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 IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

Petitioner frames the following question:

> Whether applying a state public-accommodations statute to require a photographer to create expressive images and picture-books conveying messages that conflict with her religious beliefs violates the First Amendment's ban on compelled speech.

A procedural bar forecloses this Court from reaching a core element of that question: the impact of religious belief upon a putative speech claim. Petitioner waived that issue in the state court proceedings. In addition, the defendant in this action was a limited liability company, not an individual.

In light of Petitioner's waiver, the only question available to be considered in the Petition is:

> Whether a business that sells commercial goods and services to the general public has an absolute right under the Speech Clause to discriminate against any customer in violation of a state anti-discrimination law that makes no reference to expression, merely because its goods or services have a creative or expressive element.

PARTIES TO THE PROCEEDING

Vanessa Willock is a citizen of New Mexico and was the plaintiff and appellee in the proceedings below. Elane Photography, LLC is a limited liability company organized and doing business under the laws of New Mexico and was the defendant and appellant in the proceedings below.

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INTRODUCTION

A procedural bar forecloses this Court from reaching a key part of the question that Petitioner frames in the Question Presented and urges throughout its brief: that religious belief lends additional weight to a Speech Clause challenge to a neutral regulation on business conduct. The New Mexico Supreme Court found that Petitioner waived this Hybrid Rights argument. That waiver imposes a procedural bar to any argument that religious motivation bolsters the putative speech rights of a business. This case does not properly raise that issue.

In addition, Petitioner admits that there is no split of authority on the Question Presented. No court has ever held that businesses selling goods and services to the general public have a right under the Speech Clause to discriminate against customers in violation of a neutral state law. In Petitioner's words, disputes that might present such claims "don't happen very often." Respondent's Appendix ["RA"] at App. 5, Transcript of Oral Argument before the New Mexico Supreme Court ["TOA"] at 48.

Even within New Mexico, the impact of the Speech Clause ruling remains unclear. Petitioner raised state constitutional claims in the lower courts, but it failed to support those claims and was found to have waived them. Despite this waiver, members of the New Mexico Supreme Court and Court of Appeals indicated that the state constitution might have provided alternative grounds for relief in this case. If

the courts of New Mexico recognize such a claim in a future dispute, it could deprive the ruling below of controlling effect on the Question Presented in cases like this one. Thus, it is unclear what lasting impact the ruling below will have in New Mexico.

Finally, the decision is correct on the merits. This Court has consistently held that states may regulate commercial conduct through neutral laws that make no reference to expression. The New Mexico Supreme Court faithfully applied those precedents. New Mexico neither discriminated based upon content nor intruded upon the speech of private actors. It simply applied a neutral regulation to a business operating in the public market. The court below reserved the right of all businesses to express their views and voice opposition to that law, including in communications with customers. This Court has held that the First Amendment is not implicated in such a case.

There is no reason for this Court to alter its well-settled precedents in this area, and the present case would be an inappropriate vehicle for exploring such a shift. Respondent therefore respectfully requests that the Court deny the Petition.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Elane Photography, LLC ["Petitioner" or "the Company"] is a limited liability company that offers commercial photography services to the general public. The Company solicits customers through broad public advertising, with the majority of its business deriving from email inquiries sent through its website. Petitioner's Appendix ["PA"] at 64a, ¶2; 137a, ¶11.

The Company has a policy of refusing to accept business from same-sex couples having wedding ceremonies. Although wedding photography is the main part of the Company's business, it will not offer that service to a paying customer if the ceremony involves a same-sex couple. On September 22, 2006, Vanessa Willock emailed the Company to inquire about its availability to photograph a ceremony with her female partner. Petitioner refused Willock's business, explaining that it would not offer wedding photography services to same-sex couples. PA at 6a-7a, ¶¶7-8; 138a-141a, ¶¶15-22.

II. PROCEDURAL HISTORY

Following the Company's denial of service, Willock filed a complaint with the New Mexico Human Rights Commission, seeking a declaration that the Company's actions violated the public accommodations provisions of the New Mexico Human Rights Act ["NMHRA"]. NMHRA prohibits discrimination on

certain specified grounds by "any establishment that provides or offers its services, facilities, accommodations, or goods to the public." The statute covers businesses selling commercial goods and services to the general public but excludes "a bona fide private club or other place or establishment that is by its nature and use distinctly private." § 28-1-2(H). Willock prevailed before the Commission and obtained a declaration that the Company's discrimination had been illegal.[1] Petitioner sought *de novo* review before the state trial court, which affirmed the Commission ruling on cross motions for summary judgment. The New Mexico Court of Appeals affirmed the trial court decision, and the Supreme Court of New Mexico affirmed the Court of Appeals. PA at 7a-8a, ¶¶9-11.

In the state courts, Petitioner invoked the New Mexico Religious Freedom Restoration Act, the Religion Clause of the New Mexico Constitution, the Free Exercise and Free Speech Clauses of the First Amendment, and the federal Hybrid Rights doctrine to challenge the statute. Petitioner partially waived and then abandoned its state constitutional arguments. It has not sought review of the Free Exercise ruling. And it waived its federal Hybrid Rights argument by failing to support it adequately.

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[1] The Commission also issued an award of costs and attorney's fees. Vanessa Willock and her attorneys voluntarily waived this award.

Respondent prevailed in unanimous rulings at every stage of the state court proceedings.

REASONS FOR DENYING THE WRIT

I. A STATE PROCEDURAL BAR FORECLOSES A CORE ELEMENT OF THE QUESTION PRESENTED IN THE PETITION

A core element of the question framed in the Petition and advanced throughout Petitioner's brief emphasizes the religious motivation of the Company's owners in violating New Mexico law. The Question Presented makes clear that Petitioner is contesting an application of New Mexico law that would require it to provide equal access to its commercial services in "conflict with [the] religious beliefs" of the Company's owners. Petition at i. This proposition is a central theme of Petitioner's brief:

- *Introduction*: Application of New Mexico law would "conflict with [the] religious beliefs" of the Company's owners. Petition at 1.
- *Statement of the Case*: The Company's owners will not serve customers when doing so would be "contrary to their religious beliefs," would conflict with their "sincere religious belief," and would lead them to believe that "they would be disobeying God." Petition at 6.

– *Reasons for Granting the Writ*: New Mexico law would "conflict with [the owner's] religious beliefs." Petition at 13; Application of NMHRA to the Company would "conflict with [the owner's] religious beliefs." *Id*. at 14. *See also id*. at 15, 17, 20, 24, 25, 27, 32 & 35.

A state-law procedural bar forecloses this Court from addressing this core element of Petitioner's claim.

Petitioner advanced three federal claims below: a Free Exercise claim, a Free Speech claim, and a Hybrid Rights claim. The courts of New Mexico rejected the Free Exercise claim on the merits, and Petitioner does not raise it here.

Petitioner's Hybrid Rights claim relied upon this Court's ruling in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and the decision of the Tenth Circuit in *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), to argue that the religious motivation of the Company's owners in violating New Mexico law gave additional weight to their Free Speech claim. But Petitioner failed to support that argument, thereby waiving it under state law, and there was no ruling on the merits before the New Mexico Supreme Court, as the opinion below explains:

> This Court requires that the parties adequately brief all appellate issues to include an argument, the standard of review, and citations to authorities for each issue presented. . . . To rule on an inadequately briefed

> issue, this Court would have to develop the arguments itself, effectively performing the parties' work for them. . . . Elane Photography devotes a single three-sentence paragraph to its hybrid-rights claim, stating that a hybrid claim exists because it has raised a compelled-speech claim and a free exercise claim. . . . As a matter of New Mexico law, Elane Photography's briefing of its hybrid-rights claim is inadequate to permit us to review the issue. For this reason, we do not consider its hybrid-rights argument.

PA at 48a-50a, ¶¶70-71. Petitioner's state-law waiver bars any consideration of a Hybrid Rights theory, *see Coleman v. Thompson,* 501 U.S. 722, 729-730 (1991), and that theory is the only basis on which Petitioner could argue that religious motivation lends additional weight to its Speech Clause claim.

In a claim brought solely under the Speech Clause, this Court has never held that religious motivation confers additional privileges. To the contrary, this Court has applied the same standard to Speech Clause claims without regard to religious motivation. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 634 (1943), the Court explained that a compelled speech claim does not "turn on one's possession of particular religious views or the sincerity with which they are held." The same proposition defined the analysis in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), a case brought by a religious student group that was denied official sponsorship at a public university when it

refused to comply with a non-discrimination policy. The group asserted a compelled association claim under the Speech Clause, and this Court rejected that claim without giving additional weight to the religious origin of the group's objections. *See also International Soc'y of Krishna Consciousness v. Lee*, 505 U.S. 672, 685 (1992) (rejecting religious group's challenge to airport policy banning solicitation and leafleting and noting that the claimed Speech Clause right would apply to "all other religious, nonreligious, and noncommercial organizations") (internal quotation marks omitted).

Petitioner has structured its argument around the religious beliefs of the Company's owners. But Petitioner has not raised a Free Exercise claim, and a state-law waiver bars Petitioner from asserting a Hybrid Rights argument that religious motivation lends additional weight to its Speech Clause theory. This Court is thus foreclosed from addressing a core element of the question that the Petition attempts to present.

II. PETITIONER ADMITS THAT THERE IS NO SPLIT OF AUTHORITY ON THE QUESTION PRESENTED AND NO SUBSTANTIAL BODY OF CASES PRESENTING QUESTIONS OF THIS TYPE

Petitioner's submission to this Court, together with the concessions it made below, demonstrate the absence of any reason for this Court to grant review of

the Question Presented. There is no split of authority requiring resolution, no significant number of reported cases asserting claims of this type, and no record of a significant number of disputes between businesses and customers in which the claim that Petitioner advances could be implicated. Rather, Petitioner admitted below that "[t]hese cases don't happen very often."

Petitioner concedes that the claim it advances "do[es] not present a Circuit split or a conflict between state appellate or federal circuit decisions." Petition at 38. Indeed, there appears to be no reported decision of any court finding that a business selling goods and services to the general public has a right under the Speech Clause to violate a neutral anti-discrimination law. Petitioner conceded during argument before the New Mexico Supreme Court that no such case exists in the Company's industry:

> JUSTICE BOSSON: We've had anti-discrimination laws all over this country; state, local, federal, for decades.
>
> MR. LORENCE: Right.
>
> JUSTICE BOSSON: And there have been hundreds of thousands of commercial photographers around the country. Has any case, in the history of the American jurisprudence, ever said that the anti-discrimination laws cannot be applied against a commercial photographer because they're exercising First Amendment activity? Any –

> MR. LORENCE: (Indiscernible) [Ah, no.][2]
>
> JUSTICE BOSSON: Any case.
>
> MR. LORENCE: And in fact I'm not even aware of a anti-discrimination charge being brought against a commercial photographer. So these are unique cases. These cases don't happen very often. RA at App. 4, TOA at 47-48.

Before this Court as well, Petitioner identifies no case in which any court has issued such a holding. Petitioner is forced to concede that there is no division of authority on its novel constitutional theory, no substantial body of cases addressing that theory, and no significant number of disputes even placing that theory in contention.

Instead, Petitioner attempts to substitute its position on the merits for an argument about the propriety of certiorari review. Petition at 38-39. Every judge who has considered the merits in this case has rejected Petitioner's argument, and properly so. As Part IV explains, the New Mexico Supreme Court faithfully applied this Court's compelled-speech precedents when it rejected Petitioner's claim.

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[2] Review of the audio recording makes clear that this initial part of Counsel for Petitioner's answer was "Ah, no."

Petitioner also asserts that a party advancing a compelled-speech argument need not show any conflict of authority or widespread litigation of an issue when seeking certiorari, invoking *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). Petition at 38-39. The cited cases do not support that assertion.

In *Rumsfeld*, two federal courts had declared a federal statute facially unconstitutional. This Court routinely grants review in such circumstances. *See* Eugene Gressman et al., *Supreme Court Practice* § 4.12, at 264 (9th ed. 2008). And Petitioners are incorrect when they assert that no division of authority existed in the lower courts when certiorari was granted in *Dale* and *Hurley*. Regarding *Dale*, there was litigation around the country over the Boy Scouts' membership policy when this Court decided to hear the New Jersey case, with several courts citing First Amendment concerns as a reason to adopt narrow interpretations of their public accommodations statutes.[3] And the decision of the Massachusetts

[3] *See, e.g.*, *Curran v. Mt. Diablo Council of Boy Scouts*, 952 P.2d 218, 239 (Cal. 1998) (adopting narrow construction of state public accommodations law and referencing the "constitutional constraints" that informed its judgment); *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1277-1278 & n.8 (7th Cir. 1993) (finding that Title II of the Civil Rights Act does not apply to the Boy Scouts and declining to address "First Amendment Freedom of

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Supreme Judicial Court in *Hurley* conflicted directly with a New York federal district court decision in another case in which lesbian and gay groups sought to participate in a private St. Patrick's Day parade.[4]

Petitioner provides no basis for overcoming its concession that the novel theory it advances has never been adopted by any court, is not being litigated in a substantial body of cases, and "do[esn't] happen very often." RA at App. 5, TOA at 48.

III. IT REMAINS UNCLEAR WHETHER THE RULING BELOW WILL HAVE CONTROLLING EFFECT ON THE QUESTION PRESENTED IF SIMILAR CASES ARISE IN THE FUTURE

This case is also a poor candidate for Supreme Court review because the Speech Clause ruling in the opinion below may not be controlling if similar cases arise in the future in New Mexico.

Religion" arguments); *Seabourn v. Coronado Area Council*, 891 P.2d 385 (Kan. 1995) (holding that state public accommodations statute does not apply to Boy Scouts). This division of authority was highlighted in the petition for certiorari. *See Boy Scouts of Am. & Monmouth Council v. Dale*, Petition for Certiorari, 1999 WL 35238158.

[4] *See N.Y. County Bd. of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358, 366 (1993). The petition for certiorari in *Hurley* reproduced the *Hibernians* case in its appendix. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, Petition for Certiorari, 1994 WL 16875884.

In the proceedings below, Petitioner argued that the Religion Clause of the New Mexico Constitution, N.M. Const. Art. II § 11, confers broader protection to religious objectors than the U.S. Constitution. The state courts expressed strong interest in the possibility that this provision might require exemptions from general laws for religiously motivated business owners. However, Petitioner failed to support its argument adequately and the claim was waived, leaving resolution of the issue "for another day." PA at 103a, ¶55.

New Mexico courts have held that their state constitution may afford broader protection than the federal constitution if the text indicates that the state constitution aims to serve a function distinct from its federal counterpart. *State v. Gomez*, 932 P.2d 1, 7-8 (NM 1997). In the lower state courts, Petitioner argued that the text of Article II, Section 11 indicates such a purpose, entitling religiously motivated business owners to exemptions from neutral laws of general applicability. State supreme courts around the country have given serious attention to such claims under their respective state constitutions, with a range of results.[5]

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[5] *See, e.g.*, *N. Coast Women's Care Med. Gp. v. San Diego Cty. Sup. Ct.*, 189 P.3d 959 (Cal. 2008) (assuming strict scrutiny when owners of fertility clinic assert state constitutional right not to serve lesbian client, but finding standard satisfied by anti-discrimination law); *Att'y Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (concluding that landlord enjoys state constitutional right not to rent to unmarried tenants and that fact question remains whether Commonwealth has sufficient interest to

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Petitioner failed to support this claim with adequate arguments before the New Mexico Court of Appeals, however, and that court found it waived. PA at 86a-87a, ¶¶32-33. Writing separately, Justice Wechsler "agree[d] . . . that the New Mexico Constitution may provide broader protection than the First Amendment" but concurred that Petitioner had waived the argument. PA at 99a-103a, ¶¶52-55. Justice Wechsler concluded his opinion with an invitation: "Although the language of Article II, Section 11 is different from that of the First Amendment and may provide broader protection, determination of its scope remains for another day." PA at 103a, ¶55.

When Petitioner appealed to the New Mexico Supreme Court, it did not contest the finding that it had waived its state constitutional claim, which was absent from its papers. Nonetheless, the court inquired about the issue repeatedly during argument, with Justices asking counsel for both Petitioner and Respondent whether the court could address the claim despite Petitioner's waiver.[6] Petitioner

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enforce anti-discrimination law); *Swanner v. Anchorage Equal Rights Comm'n,* 874 P.2d 274 (Alaska 1994) (landlord enjoys greater protection under state free exercise provision but must still comply with housing ordinance prohibiting marital status discrimination).

[6] The court first posed questions to Respondent:

JUSTICE VIGIL: I have a question about the New Mexico constitution and whether it provides broader protections against compelling anyone to attend

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acknowledged its failure to preserve the claim, and the opinion of the New Mexico Supreme Court left it unaddressed. As Justice Wechsler had said, that issue remains for another day.

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religious ceremonies than the federal Constitution. Can you talk –

MR. WOLFF: [T]hat's an issue that was not properly preserved by the petitioners in this case.

JUSTICE VIGIL: And do you think, because it wasn't properly preserved, that this Court should not address whether the New Mexico constitution should provide broader protection?

MR. WOLFF: Indeed that's what this Court itself has said. . . .

JUSTICE BOSSON: Well, you're right as a general proposition, but I don't think there is any New Mexico case law interpreting the New Mexico religious freedom constitutional aspect. At least I'm not aware of any. There may be a case somewhere. So there is no jurisprudence, which is oftentimes the problem we have in a small state like ours. So what good would it have done functionally to have preserved this in that respect? What is that case when there is no case?

RA at App. 3-App. 4, TOA at 38-39. And on Petitioner's rebuttal:

JUSTICE VIGIL: What is your view about whether the New Mexico constitution provides broader protections for the exercise of religion than the –

MR. LORENCE: Your Honor, we think that it does, and that we have argued that below. But we do realize that there is a process on how these questions are supposed to be brought before the Court, and I think this Court would have to determine if we had preserved that appropriately.

JUSTICE VIGIL: Okay. Thank you.

RA at App. 6, TOA at 52.

New Mexico courts are ready to explore whether the state constitution affords greater protection to religious objectors than does the Free Exercise Clause and, if so, whether those protections permit a business operating in the public marketplace to violate a neutral regulation on commercial conduct. If the state courts accept these arguments – as Petitioner maintains that they should – then the Speech Clause ruling below will not control such cases. Until another religiously motivated business owner raises the claim that Petitioner has waived, the effect of the ruling below on the Question Presented will remain unclear.

IV. THE NEW MEXICO SUPREME COURT CORRECTLY APPLIED THIS COURT'S COMPELLED SPEECH PRECEDENTS

Finally, Petitioner's argument on the merits provides no basis for granting certiorari. The ruling below properly rejected Petitioner's claim and faithfully applied this Court's precedents, which have never found a neutral regulation on business conduct to constitute compelled speech under the First Amendment. To the contrary, this Court has repeatedly held that businesses operating in the public marketplace must obey anti-discrimination laws and that the First Amendment poses no barrier. As this Court has explained, "Provisions like [NMHRA] 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 v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 571-572 (1995).

The decisions of this Court have rejected the argument that businesses are entitled to special exemptions from content-neutral laws merely because they sell goods or services that involve creativity or expressive content. Neutral regulations on business conduct apply in equal measure to media companies, *see Cohen v. Cowles Media*, 501 U.S. 663 (1991); bookstores, *see Arcara v. Cloud Books*, 478 U.S. 697 (1986); commercial law firms, *see Hishon v. King & Spalding*, 467 U.S. 69 (1984); and private schools, *see Runyon v. McCrary*, 427 U.S. 160 (1974). Petitioner's business is no different.

What is more, the New Mexico Supreme Court specifically held that NMHRA leaves all businesses free to express their own views on whatever subjects they wish – to the public at large, and directly to prospective customers. PA at 33a-34a, ¶47. Under NMHRA, any New Mexico business can explain that it would prefer not to serve same-sex couples and does so only because state law requires it. The First Amendment rights of businesses are fully preserved.

Petitioner attempts to avoid these clear principles by citing to cases in which the government forcibly sought to impose its own message, *see W.V. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Agency for Int'l Dev.*

v. Alliance for Open Soc'y Int'l, 133 S. Ct. 2321 (2013); or selected messages based upon content and imposed them upon unwilling speakers, *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Pac. Gas & Elec. v. Public Util. Comm'n of CA*, 475 U.S. 1 (1986); *Riley v. Nat'l Fed. of the Blind of NC*, 487 U.S. 781 (1988); or stepped outside the public marketplace and sought to regulate private speakers engaged in the expression of their own views, *see Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). None of these circumstances is present here.

NMHRA imposes no government message, and it involves no discrimination based upon content. NMHRA has nothing to do with messages. It is a neutral regulation on commercial conduct, applicable to all businesses that sell goods and services to the general public. The law simply says: Whatever service you provide, you must not discriminate against customers when you engage in public commerce.

Moreover, when the Company sells its goods and services to the general public, it is not a private actor engaged in the expression of its own message. Customers do not pay for the privilege of facilitating the Company's message. Customers pay to have their own event memorialized. The Company does bring creative skill to the goods and services it provides. That is why it is able to charge a fee. But customers pay for services and products that are tailored to the customers' needs. The same would be true for a

graphic design company or a website specialist. All are businesses that charge for their creative expertise. None charges customers for the privilege of facilitating the company's own views.

This Court reiterated these principles in *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006), making clear that the compelled speech doctrine is not implicated when a commercial regulation controls only conduct and permits the regulated entity to express its own views freely. The holding in *Rumsfeld* controls this case.

A. This Court Reaffirmed in *Rumsfeld* that Content-Neutral Regulations on Business Conduct Do Not Implicate the Compelled Speech Doctrine.

The *Rumsfeld* decision reaffirmed that neutral laws that target commercial conduct raise no First Amendment concerns. *Rumsfeld* involved a challenge by certain law professors to the Solomon Amendment, a federal statute requiring law schools to provide equal access to military recruiters at on-campus job fairs. The schools wished to limit the access of military recruiters "because of disagreement with the Government's policy on homosexuals in the military." 547 U.S. at 51. They argued that being required to facilitate the military's recruiting message would compel them to speak.

The Court disagreed, explaining that none of the conditions required for a compelled speech claim was

present. The Solomon Amendment imposed no government message, and it engaged in no content discrimination:

> As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do* – afford equal access to military recruiters – not what they may or may not *say*. . . . The Solomon Amendment . . . does not dictate the content of the speech at all, which is only "compelled" if, and to the extent, the school provides such speech for other recruiters.

Id. at 60 & 62. And the commercial job fairs were not venues for law schools to engage in their own expression:

> In this case, accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions. Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs. A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.

Id. at 64.

The infirmity in the law schools' argument was not that recruiting and solicitation activities are never protected under the First Amendment. This Court has held that they are. *See Vill. of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Had the Solomon Amendment regulated the content of a recruiter's own message, the First Amendment would have been implicated. *See Riley*, 487 U.S. at 795-801. The infirmity, rather, was that the job fairs were not "inherently expressive" events for the communication of "any message of the school." *Rumsfeld*, 547 U.S. at 64.

As the New Mexico Supreme Court properly held, these principles foreclose Petitioner's claim. NMHRA neither imposes a government message nor engages in content discrimination:

> Like the law in *Rumsfeld,* the NMHRA does not require any affirmation of belief by regulated public accommodations; instead, it requires businesses that offer services to the public at large to provide those services without regard for race, sex, sexual orientation, or other protected classifications.

PA at 21a, ¶31. Nor does the law intrude upon any activity in which the Company is engaged in the expression of its own message:

> Elane Photography argues that photographs are also inherently expressive, so *Hurley* must apply to this case as well. However, the NMHRA applies not to Elane Photography's photographs but to its business operation,

> and in particular, its business decision not to offer its services to protected classes of people. While photography may be expressive, the operation of a photography business is not.

Id. at 29a, ¶41.

Only when states have extended anti-discrimination laws outside the commercial marketplace and sought to regulate private actors engaged in their own expression has this Court found the First Amendment to be implicated. In *Hurley* – upon which Petitioner places heavy reliance – the Court emphasized that it was the intrusion upon the prerogatives of "private [parade] organizers" engaged in the expression of their own message that violated the Constitution. *Hurley*, 516 U.S. at 566. *See also id*. at 559-560 (case involves "private citizens who organize a parade"); *id*. at 569 (parade organizer was a "private speaker"); *id*. at 572 (state cannot alter the content of "the message conveyed by the private organizers"). Only because "the Massachusetts law [had] been applied in [this] peculiar way" was the First Amendment implicated. *Id*.

Petitioner's efforts to bring itself within the holding of *Hurley* rest entirely upon its assertion that "Ms. Huguenin, and not her customer, is the speaker communicating through her photographs and books." Petition at 5. This would come as a shock to any customer of a wedding photography company. Imagine a couple hiring a commercial photographer, only

to have the photographer arrive at the wedding and say: "This part of the ceremony has to go. And this part has to change. You may think that this is your wedding, but *I'm* the speaker here. The message of this ceremony belongs to me."

A customer hires a wedding photographer to memorialize the customer's ceremony. The fact that talented photographers bring creative skill to their craft does not convert the customer's wedding into a platform for the photographer's views. This is the basic distinction between pursuing one's own artistic projects – which NMHRA does not touch and *Hurley* fully protects – and offering one's skills for sale in the marketplace. *Hurley* was a case about "a speaker who takes to the street corner to express his views." *Hurley*, 515 U.S. at 579. It had nothing to do with the sale of commercial goods and services to the public at large. The New Mexico Supreme Court applied these holdings faithfully:

> If Elane Photography took photographs on its own time and sold them at a gallery, or if it was hired by certain clients but did not offer its services to the general public, the law would not apply to Elane Photography's choice of whom to photograph or not. The difference in the present case is that the photographs that are allegedly compelled by the NMHRA are photographs that Elane Photography produces for hire in the ordinary

> course of its business as a public accommodation.

PA at 24a-25a, ¶35.[7]

There is nothing peculiar about the operation of an anti-discrimination law in the public marketplace. Indeed, the Solomon Amendment is an anti-discrimination law, enacted to prohibit discrimination and guarantee equal access for a particular institution (the military) in a particular commercial setting (recruitment at universities). *Rumsfeld* drew the comparison with traditional anti-discrimination laws when rejecting that constitutional claim: "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld*, 547 U.S. at 62.

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[7] With great respect to the 18 individual photographers who submitted an *amicus* brief, the use of the term "photojournalistic" does not change these basic facts. There is no doubt that commercial photographers bring artistic and creative skill to their work. That includes using their expertise to capture important moments at wedding ceremonies. But when they offer that skill for sale in the public marketplace and invite any customer to hire them to memorialize an event, they are not "speaker[s] who take[ ] to the street corner to express [their own] views." *Hurley*, 515 U.S. at 579.

In this respect, *Rumsfeld* joined a line of cases in which this Court has rejected First Amendment challenges to anti-discrimination laws in the marketplace. When private schools with segregationist beliefs argued that the First Amendment empowered them to ignore federal civil rights law when soliciting students from the general public, this Court disagreed:

> [I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle.

Runyon, 427 U.S. at 176. And when a commercial law firm that stood accused of discriminating against female employees claimed that the First Amendment exempted it from the Civil Rights Act, this Court rejected the argument, reaffirming that "[i]nvidious private discrimination . . . has never been accorded affirmative constitutional protections" in the commercial arena. *Hishon*, 467 U.S. at 78 (citations omitted).

Petitioner seeks to escape these settled precedents by insisting throughout its brief that photography is an expressive medium that can communicate messages. That proposition has never been in dispute, any more than it was for the expressive work of

educational institutions, as in *Rumsfeld* and *Runyon*, or commercial law firms, as in *Hishon*. In each case, the target of legal regulation was not expression, but the act of discriminating: against a prospective applicant (*Runyon*), an employee (*Hishon*), or a recruiter at a commercial job fair (*Rumsfeld*). If government targets the expressive work of a professional and seeks to restrict disfavored messages, it offends the First Amendment. *See, e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (invalidating prohibition on making certain constitutional or statutory arguments in lawsuits brought by federally funded lawyers). But when a law prohibits the same professional from engaging in invidious discrimination when selecting customers or employees, the First Amendment is not implicated. Such discrimination "has never been accorded affirmative constitutional protections." *Hishon,* 467 U.S. at 78.

This distinction between content-based restrictions, as in *Velazquez*, and neutral regulation of business conduct, as in *Hishon*, controls this case. As the court below explained:

> The NMHRA does not, nor could it, regulate the content of the photographs that Elane Photography produces. It does not, for example, mandate that Elane Photography take posed photographs rather than candid shots, nor does it require every wedding album to contain a picture of the bride's bouquet. Indeed, the NMHRA does not mandate that Elane Photography choose to take wedding pictures; that is the exclusive choice of

> Elane Photography. . . . The NMHRA requires that Elane Photography perform the same services for a same-sex couple as it would for an opposite-sex couple; the fact that these services require photography stems from the nature of Elane Photography's chosen line of business.

PA at 24a, ¶34. Like the Solomon Amendment, NMHRA "regulates conduct, not speech." *Rumsfeld*, 547 U.S. at 60.[8]

Apparently recognizing that *Rumsfeld* forecloses its claim, Petitioner argues that the decision holds no sway outside the military setting. Petition at 13, 33-38. The assertion is without merit. *Rumsfeld* rests on generally applicable First Amendment principles, and this Court has already relied upon it in a case having nothing to do with the military. *See Agency for Int'l Dev.*, 133 S. Ct. at 2327-2328 (invoking *Rumsfeld*). Like *United States v. O'Brien*, 391 U.S. 367 (1968) – another speech case that involved military recruitment,

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[8] The Cato *amici*, in contrast, place their reliance upon this Court's decision in *Wooley*. But *Wooley* did not involve a content-neutral regulation of business conduct. The law in that case was a content-based regulation that compelled private citizens to propagate the government's own message. As the Court emphasized at the outset of its analysis: "We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Wooley*, 430 U.S. at 713. No government-mandated ideology is present here.

emphasized Congress's "broad and sweeping" powers in that realm, *id*. at 377, and was promptly applied to a wide range of disputes – *Rumsfeld* is a core Speech Clause precedent.

B. The New Mexico Supreme Court Fully Protected the Company's Right to Express its Views

The New Mexico Supreme Court also followed this Court in preserving the speech rights of businesses. *Rumsfeld* emphasized the freedom that law schools retain under the Solomon Amendment to express their own views without restriction: "Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds." *Rumsfeld*, 547 U.S. at 60. That fact was important for two reasons. It eliminated any argument that the statute forced schools to appear to endorse the military policy. *See id*. at 64-65 (discussing *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980)). And it made clear that the statute regulated only the conduct of schools in facilitating the message of military recruiters and did not restrict the schools' own speech in any way. *See id*. at 60.

NMHRA preserves the same freedom for New Mexico businesses. "As in *Rumsfeld* and *PruneYard,* Elane Photography is free to disavow, implicitly or explicitly, any messages that it believes the photographs

convey." PA at 33a-34a, ¶47. The court below confirmed that businesses possess broad license to voice opposition to NMHRA:

> Elane Photography and its owners . . . retain their First Amendment rights to express their religious and political beliefs. They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws.

Id. And the court emphasized that businesses remain free to choose how to communicate about their work without interference.

> We note that when Elane Photography displays its photographs publicly and on its own behalf, rather than for a client, such as in advertising, its choices of which photographs to display are entirely its own. The NMHRA does not require Elane Photography to either include photographs of same-sex couples in its advertisements or display them in its studio.

Id. NMHRA requires only that the Company provide the "same services" that it offers all its customers. *Id*. Those services are described in the Company's pricing package and standard contract, and none requires it to display, take ownership of, identify with, or apply a watermark to clients' images. Rather, a client pays for a set number of hours of on-site photography and a

budget with which to select and purchase photos through a third-party vendor. PA 137a-138a, ¶¶12-13.

Under the decision below, the Company could have responded to Vanessa Willock's inquiry by saying, "We wish to let you know that we have personal and religious objections to same-sex couples marrying. However, we comply with the laws of New Mexico and will provide our services on equal terms" – or even, "We will provide our services, but first we ask that you review the statement on our website describing our views on marriage." NMHRA sets fair terms for business conduct in the public marketplace while also protecting the rights of all businesses to express their own views. As this Court held in *Rumsfeld*, the First Amendment poses no barrier to such a law.

C. The Hypothetical Scenarios Advanced by Petitioner and its *Amici* Do Not Change the Analysis

Petitioner and its *amici* seek to buttress their arguments with an array of hypothetical scenarios. None supports the case for certiorari review.

The briefs invoke laws in several other states that prohibit discrimination on the basis of "political affiliation." Petition at 21-22; Alabama Brief at 8-9; 11-12. No such provision was involved here. To the contrary, "political views and political group membership . . . are not protected categories under the NMHRA." PA at 39a-40a, ¶55. If such a case were to

arise in another state (*amici* cite none), courts would have to determine whether a law triggered by political belief constitutes regulation "with reference to the content" of speech. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). That question is not presented here.

The Cato *amici* also craft hypotheticals (again, no actual cases) involving freelancers who sell their services as actors, singers, or drafters of press releases. Cato Institute Brief at 2-3, 11-14. But the court below made clear that NMHRA does not cover freelancers who were "hired by certain clients but did not offer [their] services to the general public," PA at 24a-25a, ¶35, and it reaffirmed the freedom of all creative professionals when crafting their own works: "If Elane Photography took photographs on its own time and sold them at a gallery . . . , the law would not apply to Elane Photography's choice of whom to photograph or not." *Id*.

The decision below reflects this Court's consistent rulings that businesses selling goods or services with an expressive dimension must abide by neutral regulations on commercial conduct. Thus, government cannot target the press for unfavorable treatment, but "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media*, 501 U.S. 663, 669 (1991). Government cannot regulate books because of their unpopular content, but it can apply nuisance laws to a bookstore facilitating illegal

conduct on its premises, even when doing so will result in the bookstore's closure. *Arcara v. Cloud Books*, 478 U.S. 697 (1986). Government cannot punish law firms for making unpopular arguments, or private schools for teaching controversial ideology, but it can prohibit them from discriminating when they make hiring decisions, *Hishon*, 467 U.S. at 78; solicit applicants, *Runyon* 427 U.S. at 176; or host commercial job fairs, *Rumsfeld*, 547 U.S. at 64.

Petitioner's novel constitutional argument would throw this stable body of precedent into doubt. Petitioner identifies "marketers, advertisers, publicists, website designers, writers, videographers, and photographers" among the businesses that it says could assert First Amendment defenses to neutral regulations on commercial conduct. Petition at 18. One can add to that list media companies (*Cohen*), bookstores (*Arcara*), commercial law firms (*Hishon*), private schools (*Runyon*), law schools (*Rumsfeld*), and many others. All are protected from laws that target the expressive content of their goods and services, but none has a constitutional right to play by a different set of rules in the public marketplace.

Finally, *amici* Alabama *et al.* stress that some legislatures have debated whether to enact statutory exceptions to certain business regulations. Alabama Brief at 8-10. That fact provides a telling argument for denying certiorari review, not granting it. This Court has provided clear guidance concerning the obligation of all participants in the public marketplace to obey neutral regulations on business conduct. The decision

whether to create exceptions to such regulations is a matter of policy best addressed by legislation, not constitutional mandate. The fact that some legislatures are debating that question, and the paucity of litigants attempting to raise the issue as a constitutional claim, confirm that intervention by this Court is unwarranted.

CONCLUSION

Respondent respectfully asks that this Court deny the Petition.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

ELANE PHOTOGRAPHY, LLC, No. 33,687

Plaintiff-Petitioner,

vs. Santa Fe, New Mexico
Thursday, August 22, 2013

VANESSA WILLOCK,

Defendant-Respondent.

. . . . . .

ORAL ARGUMENT

BEFORE THE HONORABLE PETRA JIMENEZ MAES, CHIEF JUSTICE
THE HONORABLE CHARLES W. DANIELS, JUSTICE
THE HONORABLE BARBARA J. VIGIL, JUSTICE
THE HONORABLE RICHARD C. BOSSON, JUSTICE

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Proceedings recorded by electronic sound recording; transcript produced by court reporting service.

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[38] JUSTICE VIGIL: I have a question about the New Mexico constitution and whether it provides broader protections against compelling anyone to attend religious ceremonies than the federal Constitution. Can you talk –

MR. WOLFF: Certainly. I'll address that quickly. First and foremost, that's an issue that was not properly preserved by the petitioners in this case.

JUSTICE VIGIL: And do you think, because it wasn't properly preserved, that this Court should not address whether the New Mexico constitution should provide broader protection?

MR. WOLFF: Indeed that's what this Court itself has said. And what this Court has said repeatedly is that in order to preserve an issue, not simply in a punitive fashion, but in order to properly inform this Court, it needs to have cases and authorities pointed out to it as a proper basis for making the decision. And there (indiscernible) the second, the suggestion that the provision of the New Mexico constitution that the petitioners pointed to below simply creates a blanket under all circumstances you can never be sanctioned for not being physically in the presence of some kind of ceremony would apply to law enforcement officers, [39] would apply to first responders; it simply is not a workable standard, and without having raised it and preserved it properly is simply not before this Court for decision.

JUSTICE BOSSON: Well, you're right as a general proposition, but I don't think there is any New Mexico case law interpreting the New Mexico religious freedom constitutional aspect. At least I'm not aware of any. There may be a case somewhere. So there is no jurisprudence, which is oftentimes the problem we have in a small state like ours.

So what good would it have done functionally to have preserved this in that respect? What is that case when there is no case?

MR. WOLFF: Well, I'll say a number of things very quickly, Your Honor. First of all, it would have provided an argument before this Court on exactly how the language of the New Mexico constitution is being interpreted. I mean, to be clear, the petitioners put this in their papers below, and the Court of Appeals found it was not properly preserved. It's not in their papers before this Court, and so the Court simply has no basis for – if they wanted to contest the fact that it was not properly preserved, they could have done so, and they failed to do so before this Court.

* * *

[47] MR. LORENCE: And so I think that this is a more egregious violation than when it – in these other cases.

JUSTICE BOSSON: Let me ask you about this egregious violation. I'm intrigued by your argument that a commercial photographer is exercising First Amendment activity in –

MR. LORENCE: Yes.

JUSTICE BOSSON: – in the activities that they photograph, as far as the commercial photography.

MR. LORENCE: Right.

JUSTICE BOSSON: We've had anti-discrimination laws all over this country; state, local, federal, for decades.

MR. LORENCE: Right.

JUSTICE BOSSON: And there have been hundreds of thousands of commercial photographers around the country. Has any case, in the history of the American jurisprudence, ever said that the anti-discrimination laws cannot be applied against a commercial photographer because they're exercising First Amendment activity. Any –

MR. LORENCE: (Indiscernible)

JUSTICE BOSSON: Any case.

[48] MR. LORENCE: And in fact I'm not even aware of a anti-discrimination charge being brought against a commercial photographer. So these are unique cases. These cases don't happen very often.

* * *

[52] JUSTICE VIGIL: May I interrupt, please?

MR. LORENCE: Yes, Your Honor.

JUSTICE VIGIL: What is your view about whether the New Mexico constitution provides broader protections for the exercise of religion than the –

MR. LORENCE: Your Honor, we think that it does, and that we have argued that below. But we do realize that there is a process on how these questions are supposed to be brought before the Court, and I think this Court would have to determine if we had preserved that appropriately.

JUSTICE VIGIL: Okay. Thank you.

MR. LORENCE: If there are no further questions –