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CONSTITUTIONAL LAW — FIRST AMENDMENT — NEW MEXICO SUPREME COURT HOLDS THAT APPLICATION OF PUBLIC ACCOMMODATIONS LAW TO WEDDING PHOTOGRAPHY COMPANY DOES NOT VIOLATE FIRST AMENDMENT SPEECH PROTECTIONS. — *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013).

Public accommodations laws have their origin in some of the darkest moments of our nation's past.<sup>1</sup> Over the last half century, however, state laws have dramatically expanded the definition of "public accommodation," along with the number of protected groups,<sup>2</sup> raising important questions about the interaction of public accommodations laws with other cherished rights.<sup>3</sup> The First Amendment protects freedom of speech, thought, and expression.<sup>4</sup> What happens when public accommodations laws conflict with the First Amendment rights of expressive businesses? The Supreme Court has found public accommodations laws generally constitutional,<sup>5</sup> but has held them inapplicable in cases where they burdened First Amendment rights.<sup>6</sup>

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<sup>1</sup> The passage of the Civil Rights Act of 1964 was the watershed achievement of a nearly century-long struggle to outlaw invidious racial discrimination at hotels, restaurants, and places of public entertainment at the federal level. States have adopted more expansive laws before and since, making it unlawful for a broad category of individuals and establishments to refuse to provide services to persons falling within protected groups. See generally Lisa Gabrielle Lerman & Annette K. Sanderson, Project, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215 (1978).

<sup>2</sup> See *Romer v. Evans*, 517 U.S. 620, 628–29 (1996) ("[M]ost states have chosen to counter discrimination by enacting detailed statutory schemes." *Id.* at 628.); James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961, 967–68 (2011).

<sup>3</sup> See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657 (2000) ("As the definition of 'public accommodation' has expanded . . . the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased."). See generally Gottry, *supra* note 2; Pamela Griffin, Comment, *Exclusion and Access in Public Accommodations: First Amendment Limitations upon State Law*, 16 PAC. L.J. 1047 (1985); Susan Nabet, Note, *For Sale: The Threat of State Public Accommodations Laws to the First Amendment Rights of Artistic Businesses*, 77 BROOK. L. REV. 1515 (2012); Lauren J. Rosenblum, Note, *Equal Access or Free Speech: The Constitutionality of Public Accommodations Laws*, 72 N.Y.U. L. REV. 1243 (1997).

<sup>4</sup> U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . ."); see, e.g., *Wooley v. Maynard*, 430 U.S. 705, 714–15 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714.).

<sup>5</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 572 (1995) ("[Public accommodations laws] do not, as a general matter, violate the First or Fourteenth Amendments.>").

<sup>6</sup> Compare *Dale*, 530 U.S. at 654–55 (requiring Boy Scouts to admit gay scoutmaster violated First Amendment right of expressive association), and *Hurley*, 515 U.S. at 573 (requiring parade organizers to include gay, lesbian, bisexual, and transgender group violated First Amendment right to free speech), with *Roberts v. U.S. Jaycees*, 468 U.S. 609, 627 (1984) (requiring public club to accept female members did not infringe on First Amendment right to free speech).

Recently, in *Elane Photography, LLC v. Willock*,<sup>7</sup> the New Mexico Supreme Court held first that a wedding photography company's refusal to photograph a same-sex couple's commitment ceremony constituted discrimination based on sexual orientation in violation of the New Mexico Human Rights Act<sup>8</sup> (NMHRA) and second that application of the statute did not violate the First Amendment. While the court's opinion engaged many of the U.S. Supreme Court's relevant precedents, its analysis of the First Amendment speech question failed to consider a series of countervailing hypotheticals — briefed to the court, raised by scholars, and discussed by commentators — in which other, undeniably expressive services would be compelled by its holding. As a result, the court's reasoning failed to reach the heart of the tension between modern public accommodations laws and First Amendment speech protections. While addressing the proposed hypotheticals may not have changed the court's ultimate holding, it likely would have forced the court to narrow its decision to better balance the competing values of free speech and nondiscrimination.

Elane Photography is a New Mexico limited liability corporation specializing in wedding photography.<sup>9</sup> The company is owned by Elaine and Jonathan Huguenin<sup>10</sup> and has a policy against creating photographs that communicate messages contrary to the owners' beliefs,<sup>11</sup> including their belief that the Bible teaches that marriage is the union of a man and woman.<sup>12</sup> When Elane Photography received an inquiry from Vanessa Willock asking whether the company could photograph her commitment ceremony with her female partner, the company responded that it did not photograph same-sex weddings.<sup>13</sup>

In December 2006, Willock filed a claim with the New Mexico Human Rights Commission (NMHRC), charging that Elane Photography's refusal to offer its wedding photography services to her was discrimination based on sexual orientation.<sup>14</sup> The NMHRC determined that Elane Photography was a "public accommodation" and

<sup>7</sup> 309 P.3d 53 (N.M. 2013).

<sup>8</sup> N.M. STAT. ANN. § 28-1-1 to -15 (LexisNexis 2004 & Supp. 2013). The Act proscribes discrimination on the basis of "race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap." *Id.* § 28-1-7(F). It defines "public accommodation" in meaningful part as "any establishment that provides or offers its services, facilities, accommodations or goods to the public." *Id.* § 28-1-2(H).

<sup>9</sup> See Hearing Transcript at 97, *Willock v. Elane Photography, LLC*, HRD No. 06-12-20-0685 (N.M. Human Rights Comm'n Apr. 9, 2008).

<sup>10</sup> *Id.* at 71-72.

<sup>11</sup> *Id.* at 80, 82-83.

<sup>12</sup> *Id.* at 85-86.

<sup>13</sup> See *Elane Photography*, 309 P.3d at 59-60. Willock subsequently secured the services of a different photographer. *Elane Photography, LLC v. Willock*, No. CV-2008-06632, 2009 WL 8747805, slip op. at 2 (N.M. Dist. Ct. Dec. 11, 2009).

<sup>14</sup> *Elane Photography, LLC v. Willock*, 284 P.3d 428, 433 (N.M. Ct. App. 2012).

had unlawfully discriminated against Willock, and it ordered the company to pay her roughly \$6600 in attorneys' fees and costs.<sup>15</sup> Elane Photography appealed to state district court, seeking reversal of the award of attorneys' fees, declaratory judgment that it had not discriminated based on sexual orientation, and a ruling that its First Amendment rights had been violated.<sup>16</sup> The parties filed cross-motions for summary judgment, and the district court granted summary judgment for Willock.<sup>17</sup> On appeal, the New Mexico Court of Appeals affirmed the district court, and the company again appealed.<sup>18</sup>

The New Mexico Supreme Court affirmed.<sup>19</sup> Writing for the court, Justice Chávez<sup>20</sup> held that Elane Photography had unlawfully discriminated against Willock, rejecting the company's First Amendment claims.<sup>21</sup> The court repudiated the argument that enforcement of the NMHRA violated the First Amendment by compelling Elane Photography to communicate a message against its owners' personal beliefs.<sup>22</sup> The court identified two lines of cases under the U.S. Supreme Court's compelled-speech doctrine — prohibiting the government from requiring an individual to either “speak the government's message” or “host or accommodate another speaker's message”<sup>23</sup> — and distinguished both. The first involved laws that required individuals to communicate a discrete message — such as displaying the state motto on a license plate<sup>24</sup> — and served little other purpose.<sup>25</sup> With respect to the second, the court noted that the Supreme Court “ha[d] never found a compelled-speech violation arising from the application of antidiscrimination laws to a for-profit public accommodation.”<sup>26</sup>

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<sup>15</sup> Willock v. Elane Photography, LLC, HRD No. 06-12-20-0685, slip op. at 15–16, 19. Willock did not seek monetary damages. *Elane Photography*, 284 P.3d at 433.

<sup>16</sup> *Elane Photography*, 309 P.3d at 60.

<sup>17</sup> *Elane Photography*, 2009 WL 8747805, slip op. at 1.

<sup>18</sup> *Elane Photography*, 309 P.3d at 60.

<sup>19</sup> *Id.*

<sup>20</sup> Chief Justice Maes and Justices Daniels and Vigil concurred, joining Justice Chávez's opinion. Justice Bosson specially concurred and filed a separate opinion.

<sup>21</sup> *Elane Photography*, 309 P.3d at 59. The court also held that New Mexico's Religious Freedom Restoration Act, N.M. STAT. ANN. § 28-22-1 to -5 (LexisNexis 2004), was inapplicable. *Elane Photography*, 309 P.3d at 76–77.

<sup>22</sup> *Elane Photography*, 309 P.3d at 63.

<sup>23</sup> *Id.* (quoting *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006)) (internal quotation marks omitted).

<sup>24</sup> *Wooley v. Maynard*, 430 U.S. 705, 707 (1977); see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626–29 (1943) (holding unconstitutional a requirement that students salute the flag and recite the Pledge of Allegiance).

<sup>25</sup> *Elane Photography*, 309 P.3d at 64. In contrast, the court found that the NMHRA did not dictate any specific message and served the important purposes of promoting the free availability of goods and services and “protect[ing] individuals from humiliation and dignitary harm.” *Id.*

<sup>26</sup> *Id.* at 65. The court specifically distinguished *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) — where the Supreme Court reversed Massachusetts courts' holding that St. Patrick's Day parade organizers violated public accommodations

The court flatly rejected an exemption for professional photographers from public accommodations laws: “We decline to draw the line between ‘creative’ or ‘expressive’ professions and all others. . . . Courts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws.”<sup>27</sup> Such an exemption “would allow any business in a creative or expressive field to refuse service on any protected basis.”<sup>28</sup> Painting this implication in the starkest terms, the court noted that the exemption would “allow a photographer who was a Klan member to refuse to photograph an African American customer’s wedding, graduation, newborn child, or other event if the photographer felt that the photographs would cast African Americans in a positive light.”<sup>29</sup> In the court’s view, “[s]uch a holding would undermine all of the protections provided by antidiscrimination laws.”<sup>30</sup>

Justice Bosson wrote a special concurrence. The Huguenins, he wrote, are “compelled by law to compromise the very religious beliefs that inspire their lives. Though the rule of law requires it, the result is sobering. It will no doubt leave a tangible mark on the Huguenins and others of similar views.”<sup>31</sup> Justice Bosson concluded that “[i]n the smaller, more focused world of the marketplace, of commerce, of public accommodation, the Huguenins have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. . . . [I]t is the price of citizenship.”<sup>32</sup>

The historical purpose of public accommodations laws — to stamp out invidious racial discrimination — clearly animated the New Mexico Supreme Court’s rejection of *Elane Photography*’s appeal. The court viewed the company’s arguments as threatening the basic premise of antidiscrimination law, turning back the clock on over a century of hard-fought gains. But by failing to grapple with relevant hypotheticals, the court failed to reach the heart of the tension between modern public accommodations laws and the First Amendment. While doing so would not necessarily have changed the case’s ultimate

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laws by denying the application of a group of gay, lesbian, and bisexual Irish-Americans to march as a unit in the parade — suggesting that the lower courts in that case “erroneously classified” the privately organized parade as a public accommodation and noting that a parade is inherently expressive. *Elane Photography*, 309 P.3d at 68. Without explicitly determining whether photography is expressive, the court held that the NMHRA applies “not to *Elane Photography*’s photographs but to its business operation.” *Id.*

<sup>27</sup> *Elane Photography*, 309 P.3d at 71.

<sup>28</sup> *Id.* at 72.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* The court also held that the NMHRA was “a neutral law of general applicability, and as such it does not offend the Free Exercise Clause of the First Amendment,” *id.* at 75, and that *Elane Photography* had not adequately briefed a hybrid-rights claim, *id.* at 75–76.

<sup>31</sup> *Id.* at 79 (Bosson, J., specially concurring).

<sup>32</sup> *Id.* at 80.

outcome, it likely would have required a narrower holding — drawing a line either between expressive and nonexpressive professions, or between protected and unprotected speech in the marketplace.

The centrality of the historical purpose of public accommodations laws to the court’s holding is evident throughout Justice Chávez’s opinion for the court and Justice Bosson’s special concurrence. The introduction to Justice Chávez’s opinion characterized Elane Photography’s refusal to take photographs of Willock’s commitment ceremony as no different from a refusal to photograph a ceremony “between people of different races.”<sup>33</sup> The court explicitly drew on language describing the purpose of the Civil Rights Act of 1964 to describe the purpose of the NMHRA.<sup>34</sup> Justice Bosson’s special concurrence relied on *Loving v. Virginia*<sup>35</sup> and *Heart of Atlanta Motel, Inc. v. United States*<sup>36</sup> to explain how it was that New Mexico could compel the Huguenins to “disobey God” and compromise their “fundamental religious tenets.”<sup>37</sup> But the court’s mindfulness of the historical backdrop is most apparent in its discussion of the Ku Klux Klan hypothetical: whether a Klan member could refuse his photography services to an African American family to avoid communicating a message with which he disagreed. The court believed an opinion permitting such a refusal would effectively “undermine *all* of the protections provided by antidiscrimination laws,”<sup>38</sup> and thus the court could not condone a holding that exempted commercial photographers from the NMHRA.

While the Klan hypothetical is undeniably compelling, the court failed to consider a series of countervailing hypotheticals that were ex-

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<sup>33</sup> *Id.* at 59 (majority opinion).

<sup>34</sup> *See id.* at 64–65 (citing *Daniel v. Paul*, 395 U.S. 298, 307–08 (1969)). Implicit in the court’s holding is the analogy between racial discrimination and other forms of discrimination. But this equivalence is not directly discussed, and the Supreme Court has yet to apply heightened scrutiny under the Equal Protection Clause to many classes protected by state accommodations laws. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 n.2 (2000) (noting that public accommodations laws “have expanded beyond those groups . . . given heightened equal protection scrutiny under our cases”). *But see, e.g., United States v. Windsor*, 133 S. Ct. 2675, 2693–96 (2013) (applying something other than rational basis review in striking down a federal law discriminating against same-sex couples). The NMHRA is representative of this trend in which public accommodations laws have broadened beyond their original purpose of combating racism. In the District of Columbia, for example, public accommodations laws now include “age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, or place of residence or business” as unlawful bases for discrimination. D.C. CODE § 2-1402.31(a) (LexisNexis 2001).

<sup>35</sup> 388 U.S. 1 (1967) (striking down a Virginia antimiscegenation law).

<sup>36</sup> 379 U.S. 241 (1964) (upholding the constitutionality of the Civil Rights Act of 1964’s public accommodations provisions).

<sup>37</sup> *Elane Photography*, 309 P.3d at 78–79 (Bosson, J., specially concurring) (internal quotation mark omitted).

<sup>38</sup> *Id.* at 72 (majority opinion) (emphasis added).

tensively briefed,<sup>39</sup> raised by scholars,<sup>40</sup> and discussed in national publications commenting on the litigation.<sup>41</sup> For example, should a freelance writer who brings her services under public accommodations laws by advertising them online, and who regularly writes press releases for a variety of groups, be compelled to write a release for Westboro Baptist Church because refusing to do so would be discrimination on the basis of religion?<sup>42</sup> In the District of Columbia, where businesses may not discriminate based on “political affiliation,”<sup>43</sup> should a Democratic freelance writer be compelled to write a release for a controversial Republican group? In both scenarios, the business would be “compelled to [offer services] only to the extent that it would provide the same services to [other clients],”<sup>44</sup> and each is thus a logical consequence of the court’s holding. But each scenario also clearly implicates free speech,<sup>45</sup> and each seems far removed from the racially segregated ice cream parlor or motel.<sup>46</sup>

These examples are indicative of the tension between the First Amendment and modern public accommodations laws: while such

<sup>39</sup> See Brief in Chief of Petitioner Elane Photography, LLC at 23, *Elane Photography*, 309 P.3d 53 (No. 33,687) [hereinafter *Elane Photography Brief*]; Brief of Amici Curiae the Cato Institute, Prof. Dale Carpenter & Prof. Eugene Volokh at 3–4, 14, *Elane Photography*, 309 P.3d 53 (No. 33,687) [hereinafter *Cato Institute Brief*].

<sup>40</sup> See, e.g., Gottry, *supra* note 2, at 987; Nabet, *supra* note 3, at 1531 n.120 (quoting Eugene Volokh, *First Amendment and Photography/Writing/Publishing/Book Distribution for Money*, VOLOKH CONSPIRACY (Apr. 9, 2008, 3:07 PM), <http://www.volokh.com/2008/04/09/first-amendment-and-photographywritingpublishingbook-distribution-for-money>).

<sup>41</sup> See, e.g., George F. Will, *The Right to Be Let Alone*, WASH. POST, Sept. 16, 2012, at A23.

<sup>42</sup> See *Cato Institute Brief*, *supra* note 39, at 3–4.

<sup>43</sup> D.C. CODE § 2-1402.31(a) (LexisNexis 2001).

<sup>44</sup> *Elane Photography*, 309 P.3d at 65.

<sup>45</sup> The fact that speech is created for profit does not change its constitutional protection. See *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988) (“[A] speaker is no less a speaker because he or she is paid to speak.”); see also, e.g., *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011) (applying First Amendment to commercial video games); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (applying First Amendment to for-profit publisher); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (applying First Amendment to paid advertisements); cf. *Citizens United v. FEC*, 130 S. Ct. 876, 899–900 (2010) (noting that First Amendment protection has long applied to corporations and citing cases). And beyond the government compelling an individual to “host or accommodate” another’s message, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006), both hypotheticals involve the compelled creation of speech — arguably a more troublesome burden on the exercise of First Amendment speech.

<sup>46</sup> The application of the antidiscrimination law in these scenarios would not seem to further the historical purpose of public accommodations laws that appeared to animate the court’s holding. Similar examples briefed to the court include: In jurisdictions that prohibit discrimination based on “marital status,” see, e.g., VT. STAT. ANN. tit. 9, § 4502(a) (2006), should a Catholic singer who disapproves of divorced persons remarrying, but who regularly sings at weddings and advertises her services to the public, be compelled to sing the praises of the couple or the occasion at such a wedding? See *Cato Institute Brief*, *supra* note 39, at 14. Or would an actor who advertises through online casting sites and indiscriminately accepts roles in television commercials be compelled to perform in a commercial for a religious organization of which he disapproves? See *id.*

laws serve to protect against forms of discrimination society has grown to condemn, their expansion can lead to results that are deeply troubling in other ways.<sup>47</sup> By failing to address the First Amendment consequences of its holding, the court failed to reach the heart of this tension and its analysis was necessarily incomplete.<sup>48</sup> Of course, consideration of the hypotheticals may have had little effect on the court's ruling: for-profit public accommodations, regardless of the nature of the goods and services provided, may not discriminate on the basis of any classification prohibited by state law. The court may have considered the possibility of free speech burdens to be the necessary price of eradicating discrimination. But if the court viewed the hypotheticals as constitutionally acceptable burdens on speech based on a sufficiently compelling state interest, it could easily have said so.<sup>49</sup> Alternatively, perhaps the court did not think that the examples *were* an infringement on First Amendment rights — believing that they merely involved regulation of “business operation[s],” not speech.<sup>50</sup> But such a claim seems more difficult to maintain the further it is extended.<sup>51</sup>

It is more likely, then, that addressing the countervailing hypotheticals would have compelled the court to narrow its holding to better account for the intersection between the competing values of free speech and nondiscrimination. The court was determined to avoid drawing a line between “creative” or “expressive” businesses and “all others.”<sup>52</sup> But the court implicitly drew a line between “for-profit” public accommodations and all others instead.<sup>53</sup> It is not clear that the court's distinction is the correct one, and the counterexamples help demon-

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<sup>47</sup> This explains why Professors Dale Carpenter and Eugene Volokh filed an amicus brief in support of *Elane Photography*. Both professors are supporters of gay rights, see Cato Institute Brief, *supra* note 39, at 1–2, but argued that “creators’ rights to choose what First Amendment-protected expression to create should be supported both by those who favor gay rights and by those who take the opposite view.” *Id.* at 2.

<sup>48</sup> The district court and court of appeals also failed to address this constitutional tension. It is unclear, however, to what extent the relevant hypotheticals were briefed to those courts.

<sup>49</sup> Cf. *Elane Photography*, 309 P.3d at 79–80 (Bosson, J., specially concurring). Justice Bosson was willing to acknowledge the “sobering” result of a holding he fully supported. *Id.* at 79.

<sup>50</sup> *Id.* at 68 (majority opinion).

<sup>51</sup> In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Supreme Court noted that “by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis.” *Id.* at 687. And while the Supreme Court has never expressly applied the compelled-speech doctrine to a for-profit public accommodation as such, see *Elane Photography*, 309 P.3d at 65, in *Hurley* the Court contemplated the rights of for-profit entities, stating that government “may not compel affirmation of a belief with which the speaker disagrees,” 515 U.S. 557, 573 (1995), whether the speaker is an “ordinary [person]” or “business corporation[.]” *id.* at 574.

<sup>52</sup> *Elane Photography*, 309 P.3d at 71. But drawing lines is arguably the core function of adjudication. See, e.g., Louis Henkin, *The Supreme Court, 1967 Term — Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 63 (1968) (“Judgment consists in drawing lines . . .”).

<sup>53</sup> See *Elane Photography*, 309 P.3d at 65–68, 72.

strate why: The court never directly addressed the issue of whether wedding photography deserves First Amendment protection, despite extensive briefing on the question.<sup>54</sup> But if writing political press releases in the proposed hypotheticals is “pure speech” and selling a hamburger is “pure nonspeech,” it seems implausible to subject both to the same First Amendment analysis. And if the two are distinguishable, on which side of the line does wedding photography fall?<sup>55</sup>

Answering that question may have caused the court to reach the opposite conclusion on the compelled-speech claim,<sup>56</sup> but not necessarily: even if it determined that wedding photography is protected speech, it plausibly could have found that it was “plainly incidental” to the NMHRA’s application<sup>57</sup> or that applying the law to *Elane Photography* was justified by a compelling state interest in protecting Willock and others from “humiliation and dignitary harm.”<sup>58</sup> This narrower opinion also would have been more complete, forcing the court to answer the very question that makes the countervailing hypotheticals troublesome and relevant: must not certain expressive activity, even in the marketplace, be protected, even if other activity is not? Regardless of *how* the court addressed the hypotheticals, doing so would have enhanced its analysis. In a society that justly condemns invidious discrimination and cherishes First Amendment speech, the implications on both sides of the court’s decision deserve to be fully addressed.

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<sup>54</sup> See *Elane Photography Brief*, *supra* note 39, at 15–24; Cato Institute Brief, *supra* note 39, at 8–11, 15–16; Brief of Amici Curiae Wedding Photographers in Support of Petitioner at 5–9, *Elane Photography*, 309 P.3d 53 (No. 33,687).

<sup>55</sup> Presumably, the court viewed the question of whether wedding photography is protected speech as irrelevant, since even if it were protected, the court found that the case did not fall within the Supreme Court’s precedent in either line of the compelled-speech cases. *Elane Photography*, 309 P.3d at 59. But the question becomes immediately relevant when the court’s holding is applied in contexts like those outlined in the proposed hypotheticals. The Supreme Court has given reason to believe that wedding photography would be considered protected speech. See, e.g., *United States v. Stevens*, 130 S. Ct. 1577, 1584, 1592 (2010) (striking down ban on the creation of videos and photographs depicting animal cruelty); cf. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011) (holding that commercial video games are fully protected speech).

<sup>56</sup> While the court characterized its choice as either drawing a line between “expressive” or “creative” businesses and all others or declining to do so, *Elane Photography*, 309 P.3d at 71, it is not clear why it could not have limited its decision to the wedding photography in question.

<sup>57</sup> See *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006). The court quoted the “incidental” standard from *Rumsfeld* but never applied it to the facts of the case. See *Elane Photography*, 309 P.3d at 65.

<sup>58</sup> *Elane Photography*, 309 P.3d at 64.