IN THE NEW MEXICO SUPREME COURT

Case No. 33,687

ELANE PHOTOGRAPHY, LLC,

Appellant-Petitioner,

v.

VANESSA WILLOCK,

Appellee-Respondent.

SUPREME COURT OF NEW MEXICO
FILED

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BRIEF OF *AMICI CURIAE* ACLU FOUNDATION AND ACLU OF NEW MEXICO IN SUPPORT OF APPELLEE-RESPONDENT AND AFFIRMANCE

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STATEMENT OF COMPLIANCE

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles embodied in the Bill of Rights. The American Civil Liberties Union of New Mexico is one of the ACLU's statewide affiliates with approximately 7000 members. Since its founding in 1920, the ACLU has been deeply involved in securing the liberties embodied in the Bill of Rights. As organizations that have long been dedicated to preserving First Amendment rights and opposing discrimination, the ACLU and the ACLU of New Mexico have a strong interest in the proper resolution of this controversy.

SUMMARY OF PROCEEDINGS

Amici incorporate by reference the summary of proceedings in Vanessa Willock's brief.

ARGUMENT

Elane Photography does not simply take and sell artistic photographs of weddings; it sells its services as a photographer for hire. The First Amendment provides speakers – including businesses – with autonomy to decide what to say or not to say as part of their own speech, even when that speech is subsequently sold for a profit. But a commercial photography studio cannot solicit customers from the general public to buy its services as a photographer for hire and then turn

around and claim that taking those photographs is a form of its own autonomous expressive activity. Taking photographs for hire is a commercial service subject to commercial regulation. To the extent the public accommodations law places any incidental burden on a business's First Amendment right in this context, the law easily passes constitutional scrutiny as the least restrictive means of advancing the government's compelling interest in preventing discrimination in the commercial marketplace.

I. An Exception Giving Public Accommodations a Constitutional Right to Discriminate if Their Goods And Services "Create Expression" Would Have Far-Reaching and Destabilizing Consequences.

Elane Photography asks this Court to ignore more than 150 years of precedent and create a new First Amendment right to discriminate in the commercial marketplace. On its own terms, Elane Photography's proposed exception would have startling consequences. And if extended to its logical conclusion, Elane Photography's argument would provide a roadmap for any would-be discriminator to evade public accommodation laws by recharacterizing its goods and services as a form of speech or expression.

Elane Photography argues that because photography is expressive, a business that provides photography services has a First Amendment right to enter the commercial marketplace, solicit customers from the general public, and then – in violation of a state's public accommodation law – refuse to provide photography

services to particular customers based on their race, sex, religion, sexual orientation, age, disability, or any other characteristic. Under Elane Photography's proposal, customers could walk into the photography studio at Sears or JCPenny for a family portrait and be told they cannot have their picture taken because they are a Latino family, or a Jewish family, or a family with a child who has Down Syndrome. A photography studio could tell an interracial family that taking their portrait would create expression celebrating their interracial relationship and that it would violate the studio's First Amendment rights to participate in that expression.

These examples are striking enough on their own, but Elane Photography and its *amici* do not just want to give this license to discriminate to photography studios. Under Elane Photography's reading of the First Amendment, this right to discriminate in the commercial marketplace would apply to all "creators of expression," such as court reporting services, translation services, graphic-design agencies, architecture firms, sound technicians, print shops, and dance studios. Elane Photo Br. at 34; Cato Br. at 13-15, 21-25. In addition, almost any good or service involving computers could be characterized as a form of expression through the use of computer code and the display of words and images. *See* Andrew Tutt, *Software Speech*, 65 Stan. L. Rev. Online 73 (2012) (discussing First Amendment protection for computer software); Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results* (2012),

available at http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf (arguing that Internet search engine results are fully protected speech).

And those are just examples of some of the public accommodations that "create expression" through words, pictures, numbers, or sounds as part of their services for hire. There are countless other public accommodations in which goods and services "create expression" through other, equally expressive, forms of artistic creativity. For example, makeup artists and hair stylists use their artistic skills when serving clients, and florists use artistic skills to assemble bouquets and flower arrangements for customers. The fact that these professions involve artistic and creative choices does not insulate them from public accommodation laws when they offer services for hire to the general public. *See, e.g.*, *Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427, 429 (4th Cir. 2006) (applying nondiscrimination law to beauty salon providing hair styling and "makeup artistry").

Elane Photography attempts to minimize the impact of its First Amendment argument by suggesting a line between "expressive" speech and "non-expressive" speech. According to Elane Photography, the right to discriminate would apply to artistic photographs but "not to a photography company's refusal to capture unexpressive portfolio snapshots akin to 'those taken in photography booths.'" Elane Photo. Br. at 35. But where fully protected speech is at issue, the First

Amendment does not discriminate based on a court's determination of how expressive or artistic that speech is. Indeed, it is black-letter law that the First Amendment prohibits not only compelled statements of "expressive" speech, but also compelled statements of fact. *See Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988); Elane Photo Br. at 6, 25 (citing *Riley*). And in fact, just a few pages earlier in its brief, Elane Photography vigorously argued that *all* photography is inherently expressive. *Id.* at 18 (quoting *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996), for the proposition that photographs "always communicate some idea or concept to those who view [them]").

Similarly, Elane Photography's *amici* try to draw a line between expressive professions and non-expressive professions. According to Elane Photography's *amici*, an exemption for "creators of expression" would not apply to public accommodations that provide non-expressive goods and services such as car services that drive a same-sex couple to their wedding or caterers that serve food at the wedding. Cato Br. at 21. But this distinction too is unworkable. When a newlywed couple hires a car service, they frequently also hire the car service to carry an expressive message on the car saying "Just Married." And when a couple at an engagement party hires a caterer, they frequently hire the caterer to carry an expressive message on the cake saying "Congratulations on Your Engagement." Even without placing additional verbal messages on their products, many caterers

would disagree with the suggestion that their culinary creations and the decorative presentation of those creations at a party are not creative or expressive. For example, "Artistic Catering" in Destin, Florida advertises that its "inventive staff will take your event dreams from the theoretical drawing board to the full realization and triumph of a stunning affair." *See* http://artisticcateringdestin.com/index.php?option=com_content&view=article&id=25&Itemid=137. "Catering Works" in Raleigh, North Carolina advertises that it "can paint a picture" through its use of "linens displayware, floral and props in combination with our innovative menus." *See* http://cateringworks.com/events/. And to "Art of Catering" in Portland, Oregon says that it "conceives of each dish using color, texture and imagination." *See* http://www.artofcatering.net/4.0/about/philosophy.[1]

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[1] Elane Photography's *amici* also draw an analogy to the constitutionality of licensing schemes and suggest that applying a public accommodation law would violate the First Amendment whenever the public accommodation engages in an expressive activity that could not be regulated by the government through a permit or licensing scheme. Cato Br. at 22-23. But this argument ignores the critical distinction between licensing schemes regulating speech by private individuals and licensing schemes regulating professions. As Justice Jackson has explained:

> [T]he state may prohibit the pursuit of medicine as an occupation without its license but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought. . . . This wider range of power over pursuit of a calling than over speech-making is due to the different effects which the two have on interests which the state is empowered to protect. . . . Very many are the interests which the state may protect against the

As these examples demonstrate, a business providing almost any type of commercial service will at some point have to create, utter, or convey speech or expression. Lawyers, accountants, and travel agents all engage in speech while serving customers, and yet each of those professions may be regulated as public accommodations when they solicit business from the general public. *See* 42 U.S.C.A. § 1218(7)(f) (public accommodations under the ADA include travel services and offices of accountants and lawyers). Even the act of serving a customer at a restaurant intertwines with speech when a waiter asks "May I help you?" or "What would you like to order?" *See Brooks v. Collis Foods, Inc.*, 365 F. Supp. 2d 1342, 1347 (N.D. Ga. 2005) (public accommodation case where restaurant employees greeted white customers when they entered but not black customers); *Gilyard v. Northlake Foods, Inc.*, 367 F. Supp. 2d 1008, 1009 (E.D. Va. 2005) (public accommodation case where plaintiffs "allege that they were not greeted and seated in the same manner as other patrons"). Under Elane Photography's proposal, each time a service provider engages in some form of expression as part of providing goods and services, the First Amendment would immunize the business from ordinary antidiscrimination requirements.

> practice of an occupation, very few are those it may assume to protect against the practice of propagandizing by speech or press.

Thomas v. Collins, 323 U.S. 516, 544-45 (1945) (Jackson, J., concurring).

There is no reason for the Court to follow Elane Photography down this rabbit hole. Elane Photography and its *amici* argue that unless the Court adopts a broad exception to the public accommodation statute for "creators of expression," publicists would be forced to issue press releases for the Church of Scientology and speech writers would be forced to draft speeches for political opponents. Cato Br. At 14. The simple answer to all these hypotheticals is that New Mexico's public accommodation law applies only when a business "provides or offers its services, facilities, accommodations or goods *to the public*." N.M.S.A. 1978, § 28-1-2 (H) (emphasis added). As the court of appeals explained, "'the hallmark of a place of public accommodation [is] that 'the public at large is invited [.]'" *Elane Photography, LLC v. Willock*, 284 P.3d 428, 436 (N.M. Ct. App. 2012) (quoting *Nat'l Org. for Women v. Little League Baseball, Inc.*, 318 A.2d 33, 37 (N.J. Super. Ct. App. Div. 1974)); *see also Daniel v. Paul,* 395 U.S. 298, 307-08 (1969) (noting that one of the overriding purposes of the federal public accommodation laws is to remove "the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public" (internal quotation marks omitted)). Freelance "creators of expression" that do not want to serve the public at large can preserve their autonomy by not soliciting business from the general public.

II. A Business That Provides Goods and Services to Customers From the General Public Sacrifices Its Autonomy Over Which Customers to Serve – Even When the Goods and Services "Create Expression."

"The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring). For over 150 years, the fundamental principle of public accommodations law has been that when a business chooses to solicit customers from the general public, it relinquishes autonomy over whom to serve. "'The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.'" *Bell v. State of Md.*, 378 U.S. 226, 314-15 (1964) (Goldberg, J., concurring) (quoting *Marsh v. Alabama*, 326 U.S. 501, 506 (1946)). As the Supreme Court of Nebraska explained in one of the earliest public accommodation decisions:

> A barber, by opening a shop, and putting out his sign, thereby invites every orderly and well-behaved person who may desire his services to enter his shop during business hours. The statute will not permit him to say to one: "You are a slave, or a son of a slave; therefore I will not shave you."

Messenger v. State, 41 N.W. 638, 639 (Neb. 1889). In short, "one who employ[s] his private property for purposes of commercial gain by offering goods or services to the public must stick to his bargain." *Heart of Atlanta Motel, Inc. v. United*

States, 379 U.S. 241, 284 (1964) (Douglas, J., concurring) (quoting S. Rep. No. 872, 88th Cong., 2d Sess., pp. 22).[2]

Once a business chooses to commodify words or expression into a service offered to the general public, it cannot use the First Amendment to hide from public accommodation laws that apply to the commercial marketplace. Although public accommodation laws may sometimes come into conflict with the First Amendment when applied to truly private expressive associations, "[p]redominately commercial organizations are not entitled to claim a First Amendment associational or expressive right to be free from the anti-discrimination provisions triggered by the law." *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 20 (1988) (O'Connor, J. and Kennedy, J., concurring).[3]

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[2] Moreover, although Elane Photography argues that there is something especially problematic in making a business owner personally participate in serving an unwanted customer, public accommodation laws are routinely applied to providers of personal services. *See Washington v. Blampin*, 226 Cal. App. 2d 604, 608 (Cal. 1964) (rejecting argument that "because of the personal nature of the relationship between physician and patient, the court should not attempt to compel a physician to treat an unwelcome patient"); *Sellers v. Philip's Barber Shop*, 217 A.2d 121, 348-49 (N.J. 1966) (barber cannot refuse to serve customers on the basis of race or because he does not want to work with black people's hair type); *Bragdon v. Abbott*, 524 U.S. 624, 629 (1998) (dentist office cannot discriminate based on disability).

[3] As Justice O'Connor explained in an analogous context with respect to organization's membership policies: "An association must choose its market. Once it enters the marketplace of commerce in any substantial degree, it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas." *Roberts*, 468 U.S. at 636 (O'Connor, J.,

To be sure, speech does not lose constitutional protection whenever it is created or sold for profit. *See e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-26 (1964). But it is equally true that "[t]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). In other words, a commercial product involving speech cannot be regulated based on its expressive qualities, but it can be regulated based on its commercial qualities even if those regulations incidentally burden speech. For example, because video games are protected speech, the government cannot bar retailers from selling video games to minors based on the violent content of the video game. *See Brown v. Entm't Merchants Assoc.*, 131 S. Ct. 2729 (2011). But the government certainly could require video game retailers to comply with neutral laws prohibiting price-fixing or setting a minimum wage for employees; and the government can also require video game retailers to sell their expressive products without discriminating based on a customer's race, gender, sexual orientation, or other protected characteristic. *Cf. Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-

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concurring). *Cf. United States v. Lee*, 455 U.S. 252, 261 (1982) (explaining in the context of the Free Exercise Clause that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity").

70 (1991) (press must obey generally applicable regulations such as copyright laws, antitrust laws, and the Fair Labor Standards Act).

Elane Photography argues that – unlike businesses that provide "non-expressive" services – Elane Photography can never surrender autonomy over its photography services because photography is a creative profession requiring editorial discretion and artistic judgment. But that argument confuses the distinction between an artist who sells photographs and an artist who sells her services as a photographer for hire. This case would be different if Elaine Huguenin were an independent photographer who took pictures of subjects that interested her – say various wedding scenes – and then offered those pictures for sale. Under those circumstances, Elane Huguenin would retain complete autonomy over her own self-expression, and potential subjects of her photographs could not bring an antidiscrimination claim to force her to take more pictures with African-Americans, or Jewish wedding scenes, or weddings for same-sex couples.

Elane Photography, however, offers a different commercial service. Instead of selling photographs, Elane Photography offers its services as a photographer for hire. Although the customer does not control every detail of each individual photograph, the photographs are taken at the direction and request of the customer. Once it agrees to take photographs on behalf of some customers from the general public as part of a commercial service, Elane Photography cannot claim an

autonomy interest in refusing to take photographs for other customers on a discriminatory basis.

Elane Photography's legal argument based on "editorial discretion" boils down to a distorted reading of *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The Supreme Court in *Tornillo* struck down a "right of reply" statute requiring that "if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges." *Id.* at 244. Supporters of the law argued that newspapers are "surrogates for the public" with a fiduciary obligation to ensure that the public is provided with a diverse array of viewpoints as part of the "marketplace of ideas." *Id.* at 251. In that context, the Supreme Court rejected the contention that a newspaper is "a passive receptacle or conduit for news, comment, and advertising" and instead explained that what a newspaper publishes reflects "the exercise of editorial control and judgment" of the newspaper editors. *Id.* at 258. *Tornillo* thus described the editorial judgment of newspaper editors in order to illustrate why a newspaper is not the same as a community

billboard for speakers to post their own messages as part of the marketplace of ideas.[4]

Unlike a newspaper, Elane Photography has voluntarily chosen to make itself a surrogate for the expression of the customers it solicits from the general public. Providing photography services to its customers may require Elane Photography to use editorial control and judgment, but Elane Photography has decided to offer a commercial service in which it exercises that editorial judgment on its customers' behalf. Having voluntarily agreed to exercise creative decisions as part of a commercial service to the general public, Elane Photography cannot claim a First Amendment right to pick and choose which customers it will provide that service to.

III. Any Incidental Burdens on Elane Photography's Speech Pass Constitutional Scrutiny.

To the extent that Elane Photography's First Amendment rights are implicated in this case at all, the burdens on those rights easily pass constitutional scrutiny. When analyzing the burdens placed on Elane Photography's expressive

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[4] *See id.* at 259 (White, J., concurring) ("A newspaper or magazine is not a public utility subject to 'reasonable' governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed."); *Treanor v. Wash. Post Co.*, 826 F. Supp. 568, 569 (D.D.C. 1993) (holding that "newspaper columns are not 'public accommodations'"); *cf. Ark. Educ. Tel. Comm'n v. Forbes*, 523 U.S. 666, 673 (1998) ("[B]road rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations.").

interests, the Court could potentially employ the "compelling interest" framework used by the Supreme Court to evaluate the free speech claims of purported expressive associations in *Roberts* and *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987). Under that framework, infringements on associational rights are constitutional if they are justified by "[a] compelling state interests, [b] unrelated to the suppression of ideas, that [c] cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623; *accord Rotary Club*, 481 U.S. at 549. Alternatively, this Court could employ the intermediate standard of scrutiny established by *United States v. O'Brien*, 391 U.S. 367 (1968), to evaluate content- and viewpoint-neutral laws that do not on their face target speech. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 629 (1994) (applying *O'Brien* to content-neutral "compelled speech" claim); *Jews for Jesus, Inc. v. Jewish Cmty. Relations*, 968 F.2d 286, 295-96 (2d Cir. 1992) (applying *O'Brien* to First Amendment defense to public accommodation law); *Butler v. Adoption Media, LLC,* 486 F. Supp. 2d 1022, 1060 (N.D. Cal. 2007) (applying *O'Brien* to First Amendment defense to public accommodation law based on "compelled speech"). As discussed below, because any claimed burdens on Elane Photography's rights pass scrutiny under the more stringent "compelling interest" test used in *Roberts*, those burdens would also pass the intermediate scrutiny used in *O'Brien*.

First, there is no question that public accommodation laws like the one in New Mexico serve a compelling governmental interest in preventing discrimination in the commercial marketplace. Public accommodation laws reflect the "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups." *Roberts*, 468 U.S. at 626. Discrimination in public accommodations harms both the individual and society at large because it "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Id* at 625. Without these protections, discrete groups could be excluded from the "almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996).

Second, it is also well settled that this compelling government interest is "unrelated to the suppression of free expression" because "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit." *Roberts*, 468 U.S. at 628; *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572 (1995).

Finally, the compelling governmental interests in preventing discrimination in the commercial marketplace "cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623. As discussed above, New Mexico's public accommodations law applies only to the extent that a business offers goods and services to the general public; in doing so, the statute focuses on activities that affect the broader commercial marketplace and carry with them an implicit invitation of being open to the public. Like the public accommodation statute upheld in *Roberts*, "in prohibiting such practices, the [New Mexico statute] therefore responds precisely to the substantive problem which legitimately concerns the State and abridges no more speech or associational freedom than is necessary to accomplish that purpose." *Roberts*, 468 U.S. at 628-29.[5]

In contrast to the facts of this case, the two cases on which Elane Photography primarily relies did not involve discrimination by a commercial

[5] Indeed, the public accommodation statute does not require Elane Photography or Elaine Huguenin to personally photograph anything. If Elaine does not wish to take photographs for certain customers of Elane Photography LLC, the corporation is free to hire another employee or to subcontract with another photographer to take the pictures in Elaine's place. *Cf. David v. Vesta Co.*, 212 A.2d 345, 355 (N.J. 1965) (explaining that applying public accommodation law to construction company did not violate the Thirteenth Amendment because: "The order did not direct the individual respondents to personally perform any labor in the construction of the house. At most, the order obligated the respondents to see that the house was constructed. They were free to substitute the performance of another, whether he be a subordinate agent or an independent contractor.").

business in the commercial marketplace: *Hurley* and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). In both those cases the public accommodation statutes were applied directly to private, non-commercial speech – not speech that was incidental to a commercial transaction. Because the public accommodation laws had been applied to speech that was not connected to any commercial transaction, the laws as applied in those cases did not serve a purpose unrelated to the suppression of free expression and were not tailored to focus on the goal of preventing discrimination in the commercial marketplace. As discussed below, those cases do not provide any support for Elane Photography, which is a commercial business selling services in the commercial marketplace.

For example, in *Dale* the Supreme Court held that a public accommodation statute could not be applied to the membership policies of a private, not-for-profit expressive association. The Supreme Court emphasized that the conflict between the public accommodation statute and the First Amendment in that case stemmed from the fact that the statute had been extended from "clearly commercial entities" to "membership organizations" and other "places that often may not carry an open invitation to the public." *Dale*, 530 U.S. at 657. Unlike the private expressive association in *Dale*, Elane Photography is a commercial organization that invites the public at large to purchase its goods and services. Nothing in *Dale* calls into question the constitutionality of applying public accommodation statutes to a for-

profit commercial entity that engages in "speech" as part of the goods and services it provides to the general public.

Similarly, in *Hurley*, the Supreme Court held that a public accommodation statute could not be applied to a private organization's parade. The parade was organized by an unincorporated association of individuals elected from various South Boston veterans groups. The Supreme Court held that forcing the organization to include unwanted groups in the parade would constitute compelled speech because it was a private parade that was not connected in any way to the sale of commercial goods and services. *Hurley*, 515 U.S. at 579-81. Applying the statute to a private parade therefore served the only apparent purpose of requiring private parties to change their messages as "an end in itself" without serving "some further, legitimate end." *Id.* at 579. And if the "further end" served by forcing the speaker to change its message was to "produce speakers free of the biases," then that was an illegitimate end under the First Amendment. *Id.* By its own terms, *Hurley* does not apply to businesses selling commercial products. Unlike in *Hurley*, the purpose of public accommodation laws regulating a business's commercial activities is not to produce "speakers free of biases." It is to protect customers against discrimination in the sale of commercial goods and services. *Cf. Butler,* 486 F. Supp. 2d at 1060 ("Defendants cite no reported decision extending

the holding of *Hurley* to a commercial enterprise carrying on a commercial activity.").

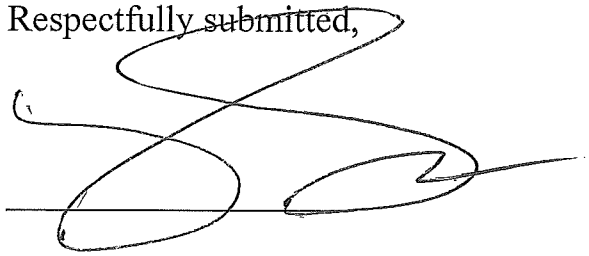
In short, none of the First Amendment concerns at issue in *Dale* or *Hurley* is present in this case. To the extent that Elane Photography asserts that its First Amendment interests are burdened at all, those burdens are easily justified by the long-standing, compelling governmental interest in preventing discrimination in the commercial marketplace under *Roberts*.

CONCLUSION

For the foregoing reasons, this Court should reject Elane Photography's claims that applying the public accommodation statute to its commercial photography services unconstitutionally compels speech and should affirm the judgment of the Human Rights Commission, the District Court, and the Court of Appeals in favor of Vanessa Willock.

Dated: December 17, 2012

Respectfully submitted,



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