No. 17-3352

United States Court of Appeals for the Eighth Circuit

TELESCOPE MEDIA GROUP, ET. AL.,
Plaintiffs-Appellants

v.

KEVIN LINDSEY, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Minnesota, The Hon. John R. Tunheim

MOTION OF THE FOUNDATION FOR MORAL LAW FOR LEAVE TO FILE AN AMICUS BRIEF IN SUPPORT OF APPELLANTS AND FOR REVERSAL

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The Foundation for Moral Law ("the Foundation"), an Alabama nonprofit corporation dedicated to the strict interpretation of the Constitution as intended by its Framers and to the defense of religious liberty, respectfully requests permission to file an *amicus curiae* brief in support of the Larsens and Telescope Media Group in the above-entitled matter. *See* Rule 29(a)(3), Fed. R. App. P.

The Foundation believes its brief would assist the Court in deciding this case by: (1) explaining why compelled speech is an even more egregious First Amendment violation than prohibited speech, (2) demonstrating that "commercial speech" analysis is inappropriate when applied to speech that has religious, moral, or ideological content, (3) analyzing a pertinent Fourth Circuit case on compelled speech decided earlier this month, (4) showing that the trial court erred in calling the Larsens' religiously-motivated plan "truly incredible" and "a creative lawyer's attempt" to evade the MHRA guidelines, (5) arguing from *McDaniel v. Paty,* 435 U.S. 618 (1978), that the State may not force the Larsens to surrender one right in order to exercise another, and (6) concluding that the trial court's decision is contrary to the spirit and the letter of *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015).

The Foundation has requested the consent of the parties to file an amicus brief. Appellants have consented, but Appellees have not responded to our request as of this writing.

WHEREFORE, the Foundation for Moral Law requests leave as amicus curiae to file the attached brief .

Respectfully submitted this 25th day of January, 2018.

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BRIEF OF THE FOUNDATION FOR MORAL LAW AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND FOR REVERSAL

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INTEREST OF AMICUS CURIAE

Amicus Curiae Foundation for Moral Law ("the Foundation") (www.morallaw.org) is a national public-interest organization based in Montgomery, Alabama, dedicated to the strict interpretation of the Constitution as written and intended by its Framers and to the defense of traditional marriage. The Foundation has an interest in protecting people against compelled speech and standing against the elevation of court-created rights over those expressly set forth in the Constitution.[1]

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Fed. R. App. P., the Foundation hereby discloses that it is a nonprofit corporation and that it has no parent corporations. Because the Foundation is a nonprofit corporation, no corporation holds 10% or more of an ownership interest in the Foundation.

SUMMARY OF THE ARGUMENT

Because compelling a person to speak contrary to one's beliefs is an even more egregious First Amendment violation than a prohibition on speech, the effect of the

[1] Because the Foundation has not received consent of all parties to file this brief, an accompanying motion has been filed. No party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief. Rule 29(a)(4)(E), Fed. R. App. P.

Minnesota Human Rights Act, Minn. Stat. § 363A.01 *et seq.* ("MHRA") on the speech of the appellants in this case must be analyzed under strict scrutiny.

The First Amendment specifically identifies and protects free exercise of religion and freedom of speech. "Congress shall make no law ... prohibiting the free exercise [of religion]; or abridging the freedom of speech ...." The courts have created a right to same-sex marriage which Minnesota has extrapolated into a right to force others to promote and celebrate same-sex wedding ceremonies. In so doing, Minnesota seeks to elevate the court-created right of same-sex marriage above the constitutionally-enumerated rights of free exercise of religion and freedom of speech.

ARGUMENT

I. Compelled Speech is an Especially Egregious First Amendment Violation.

Transport yourself back to Germany in the year 1942.

You strongly oppose National Socialism, and you consider Adolph Hitler a dangerous man. You want to speak out in opposition to the Nazis, but you know the severe consequences if you do. So with great reluctance you resolve to bite your tongue and remain silent, knowing that your conscience will torment you for years to come.

But that's not enough. You are at a major Nazi rally in Nuremberg. The frenzied crowd are extending their right arms in the Nazi salute and shouting "Heil Hitler!" and you will be most conspicuous if you do not do the same.

And worse yet, Nazi cameramen, making a newsreel, are focusing the cameras on you. By performing the Nazi salute and shouting "Heil Hitler!", you will proclaim your support for the Nazis throughout Germany and beyond. Your speech will be used to promote what you strongly oppose. And if you do not, you will lose your employment and probably more.

"If only I could remain silent," you think. But that's not an option. Not if you want to live.

The point is this: Compulsory speech that is immortalized in a video is an even more egregious First Amendment violation than compelled silence.[2] Forcing a person to give money to a candidate he opposes is more offensive that simply prohibiting him from giving to the candidate he supports. Likewise, compelling

[2] As a classical example in which compelled speech was considered more egregious than prohibited speech, one is reminded of Sir Thomas More, the Lord High Chancellor of England, who in 1535 faced death by beheading for refusing to sign the Succession to the Crown Act by which he would acknowledge King Henry VIII as head of the Church of England. More was willing to remain silent, even understanding the legal maxim *qui tacet consentire videtur* ("one who keeps silent seems to consent"), but he would not affirm what he believed to be false. *Thomas More's Trial by Jury: A Procedural and Legal Review with a Collection of Documents* 22 *et seq.* (Henry Ansgar Kelly, Louis W. Karlin, Gerard Wegemer, eds., 2011).

speech in favor of a cause one fervently opposes is far more offensive to one's conscience than simply prohibiting speech against the same cause.[3]

These analogies may seem dramatic, but they accurately depict the unconstitutional demand the State of Minnesota has placed on the Larsens[4] by compelling them to use their film-making talent to promote same-sex marriage as happy and wholesome in stark contrast to God's condemnation of sodomy. *Leviticus* 18:22; *Romans* 1:26-27.

The Larsens have capably asserted the compelled speech argument in their brief. The Foundation will not duplicate their presentation but simply observes that because compelled speech is a more egregious free speech violation than mere prohibitions on speech, strict scrutiny should certainly apply.[5]

A very recent Fourth Circuit case is instructive. A Baltimore ordinance required pregnancy clinics that do not offer or refer for abortion to disclose that fact through

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[3] The Supreme Court recognizes that forced silence and forced speech are both subject to the First Amendment. "Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views[.]" *United States v. United Foods, Inc.,* 533 U.S. 405, 410 (2001).

[4] Throughout this brief, all references to the Larsens include Carl Larsen, Angel Larsen, and the Telescope Media Group.

[5] Allowing the State to compel the Larsens to produce a same-sex wedding video abridges the common-law principle that only innkeepers and common carriers had an obligation to serve all potential customers; other businesses had a right at common law to decline service for any reason or no reason. *See* Lauren J. Rosenblum, *Equal Access or Free Speech: The Constitutionality of Public Accommodations*, 72 N.Y.U.L. Rev. 1243, 1249 n.29 (1997). The Thirteenth Amendment guarantee against involuntary servitude reinforces this principle.

signs posted in their waiting rooms. The Fourth Circuit concluded that the ordinance "compel[led] a politically and religiously motivated group to convey a message fundamentally at odds with its core beliefs and mission" in violation of "the right not to utter political and philosophical beliefs that the state wishes to have said." *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore,* No. 16-2325, slip op. at 5, 16 (4th Cir. Jan. 5, 2018).[6]

The Fourth Circuit also recognized that the required signs were more than commercial speech, which is 'usually defined as speech that does no more than propose a commercial transaction.'" *Greater Baltimore*, slip op. at 9 (quoting *United States v. United Foods, Inc.,* 533 U.S. 405, 409 (2001)). The signs required by the City of Baltimore, like the videos required by the State of Minnesota, have strong moral, ideological, and religious implications. The Baltimore signs advised patients where they could obtain information about abortion, a "procedure" that the pregnancy clinics view as the murder of a human being created in the image of God. *Genesis* 9:6. The videos Minnesota compels the Larsens to produce would celebrate and promote same-sex marriage in contradiction to their deeply held religious and moral convictions.

[6] The Supreme Court has granted certiorari in a similar case. *See* No. 16-1140, *National Institute of Family and Life Advocates, d/b/a NIFLA, et al., v. Xavier Becerra*.

Just because the Larsens operate Telescope Media Group as a business and charge for their services, their videos are not automatically commercial speech. The First Amendment fully protects a person who speaks for or against same-sex marriage. That protection does not diminish if the speaker receives remuneration for the speech. Likewise, if an author writes a book about same-sex marriage, that book is fully protected by the First Amendment, and that protection does not diminish if the author, publisher, or bookseller receives compensation.[7] Such creative expression goes far beyond "propos[ing] a commercial transaction." *United Foods, Inc.*, 533 U.S. at 409. In sum, the commercial speech doctrine does not apply to messages that have significant moral, ideological, political, or religious implications.

Because compelled speech is an even more egregious First Amendment violation than prohibited speech, any doubt as to whether an instance of compelled speech is "pure speech" or commercial speech should be resolved in favor of applying strict scrutiny.

[7] In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014), the Supreme Court held that "a for-profit closely held corporation" was entitled to free exercise of religion under the Religious Freedom Restoration Act. The Court reasoned that "[c]orporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all." *Id.* at 2768.

II. The Constitutionally Enumerated Right to Free Speech and Free Exercise of Religion Takes Precedence over the Court-Created Right to Same-Sex Marriage.

The freedoms guaranteed by the First Amendment stand as the foremost of all freedoms except possibly for life itself. Besides being endowed by the Creator, freedom of speech also safeguards other liberties by drawing attention to abuses of governmental authority.

Of the two religion clauses, the Free Exercise Clause is the "favored child" of the First Amendment. Leo Pfeffer, *Church, State and Freedom* 74 (1953). The First Amendment religion clauses embody two basic principles: separation (the Establishment Clause) and voluntarism (the Free Exercise Clause). Lawrence H. Tribe, *American Constitutional Law* § 14-3 (2d ed. 1978). "Of the two principles, voluntarism may be the more fundamental." Therefore, "the free exercise principle should be dominant in any conflict with the anti-establishment principle." *Id.* The principle of voluntarism is central to the case at hand. The MHRA as interpreted by the district court has the effect of compelling the Larsens to violate basic religious beliefs protected by the Free Exercise Clause.

The Supreme Court has often affirmed the importance and preeminence of the Bill of Rights and specifically the First Amendment. "[P]rotecting the freedom to believe, express, and exercise a religion [is] the mission of the Free Exercise Clause" *Bowen v. Roy*, 476 U.S. 693, 700 (1986). The Court earlier stated:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

Furthermore, in this case the Larsens are not challenging the right to same-sex marriage, trying to prevent the wedding from occurring, or excluding respondents from general patronage at their shop. They merely object, based on their religious and moral convictions, to participating in the ceremony and celebrating the occasion by preparing a customized video of the event. A video is neither a legal requirement for a marriage nor a universal fixture at every wedding; weddings took place for thousands of years before cameras were invented. The complaining parties have made no showing that they were unable to obtain a video of their wedding from another source.

Minnesota has inflated the newly-minted right to same-sex marriage into an imaginary right of same-sex couples to force others to promote their weddings. Worse, Minnesota has elevated this supposed right above the constitutionally enumerated rights of free exercise of religion and freedom of speech. Minnesota may not compel citizens to forfeit their First Amendment rights.

The trial court stated the following:

> The Court does not doubt the genuineness of the Larsens' religious objections to same-sex marriage. For this reason, it seems truly incredible that the Larsens would voluntarily structure a contract to obligate themselves to publicize videos of same-sex weddings and to adopt those videos as their own personal speech. ... In the Court's view, the plan to structure contracts in a manner that obligates the Larsens to publicize these videos is a creative lawyer's attempt to bring the facts of this case closer in line with the facts in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995).

Telescope Media Group v. Lindsey, No. 16-4094, slip op. at 19 n.10 (D. Minn. Sept. 20, 2017). The Court states that it does not doubt the genuineness of the Larsens' religious convictions, but then calls that genuineness into question by saying that their plan to make each of their wedding videos into a public testimony to the sanctity of marriage is "truly incredible" and "a creative lawyer's attempt" to avoid the state guidelines.

The trial court apparently does not believe that some Christians, including the Larsens, are so committed to their faith that the prime object of their lives and careers is to glorify God and to do His will. The Larsens' belief that God has ordained marriage as the union of one man and one woman is so central to their faith that they devote their video-production business to providing testimonials to the sanctity and blessedness of marriage. Whether the trial court agrees or not, the Larsens are entitled to their belief that same-sex marriage not only violates the will and Word of God but also undermines and threatens the sanctity of the institution of marriage. The trial court's incredulity at their expression of faith may lie at the

heart of its unwillingness to give the Larsens' objections the strict-scrutiny protection they deserve. "Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law." *United States v. Ballard*, 322 U.S. 78, 86-87 (1944).

In *Employment Division v. Smith,* 494 U.S. 872 (1990), a divided Supreme Court held that religious objections to laws of general applicability do not necessarily require strict scrutiny. However, even in *Smith* the Court recognized that religious objections are entitled to strict scrutiny when asserted as "hybrid rights" in tandem with other fundamental rights such as freedom of speech, freedom of the press, freedom of association, and equal protection, *id.* at 881-82, all of which the Larsens have asserted in this case.

III. The State Cannot Force the Larsens to Surrender One Constitutional Right in Order to Exercise Another.

The trial court stated that "[t]he Larsens' unconstitutional-conditions claim fails as a matter of law because the Larsens have not alleged the denial of a government benefit." *Telescope Media Group*, No. 16-4094, slip op. at 53. The trial court also reasoned that the State can place reasonable restrictions on the operation of a business. The MHRA as applied to the Larsens, however, is not a reasonable regulation because it forces them to close their business rather than violate their sincerely-held religious beliefs. As applied to the Larsens, therefore, the MHRA

violates "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference." *Greene v. McElroy,* 360 U.S. 474, 492 (1959).

The Larsens properly cited *Bourgeois v. Peters,* 387 F.3d 1303 (11th Cir. 2004), and *Lefkowitz v. Cunningham,* 431 U.S. 801 (1977), for the proposition that the State may not require a person to give up one constitutional right in order to exercise another. Another case, *McDaniel v. Paty,* 435 US. 618 (1978), also supports this argument. Rev. Paul McDaniel, a black civil rights leader and pastor of Second Missionary Baptist Church of Chattanooga, ran to be elected a member of the 1977 Tennessee Constitutional Convention. His opponent challenged his candidacy on the ground that Tennessee law prohibited clergy from holding public office. Finding that Tennessee forced Rev. McDaniel to surrender his free exercise right to be a pastor in order to exercise his right to run for public office, the Court struck down the Tennessee law as unconstitutional.

> [T]he right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions, or, in other words, to be a minister of the type McDaniel was found to be. *Murdock v. Pennsylvania,* 319 U.S. 105 (1943); *Cantwell v. Connecticut,* 310 U. S. 296 (1940). Tennessee also acknowledges the right of its adult citizens generally to seek and hold office as legislators or delegates to the state constitutional convention. Tenn.Const., Art. 2, §§ 9, 25, 26; Tenn.Code Ann. §§ 8-1801, 8-1803 (Supp. 1977). Yet, under the clergy disqualification provision, McDaniel cannot exercise both rights simultaneously, because the State has conditioned the exercise of one on the surrender of the other. Or, in James Madison's words, the State is "punishing a

> religious profession with the privation of a civil right." 5 Writings of James Madison, *supra,* at 288. In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion.
>
> "[T]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties." *Sherbert v. Verner,* 374 U.S. 398, 406 (1963).

McDaniel, 435 U.S. at 626.

Just as Rev. McDaniel believed God had called him into the ministry, so the Larsens believe God has called them into the work of promoting the sanctity of marriage through the artistic production of videos. Just as Rev. McDaniel could not be forced to surrender his right to run for public office in order to exercise his right to serve in the ministry, so the Larsens cannot be forced to surrender the right to pursue their video-making career in order to exercise their religious right to oppose same-sex marriage. The Constitution that protected the religious rights of Rev. McDaniel in the face of a contrary state law provides the same protection for the religious convictions of the Larsens.

IV. The Trial Court's Ruling Violates the Letter and Spirit of *Obergefell*.

Finally, the decision of the trial court should be reversed because it violates both the letter and spirit of the very case in which the Supreme Court recognized a right to same-sex marriage. As the Court stated in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015):

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.

Id. at 2607.

By telling the Larsens that the consequence of following their religious and moral convictions is that they must abandon their careers, close down their business, and suppress their artistic expression, the State of Minnesota has displayed animus toward them and all who hold the traditional view of marriage. Adapting Justice O'Connor's concurring opinion in another context, such compulsion "sends a message to non-adherents that they are outsiders, not full members of the political community." *Lynch v. Donnelly,* 465 U.S. 668, 688 (1984).

CONCLUSION

There is room in the American community for the Larsens. The decision of the trial court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 32(a)(7)(B), Fed. R. App. P., because it contains 3,248 words, excluding those parts of the brief exempted by Rule 32(a)(7)(B)(iii), Fed. R. App. P.

2. This brief complies with the typeface requirements of Rule 32(a)(5), Fed. R. App. P., and the type style requirements of Rule 32(a)(6), Fed. R. App. P., because it was prepared in Microsoft Word 2007 using Times Roman 14-point type.

s/ John Eidsmoe
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Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I certify that on the 25th day of January, 2018, I filed the foregoing document with the Clerk of the Court using the CM/ECF system that will automatically serve electronic copies upon all counsel of record.

s/ John Eidsmoe
John Eidsmoe

Counsel for Amicus Curiae