No. 13-585

In the Supreme Court of the United States

ELANE PHOTOGRAPHY, LLC,
Petitioner
v.
VANESSA WILLOCK
Respondent

On Petition for a Writ of Certiorari to the New Mexico Supreme Court

BRIEF OF ALABAMA, ARIZONA, KANSAS, MICHIGAN, MONTANA, OKLAHOMA, SOUTH CAROLINA, AND VIRGINIA AS AMICI CURIAE SUPPORTING PETITIONER

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The *amici curiae* are States that recognize the potential for conflict between first-amendment principles and public-accommodation laws.[1] To be sure, States have the power to enact public-accommodation laws, and those laws do not, as a general matter, violate the First Amendment. But it is the considered opinion of the *amici* States that New Mexico crossed the constitutional line here. The government cannot constitutionally compel the Huguenins to create and express a message on one side of a contentious cultural and political issue.

As this Court put it Last Term, "until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *Windsor v. United States,* 133 S.Ct. 2675, 2689 (2013). There is now an animated debate between those who view the "very definition" of marriage as being between a man and a woman and those who believe such a definition is an "unjust exclusion." *Id.* The States are free to take sides in that debate, and most have done so. But the States are not free to compel their citizens to create or communicate a message in support of one side or the other.

No one should be punished for refusing to create messages that support or oppose a controversial issue. "If there is any fixed star in our constitutional

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[1] The *amici* States gave timely notice of their intent to file this brief to counsel for the parties on November 25, 2013. *See* Sup.Ct. R. 37(2)(a). The *amici* States do not need consent of the parties to file this brief. *See* Sup.Ct. R. 37(4).

constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). The New Mexico Supreme Court has lost sight of that fixed star.

The Court should use this case to reinforce the principle that the First Amendment protects the right to speak or not speak, even when the topic is politically and culturally divisive. In fact, that is precisely where the First Amendment's protections are needed the most. This Court should grant the petition for certiorari.

ARGUMENT

The Court should grant the petition for certiorari for three reasons, in addition to those explained in the petition itself. First, the state court's decision conflicts with this Court's first-amendment precedents, especially *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). Second, this particular application of the law serves no rational state interest. Third, this Court's guidance would benefit state lawmakers who are considering proposals to enact conscience-based exceptions to public-accommodations and same-sex marriage laws.

A. A State cannot force its residents to create expressive works that communicate a particular viewpoint.

This case is controlled by *Hurley*. Like the law at issue in *Hurley*, the New Mexico Human Rights Act makes it unlawful for "any public accommodation to make a distinction . . . because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap." N.M. Stat. § 28-1-7(F). This Court has explained that "[p]rovisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley*, 515 U.S. at 572; *see also New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988).

But, although States can prohibit invidious discrimination in public accommodations, this Court held in *Hurley* that States cannot use public-accommodations laws to compel persons to speak. It is unconstitutional to apply a public-accommodations law "to expressive activity . . . 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." *Hurley,* 515 U.S. at 578. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.* at 579.

The effect of the New Mexico Supreme Court's decision is to "interfere" with speech. The state court's decision requires Elane Photography to speak about same-sex marriage, and to do so by communicating a message of approval. Wedding photography does not merely create a record of "purely factual and uncontroversial information" about the event. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). Instead, when people hire a wedding photographer, they expect the photographer to create expressive works that portray particular sentiments about their wedding. They want the photographs to convey the message that the ceremony was a happy, significant, and sacred event, as opposed to sad, mistaken, or boring. By compelling Elane Photography to photograph a same-sex commitment ceremony, New Mexico is unconstitutionally requiring the photographer to create expression with a particular viewpoint—approval, validation and celebration of the ceremony.

The state court's decision in this case, like the state court's decision in *Hurley*, is a "peculiar" application of public-accommodations law. *Hurley*, 515 U.S. at 572. The Huguenins do not object to working for homosexual clients; they object to producing photographs that express their approval or validation of a same-sex commitment ceremony, regardless of the sexual orientation of the client who pays for the photographs. *Cf. id.* ("Petitioners disclaim any intent to exclude homosexuals as such"). It is one thing to compel a business to serve people on an equal basis without regard to sexual orientation; it is quite another thing to compel a

person to create photographs that communicate a message that he or she believes to be profoundly wrong. Unlike the typical application of state nondiscrimination laws, "this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573. As in *Hurley*, it may be that the government believes the Huguenins' views about same-sex ceremonies are misguided. But it can get a countervailing message across without regulating citizens' speech.

As the cert petition explains, *see* Pet. 23-28, the state court has no meaningful response to this Court's decision in *Hurley*. The state court reasoned that there are different speech rules for "public accommodations." But it does not follow that, merely because Elane Photography is an "ordinary public accommodation" under state law, "its provision of services can [constitutionally] be regulated" in every instance. Pet. App. 23a-24a. The parade in *Hurley* was held to be a "public accommodation" under state law as well. Nor does it matter, as the state court indicated, that the photographer in this case is paid, while the parade in *Hurley* was a non-profit. "[A] speaker is no less a speaker because he or she is paid to speak." *Riley v. Nat'l Fed'n of the Blind of North Carolina*, 487 U.S. 781, 801 (1988). Under this Court's precedents, Elane Photography cannot be compelled to create or communicate messages about same-sex ceremonies.

B. The New Mexico Supreme Court's decision is unreasonable.

The New Mexico Supreme Court's decision is not justified by the state interests that public-accommodations laws are intended to serve. Public-accommodations laws, when constitutionally applied, serve several legitimate state interests. They ensure that protected classes have adequate access to goods and services in the marketplace. *See, e.g., Katzenbach v. McClung*, 379 U.S. 294, 299-300 (1964) (describing the effects of racial segregation on the economy). They can also "protect individuals from humiliation and dignitary harm." Pet. App. 20a.

But the state court's decision does not meaningfully advance either of these interests. The same-sex couple at the center of this dispute derives no meaningful marketplace benefit from compelling the Huguenins to attend and photograph their ceremony. The phonebooks of any metropolitan area are full of wedding photographers, some of whom specialize in same-sex ceremonies, and the couple in this case readily found another photographer for their event.

The state court's result also fails meaningfully to "protect individuals from humiliation and dignitary harm." The state court attempted to accommodate the Huguenins' free-speech rights by allowing that they could "post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage." Pet. App. 5a. But if the state court's judgment coerces the Huguenins to broadcast their

views on same-sex marriage, instead of quietly declining requests to photograph same-sex ceremonies, this case could lead to more, not less, public dignitary harm for same-sex couples.

Of course, public-accommodation laws also express the government's view that certain biases are disfavored, with the hope of ultimately "produc[ing] a society free of the corresponding biases." *Hurley*, 515 U.S. at 578-79. Although that may be a laudable goal, this Court has held that it is a "decidedly fatal objective" for applying a public-accommodations law to "expressive conduct." *Id.* at 579. The notion that one person's speech should be limited or compelled "to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment . . . ." *Id.* The government can make its views known without coercing the Huguenins to spread the message.

States can protect against invidious discrimination and still accommodate first-amendment rights. *See Curran v. Mt. Diablo Council of Boy Scouts*, 952 P.2d 218 (1998) (narrowly defining scope of public-accommodation law to avoid constitutional problems); *U.S. Jaycees v. Iowa Civil Rights Comm'n*, 427 N.W.2d 450, 454-55 (1988) (same). *See also PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (states have interest in regulating speech at "business establishment[s] that [are] open to the public to come and go as they please," but not necessarily other business establishments). Although the New Mexico Supreme Court gave lip service to the Huguenins' first amendment rights, it nonetheless punished them for refusing to express a particular message. The state

had no compelling reason to apply its public accommodations law in this fashion.

C. The Court should grant certiorari to provide guidance to state lawmakers.

This Court should address the contours of the First Amendment's protections now to inform proposals about religious-liberty, free-speech, and public-accommodations. Although the state court expressed concerns about a slippery slope, it was looking at the wrong side of the mountain. Contrary to the state court's hyperbole, the petitioner's proposed rule would not allow a public accommodation to refuse service based on the fact of a protected characteristic itself. *See* Pet. App. 40a. There is a readily-discernible difference between, for example, a ghostwriter who does not want to write for a female client and a ghostwriter who does not want to promote stereotypes about women. The former is about gender; the latter is about subject matter and viewpoint.

Instead, the real slippery slope arises from the state court's rule that the government can use public-accommodations laws to compel persons who create speech to create certain kinds of speech. Under the state court's rule, a law firm would be obligated to take on a homosexual client who wants to make arguments in favor of same-sex marriage, in the same way this photographer is being forced to photograph a same-sex ceremony. Under the state court's rule, a right-wing ghostwriter could be forced to write copy for a left-wing publication. *See, e.g.*, D.C. Code § 2-1411.02 (2001) ("political affiliation" is

protected class); V.I. Code tit. 10, § 64(3) (2006) (same). It is no answer to these concerns to say, as the state court did, that New Mexico law does not yet compel these results. *See* Pet. App. 39a-40a. It follows from the state court's decision that a government *could* compel them, and that is problem enough. This Court should give legislators and judges guidance before those cases arise.

A decision from this Court would also inform the debate about the legalization of same-sex marriage. It is no surprise that opponents of legally-recognized same-sex marriage have cited the state court's decision in this case in support of their arguments, and both sides of the same-sex marriage debate have proposed competing legislation to respond to the perceived need to "fix" the result.[2] One Hawaii legislator, herself a homosexual, recently voted against a bill legalizing same-sex marriage because she believed that it needed to include stronger protections for religious objectors. *See* Diane Lee, *Exclusive: Why Rep. Jo. Jordan voted against Marriage Equality*, HONOLULU MAGAZINE, Nov.

[2] *Compare* Letter to State Legislators from Five Legal Scholars, Religious Liberty Implications of Legalizing Same-Sex Marriage (May 2, 2013) (arguing for broad exceptions because of this case) at http://mirrorofjustice.blogs.com/files/mn-main-letter-pdf-1.pdf (last visited Dec. 3, 2013) *with* Letter from Five Law Professors to State Lawmakers, Religious Liberty and Marriage for Same-Sex Couples (Oct. 23, 2013) (arguing against the need for broad exceptions to public-accommodations laws) at http://blogs.chicagotribune.com/files/five-law-professors-against-changing-sb-10.pdf (last visited Dec. 6, 2013).

2013.[3] And, in several states, there are competing legislative proposals and ballot initiatives to create exceptions to same-sex-marriage and public-accommodations laws.[4] Legislators and the general public could more intelligently craft and vote on legislation to address the claims of conscientious dissenters if they knew what protection, if any, the Constitution already provides to people like the Hueginins.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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[3] http://www.honolulumagazine.com/Honolulu-Magazine/November-2013/Exclusive-Why-Rep-Jo-Jordan-voted-against-Marriage-Equality/ (last visited Dec. 3, 2013).

[4] *See* Matthew Brown, *Oregon religious freedom group counters gay marriage ballot proposal*, TIMESREPORTER.COM, http://www.timesreporter.com/article/20131127/NEWS/311279968/10698/LIFESTYLE (last visited Dec. 3, 2013) (discussing two ballot initiatives, one legalizing same-sex marriage, and the other protecting religious objectors from claims by same-sex couples); Arkansas Initiative for Marriage Equality, *Ballot Initiative*, www.arequality.org/ballot-initiative/ (last visited Dec. 3, 2013) (Arkansas ballot initiative to allow same-sex marriage but providing that no clergy or religious organization "shall be obligated to provide wedding ceremonies or participate in the solemnization of any marriage").

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