



## Same-Sex Marriage Ruling May Polarize the Marriage Equality Debate

Stephen Richer

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On August 22, the New Mexico Supreme Court ruled against the freedom of religion. The case, *Elane Photography v. Willock*, pitted Christian professional photographer Elaine Huguenin against Vanessa Willock and her same-sex partner. When Willock asked Huguenin to photograph her same-sex commitment ceremony, Huguenin declined, stating that the assignment would conflict with her Christian beliefs. The trial court ruled that Huguenin violated the state's Human Rights Act and fined her \$7,000. The appeals court affirmed. So did the New Mexico Supreme Court [PDF], unanimously, on August 22.

There are many disturbing aspects of this decision: it cuts against free religious practice (the main argument made by lead defense counsel Alliance Defending Freedom); it compels speech (the argument made by Eugene Volokh, Dale Carpenter and the Cato Institute, an organization that supports gay rights and marriage equality); and it reinforces the simple but toxic idea that private businesses can't actually make private decisions.

In addition to the anti-freedom consequences above, the decision also promises to hurt the gay-equality movement. This seems counterintuitive at first as the gay plaintiff won the case, but it doesn't take a novel theory to realize how such a ruling could damage the movement.

Jonathan Rauch, one of the leading and one of the most reasonable voices of the gay-equality movement, has argued for over 10 years that the gay marriage movement is much better won through popular votes and electoral branches than it is through the courts. Why? Rauch argues that if the courts impose gay marriage on parts of the country that are not yet ready for it, opponents will solidify and lash out in retaliation.

This is exactly what happened in the landmark abortion case of *Roe v. Wade*. In a speech at the University of Chicago Law School in May, Justice Ginsburg cast serious doubt on the wisdom of the *Roe* decision: "[t]hat was my concern, that the court had given opponents of access to abortion a target to aim at relentlessly ... [m]y criticism of *Roe* is that it seemed to have stopped the momentum that was on the side of change." Perhaps as a result, public opinion on abortion has hardly changed over the past 40 years, and many proponents of abortion rights think that the movement has lost ground recently.

Certainly the same thing could happen to the gay marriage movement. Gay marriage support has risen consistently over the past 40 years, but it just recently crept over 50 percent; 52 percent of Americans now support gay marriage while 43 percent oppose it. Some regions, particularly 13 states and Washington, DC, might not react negatively to pro-gay marching orders from the US Supreme Court. But others would, and, as with *Roe*, this could cement opposition and prompt hostility. Support for marriage equality is below 30 percent in seven states: Mississippi, West Virginia, South Carolina, Kentucky, Georgia, Utah and Tennessee.

Return now to the New Mexico ruling where the numbers are much more drastic. This Ramussen poll found that 85 percent of those polled "Think Christian Photographer Has Right to Turn Down Same-Sex Wedding Job."

Negative reaction is already all over blogs like Hot Air, Breitbart, The Right Scoop, Fox News and National Review Online. Much of the coverage is limited to criticism of the specific reasoning of the decision, but other pieces portray the ruling as yet another win for the "homosexual agenda"—this supposed agenda including a whole buffet of progressive aims including, as some allege, a war on religion. Such fears could derail right-of-center and moderate voters who had previously been on the gay-equality bandwagon thus far.

Others worry that gay marriage will soon be inescapable. People may support gay marriage in theory, but prefer to keep these marriages out of their own personal lives. The New Mexico decision will cause some concern among people that they may not be allowed to opt-out of performing or otherwise participating in gay marriage ceremonies, like Elane Photography, and suffer legal repercussions due to their professional and personal choices. Perhaps, they wonder, it's best to nip gay marriage in the bud.

Of course, courts are not pure political institutions, nor are they puppets to public opinion. But if pro-gay equality sentiment is something that motivated the court, the legislators responsible for the law or the individuals and groups bringing the case and filing in the case, then plans for equality are likely to backfire. Before they strip more private individuals of their religious liberties or private businesses of their economic liberties, these groups, legislators and judges should stop and ask themselves what backlash these hugely unpopular laws may have on the overall gay equality movement.