged in expression. *Id.* at 570 ("[GLIB's] participation . . . was equally expressive"). Likewise, here, Willock's wedding-like commitment ceremony—complete with a minister, guests, flower girls, ring bearer, procession, traditional white wedding gown, vows, and a ring exchange [BIC7-8 (citing the record for these facts)]—was expressive in nature and purpose. Indeed, her purpose for the ceremony could not have been otherwise, for the ceremony, despite mirroring a traditional wedding ceremony in myriad respects, served no legal purpose because New Mexico does not recognize unions between same-sex couples as marriages.

Fifth, GLIB sought to access a successful provider of expression precisely because doing so would enhance its ability to convey its desired message. *See Hurley*, 515 U.S. at 570 ("GLIB understandably seeks to communicate its ideas as part of the existing parade"). Similarly, here, Willock asked Elane Photography—a skilled creator of expression who Willock admits produces "beautiful work"

[Tr.16]—to create photographs telling the story of her ceremony. She chose the Company because Elaine's expressive talents would enhance the illustrated story of her ceremony. This fact reinforces that, as in *Hurley*, expression is at the center of this case.

Sixth, the parade organizers in *Hurley* did not "exclude homosexuals as such," 515 U.S. at 572; but rather refused GLIB's participation because of the message communicated by GLIB's expression and because that expression would necessarily affect the parade's own speech. *Id.* at 572, 574. Likewise, the undisputed record here shows that Elane Photography does not refuse its services to homosexuals as such. As Elaine testified, the Company will create portrait photographs for, and provide other services to, people who identify as homosexual so long as the message communicated through Elaine's pictures does not conflict with her beliefs about marriage. [Tr.111, 115] Law Professors repeatedly recognize this fact from *Hurley* and place great weight on it. [LPBr. 23 ("The parade organizers excluded [GLIB] from marching not because of their sexual orientation, but because of their message."); *see also id.* at 24 n.7, 29] But they fail to acknowledge this fact and its relevance here.

Seventh, the application of the nondiscrimination law in *Hurley*, by requiring the parade organizers to include GLIB's message in their own expression, "essentially requir[ed] [the organizers] to alter the expressive content

of their [speech]." *Hurley*, 515 U.S. at 572-73. Here too this application of NMHRA would force Elane Photography to alter the content of its expression by creating pictures that communicate the messages about marriage conveyed through a same-sex commitment ceremony. In both cases, then, the "application of the [nondiscrimination] statute had the effect of declaring the [entities'] speech itself to be the public accommodation" and forcing them to alter their expression. *Id.* at 573.

Eighth, the relevant government interest in *Hurley*, when properly focused on the compelled speech at issue, was illegitimate. As the Court there held, "[w]hen the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression." *Id.* at 578. But "this object is merely to allow exactly what the general rule of speaker's autonomy forbids." *Id.* The application of NMHRA here presents the same illegitimate government interest. [BIC32-33, 45-46]

Despite all this, ACLU attempts to disregard *Hurley* by arguing that the Court there found a compelled-speech violation because the case involved "a private parade that was not connected in any way to the sale of commercial goods and services." [ACLUBr. 19] That is a convenient distinction, but it has no basis in the Court's reasoning. *Hurley* did not at all suggest—let alone indicate—that the noncommercial context was decisive to its decision. Nor did it imply that the

outcome would have been different had the context been commercial. *Hurley* is silent on the matter, and thus does not support ACLU's superficial attempt to dismiss that case.

4. Elane Photography Has Established Constitutionally Impermissible Effects on Its Expression.

Elane Photography has shown that compelling it to create photographs expressing the messages about marriage communicated through a same-sex commitment ceremony would affect the Company's expression in four constitutionally significant ways. [BIC29-32] Willock and her amici dispute each of the four points, but have failed to refute the Company's arguments.

First, Law Professors argue that "[c]ompelled speech is not in and of itself a sufficient condition to make out a First Amendment violation." [LPBr. 18] As support, Law Professors discuss situations, much different from this case, where the government may compel a private person's speech—specifically, in the context of judicial and legislative testimony, police officers asking for identification, mandatory political disclosures, doctors discussing abortion risks, and attorneys advertising their services. [LPBr. 9-10] These inapposite examples, however, stand only for the unremarkable proposition that sometimes (albeit rarely) the government has a significantly strong interest in compelling speech. Specifically, those examples do not advance Law Professors' argument because in each of those situations, the government has an interest in acquiring or transmitting information

for the benefit of the public. Here, however, that informational interest is absent. Instead, the government compels not the disclosure of information for the good of the public, but the creation of expression conveying messages that conflict with the Huguenins' views on marriage. This, as *Hurley* teaches, the government may not do. Law Professors' examples of compelled speech thus are not germane to this case.

Second, Law Professors and Willock assert that Elane Photography has not developed a sufficient record to demonstrate an adverse impact on its expression. [LPBr. 18; AB27-28] Yet the Company has demonstrated that it engages in expression when it creates photographs telling the story of weddings [BIC18-24], and that if forced to do the same for same-sex ceremonies, Elane Photography would convey messages that violate its owners' beliefs. [BIC6-8, 24-27] These facts plainly present an adverse impact on Elane Photography's expression. [BIC30-31] No more evidence is needed.

Third, in an attempt to refute the undeniable, Law Professors contend that Elane Photography would not experience a "chilling effect on photographing weddings because same sex couples cannot get married in New Mexico." [LPBr. 19] That is true, but beside the point. This Court, after all, will not even reach the compelled-speech question unless it first holds, as the Commission did, that a photojournalistic wedding photographer violates NMHRA by creating photographs

telling the story of weddings between one man and one woman but not commitment ceremonies between same-sex couples. If the Court reaches that point, it necessarily follows that a photographer like Elaine—who wants to tell the story of the former, but whose convictions forbid her from telling the story of the latter—will be chilled in her willingness to creative expressive photojournalistic images for weddings. *See Tornillo*, 418 U.S. at 257. This chill cannot seriously be questioned.

Fourth, Law Professors do not deny that if Elane Photography's pictures telling the story of a same-sex commitment ceremony communicate messages about marriage that contradict its owners' past expression and beliefs, the Company would be forced either to appear to agree with those messages or to respond by clarifying its views. *See Pacific Gas and Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 15-16 (1986) (plurality); *Hurley*, 515 U.S. at 575-76. Rather, they argue that Elane Photography does not disagree with the messages about marriage that would be conveyed through those photographs. [LPBr. 20] We have explained above why that argument fails and incorporate that argument here. [*Supra* at 11-13]

These effects on Elane Photography's expression undercut Law Professors' efforts to distinguish *Tornillo* or *Pacific Gas*. Law Professors argue that those cases do not pertain here because they, unlike this case, involved content

discrimination and interference with an entity's speech. [LPBr. 29-31] Assuming, without conceding, that the second type of compelled-speech claim requires content discrimination and speech interference, we have shown that both factors are present here. [BIC29-31; *supra* at 21-24, 29-31] Hence, *Tornillo* and *Pacific Gas*, even as described by Law Professors, support Elane Photography's compelled-speech claim.

Finally, although *Hurley*, *Tornillo*, and *Pacific Gas* necessitate a ruling in Elane Photography's favor, it bears emphasizing that the compelled-speech violation at issue here is far more egregious than what occurred in those cases. This application of NMHRA would force Elane Photography not merely to facilitate a message that conflicts with its owners' beliefs, but actually to create expression conveying such messages. This case, then, is akin to compelling the parade organizers in *Hurley* to develop slogans and create banners expressing messages that the organizers do not support, forcing the newspaper in *Tornillo* to write an article rebuking its own criticism of a political candidate, or requiring the business in *Pacific Gas* to author a nonprofit group's newsletter espousing views that conflict with the business's own. The Constitution will not permit such egregious violations of expressive liberties—either in those cases or here.

D. Requiring Elane Photography to Create Photographs Telling the Story of a Same-Sex Commitment Ceremony Does Not Satisfy Strict Scrutiny.

1. The Strict-Scrutiny Standard Applies.

Willock acknowledges that strict scrutiny is the relevant constitutional standard of review. [AB42] Her amici, however, urge this Court to apply different standards. But because "[a]mic[i] must accept the case on the issues as raised by the parties," they cannot contest this conceded question. *See New Energy Economy, Inc. v. Vanzi*, 2012-NMSC-005, ¶45, 274 P.3d 53. Regardless, even if the Court were to consider amici's arguments on this point, it should reject those contentions as lacking merit.

ACLU states that the Court "could potentially employ" the standard articulated in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) [ACLUBr. 14-15]; and Willock makes passing reference to the "conditions" outlined in *Roberts*. [AB45] But *Roberts* itself makes clear that its standard applies to expressive-association claims (rather than compelled-speech claims). *See Roberts*, 468 U.S. at 623 (analyzing "[t]he right to associate for expressive purposes"). Moreover, the group raising an expressive-association claim in that case failed to demonstrate "any serious burdens" on its First Amendment rights, *see id.* at 626, thereby obviating the need for the *Roberts* Court to apply strict scrutiny.

Law Professors and ACLU alternatively argue for the intermediate-scrutiny standard established in *United States v. O'Brien*, 391 U.S. 367, 382 (1968). [LPBr. 21; ACLUBr. 15] Willock raised this argument at prior stages of this litigation [RP96-99], but has wisely abandoned it for the reasons that we will explain.

The Supreme Court has applied strict scrutiny (not intermediate scrutiny) in its compelled-speech cases. *See, e.g.*, *Hurley*, 515 U.S. at 575-79 (juxtaposing and distinguishing the *Turner* case where the Court "applied only intermediate scrutiny"); *Riley*, 487 U.S. at 795-98 (applying strict scrutiny); *Pacific Gas*, 475 U.S. at 19 (applying strict scrutiny). Indeed, Law Professors admit that where government action "violate[s] either branch of the compelled speech doctrine," at a minimum "an exacting standard of review would be in order." [LPBr. 24]

Law Professors and ACLU nevertheless suggest that strict scrutiny governs in compelled-speech cases only when the government applies the law at issue in a content-discriminatory manner. [LPBr. 21; ACLUBr. 15] The Supreme Court has not required content discrimination in the compelled-speech context, so the constitutional basis for this argument is suspect. But this Court need not dwell on this issue because, as we have shown in Section (II)(C)(2) above, this application of NMHRA discriminates on the basis of content and viewpoint. [*Supra* at 21-24]

Law Professors and ACLU also suggest that *Turner Broadcasting Systems Inc. v. FCC*, 512 U.S. 622 (1994), calls for intermediate scrutiny here. [LPBr. 21;

ACLUBr. 15] But it does not. Our Amicus Professor Volokh and his co-amici explain why, and we incorporate their arguments here. [CatoBr. 19-21] In addition to their points, we add three more. First, there is no indication that the cable operators in *Turner*, unlike Elane Photography here, objected to the messages contained in the expression that the law forced them to transmit. Second, the law in *Turner* forced the cable operators merely to *transmit* expression, *see* 512 U.S. at 653, whereas the NMHRA here requires Elane Photography to *create* expression. Finally, the *Turner* Court found that the law did not chill the cable operators' speech, *see id.* at 655-56; but as we have shown, this application of NMHRA would chill Elaine's expression. [BIC30-31; *supra* at 30-31]

2. Strict Scrutiny Is Not Satisfied.

Elane Photography has shown that Willock cannot meet her burden of satisfying the strict-scrutiny standard. [BIC32-33, 45-48] In response, Willock's amici, like Willock herself, try to obfuscate the proper analysis, arguing that the relevant government interest is in preventing discrimination against same-sex couples "in the commercial marketplace" and harm to their "individual dignity." [ACLUBr. 16; *see also* AB42-43] But Supreme Court precedent belies this broad characterization of the relevant interest. *Hurley* demonstrates that the relevant interest must pertain particularly to the compelled expression at issue. [BIC32-33, 45-46] And other Supreme Court cases applying strict scrutiny—indeed a host of

cases in the free-exercise context—show that this heightened analysis demands a precise link to the specific parties and facts. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (discussing cases showing that strict-scrutiny analysis demands a particularized focus on the parties and circumstances). Accordingly, Supreme Court precedent contradicts ACLU's attempt to frame the relevant government interest broadly; instead, this Court should precisely characterize the relevant government interest in light of the facts and parties involved here.[3]

Law Professors and ACLU claim that *Hurley* does not support our strict-scrutiny argument or our particularized characterization of the relevant government interest. [LPBr. 24 n.7; ACLUBr. 17-20] They are mistaken. *Hurley* recognized the public-accommodation nondiscrimination law's broad purpose of ensuring "for gays and lesbians desiring to make use of public accommodations" that "they will not be turned away merely on the proprietor's exercise of personal preference." 515 U.S. at 578. But the *Hurley* Court did not consider that the relevant interest for purposes of constitutional analysis. Instead, the Court concluded, as this Court should, that the relevant government interest, "[w]hen the law is applied to

[3] *Roberts* is not to the contrary. For as we have explained, that case analyzed an expressive-association claim (not a compelled-speech claim), 468 U.S. at 623; the party raising that constitutional claim failed to demonstrate "any serious burdens" on its rights, *see id.* at 626; and thus the Court did not apply strict scrutiny. [*Supra* at 33]

expressive activity in the way it was done," was "simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it." *Id. Hurley* thus supports our narrow framing of the state interest.[4]

Hurley also contradicts Willock's and ACLU's argument that the relevant government interest is, at least in part, in preventing dignity harm to same-sex couples. [ACLUBr. 16; AB42-43] The parade organizers in *Hurley* distributed applications to members of the public who wanted to participate in the parade, and although they generally accepted all comers, they denied GLIB's request. *See Irish-American Gay, Lesbian & Bisexual Group of Boston*, 636 N.E.2d at 1295-96. That message-based decision undoubtedly inflicted some dignity harm on GLIB and its members. Notwithstanding this, the Court did not mention the government's interest in preventing the dignity harms that accompany the denial of publicly accessible services. The reason why *Hurley* did not consider that seemingly implicated interest (though unstated) is obvious: a long line of Supreme Court precedent establishes that when analyzing speech-related decisions in the First Amendment context, it is illegitimate for the government to act for the purpose of protecting its citizens from subjective offense. *See, e.g.*, *Texas v.*

[4] Having refused to connect the relevant state interest particularly to the facts of this case, Willock and ACLU cannot characterize that interest as pertaining only to "the commercial marketplace." [ACLUBr. 16; AB42-43] We explain this argument in our Reply Brief. [RB13]

Johnson, 491 U.S. 397, 414 (1989) (collecting cases); *Street v. New York*, 394 U.S. 576, 592 (1969). Willock and ACLU thus misstep by attempting to invoke a dignity interest, which is illegitimate as applied to an expression-based decision.

Even assuming that these broad interests in preventing discrimination against, and dignity harms to, same-sex couples are constitutionally relevant and legitimate here, ACLU has not shown that this application of NMHRA is the least-restrictive means of achieving them. [ACLUBr. 17] Indeed, a decision affirming Elane Photography's constitutional rights would not materially undermine those purported interests, and thus this application of NMHRA is not narrowly tailored to (let alone the least restrictive means of) achieving them. In addition to our prior arguments on this least-restrictive-means issue [BIC47-48; RB13-14], we add the following three points.

First, even if this Court affirms the First Amendment rights of Elane Photography and similar photojournalist companies, an abundance of willing wedding photographers will still be available for same-sex commitment ceremonies in New Mexico. Professor Volokh has shown that more than 100 wedding photographers operate in Albuquerque—the city where Elane Photography is based. [CatoBr. 23-24] Furthermore, Small Businesses demonstrate that strong free-market forces encourage wedding photographers to include same-sex commitment ceremonies within their services because of the buying power of

the "LGBT market." [SBBr. 16-17] Small Businesses also acknowledge that the vast majority of companies—both large and small—have already adopted "policies aimed at including the LGBT community." [SBBr. 17-18] And Small Businesses illustrate the great incentive for wedding photographers to advertise specifically for same-sex commitment ceremonies, because "LGBT consumers are typically loyal to LGBT-friendly brands and those that speak to them directly." [SBBr. 17]

Second, any dignitary harm caused by protecting Elane Photography's constitutional rights is significantly reduced under these circumstances because Willock did not have a reasonable expectation that Elane Photography would provide the services she requested. Elane Photography markets itself as a business that specializes in photojournalistic wedding photography. [RP162-63] The word "wedding" has historically meant—and in most places continues to mean—a ceremony uniting one man and one woman in marriage. Indeed, that is how the State of New Mexico understands that term. Under these circumstances, Willock did not have a reasonable expectation that Elane Photography would create pictures telling the story of her same-sex ceremony.

Third, discarding Elane Photography's constitutional rights will significantly harm the government's interests in protecting the dignity interests of its citizens. Faced with the prospect of civil punishment for violating NMHRA, the Huguenins and other businesses that create expression for their customers will face an

intolerable choice: either violate their convictions by expressing messages they deem objectionable; or give up their constitutionally protected expression, their businesses, and the work they love to do. If they stand by their convictions, they will be forced to leave the marketplace, and Elaine, in particular, will be stripped of her right to earn a living doing "what [she] live[s] to do." [Tr.109] These dignity—not to mention financial—harms are extensive, and they significantly overshadow any harm that might result from a decision protecting Elane Photography's First Amendment rights. For all these reasons, the least-restrict-means analysis favors the Company.

ACLU also argues in passing that Elane Photography could have subcontracted with another photographer to create images telling the story of Willock's ceremony. [ACLUBr. 17 n.5] But that plainly will not work where, as here, the customer seeks a particular photographer because of her unique expressive skills. Willock chose to contact Elane Photography because of Elaine's "beautiful work." [Tr.16] In this context, Willock would not have received the services she requested if Elaine subcontracted for another photographer to create the pictures.

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

ACLU, Willock, and Willock's other amici present a series of hypotheticals in a misleading attempt to portray our compelled-speech theory as amorphous and unworkable. [ACLUBr. 2-7; AB36-39] But once our theory is properly characterized and once the facts of this case are brought into sharp focus, these arguments are drained of any persuasive force.

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. Amici's apocalyptic hypotheticals reach well beyond these parameters. To the extent that those situations arise one day, they can be addressed

on their facts. But most of them will not find protection under the nuanced compelled-speech theory we press here.

The initial question for determining whether our compelled-speech theory applies is whether the NMHRA compels the creation of expression or non-expression. ACLU and Willock seek to blur this line, suggesting instead that we claim First Amendment protection for all "creative work product" [AB1] or "art." [ACLUBr. 4] That is not true.[5] We acknowledge that the First Amendment protects expression, not mere creativity or artistic influences.[6]

The centrality of expression refutes ACLU's unfounded claim that our compelled-speech theory would protect "makeup artists" applying cover-up, "hair stylists" cutting hair, or "florists" assembling flower arrangements. [ACLUBr. 4] Unlike Elaine when she tells the story of her customers' weddings through pictures, those businesses almost certainly do not create expression for their customers when they provide these services. Law Professors admit this, stating that, unlike photographs, these sorts of artistic pursuits "are not ordinarily conceived of as speech within the meaning of the First Amendment[.]" [LPBr. 14]

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[5] Nor do we attempt to draw, as ACLU claims we do, "a line between 'expressive' speech and 'non-expressive' speech." [ACLUBr. 4] Such a line is nonsense—not the Company's argument.

[6] Creativity and art, to be sure, often correlate to expression, but the concepts are not coextensive.

Unable to face our arguments head on, ACLU distorts them, citing our brief and claiming that we argue that our theory would apply to "court reporting services, translation services, graphic-design agencies, architecture firms, sound technicians, print shops, and dance halls." [ACLUBr. 3] But a review of the pages that ACLU cites shows that neither Elane Photography nor its amici invoke these examples. Instead, we and our amici argue that our compelled-speech theory will protect "newspapers, marketers, publicists, lobbyists, speech writers, film makers," "writers, singers," "painters," and "actors" from certain applications of NMHRA's public-accommodation provision. [BIC34; CatoBr. 13-15] ACLU, however, does not mention these.

ACLU additionally claims that Elane Photography "vigorously argue[s] that *all* photography is inherently expressive." [ACLUBr. 5] That claim is mystifying. The very page of our Brief-in-Chief that ACLU cites states that "photographs *typically* constitute expression protected by the First Amendment." [BIC18 (emphasis added)] And the Brief-in-Chief elsewhere recognizes that the First Amendment would not protect some pictures, such as "portfolio snapshots akin to those taken in photography booths." [BIC35 (quotation marks omitted)] In short, the Constitution demands a careful inquiry to determine whether expression is present; while that is typically true of photographs, it is not universally so.

The presence of expression illustrates the difference between this case and ACLU's proposed scenario about a Sears' portrait photographer declining to take "a family portrait" because the family is "Latino," "Jewish," or "interracial." [ACLUBr. 3] While the record and facts here show that Elaine creates expression when she produces pictures telling the story of an inherently expressive ceremonial event like a wedding, the expressive nature of the Sears' portrait photographer's work—in which she takes still photographs of a posed family rather than an inherently expressive ceremonial event—is a very different question. The outcome of this case does not establish that the Sears' photographer's portraits constitute expression—only the record in that case can do that.

Our compelled-speech theory, then, when properly characterized, readily withstands ACLU's charge that it is "unworkable." [ACLUBr. 5] Since the dawn of our Republic, the Constitution has required courts to distinguish expression from non-expression. Nothing suggests that the judiciary has lost the ability—or has been given license—to stop doing that now.[7]

Another significant constraint on a decision upholding Elane Photography's First Amendment rights is that this case involves a situation where the compelled expression is central (rather than incidental) to the services compelled by

[7] Small Businesses argue that under Elane Photography's reasoning, "employers" would "be excluded from the NMHRA's coverage." [SBBr. 20-21] Yet we have already explained that our compelled-speech theory would not apply in the employment-discrimination context. [BIC34]

NMHRA's application. The holding in this case, therefore, will not control the outcome of a case where the compelled speech at issue is "plainly incidental" to what the law requires under the circumstances. *See Rumsfeld*, 547 U.S. at 62.

ACLU is thus wrong to assert that our compelled-speech theory would permit a restaurant owner to claim an exemption from NMHRA because forcing him to serve a customer would have the incidental effect of requiring him to talk. [ACLUBr. 7] Consequently, a waiter who welcomes Caucasian patrons to his restaurant while ignoring African American customers does not have a compelled-speech defense against a discrimination claim. Nor would our compelled-speech theory "immunize [a] business from ordinary antidiscrimination requirements" for every incidental instance where "a service provider engages in some form of expression as part of providing goods and services[.]" [*Id.*] Nothing in our compelled-speech arguments suggests otherwise.

A final limitation on the scope of a ruling for Elane Photography is that the Company, like the parade organizers in *Hurley*, does not refuse to serve homosexuals as such, but stands ready to serve them when the photographs that they ask Elaine to create would not require her to convey messages about marriage that are at odds with her beliefs. *See Hurley*, 515 U.S. at 572-73. This factor impacts the compelled-speech doctrine in at least two ways. First, if the declining entity does not have an expression-based objection, the freedom of the mind that

animates the compelled-speech doctrine is not implicated [*see* BIC27-28; RB8-9; CatoBr. 5-8], and thus the compelled-speech doctrine does not apply. Second, this factor impacts the strict-scrutiny analysis when the court appropriately focuses that analysis on the facts of the case. Simply put, where the entity does not discriminate against a protected class as such, but instead is motivated by message-related concerns, the relevant state interest is substantially decreased and perhaps, as here, rendered illegitimate. [BIC32-33, 45-46]

F. Ruling against Elane Photography Would Engender Troublesome Consequences.

Denying Elane Photography's First Amendment rights treats businesses that offer to create expression for customers like automatons—mindless drones at the beck and call of the consuming public. This would compel professional marketers, publicists, lobbyists, speech writers, film makers, newspapers, singers, painters, actors, and a host of others to create expression communicating messages at odds with their beliefs. Indeed, Law Professors admit that the State could apply NMHRA to force a publicist to write materials promoting a same-sex commitment ceremony even if she thought that the expression conveyed messages at odds with her convictions. [LPBr. 16-17] Such an Orwellian view of expression is at war with the First Amendment's premises.

A chilling effect will result from withholding First Amendment protections from businesses that offer as one of their services to create expression for clients.

We have above and elsewhere explained the chill specifically experienced by Elane Photography. [BIC30-31; *supra* at 30-31] We incorporate that analysis here.

Moreover, circumscribing First Amendment freedoms as Willock's amici suggest would diminish the quality of speech in the market. Professionals that create expression for customers would have an incentive to withdraw their services from the public, lest they subject their expression to the whim of nondiscrimination laws and other government regulations. But even if those professionals continue to serve the public, the quality of speech will nevertheless suffer because a compelled speaker is not a genuine voice. The stories told by those speakers, as the Amici Wedding Photographers have indicated, will be suboptimal and distracted with "no chance at success." [WPBr. 8 n.3; *see also* CatoBr. 23] Eventually, citizens lacking refined expressive capabilities would suffer greatest, for they are most in need of the mouthpiece provided by professionals (like Elaine) who serve as an authentic voice in telling the stories of their customers.

CONCLUSION

The First Amendment protects all who engage in expression, regardless of their political, personal, public-policy, or religious views. It thus safeguards (against a religious-discrimination claim) a homosexual commercial photojournalist who declines a request from the Westboro Baptist Church to create pictures telling the story of an event disparaging homosexuals—just as surely as it

protects Elane Photography against the discrimination claim asserted here. *Cf. Snyder v. Phelps*, 131 S. Ct. 1207, 1216-1219 (2011) (case involving a Westboro Baptist protest). Troublingly, though, if the First Amendment does not shield us all, it guards none of us, and becomes an empty shell of what our Founders intended it to be.

This result, unfortunately, does not deter Willock or her amici. They disagree with the beliefs and convictions of Elane Photography and its owners. They consider misguided the Huguenins' decision not to create pictures telling a story that expresses messages in conflict with their faith. They would rather the Huguenins act differently. The Legislature, the Commission, and others agree. But that is no cause for discounting or otherwise circumscribing First Amendment freedoms. On the contrary, when popular sentiment or the Legislature disagrees with an expression-based decision—in this case, the decision not to create expression conveying a particular message—it is precisely then that we need the First Amendment most. For "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Snyder*, 131 S. Ct. at 1219 (quoting *Hurley*, 515 U.S. at 574).

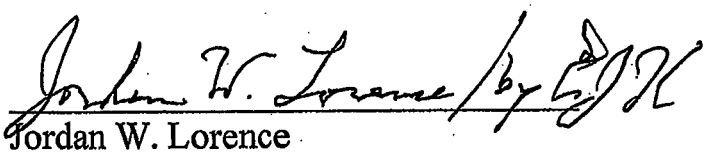
But Willock and her amici decry the demands of the First Amendment, and refuse to accept that the Constitution imposes modest limitations on public-accommodation nondiscrimination laws like NMHRA. They prefer the policy

choices embodied in NMHRA over those enshrined in the First Amendment. They think that under these circumstances the costs of the First Amendment outstrip its benefits. But that decision is not for them, the Legislature, or even this Court to make. Rather, "the American people" have already decided that "the benefits of [First Amendment] restrictions on the Government outweigh the costs." *Stevens*, 130 S. Ct. at 1585. All that remains is for this Court to affirm that truism.

Date: January 23, 2013

Respectfully submitted,

ALLIANCE DEFENDING FREEDOM



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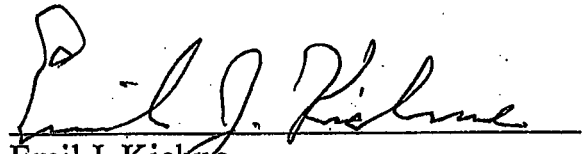

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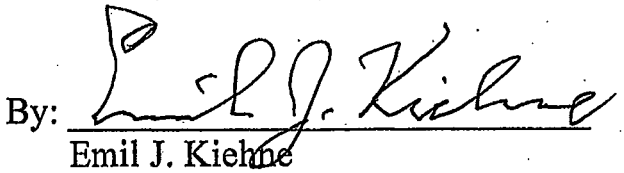
By: 
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