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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.

* * * *

HEARING on MOTIONS FOR SUMMARY JUDGMENT

* * * *

BEFORE: THE HONORABLE PAUL L. MALONEY
United States District Judge
Kalamazoo, Michigan
April 12, 2019

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APPEARANCES:

APPEARING ON BEHALF OF THE PLAINTIFF:

KATHERINE L. ANDERSON
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MICHAEL S. BOGREN
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950 Trade Centre Way, Suite 310
Kalamazoo, Michigan 49002

1 Kalamazoo, Michigan

2 April 12, 2019

3 at approximately 1:32 p.m.

4 PROCEEDINGS

01:32:47

5 THE COURT: This is File Number 17-487; Country
6 Mills Farm and Stephen Tennes vs. The City of East Lansing.

7 This matter is before the Court on cross motions of the
8 parties for summary judgment.

01:33:03

9 The record should reflect that Attorneys Anderson
10 and Bursch are here on behalf of the plaintiff. Attorney
11 Bogren is here on behalf of the defendant.

12 The Court is ready to proceed. How would you like
13 to proceed? Who wants to go first?

14 MS. ANDERSON: I would be happy to go first.

01:33:16

15 THE COURT: Ms. Anderson, you may proceed.

16 MS. ANDERSON: May it please the Court, when we
17 were here the last time, this Court issued a preliminary
18 injunction, because this Court believed that the City of
19 East Lansing had targeted and retaliated against Steve
01:33:33 20 Tennes for his Catholic beliefs, his Catholic speech, and
21 his Catholic practices. Everything we've learned since that
22 time has confirmed this Court's ruling. Since then, the
23 Supreme Court issued its decision in Masterpiece, and in
24 that case confirmed this Court on the law, that even slight
01:33:47 25 suspicion of hostility is enough to get rid of a rule like

1 the City of East Lansing held.

2 The discovery in the fuller record has confirmed
3 this Court on the facts. Every fact that this Court was
4 concerned about in its original order has been confirmed by
01:34:00 5 the testimony and the evidence in the record. The City of
6 East Lansing, when they learned of Steve's religious
7 beliefs, they pressured him to leave the market. When he
8 took the conduct that they say they are concerned about off
9 the table, when he said he wouldn't do any more weddings,
01:34:14 10 they continued to pressure him to leave the market. And
11 then they created a new policy, they pulled his application
12 from the normal process, and instead of letting the market
13 committee, the committee of farmers that normally review
14 applications, review his application and invite him to the
01:34:28 15 market, the City instructed them that if Steve were to
16 apply, it had to come to the City for the City to review
17 that. The City did review his application and then rejected
18 it, citing only Steve's words about his Catholic faith on
19 Facebook as the sole basis for all of his actions.

01:34:43 20 While excluding Steve from the market for his
21 Catholic faith, the City officials also spoke publicly
22 opposing his beliefs. For instance, the mayor, on his own
23 Facebook page, accused Steve of citing his religious beliefs
24 only to make money, blamed him and ridiculed him for taking
01:35:00 25 his Catholic views and making them not just his views, but

1 the views of his business. Councilwoman Ruth Beier went
2 onto a public debate and called Steve a bigot, she called
3 his religious beliefs ridiculous, horrible, hateful things,
4 and she said that she wanted his beliefs to change. She
01:35:17 5 said this in her deposition testimony and she said it to
6 public citizens that beliefs like Steve's should change, and
7 that with enough government pressure, they would change.

8 Along with this, the City manager echoed some of
9 the beliefs of the council, and the mayor, he also compared
01:35:35 10 Steve's beliefs to those that justified racism at 60 years
11 ago, and he said that even citing the Bible did not make
12 those beliefs right, it didn't make them true, they're
13 wrong, and it's the same thing with Steve's Catholic beliefs
14 that marriage is between a man and woman.

01:35:51 15 This collection of statements with the actions that
16 show unfair treatment violates the Court's precedent laid
17 out in Masterpiece. It violates Lukumi as well, but the
18 Court has made it even more clear now in Masterpiece. In
19 Masterpiece, the Court said that the government is committed
01:36:06 20 to -- they have a high duty, a solemn duty to treat religion
21 with neutrality, that even subtle departures are too much,
22 pulling from the language in Lukumi, and that even slight
23 suspicion of gerrymander, of a lack of neutrality requires
24 Court action to stop the City from violating somebody's
01:36:24 25 religious beliefs.

1 In particular, in Masterpiece. The Court was
2 concerned about the way that baker Jack Phillips was treated
3 differently than other bakers. There was an unfair
4 treatment history there, as well as particular hostile
01:36:36 5 statements that were made by commissioners about Jack
6 Phillips' faith. His faith, that marriage is between a man
7 and woman, the same issue that is Steve's beliefs and the
8 belief of all Catholics here.

9 Steve faced the unfair treatment in the way that
01:36:53 10 the City dealt with his application, the way that they say
11 that they -- it was, he was the catalyst for the change in
12 the policy, their 30(b)(6) witness admits that. Their other
13 30(b)(6) witness admitted that the policy was changed after
14 they learned of Steve's statements on Facebook describing
01:37:10 15 his faith. And the City Attorney actually said that the
16 policy was directed at Steve. Again, they treated him
17 differently by pulling his application. He was the only
18 person they admitted that had an application pulled from the
19 process, reviewed by the City, rather than being reviewed by
01:37:27 20 the vendor selection committee.

21 While they were doing this, they made statements
22 that are very close to the statements that were made in
23 Masterpiece. And we did provide that sort of one-to-one
24 comparison in some of our briefings. But just to reiterate,
01:37:40 25 some of the statements that the Court was concerned about in

1 Masterpiece included statements by the commission that
2 demeaned Jack Phillips' religious beliefs calling them
3 despicable rhetoric. Well, this case, the mayor accused
4 Steve of citing his beliefs merely to make money, and he
01:37:55 5 also on that same Facebook post in the comments started
6 debating the validity of Steve's belief, whether the Bible
7 actually justifies one man, one woman marriage, indicating
8 that Steve may be just using his belief for some sort of
9 rhetorical purpose and suggesting that it wasn't -- it
01:38:13 10 really just contesting the validity of the belief, which is
11 something that a government official who is bound to
12 neutrality should never do.

13 They also compared Steve's beliefs and Jack's to --
14 well, in Jack's case, they compared them to beliefs that
01:38:29 15 justified slavery. And you have the City manager here in
16 this case saying that Steve's beliefs are akin to those that
17 justified racism 60 years ago, racism that stemmed from
18 slavery.

19 The commission said that the baker, Jack Phillips,
01:38:44 20 that he could believe what he wanted to believe, but he
21 could not act on it if he wanted to do business in the
22 state. Many of the City officials said something very
23 similar in this case, but in particular the City manager,
24 George Lahanas, was in various articles saying that Steve
01:38:57 25 needed to change his practices, which are his religious

1 beliefs and his religious practices, in order to do business
2 in the City. He also said it in his deposition, and that's
3 all cited in our record.

4 Fourth, the commission said that they -- they said
01:39:12 5 things that implied that certain religious beliefs and
6 persons were less than welcome in the state. The Court in
7 Masterpiece was concerned about that implication of that.
8 Well, here it was explicit. Councilwoman Ruth Beier said
9 that unless Steve did same sex weddings, he was not welcome
01:39:29 10 in the City of East Lansing.

11 That combination of unfair treatment and hostile
12 statements under Masterpiece is per se a violation of the
13 free exercise clause. Masterpiece didn't even go into a
14 strict scrutiny analysis, but said that this is so
01:39:44 15 egregious, that this violates the free exercise clause just
16 as it stands. And we have the same thing going here. And
17 we would urge the Court to follow its preliminary injunction
18 ruling and the precedent laid out in Masterpiece, and find
19 that there's a free exercise clause violation here.

01:39:57 20 Some of the same facts underscore the Court's
21 earlier ruling on the speech retaliation claim that still
22 stands. The Court was right that there is -- Steve engaged
23 in protected speech on his Facebook post, he talked about
24 his religious beliefs. The defendant took an adverse
01:40:15 25 action, they removed him from the market, and there was a

1 connection between the two. Again, 30(b)(6) witnesses said
2 that is was the Facebook post that was the catalyst for the
3 change in the policy and the catalyst for him being removed
4 from the market.

01:40:27 5 And I will note that the City has defended the
6 speech retaliation claim on the summary judgment exactly as
7 they had in the preliminary injunction conceding causality
8 and conceding the adverse action, but just arguing about
9 protected speech, yet their own witnesses talk about Steve's
01:40:44 10 beliefs and about his Facebook post proving this Court
11 right, that it was because of his protected statements on
12 Facebook that he was excluded from the market.

13 We'll rely on much of our briefing on several
14 things, but the facial claims I think are important to note
01:41:02 15 because that ordinance has changed somewhat midstream in the
16 Motion For Summary Judgment ruling -- or not ruling, but the
17 briefing. And in particular -- in particular, while the
18 City did make some changes to the ordinance that dealt with
19 concerns about like the unwelcome objected to language, as
01:41:23 20 well as changed some things in the harassment policy, the
21 City did not make any change to the language, the purpose or
22 effect of substantially interfering, and that is when the
23 harassment policy. It's language that was actually ruled
24 upon in the case in Saxe with then Judge Alito, now Justice
01:41:41 25 Alito saying that that's problematic vague language, and

1 that still stands. So we would maintain our facial claims
2 as to that language in particular.

3 THE COURT: What about the amendment to the general
4 business practice definition?

01:41:55

5 MS. ANDERSON: It's our position that words like
6 typical, standard, usual manner, customary action by a
7 person or entity in the operation of a business continue to
8 be overbroad and vague, and that a reasonable person would
9 not understand what those words mean. So we do maintain
10 that portion.

01:42:11

11 And indeed, when individuals were asked about not
12 just that definition, but sort of how they would apply a
13 general business practices, like what that means, when they
14 were asked in deposition, there were, as it shows in our
15 briefing, answers all over the map, and including one
16 witness who said much of these things would need to be
17 litigated because no one would know, underscoring that a
18 reasonable person would not know what these meant.

01:42:26

19 THE COURT: Doesn't the new definition though
20 confine the exercise of discretion to determine what
21 constitutes a general business practice as opposed to what
22 the status of the record was when the Court dealt with the
23 Motion For Preliminary Examination?

01:42:39

24 MS. ANDERSON: Well, it's certainly better, but --

01:42:57

25 THE COURT: Hasn't the ground shifted? I mean,

1 your position is that as far as general business practice is
2 concerned, that there is still inadequate notice to those
3 individuals who want to be on notice, if you will, as to
4 what the impact of the ordinance is, that you still don't
01:43:16 5 think that the definition of general business practice is
6 sufficient?

7 MS. ANDERSON: It has changed. It is better than
8 having no definition, but we still are concerned about some
9 of the language used there. And I will point out that the
01:43:27 10 general business practice language is something that existed
11 in that policy purely to be able to target Mr. Tennes.
12 Mr. Tennes already was required to comply with the
13 underlying ordinance when he was at the market, and there's
14 absolutely no question he serves everybody at the market, he
01:43:45 15 always has in that long history. So the use of the term
16 general business practices was really to extend the reach of
17 that policy and has problems there as well.

18 Steve Tennes serves everybody, and he always has.
19 He treats people with dignity and respect. This is a person
01:44:00 20 who is engaged in many ways in his community providing
21 community services and other excellent housing for his
22 workers. This is a person who is very involved in his
23 community and had been in East Lansing and had long gone to
24 this market. The only reason he is being removed from the
01:44:19 25 market is his Catholic belief that marriage is between one

1 man and one woman, and that is something under the
2 Constitution that just cannot stand.

3 I would like to reserve some time for rebuttal.

01:44:34

4 THE COURT: Oh, don't worry. I allow the lawyers
5 to exhaust themselves with argument, if that's what they
6 want to do.

7 MS. ANDERSON: Thank you.

8 THE COURT: Thank you, Ms. Anderson.

9 Mr. Bogren, go ahead, sir.

01:44:41

10 MR. BOGREN: Thank you, your Honor.

11 Your Honor, the plaintiff's arguments really suffer
12 from two fundamental fallacies. In the first one, we read
13 throughout the plaintiff's papers, and we heard again in the
14 plaintiff's argument, which is, this is the syllogism, I am
01:45:06 15 -- my actions are motivated by my religious belief. You
16 have disagreed with my actions, therefore, you disagree with
17 my religious beliefs.

01:45:28

18 What the plaintiff either refuses or declines to do
19 is separate motivation from action. The plaintiff in their
20 papers say can't be done, can't parse out one from the
21 other, which is just not true. It's neither legally
22 accurate nor factually accurate. There is not a single
23 shred of evidence in this record that the City would have
24 taken any different action if Mr. Tennes had been motivated
01:45:50 25 by something other than religion. And every time the

1 plaintiff says the City officials testified that they found
2 Mr. Tennes' Catholic beliefs to be bigoted or hateful or
3 whatever, that is simply not true, your Honor. There is not
4 a single--

01:46:08 5 THE COURT: What do you make of the statement of
6 the one commissioner that uses that very word?

7 MR. BOGREN: She does use that word and she uses
8 that word in the context of what people can say. And she
9 says they can say whatever they want to say, however
01:46:23 10 bigoted, hurtful, whatever the litany is, they are free to
11 say it, but when they act on it, that's when the City will
12 take action. Never once did she mention religion. Not --
13 there is no mention of religion by a decision maker in this
14 case.

01:46:41 15 The comparison that Mr. Lahanas made is an
16 absolutely valid comparison based on the City of East
17 Lansing ordinance. The City of East Lansing treats sexual
18 orientation the very same way that it treats race. You
19 cannot discriminate on that basis. And that's all
01:47:05 20 Mr. Lahanas was trying to convey. That if you act, if you
21 take discriminatory action against an LGBT person, we will
22 treat that the same as if you were taking racially
23 discriminatory action against a person of color. That's an
24 unexceptional proposition. That doesn't show religious
01:47:24 25 animus. It shows that the City is gong to enforce its

1 ordinance under those -- against those classes of persons
2 that the City has chosen to protect.

3 What this boils down to is, the plaintiff doesn't
4 like the fact that the City has chosen to protect LGBT
01:47:42 5 people, and somehow seems to think that the law allows their
6 religious beliefs to supercede what is, on its face, a
7 generally applicable statute that is facially neutral. But
8 the law doesn't allow that. The Supreme Court in
9 Masterpiece reiterated that fact. You cannot take action --
01:48:06 10 well, I'll say it the other way, that the State or a
11 municipality is free to protect LGBT people against
12 discriminatory action. That is what happened here.

13 Your Honor, I'm not going to go through -- I mean
14 we did to some degree in our briefing, but again, every time
01:48:31 15 the plaintiff says that the City opposed Mr. Tennes, it's
16 not that the City opposed his actions, it's that the City
17 opposed his Catholic beliefs. But there is simply no
18 evidence of that. The City is free to take action when
19 someone has violated their ordinances. Now plaintiff also
01:48:57 20 says that the City targeted Mr. Tennes. He is the only one
21 whose application was singled out. He is the only one who
22 has had this policy applied.

23 THE COURT: Did anybody else's application get
24 referred to the City?

01:49:11 25 MR. BOGREN: They did not. Because no one else

1 essentially posted an electronic sign that said no gay
2 couples allowed. He is the only one. So it stands to
3 reason he would be the only one who was singled out.

4 THE COURT: Well, if I understand the record, the
01:49:28 5 direction to someone in the City administration was, is that
6 if Mr. Tennis applies, number one, don't let him in. If he
7 does apply, refer it. Right?

8 MR. BOGREN: Well --

9 THE COURT: Correct?

01:49:46 10 MR. BOGREN: To a point, your Honor.

11 THE COURT: Well, so the application -- If Mr.
12 Tennes applied, the application was going to be handled
13 outside of normal course, correct?

14 MR. BOGREN: After he stated that he would not
01:50:00 15 allow gay couples to use his facilities, that's correct.
16 Not before.

17 THE COURT: And it was bumped up to the City level
18 for what reason?

19 MR. BOGREN: Because they knew that there were
01:50:20 20 potential legal ramifications from it.

21 THE COURT: All right. What do you -- I recognize
22 that the City has gone through a series of amendments to its
23 ordinance, but what do you make of the temporal relationship
24 between Mr. Tennes' posting in December and the actions of
01:50:41 25 the City post December 2016?

1 MR. BOGREN: Well, your Honor, there is no question
2 as Heather Surface testified, that was the catalyst. But I
3 mean when you look at the arc of events, it makes perfect
4 sense. Mr. Tennes in August posts that he's not going to
01:51:04 5 host gay couples at his farm. He and the City get into a
6 dialogue, the result of which is, he agrees that he will no
7 longer hold weddings of any sort.

8 Now, just as an aside, your Honor, the plaintiff
9 says that the City continued to harass him on that point.
01:51:22 10 Mr. Tennes' testimony was that for one day, the day before
11 that Sunday session in August, he received several calls
12 from Tim McCaffrey asking him not to come. And he -- they
13 never spoke, he just left messages. And Mr. Tennes
14 testified after that day, he never heard from him again and
01:51:51 15 continued to attend the market. He was never asked not to
16 come back to the market. So he doesn't hold weddings, he
17 continues to come to the market.

18 THE COURT: Well, he wasn't -- I think it's better
19 stated, he wasn't ordered not to come back to the market.

01:52:04 20 MR. BOGREN: He wasn't even asked not to come back,
21 your Honor. After that day, there was never any additional
22 discussion.

23 THE COURT: So okay, so perhaps I misunderstood
24 what you said, which is entirely possible.

01:52:17 25 The -- There was one request, but that was it, or

1 there was no request at all?

2 MR. BOGREN: There were several requests over a
3 24-hour period. Although, as I understand it, Mr. McCaffrey
4 left several messages that were not returned. But it was in
01:52:36 5 this 24-hour period from Friday to Saturday, before the
6 Sunday farmers market in August, when they were asked not --
7 they weren't told they couldn't, they were asked not to.
8 And the testimony was, because there had been demonstrations
9 the previous year at a folk festival, and the City was
01:53:00 10 concerned that there would be additional problems, so they
11 asked him not to come. He came. And after that Sunday,
12 when he came to the market, there was not another request,
13 direction, or anything else, there was simply no more
14 dialogue between the City and Mr. Tennes.

01:53:16 15 THE COURT: All right. Thank you for the
16 clarification.

17 MR. BOGREN: So then in December, he posts I've
18 reconsidered, I'm not going to allow gay couples to use the
19 farm. I'm going to start holding weddings again, but no gay
01:53:30 20 couples. That was brought to the City's attention. And
21 there is a reference in the plaintiff's papers about the
22 City trolling the internet. And frankly, I was disappointed
23 to see that, because the plaintiffs know full well that
24 there is nothing in the record that supports an allegation
01:53:49 25 that the City was trolling the internet. In both

1 situations, citizens brought the Country Mill Facebook post
2 to the attention of the City. That's what happened in
3 August, that's what happened in December. So a citizen
4 brought that to the City's attention. The City had an
01:54:07 5 internal discussion, what do we do now? The response was,
6 well, we need to talk to the City Attorney if they apply for
7 membership, but if they apply, the Farmers Market Committee
8 isn't going to address that, basically that gets bumped
9 upstairs. That's the genesis of it.

01:54:30 10 Again, your Honor, that simply doesn't show any
11 sort of religious animus. Mr. Tennes, as he stated and
12 testified, he uses Facebook to communicate with his
13 customers and the public. He made a post to his customers
14 and the public that is the electronic equivalent of no gay
01:54:57 15 couples allowed. At that point, the City can take action if
16 they choose to. And in this case, what they did, was they
17 reviewed their policies. They recognized that the farmer's
18 market policies were not consistent with all of the other
19 City policies as it related to their business relationships
01:55:18 20 in that it didn't specifically incorporate the
21 antidiscrimination policies and statutes. So they did that.

22 Now, again the plaintiff says, well, you're
23 targeting me. Well, you are the only one who has announced
24 that you are not going to comply with the City's
01:55:35 25 antidiscrimination ordinances. We can't turn a blind eye --

1 well, I guess we could, but we are not compelled to. But
2 that doesn't demonstrate religious animus. He continues to
3 insist that his motivation must be the City's motivation,
4 and there is just simply no evidence of that.

01:55:54 5 Your Honor, the other --

6 THE COURT: Let's talk a moment about the
7 Mr. Tennes' Facebook messages, which appear to the Court to
8 contain protected and unprotected speech. Would you agree
9 with that?

01:56:18 10 MR. BOGREN: I think that's right.

11 THE COURT: All right. The issue that the Court
12 highlighted during the course of its prior order was the
13 issue of causation on this particular subject, and I don't
14 see any, frankly, I don't see it in either brief, that
01:56:46 15 either one of you have briefed the issue of causation as it
16 relates to the Facebook messages. And this relates to the
17 retaliation claim. Can you help me with that?

18 MR. BOGREN: I hope so.

19 From our perspective, your Honor -- and I agree
01:57:07 20 there is both protected and unprotected speech. The
21 unprotected speech is what the City took action about. And
22 the unprotected speech is as was described in Rumsfeld,
23 posting a sign that says in essence no gay couples allowed.
24 What the record evidence, I think pretty clearly
01:57:26 25 demonstrates, is that the communication from that point

1 forward between the City and Mr. Tennes was, you have said
2 you are not going to allow gay couples to use your public
3 accommodation, therefore, you're in violation of our
4 policies, therefore, you are not invited back. But then
01:57:43 5 they said, if we misunderstand, please tell us and we will
6 be happy to look at this again. To which he responded
7 essentially, no, you got it right. I'm not going to allow
8 gay couples to use my farm. To which the City responded,
9 then you are not welcome at the farmers market. So there is
01:58:05 10 nothing in that exchange, and there is nothing in the record
11 that would demonstrate that the City was concerned about the
12 motivation for his statement that he wouldn't allow gay
13 couples to use his farm.

14 And that is the key distinction, your Honor. If a
01:58:27 15 plaintiff can defeat an antidiscrimination ordinance by
16 saying, my religion requires me to do this, then
17 antidiscrimination ordinances are no longer valid. Burwell
18 explicitly rejected that argument. And I think, your Honor,
19 the same analysis has to apply here because, number one,
01:58:58 20 Mr. Tennes made the choice of entering into commerce and
21 holding his farm open to be rented out for weddings. That's
22 purely a secular undertaking. Now, they say that that's
23 religious in nature. But with all due respect, it's not.
24 He is not a minister, Country Mill isn't a church. He is
01:59:30 25 holding out a business premises, he is charging people to

1 use it as a wedding venue. That's not a religious
2 undertaking. And that is what Lukumi and Masterpiece and
3 the other cases speak to, which is religious conduct.
4 Renting out your business premises to be used for a wedding
01:59:58 5 is not a religious endeavor, it's a secular endeavor. It's
6 a business endeavor. That's what the City focused on.

7 The City never took issue with his motivation.
8 Never said, you are not allowed to say what you believe.
9 Never said, you can't do what you do on your farm. What
02:00:18 10 they said is, if you don't allow your farm, which is a place
11 of public accommodation, to be used by a class of people
12 that we protect, then we are not going to enter into a
13 business relationship with you. And so is there causation?
14 There is in the sense that the City took action after
02:00:45 15 Mr. Tennes had first said, I'm not going to hold weddings,
16 okay? Then we have no problem at all. Then changed course
17 and said, I'm going to hold weddings, but I'm not going to
18 allow gay couples to use my farm. That's when the City took
19 action. So there is a correlation, but, your Honor, again,
02:01:05 20 I don't mean to be repetitive, but this is literally no
21 different than the Rumsfeld example of someone posting a
22 sign that says, "White Applicants Only." It's not protected
23 speech. That's what caused the City to act. So the City
24 was not acting in response to protect its speech, and that's
02:01:32 25 why we believe that the retaliation claim fails.

1 THE COURT: Well, part of the Masterpiece cake
2 decision is comment by Justice Kennedy that talks about
3 statements by the officials of Colorado being open to
4 different interpretations. In evaluating your motion, I
02:01:51 5 have to evaluate the proofs in the light most favorable to
6 the plaintiff as the opposing party. Why isn't there enough
7 in this record to at least allow the case to proceed on the
8 -- what I'll refer to as the Masterpiece cake claim, in
9 light of the fact that these, some of the comments which are
02:02:18 10 "subject to different interpretations"?

11 MR. BOGREN: Two reasons, your Honor. One, they
12 are not made by decision makers. And I know the plaintiff
13 takes issue with that. But, and we cited all of the
14 testimony. I think the record is clear that the decision
02:02:39 15 makers in this case were George Lahanas ultimately and Tim
16 McCaffrey when it came to the decision to exclude Country
17 Mill, and Heather Surface and Tim McCaffrey when it came to
18 the decision to revise the guidelines which were ultimately
19 signed off on, if you will, by Mr. Lahanas. The plaintiff
02:03:03 20 says, well, yeah, but the City council was kept informed.
21 Okay. That would certainly be unusually if they weren't
22 kept informed on something that it had generated so much
23 media attention. But there is no evidence that they were
24 decision makers, and there is a lot of evidence to the
02:03:24 25 contrary, that's number one.

1 Number two, your Honor, I get back to the same
2 issue. Every time the plaintiff attributes, you know, they
3 commented on Steve's Catholic beliefs or Steve's Catholic
4 faith or Steve's religious beliefs, they are inserting the
02:03:44 5 words Catholic and religious. Nobody on the City made those
6 statements. And yet this gets back to the syllogism, I'm
7 motivated by my religion, you disagree with me, therefore,
8 you disagree with my religion. But that's not legal. I
9 mean there is no legal authority to support that, and
02:04:03 10 there's certainly no logical authority to support it. The
11 plaintiff is inserting that, and they are trying to impute
12 the plaintiff's subjective motivation onto the City.

13 The comments that were made, were not made directed
14 to his religion, they were made directed to his actions.
02:04:21 15 Again, if all a person has to do to immunize themselves from
16 an antidiscrimination statute is say, "That's what I believe
17 my religion requires," then antidiscrimination statutes are
18 basically useless.

19 Because as the Supreme Court and every court to
02:04:42 20 have addressed the issue has recognized, the Courts are not,
21 are not, will not, cannot inquire into whether a religious
22 belief is reasonable. So if someone says, my religion
23 requires me, or my religion compels me, the courts can't
24 look behind that, but the City can look at an action and can
02:05:09 25 divorce the action from the motivation. And that's what has

1 happened here throughout this case, your Honor. The City
2 has never been concerned with the motivation and there's no
3 evidence that they have.

02:05:21 4 THE COURT: Well, I appreciate the assertion, but
5 are you suggesting there is nothing in this record that
6 would point the other direction?

02:05:36 7 MR. BOGREN: Your Honor, the only thing -- the only
8 thing in my view that the plaintiff could hang their hat on
9 is a statement by Mr. Lahanas where he was comparing
10 discrimination against LGBT people to racial discrimination,
11 and he made the comment that racial discrimination in post
12 Civil War -- I'm not exactly sure how he phrased it -- was
13 justified on the basis of religion or on the basis of the
14 Bible. That doesn't make it right. That's it. That is the
02:06:00 15 only specific mention of religion. And in context, your
16 Honor, I don't think that's nearly enough. Because Mr.
17 Lahanas was being asked basically, well why do you care if
18 Steve Tennes doesn't allow gay people to use his farm in
19 Charlotte? This is East Lansing. And his response was, for
02:06:22 20 the same reason that I wouldn't allow a vendor who didn't
21 allow African Americans to use their farm to do business
22 with the City, because we protect both classes of people.
23 And he would be saying a religious justification for racial
24 discrimination wouldn't make me change my mind, and a
02:06:46 25 religious justification for LGBT discrimination doesn't make

1 me change my mind. In context, that's what his testimony
2 was. And I don't think that is nearly enough, your Honor,
3 under Masterpiece.

02:07:04 4 THE COURT: All right. Let's turn now to the
5 amendments that the City made. You reconstructed the
6 definition of general business practice. You also addressed
7 harassment as a definition. How do you think that the new
8 definition of harassment comports with Judge Alito's Second
9 Circuit opinion, obviously now he is a Justice --

02:07:39 10 MR. BOGREN: Well, Justice Alito, based on that
11 opinion, may not find it appropriate. There is no Sixth
12 Circuit decision that would find it inappropriate. And I
13 would say, your Honor, that this is standard language that's
14 found in virtually every antidiscrimination ordinance, state
02:08:02 15 level, local level, country-wide. There's nothing
16 remarkable about this definition.

17 The substantially interfere -- again, it's not a
18 unique phrase in an antidiscrimination statute, and I
19 disagree that it's Constitutionally infirm, with all due
02:08:25 20 respect to Justice Alito.

21 And I would also say, your Honor -- well, two other
22 things; number one, you know, the plaintiff says well, yes,
23 you define general business practices, but you don't define
24 any number of words. Well, we didn't define means, we
02:08:45 25 didn't defined typical. I mean, your Honor, at some point

1 it becomes kind of an exorcism -- I'm sorry, an exercise in
2 silliness. This is a perfectly understandable definition of
3 what a general business practice is. Anybody who reads this
4 understands what they can and can't do or what the ordinance
02:09:09 5 applies to. The testimony that came in came in before the
6 ordinance was amended. So they were asked what does general
7 business practice mean to you? And there was no definition
8 in the act, although, again, all of the responses of that
9 question were remarkably similar. I think it's a rather
02:09:35 10 easily understood proposition even without a definition, but
11 now it has one.

12 The plaintiff also made reference to the Dambrot
13 case. The amendment -- on the last page of the ordinance,
14 that under (b) (2), removed all of the objectionable material
02:10:00 15 from -- that Dambrot found unconstitutional. So basically,
16 what that says now is, you can't post a sign that says a
17 protected class is not welcome or will not be provided
18 service. Again, easily understandable and not
19 Constitutionally in firm.

02:10:26 20 Unless the Court has other questions, your Honor,
21 I'm not going to take up more of the Court's time.

22 THE COURT: All right. I don't have any more at
23 this point, Mr. Bogren. Thank you.

24 MR. BOGREN: Thank you, your Honor.

02:10:36 25 THE COURT: Ms. Anderson, go ahead.

1 MS. ANDERSON: Your Honor, the City refuses to
2 recognize that Steve Tennes serves everyone, regardless of
3 their race, regardless of sexual orientation, regardless of
4 sex or marital status. He just can participate in a
02:10:56 5 sacramental ceremony that violates his Catholic beliefs. He
6 never ever said in any of the three Facebook posts that gay
7 couples can't use his farm. It's simply not true. What is
8 in the record is that he has many customers who are part of
9 the LGBT community and every community. He works with
02:11:11 10 people, business associates, and he has employees from
11 varied communities. So that representation is just
12 incorrect.

13 What he cannot do is participate in a ceremony that
14 to him is holy. And that belief, that Catholic belief is
02:11:25 15 something that is what motivated the City. The words on
16 this speak for themselves. The City was concerned about
17 Steve's Catholic views, whether he keeps them to himself or
18 brings those into his business, that is something the mayor
19 said. They were talking about his beliefs all along. What
02:11:43 20 opposing counsel said about George Lahanas' reference to the
21 Bible, which actually that entire quote is in our briefing,
22 and it was a bit longer than what was presented. But at
23 every stage, the City was motivated by his beliefs, and they
24 treated him differently than they treated anyone else.

02:12:00 25 This debate about whether they asked him to leave

1 for just one day, well, of course, it was over that one day,
2 because the market was the very next day. There ws no point
3 in asking him not to come to a market once the market
4 occurred, as well as there were multiple voice mails,
02:12:15 5 multiple calls, multiple emails.

6 I would take the Court to the timeline a bit. You
7 saw in August, Steve posts the Facebook post, and the mayor
8 immediately comes out and says that it's because of his
9 public statements about his religion, that he wants him to
02:12:33 10 leave the market, and that is after Steve has posted the
11 second Facebook post saying he is not going to do any
12 weddings on his farm for the time being. And then you have
13 the Facebook post in December followed quickly by the change
14 in the policy in January, and the witnesses saying that that
02:12:52 15 Facebook post was the catalyst for those changes.

16 So when Steve took weddings off the table, they
17 were still trying to exclude him. And they were motivated
18 by his beliefs.

19 The Court mentioned -- The Court's question made
02:13:11 20 me think along the lines of the statements that were made.
21 The statements from Masterpiece were not treated as a fact
22 issue, and there is no reason to treat the statements that
23 were made here as a fact issue. The statement from Kennedy
24 about that they could be open to different interpretations,
02:13:27 25 he went back to the standard that there needs to be -- if

1 there's slight suspicion of hostility or targeting, then
2 that action does not stand, that State action does not
3 stand. And so while he said that different statements could
4 be taken in different ways, the combination of the
02:13:41 5 statements with the unfair treatment was enough to show more
6 than that slight suspicion. And he could -- the same
7 argument could have been made there. He could have sent
8 those statements back to find out what those really meant or
9 get more context, but in the context of those hearings, he
02:13:56 10 just took those statements on their face, and we think the
11 Court should here as well without going back to anything
12 further.

13 Those statements together were about -- We talked
14 about the Facebook -- We talked about the Facebook post
02:14:10 15 itself, and I think that the words there stand for
16 themselves. It's our position that the entire Facebook post
17 is protected speech, certainly the part that the Court has
18 identified where Steve is speaking about his religious
19 beliefs; but then the second half is really reservation of
02:14:24 20 his rights and a statement about that he must adhere to his
21 Catholic faith. And this Court has a brief from the
22 Catholic conference that makes clear that the -- that as a
23 Catholic, he has to take his beliefs into his daily life,
24 that he is required to do that to be authentically Catholic,
02:14:41 25 and that's what the rest of that is saying. Again, what he

1 is saying is he cannot participate in an event. And he is
2 fully participating in the events on his farm as he talks
3 about in his declaration. He and his whole family are
4 engaged in preparing with the couple for everything they
02:14:58 5 would need that day. He greets guests and he, with his
6 kids, greets guests and gets them to where they need. He
7 puts up celebratory signs to welcome, and he's engaged in
8 the event. There are more facts in the declaration, but he
9 is very much engaged with this. And this is about whether
02:15:12 10 the City can force him to participate in an event that
11 violates his beliefs.

12 I would also point out that the City tries to
13 conflate the public accommodation law with the policy.
14 Except for the Saxe-like objection -- the facial problems
02:15:28 15 with the ordinance, what we are challenging is the policy,
16 and it's not a usual public accommodation law. This is
17 something that they created and added that general business
18 practice language to -- in order to target Mr. Tennes. You
19 can see that in the time and in the other actions and in the
02:15:43 20 things they're saying. They say he was the one it was
21 directed at, he was the catalyst for it.

22 The decision maker point, I think in every brief it
23 changed a bit who were the decision makers in the case.
24 Certainly everybody agrees that Lahanas was the decision
02:16:01 25 maker, and we had a number of things that he said in our

1 briefing that were hostile, but he was also influenced by
2 the people that he reported to. And you had the mayor, the
3 mayor is the first one that brought this up, that's in
4 Exhibit 5. In Exhibit 6, he was telling Lahanas, I want you
02:16:17 5 to keep asking them to leave, even after Steve stopped doing
6 weddings. Eric Altmann, the council member, weighed in on
7 that as well. And the council members and the mayor
8 approved the letter. There are emails at 22 and 23 where
9 the mayor is approving the letter that denied Steve access
02:16:34 10 to the market in 2017. And every council person and the
11 mayor and George Lahanas, they all completely affirmed the
12 City's actions at every stage along the way. They never
13 disavowed what the City had done, that they had taken these
14 actions because of Steve's religious beliefs, and indeed,
02:16:53 15 they are talking in the public square about his beliefs
16 themselves.

17 Just to close, I would bring the Court back to the
18 relief that we are requesting. We are asking that the
19 injunction be made permanent, that you grant us the summary
02:17:05 20 judgment, and make that injunction permanent. We are asking
21 for damages, which are uncontested in the record, and costs.
22 And a declaration that the policy violates the First
23 Amendment, and as to that facial problem, the Fourteenth
24 Amendment.

02:17:21 25 Unless the Court has further questions from me, I

1 believe that's all I have.

2 THE COURT: My review of the briefing and the
3 caselaw coming out of the Michigan Intermediate Appellate
4 Court and the Michigan Supreme Court on what standard should
02:17:37 5 be applied, whether it's the federal standard or some other
6 standard.

7 MS. ANDERSON: On the State Constitution?

8 THE COURT: On the State Constitution, can you
9 slice through what I view as somewhat inconsistent opinions
02:17:53 10 from the Michigan Appellate Courts?

11 MS. ANDERSON: Well, I would refer the Court to
12 Champion and Reid that were post-Smith cases that held the
13 pre-Smith standard, so if there was a burden to a sincere
14 religious belief or conduct then it was strict scrutiny. I
02:18:08 15 believe that is the standard this Court adopted in the
16 preliminary instruction. And I think that there is, under
17 those cases, a basis to find that the Michigan Constitution,
18 it has some additional language, that it can be applied and
19 should be applied more strictly than the federal
02:18:23 20 counterpart.

21 THE COURT: Are you aware of any First Amendment
22 case now pending before the United States Supreme Court that
23 might impact this case, this term?

24 MS. ANDERSON: I am not aware of any. I will say
02:18:39 25 that the two cases that were cited by opposing counsel in

1 the briefing on this issue both said that it was at least as
2 protective, but they did not say that it was exactly the
3 same as the federal counterpart. So they still left open
4 the precedent from Champion and Reid.

02:18:55 5 THE COURT: If I remember correctly, Masterpiece
6 was still pending when I issued my opinions earlier,
7 correct?

8 MS. ANDERSON: It was still pending. It actually
9 had only been set for argument when you issued your decision
02:19:12 10 before. It had not even been argued.

11 THE COURT: As far as you're aware, there is no
12 either freedom of speech cases or freedom of religion cases
13 that might impact the analysis in this case?

14 MS. ANDERSON: I'm not aware of any.

02:19:26 15 THE COURT: All right. Thank you.

16 MS. ANDERSON: If I may make one more comment, I
17 realize I've --

18 THE COURT: I'm not going to cut you off. Go
19 ahead. It's a very important case, I'm not going to cut you
02:19:33 20 off. I rarely cut lawyers off, so go ahead.

21 MS. ANDERSON: I appreciate it.

22 Opposing counsel has tried to cast this as a
23 business transaction. It is a license, the record shows
24 that it's a licensing agreement that they signed. It makes
02:19:46 25 it much like Holzemer and the buggy case. I'm talking about

1 that kind of license. But I'll also point out that in the
2 ordinance itself, the ordinance that's at issue here, it
3 actually exempts from the nondiscrimination law any business
4 they contract with that they do less than \$20,000 in
02:20:04 5 business. So Mr. Tennes is actually exempt under the
6 ordinance itself, even if it were a contract, which we
7 believe it's not, but I think that's of help.

8 THE COURT: All right. Thank you, counsel.

9 MS. ANDERSON: Thank you.

02:20:16 10 THE COURT: Mr. Bogren, go ahead, sir.

11 MR. BOGREN: Your Honor, first, I'm not sure why
12 opposing counsel thinks that we haven't contested damages.
13 We do. We don't believe that Mr. Tennes has suffered any
14 damages, but we are entitled to a trial on that issue. So
02:20:34 15 I've never conceded that, I don't concede that. So I want
16 the record very clear on that point.

17 Your Honor, the one case that plaintiff never
18 addressed in their papers is United States vs. Lee. Lee
19 says, "When followers of a particular sect enter into
02:20:54 20 commercial activity as a matter of choice, the limits they
21 accept on their own conduct as a matter of conscience and
22 faith are not to be superimposed on the statutory schemes
23 which are binding on others in that activity."

24 This is not like Burwell where the City is
02:21:11 25 compelling Mr. Tennes to hold weddings at his farm. Mr.

1 Tennes voluntarily made the choice to hold weddings at his
2 farm. He made his farm a place of public accommodation. So
3 under Lee and under every case decided since Lee, and cases
4 decided prior to Lee going back to Reynolds, action can be
02:21:39 5 and is divorced from motivation. The City is entitled to
6 take action when someone has violated their
7 antidiscrimination policy, regardless of the motivation for
8 it, unless the motivation, the religious motivation is what
9 has caused the City to take action. There is simply no
02:22:04 10 evidence to support that, your Honor.

11 Unless the Court has questions, I don't have
12 anything else.

13 THE COURT: All right. Thank you.

14 Ms. Anderson, go ahead.

02:22:12 15 MS. ANDERSON: Just going to say one more thing.

16 Jack Phillips also made his place a public
17 accommodation.

18 THE COURT: I'm sorry, I didn't hear you.

19 MS. ANDERSON: Jack Phillips, the baker, also made
02:22:24 20 his place a public accommodation. But as soon as the
21 commission there targeted him with differential treatment
22 and hostile statements, that inquiry was over. So this
23 Court doesn't need to reach the issue of how to balance
24 religious beliefs versus a public accommodation law. Here,
02:22:38 25 we have a clear case of targeting and hostility towards

1 Catholic beliefs, and that is all this Court needs to decide
2 upon.

3 THE COURT: All right. Thank you.

4 Well, first, thank you for the quality of the
02:22:51 5 written submissions that both of you have made, as well as
6 the oral argument here today. I'll get a written opinion
7 out as soon as I can. I can't promise anything about the
8 timing. I did sign the proposed order adjourning the case.

9 MS. ANDERSON: That was my question, but there
02:23:12 10 wasn't another date set, and I just wanted to make sure, the
11 Court doesn't expect us to file anything else related to
12 trial until we hear on this order.

13 THE COURT: The date was set for --

14 MS. ANDERSON: Was the date set? I thought it just
02:23:26 15 said adjourned until after.

16 THE COURT: We didn't set a date, did we?

17 We didn't set any more dates. There is no schedule
18 at the moment. I mean, the schedule moving forward will
19 obviously be based on the timing of my -- timing of my
02:23:42 20 opinion.

21 MS. ANDERSON: Thank you, your Honor.

22 THE COURT: Okay. Thank you.

23 MR. BOGREN: Thank you, your Honor.

24 THE COURT: Thank you. Have a good day.

02:23:48 25

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COURT CLERK: All rise, please.
Court is adjourned.
(At 2:23 p.m. proceedings concluded.)

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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
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