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Choosing What to Photograph Is a Form of Speech

We back same-sex marriage, but the case against the New Mexico photography business owners would make bad law.

By Eugene Volokh and Ilya Shapiro

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The past year has been good to advocates of marriage equality. The Supreme Court struck down the part of the Defense of Marriage Act that denied federal benefits to lawfully married same-sex couples. Six more states extended marriage rights to same-sex couples—Illinois will join them June 1, becoming the 17th state overall—and federal courts struck down same-sex marriage bans in four more states (now on appeal).

We support the extension of marriage to same-sex couples. Yet too many who agree with us on that issue think little of subverting the liberties of those who oppose gay marriage. Increasingly, legislative and judicial actions sacrifice individual rights at the altar of antidiscrimination law.

Consider the case of the New Mexico wedding photographer, *Elane Photography v. Willock*, which the Supreme Court is now deciding whether to take, with a decision expected soon after its March 21 conference.

Elane Photography, a small business based in Albuquerque, declined to photograph Vanessa Willock's same-sex commitment ceremony based on the business owners' personal opposition to gay marriage, which is rooted in their Christian faith. New Mexico law prohibits any refusal to provide business services because of sexual orientation, however, so Ms. 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 and subject to the state's antidiscrimination law.

The commission found against Elane Photography and ordered its owners, Jonathan and Elaine Huguenin, to pay $6,600 in attorney fees. The state trial and appellate courts affirmed that order.

The case then moved to the New Mexico Supreme Court, where we filed a brief urging the court to reverse the court of appeals. Our brief explained that photography is protected by the First Amendment—even if it's not political and even if the photos are taken for money, just as a lot of writing and art is done for money. Creators of expression have a First Amendment right to choose which expression they want to create.

The U.S. Supreme Court ruled in *Wooley v. Maynard* —the 1977 "Live Free or Die" license plate case out of New Hampshire—that forcing people to display messages on their cars is just as unconstitutional as preventing or censoring speech. The First Amendment "includes both the right to speak freely and the right to refrain from speaking at all," the court said. That applies even more strongly to forcing people to create messages.

The New Mexico Supreme Court ruled against the Huguenins, holding that applying the New Mexico antidiscrimination law here "does not violate free speech guarantees because [the law] does not compel Elane Photography to either speak a government-mandated message or to publish the speech of another." But limiting First Amendment protections in this way would lead to startling results.

Take, for instance, a freelance writer who declines to write a press release for a religious organization with which he disagrees. By the reasoning of the New Mexico Supreme Court, the writer has violated the law because his refusal to write the press release is discrimination based on religion—much as Elaine Huguenin's refusal to photograph an event with which she disagreed was treated as violating the law. Yet a writer must have the First Amendment right to choose which speech he creates, notwithstanding any state law to the contrary.

The same is true of photographers who create a visual expression. The U.S. Supreme Court has said repeatedly that the First Amendment protects an "individual freedom of mind"—e.g., *West Virginia State Board of Education v. Barnette* (1943), which affirmed the right not to salute the flag or say the Pledge of Allegiance—which the government violates whenever it tells a person that she must or must not speak. Forcing a photographer to create a unique piece of art violates that freedom of the mind.

Upholding the First Amendment against compelled speech here would ultimately inflict little harm on those who are discriminated against. A photographer who views a same-sex wedding as immoral would be a dubious choice for the couple getting married; there's too much risk that the photographs will, even inadvertently, reflect the photographer's disapproval.

Those engaging in such a ceremony—or, say, entering into an interfaith marriage, or remarrying after a divorce—would likely benefit from knowing that a prospective photographer disapproves of their union, so they could then hire someone more enthusiastic. A YellowPages.com search yields well over 100 photographers in the Albuquerque area, for example, most of whom would likely be happy to take the money of anyone who comes to them.

Of course, a couple that is told by a photographer that she does not want to photograph their commitment ceremony may understandably be offended. But avoiding offense is not a valid reason for restricting or compelling speech.

The Supreme Court's ruling in *Wooley* guarantees the right of photographers, writers, actors, painters, actors, and singers to decide which commissions, roles or gigs they take, and which they reject. But the ruling does not necessarily apply to others who do not engage in constitutionally protected speech. The U.S. Supreme Court can rule in favor of Elane Photography on freedom-of-speech grounds without affecting how antidiscrimination law covers caterers, hotels, limousine drivers, and the like. That's a separate issue that mostly implicates state religious-freedom laws in the more than two-dozen states that have them.

The First Amendment secures an important right to which all speakers are entitled—whether religious or secular, liberal or conservative, pro- or anti-gay-marriage. A commitment to legal equality can't justify the restriction of that right.

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