UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Telescope Media Group, a Minnesota corporation, Carl Larsen and Angel Larsen, the founders and owners of Telescope Media Group, Plaintiffs, vs. Kevin Lindsey, in his official capacity as Commissioner of the Minnesota Department of Human Rights and Lori Swanson, in her official capacity as Attorney General of Minnesota, Defendants.	File No. 16CV4094 (JRT/LIB) Minneapolis, Minnesota May 26, 2017 Courtroom 15 10:51 a.m.

BEFORE THE HONORABLE JOHN R. TUNHEIM

UNITED STATES DISTRICT COURT CHIEF JUDGE

(CIVIL MOTIONS)

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P R O C E E D I N G S

IN OPEN COURT

(10:51 a.m.)

THE COURT: You may be seated. Good morning, everyone. All right. This is Civil Case Number 16-4094. Telescope Media Group, Carl Larsen and Angel Larsen versus Kevin Lindsay, et al.

All right. Counsel, would you note appearances this morning? First, for the plaintiffs?

MR. TEDESCO: Good morning, Your Honor. Jeremy Tedesco for plaintiffs.

MR. WARNER: Good morning, Your Honor. Jacob Warner for the plaintiffs.

MS. CARLSON: Good morning, Your Honor. Renee Carlson for the plaintiffs.

THE COURT: All right. Good morning to all of you. For the defendants?

MS. HUYSER: Good morning, Your Honor. Alethea Huyser for the defendants in this matter. I've got with me my colleague Janine Kimble and Commissioner Kevin Lindsey, Minnesota Department of Human Rights.

THE COURT: Good morning to all of you. We have both the motion to dismiss and the motion for preliminary injunction this morning. The parties have any suggestion on order here?

MR. TEDESCO: We discussed beforehand and agree that I would go first.

THE COURT: All right. Go ahead.

MR. TEDESCO: Your Honor, I just want to clarify at the front end, I know that typically there's 20 minutes allotted for argument. If we're going to stick to that, I'd like to reserve rebuttal time. I just wasn't sure --

THE COURT: We don't have to stick too closely to that. Although, I don't want to go overly long as well. I'm not going to put the timer on you.

MR. TEDESCO: Okay. I wanted to clarify that I wanted to reserve for rebuttal.

THE COURT: Sure.

MR. TEDESCO: Your Honor, nondiscrimination laws like the Minnesota Human Rights Act generally function as regulations of conduct, and the Larsen lawsuit does not challenge that principle at all; instead, as in the Supreme Court's decision in *Hurley*, the Larsens are challenging the peculiar application of the law to compel their speech.

Your Honor, Carl and Angel Larsen have a First Amendment right to express their religious views about marriage through their films. But the State says that under the Minnesota Human Rights Act that that classic exercise of free speech is an all or nothing proposition. The Larsens have to either promote all views about marriage through

their films or none at all because if they decline to promote views about marriage that violate their beliefs, they expose themselves to substantial fines and even up to 90 days in jail.

Your Honor, under any other circumstances, this kind of speech coercion would be intolerable. Consider a publishing company, progressively-minded publishing company that want to publish only books promoting Palestinian claim on ownership to Jerusalem being threatened with fines and jail time if they decline to publish a book promoting the Jewish perspective on that issue.

Or a progressive newspaper that accepted paid advertisements extolling the Supreme Court's decision in *Obergefell* being threatened with fines and jail time if they declined ads from religious organizations or religious criticism of that decision.

THE COURT: But those are pure speech cases. Why is this a pure speech case?

MR. TEDESCO: This is a pure speech case as well, Your Honor, because films and video production like the Larsens engage in have been recognized as pure speech under the First Amendment for many, many decades now, going all the way back to 1952.

I think it's interesting that in the *Interactive Digital* case from the Eighth Circuit, the Eighth Circuit

actually extended pure speech protection to violent video games because those violent video games had none of the characteristics of films and videos. And so in the Eighth Circuit, and clearly under Supreme Court case law, *Joseph Burstyn*, we're dealing with pure speech.

And I think the other critical issue when it comes to the films that the Larsens desire to produce and do produce is that they express their own messages through the films. Now, the State says it's all the third party. They're just being paid to speak someone else's message. But they wouldn't say that if someone hired an author to write an autobiography and paid him to do that. And we would say that the resulting book is the speech of the author as well.

And, so, I think the way we can see that the Larsens are speaking here is because of the extreme amount of editorial control they exercise over the films they produced. That starts from the beginning of the process as soon as the request comes in, they are immediately exercising editorial discretion. Much like a --

THE COURT: Why, assuming that they're serving all clients who come in to the extent that they can, why would their editorial control over the video itself be regulated by the Minnesota Human Rights Act?

MR. TEDESCO: Because it's that decision that

impacts the resulting message. So the case law has said, both the *Anderson* case out of the Ninth Circuit, and the *Buehrle* case out of the Eleventh Circuit, that you can't disconnect the process of creating a form of pure speech from the final product, the pure speech itself.

So it would be like saying to a publishing company the books you publish are protected, but all the editorial decisions and content control that you exercise before the fact aren't protected. We can regulate that as conduct. That's the State's position in this case.

So those decisions that they make, especially the most essential decision when it comes to compelled speech, what to publish, what not to publish, what to print in my newspaper and what not to print in my newspaper, what films to produce and what film not to produce are all protected by the First Amendment. It goes to the core of exercising the right to be free of compelled speech, which is the right to decide what speech I'm going to promote and what speech I'm not going to promote through my own expression.

And, Your Honor, I think it's important to note that the Supreme Court has found that organizations that exercise far less editorial control than the Larsens do, well, really are just mere conduits for other people's speech are protected speakers as well whose speech can't be compelled. And *PGE, Pacific Gas & Electric* is a public

utility company, a for profit company, who had to host a third parties' message in their billing envelope, and the Court said that compelled speech couldn't be tolerated. And so this, of course, is a very different case because of the substantial amount of editorial control that the Larsens exercise over their films, which are pure speech.

So, in our view, *Hurley* controls this case. And, *Hurley*, the problem with that law was that it was being applied to speech, the speech itself, the Court said, was the public accommodation. There it was the parade. Here, it's the films that the Larsens produce. And when a law under *Hurley* is applied in that way a nondiscrimination law, it's applied to set in a peculiar way that actually applies it directly to speech and forces speakers to express messages they disagree with. That's a violation under *Hurley*.

I would point out that the violation is more egregious here because here the Larsens actually have to create the message they object to. That would be -- so it would be like *Hurley* not just forcing the parade to host a contingent they disagreed with, but to make signs and a parade float expressing their message.

So here, I think, the compelled speech is even more egregious because it forces the Larsens to use their creative talents and their editorial control over message to

promote a message they disagree with.

THE COURT: If they are simply providing services to individuals wishing to be married, how is that promoting a viewpoint generally? Because I think that as I read the Complaint, what the Larsens would like to do is to have videos that go beyond just simply providing a video to the couple who are desired to be married. But to go beyond this to promote videos online, which I presume would promote the company, but also promote their viewpoint. Isn't that what they are trying to do?

MR. TEDESCO: They're trying to promote their religious views through the films and videos they produce, and they do that across the board in practice, and so --

THE COURT: But nothing would stop them from not posting online as a form of advertising or a form of expressing their viewpoint, only the videos that they want to put online as long as they're serving all customers equally under the law, right?

MR. TEDESCO: No, Your Honor, that would still be a violation. So they would still be forced, the core problem is they don't want to promote a message about marriage they disagree with. So whether they have to --

THE COURT: Let's say they want to advertise for their services and they want to, you know, promote their viewpoint through the advertisement to attract a certain

kind of client. I understand that. Why could they not choose how they want to advertise or how they want to promote themselves online, if they're serving all clients that come in the door?

MR. TEDESCO: Well, I think the problem is under your hypothetical, as I understand it, Your Honor, they still have to produce the videos that they disagree with about marriage.

THE COURT: That's right, but they don't have to put those online in order to advertise their business, do they? The State can't regulate that.

MR. TEDESCO: Well, there's two points I would make. One is they're going to place, the Complaint alleges, every video they produce for marriage as part of the contract is going to be mandatory that they place that on their website and promote it through their social media. So they've already decided that they're going do that with every marriage video that they produce because they want to promote a particular message about marriage and align themselves in that business with that message in the public space as well.

THE COURT: But would the State require them to do that, to place every video online even if they had the contractual right to do that?

MR. TEDESCO: The State is not requiring them to

do that. They're choosing to do that, and they have a constitutional right to do that. But I think the problem is, Your Honor, they're still being forced to express a message they disagree with, even if there's a hypothetical where they don't put that on the internet. And the Supreme Court said in *Hurley*, the State can't force you to deny in one breath that which you deny in the next.

Even if they're not putting those films on their website, the compulsion is being forced to promote a message you disagree with. That happens whether it's happening to the public, which is going to under these circumstances because the Larsens are going to make that mandatory in every contract.

But even if it weren't to happen, they would still be promoting that message to the couple, to the attendees of the couple, the couple's wedding, their friends and family who view the video. And the bottom line is they would be compelled to create a video that promotes a point of view about marriage that they fundamentally disagree with. And so even if no one ever saw that, the government can force you to do that.

So say the government said to an author that provides his services to the public, say, a gay author who gets approached by a religious organization and says, "We want you to write a book about marriage and extolling what

the Bible says about marriage." If the State came in and said, "You don't have to publish the book. You don't have to put your name on the book. Nobody has to know you're involved with the book." The fact that the author still had the write that book is a compelled speech violation. So I think it would still violate the law.

Your Honor, under *Tornillo* and *Pacific Gas*, I think those cases are very important for our purposes as well, because in both of those cases the Court was talking about how the problem that it constitutional aspects of laws that operate like the Minnesota Human Rights Act here as applied to Larsens has a viewpoint based penalty on speech.

And, basically, in *Tornillo* when the newspaper expressed a view upon the in its paper, it triggered and then host a third party message in their pages that they disagreed with. And the Court said the problem with that is the newspaper either had to accept the compelled speech, violate the law, and be subject to the penalties. Or the Court was very concerned the newspaper would simply walk away and chill their speech and not speak at all about that topic.

And that's exactly what's going on here is the Larsens, if they expressed their religious views about marriage through their films that they promote that they provide those services, that triggers an obligation for them

to accept the requirement that they ought to promote views in their films they disagree with or chill their speech, and they've, of course, taken the path here to chill their speech. And I guess I would say who wouldn't, when you're looking at very substantial fines, up to 90 days in jail? This is a criminal statute.

And, again, I go back to the hypotheticals that I raised at the beginning, if a newspaper accepted paid advertisements, so the newspaper is acting as a public accommodation. Our advertising space is open to the public for advertisements. They accept a bunch of advertisements about *Obergefell* or celebrating that decision and promoting it, and declining advertisements or other religious organizations that said we want to provide religious criticism to that decision in a paid space in our advertisement in your newspaper, and they were threatened with fines and jail time, I don't think -- that would clearly be a violation of the First Amendment. And so those same principles protect the Larsens here.

Also, the State says quite a bit about their concerns about our theory of relief, and they misstate the breadth of it. But I think the problem here is the State's arguments and the dangerous arguments of the State's arguments, because they essentially say that as soon as you enter business you have no First Amendment rights. Their

position is if you're paid to speak, you lose your First Amendment rights.

That's inconsistent with well-established First Amendment law that says exactly the opposite from the Supreme Court in *Riley* and many other cases. They say you disconnect the process of creating pure speech from the speech itself and regulating the process in your conduct. But that also is not acceptable under *Anderson* or *Buehrle* or other decisions.

They also say that only those who create original content are protected by the First Amendment. But, again, that is just an incredibly narrow view of the First Amendment. Much speech is collaborative in nature, and it's especially true in the visual arts context where most visual arts expression is either paid for or even commissioned. Michelangelo wouldn't have a speech interest in the Sistine Chapel though under the defendant's theory in this case.

So, Your Honor, I think there's clearly a violation here when it comes to compelled speech, and I just want to stress that the state has not satisfied strict scrutiny here. I think the thing I wanted to point out most at the argument here, unless you had additional questions about that, is that the State itself has carved out individualized protection under the MHRA for its own speech. So at the same time it added sexual orientation to the law,

it added provisions that said it could not be forced under the MHRA to condone homosexuality or promote homosexuality in its educational institutions. So they can't simply compel interest to force the Larsens to promote a message that they themselves have carved out an exception under the law for them to not have to speak that message.

They also base the least restrictive means aspect of the test. The State knows how to carve out protections for speech interests, its own, and it's simply enough for the State to extend that exception to the Larsens, and they're obviously not following the least restrictive means if the law itself has an individualized protection that is simply extended to the Larsens would provide them protection.

I did want to address the extended rightness considerations as well. Unless Your Honor wants to address those issues in a separate --

THE COURT: No, that's fine. Go ahead.

MR. TEDESCO: This case involves threatened enforcement of a statute that threatens First Amendment expression. And under those circumstances a person, it's well established, does not have to expose themselves to enforcement or prosecution before challenging the law. And that's because, of course, the delicate nature of First Amendment freedoms and precisely because courts are

concerned that parties will chill their speech rather than run the risk of violating a law, especially a law like the Minnesota Human Rights Act, which has criminal penalties.

And so here, of course, the Larsens face a choice, they either promote all views about marriage through their films or they chill their expression to avoid enforcement consequences because they intend to decline.

THE COURT: But isn't there a difference -- this is going back a little bit -- isn't there a difference between serving customers who come in the door as a regular business might, and this extra step of posting videos online to promote their viewpoint? Isn't there a difference between the two?

The first serving customers seems more like conduct to me, whereas, you know, whatever they want to do online to promote their business or viewpoint seems much more like speech. And I don't see where the state gets involved in the second part, the online part of all this. That's where I'm having travel understanding that distinction.

MR. TEDESCO: Well, they get involved, a couple of answers. First of all, the Larsens are going to make publishing their marriage videos and films a necessary element of every contract. So when the state forces them to create a film promoting same sex marriage, that forces them

also to conclude that --

THE COURT: Just because they're entering into a contract which allows them the right to do that, why would the State force them to be able to force them to put some of their videos online or put all of their videos online as opposed to just some of them? I don't understand why the additional step applies there?

MR. TEDESCO: Well, I think the problem with that, Your Honor, is that the State is then putting them in a position of chilling their speech again. They're having to choose. So say the Larsens say, "You're forcing us to create films we don't want to create. We're not going to put those on our website, but we want to. We have the First Amendment right to promote our films through our website." So the State can't put them in that kind of position to make that kind of choice.

But I think the underlying issue with the hypothetical you're asking, Your Honor, is that this isn't provision of services. This is applying the Human Rights Act to speech. And I think that's the way to understand the case. The State says this is just providing services, but when you're dealing with pure speech, the creation and production of a film, that adds a different outcome. The speech is the public accommodation just like the parade was in *Hurley*.

And, again, it goes back to *Anderson* and *Buehrle* from the Ninth Circuit and the Eleventh Circuit that said you can't disconnect the process of creating pure speech from the end result. So if the State could disconnect the process of creating films from the end result and treat it completely as conduct, then the State could actually pass a law that banned any film production company in its jurisdictions because it wouldn't be a speech violation to say, well, we're only regulating the production of films.

I mean that was the argument in *Anderson*, the Ninth Circuit case. We're only restricting the business of running a tattoo parlor. We're not restricting tattoos themselves. And like in *Buehrle*, the Court was very concerned about that and said, look, if you can dam the source, you're regulating the speech just the same as you had written the speech itself.

From a standing perspective, I think I went through a couple important parts of what's going on here. And I think the most important thing is the State essentially can't have it both ways. They say there's nothing to see here. Dismiss the case. It's speculative. You know, no problem whatsoever. Yet over and over and over in their pleadings, they say that what the Larsens want to do clearly violates the law.

So they can't have it both ways. It's one or the

other, and we know there's no question that the State considered what the Larsens want to do to be a violation of the law. They plastered all over their websites that people in the wedding context would be in violation of the law if they did what the Larsens wanted to do. They've, of course, reaffirmed that in their pleadings to the Court. We have an actual enforcement here against the wedding venue in the wedding context under the State's interpretation.

The State uses testers, which is very unique to actually collect additional evidence. They have people pose as clients, as customers. So under these circumstances, there's really no question that the Larsens have satisfied Article III standing. There's an injury in fact. They chill their speech. There is a credible threat of enforcement.

And as far as the ripeness considerations are concerned, the Supreme Court in *SBA List* said that ripeness and constitutional standing boil down to the same question in the First Amendment context. So if Article III is satisfied, ripeness is as well. And the Court doesn't really have to address fitness and hardship, but they're clearly met here.

The Court did go on in *SBA List* to consider those factors very briefly, and basically showed that in the First Amendment context the case like this is fit, it presents

legal questions, and the hardship, of course, is chilled speech.

So unless the Court has further questions, I'll reserve my time.

THE COURT: That's fine. Thank you, Mr. Tedesco.

MS. HUYSER: Good morning, Your Honor. Since 1885, Minnesota has had a law that prohibits places of public accommodation from refusing service to individuals based on race. Today that law is referred to as Minnesota's public accommodation law.

COURT REPORTER: Can you please slow down?

MS. HUYSER: I can. I apologize.

It's part of Minnesota's Human Rights Act set forth in Chapter 363A of the Minnesota statute. And the law today still promises that individuals are entitled to the full and equal enjoyment of services and goods offered by places of public accommodation regardless of their protected characteristics.

The United States Supreme Court in the *Hurley* case relied on so heavily by plaintiffs has actually stated that public accommodation laws, which are common throughout the country, are well within the State's usual power to enact when a legislature has reason to believe a group is a target of discrimination, and they do not as a general matter violate the First or the Fourteenth amendment.

THE COURT: So the plaintiffs in this case are arguing that all they are doing is producing movies or films, videos, which are inherently expressive. Most cases involving movies, for example, prohibit any form of censorship, unless you go beyond the bounds of what the First Amendment allows. Why isn't the State trying to regulate expressive conduct?

MS. HUYSER: Well, I think the place for the analysis has to start in any case we're looking at and in this case is with what the State's action actually is. In this case, it's public accommodation law. And what the public accommodation law does is it regulates once an individual has chosen to put their services out to the public, it regulates who they can sell to. It does not regulate what they sell, what they say. It doesn't regulate the content of their product at all. It regulates who they sell to. And it says if they're going to provide it to the public in general, they simply can't exclude X, Y and Z people, historically marginalized groups. That's all this law does. That's the alpha and omega of it. And so it's not --

THE COURT: It isn't exactly like the plumbing supply store that decides that they don't want to serve certain types of individuals who are protected under the act. It's more you have to admit there's an element of

expression involved here, don't you?

MS. HUYSER: I acknowledge that their product, movies, are something that can involve some expressive elements.

You know, I think when we look to the case law, though, for example, in the *Rumsfeld* case, and we would direct the Court to the *Rumsfeld* case, is one I think is a good model for how this case should be analyzed. And the individual law schools who didn't want to host military recruiters, complained about having to associate with them, having to host them infringed on the law school's objections. And among other things, they had to send out e-mails on their behalf. They might have to post posters. You know, things that involved elements of expression.

And the Court said, you know, the law is not regulating those things. Those are incidental facts. They don't arise to First Amendment issues. What the law is actually regulating is the act of denying the recruiters access and that itself is not an inherently expressive activity; and, therefore, not something that violates the First Amendment.

The Court can also look to some cases like I think the *Turner Broadcasting* case is a telling case. That involved a must carry provision that was sort of regulating cable providers. And in *Turner*, I mean the Court

acknowledged cable television. These are inherently expressive products, but the must carry provision wasn't regulating the content. It was regulating the who. The fact that they had to provide some bandwidth for certain broadcasters. And the Court said that in a motion to accommodate both who's did not violate the First Amendment.

So I think it's a very similar type of circumstance this Court could recognize the distinction and allow states to regulate the conduct, who can have access, and recognize that, you know, to the extent that there are incidental effects on expressions as a result, they don't amount to First Amendment violations.

And we know that the United States Supreme Court, which has had a chance to expressly look at Minnesota as public accommodation law, has said that it's a constitutional law. In 1984, in the *Roberts v. Jaycee* case, the Supreme Court expressly held that the goal of the Human Rights Act to the public accommodation law of Minnesota is unrelated to the suppression of expression and plainly serves the State interests as the highest order. And I think that the plaintiffs' claims are going to fail as a result of that exact analysis.

THE COURT: Well, I think, yeah, it presents an interesting issue because I think you could make an argument that these -- the plaintiffs in this case want to be able to

produce certain kinds of videos. It's based on their expressive conduct. And by the State forcing them to include other customers, it changes the type of expression that they want to provide. And so I think it's a little bit different than just a simple is this simply conduct or is this conduct which has an incidental impact on speech? It has at least some level of impact on speech, doesn't it?

MS. HUYSER: You know, we're in a difficult position because it's sort of a hypothetical business model and, of course, your average videography business is not something that you think of as inherently expressive to the business owner. Most of the time, if you walk in the door they will create the video you ask them to create.

I think the question here is if plaintiffs want to offer this as a public accommodation, if they want to say, "We offer this service," they just can't deny certain people based on -- they can't just say, "We won't serve a certain race or gender." That's just not an option. And the courts have consistently within the public accommodations context recognized that states have not only a right to regulate but that doesn't violate the First Amendment.

They have also said in the *Hishon* case, the Supreme Court said that even if there's some sort of you could say there's a First Amendment-type activity when it comes to businesses and various private discrimination has

never been afforded constitutional protections.

THE COURT: Will the State also be requiring the plaintiffs to post all their videos on their website if that's what they felt they had to do or didn't want to do based on that contractual provision? What's your view on that?

MS. HUYSER: I appreciate the question. That's something I wanted to clarify. No, nothing in State law would require plaintiffs to promote any particular video, if that's something that plaintiffs have a First Amendment right to do, but there is certainly nothing compelling them to do so, and that would be something that they -- what individual videos they promote would be in their own discretion or their own choice.

THE COURT: Because I think that's perhaps what they're arguing distinguishes this from perhaps other of the wedding photography or video cases where here they would be putting everything online; and, therefore, the State is forcing them to put a viewpoint online that they don't agree with.

MS. HUYSER: Yeah. And to the extent that plaintiffs have posted things online, that would be utterly and completely within their control and discretion.

I also want to sort of point out that when it comes to conduct in terms of speech in *Sorrell*, the Supreme

Court also explained that that sort of general laws that regulate conduct sort of generically, you know, they sort of set forth some examples of incidental burdens on speech in extreme situations where it would be consistent with and not violative of the First Amendment.

So they talk about the fact that, you know, a ban on race-based hiring may require employers to remove white applicant signs only. That's constitutional. They talk about the fact that an ordinance against outdoor fires may forbid burning a flag, but it's still constitutional because it's a general law. And that antitrust laws, you know, can prohibit agreements and restraint of trade.

And I think this situation is like those. We've got a general law. It does something the State is permitted to do. The fact that plaintiffs have a very specific idea of an action they want to take doesn't make the law itself unconstitutional even as applied to them.

I want to point out, again, that the *Hurley* case that plaintiffs rely on, you know, *Hurley* was what the Supreme Court called a very peculiar case. In *Hurley*, the Massachusetts Supreme Court had issued a definitive interpretation of the State law saying that it applied to a parade. A parade is not the kind of quintessential public accommodation that these laws historically apply to. It's not a business hanging a shingle out and welcoming people to

come in the door.

And In analyzing *Hurley*, the Court took pains to explain that its decision wasn't underlining sort of the well-established decades old precedent of public accommodations. And they exclusively said that these statutes do not target speech, do not discriminate on the basis of content, and that the focal point of the prohibition is the provision of publicly available goods and services, which is, of course, conduct.

We cited for the Court decades of case law upholding the public accommodation laws in the face of other protected First Amendment challenges, religious objections have been well litigated both in public accommodation and anti-discrimination realms. And the statutes have been upheld in the face of those repeatedly.

And I think that it's telling that plaintiffs aren't able to really cite for the Court today any case that has granted the exception that they're asking for here. Because there has been so much litigation in the context of anti-discrimination laws when race was first added, when gender was added, and despite all of that history, they really have no case to rely on.

What they're looking at instead are cases like *Tornillo,* which involved regulation of speech, specifically, in newspapers. The *Pacific Gas* case, which was regulation

of speech in a newsletter. What those cases were regulating, I mean they were just pure regulation of speech, which public accommodation laws are not. And if we were to actually analyze those cases under a public accommodation law framework, we can see the difference, right? Because a newspaper doesn't sell column space. It doesn't put up a shingle and say, "drop off your article and put it in." A newspaper develops a newspaper, turns around and sells it. Of course, the newspaper couldn't discriminate in its customers. It couldn't only sell its newspaper to people of a certain race.

And so what plaintiff is proposing here is if they want to sell a service, they just can't discriminate in the provision of that service. That's not an option. And I think plaintiffs really studiously avoid that distinction, but it's really important here.

I also want to point out that there's been some State Court decisions who have had a chance to very explicitly look at the arguments that plaintiffs are advancing for the Court today. Similar cases have come up in Colorado, in New Mexico, in Washington, and in Alaska. And, universally, the courts, including several Supreme Courts of states, have rejected this argument, have declined the invitation to create some sort of exception to public accommodation laws for creative or artistic businesses.

And in addition to sort of the legal analysis, which we've walked through today, which is consistent with what those courts have done, they also talked about some concerns about what that rule would look like. And --

THE COURT: I'm not sure there have been any cases that take this to the next step. I mean those cases all involve businesses that did not want to provide services to certain kinds of people just simply because they didn't want to do that for their own beliefs.

Here, you've got these videos and this additional motivation, I think, the plaintiffs are wanting to spread this additional motivation of their promoting their belief of what marriage should be and what it shouldn't be. And it seems to me to be a step beyond where those cases are. Am I wrong about that?

MS. HUYSER: Two answers. First of all, I think the *Elane Photography* case, which developed a photographer. First of all, all of those individuals, you know, I think made the same arguments that were here, and they said that they are a particular business in an expression of their religious beliefs. And what they created was an expression of that. So they made the same argument.

The photography case out of New Mexico, I think, is, you know, the difference between still photography and moving photography. It is not terribly material. And so

they would have addressed this issue. But I also --

THE COURT: Were any of those cases a creation of some kind of expressive material for broader distribution than simply providing distribution to their customers?

MS. HUYSER: You know, I don't recall off the top of my head that detail in those cases and whether that was part of it. But, again, that's not something the State is regulating here.

Plaintiffs have an absolute right to make whatever videos they want, to promote whatever message they want, and the public accommodation law does not get in that way. They can do it privately, not as public accommodation. They can do it with certain types of customers that make the message they want to make, and they can promote that. But nothing about this public accommodation law hinders their belief or hinders their speech on those issues. It just doesn't regulate that. It just says they can not say everybody is welcome except those people. That's not a choice that they have.

And one of the things that I think the Court is grappling with and these courts recognize, and I think the Washington Supreme Court talked about very articulately was the fact that there's -- this is not a terribly judicial and manageable standard. This question of what's artistic enough, what's creative enough, you know, what business do

we exempt? Is a chef who makes really fancy meals more expressive than a diner? And do we treat them differently?

How about an architect versus a builder? And why should we have a two-tiered system? Why is it that these sort of more white collar expressive businesses should be exempted from laws that other people have to comply with?

And I would point out that plaintiffs own briefs are replete with cases that demonstrate that when it comes to measuring, you know, artistic value and expression in the creative areas, the courts have declined that invitation. They said that they're going to treat for First Amendment purposes a Fellini film the same as a Crush video. They're not different, and I think what they're inviting the Court to do is to make a difference between those things, and there's not a basis for it in First Amendment law.

I do just want, and this may be self-evident, but I do want to point out that I think the consequence of the rule the plaintiffs are asking for, you know, there's no ability under the public accommodation law. There's no legal justification to distinguish between different protective characteristics.

And so if somebody can claim that they just have a personal motivation to express a certain message related to sexual orientation, there's nothing that would, I mean the same argument would apply to the context of interracial

marriage or interfaith marriages or outside the context of marriage.

A restaurant owner who wanted to run a creative expressive restaurant excluding certain patrons, the rule there articulating seemingly would apply in all those circumstances. And there's just nothing in the case law of public accommodations that would permit that kind of broad exception to take place.

But even if the Court were to find some sort of, some sort of expressive sort of aspect to this, that belongs to plaintiffs and that is protected by the First Amendment, then the Court would look at some factors. Is the law content and viewpoint neutral, and then what scrutiny do we apply to it?

And I would first point out that in the *Jaycees* case when the Supreme Court looked at Minnesota public accommodation law that explicitly held that the law was viewpoint neutral.

In the *Hurley* case, the Supreme Court explicitly said that public accommodation laws are content neutral. And I think the *Turner Broadcasting* case, the Court walked through that must carry provision and looked at that and said that that regulation of content or, excuse me, of conduct was content and viewpoint neutral. And I think the public accommodation law clearly is because it's not really

trying to reach speech at all. It's not punishing any particular kind of speech or any particular kind of viewpoint. It's concerned with who you're selling to not what you're selling or what you're saying.

But even if we were to apply strict scrutiny analysis here, I think that within the context of these sort of quintessential public accommodations, the case law is just really clear that these laws survive strict scrutiny, that the Human Rights Act itself explains that it prohibits discrimination because it threatens the rights and privileges of the inhabitants of the State, and menaces the institutions and foundations of a democracy.

The United States Supreme Court in *Jaycees* recognize the unique evils caused by discrimination and the distribution of public goods and services. And it said that states plainly have a compelling interest in that, and the Minnesota Supreme Court articulated very much the same thing. And these cases spend paragraphs on this. I could read to you for 10 minutes about it. There's clearly a very compelling State interest in prohibiting sort of individualist private discrimination by businesses.

And as it relates to sexual orientation and that the inclusion of sexual orientation in the Minnesota Human Rights Act, that was something that was done with great care and consideration by the Minnesota legislature. The

governor convened a task force. The task force held hearings. It gathered evidence. And it found evidence of substantial societal hostility to homosexuals, and it found it was damaging not only to those individuals but to society as a whole.

And the recommendation that sexual orientation be included within the Human Rights Act was one of the key recommendations that came out of that task force and actually led to its passage in Minnesota.

And, furthermore, this law is narrowly tailored. Both the *Jaycees* case and in *McClure*, the United States and Minnesota Supreme Courts have recognized that these laws prohibit only or they prescribe only what they seek to prohibit. They really only prevent the discrimination provision of goods and services by for profit businesses based on protected characteristics, and so they are very limited laws.

And, you know, plaintiff's suggestion that they're not narrowly tailored because they don't exempt expressive businesses I think misses the point. The fact of the matter is there's a compelling reason to prevent the harms associated with discrimination in that context too. Those harms occur if an individual is going to hire a speech writer or a photographer just as much or maybe more than a hotel or a restaurant or a plumber, so the same compelling

reasons apply in all of these contexts.

So, I think that's why the plaintiffs quickly walked through some of the other claims in this case. Plaintiffs have brought a claim related to freedom of association. I think that fails for essentially, you know, a lot of the same reasons the freedom of expression does. This is a for profit commercial business, and so it's not -- the law has not recognized those as being something that's primarily organized for expressive purpose.

But I think even more importantly, serving a customer at a business is not the kind of associational right that's traditionally been constitutionally protected.

In *Rumsfeld*, the Supreme Court explained that a speaker cannot erect a shield against laws requiring access simply by asserting that a mere association with a parent's message.

And even with *Boy Scouts v. Dale*, which in their briefing plaintiffs rely on, the Court was careful to distinguish the kind of private membership organizations in that case from what it called clearly commercial enterprises. Plaintiffs almost uniquely rely on cases occurring within those membership.

Plaintiffs also bring a claim based on freedom of religious exercise, which protects an individual's right to practice their religion. It does relieve the individual

from complying with traditional and generally applicable laws. And the Minnesota Human Rights Act is usually generally applicable law. It applies to all discrimination on the basis of protected status regardless of purpose --

COURT REPORTER: Slow down, please.

MS. HUYSER: I'm sorry. I am a fast talker. I apologize.

It applies to all discrimination on the basis of protected status regardless of purpose or motive behind the violating act. And it is generally applicable because it doesn't target religion, doesn't target religious belief. It applies to all for profit businesses regardless.

Plaintiffs target the phrase "legitimate business purpose," and they argue that that somehow permits discrimination for a secular reason but not a religious one. I think that just fundamentally misses the point that phrase as I'm sure actually the Court is aware it was penned by the Supreme Court in the *McDonnell Douglas* case. It's one that applies in anti-discrimination cases generally. And it's a phrase that distinguishes -- it's used to identify whether a particular act was taken with discriminatory animus. So it's actually a situation where there has not been discrimination at all. Another act of discrimination was based on protected status, the law applies regardless.

They also, you know, discussed the fact that the

law has some exemptions. I just would point out that, you know, the case law around exemptions in freedom of religion cases is really concerned with whether or not they provide evidence of religion being sort of surreptitiously targeted, and that's not the case here. Religion is actually included as a protected status under the act. The express accommodations are made for religion, and the act applies to businesses regardless of religion. So I think that wraps up the First Amendment claims.

Plaintiffs also bring a handful of other claims. Plaintiffs assert an unconstitutional conditions claim. It's not really a square fit because I think the Human Rights Act directly regulates. It's not an in depth violation, but I think that piggy backs off the First Amendment claims. And if they fail, this does as well, which we contend is the case here.

And then plaintiffs brought Fourteenth Amendment claims. I'll try to go through these quickly because I think they do rely on the First Amendment claims.

First, under equal protection, obviously equal protection is concerned with whether or not similarly situated persons are treated differently under the law on the basis of a suspect class, a fundamental right. Plaintiffs are not a suspect class. They don't allege that they are. For the reasons we just discussed, we don't

believe there's a fundamental right issue here.

In any event, the Human Rights Act in the public condition will treat similarly situated people the same. All people have to comply with it, and if they don't, they have the same consequences.

As for procedural due process, that's a claim about, that the statute is unconstitutionally vague. In *Jaycees*, United States Supreme Court's claim that its laws uses familiar standards that the Court uses, that insures that the statute is within reach of sort of what's permissible under the constitution. And plaintiffs focus on that phrase which is for business purposes. As I just discussed, that's in fact a phrase penned by the courts and in numerous cases across the country, so it meets that standard.

And, finally, plaintiffs bring a substantive due process claim, and I think that fails for a variety of reasons. I'll just point out quickly two of them. First, it's a repeating of their First Amendment claim. Under the *Albright* case, the Court has explicitly declined to allow substantive due process to serve as sort of a generalized form of re-pleading claims that are specifically enumerated elsewhere, and so it fails for that reason.

Second, to the extent plaintiffs are trying to claim some sort of fundamental right to their identity or to

practice without any kind of government regulation, there has never been a case recognizing that broad proposition. And, indeed, the Supreme Court has really been very wary of using substantive due process for those kind of broad and vague pronouncements.

We did brief a couple jurisdictional issues. I'm going to rest on the briefing on those and not go through them.

Your Honor, I'll wrap up by saying, you know, as Minnesotans and Americans, we live in a pluralistic society. It is imperative for a democracy that as citizens we accommodate people of different stripes and creeds. And the First Amendment is a vulnerable part of our tradition, and it protects our great freedom of belief and speech in this country.

Justice Ginsburg once wrote as it relates to First Amendment rights, "Your right to swing your arms ends where the other man's nose begins."

And so plaintiffs have a constitutionally guaranteed right to hold their beliefs and to express them, but this case is not about their beliefs, and it is not about their speech. This case is about conduct and, very specifically, a course of conduct that would invite the public to come buy their services and then say, "except you," to certain people of a certain sexual orientation, and

that conduct respectfully, Your Honor, is where the other man's nose begins.

And for that reason, defendants do ask the Court to deny plaintiff's motion for Temporary Restraining Order, grant our motion to dismiss, and dismiss plaintiff's Amended Complaint in its entirety and with prejudice.

THE COURT: All right. Thank you. Go ahead, Mr. Tedesco.

MR. TEDESCO: Thank you, Your Honor. I just want to clarify a couple points.

First, on the website issue, and the question of whether the Larsens would be required to publish websites, I'm sorry, publish the films regarding their same sex weddings under your hypothetical. The answer is yes, because the provision that we're challenging says that the businesses cannot discriminate on the basic terms, conditions, or performance of contracts.

They intend to publish all of the films they do regarding marriage between a man and a woman on their website in their social media accounts. And so the State would say --

THE COURT: But they're not required to, correct? Even if they have a contractual provision which allows them to do that, it doesn't require them to do it, does it?

MR. TEDESCO: But that goes to the whole problem.

So the State's proposition to the Larsens is if you want to put something on your website, you have to put all messages about marriage on your website or none, because if the Larsens say they have a First Amendment right to promote their films on their website about marriage, about promoting the views of marriage they agree with and believe in. If they put those on the website and contract for the purposes of doing that, the State says it is sexual orientation discrimination for them to decline to do that in contracts with same sex couples. So clearly the states under these circumstances would be compelling them --

THE COURT: I'm not hearing that as their argument. Their argument is they have to serve, the plaintiffs have to serve all people coming in the door. They can't discriminate on the basis of sexual orientation, but I'm not hearing them say that they also possess the right to require you to put all of those videos online.

MR. TEDESCO: They do if the Larsens decide to promote their videos about man and woman on their website. That is the Larsens First Amendment right to do that. And so what, see the problem is it would be operating in the exact same way. The State says, well, you can put those on your website, but we're going to find it to be sexual orientation discrimination if you don't provide the same service to same sex couples.

And so they would be required under the law, as far as we understand the law, but again it doesn't matter. Even if there was no website issue involved in the case and promotion of the individuals on the website, the legal analysis, the compelled speech analysis, all that would still be the same.

It goes back to my hypothetical about forcing an author who provides the services to the public to write a book, a gay author, a book about religious opposition to same sex marriage, and tell them the State says, "Don't worry, your name is not going to be on that. It's never going to be published. We just want it written." And nobody is ever going to see it. It would still be a speech violation. Of course, that's not what's going on here. There's far more indications that individuals will know that the Larsens are speaking a message they disagree with.

In addition to that, Your Honor, I just want to address a couple other things. I think it's critical to know that in *Hurley* itself, the Court recognizes that there was an honest distinction between message based objections and status based objections. The Court said that the objection in *Hurley* wasn't message based because the parade objected to the message that the contingent was promoting. And it specifically pointed out, the LGBT individuals were welcome to march in the parade. So that was a core

distinction, and it's a distinction that the State is ignoring and obliterating in this case. And they just say message based discrimination or objections are tantamount to status discrimination.

The State also conflates the facial challenges to nondiscrimination laws as applied repeatedly. *Hurley* itself affirmed the general, you know, constitutionality of nondiscrimination laws but then turned around and said this is a peculiar application. And the peculiar application I just read from the Court, it says that it becomes apparent that the state court's application of the statute has the effect of declaring the sponsor speech itself to be the public accommodation. That's the peculiarity when the law *is* being applied to speech, and that's the same exact thing that's occurring here.

As far as strict scrutiny is concerned, I just want to reaffirm that it's a particularized analysis. The State has to have a particular compelling reason to force Carl and Angel Larsen to promote views about marriage that they disagree with, and they simply can't satisfy that for the reasons I gave before. They have an underlying protection for their own speech that they're not willing to provide to them.

As far as free exercise goes, I did want to address that briefly because the State raised it. The

legitimate business purpose exception, I think, is critical both from a free speech and free exercise standpoint. The State has categorically said that religious business owners that raise First Amendment objections to promoting same sex marriage can never qualify under legitimate business purpose exception.

Yet, they have the discretion to pick and choose other creative business owners and elevate their reasons as acceptable. Secular reasons, nonconstitutional reasons. The one reason we know is off the table are religious based reasons where First Amendment concerns are involved.

That flips the First Amendment on its head. That legitimate business purpose exception is a classic individualized assessment that the Court talked about in both *Smith* and *Lukumi*, and then the government makes these kinds of individualized assessments of the reasons for why they're asking to not have the law applied to you. They can't extend those in cases of secular or even have the authority to extend those in cases of secular objections, yet, deny them in cases of religious hardship like here.

Just a few other, one other point I wanted to make was that in the *Jaycees* case, Your Honor, the Court and the party that was challenging the law both specified that the law, the application of the law under those circumstances did not impact the organization's speech in any way at all.

And so, again, that goes back to conflating the facial challenges that these laws and then as applied to challenges where they're actually compelling speech. Thank you, Your Honor.

THE COURT: All right. Thank you. Do you have anything else?

MS. HUYSER: No, we're fine. Thank you, Your Honor.

THE COURT: All right. Thank you, counsel, for the arguments this morning. The Court will take the motions under advisement and issue a written order as quickly as possible. I appreciate the arguments today. Thank you. Court is in recess.

(Court adjourned at 11:49 a.m.)

* * *

I, Maria V. Weinbeck, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: *s/ Maria V. Weinbeck*

Maria V. Weinbeck, RMR-FCRR