



High court hears gay bias case

By: Scott Sandlin – March 12, 2013

Barely three sentences into his argument, the lawyer for a photo studio that refused to photograph a gay couple's commitment ceremony was assailed with questions from a skeptical New Mexico Supreme Court.

Attorney Jordan Lorence's theme in his oral argument Monday was that earlier courts' decisions in favor of the couple who challenged Elane Photography's refusal to photograph the ceremony amounted to "compelled speech" in violation of their First Amendment rights, or the government putting words in someone's mouth.

"The law cannot compel someone to stand on a soapbox," he said, "in the same way that a court cannot compel someone to use his photographic skills to say something contrary to his beliefs."

Vanessa Willock filed a complaint in 2007 under the state Human Rights Act after she and her partner approached the Albuquerque studio, owned by photographer Elaine Huguenin and her husband, Jonathan, to take pictures of their commitment ceremony and were rebuffed.

The studio owners' reason for rejecting the job was that recording the ceremony would conflict with their Christian beliefs about marriage as the sacred union between a man and a woman, according to court filings. Willock has won each round in the case.

Almost as soon as Lorence began, Justice Edward Chávez jumped in to question his argument that Elane Photography's work was expressive and not mere recording. Lorence compared Elane's productions to the story-telling work of photojournalists who memorialized a girl consumed by napalm flames during the bombing of Vietnam. He argued that Elane Photography did not violate the Human Rights Act, and even if it did, applying state law would violate the First Amendment.

Justice Charles Daniels asked what guidelines Lorence was promoting about who is protected and who is not, and whether Lorence was advocating a position for all photographers — should someone taking a passport photo at Kinko's be protected? What if, he asked, a photographer objected to mixed races and both were present at a child's birthday party — would it be OK under Lorence's premise to refuse the job?

The attorney for the lesbian couple, by contrast, argued that refusing to photograph the event because the couple were the same sex, "is illegal under New Mexico law."

“This case,” Tobias Barrington Wolff, a constitutional law professor at the University of Pennsylvania, told the court, “calls upon the court to clarify questions about business in the public marketplace.”

The Elane case does not fit under either line of U.S. Supreme Court cases dealing with compelled speech, he said.

But Justice Richard Bosson, like his colleagues, asked a hypothetical question. Suppose a photographer who handles exclusively Jewish weddings is asked to photograph a Muslim ceremony. “You’re saying he can’t refuse?”

Wolff said the photographer could not refuse if he is offering his services to the public.

The opposite would be true, he said in response to Chief Justice Petra Maes, if a photographer who did no advertising refused a same-sex wedding commission. Ads on the Web, like those of Elane Photography, “are entrances to public commerce,” he said.

The case has drawn some high-profile advocates.

Lorence’s Washington, D.C.-based Alliance Defending Freedom represents the studio and has vowed to go to the U.S. Supreme Court if there is an adverse ruling from New Mexico’s highest court.

Weighing in for that side with separate amicus briefs are wedding photographers; the Becket Fund for Religious Liberty; and the Cato Institute; and conservative law professors Dale Carpenter and Eugene Volokh.

Wolff, who argued on behalf of Willock, has been joined by the American Civil Liberties Union of New Mexico and a coalition of 21 New Mexico small businesses, from galleries and photo studios to urban planners and restaurants.

So far, Elane Photography has been on the losing side.

The New Mexico Human Rights Commission found for Willock under the Human Rights Act, which bars discrimination by any establishment on the basis of “race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap.”

The commission decision that the studio violated state law was affirmed by the 2nd Judicial District Court and the New Mexico Court of Appeals before the case was appealed to the Supreme Court.

Lorence said after the hearing he sensed “some clear division on the court,” including “some skepticism and some openness to what we were saying.”

He emphasized the “unique, artistic skills” that he said photographer Elaine Huguenin brings to her work. “This was not just recording like a security video camera, and the other side downplays that considerably,” he said.

Wolff said that despite arguments by the studio on constitutional grounds, “This is a straightforward case of discrimination by a business and the (justices’) questions reflected that fact.”

The court sets its own deadline for releasing opinions, but it is typically several months.