

IN THE NEW MEXICO SUPREME COURT

ELANE PHOTOGRAPHY, LLC,

Appellant-Petitioner,

v.

No. 33,687

VANESSA WILLOCK,

Appellant-Respondent.

**BRIEF OF AMICI CURIAE
WEDDING PHOTOGRAPHERS
IN SUPPORT OF PETITIONER**

Evie Jilek
7304 San Francisco Rd. NE
Albuquerque, NM 87109
(505) 514-2817
evie.m.jilek@gmail.com

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*Counsel for Amici Curiae
Wedding Photographers*

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INTRODUCTION¹

This case involves an appeal from the New Mexico Human Rights Commission's determination that Petitioner Elane Photography's refusal to create photographs of a same-sex commitment ceremony violated the New Mexico Human Rights Act. One of Elane Photography's primary arguments is that forcing the company to create photographs communicating a message that its owners do not want to convey would constitute a compelled speech violation. The Court of Appeals rejected that argument because it said that the photographs created by the company do not communicate a "message from Elane Photography," and thus "Elane Photography is not [a] speaker" who "warrant[s] First Amendment protections." Slip Op. at 22-24. *Amici* Wedding Photographers urge the Court to reject this thoroughly flawed conclusion, and find instead that Elane Photography's photojournalistic wedding pictures embody the company's own expression and communicate a favorable story about the photographed event.

Amici Wedding Photographers are twenty-two wedding photographers that operate throughout the country, including here in New Mexico.² We employ the

¹ The undersigned counsel provided counsel for all parties timely notice of the intent to file this brief.

² *Amici Curiae* Wedding Photographers are Ampersand Photography, Colorful Moments Photography, LLC, Diamond Portraits, Ed's Photogenics, Elizabeth C. Phillips, Eric McCarty, Grandeur Photography, Hilling Design Fine Portraiture, John Henry Photography Inc., Mark Kidd Studios, Megan Quist Photography, Moments in Time Photography, Nick Pantele Photography, Our Dreams Photography, Pallock Productions, Poly Mendes Photography, Purrington

photojournalistic style in our work. Many of us have been trained in the expressive and artistic medium of photography. Others of us have taught classes or instructed others on the topic of photography. Some of us have had our photographs published in well-respected periodicals like the New York Times and The Knot. Our firsthand experience with photography in general, and photojournalistic wedding photography in particular, will aid the Court's evaluation of Elane Photography's compelled speech claim.

Our brief begins by quickly explaining that the First Amendment prohibits the Commission from forcing a commercial business like Elane Photography to express an unwanted message. Then we explore the nature of photography and its well-accepted role as a means of communication and form of expressive art. After that, we discuss the history and characteristics of photojournalism, which is the field of photography that gave birth to wedding photojournalism. Finally, the brief establishes the expressiveness of photojournalistic wedding photography, explaining that wedding photojournalists' pictures are their own expression (their illustrated version of the wedding story) and that their images convey a highly emotional tale that positively portrays the event to viewers.

Amici Wedding Photographers emphasize that this brief focuses exclusively on the expressiveness of photojournalistic wedding photography. We do not write

Photography, Renaissance Digital Arts, Sara-Anne Photography, Susan Rea Photography, Tibungla Productions, Inc., and uShoot Studios, Inc.

to voice our approval or disapproval of Elane Photography's decision not to photograph a same-sex ceremony. In fact, if asked, some of us might photograph such a ceremony. The issue for us is not the nature of the declined work, but the fact that photojournalistic wedding photography is expression entitled to First Amendment protection, and that none of us should be forced to convey the story of an event whose message conflicts with our core principles.

ARGUMENT

I. The First Amendment Prohibits The Government From Compelling A Private Commercial Business To Express A Message.

A long line of United States Supreme Court precedent establishes that the First Amendment prohibits the government from compelling a private entity or individual to express a message. *See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 566 (1995) (government may not apply a sexual orientation nondiscrimination law to compel private citizens to communicate an unwanted message through their parade); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 20-21 (1986) (plurality opinion) (government may not force a company to communicate a third party's message by including its newsletter in the company's billing envelope); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (government may not compel a citizen to display the State's motto on a government-issued license plate); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (government may not compel a newspaper

company to print a third party's opinion editorial); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (government may not compel public school students to recite a pledge).

A similarly long line of United States Supreme Court case law holds that the First Amendment's speech-related protections apply with full force to private for-profit businesses like Elane Photography. *See, e.g., City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("[T]he degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away."); *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak."); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) (discussing the Supreme Court's First Amendment "decisions involving corporations in the business of communication"); *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967) (quotation marks and citation omitted) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."); *Smith v. California*, 361 U.S. 147, 150 (1959) ("It is of course no matter that the dissemination [of books and other forms of the printed word] takes place under commercial auspices."); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495,

501 (1952) (rejecting the argument that “motion pictures do not fall within the First Amendment’s aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit”).

It is thus indisputable that the Commission cannot apply the State’s nondiscrimination law to compel Elane Photography, a for-profit business, to express a message that its owners do not want to communicate. Therefore, the Court’s analysis of this critical constitutional question hinges on whether photojournalistic wedding photographers, like Elane Photography, engage in expression when they create photographs of their clients’ weddings. The answer to that question is certainly yes, as we *Amici* Wedding Photographers can attest—and explain in detail below—based on our first-hand experience as wedding photographers who use the photojournalistic style.

II. Photographs Typically Are The Artistic Expression Of The Photographer And, As Such, Are Protected By The First Amendment.

“Ever since 1839 photography has been a vital means of communication and expression.” BEAUMONT NEWHALL, *THE HISTORY OF PHOTOGRAPHY* 7 (5th ed., 3d prtg. 1988). *See also* W. Eugene Smith, *Photographic Journalism*, *PHOTO NOTES*, Jun. 1948, at 4-5, *reprinted in* *PHOTOGRAPHERS ON PHOTOGRAPHY* 103, 103 (Nathan Lyons ed., 1966) (identifying photography as a particularly “potent medium of expression”). “The invention of photography gave visual communication its most simple, direct, universal language.” Edward Steichen, *On*

Photography, 42 DAEDALUS 136, 136-37 (1960), *reprinted in* PHOTOGRAPHERS ON PHOTOGRAPHY, *supra*, 106, 107. “Like music, it is a language that all mankind can understand.” HOWARD CHAPNICK, TRUTH NEEDS NO ALLY: INSIDE PHOTOJOURNALISM 1 (1994). “[W]ritten language is far more constricting because of its many variants . . . and because some within each language group are illiterate[.]” *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996). Photography, in contrast, “cuts across the boundary of illiteracy that isolates much of the world’s population.” CHAPNICK, *supra*, at 1.

Photography is not merely a means of communication; it is a form of artistic expression. See BRUCE BARNBAUM, THE ART OF PHOTOGRAPHY: AN APPROACH TO PERSONAL EXPRESSION 1 (Rev. ed. 2010) (“[P]hotography is similar to other forms of artistic, nonverbal communication such as painting, sculpture, and music.”); NEWHALL, *supra*, at 167 (“[T]he opening years of the twentieth century” saw “the acceptance of the straight photograph”—that is, an un-manipulated photograph—“as a ‘legitimate’ art medium”). A photographer, then, “[t]hough not a poet, nor a painter, nor a composer, . . . is yet an artist,” Dorothea Lange, *Photographing the Familiar*, 1 APERTURE, no. 2, 1952 at 4-15, *reprinted in* PHOTOGRAPHERS ON PHOTOGRAPHY, *supra*, 68, 69; because “[s]election of proper picture content comes from a fine union of trained eye and imaginative mind.” Berenice Abbott, *Photography at the Crossroads*, UNIVERSAL PHOTO ALMANAC

42 (1951), *reprinted in* PHOTOGRAPHERS ON PHOTOGRAPHY, *supra*, 17, 21. *See also* NEWHALL, *supra*, at 168 (“[Each] picture [is] the result of instant recognition of subject and form—‘spontaneity of judgment’ and ‘composition by the eye[.]’”).

Photographs are the unique expression of the photographer who captures the images. Making a photograph “is utterly personal: no one else can ever see quite what [the photographer has] 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, 93-94, *reprinted in* PHOTOGRAPHERS ON PHOTOGRAPHY, *supra*, 96, 97. The subjective selectivity of the photographer determines the message conveyed by each photograph. “A photographer . . . can modify perspectives by a slight bending of the knees. [Or] [b]y placing the camera closer to or farther from the subject, he draws a detail—and it can be subordinated, or he can [be] tyrannized by it.” HENRI CARTIER-BRESSON, *Introduction*, THE DECISIVE MOMENT, *reprinted in* PHOTOGRAPHERS ON PHOTOGRAPHY, *supra*, 41, 47. Stated differently, “[b]y varying the position of his camera, his camera angle, or the focal length of his lens, the photographer can achieve an infinite number of varied compositions with a single, stationary subject. By changing the light on the subject, or by using a color filter, any or all of the values in the subject can be altered.” Edward Weston, *Seeing Photographically*, 9

The Complete Photographer, no. 49, 1943 at 3200-06, *reprinted in* PHOTOGRAPHERS ON PHOTOGRAPHY, *supra*, 159, 161.

At bottom, then, as photography icon Ansel Adams has written, “[a] great photograph is a full expression of what one feels about what is being photographed in the deepest sense[.]” Ansel Adams, *A Personal Credo*, 58 AMERICAN ANNUAL OF PHOTOGRAPHY 7, 7-16 (1944), *reprinted in* PHOTOGRAPHERS ON PHOTOGRAPHY, *supra*, 25, 29. That expression, in turn, impacts its viewers. “[It] expands our vision and our thoughts. It extends our horizons. It evokes awe, wonder, amusement, compassion, horror, or any of a thousand responses.” BARNBAUM, *supra*, at 2.³

In light of this, a host of federal and state appellate courts, including the United States Supreme Court, has concluded that photography is expression entitled to First Amendment protection. *See, e.g., Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 246 (2002) (finding that “the 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”); *Regan v. Time, Inc.*, 468 U.S. 641,

³ Attempts to create expressive and artistic photographs “are wasted unless the motive power which impelled [the photographer] to action is strong and stirring.” Abbott, *supra*, at 21. “[P]eople who attempt creative work of any type—scientific, artistic, or otherwise—without feeling any enthusiasm for that work have no chance at success.” BARNBAUM, *supra*, at 5.

646-48 (1984) (noting without criticism the lower court's conclusion that a "photographic color reproduction of \$100 bills" was "speech protected by the First Amendment," and proceeding to apply First Amendment analysis on appeal); *Massachusetts v. Oakes*, 491 U.S. 576, 591-92 (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*, 97 F.3d at 696 ("[P]hotographs . . . always communicate some idea or concept to those who view [them], 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."). In light of this authority, and as explained in greater detail below, this Court should not hesitate to conclude that Elane Photography's pictures are protected by the First Amendment.

III. Photojournalists Are Storytellers Whose Pictures Communicate Messages That Speak To And Influence Their Viewers.

Photojournalistic wedding photography, as the name implies, finds its roots in photojournalism. The style of photography known as photojournalism is the art of “[t]elling a story with a picture, . . . recording a moment in time, the fleeting instant when an image sums up a story.” BRIAN HORTON, ASSOCIATED PRESS GUIDE TO PHOTOJOURNALISM 14 (2d ed. 2001). *See also* NEWHALL, *supra*, at 259 (Photojournalism is a “form of communication” that uses photographs); CHAPNICK, *supra*, at 10 (quotation marks and citation omitted) (“[P]hotojournalism is all about . . . singling out the one image that will capture the essence of the story.”). “[T]he job of a photojournalist,” then, “is to tell a story and communicate.” HORTON, *supra*, at 42 (quotation marks and citation omitted). *See also id.* at 31 (A photojournalist’s “prime responsibility is to communicate”) (quotation marks and citation omitted). Photojournalists tell their stories by “communicat[ing] simply and directly . . . through their capture of spontaneous, unposed, and surprising moments.” CHAPNICK, *supra*, at 8.

The father of photojournalism is Henri Cartier-Bresson. *See* TRACY DORR, ADVANCED WEDDING PHOTOJOURNALISM: PROFESSIONAL TECHNIQUES FOR DIGITAL PHOTOGRAPHERS 45 (Amherst Media 2010). Cartier-Bresson’s photojournalistic style derived from his “crav[ing] to seize the whole essence, in the confines of one single photograph, of some situation that was in the process of

unrolling itself before [his] eyes.” HENRI CARTIER-BRESSON, *supra*, 42. “Sometimes,” Cartier-Bresson wrote, “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. Other times the “picture story,” as he called it, is told through a collection of “pictures of the ‘core’ as well as the struck-off sparks of the subject” that “reunite[s] the complementary elements which are dispersed throughout several photographs.” *Id.*

The story communicated through the photojournalist’s pictures is the photojournalist’s own expression—his or her own version of the story. “The journalistic photographer can have no other than a personal approach; . . . it is impossible for him to be completely objective.” Smith, *Photographic Journalism*, *supra*, at 103. By way of illustration, if three different photojournalists were “to handle the same subject matter, . . . it could almost be guaranteed that their interpretations of the same subject would be quite different.” *Id.* at 103-04. Photojournalists thus produce pictures that “tell[] the truth of what the photographer wanted to relate”—their very own “visual statements, with the imprint and input of the photographer in each picture.” HORTON, *supra*, at 42 (quotation marks and citations omitted).

Photojournalists make myriad decisions that determine the message conveyed by their pictures. Based on their “recognition, in a fraction of a second, of the significance of [a scene],” photojournalists must decide which scenes at an event warrant their attention. *See* CARTIER-BRESSON, *supra*, at 51. Photojournalists next must decide from which angle to view and capture the scene. *See* HORTON, *supra*, at 47, 50. After focusing on a particular sight from a particular angle, photojournalists must “compose[] through the [camera’s] finder,” NEWHALL, *supra*, at 225, searching for the “precise organization of forms which give that event its proper expression.” *See* CARTIER-BRESSON, *supra*, at 51. In short, every time photojournalists shoot certain pictures instead of others, they are making decisions as “editor[s]” of their stories. HORTON, *supra*, at 52. *See also* Smith, *Photographic Journalism*, *supra*, at 104 (“Up to and including the instant of exposure, the photographer is working in an undeniably subjective way. . . . [B]y 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 [viewers].”). Finally, once all the pictures have been taken, photojournalists “must go about separating the pictures

which, though they are all right, aren't the strongest" and selecting the photographs that best tell the story. CARTIER-BRESSON, *supra*, 44.⁴

Because photojournalists communicate to their audience, they often impact their viewers' opinions about a subject. Photojournalism, it has been said, "has more influence on public thinking and opinion than any other branch of photography." Smith, *Photographic Journalism*, *supra*, at 103. Therefore, the photojournalist "must bear the responsibility for his work and its effect. . . . Even on rather 'unimportant' stories, this attitude must be taken—for photographs . . . are molders of opinion." *Id.* at 104.

Public opinion in America has been influenced by many great photojournalists. For instance, Matthew Brady's "sense of photographic documentation impelled him to undertake the recording of the Civil War[.]" NEWHALL, *supra*, at 88. One of Brady's contemporaries remarked that "[i]f he has not brought bodies and laid them in our door-yards and along the streets, he has done something very like it" through his pictures. *Id.* at 91. Jacob A. Riis similarly used photography "to expose the misery of the underprivileged living in the crime-infested slums of the lower East side" of New York City. *Id.* at 132. "The importance of [his] photographs [was] in their power not only to inform, but

⁴ Given that the message conveyed through the photojournalist's images is that of the photojournalist (rather than that of the subjects), it is not surprising that many photojournalists "develop a 'style'" from which others can identify their work. See HORTON, *supra*, at 29.

to move us. . . . [T]hey contain[ed] qualities that will last as long as man is concerned with his brother.” *Id.* at 133. Lewis W. Hine likewise made “a series of remarkable photographs of immigrants arriving in New York. . . . Hine realized, as Riis had before him, that his photographs were subjective and . . . were powerful and readily grasped criticisms of the impact of an economic system on the lives of underprivileged and exploited classes. . . . His revelation of the exploitation of children led to the eventual passing of child labor laws.” *Id.* at 235.

Following in this tradition, wedding photojournalists also tell stories through their pictures. Admittedly, the audience for a wedding photojournalists’ work is not typically as vast as the audience for news photojournalists, and the events that wedding photojournalists shoot usually do not convey messages with as much societal interest as the stories told by news photojournalists. Nevertheless, as discussed below, wedding photojournalism shares many of the great communicative and storytelling traits embodied in news photojournalism.

IV. Wedding Photojournalists Tell The Wedding Story Through Artistic and Candid Images.

“Photojournalism . . . is a popular trend in today’s [wedding] photographic market that is quickly gaining momentum.” DORR, *supra*, at 6. The chief characteristics of wedding photojournalism are (1) an unobtrusive approach that captures candid images, (2) the creation of artistic photographs, and (3) the goal of

communicating the wedding story through pictures. We will explore these three characteristics in some detail.

First, wedding photojournalism focuses on “candid imagery created with limited photographer-subject interaction.” JOSE VILLA & JEFF KENT, FINE ART WEDDING PHOTOGRAPHY: HOW TO CAPTURE IMAGES WITH STYLE FOR THE MODERN BRIDE 9 (2011). Wedding photojournalists adopt an “unobtrusive” approach, *see* GLEN JOHNSON, DIGITAL WEDDING PHOTOGRAPHY: CAPTURING BEAUTIFUL MEMORIES 17 (Wiley Publishing 2006), functioning primarily as “fly-on-the-wall documenters” of the wedding day. VILLA & KENT, *supra*, at 9. “[T]he photojournalist tends to fade into the background so the subjects are not aware of his or her presence. This results in images that are spontaneous and lifelike.” BILL HURTER, THE BEST OF WEDDING PHOTOJOURNALISM: TECHNIQUES & IMAGES FOR PROFESSIONAL DIGITAL PHOTOGRAPHERS 13 (2d ed. 2010). “[P]hotojournalism is all about capturing moments that are fleeting and barely present. . . . They last only seconds but capture a compelling narrative in a single frame[.]” DORR, *supra*, at 8.

Like other wedding photojournalists, Elane Photography captures candid wedding images through an unobtrusive approach. Elaine Huguenin, co-owner and lead photographer of Elane Photography, testified regarding her photojournalistic approach to photography, stating that she “take[s] the approach of

a silent observer—clicking on the moments which are fresh, real and un-staged.” Human Rights Commission Transcript at 100 (“Transcript”); RP 0163. She “like[s] catching things as they happen” while the emotion is “still fresh on [people’s] faces.” Transcript at 106.

Second, photojournalism employs “a distinctly artistic vision toward wedding photography.” Wedding Photojournalist Association, Homepage, *available at* <http://www.wpja.com/> (last visited Oct. 19, 2012). “[G]ood wedding photojournalism takes the ordinary and makes it a piece of art.” 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 Oct. 19, 2012). *See also* DORR, *supra*, at 8 (wedding photojournalists create “moving pieces of art”). Photojournalism requires a discerning eye; that is the key to capturing the artistic “potential of any given scene” during the wedding day. *See* HURTER, *supra*, at 12 (quotation marks and citation omitted). Also, photojournalistic images must be well composed, meaning that the subject must be properly arranged within the frame. *Id.* at 62. “To master composition, the photographer must be fluent in all the elements of artistic creation[.]” *Id.* at 67.

Many photojournalists showcase their artistic talents by creating stylistic pictures of “the tiny details that th[e] bride has prepared for her wedding day,” such as her shoes, flowers, or invitations. *Id.* at 112. *See also* DORR, *supra*, at 85-

86 (discussing “artistic close-ups of all the details the bride worked on so tirelessly”); BAMBI CANTRELL & SKIP COHEN, THE ART OF WEDDING PHOTOGRAPHY: PROFESSIONAL TECHNIQUES WITH STYLE 24 (2000) (similar). They also exercise their creativity and produce their own artistic style through “[s]pecial effects in postproduction[.]” DORR, *supra*, at 103. Primary examples of these special effects include adjusting a photograph’s color, “intentionally blur[ring] parts of [an] image to lead the viewer to the subject,” or “darkening the edges of an image” to “draw[] the viewer’s attention in to the lighter portion in the center” (a technique known as a vignette). JOHNSON, *supra*, at 89.

Staying true to its photojournalistic style, Elane Photography approaches its wedding photography with a distinctly artistic vision. Regarding her photography philosophy, Elaine testified: “When you find something you’re passionate about it’s one of the most invigorating feelings ever. . . . The arts evoke that in me. . . . [I] see and capture the world through images.” Transcript at 100. *See also* RP 0162. Spurred by her artistic vision, Elaine approaches wedding photography with her “own flare . . . style . . . edge.” Transcript at 101. And drawing on her education in photography, she uses well-established composition principles like “the rule of third[s]” to create images that “are more appealing to the eye[.]” *Id.* at 103. *See also* JOHNSON, *supra*, at 82 (“The Rule of Thirds is perhaps the most commonly known and used concept in the art world.”). She also adjusts colors,

crops scenes, and applies other artistic techniques when editing her images using a popular computer program known as Photoshop. Transcript at 104-05, 107. *See also* RP 0162 (“[D]igital photography . . . allowed me to . . . try[] any new technique I could think of.”).

Third, and most importantly, wedding photojournalists “[t]ell a story” and “communicate with . . . viewer[s].” DORR, *supra*, at 6. “Above all, the skilled wedding photojournalist is an expert storyteller. The wedding day is a collection of short episodes that, when pulled together, tell the story of an entire day. A good wedding photojournalist is aware of the elements of good storytelling—a beginning, middle, and end—as well as the aspects that make a story entertaining to experience—emotion, humor, tension, and resolution.” HURTER, *supra*, at 15.

Indeed, as the wedding photography industry overwhelmingly affirms, it is axiomatic that telling the story of the wedding day in pictures is the primary function of the wedding photojournalist. *See, e.g.*, Denis Reggie, *Foreword* to CANTRELL & COHEN, *supra*, at 7 (“Wedding photojournalists are reporters, followers who quietly observe and quickly document” and tell “the actual story” of the wedding day); HURTER, *supra*, at 15 (“[T]he skilled wedding photojournalist is an expert storyteller.”); DORR, *supra*, at 73 (“[T]he moments that we as photojournalists strive so hard to catch are the ones that tell the story”); *id.* at 107 (“[P]hotojournalism is, by nature, all about the subject and the story.”); JOHNSON,

supra, at 19 (Wedding photojournalists are “being paid to tell the whole story of the day”); McEwen, *supra* (“Wedding photojournalists will agree that the most important aspect of their craft is telling the story of the day in an authentic, unplanned way.”); 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 Oct. 19, 2012) (“Couples hire wedding photojournalists for their narrative approach to photography. . . . ‘I love sharing a collection of photographs from weddings that tell the whole story of the day or of the wedding weekend.’”); Lorna Gentry, *Machine Gun Shooting at Weddings*, WEDPIX MAGAZINE, available at <http://www.wedpix.com/articles/014/machine-gun-wedding-shooting.html> (last visited Oct. 19, 2012) (The photojournalist “choos[es] only those [images] that tell the story of the day best”); Wedding Photojournalist Association, Homepage, available at <http://www.wpja.com/> (last visited Oct. 19, 2012) (“It is our goal to use photography to tell the story of your wedding day”).

The record amply shows that Elaine, like other wedding photojournalists, tells the story of her clients’ wedding day through pictures. When asked about her approach to wedding photography, Elaine testified that she “speak[s] through images” and “create[s] a story out of one frame” by making “photographs that capture the entirety of a single day—one of the most important days of two

people's lives together.” Transcript at 100-01. Jonathan Huguenin, co-owner of Elane Photography, similarly testified that Elaine's photojournalistic pictures “tell[] a story.” *Id.* at 80. *See also id.* at 73, 79.

A. Wedding Photojournalists' Pictures Are Their Own Expression, Their Illustrated Version Of The Wedding Story.

The Court of Appeals declared that “Elane Photography is not [a] speaker” and that “[t]he NMHRA does not force Elane Photography to . . . modify its own speech in any way.” Slip Op. at 23-24. These conclusions result from a misunderstanding of wedding photojournalism. Properly understood, the story that wedding photojournalists tell through their images is their own expression—their illustrated version of the wedding day story—and thus forcing them to tell the tale of a particular event directly modifies their speech.

“[H]ow the [wedding] story gets told” is determined by “the photographer's individual character and point of view[.]” McEwen, *supra*. Ultimately, it is the wedding photojournalists' “obligation to decide how [they] want to record the memories for [their] couples.” JOHNSON, *supra*, at 26. It is true, of course, that photographers work closely with their clients to ensure that they understand client expectations. *See* Bowlan, *supra* (“[T]he presentation of the day is as much the choice of the photographer as of the clients—which is why you work together.”). But in the end, the illustrated tale is told from the perspective, and in the visual language, of the photographer.

Countless decisions of the wedding photojournalist dictate the message of their photographs, thus underscoring that the photojournalists are the ones speaking through their images. During the wedding preparation, ceremony, and reception, wedding photojournalists have wide latitude to photograph different scenes, details, interactions, and “[a]nything that catches [their] interest.” See JOHNSON, *supra*, at 19. See also *id.* at 155, 199. Photojournalists may capture almost anything that happens throughout the day, and these subject-matter decisions directly impact the story told through their pictures. See DORR, *supra*, at 94.

“[A] good [wedding] story” conveyed through photographs “includes many details that go unobserved by most people, even those attending the event.” HURTER, *supra*, at 16. See also *id.* at 56 (The clients “usually see . . . very little”); CANTRELL & COHEN, *supra*, at 45 (“The looks on people’s faces as they see [the bride] for the first time will only be captured by you. The bride will never notice . . . how people reacted[.]”). This belies the Court of Appeals’ suggestion that the storyteller speaking through the wedding pictures is the client. See Slip Op. at 21 (Elane Photography is “a mere conduit for another’s expression”). Indeed, it simply defies logic to suggest that the client is communicating through pictures of scenes, reactions, landscapes, and other details of which they were not even aware.

A picture's message is also impacted by the photographer's chosen position in relation to the scene and the angle from which the picture is shot. For instance, a wide-angle full-view picture of the ceremony taken from behind the crowd tells a very different story than the emotion captured by a close-up of the couple exchanging their vows. To best capture the essence of a particular scene or activity, wedding photojournalists must "move to the location that will allow [them] to tell the story with [their] camera." JOHNSON, *supra*, at 7. See also DORR, *supra*, at 22 (Photojournalists must "keep moving" to "get the exact moment that best tells the story"). In addition, "[w]orking the angles lets [photographers] express the way [they] see the story unfolding." McEwen, *supra*.

Elaine testified that she uses unique angles in her photography to help her tell the wedding story: "I do sometimes odd things like stand on the tables or [lie] on the floor [and] try to capture . . . things how I think they would be best creatively framed . . . and tell the . . . story of how [the wedding] happened." Transcript at 101. Also, Jonathan testified that the company contracts with set photographers to shoot weddings with Elaine so that they "can get two different angles and two different perspectives to help paint the story of the event." *Id.* at 73.

The expression in a photograph is also shaped by what photographers include when they look through the viewfinder. For example, a close-up of the

couple's hands tightly intertwined conveys a different message—one of nervousness or commitment—than a headshot of them laughing with each other. Once wedding photojournalists have identified an intriguing scene and positioned themselves to capture it, they must “carefully compose, crop, and edit in-camera before the decisive moment has passed.” DORR, *supra*, at 67. They must “focus on composing the picture so that it tells the story” they are trying to communicate. JOHNSON, *supra*, at 88.

The story told through the wedding pictures is also significantly impacted by the editing process. Because of the difficulty of capturing candid moments that tell a story, wedding photojournalists discard many, if not a majority, of the pictures shot without the client ever viewing them. DORR, *supra*, at 55. The photographer “pares down the number of images by choosing only those that tell the story of the day best.” Gentry, *supra*. See also DORR, *supra*, at 54 (“You need to be able to discern which shot is strongest, most flattering, and has the most storytelling ability.”). Elaine testified that, on average, she shoots 1,600 photographs during a wedding, and reduces that number significantly during her review when she chooses “the best of the best of them.” Transcript at 107. After her review, she selects approximately 200 to 400 images that she will individually edit. RP 0164.

Then, by editing the selected images, wedding photojournalists further adjust the messages communicated through their pictures. By “delet[ing]

extraneous details, crop[ping] away dead space, [and] enhanc[ing] lighting and color,” wedding photojournalists alter “the story being told by each moment.” DORR, *supra*, at 103. Cropping, in particular, enables photographers to best convey “the story [they] are trying to tell.” *Id.* at 108. For example, by cropping out a playful look of disgust on the face of a young child standing behind the couple while they kiss, the photographer transforms the picture’s message from humor to romance.

Elaine testified about this post-shoot editing process, when she crops and adjusts her images in Photoshop. Transcript at 107. Jonathan also testified about this process, stating that “[Elaine] brings the . . . images back and spends quite a while—usually three or four weeks—editing the images [and] cropping them.” *Id.* at 79. *See also id.* at 80 (“I see my wife pouring over her images for three, four weeks on end”).

Once the selected pictures are edited, many wedding photojournalists arrange the most notable storytelling pictures in an album or book for their clients. *See* JOHNSON, *supra*, at 291. “Since they tell so many stories, photojournalistic images lend themselves best to a matted series in . . . a book.” DORR, *supra*, at 118. “Like any good story, a wedding album should have a beginning, a middle, and an end.” HURTER, *supra*, at 101. A good wedding book demonstrates the photojournalist’s “effectiveness as a storyteller.” CANTRELL & COHEN, *supra*, at

116. Creating these books requires wedding photojournalists to use their skills not only as a storyteller, but also as “a graphic artist and a designer.” HURTER, *supra*, at 111. After the wedding, the couple will show this book to others who ask about the story of their wedding day. *See* CANTRELL & COHEN, *supra*, at 119.

Elane Photography creates a wedding book for every wedding it photographs. *See* Transcript at 43 (stating that a “‘coffee table book’ . . . is included in all of [the company’s] packages”); RP 0164. After Elaine has captured, sorted, and edited her pictures, “she creates a [picture] book for the client and that book . . . tells the story of the day.” *Id.* at 79. *See also id.* at 108.

Also of note is that clients defer to wedding photojournalists’ artistic skills and storytelling ability. As Elaine testified, her clients want their pictures to look like her past work, so rather than try to interfere with the creative process, they tell her: “[D]o what you do.” Transcript at 102. The same applies for the creation of the wedding book. “[T]he client actually has very little input . . . into how that book’s made because they trust [Elaine’s] artistic style.” *Id.* at 79. Simply put, while Elaine will consider a “special request” from her clients, she dictates the creative process because “she likes to have a consistent style so that people can see her artwork.” *Id.* She has “the creative license to shoot things” in her own style. *Id.* at 113.

B. Wedding Photojournalists’ Pictures Convey An Emotional And Favorable Story That Speaks To Viewers.

The Court of Appeals asserted that Elane Photography does not convey an “expression of approval” for the events that it photographs and that “[i]n no context” would the company “send a message of approval.” Slip Op. at 23. This is not true, however, because the pictures created by wedding photojournalists tell a highly emotional and favorable story of love, romance, celebration, and joy about the photographed event. Those images positively portray the event and thus convey to viewers a favorable message about the wedding day.

One storytelling essential is that wedding photojournalists must capture the emotion of the day in their images. Wedding photojournalists “search out the moments that reveal the height of the subjects’ emotion.” DORR, *supra*, at 32. Upon finding those moments, the photographer “captur[es] them in a way that is as emotionally resonant as possible.” *Id.* at 14. In short, the photojournalists’ “portrayal of the events . . . highlight[s] the true emotions elicited.” HURTER, *supra*, at 15. Elaine, like other photojournalists, strives to capture and communicate deep emotion through her pictures. See Transcript at 80 (testifying that Elaine’s pictures “convey[] emotion” and “tell[] a story”).

Foremost to expressing the emotion of the day is creating photographs that communicate the couple’s love for each other. This is one of the wedding photojournalist’s primary goals when shooting the ceremony. See JOHNSON, *supra*, at 172; CANTRELL & COHEN, *supra*, at 56 (“[The photographer’s] goal is to

capture the excitement, romance, sensitivity, and passion of the ceremony.”). Another photojournalistic technique for capturing the love and romance between the couple is to isolate them and “let them do their own thing . . . , looking for the right moment to capture their emotional impulses,” HURTER, *supra*, at 8, and “wait[ing] patiently for the moments that best convey their emotions.” DORR, *supra*, at 78-79. See also JOHNSON, *supra*, at 91, 194; CANTRELL & COHEN, *supra*, at 77.

Elane Photography creates these romantic images for the weddings it shoots. During the wedding day, Elaine takes the couple to an isolated spot and tells them to “be themselves” and “do [their] thing” while she silently observes and photographs their interactions. Transcript at 103. She testified that these pictures capture “emotions that are just really . . . fresh and real and un-staged” and that tell the story of the couple “loving each other the way that they do.” *Id.*

Other emotions captured by, and communicated through, photojournalists’ pictures are celebratory sentiments such as joy, excitement, and happiness. Willock clearly understood the celebratory aspect of her commitment ceremony because when asking Elane Photography to shoot her event, she inquired whether the company was “open to helping [her] celebrate[.]” RP 0166. Indeed, it cannot be denied that “the wedding is a celebration for the couple’s family and friends” and that “[t]he wedding photographer gets to be part of this joy and create pictures

that tell the story of the fun.” HURTER, *supra*, at 25. Therefore, the wedding photojournalist must “capture the feeling” of these celebratory moments, CANTRELL & COHEN, *supra*, at 97, and create photographs that will convey to viewers “the joy of the[] wedding day.” DORR, *supra*, at 15.

Wedding photojournalists’ images thus convey a story of love, joy, and celebration. In doing so, they undoubtedly express a favorable story approving the depicted event. The Court of Appeals erred in stating to the contrary.

Moreover, photographs telling this emotionally charged tale evoke the sentimentality of the people who view them. “All of [a photographer’s] photographic, journalistic, and storytelling skills go into making pictures that evoke in viewers the same emotions experienced by those present on the wedding day.” HURTER, *supra*, at 21. *See also* DORR, *supra*, at 6 (Successful photojournalism “stir[s] emotions in [the] viewers”). “Images that capture the decisive moment have a unique ability to affect the audience[.]” *Id.* at 45. Romantic depictions, in particular, speak to and impact viewers. Typically, upon seeing such a picture, “[t]he viewer experiences the same romantic feelings through empathy with the [couple].” JOHNSON, *supra*, at 185. *See also* HURTER, *supra*, at 21.

By evoking emotions, photojournalist’s images often have a strong, persuasive impact on the thoughts and sentiments that viewers—such as the

couple's friends and family members—have about the event or the people involved. For example, the bride's uncle who did not attend the wedding in protest because he did not believe that the groom truly loved and respected his niece might change his opinion after viewing the wedding pictures. In this way, the story that the photojournalist tells not only speaks to and informs viewers, but often shapes their opinions on the matters or people involved in that event.⁵

C. Many Viewers of Wedding Photojournalists' Pictures Know The Identity Of The Photographer.

The Court of Appeals stated that Elane Photography does not publicly “identify with its clients” or the pictures that it creates, suggesting that almost no one will know that the company created its images so long as it does not use those images for promotional purposes. *See Slip Op.* at 24. Yet again, that assertion misunderstands the operations of wedding photojournalists like Elane Photography.

Without using images for promotional purposes, wedding photojournalist's pictures are viewed by many people who know the photographer's identity. Of

⁵ Because wedding photojournalists capture, communicate, and evoke profound emotions like love and joy, they must have “the ability to immerse [themselves] in the . . . day”—“to feel and relate to the emotion of the moment.” HURTER, *supra*, at 20-21. *See also* DORR, *supra*, at 42 (“[P]roject some of [the couple's] feelings onto yourself” as the photographer). “In order to feel the moment and turn it into art,” the emotions need to be “just as palpable” to the photojournalist as they are to the couple. DORR, *supra*, at 40. Thus, to create the artistic expression required from wedding photojournalists, it is vital that they embrace the event and story that they will portray.

course, the clients know who created the photographs, as would anyone else present at the wedding. *See* JOHNSON, *supra*, at 223. Depending on the wedding's size, this group alone may include hundreds of people.

In addition, the couple and their family typically tell others who the wedding photographer was. *See* DORR, *supra*, at 17 (discussing the importance of word-of-mouth communication in the wedding photography industry); CANTRELL & COHEN, *supra*, at 123, 139 (same). In today's technological age, this informal means of communication results in many people viewing the wedding pictures and learning the photographer's identity. The couple and their family post this information to social media websites like Facebook or MySpace or to wedding-specific websites like www.theknot.com or www.weddingchannel.com. *See* JOHNSON, *supra*, at 225. Even if the photographer's identity is not proactively disclosed by the individuals who post or display the images, many people who view the wedding pictures will ask, "Who was the photographer?" and thus elicit this information.⁶ Through these informal channels often hundreds more people will view the wedding pictures and learn the identity of the photographer who created them.

⁶ Even if a viewer is not supplied with and does not request the photographer's identity, occasionally the viewer is able to discern the photographer, given that many wedding photojournalists "develop a signature style" that "allows people to identify [their] work and gives it a unique voice." DORR, *supra*, at 110.

Also, many wedding photojournalists' services include posting their pictures online through companies that enable the couples and their "friends and relatives ... to view the pictures and purchase their own copies." JOHNSON, *supra*, at 14. *See also id.* at 296. Elane Photography does this through a company called Pictage, and as a result, its clients and their families and friends can access the final pictures through a password-protected site. Transcript at 107; RP 0165. While the photographs are posted there, every viewer knows that Elane Photography created them because each displayed image contains a watermark with the company's name and logo. Transcript at 107-08. This permits many more people (i.e., anyone with access to the password) to view the wedding pictures with full knowledge of who created them.

A final way in which wedding photojournalists are connected to their images is through copyright. While they generally sell prints and, in some instances, limited reproduction rights to their clients, many wedding photojournalists retain the copyright on their images. *See* JOHNSON, *supra*, at 288. Elane Photography does just that. Transcript at 79-81, 109; RP 0161. By continuing to own their pictures and the right to use them, these wedding photojournalists are directly connected to their images.

CONCLUSION

Amici Wedding Photographers respectfully request that this Court grant the relief requested in Elane Photography's brief in chief.

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Respectfully submitted,

Evie Jilek
7304 San Francisco Rd. NE
Albuquerque, NM 87109
(505) 514-2817
evie.m.jilek@gmail.com

*Counsel for Amici Curiae
Wedding Photographers*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *amici curiae* brief was sent via first-class mail to the following counsel of record this 26th day of October, 2012:

Julie Sakura
Lopez & Sakura LLP
P.O. Box 2246
Santa Fe, NM 87504

Jordan W. Lorence
Alliance Defending Freedom
801 G St. NW, Suite 509
Washington, D.C. 20001

Tobias Barrington Wolff
Professor of Law
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104

James A. Campbell
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260

Sarah Steadman
225 Villeros Street
Santa Fe, NM 87501

Emil J. Kiehne
Modrall, Sperling, Roehl, Harris &
Sisk, P.A.
Post Office Box 2168
Albuquerque, NM 87103

Counsel for Respondent Vanessa Willock

Paul Becht
Becht Law Office
7410 Montgomery Blvd. NE, Ste. 103
Albuquerque, NM 87109

*Counsel for Petitioner Elane
Photography, LLC*

Evie Jilek