IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

NO. 33,687

ELANE PHOTOGRAPHY, LLC,

Appellant-Petitioner,

vs.

VANESSA WILLOCK,

Appellee-Respondent.

ANSWER BRIEF
OF APPELLEE-RESPONDENT VANESSA WILLOCK

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Oral Argument Scheduled Pursuant to this Court's Order

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(G) NMRA, this brief complies with the type-volume limitations set forth in Rule 12-213(F)(3) NMRA. It is prepared in 14-point Times New Roman, and the body of the brief contains 10,963 words, according to Microsoft Word.

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INTRODUCTION

Petitioner Elane Photography ("the Company") is a business that advertises commercial goods and services to the general public. In 2006, Vanessa Willock sought to retain the Company's services. The Company refused her business because she and her partner were a same-sex couple. These facts have never been in dispute, and they control the outcome of this case. The New Mexico Human Rights Act ("NMHRA"), NMSA 1978, §§ 28-1-1 to -14 (1969, as amended through 2007) forbids Petitioner's discriminatory refusal of service.

Petitioner places primary weight upon the First Amendment in attempting to avoid New Mexico law, arguing that it is immune from NMHRA because the commercial service it provides is expressive in nature. This argument carries no more weight for Petitioner than it would for a law firm, an architectural firm, a graphic design company, or a website development agency, all of which provide a commercial service that involves the production of creative work product, and all of which must obey NMHRA. When customers patronize these businesses, they do not pay for the privilege of facilitating the company's own message. Customers pay for a service or product tailored to their needs — the same goods and services that the company would provide to any customer. Under NMHRA, that patronage may not be refused on a discriminatory basis. The First Amendment imposes no barrier to that result.

The Company's religious motivations for discriminating against Vanessa Willock do not excuse its violation of NMHRA. The New Mexico Religious Freedom Restoration Act ("NMRFRA"), NMSA 1978, §§ 28-22-1 to 5 (2000), has no bearing on disputes between private parties, and the Free Exercise Clause of the U.S. Constitution does not limit the enforcement of neutral laws of general applicability.

Respondent therefore asks that this Court affirm the judgment below.

SUMMARY OF PROCEEDINGS

Elane Photography is a limited liability company owned by Elane and Jonathan Huguenin that offers commercial photography services to the general public. [Human Rights Commission Hearing Transcript ("Tr.") 71–73, RP 120] The Company advertises its services through its website, the Yellow Pages, and multiple Internet services including Yahoo! and Google. It secures business through broad public advertising, and the vast majority of that business derives from email inquiries sent by customers through its website. [Tr. 74–77]

The Company has a policy of refusing to accept business from gay couples having wedding ceremonies [Tr. 80-82, 88-89]. Although wedding photography is the main part of the Company's business, it will not offer that service to a paying customer if the ceremony is between two people of the same sex. [Tr. 74, 80–82, 88–89].

On September 22, 2006, Vanessa Willock emailed the Company to inquire about its availability to photograph her wedding to her female partner. *See Elane Photography, LLC v. Willock,* 2012-NMCA-086, ¶ 3, __ N.M. __, 284 P.3d 428; [RP 122, 167]. Petitioner refused Willock's business, explaining that it did not offer wedding photography services to same-sex couples. *See Elane Photography,* 2012-NMCA-086, ¶ 3; [RP 124, 168, 169, 170]. Willock brought a complaint before the Human Rights Commission ("Commission"), seeking a declaration that Petitioner's actions violated NMHRA. She prevailed before the Commission, the Second Judicial District granted summary judgment in her favor on *de novo* review, and the ruling of the trial court was affirmed by the Court of Appeals.[1]

ARGUMENT

I. The Company's Discriminatory Denial of Services Violated NMHRA

A. NMHRA Applies to the Company

Petitioner has abandoned its arguments concerning the scope of NMHRA, apparently conceding that the Act applies to the Company's services. That concession was a necessary one. Under NMHRA, "any establishment that provides or offers its services, facilities, accommodations, or goods to the public" is a public

[1] The Commission also issued an award of costs and attorney's fees. Vanessa Willock and her attorneys have voluntarily declined to pursue this award, thus waiving it.

accommodation, excluding only "a bona fide private club or other place or establishment that is by its nature and use distinctly private." § 28-1-2(H). As the Court of Appeals correctly held, this "plain language" applies to Petitioner. *See Elane Photography,* 2012-NMCA-086, ¶¶ 9-18. When any New Mexico business, including "a photography business[,] offer[s] its goods or services to the general public as part of modern commercial activity," it must refrain from subjecting customers to impermissible discrimination. *Id.,* ¶ 17. "Elane Photography takes advantage of . . . a variety of resources . . . to market to the public at large and invite them to solicit services offered by its photography business. . . . It does not participate in selective advertising, such as telephone solicitation, nor does it in any way seek to target a select group of people for its Internet advertisements." *Id.,* ¶ 18. The Company is therefore "a public business and commercial enterprise" subject to NMHRA. *Id.*

B. The Company Discriminated on the Basis of Sexual Orientation

The Company discriminated against Vanessa Willock on the basis of sexual orientation in violation of NMHRA. In their email correspondence and in their testimony before the Commission, the Huguenins stated unequivocally that the Company refused Willock's business because she and her partner were both women, emphasizing that it maintains a categorical policy of refusing to sell wedding

photography services to same-sex couples. [Tr. 74, 80–82, 88–89] A policy that is "discriminatory on its face" constitutes "direct evidence" that renders unnecessary alternate methods of proving discrimination. *Trans World Airlines v. Thurston*, 469 U.S. 111, 121–22 (1985). As this Court has explained, evidentiary devices like the *McDonnell-Douglas* burden-shifting approach are necessary only "when no direct evidence of discriminatory motive exists." *Sonntag v. Shaw*, 2001-NMSC-015, ¶ 27, 130 N.M. 238, 22 P.3d 1188. "In the rare situation in which the evidence establishes that an employer openly discriminates against an individual it is not necessary to apply the mechanical formula of *McDonnell Douglas* to establish an inference of discrimination." *Rizzo v. Children's World Learning Ctrs.*, 84 F.3d 758, 762 (5th Cir. 1996) (citation omitted). "Direct evidence" includes "proof of an existing policy which itself constitutes discrimination." *Hall v. United States Dep't of Labor*, 476 F.3d 847, 854–55 (10th Cir. 2007). The Company's facial policy of discrimination against same-sex couples is the paradigm of direct evidence.

The Company argues that its discriminatory denial of services does not constitute "intentional discrimination" because the Company was not motivated by malice. [BIC 10–12] That is not the law. NMHRA does not require a claimant to establish that a facially discriminatory policy was malicious. In cases involving direct evidence of discrimination, defendants often avow benign motives for their actions. Where there is intentional discrimination, benign motives do not excuse the

violation of the statute. Thus, when a dentist refused to treat a patient because of his HIV status, the Supreme Court of the United States found that his action constituted intentional discrimination under the Americans with Disabilities Act. *See Bragdon v. Abbott*, 524 U.S. 624, 648–55 (1998). The fact that the dentist acted out of anxiety over possible infection, rather than a malicious attitude toward people with HIV, did not render his action non-discriminatory. *Id.* And when a municipal department required women employees to make larger contributions to its pension fund than men, the Court found that this facial classification constituted intentional discrimination on the basis of sex under the Civil Rights Act, notwithstanding the defendant's explanation that its discrimination reflected an actuarial assessment of the greater longevity of female employees. *See Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707–08 (1978). Subjective motive is not germane in such cases. The question is whether the defendant knowingly and intentionally discriminated on an impermissible basis.[2]

The Company next argues that its policy of refusing service to same-sex couples does not constitute discrimination based upon sexual orientation at all, since

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[2] The Company's hypothetical involving the Ku Klux Klan is unhelpful. [BIC 12] Membership in a group like the KKK is not a protected category under NMHRA; however, if a public accommodation refused to do business with customers because of their race, that refusal would violate NMHRA, regardless of whether the customers were members of the KKK.

it would also refuse to take business from "a movie [in which] the actors playing the same-sex couple were heterosexual." [BIC 11] A business cannot excuse a facially discriminatory policy by asserting that it would refuse business from other customers as well. This is roughly the equivalent of arguing that a company can categorically refuse to do business with Jews if it also refuses to do business with people who look Jewish. An avowed policy of turning away customers because they are gay constitutes a violation of NMHRA, regardless of what other business the Company would refuse.

The Company also cannot excuse its discriminatory policy by arguing that it "would have created other photographs for Willock, such as personal portraits." [BIC 11] When a company targets customers for discrimination, it does not cure the violation of NMHRA by permitting those customers to patronize other parts of its business. Every act of discrimination is an independent violation. *See, e.g., McDonald v. Santa Fe Trail Transp.*, 427 U.S. 273 (1976) (holding that two White employees stated a claim under Title VII by alleging a single instance of race discrimination). Thus, a hotel cannot justify its refusal to rent rooms to Latino customers by saying that it is willing to serve them at the take-out café. Each discriminatory refusal to serve a customer violates New Mexico law.

NMHRA outlaws both "direct[]" and "indirect[]" discrimination on the basis of sexual orientation. § 28-1-7(F). No reasonable construction of these words could

fail to reach a categorical refusal to serve same-sex couples. If public accommodations were permitted to discriminate using the strategies the Company attempts here, every gay couple would be left without protection when participating in the commercial life of New Mexico. NMHRA forecloses that result. Discrimination against a customer because she identifies as a lesbian or because she is in a relationship with a woman is precisely what the legislature prohibited when it banned discrimination based on sexual orientation. *See Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010) ("Our cases have declined to distinguish between status and conduct" when analyzing antigay discrimination.); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("[A] tax on wearing yarmulkes is a tax on Jews."); *Elane Photography,* 2012-NMCA-086, ¶ 20 (rejecting "attempts to justify impermissible discrimination by distinguishing Willock's participating in a same-sex commitment ceremony from her status as a member of a protected class").

II. NMRFRA is Inapplicable in Disputes between Private Parties

The other statute that Petitioner invokes, NMRFRA, is inapplicable. NMRFRA limits the circumstances under which "a government agency" can interfere with religious exercise. It has no bearing on disputes between private parties.

NMRFRA is unambiguous. The statute provides: "A government agency shall not restrict a person's free exercise of religion unless" certain conditions are met. § 28-22-3. It limits its cause of action to "appropriate relief against a government agency." § 28-22-4(A). It authorizes injunctive and declaratory relief only against "a government agency that violates or proposes to violate the provisions of" NMRFRA, § 28-22-4(A)(1). Damages are available only "pursuant to the Tort Claims Act," a remedial provision for government defendants. § 28-22-4(A)(2). And the statute addresses actions of "a government agency" when explaining how to construe its terms. § 28-22-5. Vanessa Willock is not "the state or any of its political subdivisions, institutions, departments, agencies, commissions, committees, boards, councils, bureaus or authorities," § 28-22-2(B) — the definition of a "government agency" under the Act. NMRFRA thus plays no role in this dispute.

Petitioner makes numerous attempts to argue around the language of the statute. None has merit. First, Petitioner focuses on the word "and" in the private remedies provision of the statute, arguing that it establishes the ability of a party in any case to assert NMRFRA as a defense. [BIC 36–37] Parties can indeed "assert the statute as a defense" in any case where it applies. And NMRFRA specifies the circumstances in which the statute applies: cases where "[a] government agency . . . restrict[s] a person's free exercise of religion." § 28-22-3.

Petitioner next argues that the Commission, before which Vanessa Willock filed her complaint, is a government agency. That is both true and irrelevant. The Commission has taken no agency action to restrict the Company's religious freedom. It acted as a tribunal, adjudicating the rights of private parties, just like this Court, the Court of Appeals, and the District Court, all of which are government agencies. As with any agency, New Mexico's commissions and courts would be subject to NMRFRA if they adopted regulatory policies that restricted the religious exercise of their employees, or others subject to their agency authority. That has nothing to do with their work as tribunals adjudicating private disputes.

Petitioner then invokes the legislative history of NMRFRA. Legislative history need play no role in this analysis, for the statutory text requires no clarification. If this Court does examine that history, however, it will find that every version of the bill considered by the legislature, including the final version, used language in the caption describing the bill as "An Act . . . prohibiting government agencies from restricting a person's free exercise of religion in certain instances." *See* HB 419; HB 458; SB 239; SB 359, 44th Legislature, 1st Sess. (N.M. 2000); *see also* HB 20, 44th Legislature, 2nd Special Sess. (N.M. 2000) (enacted Laws 2000 (2nd S.S.), ch. 17, §§ 1-5). The limited scope of NMRFRA has been clear from the beginning.

Seeking to resist this fact, Petitioner asserts that there was a "contemporaneous consensus" for its contrary interpretation, relying not upon legislative materials but rather two statements in the press by advocates who expressed their desire that NMHRA be exempted from NMRFRA. Petitioner's assertion is flatly inaccurate. In fact, contemporaneous press coverage regularly described NMRFRA as a limit on actions by "government agencies," using examples of agency action like prison policies or zoning board decisions to explain the law's operation. These passages from a March 2000 story in the Albuquerque Tribune are typical:

> The measure, known as the "Religious Freedom Restoration Act," would toughen the legal standard for the government to prevail in lawsuits brought against state and local agencies for alleged violations of a person's right to free exercise of religion. . . .
>
> Dick Minzner, a lobbyist for the Association for the Preservation of Religious Freedom, said that damage awards for religious rights violations would be subject to the same limits as other claims currently allowed against governmental agencies under state law.
>
> Minzner said the legislation could deal with governmental decisions such as a church being denied permission to expand its building in a historic district.

"Roundhouse Takes on Religious Freedom, Feed Bill," Albuquerque Tribune, A4 (March 30, 2000). *See also*, *e.g.*, "Bill Would Protect Religious Freedom," Albuquerque Journal, B2 (April 2, 2000) ("The Religious Freedom Restoration Act,

which is supported by leaders of several denominations, would make it harder for state and local agencies to win lawsuits brought for alleged violations of a person's right to the free exercise of religion."). Whatever concerns the individuals quoted in Petitioner's brief harbored, there was no "contemporaneous consensus" for Petitioner's view. Rather, it was clear that NMRFRA's repeated use of "a government agency" to define the scope of the statute in fact meant that NMRFRA would apply only to actions by "a government agency."

Precedents construing the federal Religious Freedom Restoration Act ("USRFRA") of 1993, 42 U.S.C. §§ 2000bb, 2000bb-1 to -4, reinforce this understanding of NMRFRA. Several federal circuits have indicated that USRFRA applies only to the actions of government agencies, even though the limiting language in that statute is less extensive than NMRFRA's. In *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006), the Seventh Circuit relied upon the provision of USRFRA prohibiting "government" from burdening religious exercise to hold that "[USRFRA] is applicable only to suits in which the government is a party." *Id.* at 1042. The Second Circuit has pointed to the language in USRFRA authorizing "appropriate relief against a government" and explained, "we do not understand how [USRFRA] can apply to a suit between private parties, regardless of whether the government is capable of enforcing the statute at issue." *Rweyemamu v. Cote*, 520 F.3d 198, 203–04 & n.2 (2d Cir. 2008). In so doing, the

Second Circuit disapproved its own earlier statement to the contrary, the only federal precedent upon which Petitioner relies. *See Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006).[3] Even in that earlier case, Judge (now Justice) Sotomayor explained in dissent that the majority was "unable to locate a single court holding that directly supports [the] novel application of [USRFRA] to a suit between private parties." *Id.* at 115. NMRFRA's limitation to "a government agency" is woven throughout the Act, making its scope yet clearer when compared to USRFRA.

Finally, Petitioner insists that applying the plain language of NMRFRA would produce "absurd" results [BIC 42-43]. Under the NMHRA, Petitioner claims, the Commission can "institute their own actions" on behalf of aggrieved individuals. *Id.* Petitioner asserts that "NMRFRA would apply" to such actions and argues that it would be absurd for New Mexico to treat suits instituted by the Commission differently from actions instituted by an individual. *Id.* Petitioner's solution is to apply NMRFRA to all individual suits, despite the statute's limiting language, to avoid an absurd result. *Id.* But there is no absurdity here.

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[3] Petitioner's *amicus* also cites a bankruptcy ruling, *In re Young*, 82 F.3d 1407 (8th Cir. 1996). [Becket Fund brief at 7–8] That case was filed by a bankruptcy trustee, an agent of the federal government, to ensure the proper disposition of all funds in that Chapter 7 proceeding. *See id.* at 1409–10. It was not a dispute between private parties.

First, Petitioner misunderstands NMHRA. The statute does not authorize the Commission to file a lawsuit on behalf of an individual. The Commission's active role in NMHRA disputes is focused on conciliation and settlement. That role is defined in § 28-1-10(F) — not Subsection G, the provision Petitioner cites. The only "complaint" the Commission files in private disputes is a document entitled a "commission complaint" that grants it power to hold a hearing and requires both parties to appear. Parties represent themselves before the Commission, as the Department of Workplace Solutions explains on its website: "The Human Rights Bureau is a neutral agency that investigates complaints fairly and impartially. It does not represent either side and does not provide attorneys for either side." (http://www.dws.state.nm.us/LaborRelations/Resources/FAQs). Subsection G merely sets a one-year time limitation within which the Commission must offer some response to a complaint: dismissal for lack of probable cause, settlement (a "satisfactory adjustment"), or initiation of a hearing between the parties through the filing of a commission complaint. See § 28-1-10(G)

These matters are explained in the New Mexico Administrative Code, Title 9, which defines the role of the Commission in mediating a dispute, 9.1.1.9 NMAC, issuing a probable cause determination, 9.1.1.10 NMAC, and attempting conciliation, 9.1.1.11(B) NMAC. If conciliation fails, the code authorizes a hearing

before the Commission. Under the subsection entitled "Time limits," the code provides:

> Unless the complaint has already been dismissed or a satisfactory adjustment of the complaint has been reached, a commission complaint will be issued on behalf of the complainant within one year of the complainant's filing of a complaint with the division, as provided in Subsection G of Section 28-1-10 NMSA 1978 of the New Mexico Human Rights Act"

9.1.1.11(C)(1)(a) NMAC. The code makes clear that Subsection G relates entirely to the "commission complaint" that initiates a hearing between the parties. *See also* 9.1.1.12(A) NMAC (hearing is commenced by "[i]ssuance of commission complaint"). And again, "[e]ach party is responsible for preparing its case for presentation to the commission at hearing." 9.1.1.11(C)(2)(a) NMAC. The only role contemplated for commission counsel is to "advise the commission during the hearing on legal matters and . . . assist in the preparations of findings of fact, the conclusions of law and the order." 9.1.1.12(C)(1)(d) NMAC.

In short, Petitioner's argument about absurd results proceeds from a misunderstanding of New Mexico law.

Second, even it were possible for the State to file a lawsuit under NMHRA on behalf of an aggrieved individual, Petitioner is incorrect that NMRFRA would apply in such a case. When the State sues to enforce the rights of an individual, the individual remains the real party in interest. Only her rights are adjudicated. The

presence of the State as a nominal party does not change the nature of the claim asserted. Thus, in *State ex rel. Salazar v. Roybal*, 1998-NMCA-093, 125 N.M. 471, 963 P.2d 548 (the Court of Appeals found that the Child Support Enforcement Division of the Human Services Department lacked its own standing to bring a petition for parentage and support on behalf of a child. Rather, the court found, the Division acted only as a "nominal party" when it brought such an action, since the only interests at stake were those of the child, who remained "the real party in interest." *Id.* at ¶¶ 12-13. The State is the real party in interest when it asserts interests that belong uniquely to the State. Such was the case in *State ex rel. Bingaman v. Valley Savings & Loan Assoc.*, 97 N.M. 8, 636 P.2d 279 (1981), where the Attorney General sued on behalf of the State to challenge certain lending practices by the defendant. This Court found that the State was the "real party in interest" and hence could secure an award of restitution because it had "challenged the lending policies of [defendant] as being in violation of" New Mexico law, rather than "rely[ing] on any specific transaction" in which a particular customer was aggrieved, thus asserting "the interest of the state" as the basis of the suit. *Id.* at 12–13, 636 P.2d at 283-84.

Even if the State could file suit under NMHRA on behalf of an individual, only the rights of "[a] person claiming to be aggrieved" would be at issue. § 28-1-10(A). When the government sues as a nominal party on behalf of an aggrieved

individual and asserts the rights of that individual in a dispute between private parties, the government is not the real party in interest and NMRFRA has no application.

NMRFRA applies only when "a government agency . . . restrict[s] a person's free exercise of religion." § 28-22-3. This Court should reject Petitioner's attempts to circumvent the language of the statute. NMRFRA plays no role in this case.

III. The First Amendment Does Not License the Company to Violate NMHRA

Three well established principles require the rejection of Petitioner's First Amendment claims.

First. An anti-discrimination law regulates conduct, not speech. Discrimination by a business against its customers is not a form of expression, regardless of the service that the business offers. Discrimination in the marketplace is conduct that "has never been accorded affirmative constitutional protections." *Hishon v. King & Spaulding*, 467 U.S. 69, 78 (1984).

Second. When a business offers goods and services for sale to the general public, it is not a "speaker" engaged in its own expression. Customers do not pay for the privilege of facilitating a business's own message. Customers pay for goods and services that are tailored to the customer's needs, and the State has the power to regulate the conduct of the business in that commercial transaction.

Third. The compelled speech doctrine applies in only two circumstances: (1) where the state imposes its chosen message upon unwilling adherents, or (2) where state compulsion forces a speaker to incorporate unwanted elements into its own message. *See Rumsfeld v. FAIR*, 547 U.S. 47, 63–65 (2006). In the absence of these circumstances, there is no compelled speech under the First Amendment.

All of these principles apply with full force to a business that sells a good or service with some expressive dimension. The Free Speech Clause of the First Amendment does not give any business a roving license to discriminate against customers. When a customer pays for work that involves creative skill — a brief written by a lawyer; a professionally designed website; a graphic design layout; professional photographic services — the business that provides that work is not a "speaker," it is a service provider. NMHRA prohibits discrimination in that business transaction, and the First Amendment imposes no barrier to the statute's enforcement.

A. NMHRA Does Not Target Speech

NMHRA does not regulate speech. Nothing in the statute makes reference to speech or expression. Neither was NMHRA enacted to punish businesses because of their expression, nor to regulate conduct as a pretext for targeting symbolic speech. On its face and as applied in this case, NMHRA regulates business conduct: invidious discrimination against customers.

Petitioner argues that it is entitled to a categorical exemption to NMHRA because it sells a service with an expressive dimension. That is not the law. The First Amendment does not exempt companies from general business regulations simply because they sell expressive goods or services. When government enacts evenhanded laws that regulate the conduct of all businesses, no constitutional scrutiny is required. It is only when government enacts laws that target the expressive component of a business's activities that the First Amendment is implicated. NMHRA does not target expression and provokes no First Amendment scrutiny.

Courts have regularly applied these core principles to the commercial practice of law. Legal practice occupies an important place under the First Amendment: lawyers produce creative work product when they advocate on behalf of a client, and the legal profession gives meaning to the right of access to court. Nonetheless, commercial legal practice is fully subject to laws that prohibit discrimination in the workplace and the market. In *Hishon*, the Supreme Court held that Title VII of the Civil Rights Act of 1964 forbids a law firm from refusing to promote a female associate because of her sex. In seeking to avoid that result, the firm argued that it was entitled to a constitutional exemption because its work enjoys First Amendment protection. The Court rejected the argument. Title VII neither regulates speech nor targets the expressive components of a business's work. Rather, it targets only

conduct: workplace discrimination. "[I]nvidious private discrimination . . . has never been accorded affirmative constitutional protections," the Court explained, and the firm's discrimination enjoyed no First Amendment shield. *Hishon,* 467 U.S. at 78. Likewise, a commercial law firm may not discriminate against clients in violation of anti-discrimination laws. In *Nathanson v. Massachusetts Comm'n Against Discrimination,* 16 Mass. L. Rptr. 761, 2003 WL 22480688, 2003 Mass. Super. LEXIS 293 (Mass. Super. 2003), a Massachusetts court found that a divorce lawyer who "advertises to the general public via the white and yellow pages and local newspapers" violated the state public accommodations law when she refused to take business from a male client. *Id.* at *1, *1-2. Rejecting a First Amendment claim, the court explained that a "private attorney, when representing a client, operates more as a conduit for the speech and expression of the client, rather than as a speaker for herself." *Id.* at *6, *24; *see also Turner Broadcasting Sys. v. F.C.C.*, 512 U.S. 622, 629 (1994) (cable television companies serve as conduits for the programming they must host and are not themselves "speakers" for First Amendment purposes); *Elane Photography,* 2012-NMCA-086, ¶¶ 27–28. The anti-discrimination law neither regulated the expressive component of the lawyer's work nor interfered with any expression of the lawyer's own message, so the First Amendment was not implicated.[4]

[4] A non-commercial advocacy organization, in contrast, would

In contrast, government cannot place restrictions on the viewpoint that lawyers assert when arguing on behalf of their clients. The Court affirmed this proposition in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), holding that the First Amendment prohibits Congress from imposing a restriction that "prevents [a Legal Services] attorney from arguing to a court that a state statute conflicts with a federal statute or that either a state or federal statute . . . [violates] the United States Constitution." *Id.* at 536-37. Because Congress sought "to exclude from litigation those arguments and theories [it found] unacceptable," *id.* at 546, its law targeted expression and provoked First Amendment scrutiny. Nothing in NMHRA targets the expressive component of any business.

The Court has applied the same principles to private schools. Direct regulation of a private school's expressive activity — for example, dictating the viewpoint that teachers must convey to students — would present serious First Amendment problems. But discriminatory practices receive no such protection. In *Runyon v. McCrary*, 427 U.S. 160 (1976), a private school refused to admit African-American children as students, prompting the children to sue for admission under federal civil rights law. The school asserted that requiring it to teach Black children

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not be subject to NMHRA and might well have a First Amendment right to control the work it undertakes, precisely because it engages in its own speech rather than the sale of a service to the general public. *See In re Primus*, 436 U.S. 412 (1978).

would violate its belief in segregation, which it incorporated into its curriculum, and that the First Amendment entitled the school to an exemption. The Court summarily rejected the argument. "[I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable," the Court explained. *Id.* at 175-176 "But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle." *Id.*

The Court reiterated this core principle in *Arcara v. Cloud Books*, 478 U.S. 697 (1986), a case involving the application of public nuisance laws to an adult bookstore. State authorities found that the bookstore was facilitating illegal sexual activity on its premises and ordered it to close for a year. Although the order harmed Cloud's ability to sell protected materials, the First Amendment was not implicated:

> [W]e have not traditionally subjected every criminal and civil sanction imposed through legal process to "least restrictive means" scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction. Rather, we have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place . . . .

Id. at 706-07. When a law regulates conduct rather than speech, the mere fact that a business sells a good or service with some expressive element does not excuse the

business from following the same rules that apply to all businesses. "[I]nvidious private discrimination" is conduct that lacks a significant expressive element and "has never been accorded affirmative constitutional protections." *Hishon*, 467 U.S. at 78.

One can imagine a law firm or private school making the same arguments that Petitioner presses before this Court. A lawyer's work is "expressive activity," the argument would go. A lawyer "speaks on behalf of" her law firm or client, signing her name to papers submitted to the court and conveying the client's message. The practice of law is not merely "mechanical" but requires "creativity" and the lawyer's distinctive "style" as he "represents" his client. *Compare* [BIC 2–5, 19–21]. All these assertions would be true. None would call into question the obligation of a law firm or private school to obey generally applicable rules that prohibit commercial entities from discriminating in the workplace or marketplace. The same holds true for Petitioner.

B. NMHRA Does Not Violate the Compelled Speech Doctrine

Petitioner's effort to reframe its argument as a compelled speech claim does not change the result. The Supreme Court has identified two circumstances that can give rise to a compelled speech claim: (1) when the state imposes its chosen message upon unwilling adherents, or (2) when state compulsion forces a speaker to incorporate unwanted elements into its own message. Neither circumstance pertains

here. NMHRA does not impose any State-chosen viewpoint. And Petitioner is not communicating its own message when it sells photographic services to its customers.

1. NMHRA Neither Compels Affirmation of Belief Nor Imposes a State-Chosen Message

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), was the foundational case in the Supreme Court's compelled speech doctrine, establishing the principle that the State may not impose its own ideology upon unwilling adherents. The *Barnette* Court confronted a West Virginia law that required school children to recite the Pledge of Allegiance to the American flag, a patriotic message chosen by the State and involving "affirmation of a belief and an attitude of mind." *Id.* at 633. Striking down the law, the Court declared that government must not "prescribe what shall be orthodox in politics, nationalism, religion, or matters of opinion, or force citizens to confess by word or act their faith therein." *Id.* at 642.

The Court has repeatedly reiterated this principle when government has sought to impose its chosen message upon unwilling speakers. Thus, in *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), the Court struck down a Florida statute that compelled newspapers to publish responses from political candidates when the papers ran editorials critical of those candidates; and in *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1 (1986) ["*PG&E*"], the Court

invalidated the actions of a California agency that selected an environmental newsletter based upon its viewpoint and required a utility company to replace its own newsletter with the environmental literature in the bills it sent to customers.

The high-water mark among these cases is *Wooley v. Maynard*, 430 U.S. 705 (1977), upon which Petitioner and its *amici* rely heavily. In *Wooley*, the Court prohibited New Hampshire authorities from penalizing a couple for covering the state motto on the license plate of their car. The Court defined the issue it confronted in the following terms: "We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Id.* at 713. The Court answered in the negative, finding that the State could not force people to "use their private property as a 'mobile billboard' for the State's ideological message." *Id.* at 715.

The core violation in all these cases has been the same: the State has selected a message and compelled individuals to affirm that message or become unwilling public ambassadors for it. Such compulsion is impermissible where the State's message embodies its own ideology, as in *Barnette* and *Wooley*, and where the State selects one speaker's viewpoint and requires others to promote that view, as in *Tornillo* and *PG&E*. *See also Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290–93

(10th Cir. 2004) (drama student at state university who was penalized for refusing to recite lines from a script could only assert compelled speech claim if the assignment reflected "anti-Mormon sentiment").

NMHRA does not involve any such compulsion. The statute does not impose the State's own message upon unwilling speakers. Nor does the statute select a private message based upon its viewpoint and require others to publish it. NMHRA has nothing to do with messages. It prohibits a form of business conduct — discrimination against customers and employees — and applies that prohibition to all public accommodations, without reference to expression. The *Barnette / Wooley* line of cases is therefore inapplicable.

Petitioner attempts to escape this conclusion by making a series of assertions about the manner in which compliance with NMHRA would "interfere" with the Company's own speech. [BIC 29–32]. These assertions are inapposite.

The authorities upon which Petitioner relies, *Tornillo* and *PG&E*, were both cases in which the government selected a message on the basis of viewpoint and required unwilling actors to promote that message: in *Tornillo*, essays by political candidates, which Florida required newspapers to publish because of the newspaper's critical coverage of those candidates; and in *PG&E*, a newsletter by an environmental group, which California required utility companies to distribute because of the viewpoint embodied in that newsletter. It was the forced promotion

of a state-chosen message that required the invalidation of those laws. *See Tornillo*, 418 U.S. at 256 ("The Florida statute exacts a penalty on the basis of the content of a newspaper."); *PG&E*, 475 U.S. at 12 ("The order [by California authorities] does not simply award access to the public at large; rather, it discriminates on the basis of the viewpoints of the selected speakers.").

Moreover, Petitioner continues to rely upon the erroneous assertion that the Company is engaged in its own speech when it sells commercial photography services to paying customers, as when it asserts that "forcing Elaine to spend a day shooting pictures and three to four weeks selecting, editing, and arranging images... takes up time that she could devote to her preferred message of telling wedding stories about marriages between a man and a woman." [BIC 30] Again, customers are not paying for the privilege of facilitating the Company's message when they retain its services, they are paying for a service tailored to their own needs. *See Elane Photography,* 2012-NMCA-086, ¶ 29 ("By taking photographs, Elane Photography does not express its own message. Rather, Elane Photography serves as a conduit for its clients to memorialize their personal ceremony."). The Company may prefer not to take business from gay customers, but that preference does not transform a prohibition on discrimination into a regulation of speech.

Finally, Petitioner's assertions are unsupported by the record. At no point before the Commission or the lower courts did Petitioner seek to develop a factual

record in support of the proposition that complying with NMHRA would materially affect other expressive activities that the Company and its owners might wish to undertake. Had they done so, Respondent would have contested that assertion.

The Supreme Court reaffirmed these important limits on compelled speech doctrine in its recent decision in *Rumsfeld v. FAIR*, 547 U.S. 47 (2006). In so doing, it took particular aim at the expansive uses to which some litigants have attempted to put its earlier decision in *Wooley*.

The *Rumsfeld* case arose when law schools sought to escape a federal statute that required them to host military recruiters at on-campus commercial job fairs. The schools objected because of the military's policy of refusing to interview gay students. A federal statute, the Solomon Amendment, imposed a targeted anti-discrimination provision that required schools to grant access to the military on terms equal to those available to other recruiters. *See id.* at 52–55. When schools created or disseminated speech as part of the service they offered to participants in the job fair, they were required to do the same for military recruiters as well: "in assisting military recruiters, [the] law schools provide[d] some services, such as sending e-mails and distributing flyers, that clearly involve speech." *Id.* at 60. The Court found no First Amendment problem:

> [Federal law] neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on

> the military's congressionally mandated employment policy . . . . [The Solomon Amendment] regulates conduct, not speech. It affects what law schools must *do* — afford equal access to military recruiters — not what they may or may not *say*.

Id. at 60. The Solomon Amendment, the Court explained, was "a far cry from the compelled speech in *Barnette* and *Wooley*." *Id.* at 62.

NMHRA is an even further cry from the compelled speech in *Barnette* and *Wooley* than was the Solomon Amendment. Solomon protects a single, specified entity — the military — and requires equal access in a single, specified setting — recruiting at colleges and universities. Thus, it was at least arguable in *Rumsfeld* that federal law had conscripted schools to serve as unwanted ambassadors for a specific recruiting message chosen by the government, using the schools' own speech as the vehicle. The plaintiffs in *Rumsfeld* made that argument a centerpiece of their case, but the Supreme Court rejected it squarely: "The Solomon Amendment, unlike the laws at issue in those cases, does not dictate the content of the speech at all, which is only 'compelled' if, and to the extent, the school provides such speech for other recruiters." *Id.* at 62. This holding applies with even more force to NMHRA. New Mexico's public accommodations law applies to all businesses that sell goods and services to the general public, not just to a single setting like colleges and universities, and it protects all New Mexicans from the specified forms of invidious discrimination, not just a single institution like the

military. It is thus all the more clear that NMHRA "does not dictate the content of [any] speech at all," *id.*, and there can be no violation of *Wooley* in the absence of a state-dictated message. As the Ninth Circuit has said, "Even as broadly construed, therefore, the holdings of both *Barnette* and *Wooley* are limited to compelled speech that affects the content of the speaker's message by touching on matters of opinion, or to compulsions that force the speaker to endorse a particular viewpoint." *Jerry Beeman & Pharmacy Servs. v. Anthem Prescription Mgmt., LLC,* 652 F.3d 1085, 1098 (9th Cir. 2011).

Petitioner's *amici* seek to downplay the importance of this key requirement in *Wooley* — the forced dissemination of an ideological message chosen by the State — by positing a case in which "a state required the display of an image . . . on a license plate" and arguing that such a requirement must constitute compelled speech even if it does not impose a specific ideological message. [Cato Institute brief at 9] But a federal district court has rejected this exact claim. In *Cressman v. Thompson*, __ F. Supp. 2d __, 2012 WL 1795210, 2012 U.S. Dist. LEXIS 68236 (W.D. Okla., May 16, 2012), the plaintiff objected to the requirement that his car bear a license plate containing a Native American image. The court applied *Wooley* and held: "To establish his claim, plaintiff must show the State's intent . . . to convey a 'particularized message' along with a great likelihood that the message will be understood by those viewing it." *Id.* at *4, *15-16 (citation omitted). As the court

explained, *Wooley* targets a particular kind of violation: attempts by the State to "'foster[] public adherence to a point of view' or 'disseminate an ideology.'" *Id.* at *7, *25 (quoting *Wooley*, 430 U.S. at 715, 717). Oklahoma's commemorative license plate image made no such attempt. Therefore, the requirement that all registered vehicles carry a license plate bearing the commemorative image posed no First Amendment problem.

NMHRA neither imposes the State's ideological message nor conscripts private citizens to host a viewpoint of the State's choosing. Petitioner cannot assert a claim under *Barnette* and *Wooley*.

2. NMHRA Does Not Force Speakers to Incorporate Unwanted Elements into Their Own Messages

NMHRA also does not force speakers to incorporate unwanted elements into their own messages. The Company is not engaged in the communication of its own message when it sells its services to the general public, it is engaged in a commercial transaction. The second type of compelled speech claim is thus inapplicable to this case.

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995), is the paradigm case here. *Hurley* involved a dispute between a gay Irish-American group and the private organizer of a large St. Patrick's Day parade in Boston. The gay group wanted to participate as a unit marching in the

parade under its own banner, but the organizers refused to add a gay component to their parade's message. The group sued under a state anti-discrimination law and prevailed before the state court, which interpreted its public accommodation law to extend outside the commercial context and ordered the organizer to admit the group. The Supreme Court reversed, finding that this application of the law violated the First Amendment's prohibition on compelled speech.

The ruling of the Court in *Hurley* was based upon two key facts: (1) a parade is an "inherent[ly] expressive[]" event that communicates the speaker's message; and (2) the parade organizer is the speaker, for "we use the word 'parade' to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way." *Id.* at 568. A private parade organizer must therefore have the prerogative to select which units will march in his parade, because "every participating unit affects the message conveyed by the private organizers." *Id.* at 572–73. The compelled inclusion of unwanted units forced the organizers to alter a message they were presenting as their own.

Petitioner and its *amici* confuse the issue in their discussion of *Hurley*. They insist that photographic images sometimes constitute expression that is entitled to First Amendment protection, which is of course correct, and then argue that any business that provides commercial photography services is "inherently expressive" and cannot be subject to anti-discrimination laws. That is incorrect. The term

"inherently expressive" has a specific meaning in the Court's compelled speech cases. It refers to a setting in which a speaker is engaged in the communication of its own message.

In this respect as well, the *Rumsfeld* Court clarified the boundaries of compelled speech doctrine. Rejecting the attempt by law schools to invoke the *Hurley* line of cases, the Court held:

> Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs. A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper . . . .

Rumsfeld, 547 U.S. at 64. As the Court of Appeals correctly explained, "unlike the parade organizers in *Hurley*, here, Elane Photography is not the speaker. By taking photographs, Elane Photography does not express its own message." *Elane Photography,* 2012-NMCA-086, ¶ 29. Customers that hire Elane Photography are not paying for the privilege of facilitating the Company's own message, any more than a client pays a law firm to promote the firm's own agenda. Customers hire the Company to memorialize the ceremony they have chosen. [RP 161, 164] A commercial wedding photography business is not "inherently expressive" under *Hurley*.

NMHRA also does not require businesses to endorse the message of any customer when providing commercial services. As the Court of Appeals found, "In no context would Elane Photography's conduct alone send a message of approval for same-sex ceremonies." *Elane Photography,* 2012-NMCA-086, ¶ 28. In so holding, the Court of Appeals followed a long line of Supreme Court precedent rejecting arguments about "endorsement" in the commercial context. In *Rumsfeld*, law schools argued that "if they treat military and nonmilitary recruiters alike [in their commercial job fairs] in order to comply with the Solomon Amendment, they could be viewed as sending the message that they see nothing wrong with the military's policies." *Rumsfeld*, 547 U.S. at 64–65. The Court rejected the argument out of hand, explaining, "Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." *Id.* at 65. And in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court rejected a similar argument by a shopping center owner who objected to a state law requiring equal access to his property for private groups engaged in expressive activities, holding that views expressed by private citizens at "a business establishment that is open to the public" would "not likely be identified with those of the owner," particularly where "[t]here . . . is no danger of governmental discrimination for or against a particular message" and the business owner is free to "disavow any

connection with the message." *Id.* at 87. Courts have consistently rejected the proposition that anti-discrimination laws impose compelled "endorsement" in commercial settings.

Seeking to buttress its argument, Petitioner asserts that the Company may appear to endorse the images of its customers because it "posts those images, each displaying a watermark of the Company's logo, to a website accessible by her clients, their families, and their friends." [BIC 28]. Petitioner is confusing the mandates of NMHRA with its own discretionary business decisions. NMHRA does not require the Company to identify with its clients, publicly or otherwise. The statute merely prohibits the Company from discriminating in the "services" that it "offers . . . to the public." § 28-1-2(H). Those services are described in Petitioner's pricing package and standard form contract, and none requires the Company to display, identify with, or take ownership of clients' images. Rather, a client purchases "wedding photography services" [RP 161], which include a set number of hours of on-site photography and a budget with which to select and purchase photos through a third-party online vendor. [RP 164, 165] The contract gives the Company the right to retain copyright in photos and make use of them for "display, advertising, or any other purpose thought proper by the Studio," [RP 161], but it imposes no obligation on the Company to do anything of the kind. The same holds true when the Company puts a watermark on photos, another discretionary practice

that redounds solely to the Company's benefit and is not even mentioned in the Company's contract or description of services. If it chooses, the Company can decline to assert ownership rights in client photos, decline to use particular photos for display or advertising, and decline to include its watermark on photos posted on its vendor's website, all without offending NMHRA's mandate that it refrain from discrimination when providing "services . . . or goods to the public." § 28-1-2(H).

NMHRA does not impose a state-chosen message upon the Company. It does not intrude upon any "inherently expressive" setting in which the Company is engaged in communicating its own message. And it does not require the Company to endorse any message of its customers. The statute therefore imposes no compelled speech.

3. Petitioner's Hypotheticals are Inapposite

These clear First Amendment principles provide answers to the array of hypothetical scenarios that Petitioner and its *amici* advance. Most notably, Petitioner asks this Court to imagine that the Company provided the service of "[writing] stories chronicling [its] clients' weddings," rather than photographing them. [BIC 22–24]. That variation does not change the analysis. If a writer establishes a business advertising to the public that she will write the story of any customer's wedding for a fee, then that business cannot discriminate against couples on the basis of race, sexual orientation, or religion in violation of NMHRA, any

more than a law firm, which also tells the stories of its clients, can violate anti-discrimination laws when choosing the lawyers who write those stories, *see Hishon*, 467 U.S. at 78, or the clients they serve, *see Nathanson*, 16 Mass. L. Rptr. 761, 2003 WL 22480688, 2003 Mass. Super. LEXIS 293 (Mass. Super. 2003). These businesses memorialize the messages of customers. They do not engage in their own expression. That fact renders the compelled speech doctrine inapplicable.

Petitioner's *amicus* argues that "freelance writers, singers, and painters" or "an actor [who] refused to perform in a commercial" could also be regulated if Respondent prevails. [Cato Institute brief at 13] These assertions miss the mark, since NMHRA would not apply to freelance workers of this description. NMHRA prohibits discrimination by "any establishment that provides or offers its services, facilities, accommodations, or goods to the public," § 28-1-2(H). The Court of Appeals was careful to note that it was the Company's broad and undifferentiated advertising of its services to the general public — services that it sells almost entirely through solicitation of business on its website [Tr. 74–77] — that brought the Company within NMHRA's scope. *Elane Photography,* 2012-NMCA-086, ¶ 18. Freelancers who seek out business through word of mouth would not qualify as a public accommodation.

But consider a more apt hypothetical. Suppose that a painter sets up a store in which he offers to paint the portrait of paying customers, advertising his business to

the general public. When a White customer enters the store, however, the owner turns him away, saying, "I don't paint portraits of White people." The store would stand in violation of NMHRA, and the First Amendment would pose no obstacle. While the artist brings creative skill to his work, he is not engaged in his own expression when he sets up a portraits-for-hire store. Under *Rumsfeld*, discrimination against customers is business conduct that the State may prohibit.

In contrast, consider an artist who paints on his own time, choosing his subjects according to his own inspiration, and then sets up a store in which he sells his work to the public. *Barnette*, *Wooley* and *Hurley* would prohibit any statute from dictating the content of the painter's work. He engages in his own artistic expression when creating the work, and any interference by the State would constitute a regulation of his message. However, when that same artist brings his work to the store and sells it to the public, he may not turn away customers based upon race or any other prohibited category, even if he strongly believes that only certain types of people should own his work.

The First Amendment provides broad protection to businesses that sell expressive products and services. It prohibits government from dictating their creative choices, as in *Velazquez*, prevents the State from selecting ideological messages and using businesses as tools for their promulgation, as in *Tornillo* and *PG&E*, and protects the right of business owners to engage in their own expression.

But the First Amendment is not a libertarian manifesto entitling businesses to operate without any restrictions on their conduct in the marketplace.

The Company's owners remain free to express their own views about marriage or same-sex couples. *Elane Photography,* 2012-NMCA-086, ¶ 43; *Rumsfeld*, 547 U.S. at 60. As a practical matter, it is unlikely that many couples would choose to memorialize their special day with a company whose owners speak unfavorably about their relationship in the public square. When business owners express their views, customers often adjust their choices. The law cannot eliminate disagreement or craft perfect solutions. It can set fair terms for the market. NMHRA does exactly that.

IV. The Free Exercise Clause Does Not Grant the Company an Exemption from NMHRA

The Free Exercise Clause does not entitle a business to violate the law because of a religious objection. "[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Div. of Oregon v. Smith*, 494 U.S. 872, 879 (1990). Petitioner asks this Court to find an exception to this established rule. There are no grounds for doing so.

NMHRA does not have as its "object . . . to infringe upon or restrict practices because of their religious motivation." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). It is therefore a neutral law. It does not selectively "impose burdens only on conduct motivated by religious belief." *Id.* at 543. It is therefore generally applicable. Neutral laws of general applicability are governed by the rule in *Smith*.

Petitioner points to two exemptions in NMHRA concerning small-scale landlords, § 28-1-9(A)&(D), and argues that these exemptions render the entire statute constitutionally suspect, citing the Third Circuit's decision in *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004), for the proposition that "[s]uch categorical nonreligious exemptions impermissibly prefer the secular to the religious." [BIC 50] Petitioner either does not understand *Blackhawk* or does not understand NMHRA. The policies in *Blackhawk* were suspect because they "permit[ted] exemptions for entirely secular reasons" but refused exemptions for religious reasons. 381 F.3d at 212. The provisions in NMHRA are equally available to all landlords, whether their reasons for rejecting tenants are religious or secular.

NMHRA also includes an accommodation for "religious or denominational institution[s]" and "organization[s] . . . operated, supervised or controlled by" or "operated in connection with a religious or denominational organization." § 28-1-

9(B)&(C). Petitioner argues that these accommodations also render the whole statute constitutionally suspect, now contending that the statute is too generous to religious adherents. The argument is frivolous. The Supreme Court has held that "it is a permissible purpose to alleviate significant government interference with the ability of religious organizations to define and carry out their religious missions" by enacting such exemptions, *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987), and courts around the country have rejected Free Exercise challenges to accommodation provisions. *See, e.g., Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510, 522, 859 N.E. 2d 459, 464 (2006); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 551, 85 P.3d 67, 83 (2004).

In a last effort, Petitioner invokes the defunct "hybrid rights" doctrine. The Supreme Court has abandoned that constitutional anomaly. *See Christian Legal Soc'y*, 130 S. Ct. at 2995 n.27 (2010) (rejecting Free Exercise claim without mentioning hybrid rights, despite presence of Free Speech claim); *City of Hialeah*, 508 U.S. at 566–67 (Souter, J., concurring in part and concurring in the judgment). No precedent supports the proposition that an inadequate Free Exercise claim can join with an inadequate claim under some other constitutional provision to produce a new right. No such alchemy is possible here. Rather, the precedents that Petitioner advances require an independently sufficient claim under some constitutional provision. *See Axson-Flynn*, 356 F.3d at 1292–95 (finding student's free exercise

and free speech claims independently sufficient to defeat summary judgment); *Health Servs. Div., Health and Envtl. Dep't v. Temple Baptist Church*, 112 N.M. 262, 814 P.2d 130 (Ct. App. 1991) (free exercise claimant must assert some other adequate constitutional claim).

V. NMHRA Satisfies Strict Scrutiny

Even if this Court concludes that constitutional scrutiny is necessary, it should affirm, for the compelling purposes underlying NMHRA satisfy a strict standard. NMHRA aims to eliminate the discriminatory exclusion of New Mexico citizens from public commercial life on the basis of irrelevant and historically disfavored characteristics, and it is carefully targeted to remedy that evil. This is not a case in which state law inflicts unnecessary or excessive burdens upon objectors. NMHRA does not require the Company to participate as celebrants in any ceremony. It does not compel the Company to display unwanted images on its website, claim ownership of the images, or in any way communicate its endorsement of the ceremony to a private or public audience. The statute commands only that the Company offer its commercial photography services on the same terms to all customers without discriminating on the basis of "race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap." § 28-1-7(F). If this mandate imposes a burden, it "falls on conduct and not . . . beliefs" and is limited exclusively to conduct affecting

"commercial activities." *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994). Any burden is thus imposed in the least restrictive means available to accomplish the compelling goal of eliminating invidious discrimination from New Mexico commerce.

The trial court correctly stated the interest at stake in this dispute: "There is no doubt that the State of New Mexico has a compelling interest in reducing, if not eradicating, acts of discrimination." [RP 341-42]. As this Court has held, "the law against discrimination seeks to remedy an evil that threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state." *Sabella v. Manor Care, Inc.,* 1996-NMSC-014, ¶ 18, 121 N.M. 596, 915 P.2d 901 (quotation omitted). Federal and state courts have accorded the highest value to legislative efforts to eliminate irrational or invidious discrimination from public life. In *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–29 (1984), the Supreme Court of the United States recognized a state's compelling interest in eliminating discrimination against women from the realm of commerce when it found that a commercial membership organization could be compelled to accept women as full voting members. And in *Swanner*, 874 P.2d at 283, the Alaska Supreme Court reaffirmed the government's compelling interest in eliminating "acts of discrimination," which constitute "independent social evils" that "degrade[] individuals, affront[] human dignity, and limit[] one's opportunities,"

holding that a state antidiscrimination law could prevent a landlord from refusing to rent property to unmarried tenants. *See also Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (compelling interest in eradicating race discrimination in higher education).

Antigay discrimination is no less a matter of state concern. Gay, lesbian and bisexual people have been subject to widespread and pervasive discrimination by government, in the workplace, and in the market. When the legislature outlawed private antigay discrimination in the commercial life of New Mexico, it acted to protect citizens from damaging prejudice. As the Alaska Supreme Court has explained, that goal is a compelling one. *See Swanner*, 874 P.2d at 282–83.

NMHRA is narrowly tailored to effectuate its compelling purpose. The law aims precisely and exclusively at the evil it seeks to eradicate: individual acts of discrimination against New Mexico consumers. Because each act of discrimination inflicts the very harm sought to be avoided, the "government interest does not involve a numerical cutoff below which the harm is insignificant." *Swanner, 874 P.2d* at 282. Rather, the compelling interest in eradicating discrimination "will clearly suffer if an exemption is granted to accommodate" the religious or expressive objections of every business that asserts a protest. *Id.*

Finally, any burden that NMHRA imposes upon the Company is content neutral, making no reference to expression and addressing only the "manner" in

which the Company undertakes its craft in the commercial market. *Clark v. Committee for Creative Non-Violence*, 468 U.S. 288, 293 (1984). For the reasons described above, the compelling purposes of NMHRA justify such a burden, as the Company enjoys "ample alternative channels for communication" of its own message. *Id.*

The Supreme Court of the United States has held that the compelling interest in eradicating invidious discrimination in commerce "justifies the impact" that an antidiscrimination statute may have upon First Amendment interests so long as the statute "does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria." *Jaycees*, 468 U.S. at 623. NMHRA satisfies all these conditions.

CONCLUSION

In its brief before this Court, as in the courts below, Petitioner repeatedly emphasizes the sincerity of the beliefs that led the Company to refuse to do business with Vanessa Willock, along with the strength of its objection to NMHRA. Respondent has never challenged the sincerity of those beliefs, despite her disagreement with Petitioner's advocacy position.

Vanessa Willock has not made the harm she experienced from the Company's discrimination a centerpiece of her argument. Doing so has never been necessary to show that she is entitled to NMHRA's protection and that the statute complies with the First Amendment. But it is perhaps appropriate to end by allowing Ms. Willock's own words to convey the impact of the Company's mistreatment. When asked at the Commission hearing to describe how the Company's discrimination had affected her, Ms. Willock responded as follows:

> [T]here was shock and then there was, you know, an anger and a sadness...kind of a sense of disbelief at the blatant nature of what I was being told. And there was...there was some fear around this that it was so blatant. You know, if a business can do this because of my orientation, if this was in...in a racial way, they could do the same. . . . [I]t was very hurtful and it caused me to be anxious. I was definitely anxious in contacting other vendors as I planned...as we planned our ceremony that, you know, if I contact them, would we have a similar response? You know, I mean, we're planning a very important day and happy day for us and we're being met with ...It's...It's a hatred is how it felt; it...it...it was a blow. [Tr. 20]

Vanessa Willock is a woman of quiet dignity, a private and modest person, and the Company's act of discrimination profoundly harmed her sense of safety and belonging in the commercial life of her community. There is genuine sentiment on both sides of this dispute.

The law cannot conjure away such differences. Nor may it punish people because of their beliefs. As Justice Jackson warned, "Those who begin coercive

elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." *Barnette*, 319 U.S. at 641.

What the law can do, and what New Mexico has done, is to set fair terms of conduct that businesses operating in public commerce must observe. Like the law schools in *Rumsfeld*, the Huguenins remain free to express their beliefs often and loudly. But their beliefs do not give them license to provide a commercial service to the general public and then deny that service to certain customers on a discriminatory basis. That is a form of business conduct that the New Mexico legislature may forbid. The Constitution affords no sanctuary to invidious discrimination in the commercial arena.

Respondent respectfully asks this Court to affirm the judgment below.

Date: December 10, 2012

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