

Religious liberty depends on right-of-center gay marriage advocates

By Stephen Richer 08/26/2013

Suppose — and it shouldn't take too much imagination — that gay marriage is inevitable. The remaining question becomes: Is it a gay marriage of the progressive left, one that forces gay marriage down the throats of unwilling Americans, trumping all other protected liberties? Or is it a gay marriage of the right, creating equality under the law without carving out any protected classes and without violating established liberties?

This question came to the foreground in the New Mexico Supreme Court's recent ruling in *Elane Photography v. Willock*. In that case, professional photographer, and observant Christian, Elaine Huguenin refused on religious grounds to photograph the same-sex commitment ceremony of Vanessa Wilcock and her partner. The New Mexico trial court found Ms. Huguenin guilty of violating the state's Human Rights Act and fined her \$7,000. The New Mexico Court of Appeals affirmed the decision in June, 2012, and the New Mexico Supreme Court affirmed unanimously on Thursday.

At first glance, this seems like just another abuse of individual liberty. The case has its legal nuances (The Alliance Defending Freedom, for instance, asked what the court would rule if a black photographer refused to photograph a KKK rally, and see, generally, Dale Carpenter at The Volokh Conspiracy for the legal complexities), but for the most part, the court's ruling is a not-so-veiled collectivist opinion. The Right Scoop correctly laughed and cried when it read the concurring opinion's language that the price of citizenship is sacrificing your freedoms:

In the smaller, more focused world of the marketplace, of commerce, of public accommodation, the Huguenins have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. That sense of respect we owe others, whether or not we believe as they do, illuminates this country, setting it apart from the discord that afflicts much of the rest of the world. **In short, I would say to the Huguenins, with the utmost respect: it is the price of citizenship.**

Unsurprisingly, the standard progressive collectivists and statistes celebrated the opinion: Think Progress, the ACLU, which praised the ruling for making it “clear that no one's religious beliefs make it okay to break the law by discriminating against others; Equality New Mexico called it “a big victory,” etc.

But the case gets more interesting when you look at the briefs and comments written by some on the right-of-center. Consider the Cato Institute. Cato is very outspoken about its support for marriage equality — it filed on the pro-gay marriage side in the *Windsor* and *Perry*. And yet, Cato filed on behalf of the Christian photographer in this case:

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).

See too Dale Carpenter — one of the authors of the Cato brief, a law professor, outspoken gay marriage proponent, and author of a book on *Lawrence v. Texas* — who writes at The Volokh Conspiracy why he disagrees with the New Mexico court's decision.

Now return to my original assumption: gay marriage is inevitable. If that's true (and I really do think it is, but we can have that debate later, Ryan Anderson), we want people like Dale Carpenter and Eugene Volokh — who wrote Cato's brief — leading the way. And that's why Republicans and right-of-center advocates need to get involved in the pro-gay marriage cause — a right-of-center gay marriage creates equality under the law while respecting the freedoms and opinions of those who disagree. A gay marriage crusade that is devoid of right-of-center involvement will lead to everyday occurrences like the New Mexico case; it will mirror the Obama administration's imposition of birth control insurance on Catholic institutions, and it will create a new series of protected-class legislation that will weigh heavily on the freedoms of Americans for years to come. Bad, bad, bad.

It seems as if the country is with us on this one; a recent Rasmussen poll shows that “85% of American support the right of a religious photographer not to participate in a gay-marriage ceremony.” But if we want to make sure gay equality comes to the country the right way — and that we don't redo some of the excesses of the civil rights movement — then we right-of-center folk need to get involved rapidly, prominently, and influentially on the marriage equality side.