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

BRIEF OF *AMICI CURIAE* CATO INSTITUTE, EUGENE VOLOKH, AND DALE CARPENTER IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the First Amendment protect the right of a photographer to refuse to take a photograph?

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INTEREST OF *AMICI CURIAE*[1]

Amici are supporters of same-sex marriage who also believe that photographers, singers, writers, and other creators of expression have a First Amendment right to choose which expression they want to create.

The Cato Institute, founded in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. Cato has published a vast range of commentary both on the First Amendment and gay rights.

Dale Carpenter is the author of *Flagrant Conduct: The Story of* Lawrence v. Texas (2012), which won the 2013 Lambda Literary award for best GLBT Nonfiction. He also wrote *The Unconservative Harms of Conservative Opposition to Gay Marriage*, in *What's the Harm?: Does Legalizing Same-Sex Marriage Really Harm Individuals, Families, or Society?* (Lynn Wardle ed. 2008), and other works on sexual orientation and the law, as well as many law review articles on the First Amendment. He is the Earl R. Larson Professor of Civil Rights and Civil

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[1] All parties were given timely notice to the filing of this brief and have consented to its filing pursuant to Rule 37.2(a). This brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici* made a monetary contribution to its preparation or submission.

Liberties Law at the University of Minnesota, and was the Treasurer of Minnesotans United for All Families, a statewide group that opposed Minnesota's proposed opposite-sex-marriage-only constitutional amendment. (In this brief, he is speaking only for himself.)

Eugene Volokh, Gary T. Schwartz Professor of Law at UCLA, is the author of *Same-Sex Marriage and Slippery Slopes*, 34 Hofstra L. Rev. 1155 (2006), which expresses support for same-sex marriage, *id.* at 1197–98, and was reprinted in 5 Dukeminier Awards 1 (2006), a journal that "Recogniz[es] the Best Sexual Orientation and Gender Identity Law Review Articles." He has also authored or coauthored over 30 law review articles on the First Amendment, as well as the casebook *The First Amendment and Related Statutes* (4th ed. 2011).

SUMMARY OF ARGUMENT

This case is largely controlled by this Court's holding in *Wooley v. Maynard*, 430 U.S. 705 (1977). *Wooley*, the New Hampshire "Live Free or Die" license plate case that we discuss below, makes clear that speech compulsions are generally as unconstitutional as speech restrictions. *Wooley*'s logic applies to photographs and other displays, not just verbal expression. It also applies to compulsions to create photographs and other works (including when the creation is done for money), not just to compulsions to display such works. Much of the reasoning used by the New Mexico Supreme Court is directly contrary to the reasoning of *Wooley*.

Indeed, the state court's reasoning would produce startling results. Consider, for instance, a freelance

writer who writes press releases for various groups, including religious groups, but refuses to write a press release for a religious organization or event with which he disagrees. Under the New Mexico Supreme Court's theory, such a refusal would violate the law—being a form of discrimination based on religion—much as Elaine Huguenin's refusal to photograph an event with which she disagreed was treated as a violation of the law. Yet a writer must have the First Amendment right to choose which speech he creates, notwithstanding any state law to the contrary. The same principle applies to photographers.

While *Wooley* provides important constitutional protection, it also offers an important limiting principle to that protection: Though photographers, writers, singers, actors, painters, and others who create First Amendment-protected speech must have the right to decide which commissions to take and which to reject, this right does not necessarily apply to others who do not engage in protected speech. This Court can rule in favor of Elane Photography on First Amendment grounds without blocking the enforcement of antidiscrimination law against denials of service by caterers, hotels, limousine service operators, and the like.[2]

Wooley secures an important constitutional right to which all speakers are entitled—whether religious or secular, liberal or conservative, pro- or anti-gay-rights. The decision below violates that right.

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[2] *Amici* take no position for purposes of this case regarding potential defenses that non-expressive businesses may have against the operations of antidiscrimination laws.

ARGUMENT

I. Under the First Amendment, Speech Compulsions Are Generally Treated the Same as Speech Restrictions

This Court has long recognized that the First Amendment prohibits speech compulsions as well as speech restrictions. "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley*, 430 U.S. at 714 (quoting *West Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943)).

In *Wooley*, the Maynards objected to having to display the state motto on their government-issued license plates, and sought the right to obscure the motto. *Wooley*, 430 U.S. at 707-08, 715. Of course, no observer would have understood the motto—printed by the government on a government-provided and government-mandated license plate—as the driver's own words or the driver's own sentiments. Yet this Court nonetheless held for the Maynards.

A driver's "individual freedom of mind," this Court reasoned, protects her "First Amendment right to avoid becoming the courier" for the communication of speech that she does not wish to communicate. *Id.* at 717. Drivers have the "right to decline to foster . . . concepts" with which they disagree, even when the government requires merely that drivers display a slogan on a state-issued license plate. *Id.* at 714.

Even "the passive act of carrying the state motto on a license plate," *Id.* at 715, may not be compelled, because such a compulsion "'invades the sphere of intellect and spirit which it is the purpose of the First

Amendment to our Constitution to reserve from all official control.'" *Id.* (quoting *Barnette*, 319 U.S. at 642). Requiring drivers to display the slogan, this Court held, required them "to be an instrument for fostering public adherence to an ideological point of view [they] find[] unacceptable," which is unconstitutional. *Id.* "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Id.* And this reasoning applies whether or not the compelled slogan has a great deal of ideological content. See, e.g., *Ortiz v. State*, 749 P.2d 80, 82 (N.M. 1988) (stating that *Wooley* would allow drivers even to obscure the slogan "Land of Enchantment," which is non-ideological).

This view of "individual freedom of mind" makes eminent sense. Democracy and liberty rely on citizens' ability to preserve their integrity as speakers, thinkers, and creators—their sense that their expression, and the expression that they "foster" and for which they act as "courier[s]," is consistent with what they actually believe.

This is why, in the dark days of Soviet repression, Alexander Solzhenitsyn admonished his fellow Russians to "live not by lies": to refuse to endorse speech that they believe to be false. Alexander Solzhenitsyn, *"Live Not by Lies"*, *Wash. Post*, Feb. 18, 1974, at A26. Each person, he argued, must resolve to never "write, sign or print in any way a single phrase which in his opinion distorts the truth," to never "take into hand nor raise into the air a poster or slogan which he does not completely accept," to never "depict, foster or broadcast a single idea which he

can see is false or a distortion of the truth, whether it be in painting, sculpture, photography, technical science or music." *Id*.

Such an uncompromising path is not for everyone. Some people may choose to make peace with speech compulsions, even when they disagree with the speech that is being compelled. But those whose consciences, whether religious or secular, require them to refuse to distribute expression "which [they do] not completely accept," *Id*., are constitutionally protected in that refusal. "[T]he 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." *Wooley*, 430 U.S. at 714.

II. *Wooley* Extends to Photography, Including Photography Created for Money

Photography is fully protected by the First Amendment. That includes photography that does not have a political or scientific message. *See*, e.g. *United States v. Stevens*, 130 S. Ct. 1577, 1584, 1592 (2010) (striking down ban on commercial creation of photographic depictions of animal cruelty); *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (striking down portion of law that banned photographic reproductions of currency). This is just a special case of the broader proposition that visual expression is as protected as verbal expression. *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011) (holding that commercially distributed video games are fully protected speech); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (concluding that even works that ex-

press no "clear social position" are constitutionally protected, giving Jackson Pollock paintings as an example). This full protection also extends to photography that is created to be distributed for money, see, *e.g.*, *Stevens*; *Regan*, as well as other works that are created to be distributed for money, see, *e.g.*, *Brown*.

Photographs, then, are generally protected against governmental restriction. And by the logic of *Wooley*, if the government may not suppress photographs, it may not compel their distribution or display, either.

Say that instead of requiring the display of the slogan "Live Free or Die" on a license plate, a state required the display of an image—for instance, a picture of Patrick Henry, who famously said, "Give me liberty or give me death," or a drawing or photograph of two women holding hands. The driver's claim that requiring that display violated his First Amendment rights would be just as strong as it was in *Wooley*.

Requiring the display of an image intrudes on the "individual freedom of mind" as much as does requiring the display of a slogan. And the "First Amendment right to avoid becoming the courier" for speech that one does not want to disseminate, *Wooley*, 430 U.S. at 717, applies as much when the speech is visual as when it is verbal. The Circuit Court that is responsible for New Mexico has expressly recognized this, in *Cressman* v. *Thompson*, 719 F.3d 1139 (10th Cir. 2013) (applying *Wooley* to a display of an image rather than words on a license plate).

Indeed, *West Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943)—this Court's first compelled speech

case, on which *Wooley* heavily relied, *see* 430 U.S. at 714, 715—included nonverbal expression. *Barnette* struck down not only the requirement that schoolchildren say the Pledge of Allegiance, but also that they salute the flag. 319 U.S. at 628, 632-34. Compelled verbal expression was treated the same as compelled symbolic and visual expression.

Likewise, in *Hurley* this Court held that St. Patrick's Day Parade organizers had a right to exclude marchers who wanted to carry a banner that read, "Irish American Gay, Lesbian and Bisexual Group of Boston." 515 U.S. at 570. Though Massachusetts courts held that this exclusion violated state laws banning discrimination in places of public accommodation, this Court ruled that applying those laws in that case would unconstitutionally compel speech. The government "may not compel affirmance of a belief with which the speaker disagrees," and likewise generally may not compel even "statements of fact the speaker would rather avoid." 515 U.S. at 573.

This same reasoning would have been applicable had the would-be marchers wanted to carry a large photograph depicting smiling same-sex couples at a commitment ceremony, and the parade organizers refused to allow such a display. If parade organizers are entitled to exclude verbal representations of ideas that they "would rather avoid," *id.*, they are likewise entitled to exclude visual representations.

Hurley, after all, treated "the unquestionably shielded painting of Jackson Pollock" as equivalent to verbal poetry for First Amendment purposes, *id.* at 569, and as fully protected from restriction. And Hurley likewise reinforced what *Wooley* had made clear—that speech compulsions are as unconstitu-

tional as speech restrictions, because "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley*, 515 U.S. at 573 (quoting *Pacific Gas & Elec. Co. v. Public Util. Comm'n,* 475 U.S. 1, 16 (1986) (plurality opinion) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say."). It thus follows that compulsions of the display of photographs are just as unconstitutional as compulsions of the display of words.

III. *Wooley* Extends to Compelled Creation of Speech as Well as Compelled Distribution of Speech

So far we have discussed compulsion to speak or communicate a pre-fabricated message, while this case involves a compulsion to create an original message. But the First Amendment equally protects the creation of speech as well as its dissemination, including when that creation is done in exchange for money. *See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (holding that an author who writes for money is fully protected by the First Amendment); *United States v. Stevens*, 130 S. Ct. 1577, 1583-85 (2010) (striking down a restriction on the commercial creation and distribution of material depicting animal cruelty, with no distinction between the ban on creation and the ban on distribution); *Citizens United v. FEC*, 130 S. Ct. 876, 917 (2010) ("The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech.") (internal quotation marks omitted).

This equal treatment of speech creation and dissemination makes sense. Restricting the creation of speech interferes with the dissemination of speech. And compelling the creation of speech interferes with the "individual freedom of mind" at least as much as compelling the dissemination of speech does.

To be sure, creation and dissemination are not identical. This case does not, for instance, involve the concern that Elaine Huguenin is required to "use [her] private property as a 'mobile billboard'" for a particular message, *Wooley*, 430 U.S. at 715. But compelled creation and compelled dissemination are similar in that they both involve a person being required "to foster . . . concepts" with which she disagrees, *id.* at 714, and "to be an instrument for fostering public adherence" to a view that she disapproves of, *id.* at 715. If anything, requiring someone to create speech is even more of an imposition on a person's "intellect and spirit," *id.* (internal quotation marks omitted), than is requiring the person to simply engage in "the passive act of carrying the state motto on a license plate," *id.*

Creating expression—whether writing (even just writing a press release), painting, singing, acting, or photographing an event—involves innumerable intellectual and artistic decisions. It also, for many creators who want to "live not by lies," requires sympathy with the intellectual or emotional message that the expression conveys, or at least absence of disagreement with such a message. Requiring people to actually *produce* speech is even more intrusive than requiring them to be a "conduit" for such speech. As Solzhenitsyn noted, a person can rightfully insist that she should never "depict, foster or

broadcast a single idea which [she] can see is false or a distortion of the truth, whether it be in painting, sculpture, [or] photography," Solzhenitsyn, *supra*—just as she can rightfully insist that she should never "take into hand nor raise into the air a poster or slogan which [she] does not completely accept," *id.*

Consider for instance the very sort of public accommodations antidiscrimination law involved in this case. As interpreted by the state court, the law applies not just to photographers but also to other contractors, such as freelance writers, singers, and painters. And it would apply not just to weddings, but also to political and religious events.

Thus, for instance, a freelance writer who thinks Scientology is a fraud would be violating New Mexico law (which bans religious as well as sexual-orientation discrimination) if he refused to write a press release announcing a Scientologist event. An actor would be violating the law if he refused to perform in a commercial for a religious organization of which he disapproves. And since the same rule would apply to state statutes that ban discrimination based on "political affiliation," *e.g.*, D.C. Code § 2-1411.02 (2001); V.I. Code tit. 10, § 64(3) (2006); Seattle, Wash. Mun. Code §§ 14.06.020(L), .030(B), a Democratic freelance writer in a jurisdiction that had such a statute would have to accept commissions to write press releases for Republicans (so long as he writes them for Democrats).

Yet all such requirements would unacceptably force the speakers to "becom[e] the courier[s] for . . . message[s]" with which they disagree," *Wooley*, 430 U.S. at 717. All would interfere with creators' "right to decline to foster . . . concepts" that they disapprove

of. *Id.* at 714; *see also Id.* at 715 (recognizing people's right to "refuse to foster . . . an idea they find morally objectionable"). And all would interfere with the "individual freedom of mind," *Id.* at 714, by forcing writers, actors, painters, singers, and photographers to express sentiments that they see as wrong.

This logic is just as sound for wedding photographers as for these other kinds of speakers. The taking of wedding photographs—like the writing of a press release or the creation of a dramatic or musical performance—involves many hours of effort and a large range of expressive decisions—about lighting and posing, about selecting which of the hundreds or thousands of shots to include in the final work product, and about editing the shots (for instance, by cropping and by altering the color). *See, e.g.*, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884) (concluding that photographs are protected expression for copyright purposes because they embody the photographer's creative choices); *Schrock v. Learning Curve Int'l, Inc.*, 586 F.3d 513, 519-20 (7th Cir. 2009) (likewise); *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 793 (9th Cir. 1992) (likewise).

Clients pay a good deal of money to wedding photographers, precisely because of the value of the photographers' expressive staging, selection, and editing decisions. The state court of appeals in this case concluded that the taking of wedding photographs was not constitutionally protected, citing *State v. Chepilko*, 965 A.2d 190, 199 (N.J. Super. Ct. App. Div. 2009), for the proposition that a "defendant [who] used a pocket camera to take snapshots of persons walking on the boardwalk" was not engaged in sufficiently "expressive" activity. *Elane Photography,*

LLC v. Willock, 284 P.3d 428, 438 (N.M. Ct. App. 2012). But whatever the force of *Chepilko* might be on its own facts, *Chepilko*'s reasoning cannot apply to someone who engages in the extensive and painstaking process of staging, selecting, and editing the hundreds of photographs that enter wedding albums.

Moreover, the photographs at a wedding must implicitly express a particular viewpoint: Wedding photographers are hired to create images that convey the idea that the wedding is a beautiful, praiseworthy, even holy event. Mandating that someone make such expressive decisions, and create photographs that depict as sacred that which she views as profane, jeopardizes the person's "freedom of mind" at least as much as would mandating that she display on her license plate "Live Free or Die" or "Land of Enchantment," *see Ortiz v. State*, 749 P.2d at 82 (holding that *Wooley* applies to the latter slogan).

The New Mexico Supreme Court thus erred in reasoning 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." Pet. 5a; *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013). For the reasons given above, the First Amendment protects the right not to create a message, not just the right not to convey another's message.

And this analysis also helps explain why *Rumsfeld v. FAIR*, 547 U.S. 47 (2004), likewise cannot justify the decision below. *Rumsfeld* did hold that "[c]ompelling a law school that sends scheduling emails for other recruiters to send one for a military recruiter is simply not the same as forcing a student

to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is." *Id.* at 62.

But this distinction between the situation in *Rumsfeld* and the situations in *Barnette* and *Wooley* must have rested on the conclusion that requiring an institution to send scheduling e-mails does not interfere with anyone's "individual freedom of mind." *Wooley*, 430 U.S. at 714 (citing *Barnette*, 319 U.S. at 637). For the reasons given above, requiring an individual to personally create expressive works does interfere with that "freedom of mind," indeed even more than requiring an individual to display a motto on his car does. This case is thus governed by *Wooley*, not by *Rumsfeld*.

IV. The Freedom from Speech Compulsions Extends to For-Profit Speakers

It also does not matter that Huguenin was engaged in photography for money. As was noted above, the First Amendment fully protects both the dissemination and the creation of material for profit. The compelled-speech doctrine applies to commercial businesses, both newspapers, *see, e.g.*, *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), and non-media corporations, *see, e.g.*, *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986). And this protection makes sense: A wide range of speakers, whether newspapers, photographers, freelance writers, or others, use speech to try to make money.

This is the nature of our free-market system: The prospect of financial gain gives many creators of speech an incentive to create, and the money they

make by selling their creations gives them the ability to create more. *United States v. National Treasury Employees Union*, 513 U.S. 454, 469 (1995) (treating speech for money as fully protected, because "compensation [of authors] provides a significant incentive toward more expression"). Indeed, that is the premise of copyright law, *see Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (internal quotation marks omitted) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."), as well as of the free market more generally. If making money from one's work meant surrendering one's First Amendment rights to choose what to create, then a great many speakers would be stripped of their constitutional rights, including this country's most popular entertainers, authors, and artists.

V. The First Amendment Right Not to Speak Cannot Be Trumped by State Laws Creating Countervailing Rights

The New Mexico Supreme Court also defended its decision by reasoning that Elane Photography's claimed speech right "directly conflicts with Willock's right under Section 28-1-7(F) of the NMHRA to obtain goods and services from a public accommodation without discrimination on the basis of her sexual orientation." Pet. 20a; *Elane Photography* 309 P.3d at 64. *Barnette*, the court held, was inapposite because this Court in that case noted that the students' refusal to salute "[did] not bring them into collision with rights asserted by any other individual." *Id.* (quoting *Barnette*, 319 U.S. at 630).

But laws that substantially burden First Amendment rights cannot be trumped by state law rights, as *Hurley* and *Tornillo* show.[3] *Hurley*, like this case, involved a state law right to equal treatment in places of public accommodation, which the state's highest court authoritatively interpreted as covering parades. *Tornillo* likewise involved a law that created an equality right, namely "a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper." 418 U.S. at 243. In both cases, the First Amendment prevailed over the assertions of contrary state law rights.

Indeed, the point of First Amendment protection is to trump legislative speech restrictions—"to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts," *Barnette*, 319 U.S. at 638. That is just as true for restrictions that are aimed at securing legislatively created equality "rights" as for other speech restrictions.

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[3] *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657 (2000) (distinguishing *Roberts v. United States Jaycees*, 468 U. S. 609, 657 (1984), on the grounds that the law in *Roberts* did not substantially burden the group's First Amendment rights).

VI. First Amendment Protection Against Compelled Speech Extends Only to Refusals to Create First-Amendment-Protected Expression

The First Amendment protection offered by *Wooley* is limited in scope: It extends only to people who are being compelled to engage in expression.

Under *Wooley*, photographers' First Amendment freedom of expression protects their right to choose which photographs to create, because photographs are protected by the First Amendment. But caterers, hotels, and limousine companies do not have such a right to refuse to deliver food, rent out rooms, or provide livery services, respectively, for use in same-sex commitment ceremonies.

This simply reflects the fact that the First Amendment does not extend to all human endeavors, but only to expression. This is well understood when it comes to laws that regulate activity. The First Amendment does not forbid a government decision to restrict catering, hotels, or limousines—for instance, the state may create a monopoly on catering, restrict the operation of dance halls, set up a medallion system to limit the number of limousine drivers, or require a license for such businesses that the state had the discretion to grant or deny. *See, e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (upholding a ban on new pushcart vendors that allowed only a few old vendors to operate); *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (upholding a ban on businesses that engage in "debt adjusting"); *City of Dallas v. Stanglin*, 490 U.S. 19 (1989) (upholding a law that barred dance halls that cater to 14-to-18-year-olds from letting in adult patrons).

But it would be an unconstitutional prior restraint for the government to require a discretionary license before someone could publish a newspaper or write press releases, or to give certain singers, painters, or photographers a monopoly and thereby bar others from engaging in such expression. Cf., *e.g.*, *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (striking down licensing scheme for newspaper racks); *Mahaney v. City of Englewood*, 226 P.3d 1214, 1220 (Colo. Ct. App. 2009) (striking down licensing scheme for wall murals).

The line between expression and nonexpressive behavior is thus drawn routinely by courts evaluating the constitutionality of speech restrictions. Restrictions on expression trigger First Amendment scrutiny; restrictions on nonexpressive conduct do not. Precisely the same line can be drawn—and with no greater difficulty—when it comes to compulsions.

Such a line would be clear and administrable, and would protect a relatively narrow range of behavior: only behavior that involves the creation of constitutionally protected expression. If a person's activity may be banned, limited only to certain narrow classes of people, or subjected to discretionary licensing without violating the First Amendment—which is to say that it is not constitutionally protected expression—then the person may likewise be compelled to participate in events she disapproves without violating the First Amendment.[4] But if a person's activity is protected by the First Amendment against a ban,

[4] Of course, other constitutional (and statutory or common law) rights may be implicated in such circumstances.

for instance because it involves writing or photography, then it likewise may not be compelled.

Upholding the First Amendment right against compelled speech that is implicated here would ultimately inflict little harm on those who are discriminated against. A photographer who views a same-sex commitment ceremony as immoral would be of little use to the people engaging in the ceremony; there is too much risk that the photographs will, even inadvertently, reflect the photographer's disapproval.

Those engaging in such a ceremony—or, say, entering into an interfaith marriage or remarrying after a divorce—would likely benefit from knowing that a prospective photographer disapproves of the ceremony, so they could then turn to a more enthusiastic photographer. One publication estimates that there are about 100,000 wedding photographers in the United States,[5] so even a town of 50,000 people would likely contain over 15 wedding photographers. A YellowPages.com query for "wedding photography" near Albuquerque, where Elane Photography is located, yielded well over 100 results.[6] And most wedding photographers would likely be happy to take the money of anyone who comes to them.

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[5] Christopher Lin, *Business—The Wedding Photography Market Size (Estimating the Number of Wedding Photographers in the United States*), SLR Lounge, Feb. 9, 2009, http://www.slrlounge.com/business-the-wedding-photography-market-sizeestimating-the-number-of-wedding-photographers-in-the-united-states.

[6] http://www.yellowpages.com/albuquerque-nm/wedding-photography?g=albuquerque%2C.+nm&q=wedding+photography (search performed Dec. 7, 2013)

In this respect, discrimination by these narrow categories of expressive commercial actors is much less damaging and restrictive than other forms of discrimination. Employment discrimination can jeopardize a person's livelihood. Discrimination in education can affect a person's future, as can discrimination in housing—especially when housing is scarce in the safe parts of town with good schools.

Discrimination in many places of public accommodation has been historically pervasive, to the point that mixed-race groups might have been unable to find any suitable hotel or restaurant. But protecting the First Amendment rights of writers, singers, and photographers would come at comparatively little cost to those denied such inherently expressive and personal services by specific providers.

Of course, when a photographer tells a couple that she does not want to photograph their commitment ceremony, the couple may understandably be offended by this rejection. But the First Amendment does not treat avoiding offense as a sufficient interest to justify restricting or compelling speech. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989); *Cohen v. California*, 403 U.S. 15 (1971).

The First Amendment right to sing, write, photograph, and the like also rebuts the notion that people who voluntarily choose to photograph some ceremonies may on that basis be required to photograph all others at the state's command. *See*, *e.g.*, Pet. 19a; *Elane Photography*, 309 P.3d at 64 (reasoning that the New Mexico law "does not even require Elane Photography to take photographs" but rather "compelled [Elane Photography] to take photographs of same-sex weddings only to the extent that it would

provide the same services to a heterosexual couple"). Creating expressive works such as photographs—unlike delivering food, driving limousines, or renting out ballrooms—is a constitutional right. States therefore cannot impose new burdens on creators as a result of their having exercised this right.

This Court's decision in *Tornillo* illustrates that point. In *Tornillo*, this Court struck down a law that required newspapers to publish candidate replies only to the extent that they published criticisms of the candidates. 418 U.S. at 243. The newspaper's publication of the initial criticism could not be the basis for compelling it to publish replies that it did not wish to publish. Likewise, a person's choice to create constitutionally protected artistic expression cannot be the basis for compelling her to engage in artistic expression that she does not wish to create.

CONCLUSION

For the reasons set forth above, this Court should grant the petition.

Respectfully submitted,

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