No. 17-3352
IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Telescope Media Group, Carl Larsen and Angel Larsen,
Appellants,
v.
Kevin Lindsey and Lori Swanson,
Appellees.

On Appeal from the United States District Court
for the District of Minnesota
No. 0:16-cv-04094-JRT
The Honorable John R. Tunheim, Chief District Judge

BRIEF *AMICUS CURIAE* OF THE CATO INSTITUTE AND 11 LEGAL SCHOLARS IN SUPPORT OF APPELLANTS

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Statement Pursuant to Fed. R. App. P. 29(4)(E)

No party's counsel authored this brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the *amici* and their counsel contributed money that was intended to fund preparing or submitting the brief.

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Interest of the *Amici Curiae*

The Cato Institute, founded in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts.

Cato has published a vast range of commentary strongly supporting both the First Amendment and gay rights. *See, e.g.*, Eugene Volokh & Ilya Shapiro, *Choosing What to Photograph Is a Form of Speech*, WALL ST. J., Mar. 17, 2014, available at http://www.cato.org/publications/commentary/choosing-what-photograph-form-speech; Robert A. Levy (Cato's chairman), *The Moral and Constitutional Case for a Right to Gay Marriage*, N.Y. DAILY NEWS, Aug. 15, 2011, available at https://www.cato.org/publications/commentary/moral-constitutional-case-right-gay-marriage.

Cato is joined in this brief by 11 individual legal scholars, listed in Appendix A, who teach, research, and publish in the fields of antidiscrimination, free-

dom of religion, and freedom of expression. In this matter, Cato and the individual *amici* are united in their belief that the First Amendment properly balances all of these commitments, as explained below.

Summary of Argument

1. The government may not require Americans to help distribute speech of which they disapprove. The Supreme Court so held in *Wooley v. Maynard*, 430 U.S. 705 (1977), when it upheld drivers' First Amendment right not to display on their license plates a message with which they disagree. The logic of *Wooley* applies equally to filmmakers' right not to create such expression.

2. The government's interest in preventing discrimination cannot justify restricting Telescope Media's First Amendment rights. Telescope Media is not discriminating based on the sexual orientation of any *customer*. Rather, its owners are choosing which *messages* they film and promote. In this respect, the owners' actions are similar to the actions of the parade organizers in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), who also chose not to spread a particular message through their parade.

In *Hurley*, the Supreme Court noted that the state, in trying to force the organizers to include a gay pride group in a parade, was applying its antidiscrimination law "in a peculiar way," mandating the inclusion of a message, not equal

treatment for individuals. *Id.* at 572. And the Court held that this application of antidiscrimination law violated the First Amendment. The attempt to apply such law to Telescope Media's choice about which messages to film and promote likewise violates the First Amendment.

3. The Supreme Court has held that large organizations that host competing messages, such as cable operators or universities, might be required to host messages from additional speakers with whom they disagree, especially when otherwise the speakers would find it hard to reach their intended audience. But Telescope Media is a small owner-operated company, in which the owners are necessarily closely connected to the speech that Telescope Media produces; and their declining to create a wedding video would not interfere with the couple's ability to get others to create the video instead. In this respect, the Larsens, as the husband-and-wife owners of Telescope Media, are much closer to the Maynards in *Wooley v. Maynard*, whose "individual freedom of mind," 430 U.S. at 714, secured the right not to help distribute speech of which they disapproved.

Argument

I. *Wooley* Shows That Telescope Media May Not Be Forced to Produce Films Expressing Messages With Which It Disagrees

Because the First Amendment protects the "individual freedom of mind," people may not be required to display speech with which they disagree. *Wooley*, 430 U.S. at 714. Likewise, this individual freedom of mind means that people may not be required to produce films[1] with which they disagree. Like artists, writers, or book publishers, filmmakers—whether their films run in theaters or on websites—have the constitutional right to choose which messages they convey. "[E]xpression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952). "It cannot be doubted that motion pictures are a significant medium for the communication of ideas," *id.*, ranging from "direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression." *Id.* at 501.

Films created to be distributed for money are likewise as protected as other speech, like books and newspapers. "We fail to see why operation for profit should have any different effect in the case of motion pictures." *Id.* at

[1] This brief uses the words "film" and "filmmaking" to encompass all forms of moving pictures, whether captured on celluloid or cell phone.

502; *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011); *see also Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (even regulation of communications about price should be analyzed as a restriction on speech for First Amendment purposes).

Wooley should dispose of this case. In *Wooley*, the Supreme Court held that drivers have a right not to display the state motto "Live Free or Die" on their license plates. Of course, this motto was created and printed by the government, and observers doubtless realized that it did not represent the drivers' own views. Yet the Court nonetheless held that the law requiring drivers to display this motto "in effect require[d] that [drivers] use their private property as a 'mobile billboard' for the State's ideological message." 430 U.S. at 715. And such a requirement, the Court concluded, unconstitutionally "'invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'" *Id.* (citation omitted).

"A system which secures the right to proselytize religious, political, and ideological causes," the Court held, "must also guarantee the concomitant

right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Id.* at 714 (citation omitted).

The same reasoning applies here. Just as the Maynards in *Wooley* had a "First Amendment right to avoid becoming the courier for [a] message," *id.* at 717, the Larsens, as owners of Telescope Media, have a First Amendment right to avoid helping create videos that contain the message. Indeed, if the government could not compel even "the passive act of carrying the state motto on a license plate," *id.* at 715, it likewise may not compel the more active act of portraying the message in film. And just as the Maynards prevailed even though passersby would not have thought that the license plate motto represented the Maynards' own views, Telescope Media should prevail even though people would be unlikely to attribute a particular video's message to Telescope Media.

The respect shown in *Wooley* for "individual freedom of mind," as a right not to take part in creating and distributing material one disagrees with, makes eminent sense. Democracy and liberty in large measure rely on citizens' ability to preserve their integrity as speakers and thinkers—their sense that their expression, and the expression that they "foster" and for which they act as "courier[s]," is consistent with what they actually believe.

This is why, in the dark days of Soviet repression, Alexander Solzhenitsyn admonished his fellow Russians to "live not by lies": to refuse to endorse speech that they believe to be false. Alexander Solzhenitsyn, *Live Not by Lies*, Wash. Post, Feb. 18, 1974, at A26, *reprinted at* http:// www. washingtonpost. com/wp-dyn/content/article/2008/08/04/AR2008080401822.html. Each person, he argued, must resolve to never "write, sign or print in any way a single phrase which in his opinion distorts the truth," to never "take into hand nor raise into the air a poster or slogan which he does not completely accept," to never "depict, foster or broadcast a single idea which he can see is false or a distortion of the truth." *Id.*

Such an uncompromising path is not for everyone. Some people may choose to make peace with speech compulsions or restrictions, even when they disagree with the speech that is being compelled or restricted. Many Americans may go to great lengths to avoid controversial statements about the deeply held religious, moral, and ethical beliefs of others. But those whose consciences, whether religious or secular, require them to refuse to produce expression "which [they do] not completely accept," *id.,* are constitutionally protected in that refusal.

II. Antidiscrimination Law Cannot Override Telescope Media's Right Not to Portray in Film Messages With Which It Disagrees

The government's interest in preventing discrimination does not justify restricting Telescope Media's First Amendment rights. To be sure, the U.S. Supreme Court has held that antidiscrimination laws "do not, as a general matter, violate the First . . . Amendment[]," in part because, in their usual application, they do not "target speech" but rather target "the act of discriminating against individuals." *Hurley*, 515 U.S. at 572. But the Court noted in *Hurley* that applying antidiscrimination laws to private organizations' exclusion of speech based on its content is quite different from applying them to private organizations' exclusion of people based on their identity.

In *Hurley*, a parade organizer excluded a group that wanted to carry an "Irish American Gay, Lesbian & Bisexual Group of Boston" banner in a parade. Massachusetts courts held that this exclusion violated antidiscrimination law, but the Supreme Court concluded that in this situation "the Massachusetts [antidiscrimination] law has been applied in a peculiar way." *Id.* "Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march." *Id.* "Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner." *Id.*

And the parade organizers, the Supreme Court held, had a First Amendment right to exclude that banner.

Likewise, Telescope Media did not seek to exclude gay, lesbian, or bisexual customers as such, but simply does not want to produce what amount to short films in support of any client's messages that are contrary to their faith. This distinction between customer and message is unfortunately lost in the opinion below. *See* op. at 15-16 (describing Telescope as seeking to deny services to same-sex couples). But, presumably, Telescope would accept a same-sex couple as customers, if they are parents or friends who wish to pay for a film celebrating their son or daughter's opposite-sex wedding. Just as the parade organizers had a right not to participate in the dissemination of GLIB's message in *Hurley*, so here Telescope Media has a right not to participate in the creation of films that promote ceremonies of same sex couples.

This principle of course applies far beyond Telescope Media's decisions. A filmmaker must be free to refuse to produce visual media promoting Satanism, or Scientology, or, if it chooses, conservative Christianity; the ban on discrimination against religious *customers* cannot justify requiring a filmmaker to create a film carrying religious *messages* with which it disagrees. *See Joseph*

Burstyn, 343 U.S. at 504 (state could not prohibit films that subjected religion to "contempt, mockery, scorn [or] ridicule").

This freedom is protected regardless of whether the messages are intertwined with the religion, sexual orientation, sex, race, national origin, or other protected status of the group seeking to place the order. An Israeli-American filmmaker must be free to choose not to produce a documentary in support of Palestine in the Israeli-Palestinian Conflict, and a Palestinian-American filmmaker must be free to choose not to produce a documentary supporting Israel in the Israeli-Palestinian Conflict. Again, a ban on discrimination based on customers' national origin cannot justify requiring a filmmaker to produce messages with which it disagrees, including when the disagreement stems from views related to the nationalities involved in a political dispute.

To offer one more example, some jurisdictions ban discrimination based on a customer's political affiliation.[2] Yet even in those jurisdictions, filmmakers

[2] *See*, *e.g.*, Ann Arbor, Mich. Code of Ordinances §§ 9:151, :153; Broward County, Fla. Code of Ordinances §§ 16½-3, -34; D.C. Code § 2-1411.02; Champaign, Ill. Code of Ordinances §§ 17-3, -56; Decorah, Iowa Code of Ordinances §§ 2.50.020, 2.50.050.B; Harford County, Md. Code § 95.3, .6; Howard County, Md. Code of Ordinances § 12.210; Lansing, Mich. Code of Ordinances §§ 297.02, .04; Prince George's County, Md. Code §§ 2-186, 2-220; Madison, Wisc. Code of Ordinances §§ 39.03(2)(cc), (5); Seattle, Wash. Mun. Code §§ 14.06.020(L), .030(B); Urbana, Ill. Code of Ordinances §§ 12-37, -39, -63; V.I. Code tit. 10, § 64(3) (2006).

must have the First Amendment right to refuse to produce films that normalize or praise the Communist Party or the National Socialist Party or the Democratic Party or the Republican Party. Similarly, filmmakers must be free not to produce video-based messages that express views they disagree with related to marriage or sexual orientation.

Videographers should indeed be free to choose not to create advocacy for any political movement, whether or not related to a protected class. Filmmakers should be free not to create films saying "White Lives Matter," "The Nation of Islam is Great," "KKK," "There Is No God But Allah," "Jesus Is the Answer," "Dianetics: The Modern Science of Mental Health" (the title of a major Scientology text), or any other message of which they disapprove.

This argument is consistent even with *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. App. 2015), which held that a baker may not decline to bake a wedding cake with two men on top. (That holding is also not binding here and is under review by the Supreme Court. *See Masterpiece Cakeshop v. Colorado Civil Rights Com'n*, 137 S.Ct. 2290 (Mem.) (granting certiorari)). The Colorado court expressly noted that "a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment speech protections may be implicated." *Craig,*

370 P.3d at 288. But it concluded that it "need not reach this issue" because the bakery "denied Craig's . . . request without any discussion regarding . . . any possible written inscriptions." *Id.*

And the argument is also consistent with *Klein v. Oregon Bureau of Labor & Indus.*, 209 Or. App. 507, 2017 WL 6613356 (2017), another baker case: The Oregon court concluded that wedding cakes are generally not expressive enough to trigger the freedom from speech compulsion, but stressed that the First Amendment may well be "implicated by applying a public accommodations law to require the creation of pure speech," such as "music or poetry" or "a sculpture or portrait." *Id.* at *13.

Telescope Media's productions are films, and films communicate messages more obviously than unadorned wedding cakes. In deciding how to film, light, and edit their imagery, the Larsens are making an expressive creation to affect viewer attitudes and behavior about marriage and weddings in a variety of ways, including the "subtle shaping of thought which characterizes all artistic expression." *Burstyn,* 343 U.S. at 501. Like other creators of expressive work, they have the right to decide how to portray their subjects, and the right to refuse to portray messages to which they object.

III. Forcing Telescope Media to Produce Films Interferes More With Individual Freedom of Mind and Conscience Than Did the Laws in *Turner* or *Rumsfeld*

Telescope Media is a small business owned by a couple. It is not a vast publicly held corporation like Turner Broadcasting System, *see Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994), or a large nonprofit university, like the ones in *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47 (2006). Requiring Telescope Media to produce films with messages that its owners oppose interferes with the owners' "freedom of mind" much more than would imposing similar requirements on Turner Broadcasting or on a university.

In *Rumsfeld*, the Supreme Court held that the government could demand that universities let military recruiters access university property and send out e-mails and post signs mentioning the recruiters' presence. "Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter," the Court reasoned, "is simply not the same as . . . forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in . . . *Wooley* to suggest that it is." 547 U.S. at 62.

But even if universities are far removed from the Maynards in *Wooley*, the owners of Telescope Media are quite similar to those drivers. Like the Maynards, the owners are individuals who have to be closely and personally

involved in the distribution of messages with which they disagree—in *Wooley*, by displaying the message on their own car, and in this case, by having to produce the message in their own small shop.

Turner is also different from this case because letting cable operators exclude certain channels interfered with those channels' ability to reach customers. As the U.S. Supreme Court noted in *Hurley*, "A cable is not only a conduit for speech produced by others and selected by cable operators for transmission, but a franchised channel giving monopolistic opportunity to shut out some speakers." 515 U.S. at 577. Because of this, the government had an interest in "limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed." *Id.* Likewise, in *Rumsfeld*, military recruiters would often find it much harder to reach students who study and often live on a secluded university campus, if the recruiters could not do so through the normal on-campus interview process. One more recruiter at the job fair, or one more channel on a cable network did not impact the message of the host institution.

But Telescope Media is no monopoly. Telescope notes that dozens of other filmmakers, all over Minnesota, have identified themselves as happy to accept money for films about same-sex weddings. Amd. Compl. ¶¶ 175–80. A

rule protecting the Larsens' choice about what films to create does not diminish the ability of any couple in Minnesota to obtain a professionally produced film to celebrate their wedding; the government's interests can be served without interfering with Telescope Media's First Amendment rights.

Conclusion

Filmmakers, like others engaged in commercial expression—and like the drivers in *Wooley*—have a First Amendment right to choose which speech they will disseminate. The district court's grant of summary judgment, which fails to recognize and protect this right, and should be overruled.

Respectfully submitted,

s/Jonathan R. Whitehead

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Appendix A – List of Individual *Amici*

List of individual *amici*:[1]

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[1] Institutions of individual *amici* listed for identification purposes only. The opinions expressed are those of the individual *amici*, and not necessarily of their affiliated institutions.

Appendix B - Certificates

Certificate of Compliance with Rule 32(G)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because this brief contains 3,391 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced, roman typeface with serifs (Equity) using Microsoft Word, set in 14 points.

Date: February 9, 2018
s/Jonathan R. Whitehead
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Certificate of Compliance with Eighth Cir. R. 28A(h)

This brief has been scanned for viruses and is virus free.

Date: February 9, 2018
s/Jonathan R. Whitehead
AN ATTORNEY FOR *AMICI*

Certificate of Service

I hereby certify that on February 9, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid to the following non-CM/ECF participants:

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