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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CHELSEY NELSON)	
PHOTOGRAPHY, LLC, ET AL)	
)	
Plaintiff,)	Case No. 3:19-CV-851
)	
v.)	
)	
LOUISVILLE/JEFFERSON COUNTY)	
METRO GOVERNMENT, ET AL)	
)	August 7, 2020
Defendant.)	Louisville, Kentucky

* * * * *

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE HONORABLE JUSTIN R. WALKER
UNITED STATES DISTRICT JUDGE
* * * * *

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by computer.

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1 (Begin proceedings in open court 10:17 a.m.)

2 THE COURT: Okay. We're on the record in Chelsey
3 Nelson Photography versus Louisville, 3:19-CV-851. Let's start
4 with appearances. For the plaintiff. Begin with the plaintiff.

5 MR. NEIHART: Starting off, thank you. Good morning,
6 Your Honor. My name is Bryan Neihart representing the
7 plaintiffs, Chelsey Nelson Photography, LLC and Chelsey Nelson.
8 With me at counsel's table and also representing the plaintiffs
9 are Jonathan Scruggs to my midmedial left and Joshua
10 Hershberger.

11 THE COURT: And I think the document you filed said
12 somebody is going to talk about standing, and somebody is going
13 to talk about the merits?

14 MR. NEIHART: Yes, Your Honor. I'll be addressing the
15 standing argument and our position to Louisville's motion to
16 dismiss, and Mr. Scruggs will be arguing in support of the
17 preliminary injunction motion.

18 THE COURT: Okay. Very good. And for the defendant.

19 MR. KAPLAN: Good morning, Your Honor. David Kaplan
20 for the Louisville/Jefferson County Metro defendants. I have
21 with me here today Jason Fowler, an assistant county attorney
22 involved with enforcement, and my partner Casey Hinkle is to my
23 right as well.

24 THE COURT: Okay. Very good. A couple of preliminary
25 things. Somebody said something about a projector. Whose side

1 is that?

2 MR. KAPLAN: Your Honor, I had seen that there was a
3 projector set up, and I thought that, optionally, it might be
4 something that we would think about using. Then later we were
5 informed that, you know, if it was needed, we'd need to do some
6 safety protocols with the disinfectant and so on, so we'll
7 really take the Court's lead there. We don't have anything we
8 absolutely have to display.

9 THE COURT: Okay. I was going to basically say that.
10 That if you have something you absolutely do need to display,
11 then, by all means, let's do it, but, otherwise, there's a lot
12 of briefing, there is long appendices -- appendices, there is --
13 and we'll be here -- we'll chat -- we'll talk a long time today.
14 So I think it will be -- I think we'll have a thorough
15 examination of all the issues, even without that.

16 On the masks thing, if you -- if Mr. Kaplan, Neihart, am I
17 pronouncing that right?

18 MR. NEIHART: That's correct, Your Honor, yes.

19 THE COURT: And Mr. Scruggs, when you-all are speaking
20 or when it's your -- if you want to take your masks off, that's
21 fine with me if it's okay with the people who are within six
22 feet of you. On the other hand, if you'd rather keep them on, I
23 understand, but it's whatever you're comfortable with there.

24 In terms of order, plaintiff has the burden on standing,
25 even though it's the defendant's motion to dismiss, and then

1 plaintiff has the burden on the merits with the preliminary
2 injunction.

3 However, I think it makes more sense to hear from the
4 defendants on standing first. Let's -- you made the motion.
5 And then I'll hear from the plaintiffs on standing. Then I'll
6 hear from the plaintiffs on the merits, and then I'll turn to
7 the defendants on the merits.

8 Do you have preliminary issues, Mr. Neihart?

9 MR. NEIHART: No, Your Honor.

10 THE COURT: Okay. Mr. Kaplan.

11 MR. KAPLAN: Thank you, Your Honor. May it please the
12 Court. With respect to standing, the parties have briefed
13 Article III standing and also cited a few cases in regards to
14 what's referred to as equitable standing, ripeness, prudential
15 standing. I want to address both of those at the same time.

16 Before getting directly into the standing, I want to orient
17 a little bit about what they do or do not have standing to
18 challenge. So what -- I'm going to ahead and remove my mask,
19 because Jason said that that would be okay with him.

20 So in this case, Your Honor, the challenges to the public
21 accommodations ordinance in Louisville, Jefferson County, that
22 is in effect within the boundaries of this jurisdiction, the one
23 that was passed in 2004 by a nineteen-to-six margin and has been
24 the law of this jurisdiction ever since.

25 That public -- public accommodations provision, for purposes

1 of this case, we'll follow their nomenclature. So it's got a
2 what we'll call the public accommodations provision, which
3 mandates that any merchant who is classified as a place of a
4 public accommodation has to provide goods and services to
5 all-comers without regard to race, gender identity, sexual
6 orientation, religion, disability, and so forth.

7 Separate from that, we have what they've referred to in
8 their briefing as the publication provision, which is an
9 enforcement mechanism for the accommodations provision, and it's
10 got two components, but, in general, that provision has to do
11 with what someone who's covered by the publications -- public
12 accommodations ordinance cannot say, and, specifically, that
13 they cannot refuse to provide the services.

14 And the obvious purpose for that is that if you can deter
15 people from coming to your place of business in the first place
16 by telling them in advance, "We will refuse to provide this
17 service should you show up," you can circumvent the public
18 accommodations portion, 'cause you'll never have to refuse in
19 the first place if you can -- so you can see the connection
20 there.

21 So these are two separate mandates, which are separate and
22 distinct from one another, and they're challenging both of them,
23 but we assume that the Court has to separately analyze standing
24 with respect to both.

25 With respect to the public accommodations ordinance, it

1 seems to be undisputed, based on the pleadings, that Miss Nelson
2 has never actually been asked, by a same-sex couple, for her to
3 take pictures at their wedding.

4 There's an allegation in the complaint to the effect that
5 she has been afraid to advertise, because she's afraid that if
6 she does, she might be approached and have to say no, which
7 would subject her to liability. It's sort of a subjective chill
8 kind of allegation.

9 And so the fact of the matter is, however, that she hasn't
10 been approached, so she hasn't had to have the conversation with
11 them where she has to choose whether to refuse or not to refuse
12 to provide the services, and, therefore, there's never been an
13 opportunity for a customer to complain, or for any other person,
14 for that matter, who learns about it to complain about the
15 refusal.

16 THE COURT: Let me interrupt, because -- and this is
17 for both sides. Assume I've read everything that you've
18 submitted. So if there's something -- I'm going to ask some
19 questions. I'm apologizing in advance for me interrupting
20 asking questions, but at the end of this, like I said, I'm not
21 in any hurry, so if there's more that we didn't cover through
22 the questions, then tell me, and I want to listen to everything
23 that both sides have to say.

24 My understanding of this standing question, based on Susan
25 B. Anthony, from the Supreme Court, and from Sixth Circuit

1 precedence, is that they have to show a credible threat of
2 prosecution. They don't have to show that they were prosecuted
3 yet, and that's from the McKay v. Federspiel, which is a case
4 that the city relies on pretty heavily from the Sixth Circuit.

5 How do you show a credible threat of prosecution? Well, you
6 have to show two things. You have to show subjective chill,
7 which I take it to be pretty easy to show, because it's
8 subjective, but then you have to show some combination of four
9 factors. So it's like you got to show two things, and the
10 second thing has four parts.

11 Maybe we should have had the visual aid, for my own benefit,
12 but how do you show some com -- what are the following factors
13 they have to show a combination of? And McKay says this:

14 Number one: A history of past enforcement against either
15 the plaintiffs or others.

16 Number two: Enforcement warning letters regarding the
17 plaintiff's specific conduct.

18 Number three: A provision in the ordinance that allows any
19 member -- any member of the public to initiate an enforcement
20 action.

21 And number four: So they don't really list when they're
22 listing the numbers of factors, but then they come to it pretty
23 quickly, so I'm counting it as a fourth. A refusal to disavow
24 enforcement of the challenged conduct by the Government.

25 So some combination of the following factors: History of

1 past enforcement, a warning letter to this plaintiff, a
2 provision that allows the public to sue or initiate enforcement
3 action, and refusal to disavow.

4 Let's start with the last one. From your brief, Louisville
5 has not refused to disavow.

6 MR. KAPLAN: That's correct.

7 THE COURT: Okay. And you're not refusing today to --
8 you're not disavowing -- you're not promising you'll never
9 enforce if --

10 MR. KAPLAN: That's right.

11 THE COURT: -- there's a violation by Chelsey Nelson?

12 MR. KAPLAN: Right.

13 THE COURT: Okay. So by my count, when we do the
14 combination of the four factors, they're looking pretty strong
15 on three. There's a history of past enforcement against others.
16 First factor's plaintiffs or others. I think they allege that
17 there's been something like 93 enforcement actions in the past
18 decade or so, 2010 to 2017, I think. You're looking like I'm
19 wrong on that.

20 MR. KAPLAN: I think it's 173 since 2002, so about
21 ten/per year.

22 THE COURT: Okay. Enforcement warning letters
23 regarding the plaintiff's specific conduct, that you're strong
24 on that. There's been no enforcement warning letters. A
25 provision allowing any member of the public to initiate an

1 enforcement action, very strong on that, 'cause there is such a
2 provision in the fairness ordinance. And the refusal to disavow
3 by the Government, they're strong on that.

4 So what do you say to the argument that the Sixth Circuit
5 says I'm supposed to look at four factors, and they're strong on
6 three of the four? I'm supposed to look at some combination --
7 that's the Sixth Circuit's word. Some combination of those four
8 factors, and they're strong on three of the four.

9 MR. KAPLAN: Well, I'd go back to Susan B. Anthony
10 List and the fundamental requirement of injury, in fact, which
11 they can demonstrate if they can show a credible threat of
12 prosecution. I think you're supposed to look at all of those
13 factors, Your Honor, but you also have to look at the big
14 picture. Has there really been a credible threat of
15 prosecution?

16 I would concede that there have been ten complaints per
17 year, approximately, filed with respect to sexual orientation,
18 for enforcement purposes. Only two have ever gone to hearing
19 over the eighteen-year period. That's from the declaration of
20 Mr. Kendall Boyd that was attached to the reply in support of
21 the motion to dismiss. So -- but those --

22 THE COURT: Why only look at enforcement of sexual
23 orientation discrimination? Why not look at all enforcement
24 under the public accommodations law?

25 MR. KAPLAN: Well, I think the question is: Would

1 Chelsey Nelson have -- feel that there is a credible threat of
2 enforcement with respect to the type of conduct that she
3 intends -- that she says she intends to engage in? So I do
4 think that it would be appropriate to focus on sexual
5 orientation simply because that is the issue that Metro would be
6 investigating.

7 Is there evidence that -- and, again, this is entirely
8 speculative, at this point, with respect to the violation of the
9 accommodations ordinance, but is there evidence that she took
10 the actions that she took based on sexual orientation, which is
11 that specific classification. But I don't -- I can't point to
12 any specific precedent that would require you to limit it
13 that -- in that fashion.

14 THE COURT: And I don't necessarily disagree with you
15 on that. It's just we're trying to figure out what -- is there
16 a credible threat of enforcement against this particular
17 photographer we're looking at, and --

18 MR. KAPLAN: You're absolutely correct that the
19 ordinance allows any single person, whether they are grieved
20 directly or not, to file the complaint, which in Susan B.
21 Anthony List, the Thomas writing for the Court did focus on that
22 as being a very relevant factor.

23 But in Susan B. Anthony List, the Court also paid special
24 attention to what is, in my view, the most pertinent fact in
25 Susan B. Anthony List, which was that -- and you'll recall in

1 that case, a candidate for office had complained about false
2 statements being made by the Susan B. Anthony List indicating
3 that he had supported taxpayer-funded abortions based on his
4 support of the Affordable Care Act.

5 He filed a complaint. The commission found probable cause
6 to sustain a violation. He then dropped his complaint when he
7 lost the election. Susan B. Anthony List -- and it appeared to
8 me the Court was very open to the idea that the lack of any
9 pending action was certainly a pertinent thing that the Court
10 needed to address.

11 And the way of addressing it was to say, "Look, Susan B.
12 Anthony List intends to say exactly the same thing about other
13 candidates who voted for the Affordable Care Act that they said
14 about the guy who filed the complaint."

15 Therefore, they, obviously have a very reasonable fear that
16 if they engage in exactly that same course of conduct, that they
17 will, again, be subject to a complaint and, again, be subject to
18 a probable cause determination.

19 I feel that was a very pertinent factor in Susan B. Anthony
20 List and, really, the overriding one, on my reading. Now, the
21 other factors were important, and I can't deny that, certainly,
22 any member can step forward at any time and accuse her of having
23 violated -- now, certainly, they can't -- based on the record we
24 have right now, Your Honor, nobody could come forward right now
25 and say there's been any actionable conduct.

1 What she said she intends to do is -- what she wants to do
2 is publish Exhibits 1 and 2 to the complaint. That's the only
3 thing that she said she absolutely wants to do right now. And I
4 was going to put it up on the screen, but you've seen it. There
5 is, you know, one sentence in paragraph three where she flat out
6 states, "I don't photograph same-sex weddings or ceremonies
7 celebrating an open marriage."

8 Everything else in here is just her belief statement, which
9 is protected, and she would not violate the ordinance by
10 communicating anything else in there. But I think she plausibly
11 suggests that if she mailed that out to -- in a mass mailing or
12 posted it on her website, that a person -- some person finds out
13 about it could step forward and say, "You know what? You
14 violated the denial clause explicitly."

15 So this is like Susan B. Anthony in that sense that there is
16 a -- it's a very specific thing that she said she intends to do,
17 and I think it's been pled that way on purpose, to crystallize
18 the issue, and Metro would -- I have to concede that would be a
19 violation of the denial ordinance.

20 So -- but I think when you start looking at the
21 accommodations provision, it becomes much more attenuated,
22 because there -- let's assume she sent out an adverti -- there's
23 a little bit of inconsistency in their complaint. On the one
24 hand, they say she doesn't want to advertise, because she is
25 afraid gay couples might come forward and ask her.

1 Now, if she sends this advertisement out, that would deter,
2 you would think, most gay couples from approaching her, because
3 she said right there she doesn't want to do it. But under the
4 hypothetical situation where she advertises like she indicated
5 she wants to, she's approached, there would be a conversation
6 with the couple to the effect that, "I believe marriage is a
7 special gift from God that represents Jesus Christ's love for
8 his church," and so on. "Marriage is -- traditional marriage is
9 what I believe in."

10 If that couple, then, still wanted to go forward after
11 hearing that, knowing that the vendor is not enthusiastic about
12 the event that they want her to provide services at, and they
13 insisted on hiring her and paying good money for that service
14 that will be provided by the unenthusiastic person, then she
15 would have to do it. And it would be interesting to have a
16 factual record, because that's relevant to equitable standing,
17 about what would happen from there.

18 We don't have that, but what I'm trying to illustrate is
19 that for standing purposes, there isn't a lot to go on with
20 respect to why she, right now, feels that she's under a credible
21 threat of being -- that if she takes the action she intends to
22 take, a credible threat rather than sort a remote scenario that
23 she's going to have to refuse a same-sex couple who has actually
24 asked her to perform the services.

25 THE COURT: Well --

1 MR. KAPLAN: I concede on the denial clause. It's a
2 much stronger case for standing.

3 THE COURT: Let me step back. Ask just -- I interpret
4 your standing argument and their standing argument in lay terms
5 this way, and I think you both -- from a just general
6 principles, what-makes-sense perspective, I think you both have
7 a point to make.

8 I think I'm going to ask you what you think about their
9 point, and then I'm going to ask them what they think about your
10 point. Maybe I'll turn to them after this answer, and then,
11 like I said, we can always circle back.

12 I interpret your point to be that Louisville had never heard
13 of Chelsey Nelson until this suit, and if she hadn't filed the
14 suit, Metro Louisville would probably still not have heard of
15 her, and pluralism is hard. It's a good thing, but it's hard.

16 We've been trying to figure out for a couple centuries how
17 to be able to do what we have a right to do without getting in
18 the way of other people who have a right to do other things.
19 And one of the ways that it kind of should work is don't go
20 looking for a fight when you don't have to.

21 And so I think part of what Louisville's point is is Chelsey
22 Nelson probably could have just gone about photographing
23 opposite-sex weddings, and she would have been fine doing that.
24 Probably no same-sex couples would have asked her to photograph
25 their weddings. We wouldn't be here. Like, why go spoiling for

1 a fight?

2 I'm going to ask them in a second why that's wrong. I think
3 their point is: Why should you have to break the law in order
4 to find out if that law is constitutional. Now, obviously, you
5 know, you can't just pick a law that has nothing to do with you
6 and ask for an advisory opinion about it, but if you're in a
7 business that is breaking the law or, absent the fairness
8 ordinance, would be doing what the fairness ordinance prohibits,
9 why should you have to break the law first, subject yourself to
10 the administrative process, possibly subject yourself to a civil
11 suit, which is allowed by a member of the public, all to find
12 out that the ordinance was unconstitutional as applied to you?

13 So what's your answer to that? Then I'll ask them what
14 their answer is to you.

15 MR. KAPLAN: My answer is that she's only proposing
16 right now to do one thing which would break the law, which is
17 the sentence in this advertisement.

18 So my reaction to what you're saying is absolutely true.
19 That what she could have done is send out Exhibit 1 and Exhibit
20 2 without this highlighted sentence and accomplish exactly the
21 same objective, which I believe is to -- in a respectful,
22 candid, and is worded in a humane way to say, "This is what I
23 believe, and so this is what you will get if you hire me to take
24 pictures at your wedding."

25 That would have avoided this dispute, but in order to get

1 standing, they have pled that the advertisement has to be
2 written this way. It has to say not only what she positively
3 believes, but what she will refuse to do if asked.

4 That is the only hook that they have, really, for standing,
5 because if you send out this advertisement, you're not going to
6 get any takers, unless it's a masochistic person who wants to
7 make a point as much as the plaintiff. So --

8 THE COURT: But, I mean, you say that as if it's
9 unplausible, but, I mean, that's what happened in Masterpiece
10 Cakeshop. It's what happened at Arlene's Flowers. It's not --
11 it happens.

12 MR. KAPLAN: So my reaction is no, you shouldn't --
13 the law in the Sixth Circuit and Susan B. Anthony List says that
14 there is no expectation that someone who wants to assert their
15 First -- protected First Amendment rights has to risk a severe
16 penalty, jail time, et cetera in order to prove -- to vindicate
17 their rights.

18 That they can file a preenforcement challenge and allege
19 sufficient facts which would satisfy in Article III court that
20 there's actually a real controversy here that warrants
21 adjudication.

22 So we would never expect Miss Nelson to have to, you know,
23 shoot first and, you know, ask for permission later, but, in
24 this case, there is an element of artificiality and manufacture.

25 So perhaps this sits better under prudential standing, which

1 is a little looser, which focuses on, under the Grace Community
2 Church case, the likelihood that the harm alleged will ever come
3 to pass. Two, whether the factual record is sufficiently
4 developed to produce a fair adjudication on the merits.

5 And that factor is important, Your Honor, because I would
6 have loved to have asked Miss Nelson, "Why does the
7 advertisement have to be worded this way?" Why -- I guess I'm
8 showing my hand here if we ever went into discovery, but why is
9 it necessary to express that in the negative?

10 But, in any event, we don't have a well-developed factual
11 record --

12 THE COURT: I mean, it would be -- you would object --
13 you would find it illegal even if she expressed it in I'll say
14 the nonnegative, the positive, if she said, "I only photograph
15 opposite-sex weddings"? That would be as objectionable --

16 MR. KAPLAN: True.

17 THE COURT: -- to Louisville --

18 MR. KAPLAN: Yeah. I was being imprecise. I mean,
19 rather than expressing her positive views of the type of
20 marriage God approves of, and her being a devout adherent to it,
21 her version of Christianity, she does not want to participate in
22 a same-sex wedding or be present at one, that would be
23 absolutely fair game. That's the society we live in.

24 You have no right to not be uncomfortable, whether you're
25 the same-sex couple or a devout Christian wedding photographer

1 with certain beliefs about traditional marriage, neither one has
2 a right not to be uncomfortable, but there is an element of
3 artificiality here in the sense that she -- I think the Court
4 can take judicial notice of the fact that a same-sex couple --
5 if she really wants to disseminate this advertisement,
6 presumably, she wants to do it widely. And really -- you know,
7 because that's how she thinks she's going to get business.

8 She must presume that same-sex couples will see that and be
9 aware. Now, if they still think she's so talented, I want to go
10 in and talk with her, maybe convince her to do the service, they
11 are going to have a conversation where she can -- there is an
12 article at appendix 386, Should I Attend a Homosexual Wedding by
13 Kevin DeYoung.

14 She could hand them that article, say, "This is what I
15 believe." There would be a conversation, so there's an element
16 of artificiality in that they're stating --

17 THE COURT: You think she --

18 MR. KAPLAN: -- their case.

19 THE COURT: You think she could do that without
20 violating the fairness ordinance?

21 MR. KAPLAN: Yes, absolutely. Absolutely. You know,
22 we -- our position is a little different from other
23 jurisdictions. This isn't like Telescope Media Group where
24 Minnesota said, "She has to positively depict this wedding
25 exactly the same as this wedding."

1 I mean, Metro prosecutes for violation of the denial
2 ordinance, which is, "I won't provide the service to you."
3 They're not going to prosecute a situation where the person
4 says, "You know, this will make me very uncomfortable because of
5 the belief system that I follow. Do you still want to move
6 forward? Because I will do it, as I'm legally required to do."

7 So absolutely, Your Honor, I do think their briefs -- it
8 foists a view upon Metro that it doesn't have, which is that she
9 is required to bow her head when the clergyman says, "Bow your
10 head," that she's required to kneel when he says, "Kneel," that
11 she can't express objections while she's at the wedding.

12 THE COURT: But I would think for the sake of the
13 fairness ordinance having the teeth it's supposed to have when
14 applied to conduct that everyone agrees is not expressive, that
15 you violate the fairness ordinance if you say, "I'll provide you
16 the service, but I won't do it well."

17 MR. KAPLAN: I'm not sure about that. I don't think
18 that's -- I don't think that's correct. I think it would be --
19 to be honest and say, "I am an excellent wedding photographer,
20 but because of my belief system, I'm going to be uncomfortable,
21 and I'll do my best, as I'm required to do, but the pictures
22 probably" --

23 THE COURT: Well, that's --

24 MR. KAPLAN: -- "won't be as good."

25 THE COURT: So -- but it would be a violation of

1 fairness ordinance to say, like, "I'll provide you this service,
2 but I won't do my best"?

3 MR. KAPLAN: I think if you said, "It's going to be
4 crappy," you're effectively denying the service. So -- but,
5 again, we don't have a factual --

6 THE COURT: I mean, I think so -- I agree, I think so
7 too, but let me turn to them on the standing thing. If you
8 could start with what I think is kind of their larger point,
9 which is this is not Masterpiece Cakeshop where somebody went
10 into the cake shop, said, "I want a custom-made cake for a
11 same-sex marriage." The baker said, "No," and somebody tried to
12 enforce -- tried to fine -- tried to fine the baker.

13 Same thing with Arlene's Flowers where somebody said, you
14 know, "Do the floral arrangements for the wedding." The florist
15 said, "I can't, in good conscience, do that," and somebody
16 brought an enforcement action. Like, I think Louisville thinks
17 that Chelsey Nelson picked this fight. So can you address that?

18 MR. NEIHART: Yes, Your Honor. I think I'll start
19 with in paragraphs 212 and 213 indicates the reasons that Miss
20 Nelson filed this complaint, at least some of the reasons, and
21 there, Miss Nelson had been coming --

22 THE COURT: Can you move your microphone a little
23 closer? Thanks.

24 MR. NEIHART: Is that better? Okay. In paragraphs
25 212 and 213 of the complaint, Miss Nelson has indicated at least

1 part of the reason why that she filed this complaint, which was
2 that she had noticed news reports of the Masterpiece case as
3 well as even just down the street in Lexington, Kentucky, where
4 a gay pride festival had requested that a well-known Christian
5 print shop create a t-shirt celebrating the gay pride festival.

6 And so, in this case, the standard is whether there is a
7 credible threat of enforcement, not whether there is an actual
8 enforcement or even a threatened enforcement or whether there's
9 been -- there's been history of enforcing against Miss Nelson.
10 This question is whether there's a credible threat of
11 enforcement.

12 And so far, from -- from seeking a fight in this case, Miss
13 Nelson has wanted to ensure that she can advertise as she wants
14 to, she -- that she can grow her business in the way that she
15 wants to, that she can run her business consistent with her
16 religious beliefs, and Miss Nelson cannot do that if there is a
17 law, as Louisville has explicitly stated in its briefing and
18 here today in court, that prohibits Miss Nelson from running her
19 business in this way.

20 And so the purpose of the preenforcement suit is to gain
21 clarity for her business so that she can continue to promote
22 messages that are important to her faith well into the future.

23 THE COURT: But that's -- that, alone, is not what
24 courts do. We don't issue advisory opinions just because some
25 clarity would be nice. So why is there -- and it also can't be

1 the case that there's a credible threat of prosecution in
2 Louisville just because there was an aggressive enforcement
3 proceeding in Colorado. So -- arguably. I'm not putting this
4 on -- arguably. So why is there a credible threat of
5 prosecution in this case?

6 MR. NEIHART: Well, I think, as the Court pointed out,
7 one of the McKay factors is whether it makes it easy -- whether
8 there is some sort of thing of -- some sort of mechanism in the
9 statute that makes it easy to enforce the statute, and here, I
10 think there's two mechanisms that make Louisville's ordinance
11 specifically capable of enforcement.

12 One is that any person can file a complaint, and then the
13 other one is that the commission itself can file a complaint if
14 it has reason to be that an unlawful practice has occurred. And
15 so, in this case, Louisville has stated that Miss Nelson would
16 violate the law if she posted her desired statements. And so --
17 and, in fact, Louisville had stated that she has a strong
18 standing argument in that respect.

19 But this goes to the intertwinement argument that we make in
20 the response to the motion to dismiss, and that is that whether
21 Miss Nelson can post her statement does not depend on receiving
22 a third-party request. Instead, it depends entirely on whether
23 posting the statement is constitutionally protected or whether
24 it's prohibited by the publication provision.

25 But in order to make that determination, the Court also

1 needs to evaluate the merits underlying the -- Miss Nelson's
2 claim to the accommodations provision. Because whether she has
3 a constitutional right to decline to celebrate same-sex services
4 informs whether she has the intertwined constitutional right to
5 post a statement explaining that choice.

6 And so in Telescope Media Group and Brush & Nib, the Eighth
7 Circuit and the Arizona Supreme Court respectively found that to
8 be the case.

9 THE COURT: So let me interrupt, and I think I
10 understood what you just said to be something that I think is
11 right. If the accommodations provision can be constitutionally
12 applied to Chelsey Nelson Photography, then the publication
13 provision is constitutional?

14 MR. NEIHART: Yes, that's correct. That's correct,
15 because they're intertwined. Now --

16 THE COURT: So let me, then, ask about your facial
17 challenge to the publication provision, because you make a
18 vagueness, overbreadth argument -- well, let me just -- I'm
19 going to get there, but you would agree, I think, that most
20 public -- most applications of a public accommodations law, most
21 applications of an anti-discrimination law are constitutional?

22 MR. NEIHART: Your Honor, that's correct. I'll
23 leave --

24 THE COURT: So, for example, like a Marriott hotel can
25 constitutionally be fined by the government if it says, "I won't

1 rent a gay couple a room for the night," correct?

2 MR. NEIHART: Of course.

3 THE COURT: And McDonald's can be fined if they say to
4 a gay couple, "I'm not going to sell you a hamburger"?

5 MR. NEIHART: Yes.

6 THE COURT: Correct? Okay. And the 1964 Civil Rights
7 Act is constitutional as applied, at least for most -- most
8 applications?

9 MR. NEIHART: Yes.

10 THE COURT: So how is the publication provision
11 facially invalid if it's saying most vendors can't put up a sign
12 that says, "No gays and lesbians allowed," when, in fact, most
13 vendors can be fined for refusing to serve gay and lesbian
14 customers?

15 MR. SCRUGGS: Your Honor, can I --

16 THE COURT: Yeah.

17 MR. SCRUGGS: -- jump in?

18 THE COURT: That does go to merits.

19 MR. SCRUGGS: Bit of a merits question. I'm happy to
20 answer that, and I think to answer your question, first of all,
21 your premise is exactly right, that the Fair Housing Act, the
22 Title VII both have provisions similar to what we call the
23 denial clause.

24 So there are, essentially, two clauses in the publication
25 provision. The denial clause, which we totally agree is

1 facially constitutional, because it applies the constitution in
2 the vast amount of situations.

3 What we're seeking to facially invalidate, though, is what
4 we call the unwelcome clause. So -- and that's the only thing
5 we're seeking to facially invalidate, and, in fact, I think the
6 point you make actually supports our argument, in the sense that
7 they are two separate provisions, so they must be doing two
8 separate things.

9 I mean, they are separate language. We interpret -- you
10 know, we will interpret it that it's not superfluous, so that --

11 THE COURT: And this is a canon of construction, but
12 it's not -- it is often not a dispositive canon, and the belt
13 and suspenders approach is not unusual.

14 MR. SCRUGGS: I agree with that, Your Honor, but just
15 look at the plain language of what we're seeking to challenge is
16 that unwelcome, unacceptable, and, be specific, it's -- the only
17 part we're facially challenging is that -- a statement that
18 indicates that a person's presence at or patronage of a public
19 accommodation is unwelcome, unacceptable, undesirable, or
20 unwelcome.

21 And that's why the Brush & Nib court, even the appellate
22 court that ruled against Brush & Nib on the merits of their
23 underlying claim facially invalidated, that is one particular
24 language, because it was vague and overbroad.

25 So that's really the only part that we're seeking to

1 facially invalidate. It's not the denial clause. In a sense,
2 we would just ask the Court to sever that end -- that end
3 language, which, again, would allow the Court, would allow
4 Louisville to prosecute individuals who say, "I can't -- I'm not
5 going to provide this service."

6 THE COURT: I mean, it sounds like you're saying
7 that -- let's take the Marriott hotel for an example. The
8 Marriott hotel -- it's okay for Louisville to fine the Marriott
9 for putting up a sign that says, "We won't rent a room to a gay
10 couple," but it is unconstitutional, according to you, for the
11 Marriott to put up a sign that says, "We don't want to rent a
12 room to a gay couple." That doesn't make sense.

13 MR. SCRUGGS: Well, now, I think to go to the example
14 that Louisville -- I think we'd go to the example Louisville
15 came up with, in the sense of you can anticipate someone who's
16 struggling saying, you know, "I don't believe in same-sex
17 marriage. I struggle with this. I'll do your -- I'll
18 photograph your wedding, but I want you to know it violates my
19 beliefs, but I'm going to do it."

20 My reading of that unwelcome, undesirable language would
21 prohibit that, and it would prohibit even things broader than
22 that, Your Honor. Just take the simple statement, you know,
23 Israel commits murder. Does that indicate that someone's
24 presence or patronage is unwelcome because of their national
25 origin, for example?

1 I think it arguably could, because that language is vague
2 and taken in and overbroad. Again, looking at some other courts
3 that have ruled that way. And, really -- but, of course, I will
4 fully admit, Your Honor, that that's not our central claim here.

5 THE COURT: And let's -- so let's go to the -- let's
6 get to the merits.

7 MR. SCRUGGS: Absolutely.

8 THE COURT: And start with the accommodation merits.
9 I'm going to go -- I did a little research on weddings. It's
10 been 13 years since mine, but I remember some of it, and I did a
11 little research to see what else is out there.

12 I made a list of all of the vendors that an engaged couple
13 might hire, and I'm not going to do all of them, but I'm going
14 to go through a lot of them and try to apply the test that I
15 think you applied for when is conduct speech.

16 McDonald's selling hamburger, not speech. Marriott renting
17 a room for the night, not speech. But some -- marching in a
18 parade, speech. Even though there's no words, speech. So what
19 conduct is speech?

20 I think, under your test, the tailor for the tux, the
21 groom's tux, not speech. The baker who makes a plain, generic
22 white cake that is already sitting in the window, not speech.
23 The chef for the reception, even if the chef is onsite, not
24 speech. If I'm wrong, I need this: Don't -- just make a note,
25 if you would, and then we'll circle back. If I'm right, don't

1 make any notes.

2 MR. SCRUGGS: Yeah.

3 THE COURT: That's fine. The chef, not speech. The
4 blow-dry stylist for the bridal party, not speech. The makeup
5 artist for the bridal party, even though it's an -- even though
6 it's an artist, not speech. The manicurist for the wedding
7 party, not speech. The floral -- the customized floral
8 arrangements for the wedding, speech. A custom-made wedding
9 cake, speech. Videography, speech. Photography, speech.

10 Let me just stop there. Am I wrong on anything so far?

11 MR. SCRUGGS: No, Your Honor. I think that's --

12 THE COURT: Okay.

13 MR. SCRUGGS: -- all accurate.

14 THE COURT: So here's the ones that I think -- I'm not
15 sure under your test. So I'll guess, and then, at the end, you
16 tell me which ones I guessed wrong on.

17 The wedding planner, speech. The seller of wedding
18 insurance, which I didn't even know was a thing, but I guess if
19 you spend a bunch of money on a wedding, and then it doesn't
20 happen, you can get an insurance policy to cover against that.
21 The seller of wedding insurance, not speech.

22 The venue for the wedding -- and this is all assuming that
23 none of these vendors are churches, core religious institutions.
24 Okay. The venue for the wedding, not speech. A custom-designed
25 wedding dress, speech. Custom-designed invitations, speech.

1 Generic stationery, not speech. Calligrapher, speech.

2 The printer of stationery, let's say the equivalent of like
3 a FedEx office printer, but they mainly do -- anyway, I think
4 you would say speech. The jeweler who sells the rings, not
5 speech. At jeweler who inscribes the wedding date inside the
6 rings, speech.

7 A custom wedding vows writer, which, it turns out, is a
8 thing that you can -- who you can hire, speech. The officiant,
9 again, nonreligious officiant, speech. The waiters at the
10 reception, not speech. The deejay, speech. The dance
11 instructor for the wedding couple, teach them how to do their
12 first dance, speech.

13 The limo driver for the bride and groom leaving the wedding,
14 not speech. The Uber driver for the wedding guests leaving, not
15 speech. The travel agent for the honeymoon, not speech. A
16 divorce attorney, speech.

17 Now, which ones was I wrong on?

18 MR. SCRUGGS: All right. It's quite the list, Your
19 Honor, and I appreciate it. I think, for the most part, you're
20 generally right. I want to, though -- some caveats that,
21 obviously, I think we can think of just bizarre and extreme
22 examples that could eliminate or include --

23 THE COURT: I'm not asking about that.

24 MR. SCRUGGS: Yes. Okay. But I think that's
25 generally right. The ones I have kind of a mark on were the

1 jewel -- the jeweler making the rings. Part of me wants to
2 consider is that like the wedding dress? Is there something so
3 symbolic about the final product that it conveys a message? I
4 think that's a much closer call, but I think -- and another one
5 I have a mark on was the FedEx office, one, where --

6 THE COURT: You think maybe not speech for that?

7 MR. SCRUGGS: Well, I think, you know, there is -- you
8 can argue that, at some point, it almost is like a common
9 carrier.

10 THE COURT: What's the difference between the printer
11 of stationery and the printer of t-shirts with hands on?

12 MR. SCRUGGS: And, Your Honor, I think that's exactly
13 the parallel. Is it like a publisher printer or is it more like
14 a telegraph company or telephone company? I think that is
15 protected, but I just mark it.

16 THE COURT: Well, I'll share. My mom had a stationery
17 shop for the first 20 years -- or for about 15 years of my life,
18 and a lot of the stationery that she would sell, they would --
19 she or an employee would drive over to a little shop called
20 Minuteman Press, and they would tell Minuteman Press exactly
21 what the invitation should say, you know, "Come to our wedding,"
22 you know, "Justin and Jason," and Minuteman Press would print
23 it. So that's my hypothetical. In that situation, is Minuteman
24 Press engaging in speech?

25 MR. SCRUGGS: Yes, Your Honor. I think that's right.

1 I was thinking of a different kind of FedEx context. The other
2 one I think I marked is dance instructor. You know, I think
3 dance is protected speech, but, you know, it's -- I think it
4 would be sending dancing cases, right, of -- from the Supreme
5 Court where it kind of creates its own kind of category, in a
6 sense, but I think, generally, your -- your definitional list is
7 correct.

8 THE COURT: Okay. Then let me ask. Imagine that
9 we're on a small -- let's imagine we're on a military base where
10 they don't have any of this stuff, and it's kind of in the
11 middle of nowhere. There's a small town nearby that has all of
12 these things, but there's only one, and that one person is
13 opposed to same-sex marriage.

14 If I understand your theory right, a gay couple, the gay
15 couple in the military who wants to get married can't -- in that
16 community, that small town near the military base, they can't
17 get a custom-made floral arrangement, custom-made cake,
18 videography, photography, a wedding planner, a custom-design
19 dress, the stationery printed, rings, maybe, they can't get, an
20 officiant, a deejay, and if they need an attorney, an attorney
21 related to the marriage.

22 First of all -- well, what do I do with that?

23 MR. SCRUGGS: Yes, Your Honor. It is, you know, in
24 some sense, a difficult question, but I think that it's that
25 monopoly question that the Supreme Court addressed in Tornillo,

1 in a sense. That was the argument in *Tornillo*, that because of
2 the newspapers were a monopoly, and no one could access those
3 newspapers, we could force the newspapers to open up to allow
4 people to speak particular messages.

5 And the Supreme Court rejected that argument and said that
6 that monopoly interest doesn't override the speaker's interest
7 to control what they do or do not say.

8 I think more in practical terms, Your Honor, is that in our
9 connected society, someone could obtain those services, for the
10 most part, but I'll also say thankfully, Your Honor, it's not
11 really an issue, obviously, in this case, right? Because I
12 think your question goes to the compelling interest analysis.
13 It is speech. Does the government have a compelling interest?

14 THE COURT: So maybe in that small town, the
15 government would survive the strict scrutiny analysis. Is that
16 what you're saying?

17 MR. SCRUGGS: I'd say perhaps, Your Honor. I'm
18 hesitant, because of *Tornillo*, and because of the principles
19 that *Tornillo* addressed, but I would say it's a different
20 analysis is my point. That here, where everyone can see
21 hundreds of photographers and bloggers who are willing to
22 photograph and --

23 THE COURT: Can -- let's go back to Louisville for a
24 minute. All of that list that you said is speech, can they all
25 put up a sign that says -- and now I'm quoting from *Masterpiece*,

1 in terms of what Masterpiece said, a sign that would impose a
2 serious stigma on gay persons? Can they all, according to your
3 theory, put up a sign that says, "No goods or services will be
4 sold if they will be used for gay marriages"?

5 MR. SCRUGGS: No, Your Honor. I think our argument's
6 slightly different. So -- and I think the language that
7 Masterpiece uses was precise. No goods or services sold that
8 will be used.

9 Our client is saying she wanted to custom create from
10 scratch, you know, these blogs or photographs. So that is, I
11 think, slightly different, and to go back to the Brush & Nib
12 example that came up there, where, in that situation, you have
13 to kind of custom verse off-the-shelf scenario, where the
14 calligraphers would sell things off the shelf.

15 It's -- the objection here is not to how the product will be
16 used down in the stream of commerce or misuse. The objection
17 here is the custom creation. So I think we have to make that
18 distinction, which is a bit different than what the Supreme
19 Court was worried about, and, in fact, you know, that was one of
20 the reasons I think the majority didn't reach the bigger
21 question.

22 THE COURT: How does the test you just gave apply to
23 the jeweler who is just selling a gold ring?

24 MR. SCRUGGS: Well, Your Honor, again, I was just
25 saying --

1 THE COURT: It's not custom made.

2 MR. SCRUGGS: Then if it's not custom, then we don't
3 view that as protected.

4 THE COURT: Okay.

5 MR. SCRUGGS: It's off the shelf, like the
6 off-the-shelf cake.

7 THE COURT: And then let's -- let's do -- I mean, I
8 know you don't think this next hypothetical is fair, and I'm not
9 sure it's analogous either. In fact, I think under Obergefell,
10 it's not analogous, but I do want to -- I do want you to have a
11 chance to answer it.

12 Chelsey Nelson, same website, same photography, same
13 services, same city, same everything else, except she says under
14 her religious beliefs, interracial marriages are wrong, and so
15 she won't photograph one. What would I do with that case?

16 MR. SCRUGGS: I think that would be different, Your
17 Honor, and I think we want to think about it in terms of the
18 objection is different, and the interest analysis is different.
19 So the --

20 THE COURT: Walk me through all that, please.

21 MR. SCRUGGS: Absolutely. So the objection, I think I
22 would turn exactly, to contrast, Loving versus Obergefell,
23 right? Loving said that objections to interracial marriage are
24 inherently based on invidious racial discrimination designed to
25 maintain white superiority. That's a quote. Versus we look at

1 Obergefell where it said that objections to same-sex marriage
2 are based on decent and honoris religious and philosophical
3 principles.

4 So we would say, Your Honor, that that objection to
5 interracial marriage is inherently a status-based objection, not
6 a message-based objection. But even if we kind of take that
7 analysis, then you go to the second part I think is different,
8 which is the interest analysis, and I point the Court to the US
9 Supreme Court decision that the DOJ cited in their brief, which
10 is Pena-Rodriguez versus Colorado where it specifically said
11 racial bias is a unique constitutional harm or history or
12 tradition is different.

13 So I think the interest analysis would be much stronger for
14 the state, and I'd actually point the Court that I think
15 Louisville even agrees with us. So if you look at their
16 ordinance, the city of Louisville's ordinance, in section, I
17 think is it 90 -- 92-6, subsection B, which is the employment
18 section, they have an exception for religious organizations that
19 only accepts religious organizations regarding sexual
20 orientation and gender identity but not for any other category.

21 So I think what that is almost telling is, you know, we do
22 treat this kind of racial objection differently. The Government
23 has a much stronger interest in doing so.

24 THE COURT: Let me ask some general -- some
25 big-picture questions again, and then I'm going to give

1 Louisville --

2 MR. SCRUGGS: Well, oh go ahead, Your Honor. I was
3 going to -- I do want to circle back slightly to your question
4 about kind of the list of different groups, and I think one of
5 the challenges is the challenge there is not so much the nature
6 of this case, it's the nature of the First Amendment, right?
7 Because in every First Amendment case, no matter what it is, the
8 Court's going to have to draw that conduct versus speech
9 analysis.

10 So let's say the Government put a ban on wedding rings, for
11 example. I know that sounds strange, but the Court, in that
12 case, is going to have to analyze whether that's speech or
13 conduct, and for all of those things.

14 So I don't think it's necessarily the nature of this case
15 that makes those line drawings difficult. The courts are --
16 have typically drawn those lines throughout just the nature of
17 the First Amendment.

18 So I just wanted to point that out, and that's why, when it
19 comes down, you know, I know the Court's, obviously, concerned
20 about the implications of its ruling, not just the facts of this
21 case, but I think everyone agrees that photographs and blogs are
22 protected speech. And so that's what kind of makes this case
23 safer and easier, in some respects, drawing that conduct versus
24 speech line. So I'm sorry. I just wanted to make that point.

25 THE COURT: No. I mean, that would be a, I think,

1 convenient segue to turn back to Louisville. Let's start there.
2 Speech does not have to have words, correct?

3 MR. KAPLAN: I'm sorry?

4 THE COURT: Speech does not have to have words?

5 MR. KAPLAN: That's correct. That's --

6 THE COURT: Burning a flag -- burning a flag is --
7 burning a flag is speech.

8 MR. KAPLAN: Burning a flag.

9 THE COURT: But there's no words.

10 MR. KAPLAN: Right.

11 THE COURT: But as a general matter, art counts at
12 speech. Artistic expression.

13 MR. KAPLAN: The courts have tended to find that, yes.

14 THE COURT: The Sixth Circuit and the Supreme Court
15 have both listed photography in the category of things they
16 count as art. Sixth Circuit said in *ETW Corporation*, it talked
17 about protected mediums of expression, and it listed music,
18 pictures, films, photographs, paintings, drawings, engravings,
19 prints, and sculptures.

20 Supreme Court in *Stevens*, about a decade ago, talked about
21 protected visual and auditory depictions, and it listed
22 photographs, videos, and sound recordings as protected speech.

23 So you got a Sixth Circuit saying photographs are speech.
24 Supreme Court saying photographs are speech. I guess by -- my
25 question to you is what do I do with that?

1 And maybe to be a little more specific, what's wrong with
2 this -- I don't think syllogism is exactly the right word, but
3 art is speech. Photography is art. You can't compel political
4 or religious speech, so you, therefore, can't compel
5 photography. Political or religious photography. Your turn.

6 MR. KAPLAN: All right. Thank you. I'd love the
7 opportunity to talk about some of the other questions you asked,
8 but with respect to your question, yeah, it's an interesting
9 question. Photography, clearly art in some cases. Robert
10 Mapplethorpe, when he does a photograph, is clearly trying to
11 convey to an audience certain ideas.

12 I don't believe any of the cases from the Supreme Court of
13 the Sixth Circuit say that in all cases, a photo is art or even
14 inherently expressive.

15 The case that they cite in their brief, which is the one
16 that I read most closely, which is from the Second Circuit, I
17 assume it's similar to the ones you're citing, which is the
18 Barry versus City of New York, treated -- puts photographers
19 along with other artists, other visual artists, as being engaged
20 in speech.

21 So I do think the context of these cases is important. I
22 want to back up and remind the Court that here, we're not
23 dealing with a regulation that regulates speech per se or that
24 burdens speech per se. I think they've suggested that it could
25 be viewed as a viewpoint-biased or content-biased statute.

1 That's simply just inconsistent with our precedence. It's not.

2 THE COURT: Yeah, but what do you do with -- so I have
3 a quote from Hurley talking about public accommodations law. It
4 said -- this was the Hurley v. -- the case in Massachusetts
5 about the St. Patrick's Day parade, and a gay rights group
6 wanted to march in a private organization's St. Patrick's Day
7 parade.

8 Normally, private organization can't discriminate against
9 gays and lesbians. So it seemed that this private organization
10 was running afoul of the public accommodations law, and this was
11 1995.

12 Unanimous Supreme Court said yes, the private organization
13 is running afoul of the public accommodations law, but that
14 public accommodations law as applied here is a violation of the
15 First Amendment, because the First Amendment applies when the
16 effect of declaring someone's speech itself is the public
17 accommodation. So how do you get past Hurley?

18 MR. KAPLAN: Well, I'm glad you brought up Hurley,
19 Your Honor. All the lower courts that have come out different
20 ways on this issue, they all cite Hurley, and they all cite
21 Rumsfeld, and I believe that to reach the right result in this
22 case, those are both unanimous decisions, we have to read those
23 decisions and decide what they really say, because someone's
24 reading those cases wrong. There's no other way to explain
25 these lower courts coming out in different ways.

1 With respect to Hurley, I'm shocked that they cite Hurley to
2 support their position. I'm shocked to see it as a precedent
3 that the plaintiffs would use supporting their position, and
4 here's why.

5 In that case, Massachusetts had a public accommodations
6 ordinance that included sexual orientation as a protected
7 classification. They chose to apply that in a peculiar way, as
8 the Court notes, to say, okay, the south Boston war veterans,
9 who have been given, basically, plenary authority to decide who
10 is in this parade on St. Patty's Day.

11 They're also celebrating the expulsion of the British with
12 the guns of Ticonderoga, historically, but it's a parade that
13 the war veterans were given, basically, plenary authority to
14 decide who's in and who's out.

15 That process worked as normal. A group called GLIB, a group
16 of gays and lesbians who wanted to express their identities as
17 Irish Americans in the parade, complained that this was a public
18 accommodation, and Massachusetts did an odd thing, which is to
19 say even though this is a private parade being organized by a
20 private parade sponsor, and has been for decades, nonetheless,
21 we're viewing this as a public accommodation.

22 Based on that premise, the Court quite rightfully ruled
23 unanimously that when you have an inherently expressive
24 activity, which is a parade, and the reason that's inherently
25 expressive is a group of people get together, they go down the

1 public thoroughfare. There are people to their right, people to
2 their left. They're clearly communicating a message to the
3 public, and it's a message of their choice.

4 The reason that the fairness ordinance couldn't be applied
5 to require them to include a unit of gay pride individuals was
6 that they were already speaking, and that was going to alter
7 their message. Inherently, it was going to either dilute, alter
8 their message by allowing a unit of people who they did not want
9 to include to, basically, piggyback on their parade.

10 This couldn't be more of a different situation. This isn't
11 Miss Nelson's parade. If it's a parade at all she's attending,
12 it's somebody else's parade. So I think quite rightfully,
13 rather than focusing on the medium, which is photography, and I
14 want to go down that path, because as a philosophy major, I like
15 to analyze, like, parse issues like that, but let's forget about
16 photography for a second and focus on the fact that, you know, I
17 gather from her complaint she feels like she's being compelled
18 to attend a religious ceremony and to express support for what's
19 going on there in a way that's inconsistent with her religious
20 beliefs.

21 She's using a camera. Yes, that's the service, she's that
22 type of service provider, but she feels her speech is being
23 compelled. But as you point out, she's one of many vendors.
24 Just like the caterer, the harp player, the tablecloth person,
25 she's collateral to a private event that's being held by private

1 individuals, and she's showing up to be paid and to provide a
2 service.

3 So the idea that, somehow analogous to Hurley, her message
4 is being hijacked or piggybacked on by an unwelcome speaker
5 who she doesn't agree with, it's really -- it's really quite the
6 opposite. She's being, true, required to provide a particular
7 service at that wedding.

8 The disconnect, I think, for me, and why I think we should
9 view this more in a Rumsfeld -- I want to talk about Rumsfeld
10 really deeply. But the disconnect is how can it be inferred
11 that she is any way endorsing what's going on at that ceremony,
12 wedding, from the fact that she's taking pictures at it?

13 I've got -- first of all, let's talk about photography,
14 because I thought you were right to focus on that.

15 THE COURT: Let --

16 MR. KAPLAN: Let's talk about photography.

17 THE COURT: Well, I do want to get there, but I want
18 to follow up on the Hurley, the Rumsfeld v. FAIR, the photog --
19 and where photography fits. Marching in a parade is speech.
20 That's what Hurley said, and I take it that's what you're -- and
21 you just said -- you said that, and that's why you think
22 Hurley -- it sounds like you're saying you think Hurley was
23 rightly decided.

24 MR. KAPLAN: Correct.

25 THE COURT: In Rumsfeld v. FAIR, the government was

1 forcing, incentivizing, whatever word you want to use, the law
2 school to provide space, physical space for job interviews with
3 the military. And I guess I read that case to say an empty room
4 is not speech. And, you know, some -- and at some law schools,
5 most of the on-campus interviews are actually in hotels, as you
6 know.

7 So Hurley says marching in a parade is speech. Rumsfeld v.
8 FAIR says an empty hotel room is not speech. They seem very
9 consistent to me. They don't seem in conflict at all. And then
10 that just leads to the question, well, okay. Marching is
11 speech. An empty hotel room is not speech. Is photography
12 speech?

13 And it sounds like your argument on photography is it's
14 speech if it's good. If it's Robert -- if it's Robert
15 Mapplethorpe, it's good. If it's me taking a selfie and posting
16 it on Instagram, then it's not speech. That -- you're shaking
17 your head like I'm not -- like I'm not capturing your test --

18 MR. KAPLAN: Well, I'm going to --

19 THE COURT: -- correctly.

20 MR. KAPLAN: Actually, I think there's -- I think
21 we're on the same page.

22 THE COURT: Okay. So why -- I mean, it seems to me
23 very expressive for me to snap a selfie, put it on Instagram,
24 let people know, you know, where I was, how I was feeling. It
25 seems to me, you know, a random bystander's photograph of police

1 brutality, for example, might not be professional photography
2 quality, but that's a photograph that -- taken on a phone and
3 posted on social media. I think that photograph seems like
4 pretty -- pretty clearly speech to me.

5 And then, you know, I got -- at a wedding, like, why
6 don't -- why would I post a picture of my wedding day on my
7 desk? It's to express something about myself.

8 Tell me why it has to be a talented photographer in order to
9 count -- in order for photography to count as speech.

10 MR. KAPLAN: It doesn't need to be a talented
11 photographer to count as speech. I do think that you cannot, in
12 the abstract, say that photography, that taking -- and the
13 reason we're using the term photography, which says more, I view
14 this as taking -- the abstract question is: Is taking pictures
15 always inherently expressive conduct? And I want to talk about
16 Rumsfeld more in a second, because Justice Roberts writing for
17 the Court talked about inherently expressive conduct.

18 There is the fact that photography can be expressive, and
19 there's also what is being expressed. That has to be key to
20 what we're talking about. It can't just be this medium is
21 expressive, ergo that means Chelsey Nelson is being forced to
22 express support for same-sex marriage. That's another step
23 forward, but let's just focus on the issue of photography,
24 'cause I do think it's interesting.

25 Is -- before we talk about her specific pictures, is taking

1 pictures, in general, an inherently expressive activity? And,
2 if so, what's being expressed? I think in normal human
3 experience, we've all had the experience of people taking
4 pictures to record an event so they can remember it later, and
5 that that's their purpose. It's -- they're not conceptualizing
6 themselves as personally expressing themselves when they snap a
7 picture.

8 THE COURT: That's why people keep a journal or a
9 diary also.

10 MR. KAPLAN: Right.

11 THE COURT: I want you to address that, because --

12 MR. KAPLAN: Right. Well, sure, but, again, we need
13 to talk about what is the message that's being expressed. I
14 mean, a picture can express 1,000 words, but which 1,000, and
15 who is deciding what's actually being -- being expressed?

16 So with photography, you've got visual artists. You've got
17 my kids with their smart phones snapping pictures. Their
18 purposes can be to remember something, to capture something to
19 show to a friend who wasn't there, to Grandma, who couldn't
20 attend the event. It's a social thing. You know, it's just
21 what you do on vacation. You see the Eiffel Tower, "Oh, I got
22 to take a picture of that."

23 Now, you can call all of that expression, but that starts to
24 really generalize overly much about what's actually going on in
25 these different cases.

1 Another reason you take a picture is to get paid, because
2 you're an -- she's clearly a good photographer. The pictures
3 are pretty. So she provides a technical skill, like a skilled
4 trade, that results in, you know, some pretty, very attractive
5 pictures.

6 But let's look at this picture, Your Honor. So here is a
7 man and a woman. He's not in a tux, but he's in a suit. She's
8 in a wedding dress. She's holding flowers. It's outside.
9 There's an old house in the background. So -- this is at
10 appendix 182.

11 If you show this picture to somebody on the street, would
12 they automatically say, "You know what" -- well, actually, let's
13 change it. Let's change it. Let's assume that there were
14 either two -- same picture, but two men or two women walking.
15 All right?

16 If you handed this picture to somebody on the street, would
17 they automatically say, "You know what? That photographer must
18 really support gay marriage"? Maybe somebody would say that. I
19 doubt it. They might say, "Well, what this is expressing is you
20 should get married outside." Or, "What this is expressing is
21 that it's quaint to have an old house on the grounds." Or,
22 "Don't wear a tuxedo, wear a more casual, hip suit instead of
23 a -- instead of a tux."

24 THE COURT: But Mr. --

25 MR. KAPLAN: Or --

1 THE COURT: -- Kaplan, Justice Souter for the
2 unanimous court in Hurley addressed that exact point. He said
3 even if the message is hard to understand, it doesn't mean that
4 the art is not speech, and he gave the example of a Jackson
5 Pollock painting. Everyone in this room might disagree about
6 what that Jackson Pollock painting is expressing, but I would
7 hope we would all agree that it's speech.

8 MR. KAPLAN: But, Your Honor, she is not alleging that
9 she's being just required to express something. Her allegation
10 is that if I -- 'cause let's remember what she's being required
11 to do, and what she's not being required to do.

12 She is required to offer same-sex couples the same wedding
13 photography services she's willing to provide to opposite-sex
14 couples. Okay. That's undisputed. This requires her to take
15 and edit pictures. This requires her to attend the wedding.
16 Unless she can send a drone in to take the pictures, she's going
17 to have to be present.

18 She's not required to participate in the ceremonies like the
19 gay rights unit in the parade situation. She's not there to be
20 part of a parade. She is there as a service provider to provide
21 a service for pay. She is not required to bow her head to pray
22 or to withhold any objections, and with respect to the blog,
23 she's -- if that's really part of her bundle of services that
24 she absolutely has to provide, she does have to blog afterwards,
25 but the ordinance in no way regulates what she has to say in her

1 blog.

2 So really what we're talking about is being forced to take
3 and edit pictures. You can define that as having expressive
4 qualities to it or being, in some way, artistic, but I think
5 that gets away from the fundamental allegation, which is
6 compelled speech. In Hurley, the parade sponsors, the south
7 Boston war veterans were being required to support and host a
8 foreign message that they felt was altering their message.

9 In this case, it's not as if Chelsey Nelson's already
10 talking about her loyalty to traditional marriage or having a
11 private event that somebody else wants to highjack. She is not
12 there to express herself, she's there to -- because her conduct
13 is being regulated, she's required to show up and take pictures.

14 THE COURT: Well, Mr. Kaplan, wouldn't you say that
15 her job is to create -- to create a product that sell -- create,
16 I think -- wouldn't you say it's to create art that celebrates
17 the wedding?

18 MR. KAPLAN: I don't believe so. I think it's her
19 interpretation. I don't believe an objective observer would
20 look at this and say that her job is to celebrate the wedding.
21 She is a --

22 THE COURT: Would you want to -- would you want to
23 hire a wedding photographer whose services did not celebrate
24 your wedding?

25 MR. KAPLAN: Well, I'm celebrating my wedding, and I'm

1 hiring somebody, along with many other service providers, to
2 play, you know, a significant but not over -- overly important
3 role. So --

4 THE COURT: Spoken like the groom.

5 MR. KAPLAN: Exactly. Well, can I -- Your Honor,
6 would you permit me to shift the focus to Rumsfeld for just a
7 moment?

8 THE COURT: Sure.

9 MR. KAPLAN: Because I do think that going down this
10 speech rabbit hole, and what -- how speechy is a certain medium
11 of expression, and what exactly is being communicated. As you
12 point out with your hypos to the other side, it's a lot of work
13 for judges to figure out what counts as speech.

14 I'd like to refocus it. There's a different interpretation
15 of this situation, which is that, as has been the case for many
16 years, Louisville, Jefferson -- at the federal, state, and local
17 level, Louisville, Jefferson County has chosen to regulate
18 conduct. They have chosen to prohibit discrimination in
19 offering goods and services to the general public.

20 So let's talk about Rumsfeld. I have a little bit of a
21 different interpretation of Rumsfeld. I think it's on point, in
22 this case, for our side. I think it's -- I think it's hard to
23 distinguish. Here's why. And it was a unanimous opinion.

24 So the Solomon Act. Okay. What was the Solomon Act? It's
25 a nondiscrimination statute. Pure and simple. It's a

1 nondiscrimination statute. When law schools started objecting
2 to hosting military recruiters at law schools and forcing them
3 on to the undergraduate campuses to show how they felt about
4 don't ask, don't tell, the federal government stepped in and
5 said, "You know what? If you want federal money, you can't
6 discriminate against military recruiters."

7 And the Court said they could have just directly mandated
8 that they host military recruiters. They chose to make it a
9 condition for receiving federal funds.

10 And it was this -- it was a very similar nondiscrimination
11 statute. It said if you provide a place for military recruiters
12 to talk to students to try to convince them to join the
13 military -- I'm sorry. If you provide -- if you provide a place
14 for nonmilitary recruiters to -- whether it's Ford Motor Company
15 or Dow Chemical or IBM to try to convince students to join their
16 companies, and you facilitate that by sending e-mails and
17 posting fliers and make -- bringing the students and the
18 recruiters together, and posting what the recruiters are asking
19 you to post on those bulletin boards, if you do that for
20 nonmilitary recruiters, you must also do it for military
21 recruiters.

22 So you can't discriminate against military recruiters.
23 Whatever -- whatever is the best standard you're providing for
24 nonmilitary recruiters, you have to also provide it to military.
25 Very similar to Metro's ordinance in this case.

1 What Justice Roberts writing for the Court did, I think
2 correctly, is say, "Look, this is regulating conduct." And I
3 understand the position of the law schools that they feel that
4 they are endorsing the military policy, and, specifically, don't
5 ask, don't tell, when they send e-mails and post fliers
6 announcing the presence of military recruiters, and thereby
7 making it more likely that students will join the military. I
8 mean, they are being forced to participate in that process.
9 They are -- and I think the word used by -- in the Court was
10 facilitate or might have been a stronger word than that, but
11 that was assumed.

12 And where the Court came down was, you know, look, these
13 communications, these expressive acts, 'cause just as much as
14 the photo, we can say an e-mail is an expressive act, it's a
15 verbal. A flier, let's say that the military recruiters said,
16 "Here, hang up this flier." It's got a picture of an American
17 flag, and an eagle, some stars, a couple people in uniform
18 looking proud to be part of the American military, and
19 announcing the time and place of this interview. "Post it." I
20 think the law schools would have had to post it.

21 THE COURT: But you couldn't make the law school
22 create it.

23 MR. KAPLAN: So, you know, I don't know that Roberts
24 address -- I don't know that the Court actually addressed that.
25 Could they force them to print it out on their --

1 THE COURT: If under Barnette, we can't make someone
2 salute the flag, I would surely think we can't make someone
3 create a flier that celebrates the military.

4 MR. KAPLAN: Well --

5 THE COURT: Under the First Amendment.

6 MR. KAPLAN: -- I think it might -- I think there
7 could be a debate there, Your Honor, for this reason. In
8 Barnette, West Virginia Board of Education vs. Barnette, the
9 Government mandated that students salute the flag and say the
10 pledge of allegiance. It was a specific state-sponsored message
11 that they were being required to mouth, and that was -- they
12 were required to say exactly what the Government wanted them to
13 say.

14 Similarly, Wooley v. Maynard, you know, with the live free
15 or die model on the license plates, again, a state-sponsored
16 message was being jammed down their throat.

17 In this case, what's going on is the law schools are being
18 required to engage in conduct, to host military recruiters who
19 want to interview on campus. Any communications that they are
20 sending is adjunct to that fundamental purpose. It's
21 incidental.

22 I think Rumsfeld's hard to distinguish. Now, your question
23 could they have been forced to design the flier, you know, that
24 wasn't addressed. You know, the Court, instead, focused on the
25 fact that, like, look, it's undisputed that you're going to have

1 to help facilitate a message that you disagree with. But the
2 Court didn't analyze that as speech, because the speech
3 components were subsidiary. They were incidental to the
4 regulation of the conduct.

5 In the cases you're talking about and also Hurley, all we're
6 talking about is expression. All we're talking about --

7 THE COURT: I do think we're -- you and the
8 plaintiffs, you know, you don't agree on a lot, but I think you
9 both agree the Government can't compel speech.

10 MR. KAPLAN: That's absolutely correct.

11 THE COURT: And so then it just raises the question
12 what's speech.

13 MR. KAPLAN: Well, exactly, and --

14 THE COURT: And the question here is whether this
15 wedding photography is speech.

16 MR. KAPLAN: And if it is, Your Honor, if -- under
17 Rumsfeld, if we're going to classify this with flag burning and
18 say okay. This is conduct that has enough speech elements to be
19 considered to be inherently expressive, then we're going to
20 apply the O'Brien test, which I think would be fatal to their
21 case.

22 And in Rumsfeld, Justice Roberts writing for the Court said,
23 "Look, we disagree that this is really speech, even though
24 you're being required to engage in speech acts. Maybe not
25 required to design the flier, but you're being required to be

1 part and parcel of disseminating a message you disagree with."

2 But if that is regulating -- if there's enough speech
3 elements to that regulation of conduct to trigger the First
4 Amendment, arguendo, then citing Albertini, all the Government
5 has to show is an important governmental interest, which with
6 Masterpiece Cakeshop, you know, they elevate nondiscrimination
7 against gays and lesbians about to the level of race. I mean,
8 you know the quote, our society's come to the recognition gays
9 and gay couples cannot be treated as social outcasts and on and
10 on.

11 Clearly, Louisville/Jefferson County Metro has the
12 discretion to say we have a -- this is a compelling state
13 interest in this community. So the issue becomes, under
14 O'Brien, if there's an important governmental interest which
15 would be in any way made less effective by not regulating,
16 completely different from strict scrutiny. So if the purpose
17 would be impeded in any way, made less effective by not
18 regulating, then the First Amendment must give way.

19 THE COURT: Right. So they said that the wedding
20 venue is not speech. That just seems very analogous to Rumsfeld
21 v. FAIR. You want to have a facility that rents -- where you
22 rent space for weddings, you got to rent it to opposite-sex
23 couples and same-sex couples. Because renting empty space is
24 not speech.

25 You want to run a law school where you provide space for job

1 interviews, you got to -- the government can make you allow
2 military job interviews along with nonmilitary job interviews.

3 The analogy between the Rumsfeld v. FAIR case and the
4 wedding venue case seems very strong. The analogy between the
5 Rumsfeld v. FAIR case and the photography case here seems less
6 strong, because we can all agree that renting a wedding venue is
7 not speech, we can all agree that renting -- or providing a
8 facility for a job interview is not speech, but you two disagree
9 about whether photography is speech.

10 And so I think my job is to try to figure out, well, what is
11 photography most like? Is it like a flag burning? Is it like
12 renting a hotel room? Is it like a custom-made wedding cake?
13 Is it like -- is it like the things that the courts call speech?
14 And so, you know, again, is it like music? Is it like films?
15 Is it like paintings? Is it like drawings? Is it like
16 sculptures?

17 MR. KAPLAN: But, Your Honor, that question can't
18 answered in the abstract. You'd have to look at --

19 THE COURT: Is wedding photography like it? Yeah.

20 MR. KAPLAN: Well, but also these pictures, that's
21 where I think the rubber hits the road, because the issue is not
22 whether photography, in general, can be artistic or if not,
23 quote, unquote, artistic, expressive. The issue is what idea is
24 being fundamentally expressed, and is she being required by
25 being, essentially, forced to take pictures at a gay wedding, is

1 she being required to communicate a message of endorsement or
2 celebration of that?

3 That's where it's like Rumsfeld, because Rumsfeld -- and
4 Rumsfeld is -- the law school didn't just have to host. They
5 didn't just say, "Here is a room. We're out of it." Their
6 administrative infrastructure was, to some degree, highjacked,
7 and they were required -- they became complicit --

8 THE COURT: They were allowed -- and I remember,
9 because I was there. They were allowed to send an e-mail to
10 every student saying, "We don't want the military on campus, and
11 we don't support the don't ask, don't tell policy."

12 Now, I think you would have to agree that Chelsey Nelson
13 will be in violation of the fairness ordinance if she said to a
14 gay couple, "I'll photograph your wedding, but I'm going to put
15 a caption on every picture that says I don't like what's going
16 on."

17 MR. KAPLAN: That's true. Well, I don't like -- yeah.
18 Well, that's a -- that's a hypothetical that's not faced here,
19 because it's undisputed --

20 THE COURT: Gay -- same-sex marriage is wrong.

21 MR. KAPLAN: She doesn't --

22 THE COURT: And --

23 MR. KAPLAN: -- put --

24 THE COURT: -- if that were the caption.

25 MR. KAPLAN: -- words on her pictures, so this is not

1 like Brush & Nib where they had to say the word "celebrate" over
2 and over, and there's many distinctions, but -- but, to your
3 point, she is -- I think this may be a misunderstanding.

4 Like the law schools in Rumsfeld, which as the Court pointed
5 out, it wasn't their refusal to host -- to allow military
6 recruiters to be on the law school campus, and to force them on
7 to the undergraduate campus that was expressing some clear
8 message.

9 No third-party observer would have said, "Okay. They've
10 relegated them to the undergraduate campus. They must really be
11 against don't ask, don't tell." It was the speech that
12 accompanied --

13 THE COURT: But as you'll -- the Court said that the
14 e-mail providing information about the venues was incidental to
15 the nonexpressive conduct. Here, the photography is not
16 incidental to the photography. The photography is the
17 photography.

18 MR. KAPLAN: Well, but the photography is incidental
19 to the -- the photography is incidental to -- as you point out,
20 there are many different kinds of vendors that could be
21 classified as engaging in expressive conduct.

22 She is being required to take pictures at a same-sex wedding
23 if she's asked to do so by a same-sex couple. She's not being
24 required to express any particular viewpoint about gay marriage.
25 That is something that she suggests in her complaint, but it's

1 implausible, because like the law schools in Rumsfeld, if she
2 wants to, at the wedding, she could elbow the person next to her
3 and say, "You know what? I'm not comfortable with this."

4 THE COURT: Really? You think she could do that and
5 not violate the fairness ordinance?

6 MR. KAPLAN: Absolutely. Your Honor --

7 THE COURT: I'm not sure that's the right reading of
8 the fairness ordinance.

9 MR. KAPLAN: Well, but, Your Honor, the fairness
10 ordinance requires her to offer goods and services to the public
11 on the same terms and conditions she would provide them to
12 anybody else. It doesn't say that she has to say or do anything
13 else, in particular.

14 So this is -- this is why the First Amendment is important,
15 Your Honor. I mean, Louisville Metro Government can't force her
16 to say, "I'm here, and I'm happy, and I approve of gay
17 marriage." Absolutely not. The First Amendment is more robust
18 than that.

19 So this is where there's an element of unreality to this,
20 because getting back to why are we here, in the real world,
21 there would be a conversation that would occur where, from the
22 get-go, the people buying the service would understand who
23 they're dealing with and wouldn't hire her in the first place.

24 Now, if they did despite that, because they wanted to prove
25 a point, I mean, they would get possibly what they asked for,

1 which is that she wouldn't have a smile on her face. She
2 wouldn't be standing up when it was time to stand up. She
3 wouldn't be kneeling when it's time to kneel.

4 THE COURT: She might be --

5 MR. KAPLAN: She might even --

6 THE COURT: -- bad --

7 MR. KAPLAN: -- express an objection to the gay
8 wedding.

9 THE COURT: Yeah. She would be badmouthing the
10 wedding --

11 MR. KAPLAN: Yeah. But that's why --

12 THE COURT: -- at the wedding.

13 MR. KAPLAN: -- this would never happen, that's the
14 point, but she'd have a right to do that, absolutely. She's not
15 like the kids in Lee vs. Weisman where she's under some type of
16 peer pressure, and she's not going to be able to articulate her
17 views.

18 THE COURT: I have to say that I think if you are a
19 wedding photographer who goes to opposite-sex weddings and takes
20 pictures without badmouthing the wedding, under the fairness
21 ordinance, you have to be a photographer who goes to a same-sex
22 wedding and takes pictures without badmouthing the wedding.

23 MR. KAPLAN: That isn't what it -- how it reads, Your
24 Honor. It regulates conduct only. It doesn't regulate speech.
25 It requires her to provide any service that she provides to an

1 opposite-sex couple.

2 THE COURT: I mean, I understand that that
3 interpretation could be helpful in the short term on the
4 judgment in this case, but that -- you have taken a lot of teeth
5 out of the fairness ordinance for nonexpressive conduct, and I'm
6 a little -- I'm not -- you know, your client's -- the mayor's
7 not here, but I'm not sure you would want an interpretation of
8 the fairness ordinance that is that toothless.

9 MR. KAPLAN: Well, it's really not toothless, though,
10 because in the real world, in that situation, most wedding
11 photographers would comport themselves with dignity and respect
12 and wouldn't do that, but that doesn't mean she doesn't have a
13 right to express herself. I don't think there's anything that
14 I've said that would surprise anybody in Louisville Metro or
15 not.

16 We're just talking about behavior that could possibly occur,
17 but given how the fairness ordinance actually works, if a person
18 in her position is approached and asked to provide wedding
19 photography services at a same-sex wedding, and then the normal
20 conversation that would take place in a pluralistic society
21 occurs which is, "Here's who I am. We've met. Here's the type
22 of photographer I am, it's not going to be a good fit for a
23 same-sex couple."

24 But if they decided to go forward, they would face the
25 consequences of that, which is they've hired someone who's not

1 happy to be there. Now, we would be speculating about what
2 Chelsey Nelson would do in that situation. She seems like a
3 very nice person. So -- but, again, nothing in the ordinance
4 requires her to participate in a religious ceremony in any way,
5 shape, or form.

6 THE COURT: Let me --

7 MR. KAPLAN: And I just want to emphasize that, that,
8 yeah, I'm sure the mayor would not like to think that there are
9 going to be gay weddings happening all over town with wedding
10 photographers making a scene.

11 THE COURT: It's not just the photographers. I'm
12 talking about every -- every vendor, not just in a wedding
13 context, but, again, Marriott, Burger King, stationery shops,
14 every -- every place that we go, you know, the car wash, and
15 your interpretation of the fairness ordinance would say, yes,
16 they have to serve gay customers, but they're allowed to provide
17 a different service to gay customers than they are to
18 opposite --

19 MR. KAPLAN: Not a -- not a different service.
20 They're allowed to say what they want to say unless they're
21 saying, "I won't provide you with the service." That's what's
22 prohibited. They're allowed to speak their minds.

23 You can imagine a restaurateur who grew up under Jim Crow
24 was inconvenienced by Title VII, felt like his message was being
25 squashed, who had to open up his restaurant to black people. I

1 don't think there's anything that would have required him to
2 have a smile on his face when black customers come in there. Or
3 I don't think there's anything that would have prevented him
4 from saying, "You know what? I don't believe in mixed-race
5 marriages."

6 THE COURT: You think the guy who ran Ollie's
7 Barbecue, which was the civil rights -- 1964 Civil Rights Act
8 case on the public accommodations, you think the guy who ran
9 Ollie's Barbecue would have been allowed, under the Civil Rights
10 Act, to serve white customers with a smile but serve all black
11 customers while -- while telling them, "I wish you weren't
12 here"?

13 MR. KAPLAN: "I wish you weren't here" crosses the
14 line, I think, because under the -- under the unwelcome clause,
15 conduct that's tantamount to a refusal.

16 So, for example, if Chelsey Nelson were to say on her
17 advertisement or website, "I believe in traditional marriage. I
18 believe only in marriage between a man or a woman, and if you
19 don't like that, don't bother showing up," or, "if you don't
20 like that, get out of here."

21 That does become a violation of the publication provision,
22 because she's essentially saying, "I won't serve you." But the
23 ordinance doesn't -- I mean, perhaps they could have tried to
24 draft it in a way that and if you're civil to your -- all your
25 general public customers, you have to be equally civil to

1 same-sex customers.

2 THE COURT: That's part of what you're buying --
3 maybe -- I don't want to go into it, but I think that's part of
4 what you're buying when you buy a photographer is you're buying
5 somebody who -- well, you're not buying somebody, but you're
6 buying the services of a photographer who will celebrate your
7 wedding. Help you -- help, you know --

8 MR. KAPLAN: That's a reasonable expectation but not
9 legally mandated by the -- by the Metro ordinance. So people
10 should protect themselves and only hire people who vibe with
11 what they want to vibe at their wedding.

12 THE COURT: Let me shift from weddings. Let's say
13 that there is a freelance photographer who take pictures for
14 National Geographic, takes pictures of scenery, loves the
15 environment, and really feels called to use her photographic
16 talents to celebrate conservation.

17 And then there is a website that is a climate-change-denying
18 website, and they say, "We want to hire you. Go take pictures
19 for us." And do you think the government could constitutionally
20 fine that photographer if she says, "No, I won't take your
21 pictures"?

22 MR. KAPLAN: Well, in that -- I want to respond
23 directly to your hypo, but I think in that situation, I've got
24 my Metro hat on, Metro enforcement, and we're looking at the
25 metro ordinance, there isn't any -- there seemingly is no

1 protected classification that is represented by that customer.
2 So in that case --

3 THE COURT: Yeah, but that -- but it's a different
4 hypothetical. I mean, that -- I'm just saying imagine --
5 imagine there was a state law that said, you know, you are --
6 let's just say you're fined if you don't take photographs for
7 all-comers, and then this situation arose. Constitutional?

8 MR. KAPLAN: Well, these are tough -- tough
9 hypotheticals. I think the first thing I would say to you is
10 that that photographer has to provide the same services for that
11 request or that she's provided to any other requestor. So if
12 she's ever done anything like that in the past, she'd have --
13 for certain, have to provide it to that customer.

14 THE COURT: What about a freelance writer? Same --
15 everything else is the same.

16 MR. KAPLAN: I guess --

17 THE COURT: Environmentalist loves conservation.
18 Climate change people -- climate-change-denying website wants to
19 hire the freelance writer to write the text of the website.

20 MR. KAPLAN: We -- okay. And we're stipulating that
21 climate change deniers are a protected class?

22 THE COURT: Yeah. There's a -- there's a state
23 statute that says, you know, freelance writers for websites have
24 to take all comers.

25 MR. KAPLAN: You know, it reminds me of a hypo of the

1 republican campaign forcing a democratic speech writer to write
2 their speeches. The speeches won't be very good. So the hypos
3 are a little -- there's an element of unreality where -- that's
4 why I always want to try to stay focused on the fact that who is
5 the protected classification, and is the refusal, can we infer
6 from that --

7 THE COURT: But can you answer my hypothetical?

8 MR. KAPLAN: I don't -- I don't know the answer to
9 that question. If climate change deniers were afforded
10 protected status, such that all vendors out in the world who
11 they might ask to provide services for them are required to
12 provide goods and services to them on the same services they
13 provide to other members of the general public, I guess I would
14 say, if I have to answer -- I think it's a tough hypothetical.

15 If I had to answer the question, I'd say that the speech
16 writer would have to provide that service to the climate change
17 deniers and would probably not do the best job, because when
18 you're in a creative field, and your heart's not in it, you're
19 not going to do as well as somebody who is on the same page with
20 the customer.

21 THE COURT: And that -- but then --

22 MR. KAPLAN: Which is why these hypotheticals don't --

23 THE COURT: I know, but that --

24 MR. KAPLAN: -- don't ring true.

25 THE COURT: But that's your -- that's your -- and that

1 is a consis -- that is a consistent answer with the position on
2 photography, and I'm guessing that your answer would be the same
3 for, again, the climate-denying website. It'd be the same for a
4 freelance illustrator, a freelance composer for, you know,
5 music, a freelance -- I don't -- I don't even know what else.

6 MR. KAPLAN: One example is that the thing about --

7 THE COURT: Would it be the same for those two?

8 MR. KAPLAN: Does an atheist have to -- again, I want
9 to have my Metro hat on for a second. In all of these cases,
10 Metro would want to know all of the facts or with any government
11 authority would want to know what exactly was requested? What
12 has the vendor provided in the past? Was it similar? You know,
13 so are they willing to do something for money in this case but
14 not in this case, and is that because of the protected
15 classification? That's really the type of inquiry that the
16 government, in good faith, must do.

17 You can't make these broad-brush judgments, 'cause what
18 you're trying to find out is is invidious discrimination taking
19 place, and, oftentimes, you need the facts, but in the abstract,
20 I don't think those hypos are any different.

21 What you're talking about, yes, is somebody who is in a
22 field involving verbal skills. Some -- some element of
23 creativity is not true, like, artistry, however you define those
24 terms, who is being asked to deploy that skill set by a member
25 of a protected classification.

1 In those cases, those are hard cases, but I would think that
2 I would err on the side of saying that the service needs to be
3 provided on an equal basis, because the government has said, for
4 whatever reason -- and in the climate change situation, I can't
5 imagine they ever would, but the Government has said we have a
6 compelling state interest in making sure this particular group
7 of people doesn't get discriminated against.

8 And so if that requires somebody to facilitate their
9 message, kind of like in Rumsfeld, they're going to have to, in
10 their view, get their hands a little dirty somehow. That does
11 not override -- their First Amendment interest in avoiding that
12 outcome don't override the Government's compelling state
13 interest in creating a society that's free of discrimination.

14 THE COURT: Let me turn to the plaintiffs.

15 MR. KAPLAN: Can I ask, Your Honor, please, on the
16 race is different thing, I really do feel the need to comment on
17 that.

18 THE COURT: Yeah. Go ahead.

19 MR. KAPLAN: I don't think there's any principle basis
20 to distinguish how compelling is the state interest in rooting
21 out invidious racial discrimination versus evaluating how
22 compelling is a state or local government's interest in
23 eradicating invidious discrimination against sexual orientation.

24 I think you can stipulate that slavery is probably the
25 largest blemish, moral blemish on this society, and it had to be

1 dealt with through laws that were remedial in nature and ensured
2 that black people would not be discriminated against.

3 But the evil of slavery, and the trauma that this country
4 had to go through to start to get past that, through those
5 remedial laws, it's not really evidence that other interests
6 articulated by government entities are somehow lesser than that,
7 because they don't involve race.

8 In fact, the experience with race in many ways paved the way
9 to other classifications being set up. It became the model. So
10 I don't think -- I think because it's tough to say that it would
11 be -- you know they don't want to say, "Well, Bob Jones
12 University should have been decided differently," or any number
13 of other cases involving race.

14 But in the end, it's up to a legislature that's
15 democratically elected to decide what is or is not a compelling
16 state interest, and the courts, including Telescope Media Group
17 and on down the line, essentially stipulate there is a
18 compelling state interest here.

19 Some of these courts, though, for whatever reason, say but
20 it automatically falls, because we have a sincere speaker or
21 sincere religious belief that's going to be, in our view, in
22 some measure of burden by that or forced to say something they
23 don't want to say.

24 If you wind up applying a test that involves an important
25 governmental interest or a compelling state interest, which I

1 don't think is warranted in this case, it should be rational
2 basis review, but if you did, I don't think there's any
3 principle basis to give any less weight to the need to avoid
4 discrimination against gays and lesbians.

5 THE COURT: And you said the legislature gets to
6 decide what's a compelling interest, but I think that's not what
7 you meant, right?

8 MR. KAPLAN: Well, I'm sorry. The legislature gets to
9 make findings that Your Honor has to take at face --
10 essentially, at face value about the importance of the statutory
11 scheme. So yes, it's the duty of the Court to decide if a
12 compelling state interest has been articulated. And if -- but
13 perhaps I'm wrong, Your Honor, but the way I look at it, you
14 don't probe too much behind someone's sincere religious beliefs.

15 By the same token, if Louisville Metro has said, "We believe
16 this ordinance is necessary to avoid social strife, and to
17 preserve human dignity, and to ameliorate humiliation, and to
18 unleash everyone's productive capacities, and to -- for the
19 general welfare, that, in general, the Court's not going to
20 question the judgment of a democratically-elected body that it
21 is really that important.

22 And so what your -- what the Court ultimately does, though,
23 is decide, okay, in this case, given that we have a strong
24 interest here, and also a sincere religious belief that's
25 entitled to neutral and respectful consideration, in the case of

1 a religious belief, if you're evaluating speech, speech, does
2 one have to give weight to the other in a particular case?

3 THE COURT: Okay. Let's turn to Mr. Scruggs again,
4 and, I guess, responses?

5 MR. SCRUGGS: Sure, Your Honor. A lot of different
6 things, and quickly respond to that last point. Under the
7 compelling interest analysis, the burden, it's a high burden on
8 the government.

9 In the Playboy case, which is United States vs. Playboy
10 Entertainment Group, the legislature put forth a 10,000-page
11 record to try to establish its compelling interest, and the
12 Court analyzed that and didn't just accept it at face value and
13 said mere anecdotes and supposition is not enough.

14 So there's a long history of the Government refusing just to
15 defer, under the compelling interest analysis, to statements
16 made by the legislative body. I mean, these are fundamental
17 constitutional rights at stake.

18 I do want to back up. There are a couple points. I do
19 agree with my colleague that it is, in some sense, a Hurley
20 versus Rumsfeld. The points that I do want to leave the Court
21 is we do think Hurley controls, and that Hurley provides the
22 right balance in this situation, and, in fact, Your Honor, I
23 encourage the Court, if you go back and read the briefs that
24 were put forth before the Supreme Court, you get a sense of deja
25 vu, in fact, because it's really the exact same arguments.

1 That in that situation, the LGBTQ group was arguing we're
2 regulating conduct and not speech. They invoked O'Brien and
3 said it's only an incidental burden, and, in fact, that's what
4 the lower courts in Hurley adopted. They adopted the O'Brien
5 test to say it's only incidental burden here. You have thrown
6 yourself open to the public, and, therefore, you have to
7 serve everyone, allow access to everyone.

8 But the Supreme Court, obviously, rejected those arguments
9 and said, as you noted before, when you make speech itself the
10 public accommodation, it compels speech.

11 THE COURT: O'Brien was burning a draft card. Why is
12 burning a draft card not speech, but burning a flag is speech?

13 MR. SCRUGGS: Well, Your Honor, I think that
14 situation, the analysis, in a sense, was the same in the sense
15 of it was first analyzing what was happening and said, "Is this
16 expressive conduct or not," and it views those events as a
17 whole.

18 Our argument is not whether there is expressive conduct. We
19 kind of view photography as pure speech. It's like a book or a
20 film that you can -- as the Eighth Circuit said, you can break
21 those up into constituent acts, you know, typing the letters on
22 the page or writing the words, but you need to focus on the
23 final product, right? And if the final product is expressive,
24 those events leading up to the creation of the product are
25 inherently tied together. That's what numerous court -- and --

1 THE COURT: There's a little bit of your test that
2 sounds like the more expensive something is, the more it counts
3 as speech. I mean, going back to all the wedding hypotheticals.
4 Like, is that unfair?

5 MR. SCRUGGS: Well, Your Honor, I don't think it's
6 required. I think you could argue it's illuminating, in the
7 sense of, you know, there is the kind of practical reality of
8 why does someone go to a photographer, a professional
9 photographer to photograph their wedding? They're hiring them
10 for their skills to express their -- a message versus someone
11 just off the street doing a selfie.

12 So -- but I don't think it's necessarily required. I mean,
13 someone can speak through photography whether they're being paid
14 a lot or a little, but I think it's just a practical reality of
15 this person is being sought out to pay for their artistic
16 capabilities and skills. I think what that shows is precisely
17 the reason they're being sought out is because of their
18 capability to express that artistic message.

19 I do want to go back to kind of the Hurley versus Rumsfeld
20 point, Your Honor. So Hurley, the message, in many respects,
21 walking in a parade is more like conduct than photography,
22 right? There's a lot more con -- photography is much more
23 speechy than 20,000 people marching.

24 So in that respect, I think it's -- in this case, as has
25 been earlier, easier than Hurley, because the Supreme Court and

1 the Sixth Circuit have held numerous times that photographs are
2 speech, and they're inherently expressive.

3 THE COURT: Let me interrupt just while I'm on it.
4 Mr. Kaplan, what's the message of the St. Patrick's Day parade?

5 MR. KAPLAN: Well, you know, the opinion of the Court
6 admitted of the fact that there isn't, necessarily, one distinct
7 message, it's kind of an amalgam, because a parade is made up of
8 units, but there's sort of a fundamental coherence, in theory,
9 and the parade organizers are gathering together different
10 units, that they think that the whole will be greater than the
11 sum of its parts, and it's a vision of this is what it means to
12 be Irish American in Boston. That this is what we believe it's
13 about. It's -- and maybe there's an element of patriotism, and
14 maybe there is an element of pride and being a part of the
15 birthplace of democrac -- or of the revolution.

16 And -- but the fundamental message is this is who we are.
17 And so you can see why if you're already engaging in that
18 conduct, and this kind of a foreign body is trying to infiltrate
19 what you're trying to do, that that does offend the First
20 Amendment, and it was a unanimous opinion that was clearly
21 correctly decided that that would alter your message.

22 That's where I have a problem understanding how it's
23 analogous to this case, because Chelsey Nelson's not being
24 forced to alter her message. I mean, she can be out there at
25 all times before -- before and after the event, and, perhaps,

1 during, expressing her views about traditional marriage. No
2 one's trying to highjack what she is doing and infiltrate it
3 with a gay rights or same-sex --

4 THE COURT: Okay.

5 MR. KAPLAN: -- marriage.

6 THE COURT: What do you -- what do you say to that,
7 Mr. Scruggs, that -- the message of the parade, I think it was
8 well put, is this is who we are. The wedding's message is the
9 message of the couple, and, you know, you're not -- it's not
10 Chelsey Nelson's message that day. It's not about her.

11 MR. SCRUGGS: Absolutely. So I just think of
12 Tornillo. No one thinks that, necessarily, the newspaper
13 endorses the op-ed written by someone else under someone else's
14 name, but -- well, maybe, unless --

15 THE COURT: If you follow the news recently, but --

16 MR. SCRUGGS: Yes, Your Honor. There are probably
17 some rare examples --

18 THE COURT: Sure.

19 MR. SCRUGGS: -- or exceptions to that, but, generally
20 speaking, Tornillo, Pacific Gas & Electric, Wooley all really
21 kind of rejected this core argument that, you know, you're
22 speaking on behalf of someone else. Even Riley. Riley involved
23 fundraisers who are paid to speak somebody else's message. The
24 Court there said you can't compel them to speak, in that case,
25 you know, the government's message, even though they are

1 speaking on behalf of someone else.

2 Our fundamental argument, Your Honor, is that it is Chelsey
3 Nelson's speech. She creates it. She makes it. There's no
4 commission speech exception to the First Amendment, you know,
5 for -- the Government can't compel someone to ghostwrite a book
6 for someone else.

7 THE COURT: Well, he says -- he says they can. You
8 can compel a democratic speechwriter to write speeches for a
9 republican.

10 MR. SCRUGGS: And I think -- I think that's absolutely
11 wrong, and I would say it's not even that far of a hypothetical.
12 There are numerous jurisdictions in the Sixth Circuit that make
13 political belief a protected class.

14 So -- and I think it -- and that's why it conflicts with
15 Hurley. It conflicts with the Sixth Circuit cases involving
16 newspapers saying that you can't apply the 1866 Civil Rights Act
17 to compel a newspaper to publish an op-ed that the newspaper
18 disagrees with.

19 And so we think that, again, along those other lines of
20 cases that say when, you know, Michelangelo was hired to draw
21 the Sistine Chapel ceiling by the Pope, whose speech is it?
22 Well, I guess, in some sense, you can say it's the Pope's
23 speech, he paid for it, but I think we would give a little bit
24 of leeway to Michelangelo there too. I think --

25 THE COURT: What about the selfie of me with the

1 Eiffel Tower behind me, speech or not speech?

2 MR. SCRUGGS: Your Honor, my lean is to create -- is
3 to say that all photographs are speech, 'cause that's what the
4 courts seem to indicate. You know, I think we could come up
5 with some no artistic skill whatsoever done, just click the
6 button. That might be an extreme case.

7 THE COURT: Sounds like my photographs.

8 MR. SCRUGGS: That -- what was that, Your Honor? I'm
9 sorry.

10 THE COURT: It's okay.

11 MR. SCRUGGS: That, you know, given the record we have
12 here is all of the facts are undisputed, in the sense that
13 they're not disputed, right? And it said -- we've articulated
14 in extreme detail. We've provided photographs. We've explained
15 Miss Nelson's photographic process and artistic skill. I think
16 this falls fairly in the scope of what protected expression is.

17 I want to turn really quick to Rumsfeld. Now, Your Honor,
18 Rumsfeld would be like this case if they applied the equal
19 access law to say, "Look, you're teaching a class criticizing
20 the don't ask, don't tell policy. Therefore, you've got to
21 teach a class, you know, defending that policy." Right?

22 That it would be an attempt by the government to comply --
23 to apply that equal access law to speech itself, in that case,
24 teaching, versus, as you know, the rooms are different, because
25 that's not expressive, and I think, actually, we've all agreed,

1 we've had some -- a bit of consensus to say that e-mails were
2 adjacent or incidental to the content that they can require.

3 You know, again, to make the scenario, Miss Nelson is not
4 hosting a same-sex wedding in her house or a venue. Like, so,
5 therefore, she can't be required to photograph or send out
6 e-mails adjacent to that.

7 Again, to draw the analogy back to Hurley -- or back to
8 Rumsfeld, Rumsfeld would be like this case if the school stopped
9 hosting all recruiters, and then the Government turned around
10 and said, "You've got to send out an e-mail promoting the don't
11 ask, don't tell policy." I think these are just separate
12 situations.

13 But, again, the two points that we just want to leave the
14 court with is Hurley controls, and Hurley is the right balance,
15 and Hurley's exactly the right balance, because, Your Honor, it
16 protects speakers, but it doesn't stop the Government from
17 stopping actual status discrimination, as all the hypos we've
18 talked to before.

19 And one issue that we have not addressed is I think any
20 argument the Government has about its interest in compelling
21 Chelsey can't succeed when they have an exception regarding sex
22 discrimination, allowing most businesses to engage in sex
23 discrimination.

24 Well, if that's true, what basis can the Court -- or can
25 Louisville have to say that -- to force Miss Nelson just to

1 convey a message she disagrees with? So I think that exception
2 in the law undermines any interest that the city puts forth.

3 So that's really the major things that I want to leave the
4 Court with is those two points about Hurley's importance and
5 Hurley's balance.

6 THE COURT: We haven't -- we haven't -- it's hard to
7 imagine there is anything we haven't talked about yet, but there
8 is at least one thing that comes to mind. You have an
9 establishment clause claim.

10 I would think if you get a preliminary injunction on
11 Louisville can't fine -- Louisville can't -- Louisville can't
12 make Chelsey Nelson photograph a gay wedding, then you don't
13 need an injunction that says Louisville can't make her attend a
14 gay wedding. Because she is a wedding photographer, there's no
15 reason for her to be at a wedding other than to photograph it.
16 I mean, weddings are private events.

17 MR. SCRUGGS: That's correct, Your Honor. They're
18 alternative arguments.

19 THE COURT: Okay. I don't know that I think just
20 attending something while -- being present while something is
21 said means you're endorsing it.

22 MR. SCRUGGS: Well, Your Honor, I think there are a
23 few situations come to mind. Obviously, Lee versus Weisman, but
24 there is actually a fair amount --

25 THE COURT: You're defending -- you're -- ADF is using

1 the majority opinion in Lee v. Weisman as part of its argument?

2 MR. SCRUGGS: Well, Your Honor, always -- I think the
3 situation is easier than Lee versus Weisman, because in Lee,
4 they were not actually required to be there.

5 So what -- this case is similar, I think, if you look at the
6 caselaw, is you could imagine scenarios in government employees
7 required to attend events where there's proselytization, and
8 courts have said no, you can't compel someone to do that. That
9 would be our primary argument with that.

10 And that actually fits with the original meaning of the
11 establishment clause. Michael McConnell's done a lot of work
12 and has said that one of the original points and original
13 meanings is you can't force someone to attend a religious event.
14 A church ceremony, for example. So I think that that original
15 meaning of the establishment clause is relevant in that sense.

16 THE COURT: The distinction you draw between status
17 and -- status and message, I think, is a sometimes hard one. I
18 think your -- I think the defendants would say -- they would
19 criticize it more harshly. The status versus message line is
20 impossible to draw. Can you defend it?

21 MR. SCRUGGS: I think -- sure. Absolutely. And,
22 obviously, I think it's a line that might be hard in certain
23 situations, but it's a vital line, because it does allow that
24 balance, and I think it is possible to draw it, because courts
25 have drawn it repeatedly.

1 We'd note the Brush & Nib decision. I'd also point the
2 Court, a mutually interesting case even pre Hurley, was that
3 World Peace Movement case from the Utah Supreme Court involving
4 the religious newspaper who didn't want to publish this
5 religious ad from a group, because it violated the
6 newspaper's -- I think the newspaper's owned by a Mormon group.
7 Even, maybe, the Mormon church, I think.

8 And they didn't want to publish this ad, and there they were
9 sued under the public accommodation law, and in that situation,
10 the Court -- the Utah Supreme Court said this law doesn't even
11 apply. Kind of -- it's not a status-based denial, but it's
12 based on the message conveyed in the advertisement. That they
13 would serve other people from that religious group, they would
14 publish other advertisements and hotbeds from that religious
15 group, but not just this particular one because of the message
16 it conveyed.

17 So I think we have to hold that distinction. Otherwise,
18 you're going to get into some very difficult scenarios, I think,
19 really both ways. Some of the scenar -- some of the hypos we've
20 put forth already, I think we've described already.

21 In many ways, I'd point the Court to Justice's Gorsuch --
22 his concurring opinion in Masterpiece. I think our message
23 status distinction is somewhat similar to his distinction that
24 he draws between kind of foreseeable consequences and
25 unforeseeable cause versus consequence, and he notes that that's

1 a line the law often draws.

2 And, in fact, I'd say, Your Honor, that that's a line that I
3 think the statutes require to be drawn on a statutory level.
4 We're just asking the Court to also make sure to draw it on the
5 constitutional level, much as, again, the Court did in Hurley.
6 It drew that distinction there too.

7 THE COURT: Would you agree -- sorry. Would you agree
8 with some of the -- I don't know if I want to call it
9 conventional wisdom, but frequently-expressed analysis, in the
10 wake of the last Supreme Court term, that the Court, over the
11 course of a decade, and maybe this term more than ever, has made
12 clear that same-sex marriage, yes; accommodations, yes; Windsor,
13 yes; Obergefell, yes; Bostock, yes; and at the same time, we're
14 carving out a robust protection for religious liberty?

15 Justice Ginsburg this term, in dissent, accused the majority
16 of protecting a religious liberty to the nth degree. Is that --
17 and I'm a lower court judge who goes where the Supreme Court
18 precedence lead. Is that where I am to be led?

19 MR. SCRUGGS: Well, Your Honor, I'm always a bit
20 hesitant to give broad pronouncements. I think there is that
21 trend that you're seeing in the sense of is the Government
22 infringing on somebody? Is the Government acting -- you know,
23 this is not a situation where Miss Nelson is preventing someone
24 from getting married, in the sense of they're not -- she's not
25 acting like the government, right? She's not the withholder or

1 determiner of who can marry and who can't.

2 I think the trend that I would point the Court to is not
3 just a religious liberty trend, but it's a trend that
4 commentaries have noted on, it's the trend to protect free
5 speech. That the Roberts court has been quite protective of
6 free speech, not just in the religious liberty context, but also
7 not being able to -- just look at the NIFLA decision. Look at
8 the Janus decision. That it's quite concerned when the
9 Government comes in and says, "You've got to speak a particular
10 message."

11 I think that's one of the primary trends we want to focus
12 the Court on, because it makes this case, I think, fall -- fall
13 into the -- fall into place.

14 THE COURT: Okay. I'm going to ask a last question or
15 two and give the -- of the city and give the city the last word.
16 Anything else before I do?

17 MR. SCRUGGS: My last word, Your Honor, is just it is
18 a controversial topic, we fully admit that, and there are people
19 of good faith on both sides, we admit that, but, Your Honor, we
20 think that the freedom to speak -- control what you say
21 transcends this particular case and this particular debate, and
22 that freedom should stick with the speakers and not government
23 officials.

24 THE COURT: Okay. Thanks, Mr. Scruggs. Mr. Kaplan,
25 I'm going to read an Obergefell quote, and you tell me what I'm

1 supposed to do with it, and then I'll give you a chance to add
2 anything else that you want before we adjourn.

3 So this was in the majority opinion by Justice Kennedy
4 joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. And
5 the Court said, "It must be emphasized that religions, and those
6 who adhere to religious doctrines, may continue to advocate with
7 utmost, sincere conviction that, by divine precepts, same-sex
8 marriage should not be condoned.

9 The First Amendment ensures that religious organizations and
10 persons are given proper protection as they seek to teach the
11 principles that are so fulfilling and central to their lives and
12 faiths and to their own deep aspirations to continue the family
13 structure they have long revered. The same is true for those
14 who oppose same-sex marriage for other reasons.

15 In turn, those who believe allowing same-sex marriage is
16 proper or, indeed, essential, whether as a matter of religious
17 conviction or secular belief, may engage those who disagree with
18 their view in an open and searching debate."

19 Over to you.

20 MR. KAPLAN: That's well said. I don't see anything
21 to disagree with. My response to that would be that --

22 THE COURT: I mean, maybe I'll ask a more pointed
23 question. That's not the way the Court talks about opponents of
24 interracial marriage.

25 MR. KAPLAN: Well, the Court hasn't had to talk about

1 opponents of that for some long period of time. We are in a
2 different era now. The, you know, folks who didn't believe in
3 mixed-race marriages are much quieter now than they used to be.

4 It would be erroneous to suggest that somebody like Miss
5 Nelson, who has the views that she has, should be viewed in the
6 same way as somebody who opposed mixed-race marriage.

7 So the position of Metro is not to build up any type of
8 equivalence there or to cast aspersions and say that you're as
9 bad as a racist if you believe in traditional marriage. That's
10 not a position that we need to endorse here.

11 Miss Nelson, as I started from the get-go, and it's Justice
12 Kennedy's formulation, she is entitled to neutral and respectful
13 consideration of her opinions, and I am not a constitutional law
14 expert. My reading of the case is that what's being carved out
15 or at least what I expect to be carved out, at a minimum, is a
16 place for free speech and -- by people with sincere religious
17 beliefs. We haven't talked much about free exercise today, but
18 there is similarity there.

19 Folks have to be able to live according to their religious
20 beliefs and not be subject to undue interference or coercion
21 from the government or not be able to communicate their views to
22 society. But on the flip side of that -- so, at a minimum, what
23 you see in the cases right now is an absolute rule against
24 targeting.

25 Starting with Lukumi Babalu and going up to the present,

1 it's absolutely inappropriate to -- and unlawful, under the
2 constitution, to target a person because of what they believe,
3 because of what they say or to require them to state any message
4 with which they disagree. So -- particularly if it's the
5 Government, like in the Barnette case and Wooley vs. Maynard.

6 So that's really where I would like to plant my flag is, for
7 starters, no one's being singled out. The purpose of the
8 ordinance, on its face, is not to oppress anybody. The effect
9 of it, though, however, is to inconvenience somebody who
10 disagrees with same-sex marriage but is asked -- and I think
11 this is unlikely, but asked to take pictures at one.

12 She's got to do it, because as the Court said in Masterpiece
13 Theater, if it comes down to it, I think the counterpart that --
14 the quote you read, our society has come to the recognition that
15 gay persons and gay couples cannot be treated as social outcasts
16 or as inferior in dignity and worth.

17 For that reason, the laws in the constitution can and, in
18 some instances, must protect them in the exercise of their civil
19 rights. The exercise of their freedom on terms equal to others
20 must be given great weight and respect by the courts.

21 So how do we reconcile these two things? In this instance,
22 all that Metro is asking is that any merchant who offers their
23 goods and services to the general public has to offer their
24 package of services to these various protected classifications
25 on the same terms that they would offer to someone who doesn't

1 belong to one of those classifications.

2 We could take about hypos all day long, and they're perilous
3 to talk about, because they're stripped-down models that don't
4 reflect reality, but here what we've got is a mandate that she
5 engage in conduct. She is not told how to do the conduct. She
6 is not in any way prohibited from saying or doing anything in
7 conjunction with performing the service, except she can't say
8 after the wedding is over, "I'm never going to do this again."
9 That's the one thing that she's prohibited from saying, and it's
10 entirely lawful if the accommodations provision's itself lawful.

11 So we would suggest to Your Honor that after reading
12 Rumsfeld and Hurley and the other related precedence, that the
13 Court should come to the conclusion that Louisville/Jefferson
14 County is within its power to regulate the conduct of an
15 individual working for hire to take pictures, even at an event
16 that might make her uncomfortable, should she be asked to do
17 that, and that -- that that should not be treated as equivalent
18 to the situation in Barnette, Wooley vs. Maynard or even
19 Tornillo or Pacific Gas, which didn't involve direct
20 government-mandated messages be mouthed, but did require someone
21 who is in the process of speaking to basically host a
22 contradictory message.

23 What Miss Nelson is being asked to do is just to take
24 pictures at the wedding. Is it -- does it have creative
25 elements? Does it require technical skill? Sure. But it's not

1 inherently expressive. And none of these pictures that I have,
2 and I printed out many, many yesterday, nobody would look at
3 these and say, if they had two people of the same gender in them
4 instead of opposite sex, that this photographer really must
5 support same-sex marriage.

6 I gather from the plaintiff that's what she feels like she's
7 being required to do, but I think the Court can look behind that
8 and ask what's objectively reasonable.

9 What's objectively reasonable for someone to infer from a
10 picture, when a picture is subject to so many, many different
11 interpretations, is she really being asked by being asked to
12 attend, not participate in, attend a gay wedding and take
13 pictures, is the government really compelling her to express
14 support for that?

15 I don't believe the factual record or common sense supports
16 that conclusion, and it would be a change in the law or at least
17 new -- a new -- new precedent were the Supreme Court ever to say
18 that nondiscrimination laws should be evaluated in that fashion.
19 When they're not targeting speech, when they're not targeting
20 religion, when, simply, they're effect is to require people,
21 from time to time, who are selling their goods and services to
22 the general public, to sell services in a context that makes
23 them feel uncomfortable.

24 Because even if that's required by the constitution, and the
25 compelling state interest or important governmental interest if

1 you're applying O'Brien or just rational basis review, which we
2 think is what applies here under Rumsfeld, Chelsey Nelson
3 absolutely remains free and unfettered to express her views of
4 traditional marriage at any other point in time, and the
5 government cannot make her host anybody's message.

6 They cannot make her put up signs at her home or on her
7 business that support pride or say that opposite-sex marria --
8 or I'm sorry. Same-sex marriage is ordained by God. She
9 maintains absolute freedom in every other part of her life to
10 speak the message that she believes in her own in her office.

11 And so, in the end, this encroachment on her rights, if it
12 even is that, encroachment of expression is not something that
13 the Court should find outweighs what is an absolutely compelling
14 state interest in continuing the march toward equality that this
15 country has been on in making sure that everybody has equal
16 access to goods and services and doesn't have to suffer the
17 humiliation of being turned down simply because of the
18 classification they belong to.

19 And I would just suggest, as a final statement, this is a
20 collateral point, but on the status versus class -- class versus
21 message distinction that is sometimes difficult, I think
22 Lawrence v. Texas provides as good of a way of dealing with that
23 as any other opinion, which just simply looks at the
24 correlation.

25 If everybody who's asking for same-sex wedding services, you

1 know, they're all going to be gay, with very rare exceptions.
2 So if you are saying no to a gay wedding because you object to
3 same-sex marriages, you are actually discriminating on the basis
4 of sexual orientation, simply because no one else is going to be
5 asking for the service to any reasonable degree.

6 Correlation is going to be very, very tight, and that's a
7 good way to evaluate some of these hypotheticals is to ask
8 yourself, okay, and we could take real protected
9 classifications. Who's asking for the service? What class do
10 they belong to, and is the message that they are promoting or
11 asking the service provider to promote, is that highly
12 correlated with a protected classification?

13 I think a lot of those hypos start to fall away once you
14 start viewing it through that lens, and you realize that this
15 isn't really as hard in the real world as we might think.

16 So Metro appreciates Your Honor's consideration. If you
17 have any questions about the free exercise part of their
18 argument, we'd be happy to address those, but it sounded like
19 Your Honor was more focused on the speech issues, which we did
20 view as the more -- more difficult issues than as compared with
21 the establishment clause for free exercise arguments that were
22 made.

23 THE COURT: Very good. Mr. Kaplan, Mr. Scruggs,
24 Mr. -- Mr. Scruggs, Mr. Neihart, thank you all for the briefing,
25 the arguments, and I appreciate it. All right. We're

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adjourned.

(Proceedings concluded at 12:36 p.m.)

C E R T I F I C A T E

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM
THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

s/Rebecca S. Boyd
Official Court Reporter

9-21-2020
Date