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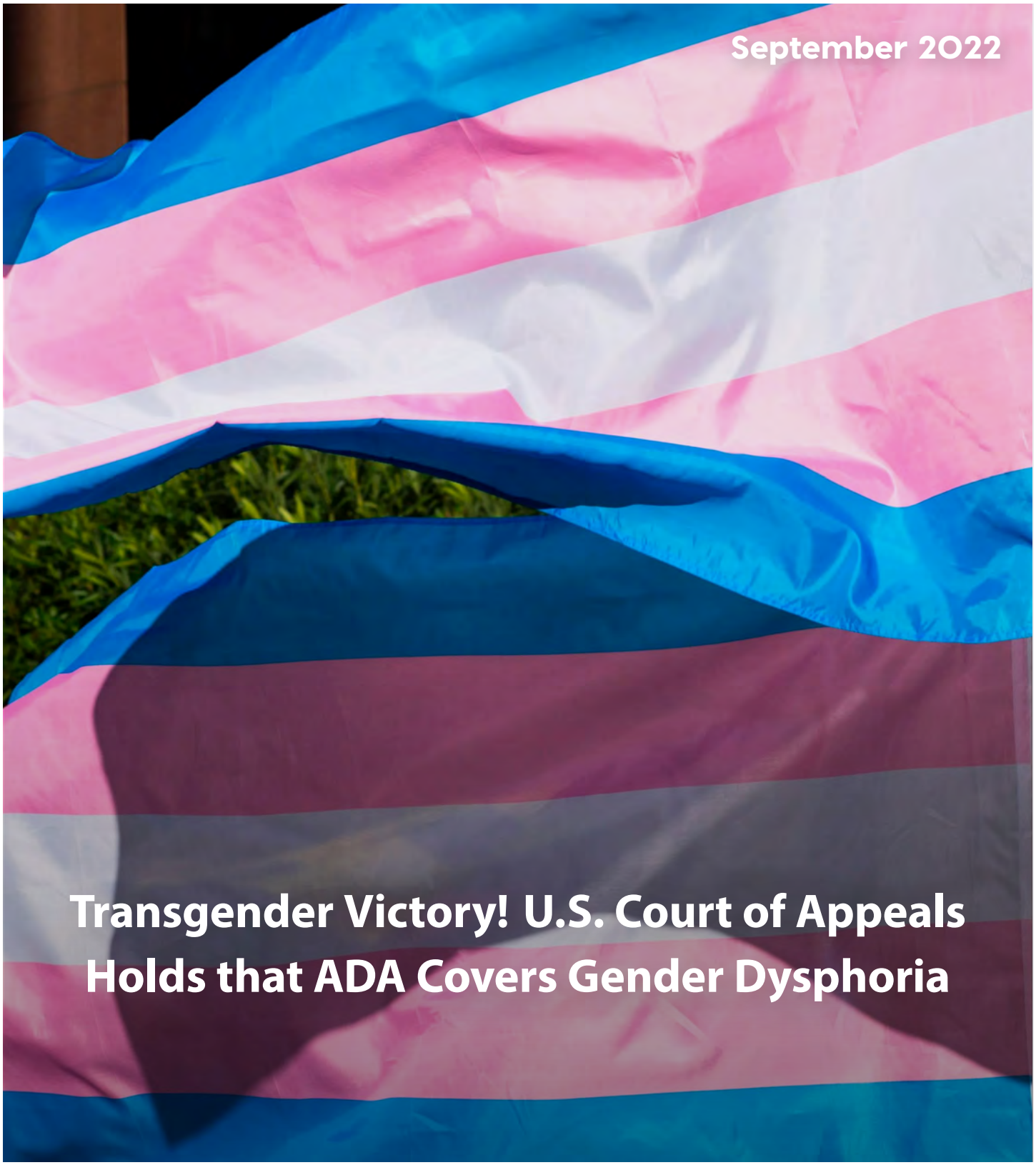
Kentucky Federal Court Rules Wedding Photographer Has a Constitutional Right to Refuse Services to Same-Sex Couples

Arthur S. Leonard

LGBT LAW NOTES



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LAW NOTES

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EXECUTIVE SUMMARY

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Kentucky Federal Court Rules Wedding Photographer Has a Constitutional Right to Refuse Services to Same-Sex Couples

By Arthur S. Leonard

U.S. District Judge Benjamin Beaton ruled on August 30 in *Chelsey Nelson Photography v. Louisville/Jefferson County Metro Government*, 2022 WL 3972873, 2022 U.S. Dist. LEXIS 156059 (W.D. Ky.), that Chelsey Nelson, a photographer who is challenging the Louisville/Jefferson County (Kentucky) ordinance banning sexual orientation discrimination by businesses selling goods and services to the public, has a First Amendment free speech right to refuse to provide her services for weddings of same-sex couples, and is free to publicize her exclusionary policy. The judge also found these rights to be protected by Kentucky's Religious Freedom Restoration Act.

Judge Beaton granted Nelson's motion for summary judgment, and issued a permanent injunction prohibiting the Louisville Metro Government and its Human Relations Commission from taking any action against Nelson, who stated that her "sincere religious belief" dictates her hypothetical refusal of services. Nelson also says that she is "happy" to provide photographic services to LGBT people, other than in connection with their weddings.

In 1999, the city/county governments amended their nondiscrimination laws to add "sexual orientation" to the prohibited grounds of discrimination. There is no record of the local government taking any action against a photographer for refusing to photograph a same-sex wedding, but in response to the filing of this lawsuit, the government has made clear that it interprets the ordinance to require professional photographers to photograph same-sex weddings if their business includes providing photographic services for other weddings. In addition to prohibiting discrimination, the ordinance forbids a business from communicating that its services will be "refused, withheld, or denied an individual on account of his sexual orientation or gender identity, or that patronage of an individual, on account of his or her sexual orientation of gender identity is objectionable, unwelcome, unacceptable, or undesirable."

After having photographed only two different-sex weddings, Nelson agreed to be represented by lawyers from Alliance Defending Freedom (ADF), a conservative religious law firm, in a lawsuit seeking an order barring enforcement of the ordinance against her. The case was assigned to District Judge Justin Walker, who had recently been appointed by President Trump. He denied the defendants' motion to dismiss the case for lack of standing, and issued a preliminary injunction pending a final ruling on the merits. *See* 479 F. Supp. 3d 543 (W.D. Ky., 2020). Then President Trump nominated Judge Walker to the U.S. Court of Appeals for the D.C. Circuit, where he now sits, and the case was reassigned to Judge Beaton, who had recently been appointed to the District Court by President Trump.

The defendants' initial defense had been to claim that Nelson lacked standing to sue, because she had not engaged in any conduct violating the ordinance, had never been asked to photograph a same-sex wedding, and had not published an exclusionary policy. Judge Walker had rejected that defense, and Judge Beaton pointed out that Nelson had taken concrete action after winning her preliminary injunction, updating her website "with a message explaining why she limits her services to celebration of opposite-sex weddings that align with her religious beliefs," a statement that the defendants concede would violate the ordinance. Consequently, she has alleged a "credible threat of prosecution," since the government has stated that it intends to enforce its law, a position reiterated by Louisville's mayor in a statement issued when this decision was announced.

In opposing the preliminary injunction, the defendants had argued that the ordinance regulates "goods or services involving speech," thus would be "commercial conduct" rather than pure speech. Judge Walker had rejected that argument, holding that Nelson's "photography is art" and "art is speech."

xExplaining his agreement with this analysis, Judge Beaton wrote, "Nelson has shown a subjective intent to promote a particular message about marriage. She uses photographs of weddings to convey her view of the world, as shaped by her values and faith." He found that "the likelihood is great" that viewers of the photographs would understanding this message. He rejected prior rulings by the Supreme Courts of New Mexico [*Elane Photography v. Willock*, 309 P. 3d 53 (N.M. 2013)] and Washington [*State v. Arlene's Flowers*, 441 P.3d 1203 (Wash. 2019)], which had found that their public accommodation laws were regulating commercial conduct, not speech, when the prohibited a wedding vendor from discriminating against same-sex couples.

Judge Beaton noted that the 10th Circuit Court of Appeals had ruled in *303 Creative v. Ellenis*, 6 F. 4th 1160 (2021), another lawsuit filed by Alliance Defending Freedom, which is now pending before the U.S. Supreme Court, that a videographer's refusal to provide services for same-sex weddings squarely raises a freedom of speech issue. In that case, however, the 10th Circuit found that the state has a compelling interest in preventing discrimination against customers due to their sexual orientation, and that applying Colorado's anti-discrimination law to prohibit the videographer from publicizing its policy on its website was a "narrowly tailored" approach due to the uniqueness of the videographer's services, so it ruled against the videographer. The Supreme Court will hear arguments and decide during its

upcoming October 2022 Term whether to reverse the 10th Circuit's conclusion, having granted the videographer's petition to decide whether "applying a public accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment."

Although the preliminary injunction issued by Judge Walker two years ago assures that Nelson will not be investigated or prosecuted while her case remains pending before Judge Beaton, and thus there was no reason for Judge Beaton to rule on her summary judgment motion and issue a permanent injunction now before the Supreme Court rules in *303 Creative v. Elenis*, he went ahead and ruled anyway, disagreeing with the 10th Circuit's view that the government's interest in preventing discrimination justified this burden on Nelson's free speech rights.

"The City takes a broad position that appears to eschew any tailoring," he wrote, quoting from the City's brief: "Uniform enforcement of the Accommodations Provision is the least restrictive means for furthering Metro's interest in ensuring equal access to goods and services, because every single instance of discrimination renders access unequal, inflicts humiliation, and creates stigma." Judge Beaton responded that the City's "pursuit of its equality goal is hardly 'uniform'" as "its nondiscrimination ordinances, like those of other jurisdictions, exempt many other people, institutions, and services. And the City never addresses why such exemptions would fail here."

He rejected the defendants' fallback position that providing a religious exemption in this sort of case would violate the Establishment Clause of the First Amendment by privileging religion over equal treatment, and he rejected the 10th Circuit's approach of finding that the "unique" services provided by a videographer – or, in this case, a photographer – would preclude "narrow tailoring" of the non-discrimination provision. Paraphrasing the City's argument, Beaton wrote, "In other words, the more expressive the service is, the more scarce it is, and thus the more valuable equal access is." But, he wrote, "this flips free speech on its head. Why would more expressive activities receive less protection?" And, he quoted from the dissenting opinion in the 10th Circuit case by Chief Judge Timothy Tymkovich: "Taken to its logical end, the government could regulate the messages communicated by all artists, forcing them to promote messages approved by the government in the name of 'ensuring access to the commercial marketplace.'"

"Such an argument is anathema to free speech," wrote Judge Beaton.

He also rejected the defendants' argument, based on an expert report submitted in opposition to the summary judgment motion, that creating an "exemption" for Nelson "could lead to an increase in real-world discrimination that would harm same-sex couple [by reducing the willingness of vendors] to serve same-sex couples, even among previously willing vendors." He found that the expert's report was factually unreliable in its contention that the Supreme Court's ruling in *Masterpiece Cakeshop v. Colorado Civil Right Commission*, 138 S. Ct. 1719 (2018), which reversed a judgment against a baker who refused to design and produce a wedding cake for a same-sex couple, had resulted in an increase in discrimination by wedding vendors against same-sex couples. He tore apart the methodology used by the expert in undertaking a survey of wedding vendors without determining whether they were aware of the Supreme Court's ruling in that case, ruling that it was inadmissible in this case.

In addition to finding that the provision barring businesses from communicating a discrimination policy directly regulated protected speech, Judge Beaton criticized some of the language in the ordinance as being unduly vague in purporting to outlaw communications that would make a consumer feel "unwelcome." Judge Tymkovich had raised a vagueness objection to the Colorado statute, which used the same wording. "Although Nelson echoes this critique of Louisville's own provision," wrote Beaton, "the City offers no reason why its law isn't similarly vague."

"Without clear language guiding discretion of the enforcement official," wrote Beaton, "this amounts to largely unrestrained authority to police speech based on subjective listener reactions."

While conceding that under existing federal precedents Nelson could not make a Free Exercise of Religion challenge to the ordinance, he found that the Kentucky Religious Freedom Restoration Act (RFRA) provided any additional basis for Nelson's claim, finding that "Kentucky statutory law applies strict scrutiny based on Nelson's religious-freedom claim." Rejecting the defendants' argument that RFRA was available to Nelson only as a defense in a prosecution for violating the statute, he noted prior cases hold that a person in Nelson's position "may assert a KRFRA claim in a pre-enforcement posture," stating that "The City offers no precedent or statutory language cabining KRFRA to an affirmative defense." He also rejected the defendants' argument that the 11th Amendment precluded Nelson bringing a KRFRA claim in federal court, pointing out that she was not suing for damages, just for declaratory relief, making an 11th Amendment governmental immunity defense unavailable.

The court converted Judge Walker's preliminary injunction into a permanent injunction.

In a statement issued shortly after the court's decision was announced, Louisville Mayor Greg Fischer, said the defendants "will likely" appeal the decision, commenting that the city "will continue to enforce to the fullest extent possible its ordinance prohibiting anti-discriminatory practices and will fight against discrimination in any form."

An appeal would go to the U.S. Court of Appeals for the 6th Circuit, which is heavily dominated by appointees of Donald Trump and George W. Bush (10 out of 16 active judges). Any appeal to that circuit would probably immediately be put on hold pending a ruling by the Supreme Court in *303 Creative v. Elenis*, which will be argued later this year and decided before the end of the Supreme Court's term in June 2023. ■