

No. 13-585

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**In The  
Supreme Court of the United States**

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ELANE PHOTOGRAPHY, LLC,

*Petitioner,*

v.

VANESSA WILLOCK,

*Respondent.*

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

**BRIEF OF WEDDING PHOTOGRAPHERS  
AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONER**

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

*Amicus curiae* are a group of 18 photographers operating throughout the United States.<sup>2</sup> We utilize the photojournalistic style, which is the use of images to tell stories. We possess a wide range of training in the expressive and artistic medium of photography, and work within a variety of disciplines, photographing weddings, landscapes, portraits, family photography, newborns, and more. Notably, all of us have counted wedding photography among our services, either presently or in the past. Some of us have taught classes or provided instruction to others in this discipline. Others of us have had our work featured in esteemed periodicals such as *The New York Times* and *The Knot*. As individuals, we reflect the diversity of this nation on

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<sup>1</sup> This brief was authored by *amicus* and their counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amicus* or their counsel has made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, all parties were given timely notice and have consented to the filing of this and other *amicus curiae* briefs. Letters indicating the parties' blanket consent have been submitted to the Court.

<sup>2</sup> Amici Curiae are Ampersand Photography, Colorful Moments Photography, LLC, Elizabeth C. Phillips, Eric McCarty, Grandeur Photography, John Henry Photography Inc., Megan Quist Photography, Megan Renae Photography, Nick Pantele Photography, Our Dreams Photography, Poly Mendes Photography, Purrington Photography, Robert A Boyd Fine Art, Renaissance Digital Arts, Susan Rea Photography, Tara D Photography, Tibungla Productions, Inc., and uShoot Studios, Inc.

multiple levels, including race, gender, age, and religion. Collectively, we are united in that photography is the medium through which we share our voices—and our messages—with the world, and therefore, have a particular interest in ensuring that photographers remain free from compelled speech in violation of their First Amendment rights.

For these reasons, our perspective regarding photography generally, and photojournalistic wedding photography particularly, will assist the Court in its evaluation of Elane Photography's petition for a writ of certiorari.

### SUMMARY OF ARGUMENT

Petitioner's petition explains at length why a public accommodation law may not require a professional to create expression that conflicts with her beliefs, and argues that this is a sufficiently weighty issue to merit the Court's consideration. We do not repeat those arguments.

Importantly, we also note that we do not express any opinion on same-sex commitment ceremonies or weddings, nor do we endorse or condemn Elane Photography's decision not to photograph such an event. Some of us may have accepted such an engagement.

Instead, we 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. For these reasons, this Court should grant review to hold that the First Amendment protects photographers like Petitioner from being compelled to speak as a condition for participating in the marketplace.

### STATEMENT OF THE CASE

*Amicus* hereby adopts and incorporates by reference the Statement of the Case set forth in the Petitioner's Brief.

### ARGUMENT

The New Mexico Supreme Court acknowledged that Elane Photography engages in expression when it photographs weddings. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 66 (N.M. 2013). It erred, however, in concluding that Elane Photography “expresses *its clients’ messages* in its photographs,” and in further suggesting that Elane Photography could negate the impact of its compelled speech by “post[ing] a disclaimer on their website or in their studio advertising that they oppose same-sex marriage.” *Id.* at 66, 70 (emphasis added). Those holdings are wrong, and threaten to severely undermine the First Amendment protections that should be afforded photographic expression.

Elane Photography, like all photojournalist wedding photographers, is a speaker engaged in its own expression. As “the sole storyteller for the entire day,” Elane Photography creates pure and influential speech. Glen Johnson, *Digital Wedding Photography: Capturing Beautiful Memories* 179 (Wiley Publishing

2006). The speech communicated through photographs “cuts across the boundary of illiteracy” and “[l]ike music, it is a language that all mankind can understand.” Howard Chapnick, *Truth Needs No Ally: Inside Photojournalism* 1 (University of Missouri Press 1994). Such speech—which transcends language—cannot be recalled by a textual disclaimer on a website or a sign inside a studio. This speech is entitled to the full First Amendment protection that has been denied by the New Mexico Supreme Court.

**I. Photographs Are a Powerful Form of Expression, Deserving of the Most Robust First Amendment Protection.**

This Court, and numerous others, have held that photographs are entitled to First Amendment protection. *See, e.g., Kaplan v. California*, 413 U.S. 115, 119 (1973) (“The Court has applied . . . First Amendment standards to moving pictures, to photographs, and to words in books.”); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 246 (2002) (“[T]he visual depiction” in a photograph “of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature” is protected speech with “serious literary, artistic, political, or scientific value”); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (First Amendment protection extends “beyond written or spoken words”); *Regan v. Time, Inc.*, 468 U.S. 641, 646-48 (1984) (discussing—without criticism—the District Court’s conclusion that a “photographic color reproduction of \$100 bills” was “speech protected by

the First Amendment,” and noting that there is a “message being conveyed” by a “photographic reproduction”); *Massachusetts v. Oakes*, 491 U.S. 576, 591 (1989) (Brennan, J., dissenting) (“Photography . . . and other two-dimensional forms of artistic reproduction . . . are plainly expressive activities that ordinarily qualify for First Amendment protection.”); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (“The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including . . . photographs[.]”); *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) (“[P]aintings, 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.”); *Ex Parte Nyabwa*, 366 S.W.3d 719, 725 (Tex. App. 2011) (“Photography is a form of speech normally protected by the First Amendment.”), *withdrawn then reinstated*, 366 S.W.3d 710 (Tex. Crim. App. 2012); *State v. Bonner*, 61 P.3d 611, 614 (Idaho Ct. App. 2002) (“[I]t is clear that the creation of photographs . . . is expressive activity that ordinarily qualifies for First Amendment protection.”).

Photography is deserving of the most robust First Amendment protection, as it is a uniquely expressive medium through which the messages conveyed may be understood at a level beyond mere words. Indeed, “[t]he world today has been conditioned, overwhelmingly, to visualize. The *picture* has almost replaced the *word* as a means of communication.” Berenice Abbott, *Photography at*

*the Crossroads, Universal Photo Almanac* 42 (1951), reprinted in *Photographers on Photography* 17 (Nathan Lyons ed., 1966) (emphasis in original). Abbott's words were recorded in 1951, but they resonate even more strongly in today's technological landscape, filled with smart phones and tablets, and dominated by an internet increasingly flooded by photographs<sup>3</sup> and their moving counterpart, video.<sup>4</sup> Even aside from technological mediums, the communicative impact of images has long been utilized in periodicals, displayed on billboards, and even inserted into the skin by tattooing.<sup>5</sup>

Within this panoply of visual communication, photography is "its most simple, direct, universal language." Edward Steichen, *On Photography*, 42 *Daedalus* 136-37 (1960), reprinted in *Photographers*

<sup>3</sup> In 2012, 7 petabytes of photo content was added to Facebook each month, representing 300 million new photographs every day. *Internet 2012 in Numbers*, Pingdom.com, <http://royal.pingdom.com/2013/01/16/internet-2012-in-numbers/> (last visited December 4, 2013).

<sup>4</sup> In 2012, 4 billion hours of video was watched on YouTube each month. *Internet 2012 in Numbers*, *supra*.

<sup>5</sup> Notably, the Ninth Circuit held in 2010 that "[t]he tattoo *itself*, the *process* of tattooing, and even the *business* of tattooing are not expressive conduct but purely expressive activity fully protected by the First Amendment." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010) (italics in original); see also *Coleman v. City of Mesa*, 230 Ariz. 352, 358-59, 284 P.3d 863, 869-70 (2012) (citing *Anderson* and describing as "incontrovertible" its "proposition that a tattoo itself is pure speech."

on *Photography*, *supra*, at 106, 107. Bruce Barnbaum, author and photographer, expresses the photograph's power to render words superfluous:

A true photograph possesses a universal quality that transcends immediate involvement with the subject or events of the photograph . . . *because the artist has successfully conveyed a message to me*. The photograph says it all. Nothing else is needed.

Bruce Barnbaum, *The Art of Photography: An Approach to Personal Expression* 1 (Rev. ed. 2010) (emphasis added).

Beyond simply communicating a message, however, photography allows for the *artistic* expression of that message. *See, e.g.*, Beaumont Newhall, *The History of Photography* 167 (5th ed., 3d prtg. 1988) (noting that the twentieth century ushered in “the acceptance of the straight photograph as a ‘legitimate’ art medium”). This artistic expression encompasses not only the raw, unedited image captured by the photographer from his own unique vantage point, reflecting the elements that he has chosen to capture, but also its presentation, as influenced by cropping, color correction, and other post-production effects applied by the photographer. *See, e.g.*, Tracy Dorr, *Advanced Wedding Photojournalism: Professional Techniques for Digital Photographers* 110 (Amherst Media 2010) (noting that “[i]mage editing software can allow you to change your digital photos in order to re-brand them in your own personal style”).

In addition to the artistic communication of a message, the finished product has the potential to be a “molder[ ] of opinion.” W. Eugene Smith, *Photographic Journalism, Photo Notes* 4 (1948), reprinted in *Photographers on Photography, supra*, at 103, 104. Specifically, images utilized in photojournalism may have “more influence on public thinking and opinion than any other branch of photography.” *Id.* at 103. Dorothea Lange recognized this fact when, during the depression, she photographed the “breadlines of the homeless and unemployed . . . so that others might feel the compassion she so deeply felt.” Newhall, *supra*, at 238. Indeed, it cannot reasonably be debated that certain images—such as those included below—have captured world events with a clarity and intensity that words cannot match.



Alfred Eisenstaedt, *V-J Day in Times Square* (1945).<sup>6</sup>



Nick Ut, *Phan Thi Kim Phuc, South Vietnam* (1972).<sup>7</sup>

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<sup>6</sup> Available at <http://www.famouspictures.org/vjday-times-square-kiss/> (last visited Dec. 5, 2013).

<sup>7</sup> Available at <http://abcnews.go.com/blogs/headlines/2012/06/the-historic-napalm-girl-pulitzer-image-marks-its-40th-anniversary/> (last visited Dec. 5, 2013).



Walter Iooss, Jr., *Michael Jordan, Foul Line Dunk* (1988).<sup>8</sup>



Jeff Widener, *Tiananmen Square*, (1989).<sup>9</sup>

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<sup>8</sup> Available at <http://sportsillustrated.cnn.com/nba/news/20130215/1988-nba-slam-dunk-contest-michael-jordan/> (last visited Dec. 11, 2013).

<sup>9</sup> Available at <http://www.theguardian.com/commentisfree/2008/jun/04/rememberingtiananmen19years> (last visited Dec. 5, 2013).



Alexander Joe, *Nelson Mandela's Release* (1990).<sup>10</sup>



Thomas E. Franklin, *9/11 Ground Zero* (2001).<sup>11</sup>

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<sup>10</sup> Available at <http://photography.nationalgeographic.com/photography/photos/100-days-photo-gallery> (last visited Dec. 11, 2013).

<sup>11</sup> Available at <http://photography.nationalgeographic.com/photography/photos/100-days-photo-gallery> (last visited Dec. 11, 2013).

The New Mexico Supreme Court’s proposed solution—that photographers such as Elane Photography can effectively offset any expression they are compelled to make by posting a disclaimer—gives no regard to the weightiness of a photograph and the indelible mark it leaves on those who view it. *Elane Photography*, 309 P.3d at 70. Just as one cannot unring a bell, the message of a picture cannot be erased by a few words on a website or a sign inside a studio.

## **II. Wedding Photographs Are the Photographer’s First Amendment Speech.**

The Court should reject the New Mexico Supreme Court’s conclusion that Elane Photography expresses only “*its clients’ messages* in its photographs,” *Elane Photography*, 309 P.3d at 66 (emphasis added), and Willock’s argument that Elane Photography is “not a ‘speaker’ engaged in its own expression.” Answer Brief of Appellee-Respondent Vanessa Willock [hereinafter Respondent’s Answer] at 17, *Elane Photography, L.L.C. v. Willock*, 309 P.3d 53 (N.M. 2013) (No. 33,687).

Of course, “speech does not lose its protection because of the corporate identity of the speaker.” *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 16 (1986). And this Court has recognized that “a speaker is no less a speaker because he or she is paid to speak.” *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 801 (1988).

Even more fundamentally, photojournalists are not merely conduits for the messages they are

paid to capture through their lens. Rather, they are the creators of those messages, and the artistic choices they make regarding their photographs influence not only the power, but also the meaning of the message conveyed. A photographer's work should not, therefore, lose its First Amendment protection merely because a client is willing to pay to have the photographer create the messages.

**A. Photojournalists are storytellers who communicate their message with images.**

Elane Photography, like all wedding photojournalists, anchors her work in the branch of photography known as photojournalism. Just as “[p]hotography is about communication,” “the job of a photojournalist is to tell a story and communicate.” Brian Horton, *Associated Press Guide to Photojournalism* 42, 216 (2d ed. 2001) (internal quotations and citations omitted). As the name suggests, photojournalists communicate their messages “with a picture,” waiting for the “fleeting instant when an image sums up a story.” *Id.* at 14. The goal of photojournalism is to both “depict the content of some event which is in the process of unfolding,” and also “to communicate impressions.” Henri Cartier-Bresson, *Introduction, The Decisive Moment* (1952), reprinted in *Photographers on Photography, supra*, at 41, 43.

Because the ultimate goal is to communicate a message, it is of preeminent importance that photojournalists become “excellent storytellers.” Horton, *supra*, at 216 (internal quotations and citations omitted); see, e.g., Dorr, *supra*, at 107

("[P]hotojournalism is, by nature, all about the subject and the story."). This story comes from—and belongs to—the photographer, and results from his subjective control over both the moment captured, and the way in which it is captured. Photojournalist W. Eugene Smith explains how a photojournalist's subjective decisions determine the story that is told:

Up to and including the instant of exposure, the photographer is working in an *undeniably subjective way*. By his *choice of technical approach* (which is a tool of emotional control), by *his selection of the subject matter* to be held within the confines of his negative area, and by **his decision as to the exact, climactic instant of exposure**, he is blending the variables of interpretation into an emotional whole which will be a basis for the formation of opinions by the viewing public.

Smith, *supra*, at 104 (emphasis added). Indeed, photojournalism is inherently subjective, as "[t]he journalistic photographer can have no other than a personal approach; and it is impossible for him to be completely objective." *Id.* at 103.

Because the photojournalist controls the message shared, and in a quite literal sense the framing of that message, the photograph "tell[s] the truth of *what the photographer wanted* to relate." Horton, *supra*, at 42 (emphasis added). Not surprisingly, three different photojournalists, "were they to handle the same subject matter, would be capable of giving the world fine and individual

interpretations. . . . [I]t could almost be guaranteed that their interpretations of the same subject would be quite different.” Smith, *supra*, at 103-04.<sup>12</sup>

As an initial matter, a photojournalist decides *what* the story is, by choosing what moments to capture. *See, e.g.*, Horton, *supra*, at 52. His editorial discretion does not end there; among other storytelling tools, photojournalists utilize perspective, depth of field, and color in order to create—and shape—their story. The use of perspective is integral to the telling of the story; a failure to do so “makes the reader lose interest” and can “dull the reader’s response.” *Id.* “Just as a film director wouldn’t shoot from one perspective and with one focal length lens, a still photographer needs to compose the story with different perspectives and focal lengths to give visual variety to the story.” *Id.* at 51 (internal quotations and citations omitted).

Photojournalists also determine the appropriate lens and depth of field to capture their images. A large aperture will decrease the depth of field and allow a photojournalist to draw the viewer’s eye to a particular part of his image. Conversely, a smaller aperture will bring more of the image into

<sup>12</sup> For example, one iconic photograph from 9/11 communicates the vulnerability of first responders, while another reveals their strength and resolve. *Compare* photograph by Mario Tama, showing a firefighter overcome by emotion, *available at* [http://www.huffingtonpost.com/2012/09/11/september-11-photos-\\_n\\_1869226.html](http://www.huffingtonpost.com/2012/09/11/september-11-photos-_n_1869226.html) (last visited Dec. 5, 2013), *with* photograph by Thomas E. Franklin, showing firefighters raising the American flag, *available at* <http://photography.nationalgeographic.com/photography/photos/100-days-photo-gallery> (last visited Dec. 11, 2013).

focus, allowing a photojournalist to share intricate details with the viewer. See Darren Rowse, *Introduction to Aperture in Digital Photography*, Digital Photography School, <http://digital-photography-school.com/aperture>. Photojournalists may even utilize the absence of color to make the *story* more vibrant. See Dorr, *supra*, at 107 (stating that “a monotone [i.e., black-and-white] effect often greatly enhances your work because photojournalism is, by nature, all about the subject and the story”).

Capturing the raw image is only the first step in the photojournalist’s creation of his story. Next, the photojournalist “must go about separating the pictures which, though they are all right, aren’t the strongest.” Cartier-Bresson, *supra*, at 44. “Sometimes there is one unique picture whose composition possesses such vigor and richness, and whose content so radiates outward from it, that this single picture is a whole story in itself.” *Id.* at 43. Even still, a photograph may need to be cropped in order to “includ[e], or exclud[e], elements” of the captured scene. Horton, *supra*, at 42. Additionally, “burning” (darkening areas of the image) or “dodging” (lightening areas of the image) might be required to bring out the essential elements of the photograph and best tell the story. *Id.* at 38 (quoting from The Associated Press’s Electronic Photography Ethics Policy).

The end result “is utterly personal: no one else can ever see quite what you have seen, and the picture that emerges is unique, never before made and never to be repeated.” Aaron Siskind, *The Drama of Objects*, 8 *Minicam Photography*, no. 9,

1945, at 20-23, *reprinted in Photographers on Photography, supra*, at 96, 97. In a very real sense, therefore, the photograph conveys the *photographer's* message.

**B. Wedding photojournalists communicate their stories by marrying actual events with their own unique artistic style.**

The fact that Elane Photography tells wedding stories does not make its work less expressive. In recent decades, photojournalism has “swept across the [wedding photography] industry like a monsoon flood—slowly, surely changing the landscape of modern wedding photography.” Jose Villa & Jeff Kent, *Fine Art Wedding Photography: How to Capture Images with Style for the Modern Bride* 9 (2011). Rather than relying on “traditional posing rules and lighting techniques,” today’s wedding photojournalists have sought to become “excellent storytellers.” Horton, *supra*, at 216 (internal quotations and citations omitted). As such, they seek “inspiration from photojournalist icons” and embrace “[c]oncepts like ‘slice of life’ and ‘moments in time’” in the creation of their stories. Villa & Kent, *supra*, at 9.

As is the case with traditional photojournalism, wedding photojournalists seek to identify and create the unique image that captures an entire story. See Cartier-Bresson, *supra*, at 43. They do this with minimal interference in the events that transpire before them. Bambi Cantrell & Skip Cohen, *The Art of Wedding Photography: Professional Techniques with Style* 15 (2000). There

is, however, a notable distinction that may be found between traditional photojournalism and wedding photojournalism. While photojournalists are often aided by the presence of the written word accompanying their photographs, a wedding photojournalist is “the sole storyteller for the entire day.” Johnson, *supra*, at 179. The story that will be told thus finds its voice *only* through the viewfinder of the photographer, and only at the discretion of her finger on the shutter; any moment excluded “will soon be forgotten.” *Id.* For this reason, a wedding photojournalist’s photographs must convey their message with even more clarity.

1. *Wedding photojournalists tell their story of the wedding day.*

A wedding photographer is not only a “witness” to one of the four major milestones of a person’s life, she is also a “historian.” *Id.* at 8. The goal of a wedding photojournalist is to “tell the whole story of the day.” *Id.* at 19. A successful wedding photojournalist is trusted to “document” a couple’s wedding; the story is not “dictate[d] or script[ed]” by the couple. Therefore “the presentation of the day is as much the choice of the photographer as of the clients.” Heather Bowlan, *Who are You Shooting and Presenting for—Current Clients or Future Ones?*, WedPix Magazine, available at <http://www.wedpix.com/articles/016/wedding-clients-websites.html> (last visited Dec. 11, 2013).

The wedding day is full of “details to attend to, decisions to be made [and] negotiations to be undertaken.” Lauren Ragland, *Capturing Romance at the Wedding*, Wedding Photojournalist

Association,  
<http://www.wedpix.com/articles/015/capturing-wedding-romance.html> (last visited Dec. 5, 2013). The bride and groom will not participate in, or even be aware of, every detail that takes place. The wedding photojournalist has a unique vantage point and is the sole witness to many of these moments. Therefore, she must work to capture “every smile, every tear,” “images of all the big moments as well as the smaller details.” Johnson, *supra*, at 19.

The photographs captured by a wedding photojournalist do not only capture her “vantage point,” they capture her *viewpoint*. See Robert Frank, *A Statement*, *U.S. Camera Annual* 115 (1958), reprinted in *Photographers on Photography*, *supra*, at 25, 29 (stating that his photographs reflect “my viewpoint”); see also Barnbaum, *supra*, at 1 (a photograph “conveys a thought from one person, the photographer, to another, the viewer”). In telling the story of a wedding, a wedding photojournalist must communicate more than the events of the day; she must utilize her “individual character and point of view” to shape “*how* the story gets told.” Meghan McEwen, *Working the Camera Angles at the Wedding*, *WedPix Magazine*, available at <http://www.wedpix.com/articles/009/working-the-camera-angles/> (last visited Dec. 5, 2013).

2. *Wedding photographs are the photographer’s artistic work, and are carefully crafted and arranged to tell her story.*

“[G]ood wedding photojournalism takes the ordinary and makes it a piece of art.” *Id.* Thus, a

photojournalist, while she must be an “expert storyteller,” must also be “an artist, a painter of real-life happenings.” Dorr, *supra*, at 22. Though the “art [of wedding photography] is based on reality,” this “does not mean that the photos [taken by a wedding photojournalist] shouldn’t have all the creative and emotional resonance of a painting.” *Id.*

To create art that resonates, a wedding photojournalist must possess a “strongly developed inner eye.” *Id.* “[T]here’s always a good shot. ‘Finding it is the art.’” McEwen, *supra*. In a search for this “good shot,” a wedding photojournalist may capture 2,000 images in a single day. Johnson, *supra*, at 19. Many of these will be discarded in the editing process, abandoned in favor of more promising storylines or characters. The wedding photojournalist “will not be settling for any old candid moment,” but instead will seek “moments that demonstrate the height of emotion and tell stories in touching and innovative ways.” Dorr, *supra*, at 5. Even once the wedding photojournalist has found the “good shot,” she must “captur[e] [it] in a way that is as emotionally resonant as possible.” *Id.* at 14. It takes patience and a willingness to “keep trying—and keep moving—until [she] get[s] the exact moment that best tells the story.” *Id.* at 22.

After the wedding, the photographer selects the images “that tell the story of the day best.” Lorna Gentry, *Machine Gun Shooting at Weddings*, WedPix Magazine, *available at* <http://www.wedpix.com/articles/014/machine-gun-wedding-shooting.html> (last visited Dec. 11, 2013). She eliminates “extraneous details, enhance[s]

colors, and take[s] care that nothing is distracting from [her] romantic depiction of the day.” Dorr, *supra*, at 107. She might “intentionally blur parts of [an] image to lead the viewer to the subject,” or “darken[ ] the edges of an image” to “draw[ ] the viewer’s attention in to the lighter portion in the center.” Johnson, *supra*, at 89. These and other techniques enable the wedding photojournalist to “create a one-of-a-kind personal style in [her] images and better enhance the story being told by each moment.” Dorr, *supra*, at 103.

3. *Wedding photojournalists develop an identifiable style of storytelling, and have control of the message of their photographs.*

The “personal style” of a wedding photojournalist plays an integral role in how the story is told, and in how it is understood. While the initial process of capturing images allows the wedding photojournalist to select the characters of her story, and determine and develop her artistic vision, the editing process provides an opportunity for her to shape the images and refine her message. *See id.* Simply by cropping an image, she can completely alter the story. For example, a photograph of a couple passionately embracing is transformed from romance to humor by the presence of a giggling flower girl in the background; removing the girl returns the romance to the foreground. *See* Petition for Writ of Certiorari, *Elane Photography v. Willock*, No. 13-585, at 5 n.2. In the example below, the focus and message of the photograph is dramatically altered by the inclusion of a young girl.



Photograph by Megan Renae Photography. Likewise, the use of filters, adjustments to depth of field, and other post-production effects all can alter the story communicated by the photograph. *See Dorr, supra*, at 103. The impact is not difficult to illustrate. When presented with the same raw image, three wedding photojournalists will edit the image using their own personal style, resulting in three distinct interpretations and, consequently, messages. In the example below, the original image, by Robert A Boyd Fine Art, is in the upper left position. Edits were then made independently by Amici Robert A Boyd Fine Art (upper right), Tara D Photography (lower left), and Megan Renae Photography (lower right), resulting in three distinct artistic interpretations.



This phenomena—a personal style of storytelling that shapes the message conveyed—is not unique to wedding photography. For example, film directors regularly become known for particular stylistic elements or features.<sup>13</sup> Directors also utilize colors and filters, not just to bring an artistic element to the film, but to alter or—at the very least—enhance the message being communicated. For example, in *The Wizard of Oz*, the “surreal” Oz sequences were shot in color, while the “drab” Kansas sequences were filmed in black and white. See, e.g., Katy Coil, *Surreal and Symbolic: The Use of Color in Film*, Apr. 8, 2009, available at <http://www.examiner.com/article/surreal-and-symbolic-the-use-of-color-film>; see also *The Wizard of Oz (1939 film)*, Wikipedia, [http://en.wikipedia.org/wiki/The\\_Wizard\\_of\\_Oz\\_\(1939\\_film\)](http://en.wikipedia.org/wiki/The_Wizard_of_Oz_(1939_film)) (last visited Dec. 6, 2013).

Just as a director compiles his moving images into a finished film, the wedding photojournalist’s story of the wedding will ultimately be told in the wedding album. The editing process must be done with an eye toward this final story. “Like any good

<sup>13</sup> See, e.g., *Celebrating 5 Modern Directors And Their Signature Styles*, Cinema Blend, Aug. 6, 2012, <http://www.cinemablend.com/new/Celebrating-5-Modern-Directors-Their-Signature-Styles-32314.html> (last visited Dec. 6, 2013) (discussing Quentin Tarantino’s trunk shots, M. Night Shyamalan’s frame shots, and J.J. Abrams’ of lens flares, among others); see also Ismail Sakalaki, *Why are Wes Anderson films easily recognizable*, Criticism About..., Dec. 5, 2012, <http://criticismabout.com/2012/12/05/why-are-wes-anderson-films-easily-recognizable/> (last visited Dec. 6, 2013) (discussing the “highly stylized visuals” present in Wes Anderson movies).

story, a wedding album should have a beginning, a middle, and an end.” Bill Hurter, *The Best of Wedding Photojournalism: Techniques and Images for Professional Digital Photographers* 101 (2d ed. 2010). “[T]he album can be designed to impart many different aspects of the overall story.” *Id.* at 107-09. Thus, the “real work” of a wedding photographer is “being able to take the emotions [the photographer has] captured on film and put them into the pages of the wedding album.” Cantrell & Cohen, *supra*, at 116. Done correctly, the album will be a testimony to the celebration of a new family, as well as to [the photographer’s] skills as a storyteller.” *Id.* at 115.

### **III. As a Wedding Photojournalist, Elaine Huguenin Relies on Her Unique “Voice” to Artistically Craft and Communicate Her Story of a Wedding Day.**

Elaine Huguenin, co-owner and lead photographer of Elane Photography, utilizes her education in photography to capture and communicate her story of a wedding while maintaining her unique artistic “flare . . . style . . . edge.” Tr. 101.<sup>14</sup> As a wedding photojournalist, Elaine observes “fresh, real and un-staged” moments and captures those moments “as they happen.” Tr. 100-01. Like other wedding photojournalists, Elaine’s ultimate goal is to “speak through images” and “tell[ ] a story.” Tr. 80, 101. Blending her abilities as a storyteller with her skills as an artist, Elaine considers her work to be both “artistic” and

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<sup>14</sup> Tr. references the transcript of the evidentiary hearing before the New Mexico Human Rights Commission, which is part of the record in this case.

“*personally* expressive.” Plaintiff’s Memorandum of Law in Support of Motion for Summary Judgment [hereinafter Plaintiff’s Memorandum] at 4, *Elane Photography, L.L.C. v. Willock*, No. CV–2008-06632 (N.M. Jud. Dist. Ct. N.M. Jul. 9, 2009) (emphasis added).

On the day of the wedding Elaine captures “approximately sixteen hundred photographs, searching for candid images that best capture the story of the day.” *Id.* After shooting a wedding, Elaine begins the arduous task of selecting the best images, making both technical and artistic modifications to three or four hundred photographs. *Id.* Elaine crops images, adjusts colors, and utilizes “any new technique [she can] think of,” all in an effort to best tell her story of the wedding. Tr. 104-05, 107; Record Proper, *Elane Photography, L.L.C. v. Willock*, No. CV–2008-06632, at 0162 (N.M. Jud. Dist. Ct. N.M. Jul. 9, 2009). Finally, she designs and creates a wedding album that “illustrates the wedding story through pictures.” Plaintiff’s Memorandum, at 5. The images included in the book are selected by Elaine, and include only the images she “deem[s] coffee table book worthy.” Tr. 108. No other “voice” could create this unique expression, because it is Elaine who is speaking through her images.

By way of illustration, imagine a Fortune 500 company decides to engage someone from the world of athletics to speak to its top executives regarding teamwork, recognition of individual roles, and a focus on “victory.” An outline with key points is prepared and available to the speaker. Two

individuals are available: one is the basketball coach for a junior high girls' team, the other is former NBA head coach Phil Jackson. Despite having an exponentially higher speaking fee, Phil Jackson will almost certainly be the consensus choice, because his *voice* and perspective are valuable and desirable. Even if the main points are essentially dictated to him, those who hear the message recognize that it is nonetheless Phil Jackson's message. He is the speaker, he delivers the message in his personal style, and he—implicitly or explicitly—thereby endorses the message.

In the case of *Elane Photography*, the conclusion that she creates, shapes, and ultimately endorses the messages conveyed by her photographs is even easier to reach. Elaine has, in large degree, “free reign to photograph whatever [she] find[s] interesting.” Johnson, *supra*, at 199. While a general subject is provided—the wedding—she can include “literally anything” in her photographs, “provided [the subjects] make sense in [her] story.” Dorr, *supra*, at 94.

The New Mexico Supreme Court justified its denial of First Amendment protection for wedding photojournalists, in part, by holding that “it may be that *Elane Photography* expresses its clients' messages in its photographs, but only because it is hired to do so.” *Elane Photography*, 309 P.3d at 66. The court further reasoned that the First Amendment protected a photographer who sold her prints in a gallery, but did not protect a photographer who offered her services to the general public. *Id.* As an initial matter, this Court has

explicitly held that “a speaker is no less a speaker because he or she is paid to speak.” *Riley*, 487 U.S. at 801. In regards to the New Mexico Supreme Court’s attempt to differentiate between a professional who creates images on her own initiative and a professional who is commissioned to create images by a customer, this is a distinction without a difference. In both scenarios, the photographer both creates and endorses the message being portrayed by (1) making subjective decisions regarding what images to capture; (2) capturing those images through a unique perspective and experience; (3) editing the images in accordance with her personal style and to create a particular story; and (4) getting paid for her work.

In an analogous situation, the Ninth Circuit has considered the ownership of expression in the context of tattoo artists. The court first held that both the *process* and the *product* of tattooing are entitled to full First Amendment Protection. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010). It went on to find that even if the customer has “ultimate control over which design she wants tattooed on her skin,” and even if the tattooist simply “provide[s] a service,” those facts “do[ ] not make the tattooing process any less expressive activity, because there is no dispute that the tattooist applies his creative talents as well.” *Id.* at 1062. Contrary logic, the court held, would result in a scenario in which “Michelangelo’s painting of the Sistine Chapel”—which was commissioned by the Pope—was unprotected by the First Amendment. *Id.* The court concluded that, “[a]s with all collaborative creative processes, both the tattooist and the person

receiving the tattoo are engaged in expressive activity.” *Id.* Thus, even if Elaine was directed in every facet of the capture and production of her images,<sup>15</sup> they would *still* constitute expression.

At its core, Elaine’s work does not just reflect her unique style or “voice,” it is *her* unique expression. Throughout the process of capturing, editing, and presenting images, Elaine is working to create and share *her* story of a wedding day. Elaine is not a conduit of someone else’s message; on the contrary, she uses her camera to capture moments that the bride and groom would not otherwise know existed. “The looks on people’s faces as they see [the bride] for the first time will only be captured by [the photographer]. The bride will never notice or remember how people reacted until [the photographer] present[s] those memories to her.” Cantrell & Cohen, *supra*, at 45. A father’s single tear as he walks his daughter down the aisle; the expression on the mother-of-the-bride’s face as the newly married couple share their first dance. “[A] good story includes many details that go unobserved by most people, even those attending the event.” Hurter, *supra*, at 16. Elaine captures these unobserved moments and weaves them into her story. As an artist must be free to choose *how* the story is told, so Elaine must be equally free to choose *which* stories she tells.

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<sup>15</sup> As explained above, Elaine in fact has broad discretion in the creation of her messages.

**CONCLUSION**

For the foregoing reasons, the Court should grant the Petition.

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December 13, 2013