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Weighing Free Speech in Refusal to Photograph Lesbian Couple's Ceremony

By: Adam Liptak - November 18, 2013

A New Mexico law forbids businesses open to the public from discriminating against gay people. Elaine Huguenin, a photographer, says she has no problem with that — so long as it does not force her to say something she does not believe.

In asking the Supreme Court to hear her challenge to the law, Ms. Huguenin said that she would “gladly serve gays and lesbians — by, for example, providing them with portrait photography,” but that she did not want to tell the stories of same-sex weddings. To make her celebrate something her religion tells her is wrong, she said, would hijack her right to free speech.

So she turned down a request from a lesbian couple, Vanessa Willock and Misti Collinsworth, to document their commitment ceremony. The women, who hired another photographer, filed a discrimination complaint against Ms. Huguenin's studio, Elane Photography. So far, the studio has lost in the courts.

There are constitutional values on both sides of the case: the couple's right to equal treatment and Ms. Huguenin's right to free speech. I asked Louise Melling, a lawyer at the American Civil Liberties Union, which has a distinguished history of championing free speech, how the group had evaluated the case.

Ms. Melling said it had required difficult choices. Photography is expression protected by the Constitution, she said, and Ms. Huguenin acted from “heartfelt convictions.”

But the equal treatment of gay couples is more important than the free speech rights of commercial photographers, she said, explaining why the A.C.L.U. filed a brief in the New Mexico Supreme Court supporting the couple.

“This is a business,” Ms. Melling said. “At the end of the day, it sells services for photographing weddings. This is like putting up a sign that says ‘Heterosexual Couples Only.’ ”

Other supporters of gay rights and same-sex marriage said they would strike a different balance.

“Photographers, writers, singers, actors, painters and others who create First Amendment-protected speech must have the right to decide which commissions to take and which to reject,” the libertarian

Cato Institute and two law professors — Eugene Volokh of the University of California, Los Angeles, and Dale Carpenter of the University of Minnesota — told the New Mexico Supreme Court.

Most discussions of conflicts between religious beliefs and laws banning discrimination against gay people center on the First Amendment's protection of the free exercise of religion. Ms. Huguenin's case relies on a different part of the amendment: its protection of free speech.

Ms. Huguenin says the government should not be allowed to compel her to say something she does not believe — that same-sex weddings should be celebrated. For the same reason, she says, she would not want to work on a fictional film about a same-sex marriage even if the actors were straight.

Most courts, to say nothing of serious photographers, agree that photography is expression entitled to First Amendment protection. Ms. Huguenin composes and selects images, arranging them in picture books that tell the stories of memorable days. But there are stories that she does not wish to tell.

Tobias B. Wolff, a law professor at the University of Pennsylvania who represents Ms. Willock and Ms. Collinsworth, said Ms. Huguenin gave up the right to make that choice when she opened the doors of her business to the public.

"This was a straightforward case of discrimination in the public marketplace," Mr. Wolff said. "No court has ever held that the First Amendment gives businesses a license to sell goods and services to the general public but then reject customers based on race or religion or sexual orientation, in violation of state law."

The New Mexico Supreme Court agreed, saying Ms. Huguenin's "services can be regulated, even though those services include artistic and creative work." Laws banning discrimination, the court said, apply to "creative or expressive professions."

Jordan W. Lorence, a lawyer at the Alliance Defending Freedom, which represents Elane Photography, said Ms. Huguenin should be able to decline assignments at odds with her beliefs in a way that, say, motels and hardware stores may not. "There are some professions that are inherently expressive — an ad agency, website designer or even a tattoo artist," he said.

"A tattoo artist should not be forced to put a swastika on an Aryan Nation guy," Mr. Lorence said. "The government could not force someone to put a bumper sticker on their car that says 'I support same-sex marriage' or 'I support interracial marriage.'"

The court agreed, to a point. "If Elane Photography took photographs on its own time and sold them at a gallery," it said, then it could say what it liked, but a business open to the public must take all comers.

Justice Richard C. Bosson concurred with the majority opinion, but uneasily.

"The Huguenins are not trying to prohibit anyone from marrying," he wrote. "They only want to be left alone to conduct their photography business in a manner consistent with their moral convictions." Instead, they "are compelled by law to compromise the very religious beliefs that inspire their lives."

“Though the rule of law requires it,” Justice Bosson wrote, “the result is sobering.”