NO. 13-585

IN THE

Supreme Court of the United States

ELANE PHOTOGRAPHY, LLC,

Petitioner,

v.

VANESSA WILLOCK,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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Respondent cannot deflect the need for this Court's review. As the petition explains, the decision below conflicts with bedrock principles of free-speech jurisprudence. It allows the State to compel speech conveying messages that the speaker considers objectionable and, if dissension exists, to punish conscientious objectors. It thus permits state public-accommodation laws to reach well beyond *status-based* discrimination and compel speakers to express politically correct *messages* with no regard for their conscientious disagreement.

Respondent's arguments against review are unavailing. First, the purported procedural bar relates to an argument supporting a distinct federal free-exercise claim that is no longer part of this case. It has nothing to do with the federal free-speech claim that was consistently preserved below and is cleanly presented here. The decision below rested squarely on the First Amendment, with no adequate and independent state ground to obstruct review.

Second, the issue presented is vitally important despite the absence of a split of authority. The decision below set a dangerous precedent that is already the subject of intense controversy, as the amicus briefs confirm. And that decision threatens to compel speech not only by photographers, but also by all professional creators of expression, regardless of the nature of their convictions. Acknowledgement of the pressing need for review crosses ideological lines,

as multiple supporters of same-sex marriage urge this Court to grant certiorari.

Finally, the decision below violates the First Amendment. The State may not compel speakers to give voice to messages with which they disagree. The contrary cases on which Respondent relies involved no speech at all, let alone compelled speech. While the State may properly forbid discrimination based on a person's *status*, it may not compel citizens to express *messages* that they consider disagreeable. Further review is warranted.

I. The Free-Speech Claim at Issue Is Properly Preserved.

This case presents a clean free-speech claim unencumbered by any procedural bar. Respondent's contrary argument confuses the difference between a claim and an argument. Petitioner can "formulate[ ] any argument [it] like[s] in support of [a] claim" that it properly raises in this Court. *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992); *accord Citizens United v. FEC*, 558 U.S. 310, 330-31 (2010).

Petitioner raised two federal claims before the New Mexico Supreme Court. The first was a free-speech claim, supported by a compelled-speech argument. *See* Br. in Chief of Pet'r 12-35; Reply Br. of Pet'r at 3-16. The New Mexico Supreme Court rejected that claim on the merits. Pet.App.16a-41a.

Petitioner also asserted a federal free-exercise claim, presenting two arguments in support: first,

that the state public-accommodations statute is not generally applicable, *see* Pet.App.43a-48a; and, second, that this application of the public-accommodations statute violates a hybrid of rights. *See* Pet.App.48a-50a. In ruling against the federal free-exercise claim, the New Mexico Supreme Court rejected the general-applicability argument on the merits, Pet.App.48a, and held that the hybrid-rights argument was "inadequate[ly]" briefed. Pet.App.49a-50a.

In this Court, Petitioner raises only the free-speech claim, premised on a compelled-speech argument. Free-speech claims upheld by this Court have taken many forms, including some of a distinctly religious nature. Indeed, this Court has observed that "[s]ome of [its] cases prohibiting compelled expression, *decided exclusively upon free speech grounds*, have also involved freedom of religion[.]" *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 882 (1990) (emphasis added) (citing *Wooley v. Maynard*, 430 U.S. 705 (1977), and *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

Respondent errs doubly in asserting that a "state-law waiver bars any consideration of a Hybrid Rights theory." Opp.7. First, hybrid-rights arguments support free-exercise claims, but Petitioner has not raised any such claim here. *See Smith*, 494 U.S. at 882 (discussing a hybrid-rights argument when analyzing a free-exercise claim); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293-97 (10th Cir. 2004) (same). Second, the hybrid-rights

theory is an *argument*, not a *claim*, and thus is not subject to a procedural bar. *See Citizens United*, 558 U.S. at 330-31 ("[A] party can make any argument in support of [a properly presented] claim.").

"A litigant seeking review in this Court of a claim properly raised in the lower courts . . . generally possesses the ability to frame the question to be decided in any way he chooses[.]" *Yee*, 503 U.S. at 535. That is what Petitioner has done here, and no procedural bar obstructs review of the question presented.

This case, in short, presents only one claim (free speech) under one clause of the First Amendment raising only one theory (compelled speech). It is thus a clean vehicle for addressing an important First Amendment question.

II. The Issue Raised Is Vitally Important.

As the petition conceded, there was no split of authority and no substantial body of cases at the time of the decision below. Pet.38-39. Respondent suggests that these factors establish that the question presented is unimportant. Opp.8-12. These factors, however, simply underscore the novelty and error of punishing Petitioner for declining to create speech.

The decision below presents a burgeoning legal issue that threatens the "individual freedom of mind" for expressive professionals coast to coast. *See Wooley*, 430 U.S. at 714 (quoting *Barnette*, 319 U.S.

at 637). It will harm not only photographers, but all professional creators of expression, such as print-shop professionals, marketers, and graphic designers, whether their scruples are religious or secular. Pet.17-19.[1] None will be assured of their constitutional right not to speak messages that they cannot in good conscience convey. *See, e.g.*, *Baker v. Hands On Originals*, No. 03-12-3135, Determination of Probable Cause and Charge of Discrimination (Lexington-Fayette Urban County Human Rights Commission November 13, 2012), *available at* http://www.adfmedia.org/files/HOOdetermination.pdf. (charging a print-shop professional with discrimination for declining to produce a shirt because of the message that he was asked to display on it). And the constitutional crisis will only deepen as public-accommodations laws continue to expand in scope, and as more local governments enact them. Pet.20-23.

The importance of the question presented is further highlighted by the media's and the legal community's widespread interest in this case. *See, e.g.*, Adam Liptak, *Weighing Free Speech in Refusal to Photograph Lesbian Couple's Ceremony*, N.Y. Times, Nov. 18, 2013 (acknowledging that this case implicates "Ms. Huguenin's right to free speech"); Susan Nabet, *For Sale: The Threat of State Public*

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[1] Because the decision below jeopardizes the free-speech rights of all professional creators of expression (not just photographers), Petitioner's recognition that instances where discrimination complaints are brought against "a commercial photographer . . . don't happen very often" does not undermine this case's importance. Resp.App.5.

Accommodations Laws to the First Amendment Rights of Artistic Businesses, 77 Brook. L. Rev. 1515, 1554 (2012) ("Elane Photography may be one of the first cases to highlight the tension between public accommodations laws and the First Amendment right to be free from compelled speech, but it will not be the last."); James M. Gottry, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 Vand. L. Rev. 961, 963 (2011) ("[D]efenders of liberty should agree that decisions which force a [religious] photographer to provide services for a same-sex commitment ceremony or force a liberal filmmaker to shoot political advertisements for conservative candidates are untenable.").[2]

Many influential voices have supported Petitioner, like the eight States that have filed an amicus brief here. *See* States Br. 1-5. Even unexpected allies, such as the Cato Institute, its fellow amici professors, and the Los Angeles Times editorial board—all of whom support same-sex marriage—acknowledge the danger of the New Mexico Supreme Court's decision, and implore this Court to take action. *See* Cato Br. 2-3; Editorial Board, *Can Discrimination Be Legal?*, L.A. Times, Dec. 12, 2013 ("The Supreme Court should find a way to protect" wedding photographers who speak

[2] A WestlawNext search in the "News" database indicates that 90 articles published since the New Mexico Supreme Court's decision have discussed "Elaine Huguenin" or "Elane Photography." 54 articles in the "Law Reviews and Journals" database discuss the same.

through their images "and members of other 'expressive professions'").

Finally, this case cleanly presents the compelled-speech question at issue. Respondent does not dispute that Petitioner declined Respondent's request because the Huguenins objected to the messages that would have been conveyed through the created photographs and picture-book, *see* Pet.7, that Petitioner will gladly serve gays and lesbians in other contexts, *see id.*, and that the decision below mandated that Petitioner create expression conveying messages in conflict with the Huguenins' beliefs. *See* Pet.15-17. Respondent's discussion of state issues not decided below serves only to confirm the absence of an "adequate and independent state ground[ ]" for the New Mexico Supreme Court's decision, *see Michigan v. Long*, 463 U.S. 1032, 1038 (1983), and thus to emphasize that the federal issue is cleanly presented here. *See* Opp.12-16. This case, then, is a clean vehicle for deciding a critical constitutional issue.

III. The Decision Below Conflicts with This Court's Case Law.

The compelled-speech doctrine exists to protect the "individual freedom of mind" from state coercion. *Wooley*, 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 637). Requiring professionals to create speech that conveys messages at odds with their deepest convictions infringes that freedom. Yet the decision below requires professionals to do just that, and thus conflicts with this Court's precedent.

Hurley. The New Mexico Supreme Court's decision directly conflicts with *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 568-81 (1995). Pet.23-28. Respondent claims that *Hurley* is distinguishable because the State there applied the public-accommodations law "outside the commercial marketplace." Opp.22. But compelled-speech analysis does not differentiate for-profits from nonprofits or commercial entities from noncommercial groups. Pet.28-31.

Respondent next argues that the parade organization in *Hurley* was "engaged in the expression of [its] own message," while Ms. Huguenin is not "the speaker communicating through her photographs and books." Opp.22. Yet Ms. Huguenin unquestionably expresses her own messages—which need not be "particularized" or "succinctly articulable," *Hurley*, 515 U.S. at 569—through her photographs and picture-books. *See* Pet.4-5. She is not a passive surveillance camera, but a professional artist and storyteller speaking through the images that she captures, edits, and arranges in a book. *See* Pet.4-5. If three photographers—like Annie Leibovitz, Henri Cartier-Bresson, and Ansel Adams—all created images of the same wedding or event, their photographs and picture-books would undoubtedly convey different messages. *See* Wedding Photographers Br. 14-15, 21-25.

It would thus not "come as a shock" to Ms. Huguenin's customers that she "is the speaker communicating through her photographs and books."

Opp.22. Indeed, Ms. Huguenin told her customers this on her website. RP163 ("[T]o do what I do, I . . . speak through images").[3] And a coalition of wedding photographers has confirmed this industry-wide understanding in its amicus brief. *See* Wedding Photographers Br. 17-25.

Respondent blurs the obvious distinction between the message of the ceremony and the message communicated through Ms. Huguenin's photographs. Petitioner has never suggested that Ms. Huguenin determines "[t]he message of th[e] ceremony" or "the customer's wedding." Opp.23. Rather, Ms. Huguenin determines the messages "communicat[ed] through her photographs and books," Pet.5, the very expression that the decision below requires her to create.

More fundamentally, whether a compelled speaker has her "own message" is not a constitutional requirement. *Hurley* itself discussed numerous instances where First Amendment protection applies even though the speaker is not "generat[ing]" speech "as an original matter." 515 U.S. at 570. And as the petition explained, *see* Pet.30, the paid professional fundraisers in *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795-98 (1988), spoke their customers' messages (not their own), yet they were protected by the compelled-speech doctrine. Similarly, the motorists in *Wooley* did not have their

[3] This citation references the "Record Proper" maintained in the state court.

own message, but nevertheless prevailed on their compelled-speech claim. 430 U.S. at 713-17.

Regardless of whether compelled speakers have their "own message," the State cannot force them to serve as mouthpieces or couriers for messages to which they object, especially when the topic involves an ongoing nationwide debate. *See United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013). Just as New Mexico cannot require Ms. Huguenin to create speech conveying favorable messages about same-sex unions, no State may seek to eliminate religious discrimination by forcing a gay photographer to create positive images telling of a Westboro Baptist Church rally that expresses "hurtful" messages about same-sex relationships. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011). It matters not whether either photographer has her "own message" on the topic.

Rumsfeld. Trying to mold *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47 (2006), to fit this case, Respondent implausibly asserts that "the Solomon Amendment is an anti-discrimination law," Opp.24, that addresses "commercial conduct." Opp.19. On the contrary, *Rumsfeld* considered whether the federal government may condition funding on private schools' permitting military recruiting. *Rumsfeld*, therefore, was a federal subsidy case about military recruitment—not a nondiscrimination case about commercial conduct.

Rumsfeld rejected the law schools' compelled-speech claim because "the schools [were] not speaking when they host[ed] interviews and recruiting receptions." 547 U.S. at 64; *see also* Pet.34-35. Respondent, however, insists that the Court denied the schools' compelled-speech claim because the Solomon Amendment did not interfere with the schools' "own message" or engage in "content discrimination." Opp.20-21. But the absence of speech, of course, necessarily entails the absence of a school message or content discrimination. It was thus the lack of speech—not the ancillary conditions identified by Respondent—that foiled the compelled-speech claim in *Rumsfeld*.

Petitioner has already explained why Respondent's emphasis on whether a speaker has her "own message" does not advance Respondent's argument. *See supra* at 8-10. Neither does Respondent's discussion of content discrimination. "Mandating speech that a speaker would not otherwise make," as this application of the public-accommodations statute threatens to do, "necessarily alters the content of the speech." *Riley*, 487 U.S. at 795. Consequently, this application of the statute is "consider[ed] . . . a content-based regulation of speech." *Id.* Additionally, the content discrimination here is just like the content discrimination in *Hurley*: the State prohibited Petitioner from declining to speak a message; and in so doing, it has preferred that message above others.

Respondent also dwells on Petitioner's ability to post disclaimers or otherwise express its own views

and beliefs. Opp.28-30. But these disclaimer opportunities do not obviate the compelled-speech violation. Pet.35-36. The ability to disclaim one's coerced speech does not protect the freedom of mind, but makes the mind duplicitous and conflicted.

Respondent asserts that the ability to present a disclaimer is "important" because it "eliminate[s]" any impression that Petitioner "appear[s] to endorse" an unwanted message. Opp.28. But the Constitution proscribes the invasion of conscience that occurs when the State requires Ms. Huguenin to create expression conveying messages she deems objectionable. That incursion on liberty does not depend on mere appearances or the perceptions of others. In *Wooley*, for instance, the motorists could have affixed a bumper sticker to disclaim the State's motto; nevertheless the First Amendment prohibited the State from compelling conscientious objectors to display the government's message on their license plates. *Cf.* 430 U.S. at 722 (Rehnquist, J., dissenting).[4] In short, the New Mexico Supreme Court's misreading of *Rumsfeld* "threatens to eviscerate much compelled-speech protection[.]" Pet.36-38.

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[4] Petitioner nonetheless would surely be linked to any images that Ms. Huguenin would create telling the story of a same-sex ceremony. Petitioner's pricing package and standard contract would require Ms. Huguenin to take ownership of those photographs and to display them online for customers, their friends, and their family to view and purchase. *See* RP161, 164-65; *contra* Opp.29.

Other Cases. Unable to fit this case within *Rumsfeld*, Respondent argues that the decision below is consistent with other decisions that did not involve compelled speech. *Hishon v. King & Spalding,* 467 U.S. 69, 78 (1984), for example, held that a law-firm employer must "consider [an attorney] for partnership on her merits" without regard to her sex. *Id.* But the firm did not raise a compelled-speech defense, and nothing about the Court's decision compelled the firm to speak.

Nor was compelled speech implicated in *Runyon v. McCrary*, 427 U.S. 160, 175-76 (1976). The Court there required a private school to admit students of all races. It did not force the school to teach certain "ideas or dogma," *id.* at 176, which Respondent conceded below would "present serious First Amendment problems." Answer Br. of Resp't 21.

Hishon and *Runyon* properly condemn discrimination because of a person's protected *status*. They had nothing to do with a compelled *message*. Here, however, Petitioner declined a request to create expression because she disagreed with the message conveyed. That message-based decision is protected by the First Amendment.[5]

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[5] Petitioner has never claimed that all professionals whose work involves "creativity or expressive content" are exempt from public-accommodations laws. Opp.17. Rather, the freedom not to speak is implicated only where a customer asks a professional to create or speak messages that the professional deems objectionable. Thus, while an attorney may decline to advance a legal argument with which she disagrees, she may not refuse to represent African American clients because of their race.

Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991), and *Arcara v. Cloud Books*, 478 U.S. 697, 705-07 (1986), are even further afield. The plaintiff-informant in *Cohen* brought a promissory-estoppel claim against a newspaper for reneging on its assurance to preserve his anonymity. The decision did not force the newspaper to publish unwanted speech, an outcome that this Court has plainly denounced. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). And in *Arcara*, the government closed an adult bookstore due to solicitation of prostitution occurring on its premises. Compelled speech was not implicated because the government did not, for example, require the store to sell books that its owners deemed objectionable.

CONCLUSION

For the foregoing reasons, as well as for the reasons explained in the petition, this Court should grant review.

Respectfully submitted,

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