Public Accommodation law and the First Amendment: HELP

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Dedication

This thesis is dedicated to George, Alex, Casey, Dillon, Sarah, Brett, Kristie, Akira, Joy, Brittany, Anna, Andrew, Elizabeth, Paul, Sandra, Irene, Cynthia, Yolanda, Joseph, Morgan, Suzie and Rachel. I'd have lost my mind completely without you.

Abstract

This thesis covers the conflict between public accommodation law and the First Amendment. It uses Elane Photography v. Willock as a case study to explore this conflict further. It expands on current literature by suggesting that not only religious businesses should be offered First Amendment protection, but that there is potentially an independent solution to the problem.

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I. INTRODUCTION

"Your company does not offer your photography services to same-sex couples?"[1]

"Yes, you are correct in saying we do not photograph same-sex weddings, but again, thanks for checking out our site!"[2]

This exchange took place over email, as a potential customer inquired with Elaine Huguenin, co-owner of Elane Photography LLC, about the possibility of her company's providing photography services at a same-sex ceremony.[3] Following this communication, Vanessa Willock, a lesbian in the above same-sex couple, instigated a discrimination complaint against Elane Photography LLC.[4] The matter was first heard in front of the Human Rights Commission of New Mexico in April of 2008.[5] The outcome was that Huguenin was found to have discriminated against Willock on the basis of her sexual orientation. The hearing at the Human Rights Commission prompted the case's movement through the New Mexico state court system, for the next six years, until finally the case was denied certiorari at the Unites States Supreme Court, in 2014.[6]

The case's final resting place was with the New Mexico Supreme Court, which upheld the Human Rights Commission's decision. The ruling of discrimination based on sexual

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[1] Willock v. Elane Photography, Inc., HRD No. 06-12-20-0685, slip op. at 5 (N.M. Human Rights Comm'n Apr. 9, 2008), *available at* http:// volokh.com/files/willockopinion.pdf.

[2] *Id.* at 5.

[3] *Id*. at 5.

[4] *Id.* at 1.

[5] *Id.* at 1.

[6] Elane Photography, LLC v. Willock, 134 S.Ct. 1787 (2014).

orientation was confirmed, and Huguenin was ordered to pay damages of $6, 637.94 in attorney's fees to Vanessa Willock.[7] The New Mexico Supreme Court's ruling presents an unwavering civil and social rights conflict, wherein the First Amendment, Public Accommodation laws, religious freedom, and discrimination conflict, theoretically, practically, and legally.[8]

Elane Photography LLC v. Willock (Elane) occurred in a time of national turbulence and movement surrounding gay rights, same-sex marriage, and religious accommodation.[9] In this way, *Elane* was uniquely positioned in terms of the national discussion, but also in terms of the concurrent United States Supreme Court session.[10] Its unique position and controlling outcome with respect to future cases in New Mexico make *Elane* a compelling lens through which to study Public Accommodation laws in New Mexico and the United States.

A. Inquiry

This thesis is examining the answer to four research questions and provides a potential solution to the unique discrimination that is *Elane.* The four questions answered are as follows. First, in *Elane* was there a loss of First Amendment rights? Second, was the New Mexico Supreme Court decision allowing same-sex marriage influential in the outcome of *Elane?* Third, is the United State Supreme Court decision in *Burwell v.*

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[7] *Elane*, No. 06-12-20-0685, slip op. at 20.

[8] Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law,* 66 STAN. L. REV. 1205, 1233 (2014).

[9] *See* Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 160 (2014).

[10] *Id.* at 155.

Hobby Lobby Stores, Inc. ("Hobby Lobby") a gateway to reaffirm religious freedom in business owners?[11] Fourth, can reform of Public Accommodation laws reinvigorate First Amendment rights in LLC owners? In answering these questions as a whole, the solution is not per se legal, in that it adjust current laws, but is a social suggestion that could impact society's interpretation of our freedoms. The solution is to create a separate independent certification agency in a small town that instead of brandishing those businesses that do discriminate, certifies those that don't with a visible marking to consumers. These questions are answered and the solution is developed and discussed in full.

Additionally as a benefit to the reader, this thesis has collected all fifty states' Public Accommodation laws for the benefit of the reader, in Appendix A. There has not been a collection of all fifty Public Accommodation laws in one place since 2005.[12] The author's categorization of the laws, discussed later, makes it easier to understand the suggested "narrowing" of their application, as discussed in the presentation of results in the final section of this thesis. By understanding the United States' collection of Public Accommodation laws, one can more easily understand the controlling position of *Elane* with respect to the other states' interpretations of similar conflicts within their own jurisdictions.

B. Current Impact and History

[11] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[12] AMERICAN BAR ASSOCIATION, MONOGRAPH ON STATE DISABILITY DISCRIMINATION LAWS app. 3 (2005).

Though *Elane* was heard in the New Mexico Supreme Court in 2013, its impact has resonated with business owners in other states. Among those making the news are bakers, a florist, and an auto mechanic, all of whom have found themselves in similar quandaries, where their religious beliefs prevent them from serving lesbian, gay, bisexual, transgender, or queer ("LGBTQ") customers.[13] The quandary exists because the businesses they own in their respective states—Oregon, Washington, and Michigan—are classified as Public Accommodations and therefore must serve LGBTQ customers. The conflict *Elane* represents is thus continuing. This thesis will explore *Elane* specifically and offer a discussion of a possible solution.

Elane can be well understood by following its passage through the courts, where multiple bodies of law were drawn from; these bodies of law will be consecutively discussed in this thesis. The First Amendment "prohibits the making of any law respecting an establishment of religion, impeding the free exercise of religion, abridging the freedom of speech…."[14] For our purposes, it is particularly important to understand the portion of the Amendment that reads *the making of any law*. This phrase refers to Congress. But in the event that a private business owner follows the law and registers her business, and the business happens to be classified as a Public Accommodation in her

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[13] Maxine Bernstein, *Lesbian Couple Refused Wedding Cake Files State Discrimination Complaint*, OREGONLIVE.COM, Aug. 14, 2013, http://www.oregonlive.com/gresham/index.ssf/2013/08/lesbian_couple_refused_wedding.html (last visited Apr. 30, 2015); OR. REV. STAT. ANN. § 659A.400 (West); *Charlie Craig and David Mullins v. Masterpiece Cake Shop*, AMERICAN CIVIL LIBERTIES UNION, Feb. 13, 2015, https://www.aclu.org/lgbt-rights/charlie-craig-and-david-mullins-v-masterpiece-cakeshop (last visited April 30, 2015); COLO. REV. STAT. ANN. § 24-34-601 (West); *Michigan Auto Repair Shop Says Yes to Gun Owners, No to Homosexuals*, CNN.COM, Apr. 17, 2015, http://www.cnn.com/2015/04/17/us/michigan-business-bans-openly-gay-people/ (last visited Apr. 30, 2015); MICH. COMP. LAWS ANN. § 37.2301 (West).

[14] U.S. CONST. amend. I.

state, there is a chance that her free exercise of religion may be constrained or, similarly, that her speech may be compelled.[15] The jurisprudence upholding the First Amendment, however, dictates that Congress cannot make laws that compel or forbid speech.[16] Through the same jurisprudence, it has been generally established what constitutes speech.[17] How it is possible for photos to be categorized as speech will be clarified in the thesis, as well as precisely how this First Amendment jurisprudence developed.

The Public Accommodation laws of all states are rooted in the history of the United States' Civil Rights Movement.[18] These laws were created with the intention of abolishing segregation in places of public accommodation.[19] Their creation was plagued by disagreement and controversy, which persist today.[20] Each state has a varied interpretation of the Civil Rights Act of 1964; each law is listed in Appendix A.[21] The premise of these laws, designed to create acceptance and equality, conflicts with a business owner's ability to freely express herself.[22] This conflict was not simply

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[15] Hans Bader, *New Mexico Court: Go Into Business, Lose your First Amendment Rights*, COMPETITIVE ENTERPRISE INST. BLOG (Aug. 23, 2015 2:48 PM), https://cei.org/blog/new-mexico-court-go-business-lose-your-first-amendment-rights/ (last visited Jan. 5, 2015).

[16] *See* Wooley v. Maynard, 430 U.S. 705 (1977); *see also* Elane Photography, LLC v. Willock, 284 P.3d 428 (N.M. Ct. App. 2012) ("[*Wooley*] makes it clear that the right to speak freely includes the right to refrain from speaking.").

[17] *See* Wooley v. Maynard, 430 U.S. 705 (1977).

[18] Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1349 (1996).

[19] James M. Gottry, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961, 966 (2011).

[20] Bagenstos, *supra* note 8, at 1207.

[21] App. A; states are listed alphabetically. Some states do not have Public Accommodation laws.

[22] Elane Photography, LLC v. Willock, 284 P.3d 428 (N.M. Ct. App. 2012).

overlooked in 1964, as demonstrated by *Heart of Atlanta v. United States*, but the creators of the Civil Rights Act knew there was no perfect solution and had to make a compromise.[23]

This thesis will briefly explain the history of these laws and will then discuss how they are applied today. There is the potential that limitations to state public accommodation could help address the conflict between free expression and the body of Public Accommodation law.

C. Conflict and Resolution

The conflict that is created between Public Accommodation law and the First Amendment has been addressed in legal scholarship in the past, and it is being revisited now because of the *Elane* case.[24] The development of this conflict is explained in the State Action section of this thesis. The arguments supporting both sides of the outcome in *Elane* are very strong.[25] Some scholars, and the State of New Mexico, maintain that the Public Accommodation laws prevail over the First Amendment, and thus a private business owner must accommodate all customers (of protected classes).[26] Other scholars argue that the Court got it wrong and that the protection of the First Amendment and forms of expression must outweigh our current protections of certain classes granted via

[23] *See* sources cited *infra* note 214.

[24] Bagenstos, *supra* note 8, at 1207.

[25] Bagenstos, *supra* note 8 at 1207, 1208.

[26] Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013), c*ert. denied* 134 S.Ct. 1781 (2014).

Public Accommodation law.[27] This thesis will not attempt to solve the underlying civil rights conflict, but it will explore the acute setting of this argument, as specific to *Elane.* The thesis will also address libertarian, and corporate theory demonstrated in the outcome of *Burwell v. Hobby Lobby Stores, Inc.*[28] ("Hobby Lobby") imploring an in-depth exploration of how its outcome can affect the current and future of state Public Accommodation laws.

Hobby Lobby is a United States Supreme Court case that was decided after *Elane*,[29] and it represents a vast step forward for the accommodation of religious rights.[30] *Hobby Lobby* is not a case about Public Accommodation laws. It represents a conflict between two federal acts, the Affordable Care Act and the Religious Freedom Restoration Act.[31] What this conflict demonstrates is a potential way forward for providing First Amendment rights to business owners while strengthening religious freedoms and theories.[32] The background and decision of *Hobby Lobby* will be discussed as one possible way of extending freedoms to individual business owners in the future.

II. METHODOLOGY

[27] Motion for Leave to File Brief of Amici Curiae: The Cato Institute, Prof. Dale Carpenter, and Prof. Eugene Volokh, Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (No. 33-687), 2012 WL 5990629 (N.M.).

[28] *See*, *supra* note 11.

[29] *See* Cato Institute Motion for Leave to File Brief of Amici Curiae, *supra* note 27.

[30] Horwitz, *supra* note 9, at 154.

[31] *See* Horwitz, *supra* note 9.

[32] *See* Bagenstos, *supra* note 8.

The motivation for this thesis began in 2013. I read a headline, "Go into business, lose your First Amendment rights".[33] I read this article and began using Westlaw to research *Elane* in its entirety. Similarly, I created news and case alerts for *Elane* and since 2013 have been adding to my legal research.

The research prompted me to realize that though there was a lot of speculation and theoretical projection, there was substance missing. I wanted to speak with the players involved.

My first attempt at an interview was with Dale Carpenter at the University's Law School, as an amicus brief writer for the case, who led me to Ilya Shapiro, who had more hands on writing of the amicus brief. While it was easy to interview persons who suggest the New Mexico Court ruled incorrectly it was not easy to interview those who felt the ruling was proper.

In drafting my interview questions for my interview participants, I wanted to ask similar questions to both "sides" of the argument, and get a greater understanding for the moment in time surrounding the actual case, arguments, and emotional setting in New Mexico. I had five interviews tentatively scheduled, Ilya Shapiro, Jordan Lorence, Tobias Wolff, Sarah Steadman, and Julie Sakura. I also reached out to the ACLU and spoke with Micah McCoy who had written about *Elane* and was uninterested in contributing. With these interviews scheduled I began my in-depth questioning of the same 10 questions, slated for a thirty to sixty minute interview.

Through many trials and tribulations, only two participants actually spoke with me. Sarah Steadman and Julie Sakura had to politely decline because Vanessa Willock

[33] *See* Bader, *supra* note 15.

thought the information was too sensitive to share. Tobias Wolff was working a rigorous academic schedule and couldn't meet the time frame. Though my questions and solution were not posed or designed as one-sided, it was the hope of this author that both sides of the argument could have contributed to the legal and social research included.

III. OVERVIEW

A. Roadmap

Part I of this thesis is the summary of *Elane*'s progress through the court system, told through interviews, fact gathering, and legal research. Part II begins with a literature review addressing the conflict between the First Amendment and Public Accommodation laws. The conflict will be explained through an overview of the development of First Amendment jurisprudence, and theoretical applications of individual autonomy to *Elane* will be given in order to demonstrate the case's significance. The Civil Rights Act and Public Accommodation law jurisprudence will also be discussed, and social contract theory will be discussed as a background to the creation of the Civil Rights Act. The literature review will also discuss relevant scholarly works on the conflict between these bodies of law, specifically in New Mexico. The thesis then turns to religious freedom and how the *Hobby Lobby* decision impacts *Elane's* future societal impact.

Part III of this thesis builds on Part II by establishing research questions for discussion and analysis. Part IV of the thesis is a presentation of results from the interviews and the literature review. Part V concludes by demonstrating the importance of this research to other states' interpretations of similar conflicts and offers potential avenues for future research. Before the thesis commences, an introduction to the interviewees is offered.

1. Interviewees Introduction

a. Jordan Lorence

Jordan Lorence ("Lorence") represented Huguenin in his position as senior counsel for Alliance Defending Freedom.[34] Lorence gives a first-hand account of receiving the case, his predictions at the time, and his opinion of the case today. He explains his strategies and provides emotional reflections on his courtroom appearances. His perspective is important to this thesis because of his integral role and his first person perspective within *Elane.*

b. Ilya Shapiro

Ilya Shapiro ("Shapiro") wrote in part on an amicus brief for *Elane.*[35] He is a senior fellow at the Cato Institute, a libertarian think tank that functions as amici on many Supreme Court cases. Shapiro focuses on the First Amendment and in his responses offers content applicable to the future of litigation surrounding individual Americans' freedoms. His interview provides a broader picture of the case, as he comes from a position of dealing with multiple similar cases. Because his time is valuable, his role in this case and the considerable contributions he made to the amicus brief suggest the importance he saw in *Elane*.

B. Interview Jordan Lawrence, Introduction to *Elane*

In 2009, Jordan Lorence was contacted by Huguenin, who was baffled by the discrimination charges that were being brought against her.[36] Huguenin's situation

[34] Telephone Interview with Jordan Lorence, Senior Counsel, Alliance Defending Freedom (Feb. 26, 2015).

[35] Telephone Interview with Ilya Shapiro, Senior Fellow, Cato Institute (Feb. 27, 2015).

represented a case that Lorence knew would be coming.[37] With the ever growing movement for LGBTQ rights sweeping the United States, Lorence had forecasted in previous meetings at the Alliance that they would start seeing cases of this nature in the future.[38] Lorence predicted situations worthy of any law school classroom, whereby a business owner with personal convictions and beliefs would be compelled to serve someone they wished to refuse.[39] For example, Lorence imagined a hypothetical situation where a tattoo artist is asked to create a swastika for a customer and is compelled to do so by Public Accommodation laws.[40] Though this scenario leaves out the legal necessity of the potential customer belonging to a protected class, such as LGBTQ persons, the same principle applies: A business owner is compelled by the government to express and communicate something she doesn't believe in. For Alliance Defending Freedom, *Elane* represented the concretization of Lorence's hypotheticals.[41]

Ms. Huguenin's case arrived at the Alliance as any other case does. She reported that she was being charged with discrimination.[42] Like many other civilians, she didn't understand the legal intricacies of her case.[43] She didn't understand how it was possible

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[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

for her to be charged with discrimination when, not only was same-sex marriage against her personal beliefs, but the State of New Mexico itself didn't recognize same-sex unions as legally valid.[44] The Alliance contacted Lorence immediately. The controversy he had predicted had arrived. A Christian photographer had declined to photograph a same-sex ceremony and was being charged with discrimination.[45]

Lorence formulated a solid defense based around First Amendment rights and compelled speech. He felt assured they had strong arguments for Ms. Huguenin's case against Ms. Willock. But perhaps he should not have been so assuming. As the case went through the courts, he found that his arguments were continually denied, and he was treated poorly and felt unwelcomed by the bench. He described the atmosphere as tense and confusing and didn't understand why his arguments weren't prevailing.

As time passed, with the suit and the appeals, Huguenin was made to look like a villain in the New Mexican press. Overwhelmingly, the public seemed to feel that Vanessa Willock did have the right to be served by Elane Photography. Meanwhile, Huguenin was offered no public condolences to silence her expression that differed from the masses'.

Lorence reflected on a similar situation that was widely covered by the New Mexican popular media during the same time that Ms. Huguenin was receiving bad press. Antonio Darden was a gay hairdresser who had for years been styling and coloring New Mexican Governor Susana Martinez's hair.[46] After Martinez commented publicly that she, like

[44] *Id.*.

[45] *Id.*

Chris Christie in New Jersey, would vote against a bill legalizing gay marriage in New Mexico, Darden refused to continue being her hairdresser. Darden gave interviews and made social media appearances in which he expressed his view and opinions of those who were opposed to gay marriage.[47] He encouraged gay citizens and supporters of gay marriage to continue his precedent and not allow persons who didn't support the cause to use the services they provided.[48] Lorence asked, "How is this not discriminatory or viewed in a negative light, like Ms. Huguenin's situation?" Darden is quoted as saying, "I do believe we should be able to refuse the service. If our equal rights are being violated, I think I should refuse the service."[49]

While Lorence did not claim it was the sole reason for the decision, he was convinced that the national movement for same-sex rights impacted the outcome of the case. In the same New Mexican Supreme Court term, New Mexico voted to legalize same-sex marriage.

Although these soft factors may have influenced the case, what it came down to legally was a battle in which the Constitution lost. Lorence stated that, in principle, the competing laws seek to achieve a harmonious goal. States and the federal government put Public Accommodation laws in place for a true and good intention. The author of this thesis as well as many commenters on the case agree that hoping for a different legal

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[46] Sam Stein, *Susana Martinez Hairstylist Troubles Prompted by Chris Christie Gay Marriage Veto*, HUFFINGTON POST, Feb. 24, 2012, http://www.huffingtonpost.com/2012/02/24/susana-martinez-hairstylist-antonio-darden-chris-christie-gay-marriage_n_1300040.html.

[47] *Id.*

[48] *Id.*

[49] Telephone Interview with Ilya Shapiro, Senior Fellow, Cato Institute (Feb. 27, 2015).

outcome is not the same as making discrimination a goal or even desirable. But the "goals versus the means" of the actual application of Public Accommodation laws becomes confounding.

Lorence's interview adds to the case study methodology and overall writing about this case. His contribution also legitimizes points of the conclusion and answering questions in this thesis. His conclusion generally about *Elane* is the struggle he calls a "troubling absolutism". There isn't an answer to all of the conflicts. But the answer certainly doesn't lie in compelling a person to speak against their convictions.

C. Facts of *Elane*

In late 2006, Vanessa Willock emailed Elane Photography requesting services to photograph a same-sex commitment ceremony.[50] The business of Elane Photography involved photographing the significant life events of its customers, events such as weddings, graduations, and celebrations.[51] Elane Photography was co-owned by Jonathan Huguenin and Elaine Huguenin.[52] The couple had been in business as a limited liability company in New Mexico since April 2006.[53] Elane Photography's business and contact information was advertised in multiple locations, including on their company

[50] Willock v. Elane Photography, Inc., HRD No. 06-12-20-0685, slip op. at 5 (N.M. Human Rights Comm'n Apr. 9, 2008), *available at* http://volokh.com/files/willockopinion.pdf.

[51] *Id.* at 2.

[52] *Id.*

[53] *Id.*

website and in the Yellow Pages, and customers generally contacted Huguenin by email to request services.[54] Huguenin and her husband were followers of a Christian faith.[55]

In the opening of this thesis, Huguenin's response to Vanessa Willock was quoted further: "As a company, we photograph traditional weddings, engagements, seniors, and several other things such as political photographs and singer's portfolios."[56] This response prompted Vanessa Willock to believe she had been declined services and thus discriminated against because of her sexual orientation.[57]

Vanessa Willock, in an effort to confirm her suspicions, responded with an email asking if Elane Photography did not offer their services to same-sex couples.[58] Huguenin's response—"Yes, you are correct in saying we do not photograph same-sex weddings, but again, thanks for checking out our site!"—led to the stirring controversy discussed in this thesis.[59]

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[54] *Id.*

[55] Elane Photography, LLC v. Willock, 284 P.3d at 432 (N.M. Ct. App. 2012).

[56] *Elane*, No. 06-12-20-0685, slip op. at 5; Lorence interview, *supra* note 34. Huguenin saw and used no malice in this simple emailed response similar to other things her company was going to decide not to photograph she sat back and reflected and decided as an organization they would not photograph same-sex ceremonies. She also did not think this was a major issue because at that time, New Mexico did not legally recognize same-sex marriages as valid.

[57] Lorence interview, *supra* note 34. Lorence relates that Elaine shot photos of LGBTQ persons. Elaine had also declined to photograph other things against her religion in the past in her business. Specifically, her company made an artistic decision to not do any nude photos. Elane was asked by a New Mexico mother to take newborn photos where the mother and the baby were nude. Elane declined as she felt uncomfortable and did not see this as a message she wanted for the business.

[58] *Elane*, No. 06-12-20-0685, slip op. at 5.

[59] *Id.*

Vanessa Willock took one more step to confirm what she had suspected: that she had been discriminated against.[60] Her partner sent an email to Huguenin two months after Vanessa Willock's initial correspondence, requesting photography services for the same date and location but without describing the event as a same-sex. In an email response, Huguenin confirmed her availability and willingness to offer her services.[61]

These events led Vanessa Willock to file a discrimination complaint with the Human Rights Commission (HRC), the first organization involved in the processing of such a complaint in the State of New Mexico. After the result was returned in favor of Vanessa Willock, the complaint was turned into a legal case in which Elane Photography LLC was the plaintiff and Vanessa Willock the defendant.

Elane went on to the district court, the court of appeals, and finally the Supreme Court of New Mexico. Each court found in favor of Vanessa Willock. In the following sections, the progression of the case through these courts will be examined. The specific arguments made by these courts will be used in a later part of thesis, as the author makes an argument about the future of Public Accommodation laws. It is particularly important to note where the courts start to discard certain arguments made by Lorence and what arguments the court values and focuses on.[62]

1. *Elane's* movement through justice System

a. Human Rights Commission

[60] *Id.* at 7.

[61] *Id.*

[62] Lorence interview, *supra* note 34.

The HRC of New Mexico met to review the discrimination complaint in 2006.[63] The HRC decided in favor of Vanessa Willock on all three issues: The first issue was that Vanessa Willock was discriminated against for her sexual orientation, in violation of Section 28-1-7(F) of the New Mexico Human Rights Act (NMHRA).[64] The second issue was that Elane Photography, as a licensed business in New Mexico, was found to be a public accommodation; *public accommodation* is defined in Section 28-l-2(H) of the NMHRA as "any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private...."[65] The third issue was that Huguenin could not use her religious beliefs as a defense. The arguments made by the HRC for these conclusions are written below.

The HRC said that the United States Constitution, the New Mexico Constitution, and the New Mexico Religious Freedom Restoration Act (NMRFRA), take precedence over the NMHRA are therefore not reviewed by the HRC.[66] What the HRC meant is that deciding on the constitutionality of the NMHRA was outside of their authority, and therefore any claim of unconstitutionality would have to be heard in a court with jurisdiction over that particular issue. It is central to the argument of this thesis that

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[63] *Elane*, No. 06-12-20-0685, slip op. at 1.

[64] *Id.* at 13. Section 28-1-7(F) of the NMHRA describes it as an unlawful 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, provided that the physical or mental handicap is unrelated to a person's ability to acquire or rent and maintain particular real property or housing accommodation." (emphasis omitted) (quoting NMSA 1978, § 28-1-7(F)).

[65] *Id.* at 10.

[66] *Id.* at 18.

Constitutional issues must be discussed in order to find a fair ruling in such cases and to set correct future precedent. Additionally, it should be noted, Vanessa Willock did follow proper procedure in the State of New Mexico by first bringing the case to the HRC.[67] And the Constitutional issues that follow are the reason Huguenin becomes the plaintiff.

The HRC's decision was reviewed in the district court on cross motions from both parties, meaning both parties made new claims against each other.[68] Both parties wished to have summary judgment declared in their favor on the issues they presented in their motions. Summary judgment meant the court found no dispute of facts and rules on the issues of law without a trial. The details of the outcome of *Elane* in district court are below.

b. District Court

This district court ruled on the four following issues: The district court confirmed the HRC decision that Elane Photography was a public accommodation. It also confirmed the HRC decision that the discrimination was based on sexual orientation. Most importantly, it also ruled that the freedom of expression that is guaranteed to residents of New Mexico through the United States Constitution and the New Mexico Constitution was not violated.[69] And, finally, the court held that Elane Photography's freedom of

[67] NEW MEXICO DEPARTMENT OF WORKFORCE, FILING A COMPLAINT OF DISCRIMINATION, http://www.dws.state.nm.us/LaborRelations/HumanRights/FilingaComplaintofDiscrimination (last visited May 1, 2015).

[68] Memorandum Opinion and Order on Cross–Motions for Summary Judgment, Elane Photography, LLC v. Willock, (N.M. Dist. 2009) (No. CV-2008-06632), 2009 WL 8747805.

[69] *Id*. at ¶ 25 ("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

religion was superseded by statute, meaning their religious freedom did not equally counter New Mexico's statute in their Human Rights Act against discrimination.[70] The defendant, Vanessa Willock, prevailed on all issues. Below is a more detailed account of the reasoning.

Public Accommodation classification

Lorence tried to argue that a photography business is not a public accommodation based on the fact that it does not occupy a physical space and was not one of the five types of accommodations listed in NMSA § 49-8-5 (1955).[71] Lorence supported this argument by referencing *Human Rights Comm'n of N.M. v. Bd. Of Regents of Univ. of N.M. College of Nursing*, which listed hotels, other lodgings, restaurants, hospitals and clinics, places of entertainment, and common carriers as the original types of public accommodations and which the court previously had used as its precedent.[72] The court disagreed with this argument, saying that photography's being non-essential, comprising

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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. 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").

[70] *Id.* at ¶¶ 27, 36 ("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 . . . Plaintiff's religious beliefs, as a matter of law, do not over-ride New Mexico's compelling interest in combating discrimination").

[71] *Id.* at ¶ 7. The laws "[e]numerated 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, 624 P.2d 518, 520 (1981), the Court relied on the historical and traditional meanings of "public accommodation" (citation omitted).

[72] *Id.*

artistic discretion, and not having a physical location were not worthy arguments against its classification as a public accommodation.[73] The Huguenins' nonessential service argument was shown to be irrelevant based on a previous case in which a dancing school was considered a public accommodation.[74] Professional creativity and artistic discretion as arguments were not entertained by the court because this argument had no precedent at all.[75] And, with the advent of the internet and modern ways of doing business and commercial exchange, the physical location argument also did not hold weight for Lorence and Elane Photography.[76] Based on the evidence, the court found no genuine dispute of material fact, meaning summary judgment for Vanessa Willock was possible on this issue. The court found Elane Photography was a public accommodation, per the NMHRA.[77]

Discrimination based on sexual orientation

The court found Lorence's argument that Elane Photography could not photograph same-sex ceremonies for religious reasons was without merit.[78] The court found that

[73] *See id.*

[74] *Id.* at ¶ 8. The court references Crawford v. Robert L. Kent, Inc., 167 N.E.2d 620 (Mass. 1960), *In re* Johnson, 427 P.2d 968 (Wash. 1960), and Walston & Co., Inc. v. New York City Comm'n on Human Rights, 342 N.Y.S.2d 459 (N.Y. App. 1973) to support its finding that "it is immaterial that Plaintiff does not provide a traditional 'essential service.'"

[75] *Id.* at ¶ 9.

[76] *Id.* at ¶ 10.

[77] *Id.* at ¶ 41.

[78] *Id.* at ¶ 16 (responding to Plaintiff's claim 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").

there was explicit unwritten company policy that excluded providing service to same-sex couples, and it determined that this was direct evidence of discrimination.[79]

Freedom of expression

The court said the nondiscrimination laws that were in play did not violate the First or Fourteenth Amendments. The court used arguments from previous Supreme Court cases, described later in this thesis, to do so, conceptualizing the discrimination as action not speech[80]: It was the *action* of discrimination, not the expression of speech, the laws addressed. Thus, although the court said the New Mexico State Constitution and the U.S. Constitution both protected freedom of expression from coercion by the state, it also ruled against Huguenin on this issue. The message or speech created by photography is not the *photographer*'s message, but rather belongs to the customer. The only thing a photographer has to do is take the photo.

The court was so sure of their position on this distinction of action versus expression that they used previous jurisprudence wherein photographs were declared speech and

[79] *Id*. ("Plaintiff states further that the 'Company's policy [unwritten] allows Huguenin to photograph the wedding of a 'homosexual' who marries a person of the opposite sex[.]' 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.' 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") (citations omitted).

[80] *Id*. at 9 (citing Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 572 (1995); Hishon v. King & Spalding, 467 U.S. 69 (1984); Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1, 20–21 (1986); Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006)).

entitled First Amendment protection.[81] They claimed that this declaration was "taken out of context."[82] The court said Elane Photography did not have a message of its own that could possibly be declared speech, thus there was nothing for the government to compel.[83] The court declared Elane Photography was a conduit to convey the messages of its clients on particular "well spent" days.[84] "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."[85]

Freedom of Religion

The fourth issue discussed in the case was the plaintiff's freedom of religion.[86] The court said that because Elane Photography was not being forced to participate in the ceremony, but rather to "merely photograph" it, that their rights were not being violated.[87] The court used a case out of Alaska where a landlord with religious beliefs did not want to rent apartments to unmarried couples.[88] Describing the facts in *Elane* as analogous to the Alaska case, the court held that the "[p]laintiff's religious beliefs as a

[81] *Id.* at ¶ 19 (citing Kaplan v. California, 413 U.S. 115, 119 (1973) and Bery v. City of New York, 97 F.3d 689, 696 (2nd Cir. 1996) ("Because such artistic expressions 'communicate some idea or concept to those who view [them], they 'are entitled to full First Amendment protection'" (quoting *Bery*))).

[82] *Id.* at ¶ 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").

[83] *Id.* at ¶ 25.

[84] *Id.*

[85] *Id.*

[86] *Id.* at ¶ 26.

[87] *Id.* at ¶ 34.

[88] *Id.* at ¶ 35 (citing Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994)).

matter of law, do not over-ride New Mexico's compelling interest in combating discrimination."[89]

Lorence used multiple arguments in this section of the case. Included in his arguments was the concept of "hybrid rights."[90] This concept is only found in dicta of cases, not the actual ruling made by a court, only the discussion portion which is not controlling, and is not upheld by the Supreme Court. Lorence's final argument was to say the HRC must demonstrate a compelling state interest in the NMHRA to counter-balance the burden it had placed on Huguenin.[91] Lorence described their reply against this argument as "willful avoidance to acknowledge what is going on."[92] The "Free Exercise Inquiry" that Lorence was seeking ended with the court saying the following:

> 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.[93]

Additionally the court found that the New Mexico Religious Freedom Restoration Act (NMRFRA) did not apply because a photography company is not a "person."[94] This finding is wildly relevant when considering the final outcome of *Hobby Lobby*.

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[89] *Id.* at ¶ 36.

[90] *Id.* at ¶¶ 28–30.

[91] *Id.* at ¶ 32.

[92] Lorence interview, s*upra* note 34.

[93] Memorandum Opinion, *Elane* (No. CV-2008-06632) at ¶ 34.

[94] *Id.* at ¶ 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").

c. Appeals Court

The case moved from the district court to the appeals court, where all previous arguments would be considered *de novo*, meaning the appeals court would look at all of the arguments and presented fact under their own jurisdiction and not base it off the facts found in the court below.[95] Using different case law than the district trial court, different analogies and hypotheticals, the court of appeals was still unsatisfied with Lorence's arguments.[96] The court of appeals, like the district court, ruled on each issue in favor of Willock.[97]

The court considered the continual determination of Elane Photography as a public accommodation to be correct as a matter of law.[98] What this decision demonstrated at the appeals court level was that the classification of a photography business as a Public Accommodation would going to stand. The issue for businesses in New Mexico and other states as discussed in this thesis is, however, is whether this *should* be the classification.

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[95] *Elane*, 284 P.3d at 433.

[96] *See id.*

[97] *See id.*

[98] *Id.* at 436 ("We conclude that Elane Photography is a public business and commercial enterprise. The NMHRA was meant to reflect modern commercial life and expand protection from discrimination to include most establishments that typically operate a business in public commerce. As a result, Elane Photography constitutes a public accommodation under the NMHRA definition and cannot discriminate against any class protected by the NMHRA"). This correctness as a matter of law, though discussed in this paper, is not the focus as is determining if the laws need to be changed or updated to reflect modern social thought.

The debate over Public Accommodation classifications had made an appearance in previous cases in New Mexico.[99] The legislative history of the Public Accommodation law in New Mexico has been described in depth in *Regents.*[100] In this example, a university was deemed not a Public Accommodation in New Mexico because the modifications of the statute from an exclusive list to a broad statute were to still include original intentions of federal Public Accommodation laws that covered essential public services.[101] The court in *Regents* made it known that its interpretation should be construed narrowly and was not to be applied in future situations not described.[102] The Supreme Court in *Elane* therefore did not have to follow *Regents*' interpretation and could have evaluated the statute differently suggesting the broad language was used on purpose by the legislature to cover services like that of Elane Photography and the legislature "ha[s] not recognized a special exception for nonessential, artistic or discretionary businesses."[103] This classification was considered final and "over broad" in the eyes of Shapiro. The case moved to the Supreme Court of New Mexico.[104] The classification as a public accommodation was largely what spelled disaster for Elane

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[99] Human Rights Comm'n of N.M. v. Board of Regents of Univ. of N.M., 624 P.2d 518, 519–20 (1981).

[100] *Id.* at 520. ("The previous New Mexico statute which prohibited discrimination in places of public accommodation did not include universities within its coverage. We do not feel that the legislature, by including a general, inclusive clause in the Human Rights Act, intended to have all establishments that were historically excluded, automatically included as public accommodations subject to the Human Rights Act") (citation omitted).

[101] *Id*.

[102] *Id*.

[103] *Elane*, 284 P.3d at 436.

[104] Shapiro interview, *supra* note 35.

Photography and is also where interpreting the *Hobby Lobby* decision can lead to an understanding of how to modify current Public Accommodation laws in order to avoid awkward rulings like this one.

The appeals court also made conclusions for discrimination based on sexual orientation, freedom of expression, freedom of religious, and the constitutionality of the NMHRA.[105] In Lorence's opinion, none of his arguments was given adequate consideration, and he petitioned for certiorari in the New Mexico Supreme Court. Certiorari was granted, and Lorence continued defending *Elane* in front of what he described as "five, barely civil, supreme court justices."[106]

d. Supreme Court of New Mexico

In the New Mexico Supreme Court, the case was heard on only three issues.[107] The argument that Elane Photography was not a public accommodation had been dropped by Lorence. First, the court looked at whether Elane Photography had violated the NMHRA by not photographing Willock's ceremony.[108] Second, it decided if applying the NMHRA in this way violated free speech or the free exercise clause of the First Amendment.[109] Third, the court determined if the NMHRA conflicted with the

[105] *Elane*, 284 P.3d at 445.

[106] Lorence interview, *supra* note 34; *Elane*, 284 P.3d 445, *writ granted* 296 P.3d 491 (N.M. Aug. 16, 2012) (No. 33-687).

[107] Elane Photography, LLC v. Willock, 309 P.3d at 58, 59.

[108] *Id.* at 59.

[109] *Id.*

NMRFRA.[110] The court's conclusions, which favored Vanessa Willock, are analyzed below.

Discrimination based on sexual orientation

The court concluded that, "a commercial photography business that offers its services to the public, thereby increasing its visibility to potential clients, is subject to the antidiscrimination provision of the NMHRA and must serve same-sex couples on the same basis that is serves opposite sex couples."[111] Because the NMHRA protects sexual orientation, the court denied Lorence's argument that Elane Photography would have photographed a gay person, just not a same-sex ceremony. The court interpreted the NMHRA broadly, saying that discrimination made directly or indirectly is still discrimination.[112] The court relied on *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, where the Supreme Court of the United States held that targeting gay conduct versus a gay person was not a distinction that could protect against discrimination.[113] It thus concluded that Elane Photography had violated the NMHRA.[114]

Free speech guarantees

[110] *Id.*

[111] *Id.* at 58.

[112] *Id.* at 61.

[113] *Id.* at 62; Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 671 (2010).

[114] *Elane*, 309 P.3d at 75. ("The exemptions in the NMHRA are ordinary exemptions for religious organizations and for certain limited employment and real-estate transactions. The exemptions do not prefer secular conduct over religious conduct or evince any hostility toward religion. We hold that the NMHRA is a neutral law of general applicability, and as such it does not offend the Free Exercise Clause of the First Amendment").

Secondly, the court concluded that "the NMHRA does not violate free speech guarantees because the NMHRA does not compel Elane Photography to either speak a government-mandated message or to publish the speech of another."[115] Two Supreme Court cases reigned throughout the discussion: *Wooley* and *Hurley*.[116] Lorence used reasoning from *Hurley* to suggest that speech had been compelled, and the court used *Wooley* and *Hurley* to contradict Lorence's argument. The court interpreted *Wooley* and *Hurley* to be very narrowly tailored to "speaking the government's message"[117] and said the "NMHRA act does not require Elane Photography to recite or display any message." The court emphasized this by saying "[i]t does not even require Elane Photography to take photographs."[118] The court declared that if the Huguenins wanted to have a photography business, they simply cannot discriminate against potential clients based on their sexual orientation.[119] It goes without saying that operating a photography business without taking photos is blatantly counterintuitive.

Additionally because photography is the line of business Huguenin is in; and she wishes to collect revenue, she, like Annie Lebowitz, would be considered a public accommodation and would have to be available to be hired by any client to do the

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[115] *Id.* at 58.

[116] Wooley v. Maynard, 430 U.S. 705 (1977); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557 (1995).

[117] *Elane*, 309 P.3d at 64.

[118] *Id.*

[119] *Id.*

work.[120] The court distinguished *Elane* from *Hurley* by noting that Elane Photography sold its services to the public. This argument develops to say that Elane Photography is not in business of photography, but simply a public accommodation and because the photographs are not distributed publicly and the speech is not being chilled. Meaning the effect this has on Huguenin would not interfere with her motivation to become a photographer simply because she has to photograph the LGBTQ community. Because it would not interfere with Huguenin's motivation, the court argues, the government is not commandeering any editorial choices of the speech, only that as a public accommodation all potential clients must be served.[121]

The court additionally suggested that Elane Photography's taking of these photos would not lead to the assumption that they supported same-sex marriage. The court claimed the following: "It is well known to the public that wedding photographers are hired by paying customers and that a photographer may not share the happy couple's views on issues ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom)."[122] And if Elane Photography wanted to alleviate the concern of someone thinking they supported same-sex marriage, Huguenin's business was welcome to put a message on their website saying they opposed same-sex marriage but do comply with all New Mexico law including Public Accommodation laws.[123] This was the court's proposed solution to Elane

[120] *Id.* at 66.

[121] *Id.* at 68.

[122] *Id.* at 69, 70.

[123] *Id.* at 70.

Photography's dilemma, suggesting that customer's could interpret Huguenin's faith in their own way and choose or not choose to use her services. The court was unwilling to hear Lorence's arguments suggesting that there was a potential to solve the problem by narrowing the law because the Supreme Court was not arguing on this issue particularly, like the lower courts.

This issue was the focus of Shapiro's amicus brief in the case. Even if Shapiro thinks the court misinterpreted *Wooley* and *Hurley* in 2008, there is time and space in constitutional law right now to create a new genre of Public Accommodations.[124] Shapiro stated "there are less restrictive means to achieve the goals of Public Accommodation."[125] The goals will be discussed in the literature review. The suggested approach in the amici brief is to narrow Public Accommodation laws or give them a caveat exempting "expressive" businesses from being classified as Public Accommodations.[126]

There is no precedent in New Mexico distinguishing "expressive" or "creative" businesses and granting them the ability to decline to abide by Public Accommodation laws, and the New Mexico Supreme Court was reluctant to use this as an opportunity to create that genre. The court used *King v. Spalding* as an example in which a law firm, under Title VII, tried to not hire a person of a protected class because their business had

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[124] Cato Institute Motion for Leave to File Brief of Amici Curiae, *supra* note 27.

[125] Shapiro interview, *supra* note 35.

[126] Cato Institute Motion for Leave to File Brief of Amici Curiae, *supra* note 27.

creative and expressive tendencies.[127] Giving a broad interpretation and suggesting that any business could make an argument that it has creative and expressive tendencies, the court followed the United State Supreme Court's ruling in *King* and did not give merit to Elane Photography's argument. The court then addressed the rights of Huguenin specific to their religion and freedom of expression through this vein.

NMHRA Conflicts

Lastly, the court declared that the NMHRA did not violate the NMRFRA because the NMRFRA is not applicable between private party suits.[128] This was described by Shapiro as an opinion that would produce bizarre results.[129] The possibility of irregular and misinterpreted future expressions of speech by business owners was a concern for the outcome of the New Mexico Supreme Court and other states in similar circumstances.[130] New Mexico's unique position as a state with a Religious Freedom Restoration Act that is in addition to the Federal Act is explained in the conclusion of this thesis.

e. Petition for Certiorari, United States Supreme Court

On November 8, 2013, in response to losing his case in the New Mexico Supreme Court, Lorence petitioned the United States Supreme Court for certiorari.[131] The question presented to the Court was "[w]hether applying a state public-accommodations statute to

[127] Elane Photography, LLC v. Willock, 309 P.3d 53, 72 (N.M. 2013).

[128] *Id.* at 76.

[129] Cato Institute Motion for Leave to File Brief of Amici Curiae, *supra* note 27.

[130] Caleb James, *Controversial Indiana Law Shows Striking Similarities to a Religious Freedom Law in New Mexico*, KOB EYEWITNESS NEWS 4, March 30, 2015, http://www.kob.com/article/stories/s3751451.shtml#.VUQ4gCFVhBc (last visited May 1, 2015).

[131] Elane Photography, LLC v. Willock, 134 S.Ct. 1787 (2014).

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."[132] The Court's response was delayed multiple times, but they finally decided they would hear the case on April 7, 2014, nearly eight years after the initial incident.[133]

After filing for certiorari, amicus briefs were filed in support of Elane Photography's efforts to create a specific niche for expressive business. The briefs included amici: Wedding Photographers, Cato Institute, Alabama, et al.[134] Each brief considered the New Mexico decision and its application to current and future lawmaking, in light of what had happened to Elane Photography.

The Wedding Photographers' amicus brief represented eighteen photojournalists in the United States.[135] After describing their support of Elane Photography's arguments throughout the case in New Mexico, they added the following: "[W]e focus on the threshold constitutional issue: photojournalistic wedding photography constitutes expression under the First Amendment; it is pure speech—influential and powerful in that it proclaims stories that mere words cannot; and it is the photographer's speech even when the photographer is being paid to take the photographs."[136] With this idea they

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[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] Brief of Wedding Photographers as Amicus Curiae in Support of Petitioner, Elane Photography, LLC v. Willocks, 134 S. Ct. 1787 (2013) (No. 13-585), *accessible at* http://sblog.s3.amazonaws.com/wp-content/uploads/2013/12/ElaneAmicusPhotographers.pdf (last visited May 1, 2015).

[136] *Id.* at 2.

petition the court to "hold that the First Amendment protect[] photographers like [Huguenin] from being compelled to speak as a condition for participating in the marketplace."[137] In other words, no matter what state law these professionals have conceded to by accepting payment for their craft, since photography is speech, it should not be compelled, even in the marketplace.

The Cato Institute filed a brief that went on to explain the practical realities of what would happen if expressive businesses were allowed to operate without having their speech compelled: it was likely those affected would simply choose another means of investing in the marketplace.[138]

Some states, including Alabama, Arizona, Kansas, Michigan, Montana, Oklahoma, South Carolina, and Virginia, also filed a brief, to recognize "the potential for conflict between first-amendment principles and public-accommodation laws."[139] The states refer to *Barnett*, a challenge that New Mexico had lost sight of when considering Constitutional rights.[140] The states asked the court to use *Elane* to "reinforce the principle that the First Amendment protects the right to speak or not speak, even when the topic is politically and culturally divisive."[141] Driving the point home on the crucial

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[137] *Id.* at 3.

[138] Cato Institute Motion for Leave to File Brief of Amici Curiae, *supra* note 27.

[139] Brief of Alabama, Arizona, Kansas, Michigan, Montana, Oklahoma, South Carolina, and Virginia as Amici Curiae Supporting Petitioner, Elane Photography, LLC v. Willocks, 134 S. Ct. 1787 (2013) (No. 13-585), *accessible at* http://sblog.s3.amazonaws.com/wp-content/uploads/2013/12/ElaneAmicusStates.pdf (last visited May 1, 2015).

[140] W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[141] Brief of the States, *supra* note 139, at 2.

and important role of the Supreme Court hearing *Elane*, the states in their amicus brief say "[i]n fact that is precisely where the First Amendment's protections are needed the most."[142]

The arguments presented by Elane Photography and its three amici were not enough to convince the United States Supreme Court to hear the case. But, in the same term, the Court did issue a major decision on a related case: *Hobby Lobby*.[143] Lorence thought the Supreme Court probably gave *Elane* great consideration, but ended up choosing *Hobby Lobby* instead.[144] In light of the *Hobby Lobby* decision, it is worthwhile to explore *Elane* further and determine a best plan for LLC owners currently and in the future.

D. Ilya Shapiro Interview and *Elane* wrap up

Ilya Shapiro, a member of a libertarian think tank, was a contributor to the amicus brief written on behalf of *Elane*. The brief mainly focused on the fact that Public Accommodation laws as currently written were too broad. In most states, the laws (Appendix A) encompass most if not all businesses. What the brief addressed is the parallel fact pattern of *Elane* and *Wooley*, similar cases that have different outcomes involving compelled speech.

The brief fights for a "solution" to a problem particularly relevant to what Shapiro calls "the next frontier" of First Amendment cases. The brief argues for limiting Public Accommodation laws so as to narrow their scope to their original intentions. A Public

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[142] *Id*.

[143] Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014).

[144] Lorence interview, *supra* note 34.

Accommodation law should be enforced when an accommodation is necessary to serving the public. The brief suggest creating a loophole in Public Accommodation laws for what are called expressive businesses. Shapiro identifies multiple types of businesses that could be included in this category: writers, artists, and photographers. In his interview, Shapiro said he understood the intent of the laws, but that the goals could be achieved by less restrictive means. There are easier alternatives than going after artists for discrimination claims.

When asked what business owners should do in the meantime, Shapiro said, "Consult your lawyers." In the author's opinion, this is true and is the safest means of protecting your personal and professional interests. They are unaware when they may have violated someone else's rights. The laws disproportionately protect business owners and consumers alike.

IV: LITERATURE REVIEW, PRIMARY

A. Federalism

The division of authority between the national government and the state governments is called federalism.[145] The general concept is that there are some powers actionable by the federal government alone, some by the states alone, and some that are actionable by both. States, for example, play a prominent role in the selection of the president, and they approve Constitutional amendments.[146] Through their various institutions such as taxes, criminal law, the education system, local governments, and social issues, states exert

[145] DAVID BRIAN ROBERTSON, FEDERALISM AND THE MAKING OF AMERICA, 1 (2012).
[146] *Id.* at 2.

power over many Americans' everyday lives, within Constitutional limits.[147] State lawmaking within Constitutional limits creates state action.

1. State Action

The text of the original Constitution unambiguously establishes that it is a law governing government, not individuals.[148] The First Amendment states that "Congress shall make no law."[149] This phrasing suggests that private actors can't violate the Constitution; *state action* is what violates individual rights. And by that violation the state can be acting unconstitutionally. The way the judicial system uses the concept is as follows:

> It is the tool with which the courts attempt to balance at least three competing interests: (1) individual autonomy—the individual's interest in preserving broad areas of life in which he or she can develop and act without being subjected to the restraints placed by the Constitution on governmental action, (2) federalism—the nation's interest in preserving the proper balance between state and national power, especially the power of states to determine, within generous limits, the extent to which regulatory power should be applied to private action, and (3) constitutional rights—the interest in protecting constitutional rights against invasion by government or by action fairly attributable to government.[150]

With this definition in mind, it is important to draw out two particulars. First, state action is a balancing act. Since there are always competing values, it is unlikely that there

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[147] Casey James-Michael Carmody, *Political Culture, Policy Liberalism, and the Strength of Journalist's Privilege in the States* (2013), *accessible at* http://dc.uwm.edu/etd/243.

[148] Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1382 (2006).

[149] U. S. CONST. amend. 1.

[150] G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333, 339-40 (1997).

would ever be a perfect solution for individual autonomy. Second, state action takes places between the government and an individual, not between two individuals.

B. First Amendment Jurisprudence

1. Theory

"The United States stands alone, even among democracies, in the extraordinary degree to which its Constitution protects freedom of speech."[151] The First Amendment has a level of protection that is greater than most other laws governing individual interests.[152] This special protection is given to provide for a means of democracy.[153] Various Supreme Court cases have validated this special protection.[154]

Multiple theories surround the First Amendment: marketplace theory, self-government theory, checking-value theory, dissent, tolerance, and individual autonomy.[155] Each theory has been important for the philosophical development of Constitutional rights.[156] But for this thesis and its First Amendment implications, the author has chosen to focus on individual autonomy theory.

a. Individual autonomy theory

This theory that demonstrates the expansive role of the First Amendment holds the following: "[F]ree speech is an important component of individual liberty, regardless of

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[151] RONALD M. DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION, 9 (1996) (citing New York Times v. Sullivan, 376 U.S. 254 (1964)).
[152] *See Infra* note 309.

[153] *Id.* at 1253.

[154] *Id.* at 1254.

[155] MATTHEW D. BUNKER, CRITIQUING FREE SPEECH, 2–11 (2001).

[156] *Id.* at 11.

its products."[157] As Ronald Dworkin claims, liberty and freedom are measured by an individual's ability to listen to other actors, including the government, and to form his or her own opinions; conversely, this also liberty refers to the individual's ability to speak and communicate his or her own views, no matter how offensive they may be.[158] But to understand individual autonomy it must be understood where liberty comes from. Vincent Blasi analyzes the value of liberty and why speech can be separated from other human desires. He concludes, with reference to individual autonomy, that

> even if speech activities cannot persuasively be distinguished from many other claims of liberty on the ground of respect for the essence of the individual self, the fact remains that those aspects of liberty that involve speech receive the most explicit endorsement in the text of the Constitution and for that reason alone may properly be singled out for special judicial protection.[159]

This protection is offered because citizens, without the ability to maintain a separate viewpoint, would "cease to be individuals."[160]

Similarly, C. Edwin Baker has developed what he calls "liberty theory."[161] The theory seeks to protect non-coercive expressive activities, which operate through the free acceptance of such activities by a listener[162]: "The liberty model hold that the free speech clause protects not a marketplace, but rather an arena of individual liberty from certain

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[157] *Id.*

[158] *Id.* at 14.

[159] VINCENT BLASI, THE CHECKING VALUE IN FIRST AMENDMENT THEORY 544 (1977).

[160] *Id.* at 547

[161] DWORKIN, *supra* note 151, at 13.

[162] *Id.*

types of governmental restriction. Speech or self-expressive conduct is protected not as a means to achieve a collective good but because of its value to this individual."[163]

Liberty and individual autonomy, granted to individuals regardless of what products might arise from these privileges, lead to freedom of expression.

2. Freedom of Expression

Freedom of expression, as a system in society, has four key tenets[164]:

> First, Freedom of expression is essential as a means of assuring individual self-fulfillment. Second, Freedom of expression is an essential process for advancing knowledge and discovering truth. Third, Freedom of expression is essential to provide for participation in decision making by all members of society. Finally, freedom of expression is a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus.[165]

The practical application of freedom of expression creates a challenging environment in which multiple individual interests must be balanced.

> The doctrine of freedom of expression is generally thought to single out a class of "protected acts" which it holds to be immune from restrictions to which other acts are subject. In particular, on any very strong version of the doctrine there will be cases where protected acts are held to be immune from restriction despite the fact that they have as consequences harms which would normally be sufficient to justify the imposition of legal sanctions.[166]

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[163] C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 37–46 (1989).

[164] T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 8 (1970).

[165] *Id.*

[166] Thomas Scanlon, *A Theory of Freedom of Expression*, 1 JOURNAL OF PUBLIC AFFAIRS, no. 2, Winter 1972, at 204.

Freedom of expression is a foundation for the development of individuals. "The crux of the problem is that the limitations whatever they may be must be applied by one group of human beings to other human beings."[167] As demonstrated in *Elane*, "[t]he members of society must be willing to sacrifice individual and short term advantage for social and long range goals."[168] Thus, putting one group ahead of another is inevitable in this balancing act, but later on the author will discuss two groups applicable to *Elane* that evoke a non-political response.[169] The cases discussed in the following section represent milestones in First Amendment precedent that are related to the *Elane* case.

3. Jurisprudence Timeline

The development of First Amendment interpretations can be narrowly viewed for the purposes of this thesis.[170] The cases below were used as foundational arguments in *Elane.* Some of these cases demonstrate the protection of a certain type of expression. For example, *West Va. State Bd. Of Ed. v. Barnette*, in 1943, and *Wooley v. Maynard*, in 1977, both demonstrated that speech protection extends to the ability to refrain from speaking; in other words, being compelled to speak. *Roberts v. United States Jaycees*—a Minnesota case used by defendant Vanessa Willock's attorneys—said the national men's group chapter could not discriminate against women because the group had no message has been distinguished sixteen years later by *Boy Scouts of Am. v. Dale*, which allowed a

[167] EMERSON, *supra* note 164, at 9.

[168] *Id.*

[169] The discussion of this thesis will argue that instead of putting religious freedom against gay rights the two groups, research and focus should be the business owner and the hypothetical consumer.

[170] Narrowly viewed to First Amendment cases argued in *Elane*, related to Public Accommodations or demonstrative of photography as speech.

group to discriminate in order to protect its message. Finally, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston* ("Hurley"), exemplified an exact conflict of First Amendment rights with a state's Public Accommodation laws.

Each of these cases are useful in understanding the arguments made by the courts in *Elane.* The generalities and legal conclusions from these cases form our contemporary understanding of First Amendment protection.

1943 – Pledge of Allegiance

West Va. State Bd. Of Ed. v. Barnette

This case concerned a group of students in West Virginia who were Jehovah's Witnesses. They did not want to participate in the Pledge of Allegiance activities in their school, activities which were required by law.[171] The United States Supreme Court declared the Pledge of Allegiance a form of expression.[172] This case represented the idea of compelled speech, and the Court devised an analytical test to evaluate whether a given expression was being compelled by the government:

> First analyze whether a law has the effect of eliciting some sort of expression, then decide whether the expression amounts to a "declaration" or "affirmation" of belief. If there are sanctions for noncompliance with the statute, an impermissible compulsion will be found and will possibly be an even greater First Amendment harm than a restriction of speech.[173]

1977 – License plate motto

Wooley v. Maynard

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[171] W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[172] *Id.* at 632.

[173] Susan Nabet, *For Sale the Threat of State Public Accommodations Laws to the First Amendment Rights of Artistic Businesses*, 77 BROOK. L. REV. 1515, 1517 (2012).

Wooley came before the Court thirty-four years after the test developed in *Barnette*. The case concerned a couple, the Maynards, who were living in New Hampshire, in 1974. At the time, New Hampshire license plates displayed the state motto "live free or die."[174] Mr. Maynard and his wife, who were Jehovah's Witnesses,[175] chose to cover up the "live free or die" text on their license plates.[176] Mr. Maynard was subsequently charged multiple times with misdemeanors, because it was against NH 262:27 "[to] knowingly obscure…the figures or letters on any plate."[177] Mr. Maynard served jail time for his offense and was charged a fine.[178] After litigation and trials, the Maynards brought action for an injunction against enforcing the charges of the misdemeanor because it was unconstitutional.[179] The court said, "[w]e begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."[180]

Mr. Maynard's success in the case can be summed up by the Court's opinion that "where the state's interest is to disseminate an ideology no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid

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[174] Wooley v. Maynard, 430 U.S. 705 (1977).

[175] *Id.* at 1431.

[176] *Id.*

[177] *Id.*

[178] *Id.* at 1432.

[179] *Id.*

[180] *Id.* at 1435.

becoming the courier for such message."[181] This statement by the Court is frequently cited to demonstrate the compelled speech concept. The Court was aware of the similarities similar *Wooley* and *Barnette*,[182] and it employed *Barnette* to determine that "[…] the State of New Hampshire may not require appellees to display the state motto upon their vehicle license plates".[183] Both Lorence and Shapiro exclaimed in their interviews that *Elane* was analogous to *Wooley*.[184] *Elane* drew on the exact premise of *Wooley* in that a state was compelling one of its actors to speak against her beliefs.

1984 – Excluding female members

Roberts v U.S. Jaycees

As opposed to referencing *Wooley*, Vanessa Willock's attorneys likened the facts of *Elane* to *Roberts*. A case out of Minnesota, *Roberts* concerned a national organization, the Jaycees,[185] that was males-only.[186] The Minnesota chapter was taken to court for not allowing female members to become part of the organization.[187] The Court held that because the women's being part of the organization did not alter the organization's message, they must be allowed to join.[188] Vanessa Willock's attorney used this case to

[181] *Id.* at 1436.

[182] *Id.* at 1435.

[183] *Id.* at 1436.

[184] Lorence interview, *supra* note 34; Shapiro interview, *supra* note 35.

[185] Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

[186] *Id.*

[187] *Id.*

[188] *Id.*

demonstrate that the Court likes to eliminate irrational discrimination.[189] *Roberts* was distinguished in 2000 by *Dale*, which demonstrates the contemporary protection offered to free speech even in the delicate social climate of protecting gay citizens.

1995 – Altering expressive content of parade violates First Amendment

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston

Hurley was about a private parade in Massachusetts.[190] The parade through Boston was an annual event of local comradery. The Supreme Court ruled the Public Accommodation law of Massachusetts unconstitutional as related to this parade.[191] A group called the Gay, Lesbian and Bisexual Group of Boston (GLIB) wanted to participate in the parade but its members were denied.[192] The group brought suit. The Supreme Court determined that the parade was a form of expression.[193] The Court found that even though the parade did not have a specific message to convey, the expression was still protected.[194] The Court distinguished the case from *Roberts* and did not accept the petitioners' argument that the parade was a conduit.[195] Therefore, those in charge of the parade were legally allowed to exclude the participation of GLIB members.[196] The

[189] Answer Brief of Appellee Respondent Vanessa Willock at 47, Elane Photography v. Willock, 309 P.3d 53 (2013).

[190] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557 (1995).

[191] *Id.* at 577.

[192] *Id.* at 562.

[193] *Id.* at 577.

[194] *Id.* at 564.

[195] *Id.* at 563.

[196] *Id.* at 563.

most important outcome of *Hurley* is a two-prong test the Court designed to determine what types of messages or expression must receive First Amendment protection.[197] Like *Elane* is considered a public accommodation, with or without a specific message to convey the business should not be considered only a conduit of a message. *Hurley* is the next to last case relevant to the First Amendment discussion influential to understanding *Elane.* This section of the thesis concludes with discussing *Dale.*

2000 – Violation of Expressive Association

Boy Scouts of Am. v. Dale

Dale was a case that presented the tension between equality and freedom.[198] The Boy Scouts of America was a non-profit organization whose mission is to instill a system of values in young men.[199] James Dale was a scout leader who moved through the ranks of the Boy Scouts and as an adult became a Scout Leader. When Dale went to college, he became active in advocating for gay rights.[200] Dale sued the Boy Scouts after he was terminated from his position for being gay.[201] New Jersey, where Dale lived, prevents discrimination in places of public accommodation.[202] However, the Court held that the

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[197] Test: To achieve First Amendment protection, a plaintiff must show that he possessed: (1) a message to be communicated; and (2) an audience to receive that message, regardless of the medium in which the message is to be expressed. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557 (1995).

[198] *Infra* note 307 at 85.

[199] Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

[200] *See id.*

[201] *See id.*

[202] *See id.*

Boy Scouts' expression was protected by the First Amendment[203] and determined that Dale's existence in the organization was a disruption to this expression.[204] Like in *Hurley*, the Court cited the "severe intrusion on the Boy Scouts' right to freedom of expressive association."[205] *Dale* overruled the idea contained in *Roberts*. That the Supreme Court now holds expressive association as a value bodes well for the possibility of interpreting *Elane* under similar terms.

Paid Photography as speech

There is not a definitive ruling from the Supreme Court that addresses a photographer's First Amendment rights,[206] but there is a test for determining whether an action deserves First Amendment protection.[207] The test from *Hurley* is as follows: "To achieve First Amendment protection, a plaintiff must show that he possessed: (1) a message to be communicated; and (2) an audience to receive that message, regardless of the medium in which the message is to be expressed." The audience requirement of the second prong of the test is what ruled out First Amendment protection for private recreational photography.[208]

A Supreme Court determination of photography, stated in black letter law, does not exist. However, there was a relevant reference to the United States Court of Appeals, in

[203] *See id.*

[204] *See id.*

[205] *Id.* at 659.

[206] Bill Kenworthy, *Photography & The First Amendment*, FIRST AMENDMENT CENTER (Jan. 1, 2012), http://www.firstamendmentcenter.org/photography-the-first-amendment (last visited May 2, 2015).

[207] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557 (1995).

[208] Kenworthy, *supra* note 206.

the Second Circuit, when *Elane* was in front of the appeals court of New Mexico. The reference says

> The district court seems to have equated the visual expression involved in these cases with the crafts of the jeweler, the potter and the silversmith who seek to sell their work. While these objects may at times have expressive content, paintings, photographs, prints and sculptures, such as those appellants seek to display and sell in public areas of the City, always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection.[209]

To go beyond the general classification of photos as speech, it is important to understand that as a wedding photographer Huguenin was not just clicking the photo and handing it off to her customer. Huguenin was contributing hours of editorial critique and spending time developing thoughtful images for her customers. Since photographs pass the test in *Hurley* for first amendment protection, it would be difficult to suggest that the court is not eliciting a form of expression.

Summary

Though *Elane* did not make it to the Supreme Court, its conflict is no doubt representative of the types of conflicts that are ruled on by the Court. Historically, the Court has determined what speech is, who can speak it, who doesn't have to speak it, and what type of organization can be considered expressive, but it also clear that there is no black and white determination. As society and the marketplace change, it becomes easy to see why cases like *Elane* are central to solving future conflicts. It is with this line of precedent in mind that the thesis will now attempt to illustrate Public Accommodation laws in a logical manner.

[209]Bery v. City of New York, 97 F.3d 689, 696 (2d Cir. 1996).

C. Public Accommodation

1. Federal History & Civil Rights Act of 1964

In 1954, the landmark case *Brown v. Board of Education* was heard in the Supreme Court.[210] The holding in this case overturned the previous landmark legislation of racial segregation in education, *Plessy v. Ferguson*.[211] The holding in *Brown* revoked the concept of "separate but equal" in reference to the racial segregation of the school system from *Plessy*.[212] Similarly, the Court said racial segregation violated the Equal Protection clause of the Fourteenth Amendment.[213]

This Supreme Court decision inspired a wave of civil rights actions in the United States during the 1960s that ultimately led to the creation of the Civil Rights Act of 1964, spearheaded by Hubert Humphrey.[214] The legislation was met with criticism, a filibuster, and lengthy audits, before it was finally enacted.[215]

2. Purpose of the Civil Rights Act of 1964 & Title II (Public Accommodation)

"The purpose of [The Civil Rights Act] is to achieve a peaceful and voluntary settlement of the persistent problem of racial and religious discrimination or segregation by establishments doing business with the general public, and by labor unions and

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[210] Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483 (1954).

[211] *Id*.; Plessy v. Ferguson, 163 U.S. 537 (1896).

[212] *See id.*

[213] *Id.*

[214] S. REP. No. 88-872 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 1964 WL 4755; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; *Hubert H. Humphry*, MINNESOTA HISTORICAL SOCIETY, http://www2.mnhs.org/library/findaids/00442.xml (last visited May 2, 2015).

[215] *See* sources cited *supra* note 213.

professional, business, and trade associations."[216] This purpose was qualified by passage in the Senate.[217] The Senate read the bill before it was to "eliminate discrimination in public accommodations affecting interstate commerce."[218] The clause that represented public accommodation and interstate commerce, under Title II, was the gateway for the federal act to have preemption over state action. This concept was immediately challenged in another Supreme Court case in 1964, *Heart of Atlanta Motel Inc., v United States*, which challenged Congress's power to make such a law.[219]

Heart of Atlanta was a case where a 216-room hotel in Atlanta refused to serve black guests.[220] The owner claimed the Act violated his fifth and thirteenth amendment rights.[221] The Supreme Court ruled that Congress was well within its means to enact Title II of the Act based on their authority under the interstate commerce clause.[222] It must be noted that the federal Act only offers injunctive relief, not damages, as with some state claims.[223]

3. Influence of Hobby Lobby decision

    a. Facts

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[216] S. REP. No. 88-872 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 1964 WL 4755.

[217] *Id.*

[218] *Id.*

[219] Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1964).

[220] *See id.*

[221] *See id.*

[222] *See id.*

[223] 42 U.S.C. § 2000a.

Hobby Lobby is a "religious" case that is rooted in different bodies of law, many of which are not discussed in this thesis. However, although its legal conclusion remains extremely narrow, there are simple points that can be taken from its decision that are applicable to *Elane*.[224] Though the rule of law that is established in this case by the Supreme Court is minute, as a principle and implication for further litigation and legislation it is hugely important. The conflict of *Hobby Lobby* was set up with the passage of the Affordable Care Act.[225]

The Affordable Care Act contained a clause stating that medical services, including certain forms of birth control, must be offered to employees by their employers.[226] Hobby Lobby maintained a religious identity, and its owners held certain convictions that prevented them from believing in certain forms of birth control.[227] Their refusal to provide birth control to their employees prompted a lawsuit.[228]

b. Holding

The holding of the case permitted Hobby Lobby to not offer birth control to its employees.[229] *Hobby Lobby* "carved out" a part of the federal act, which is to say that some corporations, because of their religious affiliation, no longer have to follow a

[224] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] *Id.*

portion of the mandate.[230] Met with overwhelming societal, media, and scholarly attention, *Hobby Lobby* represented multiple conclusions.[231] Reinforcing the legal precedent that corporations are "people" and thereby allowed to have an identity, *Hobby Lobby* is and will be greatly influential in other cases related to business and religion.[232]

c. Connection to Elane

Hobby Lobby is important to *Elane* for multiple reasons, primarily for what it represents theoretically, but also for its practical, libertarian implications. Lorence saw the Court granting certiorari to *Hobby Lobby* as positive for the rights of people like Huguenin.[233] Additionally, Justice Ginsburg, in a lengthy and socialized dissent against the ruling of *Hobby Lobby*, mentioned the *Elane* case.[234] *Hobby Lobby* and *Elane* stood for different mechanisms and outcomes concerning the breadth of religion in business, but both have been influential to the future.[235] Discussed in depth in the interviews and conclusion of this thesis, the facts are different from *Elane*, but there is potential positive movement underway anytime a civil rights conflict is decided by the Supreme Court.

D. Libertarian Theory

> A government cannot have too much of the kind of authority which does not impede, but aids and stimulates, individual exertion and development. The mischief begins when, instead of calling fort the activity and powers

[230] *Id.*

[231] Shapiro interview, *supra* note 35.

[232] *Id.*

[233] Lorence interview, *supra* note 34.

[234] *Burwell*, 134 S. Ct. 2751 (2014).

[235] *See* Horwitz, *supra* note 9.

> of individuals and bodies, it substitutes it own activity for theirs, when, instead of informing, advising, and, upon occasion, denouncing , it makes them work in fetters, or bids them stand aside and does their work instead of them. The worth of a state in the long run, is the worth of the individuals composing it.[236]

Libertarian theory, although it is derived from multiple sources, can be summarized as "a spectrum of political philosophies, all sharing a general presumption of liberty."[237] The John Stuart Mill quote opening this section describes more of the thought as it applies to state government and *Elane.* In introducing Libertarianism as a theoretical concept in this thesis its place is to demonstrate the reach of liberty beyond First Amendment construction and see its spawn into multiple disciplines. In the discussion of *Hobby Lobby*, libertarian perspectives can be used to convey the principles in the Supreme Court's decision.[238] Libertarianism represents a very relevant body of thought for readers of this thesis and future business owners.

V. LITERATURE REVIEW, SECONDARY

A. Public Accommodation

In 1968, Alfred Avins described his view of the intentions of the Civil Rights Act of 1964, specifically concerning the difference between public and private accommodations.[239] He focused on how to govern in these circumstances as well as the

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[236] JOHN STUART MILL, ON LIBERTY, line 897 (1859).

[237] Aaron Ross Powell, *Introducing Libertarianism*, LIBERTARIANISM.ORG, Nov. 3, 2011, http://www.libertarianism.org/publications/essays/introducing-libertarianism-reading-list.

[238] Bagenstos, *supra* note 8.

[239] Alfred Avins, *What is a Place of "Public" Accommodation*, 68 MARQ. L. REV. 1 (1968).

logic behind the difference.[240] By examining the American adoption of public accommodations from England, his article also helps explain why states adopted the categories they did. In England, for example, an inn was a public accommodation, whereas a coffee shop was not.[241] Avins concluded that America drew examples from England as well as its own civil war and pointed out how, as a result, the Act was confusing with respect to common law and state authority.

Citing examples from case law from the 1800s and early 1900s, Avins demonstrated that, via common law, anti-discrimination protection had already been happening.[242] The enactment of the Act was therefore in a way only reinforcing what had already been happening. Avins cited Justice Holmes and his 1916 opinion in *Terminal Taxi Cab* to support his conclusion that business types should be distinguished within the Act:

> It is true that all business, and, for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But, however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shopkeeper may refuse his wares arbitrarily to a customer whom he dislikes, and although that consideration is not conclusive, it is assumed that such a calling is not public as the word is used.[243]

[240] *Id.* at 1.

[241] *Id.* at 6. This example is from law in England in 1814.

[242] *Id.* at 20.

[243] *Id.* at 253 (citing Terminal Taxicab Co. v. Kutz, 241 U.S. 252, 256 (1916)).

Avins also quoted Holmes in regard to distinguishing one business from another, claiming that "the result is an incomparable crazy quilt without rhyme or reason."[244] He concluded his article by suggesting that in 1968, the Public Accommodation laws were in a state of confusion.[245] Avins attempted to distinguish three categories of business: tax-supported government facilities, public utilities, and economic or natural monopolies.[246] In his conclusion, he also questioned whether labels needed to be placed on public accommodations.[247] His closing remarks suggested that something as irresistible as freedom of choice will always find loopholes in the laws damming up the system.[248]

What does this mean for states? It could mean there is no rhyme or reason as to how states have adopted their own laws. It could mean that states look to their statutory systems and common law interpretations to further their autonomous position in the union.

Most importantly, Alfred Avins taught that this great problem has no theoretical undercurrent. Discussed by Nan Hunter's takeaway is the following:

> Thus, in the broader discourse of whether law should be enlisted in the effort to strengthen civil society, issues of public accommodations and expressive association inevitably arise. Given this degree of significance, it is especially unfortunate that the law has never developed a theory of public accommodations. As a 1968 article [Avins] focused only on commercial entities concluded, "There is no underlying rationale which distinguishes private businesses from public businesses. Legislatures and

[244] *Id.* at 253.

[245] *Id.* at 70.

[246] *Id.* at 70.

[247] *Id.* at 72.

[248] *Id.* at 73.

> courts have chosen to lump together whatever businesses they think ought to serve [a given group], without developing any clear-cut theory to justify such inclusions or exclusions." As a result, there is great variance in the definitions of what constitutes a public accommodation.[249]

The problem of discrimination has plagued law makers and societies for hundreds of years, and it seems there can be no ultimate solution. Rather, the inevitable outcome of lawmaking in society is that some members feel indignity from being discriminated against. State laws and their adoptions are discussed below.

1. State Level Public Accommodation

Almost all states have extremely broad and encompassing public accommodation laws.[250] Most states use language similar to the Civil Rights Act of 1964.[251] The Act explicitly referred to businesses engaged in interstate commerce, which generally means those involved in food, consumption, gasoline, or entertainment, and excluded private

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[249] Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1614 (2001).

[250] Tanya Ballard Brown, *Did You Know It's Legal in Most States to Discriminate Against LGBT People?*, NPR, Apr. 28, 2015, http://www.npr.org/sections/itsallpolitics/2015/04/28/402774189/activists-urge-states-to-protect-the-civil-rights-of-lgbt-people.

[251] 42 U.S.C. § 2000a. ("(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action: (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence; (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station; (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and (4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment"). Examples of states using similar language: California, CAL. CIV. CODE § 55.52 (West); Illinois, 775 ILL. COMP. STAT. ANN. 5/5-101; Maryland, MD. CODE ANN., STATE GOV'T § 20-301 (West); Nebraska, NEB. REV. STAT. § 20-133.

businesses.[252] The widespread use of the federal act as a model for such laws does not explain why many states have gone further and broadened the language of their laws so as to refer to any business type in their state. Some states have relied so heavily on the federal act that they have no statute of their own.

There are over 25 states, including the District of Columbia, with statutes that contain a specific list of businesses that count as public accommodations, but also add in a caveat.[253] The caveat states that an encompassing ability is "accepting any form of payment from the public." This type of phrase is used by Colorado, North Dakota, and South Dakota. There are also states that make exhaustive lists of businesses that will be classified as public accommodations. Examples of businesses included on such lists are stores, banks, medical or dental offices, government agencies, hair salons, hospitals, hotels, theaters, restaurants, schools, and taxis.

Building on Avins, Hunter writes in part in her article focusing on categories of what states have classified as public accommodations and tries to pair state law creation timelines in sync with civil rights movements while using the market model as a societal theory.[254] She concludes by saying "[t]he end result was a doctrinal hangover from the civil versus social rights ideology that Congress could not cure because of the Civil

[252] 42 U.S.C. § 2000a.

[253] Colorado, COLO. REV. STAT. ANN. § 24-34-601 (West); North Dakota, N.D. CENT. CODE ANN. § 14-02.4-02 (West); South Dakota, S.D. Codified Laws § 20-13-1.

[254] Hunter, *supra* note 249 at 1592 ("Part III examines how the meanings of public accommodations have shifted in response to the differing demands of waves of civil rights movements. The result has been an extension of the definition of public accommodations to incorporate subordinated groups in civil society. This has been achieved by the adoption of an expansive concept of the market, including services as well as goods, and intangible as well as tangible aspects of economic life").

Rights Cases and that the Supreme Court has never repudiated"[255] With her interpretation of the current setting as a "doctrinal hangover," Hunter applies Habermas and the social citizenship model to Public Accommodation laws.[256]

> "In both their historical context and in contemporary social theory, they resonate most powerfully with concepts of full participatory membership in those venues that undertake to generate, in a broadly open and highly unselective way, norms of citizenship. Habermas's concept of the public sphere provides, at the least, a theoretical starting point for developing that conceptualization."[257]

Her article concludes by refuting the arguments in *Dale* and simultaneously refuting the arguments made by Shapiro.[258] Her suggestion is to focus not on altering the laws for the benefit of the business owner, but on how a business's accommodation of someone it dislikes is intrusive to its expression of beliefs. A similar argument was made by the New Mexico Supreme Court, which suggested that Huguenin could simply add a message to her website about her faith, exclaiming her religious beliefs while maintaining that she abides by all laws. Perhaps the indignity of persons discriminated against fuels the protection of individuals in a way that minimizes the importance of protecting the beliefs of business owners.

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[255] *Id.* at 1624.

[256] Hunter, *supra* note 249 at 1634 ("The concept of social and cultural citizenship can be only the beginning of an effort to define the scope of public accommodations").

[257] *Id.* at 1636.

[258] *Id.* at 1637 ("Legislators and judges should resist suggestions to solve the kind of expressive association problem presented in Dale by truncating the meaning of public accommodations. Instead, courts need to examine much more carefully than the Supreme Court did in Dale whether an organization's policy of excluding persons with an identity characteristic protected by anti-discrimination law is necessary to preserving the group's unity of beliefs. And they should do so with an understanding that public accommodations properly encompass more than the market; the concept has from its inception shaped and been shaped by our understandings of citizenship").

2. Public Accommodation exemptions cause indignity

A lesbian in New Jersey described what it was like to be sent out of a bridal shop: "I was devastated . . . . I was crying."[259] Lim and Melling explore multiple examples similar to this one, where a person who is discriminated against in public feels multiple hurtful emotions.[260] The article also discusses the Supreme Court's discussion of discrimination causing harm to dignity.[261] The central focus of the dignity argument is, "[t]he acknowledgement of dignity is thus critical because, at its core, the question in these contestations [of public accommodations and religious freedom] is whether there is a governmental interest in prohibiting the discrimination of sufficient strength to override any harm to the business owner."[262]

The short article concludes by suggesting that the detrimental effects of discrimination should be reaffirmed in future discussions.[263] It is necessary to providing an adequate and relevant reminder of what an alteration of these laws could lead to. This indignity, as discussed in the conclusions section of the thesis, could be resolved by shifting the potential burden of impartiality to the business owner. On point, the authors close their article by quoting Judge Bosson in *Elane*:

> In the smaller, more focused world of the marketplace, of commerce, of public accommodation, the [company owners] have to channel their conduct, not their

[259] Marvin Lim & Louise Melling, *Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws*, 22 J.L. & POL'Y 705, 706 (2014).

[260] *Id.* Examples are for gay couples being turned away from hotels and bridal shops.

[261] *Id.* at 712.

[262] *Id.* at 720.

[263] *Id.* at 724.

> beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. That sense of respect we owe others, whether or not we believe as they do, illuminates this country, setting it apart from the discord that afflicts much of the rest of the world. In short, I would say to the [company owners], with the utmost respect: it is the price of citizenship.[264]

Lim and Melling's is just one of many articles that recall the controlling outcome of *Elane*, with provocative social comments. The thesis now discusses multiple articles written about *Elane.*

VI. ARTICLE REVIEW AND COMMENT

A. Secular view of *Elane*

Elane is one of the first cases in which an "expressive" or "creative" business was declared a public accommodation in violation of a state's human rights act.[265] *Elane* was similar to *Hobby Lobby* in that it prompted the publication of multiple news stories, law journals and opinion pieces.[266] Many authors wrote about *Elane* as it was passing through the court systems in New Mexico.[267] After it was denied certiorari by the Supreme Court, commentary on the case focused primarily on either the religious aspect or LGBTQ rights.

A critical piece that focuses on the outcome's controlling impact and the case's potential overflow into other states is *Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?* by Lucien

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[264] *Id.* at 725.
[265] Nabet, *supra* note 173.

[266] Google News search for "Elane Photography."

[267] *Id.*

J. Dhooge.[268] Shifting away from the humdrum of pitting religion against gay rights, this article looks to determine the actual effects of placing caveats other than the religious exemption in public accommodation laws.[269] Dhooge's article is relevant based on its greater application to any business owner and this thesis' author's suggested solution to the problem in the discussion section of this thesis. Though the author will argue a solution to avoid harming those discriminated, this article argues against granting an exemption in the public accommodation laws.

The article claims that the loss of religious liberty is exaggerated and that the harm experienced by individuals who are discriminated against outweighs the intrusion on liberty.[270] Dhooge posits that the threat to religious freedom is based on two assumptions.[271] The first assumption is that without the religious exemption, there is a credible threat to individuals. The second assumption relates to our understanding of the phrase "free exercise of religion" in the context of business.[272] The second assumption, according to Dhooge, initially referred to unquestionably religious acts only, but now, he argues, *Hobby Lobby* has caused us to widen our understanding of it.[273] Dhooge claims that "business practices that are compelled or limited by the tenets of a religious doctrine

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[268] Lucien J. Dhooge, *Public Accommodation Statutes and Sexual Orientation: Should There Be A Religious Exemption for Secular Businesses?*, 21 WM. & MARY J. WOMEN & L. 319 (2015).

[269] *See id.*

[270] *Id.* at 319.

[271] *Id.* at 347.

[272] *Id.* at 348.

[273] *Id.* at 349.

fall comfortably within [the] definition [of exercise of religion]."[274] Moving through the argument of these topics Dhooge's argument narrows in on the "equation in error".[275] He suggests that the nature of business operations should distance themselves from religion, to avoid sham claims, false characterization and to not trivialize those true followers of a religion.[276]

He goes on to claim that frivolous claims would not make it through and that common sense would prevail, but he also quotes Justice Ginsburg, who has written, "secular for-profit corporations do not 'exists to foster the interests of person subscribing to the same religious faith' nor do they 'exist to serve a community of believers, to conclude otherwise creates a new up-is-down world.'"[277] Defending his argument, Dhooge speaks to the creation of a two-tier society, the believers and non-believers, and brings the argument back to considerations of justice and equality.[278] His article is provocative and well thought-out, but it remains focused on removing religion from the business context, on the one hand, and the discrimination of LGBTQ persons, on the other. His argument is compelling to the author of this thesis in that he is trying to talk about the conflict between First Amendment rights and public accommodation laws without identifying a protected class that is in a higher position than other consumers and thereby stripping the argument back to a discussion of business owners versus consumers.

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[274] *Id.*

[275] *Id.*

[276] *Id.* at 350.

[277] *Id.* at 351.

[278] *Id.* at 373.

B. Hobby Lobby and Federalism Application

The topic of over 150 law review articles to date, *Hobby Lobby* holds a prominent position among Supreme Court cases of its time.[279] A prominent article in the scholarship, *The Hobby Lobby Moment*, discusses the significance of the case, its meaning, and future implications.[280] Horwitz focuses his article on what he calls "a statutory case [turned] into the legal and political blockbuster of the Term," narrowing in on the social aspect of the case more than the litigation.[281]

Horwitz conveys three points: the moment of *Hobby Lobby* is a significant part of the meaning of the case, which represents how law and society change; culture wars move at different times and places; moving an issue to be "utterable or capable of being discussed intelligently."[282] After discussing historically prominent eras in Supreme Court History, such as the Jim Crow laws and the Lochner era, Horwitz's final observation is the pivotal argument for the writing of this thesis: "The important arguments in moments of deep social and legal contestation—including *Hobby Lobby* are not arguments about what the law is; they are assertions about what our values *should* be. They are a battle for the descriptive high ground."[283] This argument is articulated somewhat briefly but is directly related to Lorence's opinion; Lorence felt secure that *Hobby Lobby*'s being heard in front

[279] Based on a Westlaw search of law review articles using search term "Burwell v. Hobby Lobby."

[280] Horwitz, *supra* note 9, at 156.

[281] *Id.*

[282] *Id.* at 187.

[283] *Id.* at 187.

of the Supreme Court was a win for *Elane* in a tangential way.[284] The conversation about religious freedom is in conflict with the socially present LGBTQ movement.

A final mention must be given to Justice Ginsburg's lengthy and socially circulated dissent in *Hobby Lobby*, which mentions *Elane*.[285] After citing *Elane* as another example of a business seeking religious exemption, but not succeeding, she questions, "[H]ow does the Court divine which religious beliefs are worthy of accommodation, and which are not?"[286] The juxtaposition of *Hobby Lobby* and *Elane*, which are contrasting in their outcomes and were decided based on different laws, creates uncertainty for future business owners.

C. Current Events

1. Sweet Cakes

The owners of a bakery in Oregon refused to make a cake for an LGBTQ couple. [287] Accused of discrimination and fearing a lengthy and costly legal battle, the owners decided to close their business.[288] Because Oregon's laws declared the establishment a public accommodation, and because Oregon outlaws discrimination based on sexual orientation, the owners found themselves in a situation similar to that of Elane

[284] Lorence interview, *supra* note 34.

[285] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[286] *Id.* at 2805.

[287] Bernstein, *supra* note 13.

[288] *Id.*

Photography.[289] As of now, the owners have retreated to making cakes out of their home, thus becoming a "private" business.[290]

The owner of a bakery in Colorado recently found out that a cake is not speech.[291] The bakery was charged with violating the nondiscrimination laws of Colorado for declining to make a cake for an LGBTQ couple. This ruling demonstrates the explicit difference between businesses that provide marriage services and other related business types that may try to be considered expressive; this would cause a slippery slope if the ruling in *Elane* were different; determining that "expressive" can't be the only caveat to solving the conflict. The case does represent a great hypothetical explaining what could happen in our future. A cake without writing on it is not expression, and it would follow that a bouquet of flowers is unlikely to be speech either.

2. Arlene's Flowers

A floral shop owner in Washington State had provided arrangements to two LGBTQ men on multiple occasions.[292] The owner of the shop then declined to produce arrangements for this homosexual couple's marriage.[293] Charged with discrimination under Washington State's public accommodation laws, the owner fought for her right to religious freedom and to not support homosexual marriages. Like the Sweet Cakes case in Oregon, one could ask whether the case will be construed similarly to *Elane*. The

[289] *Id.*

[290] *Id.*

[291] *Charlie Craig and David Mullins v. Masterpiece Cake Shop*, *supra* note 13.

[292] *Id.*

[293] *Id.*

ruling will most likely focus, again, on the difference between photographs, on the one hand, and bouquets and flowers, on the other, as means of expression. The decision in the case depends on whether the court takes a broader or narrower view of expression.

3. Dieseltec

An auto mechanic in Michigan explicitly banned LGBTQ parties from seeking service at his auto shop by posting his beliefs on Facebook.[294] Unlike the cases above and *Elane*, where an actual incident of discrimination occurred, this case represents a business owner attempting to preempt the issue by expressing his beliefs. Unfortunately, it wasn't a completely neutral expression of beliefs; the owner threatened that if LGBTQ customers attempted to use his services, he would purposely damage their vehicle while also arguing with them about their beliefs.[295] After his post, protestors went to his auto shop, and the owner claims to have received threats of violence against him, his shop, and his family.[296] There is much to be discussed in this case, but predominantly it represents society's lack of tolerance for an unpopular opinion, although it also demonstrates society's acceptance of certain opinions, in that supporters also "liked" the owner's post, showing their support for his efforts in a public forum.

4. Millennials and business

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[294] *Michigan Auto Repair Shop*, *supra* note 13.

[295] *Id.*

[296] *Id.*

Born between 1980 and 2000, millennials represent the largest generation in America, comprising one-third of the United States' population.[297] Considered unique for being technologically savvy, connected, and diverse, millennials also have brought about a change in entrepreneurship across the United States, especially in rural areas.[298] Though categorically different from previous generations, millennials are entering the work force when unemployment is high, which drives them to start their own businesses.[299] They are drawn to entrepreneurship for factors other than just their creativity.[300] Their diverse influence will affect social causes differently from previous generations.[301] This surge into the marketplace suggests a change in value systems that will certainly influence state and federal legislatures.[302]

VII: RESEARCH QUESTIONS

The goal of this thesis is to explore the depths of *Elane* in its role as a controlling precedent in the State of New Mexico. By exploring both legal and circumstantial facts, the author intends to use the case as a launch pad to understand the greater effects of the

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[297] *Millennial Entrepreneurs are a Force for Change*, U.S. SMALL BUSINESS ADMINISTRATION, https://www.sba.gov/offices/district/mt/helena/resources/millennial-entrepreneurs-are-force-change (May 1, 205).

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] "Reputation. Millennials identify with brands more personally. Fifty percent of U.S. Millennials ages 18 to 24 and 38 percent of those ages 25 to 34 agreed that brands "say something about who I am, my values, and where I fit in." Forty-eight percent of young Millennials reported that they "try to use brands of companies that are active in supporting social causes."
http://www.bcg.com/media/pressreleasedetails.aspx?id=tcm:12-152907

[302] *Millennial Generation is Changing the Face of Consumer Marketing*, BOSTON CONSULTING GROUP, Jan. 15, 2014, https://www.whitehouse.gov/sites/default/files/docs/millennials_report.pdf.

Supreme Court's *Hobby Lobby* decision and current Public Accommodation laws. This thesis will provide answers to the following four research questions:

> R1: Is there a loss of First Amendment rights when an LLC owner in New Mexico refuses photography services to a same-sex couple?
>
> R2: How did the same-sex marriage decision occurring at the same time in New Mexico influence the outcome of *Elane?*
>
> R3: The *Hobby Lobby* decision gives religious rights to corporations in limited circumstances. Is this a gateway for LLC owners to reaffirm their religious freedom through First Amendment rights?
>
> R4: Can reform of Public Accommodation laws reinvigorate First Amendment rights in LLC owners?

VIII: Discussion and Presentation of Results

1. Interview Discussion

The interviews conducted for this thesis give beneficial insight into *Elane*. One important revelation is that the Alliance Defending Freedom had already been prepared for such a case to arrive. Another is that Lorence felt he was up against judges that treated him poorly. Ilya Shapiro's comments demonstrated his dedication to *Elane* as well as the importance he saw in the case. Shapiro has been exposed to multiple civil rights and libertarian cases through his position at the Cato Institute and still felt compelled to talk about *Elane* and to throw his weight behind the amicus brief to the Supreme Court.

The candor and concern both interviewees showed for the topic hasn't previously been documented. Both considered the legal and social territory involved in *Elane* to be very important to the future. Lorence also said the New Mexico Supreme Court's granting

same-sex marriage rights in their state at the same time as *Elane* undeniably had a huge impact on the court's reasoning and treatment of his client. He noted how Huguenin was being treated in the media as well as the blatant discrimination against religious persons by the LGBTQ community. He simply couldn't grasp how the situation unfolded as it did. Huguenin was surprised and didn't have any idea that she had given up any First Amendment rights; she was not aware that she could be compelled by the state to take a photo of something she didn't believe in. When the author asked for advice to future business owners, Shapiro responded, "call your lawyer."

As confirmed in these first-hand accounts, it is clear that to operate a business in New Mexico is to sacrifice at least some First Amendment rights. The statute reads as follows: "'[P]ublic accommodation' means any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private."[303] It is unclear if this classification of a photography business remains appropriate in the face of the results from *Elane.*

2. Literature Discussion

The author will use the Michigan case involving the auto mechanic, described above, in order to explore whether *Hobby Lobby* can be used as an example of a way forward for reforming Public Accommodation laws. The original public accommodation laws sought to ensure that discrimination would not occur in situations where essential services were being provided, whereas the broad application of these laws today means that non-

[303] N.M. STAT. ANN. § 28-1-2 (West).

essential business types also must follow such rules. This creates a conflict case in which the public accommodation law is in conflict with First Amendment rights, such as in *Elane*.

Some legal theorists have attempted to define what types of businesses should be included or excluded in public accommodation laws.[304] Some legislatures have lumped together businesses that simply should serve protected classes.[305] However, because there is no rationale for this law, the courts are in a state of confusion.[306] Since there is not a unified theory on which to create a foundation for this body of law, there will continue to be great variance in how these laws are applied.[307] The lack of such a theory also makes distinguishing between a private business and a public business very difficult.[308]

To improve the situation, states should put more effort into the legislation of public accommodation laws, and courts should evaluate individual cases and look to history and precedent before declaring whether a business is a public accommodation. There can be no theory or foundation to back up the decision without a clear understanding of the original civil and social meanings of "public accommodation" as presented in history.

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[304] Avins, *supra* note 239.

[305] *Id.* at 68.

[306] *Id.*

[307] Hunter, *supra* note 249 at 1614.

[308] *Id.* at 1614.

Outside of granting all members of society equal access to public establishments,[309] there is no continuing theoretical justification for classifying private businesses as public accommodations. Such a right of access will eventually lead to private expressive business owners being compelled to speak against their will, thus implicating if not violating their First Amendment rights,[310] as demonstrated by the interviews and legislation discussed in this thesis.

3. Presentation of Results

State public accommodation laws currently suggest one outcome: Business owners of all types will are likely to be considered public accommodations.[311] Considering the lack of uncertainty, and probability of classification as a public accommodation, business owners who want to avoid litigation should err on the side of caution and adopt the responsibilities of a public accommodation. Given the current climate, creative businesses are fertile grounds for litigation, as reiterated by Lorence.[312] Though the Supreme Court has demonstrated that certain expressive content warrants special exemption, such as in the Colorado case concerning the parade, it is more likely than not that a business will not be allowed to discriminate at all, even when their First Amendment rights appear to be violated. *Hobby Lobby* does not stand for this concept in

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[309] Lauren J. Rosenblum, *Equal Access or Free Speech: The Constitutionality of Public Accommodations Laws*, 72 N.Y.U. L. REV. 1243 (1997).

[310] *Id.* at 1243.

[311] *See,* Appendix A.

[312] Lorence interview, *supra* note 34.

each state, because like New Mexico, the Acts particular to a state may create stricter compliance.

The Supreme Court of New Mexico created a very interesting controlling precedent with its decision in *Elane*.[313] When two huge and delicate civil rights are pitted against each other, the equation is never easy to solve, no matter if you are wearing judicial robes or jeans and a t-shirt. The First Amendment applies to all United States citizens. But, New Mexico has chosen to follow their state's Act (NMRFRA) which thereby conflicts with the federal understanding of the First Amendments application.

Elane demonstrates that because of this freedom granted by the First Amendment we are going to have conflict. Based on this case study, as well as cases before it, it could be concluded that there will be no winner in any such conflict. To best represent the First Amendment private business owners in light of *Hobby Lobby* and the mind wrenching outcome of *Elane*, should be protected and maintain their First Amendment freedoms when incorporating their business.

To weigh the law against one party or another this case should not be created or contemplated with varied hypotheticals that pit one race, religion, sex or belief against another. You have your hypothetical standing right in front of you: *Elane*. All American citizens, regardless of their beliefs, possess freedoms. The First Amendment applies to everyone, and taking the personal convictions and political energies out of any multitude of hypotheticals, there is a new way to think about our conflicting parties in *Elane*. We have private business owners, and their customers.

[313] Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013), c*ert. denied* 134 S.Ct. 1781 (2014).

When you think of the equation in this way, it is easier to talk about the puzzle. What we can say about all private business owners is that to stay in business they must make a profit. To make a profit, they must be a certifiable, legally sound, and functioning as a business. This process and the success of the business owner stands for much more than the filing of their taxes. They contribute to society in non-monetary ways as well. They have etched out a small segment of the market and are trying to make their mark. States charge businesses to operate, and they operate under certain conditions and try to make money.

The second part of the equation is the customer. This party and its contribution to the marketplace is less well known. While the customer has the rights and freedoms of all others, she and her contribution to the marketplace are entirely theoretical. Maybe the customer will be discriminated against, but it can't be known for sure. What *is* known, however, is that a different member of society has started a business—and projections say there will be more in the future—and that these private business owners, under the First Amendment and in line with libertarian theory, should retain their right to their free speech.

Will the outcome always be positive? No. But if we can make any efforts to avoid litigation and let a free society govern itself, all the better. It then becomes the business owner's choice to refuse service and risk a loss of profits.[314] Private business owners and participants in an expressive business should not be compelled to speak against their

[314] Dhooge, *supra* note 268 (suggesting that there will not be a loss of profits if the business owner discriminates against parties). The author of this thesis disagrees, based on millennial reports in this thesis suggesting the diverse and "brand" conscience millennials.

beliefs. Their ownership of a business cements their foundation in the marketplace legally, versus a theoretically discriminated against customer.

Finally, to link the pieces of the equation together, we have the theory of Freedom of Expression. Emerson wrote about a "safety valve" where without free expression, the real problems of society may remain hidden and fester.[315] And this, conceptually, speaks to the current social aspect of the problem of balance and stability of society's current values. If we adjust the laws we are potentially just hiding and shadowing the issue at hand. If we are to allow true freedom of expression, a consumer should be well informed of the business and values of that business when they make their purchase. Even if the laws could be quickly adjusted, that may not be the solution because finding out the beliefs of business owners may be of a greater value.

And even so, the laws have not been adjusted. And there is no proof that discrimination can ever be defeated. It is ever present. That is why *Elane* represents a warning to future business owners and creative millennials, who must understand what rights they can lose when starting a business.

The free speech rights of Elane Photography should be protected, despite the Public Accommodation laws of New Mexico. Here, note the use of Elane Photography versus Huguenin. The author of the thesis also suggests that in addition to the outcome of *Hobby Lobby*'s standing for religious support in the future, it also stands for a connection between businesses and their owners; it represents the idea that business have a legal

[315] *See, supra* note 164.

identity just as much as their owners, and that both can have religious beliefs.[316] Shapiro emphasized the contemporary conflicts we see with individual business owners possessing their freedoms should now be conveyed not only to them as an individual but via their business if it is expressive, such as photography is as well.[317]

IX: CONCLUSION

The most common deference to First Amendment rights that arises out of the literature concerns the accommodation of religious freedoms; these freedoms often clash with the current LGBTQ movement. What is not being said, except for by Dhooge, is that granting exemptions to religious business owners *only* ignores a whole group of other business owners who may have strong, albeit not religious, convictions they wish to express in the running of their business. This presents business owners with two options: have a religion to fall back on, or accommodate all customers. The decline in religious affiliation among the nation's younger generation has taken place almost as fast as the LGBTQ movement.[318] So, without religion, it has been suggested that we narrow public accommodation laws to "expressive" businesses.[319] But, as the example of the baker and the florist demonstrate, perhaps that too is a slippery slope. Why should the accommodation of belief systems have to conform only to pre-classified hypotheticals? The author's solution drops the emotional and personal identifiers that are involved in

[316] *Id.*

[317] Shapiro interview, *supra* note 35.

[318] *Supra* note 302.

[319] Shapiro interview, *supra* note 35.

these determinations and suggests the creation of two simple categories: business owner and consumer.

The solution is presented as a means to solve the legal problem, the social problem, and, it is hoped, the emotional problem. Legally, state accommodation laws may do as they please. But federally, if the business in question affects interstate commerce, legislation will pre-emptively disallow whatever the state has allowed for with regards to specific classes (race, color, religion or national origin).[320] The author of this thesis proposes that a new category of business could be created, called "expressive, local, private" businesses (ELP)—*expressive*, meaning non-essential; *local*, meaning not federal, and thus out of the jurisdiction of the discriminatory practices disallowed by the Civil Rights Act's protected classes; and private, meaning the business would have to be private. These can be varied among states but would be single or family-owned businesses.

The choice to exempt this type of business from accommodating everyone would not be given solely for the business owners' benefit. If an ELP is looking to discriminate against another party for any reason, they should be required to bear an ethical burden. Since the Civil Rights era, indignity has been acknowledged as one of the great harms caused by discrimination. It would be unfair to place the hypothetical customer entirely in this harm's way. In this vein, the author also suggests that an independent association be created in the likeness of the Better Business Bureau, called Honest ELPs, or HELP. This organization could create advertising campaigns, state-based stickers, web disclaimers, and social media messages, certifying whether an ELP is Honest; that is,

[320] 42 U.S.C. § 2000a.

does the ELP accommodate all persons? If so, they would be certified as such by the organization and could advertise this to let patrons know they serve all customers. Similarly, for example, if the ELP does not want to serve females, they would receive a sticker sanctioned by HELP that identifies their non-acceptance of females.

The situation of the auto mechanic in Michigan serves to demonstrate that there is no perfect solution. Even being up front about your business's values and approaching the subject head on will breed conflict. But, just the same, there is no time to waste in developing possible solutions.

This thesis set out to answer four questions. With the interviews and legal and scholarly research, the questions have been answered. It has been clearly demonstrated that businesses operating in New Mexico have lost some First Amendment rights. Additionally, the question of whether the passage of same-sex marriage legislation in New Mexico affected the decision in *Elane* has been answered in the affirmative. Also, the interviews and discussion of current legislation have shown that *Hobby Lobby* indeed could be a gateway for solving problems such as that behind *Elane*. Finally, as shown in the interview with Ilya Shapiro, it appears that yes, reforming Public Accommodation law could help reinvigorate the push for First Amendment rights for business owners; however, the actual effects of such legislation are yet to be understood. With this contribution, the author developed a similar idea for narrowing public accommodation laws and shifting the burden accordingly.

As theory and history teach, there will eternally be conflict and we can only seek to manage the masses and survive. Like other authors on this topic, the author of this thesis does not condone discrimination, but she strongly supports freedom.

The parties in *Elane*, like the parties in Supreme Court cases, have moved on with their lives. They didn't wake up one day and decide to stand as symbols for others. They woke up and decided to be themselves. Similar situations are happening every day, most of which go unnoticed.

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Appendix A

Public Accommodation Defined

Alabama

> Public accommodation facilities. Buildings, facilities, and improvements for the accommodation of visitors to such public parks, including, without limitation of the foregoing, motels, restaurants, coffee shops, stores to provide groceries, drugs, and other items, sports, gift and souvenir shops, and launderettes; provided, however, that nothing contained in this chapter is intended to authorize any such corporation itself to operate as a commercial enterprise any such shops, stores, motels, or restaurants.[321]

Alaska

> "public accommodation" means a place that caters or offers its services, goods, or facilities to the general public and includes a public inn, restaurant, eating house, hotel, motel, soda fountain, soft drink parlor, tavern, night club, roadhouse, place where food or spirituous or malt liquors are sold for consumption, trailer park, resort, campground, barber shop, beauty parlor, bathroom, rest house, theater, swimming pool, skating rink, golf course, cafe, ice cream parlor, transportation company, and all other public amusement and business establishments, subject only to the conditions and limitations established by law and applicable alike to all persons;[322]

Arizona

> "Places of public accommodation" means all public places of entertainment, amusement or recreation, all public places where food or beverages are sold for consumption on the premises, all public places which are conducted for the lodging of transients or for the benefit, use or accommodation of those seeking health or recreation and all establishments which cater or offer their services, facilities or goods to or solicit patronage from the members of the general public. Any dwelling as defined in § 41-1491, or any private club, or any place which is in its nature distinctly private is not a place of public accommodation.[323]
>
> "Dwelling" means either:
> (a) Any building, structure or part of a building or structure that is occupied as, or designed or intended for occupancy as, a residence by one or more families.

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[321] Ala. Code § 11-60-1
[322] Alaska Stat. Ann. § 18.80.300 (West)
[323] Ariz. Rev. Stat. Ann. § 41-1441

(b) Any vacant land that is offered for sale or lease for the construction or location of a building, structure or part of a building or structure described by subdivision (a) of this paragraph.[324]

Arkansas

"Place of public resort, accommodation, assemblage, or amusement" means any place, store, or other establishment, either licensed or unlicensed, that supplies accommodations, goods, or services to the general public, or that solicits or accepts the patronage or trade of the general public, or that is supported directly or indirectly by government funds, but "place of public resort, accommodation, assemblage, or amusement" does not include:
(A) Any lodging establishment which contains not more than five (5) rooms for rent and which is actually occupied by the proprietor of such establishment as a residence; or
(B) Any private club or other establishment not in fact open to the public;[325]

California

"Place of public accommodation" has the same meaning as "public accommodation," as set forth in Section 12181(7) of Title 42 of the United States Code and the federal regulations adopted pursuant to that section[326]

Public accommodation
The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce--
(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
(B) a restaurant, bar, or other establishment serving food or drink;
(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
(D) an auditorium, convention center, lecture hall, or other place of public gathering;
(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer,

[324] Ariz. Rev. Stat. Ann. § 41-1491
[325] Ark. Code Ann. § 16-123-102 (West)
[326] Cal. Civ. Code § 55.52 (West)

pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
(G) a terminal, depot, or other station used for specified public transportation;
(H) a museum, library, gallery, or other place of public display or collection;
(I) a park, zoo, amusement park, or other place of recreation;
(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.[327]

Colorado

"place of public accommodation" means any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public; any place to eat, drink, sleep, or rest, or any combination thereof; any sporting or recreational area and facility; any public transportation facility; a barber shop, bathhouse, swimming pool, bath, steam or massage parlor, gymnasium, or other establishment conducted to serve the health, appearance, or physical condition of a person; a campsite or trailer camp; a dispensary, clinic, hospital, convalescent home, or other institution for the sick, ailing, aged, or infirm; a mortuary, undertaking parlor, or cemetery; an educational institution; or any public building, park, arena, theater, hall, auditorium, museum, library, exhibit, or public facility of any kind whether indoor or outdoor. "Place of public accommodation" shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes.[328]

Connecticut

"Place of public accommodation, resort or amusement" means any establishment which caters or offers its services or facilities or goods to the general public, including, but not limited to, any commercial property or building lot, on which it is intended that a commercial building will be constructed or offered for sale or rent;[329]

Delaware

A "place of public accommodation" means any establishment which caters to or offers goods or services or facilities to, or solicits patronage from, the general

[327] 42 U.S.C.A. § 12181 (West)
[328] Colo. Rev. Stat. Ann. § 24-34-601 (West)
[329] Conn. Gen. Stat. Ann. § 46a-63 (West)

public. This definition includes state agencies, local government agencies, and state-funded agencies performing public functions. This definition shall apply to hotels and motels catering to the transient public, but it shall not apply to the sale or rental of houses, housing units, apartments, rooming houses or other dwellings, nor to tourist homes with less than 10 rental units catering to the transient public.[330]

District of Columbia

"Place of public accommodation" means all places included in the meaning of such terms as inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest; restaurants or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectioneries, soda fountains and all stores where ice cream, ice and fruit preparation or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores, and establishments dealing with goods or services of any kind, including, but not limited to, the credit facilities thereof; banks, savings and loan associations, establishments of mortgage bankers and brokers, all other financial institutions, and credit information bureaus; insurance companies and establishments of insurance policy brokers; dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments; barber shops, beauty parlors, theaters, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiards and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls and public elevators of buildings and structures, occupied by 2 or more tenants, or by the owner and 1 or more tenants. Such term shall not include any institution, club, or place of accommodation which is in its nature distinctly private except, that any such institution, club or place of accommodation shall be subject to the provisions of § 2-1402.67. A place of accommodation, institution, or club shall not be considered in its nature distinctly private if the place of accommodation, institution, or club:

(A) Has 350 or more members;
(B) Serves meals on a regular basis; and
(C) Regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business.[331]

[330] Del. Code Ann. tit. 6, § 4502 (West)
[331] D.C. Code § 2-1401.02

Florida

"Public accommodations" means places of public accommodation, lodgings, facilities principally engaged in selling food for consumption on the premises, gasoline stations, places of exhibition or entertainment, and other covered establishments. Each of the following establishments which serves the public is a place of public accommodation within the meaning of this section:
(a) Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than four rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his or her residence.
(b) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station.
(c) Any motion picture theater, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment.
(d) Any establishment which is physically located within the premises of any establishment otherwise covered by this subsection, or within the premises of which is physically located any such covered establishment, and which holds itself out as serving patrons of such covered establishment.[332]

Georgia

Not defined.

Hawaii

"Place of public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors. By way of example, but not of limitation, place of public accommodation includes facilities of the following types:
1) A facility providing services relating to travel or transportation;
(2) An inn, hotel, motel, or other establishment that provides lodging to transient guests;
(3) A restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises of a retail establishment;
(4) A shopping center or any establishment that sells goods or services at retail;

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[332] Fla. Stat. Ann. § 760.02 (West)

(5) An establishment licensed under chapter 281 doing business under a class 4, 5, 7, 8, 9, 10, 11, or 12 license, as defined in section 281-31;
6) A motion picture theater, other theater, auditorium, convention center, lecture hall, concert hall, sports arena, stadium, or other place of exhibition or entertainment;
(7) A barber shop, beauty shop, bathhouse, swimming pool, gymnasium, reducing or massage salon, or other establishment conducted to serve the health, appearance, or physical condition of persons;
(8) A park, a campsite, or trailer facility, or other recreation facility;
9) A comfort station; or a dispensary, clinic, hospital, convalescent home, or other institution for the infirm;[333]

Idaho

"Place of public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public;[334]

Illinois

Place of Public Accommodation. "Place of public accommodation" includes, but is not limited to:
(1) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than 5 units for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
(2) a restaurant, bar, or other establishment serving food or drink;
(3) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
(4) an auditorium, convention center, lecture hall, or other place of public gathering;
(5) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

[333] Haw. Rev. Stat. § 489-2 (West), Classes Include: Retail dealer, Dispenser, Club, Transient Vessel, Tour or Cruise Vessel, Special, Cabaret, Hotel; Haw. Rev. Stat. § 281-31 (West)

[334] Idaho Code Ann. § 67-5902 (West)

(6) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
(7) public conveyances on air, water, or land;
(8) a terminal, depot, or other station used for specified public transportation;
(9) a museum, library, gallery, or other place of public display or collection;
(10) a park, zoo, amusement park, or other place of recreation;
(11) a non-sectarian nursery, day care center, elementary, secondary, undergraduate, or postgraduate school, or other place of education;
(12) a senior citizen center, homeless shelter, food bank, non-sectarian adoption agency, or other social service center establishment; and
(13) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.[335]

Indiana

"Public accommodation" means any establishment that caters or offers its services or facilities or goods to the general public.[336]

Iowa

a. "Public accommodation" means each and every place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods for a fee or charge to nonmembers of any organization or association utilizing the place, establishment, or facility, provided that any place, establishment, or facility that caters or offers services, facilities, or goods to the nonmembers gratuitously shall be deemed a public accommodation if the accommodation receives governmental support or subsidy. Public accommodation shall not mean any bona fide private club or other place, establishment, or facility which is by its nature distinctly private, except when such distinctly private place, establishment, or facility caters or offers services, facilities, or goods to the nonmembers for fee or charge or gratuitously, it shall be deemed a public accommodation during such period.
b. "Public accommodation" includes each state and local government unit or tax-supported district of whatever kind, nature, or class that offers services, facilities, benefits, grants or goods to the public, gratuitously or otherwise. This paragraph shall not be construed by negative implication or otherwise to restrict any part or portion of the preexisting definition of the term "public accommodation".[337]

Kansas

[335] 775 Ill. Comp. Stat. Ann. 5/5-101
[336] Ind. Code Ann. § 22-9-1-3 (West)

[337] Iowa Code Ann. § 216.2 (West)

"Public accommodations" means any person who caters or offers goods, services, facilities and accommodations to the public. Public accommodations include, but are not limited to, any lodging establishment or food service establishment, as defined by K.S.A. 36-501, and amendments thereto; any bar, tavern, barbershop, beauty parlor, theater, skating rink, bowling alley, billiard parlor, amusement park, recreation park, swimming pool, lake, gymnasium, mortuary or cemetery which is open to the public; or any public transportation facility. Public accommodations do not include a religious or nonprofit fraternal or social association or corporation.[338]

Kentucky

"place of public accommodation, resort, or amusement" includes any place, store, or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public or which is supported directly or indirectly by government funds, except that:
(1) A private club is not a "place of public accommodation, resort, or amusement" if its policies are determined by its members and its facilities or services are available only to its members and their bona fide guests;
(2) "Place of public accommodation, resort, or amusement" does not include a rooming or boarding house containing not more than one (1) room for rent or hire and which is within a building occupied by the proprietor as his residence; and
(3) "Place of public accommodation, resort, or amusement" does not include a religious organization and its activities and facilities if the application of KRS 344.120 would not be consistent with the religious tenets of the organization, subject to paragraphs (a), (b), and (c) of this subsection.
(a) Any organization that teaches or advocates hatred based on race, color, or national origin shall not be considered a religious organization for the purposes of this subsection.
(b) A religious organization that sponsors nonreligious activities that are operated and governed by the organization, and that are offered to the general public, shall not deny participation by an individual in those activities on the ground of disability, race, color, religion, or national origin.
(c) A religious organization shall not, under any circumstances, discriminate in its activities or use of its facilities on the ground of disability, race, color, or national origin.[339]

Louisiana

[338] Kan. Stat. Ann. § 44-1002 (West)

[339] Ky. Rev. Stat. Ann. § 344.130 (West)

"Place of public accommodation, resort, or amusement" means any place, store, or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public, or which is supported directly or indirectly by government funds. However, a bona fide private club is not a place of public accommodation, resort, or amusement if its policies are determined solely by its members and its facilities or services are available only to its members and their bona fide guests.[340]

Maine

Place of public accommodation. 'Place of public accommodation' means a facility, operated by a public or private entity, whose operations fall within at least one of the following categories:

A. An inn, hotel, motel or other place of lodging, whether conducted for the entertainment or accommodation of transient guests or those seeking health, recreation or rest;

B. A restaurant, eating house, bar, tavern, buffet, saloon, soda fountain, ice cream parlor or other establishment serving or selling food or drink;

C. A motion picture house, theater, concert hall, stadium, roof garden, airdrome or other place of exhibition or entertainment;

D. An auditorium, convention center, lecture hall or other place of public gathering;

E. A bakery, grocery store, clothing store, hardware store, shopping center, garage, gasoline station or other sales or rental establishment;

F. A laundromat, dry cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, dispensary, clinic, bathhouse or other service establishment;

G. All public conveyances operated on land or water or in the air as well as a terminal, depot or other station used for specified public transportation;

H. A museum, library, gallery or other place of public display or collection;

I. A park, zoo, amusement park, race course, skating rink, fair, bowling alley, golf course, golf club, country club, gymnasium, health spa, shooting gallery, billiard or pool parlor, swimming pool, seashore accommodation or boardwalk or other place of recreation, exercise or health;

J. A nursery, elementary, secondary, undergraduate or postgraduate school or other place of education;

K. A day-care center, senior citizen center, homeless shelter, food bank, adoption agency or other social service center establishment;

L. Public elevators of buildings occupied by 2 or more tenants or by the owner and one or more tenants;

[340] La. Rev. Stat. Ann. 51:2232

M. A municipal building, courthouse, town hall or other establishment of the State or a local government; and

N. Any establishment that in fact caters to, or offers its goods, facilities or services to, or solicits or accepts patronage from, the general public.

When a place of public accommodation is located in a private residence, the portion of the residence used exclusively as a residence is not covered by this subchapter, but that portion used exclusively in the operation of the place of public accommodation or that portion used both for the place of public accommodation and for the residential purposes is covered by this subchapter. The covered portion of the residence extends to those elements used to enter the place of public accommodation, and those exterior and interior portions of the residence available to or used by customers or clients, including rest rooms.[341]

Maryland

"place of public accommodation" means:

(1) an inn, hotel, motel, or other establishment that provides lodging to transient guests;

(2) a restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food or alcoholic beverages for consumption on or off the premises, including a facility located on the premises of a retail establishment or gasoline station;

(3) a motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment;

(4) a retail establishment that:

(i) is operated by a public or private entity; and

(ii) offers goods, services, entertainment, recreation, or transportation; and

(5) an establishment:

(i) 1. that is physically located within the premises of any other establishment covered by this subtitle; or

2. within the premises of which any other establishment covered by this subtitle is physically located; and

(ii) that holds itself out as serving patrons of the covered establishment.[342]

Massachusetts

A place of public accommodation, resort or amusement within the meaning hereof shall be defined as and shall be deemed to include any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public and, without limiting the generality of this definition, whether or not it be

[341] Me. Rev. Stat. tit. 5, § 4553

[342] Md. Code Ann., State Gov't § 20-301 (West)

(1) an inn, tavern, hotel, shelter, roadhouse, motel, trailer camp or resort for transient or permanent guests or patrons seeking housing or lodging, food, drink, entertainment, health, recreation or rest; (2) a carrier, conveyance or elevator for the transportation of persons, whether operated on land, water or in the air, and the stations, terminals and facilities appurtenant thereto; (3) a gas station, garage, retail store or establishment, including those dispensing personal services; (4) a restaurant, bar or eating place, where food, beverages, confections or their derivatives are sold for consumption on or off the premises; (5) a rest room, barber shop, beauty parlor, bathhouse, seashore facilities or swimming pool, except such rest room, bathhouse or seashore facility as may be segregated on the basis of sex; (6) a boardwalk or other public highway; (7) an auditorium, theatre, music hall, meeting place or hall, including the common halls of buildings; (8) a place of public amusement, recreation, sport, exercise or entertainment; (9) a public library, museum or planetarium; or (10) a hospital, dispensary or clinic operating for profit; provided, however, that with regard to the prohibition on sex discrimination, this section shall not apply to a place of exercise for the exclusive use of persons of the same sex which is a bona fide fitness facility established for the sole purpose of promoting and maintaining physical and mental health through physical exercise and instruction, if such facility does not receive funds from a government source, nor to any corporation or entity authorized, created or chartered by federal law for the express purpose of promoting the health, social, educational vocational, and character development of a single sex; provided, further, that with regard to the prohibition of sex discrimination, those establishments which rent rooms on a temporary or permanent basis for the exclusive use of persons of the same sex shall not be considered places of public accommodation and shall not apply to any other part of such an establishment.[343]

Michigan

"Place of public accommodation" means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public. Place of public accommodation also includes the facilities of the following private clubs:
(*i*) A country club or golf club.
(*ii*) A boating or yachting club.
(*iii*) A sports or athletic club.
(*iv*) A dining club, except a dining club that in good faith limits its membership to the members of a particular religion for the purpose of furthering the teachings or principles of that religion and not for the purpose of excluding individuals of a particular gender, race, or color.[344]

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[343] Mass. Gen. Laws Ann. 272 § 92A (West)

[344] Mich. Comp. Laws Ann. § 37.2301 (West)

Minnesota

"Place of public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.[345]

Mississippi

(1) Every person, firm or corporation engaged in any public business, trade or profession of any kind whatsoever in the State of Mississippi, including, but not restricted to, hotels, motels, tourist courts, lodging houses, restaurants, dining room or lunch counters, barber shops, beauty parlors, theatres, moving picture shows, or other places of entertainment and amusement, including public parks and swimming pools, stores of any kind wherein merchandise is offered for sale, is hereby authorized and empowered to choose or select the person or persons he or it desires to do business with, and is further authorized and empowered to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve. The provisions of this section shall not apply to corporations or associations engaged in the business of selling electricity, natural gas, or water to the general public, or furnishing telephone service to the public.

(2) Any public place of business may, if it so desires, display a sign posted in said place of business serving notice upon the general public that "the management reserves the right to refuse to sell to, wait upon or serve any person," however, the display of such a sign shall not be a prerequisite to exercising the authority conferred by this section.

(3) Any person who enters a public place of business in this state, or upon the premises thereof, and is requested or ordered to leave therefrom by the owner, manager or any employee thereof, and after having been so requested or ordered to leave, refuses so to do, shall be guilty of a trespass and upon conviction therefor shall be fined not more than five hundred dollars ($500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment.[346]

Missouri

"Places of public accommodation", all places or businesses offering or holding out to the general public, goods, services, privileges, facilities, advantages or accommodations for the peace, comfort, health, welfare and safety of the general

[345] Minn. Stat. Ann. § 363A.03 (West)

[346] Miss. Code. Ann. § 97-23-17 (West)

public or such public places providing food, shelter, recreation and amusement, including, but not limited to:
(a) Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
(b) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment;
(c) Any gasoline station, including all facilities located on the premises of such gasoline station and made available to the patrons thereof;
(d) Any motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment;
(e) Any public facility owned, operated, or managed by or on behalf of this state or any agency or subdivision thereof, or any public corporation; and any such facility supported in whole or in part by public funds;
(f) Any establishment which is physically located within the premises of any establishment otherwise covered by this section or within the premises of which is physically located any such covered establishment, and which holds itself out as serving patrons of such covered establishment;[347]

Montana

(a) "Public accommodation" means a place that caters or offers its services, goods, or facilities to the general public subject only to the conditions and limitations established by law and applicable to all persons. It includes without limitation a public inn, restaurant, eating house, hotel, roadhouse, place where food or alcoholic beverages or malt liquors are sold for consumption, motel, soda fountain, soft drink parlor, tavern, nightclub, trailer park, resort, campground, barbering, cosmetology, electrology, esthetics, or manicuring salon or shop, bathroom, resthouse, theater, swimming pool, skating rink, golf course, cafe, ice cream parlor, transportation company, or hospital and all other public amusement and business establishments.
(b) Public accommodation does not include an institution, club, or place of accommodation that proves that it is by its nature distinctly private. An institution, club, or place of accommodation may not be considered by its nature distinctly private if it has more than 100 members, provides regular meal service, and regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages, directly or indirectly, from or on behalf of nonmembers, for the furtherance of trade or business. For the

[347] Mo. Ann. Stat. § 213.010 (West)

purposes of this subsection (20), any lodge of a recognized national fraternal organization is considered by its nature distinctly private.[348]

Nebraska

places of public accommodation shall mean all places or businesses offering or holding out to the general public goods, services, privileges, facilities, advantages, and accommodations for the peace, comfort, health, welfare, and safety of the general public and such public places providing food, shelter, recreation, and amusement including, but not limited to:
(1) Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
(2) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including but not limited to any such facility located on the premises of any retail establishment;
(3) Any gasoline station, including all facilities located on the premises of such station and made available to the patrons thereof;
(4) Any motion picture house, theatre, concert hall, sports arena, stadium, or other place of exhibition or entertainment;
(5) Any public facility owned, operated, or managed by or on behalf of this state or any agency or subdivision thereof, or any public corporation, and any such facility supported in whole or in part by public funds; and
(6) Any establishment which is physically located within the premises of any establishment otherwise covered by this section or within the premises of which is physically located any such covered establishment and which holds itself out as serving patrons of such covered establishment.[349]

Nevada

"Place of public accommodation" means:
(a) Any inn, hotel, motel or other establishment which provides lodging to transient guests, except an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of the establishment as the proprietor's residence;
(b) Any restaurant, bar, cafeteria, lunchroom, lunch counter, soda fountain, casino or any other facility where food or spirituous or malt liquors are sold, including any such facility located on the premises of any retail establishment;
(c) Any gasoline station;

[348] Mont. Code Ann. § 49-2-101
[349] Neb. Rev. Stat. § 20-133

(d) Any motion picture house, theater, concert hall, sports arena or other place of exhibition or entertainment;
(e) Any auditorium, convention center, lecture hall, stadium or other place of public gathering;
(f) Any bakery, grocery store, clothing store, hardware store, shopping center or other sales or rental establishment;
(g) Any laundromat, dry cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, office of an accountant or lawyer, pharmacy, insurance office, office of a provider of health care, hospital or other service establishment;
(h) Any terminal, depot or other station used for specified public transportation;
(i) Any museum, library, gallery or other place of public display or collection;
(j) Any park, zoo, amusement park or other place of recreation;
(k) Any nursery, private school or university or other place of education;
(l) Any day care center, senior citizen center, homeless shelter, food bank, adoption agency or other social service establishment;
(m) Any gymnasium, health spa, bowling alley, golf course or other place of exercise or recreation;
(n) Any other establishment or place to which the public is invited or which is intended for public use; and
(o) Any establishment physically containing or contained within any of the establishments described in paragraphs (a) to (n), inclusive, which holds itself out as serving patrons of the described establishment.[350]

New Hampshire

"Place of public accommodation" includes any inn, tavern or hotel, whether conducted for entertainment, the housing or lodging of transient guests, or for the benefit, use or accommodations of those seeking health, recreation or rest, any restaurant, eating house, public conveyance on land or water, bathhouse, barbershop, theater, golf course, sports arena, health care provider, and music or other public hall, store or other establishment which caters or offers its services or facilities or goods to the general public. "Public accommodation" shall not include any institution or club which is in its nature distinctly private.[351]

New Jersey

"A place of public accommodation" shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant,

[350] Nev. Rev. Stat. Ann. § 651.050 (West)
[351] N.H. Rev. Stat. Ann. § 354-A:2

eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post secondary school from using in good faith criteria other than race, creed, color, national origin, ancestry, gender identity or expression or affectional or sexual orientation in the admission of students.[352]

New Mexico

"public accommodation" means any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private;[353]

New York

The term "place of public accommodation, resort or amusement" shall include, except as hereinafter specified, all places included in the meaning of such terms as: inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants, or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectionaries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores and establishments dealing with goods or services of any kind, dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments, barber shops, beauty

[352] N.J. Stat. Ann. § 10:5-5 (West)
[353] N.M. Stat. Ann. § 28-1-2 (West)

parlors, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls and public elevators of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants. Such term shall not include public libraries, kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses, and all educational institutions under the supervision of the regents of the state of New York; any such public library, kindergarten, primary and secondary school, academy, college, university, professional school, extension course or other education facility, supported in whole or in part by public funds or by contributions solicited from the general public; or any institution, club or place of accommodation which proves that it is in its nature distinctly private. In no event shall an institution, club or place of accommodation be considered in its nature distinctly private if it has more than one hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of a nonmember for the furtherance of trade or business. An institution, club, or place of accommodation which is not deemed distinctly private pursuant to this subdivision may nevertheless apply such selective criteria as it chooses in the use of its facilities, in evaluating applicants for membership and in the conduct of its activities, so long as such selective criteria do not constitute discriminatory practices under this article or any other provision of law. For the purposes of this section, a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state or a religious corporation incorporated under the education law or the religious corporations law shall be deemed to be in its nature distinctly private.
No institution, club, organization or place of accommodation which sponsors or conducts any amateur athletic contest or sparring exhibition and advertises or bills such contest or exhibition as a New York state championship contest or uses the words "New York state" in its announcements shall be deemed a private exhibition within the meaning of this section.[354]

North Carolina

"Place of public accommodations" includes, but is not limited to, any place, facility, store, other establishment, hotel, or motel, which supplies goods or services on the premises to the public or which solicits or accepts the patronage or trade of any person.[355]

North Dakota

[354] N.Y. Exec. Law § 292 (McKinney)
[355] N.C. Gen. Stat. Ann. § 168A-3 (West)

"Public accommodation" means every place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods to the general public for a fee, charge, or gratuity. "Public accommodation" does not include a bona fide private club or other place, establishment, or facility which is by its nature distinctly private; provided, however, the distinctly private place, establishment, or facility is a "public accommodation" during the period it caters or offers services, facilities, or goods to the general public for a fee, charge, or gratuity.[356]

Ohio

"Place of public accommodation" means any inn, restaurant, eating house, barbershop, public conveyance by air, land, or water, theater, store, other place for the sale of merchandise, or any other place of public accommodation or amusement of which the accommodations, advantages, facilities, or privileges are available to the public.[357]

Oklahoma

"place of public accommodation" does not include barber shops or beauty shops or privately-owned resort or amusement establishments or an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of the establishment as his residence.[358]

Oregon

(1) A place of public accommodation, subject to the exclusions in subsection (2) of this section, means:
(a) Any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise.
(b) Any place that is open to the public and owned or maintained by a public body, as defined in ORS 174.109, regardless of whether the place is commercial in nature.
(c) Any service to the public that is provided by a public body, as defined in ORS 174.109, regardless of whether the service is commercial in nature.
(2) A place of public accommodation does not include:
(a) A Department of Corrections institution as defined in ORS 421.005.
(b) A state hospital as defined in ORS 162.135.
(c) A youth correction facility as defined in ORS 420.005.
(d) A local correction facility or lockup as defined in ORS 169.005.

[356] N.D. Cent. Code Ann. § 14-02.4-02 (West)

[357] Ohio Rev. Code Ann. § 4112.01 (West)
[358] Okla. Stat. Ann. tit. 25, § 1401 (West)

(e) An institution, bona fide club or place of accommodation that is in its nature distinctly private.[359]

Pennsylvania

The term "public accommodation, resort or amusement" means any accommodation, resort or amusement which is open to, accepts or solicits the patronage of the general public, including but not limited to inns, taverns, roadhouses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants or eating houses, or any place where food is sold for consumption on the premises, buffets, saloons, barrooms or any store, park or enclosure where spirituous or malt liquors are sold, ice cream parlors, confectioneries, soda fountains and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises, drug stores, dispensaries, clinics, hospitals, bathhouses, swimming pools, barber shops, beauty parlors, retail stores and establishments, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, fairs, bowling alleys, gymnasiums, shooting galleries, billiard and pool parlors, public libraries, kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses and all educational institutions under the supervision of this Commonwealth, nonsectarian cemeteries, garages and all public conveyances operated on land or water or in the air as well as the stations, terminals and airports thereof, financial institutions and all Commonwealth facilities and services, including such facilities and services of all political subdivisions thereof, but shall not include any accommodations which are in their nature distinctly private.[360]

Rhode Island

A "Place of public accommodation, resort, or amusement" within the meaning of §§ 11-24-1 - 11-24-3 includes, but is not limited to: (1) inns, taverns, roadhouses, hotels, whether conducted for the entertainment or accommodation of transient guests or of those seeking health, recreation or rest; (2) restaurants, eating houses or any place where food is sold for consumption on the premises; (3) buffets, saloons, barrooms, or any stores, parks, or enclosures where spirituous or malt liquors are sold; (4) ice cream parlors, confectioneries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or beverages of any kind are retailed for consumption on the premises; (5) retail stores and establishments, dispensaries, clinics, hospitals, rest rooms, bath houses, barber shops, beauty parlors, theaters, motion picture houses, music halls, airdromes, roof gardens, race courses, skating rinks, amusement and recreation parks, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors, swimming pools, seashore accommodations and boardwalks, and public libraries;

[359] Or. Rev. Stat. Ann. § 659A.400 (West)
[360] Pa. Stat. Ann. § 43 P.S. § 954 (West)

(6) garages; (7) all public conveyances operated on land, water or in the air as well as their stations and terminals; (8) public halls and public elevators of buildings occupied by two (2) or more tenants or by the owner and one or more tenants; and (9) public housing projects. Nothing in this section shall be construed to include any place of accommodation, resort, or amusement which is in its nature distinctly private.[361]

South Carolina

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station;
(3) any hospital, clinic, or other medical facility which provides overnight accommodations;
(4) any retail or wholesale establishment;
(5) any motion picture house, theater, concert hall, billiard parlor, saloon, barroom, golf course, sports arena, stadium, or other place of amusement, exhibition, recreation, or entertainment; and
(6) any establishment which is physically located within the premises of any establishment otherwise covered by this subsection, or within the premises of which is physically located any such covered establishment, and which holds itself out as serving patrons of such covered establishment.[362]

South Dakota

"Public accommodations," any place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods to the general public for a fee, charge, or gratuitously. Public accommodation does not mean any bona fide private club or other place, establishment, or facility which is by its nature distinctly private, except when such distinctly private place, establishment, or facility caters or offers services, facilities, or goods to the general public for fee or charge or gratuitously, it shall be deemed a public accommodation during such period of use;[363]

Tennessee

[361] R.I. Gen. Laws Ann. § 11-24-3 (West)
[362] S.C. Code Ann. § 45-9-10
[363] S.D. Codified Laws § 20-13-1

"Places of public accommodation, resort or amusement" includes any place, store or other establishment, either licensed or unlicensed, that supplies goods or services to the general public or that solicits or accepts the patronage or trade of the general public, or that is supported directly or indirectly by government funds, except that:
(A) A bona fide private club is not a place of public accommodation, resort or amusement if its policies are determined solely by its members; and
(B) Its facilities or services are available only to its members and their bona fide guests;[364]

Texas

"Public accommodation" means any:
(A) inn, hotel, or motel;
(B) restaurant, cafeteria, or other facility principally engaged in selling food for consumption on the premises;
(C) bar, nightclub, or other facility engaged in selling alcoholic beverages for consumption on the premises;
(D) motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment; or
(E) other facility used by or open to members of the public.[365]

Utah

(1)(a)"Place of public accommodation" includes every place, establishment, or facility of whatever kind, nature, or class that caters or offers its services, facilities, or goods to the general public for a fee or charge, except, an establishment that is:
(i) located within a building that contains not more than five rooms for rent or hire; and
(ii) actually occupied by the proprietor of the establishment as the proprietor's residence.
(b) A place, establishment, or facility that caters or offers its services, facilities, or goods to the general public gratuitously shall be within the definition of this term if it receives any substantial governmental subsidy or support.
(c) "Place of public accommodation" does not apply to any institution, church, any apartment house, club, or place of accommodation which is in its nature distinctly private except to the extent that it is open to the public.[366]

Vermont

[364] Tenn. Code Ann. § 4-21-102 (West)
[365] Tex. Bus. & Com. Code Ann. § 107.001 (West)

[366] Utah Code Ann. § 13-7-2 (West)

(1) “Place of public accommodation” means any school, restaurant, store, establishment or other facility at which services, facilities, goods, privileges, advantages, benefits or accommodations are offered to the general public.[367]

Virginia
Not defined.

Washington

(d) “Any place of public resort, accommodation, assemblage, or amusement” is hereby defined to include, but not to be limited to, any public place, licensed or unlicensed, kept for gain, hire or reward, or where charges are made for admission, service, occupancy or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use or accommodation of those seeking health, recreation, or rest, or for the sale of goods and merchandise, or for the rendering of personal services, or for public conveyance or transportation on land, water or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or any educational institution wholly or partially supported by public funds, or schools of special instruction, or nursery schools, or day care centers or children's camps; nothing herein contained shall be construed to include, or apply to, any institute, bona fide club, or place of accommodation, which is by its nature distinctly private provided that where public use is permitted that use shall be covered by this section; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution; and the right of a natural parent in *loco parentis* to direct the education and upbringing of a child under his or her control is hereby affirmed.
(2) Every person who denies to any other person because of race, creed, or color, the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, shall be guilty of a misdemeanor.[368]

[367] Vt. Stat. Ann. tit. 9, § 4501 (West)

[368] Wash. Rev. Code Ann. § 9.91.010 (West)

West Virginia

(j) The term "place of public accommodations" means any establishment or person, as defined herein, including the state, or any political or civil subdivision thereof, which offers its services, goods, facilities or accommodations to the general public, but shall not include any accommodations which are in their nature private. To the extent that any penitentiary, correctional facility, detention center, regional jail or county jail is a place of public accommodation, the rights, remedies and requirements provided by this article for any violation of subdivision (6), section nine of this article shall not apply to any person other than: (1) Any person employed at a penitentiary, correctional facility, detention center, regional jail or county jail; (2) any person employed by a law-enforcement agency; or (3) any person visiting any such employee or visiting any person detained in custody at such facility;[369]

Wisconsin

(e)1. "Public place of accommodation or amusement" shall be interpreted broadly to include, but not be limited to, places of business or recreation; lodging establishments; restaurants; taverns; barber , cosmetologist, aesthetician, electrologist, or manicuring establishments; nursing homes; clinics; hospitals; cemeteries; and any place where accommodations, amusement, goods, or services are available either free or for a consideration, subject to subd. 2.
2. "Public place of accommodation or amusement" does not include a place where a bona fide private, nonprofit organization or institution provides accommodations, amusement, goods or services during an event in which the organization or institution provides the accommodations, amusement, goods or services to the following individuals only:
a. Members of the organization or institution.
b. Guests named by members of the organization or institution.
c. Guests named by the organization or institution.[370]

Wyoming
Not Defined

[369] W. Va. Code Ann. § 5-11-3 (West)
[370] Wis. Stat. Ann. § 106.52 (West)