The Volokh Conspiracy

Amicus Brief in Elane Photography v. Willock (the New Mexico Wedding Photography Case)

Eugene Volokh • November 2, 2012 4:21 pm

I'm pleased to report that I filed a friend-of-the-court brief, on behalf of the Cato Institute, Dale Carpenter, and myself, arguing that wedding photographers (and other speakers) have a First Amendment right to choose what expression they create, including by choosing not to photograph same-sex commitment ceremonies. All the signers of the brief support same-sex marriage rights; our objection is not to same-sex marriages, but to compelling photographers and other speakers works that they don't want to create.

You can see a PDF copy of the brief at the Cato site, and also Cato's blog post on the subject. I've also included the text of the brief below:

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I. Introduction: This Case Is Largely Controlled by Wooley v. Maynard, 430 U.S. 705 (1977)

This case is largely controlled by a United States Supreme Court precedent that the court of appeals never mentioned: Wooley v. Maynard, 430 U.S. 705 (1977). Wooley, the New Hampshire license plate case that we discuss in detail below, makes clear that speech compulsions are generally as unconstitutional as speech restrictions. Wooley's logic applies to photographs and other displays, and not just verbal expression. And that logic applies also to compulsions to create photographs and other works (including when the creation is done for money), not just to compulsions to display such works. Much of the reasoning used by the court of appeals is directly contrary to the reasoning of Wooley.

Indeed, the court of appeals' reasoning would produce startling results. Consider, for instance, a freelance writer who writes press releases for various groups, including religious groups, but refuses to write a press release for a religious organization or event with which he disagrees. Under the court of appeals' theory, such a refusal would violate the law, being a form of discrimination based on religion, much as Elaine Huguenin's

refusal to photograph an event with which she disagreed was treated as a violation of the law. Yet a writer must have the First Amendment right to choose which speech he creates, notwithstanding any state law to the contrary. And the same principle, as we argue below, applies to photographers as well.

Yet while Wooley provides important constitutional protection, it also offers an important limiting principle to that protection: Though 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, this right does not apply to others who do not engage in First Amendment-protected speech. This Court can rule in favor of Elane Photography on First Amendment freedom of expression grounds, and such a ruling would not block the enforcement of antidiscrimination law when it comes to discriminatory denials of service by caterers, hotels that rent out space for weddings, limousine service operators, and the like.

Wooley secures an important constitutional right to which speakers and those who create speech are entitled — whether they are religious or secular, liberal or conservative, pro-gay-rights or anti-gay-rights. The decision below denies New Mexicans that right.

This case can therefore be resolved entirely based on the First Amendment freedom from compelled speech. Amici express no opinion on the proper interpretation of New Mexico antidiscrimination statutes, or on petitioner's Free Exercise Clause and New Mexico RFRA arguments. [Standard of review omitted. -EV]

II. Under the First Amendment, Speech Compulsions Are Generally Treated the Same as Speech Restrictions

The United States Supreme Court has long recognized that the First Amendment prohibits speech compulsions as well as speech restrictions. "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" Wooley, 430 U.S. at 714 (quoting West Va. State Bd. of Ed. v. Barnette, 319 U.S. 624, 637 (1943)).

In Wooley, the Maynards objected to having to display the state motto on their government-issued license plates, and sought the right to obscure the motto. Wooley, 430 U.S. at 707–08, 715. Of course, no observer would have understood the motto — printed by the government on a government-provided and government-mandated license plate — as the driver's own words or the driver's own sentiments. Yet the Court nonetheless held for the Maynards.

A driver's "individual freedom of mind," the Court reasoned, protects her "First Amendment right to avoid becoming the courier" for the communication of speech that she does not wish to communicate. Id. at 717. Drivers have the "right to decline to foster . . . concepts" with which they disagree, even when the government requires merely that drivers display a slogan on a government-issued license plate. Id. at 714.

Even "the passive act of carrying the state motto on a license plate," id. at 715, may not be compelled, because such a compulsion "'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'" Id. (quoting Barnette, 319 U.S. at 642). Requiring drivers to display the slogan, the Court held, required them "to be an instrument for fostering public adherence to an ideological point of view [they] find[] unacceptable," which is unconstitutional. Id. "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." Id. And this reasoning applies whether or not the compelled slogan has a great deal of ideological content. See, e.g., Ortiz v. State, 106 N.M. 695, 697, 749 P.2d 80, 82 (1988) (stating that Wooley would allow drivers even to obscure the slogan "Land of Enchantment," which is largely unideological).

This view of "individual freedom of mind" makes eminent sense. Democracy and liberty in large measure rely on citizens' ability to preserve their integrity as speakers, thinkers, and creators — their sense that their expression, and the expression that they "foster" and for which they act as "courier[s]," is consistent with what they actually believe.

This is why, in the dark days of Soviet repression, Alexander Solzhenitsyn admonished his fellow Russians to "live not by lies": to refuse to endorse speech that they believe to be false. Alexander Solzhenitsyn, Live Not by Lies, Wash. Post, Feb. 18, 1974, at A26, reprinted at http://www.washingtonpost.com/wp-dyn/content/article/2008/08/04/AR2008080401822.html. Each person, he argued, must resolve to never "write, sign or print in any way a single phrase which in his opinion distorts the truth," to never "take into hand nor raise into the air a poster or slogan which he does not completely accept," to never "depict, foster or broadcast a single idea which he can see is false or a distortion of the truth, whether it be in painting, sculpture, photography, technical science or music." Id.

Such an uncompromising path is not for everyone. Some people may choose to make peace with speech compulsions, even when they disagree with the speech that is being compelled. But those whose consciences, whether religious or secular, require them to refuse to distribute expression "which [they do] not completely accept," id., are constitutionally protected in that refusal. "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." Wooley, 430 U.S. at 714.

III. Wooley Extends to Photography, Including Photography Created for Money

Photography is fully protected by the First Amendment. That includes photography that does not have a political or scientific message. See, e.g. United States v. Stevens, 130 S. Ct. 1577, 1584, 1592 (2010) (striking down ban on commercial creation of photographic depictions of animal cruelty); Regan v. Time, Inc., 468 U.S. 641, 648 (1984) (striking down portion of law that banned photographic reproductions of currency). This is just a special case of the broader proposition that visual expression is as protected as verbal

expression. Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729, 2733 (2011) (holding that commercially distributed video games are fully protected speech); Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569 (1995) (concluding that even works that express no "clear social position" are constitutionally protected, giving Jackson Pollock paintings as an example). And this full protection also extends to photography that is created to be distributed for money, see, e.g., Stevens; Regan, as well as other works that are created to be distributed for money, see, e.g., Brown.

Photographs, then, cannot be restricted by the government. And by the logic of Wooley, if the government may not suppress photographs, it may not compel their distribution or display, either.

Say that instead of requiring the display of the verbal slogan "Live Free or Die" on a license plate, a state required the display of an image — for instance, a picture of Patrick Henry, who famously said, "Give me liberty or give me death," or a drawing or photograph of two women holding hands. The driver's claim would be just as strong as it was in Wooley. Requiring the display of an image intrudes on the "individual freedom of mind" as much as does requiring the display of a slogan. And the "First Amendment right to avoid becoming the courier" for speech that one does not want to disseminate, Wooley, 430 U.S. at 717, applies as much when the speech is visual as when it is verbal.

Indeed, West Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 632 (1943) — the Court's first compelled speech case, on which Wooley heavily relied, see 430 U.S. at 714–15 — included nonverbal expression. The Court in Barnette struck down not only the requirement that schoolchildren say the Pledge of Allegiance, but also the requirement that they salute the flag. 319 U.S. at 628, 632–34. Compelled verbal expression was treated the same as compelled symbolic and visual expression.

Likewise, consider Hurley, in which the Court held that St. Patrick's Day Parade organizers had a constitutional right to exclude marchers who wanted to carry a banner that read, "Irish American Gay, Lesbian and Bisexual Group of Boston." 515 U.S. at 570. Though Massachusetts courts had held that this exclusion violated state laws banning discrimination in places of public accommodation, the Court held that applying those laws in this situation would unconstitutionally compel speech. The government, the Court held, "may not compel affirmance of a belief with which the speaker disagrees," and likewise generally may not compel even "statements of fact the speaker would rather avoid." 515 U.S. at 573.

Surely this same reasoning would have been applicable had the would-be marchers wanted to carry a large photograph depicting smiling same-sex couples going through a commitment ceremony, and the parade organizers refused to allow such a display in their parade. (Backers of gay rights understandably often use pictures of happy same-sex couples to convey the idea that same-sex love is as worthy of celebration as opposite-sex love. [Footnote with examples omitted. -EV]) If parade organizers are entitled to exclude

verbal representations of ideas and facts that they "would rather avoid," id., they are likewise entitled to exclude visual representations.

Hurley, after all, treated "the unquestionably shielded painting of Jackson Pollock" as equivalent for First Amendment purposes to verbal poetry, id. at 569, and as fully protected from restriction. And Hurley likewise reinforced what Wooley had made clear — that speech compulsions are as unconstitutional as speech restrictions, because "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" Hurley, 515 U.S. at 573 (quoting Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 16 (1986) (plurality opinion) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say."). It thus follows that compulsions of the display of paintings and photographs are just as unconstitutional as compulsions of the display of words.

IV. Wooley Extends to Compelled Creation of Speech as Well as Compelled Distribution of Speech

So far we have discussed compulsion to speak, and this case involves a compulsion to create speech. But the First Amendment equally protects the creation of speech and the dissemination of speech, including when the creation is done for money. See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (holding that an author who writes for money is fully protected by the First Amendment); United States v. Stevens, 130 S. Ct. 1577, 1583–85 (2010) (striking down a restriction on the commercial creation and distribution of material depicting animal cruelty, with no distinction between the ban on creation and the ban on distribution); Citizens United v. FEC, 130 S. Ct. 876, 917 (2010) ("The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech.") (internal quotation marks omitted).

And this equal treatment of speech creation and speech dissemination makes sense. Restricting the creation of speech (including for money) interferes with the dissemination of speech. And compelling the creation of speech (including for money) interferes with the "individual freedom of mind" at least as much as compelling the dissemination of speech does.

To be sure, creation and dissemination are not identical. This case does not, for instance, involve the concern that Elaine Huguenin is required to "use [her] private property as a 'mobile billboard'" for a particular message, Wooley, 430 U.S. at 715. But compelled creation and compelled dissemination are similar, in that they both involve a person being required "to foster . . . concepts" with which she disagrees, id. at 714, and "to be an instrument for fostering public adherence" to a view that she disapproves of, id. at 715. If anything, requiring someone to create speech is even more of an imposition on a person's "intellect and spirit," id. (internal quotation marks omitted), than is requiring the person to simply engage in "the passive act of carrying the state motto on a license plate," id.

Creating expression — whether writing (even just writing a press release), painting, singing, acting, or photographing an event — involves innumerable intellectual and artistic decisions. It also, for many creators who want to "live not by lies," requires sympathy with the intellectual or emotional message that the expression conveys, or at least absence of disagreement with such a message. Requiring people to actually produce speech is even more intrusive than requiring them to be a "conduit" for such speech. As Solzhenitsyn noted, a person can rightfully insist that she should never "depict, foster or broadcast a single idea which [she] can see is false or a distortion of the truth, whether it be in painting, sculpture, [or] photography," Solzhenitsyn, supra — just as she can rightfully insist that she should never "take into hand nor raise into the air a poster or slogan which [she] does not completely accept," id.

Consider for instance the very sort of public accommodations discrimination law involved in this case. If this law is interpreted as the Court of Appeals interpreted it, then it would apply not just to photographers but also to other contractors, such as freelance writers, singers, and painters. And it would apply not just to weddings, but also to political and religious events.

Thus, for instance, a freelance writer who thinks Scientology is a fraud would be violating New Mexico law (which bans religious discrimination as well as sexual orientation discrimination) if he refused to write a press release announcing a Scientologist event. And an actor would be violating the law if he refused to perform in a commercial for a religious organization of which he disapproves.

Since the same rule would apply to state statutes that ban discrimination based on "political affiliation," e.g., D.C. Code § 2-1411.02 (2001); V.I. Code tit. 10, § 64(3) (2006); Seattle, Wash. Mun. Code §§ 14.06.020(L), .030(B), a Democratic freelance writer in a jurisdiction that had such a statute would have to accept commissions to write press releases for Republican candidates (so long as he writes press releases for Democrats). And under similar laws banning discrimination based on "marital status," e.g., Vt. Stats. Ann. tit. 9, § 4502(a) (2006), a Catholic singer who disapproves of weddings of people who have been divorced would have to take a job singing at such a wedding, including singing songs that implicitly or explicitly praise the occasion or the couple.

Yet all such requirements would unacceptably force the speakers to "becom[e] the courier[s] for . . . message[s]" with which they disagree," Wooley, 430 U.S. at 717. All would interfere with creators' "right to decline to foster . . . concepts" that they disapprove of. Id. at 714; see also id. at 715 (recognizing people's right to "refuse to foster . . . an idea they find morally objectionable"). And all would interfere with the "individual freedom of mind," id. at 714, by forcing writers, actors, painters, singers, and photographers to express sentiments that they see as wrong.

And this logic is just as sound for wedding photographers as for the other speakers. The taking of wedding photographs, like the writing of a press release or the creation of a dramatic or musical performance, involves many hours of effort and a large range of

expressive decisions — about lighting and posing, about selecting which of the hundreds or thousands of shots to include in the final work product, and about editing the shots (for instance, by cropping and by altering the color). See, e.g., Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884) (concluding that photographs are protected expression for copyright purposes because they embody the photographer's creative choices); Schrock v. Learning Curve Int'l, Inc., 586 F.3d 513, 519–20 (7th Cir. 2009) (likewise); Los Angeles News Serv. v. Tullo, 973 F.2d 791, 793 (9th Cir. 1992) (likewise).

Clients pay a good deal of money to wedding photographers, precisely because of the value of the photographers' expressive staging, selection, and editing decisions. The court of appeals concluded that the taking of wedding photographs was not constitutionally protected, citing State v. Chepilko, 965 A.2d 190, 199 (N.J. Super. Ct. App. Div. 2009), for the proposition that a "defendant [who] used a pocket camera to take snapshots of persons walking on the boardwalk" was not engaged in sufficiently "expressive" activity. Elane Photography, LLC v. Willock, 2012-NMCA-086, ¶ 24, 284 P.3d 428, 438. But whatever the force of Chepilko might be on its own facts, the Chepilko reasoning cannot apply to someone who engages in the extensive and painstaking process of staging, selecting, and editing the hundreds of photographs that make their way into a wedding album.

Moreover, the photographs at a wedding must implicitly express a particular viewpoint: Wedding photographers are hired to create images that convey the idea that the wedding is a beautiful, praiseworthy, even holy event. Mandating that someone make such expressive decisions, and create photographs that depict as sacred that which she views as profane, jeopardizes the person's "freedom of mind" at least as much as would mandating that she display on her license plate "Live Free or Die" or "Land of Enchantment," see Ortiz v. State, 106 N.M. at 697, 749 P.2d at 82 (holding that Wooley applies to the "Land of Enchantment" slogan).

Nor does it matter that Huguenin was engaged in photography for money. As was noted above, the First Amendment fully protects both the dissemination and the creation of material for money. The compelled speech doctrine applies to commercial businesses, both newspapers, see, e.g., Miami Herald v. Tornillo, 418 U.S. 241 (1974), and nonmedia corporations, see, e.g., Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1 (1986). And this protection makes sense: A wide range of speakers, whether newspapers, photographers, freelance writers, or others, use their speech to try to make money.

This is the nature of our free market system: The prospect of financial gain gives many creators of speech an incentive to create, and the money they make by selling their creations gives them the ability to create more. United States v. National Treasury Employees Union, 513 U.S. 454, 469 (1995) (treating speech for money as fully protected, because "compensation [of authors] provides a significant incentive toward more expression"). Indeed, that is the premise of the copyright law, see Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (internal quotation marks omitted) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."), as well as of the free market more generally.

If making money from one's work meant surrendering one's First Amendment rights to choose what to create and what not to create, then very many speakers would be stripped of their constitutional rights.

V. The Court of Appeals' Analysis Is Inconsistent with Wooley

The court of appeals' contrary analysis, 2012-NMCA-086, ¶¶ 24–30, cannot be reconciled with Wooley. Indeed, many of the court of appeals' arguments would have been entirely at home in the Wooley dissent.

Thus, for instance, the court of appeals reasoned that, "we are unpersuaded by Elane Photography's argument that a photographer serves as more than a mere conduit for another's expression." 2012-NMCA-086, ¶ 27; see also id. at ¶ 29. Yet Elaine Huguenin's behavior involves far more creative expression than that engaged in by the Maynards — but the Maynards still prevailed, even though they really were just a conduit for the government's expression. The "First Amendment right to avoid becoming the courier" for another's expression, Wooley, 430 U.S. at 717, is indeed the right to avoid becoming the "conduit" for that expression.

Likewise, the court of appeals reasoned that Huguenin's photographs were not "a message from Elane Photography," 2012-NMCA-086, ¶ 27, and were "unaccompanied by outward expression of approval," id. at ¶ 28. "[A]n observer who merely sees Elane Photography photographing a same-sex commitment ceremony has no way of knowing if such conduct is an expression of Elane Photography's approval of such ceremonies." Id.

This is very similar to the Wooley dissent's argument that the license plates would not be seen by observers as conveying a message from the Maynards, because all would have recognized that the message on the plates was "prescribed by the State" rather than being "assert[ed] as true" by the Maynards. 430 U.S. at 721 (Rehnquist, J., dissenting). But the Wooley majority disagreed, reasoning that the "First Amendment right to avoid becoming the courier" for expression, id. at 717, applies even when the expression would be clearly seen as another's message (in that case, the government's) and not the driver's own, id. at 715.

Similarly, the court of appeals reasoned that,

Without Elane Photography's explanatory speech regarding its personal views about same-sex marriage, an observer might assume Elane Photography rejected Willock's request for any number of reasons, including that Elane Photography was already booked, or did not want to travel. . . . In no context would Elane Photography's conduct alone send a message of approval for same-sex ceremonies.

2012-NMCA-086, ¶ 28. Yet one could equally say — and the Wooley dissent did in effect so argue — that,

Without [the Maynards'] explanatory speech regarding [their] personal views about [the 'Live Free or Die' slogan], an observer might assume [the Maynards' car bore the license plate] for any number of reasons, including that [the law required it]. . . . In no context would [the Maynards'] conduct alone send a message of approval for [the slogan].

The Wooley decision shows that such reasoning cannot suffice to rebut a First Amendment compelled speech claim. The Wooley majority concluded that the Maynards should prevail, even though observers likely would not assume that the Maynards endorsed the license plate motto. Likewise, Huguenin should prevail regardless of whether observers would assume that her participation endorsed the same-sex ceremony.

The court of appeals cited Turner Broad. Sys., Inc., v. F.C.C., 512 U.S. 622, 629 (1994), for the proposition that "mere conduit[s] for another's expression" are constitutionally unprotected, and described Turner as "explaining that a cable operator serves as a conduit for speech and is not a speaker itself." 2012-NMCA-086, ¶ 27. But Turner noted that cable operators are "conduit[s]" in the sense of "transmitting [cable channels] on a continuous and unedited basis to subscribers." 512 U.S. at 629. Wedding photographers, on the other hand, create and edit their own expression, by carefully staging, selecting, and editing photographs. And in any event, Wooley makes clear that even a compulsion to be the "courier" for another's expression can be unconstitutional. Wooley, 430 U.S. at 717.

Moreover, there are two critical differences between Turner and Wooley. First, there is little interference with "individual freedom of mind," id. at 714 (internal quotation marks and citation omitted), when a large cable operator — such as the Turner Broadcasting System — is required to turn over some of its cable channels to particular cable programmers. But there is a great deal of such interference when an individual such as George Maynard is required to "foster," id., speech with which the individual disapproves. Elaine Huguenin, as coowner and principal photographer of Elane Photography, is analogous to the Maynards in Wooley, not to the Turner Broadcasting System in Turner.

Second, as the Court held in Hurley v. Irish-American Gay, Lesbian & Bi-sexual Group of Boston, 515 U.S. 557, 577 (1995) — which declined to apply Turner to a parade —

A cable is not only a conduit for speech produced by others and selected by cable operators for transmission, but a franchised channel giving monopolistic opportunity to shut out some speakers. This power gives rise to the Government's interest in limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently de-stroyed.

On the other hand, an individual driver (as in Wooley) or wedding photographer (as in this case) has no such "monopolistic" power, or opportunity to "silence[] and . . . destroy[]" rival speakers. Again, this case is analogous to Wooley, not to Turner.

VI. First Amendment Protection Against Compelled Speech Extends Only to Refusals to Create First-Amendment-Protected Expression

The First Amendment protection offered by Wooley is limited in scope: It extends only to people who are being compelled to engage in expression.

Under Wooley, photographers' First Amendment freedom of expression would protect their right to choose which photographs to create, because photographs are protected by the First Amendment. But caterers would not have such a right to refuse to deliver food for use in same-sex commitment ceremonies. Hotels would not have such a right to discriminate against same-sex commitment ceremonies. Limousine companies would not have such a right to refuse to rent out their limousines for use in events celebrating same-sex commitment ceremonies.

This simply reflects the fact that the First Amendment extends not to all activity, but only to expression. This is well understood when it comes to laws that restrict activity: The First Amendment does not interfere with a government decision to restrict catering, hotels, or limousines — for instance, by creating a monopoly on catering, limiting the operation of dance halls, setting up a medallion system under which only a few would-be limousine drivers would be allowed to operate, or requiring a license for such businesses that the state had the discretion to grant or deny. [Citations omitted. -EV] But it would be an unconstitutional prior restraint for the government to require a discretionary license before someone could publish a newspaper or write press releases, or for the government to give certain singers, painters, or photographers a monopoly and thereby bar others from engaging in such expression. Cf., e.g., City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (striking down discretionary licensing scheme for newspaper racks); Mahaney v. City of Englewood, 226 P.3d 1214, 1220 (Colo. Ct. App. 2009) (striking down discretionary licensing scheme for wall murals).

The line between expression and nonexpressive behavior is thus drawn routinely when it comes to restrictions. Restrictions on expression trigger First Amendment scrutiny and restrictions on nonexpressive conduct do not. Precisely the same line can be drawn — and with no greater difficulty — when it comes to compulsions.

Such a line would be clear and administrable, and would protect a relatively narrow range of behavior: only behavior that involves the creation of constitutionally protected expression. If a person's activity may be banned, limited only to certain narrow classes of people, or subjected to discretionary licensing without violating the First Amendment — which is to say that it is not constitutionally protected expression — then the person may likewise be compelled to participate in events she disapproves of without violating the First Amendment. But if a person's activity is protected by the First Amendment against a ban, for instance because it involves writing or photog-raphy, then it likewise may not be compelled, either.

And this First Amendment right would ultimately inflict little harm on those people who are discriminated against. A photographer who views a same-sex commitment ceremony

as immoral or even blasphemous would be of little use to the people engaging in the ceremony — there is too much of a chance that the photographs will, even inadvertently, reflect the photographer's disapproval.

People who are engaging in such a ceremony — or, for instance, entering into an interfaith marriage or remarrying after a divorce — would likely benefit from knowing that a prospective photographer disapproves of the ceremony, since they could then easily turn to a more enthusiastic photographer. One publication estimates that there are likely about 100,000 wedding photographers in the United States, so even a town of 50,000 people would likely contain over 15 wedding photographers. A YellowPages.com query for "Wedding photography" near Albuquerque, where Elane Photography is located, yielded over 100 results. [Citations omitted. -EV] And most wedding photographers would likely be happy to take the money of anyone who comes to them.

In this respect, discrimination by these narrow categories of expressive public accommodations is much less burdensome on the discriminated-against people than are other forms of discrimination. Employment discrimination can jeopardize people's livelihood, especially when the targets have skills that can only be used by a few employers. Discrimination in education can affect people's future; so can discrimination in housing, especially when housing is scarce in the safe parts of town with good schools.

Discrimination in many places of public accommodation has been historically pervasive, to the point that mixed-race groups might have been unable to find any hotel to stay at or restaurant to eat at. But protecting the First Amendment rights of writers, singers, and photographers would come at comparatively little cost to those who seek to hire such speakers and artists.

Of course, when a photographer tells a couple that she does not want to photograph their commitment ceremony, the couple may be offended by the photographer's disapproval. But the First Amendment does not treat avoiding offense as a sufficient interest to justify restricting or compelling speech. See, e.g., Texas v. Johnson, 491 U.S. 397 (1989).

The fact that people have a constitutional right to engage in writing, singing, photography, and the like also responds to the argument that people who do not want to photograph same-sex commitment ceremonies should just stop photographing weddings. Creating expressive works such as photographs (unlike delivering food, driving limousines, or renting out ballrooms) is a constitutional right. People who want to preserve their First Amendment rights to be free from compelled artistic expression cannot be required to surrender their First Amendment rights to engage in artistic expression in the first place.

Conclusion

For these reasons, the decision of the New Mexico Court of Appeals should be reversed.