

APPEAL NO. 17-3352
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TELESCOPE MEDIA GROUP, a Minnesota corporation, CARL LARSEN and ANGEL LARSEN, the founders and owners of TELESCOPE MEDIA GROUP,
Plaintiffs-Appellants,

v.

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-Appellees,

On Appeal from the United States District Court
for the District of Minnesota
The Honorable Chief Judge John R. Tunheim
Case No. 0:16-cv-04094-JRT-LIB

**PLAINTIFFS-APPELLANTS' RESPONSE IN OPPOSITION TO
APPELLEES' MOTION TO STAY APPEAL PENDING UNITED STATES
SUPREME COURT DECISION IN RELATED CASE**

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Introduction

The Larsens have been waiting almost a year to exercise their expressive freedoms. They want to immediately start producing wedding films but cannot because of Appellees' "peculiar" application of a Minnesota law. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995). That law, like the one in *Hurley*, works to "alter the expressive content" of the Larsens' films: if they create wedding films consistent with their beliefs about marriage, they must also create films that conflict with those beliefs. *Id.* So the Larsens have chilled their speech to avoid serious penalties, including fines, damages awards, and jail time.

Appellees now seek to delay this case for months on the argument that a pending Supreme Court case *might* resolve the Larsens' case. Exactly how and to what extent *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n* will affect the Larsens' case remains to be seen depending on the Supreme Court's ruling. No. 16-111 (U.S. filed Jul. 22, 2016). The Larsens' ongoing irreparable harm is certain.

This Court should not permit the Larsens to suffer additional months of inevitable harm. This is particularly true when this Court could allow the parties to continue to brief this appeal now and order supplemental briefing later after the ruling in *Masterpiece*. With such better alternatives available, the stakes are too high to accommodate Appellees' request for an indefinite delay. Better options are available than an unnecessary delay that inflicts certain and irreparable harm.

Background

Appellants Carl and Angel Larsen are Minnesota-based cinematographers who own and operate Telescope Media Group.¹ Appellees’ Mot. to Stay Appeal (“Mot. to Stay”), Ex. 1, First Am. Ver. Compl. (“Ver. Compl.”) 12-13, ¶¶ 72, 79-89, Entry ID 4600841. The Larsens produce films for events and organizations and then post their original content online “to reach and impact the broadest number of people possible with their message and the stories they tell.” *Id.* at 17, ¶ 112; *see id.* at 12-17, ¶¶ 79-112. The Larsens started Telescope Media Group in 2008 to fulfill their passion for visual storytelling. *See id.* at 12, 14, ¶¶ 79, 93. Throughout their process of capturing, editing, and disseminating films, the Larsens constantly use their “editorial control” to produce films that effectively convey compelling stories. *Id.* at 14, ¶ 95; *see id.* at 14, ¶¶ 91, 93-95.

What the Larsens consider compelling comes from their religious beliefs. *See id.* at 14, ¶¶ 91, 93. The Larsens are Bible-believing Christians who aim to “glorify God” through top-quality film production. *Id.* at 13, ¶ 83; *see id.* at 12, ¶ 72. They tell stories through their films and, consistent with industry practice, decline to tell stories that violate or compromise their beliefs. *Id.* at 14, ¶¶ 95-97. For example, the Larsens “gladly work with all people—regardless of their race, sexual orientation,

¹ For simplicity, Appellants will be referred to collectively as “the Larsens” throughout this response.

sex, religious beliefs, or any other classification.” *Id.* at 14, ¶ 92. But they cannot create films that “promote sexual immorality; support the destruction of unborn children; promote racism or racial division; incite violence; degrade women; or promote any conception of marriage other than as a lifelong institution between one man and one woman.” *Id.* at 14, ¶ 96.

The Larsens now want to use their artistic talents to tell compelling stories about God’s design for marriage. *Id.* at 1-2, ¶ 4. But Minnesota has a law² that makes it illegal for any public accommodation to deny someone “equal enjoyment” of their services because of certain traits. *Id.* at 5, ¶ 32. These protected traits include sexual orientation. *Id.* Although this law poses no constitutional problems in most of its applications, Minnesota officials interpret the law in a manner that directly affects the Larsens’ speech—it prevents them from creating films about marriage consistent with their beliefs unless they agree to create films about marriage that conflict with their beliefs. *Id.* at 1-2, ¶¶ 4-7. And if the Larsens violate this law, they face severe civil and criminal penalties including fines, damages awards, and even up to 90 days in jail. *Id.* at 3, ¶¶ 12-14. To avoid these penalties, the Larsens are self-censoring their own speech about marriage. *Id.* at 3, ¶ 15. This result violates the Larsens’

² Minnesota Human Rights Act (“MHRA”), codified at Minn. Stat. § 363A.01 et seq.

rights under the First Amendment. So they filed this pre-enforcement challenge to restore their expressive freedoms.

In this challenge, the Larsens assert that Minn. Stat. § 363A.11(1) and § 363A.17(3):

- violate their First Amendment rights to free speech, expressive association, and free exercise of religion;
- impose unconstitutional conditions on their access to Minnesota's marketplace; and
- violate their Fourteenth Amendment rights to equal protection, procedural due process³, and substantive due process.

Mot. to Stay, Ex. 1, Ver. Compl. 27-45, ¶¶ 194-328. To prevent further irreparable harm, the Larsens sought a preliminary injunction. *See* Pls.' Mot. for Prelim. Inj., *Telescope Media Grp. v. Lindsey*, No. 16-CV-4094 (JRT/LIB) (D. Minn. Jan. 13, 2017), ECF No. 14. Appellees responded with a motion to dismiss all claims. *See* Defs.' Mot. to Dismiss, *Telescope Media Grp. v. Lindsey*, No. 16-CV-4094 (JRT/LIB) (D. Minn. Feb. 15, 2017), ECF No. 31. And the district court scheduled a hearing on the pending motions for May 26, 2017. Following the hearing, the district court entered an order granting Appellees' motion to dismiss as to all claims and denying the Larsens' motion for preliminary injunction as moot. *See* Mot. to Stay, Ex. 7, Mem. Opinion & Order, Entry ID 4600841. The Larsens appealed to

³ The Larsens' procedural due process claim only concerns Minn. Stat. § 363A.17(3).

this Court. *See* Pls.’ Notice of Appeal to Eighth Circuit, *Telescope Media Grp. v. Lindsey*, No. 16-CV-4094 (JRT/LIB) (D. Minn. Oct. 20, 2017), ECF No. 55. They still wait for their expressive freedoms to be restored.

Argument

The Court should decline to stay the proceedings in this case to prevent the Larsens from suffering months of additional, unnecessary constitutional injury. Appellees seek a stay because “[t]his case involves similar legal issues to those at issue in *Masterpiece Cakeshop, Ltd.*” Appellees’ Mot. to Stay Appeal 2, Entry ID 4600841. But this Court must weigh the burdens it would impose upon those affected before exercising its inherent “power to stay proceedings.” *Landis v. N. American Co.*, 299 U.S. 248, 254 (1936); *see Dellinger v. Mitchell*, 442 F.2d 782, 787 (D.C. Cir. 1971) (requiring the need for the stay to override “the injury to the parties being stayed”). Appellees overlook the Larsens’ present, continuing constitutional injury and fail to show sufficient hardship in having to move forward with the case.

In situations like this, where Appellees request to stay a case pending resolution of a different one, the movant “must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work some damage to someone else.” *Landis*, 299 U.S. at 255; *see Jones v. Clinton*, 72 F.3d 1354, 1364 (8th Cir. 1996) (“[A]n applicant for a stay has the burden of showing specific hardship or inequity if he or she is required

to go forward.”). Not surprisingly, this kind of request will only be granted in “rare circumstances.” *Landis*, 299 U.S. at 255; *see Klein v. Adams & Peck*, 436 F.2d 337, 339 (2d Cir. 1971) (“The right to proceed in court should not be denied except under the most extreme circumstances.”). The circumstances of this case do not warrant such an exceptional stay.

I. Staying the Proceedings Would Impose Ongoing, Irreparable Harm of Self-Censorship on the Larsens.

The Larsens suffer irreparable injury every day that they must refrain “from promoting and providing their cinematic, story-telling services for weddings.” Mot. to Stay, Ex. 1, Ver. Compl. 23, ¶ 160, Entry ID 4600841; *see Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”). They desire to immediately create films that “celebrate and promote God’s design for marriage as a lifelong union of one man and one woman.” Mot. to Stay, Ex. 1, Ver. Compl. 2, ¶ 4, Entry ID 4600841. But if they do so, the MHRA would compel the Larsens to create films that celebrate and promote different conceptions of marriage in violation of their sincerely held religious beliefs. *Id.* at 2, ¶¶ 6-7.

Even the district court acknowledged this peculiar application: the MHRA “require[s] wedding videographers to make [films] they might not want to make.” Mot. to Stay, Ex. 7, Mem. Opinion & Order 43-44, Entry ID 4600841. The Larsens, of course, can “avoid” this mandate “by altering” the speech services they provide

to their clients—i.e., declining to create wedding films altogether. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 644 (1994); cf. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-57 (noting that although newspaper may avoid equal access obligations by refraining from speech critical of political candidates, it cannot be constitutionally required to do so); *Missouri Broad. Ass'n v. Lacy*, 846 F.3d 295, 303 (8th Cir. 2017) (same for alcohol producers and wholesalers who may avoid requirement to promote multiple retailers by choosing not to promote any retailers at all in their advertisements). So they have decided to do so instead of “flouting state law” and risking jail time. *Steffel v. Thompson*, 415 U.S. 452, 462 (1974). But self-censorship cannot be the solution; it’s the problem. The Larsens brought this pre-enforcement challenge to prevent that ongoing constitutional injury.

Federal courts must take a closer look at cases like this one that involve claims of “present and continuing infringement of constitutional rights” before “halting” the proceedings. *Dellinger*, 442 F.2d at 787. The Larsens seek immediate injunctive relief to restore their expressive freedom. See Mot. to Stay, Ex. 1, Ver. Compl. 45-46, Prayer for Relief, ¶ 4, Entry ID 4600841. Staying the proceedings in this case would “work damage” to the Larsens in a different, more pernicious way than doing so would in a case only involving monetary damages. *Landis*, 299 U.S. at 255; see *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005) (finding that a stay

was improper where plaintiff was seeking injunctive relief to prevent “ongoing and future harm,” as opposed to seeking “only damages for past harm”).

This ongoing harm should not be shrugged off just because the Larsens’ counsel have multiple, conflicting legal obligations. Appellees suggest that the Larsens do not need urgent relief because they could have filed or served some case documents faster and have asked for a modest extension of time to file their opening brief. *See* Mot. to Stay 7-8, Entry ID 4600841. But this assumes too much.

The Larsens’ counsel simply seek a modest 30-day extension of time here—their first such request in either this Court or the one below—so they can finish preparations for the *Masterpiece* case and meet several other litigation deadlines before turning to briefing this appeal. *See* Mot. to Stay, Ex. 5, Pls.-Appellant’s Mot. for Extension of Time to File Opening Br. with Addendum and App. ¶¶ 2-3, Entry ID 4600841. And the argument that a party could have filed or served some documents faster in the district court is always the case and does not mean that a party was dragging their feet. To the contrary, the Larsens have always pushed for speedy relief. They urged the district court for immediate, preliminary injunctive relief and never once asked it for an extension of time. *See* Mot. to Stay, Ex. 1, Ver. Compl. 45-46, Prayer for Relief, ¶ 4, Entry ID 4600841, as any earnest litigant would do.

The Larsens still seek immediate relief from their ongoing constitutional injury. “[E]ven a fair possibility” of constitutional injury requires Appellees to “make out a clear case of hardship or inequity in being required to go forward.” *Landis*, 299 U.S. at 255; see *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (“If in fact there is a fair possibility that a stay of the [] proceeding will result in irreparable injury and a miscarriage of justice,” the movant bears an increased burden of showing hardship in moving forward.). As shown in the next section, they have not done so, and the Court should deny their motion to stay.

II. Neither Appellees nor this Court Will Be Burdened if the Court Moves Forward with this Appeal.

Appellees fail to “make out a clear case of hardship or inequity in being required to go forward.” *Landis*, 299 U.S. at 255. In effect, Appellees ask this Court to halt the proceedings because supplemental briefing may be needed after the U.S. Supreme Court decides *Masterpiece*. To be sure, this case shares similarities with that one. See Mot. to Stay 6, Entry ID 4600841. But federal courts do not “hold [a plaintiff’s] constitutional rights hostage to the outcome and timing” of another person’s case. *Phelps v. Hamilton*, 59 F.3d 1058, 1069 (10th Cir. 1995). Where “[j]urisdiction exist[s]”, federal courts have a “virtually unflagging” duty “to hear and decide [the] case.” *Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013). That does not change “simply because a pending ... proceeding involves the same subject matter.” *Id.* at 588.

A. This Court Should Not Hold the Larsens' First Amendment Freedoms Hostage Based on the Outcome in *Masterpiece*.

The Court should not “hold [the Larsens’] constitutional rights hostage to the outcome and timing” of *Masterpiece*. *Phelps*, 59 F.3d at 1069. This would sacrifice fairness for marginal ease. But Appellees urge this result anyway. *See* Mot. to Stay 5-8, Entry ID 4600841. In so doing, they gloss over the Larsens’ present injury, *see supra* Section I (explaining the Larsens’ ongoing constitutional injury), and the fact that the same could be said whenever the U. S. Supreme Court accepts a First Amendment case.

If courts stayed cases as a matter of course whenever they involved similar claims to ones pending before the U.S. Supreme Court, countless plaintiffs would be required to wait indefinitely before having their rights determined. *Cf. Lair v. Murry*, 871 F. Supp. 2d 1058, 1068 (D. Mont. 2012) (“[A]ny stay would necessarily be indefinite because the Court cannot predict when the U.S. Supreme Court will resolve [a pending case]”). This policy would injure First Amendment plaintiffs more than anyone. They would be required to censor desired expression with no end in sight. Moreover, such a policy would be too manipulable. Speech cases in lower courts should not grind to a halt just because the Supreme Court decides to hear one itself. Appellees’ “similar claims” theory would leave too many First Amendment plaintiffs out of court and out of luck.

That would be the case here if the Court granted Appellees' motion. The Larsens should not have to wait any longer to have their expressive freedoms restored, especially where moving forward will not inflict any hardship on Appellees.

B. The Possibility of Supplemental Briefing does not Warrant Delaying This Appeal for Several Months.

Appellees never explain how they would suffer “clear ... hardship” if this appeal moves forward. *Landis*, 299 U.S. at 255. The Larsens do not bring “mere run-of-the-mill tort claim[s].” *Jones*, 72 F.3d at 1365. They assert “violation[s] of civil rights” under “42 U.S.C. § 1983” and thus deserve “timely vindication” of their “fundamental right[s].” *Id.* Under these circumstances, Appellees bear an increased burden to show their “need” for a stay but do not even attempt to argue that their need “overrides the injury” to the Larsens of not receiving timely relief. *Dellinger*, 442 F.2d at 787; *see id.* (movant’s overriding need for a stay “is of particular importance where the claim being stayed involves a not insubstantial claim of present and continuing infringement of constitutional rights”). This alone should doom their motion.

Rather, Appellees opt for a different route. They point to “the interests of judicial economy” to support their request. Mot. to Stay 7, Entry ID 4600841. They say this Court should “have the benefit of the [*Masterpiece*] decision *before* deciding the constitutional questions raised in this case.” *Id.* (emphasis in original). But the

Court can both “conserv[e] judicial resources” *and* protect the Larsens’ interests in obtaining timely relief by carving out a middle path. *Id.* at 5.

That middle path is for this Court to let the parties continue to brief this appeal now and order supplemental briefing after the *Masterpiece* ruling comes down. On the briefing schedule for the Larsen’s appeal (after their requested extension), this Court may not even hear oral argument until after a *Masterpiece* ruling issues, which could occur in early spring. Moreover, this Court could always set an oral argument date for this appeal after a *Masterpiece* ruling to account for exactly how *Masterpiece* will affect this appeal.

Either way, these alternatives ensure this Court will not waste any judicial resources yet still keep this appeal on track to be resolved as quickly as possible to minimize the injury on the Larsens’ expressive freedoms. And as these alternatives show, Appellees cannot cite judicial economy as a basis to justify their proposed stay. The only thing their proposed stay will prevent for sure is the minimal burden of Appellees doing some additional briefing. But the possibility of writing a few extra pages later does not overcome the certain loss of First Amendment freedoms now. That minimal (and uncertain) burden cannot possibly outweigh the Larsens’ unavoidable burden of suffering more delay and more irreparable harm.

Conclusion

The Court must protect the interests of all parties. Staying the proceedings does not do that. It would add months of waiting for the Larsens by delaying the entire briefing period, oral argument, and decision until after *Masterpiece* is decided just to save Appellees from the *possibility* of some additional work. But the uncertain possibility of additional work does not outweigh this Court's certain responsibility to decide cases or the certain and irreparable harm a delay would cause the Larsens. The Larsens offer a better way: brief the case now, set oral argument for some time after *Masterpiece* is decided, and evaluate the need for supplemental briefing then. For the foregoing reasons, the Court should deny Appellees' motion to stay and order supplemental briefing if that proves necessary.

Dated: November 27, 2017

Respectfully submitted,

s/ Jeremy D. Tedesco

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CERTIFICATE OF COMPLIANCE

1. This response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because this motion contains 3053 words, excluding the parts exempted under Fed. R. App. P. 32(f).

2. This response complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in a 14-point proportionally spaced Times New Roman typeface using Microsoft Word 2013.

3. All required privacy redactions have been made pursuant to 8th Cir. R. 25A(i).

4. Paper copies are not required for this response.

5. This response has been scanned for viruses with the most recent version of a commercial virus scanning program, Traps version 4.1, and is free of viruses according to this program.

Date: November 27, 2017

s/ Jeremy D. Tedesco
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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2017, a true and accurate copy of the foregoing was electronically filed with the Court using the CM/ECF system, which will send notification of such filing to the following:

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