STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

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CLERK DISTRICT COURT

ELANE PHOTOGRAPHY, LLC,

Plaintiff,

v.

CV-2008-06632

VANESSA WILLOCK,

Defendant.

MEMORANDUM OPINION AND ORDER

ON CROSS - MOTIONS FOR SUMMARY JUDGMENT

{1} **THIS MATTER** comes to the Court's attention as a result of the parties' cross motions for summary judgment, submitted at the Court's request after conference with counsel at which counsel stipulated that further discovery and litigation would not result in additional or different facts or in the legal arguments involved herein. The Court, having considered the arguments presented by the parties, finds that Plaintiff's Motion for Summary Judgment should be DENIED, and Defendant's Motion for Summary Judgment should be GRANTED. The Court's analysis follows.

BACKGROUND

{2} Plaintiff Elane Photography LLC is a limited liability company owned by Elaine Huguenin and her husband, Jon. (Plaintiff's motion ¶¶ 1 and 2). Elaine Huguenin is also the company's head photographer. Id. ¶ 3. The company offers photography services to the public on a commercial basis and primarily photographs significant life events such as weddings and graduations. Id. ¶ 5. Plaintiff offers its services through its website, and in advertisements on multiple internet search engines, and in the Yellow Pages. (Defendant's motion ¶ 2).

{3} On September 21, 2006, Defendant e-mailed Plaintiff to inquire about Plaintiff photographing Defendant's upcoming commitment ceremony. Id. ¶ 4. Defendant Willock indicated that this would be a "same-gender ceremony." (Plaintiff's motion, Ex. E-2). Later that day, Elaine sent an e-mail in response stating "we photograph traditional weddings" and thanked Defendant for

her interest. Id. at E-3. Confused by the somewhat ambiguous response to her inquiry, on November 28, 2006, Defendant sent another e-mail to Elaine asking her to clarify whether her "company does not offer photography services to same-sex couples." Id. at E-4. Elaine responded for Plaintiff stating, "Yes, you are correct in saying we do not photograph same-sex weddings, but again, thanks for checking out our site!" Id. at E-5. The next day, Defendant's partner, Misty Pascottini, sent an e-mail to Elaine asking if she "would be willing to travel to Ruidoso for [her] wedding?" She did not identify herself as Defendant's partner. In Elaine's response, she stated that she would definitely be willing to travel to Ruidoso for Misty's wedding. Id. at E-7. She included information regarding prices and packages and offered to meet with her to discuss options. Id. When she did not hear back from Misty, Elaine contacted her again to see if she had any questions. Id. at E-8.

(4) On December 20, 2006, Defendant Willock filed a discrimination complaint with the Human Rights Commission alleging that Plaintiff Elane Photography was a public accommodation and had illegally discriminated against her because of her sexual orientation. Id. ¶ 34. Defendant subsequently hired another photographer and had a commitment ceremony with Ms. Pascottini (who later reclaimed her maiden name of Collingsworth) on September 15, 2007. (Plaintiff's MSJ ¶¶ 23 and 25). Willock did not seek monetary damages, but sought her attorney's fees.

(5) The Human Rights Commission held a hearing on January 28, 2008, and issued its opinion on April 9, 2008. Id. ¶¶ 35 and 36. It found that Plaintiff had violated the New Mexico Human Rights Act (NMHRA) and ordered it to pay Defendant's attorney's fees. Id. at ¶ 36. That is the only monetary relief Defendant sought. (Decision and Final Order of the NMHRC, Findings of Fact, ¶ 32). On June 30, 2008, Plaintiff Elane Photography LLC timely filed its appeal.

DISCUSSION

(6) The Human Rights act declares that it is a discriminatory practice for

> any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any person because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap . . . .

NMSA 1978, § 28-2-7(F) (2004). The parties disagree over whether Plaintiff Elane Photography is a public accommodation; over whether Plaintiff discriminated based on "sexual orientation;" and

whether the application of the NMHRA to Plaintiff violates Plaintiff's constitutional right to freedom of expression and its free exercise of religion. The parties also dispute whether the New Mexico Religious Freedom Restoration Act (NMRFRA) applies in this context and whether Plaintiff violated it. The Court finds against Plaintiff on each of these issues.

A. Human Rights Act

1. Public Accommodation

{7} Plaintiff argues that is not a "public accommodation" because it does not occupy a physical space and is not one of the five types of pubic accommodations enumerated in New Mexico's original HRA. See NMSA § 49-8-5 (1955) (the five basic categories included: hotels and other lodgings; restaurants and other places where food was sold for consumption on the premises; hospitals and clinics; places of entertainment; and common carriers). In Human Rights Comm'n of N.M. v. Bd. of Regents of Univ. of N.M. College of Nursing, 95 N.M. 576, 578, 624 P.2d 518, 520 (1981), the Court relied on the historical and traditional meanings of "public accommodation" to determine whether the University's academic program was indeed a public accommodation. The court looked to the earlier Act for guidance and determined that unless the contrary was apparent, it should construe the wording of the statute in its ordinary and usual sense. From this, Plaintiff concludes that "[t]raditional public accommodations provide essential, standardized products or ministerial services to the public at large and that because photography services are not essential, Plaintiff is not a public accommodation. (Plaintiff's motion at 12, citing to no authority).

{8} Defendant Willock points out that "nonessential" and "discretionary" businesses can be public accommodations as well as those businesses that provide "essential" and "standardized products." E.g., Crawford v. Robert L. Kent, Inc., 167 N.E.2d 620 (Mass.1960) (dancing school); In re Johnson, 427 P.2d 968 (Wash. 1960) (barber shop); Walston & Co., Inc. v. New York City Comm'n on Human Rights, 342 N.Y.S.2d 459 (N.Y. App. 1973) (brokerage firm). The Court finds, therefore, it is immaterial that Plaintiff does not provide a traditional "essential service."

{9} Plaintiff Elane Photography LLC alleges that another reason it is not a public accommodation is that its work requires artistic discretion. Plaintiff cites no authority for this distinction. In fact, as Defendant points out, (Def's Reply at 8), Plaintiff is no different from an architect, film editor,

commercial music composer, commercial musician, graphic designer or any other creative professional whose services are available to the public. Professional creativity is not a basis for discrimination against a protected class. Once one offers a service publicly, they must do so without impermissible exception. Therefore, Plaintiff could refuse to photograph animals or even small children, just as an architect could design only commercial buildings and not private residences. Neither animals, nor small children, nor private residences are protected classes. Plaintiff's argument fails as a matter of law.

{10} Plaintiff next argues that its lack of physical location is another reason that it is not a public accommodation. Plaintiff states that the NMHRA defines a pubic accommodation as an "establishment" and that the dictionary defines "establishment" as "a place of business or residence with furnishings and staff." Id. (quoting Merriam Webster Online Dictionary, at http://www.m-w.com/dictionary/establishment). Plaintiff argues that the definition implies a physical location and cites Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000), which it states criticized a state's broad application of "public accommodation" "to a private entity without even attempting to tie the term 'place' to a physical location." Boy Scouts, however, is distinguishable for a number of reasons. The first is that Boy Scouts of America is an association of purportedly like-minded people. It is "engaged in instilling its system of values in young people," id. at 644; it is not intended to be open to everyone. For example, girls cannot be members, neither can very young boys. In contrast, a business such as Elane Photography LLC does not represent a particular point of view or association of like-minded people. A photography business exists simply to take and sell photographs.

{11} In contrast to Boy Scouts, supra, is Roberts v. U.S. Jaycees, 468 U.S. 609 (1984). The Jaycees are a nonprofit membership organization whose bylaws limit the membership to men. This all changed when two local Minnesota chapters began to admit women. When the national organization threatened to revoke the Minnesota local's charter, the locals brought charges against the national organization for violation of Minnesota's Human Rights Act. The case eventually found its way to the U.S. Supreme Court. The Court found that application of the Act abridged neither the Jaycees freedom of association nor speech. First, though, it determined that the Jaycees are a public accommodation. The Court noted that Minnesota has adopted a functional definition

of the term "that reaches various forms of public, quasi-commercial conduct." Id. at 625. It further observed that "[t]his expansive definition reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups . . . ." Id. at 626. As to the "goods and services" that such public accommodations must provide, the Court found that the Jaycees leadership programs are "goods" and the "business contacts and employment promotions are 'privileges' and 'advantages.'" Id. at 626 (quoting U. S. Jaycees v. McClure, 305 N.W.2d 764, 772 (Minn. 1981)).

{12} The "changing nature of the American economy" is reflected in the instant case, as well. Plaintiff reached out to the public via the world-wide web, both with a web site and in targeted search engines, as a means of advertising. Internet marketing was essentially unknown at the time of the Boy Scouts and Roberts decisions but has grown to a major means of commercial activity. The development of internet commerce makes the traditional "bricks and mortar" concept of business location less universal. This Court also recognizes "the changing nature of the American economy." Id. In doing so, the Court finds the traditional concept of a physical location is not crucial to the determination of a whether a business is a "public accommodation."

{13} Plaintiff places significant reliance on Regents, 595 N.M. at 578, 624 P.2d 518 (1981), in which the Court found that a university *program* is not a place of public accommodation. The Court cautioned that its "opinion should be construed narrowly and is limited to the University's manner and method of *administering* its academic program." Id. The Court reserved for another time consideration "of whether in a different set of circumstances the University would be a 'public accommodation' and subject to the jurisdiction of the Human Rights Commission." Id. The question in Regents was a very narrow one dealing solely with administration of a program and is not applicable to the instant case.

{14} Defendant Willock argues: "The statutory noun 'place' (of public accommodation) is a term of convenience, not of limitation." National Organization for Women, Essex County Chapter v. Little League Baseball, Inc., 318 A.2d 33, 37 (N.J. Super. Ct. App. Div. 1974). Accord U.S. Power Squadrons v. State Human Rights Appeal Bd., 452 N.E.2d 1199, 1203 (N.Y. 1983) ("Public

accommodations are customarily supplied at fixed places, but not necessarily so.). The New York statute lists places of accommodation, which are similar to Plaintiff's – they have no fixed place of operation but supply their services at a variety of locations, e.g., travel and tour advisory services and public conveyances. Id. at 1204. The court concluded by observing that "[t]he place of the public accommodation need not be a fixed location, it is the place where petitioners do what they do." Id. See also DP, Inc. v. Harris, No. 99A-12-003 HDR, 2000 WL 1211151 (Del. Super. Ct. July 31, 2000) (Domino's Pizza delivery service is public accommodation); James v. Team Washington, Inc., No. CIV.A. 97-00378 TAF, 1997 WL 633323 at *2 (D.D.C. Oct. 7, 1997) (Domino's Pizza delivery service: "the defendant overemphasizes the significance of the actual physical location at which the allegedly discriminatory conduct occurred. . . . the defendant ignores the fact that the D.C. Human Rights Act defines places of public accommodation to include 'establishments dealing with goods or services of any kind.'"). As to the unpublished cases, it is the practice of New Mexico courts not to cite unpublished opinions. Gormley v. Coca-Cola Enterprises, 2005 -NMSC- 003, ¶ 7 n. 1, 137 N.M. 192 (2005). This Court cites to them for illustrative purposes only, to indicate what courts have determined to be public accommodations. See id.

{15} Based on the foregoing, there is no genuine issue of material fact but that Plaintiff Elane Photography LLC is a "public accommodation" for purposes of the NMHRA. It advertizes on the internet, through its website, and the Yellow Pages. Through these multiple advertizing avenues it literally opens its doors to the public to provide members of the public with goods and services. That it does not work out of a fixed location makes no difference in this instance.

2. Sexual Orientation

{16} Plaintiff also alleges that it did not discriminate on the basis of "sexual orientation." Its owner/operator is sincerely opposed to same-gender marriages and does not want to "support" them or be perceived as advancing them by photographing them. Instead of discrimination based on sexual orientation, Plaintiff suggests that it discriminated on the basis of marriage. (Plaintiff's motion at 17 n.4) In fact, Plaintiff points out that it would have photographed either Plaintiff or her partner, or even both, as long as it was not during their same-sex commitment ceremony itself. Plaintiff states further that the "Company's policy [unwritten] allows Elaine to photograph the

wedding of a 'homosexual' who marries a person of the opposite sex[.]" (Plaintiff's reply at 4 n.2) Elaborating, Plaintiff asserts that "despite popular belief, studies have shown that, for whatever reason, self-identified 'homosexuals' do in fact marry persons of the opposite sex." Id. The Court disagrees and finds Plaintiff's policy discriminates, on its face, against gays and lesbians. It goes without saying that they are the only members of the public who are involved in same-sex marriages or commitment ceremonies. Just as with professional creativity, a sincerely held belief does not justify discrimination based upon sexual orientation under the NMHRA.

{17} Analogously, in a gender discrimination case, the employer required female employees to make a larger contribution to their pension fund than male employees because women usually live longer than men. Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978), The employer rationalized that the discrimination was based on longevity rather than gender. The Court disagreed, stating:

> An employment practice that requires 2,000 individuals to contribute more money into a fund than10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of the Act. Such a practice does not pass the simple test of whether the evidence shows "treatment of a person in a manner which but for that person's sex would be different." It constitutes discrimination and is unlawful unless exempted by the Equal Pay Act of 1963 or some other affirmative justification.

Id. at 711.

{18} Plaintiff next asserts that, "[i]n order to prevail, [Defendant] must demonstrate, by direct or indirect evidence, that the [Plaintiff] intentionally discriminated against her on the basis of her 'sexual orientation.'"[1] (Plaintiff's motion at 15 (quoting Sonntag v Shaw, 2002-NMSC-015, ¶ 11, 130 N.M. 238)). The Court finds Defendant Willock has done so. She has shown that Plaintiff has an existing policy that excludes same-sex couples from its wedding photography services. See Ramsey v. City & County of Denver, 907 F.2d 1004, 1007-08 (10th Cir.1990) (proof of "an existing policy which itself constitutes discrimination" constitutes direct evidence.) Plaintiff readily admits

[1]Plaintiff suggests that the Court utilize the McDonnell-Douglas "burden-shifting approach" to analyze the claim. The approach allows proof of discriminatory intent when there is no direct evidence of discrimination. Smith v. FDC Corp., 109 N.M. 514, 518, 787 P.2d 433, 437 (1990). It is not, however, a required method of proof; it is only a tool. Id.

to its policy against photographing same sex ceremonies. Plaintiff's policy creates two classes of would-be customers distinguished solely because of their sexual orientation: heterosexual couples in committed relationships and gay and lesbian couples in equally committed relationships. (Def.'s Mem. in Opp. at 12). This is sufficient direct evidence of discriminatory practices in violation of the NMHRA.

3. Freedom of expression

{19} Both the United States Constitution and the New Mexico Constitution protect freedom of expression against state coercion. U.S. Const., Amend.1; N.M. Const. art. II, § 17. "Expression" means more than the spoken word. It also refers to "pictures, films, paintings, drawings, and engravings." Kaplan v. California, 413 U.S. 115, 119 (1973). Because such artistic expressions "communicate some idea or concept to those who view [them], they "are entitled to full First Amendment protection." Bery v. City of New York, 97 F.3d 689, 696 (2nd Cir.1996).

{20} Taken out of context, both Kaplan and Bery would seem to support Plaintiff's position. But, both cases involve legal restrictions placed on the content or distribution of artistic work, not who was allowed to buy it. Further distinguishing Kaplan and Bery is the fact that the works in question were created by the artists on subjects of their own choosing. For example, in Kaplan, the artist was criminally prosecuted for the sale of "obscene matter." Kaplan, 413 U.S. at 116. In Bery, a number of visual artists sued to enjoin the City from enforcing a regulation prohibiting visual artists from exhibiting or selling their work at public places without a general vendors license. Bery, 97 F.3d at 691-93. Neither of those issues are relevant to the instant case. Neither of these cases deal with restricting who could buy the artwork once the artist offered it for sale.

{21} Plaintiff Elane Photography LLC asserts that because photography is undoubtedly a form of expression, virtually any attempt to control it is a violation of her First Amendment right to freedom of expression. Elaine Hugenin, Plaintiff's owner-operator, alleges that her photographs are artistic, not a mere posing and "point and shoot" technique. Plaintiff also states that it is "associated with and thus implicitly endorses, the messages conveyed in every created image." (Plaintiff's motion at 22). Indeed, photographs and other visual arts "communicate[] some idea or concept to those who view

[them]." Id. The concept that Plaintiff does not wish to convey is that a marital relationship can exist between two people of the same sex. This would conflict with "company policy."

{22} Nondiscrimination laws, however, "do not, as a general matter, violate the First or Fourteenth Amendments because such laws do not 'target speech' but rather prohibit 'the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.'" Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 572 (1995). In Hishon v. King & Spalding, 467 U.S. 69 (1984), a female associate sued the all-male partnership for sex discrimination when she failed to make partner. The law firm responded that application of Title VII in this case would violate its constitutional right to freedom of expression and association. The Court disagreed, stating that while it has recognized in the past the distinctive contribution that the activities of lawyers may make to the ideas and beliefs of society, the firm had failed to demonstrate "how its ability to fulfill such a function would be inhibited by a requirement that it consider petitioner for partnership on her merits." Id. at 78. The Court pointed out a previous holding that "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections. Id. (quoting Norwood v. Harrison, 413 U.S. 455, 470 (1973)).

{23} In Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006), the Forum for Academic and Institutional Rights (FAIR), an association of law schools and faculties whose mission was "to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education," sought a preliminary injunction to halt enforcement of the Solomon Amendment. The Amendment was enacted in response to many law schools prohibiting military recruitment at their school's because of the government's position on homosexuality in the military. It specifies that if any part of an institute of higher education denies military recruiters access equal to that provided other, non-military recruiters, the entire institution would lose certain federal funds. The law schools sued, alleging that enforcement of the amendment would infringe their First Amendment rights to free speech and association. The Court found:

> The Solomon Amendment neither limits what law schools may say nor requires them to say anything. 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. 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.

Id. at 59. The Court made clear that this was not an instance of "compelled speech." Comparing the situation before it with an unconstitutional law requiring all children to recite the Pledge of Allegiance while saluting the flag, West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943), and the unconstitutional law requiring all New Hampshire motorists to display the state motto-"Live Free or Die"-on their license plates, Wooley v. Maynard, 430 U.S. 705, 717 (1977), the Court concluded that while some of the Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say, this is not such a case. Id. at 61. It stated that the Solomon Amendment does not require any expression by law schools. Id. It does not dictate the content of speech. Id. at 62. Nor does the NMHRA in its prohibition against the conduct of discriminating on the basis of sexual orientation.

{24} The Court points out that in addition to cases like Barnette and Wooley where individuals were forced to deliver the government's message, it has also found unconstitutional instances in which an individual was forced to host or accommodate another speaker's message. For example, in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 566 (1995), the Court found that a state law cannot require a parade to include a group whose message the parade's organizer does not wish to send. Likewise, in Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1, 20-21(1986) (plurality opinion) (Marshall, J., concurring in judgment), the Court found unconstitutional a state agency's requirement that a utility company include a third-party newsletter in its billing envelope. The state's action in each of these instances was found unconstitutional because "the complaining speaker's own message was affected by the speech it was forced to accommodate." Rumsfield, 547 U.S. at 63. In Hurley, for example, the Court concluded that because "every participating unit affects the message conveyed by the [parade's] private organizers," a law dictating that a particular group must be included in the parade "alter[s] the expressive content of th[e] parade." Hurley, 515 U.S. at 572-573. As to requiring a utility company

to include another party's literature in its billing envelope, the court opined that it interfered with the company's ability to send its own message. Pacific Gas & Elec., 475 U.S. at 16-18.

{25} The instant case is nothing like these cases. Plaintiff is not being asked to represent the government's position, as in the pledge or the license plate motto, nor to alter its message, as in Hurley. Plaintiff's message is not and has never been about same-sex marriages. Rather, its message is fine photography of special moments. Unlike the parade, Plaintiff's final message is not its own. Instead, Plaintiff is conveying its client's message of a day well spent. As Defendant Willock states, Plaintiff is really a conduit or an agent for its clients. (Def.'s motion at 17). As such, the Court's finding that Plaintiff cannot refuse to photograph same-sex couples during a commitment ceremony is not an infringement of Plaintiff's right to freedom of expression.

4. Freedom of Religion

{26} Plaintiff alleges that compelling it to photograph a same-sex commitment ceremony forces Elaine to attend a religious ceremony that violates her conscience. Quoting Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990), superseded by statute, Religious Freedom Restoration Act of 1993 ("RFRA"), P.L. 103-141, 107 Stat. 1488, 42 U.S.C. § 2000bb, as stated in O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170 (10th Cir.(N.M.). Plaintiff asserts that "[t]he 'exercise of religion' protected by the First Amendment includes 'abstention from[] physical acts' such as "assembling with others for a worship service[.]" The sentence, taken piecemeal out of context and recombined to suit Plaintiff's purpose, does not express what the Smith Court actually said.. The Court actually stated:

> But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Id. at 878.

{27} This case is not an example of religious persecution. Plaintiff and its owner-operator is not being forced to participate in any ceremony or ritual; the only requirement is that she photograph the event. This is no different from the caterer or florist attending the ceremony in order to provide its commercial service; they attend it, not participate in it.

{28} Plaintiff also asserts that the Commission's decision violates her "hybrid rights," i.e. her free exercise claim combined with another constitutional rights, such as free speech. Mr. and Mrs. Hugenin argue their freedom of religion and speech are infringed upon when the government forces them to promote and commemorate a message antithetical to their religious beliefs.

{29} Apparently, the concept of a hybrid right arose in dicta, in Smith, when the Court stated that the case before it did not present a hybrid right, but merely a free exercise claim unconnected with any expressive activity or parental right. Smith, 494 U.S. at 882. The Court refused to hold "that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now." Id. In fact, with one exception the theory has not been discussed again by the Supreme Court since the Smith decision some 20 years ago. The exception occurred in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (Souter, J., concurring), when Justice Souter stated that

> the distinction Smith draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the Smith rule, and, indeed, the hybrid exception would cover the situation exemplified by Smith, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what Smith calls the hybrid cases to have mentioned the Free Exercise Clause at all.

{30} Other courts have expressed similar doubts about the hybrid rights theory. For example, in McTernan v. City of York, 564 F.3d 636, 647 n.5 (3rd Cir. 2009), the court refused to apply or endorse a hybrid rights theory. McTernan cites a number of other cases expressing the same sentiment. See, e.g., Jacobs v. Clark County Sch. Dist., 526 F.3d 419, 440 n. 45 (9th Cir.2008) (declining to adopt doctrine after noting widespread scholarly criticism); Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 167 (2d Cir.2001) (describing theory as dicta and not binding on the

court); Warner v. City of Boca Raton, 64 F. Supp.2d 1272, 1288 n. 12 (S.D. Fla.1999) (same); Kissinger v. Bd. of Trs. of Ohio State Univ., 5 F.3d 177, 180 (6th Cir.1993) (describing doctrine as "completely illogical" and declining to recognize it until Supreme Court expressly does so); Littlefield v. Forney Indep. Sch. Dist., 108 F. Supp.2d 681, 704 (N.D. Tex.2000) (refusing to apply doctrine, noting that it is probably based upon a misreading of Smith). Even the constitution law scholar, Erwin Chemerinsky, called the doctrine's contours "unclear." Erwin Chemerinsky, Constitutional Law: Principles and Policies § 12.3.2.3 at 1215-16 (2d ed.2002). The hybrid rights theory has far less than widespread acceptance. The Court finds no genuine issue of material fact, nor question of law, has been established by Plaintiff under the hybrid rights theory.

{31} Plaintiff makes one last argument regarding freedom of religious expression. It states that the NMHRA's small class of particularized exemptions demonstrates that the NMRHA is neither neutral towards religion nor is generally applicable. For example, while it exempts "religious or denominational institution[s] or organization[s] that [are] operated, supervised or controlled by or that [are] operated in connection with a religious or denominational organization," NMSA 1978, § 28-1-9(B),(C) (2004), it does not exempt nonreligious entities whose owners are motivated by religious precepts. Nor does the NMHRA, Plaintiff argues, protect the religious freedom of such individuals, but only the religious freedom of actual religious organizations. Plaintiffs also assert that even if their company did qualify under the Act as a religious organization, the scope of the exemption is so narrow it probably would not even protect Plaintiff's religiously motivated conduct. Plaintiff argues that because it is not a religious organization, its owner-operator is forced to attend religious ceremonies which violate her conscience and which force her to express messages contrary to her religious beliefs. Thus, according to Plaintiff, the NMHRA is unconstitutional as applied to Plaintiff Elane Photography and its owner-operators.

{32} Plaintiff states the Commission must demonstrate a compelling state interest in enforcing the Act to counter-balance the burden it argues the Act places upon them.. See, e.g., Hernandez v. C.I.R., 490 U.S. 680, 699 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden"). Additionally, the "burden" "must be

narrowly tailored to advance that interest." City of Hialeah, 508 U.S. at 531-32. But see Smith, 494 U.S. at 885 (expressly rejecting application of the compelling interest test where the law being challenged is generally applicable, or, in other words, where it is not directed at any particular religious practice or observance); City of Hialeah, 508 U.S. at 532 ("A law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."). The City of Hialeah court went on to point out that "[n]eutrality and general applicability are interrelated . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." Id. at 331-32.

(33) The NMHRA is a law of general applicability i.e., it is not directed at a particular religion or practice. The test for neutrality is whether the law discriminates on its face, i.e., whether it refers to a religious practice without a secular meaning discernable from the language or context. City of Hialeah, 508 U.S. at 533. The NMHRA does not refer to a particular religion. However, "[e]ven when a law is facially neutral . . . it may not be neutral if it is crafted to impede particular religious conduct. Id. The NMHRA satisfies this test as well. The purpose of Section 28-2-7(F) is to prohibit discrimination in public accommodations. Plaintiff does not claim, much less establish, that the purpose of 28-2-7, NMSA, is to discriminate against people based on any particular religion or even on religion in general. Therefore, the law satisfies the requirement of neutrality, and the government need not have a compelling interest to justify the burden it is placing on individuals who fall under its proscriptions.

(34) Even if a compelling interest were required, the state has one in enforcing Section 28-2-7(F). First, the "burden" placed on Plaintiff is not clear. Neither Plaintiff nor its owner-operators have been prohibited from practicing their religion or adhering to their beliefs. At most, they have been directed to respect Defendant Willock's belief system and religious observation. They are not being asked to participate in the observation or to adopt – or even defend – Defendant's beliefs. They are merely being asked to photograph it, for an agreed fee in the ordinary course of their business. There is no doubt that the State of New Mexico has a compelling interest in reducing, if not eradicating,

acts of discrimination, even assuming that results in a burden upon Plaintiff. See, e.g., Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) (requiring the Jaycees to accept females and finding that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies its action). The Roberts Court also found that "[a]ssuring women [or any disadvantaged group] equal access to such goods, privileges, and advantages clearly furthers compelling state interests." Id. at 626.

(35) A case similarly balancing sincerely held religious beliefs with the state's interest in battling discrimination is illustrative. In Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994), a landlord refused to rent his premises to three unmarried couples. The landlord, just like the instant Plaintiff, based his action on his Christian beliefs. Not only would he not rent to unmarried couples, but he also refused to rent to roommates of the opposite sex because of the appearance of immorality. The couples complained to Alaska's Equal Rights Commission, which found in their favor. Id. at 277. The case found its way to Alaska's Supreme Court where the landlord's arguments were much like the Plaintiff Elane's in this case. He insisted that he was not discriminating on the basis of marital status but, even if he was, he is excused from compliance with anti-discrimination laws because of his fundamental right to the free exercise of his religion. Id. According to the landlord, he was discriminating based on conduct, not on marital status. Id. at 278 n.4. The Alaska Supreme Court made it clear "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith, are not to be superimposed on the statutory schemes which are binding on others in that activity." United States v. Lee, 455 U.S. 252, 261 (1982). The conduct with which he was concerned was cohabitation outside of marriage. Id. at 278. The landlord asserted, as do Plaintiff Elane and its owner-operators, that compliance with Alaska's laws forces him to choose between his religious beliefs and his livelihood. Id. at 279. He asked the court to accommodate his religious beliefs by creating an exemption to the statute and ordinance for him. Id. In formulating its decision, the Swanner court noted that the Free Exercise Clause "grants absolute protection to freedom of belief and profession of faith, but only limited protection to actual conduct based upon religious belief. Id. (citing Smith, 494 U.S. 872).

{36} As the Swanner court stated:

> [Landlord] has made no showing of a religious belief which requires that he engage in the property-rental business. Additionally, the economic burden, or "Hobson's choice," of which he complains, is caused by his choice to enter into a commercial activity that is regulated by anti-discrimination laws. [Landlord] is voluntarily engaging in property management. The law and ordinance regulate unlawful practices in the rental of real property and provide that those who engage in those activities shall not discriminate on the basis of marital status. Voluntary commercial activity does not receive the same status accorded to directly religious activity.

Swanner, 874 P.2d at 283. The analysis and the result in Swanner is equally applicable to the instant case. Plaintiff's religious beliefs, as a matter of law, do not over-ride New Mexico's compelling interest in combating discrimination .

B. New Mexico Religious Freedom Restoration Act

{37} The New Mexico Religious Freedom Restoration Act prohibits a government agency from restricting a person's free exercise of religion unless:

> A. the restriction is in the form of a rule of general applicability and does not directly discriminate against religion or among religions; and
> B. the application of the restriction to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

NMSA 1978, 28-22-3 (2000).[2]

{38} Plaintiff's claim here fails because it is not a "person" under the Act. Because RFRA does not define "person," Plaintiff utilized the definition found in the NMHRA, a totally different statutory scheme. The NMHRA definition includes twenty-two different acts or declarations, many with their own set of definitions. Nowhere is it established, and no showing has been made here that one may "cut and paste" the provisions of the separate Acts. Furthermore, it is of some significance that the legislature chose to define "person" in some sections, but not in others. Certainly, those sections containing definitions establish that the Legislature knew how and when to define the term. Defendant, a limited liability company, licensed to do business in New Mexico, is not a person under

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[2]RFRA was declared by the United States Supreme Court to be unconstitutional as applied to the states and local governments in City of Boerne v. Flores, 521 U.S. 507 (1997) ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance").

the Act. See, e.g., Mahoney v. U.S. Marshals Serv., 454 F. Supp.2d 21, 38 n. 7 (D.D.C. 2006) (under federal RFRA an "unincorporated religious association" is not a "person").

{39} It has also been established that a federal statute similar to the NMRFRA cannot be raised in suits between private parties where the government is not also a party. Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006). See also Hankins v. Lyght, 441 F.3d 96, 115 (2d Cir. 2006) (Sotomayor, J., dissenting) (Noting that "the majority concedes that it is unable to locate a single court holding that directly supports its novel application of RFRA to a suit between private parties. This is telling, for Congress enacted RFRA over twelve years ago. The plain language of the statute, its legislative history, and its interpretation by courts over the past twelve years demonstrate that RFRA does not apply to suits between private parties."). The government is not a party to this case.

{40} Moreover, as stated in the NMRFRA, a government may restrict a person's free exercise of religion when "the restriction is in the form of a rule of general applicability and does not directly discriminate against religion or among religions" and when "the application of the restriction to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest." § 28-22-3, NMSA. There is no genuine issue of material fact but that the NMHRA is generally applicable and does not discriminate against religion in general or a particular religion and that the Act is the least restrictive means to further the government's interest in eliminating discrimination against certain groups has already been demonstrated elsewhere in this opinion. The NMRFRA is not applicable to this situation as a matter of law.

CONCLUSION

{41} Plaintiff, by refusing to photograph the commitment ceremony of a same sex couple, violated the Human Rights Act. Specifically, Plaintiff, a public accommodation, discriminated on the basis on sexual orientation. In enforcing the HRA, the Commission did not violate Plaintiff's freedoms of expression or religion. The NMRFRA is not properly applied to this case and, even if it was, Plaintiff can not prevail because there is no showing the NMHRA improperly impacts religious practices.

{42} **WHEREFORE**, the Court finds:

1. It has jurisdiction over the parties and the subject matter involved herein;

2. There are no genuine issues of material fact but that Defendant Willock is entitled to Judgment as a matter of law.

3. The parties have stipulated that further discovery or other litigation will not alter the facts or applicable law in this case and that the Summary Judgment procedure is appropriate;

4. Further hearing in this matter will not be conducive to the determination of the issues presented ;

IT IS THEREFORE ORDERED Plaintiff's Motion for Summary Judgment is hereby denied. Defendant's Motion for Summary Judgment is hereby granted.

ALAN M. MALOTT
DISTRICT COURT JUDGE
12-11-09

This is to certify that a true and correct copy of the foregoing document was mailed to all counsel of record on the 11th day of December 2009.

Susan Gibson
TCAA- Division XV