

Elane Photography v. Willock

Motion For Leave To File Brief Of Amici Curiae - The CATO Institute, Prof. Dale Carpenter, And Prof. Eugene Volokh

by [Cato Institute](#) on 10/29/2012 [Contact](#)

Elane Photography, a Christian-identified business in Albuquerque, declined to photograph Vanessa Willock's same-sex commitment ceremony based on the business owners' personal beliefs. New Mexico law prohibits any refusal to render business services because of sexual orientation, however, so Willock filed a claim with the New Mexico Human Rights Commission. She argued that Elane Photography is a "public accommodation," akin to a hotel or restaurant, that is subject to the state's anti-discrimination law. The commission found against Elane and ordered it to pay \$6,600 in attorney fees. Elane Photography's owners appealed that ruling, arguing that they are being denied their First Amendment right to the free exercise of religion (and a similar provision in the state constitution). Furthermore, New Mexico's Religious Freedom Restoration Act defines "free exercise" as "an act or a refusal to act that is substantially motivated by religious belief" and forbids government from abridging that right except to "further a compelling government interest." Nevertheless, the state trial and appellate courts affirmed the commission's order. The case is now before the New Mexico Supreme Court, where Cato has joined UCLA law professor Eugene Volokh and University of Minnesota law professor Dale Carpenter — who, like Cato, support gay marriage — in filing an amicus brief siding with Elane Photography on free speech grounds. Our brief explains that photography is an art form protected by the First Amendment because clients seek out the photographer's method of staging, posing, lighting, and editing. Photography is thus a form of expression subject to the First Amendment's protection, unlike many other wedding-related businesses (e.g., caterers, hotels,

limousine drivers). The U.S. Supreme Court has already ruled in *Wooley v. Maynard* that photography is protected speech—even if it's not political and even if the photos are used for commercial value—and that speech compulsions (forcing people to speak) are just as unconstitutional as speech restrictions. The First Amendment "includes both the right to speak freely and the right to refrain from speaking at all." Moreover, unlike true cases of public accommodation, there are abundant opportunities to choose other photographers in the same area. The New Mexico Supreme Court should thus reverse the lower court's ruling and allow Elane Photography to be free to choose the work it desires.

Please see full amicus brief below for more information.