IN THE NEW MEXICO SUPREME COURT

Case No. 33,687

ELANE PHOTOGRAPHY, LLC,

Appellant-Petitioner,

v.

VANESSA WILLOCK,

Appellee-Respondent.

BRIEF IN CHIEF OF PETITIONER ELANE PHOTOGRAPHY, LLC

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ORAL ARGUMENT REQUESTED

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G), we certify that this brief complies with the type-volume limitation of Rule 12-213(F)(3). According to Microsoft Office Word 2007, the body of this brief, as defined by Rule 12-213(F)(1), contains 10,983 words.

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SUMMARY OF PROCEEDINGS

I. Nature of the Case

The New Mexico Human Rights Commission ("Commission") applied the New Mexico Human Rights Act ("NMHRA") to forbid Petitioner Elane Photography, LLC ("Elane Photography" or "Company") from declining to photograph Respondent Vanessa Willock's same-sex commitment ceremony. The District Court and the Court of Appeals upheld that decision. On appeal, Elane Photography contends that it did not violate the NMHRA and that, even if it did, applying the NMHRA here would violate the First Amendment of the U.S. Constitution and the New Mexico Religious Freedom Restoration Act ("NMRFRA").

II. Summary of Relevant Facts

A. Elane Photography's Photojournalistic and Artistically Expressive Wedding Photography

Elane Photography—a New Mexico limited liability company—is co-owned by husband and wife, Jonathan and Elaine Huguenin. [Tr.71-72;[1] RP176-77] Elaine is an artist with a degree in photography [RP162; Tr.99-101]; thus she also functions as the Company's lead photographer. [Tr.73, 96]

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[1] "Tr." refers to the transcript of the Commission's January 28, 2008 hearing.

"The arts are where [Elaine's] passions lie." [RP162] She loves creating photographs. [RP162; Tr.109, 119] That is when she "feel[s] most alive." [RP163] That "is what [she] live[s] to do." [Tr.109]

While Elane Photography has shot engagement pictures, portraits, and a few miscellaneous events, the Company primarily photographs weddings [Tr.97], and Elaine does so using her "photojournalistic" style. [Tr.100-01] Applying the principles of photojournalism—a style of photography that uses pictures to convey stories—Elaine tells the story of the wedding day through the images she creates. [Tr.79 (Elaine's pictures "tell[] the story of the day"); *id.* at 100 (Elaine's pictures "create a story out of one frame"); *id.* at 101 (Elaine "speak[s] through [her] images" and "tell[s] the [client's] story"); *see also* RP162-63] Her wedding pictures thus "convey a message" to their viewers. [Tr.84]

Elaine "take[s] the approach of a silent observer—clicking on the moments which are fresh, real and un-staged"—and creates candid photographs that capture the story of "one of the most important days of two people's lives together." [Tr.100; RP163] The record includes examples of Elaine's expressive work, such as this photograph of a bride and her grandmother embracing after the wedding ceremony:

[RP183, Supplemental Ex. K; Tr.105-06] By capturing images of weddings—events that abound with expressions of love and commitment—Elaine's photographs communicate, among other things, messages about the couple's love for [Tr.103] and commitment to each other [Tr.127]:

[RP181, Supplemental Ex. I; Tr.102-03]

When creating wedding photographs, Elaine is not passive: her creativity and artistic judgment permeate her work. Beginning with the picture-taking process, Elaine uses her artistic eye and education to decide which angles to shoot from [Tr.101 ("stand on the tables or lay on the floor")], which subjects to capture in each scene [Tr.105-06 (capturing bride hugging grandmother)], how to arrange the details in the frame [Tr.103 (using artistic composition rules)], and when to click the shutter. [Tr.106 (capturing emotion while it is "still fresh" on faces)] Elaine also choreographs some of the scenes by, for example, directing the couple to stand in front of a beautiful background while she takes pictures of them interacting. [Tr.103]

Then Elaine reviews and edits the photographs for three to four weeks. [Tr.79-80] From the approximately 1,600 images captured during the wedding, Elaine identifies the best of them [Tr.107], selecting between 150 and 400 photographs. [RP164] Next Elaine individually edits the selected images in Photoshop by cropping the scenes, adjusting the color, and converting some pictures from color to black-and-white. [Tr.107, 104-05] Elaine then creates a coffee-table picture book for all her customers [Tr.43, 108; RP164], arranging the edited images so that the book "tells the story of the day." [Tr.79]

Elaine does not give the edited images to customers who purchase her standard packages; instead, she posts the final pictures to a password-protected

website hosted by Pictage. [Tr.107-08; RP164-65] Her customers, their friends and family, and anyone with the password can access the posted pictures [RP165], each of which displays a watermark of Elane Photography's name and logo. [Tr.107-08] Even if customers, their family, or their friends purchase prints, Elane Photography continues to own the copyright for all its photos. [RP161; Tr.79-80, 109]

Jonathan and Elaine remain ever mindful about the messages communicated through the photographs Elaine creates. Company policies ensure that Jonathan and Elaine will not create images that tell "a story" or convey "a message" that is contrary to their "belief system." [Tr.80] Those policies prohibit creating photographs that would convey positive messages about abortion or pornography, portray nudity of any kind, or depict graphic scenes of blood or violence. [Tr.82-84] Thus Jonathan and Elaine have declined requests to create nude maternity pictures and photographs portraying the filming of a horror movie. [Tr.82-83]

Jonathan and Elaine are Christians, and as such, they believe the Bible's teaching that marriage is the union of a man and a woman. [Tr.85-86] They also believe that preserving marriage as the union of a man and a woman is "the best way to order society." [Tr.92] Thus while the Company wants to create photographs that tell the stories of weddings between a "bride and groom" [Tr.100-01], its policies prohibit creating images that convey an understanding of marriage that conflicts with Jonathan and Elaine's beliefs. [Tr.84] Jonathan and Elaine

believe that if they were to convey a contrary message about marriage, they would be disobeying God. [Tr.86]

Elane Photography does not refuse customers because of their sexual orientation. [Tr.85, 114] Crucial to the Company is the message conveyed through its photographs, not the sexual orientation of its customers. [Tr.80, 84-86, 88, 111, 118] Therefore Elaine will not create photographs of heterosexual polygamous weddings just the same as she will not create photographs of same-sex ceremonies. [Tr.84, 87] And she will decline to create photographs telling the story of a same-sex commitment ceremony even if the ceremony was part of a movie and the actors playing the same-sex couple were heterosexual. [Tr.125] On the other hand, Elaine will create portrait photographs for and provide other services to people who identify as homosexual so long as the message communicated through her pictures does not conflict with her beliefs about marriage. [Tr.111, 115]

B. Willock's Request and Commitment Ceremony

Intrigued by Elaine's "beautiful work" on the Company's website [Tr. 16], Willock sent an email to Elane Photography in September 2006, inquiring whether the Company would be "open to helping [her] celebrate" her same-sex "commitment ceremony." [RP167] Upon receiving this email, Elaine understood that Willock's commitment ceremony would be a wedding-like ceremony between persons of the same sex, and that it would involve many of the expressive

elements—like a ring exchange, vows, and a pronouncement—that typically occur at a wedding ceremony. [Tr.113, 127]

Jonathan and Elaine declined Willock's request because they did not want to create photographs that would communicate the central message conveyed by that ceremony [Tr.87]—that it is "acceptable for one woman to be married to [another] woman." [Tr.129-30] They believed that creating photographs telling the story of that event would express a message contrary to their sincerely held beliefs, and that doing so would disobey God. [Tr. 86-87, 111, 115] Elaine thus sent an email to Willock politely declining her request to help celebrate the ceremony. [RP168]

More than two months later, Willock sent another email, asking whether Elane Photography offers its "services to same-sex couples." [RP169] Elaine's response stated that the Company does "not photograph same-sex weddings," and thanked Willock for her interest. [RP170]

In September 2007, Willock, her partner, and 75 guests celebrated the couple's wedding-like commitment ceremony and reception. [Tr.31-35] Reverend Pintki Murray—an interfaith minister of the Unity Church [Tr.50-51]—presided over the ceremony, which, like a wedding, included flower girls, a ring bearer, a procession, and a traditional white wedding dress. [Tr.33, 37-38, 56-57] Reverend Murray greeted the assembled guests, saying: "We're all here to witness and celebrate this union" so that the couple can "be joined as partners in life." [Tr.61]

Later Willock and her partner exchanged rings and recited vows they had written. [Tr.62-63] Reverend Murray then prayed and concluded the ceremony by pronouncing Willock and her partner either "partners in life" or "partners in love." [Tr.65-66]

Willock hired a photographer for the ceremony [Tr.21], and paid that photographer $1,200 [Tr.23], which is less than the cost of Elane Photography's base package. [RP164]

III. Course of Proceedings Below

In December 2006, Willock filed a discrimination complaint with the Human Rights Division of the New Mexico Department of Labor, alleging that Elane Photography discriminated against her because of her sexual orientation in violation of the NMHRA. [RP16] The Division investigated and found that probable cause existed for the complaint. *See* NMSA 1978, § 28-1-10(B)-(C) (2005). Proceedings then commenced before the Commission, and in January 2008, the hearing examiner conducted an evidentiary hearing. [RP9] In April 2008, the Commission issued its decision concluding that the Company violated the NMHRA and ordering Elane Photography to pay Willock $6,637.94 in attorney fees and costs. [RP28]

In July 2008, Elane Photography appealed the Commission's decision to the District Court. [RP1] In July 2009, the parties, relying entirely on the evidentiary

record created before the Commission, submitted cross-motions for summary judgment. [RP74, 118] In December 2009, the District Court granted Willock's motion, denied Elane Photography's motion, and dismissed Elane Photography's appeal. [RP328] Elane Photography sought review by the Court of Appeals, which affirmed the District Court's ruling. *Elane Photography, LLC v. Willock*, 2012-NMCA-086, __ N.M. __, 284 P.3d 428.

While recognizing that the Company declined Willock's request because Jonathan and Elaine did not want to create photographs expressing a particular "message" about marriage, *id.* at ¶20, the Court of Appeals nevertheless concluded that "Elane Photography intentionally discriminated against [Willock] because of her sexual orientation." *Id.* at ¶22. The court then rejected the Company's compelled-speech claim because it erroneously determined that "Elane Photography is not [a] speaker." *Id.* at ¶29. It reached this conclusion by, among other things, mistakenly applying expressive-conduct/symbolic-speech principles to resolve the Company's compelled-speech claim. *Id.* at ¶¶25-29. The Court of Appeals next denied Elane Photography's constitutional free-exercise claims by declining to apply strict scrutiny. *Id.* at ¶¶31-40. Lastly, the court distorted the plain language and ignored the well-understood purpose of NMRFRA, holding that the statute does not apply here because the government is not "an adverse party in the litigation." *Id.* at ¶47.

ARGUMENT

I. Elane Photography Did Not Decline to Photograph Willock's Ceremony Because of Her Sexual Orientation and Thus Did Not Violate the NMHRA.

Whether Elane Photography engaged in unlawful discrimination in violation of the NMHRA is a question of law reviewed de novo. *See Montgomery v. Lomos Altos, Inc.,* 2007-NMSC-002, ¶16, 141 N.M. 21, 150 P.3d 971 (filed 2006). Elane Photography preserved this issue by raising it to the Commission [Resp. Br. 15-19], the District Court [RP131-137, 238-40, 286-89], and the Court of Appeals [BIC15-21; RB3-4].

The relevant provision of the NMHRA—NMSA 1978, § 28-1-7(F) (2004)—prohibits a public accommodation from "mak[ing] a distinction, directly or indirectly, in offering or refusing to offer its services . . . or goods to any person because of . . . sexual orientation[.]" Here, however, Elane Photography did not decline to create photographs of Willock's ceremony because of her sexual orientation, but because Jonathan and Elaine did not want to create photographs that would convey a *message* about marriage that conflicts with their beliefs. The Company thus did not violate the NMHRA.

The evidence demonstrates that Jonathan and Elaine declined Willock's request because they did not want to convey through Elaine's pictures the story of an event celebrating an understanding of marriage that conflicts with their beliefs.

[Tr.87] Willock's sexual orientation was not the motivating factor. [Tr.84-85, 88, 111, 114, 118] Elaine would have declined the request even if the ceremony was part of a movie and the actors playing the same-sex couple were heterosexual. [Tr.125] Elaine would have similarly denied a request to create photographs telling the story of a heterosexual polygamous wedding because that too contradicts her understanding of marriage as the union of a man and a woman. [Tr.84, 87] Further showing that the Company did not harbor an impermissible intent, Elaine testified that she would have created other photographs for Willock, such as personal portraits, so long as the images would not have expressed what Elaine considered to be a personally objectionable message about marriage. [Tr.111, 115]

Ignoring that Jonathan and Elaine were motivated by the message alone, while pretending that they harbored illicit motives about Willock's sexual orientation, would launch this Court headlong into an unconstitutional application of the NMHRA that would coerce Elane Photography to engage in unwanted expression. But courts must construe statutes, whenever possible, "to avoid constitutional questions," *Lovelace Med. Ctr. v. Mendez*, 111 N.M. 336, 340, 805 P.2d 603, 607 (1991), and "unconstitutional" results. NMSA 1978, § 12-2A-18(A)(3) (1997). Adhering to these rules of statutory construction, this Court should refuse to find a NMHRA violation when a business that creates and sells

expression (like Elane Photography) declines a customer's request to create expression because it disagrees with the message conveyed.

That construction of the NMHRA would likewise shield, as it should, an African American photographer's refusal to create photographs telling the story of a Ku Klux Klan rally. *See Elane Photography*, 2012-NMCA-086, ¶21. Just as that photographer is motivated not by the race of the customer, but by a desire to refrain from communicating the racial-themed messages of the Klan event, so Elane Photography was motivated not by Willock's sexual orientation, but by its desire to abstain from communicating messages about an alternative understanding of marriage. The Court of Appeals' simplistic dismissal of this hypothetical is indefensible. Had that court applied its analysis consistently, it would have ruled in Elane Photography's favor, for a same-sex commitment ceremony is no more a "protected class" than the Klan is. *See id.*

II. The Commission's Decision Prohibiting Elane Photography from Declining to Create Photographs Telling the Story of a Same-Sex Commitment Ceremony Violates the First Amendment's Compelled-Speech Doctrine.

Appellate courts reviewing constitutional compelled-speech claims must independently examine the whole record without deference to the lower courts on any issue (even factual findings). *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995); *see also Bose Corp. v. Consumers Union,* 466 U.S. 485, 499 (1984). Elane Photography preserved this

compelled-speech question by raising it to the Commission [Resp. Br. 19-26], the District Court [RP137-146, 240-52, 289-96], and the Court of Appeals. [BIC21-34; RB4-12]

The First Amendment of the U.S. Constitution protects freedom of expression from government coercion. U.S. Const. amend. I. The constitutional right to free speech "includes both the right to speak freely and the right to refrain from speaking." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *see also Hurley*, 515 U.S. at 573 (discussing the right to "decide what not to say"). The right to refrain from expression is embodied in the U.S. Supreme Court's compelled-speech doctrine. *See Rumsfeld v. FAIR*, 547 U.S. 47, 61-65 (2006).

The Supreme Court has recognized that compelled-speech violations may occur in at least two ways. The first is when the government compels an entity to engage in unwanted expression (or punishes an entity for refusing to engage in unwanted expression). *Id.* at 61; *see e.g.*, *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (government may not require schoolchildren to recite the Pledge of Allegiance); *Wooley*, 430 U.S. at 717 (government may not require citizens to display state motto on their license plates). The second is when the government forces an entity to "host or accommodate" another's expression (or punishes an entity for refusing to facilitate another's speech). *Rumsfeld*, 547 U.S. at 63; *see, e.g.*, *Pacific Gas and Elec. Co. v. Public Utils. Comm'n of Cal.*, 475

U.S. 1, 20-21 (1986) (plurality) (government may not require a company to include a third party's newsletter in its billing envelope); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (government may not require a newspaper to include a third party's writings in its editorial page).

The Commission's application of the NMHRA punishes Elane Photography for declining to create expressive photographs telling the story of a same-sex commitment ceremony; therefore it effectively compels the Company (uninterested in enduring additional punishment) to create those photographs in the future. As we will demonstrate below, the Commission's decision thus violates both compelled-speech theories—(1) by requiring Elane Photography to engage in unwanted expression, and alternatively (2) by requiring the Company to facilitate the message of a same-sex commitment ceremony. Notably, the Commission's decision would require Elaine not just to parrot or host another's prepackaged message (as in *Barnette*, *Wooley*, *Pacific Gas*, and *Tornillo*), but actually to *create* unwanted expression. This inflicts a particularly egregious compelled-speech violation that goes beyond what the Supreme Court has previously addressed.

Supreme Court precedent nevertheless demonstrates that the Commission's application of the NMHRA violates Elane Photography's First Amendment rights. The Court has repeatedly recognized that state sexual-orientation nondiscrimination laws, even though constitutional on their face, are at times

applied in ways that violate the First Amendment. *See Hurley*, 515 U.S. at 572-73 (First Amendment right against compelled speech prohibits the government from applying a nondiscrimination law to force a parade organizer to facilitate the message of a homosexual-advocacy group); *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000) (First Amendment right of expressive association prohibits the government from applying a nondiscrimination law to force the Boy Scouts to accept a scoutmaster who openly identifies as homosexual). Of particular relevance here, the *unanimous* Court in *Hurley* held that Massachusetts violated the compelled-speech doctrine by applying its sexual-orientation nondiscrimination statute to compel an organization to host another's message in a way that alters the contents of its own speech. 515 U.S. at 573. Likewise, here, the Commission's decision violates Elane Photography's compelled-speech rights by coercing Elaine to create expressive photographs and, in doing so, to alter the contents of her speech.

A. The First Amendment Applies to Elane Photography's Wedding Photographs.

First Amendment protection applies with full force to commercial businesses like Elane Photography that engage in and sell expression. The right against compelled speech is "enjoyed by business corporations." *Hurley*, 515 U.S. at 574; *see also Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876, 899-900 (2010) (collecting cases); *Pacific Gas*, 475 U.S. at 16. "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); *see also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988); *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967). Therefore the "sale or dissemination" of expression, in addition to its creation, is "protected under the First Amendment." *Mastrovincenzo v. City of New York*, 435 F.3d 78, 92 (2d Cir. 2006).

The First Amendment thus applies here so long as the items that the Commission's decision would require Elane Photography to create and sell—Elaine's wedding photographs—are expressive. Yet the Court of Appeals' analysis wholly missed the mark on this point, opining that "the threshold question is whether Elane Photography's *conduct* is predominantly expressive." *Elane Photography*, 2012-NMCA-086, ¶25 (emphasis added). With this misplaced focus, the court assessed whether the Company's "conduct of taking wedding or ceremonial photographs," *id.* at ¶28, or its "conduct in accepting or refusing services," *id.* at ¶29, was expressive. But the proper analysis asks whether the Company's wedding photographs—the very goods that it would be required to produce and sell—constitute protected expression. *See Hurley*, 515 U.S. at 568-70 (evaluating whether the service that the complainant sought to access—the organization's parade—was expressive); *cf. Rumsfeld*, 547 U.S. at 64 (noting "the

expressive quality" of "a parade" (*Hurley*), "a newsletter" (*Pacific Gas*), and an "editorial page" (*Tornillo*)).

The root of the Court of Appeals' analytical error is readily apparent: it applied expressive-conduct/symbolic-speech analysis to Elane Photography's compelled-speech claim. The court below repeatedly cited and obviously drew its analytical principles from *Rumsfeld*'s expressive-conduct/symbolic-speech analysis rather than *Rumsfeld*'s compelled-speech discussion. *Compare Elane Photography*, 2012-NMCA-086, ¶¶27-28, *with Rumsfeld*, 547 U.S. at 66. But the Supreme Court has always analyzed those distinct claims differently. *Compare Rumsfeld*, 547 U.S. at 61-65 (analyzing a compelled-speech claim); *with id.* at 65-68 (analyzing an expressive-conduct/symbolic-speech claim); *accord Wooley*, 430 U.S. at 713 (treating the symbolic-speech issue separately from the compelled-speech issue). For this reason, the Court of Appeals' First Amendment analysis (which is permeated by this foundational error) and its discussion of *Rumsfeld* distort Supreme Court precedent and are unpersuasive.

Focusing on Elaine's wedding photographs (rather than miscellaneous aspects of the Company's conduct), this Court should conclude that the First Amendment applies here because (1) Elane Photography's wedding photographs constitute expression, and (2) as the creator of those photographs, Elaine is the speaker of the messages conveyed through them.

1. Elane Photography's Wedding Photographs Constitute Protected Expression.

It is well settled that photographs typically constitute expression protected by the First Amendment. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 246 (2002) (finding that a "visual depiction" in a photograph of people "engaging in sexual activity" is protected speech); *Regan v. Time, Inc.*, 468 U.S. 641, 646-48 (1984) (acknowledging without reconsidering the lower court's finding that a "photographic color reproduction of $100 bills" is protected speech); *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) ("[P]ictures . . . have First Amendment protection"); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) ("The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including . . . photographs."); *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) ("[P]hotographs . . . always communicate some idea or concept to those who view [them], and as such are entitled to full First Amendment protection.").[2]

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[2] Copyright law confirms the artistic and expressive nature of photographs. "Photos are generally viewed as creative, aesthetic expressions of a scene or image and have long been the subject of copyright." *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1177 (9th Cir. 2012). Copyright protection applies equally to photographs capturing events or scenes, *see Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1074 (9th Cir. 2000) (Matthew Brady's civil-war "depictions of battle on the front lines"), and photographs depicting posed subjects. *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884) (Oscar Wilde portrait).

Consistent with this general rule, Elane Photography's wedding photographs are protected by the First Amendment because their purpose is expressive and they communicate to viewers. As a photojournalistic wedding photographer, Elaine "speak[s] through [her] images," "create[s] a story out of [each] frame," and fashions "photographs that capture the entirety of [the wedding] day"; in short, she produces images that tell the story of the wedding in pictures. [Tr.100-01; RP162-63] *See Dale*, 530 U.S. at 653 (calling for "deference to [an organization's] assertions regarding the nature of its expression"). Traditional and wedding photojournalists overwhelmingly affirm that, like Elaine, their pictures convey stories. *See, e.g.*, Brian Horton, *Associated Press Guide to Photojournalism* 14 (2d ed. 2001) (Photojournalism is "[t]elling a story with a picture"); Bill Hurter, *The Best of Wedding Photojournalism* 15 (2d ed. 2010) ("Above all, the skilled wedding photojournalist is an expert storyteller."); Tracy Dorr, *Advanced Wedding Photojournalism* 73 (2010) ("[T]he moments that we as photojournalists strive so hard to catch are the ones that tell the story"); Wedding Photojournalist Association Homepage, http://www.wpja.com/ (last visited Oct. 17, 2012) ("It is our goal to use photography to tell the story of your wedding day").

An objective assessment of Elaine's work confirms that she tells the story of the wedding day through her photographs. She does not merely take posed pictures of the couple and their family; using her artistic skills and creativity, she captures

images depicting the scenes as they unfold. [Tr.100, 105-06; *see e.g.*, RP183, Supplemental Ex. K (bride embracing grandmother)] Elaine also choreographs, captures, edits, and produces images portraying the love and affection between the couple. [RP181-82, Supplemental Exs. I & J; Tr.102-05, 127] In addition, she (acting as editor and graphic designer) arranges the best pictures in a book that "tells the story of the day." [Tr.79]

Elaine creates images that convey a positive and approving rendition of the weddings she shoots; thus her photographs communicate favorable and supportive messages about those events. [*See* Tr.103, 106] Even though Elaine's many artistic and creative decisions impact the messages communicated through her wedding photos, some of her images will inevitably express the messages inherent in that event. Primary messages communicated at a wedding—and thus through Elaine's photographs—are the couple's love for each other [Tr.103], their commitment to each other [Tr.127], and the joyful celebration of their relationship [Tr.39]. *See* Hurter, *supra*, at 25 ("create pictures that tell the story of the fun" and "celebration"); Dorr, *supra*, at 15 (make pictures telling "the joy of the[] wedding day"). All these positive messages convey an undeniably favorable depiction of the photographed event. *See* Hurter, *supra*, Wedding Photojournalism at 15 (create a "flattering portrayal of the events"); Dorr, *supra*, at 107 (portray a "romantic depiction of the day").

Elaine conveys her pictorial account of the wedding story to an audience, which, at a minimum, includes her customers, their families, and their friends. Elaine posts the final pictures, which contain a watermark of the Company's logo, to a password-protected website. [Tr.107-08; RP165] Her customers and their friends and family (and anyone else who knows the password) can access the pictures posted there. [RP165] In addition, Elaine sends the coffee-table book to her customers, who, in turn, will show it to their friends and family. [Tr.43; RP164]

In sum, then, by communicating a positive story of the wedding day to an audience, Elane Photography's wedding pictures constitute protected expression. The First Amendment thus applies here because the Commission's decision would coerce the Company to create and disseminate wedding photographs that convey expressive messages.

2. Elane Photography Is the Speaker in Its Wedding Photographs.

Notwithstanding the Court of Appeals' contrary conclusion, *see Elane Photography*, 2012-NMCA-086, ¶¶27, 29, Elane Photography is undoubtedly the speaker telling the wedding story through its photographs. Elaine's creativity and artistic judgment permeate her creation of wedding photographs. Beginning with the picture-taking process, she uses her artistic eye and education to decide which angles to shoot from [Tr.101], which subjects to focus on in each scene [Tr.105-

06], how to arrange the details in the frame [Tr.103], and when to click the shutter. [Tr.106] In addition, Elaine choreographs some of the scenes she shoots. [Tr.103] All these decisions directly shape the messages conveyed when Elaine "tell[s] the [couple's] story" through her pictures. [Tr.101] *See* Meghan McEwen, *Working the Camera Angles at the Wedding*, WedPix Magazine, http://www.wedpix.com/articles/009/working-the-camera-angles/ (last visited Oct. 17, 2012) ("[T]he photographer's individual character and point of view" determine "*how* the story gets told"); Glen Johnson, *Digital Wedding Photography* 26 (2006) ("As the photographer, it is your obligation to decide how you want to record the [event]").

After the wedding has concluded, Elaine reviews and edits the photographs for three to four weeks, acting as editor and graphic designer of the wedding story. [Tr.79-80] She begins by selecting the choicest 150 to 400 pictures from the 1,600 captured images. [Tr.107; RP164] By choosing certain pictures and discarding others, Elaine dictates the contents of the story that she will tell through her finished product. Next Elaine individually edits the selected images by cropping the scenes, adjusting the color, and applying other artistic techniques. [Tr.107, 104-05] This editing process, particularly the cropping of images, further alters the messages that her final pictures will convey. Finally, Elaine's selection and arrangement of pictures for the coffee-table book directly affect the messages conveyed when she "tells the story of the day" in that album. [Tr.79] In short, all

these creative and artistic decisions produce pictures that embody Elaine's own expression about the wedding day.

An illustration bolsters the point. Suppose that Elaine was an author and her business wrote stories chronicling her clients' weddings. Just as the hypothetical Elaine's written rendition of a wedding story embodies her expression, the real Elaine's photographs are her expression—her pictorial portrayal of that wedding story. Like a writer who selects topics, chooses words, focuses on themes, and edits her verbiage, Elaine selects which subjects to capture, decides which pictures to take, chooses which pictures to produce, and edits the selected pictures to her artistic tastes. In the end, the expression in the photographs is Elaine's; it is her version of the wedding story communicated through pictures; no other photographer would give the same account.

Resisting this conclusion, the Court of Appeals suggested that to qualify as a "speaker," the Company must originally generate every component of the messages it conveys. *See Elane Photography*, 2012-NMCA-086, ¶29 ("Elane Photography does not express its own message"). But the First Amendment does not "require a speaker to generate, as an original matter, [the] item[s] featured in [its] communication." *Hurley*, 515 U.S. at 569-70. In fact, Supreme Court case law recognizes that many individuals and entities qualify as speakers for First Amendment purposes even though they express only messages that others

originate (if not wholly dictate). *See, e.g.*, *Wooley*, 430 U.S. at 715 (couple displayed the state motto on their license plate); *Hurley*, 515 U.S. 569-70 (parade organizers compiled "multifarious voices" of others); *see also ETW Corp.*, 332 F.3d at 925 ("Publishers disseminating the work of others who create expressive materials also come wholly within the protective shield of the First Amendment.") (citing Supreme Court cases). Thus Elaine's creation of expression telling the story of her clients' weddings fits squarely within First Amendment protection.

Having established that the First Amendment applies to Elane Photography's wedding photos, we now demonstrate that the Commission's decision violates both theories of the compelled-speech doctrine.

B. The Commission's Decision Violates the Compelled-Speech Doctrine by Requiring Elane Photography to Create and Engage in Expression.

A compelled-speech violation, as discussed above, occurs when the government coerces an entity to express an unwanted message. *See Rumsfeld*, 547 U.S. at 61 (discussing *Barnette*'s forced recitation of the Pledge and *Wooley*'s forced portrayal of the state motto). The Commission's decision violates the compelled-speech doctrine by requiring Elane Photography to create expression and convey unwanted messages through its pictures.

Compelling Elane Photography to photograph a same-sex commitment ceremony would require the Company to create pictures communicating the story

of a wedding-like event between two persons of the same sex. This story would convey both a factual message—that same-sex couples conduct wedding-like ceremonies to celebrate their relationships—and an approval message—that same-sex unions are good and worthy of celebration. *See Dale*, 530 U.S. at 653 (calling for "deference to [an organization's] assertions regarding the nature of its expression"). But the Commission may not coerce Elane Photography to create expression conveying either of these messages.

The rule against compelled speech "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid[.]" *Hurley*, 515 U.S. at 573. "[C]ompelled statements of fact . . . , like compelled statements of opinion, are subject to First Amendment scrutiny." *Rumsfeld*, 547 U.S. at 62; *accord Riley*, 487 U.S. at 797-98. Recognizing this, the *Hurley* Court found that the State may not apply its sexual-orientation nondiscrimination law to compel expression that would merely "bear witness to the fact that some Irish are gay, lesbian, or bisexual." *Hurley*, 515 U.S. at 574-75. This Court should similarly conclude that the First Amendment prohibits the Commission from requiring Elane Photography to communicate through its

photographs the factual message that same-sex couples conduct wedding-like ceremonies to honor their relationships.[3]

Not only would Elaine's photographs of a same-sex commitment ceremony express this factual message, those pictures would also communicate (contrary to the Court of Appeals' assertion) "a message of approval for same-sex ceremonies." *See Elane Photography*, 2012-NMCA-086, ¶28. Elaine's wedding photographs, after all, are not neutrally presented; her images positively portray the weddings she shoots, for this is what she is hired to do. Elaine's photographs of a same-sex commitment ceremony thus would communicate an approval message—that these unions are good and worthy of celebration. Although a compelled-speech claim does not require forced expressions of endorsement, *see Hurley*, 515 U.S. at 573, requiring Elaine to convey this approval message is particularly troubling because it compels the Company to promote as good an idea that Jonathan and Elaine deem religiously and politically objectionable. [Tr.87, 92, 111, 115] *See Wooley*, 430

[3] Supreme Court precedent further demonstrates that the First Amendment applies to the factual message that Elaine would express through her pictures of a same-sex commitment ceremony. The Supreme Court has concluded that "the visual depiction" in a photograph "of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society" is protected speech. *Free Speech Coal.*, 535 U.S. at 246. Because photographs depicting the idea of teenagers engaging in sexual activity are sufficiently expressive to invoke the First Amendment, the Constitution also applies to photographs conveying the idea of same-sex couples engaging in wedding-like commitment ceremonies.

U.S. at 713-15 (compelling citizens to express a message that they deemed religiously and politically objectionable).

Elane Photography has established its compelled-speech claim by showing that the photographs it would be required to create constitute protected expression. *See id.* at 715 (compelled-speech violation found where citizens forced to express a message). But the Court of Appeals' analysis implies that to prevail Elane Photography must also show (1) that an observer would identify the Company with Elaine's expressive photographs of a same-sex commitment ceremony, (2) that an observer would think that Elaine intended to express a message through those photographs, and (3) that an observer would receive a particularized message from those photographs. *See Elane Photography*, 2012-NMCA-086, ¶¶28-29. But that court's preoccupation with these considerations—and, more broadly, with the details of what an "observer" might think about Elaine's intent or message—derived from its misappropriation of expressive-conduct/symbolic-speech principles. *Compare id.* at ¶28, *with Rumsfeld*, 547 U.S. at 66. Compelled-speech analysis, in contrast, does not hinge on these factors.

First, the compelled-speech doctrine prohibits the government from invading the freedom of the mind (regardless of whether others would know about it); thus Elane Photography need not show that viewers of Elaine's photographs depicting a same-sex commitment ceremony would know who created them. The purpose of

the compelled-speech doctrine is to protect "the sphere of intellect and spirit which it is the purpose of the First Amendment to reserve from all official control." *Wooley*, 430 U.S. at 715 (quoting *Barnette*, 319 U.S. at 642) (alteration omitted); *see also id.* at 714 (compelled-speech doctrine is grounded in "the right of freedom of thought" and "the broader concept of 'individual freedom of mind'"); *Free Speech Coal.*, 535 U.S. at 253 ("The right to think is the beginning of freedom"). This freedom of the mind is unconstitutionally invaded when the government coerces Elaine to spend weeks of artistic, creative, and expressive work forming images that would convey an approving story of a same-sex commitment ceremony. The constitutional violation occurs regardless of whether viewers of the images would know Elaine's identity. Even still, it is surely true that if Elane Photography were compelled to create pictures of a same-sex commitment ceremony, many viewers of those photographs would know that the Company created them. For Elaine would post those images, each displaying a watermark of the Company's logo, to a website accessible by her clients, their family, and their friends. [Tr.107-08; RP164-65]

Second, Elane Photography need not establish that viewers of those images would think that the Company intended to communicate through them. For compelled-speech purposes, it is sufficient that those photographs would in fact communicate the story of a same-sex commitment ceremony (not to mention all

the messages conveyed by that story). This principle is supported by (though not discussed in) *Wooley* because no reasonable observer would think that two motorists intend to express the state motto simply because it appears on their, like all others', state-issued license plates. 430 U.S. at 715.

Third, Elane Photography need not show that viewers would glean an "obvious," "particularized," or "succinctly articulable message" from those photographs. *See Hurley*, 515 U.S. at 569; *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007). If it were otherwise, much artistic expression would fall outside constitutional protection. *See Hurley*, 515 U.S. at 569.

Setting aside these extraneous considerations, this Court should conclude that the Commission's decision violates the compelled-speech doctrine by requiring Elane Photography to create unwanted expression.

C. The Commission's Decision Violates the Compelled-Speech Doctrine by Requiring Elane Photography to Facilitate the Message of a Same-Sex Commitment Ceremony.

A compelled-speech violation alternatively occurs when (1) the government "force[s] one speaker to host or accommodate another speaker's message" and (2) the hosting speaker's own expression is "affected by the speech it [is] forced to accommodate." *Rumsfeld*, 547 U.S. at 63 (discussing *Hurley*'s forced inclusion of a group in a parade, *Pacific Gas*'s forced inclusion of a newsletter in a company's billing envelope, and *Tornillo*'s forced inclusion of an op-ed in a newspaper's

editorial page). The Commission's decision would require Elane Photography to facilitate—by creating expressive photographs conveying—the story of a same-sex commitment ceremony and the messages of that event. [Tr.129-30] This would affect the Company's own speech communicated through Elaine's wedding pictures—and its preferred message of telling wedding stories about marriages between a man and a woman [Tr.100-01]—in at least four constitutionally significant ways.

First, and most obviously, coercing Elaine to tell the story of a same-sex commitment ceremony through her pictures requires her to create expression and thus directly affects the messages that the Company communicates through its images. *Cf. Rumsfeld*, 547 U.S. at 64 (unlike Elaine when she creates wedding photographs, law schools are not engaged in expression "when they host interviews and recruiting receptions").

Second, forcing Elaine to spend a day shooting pictures and three to four weeks selecting, editing, and arranging images—all to tell the story of a same-sex commitment ceremony—takes up time that she could devote to her preferred message of telling wedding stories about marriages between a man and a woman. *See Rumsfeld*, 547 U.S. at 64 (stating that the "interference with [the] speaker's desired message" in *Tornillo* and *Pacific Gas* resulted from forcing the newspaper and the company to "tak[e] up space that could be devoted to other material").

Third, requiring Elaine to create photographs communicating the story of a same-sex commitment ceremony would chill her speech, for she "might well conclude that the safe course" is to stop creating expressive photographs for all weddings. *See Tornillo*, 418 U.S. at 257. Furthermore, she might cease photographing all events, fearing similar punishment for declining to create expressive pictures of other events conveying messages that she deems objectionable.

Fourth, because Elaine's photographs telling the story of a same-sex commitment ceremony would communicate messages about marriage that are directly contrary to the messages Elane Photography wants to express, the Company would be "forced either to appear to agree" with the messages communicated through those pictures "or to respond" by clarifying its views. *See Pacific Gas*, 475 U.S. at 15. Creating this pressure to speak is "antithetical" to the First Amendment. *Id.* at 16.

Notwithstanding all of this, the Court of Appeals rejected the compelled-speech claim because, in its opinion, Elane Photography is a "mere conduit for another's expression." *Elane Photography*, 2012-NMCA-086, ¶27. Yet as demonstrated in Sections (II)(A) and (II)(B), the Commission's decision would require Elaine not simply to host or facilitate another's expression, but to create

and convey her own expression through her photographs. Thus the Company is not functioning as a "mere conduit."

But even if Elane Photography were a mere conduit for another's expression, that does not end the matter. Entities forced to act as conduits for others' expression experience compelled-speech violations when their own speech is affected. *See Rumsfeld*, 547 U.S. at 63-64 (discussing *Hurley*, *Pacific Gas*, and *Tornillo*). As demonstrated above, Elane Photography's own speech is affected in at least four ways; thus even if the Company is acting as a conduit when it creates wedding photographs, it (like the parade organizers in *Hurley*, the company in *Pacific Gas*, and the newspaper in *Tornillo*) has nevertheless established a compelled-speech violation.

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

Government action that compels expression is subject to strict scrutiny. *Pacific Gas*, 475 U.S. at 19. Under that heightened level of review, the government's actions are presumed unconstitutional unless they are a "narrowly tailored means of serving a compelling state interest." *Id.*

When engaging in this constitutional analysis, the relevant state interest is not the government's broad purpose for enacting the law, but its particular interest in applying the law under these circumstances. *See Hurley*, 515 U.S. at 578-79. In

Hurley, for example, the Court did not evaluate the government's general interest in preventing discrimination, but its particular interest in applying the law to the expression at issue. *Id.* at 578. There, as here, the apparent purpose of applying the law to an organization's expression was "simply to require [it] to modify the content of [its] expression to whatever extent beneficiaries of the law choose to alter it." *Id.* Such an unconstitutional interest—which "allow[s] exactly what the [First Amendment] forbids," *id.*—does not trump Elane Photography's right against compelled expression. This alone is sufficient to show that strict scrutiny is not satisfied. Nevertheless, we discuss additional strict-scrutiny considerations in Section (III)(B)(2) and incorporate that analysis here.

This Court, though, need not belabor this strict-scrutiny analysis. The Supreme Court has twice applied strict scrutiny to similar applications of sexual-orientation nondiscrimination statutes, and in both instances the Court held that the application of those laws to infringe First Amendment rights did not satisfy strict scrutiny. *See Hurley*, 515 U.S. at 578-79; *Dale*, 530 U.S. at 657-59. This Court should reach the same conclusion here.

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

In her response to Elane Photography's Petition for Writ of Certiorari, Willock claims that protecting the Company's rights against compelled expression

would exempt from the NMHRA "every business [that] involv[es] people talking to one another." [Willock Resp. to Cert. Pet. at 15] Yet this hyperbole is without foundation.

Let us illustrate by highlighting four limitations in Elane Photography's compelled-speech theory. First, the compelled-speech claim presented here would apply only to businesses that *create and sell expression* to their clients. This would include, for example, newspapers, marketers, publicists, lobbyists, speech writers, film makers, and other artists.

Second, this compelled-speech claim would apply only to claims under the public-accommodation provision of the NMHRA, *see* § 28-1-7(F); indeed, it is difficult to envision this theory ever applying to claims brought under the NMHRA's many employment and housing provisions. *See* § 28-1-7(A)-(E), (G)-(H), (J). Thus, for example, the compelled-speech claim presented here would not shield a law firm who refuses to promote female attorneys, *see Hishon v. King & Spaulding*, 467 U.S. 69, 78 (1984); but it would protect a firm's decision not to advocate an argument that its partners cannot in good conscience advance.

Third, Elane Photography's compelled-speech claim would not entirely exempt from the NMHRA's public-accommodation provision a business that creates and sells expression. It would apply only when a potential client demands that the business create and sell expression (as opposed to a request for

unexpressive goods or services that the business provides). Thus, while the Company's compelled-speech theory applies here, it would not protect a photography company's refusal to capture unexpressive portfolio snapshots akin to those "taken in photography booths." *See State v. Chepilko*, 965 A.2d 190, 200 (N.J. Super. Ct. App. Div. 2009).

Fourth, the compelled-speech doctrine would not necessarily guard every refusal to create and sell expression. For where strict scrutiny is satisfied, the right against compelled speech is subordinated. *See Pacific Gas*, 475 U.S. at 19.

The Supreme Court has already told us that the First Amendment—and the compelled-speech doctrine in particular—will mandate some incisions into certain applications of the States' ever-expanding public-accommodation nondiscrimination laws. *See Hurley*, 515 U.S. at 578-79; *Dale*, 530 U.S. at 657-59. Seeking to avoid this result here, Willock tries to sell a daunting image—that affirming Elane Photography's rights spells the end of nondiscrimination laws. But that is a distorted picture, one that this Court should not buy.

III. The Commission's Decision Prohibiting Elane Photography's Religiously Mandated Refusal to Create Certain Expressive Photographs Restricts the Free Exercise of Religion in Violation of NMRFRA.

Whether NMRFRA protects Elane Photography from the Commission's decision is a question of law reviewed de novo. *Cook v. Anding*, 2008-NMSC-035, ¶7, 144 N.M. 400, 188 P.3d 1151. Elane Photography preserved this NMRFRA

defense by raising it before the Commission [Resp. Br. 30-33], the District Court [RP152-54, 257-58, 296-98], and the Court of Appeals. [BIC45-48; RB12-16]

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

When rejecting Elane Photography's NMRFRA defense, the Court of Appeals held that "NMRFRA is applicable only in cases that involve a government agency as an adverse party in the litigation." *Elane Photography*, 2012-NMCA-086, ¶47. This conclusion incorrectly construed the plain language of NMRFRA, ignored the widely understood purpose of this *unanimously* enacted statute, and endorsed a statutory construction that will produce absurd results.

"[The] primary goal when interpreting a statute is to determine and give effect to the Legislature's intent. [Courts] do so by first looking to the statute's plain language and giving effect to the plain meaning of the words therein." *Cook*, 2008-NMSC-035, at ¶7 (citation omitted). The Court of Appeals purported to rely on "[t]he text of the NMRFRA," claiming that the statute allows "a claim or defense *to* 'obtain appropriate relief against a government agency.'" *Elane Photography*, 2012-NMCA-086, ¶46 (quoting NMSA 1978, § 28-22-4(A) (2000)) (emphasis added). But that is not what NMRFRA says.

NMRFRA's "private remedies" provision states that "[a] person . . . may assert [a NMRFRA] violation as a claim or defense in a judicial proceeding *and* obtain appropriate relief against a government agency[.]" Section 28-22-4(A)

(emphasis added). The clause reading "assert [a NMRFRA] violation as a claim or defense in a judicial proceeding" and the clause stating "obtain appropriate relief against a government agency" are separate clauses (prefaced by the word "may"), each of which independently modifies the sentence's subject, "[a] person." *See id.* Contrary to the Court of Appeals' holding, then, the phrase "against a government agency" does not limit the class of "judicial proceeding[s]" in which NMRFRA may be raised as a defense. The plain language of NMRFRA thus permits Elane Photography to assert that statute as a defense even though the government is not a party.[4]

The "obtain appropriate relief against a government agency" clause is not applicable here. That clause clarifies that, in addition to asserting a NMRFRA violation as a claim or defense in a judicial proceeding, a litigant "may" assert a claim for "appropriate relief against a government agency"—relief not typically available unless the Legislature expressly prescribes it. *Cf.* NMSA 1978, § 28-1-13(D) (2005) ("[T]he state shall be liable the same as a private person").[5] The Legislature thus intended that this clause would expand the rights available to

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[4] By essentially combining the two clauses, the Court of Appeals rendered the first clause superfluous. *See State v. Javier M.*, 2001-NMSC-030, ¶32, 131 N.M. 1, 33 P.3d 1 ("[S]tatute must be construed so that no part of the statute is rendered surplusage or superfluous").

[5] The Legislature used the word "may"—a term that "confers a power" or "right"—to preface this clause, instead of the word "shall" or "must," both of which express a "requirement or condition precedent." NMSA 1978, § 12-2A-4(A)-(B) (1997).

litigants under NMRFRA—not limit the rights of parties invoking NMRFRA. *See Hankins v. Lyght*, 441 F.3d 96, 103 (2d Cir. 2006) ("[T]his language would seem most reasonably read as broadening, rather than narrowing, the rights of a party"). Moreover, that clause does not apply when a party asserts NMRFRA as a defense because a party does not obtain "relief" through a "defense," but only through "an original claim, counterclaim, cross-claim, or third-party claim." N.M. R. Civ. P. 1-008(A)-(B). Notably, however, even if that clause is applicable here, Elane Photography's request for judgment fits squarely within it, for the Company asks the Court to reverse the Commission's decision and thus seeks judicial action against a government agency. [RP6]

Applying NMRFRA here is not only required by the statute's plain language; it is also the only reading of that statute consistent with the Legislature's objective and purpose. *See* § 12-2A-18(A)(1) (A statute is construed to "give effect to its objective and purpose"). In 2000, by a vote of 65-0 in the House and 31-0 in the Senate, the Legislature unanimously enacted NMRFRA, as its name states, to restore constitutional free-exercise rights in the wake of *Employment Division v. Smith*, 494 U.S. 872 (1990), which limited the protection available under the Free Exercise Clause of the U.S. Constitution, and *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), which held that Federal RFRA ("USRFRA")—a law that itself attempted to fill the void created by *Smith*—did not apply to the States. *See* NMSA

1978, § 12-2A-20(C)(1) (1997) (courts may consider "the circumstances that prompted the enactment" of the statute).

Seeking to fill this constitutional void here in New Mexico, the Legislature intended NMRFRA to apply wherever the government restricts the free exercise of religion. *See* NMSA 1978, § 28-22-3 (2000) ("A government agency shall not restrict a person's free exercise"). But that does not mean that the Legislature intended NMRFRA to apply only when the government is a party. Supreme Court precedent long ago established that state action exists—and thus a party may assert a constitutional defense—when a litigant asks a state court or agency to apply state law (including nondiscrimination laws) even if the government is not a party. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (affirming free-speech defense in libel suit between private litigants); *Hurley*, 515 U.S. at 573 (affirming free-speech defense in public-accommodation nondiscrimination suit between private litigants); *Dale*, 530 U.S. at 659 (similar); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (affirming free-exercise defense in suit between private parties); *see also Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 880-83 (9th Cir. 1987) (affirming free-exercise defense in tort suit between private parties); *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972) (affirming free-exercise defense in employment-nondiscrimination suit between private litigants). It thus follows that NMRFRA applies here because,

even though the government is not a party, the Commission (a government agency) restricted Elane Photography's free exercise of religion through its decision applying the NMHRA to religiously mandated conduct. Allowing Elane Photography to invoke NMRFRA here accords with the purpose of that statute, while forbidding it would thwart the Legislature's unmistakable purpose.

Indeed, it was generally understood at the time of NMRFRA's enactment that the statute would apply in situations like this. Two days after the House approved NMRFRA, "Denise Clegg, acting executive director of the ACLU of New Mexico, said . . . that her group would prefer to see the bill with an exemption for state anti-discrimination laws." Jeremy Leaming, *New Mexico House Approves Religious-Liberty Protection Act*, The Freedom Forum Online (Mar. 31, 2000), http://www.freedomforum.org/templates/document.asp?documentID=12084. A few months earlier, other critics similarly stated that the measure could "be used to discriminate" by "usurp[ing] civil-rights legislation." *Religious-Freedom Law Could Curtail Other Rights, Some Say*, Albuquerque Tribune, Jan. 24, 2000, *available at* http://www.accessmylibrary.com/article-1G1-108340896/religious-freedom-law-could.html. The contemporaneous consensus thus confirms that NMRFRA applies to cases like this and provides a defense against the Commission's application of this nondiscrimination law.

When relying on cases construing USRFRA, the Court of Appeals ignored a critical difference between USRFRA and NMRFRA, *see Elane Photography*, 2012-NMCA-086, ¶¶46-47: USRFRA requires the "[g]overnment" to "demonstrate[]" that strict scrutiny is satisfied, 42 U.S.C. § 2000bb-1(b), whereas NMRFRA does not identify the "government agency" as the litigant that must satisfy that standard. Section 28-22-3. This intentional deviation from USRFRA—the act on which NMRFRA was modeled—shows that the Legislature did not intend the government to be a party in every case in which NMRFRA applies. *See Luboyeski v. Hill*, 117 N.M. 380, 384, 872 P.2d 353, 357 (1994) ("In searching for legislative intent, we presume that the legislature was aware of other statutes in existence at the time a statute was enacted.").

Although the argument for applying NMRFRA to a case between private parties is stronger than the argument for applying USRFRA in similar circumstances, precedent construing USRFRA nevertheless supports Elane Photography's construction of NMRFRA. At least four appellate decisions have discussed USRFRA in circumstances where, similar to here, a private entity asserted USRFRA as a defense to a private party's discrimination claim (in a case where the government was not a party). Only two of those cases rendered a holding on USRFRA, both finding that the statute applied. *See Hankins*, 441 F.3d at 103 (applying USRFRA to an age-discrimination suit between private parties); *Porth v.*

Roman Catholic Diocese of Kalamazoo, 532 N.W.2d 195, 199-200 (Mich. Ct. App. 1995) (applying USRFRA to a religious-discrimination suit between private parties). The other two cases, while expressing doubts whether USRFRA would apply, did not resolve the issue because it was not before those courts. *See Rweyemamu v. Cote*, 520 F.3d 198, 201 (2d Cir. 2008) ("defendants knowingly and expressly waived a RFRA defense"); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042-43 (7th Cir. 2006) (the parties "did not even argue RFRA"), *abrogated on other grounds by Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, __ U.S. __, 132 S. Ct. 694, 709 n.4 (2012). Yet the Court of Appeals sided with the latter two cases. *Elane Photography*, 2012-NMCA-086, ¶46. Those cases (*Rweyemamu* and *Tomic*) are unpersuasive not only because they contain mere dicta on this question, but also because they cite or discuss the USRFRA provision (which, as discussed above, has been materially altered in NMRFRA) that requires the "government" to "demonstrate" that strict scrutiny is satisfied. *See* 42 U.S.C. § 2000bb-1(b).

Also weighing against the Court of Appeals' statutory construction is that it would produce absurd results. *See* § 12-2A-18(A)(3) (A statute is construed to avoid "absurd" results). It is undeniable that if the Commission, instead of Willock, had instituted this action, *see* § 28-1-10(A), (G)(3) (authorizing the Commission and its commissioners to enforce the NMHRA by instituting their own actions),

NMRFRA would apply. Yet no policy of NMRFRA suggests that Elane Photography's rights under that statute depend on such procedural happenstance. *See Hankins*, 441 F.3d at 103. On the contrary, as discussed above, the objective and purpose of NMRFRA demonstrate that it should provide a defense regardless of whether the NMHRA claim was brought by the Commission or by Willock. Moreover, if Willock and the Commission had jointly pursued this action, the Court of Appeals' reading of NMRFRA would permit Elane Photography to raise its NMRFRA defense against the Commission, but not against Willock. This further underscores the absurdity of the Court of Appeals' statutory construction and demonstrates why this Court should not adopt it.

B. Elane Photography Has Established Its NMRFRA Defense.

1. This Application of the NMHRA Restricts and Substantially Burdens the Free Exercise of Religion.

To establish a defense under the NMRFRA, Elane Photography must show that a "government agency" has "restrict[ed]" or proposes to restrict the "free exercise of religion." Section 28-22-3. Free exercise of religion includes "a refusal to act that is substantially motivated by religious belief." NMSA 1978, § 28-22-2(A) (2000). The Commission's decision prohibits—and thus restricts—Elane Photography's religiously motivated refusal to create expressive photographs of a same-sex commitment ceremony. This satisfies the initial requirement for a NMRFRA defense.

The Court of Appeals nevertheless discounted the "burden on freedom of religion" because Jonathan and Elaine "voluntarily entered public commerce" and their religious beliefs do not require them to "engage in [this] business." *Elane Photography*, 2012-NMCA-086, ¶¶41-42. But this shows only that Jonathan and Elaine can avoid violating their convictions by altering their constitutionally protected expression or giving up the work that Elaine "live[s] to do." [Tr.109] Far from demonstrating the absence of a burden, this actually establishes it. For a substantial burden on free exercise exists not only where the government directly compels a person to violate her faith, but also where the government pressures a person to violate her convictions by conditioning a benefit or right on faith-violating conduct. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981). Thus by forcing Jonathan and Elaine "to choose between following the precepts of [their] religion and forfeiting [their business], on the one hand, and abandoning one of the precepts of [their] religion in order to [maintain their business], on the other hand," the Commission's decision imposes a substantial "burden upon the free exercise of religion." *See Sherbert*, 374 U.S. at 404; *see also Thomas*, 450 U.S. at 717-18 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.").

While overlooking *Sherbert* and *Thomas*, both of which establish Elane Photography's position, the Court of Appeals misconstrued *United States v. Lee*, 455 U.S. 252, 261 (1982), to support its doubts about a burden on the free exercise of religion. *See Elane Photography*, 2012-NMCA-086, ¶41. Contrary to the Court of Appeals' suggestion, the *Lee* Court did not find that the challenged tax law imposed no burden on the business's free-exercise rights, but instead concluded that the law did in fact "interfere[] with [the business's] free exercise rights." *Lee*, 455 U.S. at 257. This Court should similarly find, particularly in light of *Sherbert* and *Thomas*, that the Commission's decision impermissibly restricts—and substantially burdens—the free exercise of religion.

2. This Application of the NMHRA Fails Strict Scrutiny.

The Commission's decision violates NMRFRA unless Willock establishes that requiring Elane Photography to create expressive photographs of her ceremony in violation of Jonathan and Elaine's religious beliefs is "essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest." Section 28-22-3(B). Yet Willock cannot show that this application of the NMHRA satisfies strict scrutiny. *See Hurley*, 515 U.S. at 578-79; *Dale*, 530 U.S. at 657-59.

Like constitutional strict-scrutiny analysis, NMRFRA analysis "look[s] beyond broadly formulated interests justifying the general applicability of

government mandates" and determines whether strict scrutiny "is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being [restricted]." *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (construing USRFRA); Section 28-22-3(B) (analyzing, similar to USRFRA, "the application of the restriction to the person"). The relevant government interest, then, is not the State's general interest in prohibiting discrimination, but its particular interest in requiring Elane Photography to create expressive photographs telling an approving story of a same-sex commitment ceremony.

Yet there is no compelling government interest in ensuring that wedding photojournalists (like Elaine) who create expressive photographs telling the stories of weddings will also create photos telling the stories of same-sex commitment ceremonies. As demonstrated in Section (II)(D), the apparent object of this interest "is simply to require speakers to modify the content of their expression," but that does not constitute even a legitimate interest, much less a compelling interest of the highest order. *See Hurley*, 515 U.S. at 578-79.

Even if the interest is characterized more broadly—as ensuring that entities providing goods or services to the public treat same-sex couples the same as opposite-sex couples—Willock cannot show that the State considers this to be a compelling government interest. "[A] law cannot be regarded as protecting an

interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (quotation marks and alterations omitted). Here, because same-sex couples may not marry each other in New Mexico, *see* N.M. Att'y Gen. Advisory Letter from Attorney General Patricia A. Madrid to State Senator Timothy Z. Jennings (Feb. 20, 2004), the State and its political subdivisions treat same-sex couples differently than opposite-sex couples for myriad marriage-related purposes when providing services to the public. The State, quite plainly, does not consider there to be a compelling government interest in eliminating a form of differential treatment that it authorizes and practices in its own operations. Additionally, the State permits religious organizations, when serving the public, to decline same-sex couples as customers if doing so is calculated to promote those organizations' religious principles. *See* NMSA 1978, § 28-1-9 (2004). Thus, for instance, religious relationship-counseling organizations may refuse their services to same-sex couples, even though Elane Photography may not decline to create expressive photographs of same-sex commitment ceremonies. This categorical religious exemption further belies any claim that this government interest is compelling.

Nor has Willock established the least-restrictive-means requirement. Protecting Elane Photography's religiously mandated refusal to create expressive

photographs of a same-sex commitment ceremony would not materially undermine the asserted government interest or materially reduce the photographers available for same-sex commitment ceremonies. *Cf. Attorney General v. Desilets*, 636 N.E.2d 233, 240 (Mass. 1994) (declining to find strict scrutiny satisfied where no evidence indicated that affirming the business owner's free-exercise rights would "significantly imped[e] the availability" of the provided services). First, Willock found another photographer, and she did not introduce evidence indicating that willing photographers were scarce. [Tr.21] Second, the religious beliefs of wedding photographers like Elaine are decisively against their economic interests, so financial considerations weigh against other wedding photographers declining to photograph same-sex commitment ceremonies. *See Desilets*, 636 N.E.2d at 240 ("Market forces . . . tend to discourage [business] owners from restricting the[ir] class of [customers]."). This financial disincentive sharply distinguishes this case from situations where business owners assert that requiring them to pay taxes burdens their free exercise of religion. *Cf. Lee*, 455 U.S. at 260-61. Third, that the State, its political subdivisions, and religious organizations may treat same-sex couples differently than opposite-sex couples when providing services to the public demonstrates that allowing Elane Photography to decline requests to create expressive photographs of same-sex commitment ceremonies will not materially undermine the asserted government interest.

IV. The Commission's Decision Prohibiting Elane Photography's Religiously Mandated Refusal to Create Certain Expressive Photographs Burdens the Free Exercise of Religion in Violation of the First Amendment.

Whether the Commission's decision violates the Free Exercise Clause of the U.S. Constitution is a question of law reviewed de novo. *See Montgomery,* 2007-NMSC-002, ¶16. Elane Photography preserved this free-exercise issue by raising it before the Commission [Resp. Br. 27-30], the District Court [RP146-52, 252-57, 296-98], and the Court of Appeals. [BIC34-45; RB16-20]

The U.S. Constitution protects the free exercise of religion. U.S. Const. amend. I. Strict scrutiny applies to the free-exercise claim raised here for two independent reasons: (1) because the law that the Commission applied—the NMHRA—is not generally applicable; and (2) because this application of that statute would violate a hybrid of constitutional rights. *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294-97 (10th Cir. 2004).

First, the NMHRA is not generally applicable because it contains significant secular and religious categorical exemptions that undermine the statute's general purpose. *See Lukumi*, 508 U.S. at 542-43. The NMHRA categorically permits discriminatory conduct by owners of single-family dwellings that sell, lease, or rent their properties. Section 28-1-9(A). The statute also allows discrimination by owners of four-families-or-less multi-unit dwellings where the owner resides therein. Section 28-1-9(D). The nonreligious conduct permitted by these

exemptions—under which owners can unabashedly refuse for innumerable nonreligious reasons to sell or rent to same-sex couples—impacts the government's interest to a greater degree than Elane Photography's religiously mandated decision not to create photographs telling the story of a same-sex commitment ceremony. Such categorical nonreligious exemptions impermissibly prefer the secular to the religious. *See Blackhawk v. Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004). Moreover, the NMHRA's categorical religious exemptions similarly undercut its purpose. Those exemptions permit miscellaneous forms of discrimination by religious organizations, *see* § 28-1-9(B)-(C), which collectively jeopardize the NMHRA's purpose to a greater degree than Elane Photography's decision not to create photographs of a same-sex commitment ceremony. In short, then, these categorical exemptions—both the secular and the religious—destroy the NMHRA's general applicability and mandate strict scrutiny.

Second, Elane Photography has presented a hybrid claim by combining a free-exercise claim with a compelled-speech claim. *See Axson-Flynn*, 356 F.3d at 1295-97; *Health Servs. Div., Health and Env't Dep't of State of N.M. v. Temple Baptist Church*, 112 N.M. 262, 267-68, 814 P.2d 130, 135-36 (Ct. App. 1991). The Commission's decision substantially burdens the free exercise of religion as discussed in Section (III)(B)(1), and it compels expression as discussed in Section (II). Therefore Elane Photograph has established a hybrid claim.

Because strict scrutiny applies, Willock must show that this application of the NMHRA satisfies that heightened standard. *See Thomas*, 450 U.S. at 718. But she cannot accomplish this onerous task as demonstrated in Sections (II)(D) and (III)(B)(2).

CONCLUSION

Elane Photography respectfully requests that this Court reverse the lower courts' decisions and remand with instructions to grant Elane Photography's summary-judgment motion, deny Willock's summary-judgment motion, enter declaratory judgment in Elane Photography's favor, and vacate the Commission's decision including the award of costs and attorney fees.

STATEMENT REGARDING ORAL ARGUMENT

This Court's August 30, 2012 Order provides that "oral argument shall be heard after the filing of all briefs." Elane Photography agrees with this Court's decision to grant oral argument and allow the parties to further explain the significant legal issues raised in this case. This litigation presents novel questions of state law regarding the interpretation and application of the NMHRA and NMRFRA. This case also raises momentous issues of federal constitutional law. In light of the legal complexity, importance, and novelty of these statutory and constitutional issues, this appeal warrants oral argument by the parties.

Date: October 19, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing Brief in Chief of Petitioner Elane Photography, LLC, was sent via first-class mail to the following counsel of record this 19th day of October, 2012:

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