SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No. D-202-CV-200806632

ELANE PHOTOGRAPHY, LLC,

Plaintiff,

vs.

VANESSA WILLOCK,

Defendant.

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

NOW COMES Plaintiff Elane Photography LLC ("Elane Photography" or "Company"), by and through its counsel, and presents this memorandum of law in support of Plaintiff's Motion for Summary Judgment.

INTRODUCTION

The Human Rights Commission of the State of New Mexico ("Commission") incorrectly ruled that Elane Photography—a company co-owned by Jonathan and Elaine Huguenin—violated the New Mexico Human Rights Act ("NMHRA") by allegedly discriminating against Vanessa Willock because of her "sexual orientation." *See* N.M. Stat. § 28-1-7(F). The Commission's decision should be reversed by this Court.

First and foremost, Ms. Willock did not establish the elements of a claim under the NMHRA. Elane Photography does not constitute a "public accommodation," as that term has been defined by statute and interpreted by the courts. Moreover, Ms. Willock has not presented any evidence demonstrating that Elane Photography's decision not to photograph her same-sex

ceremony was motivated by Ms. Willock's "sexual orientation." Instead, the evidence demonstrates that Elane Photography's decision was motivated by the co-owners' sincerely held religious beliefs and moral beliefs that marriage, as a sacred institution ordained by God, is limited to the union of one man and one woman, and the corresponding company policy that prohibits the use of business resources to promote or commemorate a contrary message. Thus, Ms. Willock failed to show that Elane Photography engaged in the sort of intentional discrimination prohibited under the NMHRA.

But even if Elane Photography violated the prohibitions of the NMHRA, the Commission's application of that statute under these circumstances violated both the United States and the New Mexico Constitutions. By using artistic skills to create images, Elane Photography offers inherently expressive services to the public. The U.S. and New Mexico Constitutions protect that artistic expression. The Commission's application of the NMHRA to those expressive activities punished Elane Photography for not using its constitutionally protected expression to convey a message that it did not want to communicate. Therefore, the Commission interprets the state Human Rights Act as applied here to violate the First Amendment's well-established constitutional proscription against compelled speech. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc*., 515 U.S. 557, 573 (1995).

Additionally, the Commission's application of the NMHRA violated the free exercise of religion protected by both the United States and New Mexico Constitutions, as well as the New Mexico Religious Freedom Restoration Act ("RFRA"), N.M. Stat. § 28-22-1 *et seq*. It did so in at least two ways. First, the Commission's decision punished Elane Photography for refusing to attend, photograph, commemorate, and promote a religious ceremony that advocated a redefinition of marriage in conflict with the owners' sincerely held religious beliefs. The

constitutionally protected free exercise of religion resoundingly condemns forced attendance at a religious ceremony, but that is the precise effect of the Commission's decision.

Second, the Commission's decision punished Elane Photography for declining to express a message contrary to, and in violation of, the sincerely held religious beliefs of its co-owners. This use of the government's power violates the constitutional and statutory protections for religious exercise.

In sum, this Court should thus grant Elane Photography's motion for summary judgment and reverse the Commission's decision.

STATEMENT OF FACTS

1. Elane Photography is a limited liability company licensed to do business in New Mexico. Commission Hearing Respondent's Exhibit F (hereafter "Resp. Ex.").

2. The Company is co-owned by Jonathan and Elaine Huguenin. Commission Hearing Transcript at 72 (hereafter "Tr.").

3. Elaine Huguenin also works as the head photographer. Tr. at 73, 96.

4. The Company uses its photography services to assist its customers in commemorating significant and expressive life events. Tr. at 73; Commission Decision and Final Order at 1-2 (hereafter "Comm'n Dec.").

5. Elane Photography primarily photographs weddings, but the Company also offers its services for engagements, individual and family portraits, and high-school graduation pictures. Tr. at 73.

6. Elane Photography will not offer its services for each and every requested event. Tr. at 82-84. For example, the Company has refused to photograph the making of a horror film because Jonathan and Elaine do not want to be associated with, or implicitly promote, the making of such films. Tr. at 82.

7. Company policy also prohibits the use of business resources to positively portray or otherwise endorse abortion, pornography, nudity, or a marital union between anyone other than one man and one woman, including polygamy or same-sex "marriage." Tr. at 82-84; 110.

8. Elaine's artistic talents are the source of the Company's success. She studied photography in college and has refined her skills through the real-world experience of photographing more than twenty weddings. Tr. at 97; Resp. Ex. B. Elaine is passionate about her work, and her own words best describe her artistic approach to photography:

> I see and capture the world through images. To create a story out of one frame, as opposed to an entire movie, is an amazing challenge. Prior to my beginnings in photography, I saw the world as a right-brained person does. Now, I see it in pictures. . . .
>
> I feel as though I've truly thrived in this atmosphere of creating photographs that capture the entirety of a single day—one of the most important days of two people's lives together. I take the approach of a silent observer—clicking on the moments which are fresh, real[,] and un-staged. The name has gone from candid to photojournalistic. However one states it, my desire is to create memories that are exactly what the bride and groom experienced.
>
> To convey my love for photography is not as easy in writing or speaking as it is when I'm experiencing it. But thankfully, to do what I do, I only have to speak through images, and that is where I feel most alive.

Resp. Ex. B at 1-2.

9. Elaine is not a mere photo-dispensing, snap-and-develop wedding photographer. She is an active participant in her clients' wedding-day experience. Tr. at 101-02. Her approach—which is formally known as photojournalist—is thoroughly artistic and personally expressive. Resp. Ex. I, J, K.

10. Throughout the course of a single wedding, she takes approximately sixteen hundred photos, searching for candid images that best capture the story of the day. Tr. at 106-07. Elaine then spends the next three to four weeks sifting through these pictures and limiting them to the finest

three or four hundred. Tr. at 107. She next takes this limited group of pictures and uses her artistic talents to modify the color, crop the scenery, and do whatever is necessary to create artistically polished pictures for her clients to purchase. Tr. at 107. She then posts these pictures on a website and allows her clients to choose which pictures they want to purchase. Tr. at 107-8.

11. Elaine's active participation in her clients' wedding celebrations is readily apparent. She not only canvasses the ceremony and reception searching for just the right candid moments to capture the wedding story, but her clients often ask her to be a more active participant in the wedding. Tr. at 118-19. For example, past clients have asked her and her husband to dance at the reception or even to join in a picture with the bride and groom. Tr. at 118-19. Elaine truly becomes an intricate part of the wedding celebration.

12. Prior to purchase, the pictures contain a watermark of the Company's logo. Tr. at 79. Also the Company retains copyright ownership over all their photos, even those that have been purchased by clients. Resp. Ex. A; Tr. at 79. In addition to selling these individual photographs, Elaine usually creates a "coffee-table book" in which she illustrates the wedding story through pictures. Tr. at 108.

13. Sometimes the Company hires independent contractors to assist with the photography, but the majority of the pictures are taken by Elaine. Tr. at 73-74.

14. In September 2006, Vanessa Willock discovered Elane Photography's website while searching on the Internet for photographers. *See* http://www.elanephotography.com/. Intrigued by Elaine's unique artistic talent, *see* Tr. at 16, Ms. Willock sent an email to the Company stating that she and her partner were researching photographers for their "same-gender" "commitment ceremony" to be held on September 15, 2007, in Taos, New Mexico. Resp. Ex. E at 2. Ms.

Willock inquired whether Elane Photography would be "open to helping [them] celebrate [their] day." *Id.*

15. Elaine thought that Ms. Willock's same-sex commitment ceremony would be a wedding-like ceremony between persons of the same sex, and that it would involve many of the expressive and religious elements typically included in a wedding ceremony. Tr. at 113 and 127.

16. The Company has a policy against photographing any images conveying the message that marriage consists of anything other than the union of one man and one woman. Tr. at 84, 110. This policy derives from Jonathan's and Elaine's sincerely held Christian religious beliefs based on the Bible that marriage, as a sacred institution ordained by God, consists of only the union of one man and one woman. Tr. at 85-86, 110.

17. This policy would also prohibit the Company from photographing a polygamous "marriage." Tr. at 84, 110. A polygamous "marriage"—because it involves one man and multiple women—also communicates the message that marriage can be defined other than between one man and one woman. Tr. at 84. Elaine Photography refuses to use its resources and its employees' talents to endorse and convey such a message.

18. Because of this company policy and their corresponding religious and moral beliefs, Jonathan and Elaine decided that the Company could not photograph Ms. Willock's commitment ceremony because to do so would commemorate and promote the message that marriage can consist of a relationship other than the union of one man and one woman. Tr. at 85-86 and 113. Jonathan and Elaine believe that photographing Ms. Willock's inherently expressive ceremony would force them to commemorate and promote a message contrary to their sincerely held religious and moral beliefs. Tr. at 86, 87, 113, 115 and 119. They believe that doing so would affirmatively violate God's commands. Tr. at 86.

19. The Company did not decline to photograph the ceremony because of Ms. Willock's sexual orientation, Tr. at 85, 114, and it has never declined to provide services to people because of their sexual orientation. *Id.*

20. Because Ms. Willock's request conflicted with company policy and the owners' sincerely held religious and moral beliefs, Elaine, acting on behalf of the Company, responded to Ms. Willock's email by politely declining to "celebrate" the day with Ms. Willock and her partner. Resp. Ex. E at 3.

21. More than two months later, on November 28, 2006, Ms. Willock sent another email to the Company, seeking clarification and specifically asking: "Are you saying that your company does not offer your photography services to same-sex couples?" Resp. Ex. E. at 4. Elaine responded graciously, stating that the Company does "not photograph same-sex weddings," and thanking Ms. Willock "for checking out [the] site." Resp. Ex. E. at 5.

22. The next day, November 29, 2006, Ms. Willock's same-sex partner, Misti Pascottini ("Ms. Collingsworth"), sent an email to Elaine Photography, but did not disclose her relationship to Ms. Willock. Ms. Collingsworth asked if Elaine "would be willing to travel to Ruidoso for [her] wedding." Resp. Ex. E at 6.

23. Misti Pascottini now goes by the name Misti Collingsworth. Tr. at 44. Misti was married to a man with the last name Pascottini prior to her relationship with Ms. Willock. Tr. at 44. Since sending her email to Elane Photography, she has reverted back to her maiden name, which is Collingsworth. Tr. at 45.

24. Ms. Collingsworth never planned to have a wedding in Ruidoso. Tr. at 27-28. Elaine promptly responded and told Ms. Collingsworth of her "willing[ness] to travel to Ruidoso for [the] wedding." Resp. Ex. E. at 7. But because Ms. Collingsworth did not intend for the alleged Ruidoso wedding to occur, she never replied to Elaine's email.

25. On September 15, 2007, Ms. Willock and Ms. Collingsworth celebrated their marriage-like commitment ceremony in Taos, New Mexico. Tr. at 31, 33.

26. Reverend Pintki Murray presided over the ceremony, wearing a minister's robe and rainbow shawl. Tr. at 33, 55; Resp. Ex. G, H. Reverend Murray stood at the altar in front of approximately 75 guests and witnesses. Tr. at 35, 56.

27. The flower girls and ring bearer walked down the aisle and gathered in front of the guests near the altar. Tr. at 57. Ms. Willock and Ms. Collingsworth then proceeded down the aisle as music played and guests watched; Ms. Collingsworth wore a traditional white wedding gown. Tr. at 37, 57.

28. Once the couple arrived at the altar, Reverend Murray welcomed the assembled people, saying that "[w]e're all here to witness and celebrate this union and so that they can be joined as partners in life." Tr. at 61. Reverend Murray then said to congregants, "let's meditate," *id*., and then delivered a short meditation. *Id.* There was a reading chosen by Ms. Willock and Ms. Collingsworth. *Id*.

29. Then Ms. Willock and Ms. Collingsworth recited vows that they had written, Tr. at 56, they exchanged rings, Tr. at 56, 63; and then a prayer and a blessing spoken by Rev. Murray. Tr. at 56, 65, 66. At the conclusion of the ceremony, Reverend Murray then culminated the ceremony by pronouncing Ms. Willock and Ms. Collingsworth, either "Partners in Life" or "Partners in Love." Tr. at 66.

30. The ceremony also involved a ritual in which each person was given a stone. Tr. at 56. Each attendee was told to hold the stone through the ceremony, and while holding it, to imbue it with their love and good wishes for Ms. Willock and Ms. Collingsworth. *Id.* Towards the end of the ceremony, the ushers collected the stones from each person and placed them into a vase or urn or vessel of some sort. Tr. 56-57.

31. The State of New Mexico does not recognize any sort of legal union, including marriages, between same-sex couples.

32. Reverend Murray did not sign a marriage or civil union license for the couple.

33. Ms. Willock hired a photographer to photograph her ceremony. Tr. at 23. She paid $1200 to the photographer, and received a CD with approximately 300 photographs on it. *Id*.

34. On December 20, 2006, Ms. Willock filed a discrimination complaint with the Commission, alleging that Elane Photography, as a public accommodation, discriminated against her because of her "sexual orientation." *See* N.M. Stat. § 28-1-7(F). See Commission Finding of Fact #30 in the Commission's Decision and Final Order.

35. On January 28, 2008, the Commission heard evidence before a hearing examiner. See Transcript of Hearing, HRD # 06-12-20-0685, Hearing Transcript January 28, 2008.

36. On April 9, 2008, the Commission ruled that the Company violated the NMHRA and ordered Elane Photography, LLC to pay to the Complaintant Vanessa Willock $6,637.94 in attorneys fees and costs.

37. On June 30, 2008, Elane Photography appealed to this Court in a timely manner.

ARGUMENT

I. Ms. Willock Did Not Demonstrate That Elane Photography Violated The NMHRA's Prohibition Against Unlawful Discriminatory Practices.

Ms. Willock failed to establish that Elane Photography violated the NMHRA's prohibition against unlawful discriminatory practices. The relevant provision of the NMRA provides that "[i]t is an unlawful discriminatory practice for . . . any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations[,] or goods to any person because of . . . sexual orientation[.]" N.M. Stat. § 28-1-7(F). Ms. Willock did not present evidence to satisfy every requirement of the statute. First, Ms. Willock did not demonstrate that Elane Photography is a "public accommodation," as that term has been defined by statute and interpreted by the state courts. Second, Ms. Willock has not shown that Elane Photography made a "distinction . . . in offering or refusing to offer its services . . . because of . . . sexual orientation." *See id.*

A. Elane Photography Is Not A Public Accommodation Under The NMHRA.

Elane Photography does not qualify as a public accommodation under the NMHRA. A "public accommodation" is defined as an "establishment that provides or offers its services, facilities, accommodations[,] or goods to the public[.]" N.M. Stat. § 28-1-2(H). The Supreme Court of New Mexico, when determining whether an entity satisfies this statutory definition, "look[s] to the historical and traditional meanings [of] what constitutes a 'public accommodation.'" *Human Rights Comm'n of New Mexico v. Board of Regents of Univ. of New Mexico College of Nursing*, 95 N.M. 576, 577 (1981). That Court recognized that the "historical and traditional" meaning of the term "public accommodation" is quite limited; for instance, it includes "innkeepers and public carriers" as well as "places of lodging, entertainment[,] . . .

public transportation," and "eating." *Id.* at 577-78.[1] But it does not extend to a photography company that provides expressive and artistic services. Tellingly, no court anywhere in the United States has ever held that a photography company is a public accommodation.

The New Mexico Supreme Court also noted that it "look[s] to the previous act for guidance" when determining whether an entity qualifies as a public accommodation. *See Board of Regents*, 95 N.M. at 578. The previous version of the NMHRA states:

> A place of public accommodation . . . shall be determined to include inns, taverns, roadhouses, hotels, motels and tourist courts, . . . restaurants, . . . any place where food is sold for consumption on the premises, buffets, saloons, barrooms and any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, . . . soda fountains, and all stores where ice, ice cream, ice and fruit preparations or their derivations, or where beverages of any kind are [sold] for consumption on the premises; dispensaries, clinics, hospitals, . . . theatres, motion picture houses, music halls, concert halls, . . . race courses, skating rinks, amusement and recreation park fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors, swimming pools, public libraries, garages, public conveyances operated on land, water or in the air as well as stations and terminals thereof; public halls and public elevators . . . and structures occupied by two or more tenants, or by an owner and one or more tenants. . . .

N.M. Stat. § 49-8-5 (1955). The types of public accommodations identified in this statute include five categories of establishments: (1) hotels and other places of lodging; (2) restaurants and other places where food or beverages are served; (3) hospitals, clinics, and places for healthcare or medicine; (4) places of entertainment; and (5) common carriers or other places of public transportation. *See id.* It cannot be seriously suggested that a photography company—

[1] The United States Supreme Court has likewise noted the limited scope of the traditional concept of a public accommodation: "State public accommodation laws were originally enacted to prevent discrimination in traditional places of public accommodation—like inns and trains." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000); *see also* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1298 (1996) (noting the "common-law rule" that defines public accommodations to include "innkeepers and common carriers (and, in some states, places of entertainment)").

especially one like Elane Photography which provides inherently expressive and intensely artistic services—fits within, or even remotely resembles, any of these five categories.[2]

The reason that no court has ever found a photography company to be a public accommodation is because most photography companies, like Elane Photography, offer services that are fundamentally different from the services provided by traditional public accommodations. Traditional public accommodations provide essential, standardized products or ministerial services to the public at large. Lodging, traveling, and eating are essential needs that all members of the public must purchase from time to time. *See Cecil v. Green*, 43 N.E. 1105, 1105-06 (Ill. 1896). Moreover, operators of traditional public accommodations generally do not perform discretionary functions; instead, they perform ministerial tasks by providing individuals with a bed for resting, a vehicle for traveling, or food for consuming. Public-accommodation laws were thus enacted to ensure that disfavored classes of people were not invidiously excluded from accessing these essential and uniform public goods and services. *See Faulkner v. Solazzi*, 65 A. 947, 948-49 (Conn. 1907).

In stark contrast, however, Elane Photography provides nonessential, discretionary, and artistic services to the public. Photography services—particularly the limited types of photography services provided by Elane Photography (*e.g.*, weddings, portraits, and high-school graduation)—are not essential public services. Moreover, Elaine's photojournalist style of photography is laden with discretion and artistic judgment as she strives to tell the story of an event through pictures. Unlike traditional public accommodations, Elaine does not

[2] The general federal law prohibiting public-accommodation discrimination—Title II of the Civil Rights Act of 1964—contains a definition of public accommodation that is similar to the definition in the previous version of the NMHRA. *See* 42 U.S.C. § 2000a(b). The federal courts have recognized the narrow scope of that provision. *See, e.g.*, *Priddy v. Shopko Corp.*, 918 F.Supp. 358, 359 (D. Utah 1995) (concluding that retail establishments do not constitute public accommodations).

mechanistically offer basic goods or services for public consumption. Because her work involves so much artistic discretion, she does not take every customer who calls her, and she discusses at length their desires to decide how to serve them. Tr. at 78, 81-85 and 101. In short, vast differences separate the services offered by traditional public accommodations, like the bed of an inn or the food of a restaurant, from the artistic and expressive and individualized services provided by Elane Photography. Those differences demonstrate why no court has ever found that a photography company is a public accommodation. Thus, this Court should rule that Elane Photography is not a public accommodation under the NMHRA.

Additionally, there is another reason why Elane Photography does not constitute a public accommodation as defined in the NMHRA: it does not maintain a physical location that is open to the public. By its express terms, the NMHRA limits its definition of "public accommodations" to include only "establishments." *See* N.M. Stat. § 28-1-2(H). The wording of this statute should be construed "in its ordinary and usual sense." *See Board of Regents*, 95 N.M. at 578. The dictionary definition of an "establishment" is "something established [such] as . . . a *place* of business or residence with its *furnishings* and staff." *See* MERRIAM-WEBSTER ONLINE DICTIONARY, *at* http://www.m-w.com/dictionary/establishment (emphasis added). The use of the term "establishment" strongly implies the existence of a *physical location*. *See* 42 U.S.C. § 2000a(b) (defining "public accommodations" as "establishments" and then including a list of places all having physical locations such as inns, restaurants, movie theaters, gas stations, and places of entertainment).[3]

[3] Every example of a "public accommodation" listed in federal public-accommodation statutes has a physical location. *See* 42 U.S.C. § 2000a(b) (including physical locations such as inns, restaurants, movie theaters, gas stations, and places of entertainment); 42 U.S.C. § 12181(7) (including physical locations such as inns, restaurants, movie theaters, auditoriums, clothing stores, dry-cleaners, terminals used for public transportation, museums, parks, schools, day-care

Similarly, traditional places of public accommodation—including all those listed in the former version of the NMHRA—consist of physical locations that open their doors to the public and invite people to enter for business purposes. Here, however, Elane Photography does not maintain a physical location in which the Company invites the public to enter. This lack of a physical retail location demonstrates that Elane Photography is not a "public accommodation" because it does not constitute an "establishment" as required by statute. The United States Supreme Court has already criticized a state court's broad application of its public-accommodations law—which was expressly limited to "places"—"to a private entity without even attempting to tie the term 'place' to a physical location." *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657 (2000). The Commission's application of the NMHRA to Elane Photography, without attempting to reconcile the absence of a physical business establishment, duplicated this analytical error.

In sum, this Court should find that the Commission erred in ruling that Elane Photography qualified as a public accommodation under the NMHRA.

B. Elane Photography's Motivation For Not Photographing Ms. Willock's Same-Sex Commitment Ceremony Was Not Based On Her "Sexual Orientation."

Ms. Willock asked Elane Photography to help her and her partner "celebrate" and commemorate their wedding-like, same-sex commitment ceremony. Resp. Ex. E at 2. Elane Photography declined Ms. Willock's request because company policy prohibits supporting, advancing, or commemorating a message that conflicts with Jonathan's and Elaine's sincerely held religious beliefs and moral beliefs that marriage is the union of one man and one woman.

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centers, and gymnasiums). Federal courts have thus held that "public accommodations," as defined in those statutes, are limited to "physical, concrete places of public accommodation." *See, e.g., Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp.2d 1312, 1318 (S.D. Fla. 2002) (holding that an internet site was not a public accommodation under federal law).

For this reason, Elane Photography does not photograph ceremonies promoting same-sex commitment ceremonies, Resp. Ex. E. at 5, or any other ceremony that promotes an alternative definition of marriage, such as polygamy. Tr. At 82-84, 110.

The NMHRA prohibits a public accommodation from making a "distinction . . . in offering or refusing to offer its services . . . *because of* . . . sexual orientation." N.M. Stat. § 28-1-7(F) (emphasis added). The New Mexico courts have yet to outline the governing legal analysis for a claim of "sexual orientation" discrimination in the public-accommodation context. In the absence of that specific guidance, this Court should focus on the "ultimate issue" in discrimination cases under the NMHRA, namely, "whether the [respondent's] actions were motivated by impermissible discrimination." *See Martinez v. Yellow Freight Sys.*, 113 N.M. 366, 369 (Sup. Ct. 1992). "In order to prevail, [the complainant] must demonstrate, by direct or indirect evidence, that the [business] intentionally discriminated against her on the basis of her ['sexual orientation']." *See Sonntag v. Shaw*, 130 N.M. 238, 243 (Sup. Ct. 2001). Thus, Elane Photography violates the NMHRA only if the *reason* the Company decided not to photograph Ms. Willock's commitment ceremony was because of her "sexual orientation." *See Martinez*, 113 N.M. at 369.

The Commission incorrectly concluded that Ms. Willock presented "direct proof" of impermissible discrimination. Comm'n Dec. at 11-12. The allegedly direct proof of discrimination relied on by the Commission is the mere fact that the Company photographs wedding ceremonies, but will not photograph same-sex commitment ceremonies. Comm'n Dec. at 11-12. That evidence, however, cannot properly be characterized as direct proof of discriminatory animus.

"[E]vidence is not 'direct' if an inference of discrimination is required." *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1118 (10th Cir. 2007). Direct evidence is evidence that "does not require the fact finder to draw any inferences to reach th[e] conclusion" that unlawful discrimination was "a motivating factor" in the challenged actions. *Amini v. Oberlin College*, 440 F.3d 350, 359 (6th Cir. 2006). "This evidence usually requires an admission from the decisionmaker about [her] discriminatory animus[.]" *Nagle v. Vill. of Calumet Park*, 554 F.3d 1106, 1114 (7th Cir. 2009). It takes the form, for example, of an entity telling a customer: "I refuse to serve you because of your 'sexual orientation.'" *See Smith v. Chrysler Corp.*, 155 F.3d 799, 805 (6th Cir. 1998). Evidence "that can plausibly be interpreted two different ways—one discriminatory and the other benign—does not directly reflect illegal animus, and, thus, does not constitute direct evidence." *Hall v. United States Dep't of Labor, Admin. Review Bd.*, 476 F.3d 847, 855 (10th Cir. 2007). Federal courts have routinely recognized that *rarely* will discriminatory intent be established by direct evidence. *Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1208 (10th Cir. 2007); *Robinson v. Runyon*, 149 F.3d 507, 513 (6th Cir.1998) ("[R]arely will there be direct evidence from the lips of the defendant proclaiming his or her [discriminatory] animus").

Here, the mere fact that the Company will photograph weddings, but not same-sex commitment ceremonies does not show that its owners are motivated by unlawful animus against those with a same-sex "sexual orientation." That evidence simply does not inform the "ultimate issue" of Elane Photography's motivation, and thus, it does not constitute direct evidence of invidious discrimination. While claiming that Ms. Willock's evidence was "direct proof" of discrimination, the Commission's analysis implicitly recognized that it was not. The Commission reasoned that "[t]he facts of this case provided a sufficient basis for *inferring* an

intent or motive to discriminate." Comm'n Dec. at 14 (emphasis added); *see also id.* at 18 ("The evidence provided a sufficient basis for *inferring* intentional discrimination") (emphasis added). But "evidence is not 'direct' if an inference of discrimination is required." *Riggs*, 497 F.3d at 1118. The Commission thus erred in holding that Ms. Willock presented direct evidence of discrimination.[4]

Ms. Willock therefore must rely on indirect evidence to establish her claim of unlawful discrimination. The Supreme Court of New Mexico has adopted the burden-shifting approach from *McDonnell-Douglas,* 411 U.S. 792 (1973), for analyzing discrimination claims supported by indirect evidence. *See Smith v. FDC Corp.*, 109 N.M. 514, 518 (Sup. Ct. 1990). The first step of this analysis requires the complainant to demonstrate her *prima facie* case. "A prima facie case of discrimination may be made out by showing that the [complainant] is a member of the protected group, that [she] was qualified to continue in [her] position, that [her] employment was terminated, and that [her] position was filled by someone not a member of the protected class." *Id.* Obviously, these *prima facie* factors, which were established in the context of racial employment discrimination claims, are not readily applicable when determining whether an allegedly public accommodation has discriminated on the basis of "sexual orientation." It is thus

[4] Elane Photography's decision to photograph weddings but not same-sex commitment ceremonies does not draw a distinction based on "sexual orientation." If anything, the Company's policies distinguish on the basis of marriage, a legally recognized institution in New Mexico. Many courts around the country have recognized that such marriage-based distinctions do not amount to disparate treatment on the basis of "sexual orientation." *See Monson v. Rochester Athletic Club*, 759 N.W.2d 60, 63-65 (Minn. Ct. App. 2008) (holding that a policy granting family memberships only to married couples did not "discriminate on the basis of 'sexual orientation'"); *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 442-43 (Or. Ct. App. 1998) (holding that a policy reserving insurance benefits to married couples "did not discriminate 'because of' sexual orientation"); *Phillips v. Wis. Pers. Comm'n*, 482 N.W.2d 121, 123 (Wis. Ct. App. 1992) (holding that a policy granting family health insurance coverage only to married couples "is keyed to marriage and . . . does not illegally discriminate by doing so").

unclear which *prima facie* factors apply in this context, but the Court need not dwell on this unsettled issue because Ms. Willock cannot satisfy any other step of the burden-shifting analysis.

Once a party demonstrates each element of her *prima facie* case, that showing "may then be rebutted by evidence that the [party] was [refused service] based on a nondiscriminatory motivation." *Id.* Here, both Jonathan and Elaine testified that they declined to photograph Ms. Willock's wedding-like, same-sex commitment ceremony because their religious beliefs and moral beliefs and company policy prevent them from using their talents and company resources to promote and commemorate a message with which they earnestly disagree, namely, that marriage can exist between anyone other than one man and one woman. Tr. at 85-88, 119. Both Jonathan and Elaine expressly stated that they did not decline Ms. Willock's request because of her "sexual orientation." Tr. at 85, 114. In fact, they both acknowledged that they would provide their photography services to Ms. Willock or any other individual regardless of his or her "sexual orientation," but they could not do so in the requested context of a same-sex commitment ceremony because of the message conveyed by that event. Tr. at 88, 114. If, instead, Ms. Willock had asked Elane Photography to take pictures of her as part of, for example, individual portraits for a modeling portfolio, the Company would have been willing and able to provide those services. Tr. at 88, 115.

In sum, then, Elane Photography's decision not to photograph Ms. Willock's ceremony was motivated by Jonathan's and Elaine's religious convictions to refrain from furthering, promoting, or commemorating a message that conflicted with their sincerely held religious beliefs and moral beliefs, and not from any sort of unlawful discriminatory animus. This is not an irrational, arbitrary, post-hoc justification for the Company's actions. The legitimacy of Elane Photography's nondiscriminatory reason for not photographing a same-sex commitment

ceremony is demonstrated by a simple illustration. Suppose, for example, that a Ku Klux Klan member approached an African-American photographer and asked her to photograph a Klan event. Suppose, further, that the photographer declined the request because she did not want to further, promote, or commemorate the message conveyed by the Klan. It would be absurd to find (and this Commission would, no doubt, decline to conclude) that the photographer discriminated against the Klan member on the basis of his race. Instead, the photographer declined the request for the lawful reason that she did not want to further, promote, or commemorate a message that deeply conflicts with her personal beliefs. It was for this entirely lawful reason that Elane Photography declined Ms. Willock's request. Thus, under the burden-shifting analysis, Elane Photography has satisfied its burden of putting forth a legitimate, nondiscriminatory reason for withholding its services.

"[Once] the [business] articulates a nondiscriminatory reason for [withholding its services], the [complainant] has the opportunity to show that the articulated reason was merely a pretext for a discriminatory action." *Martinez*, 113 N.M. at 368. A complainant demonstrates pretext by "successfully discredit[ing] the [business's] proffered non-discriminatory motives." *Sonntag*, 130 N.M. at 247. "The burden of showing that the [business's] actions were a pretext merges with the [complainant's] ultimate burden of proving a discriminatory . . . practice." *Martinez*, 113 N.M. at 368. "[T]he ultimate burden of persuading the trier of fact that the [business] intentionally discriminated against the [complainant] remains at all times with the [complainant]." *Sonntag*, 130 N.M. at 247.

Ms. Willock did not introduce any evidence demonstrating that Elane Photography's legitimate, nondiscriminatory reason for refusing its services was a pretext. She did not in any way discredit the Company's proffered non-discriminatory motives. *See id.* In the absence of

such evidence, she should not have prevailed on her discrimination claim. Furthermore, the very limited evidence presented by Ms. Willock was utterly insufficient to satisfy her "ultimate burden" of proving the "ultimate issue" that the Company was motivated by impermissible discrimination. Indeed, the Commission did not identify one iota of evidence showing that Elane Photography's actions were motivated by Ms. Willock's sexual orientation or an animus to discriminate on the basis thereof. Therefore, the Commission should find that the Company did not discriminate on the basis of "sexual orientation" and thus did not violate the NMHRA. *See* N.M. Stat. § 28-1-7(F).

II. The Commission's Application Of The NMHRA To Elane Photography Violates The Company's Constitutional Right To Freedom Of Expression.

Both the United States Constitution and the New Mexico Constitution protect the right to freedom of expression against state coercion.[5] The First Amendment of the United States Constitution states that the government "shall make no law . . . abridging the freedom of speech[.]" U.S. Const. amend. I. Similarly, the New Mexico Constitution provides that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech[.]" N.M. Const. art. II, § 17. As will be demonstrated, the Commission's application of the

[5] The Commission did not analyze the free-expression and free-exercise claims raised by Elane Photography. Instead, the Commission summarily stated: "To the extent that Elane Photography's arguments in this proceeding sought to raise questions as to the constitutionality of the NMHRA or questions as to an automatic preemption of the NMHRA by the United States Constitution . . . , those questions are not before the . . . Commission for determination in this proceeding and, accordingly, are not addressed here." Comm'n Dec. at 18. The Commission apparently mistook Elane Photography's as-applied constitutional claims for facial challenges to the entire NMHRA. But, as is demonstrated here, Elane Photography does not allege that the Federal and State Constitutions preempt or invalidate the NMHRA in its entirety. Instead, the Company contends that these constitutional principles prohibit the State from applying that statute under these circumstances. The Company unmistakably raised and preserved these as-applied constitutional claims, and, despite the Commission's belief to the contrary, these claims should have been addressed by the Commission and should also be addressed by this Court.

NMHRA to Elane Photography's decision not to photograph Ms. Willock's same-sex commitment ceremony violated the Company's freedom-of-expression rights.[6]

Photographs can qualify as speech for purposes of First Amendment protection. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 ("[T]he Constitution looks beyond written or spoken words as mediums of expression."); *Kaplan v. California*, 413 U.S. 115, 119-120 (1973) ("[P]ictures, films, paintings, drawings, and engravings . . . have First Amendment protection[.]"); *Bery* v. *City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) (noting that "paintings, photographs, prints and sculptures . . . communicate some idea or concept to those who view [them], and as such are entitled to full First Amendment protection"); *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915 (6th Cir. 2003) ("The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures.").

The pictures produced by Elane Photography without question qualify for First Amendment protection. And so do the artistic skills and creative process Elaine Huguenin uses to create the photographs. "It goes without saying that artistic expression lies within . . . First Amendment protection," *National Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (1998). Elaine's photographs are distinctively artistic. She is not a robotic drone who functions as a mere extension of her client. Neither does she meticulously pose each picture, or create old-fashioned, staged photos. Instead, her style of photography—known as photojournalistic—

[6] Elane Photography's freedom-of-expression constitutional arguments rely primarily on federal law interpreting the First Amendment of the United States Constitution. But, to the extent the New Mexico Constitution provides greater protection to rights of expression, Elane Photography relies on that constitutional provision as well. *Cf. City of Farmington v. Fawcett*, 114 N.M. 537, 544-45 (Ct. App. 1992) (adopting a broader scope of expression rights in the context of obscenity law).

employs a hands-on approach to capturing candid "moments which are fresh, real[,] and un-staged." Resp. Ex. B at 2. She strives to "creat[e] photographs that capture the entirety of a single day." Resp. Ex. B at 2. And for most of her clients, she composes a "coffee-table book" that portrays the wedding story through pictures. Tr. at 108. A brief review of Elaine's pictures readily discloses the artistic nature of the Company's work. *See* Resp. Ex. I, J, K.

Elane Photography's status as a commercial, for-profit entity does not diminish its First Amendment rights. "[S]peech does not lose its protection because of the corporate identity of the speaker." *Pacific Gas and Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986). "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. National Fed'n of the Blind of North Carolina*, 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) ("Of course, the degree of First Amendment protection is not diminished merely because the . . . speech is sold rather than given away.").

Every photograph "communicates some idea or concept to those who view [them]." *See Bery*, 97 F.3d at 696. Elane Photography is associated with, and thus implicitly endorses, the messages conveyed in every created image. The Company uses many of its photographs for advertising and promotional purposes, thus directly associating its name with the images portrayed. Tr. at 74-75. In addition, every photograph that the Company posts online for clients to purchase contains the Company's logo as a watermark, which again directly associates its name with the image portrayed. Tr. at 79. Furthermore, federal law guarantees that Elane Photography owns the copyright for *each and every* picture taken by its photographers, even if the picture is purchased by a client. *See* 17 U.S.C. § 102(a)(5) ("Copyright protection subsists . . . in original works of authorship," specifically "pictorial" works, that are "fixed in any tangible

medium of expression"); 17 U.S.C. § 101 (defining a "work made for hire" as "a work prepared by an employee within the scope of his or her employment"). Above all, Elane Photography uses its employees' artistic skills and talents to create the final, meticulously edited images, and, for that reason, is intimately associated with, and, by logical extension, is promoting and endorsing, the messages conveyed in them. . *See* Tr. at 80-81. Elane Photography "create[s] a story" and "capture[s] the entirety of a single day" through its wedding photography. Resp. Ex. B at 1-2. The Company aims to tell the story of a couple's love for each other and their life-long commitment to remain in a marital relationship.

Thus, when Ms. Willock asked Elane Photography to aid in "celebrating" her wedding-like, same-sex commitment ceremony, she in essence asked Elane Photography to use its expressive First Amendment rights to commemorate the story of her day and to convey (and thus implicitly endorse) the message that a marital relationship can exist between two people of the same sex.[7] But Elane Photography does not want to further, promote, or commemorate that message because it conflicts with company policy and with the deeply held religious beliefs of its co-owners. The Commission's application of the NMHRA to Elane Photography essentially compelled the Company to convey a message with which its owners disagree and thus violated the Company's First Amendment rights.

The Commission violated Elane Photography's First Amendment rights against compelled speech by punishing it for declining to promote the messages advocated at Ms. Willock's

[7] It would be disingenuous for Ms. Willock to suggest that she was not asking Elane Photography to communicate this expressive message. Ms. Willock's wedding-like "commitment ceremony" served no legal or administrative purpose because New Mexico does not recognize any legal union between same-sex couples; thus, the only purpose of this ceremony was for Ms. Willock and her partner to express and proclaim their affections for one another and their decision to enter into a long-term relationship similar to marriage. It was this message that Ms. Willock wanted Elane Photography to capture on film, and this message that the Company refused to promote or commemorate.

ceremony. "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting Sys. Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994); *see also Wooley v. Maynard*, 430 U.S. 705, 715 (1977) ("The First Amendment protects the right of individuals . . . to refuse to foster . . . an idea they find morally objectionable."). "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995) (quotations omitted); *see also Wooley*, 430 U.S. at 714 ("[T]he right of freedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all"); *Pacific Gas and Elec.*, 475 U.S. at 11 ("[F]reedom *not* to speak publicly . . . serves the same ultimate end as freedom of speech in its affirmative aspect.").

These bedrock constitutional principles undergird the well-established rule against compelled expression, which prohibits the government, including the New Mexico Human Rights Commission, from compelling a private actor to express or affirm a message contrary to her beliefs. *See United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (recognizing that the First Amendment "prevent[s] the government from compelling individuals to express certain views"); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1283 (10th Cir. 2004) ("The Supreme Court has long held that the government may not compel the speech of private actors.").[8]

[8] These First Amendment principles apply equally to individuals, businesses, corporations, and publishers. *See Hurley*, 515 U.S. at 574 (noting that the rule against compelled expression is "enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers"); *Pacific Gas and Elec.*, 475 U.S. at 16 ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say.").

The "choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control," *Hurley*, 515 U.S. at 575, and the government may not "compromise" or otherwise invade "the speaker's right to autonomy over the message," *id.* at 576. The United States Supreme Court has found that the government has unconstitutionally invaded a speaker's autonomy by, for example, (1) requiring the speaker "to assist in disseminating" the views of another, *see Pacific Gas and Elec.*, 475 U.S. at 14; (2) requiring the speaker "to associate with speech with which [she] may disagree" because that "force[s]" her "to appear to agree with [those] views," *see id.* at 15; (3) forcing dissemination of a contrary view "upon a speaker intimately connected with the communication advanced," *see Hurley*, 515 U.S. at 576; or (4) requiring the speaker "to foster . . . an idea [she] find[s] morally objectionable," *see Wooley*, 430 U.S. at 715. The New Mexico Human Rights Commission has done all of those things here by ruling in favor of Ms. Willock's claim of sexual orientation discrimination. The New Mexico state law, as applied to this case, violates the First Amendment.

The Commission's actions forcing Elane Photography either to photograph wedding-like, same-sex commitment ceremonies or to suffer punishment compels the Company to express messages with which it vehemently disagrees, namely, that marriage can exist between anyone other than one man and one woman, and that same-sex romantic relationships are morally acceptable. Such a mandate impermissibly invades the Company's right of belief and autonomy over its artistic expression by requiring it to "associate" with messages its owners find offensive, and forcing the Company "to appear to agree with [those] views." *See Pacific Gas and Elec.*, 475 U.S. at 15. Worse yet, the Commission's decision forces the Company into the role of actively assisting in the dissemination of a message that its owners deem "morally objectionable." *See Wooley*, 430 U.S. at 715. Applying the NMHRA here forces Elaine to use

her artistic talents to further a message that conflicts with her sincerely held religious beliefs. Such an improvident application of state law cuts to the very heart of Elane Photography's freedom-of-expression rights, eradicating the Company's constitutional right of autonomy over the messages it conveys through its expressive activities.

The prohibition against compelled speech is well established and has taken many forms. *See, e.g.*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that "the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 24 (1974) (holding that a Florida statute requiring a newspaper to offer a right-to-reply to political candidates amounted to unconstitutional compelled speech); *Wooley*, 430 U.S. at 714 (holding that requiring the State's message "Live Free or Die" on state-issued license plates was unconstitutional compelled speech); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232-35 (1977) (holding that requiring government employees to contribute financially "to the support of an ideological cause [they] may oppose" was unconstitutional under the First Amendment).

The most instructive case in this context is *Hurley*, 515 U.S. 557 (1995). A homosexual activist group alleged "sexual orientation" discrimination under the Massachusetts public-accommodation antidiscrimination statute (one that is similar to the NMHRA) against the private organizers of the Saint Patrick's Day parade. They refused to allow the activist group, which advocated in favor of persons who engage in homosexual conduct, to march in the parade. The state courts ordered the parade organizers to include the activist group, finding unlawful "sexual orientation" discrimination as the reason for the group's exclusion. But a *unanimous* United

States Supreme Court reversed, holding that compelling the parade organizers to include the plaintiffs and their message in the parade unconstitutionally interfered with the organizers' freedom of expression.

> Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade. . . . *But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.*

Id. at 572-73 (emphasis added). Similarly, each event photographed by Elane Photography affects the message conveyed through its photography. Requiring Elane Photography to photograph a same-sex "wedding" ceremony, and thus forcing the Company to promote the message conveyed by such a ceremony, infringes on the Company's expressive autonomy by forcing it to support, endorse, and commemorate a message that conflicts with company policy and its owners' religious beliefs. Like *Hurley*, the present case is a quintessential example of a compelled-speech violation.

Government actions that compel private speech are subject to strict scrutiny. *See Turner Broadcasting*, 512 U.S. at 642 ("Our precedents . . . apply the *most exacting scrutiny* to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the *same rigorous scrutiny*.") (emphasis added) (citations omitted). Under that high level of scrutiny, government actions are presumed to be unconstitutional unless they are a "narrowly tailored means of serving a compelling state interest." *See Pacific Gas & Elec.*, 475 U.S. at 19; *see also Wooley*, 430 U.S. at 715-16 (acknowledging that once the court determines First Amendment protections apply, it must then "determine whether the State's countervailing interest is sufficiently compelling" to justify the infringement).

The Commission's application of the NMHRA to compel Elane Photography to photograph same-sex commitment ceremonies cannot survive strict scrutiny. Again, the *Hurley* case is on point and instructive in this context:

> On its face, the object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference. When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.
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> It might, of course, have been argued that a broader objective is apparent: that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. . . . But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective. . . . The very idea that a . . . speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.

Hurley, 515 U.S. at 578-79; *see also Wooley*, 430 U.S. at 717 ("[W]here the State's interest is to disseminate an ideology, . . . such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.").

Here, there is likewise no legitimate reason for the Commission's decision to apply the NMHRA to Elane Photography's expressive enterprises. To the extent that a legitimate (or perhaps even compelling) government interest exists for the NMHRA on its face, that interest does not pertain when the law is applied to expressive activity as it is here. But even if a compelling government interest does exist, applying the NMHRA to Elane Photography's expressive activities is not the least restrictive means of achieving that interest. Accordingly, the Commission violated the First Amendment by applying the NMHRA to Elane Photography's

decision not to use its expressive constitutional rights to promote or commemorate a message that conflicts with its owners' sincerely held religious beliefs.

III. The Commission's Application Of The NMHRA To Elane Photography Violates The Company's And Its Owners' Constitutional Freedom Of Religious Exercise.

Both the United States Constitution and the New Mexico Constitution protect the free exercise of religion. The First Amendment of the United States Constitution requires that the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. Const. amend. I. Similarly, the New Mexico Constitution provides that "[e]very man shall be free to worship God according to the dictates of his own conscience, and no person shall ever be molested or denied any civil or political right or privilege on account of his religious opinion or mode of religious worship." N.M. Const. art. II, § 11. The Commission's application of the NMHRA to Elane Photography's decision not to photograph Ms. Willock's same-sex commitment ceremony infringed on both the Company's and its owners' free exercise of religion under both the U.S. and state constitutions.[9]

Applying the NMHRA to require Elane Photography to photograph Ms. Willock's same-sex commitment ceremony forces Elaine, the Company's co-owner and head photographer, either to attend and photograph a religious ceremony that violates her conscience or face additional punishment. The Human Rights Commission did not adequately consider its extraordinary decree punishing a business owner for declining to attend a religious ceremony advocating ideas that conflicted with her own religious beliefs.

[9] Elane Photography, as a business entity, has standing to assert the free-exercise rights of its owners. For example, in *EEOC v. Townley Engineering & Manufacturing Company*, 859 F.2d 610, 619-20 (9th Cir. 1988), the court held that a closely held corporation—which was defending against a discrimination claim brought under federal law—could assert the free-exercise rights of its two primary owners. Likewise, Elane Photography, in defending against this claim of discrimination, can assert the free-exercise rights of its owners.

Ms. Willock's commitment ceremony, like most weddings, was a religious ceremony. It was presided over by Reverend Pintki Murray, a minister of Unity Church. Tr. at 50-51; Resp. Ex. G, H. And it included, among other traditionally religious elements of a wedding, the reciting of solemn vows and a prayer. Tr. at 56. As mentioned, Elaine sincerely believes that marriage is a sacred, God-ordained union between one man and one woman and that the Bible forbids any alternative definitions of marriage. Tr. at 110.

The Human Rights Commission has now ruled, in effect, that in order for private business owners to comply with New Mexico law, they must attend religious services advocating ideas that violate their personal religious beliefs or suffer formal punishment from the Commission. But this harsh rule violates the Free Exercise Clause. The "exercise of religion" protected by the First Amendment includes the "abstention from[] physical acts" such as "assembling with others for a worship service[.]" *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). "[H]istorical instances of religious persecution and intolerance . . . gave concern to those who drafted the Free Exercise Clause." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (quotations omitted).

Few (if any) infringements on the free exercise of religion are as pernicious (or as characteristic of religious intolerance) as forcing a person to attend a religious ceremony advocating ideas that violate her conscience. *See Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 9 (1947) (acknowledging that the religious persecution in the colonies included requiring all persons, "whether believers or non-believers," to attend religious services); *Locke v. Davey*, 540 U.S. 712, 722 n.6 (2004) (discussing Thomas Jefferson's "Bill for Religious Liberty," which guaranteed "that no man shall be compelled to frequent . . . any religious worship . . ."). Yet, by

applying the NMHRA to Elane Photography, that is precisely what the Commission has done. This Court cannot sanction such an egregious violation of the Free Exercise Clause.

Secondly, the Commission has violated the Free Exercise Clause by infringing on Elane Photography's "hybrid" rights. A party presents a hybrid claim when it couples a free-exercise claim with some other constitutional claim, such as, for example, the free speech claim presented here. *Axson-Flynn*, 356 F.3d at 1295. "[T]he hybrid-rights theory '. . . requires a colorable showing' of infringement of a companion constitutional right." *Id.* (quoting *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998)). This requirement of a colorable showing "mean[s] that the [party] must show a fair probability . . . of success on the merits." *Id.* at 1297.

Here, the Commission's decision infringes on Jonathan's and Elaine's free exercise of religion and freedom of speech by forcing them to promote and commemorate a message contrary to their sincerely held religious beliefs. Both Jonathan and Elaine believe that marriage, as a sacred institution ordained by God, consists only of the union of one man and one woman. Tr. at 85-86, 110. And, as manifest in their company policy, they refuse to use their Company's resources to advance the message (1) that marriage can exist between anyone other than one man and one woman, or (2) that same-sex romantic relationships are morally acceptable. Tr. at 84-86. In fact, Jonathan and Elaine would affirmatively violate their sincerely held religious beliefs if they used their company resources to promote or commemorate an event communicating those messages. But the Commission's application of the NMHRA posed a substantial burden on the Company's, Jonathan's, and Elaine's free exercise of religion, forcing them either to violate their sincerely held religious beliefs by promoting a message antithetical to those beliefs or, alternatively, to face civil liability for so-called "sexual orientation" discrimination. *See Sherbert*

v. Verner, 374 U.S. 398, 404 (1963); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981). "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [them] for [maintaining their religious beliefs]." *Sherbert*, 374 U.S. at 404. This satisfies the colorable showing requirement, invokes the hybrid-rights theory, and mandates the application of strict scrutiny.

The Commission violates the free exercise rights of Elane Photography in a third way, because the New Mexico Human Rights Act is not neutral towards religion or generally applicable to everyone. When a law contains a class of particularized exemptions, the State "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884. As discussed below, the NMHRA contains a few narrow exemptions, none of which protect the religious practice at issue here. The existence of these inadequate exceptions demonstrates that the NMHRA is not neutral or generally applicable. *See Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 364-66 (3d Cir. 1999) (holding that a regulation that contained medical exemptions but not religious exemptions was not neutral or generally applicable).

The statutory exemptions in the NMHRA are not neutral or generally applicable because they inadequately protect free-exercise rights and expose much protected religious activity to civil liability. First, the statute exempts only "religious or denominational institution[s] or organization[s] that [are] operated, supervised or controlled by or that [are] operated in connection with a religious or denominational organization." N.M. Stat. 28-1-9(B), (C). The exemptions do not extend to nonreligious organizations, like Elane Photography, whose owners are motivated by religious precepts. Second, these exemptions do not guard the religious

freedoms of individuals, but only those of religious organizations, thus leaving individuals like Jonathan and Elaine vulnerable to infringements on their religious liberties. Third, the exemptions for religious organizations are so limited in their scope that they likely would not protect Elane Photography's religiously motivated conduct even if the Company qualified as a "religious organization" under the statute. *See* N.M. Stat. 28-1-9(B) (exempting a religious organization only when the organization is "limiting admission to or giving preference to persons of the same religion or denomination or . . . making selections of buyers, lessees[,] or tenants as are calculated by the organization . . . to promote the religious or denominational principles for which it is established or maintained); N.M. Stat. 28-1-9(C) (exempting a religious organization only when it is "imposing discriminatory *employment or renting practices* that are based upon sexual orientation or gender identity," but not exempting the "*for-profit activities* of a . . . religious organization subject to [a certain provision of] the Internal Revenue Code") (emphasis added).

Thus, the NMHRA fails to protect the free-exercise rights of every religiously motivated business owner in this State and every organization, like Elane Photography, that does not meet the stringent statutory definition of a "religious or denominational organization." As a result, the NMHRA infringes on the free-exercise rights of all these unprotected individuals and organizations. It does so by compelling some religiously motivated business owners, like Elaine, to attend religious ceremonies that violate their consciences and forcing individuals and organizations, like Elane Photography, to express messages contrary to their sincerely held religious beliefs. This overbreadth problem is compounded by the Commission's broad interpretation of the term "public accommodation," as discussed in Section I.A. In sum, then, as

applied to Elane Photography, the NMHRA violates the Free Exercise rights of Elane Photograph and is unconstitutional.

The Commission must justify the burden it imposes on the Company's and its co-owners' free-exercise rights by demonstrating a compelling state interest implemented by the least restrictive means. *Hernandez v. Commissioner,* 490 U.S. 680, 699 (1989); *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 718 (1981); *Sherbert v. Verner,* 374 U.S. 398, 403 (1963); *Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972). The Commission lacks a compelling state interest, and it has not implemented its state interest by the least restrictive means. The State's main interest in this case can only be to "eliminate discrimination" broadly, or specifically, to eliminate "sexual orientation" discrimination. However, the Supreme Court in *Hurley* ruled that the state cannot justify enforcing a nondiscrimination statute by compelling private citizens to promote advocacy they oppose:

> On its face, the object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference. When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.
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> It might, of course, have been argued that a broader objective is apparent: that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. . . . But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective. . . . The very idea that a . . . speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.

Hurley, 515 U.S. at 578-79

Even if this Court finds that strict scrutiny does not apply, the Commission's application of the NMHRA to compel Elaine to attend and photograph a religious ceremony that violates her conscience fails rational-basis scrutiny. *See Axson-Flynn*, 356 F.3d at 1294 ("Depending on the nature of the challenged law or government action, a free exercise claim can prompt either strict scrutiny or rational basis review.). Compelling someone to attend—not to mention to use her artistic skills and talents to photograph and commemorate—a religious ceremony advocating ideas that conflict with her conscience is an egregious violation of the constitutional guarantee of the free exercise of religion; it cuts to the very heart of our Nation's First Amendment liberties. Because the Commission's decision created that pernicious outcome, it violates the Free Exercise Clause, regardless of which standard of review applies.

IV. The Commission's Application Of The NMHRA To Elane Photography Violates The New Mexico Religious Freedom Restoration Act.

The New Mexico Religious Freedom Restoration Act ("RFRA") provides as follows:

> A government agency shall not restrict a person's free exercise of religion unless:
>
> (A) the restriction is in the form of a rule of general applicability and does not directly discriminate against religion or among religions; and
>
> (B) the application of the restriction to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

N.M. Stat. § 28-22-3. A "person" is broadly defined in RFRA to include "one or more individuals, a partnership, association, organization, corporation, joint venture, legal representative, trustees, receivers or the state and all of its political subdivisions," N.M. Stat. § 28-1-2(A); thus, a RFRA claim may be asserted by both Elane Photography and its co-owners,

Jonathan and Elaine.[10] The "free exercise of religion" is defined as "an act or a *refusal to act* that is substantially motivated by religious belief," N.M. Stat. § 28-22-2(A) (emphasis added); thus, RFRA applies to Elane Photography's decision not to photograph Ms. Willock's same-sex commitment ceremony. The "government agencies" covered by this statute include "the state or any of its . . . departments, agencies, [or] commissions . . . ," N.M. Stat. § 28-22-2(B); thus, RFRA applies to the Commission's decision.

Here, Jonathan and Elaine's (and thus the Company's) reasons for not photographing Ms. Willock's same-sex commitment ceremony were substantially motivated by their sincerely held religious beliefs. They believe that marriage, as a sacred institution ordained by God, exists only between one man and woman, and that they would violate their sincerely held religious beliefs if they were to associate with, promote, or commemorate a contrary message by photographing a same-sex commitment ceremony. Elaine also would violate her sincerely held religious beliefs if she photographed or otherwise was an active part of promoting or commemorating a religious ceremony, like Ms. Willock's same-sex commitment ceremony, that blesses or endorses the concept that marital or marital-like unions exist between persons of the same sex.

The Commission's ruling restricts Elaine's free exercise of religion by forcing her to attend a religious ceremony that advocates ideas in conflict with her own conscience. And the Commission's ruling restricts the Company's, Jonathan's, and Elaine's free exercise of religion by forcing them to use their talents and resources to express a message contrary to their sincerely held religious beliefs or, alternatively, to suffer civil punishment under the NMHRA. *See*

[10] Elane Photography, as a business entity, has standing to assert the RFRA claims of its owners. As previously discussed, in *Townley Engineering*, 859 F.2d at 619-20, the court held that a closely held corporation—which was defending against a discrimination claim brought under federal law—could assert the free-exercise rights of its two primary owners. Likewise, Elane Photography, in defending against this claim of discrimination, can assert the free-exercise rights of its owners under RFRA.

Sherbert, 374 U.S. at 404; *Thomas*, 450 U.S. at 717-18. Imposing such a choice on Jonathan and Elaine restricts their free exercise of religion in the same manner as a "fine" imposed against them for their religious beliefs. *See Sherbert*, 374 U.S. at 404.

Placing such a restriction on the Company's, Jonathan's, and Elaine's free exercise of religion is justified only if "the application of the restriction to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest." *See* N.M. Stat. § 28-22-3. As demonstrated in Section III of this memorandum, applying the NMHRA to Elane Photography's decision not to photograph a same-sex commitment ceremony is not the "least restrictive means" of furthering a compelling government interest. Thus, applying that statute here violates the Company's, Jonathan's, and Elaine's free-exercise rights under RFRA.

CONCLUSION

The Commission erred in finding that Elane Photography violated the express terms of the NMHRA. But even if the Company did violate the express terms of that statute, the Commission's application of the NMHRA to Elane Photography under these circumstances infringed the Company's, Jonathan's, and Elaine's constitutional and statutory RFRA rights. This Court should thus grant Elane Photography's motion for summary judgment and reverse the Commission's decision.

Date: July 9, 2009

Respectfully submitted,

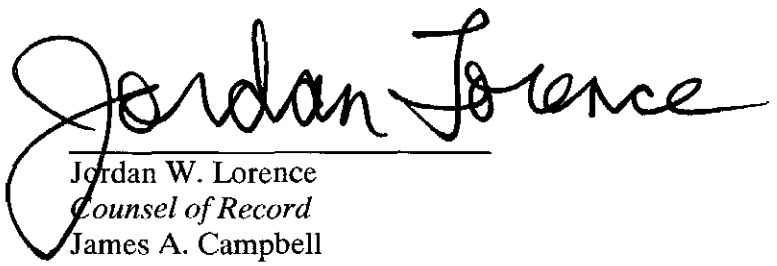

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TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES