NO. _____

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

PETITION FOR A WRIT OF CERTIORARI

EMIL J. KIEHNE
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
Post Office Box 2168
Albuquerque, NM 87103
(505) 848-1800

PAUL BECHT
BECHT LAW OFFICE
4710 Montgomery Blvd. NE
Suite 103
Albuquerque, NM 87109
(505) 883-7311

JORDAN W. LORENCE
Counsel of Record
DAVID AUSTIN R. NIMOCKS
ALLIANCE DEFENDING FREEDOM
801 G St. NW, Suite 509
Washington, D.C. 20001
(202) 393-8690
jlorence@alliance defendingfreedom.org

DAVID A. CORTMAN
BYRON J. BABIONE
JAMES A. CAMPBELL
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

Counsel for Petitioner

QUESTION PRESENTED

Petitioner Elane Photography, LLC, a small photography business owned and operated by a husband and wife in Albuquerque, New Mexico, tells stories and conveys messages through its photographs and picture-books. Elane Photography serves all classes of people, but its owners object as a matter of conscience to creating pictures or books that will tell stories or convey messages contrary to their deeply held religious beliefs.

Elane Photography declined to create photographs and a picture-book telling the story of Respondent Vanessa Willock's same-sex commitment ceremony because those images would convey messages about marriage that conflict with its owners' religious beliefs. Respondent Willock promptly found a different photographer, and then filed a complaint alleging that Elane Photography violated the state public-accommodations statute. The New Mexico Human Rights Commission concluded that Elane Photography violated the statute, and the New Mexico Supreme Court agreed.

The question presented is:

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.

PARTIES TO THE PROCEEDING

Petitioner is Elane Photography, LLC, a small New Mexico photography business owned and operated by husband and wife Jonathan and Elaine Huguenin.

Respondent is Vanessa Willock, an individual person who is a citizen of New Mexico.

CORPORATE DISCLOSURE STATEMENT

Petitioner Elane Photography is a New Mexico limited liability company. It does not have any parent companies, and no entity has any ownership interest in it.

TABLE OF CONTENTS

APPENDIX:

TABLE OF AUTHORITIES

***Cases*:**

***Constitutional Provisions*:**

Statutes

Ordinances:

***Rules*:**

***Other Authorities*:**

INTRODUCTION

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression[.]" *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (quotation marks omitted). The First Amendment right to freedom of speech "includes both the right to speak freely and the right to refrain from speaking." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This "right to refrain from speaking" is a "component[ ] of the broader concept of individual freedom of mind." *Id.* It guarantees that the government cannot force its citizens "to utter what is not in [their] mind[s]," *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943), or express messages that "'reason' tells them should not be [said]." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

Here, however, the New Mexico Supreme Court applied its state public-accommodations statute to require Elaine Huguenin to speak messages contrary to her religious beliefs. Ms. Huguenin and her husband, Jonathan Huguenin, co-owners of a small photography business, will serve anyone; they do not turn away any customers because of their protected-class status. But they will decline a request, as the First Amendment guarantees them the right to do, if the context would require them to express messages that conflict with their religious beliefs.

The New Mexico Supreme Court acknowledged that the Huguenins are part of the expressive

professions that engage in speech and create speech for others as part of their services. But the court held that the Huguenins do not have a constitutional right to be free from compelled speech because they create expression for paying customers. That decision conflicts with this Court's compelled-speech precedent.

In addition, the court below stated that the constitutional right to be free from compelled speech does not protect other professionals who create expression from applications of the public-accommodations statute. That statute thus requires individuals who create expression for a living—like marketers, advertisers, publicists, and website designers—to speak in conflict with their consciences. This strips away First Amendment freedoms from all professional creators of expression, regardless of the nature or source of their convictions.

Such disregard for the constitutional rights of these professionals threatens to drive them from the marketplace. Not only would that limit the expressive options available to the public, it would cost these individuals their livelihoods. Whether the First Amendment permits this result is a question that warrants this Court's review.

DECISIONS BELOW

The New Mexico Supreme Court's decision is reported at 309 P.3d 53, and reprinted at Pet.App.1a-61a. The decision of the Court of Appeals

of New Mexico is reported at 284 P.3d 428, and reprinted at Pet.App.62a-103a. The opinion of the New Mexico trial court is not reported, but is available at No. CV-2008-06632, 2009 WL 8747805 (Dec. 11, 2009), and reprinted at Pet.App.104a-133a. The New Mexico Human Rights Commission's decision and final order are not reported, but are reprinted at Pet.App.134a-161a.

STATEMENT OF JURISDICTION

On August 22, 2013, the New Mexico Supreme Court issued its decision rejecting Petitioner's claim that this application of the state public-accommodations statute violates its federal constitutional rights. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). Because 28 U.S.C. § 2403(b) may apply, Petitioner has served copies of this Petition on the New Mexico Attorney General.

PERTINENT CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

I. Factual Background

Petitioner Elane Photography, a small photography business owned and operated by Jonathan and Elaine Huguenin, speaks through its photographs and picture-books. Tr.79, 100-01.[1] Ms. Huguenin, an artist with a degree in photography, creates the pictures and books sold by Petitioner. Tr.97-101. She photographs engagement pictures, graduation pictures, portraits, weddings, and miscellaneous events. Tr.96-97.

Ms. Huguenin's style of wedding and event photography is photojournalistic, meaning that she conveys stories and messages through her images and books. Tr.79, 100-01. Other photojournalists—including a large group of wedding photojournalists who filed an amicus brief supporting Petitioner in the court below—affirm this expressive quality of photojournalism. *See, e.g.*, Brief of Amici Curiae Wedding Photographers in Support of Petitioner, *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (No. 33,687); Brian Horton, *Associated Press Guide to Photojournalism* 14 (2d ed. 2001) (Photojournalism is "[t]elling a story with a picture"); Bill Hurter, *The Best of Wedding Photojournalism* 15 (2d ed. 2010) ("Above all, the skilled wedding photojournalist is an expert storyteller.").

---

[1] "Tr." refers to the transcript of the evidentiary hearing before the New Mexico Human Rights Commission, which is part of the record in this case.

Ms. Huguenin's artistic expression pervades her work. During the picture-taking process, Ms. Huguenin uses her artistic eye to frame and capture images that convey the story she wants to tell. Tr.101-06. She also choreographs many of the scenes depicted in her photographs. Tr.103.

After each event, Ms. Huguenin spends three to four weeks poring over the captured images. Tr.79-80. She begins by selecting the pictures that best suit her artistic tastes and expressive goals, and she discards the rest. Tr.107. Of the pictures she keeps, Ms. Huguenin crops and edits each one to accentuate her desired message. Tr.79-80. Then she creates a picture-book for each customer by arranging the images to tell her story about the event. Tr.79.

Ms. Huguenin, and not her customer, is the speaker communicating through her photographs and books. Her actions in choreographing, capturing, selecting, editing, producing, and arranging the final photographs and storybooks all affect, and ultimately determine, the messages conveyed through her images and books. *See* Tr.79-80, 101-07.[2]

Petitioner automatically obtains federal copyright protection over all Ms. Huguenin's photographs and picture-books. Tr.79. This confirms that Ms. Huguenin is the speaker communicating

[2] For example, by cropping out a playful look on the face of a young child standing behind a kissing couple, Ms. Huguenin singlehandedly transforms a picture's message from humor to romance.

through her images and books because copyright protection vests in the "author" of "pictorial" works. 17 U.S.C. § 201(a); 17 U.S.C. § 102(a); *see also* 17 U.S.C. § 101 (defining "pictorial" works as including "photographs").

In accord with industry practice, Ms. Huguenin does not give the edited images to customers who purchase standard packages. Rather, she posts the final pictures, each of which displays a watermark of Petitioner's name and logo, to a website accessible by password. Tr.107-08; Pet.App.30a at ¶42. Ms. Huguenin's customers, their friends, and their family view the pictures posted there. Pet.App.30a at ¶42.

The Huguenins will not create images that tell stories or convey messages contrary to their religious beliefs. Tr.80; Pet.App.138a-139a at ¶15; Pet.App.141a-142a at ¶¶23-24. For this reason, they have declined requests for nude maternity pictures and photographs portraying violence. Tr.82-83.

Of particular relevance here is the Huguenins' sincere religious belief that marriage is the union of a man and a woman. Tr.85-86, 92. They believe that if they were to communicate a contrary message about marriage—by, for example, telling the story of a polygamous wedding ceremony—they would be disobeying God. Tr.84-86.

In September 2006, Respondent inquired whether Ms. Huguenin would be "open to helping . . . celebrate" her same-sex commitment ceremony by

photographing the event. Pet.App.139a at ¶17. Ms. Huguenin understood that Respondent's event would be a wedding-like ceremony between two women, and that it would involve many of the expressive elements—like a ring exchange, vows, and a pronouncement—that typically occur at a wedding ceremony. Tr.113, 127.

The Huguenins declined Respondent's request because they did not want to create images expressing messages about marriage that conflict with their religious beliefs. Tr.86-87.[3] Nevertheless, the Huguenins gladly serve gays and lesbians—by, for example, providing them with portrait photography—whenever doing so would not require them to create expression conveying messages that conflict with their religious beliefs. Tr.111, 115.

Respondent promptly found another photographer to tell the story of her ceremony. Pet.App.144a at ¶29. She paid that photographer $1,200, which is less than the cost of Petitioner's basic package. *Id.*; Pet.App.142a at ¶26.

In September 2007, Respondent, her partner, and 75 guests celebrated the couple's commitment ceremony and reception. Tr.31-35; Pet.App.145a at ¶31. A minister presided over the ceremony, which, like a wedding, included flower girls, a ring bearer, a

[3] If Ms. Huguenin were to create photographs and a picture-book for a same-sex commitment ceremony, her images would communicate, among other things, the message that a union between two women should be celebrated as a marriage. Tr.129-30.

procession, and a white wedding dress. Tr.33, 37-38, 56-57. The couple exchanged rings and recited vows, Tr.62-63; and the minister concluded with a prayer and pronouncement. Tr.65-66; Pet.App.145a at ¶31.

II. Proceedings Below

In December 2006, Respondent filed an administrative complaint alleging that Petitioner violated the state public-accommodations statute, N.M. Stat. § 28-1-7(F), by making a distinction in offering services because of sexual orientation. Pet.App.144a-145a at ¶30. The New Mexico Human Rights Commission held a one-day hearing to gather evidence. Pet.App.134a.

In its opening statement at the hearing and in its post-hearing briefing, Petitioner argued, among other things, that applying the public-accommodations statute under these circumstances would violate its First Amendment right to be free from compelled expression. *See* Pet.App.155a at ¶24; Tr.13-14. In April 2008, the Commission concluded that Petitioner violated the public-accommodations statute, remarked that the statute "d[id] not, as a general matter, violate the First . . . Amendment[ ]," and ordered Petitioner to pay Respondent $6,637.94 in attorneys' fees and costs. Pet.App.155a-161a.

Petitioner timely filed with the New Mexico Second Judicial District Court a complaint appealing the Commission's order. *See* Pet.App.66a at ¶6; N.M. Stat. § 28-1-13(A). Petitioner's complaint alleged, among other claims, that the order violated its First

Amendment right to freedom of expression. *See* Pet.App.66a at ¶6. Forgoing a trial de novo in the District Court, Petitioner and Respondent agreed to file cross-motions for summary judgment based on the evidentiary record created before the Commission. *See* Pet.App.104a at ¶1; Pet.App.133a at ¶¶3-4. Petitioner raised its First Amendment compelled-speech claim in its motion. *See* Pet.App.116a-121a. The District Court resolved the cross-motions against Petitioner, *see* Pet.App.132a-133a, and concluded that this application of the public-accommodations law was "not an infringement of [Petitioner's] right to freedom of expression." Pet.App.121a at ¶25; *see also* Pet.App.116a-121a.

Petitioner timely appealed to the Court of Appeals of New Mexico, Pet.App.66a-67a at ¶6, raising, among other arguments, its First Amendment compelled-speech claim. *See* Pet.App.80a-85a. When construing the public-accommodations statute, the Court of Appeals observed that the "broadly worded definition" of "public accommodation" in New Mexico, Pet.App.72a at ¶14, "include[s] most establishments that typically operate a business in public commerce." Pet.App.75a at ¶18. The statute applied to Petitioner, the appellate court held, because Petitioner "advertises on multiple internet pages, through its website, and in the Yellow Pages." Pet.App.74a-75a at ¶18. The court then rejected the compelled-speech claim, concluding that this application of the public-accommodations statute would not "compel unwanted expression" because

Petitioner need not "modify its own speech in any way." Pet.App.85a at ¶30; *see also* Pet.App.80a-85a.

The New Mexico Supreme Court granted review. Pet.App.8a at ¶10. Petitioner raised its First Amendment compelled-speech claim (among others) as a question presented and argued that issue in its brief. *See* Pet.App.4a at ¶1; Pet.App.15a-41a. Petitioner did not contest the Court of Appeals' conclusion that it is a public accommodation under New Mexico law. Pet.App.10a at ¶13.

New Mexico's high court first held that Petitioner violated the public-accommodations statute. Pet.App.15a at ¶19. Noting that the public-accommodations statute uses "broad terms," Pet.App.11a at ¶15, the court determined that the statute prohibits not only "discrimination based on sexual orientation," but also declining to create expression that communicates about "someone's conduct of publicly committing to a person of the same sex." Pet.App.13a-14a at ¶18.

The court then rejected Petitioner's compelled-speech claim while purporting to apply this Court's controlling precedent. *See* Pet.App.40a-41a at ¶57. The New Mexico Supreme Court spoke expansively in rejecting not only the compelled-speech claim of Petitioner, but those of other businesses operating in "expressive professions." *See* Pet.App.36a-41a. The court acknowledged that "individuals in such professions undoubtedly engage in speech" and "create speech for others as part of their services." Pet.App.37a at ¶52. But the court held that "there is

no precedent to suggest that First Amendment protections allow such individuals or businesses to violate [public-accommodations] laws." *Id.* The New Mexico Supreme Court thus determined that the First Amendment right to be free from compelled speech does not protect those professionals from applications of the public-accommodations statute that would require them to create expression. *See* Pet.App.36a-38a at ¶¶52-53.

Justice Bosson concurred. Pet.App.54a-61a. His concurrence acknowledged that the result of this case "is sobering" and "will no doubt leave a tangible mark" on many professionals because "the Huguenins . . . now are compelled by law to compromise the very religious beliefs that inspire their lives." Pet.App.60a at ¶90. "At its heart," the concurrence explained, "this case teaches that at some point in our lives all of us must compromise, if only a little, to accommodate the contrasting values of others." Pet.App.60a at ¶91. That "is the price of citizenship," the concurrence opined, "one that we all have to pay somewhere in our civic life." Pet.App.60a-61a at ¶¶91-92.

REASONS FOR GRANTING THE WRIT

First, the New Mexico Supreme Court held that business professionals cannot prevail on compelled-speech claims against applications of public-accommodations laws that require them to create expression conveying messages contrary to their deeply held beliefs. Whether professional creators of speech are disqualified from this First Amendment

protection—and thus whether their expression-creating skills may be co-opted by private parties through government coercion—is a question of great national importance.

Second, the decision below conflicts with this Court's case law. Most notably, the New Mexico Supreme Court's decision cannot be squared with *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 568-81 (1995), which held that the government may not require a public accommodation to engage in unwanted speech. Like the Commonwealth of Massachusetts in *Hurley*, the State of New Mexico here applied a public-accommodations statute to an organization's message-based decision not to communicate a particular view, required that organization to provide access to its communicative medium, and obligated that organization to change the messages conveyed through its expression. *Hurley* forbade this, but the New Mexico Supreme Court's decision allowed it. Those decisions conflict.

In addition, the New Mexico Supreme Court's decision conflicts with this Court's many cases affirming the First Amendment speech rights of businesses and professionals. *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind of N.C. Inc.*, 487 U.S. 781 (1988); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1 (1986) (plurality opinion); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). The decision below excluded Petitioner from compelled-speech protection because Ms. Huguenin operates a business that creates speech for paying customers.

That conclusion is at odds with this Court's business-speech cases.

The decision below is also inconsistent with *Wooley v. Maynard*, 430 U.S. 705 (1977). *Wooley* forbids the State from requiring its citizens to serve as expressive instruments for views that conflict with their beliefs. Yet that is precisely what the court below did when it ruled that the public-accommodations statute requires Ms. Huguenin to speak messages about marriage that conflict with her religious beliefs.

Third, the New Mexico Supreme Court's treatment of this Court's precedent threatens to curtail the compelled-speech doctrine. In particular, the decision below transforms *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47, 58-65 (2006), from a decision addressing Congress's power over military affairs—where "judicial deference is at its apogee," *id.* at 58-59 (alteration and quotation marks omitted)—into an unbridled license for the government to compel expression that conflicts with a speaker's beliefs.

The lack of a conflict between the New Mexico Supreme Court's decision and another state appellate or federal circuit decision poses no barrier to this Court's granting review. *See* Sup. Ct. R. 10(c) (indicating that this Court grants certiorari when the question presented raises "an important question of federal law" and a state court decided that "question in a way that conflicts with relevant decisions of this Court"). Indeed, this Court

frequently reviews important First Amendment questions, particularly in the compelled-speech and public-accommodations contexts, that do not present a circuit split or a conflict between state appellate or federal circuit decisions. *See, e.g.*, *Hurley*, 515 U.S. at 566; *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000); *Rumsfeld*, 547 U.S. at 55.

I. The Question Presented Raises Important Issues of Constitutional Law.

The New Mexico Supreme Court's decision applied the public-accommodations statute under circumstances that require Ms. Huguenin to speak in conflict with her religious beliefs. *See* Pet.App.24a-25a at ¶35. The decision further determined that the compelled-speech doctrine does not protect other professionals against applications of the public-accommodations statute that would compel them to create expression contrary to their deepest convictions. *See* Pet.App.36a-41a. This implicates constitutional questions about compelled-speech jurisprudence and public-accommodations laws that are of national importance.

A. The Decision Below Requires the Creation of Expression That Conflicts with the Creator's Religious Beliefs.

The decision below permitted a particularly egregious form of compelled speech. It interpreted the public-accommodations statute to require Ms. Huguenin to *create* expression (rather than merely to display or disseminate expression created by others) that conflicts with her religious beliefs. Whether the

Constitution permits the forced creation of expression is an important First Amendment question calling for this Court's review.

The compelled-speech doctrine protects "the sphere of intellect" and the "individual freedom of mind" that "it is the purpose of the First Amendment to reserve from all official control." *Wooley*, 430 U.S. at 714-15 (quoting *Barnette*, 319 U.S. at 642) (alteration omitted). This Court has previously held that the government invades this freedom of mind when it forces an individual to state or display the government's message, *see Barnette*, 319 U.S. at 641-42; *Wooley*, 430 U.S. at 713-17; or when it compels a for-profit business to publish or disseminate a private party's message. *See Tornillo*, 418 U.S. at 243, 258; *Pac. Gas*, 475 U.S. at 4, 20-21 (plurality opinion).

Here, however, New Mexico law has gone a step further—requiring Ms. Huguenin not merely to *display* or *disseminate* another's expression, but to *create* the very expression that violates her religious beliefs. The compelled creation of speech infringes the sphere of intellect to at least the same degree as the compelled dissemination of speech that this Court has previously condemned. This Court should thus grant certiorari to establish that the compelled-speech doctrine prohibits not just the forced dissemination of expression, but also the forced creation of expression.

This Court's precedent and the New Mexico Supreme Court's decision leave no doubt that the

question of compelled creation of expression is squarely presented here. This Court has repeatedly acknowledged that photographs are expression protected by the First Amendment. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 468 (2010) (recognizing that visual depictions "such as photographs" are protected "expression"); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 246 (2002) (recognizing that a "visual depiction" in a photograph of couples "engaging in sexual activity" is protected speech); *Regan v. Time, Inc.*, 468 U.S. 641, 646-48 (1984) (accepting, without reconsidering, the lower court's finding that a "photographic color reproduction of $100 bills" is protected speech); *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) ("[P]ictures . . . have First Amendment protection"). Like the photographs already considered by this Court, Ms. Huguenin's event photographs and picture-books communicate messages and thus constitute constitutionally protected speech.

That Ms. Huguenin's event photographs and picture-books express messages, and that she is the person speaking through those images, is so clear that the court below assumed it. *See, e.g.*, Pet.App.30a at ¶42 ("Whatever message Elane Photography's photographs may express"). Indeed, that court considered Ms. Huguenin part of the "expressive profession[s]" that "engage in speech" and "create speech for others as part of their services[.]" Pet.App.37a at ¶52.

The New Mexico Supreme Court additionally recognized that its construction of the public-

accommodations statute requires Ms. Huguenin—because she has exercised her First Amendment right to create photographs conveying favorable messages about weddings between a man and a woman—to create photographs conveying favorable messages about similar ceremonies between people celebrating other types of relationships. *See, e.g.*, Pet.App.25a at ¶35 ("Elane Photography [must] perform the same services for a same-sex couple as it would for an opposite-sex couple"). And it is undeniable that the messages about marriage conveyed through those compelled photographs and picture-books would conflict with Ms. Huguenin's religious beliefs. *See* Pet.App.60a at ¶90.

It is thus beyond question that the decision below interpreted the public-accommodations statute to require Ms. Huguenin to create expression that would communicate messages antithetical to her religious beliefs. Therefore, the question whether the government may require individuals or entities to create expression that conflicts with their religious beliefs is cleanly presented here.

B. The Decision Below Applies to All Professionals that Create Expression.

The decision below not only rejected Ms. Huguenin's compelled-speech claim; it also established that the First Amendment right to be free from compelled speech does not protect other professionals who create expression from similar applications of the public-accommodations statute. Pet.App.36a-38a at ¶¶52-53.

Professionals that create expression and are affected by the New Mexico Supreme Court's decision include marketers, advertisers, publicists, website designers, writers, videographers, and photographers. These professionals now must create expression requested by customers even if the communicated messages violate their consciences. Indeed, Respondent admitted in her briefing below that her view of the law, which was adopted by the New Mexico Supreme Court, requires professional authors to write stories expressing messages that conflict with their beliefs. *See* Answer Br. of Resp't at 36, *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (No. 33,687) ("If a writer establishes a business advertising to the public that she will write the story of any customer's wedding for a fee, then that business cannot discriminate").

Most New Mexico businesses that create expression are governed by the public-accommodation statute and thus impacted by the New Mexico Supreme Court's decision. As the Court of Appeals below stated, "most establishments that typically operate a business in public commerce," Pet.App.75a at ¶18, fall within the State's "broadly worded definition" of "public accommodation." Pet.App.72a at ¶14. That statute governs "any establishment that *provides or offers* its services . . . to the public." N.M. Stat. § 28-1-2(H) (emphasis added). Simply "advertis[ing] . . . through [a] website" or "in the Yellow Pages" is enough to subject a business to the public-accommodations law, *see* Pet.App.74a-75a at ¶18, as is the act of "provid[ing]" services to a member of the public. *See*

N.M. Stat. § 28-1-2(H). The court below thus did not assuage concerns about the breadth or effect of its holding when it observed that businesses, if they wish to preserve their rights against compelled expression, can avoid the public-accommodations statute's reach. *See* Pet.App.28a at ¶39. That supposed alternative is illusory.

The threat to conscience posed by the New Mexico Supreme Court's decision extends beyond business owners with beliefs like the Huguenins'. It compels all professionals subject to the public-accommodations statute, regardless of the nature or source of their convictions, to create expression that conflicts with their beliefs. Just as it requires Ms. Huguenin to create expression communicating messages that conflict with her beliefs about marriage, the decision below would require a gay photographer to create pictures of a religious-based event opposing same-sex marriage, even if doing so would force him to create images expressing messages contrary to his deeply held beliefs. *See* N.M. Stat. § 28-1-7(F) (forbidding public accommodations from making a distinction in providing services "because of . . . religion"). Thus, the freedom of all conscientious professionals—no matter what they believe—hangs in the balance.

C. Whether Public-Accommodations Laws May Require Professionals to Create Expression Conveying Messages That Conflict with Their Religious Beliefs Presents an Important Question.

Public-accommodations laws like New Mexico's have been enacted in most States and numerous political subdivisions throughout the country. The interplay between these ubiquitous legislative measures and the First Amendment's protection against compelled speech for professionals is a question of national importance warranting review by this Court. *See Hurley*, 515 U.S. at 566 (granting certiorari to review an unconstitutional application of a public-accommodations statute); *Dale*, 530 U.S. at 647 (same); *see also Smith v. Doe*, 538 U.S. 84, 89-92 (2003) (granting certiorari to review a constitutional question about a state statute, a version of which had been enacted in all States); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 385 (2000) (granting certiorari to review a constitutional question about a state statute addressing an issue that had been the subject of legislation in a "large number of States"); *New York v. Ferber*, 458 U.S. 747, 749 n.2 (1982) (similar); *New York v. O'Neill*, 359 U.S. 1, 3 (1959) (similar).

Legislative bodies "continue[ ] to broaden the scope" of "many public accommodations statutes across the Nation." *Hurley*, 515 U.S. at 571-72. Those "laws have expanded to cover more places," entities, and individuals, *Dale*, 530 U.S. at 656, casting a wide net, in particular, over businesses and

other for-profit entities. *See, e.g.*, Cal. Civ. Code § 51(b) (applying to "all business establishments of every kind whatsoever"); Haw. Rev. Stat. § 489-2 (applying to "a business . . . of any kind"); Mich. Comp. Laws § 37.2301(a) (similar). As the Court of Appeals below acknowledged, the New Mexico statute is part of "a national trend that has expanded" public-accommodations laws to nearly all forms "of business activity." Pet.App.72a at ¶15. Justice Bosson's concurrence below likewise observed that public-accommodations laws nationally "have been expanded to . . . most every public business." Pet.App.59a at ¶89.

Those "laws have also broadened in scope" to include more protected classifications. *Dale*, 530 U.S. at 656 n.2; *see also* Pet.App.59a at ¶89. These expansions have increased the potential conflicts between public-accommodations laws and First Amendment freedoms. Of particular note, many of the recently added protected classifications, such as "political affiliation" and "political ideology," directly implicate matters of viewpoint and opinion, and thus are likely to prohibit message-based decisions not to create speech. *See, e.g.*, D.C. Code § 2-1402.31(a) (prohibiting denials of service based on "actual or perceived" "political affiliation"); P.R. Laws Ann. tit. 1, § 13(a) (prohibiting denials of service because of "political" issues); Seattle, Wash., Mun. Code § 14.06.020(L) (prohibiting conduct that "differentiate[s]" because of "political ideology"). Applying the New Mexico Supreme Court's ruling in a jurisdiction that prohibits political discrimination would, for instance, require speech writers to create

campaign messages urging election of politicians whose views they vehemently oppose.

Government agencies and courts have broadly applied public-accommodations laws (regardless of the type of public accommodation or protected classification at issue) to punish message-based decisions not to communicate particular views. Massachusetts courts, for example, have applied their public-accommodations statute to prohibit decisions not to express specific messages. *See Hurley*, 515 U.S. at 572-73. Similarly, the New Mexico courts in this case have interpreted their public-accommodations statute to prohibit not just decisions to decline to serve gays and lesbians "because of" their "sexual orientation," N.M. Stat. § 28-1-7(F), but message-based decisions to decline to create speech communicating favorable messages about the expressive "conduct of publicly committing to a person of the same sex." Pet.App.13a-14a at ¶18.

The expansion of public-accommodations laws into the realm of expression presents significant constitutional concerns. Indeed, this Court has already recognized that the broadening of public-accommodations laws "has increased" "the potential for conflict between [those] laws and the First Amendment rights of organizations." *Dale*, 530 U.S. at 657; *see also* David E. Bernstein, *You Can't Say That!* 4 (2003) ("The clash of [constitutional expressive freedoms] and [public-accommodations] laws has emerged due to the gradual expansion of such laws to the point at which they regulate just about all aspects of American life."). While this

Court has previously addressed these concerns as they apply to nonprofit entities and membership groups, this constitutional crisis is even more distressing for professionals, who depend on their expressive freedom to sustain their livelihood.[4]

II. The New Mexico Supreme Court's Decision Conflicts with This Court's Precedent.

A. The Decision Below Conflicts with *Hurley*.

In *Hurley*, this Court *unanimously* held that the compelled-speech doctrine forbids an application of a public-accommodation statute that compels a parade-hosting organization to express another group's message. 515 U.S. at 574-75. In contrast, the court below upheld an application of a public-accommodations statute that requires Ms. Huguenin

[4] Protecting the compelled-speech rights of these professionals does not threaten the significant role of public-accommodations laws. The court below was mistaken in asserting that Petitioner's argument would entirely "exempt from [public-accommodations] laws any business that provide[s] a creative or expressive service." Pet.App.39a at ¶54; *see also* Pet.App.38a-40a at ¶¶54-56. Petitioner's compelled-speech argument applies only to *message-based* decisions not to create expression; it would not permit a flat refusal to serve someone because of a protected characteristic. Moreover, strong free-market forces weigh against professionals exercising their constitutional right to refrain from creating expression. By turning away paying customers, business owners obviously act against their own financial interests. And by adhering to their principles on controversial matters, business owners risk being targeted for boycotts and other reprisals. The personal convictions of business owners thus must be strong enough to endure these significant social and economic costs.

to create expression conveying messages contrary to her religious beliefs. That result directly conflicts with *Hurley*.

This case is analytically indistinguishable from *Hurley* for at least six reasons. First, *Hurley* and this case both involve compelled access to communicative mediums that "by their nature express . . . message[s]." Pet.App.29a at ¶41. The public-accommodations statute in *Hurley* compelled access to "a form of expression"—a parade. 515 U.S. at 568. Likewise, the New Mexico statute compels access to a form of expression—Ms. Huguenin's photographs and picture-books.

Second, the speakers in both cases share similar attributes. The First Amendment does not "require a speaker to generate, as an original matter, each item featured in [its] communication." *Id.* 569-70 (discussing many cases supporting this principle); *see also Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) ("Although programming decisions [of a public broadcaster] often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts"). The speech of the parade organization in *Hurley* partly consisted of expression that originated with others and was packaged and presented as the organization's own. *See Hurley*, 515 U.S. at 572-73 ("[E]very participating unit affects the message conveyed by the [parade organization]"). Similarly, while Ms. Huguenin's expression partly incorporates the expressive conduct of others, she creates images

and picture books that tell stories as she envisions them.

Third, the application of the public-accommodations statute in *Hurley* "essentially requir[ed] [the parade organization] to alter the expressive content of [its speech]." *Id.* at 572-73. Here too this application of the public-accommodations statute requires Ms. Huguenin to alter the content of her expression. In both cases, then, the "application of the [public-accommodations] statute had the effect of declaring the [entities'] speech itself to be the public accommodation" and forcing them to alter it. *Id.* at 573.

Fourth, the group seeking to access the parade organization's speech in *Hurley* was itself engaged in expression. *See id.* at 570 ("GLIB's participation . . . was equally expressive"). Likewise here, Respondent, the party who sought to access Ms. Huguenin's expression, was herself engaged in an inherently expressive commitment ceremony. These facts underscore that expression is at the center of both *Hurley* and this case.

Fifth, the parade organization in *Hurley* did not "exclude homosexuals as such," *id.* at 572; rather, it declined the group's request to participate in the parade because of the messages communicated by its expression. *Id.* at 572, 574. Similarly, Ms. Huguenin does not refuse to work for gays and lesbians as such; she gladly serves all customers so long as their requests do not require her to speak messages that conflict with her religious beliefs. Tr.111, 115.

Sixth, *Hurley* and this case both present the same relevant governmental interest. The *Hurley* Court concluded that "[w]hen the [public-accommodations] law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression." *Id.* at 578. But "this object is merely to allow exactly what the general rule of speaker's autonomy forbids." *Id.* The same governmental purpose drives the application of the public-accommodations law in this case.

Despite all the similarities between *Hurley* and this case, the New Mexico Supreme Court declined to follow it. Attempting to distinguish *Hurley*, the court suggested that Petitioner violated the public-accommodations statute here, but that the parade organization in *Hurley* did not. In particular, the New Mexico Supreme Court claimed that this Court in *Hurley* "reversed" the Massachusetts Supreme Judicial Court's determination that the parade organization engaged in "discrimination on the basis of sexual orientation." Pet.App.28a at ¶40. Yet this Court did not purport to reverse Massachusetts's highest court on that question of state law; nor would it have had the authority to do so. *See Albertson v. Millard*, 345 U.S. 242, 244 (1953) ("The construction given to a state statute by the state courts is binding upon federal courts.").

The New Mexico Supreme Court then declared that the Massachusetts Supreme Judicial Court "erroneously classified" the parade organization "as a public accommodation" under Massachusetts law.

Pet.App.29a at ¶41. But this baseless second-guessing of Massachusetts's highest court ignores that the parade organization in *Hurley* was a public accommodation for much the same reason that Petitioner is here: it offered the public access to participate in the St. Patrick's Day Parade. *See Irish-Am. Gay, Lesbian & Bisexual Group of Boston v. City of Boston*, 636 N.E.2d 1293, 1296 (Mass. 1994) (noting that the parade organization sent applications to members of the public), *rev'd on other grounds by Hurley*, 515 U.S. 557.

The court below next asserted that the public-accommodations law "applies not to [Ms. Huguenin's] photographs but to [her] business operation." Pet.App.29a at ¶41. These semantics do not distinguish *Hurley*. After all, Ms. Huguenin's "business operation" is creating event photographs and picture-books that communicate messages, and the New Mexico Supreme Court's interpretation of the public-accommodations statute requires her—much like the parade organization in *Hurley*—to convey unwanted messages through her expression.

Without supporting legal authority, the New Mexico Supreme Court also reasoned that *Hurley* is distinguishable because a parade is "a public event" and thus the audience for the compelled expression was more numerous there than it is here. Pet.App.29a-30a at ¶¶41-42. This, however, is not a material factual difference. The State has violated the compelled-speech doctrine by requiring Ms. Huguenin to create expression that conflicts with her religious beliefs and to communicate that

expression to others. Ms. Huguenin communicates her expression to others by posting versions of her final pictures, all of which display Petitioner's watermark, to a website accessible by her customers, their families, and their friends. *See* Pet.App.27a at ¶38; Pet.App.30a at ¶42. Compelled-speech violations are not confined to circumstances where the audience is of a certain size or character.

The court below finally noted that Petitioner is a business, while the parade organization in *Hurley* was not. *See* Pet.App.23a-24a at ¶33; Pet.App.25a at ¶35. But *Hurley* did not suggest that the outcome there would have been different had the parade organization been run for profit. On the contrary, *Hurley* acknowledged that the First Amendment right against compelled speech is "*enjoyed by business corporations generally*." 515 U.S. at 574 (emphasis added). Furthermore, relegating a business's expression beneath a nonprofit group's speech, as the court below did, conflicts with a host of cases from this Court, a point explored in the following section of this petition. Thus, for all the reasons explained herein, the New Mexico Supreme Court's decision conflicts with *Hurley*.

B. The Decision Below Conflicts with This Court's Precedent Upholding the First Amendment Speech Rights of Businesses.

The decision below treats professionals that market and sell their expression-creating skills as second class under the compelled-speech doctrine,

excluding them from the constitutional protection available to others. *See* Pet.App.23a-24a at ¶33; Pet.App.25a at ¶35. This conflicts with myriad decisions of this Court.

The court below dismissed Petitioner's compelled-speech rights because Ms. Huguenin "sells" her expression-creating skills and produces speech "for hire." *See* Pet.App.25a at ¶35. That is no basis, however, for placing Petitioner outside the First Amendment's protection. For "[i]t is well settled" under this Court's precedent "that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley*, 487 U.S. at 801; *see also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("Of course, the degree of First Amendment protection is not diminished merely because the . . . speech is sold rather than given away."); *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *Smith v. California*, 361 U.S. 147, 150 (1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). "[A] great deal of vital" and constitutionally protected expression "results from an economic motive." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2665 (2011).

The New Mexico Supreme Court, moreover, suggested that Petitioner is excluded from free-speech protection because Ms. Huguenin creates and disseminates her expression at the request of customers. *See* Pet.App.27a at ¶38 (claiming that Petitioner's expression is "on behalf of its clients").

That reasoning also conflicts with this Court's precedent. In *Riley*, this Court found that professional fundraisers, who were paid to speak their customers' messages, were fully safeguarded by the compelled-speech doctrine. 487 U.S. at 795-98. Similarly, in *Sullivan*, this Court concluded that the New York Times was engaged in protected expression when it selected and printed a paid advertisement on behalf of a customer. 376 U.S. at 265-66; *see also Hurley*, 515 U.S. at 570 (discussing *Sullivan*). Commercial "[p]ublishers disseminating the work of others who create expressive materials also come wholly within the protective shield of the First Amendment." *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 925 (6th Cir. 2003) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)). The decision below cannot be squared with these cases.

The New Mexico Supreme Court's refusal to protect the compelled-speech rights of businesses also conflicts with this Court's decisions in *Pacific Gas* and *Tornillo*. In *Pacific Gas*, this Court held that the compelled-speech doctrine prohibits the government from requiring a business to include another group's newsletter in its billing envelope. 475 U.S. at 4, 20-21 (plurality opinion). And in *Tornillo*, this Court concluded that compelled-speech principles forbid the government from forcing a commercial newspaper to include on its editorial page a politician's reply to the newspaper's prior commentary about him. 418 U.S. at 243, 258. Here, in contrast to those cases, the court below construed a state law to require Ms. Huguenin and her

business to create expression conveying messages that conflict with her beliefs.

Attempting to discount Petitioner's compelled-speech claim, the decision below repeatedly emphasized that Petitioner markets Ms. Huguenin's expression-creating skills to the public. *See* Pet.App.4a-5a at ¶2 (stating that Petitioner "offers its services to the public" and "thereby increas[es] its visibility to potential clients"); Pet.App.28a at ¶39 (same); Pet.App.24a-25a at ¶35 (similar). But like all businesses, Petitioner has a First Amendment right to market its services. *See, e.g.*, *Sorrell*, 131 S. Ct. at 2659 (recognizing that speech in aid of "marketing" is "a form of expression protected by the Free Speech Clause"). The court below, then, essentially held that by exercising this constitutional right to speak, professionals waive their right not to speak a message that conflicts with their beliefs. This Court's consistent recognition of the speech rights of businesses and professionals belies such wayward analysis.

C. The Decision Below Is Inconsistent with *Wooley*.

This Court in *Wooley* held that the government cannot force citizens to display on their state-issued license plates mottos that conflict with their beliefs. 430 U.S. at 717. In reaching that conclusion, this Court observed that "the right to refrain from speaking" is a "component[ ] of the broader concept of individual freedom of mind," *id.* at 714 (quotation marks omitted), and that "[t]he First Amendment

protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Id.* at 715. *Wooley* thus stands for the principle that the State cannot compel any citizen "to be an instrument for fostering . . . adherence to an ideological point of view he finds unacceptable." *Id.*

In contrast, the court below concluded that the State of New Mexico may require Ms. Huguenin to be a spokesperson for views about marriage that conflict with her religious beliefs. That court sought to justify its departure from *Wooley* by noting that *Wooley* involved "a specific government-selected message," while this case does not. Pet.App.19a at ¶27. That is a distinction without a constitutional difference. Indeed, *Wooley* would not have been decided differently if the message on the license plate had been chosen by a private citizen and a state law required motorists to display it. This is confirmed by cases like *Tornillo*, *Pacific Gas*, and *Hurley*, all of which invalidated government action "forc[ing] one speaker to host or accommodate another [private] speaker's message." *Rumsfeld*, 547 U.S. at 63-64. Regardless of who selects the message, the government cannot require Ms. Huguenin "to be an instrument for fostering . . . adherence to an ideological point of view [she] finds unacceptable." *Wooley*, 430 U.S. at 715. The decision below does just that, and as a result, it is inconsistent with *Wooley*.

III. The New Mexico Supreme Court's Treatment of this Court's Precedent Threatens to Curtail Compelled-Speech Protection.

This Court has previously granted certiorari to determine whether state courts have properly interpreted or extended this Court's constitutional holdings. *See, e.g.*, *Virginia v. Black*, 538 U.S. 343, 351-52 (2003) (granting certiorari to review a state supreme court's interpretation of this Court's First Amendment precedent); *Campbell v. Louisiana*, 523 U.S. 392, 395-96 (1998) (granting certiorari to review a state supreme court's interpretation of this Court's constitutional precedent); *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (granting certiorari because a state supreme court read this Court's constitutional case law "too broadly"). Likewise, here, this Court should grant certiorari to review a dangerous extension and misreading of its First Amendment precedent.

The New Mexico Supreme Court transformed this Court's decision in *Rumsfeld* from a ruling addressing Congress's power over military affairs—where "judicial deference is at its apogee," *Rumsfeld*, 547 U.S. at 58-59 (alteration and quotation marks omitted)—into an unbridled license for government-compelled expression. *See* Pet.App.20a-22a at ¶¶29-31; Pet.App.31a-34a at ¶¶45-47. Through this unjustifiable expansion of *Rumsfeld*, the decision below threatens to curtail compelled-speech protection.

The law-school plaintiffs in *Rumsfeld* challenged a federal statute (known as the Solomon Amendment) that required the schools to provide military personnel with the same access to students as they provided to other recruiters. 547 U.S. at 51. Among other claims, the law schools asserted a compelled-speech violation. *See id.* at 61-65. Before analyzing and ultimately rejecting the compelled-speech claim, this Court emphasized the tremendous judicial "deference given to Congress in the area of military affairs." *Id.* at 58. But the court below failed to view *Rumsfeld*'s subsequent compelled-speech analysis through that deferential prism.

Notably, *Rumsfeld* distinguished *Hurley* and, in doing so, explained why *Hurley* (not *Rumsfeld*) controls this case. The *Rumsfeld* Court acknowledged that the public-accommodations statute in *Hurley* affected the parade organization's speech because the organization expressed messages through its parade. *Id.* at 63-64. In contrast, hosting military recruiters "does not affect the law schools' speech," *Rumsfeld* reasoned, "because the schools are not speaking when they host interviews and recruiting receptions." *Id.* at 64. Here, as in *Hurley*, the public-accommodations statute affects Ms. Huguenin's speech because she, like the parade organization presenting its parade (and unlike the law schools hosting recruiters), speaks when she creates event photographs and picture-books. More specifically, the public-accommodations statute affects Ms. Huguenin's speech directly—by requiring her to create expression conveying unwanted messages. And it affects her speech indirectly—by

chilling her chosen expression (because if she continues that expression, she must communicate unwanted messages).

Overlooking *Rumsfeld*'s discussion of *Hurley*, the New Mexico Supreme Court focused instead on the Solomon Amendment's "incidental" effect of requiring law schools to "send e-mails or post notices" containing logistical information about recruiters' visits. *Id.* at 61-62; Pet.App.20a-22a at ¶¶29-31. Transmitting innocuous meeting notices is hardly equivalent to Ms. Huguenin's spending weeks laboring to create speech antithetical to her religious convictions. Instead, Ms. Huguenin's situation is more akin to the successful litigants in *Wooley*, 430 U.S. at 713-17, and *Barnette*, 319 U.S. at 641-42. She, like them, disagrees with the substantive messages that the law requires her to express, and forcing her to communicate those messages would violate her deeply held religious beliefs.

The court below further misused *Rumsfeld* by discounting Petitioner's compelled-speech claim because the Huguenins may "express their religious or political beliefs" through "a disclaimer on their website." Pet.App.5a at ¶3; Pet.App.34a at ¶47.[5] But where, as here (and unlike in *Rumsfeld*), the

[5] Many public-accommodations laws prohibit a business owner from "publish[ing]" or "post[ing]" his beliefs if those beliefs arguably "indicate[ ]" that "an individual's patronage or presence . . . is unwelcome." Colo. Rev. Stat. § 24-34-601(2); *see, e.g.*, 775 Ill. Comp. Stat. 5/5-102 (similar); Me. Rev. Stat. tit. 5, § 4592(2) (similar); N.J. Stat. Ann. § 10:5-12(f)(1) (similar); N.Y. Exec. Law § 296(2)(a) (similar); Wis. Stat. § 106.52(3)(a)(3) (similar).

government compels a speaker to express *messages with which he substantively disagrees*, the speaker's freedom to otherwise express his views does not undo the compelled-speech violation. "[I]f the government were freely able to compel speakers to propound . . . messages with which they disagree, protection of a speaker's freedom would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Hurley*, 515 U.S. at 575-76 (quotation marks and alterations omitted).

Furthermore, because Ms. Huguenin conveys the compelled messages through her photographs and picture-books, the only potentially effective disclaimer would need to be permanently affixed to each image (not simply posted on Petitioner's website). But such a disclaimer would destroy the value of the images and books because no customer wants disclaimers emblazoned on the photographs they purchase. Therefore, as in *Hurley*, an effective disclaimer is not "practicab[le]" and cannot absolve the compelled-speech violation. 515 U.S. at 576-77.

Rather than acknowledging that *Rumsfeld* is inapposite and respecting the limited nature of that decision, the court below seized on *Rumsfeld*'s observation that sending the logistical emails and notices in that case was "only 'compelled' if, and to the extent, the school provides such speech for other recruiters." *Rumsfeld*, 547 U.S. at 62; Pet.App.21a-22a at ¶¶30-31. Relying on that passing remark, the court below dismissed Petitioner's compelled-speech claim because Ms. Huguenin "is compelled to" create

expression conveying messages about marriage that conflict with her beliefs "only to the extent" that she first creates expression communicating messages about marriage that are consistent with her beliefs. Pet.App.22a at ¶31.

Extending this reasoning outside of *Rumsfeld*'s context of heightened judicial deference endorses the disconcerting idea that the government may compel speech so long as the speaker can avoid the compulsion *by forgoing other constitutionally protected expression*. Inherent within that analysis is approval of government-coerced self-censorship. *Rumsfeld* surely did not intend a wholesale endorsement of that concept, which conflicts with much of this Court's compelled-speech precedent. *See, e.g.*, *Tornillo*, 418 U.S. at 256-57 (noting that one *unconstitutional effect* of compelled speech is pressure on the speaker to "blunt[ ]" or "reduce[ ]" its other expression). In fact, if that analysis were proper, *Hurley* would have been decided differently, for the parade organization could have avoided the compelled expression by cancelling the event.

The decision below nevertheless embraces this troublesome notion as a normative principle of compelled-speech jurisprudence. That reasoning threatens to eviscerate much compelled-speech protection, particularly in (but by no means limited to) the public-accommodations context. After all, every speech-creating public accommodation (and most speakers, for that matter) can avoid compelled speech if they simply stop speaking. This Court

should thus promptly correct this dangerous treatment of *Rumsfeld*.

IV. This Court Regularly Reviews Important First Amendment Questions That Do Not Present a Circuit Split or a Conflict between State Appellate or Federal Circuit Decisions.

This Court grants certiorari, as it should here, when the petition raises "an important question" of First Amendment law and a state court decided that "question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Thus, when a state court wrongly decides a significant First Amendment issue, the presence of a circuit split or a conflict between state appellate or federal circuit decisions is not critical to a certiorari grant.

Indeed, this Court's landmark compelled-speech cases have often reviewed decisions that did not implicate a circuit split or otherwise conflict with another state appellate or federal circuit decision. *Hurley*, for example, did not present any such split or conflict. *See* Pet. for Writ of Cert., *Hurley*, 515 U.S. 557 (1995) (No. 94-749), 1994 WL 16875884; *Hurley*, 515 U.S. at 566. Nor did the petition for a writ of certiorari filed in *Rumsfeld*. *See* Pet. for Writ of Cert., *Rumsfeld*, 547 U.S. 47 (2006) (No. 04-1152), 2005 WL 482352; *Rumsfeld*, 547 U.S. at 55.[6]

---

[6] A number of this Court's compelled-speech cases have arisen under this Court's direct appellate jurisdiction (rather than this Court's certiorari jurisdiction), but even those cases did not present a circuit split or conflict between state appellate or

Moreover, in past cases where public-accommodations laws have infringed First Amendment liberties, this Court has granted certiorari even without a conflict between the decision under review and other state appellate or federal circuit decisions. *See Hurley*, 515 U.S. at 566; *Dale*, 530 U.S. at 647.

The absence of a conflict between the New Mexico Supreme Court's decision and another state appellate or federal circuit decision thus poses no barrier to this Court's review. The national importance of the constitutional question presented, the direct conflict between the decision below and this Court's precedent, and the New Mexico Supreme Court's dangerous treatment of this Court's constitutional case law more than suffice to demonstrate the need for this Court to issue the writ.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant review.

---

federal circuit decisions. *See, e.g.*, *Tornillo*, 418 U.S. at 246; *Wooley*, 430 U.S. at 709; *Pac. Gas*, 475 U.S. at 7 (plurality opinion); *Riley*, 487 U.S. at 787.

Respectfully submitted,

JORDAN W. LORENCE
Counsel of Record
DAVID AUSTIN R. NIMOCKS
ALLIANCE DEFENDING FREEDOM
801 G St. NW, Suite 509
Washington, D.C. 20001
(202) 393-8690
jlorence@alliancedefendingfreedom.org

DAVID A. CORTMAN
BYRON J. BABIONE
JAMES A. CAMPBELL
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

EMIL J. KIEHNE
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
Post Office Box 2168
Albuquerque, NM 87103
(505) 848-1800

PAUL BECHT
BECHT LAW OFFICE
4710 Montgomery Blvd. NE, Suite 103
Albuquerque, NM 87109
(505) 883-7311

November 8, 2013