

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COUNTRY MILL FARMS, LLC and
STEPHEN TENNES,

Plaintiffs,

v.

CASE NO: 1:17-CV-487

CITY OF EAST LANSING,

Defendant.

* * * *

MOTION HEARING

* * * *

BEFORE: THE HONORABLE PAUL L. MALONEY
United States District Judge
Kalamazoo, Michigan
September 13, 2017

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES:

APPEARING ON BEHALF OF THE PLAINTIFFS:

KATHERINE L. ANDERSON
JONATHAN A. SCRUGGS
Alliance Defending Freedom
15100 North 90th Street
Scottsdale, Arizona 85260

JESHUA T. LAUKA
David & Wierenga, PC
99 Monroe Avenue, N.W., Suite 1210
Grand Rapids, Michigan 49501-0208

APPEARING ON BEHALF OF THE DEFENDANT:

MICHAEL S. BOGREN
Plunkett Cooney
950 Trade Centre Way, Suite 310
Kalamazoo, Michigan 490021

THOMAS M. YEADON
McGinty Hitch Housefield Person
Yeadon & Anderson, P.C.
601 Abbott Road
P.O. Box 2502
East Lansing, Michigan 48826

1 Kalamazoo, Michigan

2 September 13, 2017

3 at approximately 9:45 a.m.

4 PROCEEDINGS

09:45:53

5 THE COURT: This is File Number 17-487; Country
6 Mill Farms, LLC, et al. vs. The City of East Lansing. The
7 case is here this morning on the defendant's motion to
8 dismiss, which is ECF 13, as well as plaintiff's motion for
9 a preliminary injunction, which is ECF Document Number 7.

09:46:25

10 The record should reflect that Attorneys Anderson,
11 Scruggs and Lauka are here on behalf of plaintiff.
12 Attorneys Bogren and Yeadon are here on behalf of the
13 defendant. The Court is ready to proceed. Let's do the
14 motion to dismiss first, I think that makes the most sense.
09:46:40 15 And then we will proceed from there.

16 Mr. Bogren, good morning, sir.

17 MR. BOGREN: Good morning, your Honor. Thank you.

18 Your Honor, I know the Court has read the papers
19 extensive that they are, so I will try not to be repetitive.

09:46:55

20 Your Honor, the plaintiffs' theories in this case
21 under both -- well, I guess three aspects of the First
22 Amendment, the free speech clause, the free exercise clause,
23 and the establishment clause, are based on flawed
24 syllogisms. The syllogism is this: If I say I will
09:47:19 25 discriminate because of my religion, the city will ban me

1 from the farmers market. The city banned me from the
2 farmer's market, therefore, the city banned me because I
3 spoke. It's the same syllogism that they use on the free
4 exercise clause, except substituting if I discriminate
09:47:42 5 because of my religion, the city will ban me, therefore, the
6 city banned me because of my religious beliefs.

7 That flaw, your Honor, if I remember my logic
8 class, is called affirming the consequent. What it ignores
9 is the fact that the city has no interest in the plaintiffs'
09:48:03 10 religious beliefs, has no interest in the plaintiffs'
11 speech. The city's only interest in this case is to
12 prohibit discrimination. This plaintiffs' subjective
13 motivation for their actions are completely irrelevant to
14 the city. There is no evidence in this record to suggest
09:48:24 15 otherwise. The plaintiff has submitted some emails to the
16 Court in its reply brief on the motion for preliminary
17 injunction and cites a portion of an email from the mayor
18 that says: And this is a portion that they cite, I'm not
19 sure hosting any weddings actually addresses the issue which
09:48:50 20 is a public statement that their religion does not permit
21 them to allow same sex couples to be married at their farm."
22 That's where the plaintiffs' stop. What that email goes on
23 to say is: "Do their religious beliefs permit them to sell
24 apples to a same sex couple at the farmer's market? Can
09:49:08 25 they sign an assurance they will provide services to all

1 patrons regardless of sexual orientation." Now, that email
2 was on August 27th. The plaintiffs' attended the farmer's
3 market on August 28th and continued to attend the farmer's
4 market for the remainder of the 2016 season.

09:49:30 5 THE COURT: But as I appreciate it, they were--
6 there was some communication from a city representative that
7 indicated that they should not attend on that particular
8 August Sunday, correct?

9 MR. BOGREN: They were asked not to attend, that is
09:49:46 10 correct, your Honor, and they did attend. And the city said
11 that they would have law enforcement present in the event of
12 a demonstration that got out of hand.

13 What is more telling though, your Honor, is that on
14 August 29th, the day after the farmer's market, and these
09:50:07 15 are also attached in the emails that the plaintiffs'
16 submitted, there is an email from Tim McCaffrey at the city
17 to George Lahanas who is the city manager, and its in
18 response to a question from Mr. Lahanas about the city's --
19 I'm sorry, about the plaintiffs' practices. Mr. McCaffrey
09:50:29 20 said, "Yes, they've assured me they will serve all customers
21 regardless of sexual orientation. To our knowledge, they
22 have always served any customer at our farmer's market. In
23 my conversation with Diana Tennes, the above answer also
24 applies to Orchard Barn Farm events where they will continue
09:50:49 25 to host special events, but not weddings."

1 Your Honor, from the city's perspective at that
2 point, there was no issue. From August 29th until the end
3 of the year, there was no further communications from the
4 city because the plaintiffs had said they were going to stop
09:51:06 5 hosting weddings. So it wasn't until the plaintiffs
6 affirmatively posted in December, four months later, they
7 posted on Facebook and said, "The Country Mill family will
8 continue to participate in hosting ceremonies. It remains
9 our deeply held religious belief that marriage is a union of
09:51:27 10 one man and one woman, and Country Mill that's a First
11 Amendment right to express and act upon its beliefs."

12 So after December, in advance of the 2017 season,
13 the city amended its policy and required all vendors to
14 comply with the city's anti-discrimination ordinance in its
09:51:51 15 general business practices.

16 THE COURT: Help me with the timing of that,
17 specifically in terms of what the dates were.

18 MR. BOGREN: Your Honor, the only indication that I
19 have from dates at this point is the March, I believe, 17th
09:52:09 20 letter from the city to the plaintiffs stating that, "It has
21 come to our attention that you don't comply with the policy
22 and therefore you are not invited back."

23 THE COURT: There is a time line though from, I
24 presume, because the city took certain actions involving
09:52:28 25 amendment of the ordinance, after the close of the season,

1 correct?

2 MR. BOGREN: Yes, your Honor, although it wasn't
3 the ordinance that was altered, they altered their policy.

4 THE COURT: The guidelines?

09:52:44 5 MR. BOGREN: Yes. And I apologize, your Honor, I
6 can't tell you when that was done, other than it was
7 sometime before March 17th when that letter was sent.

8 THE COURT: Is that important as to some of the
9 counts of the complaint?

09:52:55 10 MR. BOGREN: I don't believe it is, your Honor,
11 because once again, it's neither the fact that the
12 plaintiffs spoke, nor the motivation behind their announced
13 actions that the city was concerned with. What the city was
14 concerned with was their statement that they are not-- well,
09:53:16 15 that they are going to discriminate in their general
16 business practices with respect to same sex couples.

17 THE COURT: Is it in the record how many
18 applications for the farmer's market that the city counsel
19 reviewed?

09:53:29 20 MR. BOGREN: It is not.

21 THE COURT: Do you know the answer?

22 MR. BOGREN: I don't, your Honor, I'm sorry.

23 THE COURT: Okay. All right. Thank you.

24 MR. BOGREN: Your Honor, again, the point of this
09:53:45 25 is contrary to the plaintiffs' attempt to turn this into a

1 free speech case, it simply isn't. And I know the reason
2 they want to do that is so they can make this a highbred
3 claim and claim they are entitled to strict scrutiny.

4 THE COURT: Highbred doesn't make it in the
09:54:02 5 circuit, right?

6 MR. BOGREN: No, it doesn't.

7 THE COURT: And they have raised it and made it
8 perfectly clear that they recognize the controlling
9 authority for the court, but they want to preserve the issue
09:54:12 10 obviously.

11 MR. BOGREN: Sure, absolutely. But that is the
12 reason, in my view, your Honor, that this is a free speech
13 case, because this isn't about speech. And, your Honor, the
14 problem with the plaintiffs' position is, if this falls
09:54:26 15 within a free speech claim, any -- literally any act of
16 discrimination will fall within a free speech claim.
17 Because I'm not going to say its impossible, but I can't
18 conceive how one discriminates without communicating. You
19 have to communicate in order to accomplish your
09:54:51 20 discrimination. And the Supreme Court has ruled under Title
21 VII, we cited the R.A.V. case, that speech is not subject to
22 First Amendment protection in that context Title VII is a
23 valid enactment to address discrimination. So if the
24 plaintiff can say well, I communicated therefore I'm
09:55:20 25 entitled to First Amendment protection, and oh, by the way,

1 you took action against me because of the content of my
2 speech, that is, I am going to discriminate or I am in the
3 process of discriminating then I'm entitled to strict
4 scrutiny. It's simply not a free speech case, your Honor.

09:55:41 5 Now, I will say though, that if this is a free
6 speech case, and even assuming that it's strict scrutiny,
7 that the city has a compelling interest in prohibiting
8 discrimination, and they have done no more than exactly what
9 they are trying to prevent, which is to prohibit
09:56:05 10 discrimination. Now, the plaintiff says well, uh-huh, but
11 we didn't break any laws. Well, number one, your Honor,
12 there is no requirement that there actually has to be
13 illegal conduct in the sense that it's criminal or even
14 potentially subject to civil liability. The Oralick case
09:56:32 15 and the Brentwood Academy case where the Supreme Court made
16 the distinction between conduct and speech, neither one of
17 those involved either civil liability or criminal sanction.
18 Both of those, one had to do with Ohio State's bar rules and
19 the other one had to do with Tennessee's high school
09:56:50 20 athletic rules. So the plaintiffs' statement that we didn't
21 make-- we didn't do anything illegal, while technically
22 true, is beside the point. What this case gets down to,
23 your Honor, is this: The city has a right to control its
24 property and with whom it does business. The plaintiffs'
09:57:12 25 say well, no, all you're doing is licensing it. We are not

1 doing business with the city. We are not giving the city
2 any goods and services, we are giving people that come to
3 the farmer's market goods and services. But what that
4 ignores is the fact that the plaintiff is coming to the city
09:57:27 5 and wants to make use of the city's property to conduct its
6 business. The city has the authority under the Michigan
7 Constitution to make a determination as to who it wants to
8 do business with. And it has the authority to say we choose
9 not to do business with a business that engages in
09:57:46 10 discrimination against a class of persons that we believe is
11 entitled to protection. The fact that that discrimination
12 happens outside of the city is irrelevant. City isn't
13 trying to regulate what the plaintiffs do outside of the
14 city. They can do whatever they want to do. They can say
09:58:09 15 whatever they want to say. That is the point that the
16 plaintiffs seem not to appreciate. If the plaintiffs
17 weren't discriminating in their general business practices,
18 they could come to the farmer's market, they could put up a
19 sign that says, "Our religious beliefs compel us to object
09:58:32 20 to same sex marriage." Okay. That's fine. Nobody is
21 stopping them from doing that. Nobody has attempted to stop
22 them from doing that, you took action against us because of
23 Facebook post.

24 THE COURT: What about some of the broad language
09:58:49 25 in the definitions of harassment and other terms in the

1 ordinance. And I would also like you to address what does
2 "except where permitted by law" mean? Which is the
3 introductory phrase of prohibited practices.

4 MR. BOGREN: All right. Well.

09:59:13 5 THE COURT: I know I asked multiple questions so go
6 ahead break it down, Mr. Bogren.

7 MR. BOGREN: Yes, I'll answer the last one first,
8 because I remember that one.

9 Except as provided by law, I mean obviously.

09:59:24 10 THE COURT: Where permitted by law.

11 MR. BOGREN: I'm sorry, where permitted by law.

12 Obviously the federal and state anti-discrimination statutes
13 have exceptions, for example, bona fide occupational
14 qualifications, Catholic church can't be forced to bring
09:59:42 15 women in as priests. So where permitted by law encompasses
16 those federal and state laws that explicitly permit
17 discrimination. That's what that means.

18 Your first question in terms of the broad terms,
19 your Honor.

10:00:05 20 THE COURT: I mean I was following up with your
21 example of the sign.

22 MR. BOGREN: Yes.

23 THE COURT: And I'm just wondering if that sign
24 wouldn't meet some of the broad language that is contained
10:00:17 25 in the ordinance.

1 MR. BOGREN: I don't believe it would, your Honor,
2 because if you look at the language of the policy statement,
3 which again is not what the city is relying on, but I
4 understand under Dambrot, the Sixth Circuit said well, the
10:00:37 5 fact that essentially it's not self executing doesn't take
6 away from our ability to analyze it. But the language
7 speaks in terms of creating a hostile environment. If
8 they-- if they posted a sign that adopted the Hillsboro
9 church, I don't know, I honestly, your Honor, I don't know
10:01:08 10 the answer to that question. But I--

11 THE COURT: The reason I ask it is part, of course,
12 is the plaintiffs' assertion is that the definitions that
13 are contained in the ordinance are overly broad and sweep
14 First Amendment protection. So that was the context of the
10:01:35 15 question.

16 MR. BOGREN: And to that, your Honor, I would say
17 we cited in our brief, the Supreme Court precedent that says
18 that the plaintiff essentially can't raise those claims when
19 its conduct falls squarely within the prohibited or
10:01:54 20 proscribed conduct. And that is the situation here. They
21 say well, general business practices, who knows what that
22 means? Well, when you announce to the world that you will
23 not allow same sex couples to utilize your public
24 accommodation it certainly is a general business practice.
10:02:13 25 I don't think there is any way to dispute that fact. So if

1 they can say well, we don't know under what other context
2 that might come up, under the Supreme Court precedent, they
3 don't get to make that arguments, because their conduct is
4 clearly proscribed.

10:02:31 5 THE COURT: Who approved the change in the
6 guidelines?

7 MR. BOGREN: I don't know, your Honor. Your Honor,
8 this is Mr. Yeadon, who is the city attorney, if you don't
9 mind, he may be able to answer that question.

10:02:46 10 THE COURT: Go ahead, counsel.

11 MR. YEADON: It was Mr. McCaffrey, the parks and
12 recreation director.

13 THE COURT: All right. Thank you.

14 MR. YEADON: He may have gotten subsequent approval
10:02:58 15 from city counsel or advised city counsel that he was taking
16 that action. But he would have been the one to originally
17 establish the guidelines.

18 THE COURT: All right. Thank you.

19 MR. BOGREN: Your Honor, with respect to the
10:03:18 20 establishment clause and the free exercise clause, which in
21 our view that's what this case really is about, it's not a
22 free speech case, it's a free exercise case, and plaintiffs
23 claim it's an establishment case. The city's policy on its
24 face and as applied is neutral and applies to everyone. The
10:03:47 25 again--

1 THE COURT: Of course, the ordinance in the Hialeah
2 case appeared on its face to be neutral wouldn't apply to
3 everyone, right?

4 MR. BOGREN: Well, not really, your Honor, because
10:03:58 5 the Supreme Court was -- I mean they were -- the whole point
6 of Hialeah was Supreme Court's analysis of the statute which
7 says yes, it pretends it applies to everyone, but it exempts
8 every other manner of animal slaughter except this religious
9 practice. Here there is no exception except where state and
10:04:28 10 federal law allow it. There is no exception or exemption
11 that would exempt another vendor from its actions. The fact
12 that the plaintiff says my religion compels me, doesn't give
13 him protection, because if it did, anybody could commit
14 discriminatory acts against any protected class because my
10:04:59 15 religion compels me. I mean that's what Smith goes to, is
16 there is a difference between belief and act. The state can
17 take no action against belief, but it can against action.
18 Again, the city doesn't care why the plaintiffs
19 discriminate, they simply have no interest in that, your
10:05:25 20 Honor. And there is nothing in the complaint and nothing in
21 those emails that the plaintiffs produce that would suggest
22 otherwise.

23 THE COURT: Of course the plaintiff asserts that
24 the changes that were made to the ordinance were a veiled
10:05:48 25 cover to target him, that's what he is asserting and

1 spinning off of some of the language in the Sixth Circuit
2 Ward case about a veiled cover, what is your -- I mean
3 that's what they are asserting.

4 MR. BOGREN: Understood.

10:06:02 5 THE COURT: Why shouldn't under the facts of this
6 case, or as pled I should say, why shouldn't they get to
7 first base on that claim?

8 MR. BOGREN: Because, your Honor, other than they
9 are again, frankly, flawed syllogism, there is no factual
10:06:19 10 basis in their complaint to support that. All he is saying
11 is I'm a Catholic, I don't believe in same sex marriage, my
12 business practices have to reflect my faith, therefore, I
13 don't allow same sex marriage. Well, your Honor, that was
14 what was brought to the city's attention. He could have
10:06:43 15 said I'm a Darwinist, same sex marriage runs contrary to the
16 rules of evolution, I'm against it. We -- The city would
17 have taken the same action. It's not his subjective
18 rationale that caused the city to act, it's his objective
19 statement of what action he is going to take.

10:07:12 20 The Ward case, your Honor, I don't believe changes
21 anything because in Ward, what happened I mean, there it
22 was, and the Sixth Circuit acknowledged it was a facially
23 neutral policy, but it was not applied equally. They went
24 through a litany of people who had requested these referral
10:07:36 25 waivers or waivers-- I think maybe that was just referrals,

1 but they accommodated, but in this case, the woman who asked
2 for the waiver because she was -- again, her religion did
3 not allow her to counsel homosexuals, they refused her
4 waiver request or referral request. I mean that was a
10:08:01 5 situation where there was a record of unequal application of
6 a facially neutral standard. Here, there isn't--

7 THE COURT: This is a (b)(6) motion, so all I've
8 got is the pleadings, right?

9 MR. BOGREN: Right.

10:08:19 10 THE COURT: And I appreciate the fact that the city
11 strongly believes that the allegations in that count of the
12 complaint are not true, but given the four squares of the
13 allegations on that count, I appreciate the fact that the
14 city says not true, is it pled in a manner that gets them to
10:08:46 15 first base--

16 MR. BOGREN: Your Honor.

17 THE COURT: --to use the baseball analogy.

18 MR. BOGREN: Your Honor, I believe it's not. And I
19 would suggest that the Lemon test in the Sixth Circuit cases
10:08:59 20 that construe Lemon address that issue. Well, in Lynch vs.
21 Donley as well, where it says, "The evidence of purpose must
22 be external it cannot involve any judicial psychoanalysis of
23 a drafter's heart of desire--" I'm sorry, "desires of the
24 drafter's heart of hearts," I apologize. So the issue here,
10:09:27 25 they are not alleging facts to show that his subjective

1 motivation in turn motivated the city, he is just making
2 that logical or illogical leap. That's what motivated me.
3 The city took action, therefore, they must have taken action
4 because that's what motivated me. But there is no facts to
10:09:48 5 support that, your Honor. And they have to do more even in
6 a 12(b) setting, they have to do more than just make that
7 bald assertion that we know what is in their heart of
8 hearts. There is no record, and those emails that they
9 submitted support that even more, your Honor. All the
10:10:08 10 emails say is the mayor made reference to what they said,
11 and then he said, we need to figure out if our ordinance is
12 implicated. That's it. And they try and assign all sorts
13 of demonic motivation to Mr. Meadows for making that
14 statement, but it's not there. They can't assign motivation
10:10:30 15 in the absence of fact. The fact is that this is a facially
16 neutral policy that applies to everyone. It's only been
17 applied to one person, but they can't use that as the basis
18 to say ah-huh, it must only apply to religion. Again, your
19 Honor, if that were the case, all anyone would have to do to
10:10:53 20 avoid a motion to dismiss is to say God made me do it.

21 I don't believe that I have anything further,
22 unless the Court has additional questions.

23 THE COURT: I'm sure I'll have follow-up after
24 counsel's argument, Mr. Bogren. Thank you.

10:11:13 25 MR. BOGREN: Thank you.

1 THE COURT: Thank you very much, sir.

2 Miss Anderson.

3 MS. ANDERSON: May it please the Court. The city's
4 only interest here is ten Tennes's speech and his beliefs.

10:11:25 5 And its helpful to look at the facts in this case to
6 understand that. And if I might just briefly track through
7 them.

8 Tennes in August posts his statement on Facebook.
9 Prior to that, he has spent seven years serving at the
10:11:36 10 market during which time he was repeatedly praised by the
11 city, including about three weeks before that Facebook post
12 praised on Facebook we love the Country Mill, and repeatedly
13 invited back because he was considered a model vendor. That
14 all changed instantly when he posted the statement on
10:11:52 15 Facebook in response to a customer question asking him about
16 his religious beliefs, and he referenced those beliefs.
17 Immediately upon that Facebook post posting, within a couple
18 of days city officials contacted Country Mill asking them
19 not to come to the market two days later. They continued to
10:12:08 20 call Country Mill over and over again, to email Country Mill
21 asking them to decide voluntarily not to come. This is all
22 in our complaint.

23 Country Mill concluded that they were not violating
24 any law, that they had customers to serve, and they decided
10:12:23 25 to go to the market, but still the requests continued to

1 stop coming to the market because of the Facebook post, and
2 that was the only thin referenced.

3 Then at the end of the 2016 market, the city did
4 recognize that they had no legal basis to remove Country
10:12:38 5 Mill from the market and so they had to create this new
6 policy, and the new policy was placed in the 2017 vendor
7 application, and that was first time it had appeared. And
8 that new policy was created solely to exclude Country Mill.
9 Country Mill was the only one who was excluded under the new
10:12:56 10 policy. And they -- Country Mill was even treated different
11 in the process of that application.

12 In our complaint we pled that the city asked the
13 normal vendor committee who reviews applications to -- they
14 instructed that they could not invite Country Mill back
10:13:16 15 because of the Facebook post, and they said if Country Mill
16 applied anyway, they wanted that application to come
17 directly to the city, which is what happened, and then it
18 was declined by the city before the applications even
19 closed. And the only reason given in that denial was the
10:13:32 20 Facebook post which was attached to one much the letters
21 removing them from the market. That is all in our
22 complaint. But in reference to the emails that counsel
23 brought up, all of that is supported by what was in the
24 emails. The email that shows that as soon as that Facebook
10:13:50 25 post went up, the mayor contacted his staff. He had seen it

1 and he asked does this person attend our farmer's market?
2 When he was told that he had-- that Tennes does, he asked
3 for him to not come to the market that next Sunday, and
4 that's what started the path. When he was assured by his
10:14:06 5 staff that Tennes served everybody and staff members
6 including Tim McCaffrey recommended that they remove their
7 request to tell Tennes not to come to the market, that's
8 when the mayor said the statement that -- we quoted and that
9 counsel quoted, "I'm not sure whether not hosting any
10:14:26 10 weddings actually addresses the issue, which is a public
11 statement that their religion does not permit them to allow
12 same sex couples to be married at their farm.

13 Yes, indeed he did ask questions about how that
14 would impact the market, and he was then assured by his
10:14:40 15 staff that Tennes served everyone, and that was the piece
16 that counsel read about Tennes serving everyone and having
17 assured him that he had, and the city, in fact, recognized
18 that in the past Tennes had always served everyone at the
19 market and yet still this policy comes up and Tennes and
10:14:56 20 Country Mill are the only one's excluded under that policy.
21 That pathway shows us a couple of things. It shows us, one,
22 that the policy was created because of Tennes and only
23 applied to him. It also shows that it was created only
24 because of his speech and his beliefs. Again, the Facebook
10:15:13 25 post was the only reason he was excluded, and you have the

1 statement from the mayor confirming that it was the public
2 statement about his religion that was the reason he was
3 being removed. So this is a free speech case.

4 Furthermore, it's helpful to note that the policy
10:15:26 5 itself, again, there was no legal basis to remove him from
6 the market. Counsel says it's irrelevant, that Tennes has
7 not broken any laws, but he hasn't broken any laws in East
8 Lansing prior to the policy, and he hasn't broken any laws
9 in Charlotte. He is in perfect compliance with those. And
10:15:44 10 that's important because it's the reason that the city had
11 to create the new policy, because there was no legal basis
12 to throw them out. It also -- the policy itself, as your
13 Honor pointed out, is not a typical anti-discrimination law.
14 It includes this broad language general business practices,
10:16:01 15 which allowed the city to reach outside of its jurisdiction
16 to punish Tennes for his speech and his beliefs pertaining
17 only to his farm. And it had language even in the ordinance
18 that is overbroad, the harassment policy, the language about
19 objectionable, unwelcome, unacceptable, or undesirable are
10:16:20 20 all broad language and allowing the city to sweep in through
21 serve an unbridled unbounded discretion any speech and
22 belief that they want to, which is how it was applied.

23 These things that the city has done violate the
24 First Amendment. And we have -- plaintiffs have stated a
10:16:39 25 plausible claim and each of their claims just to highlight a

1 couple of our claims. This is clear content and viewpoint
2 based discrimination the Supreme Court has been very clear
3 that the-- that a city and a government cannot create a law
4 that distinguishes between messages and they can't create a
10:16:57 5 law that distinguishes between speakers, and they can't
6 create a law that is aimed at particular content, a law
7 that's created because of disagreement with a message, which
8 is exactly what happened here. City officials, starting
9 with the mayor on down, didn't like what Tennes said about
10:17:13 10 his Catholic faith. And all we have here is a Catholic
11 stating his Catholic faith and exercising it on his own farm
12 -- or his intent to exercise it on his own farm, and the
13 city didn't like that, so they created this new policy.
14 They then applied that policy only to him. So as applied,
10:17:30 15 it is content and viewpoint based.

16 The city tries to distinguish that in their motion
17 by arguing that somehow Supreme Court cases have held that
18 conduct regulations that are facially conduct based can
19 regulate speech, that is not what the Court has said.

10:17:48 20 Hurley is a prime example.

21 THE COURT: Say again, I'm sorry.

22 MS. ANDERSON: Hurley is a prime example, because
23 Hurley involved an anti-discrimination law that was content
24 and viewpoint neutral on its face, and the Court said those
10:18:00 25 are legal laws, but you cannot peculiarly apply them to

1 speech, and when you do so, that violates the First
2 Amendment. And so that is what is happening here. Even
3 though the law may be in part facially neutral, it's being
4 applied in a way that is not facially neutral.

10:18:19 5 THE COURT: How would you distinguish this case
6 from Rumsfeld?

7 MS. ANDERSON: Rumsfeld involved access to a room,
8 so it was a conduct regulation being applied to conduct, and
9 that is distinguishable. Here we have a conduct regulation
10:18:34 10 being applied to speech. Rumsfeld and some of the cases
11 they cite, the advertising case Giboney, there is a small
12 recognition in the Supreme Court that there is a small set
13 of circumstances in cases where there is some speech
14 involved that actually creates the conduct. So for instance
10:18:55 15 in Giboney, which counsel cites, the it was people who were
16 protesting which normally be protected, but they were using
17 that protest to actually block a business from being able to
18 operate, and so the Court said that even though there is
19 some speech involved, that speech is just commencing the
10:19:11 20 illegal conduct of blocking that business. Similarly, there
21 have been cases where people were allowed to protest, but
22 they weren't allowed to block a city street. So in some
23 limited circumstances, the Court has recognized that
24 speech-- that commences illegal conduct doesn't protect that
10:19:27 25 legal conduct -- or that illegal conduct. But here, we

1 don't have any illegal conduct and we have only speech. So
2 it's different than Rumsfeld in those cases.

3 THE COURT: It wasn't illegal for the university to
4 bar the military recruiters until the Solomon Amendment,
10:19:44 5 right?

6 MS. ANDERSON: Indeed, but the key in Rumsfeld is
7 the fact that any amount of speech that's involved, which is
8 very minimal, it was sending an email, is just commencing
9 the legal conduct, the regulable conduct.

10:19:58 10 THE COURT: But Mr. Bogren, of course, points out
11 that the Supreme Court in the Rumsfeld case indicated that
12 the Solomon Amendment regulated conduct and not speech,
13 correct?

14 MS. ANDERSON: I believe that's true.

10:20:12 15 THE COURT: Okay. So their position here is that
16 their ordinance and the guidelines for the farmer's market
17 regulate conduct, not speech. And I'm help me-- help me
18 understand the difference between Solomon Amendment
19 requiring universities to allow military recruiters on and
10:20:43 20 the Court's conclusion that that's regulating conduct and
21 not speech, because obviously the universities were taking
22 the First Amendment or taking the position through their
23 First Amendment Right to say they didn't want military
24 recruiters on the property, but yet Solomon Amendment forced
10:21:01 25 them do it and to make sure they got federal money

1 continuing to flow and the Court ruled that the Solomon
2 Amendment regulated conduct. What I'm exploring here is
3 what is the difference between the ordinance and the Solomon
4 Amendment?

10:21:24

5 MS. ANDERSON: I think there are two differences.
6 There is an as applied difference and a facial difference.
7 The as applied difference in Rumsfeld, the Solomon Amendment
8 was regulating conduct. The conduct of providing equal
9 access to an empty room for the recruiters to speak to
10 college students, whereas here, this is-- the policy is
11 being applied to a Facebook post, which the Supreme Court in
12 Packingham just announced that use of social media is
13 protected by the First Amendment, it's also he's saying
14 words, he is writing words. To be on all fours with our
15 case, Rumsfeld would have to be a situation where the school
16 was punished for announcing their opposition to the don't
17 ask, don't tell policy, which is what they were opposing,
18 and on that basis the Court-- or the government started
19 trying to take action against them. That would be akin to
20 our case. All our client has done is announced his beliefs
21 and his view on that, which is content viewpoint based.

10:22:15

10:22:33

22 On the facial piece of it, the city argues that the
23 policy is facially neutral, but it is only facially neutral
24 in part. It does contain two express speech regulations,
25 one in the harassment policy that regulates communications,

1 and one of the ordinance requiring or banning speech that
2 would make somebody feel objected to, unwelcome,
3 unacceptable, or undesirable. And that kind of speech
4 regulation to try to stop speech that someone would find
10:22:51 5 offensive is not Constitutional and the Supreme Court just
6 wrote on that in Tam saying that those kinds of policies are
7 really just happy talk policies, and that when you're trying
8 to regulate a fence, which this is on its face, that is
9 viewpoint based discrimination against speech, and it cannot
10:23:12 10 stand. So the policy is both facially problematic under
11 content and viewpoint based analysis in that part, and then
12 as to just the ban on discrimination in the statute, that
13 has been applied to speech and is unconstitutional under
14 Hurley.

10:23:28 15 The city also tries to argue that somehow what
16 Tennes has said is commercial speech, it's not commercial
17 speech, that's a very narrow category of speech that where a
18 person is actually proposing a particular-- a particular
19 business dealing, which Tennes was not, he was also speaking
10:23:46 20 about his religious beliefs and political issues, which
21 again Tam speaks to, but when you have that combination,
22 it's not commercial speech, and Tam and R.A.V., which
23 counsel quoted, also make clear that even commercial speech
24 can't be subject to viewpoint based laws, and this is
10:24:05 25 viewpoint based, because it's telling Tennes that he cannot

1 speak about something on a particular viewpoint, something
2 that is negative, something that speaks -- that could offend
3 somebody based on their sexual orientation. It's also what
4 the-- and sort of hitting some of our claims and why we have
10:24:24 5 plausibly pled them based on the motion to dismiss
6 standards, in speech retaliation, the path that we see the
7 city taking was clear retaliation against speech. They took
8 an action against protected speech, the Facebook post speech
9 about religious beliefs, and they took adverse action in
10:24:46 10 removing him from the market, which would make a person of
11 ordinary firmness want to stop continuing to speak about
12 their beliefs. And there is a causal connection between
13 those two things, which the courts -- the Sixth Circuit in
14 Holzemer, which involved a license for a buggy to operate in
10:25:03 15 a small section of the city, that case lays out this test
16 and talks about that causal connection need only be in part
17 because of the speech. And we can see from this pathway the
18 way that the facts happened that the Facebook post happened
19 and then the policy happens and he is excluded with the link
10:25:24 20 to the Facebook post actually attached.

21 THE COURT: What impact did the events in August
22 have on, from your view, on the speech retaliation claim?

23 MS. ANDERSON: It's an entire path that shows it's
24 a history of asking him to leave the market because of his
10:25:43 25 speech. And Holzemer had a similar path. There was a long

1 back and forth about whether this buggy company owner could
2 operate his business in a small section of the city. And
3 the speech involved there was very minimal. All he had done
4 was speak to another city official saying he didn't think he
10:26:01 5 was being treated fairly and that caused a whole series of
6 actions that retaliatory against him including ultimately
7 removing his licenses for being able to operate in that
8 area. So everything from August forward shows the city's
9 intent and their concern about his speech and his beliefs,
10:26:18 10 because that's what keeps coming up and coming up, and is
11 all that Tennes has done.

12 So for the purposes here, plaintiffs need only
13 plead the fact sufficient to show prima fascia case, the
14 city would have to come back and show they had taken that
10:26:35 15 action for some other reason. They have introduced no facts
16 into the record on this motion. They have purely made of a
17 facial attack on the complaint, and so the complaint stands
18 and we have pled what we needed to to state that plausible
19 claim.

10:26:48 20 Similarly what the city has done is created an
21 unconstitutional condition on access to the market. They
22 have said that a person cannot access the market if they
23 speak about these religious beliefs because they have thrown
24 them out of the market for speaking about his religious
10:27:06 25 beliefs. And any kind of condition like that where the city

1 is trying to indirectly force somebody to act in a certain
2 way that they can't directly require where constitutional
3 rights are being given up that's unconstitutional under
4 those doctrine.

10:27:22

5 And I think it's important for the Court to
6 recognize the city's lack of interest here. What the city
7 is trying to do is say they have an interest in stopping
8 people from discriminating. Well, on one hand they say
9 this. Well, Tennes hasn't discriminated against anyone.

10:27:41

10 The record shows in the pleading and in this case that he
11 has served everyone from every background. He cannot take
12 part in a particular event, a sacramental ceremony on his
13 own farm, and that is different than discriminating against
14 an entire class of people. Furthermore, there is nothing

10:27:59

15 illegal going on here, so if the city's interest is stopping
16 illegal activity, they have admitted that that's not the
17 case here. If they are interest is somehow providing access
18 to their citizens at the market, again, they have admitted
19 that he serves everyone in the market and there is no

10:28:17

20 problem there. Today the city has suggested that their
21 interest is related to their property, that the city somehow
22 doesn't have to give access to city property or public
23 benefits because they don't agree with his views. That is
24 completely unconstitutional under the Unconstitutional

10:28:39

25 Conditions Doctrine. A city is not a private actor. While

1 in some circumstances, not this one, they might act with
2 some more leeway on what they can do as a business entity,
3 the government has never given just carte blanche to decide
4 who they want to do business with based on whether they
10:28:55 5 agree with their views. And that is what is happening here,
6 and it wouldn't take much to think about the consequences of
7 that. Cities control so many areas of life, all of the
8 business licenses, permits to use public parks, access to
9 water, sewer, garbage, police, fire protection, so under the
10:29:13 10 city's rule that they are promoting to this Court, they
11 could remove any of those benefits from anybody that they
12 don't agree with. So any church that believes that marriage
13 is between a man and woman can no longer have a permit to
14 use the public parks. They can't -- That means they
10:29:29 15 couldn't do public or their picnics over the summer in the
16 parks, and even I would think ministries that perform
17 service in the park, sandwich ministries and things that
18 have to be permitted to do that.

19 THE COURT: Did you say sandwich?

10:29:44 20 MS. ANDERSON: Yes. I'm thinking like sandwich
21 ministries. People who hand out--

22 THE COURT: Help me with that, I'm unfamiliar with
23 that term.

24 MS. ANDERSON: Well, I'm thinking of ministries
10:29:52 25 where they hand out sandwiches to homeless people in the

1 park, sir. Any kind of ministry that would use public
2 property could then, under the city's rule, be told you
3 can't use the public property, and that can have a very bad
4 effect on people and on city residents. And it just creates
10:30:10 5 an unbounded policy where political winds change, viewpoints
6 change, and the city that can control the views of the
7 people is exactly the kind of thing that the Supreme Court
8 has been concerned about and why they have been so
9 protective of speech and you see that in cases like R.A.V.,
10:30:28 10 and in the Sixth Circuit and Bible Believers where the Court
11 is talking about how it's so important to protect speech and
12 the ability of people to live according to their beliefs,
13 because the flip side of that is giving the government so
14 much power they can relegate whole groups to the edges of
10:30:44 15 society, and that's really the principle that the city is
16 wanting to pursue here is that they somehow can act as a
17 private actor and exclude anyone they don't like or agree
18 with, and that's what they have tried to do to Steve Tennes.

19 As far as the free exercise claim that counsel
10:31:03 20 brought up, your Honor, I think that you're entirely correct
21 this is very much like Lacume (phonetic sp.). in Lacume you
22 had a very similar background of city officials who didn't
23 like a particular practice by the Santerian church, animal
24 sacrifice, and that was in the record before the policies
10:31:21 25 were passed, saying that was -- there was deep concern about

1 those practices, and then the policy came up to stop those
2 practices in particular. The Court there was concerned
3 about the idea of religious gerrymander to reach out to
4 particular religious practice and punish it, and the city is
10:31:42 5 doing that here by reaching outside of their jurisdiction to
6 reach him and his religious belief on his own farm.

7 THE COURT: Aren't there some Sixth Circuit cases
8 involving zoning?

9 MS. ANDERSON: Yes.

10:31:54 10 THE COURT: Vis-a-vis Muslim congregations on the
11 east side of the state. Something just clicked in my mind
12 as you were talking about that, there was a Sixth Circuit
13 case recently in which the local unit of the government, I
14 believe it was a township, was zoning out a Muslim
10:32:24 15 congregation from building their building and-- It's not
16 clicking with you?

17 MS. ANDERSON: I don't remember that.

18 THE COURT: Not clicking with you. It's not
19 clicking in any great detail with me either.

10:32:34 20 So what impact, if any, on your free exercise claim
21 does Trinity Lutheran have, and secondly, is there any piece
22 of the Masterpiece K case that implicates your-- as you
23 understand the way the issues are framed in Masterpiece case
24 before the Supreme Court, is there any implication for that
10:33:04 25 case as well?

1 MS. ANDERSON: I'll take Masterpiece first.

2 THE COURT: Okay.

3 MS. ANDERSON: I-- something could be said by the
4 Court that could impact this case, but the cases aren't
10:33:15 5 really aligned at this point. That case involves a creative
6 professional and is more interested in the free speech
7 applications to that business. So in part it depends on how
8 broadly the Court were to rule, but I don't think there
9 would be any reason for this Court to necessarily wait or
10:33:34 10 look to that ruling if that is what the Court is asking,
11 because this is a clear case of targeting and targeting
12 against pure speech which puts it in a much different
13 category than Masterpiece.

14 As to Trinity, I think Trinity helps our case. It
10:33:48 15 made clear that a government entity cannot exclude somebody
16 from a public benefit simply because they are Christian in
17 that case, and that's what is going on here. All he has
18 done is state a Catholic belief that basically says I'm
19 Catholic and I'm going to act in accord with the Catholic
10:34:06 20 church, and so they are trying to exclude him for being
21 Catholic for voicing that belief. And that very much in
22 line with Trinity, and the Court there said that cities
23 can't-- well, governments can't do that.

24 THE COURT: Would it be fair to say that that --
10:34:19 25 what you just said is perhaps an expansive view of the

1 holding in Trinity Lutheran? I mean isn't there some
2 language from the legal opinion that it's being Catholic qua
3 Catholic, if you will, that was the problem in that case, as
4 opposed to the more broad proposition that you outlined a
10:34:40 5 moment ago.

6 MS. ANDERSON: Well I-- there is some other
7 language, but I read the case to say that you can't -- I
8 believe it's actually in the language, although I don't have
9 the case right in front of me, that the reason that they
10:34:51 10 were removed from that program was because of their faith
11 and that that's a free exercise problem, it also poses an
12 establishment clause problem, and that is the same kind of
13 thing that's happening here.

14 THE COURT: Okay. Fair enough. Go ahead.

10:35:05 15 MS. ANDERSON: I don't know if your Honor would
16 like me to speak to some of our other claims; I think on
17 establishment clause we have plausibly pled that. The city
18 cannot act in a way that where their primary purpose or
19 effect of the law is hostility towards religion, and they
10:35:23 20 must have a predominantly secular purpose. Here they are
21 hiding behind what they say is a neutral law, but isn't on
22 certain areas. But the more to the point is created because
23 of Tennes' speech about his beliefs and it's applied to that
24 and that alone. And in establishment clause arena, the
10:35:46 25 courts are even quicker to look to the history behind

1 those-- the law, and that history here shows that the only
2 reason the policy was passed was because of Tennes' Facebook
3 post about his beliefs.

4 We do have facial claims that I think have been
10:36:02 5 properly briefed. We sort of touched on those areas of the
6 law that are both overbroad, vague, and cause an unbridled
7 discretion problem because of the language harassment,
8 objected to, unwelcome, unacceptable, undesirable, as well
9 as the general business practices language are so broad that
10:36:21 10 the city is just given full discretion to apply them as they
11 see fit, which is what happened and was the reason, I think,
12 that they use the general business practices in their policy
13 so they could reach outside and apply it in a broader sense.

14 THE COURT: Help me-- help me a little bit with
10:36:41 15 your home rule claim. I don't have too much occasion to tip
16 toe through the home rule city's act, so why don't you help
17 me with that one a little bit.

18 MS. ANDERSON: The idea behind our home rule
19 argument is that even state law says that a city cannot
10:36:57 20 reach outside of its boundaries to enforce its laws, and
21 that's what they are trying to do indirectly, it's through
22 something similar to an unconstitutional conditions
23 argument, they have tried to indirectly force him to stop
24 speaking about his beliefs and in the future to violate his
10:37:14 25 conscience in order to continue at the market, which is the

1 largest market he participates in, frankly, so it provides a
2 lot of pressure on him to do that. And under the home rule,
3 a city can't reach outside of their jurisdiction. I think
4 the City of Riverview case is helpful in that regard. It
10:37:30 5 involved a blasting operation just outside of the city, and
6 the city ordinance said that they had to have a permit to
7 blast both in the city and just outside of the city and the
8 Court said that just outside of the city kind of regulation
9 was a problem.

10:37:46 10 THE COURT: Well, that was the implication however
11 of a criminal ordinance, correct?

12 MS. ANDERSON: It was.

13 THE COURT: Criminal, so that's distinguishable in
14 that regard right off the top, correct?

10:37:56 15 MS. ANDERSON: Well, I would-- we think it's
16 helpful with the idea that it explains how the home rule
17 works and that you can't act outside of your jurisdiction
18 and that is the point we think that case is helpful for.

19 THE COURT: All right. Thank you.

10:38:12 20 Do you take a position that the Michigan State
21 Constitutional provision is broader than the First
22 Amendment?

23 MS. ANDERSON: Yes.

24 THE COURT: Why don't you explore that for me for a
10:38:22 25 minute.

1 MS. ANDERSON: Yes I think it's cases like Champion
2 and Reed apply the pre-Smith test and say that if there was
3 a substantial burden on a sincerely held religious belief,
4 then strict scrutiny is applied, and they don't look to the
10:38:40 5 whether the law is neutral or generally applicable. So our
6 understanding is that the free exercise clause -- the state
7 free exercise clause is broader because there is this burden
8 on his religious beliefs, it violates that clause as well,
9 but under Lacume, it may does meet even the less strict
10:38:58 10 standards of the federal free exercise, so.

11 THE COURT: Well, it's not surprising that state
12 Constitutional provision which was created in 1963 would be
13 pre Smith, right?

14 MS. ANDERSON: But the--

10:39:10 15 THE COURT: Just by chronology.

16 MS. ANDERSON: But the case of Champion and Reed, I
17 believe, came after Smith and applied the pre Smith
18 standard.

19 THE COURT: Well, you're right.

10:39:18 20 MS. ANDERSON: Because a number of cases after
21 Smith then you have a mix in both state law and circuits and
22 stuff on how to apply those things.

23 THE COURT: All right. Thank you.

24 MS. ANDERSON: Thank you, your Honor.

10:39:28 25 THE COURT: Thank you, counsel. I'm going to let

1 Mr. Bogren weigh in again, and I'll call on you too if you
2 want.

3 MS. ANDERSON: All right.

4 MR. BOGREN: Your Honor, I honestly feel like we
10:39:40 5 are speaking two different languages, and one of them isn't
6 English. This is from the letter that the city sent to Mr.
7 Tennes that plaintiff attached to their complaint, "Your
8 Facebook post dated December 12, 2016, outlines the business
9 practice that would be considered a violation of the City of
10:40:03 10 East Lansing civil rights ordinances and our public policy
11 against discrimination." The plaintiff absolutely refuses
12 to even acknowledge the fact that the city is trying to
13 address discriminatory actions. Absolutely refuses to even
14 acknowledge it, your Honor. And repeatedly claims that
10:40:27 15 Mr. Tennes doesn't discriminate against anyone at all ever,
16 and yet throughout their complaint they explicitly allege
17 that he refuses to hold open his business to same sex
18 couples. Your Honor, I honestly, there is no possible way
19 that a speaker of the English language can reach the
10:40:57 20 conclusion that Mr. Tennes doesn't discriminate. It's just
21 not possible. They acknowledge it in their complaint, but
22 we get here today, and in all of their papers, they
23 repeatedly say he has never discriminated once, never, ever.
24 And he dismisses the comparisons to what they call racists
10:41:17 25 and radical emoms as offensive, because he doesn't

1 discriminate on the basis of a class of individuals. Of
2 course, he does. He discriminates against same sex couples.
3 The city under Hurley is entitled to prohibit that action.
4 And the city is entitled to say we choose not a to do
10:41:45 5 business with you, Mr. Tennes, because you discriminate
6 against a protected class under our ordinance. The
7 plaintiff absolutely refuses to make the comparison that we
8 made. What stops the plaintiffs' argument from applying to
9 someone who says my religion prohibits me from opening my
10:42:10 10 store or my business to interracial couples. And they say
11 whoa, yeah, but that's illegal. Well, exact same set of
12 circumstances, your Honor. Instead of saying--

13 THE COURT: Well, the source of that, of course, is
14 federal law, correct?

10:42:30 15 MR. BOGREN: But if the city took action, it won't
16 be based on federal law, it would be based on the city's
17 ordinance. The ordinance doesn't say, if you violate
18 federal law, then we will take action. The ordinance says,
19 we have protected classes of individuals, among them are
10:42:51 20 sexual orientation. But also among them are race, color,
21 creed, and the others. So if a business said my religious
22 beliefs don't allow me to serve inter-racial couples under
23 the city's -- or under the plaintiffs' argument, the city
24 couldn't-- the city couldn't take any action. No, happened
10:43:14 25 outside of the city. You got to give us a spot in your

1 farmer's market. Your Honor, Hurley says we can choose who
2 we protect. We chose to protect sexual orientation. The
3 plaintiffs' can't come in now and say oh, this has nothing
4 to do with discrimination, this is all about speech, this is
10:43:36 5 all about religion. No, it's not. It's about the effects
6 of the plaintiffs' subjective motivation which results in an
7 objective action of discrimination.

8 THE COURT: How many people have had action taken
9 against them as a result of the operation of the ordinance?

10:43:58 10 MR. BOGREN: As far as I know, Mr. Tennes is the
11 only one who has announced that he is willing to
12 discriminate, he is the only one that the city has as you
13 used the ordinance, to not allow him to use the farmer's
14 market.

10:44:11 15 THE COURT: And the amended guidelines for the
16 farmer's market require the applicant to sign off that they
17 are going to be compliance with the ordinance, correct.

18 MR. BOGREN: Correct.

19 THE COURT: Has the city required that of any
10:44:24 20 vendor that does business with the city.

21 MR. BOGREN: You mean other than farmer's market.

22 THE COURT: Let's talk with a supplier of materials
23 for city hall.

24 MR. BOGREN: Your Honor, my understanding is that
10:44:37 25 there is a standard clause in the city contracts that

1 require compliance with the city's anti-discrimination
2 policies.

3 THE COURT: Okay.

4 MR. BOGREN: Which as a standard clause in
10:44:52 5 virtually every governmental contract. Every United States
6 government contract has a similar clause. So I just, your
7 Honor again, I feel like we are not speaking the same
8 language, and I know it doesn't fit the plaintiffs'--

9 THE COURT: That's not unusual for civil cases, Mr.
10:45:12 10 Bogren.

11 MR. BOGREN: Probably not, your Honor.

12 THE COURT: The plaintiffs' lawyer has one point of
13 view and the defense lawyer has another point of view.

14 MR. BOGREN: That's fair.

10:45:21 15 Your Honor, I'm sorry--

16 THE COURT: I interrupted you. Go ahead.

17 MR. BOGREN: No, I was going to say Trinity
18 Lutheran, I think we addressed that in our brief. And I
19 think the key point in Trinity Lutheran was the Supreme
10:45:38 20 Court's statement the message here is clear churches need
21 not apply. Because that was just the overriding prohibition
22 is if you're religious organization, you are not eligible to
23 even apply for this benefit. Here the message isn't
24 Catholics need not apply, the message is discriminators need
10:46:01 25 not apply. And your Honor, that really gets to the heart of

1 the matter, I guess, because, again there is nothing in this
2 record other than the plaintiffs' subjective belief that his
3 religion played any role in this. He could renounce his
4 religion today and say I'm an atheist, but I'm still not
10:46:28 5 going to serve same sex couples, and he would still be
6 banned from the market. This is not about the religion.
7 This is not about speech.

8 And your Honor, the case on the military
9 recruiters, I think the example they gave in that case in
10:46:53 10 Justice Roberts' lead opinion is more telling than the
11 actual holding of the case, which is a sign that says
12 "whites only" isn't going to be analyzed under a free speech
13 claim, it's going to be analyzed as a violation of a anti-
14 discrimination law. And for the plaintiff to maintain that
10:47:17 15 the government can't regulate a content of speech under,
16 essentially saying under any circumstances just flat out
17 wrong. And the Supreme Court has repeatedly held that, that
18 if you use speech as a means of conveying your
19 discriminatory action, of course, the government can
10:47:40 20 regulate that speech. Because it's incident to the action
21 of discrimination. That is the issue that again, the
22 plaintiff just refuses to address. And there is no evidence
23 in this record-- in the plaintiffs' own factual allegations,
24 there is no evidence taking all of their factual allegations
10:48:07 25 as true, they have got nothing to support that. All they

1 have got is my belief that it's because of my religion.

2 That is it. And that's not enough, your Honor.

3 THE COURT: How do you read Judge Alito, now
4 Justice Alito's opinion in the circuit in the Sacks case on
10:48:28 5 the overbreadth challenge.

6 MR. BOGREN: If it's the case that I'm thinking of,
7 your Honor, I think that it-- I think it-- let me say it
8 this way: If the city had taken action because of the sign
9 that you previously discussed, I think that the plaintiff
10:49:00 10 would at least have a colorable overbreadth claim, because I
11 think it would require some record development on that
12 issue, and that is the way -- again, if it's the case I'm
13 thinking of where he collects the various cases and
14 discusses them in the anti-discrimination context, then I
10:49:27 15 think that that would be a colorable claim. I think it
16 would avoid a Rule 12 motion. But here that is not what
17 happened. Here everything in the complaint and everything
18 that has been provided to the Court makes it undeniable that
19 the city's concern and what the city was addressing was
10:49:50 20 discrimination. And the plaintiff made clear that his
21 general business practice was to engage in discrimination.
22 So I don't think that it has application here, your Honor,
23 because as the other cases say, when the plaintiffs' conduct
24 is squarely proscribed, the plaintiff does not have the
10:50:14 25 ability to go outside of his own conduct and say well, yes,

1 but other conduct would have been.

2 THE COURT: But of course the general practice--
3 business practice language wasn't adopted until after
4 Mr. Tennes spoke up, right? I mean, that it seems to me
10:50:33 5 that's part of the nature of the allegation of the plaintiff
6 here, that the chronology here could lead to certain
7 conclusions, which are-- which are in opposition to what the
8 city's position is.

9 MR. BOGREN: I mean, your Honor, look the city took
10:50:57 10 no action after August 29th when there was a discussion with
11 Diana Tennes in which she said we are not doing weddings
12 anymore, so the city took no action at that point. Now, had
13 Mr. Tennes not announced to the world that Country Mills was
14 going to again start discriminating against same sex
10:51:22 15 couples, would the city have taken any action? Probably
16 not, because at that point, there was no-- there was no
17 issue to address. They had no knowledge that somebody
18 intended to engage in that kind of conduct. If he was
19 engaging in that conduct and someone brought that to the
10:51:39 20 city's attention, would the city have then taken action?
21 They probably would have, but I can't really speak to that.

22 But again, your Honor, the plaintiff-- if the
23 plaintiffs' view is accepted, if they have a viable claim,
24 then they have just provided carte blanche to everybody to
10:52:03 25 discriminate by simply announcing they are going to

1 discriminate. Because then the action that's taken isn't
2 because of the discrimination, it's because of their speech.
3 That is the problem with the plaintiffs' position here. It
4 completely destroys every anti-discrimination law, because
10:52:29 5 according to the plaintiff, every anti-discrimination law is
6 content based speech regulation. Well, yeah, it is. And
7 it's constitutional too. And that's what the Supreme Court
8 has repeatedly said, as well as the fact that the Supreme
9 Court has repeatedly said there is no constitutionally
10:52:47 10 protected right to discriminate. That's what the United
11 States Jaycees case said, which the plaintiff has never
12 addressed. This is not about speech and it's not about
13 religion. It's about discrimination.

14 THE COURT: Thank you, counsel.

10:53:04 15 Ms. Anderson, go ahead.

16 MS. ANDERSON: Counsel keeps saying this is about
17 discrimination and about conduct, but it's not. When Tennes
18 stopped booking any weddings, so he took conduct action
19 entirely off the table, the mayor still pushed for his
10:53:24 20 expulsion from the market. That statement from the mayor,
21 "I'm not sure whether not hosting any weddings actually
22 addresses the issue, which is a public statement that their
23 religion does not permit them to allow same sex couples to
24 be married at their farm."

10:53:37 25 THE COURT: Refresh my memory, what is the timing

1 of that statement?

2 MS. ANDERSON: That statement came right after
3 Tennes told the -- or Country Mill told the city officials
4 they were not going to book any weddings. And it was in
10:53:47 5 response to that information. They are not booking any
6 weddings, which he says doesn't actually address the issue.
7 And then he says is the issue is their public statement of
8 their religion.

9 THE COURT: To be fair, apparently he says I'm not
10:53:59 10 sure that addresses the issue, right?

11 MS. ANDERSON: To be fair. But he is continuing to
12 push for their expulsion from the market after they stopped
13 booking weddings altogether when the conduct is entirely off
14 the table. So this was never about their conduct, it was
10:54:13 15 always about their speech. And this case, Tennes is not
16 discriminating against anyone. He is certainly, as the city
17 clearly agrees, is not discriminating against anybody in the
18 market he has served everyone in the market. And he is not
19 discriminating against anyone on his farm. There is a
10:54:32 20 difference between an example like counsel just raised where
21 a farm is saying they won't serve or a business will say
22 they are not going to serve an entire class of people
23 because of their protected class. And a person like Tennes
24 saying I serve everyone, but I can't participate in every
10:54:51 25 event, and in this case, I can't promote and speak about

1 every event, because this violates my core beliefs about
2 this particular sacramental ceremony. And there is a
3 difference there.

4 Touching back just briefly on Rumsfeld. There the
10:55:12 5 conduct that was being regulated was-- that statute had the
6 ability to prescribe that, and it was access to an empty
7 room. It was to the extent--

8 THE COURT: What is the difference between an empty
9 room and piece of the park to sell your fruit?

10:55:28 10 MS. ANDERSON: Well, because what they were trying
11 to regulate with that statute was the conduct of providing
12 that room. Here the policy is regulating Steve's ability to
13 talk about his religious beliefs on Facebook. Removing him
14 from access to the park is the punishment, not what they are
10:55:43 15 trying to stop him from doing or force him to do.

16 THE COURT: Okay. I understand your argument. Go
17 ahead.

18 MS. ANDERSON: Okay. Furthermore, to the extent
19 there was any speech involved in Rumsfeld, it was speech
10:55:56 20 incidental to that prescribable conduct. So sending an
21 email saying when the meeting actually was going to occur
22 wasn't something that the school actually objected to that
23 -- what was the content of that email, but it was only able
24 to be sent because it actually commenced the regulable
10:56:14 25 conduct of providing that room. Here what the city wants to

1 do is stop Tennes from being able to speak about his
2 religious beliefs or they want to tell him, you can't come
3 to our farmer's market and access our property if you are
4 going to speak about your religious beliefs outside of the
10:56:27 5 market. And what he believes about marriage has absolutely
6 nothing to do with selling apples at the market.

7 The city continues to go back to contracting cases,
8 but those cases are inapplicable, because in some
9 circumstances a city is given more leeway in their
10:56:43 10 contracting when they are actually contracting like a
11 business entity, buying goods and services. Some of the
12 cases the city cite dealt with the sale of surplus military
13 vehicles to private parties, where the government is
14 actually engaged in a commercial transaction with an
10:56:57 15 individual. That is not like here.

16 Here the city is licensing and they actually have
17 people sign a licensing agreement, they are licensing them
18 to use this portion of the public park to sell their apples
19 as part of this market. And that's much more like a
10:57:12 20 business license, like the buggy case, Holzemer from the
21 Sixth Circuit where the city was licensing them to use a
22 small portion of the city's streets for their company, those
23 kinds of licenses. And in the business license world, a
24 city cannot place a restriction on any business license
10:57:31 25 about what a person can say and do outside of the market or

1 outside of the city. And I think that Bigelow is somewhat
2 helpful here. We are cited it in our briefing, but it's a
3 case that involved advertising in Virginia by a New York
4 entity to do abortions in New York, that were illegal in
10:57:48 5 Virginia, but legal in New York. And in that case, the
6 Supreme Court said even if the conduct is illegal in
7 Virginia, they can come and advertise for it here, which our
8 client isn't even doing that. He is talking about what he
9 is going to do on his farm outside of the city, and yet they
10:58:04 10 still want to stop him from doing that.

11 The city has absolutely no interest in what he does
12 on his farm. He is not discriminating against anyone. He
13 is serving everyone. He just wants to come to the market
14 and sell his apples while he still can live according to his
10:58:22 15 First Amendment rights on his own farm. And that's what is
16 at stake here. And that's why we are asking for the motion
17 to dismiss to be denied, and we are asking for the
18 preliminary injunction.

19 I don't know if your Honor wants me to separately
10:58:36 20 discuss the preliminary injunction.

21 THE COURT: We will get to that in a moment. I
22 allow the lawyers to exhaust themselves on each motion, and
23 then we move to the next one.

24 MS. ANDERSON: All right. Then I think I am.

10:58:49 25 THE COURT: Mr. Bogren in his last argument asserts

1 that your position is that your client didn't discriminate.

2 MS. ANDERSON: Yes.

3 THE COURT: That's true?

4 MS. ANDERSON: That is our position.

10:59:01 5 THE COURT: That's your position?

6 MS. ANDERSON: Yes.

7 THE COURT: How do you read the incident in which
8 apparently two females approached your client about getting
9 married on his property in 2014 and where your client said
10 no.

10:59:19

11 MS. ANDERSON: Uh-huh.

12 THE COURT: And referred them to another
13 individual-- another farmer apparently who was willing to
14 accommodate them. What is the impact of that incident on
15 this case?

10:59:32

16 MS. ANDERSON: It has no impact on this case,
17 because it wasn't the reason why he was removed from the
18 market. The city never cites that as a basis for removing
19 him from the market. But it's also, to your Honor's
20 question, not discrimination. He has served people from
21 varied backgrounds, employed people from varied backgrounds,
22 including from the LGBT community. He is not saying he
23 won't serve an entire class of people. He is saying he
24 cannot participate in a particular event, and that is not
25 discrimination. He, in that case, referred the couple to

11:00:02

1 another farm and they were married, but that is not
2 discrimination. It's also something that the city has no
3 interest in. They didn't cite it as a reason for trying to
4 exclude him, and they can't, because it's something that
11:00:16 5 happened outside of the city unrelated to the market, and
6 they have to show some kind of a government interest for
7 what they want to do that's related to the market, and they
8 can't do that. Because they have violated his
9 constitutional rights, strict scrutiny does apply, and they
11:00:31 10 haven't provided really any compelling interest related to
11 the market. They haven't even provided a rationale reason
12 honestly for -- related to the market, because again, his
13 beliefs have nothing to do with what he is doing at the
14 market.

11:00:45 15 THE COURT: Thank you, counsel.

16 MS. ANDERSON: Thank you, your Honor.

17 THE COURT: Mr. Bogren you get the last word, sir,
18 if you want to take it.

19 MR. BOGREN: I would just be repeating myself at
11:00:56 20 this point, your Honor.

21 THE COURT: All right. That's fine.

22 Okay. In light of that, let's move to the motion
23 for preliminary injunction.

24 Go ahead, Ms. Anderson.

11:01:15 25 Obviously one or more of your claims is going to

1 have to survive the motion to dismiss, right?

2 MS. ANDERSON: Right. Your Honor, we would hope
3 that they will. But they all will.

4 THE COURT: We will start from there. Go ahead.

11:01:26 5 MS. ANDERSON: Plaintiffs Steve Tennes and Country
6 Mill are seeking a preliminary injunction so they can return
7 to the markets to continue to serve their customers after
8 the city created this new policy solely to target them.
9 Your Honor, honestly we have made most of our arguments in
11:01:40 10 discussion of the motion to dismiss applicable to the motion
11 for preliminary injunction as well. For the same reasons
12 that we win the motion to dismiss, we also prevail and show
13 a likelihood of success on the merits of the preliminary
14 injunction. I would note to the Court that there is no fact
11:01:57 15 dispute in that motion. The city has agreed with all of our
16 facts, or at least conceded to them, for the purposes of
17 that motion, although the facts listed in the complaint, and
18 the emails as well.

19 For the motion for preliminary injunction, we made
11:02:12 20 the claims under content and viewpoint based discrimination,
21 unbridled discretion, unconstitutional conditions, speech
22 retaliation, and free exercise, and the home rule, so those
23 are the only arguments that are issue on that particular
24 motion. I'm happy to address any of those again or any
11:02:30 25 questions your Honor has on them particular to the motion

1 for preliminary injunction, but I don't want to waste the
2 Court's time by repeating the same arguments I just made.

3 THE COURT: Fair enough.

4 Mr. Bogren, go ahead, sir.

11:02:42 5 MR. BOGREN: Thank you, your Honor.

6 I want to -- Well, let me start by saying this:

7 As we stated in our papers, the likelihood of success on the
8 merits is a dispositive issue under the Sixth Circuit
9 precedent, so that is really the only issue that the, Court
11:03:04 10 I believe, will have to address. Even if the plaintiffs'
11 complaint survives a Rule 12 motion, I don't think it
12 automatically means they are likely to succeed on the
13 merits. For the reasons that we have outlined in our motion
14 to dismiss, we believe that they are not likely to succeed
11:03:27 15 on the merits.

16 Your Honor, the only other substantive issue I
17 wanted to raise has to do with the timing that Miss Anderson
18 referred to, and I think it is important. And again, this
19 is from both plaintiffs' complaint and the series of emails
11:03:47 20 that were submitted to the Court. Paragraph 120 of the
21 complaint alleges that on August 24, 2016, in response to
22 customer questions Tennes posted on Facebook that due to our
23 personal religious beliefs, he would refer any request to
24 celebrate a same sex ceremony at Country Mill to another
11:04:09 25 orchard nearby. So that's August 24. August 25th started

1 the email from the mayor, we need to find out if the
2 ordinance is implicated. August 27 there is a series of
3 emails, and again, the one that the plaintiffs focus on is
4 the one from the mayor that refers again to the Facebook
11:04:35 5 post, but then says, "Do their religious beliefs permit them
6 to sell apples to same sex couples at the farmer's market?
7 Can they sign an assurance they will provide service to all
8 persons regardless of sexual orientation." August 28th,
9 they actually appear at the market. August 29th is when
11:04:57 10 Mr. McCaffrey has the discussion with Diana Tennes who says
11 that they are not going to be hosting weddings.

12 Now, counsel said that the mayor nevertheless
13 continued in his efforts to ban them from the market.
14 That's not borne out by the record, your Honor. Nothing
11:05:19 15 happened after August 29th until December 12th, which is
16 when Mr. Tennes again posted on Facebook that they were
17 going to start holding weddings, but would refutes same sex
18 couples. So the timing of it is not what the plaintiff
19 suggests it is, and their claim that Mr. Meadows' actions
11:05:48 20 somehow demonstrates animosity toward Mr. Tennes and his
21 religion is just not borne out by the record, number one.
22 Number two, all Mr. Meadows did is ask whether our ordinance
23 is implicated. That's it. He doesn't say we got to stop
24 this guy from being here. So to the extent that the
11:06:10 25 plaintiffs' claims are based on the timing, I would just

1 suggest to the Court that it's not borne out by the record.

2 Beyond that, your Honor, I would just rely on the
3 previous arguments we have made.

4 THE COURT: Thank you, sir.

11:06:25 5 MR. BOGREN: Thank you, your Honor.

6 THE COURT: Miss Anderson?

7 MS. ANDERSON: I do want to respond to that
8 briefly.

9 The record does bear out our time line when you
11:06:33 10 look at the complaint.

11 THE COURT: Well, what specifically Mr. Bogren
12 points out--

13 MS. ANDERSON: Right. Tim McCaffrey--

14 THE COURT: --takes me to August 29th and says at
11:06:45 15 that point that the next important event is December 26th.

16 MS. ANDERSON: Uh-huh.

17 THE COURT: So you disagree with that and is
18 whatever happened between pled?

19 MS. ANDERSON: Well, what I disagree with that is
11:06:59 20 pled is that the assurances that they were going to stop
21 doing-- that they would continue to serve everyone and the
22 information that they were not booking weddings happened
23 before the email from the mayor. The email that counsel
24 referred to wasn't an email that was sent on 29th from Tim
11:07:17 25 McCaffrey to the mayor, I believe his staff, if I am

1 correct, but there was an oral conversation between Diana
2 Tennes and Tim McCaffrey where she told him that
3 information, and that's in our complaint, and that was
4 before the market on the 28th. I believe it was the 27th
11:07:33 5 that they had that conversation. And then there is this
6 email from the mayor that references that information. I'm
7 not sure whether or not hosting any weddings actually
8 addresses the issue. So that is the part of the time line
9 that I just wanted to clarify.

11:07:44 10 THE COURT: All right. Well, all right. But to
11 the extent that the issue of chronology has come up, and I
12 might have started it, from your perspective in terms of
13 what you've pled post August 29th through December 26th,
14 what is there in the complaint regarding events between the
11:08:05 15 city and your client on this issue?

16 MS. ANDERSON: Tennes continued to serve everyone
17 during that time and he attended the market and he thought
18 that the issue was resolved. He found out it was not
19 resolved when he applied for the-- when he didn't get the
11:08:18 20 invitation in 2017 and then applied for the market where he
21 did assure the city he serves everyone, which he does and
22 then received the letter back declining his application. So
23 in the space of time--

24 THE COURT: So the city had -- Do I understand it
11:08:33 25 correctly that the city was not communicating in any way

1 with your client between August 29th and December 26th?

2 MS. ANDERSON: Honestly, I'm not entirely sure if
3 there were any communications in there, but they are not in
4 our complaint.

11:08:52 5 THE COURT: Okay. Fair enough. And then your
6 client didn't get an application-- an application for '17?

7 MS. ANDERSON: Yes.

8 THE COURT: And applied on his own.

9 MS. ANDERSON: Yes. For the prior six years he had
11:09:07 10 received an invitation. Every year after his first year at
11 the market he received an invitation, it was standard for
12 them to do so, and he did not receive the invitation, so
13 then he went and applied himself separately.

14 Just to close out, I want to make clear that what
11:09:23 15 we were asking for is as applied relief primarily on the
16 preliminary injunction, we are asking for the facial relief
17 as to the couple of provisions that we raised, but primarily
18 it's an as applied relief request so that he can go back to
19 the market, which is ongoing and ends at the very end of
11:09:40 20 October, and so for him to be able to get into the market
21 right away and stop the irreparable harm is important.

22 We have shown a likelihood of success on the
23 merits. Certainly that's a slightly different standard than
24 the motion to dismiss standard, but the parties all agree
11:09:57 25 that as soon as we show likelihood of success on the merits

1 of a First Amendment claim then the other three factors are
2 met and the preliminary injunction should issue that was in
3 both of the briefing, and so we submit we have met that
4 standard and we ask the Court to issue our motion for
11:10:12 5 preliminary injunction.

6 THE COURT: All right. Thank you.

7 Mr. Bogren, anything further?

8 MR. BOGREN: No, your Honor.

9 THE COURT: All right. Thank you.

11:10:18 10 Well, I certainly appreciate the quality of the
11 submissions here, the quality of the argument. The Court
12 will get something out as soon as I can.

13 MR. BOGREN: Thank you, your Honor.

14 THE COURT: Thanks very much.

11:10:29 15 MS. ANDERSON: Thank you, your Honor.

16 COURT CLERK: All rise.

17 Court is adjourned.

18 (At 11:10 a.m. proceedings concluded.)
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, Kathleen S. Thomas, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/

Kathleen S. Thomas, CSR-1300, RPR
U.S. District Court Reporter
410 West Michigan
Kalamazoo, Michigan 49007