

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' REPLY IN SUPPORT OF MOTION FOR
SUPPLEMENTAL BRIEFING UNDER FED. R. APP. P. 27**

KRISTEN K. WAGGONER
DAVID A. CORTMAN
JEREMY D. TEDESCO
JONATHAN A. SCRUGGS
RORY T. GRAY
JACOB P. WARNER
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
jtedesco@ADFlegal.org

RENEE K. CARLSON
CARLSON LAW, PLLC
855 Village Center Drive
Suite 259
St. Paul, MN 55127
(612) 455-8950
rcarlson@rkclawmn.com

Attorneys for Plaintiffs/Appellants

Recent and upcoming Supreme Court decisions will affect this appeal. The Larsens ask that each party be allowed to file a short supplemental brief about *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 584 U.S. ___, 2018 WL 2465172 (June 4, 2018), and upcoming decisions in *Nat’l Inst. of Family Life Advocates v. Becerra*, (“NIFLA”) No. 16-1140 (U.S., argued Mar. 20, 2018), and *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, No. 16-1466 (U.S., argued Feb. 26, 2018) because these cases either address or are likely to address the free speech, free exercise, and free association arguments now before this Court.¹

But Minnesota seeks to bypass this opportunity, claiming these cases are irrelevant.² Appellees’ Opp’n Mot. to Suppl. Br. 2 (“None of the cases identified are material to the legal issues before the Court...”). That claim is incorrect. Starting with *Masterpiece*, this decision provides guidance for how this Court should analyze the Larsens’ free exercise *and* free speech claims. While the Supreme Court’s majority focused on free exercise and did not decide petitioner’s free speech claim, its analysis involved discussion about free speech principles, and many Justices continued that discussion in concurring and dissenting opinions. In fact, the Court addressed many issues that have been raised in this case, including whether states may use public accommodation laws to force commissioned speakers to alter the content of their expression, whether third-party perceptions matter for analyzing compelled speech claims, and whether religious business owners may bring their faith into the marketplace, to just name a few.

¹ “The Larsens” refers to all Plaintiffs-Appellants.

² “Minnesota” refers to all Defendants-Appellees.

All of these issues have been raised in this case. The Larsens challenge Minnesota’s application of its public accommodation to change the content of their expression. *See, e.g.*, Appellants’ Reply Br. 9 (“In a key respect, the compelled-speech violation here is worse. In *Hurley*, the state forced the parade organizers to alter their own speech by including another’s. Here, Minnesota commands the Larsens to create the expression in the first place ... Laws that do this [] compel pure speech and alter content as applied ... And they deserve strict scrutiny.”). But Minnesota and the district court defend this application by focusing on third-party perceptions, *see, e.g.*, Add. to Appellants’ Opening Br. 43 (district court rejecting any compelled speech problem because no one will “attribute the [films’] message[s]” to the Larsens and they “may easily disclaim the message of [their] customers”); Appellees’ Br. 15-16 (Minnesota adopting the district court’s reasoning), and by declaring the marketplace out-of-bounds for the Larsens’ religious beliefs, *see e.g.*, Add. to Appellants’ Opening Br. 36 (district court opinion (“While the Larsens have a right to engage in [their desired religious] speech, they do not have a right to fund that speech through business activities for profit....”)).

The Supreme Court addressed these issues throughout its opinion. Consider that the Court’s majority explained that states may face problems when they use their public accommodation laws to compel custom expression “with words or images celebrating [a] marriage.” *Masterpiece*, 584 U.S. at ___, 2018 WL 2465172, at *3. And the Court criticized using third-party perceptions to justify compelling speech. *See Masterpiece*, 584 U.S. at ___, 2018 WL 2465172, at *2 (criticizing Colorado’s use of third-party perceptions to justify compelling speech in some situations but not

others); *id.* at *25 (Thomas, J., concurring) (criticizing the lower court’s use of third-party perceptions to justify compelling speech as “badly misguided”). The Court also confirmed that “religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression,” *Masterpiece*, 584 U.S. at ___, 2018 WL 2465172, at *7, and that Colorado fumbled when it implied that people who hold these “religious beliefs ... are less than fully welcome in Colorado's business community,” *id.* at *9.

The parties should have an opportunity to explain these and other ways that *Masterpiece* affects the case now on appeal. The same holds true about *NIFLA* and *Janus*. Those cases involve compelled speech and compelled association claims just like this case does. To say that the facts or challenged laws in those cases differ from the ones in this case overlooks that the Supreme Court will provide more clarity about the compelled speech and compelled association doctrines that will be applied in this case. And although those cases have not yet been decided, they will be decided by the end of next week. The interests of justice and judicial economy favor granting the Larsens’ request for supplemental briefing.

The Larsens simply ask that this Court permit the parties to each submit one short supplemental brief (no longer than 2,500 words) about *Masterpiece*, *NIFLA*, and *Janus*, and how they affect this case. Granting this request will not delay this case, nor will it impose heavy burdens on the parties or the Court. Doing so would only benefit the Court and thus advance the public’s interest in deciding these important constitutional issues correctly.

Respectfully submitted this 22nd day of June, 2018.

RENEE K. CARLSON
CARLSON LAW, PLLC
855 Village Center Drive
Suite 259
St. Paul, MN 55127
(612) 455-8950
rcarlson@rkclawmn.com

s/ Jeremy D. Tedesco
KRISTEN K. WAGGONER
JEREMY D. TEDESCO
JONATHAN A. SCRUGGS
JACOB P. WARNER
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax
kwaggoner@ADFlegal.org
jtedesco@ADFlegal.org
jscruggs@ADFlegal.org
jwarner@ADFlegal.org

DAVID A. CORTMAN
RORY T. GRAY
1000 Hurricane Shoals Road, NE
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
(770) 339-6744 Fax
dcortman@ADFlegal.org
rgray@ADFlegal.org

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

1. This response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because this motion contains 828 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 4.1.4, and is free of viruses according to this program.

Date: June 22, 2018

s/ Jeremy D. Tedesco
Jeremy D. Tedesco

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: June 22, 2018

s/ Jeremy D. Tedesco
Attorney for Plaintiffs/Appellants