BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF NEW MEXICO

VANESSA WILLOCK,
Complainant,

vs.

ELANE PHOTOGRAPHY,
Respondent,

HRD No. 06-12-20-0685

RESPONDENT'S BRIEF AND CLOSING ARGUMENT

NOW COMES Elane Photography LLC ("Elane Photography" or "Company"), by and through its counsel, and presents this legal brief and written closing argument to the New Mexico Human Rights Commission ("Commission") in reference to the above-captioned matter between Complainant Vanessa Willock ("Willock") and Respondent Elane Photography.

SUMMARY OF THE ARGUMENT

Willock filed a complaint against Elane Photography — a company co-owned by Jonathan and Elaine Huguenin — with an agency now known as the Human Rights Bureau of the New Mexico Department of Workplace Solutions. In her complaint, Willock alleged that the Company violated the New Mexico Human Rights Act by discriminating against her because of her "sexual orientation." *See* N.M. STAT. § 28-1-7(F). The Bureau found probable cause of discrimination in a letter dated July 5, 2007, and submitted the case to the Commission for a determination. The Commission heard evidence before a hearing examiner on January 28, 2008, in Albuquerque, New Mexico.

Before delving into the merits of Willock's claim, this Commission should summarily dismiss her complaint because the Commission is without authority to award the injunctive relief she has requested. Willock has asked only for injunctive relief and not for damages.

Even if this Commission were to address the merits of her claim, Willock has not established the elements of a claim under N.M. STAT. § 28-1-7(F). Elane Photography does not constitute a "public accommodation," as that term has been defined by statute and interpreted by the courts. Moreover, Willock has not presented any evidence demonstrating that Elane Photography's refusal to photograph her wedding-like, same-sex commitment ceremony was motivated by Willock's "sexual orientation"; instead, the evidence demonstrates that Elane Photography's decision was motivated by the co-owners' religiously based beliefs and the corresponding company policy providing that Elane Photography cannot use its resources to foster, encourage, or promote the message that "marriage" between same-sex couples is morally acceptable. The Commission should therefore find that Elane Photography did not violate the Human Rights Act.

Even if this Commission concludes that Elane Photography violated the express terms of the Human Rights Act, it should refuse to apply that statute under these circumstances. First, applying the Human Rights Act under these circumstances would violate both the United States and the New Mexico Constitutions. If this Commission were to apply the Human Rights Act to Elane Photography's expressive activities, it would force the Company to use its constitutionally protected expression to convey a message that it does not want to communicate and, therefore, would violate the 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).

In addition, if this Commission were to apply the Human Rights Act under these circumstances, it would force Elane Photography to express a message contrary to, and in violation of, the sincerely held religious beliefs of its co-owners and, accordingly, would violate their constitutionally protected rights to free exercise of religion. Furthermore, applying the Human Rights Act in the face of Jonathan's and Elaine's religious beliefs would violate the New Mexico Religious Freedom Restoration Act ("RFRA"), N.M. STAT. § 28-22-1 *et seq.* The Commission should thus conclude that it cannot apply the Human Rights Act to Elane Photography's decision not to photograph Willock's wedding-like, same-sex commitment ceremony.

STATEMENT OF FACTS

Elane Photography is a limited liability company licensed to do business in the State of New Mexico. Resp. Ex. F. The Company is co-owned by Jonathan and Elaine Huguenin, *see* Tr. at __,[1] with Elaine also working as the head photographer, *see* Tr. at __.[2] The Company uses its photography services to assist its customers in commemorating significant life events. Tr. at __. 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 __. Elane Photography will not offer its services for each and every requested event. Tr. at __. For example, Elane Photography 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

[1] Counsel for Elane Photography has requested a copy of the hearing transcript from the Commission. However, as of the date that this brief needed to be mailed to the Commission, counsel had not yet received the transcript. Thus, Elane Photography submits this brief without citations to the transcript. Counsel nevertheless intends to submit a completed version of the brief, with relevant transcript citations, once we receive the transcript.

[2] The Company hires independent contractors to assist with some of the photography, but the majority of the pictures are taken by Elaine. Tr. at ___.

making of such films. Tr. at __. 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. Tr. at __.

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 __; Resp. Ex. B. Elaine is passionate about her art, and her own words state it best:

> 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.

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 ___.[3] Her approach — which is formally known as photojournalist — is intensely artistic and personally expressive. *See* Resp. Ex. I, J, K. Throughout the course of a single wedding, she takes approximately sixteen hundred

[3] 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 ___. 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 __. Elaine truly becomes an intricate part of the wedding celebration.

photos, searching for candid images that best capture the story of the day. Tr. at __. 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 __. 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 ___. She then posts these pictures on a website and allows her clients to choose which pictures they want to purchase. Tr. at ____.

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

In September 2006, 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 ___, 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. Willock inquired whether Elane Photography would be "open to helping [them] celebrate [their] day." *Id.* Elane Photography, however, 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 ___. This policy derives from Jonathan's and Elaine's sincerely held religious and philosophical beliefs that marriage, as a sacred institution ordained by God, is limited to the union of one man and one woman, and is the best way for societies to function. Tr. at __.

Because of this policy and the corresponding religious and philosophical beliefs, Jonathan and Elaine decided that the Company could not photograph Willock's wedding-like, same-sex ceremony because to do so would promote the message that marriage can be defined other than the union of one man and one woman.[4] Tr. at ___. Jonathan and Elaine believe that participating in Willock's commitment ceremony would force them to promote a message contrary to their sincerely held religious beliefs, ultimately causing them to violate those beliefs. Tr. at ___. They believe that they would be sinning against God and affirmatively violating His commands if they used their talents and company resources to promote an alternative definition of marriage. Tr. at ___. Because Willock's request conflicted with company policy and the owners' sincerely held religious beliefs, Elaine, acting on behalf of the Company, responded to Willock's email by politely declining to "celebrate" the day with Willock and her partner. Resp. Ex. E at 3.

More than two months later, on November 28, 2006, Willock sent another email to Elaine Photography, 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 Willock "for checking out [the] site." Resp. Ex. E. at 5.

The next day, November 29, 2006, Willock's same-sex partner, Misty Pascottini ("Misty"),[5] sent an email to Elaine Photography, but did not disclose in the email her relationship

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[4] This policy would also prohibit the Company from photographing a polygamous "marriage." Tr. at __. 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 __. Elaine Photography refuses to use its resources and its employees' talents to endorse and help convey such a message.

[5] Misty Pascottini now goes by the name Misty Collingsworth. Tr. at __. Apparently, Misty was married to a man with the last name Pascottini prior to her relationship with Willock.

to Willock. Misty asked if Elaine "would be willing to travel to Ruidoso for [her] wedding." Resp. Ex. E at 6. Curiously, however, it appears that Misty never planned to have a wedding in Ruidoso. Tr. at __. Elaine promptly responded and told Misty of her "willing[ness] to travel to Ruidoso for [the] wedding." Resp. Ex. E. at 7. But because Misty did not intend for the alleged Ruidoso wedding to occur, she never replied to Elaine's email.

In September 2007, Willock and Misty celebrated their marriage-like commitment ceremony in Taos, New Mexico. Tr. at __. Reverend Pintki Murray ("Reverend Murray") presided over the ceremony. Tr. at __; Resp. Ex. G, H. Reverend Murray stood at the altar in front of approximately 75 guests and witnesses. Tr. at __. The flower girls and ring bearer walked down the aisle and gathered in front of the guests near the altar. Tr. at __. The couple then proceeded down the aisle as music played and guests watched; Misty wore a traditional white wedding gown. Tr. at ___. Once the couple arrived at the altar, Reverend Murray began addressing the crowd, which, as one would expect during a wedding-like commitment ceremony, included the reciting of vows, a ring exchange, and a prayer. Tr. at ___. At the conclusion of the ceremony, Reverend Murray pronounced Willock and Misty, "Partners in Life." Tr. at __.[6] But because the State of New Mexico does not recognize "marriages," or any sort of legal union, between same-sex couples, Reverend Murray did not sign a marriage or civil union license for the couple; indeed, the commitment ceremony had no legal significance, but was conducted only as an expression of Willock's and Misty's marriage-like commitment to one another.

Willock subsequently filed her complaint, and these proceedings ensued.

Tr. at __. Since sending her email to Elane Photography, she has reverted back to her maiden name, which is Collingsworth. Tr. at __.

[6] Reverend Murray testified that she pronounced the couple either as "Partners in Life" or "Partners in Love"; she could not remember which one.

ARGUMENT

I. The Commission Should Summarily Dismiss Willock's Complaint Because The Commission Lacks The Power To Award The Requested Injunctive Relief.

Near the conclusion of the hearing in this case, the hearing officer asked Willock if she intended to introduce any evidence regarding damages. Tr. at ___. Willock declined the invitation to present such evidence, and emphasized that she was not asking for damages from the Commission. Tr. at ___. She instead is seeking only attorney fees and injunctive relief enjoining Elane Photography from refusing to photograph same-sex commitment ceremonies in the indefinite future. Tr. at ___.

The Human Rights Act does not authorize the Commission to grant injunctive relief. The Act provides only that "the [C]ommission may require the respondent to pay actual damages to the complainant and to pay reasonable attorneys' fees, if the complainant was represented by private counsel[.]" N.M. STAT. § 28-1-11(E). It therefore does not appear that the Commission has authority to issue injunctive relief, not to mention the vast-reaching, vague, prospective injunctive relief sought by Willock (i.e., enjoining Elane Photography from ever refusing to photograph the same-sex commitment ceremonies of innumerable unnamed couples in the future, if any of them happen to ask Elane Photography to do so). In the absence of authority to award such relief, the Commission should summarily dismiss Willock's complaint.[7]

The requirements for seeking injunctive relief differ vastly from the requirements for monetary damages. *See McKinnon v. Talladega County*, 745 F.2d 1360, 1362 (11th Cir. 1984) ("Unlike declaratory and injunctive relief, which are prospective remedies, awards for monetary

[7] The Commission cannot award monetary damages because such relief has not been sought by Willock and because Willock has not introduced any evidence demonstrating her entitlement to damages.

damages compensate the claimant for alleged past wrongs."). Monetary damages are given to "compensate the claimant for alleged past wrongs," *see id.*; thus damages are the typical method of relief awarded by administrative agencies for discrete acts of discrimination, *see* N.M. STAT. § 28-1-11(E). But "[p]ast exposure to illegal conduct does not in itself" establish that a complainant is entitled to injunctive relief "if unaccompanied by any continuing, present adverse effects." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). To be entitled to injunctive relief, a complainant must establish that there is a "real and immediate threat" that she will again be subject to the allegedly unlawful conduct and that the allegedly unlawful conduct will be committed by the respondent. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); *see also Rizzo v. Goode*, 423 U.S. 362, 372-73 (1976) (holding that the plaintiffs' "allegations of future injury" did not permit injunctive relief because such allegations were too "attenuated").[8]

Willock has not alleged that in the absence of broad injunction from this Commission, she will endure any purported future harm from Elane Photography. In fact, the likelihood that Willock will be subject to alleged future discrimination from Elane Photography is infinitesimally small. First and foremost, Willock would have to engage in another same-sex commitment ceremony. Given the nature of her vows and promises to remain with Misty for life, it is unlikely that she will participate in another commitment ceremony. Moreover, Willock would have to contact Elane Photography for a second time and request the Company's services again. Given that Elane Photography would not photograph her first commitment ceremony, it is unlikely that she will contact them once more. Thus, it is speculative, at best, to think that Willock will experience another alleged injury inflicted by Elane Photography. When the only

[8] Even though these cases involve federal principles of standing to seek injunctive relief, they apply equally under New Mexico law. *See Does I through III v. Roman Catholic Church of Archdiocese of Santa Fe*, 122 N.M. 307, 311 (Ct. App. 1996) (acknowledging that the New Mexico Supreme Court "relie[s] heavily on federal law" of standing).

alleged harms occurred in the past, and there is almost no likelihood of repeat harm in the future, it is well settled that a complainant may not obtain injunctive relief. *See Lyons*, 461 U.S. at 109.

Willock's request for injunctive relief suffers an even more fundamental flaw; she has failed to satisfy the most basic requirements for obtaining equitable injunctive relief – showing irreparable harm and no adequate remedy at law. "In New Mexico, injunctions are granted to prevent irreparable injury for which there is no adequate and complete remedy at law." *Hines Corp. v. City of Albuquerque*, 95 N.M. 311, 313 (Sup. Ct. 1980); *see also O'Shea v. Littleton*, 414 U.S. 488, 502 (1974) ("[T]he basic requisites of the issuance of equitable relief in these circumstances [include] [1] the likelihood of substantial and immediate irreparable injury [2] and the inadequacy of remedies at law.").

First, as demonstrated above, Willock has not shown a likelihood of immediate, irreparable injury. Indeed, the possibility of any purported future injury is miniscule and unsupported by evidence or even allegations. Second, Willock has not established that "remedies at law" (i.e., monetary damages) would be inadequate to remedy her alleged harms. On the contrary, monetary damages are the typical method of remedying discrimination claims, *see* N.M. STAT. § 28-1-11(E), and would likely be sufficient under these circumstances as well.

For all these reasons, the Commission should summarily refuse to grant the wide-ranging, speculative injunctive relief sought by Willock.

II. Willock Has Not Demonstrated That Elane Photography Violated The Human Rights Act's Prohibition On Unlawful Discriminatory Practices.

Willock has failed to establish that Elane Photography violated the Human Rights Act's prohibition on unlawful discriminatory practices. The relevant provision of the Human Rights Act 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). Willock has not presented evidence to satisfy every requirement of the statute. First, Willock has not demonstrated that Elane Photography is a "public accommodation," as that term has been defined by statute and interpreted by the state courts. Second, 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 New Mexico Law.

Elane Photography does not qualify as a public accommodation under New Mexico law. A "public accommodation" is defined as "any 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 analyzing 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). When reviewing the "historical and traditional meanings" of the term "public accommodation," the State Supreme Court discussed physical establishments such as "innkeepers and public carriers" as well as "places of lodging, entertainment[,] . . . public transportation," and "eating." *Id.* at 577-78.[9] Notably absent from the Court's discussion is anything remotely resembling a photography company that offers its

[9] The United States Supreme Court has likewise noted the limited scope of the traditional concept of a public accommodation by stating: "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 "current common-law rule" that defines public accommodations to include "innkeepers and common carriers (and, in some states, places of entertainment)").

services for limited events such as weddings, engagements, individual and family portraits, and high school graduation pictures. This is not surprising, of course, because it would be a great distortion of the law to suggest that a company like Elane Photography qualifies as a traditional public accommodation.

Traditional public accommodations provide basic, nondiscretionary services to the public at large. For example, operators of a hotel, bus, or restaurant perform ministerial tasks for the public by providing them with a bed for resting, a vehicle for traveling, or food for consuming. Simply put, the operation of such businesses does not involve primarily intricate skill or require specialized knowledge or artistic judgment. Individuals who provide such basic services to the public, as a general matter, usually lack a valid reason to refuse their services to all comers.

In stark contrast, Elane Photography provides creative and artistic services to the public. The procedure for photographing a wedding is laden with discretion and artistic judgment at every stage of the process; the created photographs communicate messages and viewpoints. When Elane Photography is offering such personally crafted, individualistic services to the public, there are a myriad of reasons for refusing its services (e.g., the potential client expects a photographic style different from Elaine's artistic approach, or the potential client wants Elaine to take photographs that would promote a message contrary to her beliefs). Vast differences separate the services offered by traditional public accommodations, like the bed of an inn or the food of a restaurant, and those offered by Elane Photography. Those differences demonstrate that Elane Photography does not satisfy New Mexico's statutory definition of a public accommodation, as it has been interpreted by the State's highest court.

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 Human Rights Act 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). Again, it is noteworthy that nothing in this list even remotely resembles a photography company, like Elane Photography, that offers its services for limited categories of events such as weddings, engagements, individual and family portraits, and high school graduation pictures. Given the State Supreme Court's instruction to look at the previous act for guidance, this further supports the conclusion that Elane Photography is not a public accommodation under New Mexico law.

By its express terms, the current version of the Human Rights Act 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* MERIAM-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).[10]

Similarly, traditional places of public accommodation — including all those listed in the former version of the Human Rights Act — 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 have a physical operation 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 (1) it does not constitute an "establishment" as required by statute, (2) it does not conform to the historical and traditional definition of public accommodation, and (3) it is different in kind from the types of establishments listed in the prior version of the Human Rights Act. The United States Supreme Court has already criticized a state court's decision to apply its public accommodations law — which was expressly limited to "places" — broadly "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). Applying New Mexico's public accommodations law to Elane Photography, without attempting to reconcile the absence of a physical location, would duplicate this analytical error.

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[10] Federal "public accommodation" statutes specifically list examples of "public accommodations." It is indeed telling that every place listed in these federal statutes all have 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 centers, and gymnasiums). Federal courts have likewise 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).

Given the importance of "look[ing] to the historical and traditional meanings [of] what constitutes a 'public accommodation'" and of "look[ing] to the previous act for guidance" when interpreting N.M. STAT. § 28-1-2(H), *see Board of Regents*, 95 N.M. at 577-78, it is clear that Elane Photography does not qualify as a public accommodation under that statute.

B. Elane Photography's Motivation For Refusing Its Services Was Not Based On Willock's "Sexual Orientation."

Willock asked Elane Photography to use its photography skills to help Willock and her partner "celebrate" their wedding-like, same-sex commitment ceremony. Resp. Ex. E at 2. Elane Photography declined Willock's request because company policy prohibits supporting or advancing a message that conflicts with Jonathan's and Elaine's sincerely held religious beliefs that marriage is the union of one man and one woman. For this reason, Elane Photography does "not photograph same-sex weddings." Resp. Ex. E. at 5.

Willock apparently believes that the lone fact that Elane Photography does not photograph same-sex commitment ceremonies, devoid of any context, necessarily means that it has violated the Human Rights Act. The Commission must reject such a simplistic and superficial analysis of this issue. It must be stressed that the Human Rights Act 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). Thus, Elane Photography violates this provision only if the Commission finds that the *reason* Elane Photography refused its services to Willock was because of Willock's "sexual orientation." *See Martinez v. Yellow Freight Sys.*, 113 N.M. 366, 369 (Sup. Ct. 1992) (noting that the "ultimate issue" in discrimination cases under the Human Rights Act is "whether the [respondent's] actions were *motivated* by impermissible discrimination") (emphasis added).

The New Mexico courts have yet to outline the governing legal analysis for a claim of "sexual orientation" discrimination in the context of a public accommodation. Given this absence of specific guidance, the Commission's analysis must be guided by the overarching principle of the Human Rights Act, namely, that the "ultimate issue" in discrimination cases is "whether the [respondent's] actions were motivated by impermissible discrimination." *See id.* "In order to prevail, [the complainant] must demonstrate, by direct or indirect evidence, that the [respondent] intentionally discriminated against her on the basis of her ['sexual orientation']." *See Sonntag v. Shaw*, 130 N.M. 238, 243 (2001). Here, Willock has not presented direct evidence demonstrating any sort of impermissible motivation on the part of Elane Photography. At best, Willock has introduced direct evidence that Elane Photography does "not photograph same-sex weddings," Resp. Ex. E. at 5, but that does not inform the "ultimate issue" of the Company's motivation.

Thus, Willock must rely upon indirect evidence to establish her claim of unlawful discrimination. The Supreme Court of New Mexico has adopted the *McDonnell-Douglas* burden-shifting approach 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 alleged "public accommodation" has discriminated on the basis of "sexual orientation." It is thus

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

Once a complainant establishes her prima facie case, that prima facie showing "may then be rebutted by evidence that the [complainant] was [refused service] based on a nondiscriminatory motivation." *Id.* Here, both Jonathan and Elaine testified that they declined to photograph Willock's wedding-like, same-sex commitment ceremony because they refuse to use, and company policy prevents them from using, their talents and resources to promote a message with which they earnestly disagree, namely, that marriage can exist between anyone other than one man and one woman. Tr. at ___. Both Jonathan and Elaine testified that they did not refuse their Company's services because of Willock's "sexual orientation." Tr. at __. In fact, they both acknowledged that they would offer their photography services to Willock or any other individual regardless of their sexual orientation, but they could not do so in the requested context of a wedding-like, same-sex commitment ceremony because of the message conveyed by that event. Tr. at ___. On the other hand, if 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 happy to provide its services in that context.

In sum, then, Elane Photography's refusal to photograph Willock's ceremony was motivated by Jonathan's and Elaine's desire to refrain from furthering, promoting, or endorsing a same-sex "marital" relationship, and not from any sort of unlawful discriminatory animus. This is not some irrational, arbitrary, post-hoc justification for the Company's actions. Context and message are important to artists, and the legitimacy of Elane Photography's nondiscriminatory reason 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 endorse 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 endorse a message that deeply conflicts with her personal beliefs. It was for this entirely lawful reason that Elane Photography declined Willock's request. Thus, under the burden-shifting analysis, it is clear that Elane Photography has satisfied its burden of putting forth a legitimate, nondiscriminatory reason for refusing to offer its services.

"[Once] the [respondent] articulates a nondiscriminatory reason for [refusing 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 [respondent's] proffered non-discriminatory motives." *Sonntag*, 130 N.M. at 247. "The burden of showing that the [respondent'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 [respondent] intentionally discriminated against the [complainant] remains at all times with the [complainant]." *Sonntag*, 130 N.M. at 247. Willock has not introduced any evidence demonstrating that Elane Photography's legitimate, nondiscriminatory reason for refusing its services was a pretext. She has not in any way discredited the Company's proffered non-discriminatory motives. *See id.* In the absence of such evidence, she cannot succeed on her discrimination claim. Furthermore, the very limited evidence put forth by Willock is utterly

insufficient to prove the "ultimate issue" that the Company was motivated by impermissible discrimination. Therefore, the Commission should find that Elane Photography did not discriminate on the basis of "sexual orientation" and thus did not violate the Human Rights Act. *See* N.M. STAT. § 28-1-7(F).

III. Application Of The New Mexico Human Rights Act To Elane Photography Under These Circumstances 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. 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 in this section, if the Commission applies the Human Rights Act to Elane Photography's refusal to photograph Willock's wedding-like, same-sex commitment ceremony, it will violate Elane Photography's freedom-of-expression rights.[11]

"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), and this constitutional protection includes pictures and photographs, *see Kaplan v. California*, 413 U.S. 115, 119-20 (1973); *Berry v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) (noting that

[11] Elane Photography's freedom-of-expression constitutional arguments primarily rely 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. *See, e.g., 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).

"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"). The pictures produced by Elane Photography surely qualify for First Amendment protection. Elaine's photographs are distinctively artistic. She does not simply heed her client's every wish, meticulously pose each picture, or create old-fashioned, staged photos. Instead, her style of photography, which is known as photojournalistic, 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," *see id.*, and for most of her clients, she composes a "coffee-table book" that portrays the wedding story through pictures, Tr. at ___. Indeed, 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). Moreover, "[i]t 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 Berry*, 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 their photographs for

advertising and promotional purposes, thus directly associating its name with the image portrayed. Tr. at ___. 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 ___. Furthermore, 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 images and, for that reason, is intimately associated with, and, by logical extension, is assumed to be endorsing, the messages conveyed therein. *See* Tr. at ___.

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, by asking Elane Photography to aid in "celebrating" her wedding-like, same-sex commitment ceremony, Willock 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.[12] But Elane Photography does not want to further that message because it conflicts with the

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

Company's policy and with the deeply held religious beliefs of its co-owners. If this Commission were to find a violation of the Human Rights Act under these circumstances, it would essentially be compelling Elane Photography to convey a message with which it disagrees, and would thus be violating the Company's First Amendment rights.

"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 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.").[13]

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.

Forcing Elane Photography to photograph same-sex "marriage" ceremonies compels the Company to express a message with which it vehemently disagrees, namely, that same-sex "marriage" is morally acceptable. Such a mandate impermissibly invades upon the Company's right of belief and autonomy over its artistic expression by requiring it to "associate" with a message with which it disagrees, thereby forcing the Company "to appear to agree with [those] views." *See Pacific Gas and Elec.*, 475 U.S. at 15. Worse yet, such a mandate forces the Company into the role of actively assisting in the dissemination of a message that its owners

[13] 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.").

deem "morally objectionable," *see Wooley*, 430 U.S. at 715; Elaine would be forced to use her artistic talents to further a message that conflicts with her beliefs. Such a mandate would cut to the very heart of Elane Photography's freedom-of-expression rights, making a mockery of the Company's right to 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-issues license place was unconstitutional compelled speech).

The most instructive case in this context is *Hurley*, 515 U.S. 557 (1995). The plaintiffs in *Hurley* sued for "sexual orientation" discrimination under the Massachusetts public accommodation antidiscrimination statute (one that is similar to the New Mexico statute at issue here). The defendants, who were private organizers of the Saint Patrick's Day parade, refused to allow the plaintiffs' group, who were advocating for the rights of those who engage in homosexual acts, to march in the parade. The state courts ordered the parade organizers to include the plaintiffs' group, citing "sexual orientation" discrimination as the reason for their exclusion. But a *unanimous* United States Supreme Court reversed, finding that the compelled inclusion in the parade of the plaintiffs and their message unconstitutionally interfered with the freedom of expression of the private parade organizers.

> 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.*

Hurley, 515 U.S. at 572-573 (emphasis added). Similarly, the type of events photographed by Elane Photography affects the message conveyed through the Company's photographs. 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, foster, and endorse a message that conflicts with its own policy and with 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).

Applying the Human Rights Act to compel Elane Photography to photograph same-sex "marriage" ceremonies does not survive strict scrutiny. Again, the *Hurley* case is directly on point and instructive in this context. In that case, the Court said:

> 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.
>
> 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 applying the Human Rights Act to Elane Photography's expressive enterprises. To the extent that a legitimate (or perhaps even a compelling) reason exists for the Human Rights Act on its face, that reason does not pertain when the law is applied to expressive activity as it is here. Because there is no compelling purpose for applying the statute under these circumstances, the Commission should find that strict scrutiny is not satisfied. Even if there were a compelling state interest here, the Commission must apply it in the least restrictive means so it does not violate the First Amendment, as complainant is requesting here.

In sum, then, this Commission should refrain from applying the Human Rights Act against Elane Photography in this case because such an application of the law to the Company's expressive activity will violate its freedom-of-expression rights.

IV. Application Of The New Mexico Human Rights Act To Elane Photography Under These Circumstances 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 states 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. If the Commission applies the Human Rights Act to Elane Photography's refusal to photograph Willock's wedding-like, same-sex commitment ceremony, it will infringe upon both the Company's and its owners' free exercise of religion.

Both co-owners of Elane Photography, Jonathan and Elaine Huguenin, have sincere religious beliefs that marriage, as a sacred institution ordained by God, can exist only between one man and one woman. Tr. at ___. And, as manifest in their company policy, they refuse to use their Company's photography services to advance the opposing viewpoint that alternative definitions of marriage, such as polygamy or same-sex coupling, is good public policy or morally acceptable.[14] If, however, the Human Rights Act were applied to Elane Photography under these

[14] Elane Photography, as a corporate entity, has standing to assert Jonathan's and Elaine's free-exercise rights. For example, in *E.E.O.C. 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 claim brought pursuant to a federal antidiscrimination provision — could assert the free-exercise rights of its two primary owners. Likewise, Elane Photography, in defending against this claim of unlawful discrimination, can assert the free-exercise rights of its two co-owners.

circumstances, it would pose 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 (i.e., that marriage can exist between same-sex couples), or to face civil liability for "sexual orientation" discrimination.

"Depending on the nature of the challenged law or government action, a free exercise claim can prompt either strict scrutiny or rational basis review." *Axson-Flynn*, 356 F.3d at 1294. Strict scrutiny is appropriate when the party presents a hybrid claim, i.e., the coupling of a free-exercise claim with some other constitutional claim (such as, for example, a free-speech claim). *Id.* at 1295. "[T]he hybrid-rights theory 'at least 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 probably or likelihood, but not a certitude, of success on the merits." *Id.* at 1297.

As demonstrated in Section III of this brief, Elane Photography has established a strong likelihood of success on its companion freedom-of-expression/compelled-speech claim. This satisfies the colorable showing requirement, invokes the hybrid-rights theory, and mandates the application of strict scrutiny. Under that heightened level of scrutiny, "a law restrictive of religious practice must advance interests of the highest order [i.e., compelling interests] and must be narrowly tailored in pursuit of those interests." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

The apparent government interest behind the Human Rights Act is the prevention of discrimination. Regardless of whether this amounts to a compelling government interest, the statute is not narrowly tailored to achieve that end. Instead, the Human Rights Act is extremely

overbroad, sweeping up vast amounts of protected religious activity and expression within its scope.

The statutory exemptions in the Human Rights Act 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," *see* N.M. STAT. 28-1-9(B),(C); the exemptions do not extend to nonreligious organizations, like Elane Photography, that are motivated in part 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 Elane Photography qualified as a "religious or denominational institution or organization." *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).

It is thus clear that the Human Rights Act fails to protect the free-exercise rights of every individual in New Mexico and of every organizations that is not "operated, supervised or

controlled by[,] or . . . operated in connection with[,] a religious or denominational organization." As a result, all of these individuals and organizations are inhibited in the free exercise of their religion by the mandates in the Human Rights Act. This statute serves as a means of silencing certain religiously motivated speech and conduct, and of forcing other religiously motivated individuals and organizations to speak and act contrary to the dictates of their conscience. This overbreadth problem is compounded if the Commission broadly interprets the term "public accommodation." Such a broad reading of the statute will increasingly extend its scope and ultimately infringe upon greater amounts of protected religious exercise. When the Human Rights Act is applied in this matter, it is exceedingly overbroad; it most certainly is not narrowly tailored; and, as a result, it is unconstitutional.

V. Application Of The New Mexico Human Rights Act To Elane Photography Under These Circumstances Violates The New Mexico Religious Freedom Restoration Act.

Approximately eight years ago, the New Mexico Legislature enacted the Religious Freedom Restoration Act ("RFRA"), N.M. STAT. § 28-22-1 *et seq*. That statute provides:

> 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 the Human Rights Act 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). 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). The

"government agencies" governed by this statute include "the state or any of its . . . departments, agencies, [or] commissions . . . ." N.M. STAT. § 28-22-2(B).

"A person whose free exercise of religion has been restricted by a violation of the New Mexico Religious Freedom Restoration Act may assert that violation as a . . . defense in a judicial proceeding[.]" N.M. STAT. § 28-22-4(A). A "person" may also obtain "appropriate relief" against the government agency, relief that includes (1) "injunctive or declaratory relief against [the] government agency," and (2) "damages pursuant to the Tort Claims Act, reasonable attorney fees[,] and costs." *Id.* In addition, the statute expressly waives immunity from liability for both "the government agency and its employees." N.M. STAT. § 28-22-4(B).

Elane Photography and its co-owners, Jonathan and Elaine, assert a violation of their free exercise of religion under RFRA as a defense in this proceeding. Such claims may be asserted as a defense, *see* N.M. STAT. § 28-22-4(A); thus they are properly raised at this stage of the proceedings. Furthermore, such claims may be asserted by any "person," which is defined to include both "individuals" and "organizations," *see* N.M. STAT. § 28-1-2(A); thus this claim may be asserted by both the Company and its co-owners.[15]

RFRA prohibits a "government agency," such as the Human Rights Commission, *see* N.M. STAT. § 28-22-2(B), from "restrict[ing]" the Company's, Jonathan's, or Elaine's "free exercise of religion." The "free exercise of religion" protected by RFRA includes a "refusal to act that is substantially motivated by religious belief." N.M. STAT. § 28-22-2(A). Here, Jonathan's and Elaine's (and thus the Company's) substantial motivation for refusing to

[15] Elane Photography, as an entity, has standing to assert Jonathan's and Elaine's free-exercise rights under RFRA. For example, in *Townley Engineering*, 859 F.2d at 619-20, the court held that a closely held corporation — which was defending against a claim brought pursuant to a federal antidiscrimination provision — could assert the free-exercise rights of its two primary owners. Likewise, Elane Photography, in defending against this claim of unlawful discrimination, can assert the free-exercise rights of its two co-owners under RFRA.

photograph Willock's wedding-like, same-sex commitment ceremony derived from (1) their sincerely held religious beliefs that marriage, as a sacred institution ordained by God, exists only between one man and woman and (2) their refusal to be associated with, further, or promote the contrary message that "celebrates" a marital-type union between same-sex couples. If this Commission were to issue a ruling against Elane Photography in this case, it would be restricting 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 abandon their means of livelihood or suffer punishment for declining to follow the Human Rights Act as applied here.

In order to justify such a restriction on the Company's, Jonathan's, and Elaine's free exercise of religion, the Commission would have to show that (1) "the restriction is in the form of a rule of general applicability and does not directly discriminate against religion or among religions," and (2) "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 (emphasis added). Putting aside the first requirement for the moment, it is clear that the second requirement is not satisfied. As demonstrated in Section IV of this brief, the Human Rights Act is not the "least restrictive means" of furthering a governmental interest. The limited exemptions for religious organizations are wholly insufficient to protect the free-exercise rights of individuals and organizations in New Mexico. *See* N.M. STAT. 28-1-9(B), (C). Thus, the Human Rights Act is

not the least restrictive means for furthering the government's interest,[16] and applying that statute here violates the Company's, Jonathan's, and Elaine's free-exercise rights under RFRA.

Furthermore, if the Commission were to issue a decision against Elane Photography, it would subject itself and its employees to liability under RFRA. That statute waives immunity from liability for both "the government agency and its employees." N.M. STAT. § 28-22-4(B). In addition, RFRA provides that the government agency shall be liable for "appropriate relief," including "injunctive or declaratory relief . . . , damages pursuant to the Tort Claims Act, reasonable attorney fees[,] and costs." N.M. STAT. § 28-22-4(A).

For the foregoing reasons, the Commission should refrain from applying the Human Rights Act to punish Elane Photography for its religiously motivated decision not to photograph Willock's same-sex commitment ceremony.

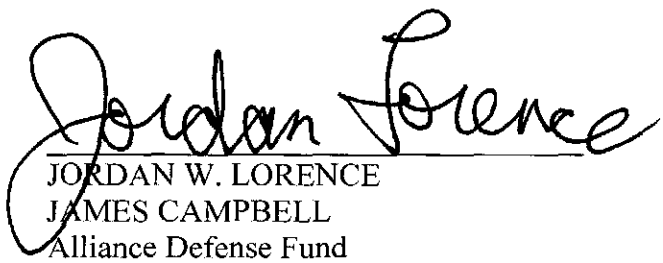
[16] The analysis in Section IV of this brief considered whether the Human Rights Act was "narrowly tailored" to further a governmental interest. The analysis under the state RFRA asks a more stringent question: whether the Human Rights Act is the "least restrictive means" of achieving a governmental interest. It follows, then, that if the Human Rights Act is not a "narrowly tailored" means to achieve a governmental interest, it most certainly does not qualify as the "least restrictive means" of attaining that end.

CONCLUSION

Elane Photography did not violate the express terms of the Human Rights Act. But, even if such a statutory violation did occur, applying the Human Rights Act to punish Elane Photography under these circumstances would infringe the Company's, Jonathan's, and Elaine's constitutional and statutory RFRA rights. The Commission should accordingly rule in favor of Elane Photography in this case.

Date: February 20, 2008

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2008, I sent via United Parcel Service Respondent's Brief and Closing Argument to the New Mexico Human Rights Commission for filing and a true and correct copy of the foregoing document via U.S. Mail to the following attorney of record:

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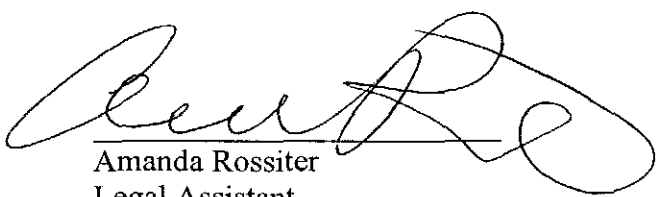

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