IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COUNTRY MILL FARMS, LLC and
STEPHEN TENNES,

Plaintiffs,

Case No. 1:17-cv-00487-PLM-RSK

v.

HON. PAUL L. MALONEY

CITY OF EAST LANSING,

Defendant.

REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs attempt to dress their arguments up in a shimmering gown of First Amendment and religious righteousness and parade it down the runway of moral superiority. When stripped of its costume, however, what lurks beneath is simply this: discriminatory conduct. The Court should ignore plaintiffs' cynical attempt at camouflage. Discriminatory conduct does not become speech or the exercise of religion entitled to First Amendment protection simply because the plaintiffs dress it the trappings of such claims.

A. The Plaintiffs Engaged in Discriminatory Conduct.

Perhaps the single most striking thing about the plaintiffs' Response Brief is its utter failure to acknowledge the Supreme Court's clear pronouncement in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 571-572, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995), that regulations banning sexual orientation discrimination "are well within the State's usual power to enact [if] a legislature has reason to believe . . . that [the] group is the target of discrimination." While that ruling might not square with plaintiffs' view of what the law **should** be, ignoring it does not make it disappear or alter what

the law **is**. Plaintiffs use that intentional ignorance to repeatedly claim they have never engaged in "bad" or "illegal" conduct. (Response Brief, pp. 4, 6, 7, 15, 20, 21). The plaintiffs are technically correct that their discriminatory business practices are not illegal in that the City cannot cite them for discriminatory conduct that takes place outside the City. However, the plaintiffs are not semantically correct because their discriminatory business practices violate the City's Farmers' Market Policy. There is no constitutional prohibition on the City taking action in response to the violation of its policy.

Although plaintiffs conveniently avoid even addressing the issue, defendant will assume plaintiffs will acknowledge their business is a place of public accommodation as defined in § 22-35(a) of the East Lansing Ordinance. Places of public accommodation are prohibited from "[d]eny[ing] an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of . . . sexual orientation." § 22-35(b)(1). The plaintiffs **have** acknowledged – one might even safely say celebrated – the fact that their business will not accommodate same-sex weddings. In other words, their "general business practice" is to discriminate on the basis of sexual orientation in providing their services. By taking that position, plaintiffs are in violation of the City of East Lansing policy that requires **all** vendors at the 2017 Farmer's Market to comply with the City's Human Relations Ordinance and the City's "public policy against discrimination . . . while at the [market] **and** as a general business practice." (Amended Complaint, ¶ 149 and Exhibit 1; emphasis added).

The plaintiffs' response to this is the same as the Wizard of Oz when Toto exposed him as a fraud: "Ignore the man behind the curtain." In this case the plaintiffs would have this Court ignore the very existence of the City's Ordinance. However, one searches plain-

tiffs' Brief in vain for any legal authority that would permit such an outcome. The irrefutable facts are: the Ordinance exists and the plaintiffs' actions violated the City's policy. That is the starting point of the legal analysis of the plaintiffs' claims in this case.

B. The Plaintiffs Have Not Stated a Plausible First Amendment Claim.

Apart from announcing that their feelings are hurt by the City comparing them "to racists, the KKK and radical Islamic imams," (Response Brief, p. 15), the plaintiffs do not attempt to explain why the government can take action in response to the discriminatory actions of others, but not in response to the plaintiffs' discriminatory actions. This refusal to address the substance of the City's argument is accompanied by the plaintiffs' hypocritical contention that all they are doing is "respectfully declin[ing] to participate in a sacramental ceremony that violates one's religious beliefs." (Response Brief, p. 6). This contention is factually false based on the allegations in the Complaint. The plaintiffs run a business. Part of their business model is renting their business premises for weddings. Plaintiffs do not "participate" in these weddings; they rent out space. Moreover, there is nothing "sacramental" about weddings held at plaintiffs' business, as plaintiffs sanctimoniously suggest. (Response Brief, p. 6).[1] The point of this is not to dispute the plaintiffs' claim that their sincerely held religious beliefs require them to discriminate. The City accepts that assertion for purposes of this motion. The point is that plaintiffs' conduct is not religious – it is secular. Plaintiffs engage in discrimination in the operation of their business. As the New Mexico Supreme Court succinctly stated: "Therefore, when Elane Photography refused

[1] Plaintiffs go to great lengths to allege how their devout Catholicism and adherence to the tenets of the Catholic faith require them to refuse to open their business to same-sex couples – in other words, to discriminate. However, their compulsion to follow the laws of the Catholic Church is apparently situational, since canonical law does not permit the sacrament of marriage to occur except at a parish church, Code of Canon Law, Title VII, Ch. V., Can. 1108 § 1, and does not recognize marriages between non-Catholics or between a Catholic and a non-Catholic unless prior dispensation has been granted. Code of Canon Law, Title VII, Ch. VI, Can. 1124, 1125.

to photograph a same-sex commitment ceremony, it violated the NMHRA in the same way as if it had refused to photograph a wedding between people of different races." *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59, 2013-NMSC-040 (2013), *cert. denied*, 134 S. Ct. 1787 (2014). The plaintiffs cannot hide behind the veil of religion in an attempt to shield their conduct from valid anti-discrimination laws and policies. The City's policy is completely neutral towards religion. It addresses discrimination, not religion. The plaintiffs' refusal to address this issue is telling.

The plaintiffs' primary response to the Motion to Dismiss – apart from proclaiming their innocence of any discrimination – is to continue to insist that conduct is speech. Plaintiffs' contention flunks the "Duck Test": "The *Duck Test* holds that if it walks like a duck, swims like a duck, and quacks like a duck, it's a duck. Joseph Lake, the plaintiff in this suit, flunks the *Duck Test.* He says, in effect, that if it walks like a duck, swims like a duck, and quacks like a duck, it sure as heck isn't a duck." *Lake v. Neal*, 585 F.3d 1059, 1059 (7th Cir. 2009). While the City does not dispute that communication was involved in plaintiffs' announcement that they would engage in discriminatory conduct, it is the plaintiffs' conduct (refusing to provide their public accommodations for same-sex weddings) that concerns the City of East Lansing, not the plaintiffs' speech. Plaintiffs' argument boils down to this: if we said (or wrote) it, you can't take action because of it. That argument fails.

The most obvious flaw in the plaintiffs' argument is that it would effectively insulate **all** conduct that is subjectively motivated by religious beliefs from governmental review. The Supreme Court has long held that non-communicative conduct is entitled to First Amendment protection as long as it conveys a particularized message. *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); *Spence v. State of Wash.*,

418 U.S. 405, 409, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974). A person in plaintiffs' position could contend the conduct of discrimination was conveying the message that her religious beliefs did not allow her to serve the person in the protected class, and was therefore shielded from any adverse consequences by the First Amendment. The Supreme Court has repeatedly rejected this argument and this Court should do so in this case.

> Moreover, since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. [Citations omitted]. Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices, 42 U.S.C. § 2000e–2; 29 CFR § 1604.11 (1991). See also 18 U.S.C. § 242; 42 U.S.C. §§ 1981, 1982. **Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy**."

R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 389–390, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). (Emphasis added). This language refutes plaintiffs' argument that East Lansing's Ordinance unconstitutionally regulates speech. Moreover, the Ordinance mirrors the language of federal and State anti-discrimination laws. Title VII explicitly prohibits an employer from printing or publishing information indicating an intent to discriminate based on membership in a protected class, 42 U.S.C. § 2000e-3, as does the Michigan Civil Rights Act, M.C.L. 37.2302(b). Both the Americans with Disabilities Act, 42 U.S.C. § 12181, and 42 U.S.C.A. § 2000a (which prohibits discrimination in public accommodations), apply to activities that "affect commerce," which explicitly includes "communications."

The "White Applicants Only" sign example used by the Supreme Court in *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006), is directly on point with the facts of this case. Plaintiffs' attempt to distinguish this

example reflects their utter refusal to accept reality. Their Brief states: "A 'Whites [sic] Applicants Only' sign in the segregationist south communicated that an entire class of people was not welcome in an establishment for any reason. That is discriminatory conduct *because of a protected status* that violates both state and federal law. In contrast, Tennes serves everyone and always has." (Response Brief, p. 7; emphasis in original). It is incredible that plaintiffs deny the reality that **they are doing precisely the same thing.** They are refusing to provide their business services to an entire class of people who have protected status (sexual orientation). **Plaintiffs do not serve everyone** – they refuse to serve same-sex couples, a fact they affirmatively and repeatedly pled in their Complaint. (Complaint, ¶¶ 86, 87, 111, 120). The truth is that plaintiffs do not believe non-heterosexuals are entitled to protection under anti-discrimination laws and they simply refuse to recognize the City's right to offer such protection. This Court must reject the plaintiffs' alternate reality.

Here, the City's Ordinance and the policy that incorporates it do not target the conduct of discrimination because it is based on religious beliefs or because it has been communicated. The City targets discrimination because it has a compelling interest in abolishing sexual orientation discrimination. *Hurley, supra*.[2] The plaintiffs' First Amendment claims fail as a matter of law.[3]

C. There Was No Unconstitutional Condition Placed on Receiving a Benefit.

[2] Plaintiffs again engage in another shell game when trying to force the City's actions in this case within the Supreme Court's holding in *Bigelow v. Virginia*, 421 U.S. 809, 824, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975), that a State cannot punish those who advertise services that are legal in another State (abortion in *Bigelow*). *Bigelow* is completely inapposite to this case. Here, the City is not attempting to prohibit its citizens from travelling to plaintiffs' business and patronizing it. Nor is the City banning advertisements in East Lansing for the plaintiffs' business. Rather, the City is refusing to enter into a commercial transaction with plaintiffs that would allow plaintiffs to engage in business on the City's property. If plaintiffs' reliance on *Bigelow* were valid, it would mean the Supreme Court required Virginia to allow abortion providers from New York to come to Virginia and perform abortions in state-owned hospitals. *Bigelow* obviously did no such thing.

[3] The same arguments apply to plaintiffs' claims under the Michigan Constitution. Plaintiffs' equal protection claim similarly fails since it is premised on the debunked theory that the City regulates speech.

The City will assume for purposes of this motion that renting a spot in the Farmer's Market is a government benefit. In *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 2697, 33 L. Ed. 2d 570 (1972), the Supreme Court held that public employment as a college teacher was a government benefit and the government could not deny that benefit in retaliation for the exercise of First Amendment rights. Stated differently, government could not condition the benefit on the recipient surrendering constitutional rights. However, the unconstitutional conditions doctrine does not even apply to all pure speech, and it certainly does not apply to this case. For example, the Sixth Circuit reversed the district court's issuance of a preliminary injunction that restored plaintiff to his teaching position at Macomb Community College after he was suspended for using "obscene and vulgar speech" in the classroom that "foster[ed] a learning environment hostile to women, a form of sexual harassment". *Bonnell v. Lorenzo*, 241 F.3d 800, 802 (6th Cir. 2001). "Plaintiff may have a constitutional right to use words such as 'pussy,' 'cunt,' and 'fuck,' but he does not have a constitutional right to use them in a classroom setting where they are not germane to the subject matter, **in contravention of the College's sexual harassment policy**. *Id*. at 820. (Emphasis added).

Similarly, in *Dambrot v. Central Michigan Univ.*, 55 F.3d 1177 (6th Cir. 1995), (a case cited by plaintiffs), the Sixth Circuit held the University could terminate a basketball coach for using the word "nigger."

> The First Amendment protects the right of any person to espouse the view that a "nigger" is someone who is aggressive in nature, tough, loud, abrasive, hard-nosed and intimidating; someone at home on the court but out of place in a classroom setting where discipline, focus, intelligence and interest are required. This same view has been and is held about African Americans by many who view the success of Black athletes as a result of natural athletic ability and the success of Black executives as the result of affirmative action.
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> What the First Amendment does not do, however, is require the government as employer or the university as educator to accept this view as a valid means of mo-

> tivating players. . . . In the instant case, the University has a right to terminate Dambrot for recklessly telling these young men to be athletically ardent but academically apathetic in his attempt to boost athletic performance. . . . Dambrot's resort to the First Amendment for protection is not well taken.

Id. at 1190 – 1191. The same rationale applies in this case. The First Amendment protects the plaintiffs' **views** that same-sex couples should not be permitted to marry. What the First Amendment does not do, however, is require the City to do business with the plaintiffs when their business practices include discrimination against a group of people protected by the City's anti-discrimination laws. The unconstitutional conditions doctrine has no applicability to this case.

D. The City's Ordinance and Policy Are Neither Overly Broad Nor Vague.

Imprecise laws can be attacked under two different doctrines. First, the overbreadth doctrine permits the invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 612–615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Second, a law may be impermissibly vague under the Due Process Clause because it fails to establish standards that are sufficient to guard against the arbitrary deprivation of liberty interests – in other words, that it is grants the government unbridled discretion in enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 52, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999).

The plaintiffs' due process claim is foreclosed by the Supreme Court's decision in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 21, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010), where the Court held, "the dispositive point here is that the statutory terms are clear in their application to plaintiffs' proposed conduct, which means that plaintiffs' vagueness challenge must fail." The City's Ordinance and policy clearly apply to plaintiffs'

conduct of refusing to allow same-sex marriages at their place of business. Thus, the plaintiffs' due process challenge must fail. The plaintiffs' overbreadth challenge also fails because the City does not ban **any** speech, and there is no constitutionally protected right to engage in discriminatory practices that conflict with laws prohibiting such practices. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

E. The City's Actions Are Not in Violation of Michigan Law.

The plaintiffs contend the City cannot refuse them a spot at the Farmer's Market because their speech and discriminatory actions occurred outside of East Lansing. To repeat: the City has no interest in what plaintiffs say – let alone where they say it. The fact that plaintiffs' discriminatory actions took place outside the City is of no moment. The City is not attempting to project itself outside its geographic boundaries. The City did not go to the plaintiffs; the plaintiffs **came to the City** and demanded a spot in the Farmers' Market which is operated on City property.

The issue here is not controlled by the Home Rule City Act, but by the Michigan Constitution. Article 7, § 22 of the 1963 Constitution provides:

> Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. **Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government**, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

(Emphasis added). Article 7, §34 of the Michigan Constitution provides: "The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor." Thus, the issue is whether East Lansing's anti-discrimination Ordinance and the policy regarding the Farmers' Market – and specifically the City's requirement that par-

ticipants in the Farmers' Market not engage in discriminatory business practices – relate to the City's municipal concerns and property. The only possible answer is that they do.

A very similar issue was recently decided by the Michigan Supreme Court, which held that a municipality had the authority under the State Constitution to "set terms for the contracts it enters into with third parties for its own municipal projects—including provisions relating to the wages paid to third-party employees. This way the municipality controls its own money, and presumably expresses its citizens' preference as to what those who work on *public* projects should be paid." *Associated Builders & Contractors v. City of Lansing*, 499 Mich. 177, 187–188, 880 N.W.2d 765 (2016). Requiring those who enter business relationships with the City to comply with the City's anti-discrimination policy is without question a matter of municipal concern.

Respectfully submitted,

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