No. 17-3352

IN THE 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, NO. 16-CV-04094-JRT-LIB

AMICUS CURIAE BRIEF OF RYAN T. ANDERSON, Ph.D., AND AFRICAN-AMERICAN AND CIVIL RIGHTS LEADERS IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

None of the corporate *amici curiae* on whose behalf this brief is filed has a parent corporation nor is there any public corporation that owns 10% or more of the stock of any *amici curiae*.

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INTEREST OF AMICI CURIAE[1]

Ryan T. Anderson, Ph.D. (A.B., Princeton University, M.A., Ph.D., University of Notre Dame) is a researcher who has published extensively on marriage and religious liberty. With Sherif Girgis and Robert P. George, he is co-author of "What Is Marriage?" (Harvard Journal of Law and Public Policy, 2011), and of What Is Marriage? Man and Woman: A Defense (Encounter Books, 2012). He is author of Truth overruled: The Future of Marriage and Religious Freedom (Regnery, 2015), and of "Marriage, the Court, and the Future" (Harvard Journal of Law and Public Policy, 2017). With Sherif Girgis, in counterpoint to John Corvino, he is co-author of Debating Religious Liberty and Discrimination (Oxford University Press, 2017), from which portions of this brief are drawn. His dissertation was entitled, Neither Liberal Nor Libertarian: A Natural Law Approach to Social Justice and Economic Rights.

African-American and Civil Rights Leaders are a diverse group of civil rights leaders, churches, pastors, religious organizations, community groups and individuals that serve constituents largely made up of racial minorities that have directly suffered the indignity of racism and the ongoing consequences of racial

[1] No party's counsel authored the brief in whole or in part, and no one other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. Fed. R. App. P. 29(c)(5). This brief is filed with consent of all parties. Fed. R. App. P. 29(a).

bigotry. Amici include 13 organizations, listed below, that serve millions of people who believe in conjugal marriage and the right of citizens to operate their businesses in accordance with this belief. Many of the people amici serve own businesses and work in the wedding industry. Amici offer this brief to provide the Court historical context on marriage, the scourge of racism, and how First Amendment protections in the racism and conjugal marriage contexts differ. Amici believe it is vital for the Court to review this brief in support of the views of millions of citizens who have worked against racism and reject the proposition that support for conjugal marriage is similar to racism. These organizations are further described as follows:

Douglass Leadership Institute (DLI). DLI is a nonprofit organization whose mission is to educate, equip and empower faith-based leaders to embrace and apply biblical principles to life and in the marketplace. Authorization: Rev. Dean Nelson, Chairman of the Board. https://www.dlinstitute.org/

Frederick Douglass Foundation (FDF). FDF is a national Christ-centered education and public policy organization committed to developing innovative approaches to today's problems with the assistance of elected officials, scholars and community activists. FDF has chapters in several states including Michigan, Virginia, Missouri, New York and California. Authorization: Troy Rolling, Vice Chairman. http://tfdf.org/index.html

Restoration Project (RP). Authorization: Catherine Davis, President and Founder. http://www.the-restoration-project.org/

The Radiance Foundation. Authorization: Officers and co-founders Ryan Scott Bomberger and Bethany Bomberger. http://www.theradiancefoundation.org/

Issues4Life Foundation. Authorization: Rev. Walter C. Hoye, II, President and Founder. http://issues4life.org

Freedoms Journal Institute for the Study of Faith and Public Policy (the Institute). Authorization: Rev. Eric M. Wallace, PhD. President and Cofounder and Jennifer Wallace, Cofounder. https://freedomsjournalinstitute.org/

The Beloved Community Redevelopment Coalition (BCRC). Authorization: Pastor Ceasar I. LeFlore, III, Executive Director. http://voiceofthebeloved.org/

Protect Life and Marriage Texas (PLMT). Authorization: Pastor Stephen Broden, President and Founder. https://www.facebook.com/Protect-Life-and-Marriage-Texas-Pastor-Stephen-Broden-1056564917764431/

Staying True to America's National Destiny (STAND). Authorization: Bishop E.W. Jackson, President and Founder. http://standamerica.us/

Civil Rights for the Unborn (CRU) for Priests for Life. Authorization: Dr. Alveda King, Evangelist and Director. http://www.priestsforlife.org/africanamerican/

Coalition of African American Pastors (CAAP). Authorization: Rev. Bill Owens. http://caapusa.org

Family Life Campaign (FLC). The FLC is the national initiative of the Church of God in Christ to rescue children and serve families. Authorization: Bishop Vincent Mathews. http://www.familylifecampaign.org/

Center for Urban Renewal and Education (CURE). Authorization: Derek McCoy, Executive Vice President. http://urbancure.org

INTRODUCTION

In *Obergefell v. Hodges*, the Supreme Court correctly noted that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." 135 S. Ct. 2584, 2602 (2015). At stake in *Telescope Media Group* (TMG) is whether these people and their decent and honorable beliefs may, consistent with the protections of the U.S. Constitution, be so disparaged by state governments. Advocates argue that, if the courts find a First Amendment right to decline to use one's artistic talents to help celebrate a same-sex wedding, then courts would also have to protect a video producer's choice to refuse to serve an interracial couple.

But no such conclusion follows.

Opposition to interracial marriage developed as one aspect of a larger system of racism and white supremacy. Such opposition is an outlier from the historic understanding and practice of marriage, founded not on decent and honorable premises but on bigotry. By contrast, support for marriage as the conjugal union of husband and wife has been a human universal until just recently, regardless of views about sexual orientation. That view of marriage is based on the capacity that a man and a woman possess to unite in a conjugal act, create new life, and unite that new life with both a mother and a father. Whether ultimately sound or not, this

view of marriage is reasonable, is based on decent and honorable premises, and disparages no one.

Exemptions from laws banning discrimination on the basis of race run the risk of undermining the valid purposes of those laws—such as eliminating the public effects of racist bigotry—by perpetuating the myth that blacks are inferior to whites. But First Amendment protections for people who act in accordance with the conjugal understanding of marriage need not undermine the valid purposes of laws that ban discrimination on the basis of sexual orientation—such as eliminating the public effects of anti-gay bigotry—because support for conjugal marriage isn't anti-gay. A ruling in favor of TMG sends no message about the supposed inferiority of people who identify as gay—indeed, it sends no message about them or sexual orientation at all. It would simply say that citizens who support the historic understanding of marriage are not bigots, and that the state may not drive them out of business. Such a ruling doesn't threaten the social status of people who identify as gay or their community's profound and still-growing political influence.

A better comparison for this case is to laws that ban discrimination on the basis of sex. If a state applied such a law in a way that forced a Catholic hospital to perform abortions or forced a crisis pregnancy center to advertise abortion, a ruling by the courts in favor of a right to not perform or promote abortion would not

undermine the valid purposes of a sex nondiscrimination policy—such as eliminating the public effects of sexism—because pro-life medicine isn't sexist. Pro-life convictions need not flow from or communicate hostility to women. A ruling in favor of a pro-life citizen sends no message about patriarchy or female subordination; it says simply that pro-life citizens are not bigots and that the state may not exclude them from public life. A ruling to protect the liberties of citizens who support a conjugal understanding of marriage would do the same for those citizens.

But a court ruling against TMG would tar citizens who support the conjugal understanding of marriage with the charge of bigotry. A court's refusal to grant First Amendment protections to TMG would teach that its reasonable convictions and associated work are so gravely unjust that they cannot be tolerated in a pluralistic society. If *Obergefell* was about respecting the freedom of people who identify as gay to live as they wish, then Americans who believe in the conjugal understanding of marriage should enjoy that same freedom.

In short, pro-life conscience protections do not undermine *Roe v. Wade*, 410 U.S. 113 (1973), or women's equality. Neither do conscience protections for conjugal marriage supporters undermine *Obergefell*, 135 S. Ct. at 2602, or gay equality. By contrast, conscience protections for opponents of interracial marriage could undermine the purposes of *Loving v. Virginia,* 388 U.S. 1 (1967), *Brown v.*

Board of Education, 347 U.S. 483 (1954), *supplemented sub nom.* Brown v. Bd. of Educ., 349 U.S. 294 (1955) and the Civil Rights Act of 1964: racial equality.

I. SHIELDS OR SWORDS? THE USES AND ABUSES OF ANTIDISCRIMINATION LAW: IMPOSING SEXUAL ORTHODOXY

Minnesota should not apply its statute to classify support for traditional marriage as "discrimination." As Chief Justice John Roberts pointed out during the *Masterpiece* oral arguments, the Court in *Obergefell* "went out of its way to talk about the decent and honorable people who may have opposing views."[2]

The Court stated in its majority opinion that belief in marriage as the union of husband and wife is held "in good faith by reasonable and sincere people here and throughout the world." It noted that "many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." *Obergefell*, 135 S. Ct. at 2602.

The states should not disparage these people and their decent and honorable beliefs, either. Antidiscrimination policies should serve as shields, not swords. These laws are meant to shield people from unjust discrimination that might

[2] Transcript of Oral Argument at 73, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 137 S. Ct. 2290 (2017).

prevent them from flourishing in society, not to punish people for acting on reasonable beliefs.

Other antidiscrimination statutes are applied in more nuanced ways. Bans on religion-based discrimination are not used to force secular organizations to violate their beliefs. Religious antidiscrimination policies have not been used, for example, to force Planned Parenthood to hire pro-life Catholics. Religious antidiscrimination laws simply do not seek to impose *religious* orthodoxy on the country.

But sexual orientation and gender identity (SOGI) antidiscrimination policies *are* used to impose *sexual* orthodoxy. SOGI laws are used to punish people who simply seek the freedom to lead their lives in accordance with their beliefs about human sexuality.

Discrimination in the broad sense is simply the making of distinctions. Discrimination in the familiar moralized sense, however, involves mistreatment based on irrelevant factors. We distinguish or discriminate based on X when we take X as a reason for treating someone differently. We "distinguish" based on relevant factors—as when we require recipients of driver's licenses to be able to see. We "discriminate" based on *irrelevant* factors—as when many states once required voters to be white.[3] Of course, there might be some traits on which we

[3] *See* JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION 163–168 (2017).

both distinguish and discriminate, and disentangling the two can take work: We *distinguish* on the basis of sex when we have separate male and female bathrooms; we *discriminate* on the basis of sex when we say men should take economics and women take home economics.[4]

Invidious discrimination is rooted in unfair, socially debilitating attitudes or ideas about individuals' worth, proper social status, abilities, or actions. Bans on interracial marriage were paradigms of invidious discrimination. *See Loving v. Virginia*, 388 U.S. 1 (1967). They were based on beliefs about African Americans, especially their supposed incompetence and threat to whites. A video producer refusing to work for an interracial wedding discriminates invidiously on the basis of race. He takes that factor—race—into consideration where it is irrelevant and mistreats people on that basis, and thus his behavior serves to perpetuate myths about African Americans that are unfair and socially debilitating.

Telescope Media, by contrast, doesn't discriminate—nor does it even distinguish—on the basis of sexual orientation. Rather, it abstains from creating a film to celebrate a same-sex wedding because the owners object to same-sex marriage, based on their common Christian belief that a same-sex wedding isn't marital (along with many other relationships—*e.g.*, sexual and not, dyadic and

[4] *See*, *e.g.*, 45 C.F.R. §§ 618.405, 618.410 (1975) (implementing Title IX).

larger, same- and opposite-sex).[5] Nowhere need TMG's reasoning even refer to the partners' sexual orientation—or any ideas or attitudes about gay people, good or bad, explicit or implicit.

TMG's reason for refusing to tell the stories of same-sex weddings is manifestly *not* to avoid contact with gay people on equal terms. TMG is simply trying to avoid complicity in what it considers one distortion of marriage among others. Some people's refusals to celebrate same-sex weddings might be ill-motivated. However, as Section III demonstrates, it's unfair to assume that actions based on the conjugal understanding of marriage are premised on ideas hostile to people who identify as gay. Indeed, refusals to help celebrate same-sex weddings needn't be based on beliefs or attitudes about people who identify as gay at all.

Therefore, affirming TMG's First Amendment rights here would not undermine any of the valid purposes of the state's sexual orientation nondiscrimination law. By contrast, an exemption from such a law for a hospital that refused to perform chemotherapy because the patient identified as gay could undermine the valid purpose of such a law—as could an exemption for TMG had it refused to work entirely with customers who identify as gay. When the underlying act discriminates on the basis of sexual orientation per se, and has no root in "decent

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[5] *See* 3 JOHN FINNIS, *HUMAN RIGHTS AND COMMON GOOD: COLLECTED ESSAYS* 315–388 (2011); JOHN WITTE JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* (2d ed. 2012).

and honorable" beliefs, an exemption could, like exemptions in the cases of racism, send the signal that citizens who identify as gay count as less than other citizens. But acting in accordance with the conviction that marriage is the union of husband and wife sends no such message.

II. THE CONTEXT OF RACE-BASED REFUSALS

Comparisons to a case involving a hypothetical racist go wrong right from the start because social context matters for claims of discrimination, and the social contexts for these two cases are profoundly different. TMG serves all customers—black and white, gay and straight—but simply cannot promote every message, advance every idea or take part in every event.

By contrast, businesses who refused to serve interracial weddings also refused to treat African Americans equally in a host of circumstances: Frequently, they refused to serve them at all.

History makes this fact clear. Before the Civil War, a dehumanizing regime of race-based chattel slavery existed. After abolition, Jim Crow laws enforced race-based segregation. Those laws mandated the separation of blacks from whites, preventing them from associating or contracting with one another. Even after the Court struck down Jim Crow laws, integration did not come easily or willingly in many instances. Public policy, therefore, sought to eliminate racial discrimination even when committed by private actors on private property.

Before the enactment of the Civil Rights Act of 1964, racial segregation was rampant and entrenched, and African Americans were treated as second-class citizens. Individuals, businesses, and associations across the country excluded blacks in ways that caused grave material and social harms without justification, without market forces acting as a corrective, and with the government's tacit and often explicit backing.

African Americans were denied loans, kept out of decent homes, and denied job opportunities—except as servants, janitors, and manual laborers. Given the irrelevance of race to almost any transaction, and given the widespread and flagrant racial animus of the time, no claims of benign motives are plausible.[6]

The context of this case could not be more different. There is no heterosexual-supremacist movement akin to the movement for white supremacy. There are no denials of their right to vote, no lynching campaigns, no signs over water fountains saying "Gay" and "Straight." This is not to deny that those identified as gay have experienced bigotry or that they still do. But TMG's work is not an instance of bigotry, as explained below, and the actual instances of anti-gay bigotry that remain simply cannot be compared to the systematic material and social harms wrought by racism. As a result, enforcing TMG's First Amendment

[6] *See* CORVINO, ANDERSON & GIRGIS, *supra* note 3, at 162–184.

rights would not undermine the social standing of people who identify as gay, nor the valid purposes of a sexual orientation nondiscrimination policy.

III. OPPOSITION TO INTERRACIAL MARRIAGE WAS PART OF A RACIST SYSTEM; SUPPORT FOR CONJUGAL MARRIAGE IS NOT ANTI-ANYTHING.

Bans on interracial marriage were the exception in world history. They have existed *only* in societies with a race-based caste system, in connection with race-based slavery. Opposition to interracial marriage was based on racism and belief in white supremacy, and thus contributed to a dehumanizing system treating African Americans first as property and later as second-class citizens.

But the understanding of marriage as the union of a man and a woman has been the norm throughout human history, shared by the great thinkers and religions of both East and West, and by cultures with a wide variety of viewpoints about homosexuality. Likewise, many religions reasonably teach that human beings are created male and female, and that male and female are created for each other in marriage.[7] Nothing even remotely similar is true of race and legally enforced racial separation.

Interracial marriage bans were unknown to history until colonial America. English common law, which the U.S. inherited, imposed no barriers to interracial

[7] *See* SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE (2012); RYAN T. ANDERSON, TRUTH OVERRULED: THE FUTURE OF MARRIAGE AND RELIGIOUS FREEDOM (2015).

marriage.[8] Anti-miscegenation statutes, which first appeared in Maryland in 1661, were the result of African slavery.[9] Since then, they've existed *only* in societies with a race-based caste system. Thus, Harvard historian Nancy Cott observes:

> It is important to retrieve the singularity of the racial basis for these laws. Ever since ancient Rome, class-stratified and estate-based societies had instituted laws against intermarriage between individuals of unequal social or civil status, with the aim of preserving the integrity of the ruling class. . . . But the English colonies stand out as the first secular authorities to nullify and criminalize intermarriage on the basis of race or color designations.[10]

This history shows that anti-miscegenation laws were part of an effort to hold a race of people in a condition of economic and political inferiority and servitude. They were openly premised on the idea that contact with African Americans on an equal plane was wrong. That idea, and its basic premises in the supposed inferiority of African Americans, is the essence of bigotry. Actions based on such bigotry contribute to the wider culture of dehumanization and subordination that antidiscrimination law is justly aimed to combat.

The convictions behind TMG's conscience claims could not form a sharper contrast with the rationale of racism. Its conviction about marriage has been

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[8] Irving G. Tragen, *Statutory Prohibitions against Interracial Marriage*, 32 CAL. L. REV. 269 (1944); *see also* Francis Beckwith, *Interracial Marriage and Same-Sex Marriage*, PUB. DISCOURSE (May 21, 2010), http://www.thepublicdiscourse.com/2010/05/1324/.

[9] Beckwith, *supra* note 8.

[10] NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 483 (2000).

present throughout human history. As one historian observes: "Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies. Through marriage, children can be assured of being born to both a man and a woman who will care for them as they mature."[11]

Great thinkers, too, affirm the special value of male-female unions as the foundations of family life. Plato wrote favorably of legislating to have people "couple[], male and female, and lovingly pair together, and live the rest of their lives" together.[12] Plutarch wrote of marriage as "a union of life between man and woman for the delights of love and the begetting of children."[13] He considered marriage a distinct form of friendship embodied in the "physical union" of intercourse.[14] For Musonius Rufus, the first-century Roman Stoic, a "husband and wife" should "come together for the purpose of making a life in common and of

[11] G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (1988).

[12] 4 PLATO, THE DIALOGUES OF PLATO 407 (Benjamin Jowett trans. & ed., Oxford Univ. 1953) (c. 360 B.C.).

[13] Plutarch, *Life of Solon*, *in* 20 PLUTARCH'S LIVES 4 (Loeb ed. 1961) (c. 100 A.D.).

[14] Plutarch, *Erotikas*, *in* 20 PLUTARCH'S LIVES 769 (Loeb ed. 1961) (c. 100 A.D.).

procreating children, and furthermore of regarding all things in common between them . . . even their own bodies."[15]

Not one of these thinkers was Jewish or Christian or in contact with Abrahamic religion. Nor were they ignorant of same-sex sexual relations, which were common in their societies. These thinkers were not motivated by sectarian religious concerns, ignorance, or hostility of any type toward anyone. They and other great thinkers—of both East and West, from Augustine and Aquinas, Maimonides and al-Farabi, and Luther and Calvin, to Locke and Kant, Confucius, Gandhi and Martin Luther King—held the honest and reasoned conviction that male-female sexual bonds had distinctive value for individuals and society.

To note this history is not merely to say something about the past but to shed light on the present. Today's beliefs about conjugal marriage aren't isolated. They grew organically out of millennia-old religious and moral traditions that taught the distinct value of male-female union; of mothers and fathers; of joining man and woman as one flesh, and generations as one family.[16] Whether those principles are ultimately sound or unsound, they continue to provide intelligible reasons to affirm conjugal marriage that have nothing to do with animus.

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[15] Musonius Rufus, *Discourses XIIIA*, *in* CORA E. LUTZ, MUSONIUS RUFUS "THE ROMAN SOCRATES" (Yale Univ. Press 1947), *available at* https://sites.google.com/site/thestoiclife/the_teachers/musonius-rufus/lectures/13-0.

[16] *See* GIRGIS, ANDERSON & GEORGE, *supra* note 7; ANDERSON, *supra* note 7.

The Larsens and many other citizens today are shaped by, and find guidance and motivation in, those traditions. History demonstrates that these intellectual streams do not have bigotry as their source. It is therefore unfair to assume that the citizens they nourish are bigots. Thus, a First Amendment ruling in favor of believers in conjugal marriage need not send any negative social message about anyone. The only message sent in protections for such citizens is that Americans of good will reasonably disagree about marriage, whereas the message sent in opposition to interracial marriage is that one group of citizens is inferior to another.

No doubt bigotry motivates some traditionalists. But not the Larsens. It would be unfair to punish them and similar professionals who believe in conjugal marriage. After all, as George Chauncey and other historians of the LGBT experience, who submitted their research to advance gay rights litigation, noted, "widespread discrimination" based on "homosexual status developed only in the twentieth century . . . and peaked from the 1930s to the 1960s."[17] Bigotry is not the reasonable, much less the most natural, motive to read into TMG's decision to decline same-sex wedding films. And ruling in its favor would not have negative social costs, as the next sections explain.

[17] Brief for Professors of History George Chauncey, Nancy F. Cott et al., as Amici Curiae Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), http://cdm16035.contentdm.oclc.org/cdm/ref/collection/p16035coll2/id/23.

IV. THE SOCIAL COSTS OF PROTECTIONS FOR RACISTS

Exemptions from laws banning discrimination on the basis of race run the risk of undermining the valid purposes of those laws—such as eliminating the public effects of racist bigotry—by perpetuating the myth that blacks are inferior to whites. Indeed, actions based on religious beliefs justifying white supremacy were part of the racism that the laws were meant to combat. The NAACP brief mentioned above notes the "religious arguments justifying slavery, defending Jim Crow segregation, implementing anti-miscegenation laws, and, of course, supporting laws and practices that denied African Americans the full and equal enjoyment of places of public accommodation."[18] The purpose of such practices was to retain the wicked system of white supremacy: "[p]roprietors unwilling to serve African-American customers relied on religious arguments that validated fears of racial integration."[19] As the NAACP notes, "[t]hese laws, policies, and customs were designed to dehumanize African Americans and maintain the racial hierarchy established during the time of slavery."[20]

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[18] Brief of NAACP Legal Defense & Educational Fund, Inc., as Amici Curiae Supporting Appellees, Charlie Craig v. Masterpiece Cakeshop, Inc. et al, No. 2014CA135 (Colo. App. Ct. Feb. 17, 2015), p. 4. https://www.aclu.org/sites/default/files/field_document/0007-2015-02-17_09-05-34_2015.02.13_ldf_amicus_brief_as_filed.pdf.

[19] *Id*.

[20] *Id*. at 6.

These are the realities that laws banning discrimination on the basis of race were meant to combat. And combatting racial discrimination is a compelling government interest pursued in narrowly tailored ways. As the Supreme Court noted in *Burwell v. Hobby Lobby Stores, Inc.*, "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." 134 S. Ct. 2751, 2783 (2014). What the Court said regarding employment law could also apply to public accommodations law. An exemption to a law prohibiting racial discrimination in public accommodations could undermine the purpose of that law by sending the message that intentional racism is protected conduct. In sending that message, such an exemption would amplify existing messages that say African Americans count for less, are subhuman, and may be treated as such. In doing so, it increases the odds that people engage in deplorable acts based on notions of white supremacy.

Therefore, comparing First Amendment protections for TMG to protections for a racist ignores the differing social context and how that context shapes the relevant legal analysis. For not only are the acts of the racist and of TMG different, so too are the messages that rulings in favor of each would send—and the harms to which those messages could contribute.

Moreover, these concerns about racist messages and ensuing material harms are by no means obsolete, as sadly witnessed by recent events. Combatting racism is a compelling state interest given not just the history of government-endorsed white supremacy but also its current effects, the badges and incidents of slavery. Despite the progress made in combatting racism, African Americans continue to face both outright discrimination and systemic disadvantages.

These important social and historical differences help explain why the Court could rule in favor of TMG but not in favor of a racist. Combatting racism through a nondiscrimination statute that is applied without exemptions may be the least restrictive means of achieving compelling interests because any exemption could allow the cancer of racism to grow, spread the idea that African Americans are inferior, and thus cause the harms it was meant to combat.

V. THE SOCIAL COSTS OF PROTECTIONS FOR CONJUGAL MARRIAGE SUPPORTERS

First Amendment protections for people who act according to the conjugal understanding of marriage need not undermine any of the valid purposes of laws that ban discrimination on the basis of sexual orientation—eliminating the public effects of anti-gay bigotry—because support for conjugal marriage is not anti-gay.[21] A ruling in favor of TMG sends no message about the supposed inferiority

[21] *See* CORVINO, ANDERSON & GIRGIS, *supra* note 3, pp. 190-198; *see also* Ryan T. Anderson, *How to Think About Sexual Orientation and Gender Identity (SOGI)*

of people who identify as gay, for it sends no message about them or their sexual orientation at all. It says that citizens who support the historic understanding of marriage are not bigots and that the state may not exclude them from civic life. It reflects the reality that, as the Supreme Court noted in *Obergefell*, citizens of good will reasonably disagree about marriage.

As explained in Section I, the Larsens and other citizens like them who believe marriage is the conjugal union of husband and wife are not discriminating on the basis of sexual orientation because they are not even taking sexual orientation into account, but rather are acting (and distinguishing) based on their reasonable view of marriage. As a result, recognizing that the First Amendment protects TMG sends no anti-gay message and thus does not have social costs similar to an exemption for a racist. Conjugal marriage conscience protections do not undermine *Obergefell v. Hodges* or gay equality.

That affirming a First Amendment protection for TMG would not undermine the valid purposes of antidiscrimination laws is more clearly seen when one considers the larger social context. An astonishingly small number of business-owners cannot in good conscience support same-sex wedding celebrations.

Policies and Religious Freedom, THE HERITAGE FOUND. (Feb. 13, 2017), http://www.heritage.org/sites/default/files/2017-03/BG3194.pdf.

Professor Andrew Koppelman, a longtime LGBT advocate, acknowledges as much:

> Hardly any of these cases have occurred: a handful in a country of 300 million people. In all of them, the people who objected to the law were asked directly to facilitate same-sex relationships, by providing wedding, adoption, or artificial insemination services, counseling, or rental of bedrooms. There have been no claims of a right to simply refuse to deal with gay people.[22]

Those three sentences shatter the strongest argument for denying a First Amendment protection in cases like these. There is no incipient movement ready to deny people who identify as gay access to markets, goods, and services. Indeed, there is a reason why there have been "no claims of a right to simply refuse to deal with gay people"—no faith teaches it.[23] As law professor Douglas Laycock—a same-sex marriage supporter—notes:

> I know of no American religious group that teaches discrimination against gays as such, and few judges would be persuaded of the sincerity of such a claim. The religious liberty issue with respect to gays and lesbians is about directly facilitating the marriage, as with wedding services and marital counseling.[24]

As a result, Robin Fretwell Wilson, a law professor who supports same-sex marriage as a policy matter, explains, "[t]he religious and moral convictions that

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[22] Andrew Koppelman, *A Zombie in the Supreme Court: The Elane Photography Cert Denial*, 7 ALA. C.R. & C.L. L. REV. 77, 77–95 (2016).

[23] See Koppelman, *supra* note 22.

[24] Doug Laycock, *What Arizona SB1062 Actually Said*, THE WASH. POST (Feb. 27, 2014), http://www.washingtonpost.com/news/ volokhconspiracy/wp/2014/02/27/ guest-post-from-prof-doug-laycock-what-arizona-sb1062-actually-said/.

motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination."[25]

The refusals of TMG have nothing like the sweep or shape of racist practices. They do not span every domain but focus on marriage and sex. Within that domain, they are about refusing to communicate certain messages about marriage, not avoiding contact with certain people. As Professor Koppelman writes, "[t]hese people are not homophobic bigots who want to hurt gay people."[26]

These considerations in favor of affirming First Amendment protections for conjugal marriage supporters are buttressed by the socioeconomic standing of people who identify as gay, in contrast to that of African Americans historically and currently. For example, there is no evidence that a single hotel chain, a single major restaurant, or a single major employer has turned away individuals who identify as gay.[27] In fact, the Human Rights Campaign—the nation's premier

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[25] Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 101 (Douglas Laycock et al. eds., 2008).

[26] Koppelman, *supra* note 22, at 13 (pdf version).

[27] The Equal Employment Opportunity Commission suggests that it secured a total of $4.4 million in awards for complainants of LGBT discrimination last year, but these figures appear to be overstated, because "[m]onetary benefits include amounts which have been recovered exclusively or partially on non-LGBT claims included in the charge." *LGBT-Based Sex Discrimination Charges FY 2013–FY 2016*, U.S. EQUAL EMP'T OPP. COMM'N, https://www.eeoc.gov/eeoc/statistics/enforcement/lgbt_sex_based.cfm.

LGBT advocacy group—reports that 89 percent of *Fortune* 500 companies have policies against considering sexual orientation in employment decisions.[28] According to Prudential, "median LGBT household income is $61,500 vs. $50,000 for the average American household."[29] An August 2016 report from the U.S. Treasury—based on tax returns, not surveys—shows opposite-sex couples earning on average $113,115, compared to $123,995 for lesbian couples and $175,590 for gay male couples.[30] For couples with children, the gap is even more dramatic: $104,475 for opposite-sex couples but $130,865 for lesbian couples and $274,855 for gay couples.[31]

Social acceptance of gays and lesbians, as well as support for same-sex marriage and protection from discrimination on the basis of sexual orientation, has seen remarkable growth in recent years. LGBT Americans overwhelmingly believe

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[28] *LGBTQ Equality at the Fortune 500*, HUM. RTS. CAMPAIGN, http://www.hrc.org/resources/entry/lgbt-equality-at-the-fortune-500.

[29] *The LGBT Financial Experience: 2012-2013 Prudential Research Study*, PRUDENTIAL, https://www.prudential.com/media/managed/Prudential_LGBT_Financial_Experience.pdf.

[30] Robin Fisher et al., *Joint Filing by Same-Sex Couples After Windsor: Characteristics of Married Tax Filers in 2013 and 2014*, (U.S. Dept. of the Treasury, Office of Tax Analysis, Working Paper No. 108, Aug. 2016), https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-108.pdf.

[31] *Id.*

that their social standing has improved in the last decade and will continue to improve in the coming one.[32]

The few cases of refusals that have garnered media attention—cases involving cake designers, a florist, and a photographer—hardly diminish a single person's range of opportunities for room, board, or entertainment. If businesses started to refuse service specifically to individuals who identify as gay, it is hard to imagine a sector of commerce or a region of the U.S. where media coverage would not provide a remedy swift and decisive enough to restore access in days—or shutter the business. The LGBT community's political influence is profound and still growing. When corporate giants like the NBA, the NCAA, Apple, Salesforce, Delta, and the Coca-Cola Company threaten to boycott states over laws merely giving believers their day in court, it is hard to see the case for denying a First Amendment protection.

Given the small numbers of such refusals, the enormous and growing social and market pressures to decrease their number over time, the wide availability of professionals willing to help celebrate same-sex weddings, and the consistent failure of very motivated and focused media outlets and advocacy groups to prove

[32] *A Survey of LGBT Americans*, PEW RES. CTR., June 13, 2013, http://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/.

otherwise, there is no reason to think that granting these conscience claims would deny access to basic goods, or markets, or income brackets.

Progressives like Professor Koppelman have noted the cultural pressures fast at work and how they weaken the case for legal coercion against people like the Larsens: "With respect to the religious condemnation of homosexuality, this marginalization is already taking place. But that does not mean that the conservatives need to be punished or driven out of the marketplace. There remains room for the kind of cold respect that toleration among exclusivist religions entails."[33] In another article, Koppelman expands: "The reshaping of culture to marginalize anti-gay discrimination is inevitable. To say it again: The gay rights movement has won. It will not be stopped by a few exemptions. It should be magnanimous in victory."[34]

VI. A BETTER COMPARISON: PRO-LIFE MEDICINE AND SEX DISCRIMINATION

Instead of comparing this case to an opponent of interracial marriage, a more instructive comparison would be to posit pro-life citizens punished under a state's prohibition of discrimination on the basis of sex. If a state were to apply such a law in a way that forced a Catholic hospital to perform abortions or a crisis pregnancy

[33] Koppelman, *supra* note 22, at 14 (pdf version).

[34] Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 628 (2015).

center to advertise abortion, no one should suggest that a court's ruling in favor of a right not to perform or promote abortion would undermine the valid purposes of a sex nondiscrimination policy—such as eliminating the social effects of sexism—because pro-life medicine is not sexist. Pro-life citizens who object to abortion do not do so out of hostility to women. A ruling in their favor sends no message about patriarchy or female subordination, it simply says that pro-life citizens are not bigots and that the state may not exclude them from public life.

Pro-life objection to abortion is built on no premises about women, let alone discriminatory premises. Pro-life objection to abortion is based on a belief about the equal dignity of all human beings, including unborn babies. True or untrue, it has nothing to do with sexism. Even those who argue that abortion access gives women equal opportunities in the marketplace and public life will recognize that pro-life medicine and messages are not inspired by, nor do they contribute to, a culture of sexism or patriarchy. Just so, a First Amendment protection for pro-life citizens would not undermine any of the valid purposes of a sex nondiscrimination statute.

Indeed, in 1993 the Supreme Court resolutely rejected the argument that pro-lifers are inherently discriminatory: "Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than

hatred of, or condescension toward (or indeed any view at all concerning), women." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993).

The same is true when it comes to marriage as the union of husband and wife: there are common and respectable reasons for supporting it that have nothing to do with hatred or condescension. But this is not true when it comes to opposition to interracial marriage—and this is where the analogies to racism break down. When the Supreme Court struck down bans on interracial marriage, it did not say that opposition to interracial marriage was based on "decent and honorable premises" and held "in good faith by reasonable and sincere people here and throughout the world." *Obergefell*, 135 S. Ct. at 2594. It did not say it, because it could not say it.

The Larsens' beliefs about marriage are built on no premises about sexual orientation or people who identify as gay—let alone discriminatory premises. They distinguish based on whether the relationship is (in their religious understanding) marital, which turns on whether it involves a man and woman. Thus sparing people such as the Larsens from the sword does not undermine the valid purposes of anti-discrimination law—eliminating the public effects of anti-gay bigotry—because support for conjugal marriage is not anti-gay.

A ruling protecting conjugal marriage supporters ensures their equal social status and opportunities. It protects their businesses, livelihoods, and professional

vocations. And it benefits the rest of society by allowing these citizens to continue offering their services, especially social services, charities, and schools.

Anti-gay bigotry exists and should be condemned. But support for marriage as the union of husband and wife is not anti-gay. Just as sexism has been combatted without treating pro-life medicine as sexist, anti-gay bigotry can be combatted without treating Orthodox Jews, Roman Catholics, Muslims, Evangelicals, and Latter-day Saints as bigots.

CONCLUSION

Professor Koppelman says that he has "worked very hard to create a regime in which it's safe to be gay" and for similar reasons "would also like that regime to be one that's safe for religious dissenters."[35] Not every disagreement is discrimination. And our law should not say otherwise.

Respectfully submitted this 9th day of February, 2018.

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[35] Koppelman, *supra* note 34, at 621.

CERTIFICATE OF COMPLIANCE

Pursuant to the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, the signature block, certificates of service and compliance, but including footnotes) contains 6,496 words as determined by the word counting feature of Microsoft Word for Mac Version 16.9.1.

Pursuant to Circuit Rule 28A(h), I also hereby certify that an electronic file of this Brief has been submitted to the Clerk via the Court's CM/ECF system. The file has been scanned for viruses and is virus-free.

/s/ *Timothy Belz*

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, and Circuit Rule 25A(a), I hereby certify that I have this 9th day of February, 2018, filed a copy of the foregoing with the Clerk of the Court through the Court's CM/ECF system, which will serve electronic copies on all registered counsel.

I further certify that I have also filed by hand delivery to the Clerk of the Court twenty-five (25) paper copies of this Brief.

I further certify that I have served two (2) paper copies of this Brief to each counsel of record for the Appellees by sending them via UPS for delivery prior to noon on February ___, 2018 to the address listed on the Court's CM/ECF system.

/s/ *Timothy Belz*

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February 12, 2018

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RE: 17-3352 Telescope Media Group, et al v. Kevin Lindsey, et al

Dear Counsel:

The amicus curiae brief of Ryan T. Anderson, Ph.D. and African-American and Civil Rights Leaders was filed on February 12, 2018. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

Michael E. Gans
Clerk of Court

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