No. 91615-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN,
Appellants.

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus, the Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. This includes the principle that government officials may neither censor nor compel speech. The Center participated as amicus in a number of cases before the United States Supreme Court on these issues including *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083, 194 L. Ed. 2d 255 (2016); *Harris v. Quinn*, 134 S. Ct. 2618, 189 L. Ed.2d 620 (2014); and *Knox v. Serv. Employees Int'l Union*, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012), to name a few.

INTRODUCTION

The United States Supreme Court confirmed in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015), that individuals retain a First Amendment right to teach and advocate that same-sex marriage is contrary to their faith or beliefs. The case before the Court today tests whether the State of Washington may nonetheless compel an individual to speak, contrary to her own faith or other beliefs, in favor of same-sex marriage. The New Mexico Supreme Court decision in *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), was one of the first decisions to confront this

issue and is thus likely to be relied on by those who seek to compel such speech. A careful review of that decision is therefore warranted. As demonstrated below, the New Mexico court misconstrued controlling U.S. Supreme Court precedent. This Court, therefore, should not rely on the New Mexico decision in its consideration of this case.

STATEMENT OF THE CASE

Amici incorporate by reference the Statement of the Case in Appellants' brief.

ARGUMENT

I. The New Mexico Supreme Court Misconstrued U.S. Supreme Court Precedent on the First Amendment's Protection Against Compelled Speech.

In concluding that wedding photographers Jonathan and Elaine Huguenin lacked a First Amendment right to refuse to photograph a same-sex wedding, the New Mexico Supreme Court never expressly acknowledged that creation of a photograph is an artistic endeavor entitled to protection under the First Amendment. We discuss this issue in more detail below, but there can be little doubt that photography is a constitutionally protected form of speech. *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 231, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977) ("But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters - to take a nonexhaustive list of labels - is not entitled to

full First Amendment protection."). The photograph itself is speech, and it is the speech of the photographer. *See United States v. Stevens*, 559 U.S. 460, 468, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010) (noting that regulation of the content of photographs is content-based regulation under the First Amendment requiring strict scrutiny). Resolution of this issue should have been the first step for the New Mexico court. Once the court understands that First Amendment protected expression is at issue, the analysis proceeds in a very different manner than that chosen by the New Mexico court. Instead of explicitly acknowledging that the application of the New Mexico law to Elane Photography regulated speech,[1] the court chose instead to attempt to distinguish the relevant United States Supreme Court precedent. The distinctions posited, however, are not supported by the law.

First, and most problematic, the New Mexico court ruled that application of the state's public accommodations law to Elane Photography passed constitutional muster because the law "does not compel Elane Photography to either speak a government mandated message or to publish the speech of another." *Elane*, 309 P.3d at 59. To support this cramped view of the compelled speech doctrine, the New Mexico court relied on a pas-

[1] Such an acknowledgment would have then steered the analysis to whether the state could demonstrate a compelling state interest for the regulation. The Supreme Court in *Hurley* has already answered that question in the negative for a similar state law. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 578, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995).

sage of the U.S. Supreme Court's decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006), where the Court noted: "Our compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message. We have also in a number of instances limited the government's ability to force one speaker to host or accommodate another speaker's message." *Id*. at 63. From this passage, the New Mexico court concluded that compelled speech doctrine was limited to these two narrow areas. *See id*. There is nothing in *Rumsfeld*, however, that indicates that the Court meant to give an exhaustive list of all types of compelled speech that conflict with the First Amendment. The U.S. Supreme Court has consistently ruled that an individual cannot be compelled to speak a message with which he disagrees, irrespective of whose message it is. *E.g.*, *Knox v. Serv. Employees Int'l Union*, 132 S. Ct. 2277, 2288–89, 183 L. Ed. 2d 281 (2012); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796–97, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988); *Keller v. State Bar of Cal.*, 496 U.S. 1, 9–10, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990); *Abood*, 431 U.S. at 234–35.

Although the court acknowledged the Supreme Court decisions in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), and *Wooley v. Maynard*, 430 U.S. 705,

97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977), the New Mexico court argued that those cases "are narrower that Elane Photography suggests." *Elane*, 309 P.3d at 64. Rather than finding a broad principle that the government may not compel individuals "to engage in unwanted expression," the New Mexico court's analysis limits *Wooley* and *Barnette* to their unique facts. *See id.*[2] The New Mexico court's analysis finds no support in the decisions of the U.S. Supreme Court and misses several other important decisions involving compelled speech.

For instance, in *Riley*, the Court struck down a state law that required professional solicitors of charitable donations to disclose financial information. *Riley*, 487 U.S. at 795. The Court held that laws that mandated the content of speech were content-based regulations, subject to strict scrutiny, *id*., because the freedom of speech *necessarily* includes "both what to say and what *not* to say," *id.* at 797. That the Court cited *Wooley* and *Barnette* as support for its conclusions is the best evidence that the Court does not consider those cases limited to instances where the regulation "require[s] an individual to 'speak the government's message'"; the speech

[2] The court then compounded its error by attempting to distinguish those cases on the basis of the asserted governmental interest for the New Mexico regulation. *Elane*, 309 P.3d at 71. That analysis, however, ought to occur as part of strict scrutiny analysis *after* the court concludes that the regulation is a content-based restriction or compulsion of speech.

compelled in *Riley* was the solicitors' own. *Cf. Elane*, 309 P.3d at 63.[3]

Another line of cases demonstrates the error of the New Mexico court's narrow reading of compelled speech cases. In *Knox*, *Abood*, and *Keller*, the Supreme Court ruled that assessing compulsory fees to be used for political speech "constitute a form of compelled speech" and thus triggered First Amendment scrutiny. *Knox*, 132 S. Ct. at 2289; *see also Abood*, 431 U.S. at 235 (citing *Barnette*); *Keller*, 496 U.S. at 9–10. These cases demonstrate that compelled speech may be quite indirect but still constitutionally problematic. The New Mexico court did not mention *Riley*, *Abood*, *Knox*, or *Keller* in its decision.

Also instructive is *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d (1974), in which the U.S. Supreme Court struck down a Florida law requiring newspapers to publish a reply by political candidates to any criticism published in the paper. The Court noted that the regulation punished the newspaper based on its content, *id*. at 256, in the same way the New Mexico statute punished Elane Photography based on the content of photographs it refused to create, *Elane*, 309 P.3d at

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[3] Even if considered only under *Rumsfeld*'s narrow "government's speech" category, strict scrutiny still should have applied. Although New Mexico does not prescribe a precise incantation as in *Barnette* or *Wooley*, compliance with the law requires "adherence to an ideological point of view [they] find[] unacceptable," *Wooley*, 430 U.S. at 721. The state-mandated approval of same-sex unions is, indirectly, the government's message. "The government may not . . . compel the endorsement of ideas that it approves," *Knox*, 132 S. Ct. at 2288, and "[w]hat the state may not do directly it may not do indirectly." *Bailey v. Alabama*, 219 U.S. 219, 244, 31 S. Ct. 145, 55 L. Ed. 191 (1911).

72. The *Elane* court tried to distinguish *Tornillo* by noting that the Supreme Court was concerned that the Florida law would deter newspapers from publishing certain stories, and, again, by limiting it to its facts. 309 P.3d at 67. Yet the New Mexico opinion also argued that the Huguenins could avoid the compelled speech if they would cease doing wedding photography altogether. *Id*. at 66, 68. This is no different than saying that the *Miami Herald* could avoid the right-of-reply statute by refraining from criticizing candidates. In both cases, the state law impermissibly requires an individual to forgo protected speech as a means of avoiding unwanted compelled speech.

A second doctrinal misstep in the *Elane* decision is the holding that compelled speech must involve "perceived endorsement" in order to violate the First Amendment. *Elane*, 309 P.3d at 68–69. The case cited by the New Mexico court for this proposition, however, explicitly disclaimed any reliance on such a theory. *Id*. at 69 (citing *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 577, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) ("*Without deciding on the precise significance of the likelihood of misattribution* . . . ."). Later decisions have also made this clear. In *Frudden v. Pilling*, 742 F.3d 1199 (9th Cir. 2014), the Ninth Circuit ruled that ability to disclaim the compelled message is irrelevant. *Id*. at 1205. The constitutional injury is not any perceived endorsement. Ra-

ther, the First Amendment violation is simply the compelled speech. *Id*. at 1206 (*citing Barnette*, 319 U.S. at 633).

The compelled fee cases are also relevant here. Having held that compelled payment of fees for ideological purposes is compelled speech, *Knox*, 132 S. Ct. at 2289, the Court's analysis was not concerned with whether dissenters would be perceived endorsers of the union's or state bar's speech. The Court ruled that the compelled speech violated the "freedom of belief." *Abood*, 431 U.S. at 235. The Court emphasized the inherent violation of core First Amendment principles created by compelled speech by reference to "Thomas Jefferson's view that '"to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."'" *Keller*, 496 U.S. at 10, 110 S. Ct. 2234 (quoting *Abood*). It is not what other people might think the Huguenins believe. The Constitution protects the Huguenins' own freedom of belief. *Abood*, 431 U.S. at 234–35 ("'For at the heart of the First Amendment is the notion that an individual should be free to believe as he will . . . .'").

Third, the conclusion of the New Mexico court that accepting commissions for their work diminished the constitutional protections available to the Huguenins, *see Elane*, 309 P.3d at 66, is also contrary to U.S. Supreme Court precedent. The New Mexico court relied on Elane Photog-

raphy's for-profit status to avoid applying *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995), in which the U.S. Supreme Court upheld the right of a not-for-profit parade organizer to exclude a gay, lesbian, and bisexual group from the parade, in violation of state law similar to the one in *Elane*.[4] The fact that the Huguenins sought to make money from the creation of photographic expressions does not alter the nature of the First Amendment protection of their speech. "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*, 487 U.S. at 801; *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) ("That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold."); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116–17, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991); *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007).

The *Elane* court then argued that the New Mexico statute did not apply to photographs taken by Elane Photography, but only to the operation

[4] Bewilderingly, the New Mexico court also distinguished *Hurley* by asserting that the Massachusetts courts misinterpreted Massachusetts law. *Elane*, 309 P.3d at 68.

of the photography business. 309 P.3d at 68. The distinction is illusory, at best. First, the New Mexico law compels Elane to create particular photographs—that is, to create an expression otherwise entitled to protection by the First Amendment. To say that this does not implicate Elane's First Amendment rights makes no sense. Although the court repeatedly focused on the impact of the statute on Elane Photography's "choice of clients," *see id.* at 66, 67, the Huguenins never sought First Amendment protection for their selection of clients. Rather, the Huguenins' actual freedom-of-speech argument was that they did not want to speak the *message* that same-sex weddings "deserve celebration and approval." *Id.* at 65.

The court may have been confused because it misunderstood the principle in *Hurley*. There, the Supreme Court held a parade to be inherently expressive, in the same way that the Huguenins' photographs are expressive. For a parade, the protected expression includes the selection of the groups that march in the parade because its participants *are* its message. *Hurley*, 515 U.S. at 568–69.[5] For a photographer, however, the identity of the subject is only a small part of the complex overall message conveyed

[5] The *Hurley* Court also identified the impracticality of displaying a disclaimer in a parade as a factor supporting its inherently expressive nature. 515 U.S. at 576–77. The same is true for wedding photography. We doubt Ms. Willock would have been satisfied if the Huguenins photographed her ceremony wearing shirts emblazoned with disclaimers, and watermarked every photograph: ELANE PHOTOGRAPHY DOES NOT APPROVE, ENDORSE, OR CELEBRATE THIS EVENT.

through his work. We discuss the substance of that message next.

II. The New Mexico Supreme Court Misapprehended the Role of Commercial Photographers as Constitutionally Protected Speakers in their Own Right.

Apart from its errors regarding U.S. Supreme Court precedent, the New Mexico Supreme Court also demonstrated considerable confusion about the nature of the Huguenins' compelled speech claim. As we have already mentioned, it is beyond doubt that photographs are speech protected by the First Amendment.[6] And the act of photographing a wedding is just as constitutionally protected as the photographs themselves are:

> The camera is essentially the photographer's pen or paintbrush. Using a camera to create a photograph or video is like applying pen to paper to create a writing or applying brush to canvas to create a painting. In all of these situations, the process of creating the end product cannot reasonably be separated from the end product for First Amendment purposes.

Ex parte Thompson, 442 S.W.3d 325, 337 (Tex. Ct. Crim. App. 2014). The *Elane* court compounded its error when it concluded that the Huguenins' expression would not be compelled by displaying photographs in their studio or on their public website, noting that they were not required to display the photographs in their business at all. 309 P.3d at 68. This dis-

[6] As photographs are constitutionally expressive, so too are wedding ceremonies themselves. The Ninth Circuit has explained, "The core message in a wedding is a celebration of marriage and the uniting of two people in a committed long-term relationship." *Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012). Wedding photographs are a further means of expressing that message.

ingenuous reassurance once again misses the point. The Huguenins object not only to the photographic images themselves, but also to being forced to be a part of the process of posing, lighting, capturing, and editing photographs of a same-sex wedding. The process—and not just the result—is inherently expressive of a view they do not wish to express: the "celebration and approval" of such ceremonies. *See id.* at 65. The New Mexico court's assumption that a photographer's work ends when he signs a contract with a new client, and only begins again when he displays the finished photographs, wholly ignores the creative nature of his labor.

In a related artistic area, courts have affirmed that the process of *creating* and *applying* a tattoo is itself an expressive activity fully protected by the first amendment. *E.g.*, *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010). Even though the customer has the "ultimate control" over the design of his tattoo, "there is no dispute that the tattooist applies his creative talents as well." *Id.*; *accord Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015); *Coleman v. City of Mesa*, 284 P.3d 863, 870 (Ariz. 2012) (en banc) (holding that tattooing is a protected expressive activity even when tattoo artists use merely "standard designs or patterns"). Although both tattoo parlors and speech opposing same-sex marriage are unpopular in many jurisdictions, the First Amendment protects both.

Even if wedding photographers were merely objective stenographers of an event,[7] in another case not cited by the *Elane* court, the Supreme Court has held that the mere exercise of editorial selection of speech is expressive enough to merit First Amendment protection. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636, 114 S. Ct. 2445, 129 L. Ed. 497 (1994). But the Huguenins' work is not merely stenography; they craft and tell their own unique story, not just the happy couple's. Most people intuitively recognize the self-expressive nature of photography, and with the ubiquity of cell phone cameras and social media, photographic self-expression has never been easier, cheaper, or more abundant. At the same time, because people recognize and value the artistic skill and craft of the professional photographer, they still turn to one on the most important days in their lives.

Two other areas provide further insight into how producers of expressive content are regarded by the law. In each, it is well established that expressive rights are held by the producers of expressive material—not by the commissioners or the subjects of that content. First, federal copyright ownership remains with an independent contractor who is commissioned

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[7] To be sure, there is no such thing as objective photography. "[W]e must remember that the photograph is itself the product of a *photographer*. It is always the reflection of a specific point of view, be it aesthetic, polemical, political, or ideological. One never 'takes' a photograph in any passive sense. To 'take' is active." Graham Clarke, *The Photograph* 29 (1997).

to create an artistic work. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 750–51, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989) (citing 17 U.S.C. §§ 201(a), 102). Second, the emerging articulations of a First Amendment right to record the police are based on the stenographic act alone, with no requirement that the photographer contribute artistic, editorial, or other self-expression to the visual or audio recording. *See, e.g.*, *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012). These instructive strands of doctrine make the New Mexico court's denial of expressive rights to the Huguenins all the more incongruous.

The New Mexico court's admitted discomfort with "draw[ing] the line" as to what activities are expressive enough to merit First Amendment protection, *Elane*, 309 P.3d at 71, should not have resulted in judicial paralysis. It is well established that photography is inherently expressive, and strict scrutiny under the First Amendment should have applied.

III. The New Mexico Supreme Court Misunderstood the Supremacy of the U.S. Constitution over State Legislation.

Despite the foregoing errors in doctrine and analysis, the most troubling aspect of the *Elane Photography* decision is its core sentiment that the Bill of Rights must yield because the New Mexico legislature has uttered the shibboleth of *nondiscrimination*. Recognizing instead that "the

Constitution controls any legislative act repugnant to it," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803), we would have urged the New Mexico court to subject the public accommodations law to the strict scrutiny the First Amendment requires.

That court's reverence for the ideal of nondiscrimination does not excuse its disregard for the Constitution. Even if the justices believe that the Huguenins' views are sadly mistaken, the United States Supreme Court reminds us that "[u]nder the First Amendment, there is no such thing as a false idea." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). If they find the Huguenins' views offensive, we recall Justice Brennan's admonition: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

Justice Bosson's concurring opinion is more explicitly problematic. After initially praising the First Amendment's protections as the "fixed star in our constitutional constellation," 309 P.3d at 77 (quoting *Barnette*, 319 U.S. at 642), Justice Bosson makes the astounding assertion that the First Amendment must give way to modern antidiscrimination laws. That conclusion is wrong as a matter of law. Justice Bosson relies on *Heart of*

Atlanta Motel v. United States, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964), which upheld federal antidiscrimination law over a business's assertion of its Fifth Amendment rights. However, the Court in that case applied only a rational-basis review and was not presented with a First Amendment claim. *See id.* at 258–61. To be sure, subsequent cases that have involved the First Amendment and public accommodation laws have reached varying outcomes following a fact-driven application of strict scrutiny. *See, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). The New Mexico court undertook no such analysis.

We are more troubled by Justice Bosson's opinion as a dangerous sign of the times for our Constitution. His empty reassurance that people who hold unpopular views "have to channel their conduct, not their beliefs," 309 P.3d at 80, utterly fails to grasp the purpose of that document. For of course, we need no Bill of Rights and no courts to tell us what we are free to believe; under the U.S. Constitution, "the people surrender nothing." *The Federalist No. 84*, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961). By contrast, the First Amendment was ratified to protect *public* activities: Exercise of religion. Speech. The press. Assembly and petition. Each of these protected activities necessarily takes place in

the public square. Perhaps, in the utopia of Justice Bosson's dreams, citizens must "compromise" their fundamental liberties in the public square as the "price of citizenship." *See Elane*, 309 P.3d at 79, 80. But in our Constitution's America, the "price of citizenship" may be exacted only after the careful judicial application of strict scrutiny to such regulations of our first freedoms.

IV. The New Mexico Supreme Court Misread the Record When It Concluded That Elane Photography Violated the State Public Accommodations Law.

The *Elane* court's eagerness to uphold New Mexico's antidiscrimination law caused it to shortchange portions of the factual record. As we have discussed, the Huguenins' actual objection to photographing Ms. Willock's ceremony was an objection to expressing the message that same-sex weddings "deserve celebration and approval." *Elane*, 309 P.3d at 65. Their objection was *not* to photographing gay people generally. Actually, the undisputed factual record established that Elane Photography would have agreed to photograph Ms. Willock in other circumstances, such as a portrait sitting. *Id.* at 61. This does not mean that Elane Photography practiced illegal discrimination as to services offered, *cf. id.* at 62, because, as the record reflected, they would also decline to photograph heterosexual actors portraying a same-sex wedding, *id.* at 61, 62. As a factual matter, the Huguenins' choices were not based on Ms. Willock's sex-

ual orientation but rather on the content of the speech Ms. Willock wished to commission from them.

The New Mexico court also failed to correctly apply Supreme Court precedent when it concluded that the Huguenins discriminated against Ms. Willock on the basis of her sexual orientation. It is true that, in certain contexts, the U.S. Supreme Court has equated disapproval of certain conduct to discrimination against a protected status. *See Elane*, 309 P.3d at 61–62. In attempting to invoke that equation, the *Elane* court went on to quote Justice Scalia's famous witticism, "A tax on wearing yarmulkes is a tax on Jews," *id.* at 62 (quoting *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993)), but it ignored the Supreme Court's holding in that case. In the very next sentence of his majority opinion, Justice Scalia went on to reject the argument that, since only women undergo abortions, opposition to abortion constitutes discrimination against women. *Bray*, 506 U.S. at 270. On the contrary, there exist reasons to oppose abortion, he explained, that do not involve "hatred or condescension" toward women as a class. *Id.* The New Mexico Supreme Court ignored this reasoning when it jumped to the opposite conclusion: that because only people of a certain sexual orientation have same-sex weddings, refusing to work at a same-sex wedding discriminates on the basis of sexual orientation. *See Elane*, 309 P.3d at 62. As in *Bray*,

there was no finding that the Huguenins were motivated by hatred or condescension toward a protected class. There was no acknowledgment that there might be reasons other than hatred of gay people to decline to celebrate a same-sex wedding. The earnest opposition to same-sex marriage by some of our gay colleagues proves that such reasons exist. *See, e.g.*, *Against Equality: Queer Critiques of Gay Marriage* (Ryan Crocker ed., 2010).

CONCLUSION

Because of the foregoing pervasive errors of law and fact, the decision of the New Mexico Supreme Court in *Elane Photography v. Willock* lacks persuasive or instructive value. We urge the court not to consider it when it adjudicates this appeal.

Respectfully submitted,

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DATED: September 28, 2016.

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