# “Gay and Proud”: Groundbreaking Film Leads to Modern Non-Discrimination Legal Battle

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Lilli Vincenz’s film “Gay and Proud” is only twelve minutes long, but it provides a unique glimpse into the early days of the gay rights movement in the United States. The film showcases a revolutionary period in history, and its message of understanding and acceptance remains just as important in 2019 as it was almost 50 years ago when the film was released. The film is especially relevant in view of Vincenz’s legal battle, which started in 2005, with a video store operator who denied her service after learning the titles of her films.

This legal battle focused on a local non-discrimination ordinance in Arlington, Virginia, and it highlights three facts that are important to the current state of the gay rights movement in the United States. First, in the majority of states in America, individuals can be fired, lose their home, or be denied public accommodations on account of their sexual orientation or gender identity due to a lack of protections against discrimination aimed at LGBTQ individuals. Second, even where cities or towns have passed local ordinances prohibiting discrimination against LGBTQ individuals, these local ordinances can face significant legal challenges that curtail their effectiveness. Finally, non-discrimination statutes or ordinances on any level are challenged persistently by opponents of LGBTQ civil rights as limitations on individuals’ exercise of religious liberties in violation of the First Amendment.

When asked about Vincenz’s struggle and the Bono case, former Arlington County Board Chair, Jay Fisette, who was Chair of the Board at the time the Bono case was filed stated it aptly when he said that Virginia remains “stuck [and] without sufficient non-discrimination protection for LGBT citizens” because Arlington’s LGBTQ community in 2019 remains “without an enforceable non-discrimination ordinance.”

While watching marchers take a stand against the hostilities faced by LGBTQ people in 1970 in “Gay and Proud,” it is important to remember that despite the progress made over the last 50 years, there remains a long road ahead to ensure equality.

*Who is Lilli Vincenz?*

Lilli Vincenz, gay rights activist and lesbian pioneer, was the first lesbian member of the Mattachine Society of Washington DC (“MSDC”). She was born in Hamburg, Germany in 1937 and spent her childhood living in Nazi-controlled Germany during World War II. At age twelve, she and her family moved to the United States.

Vincenz became an activist in the 1960s and was the first lesbian to join a picket line in Washington, D.C. protesting homosexual persecution. She joined MSDC President, Frank Kameny during the first meeting between MSDC delegates and the Civil Service Commission to discuss discriminatory policies

toward LGBTQ civil servants who were being terminated from federal employment pursuant to a ban that had begun under President Eisenhower and his Executive Order 10450 and that prohibited "sex perverts" from federal service. She became known for monthly Gay Women's Open House events hosted in her home that provided a forum for lesbians to socialize and discuss current social and political issues. Her work filming two of the first gay rights demonstrations—the 1968 Annual Reminder in Philadelphia and the 1970 Christopher Street Liberation Day Parade—allows viewers the opportunity to witness history, consider the nature and extent of the progress that has been made, and contemplate whether these activists would be satisfied with the state of equality for LGBTQ Americans today.

*Lilli Vincenz Denied Service for Promoting the "Gay Agenda"*

In 2005, Vincenz requested that a local Arlington, Virginia video business, Bono Film and Video, transfer her films from Betacam to VHS. She had been a customer of the store for years, and the prior owner, Joseph Bono, the father of the owner who denied her services, had previously accommodated her. Upon learning that the films were titled "Second Largest Minority" and "Gay and Proud," the business owner, Timothy Bono ("Bono") turned Vincenz away, calling the films part of the "gay agenda no matter what the content" and refusing to perform the copying services, despite the fact the films were documentaries containing no sexual content. Vincenz filed a complaint with the Arlington Human Rights Commission ("Commission") citing its local non-discrimination ordinance and asserting that Bono discriminated against her due to her sexual orientation or his perception thereof.[1]

As revealed by Vincenz's complaint and documents related to the Commission's investigation, after listening to Bono during a formal hearing, the Commission sided with Vincenz and concluded that Bono's refusal to provide services was a denial of a public accommodation to Vincenz based on her sexual orientation. The Commission ordered Bono Film and Video to provide the requested duplication services at her personal expense, or that it assist Vincenz in locating another suitable business where the services would be provided and payment made by Bono Film and Video.

As further revealed by court documents uncovered by the MSDC, Bono and Bono Film and Video ("plaintiffs") thereafter sued the Commission in June 2006,[2] attacking the Arlington ordinance as an unlawful exercise of municipal power and a violation of his First Amendment freedoms of speech and exercise of religion. The plaintiffs were represented by the law firm Liberty Counsel, founded and chaired by Mathew Staver, a former pastor and former dean of the Liberty University School of Law.[3] Counsel for the plaintiffs also argued that sexual orientation had not been proven to be an "immutable" characteristic and that, as a result, the existence of the ordinance prohibiting discrimination based on sexual orientation itself infringed on Bono's First Amendment rights. Plaintiffs' counsel relied heavily on case law upholding rights to freedom of speech against coercion by the government in the complaint filed against the Commission.

In an about-face move, on the day after the Bono complaint was filed, the Commission backed down and dismissed its case against Bono, reversing its prior ruling in favor of Vincenz seemingly due to its fear that the ordinance would be struck down as an unlawful exercise of municipal power under the *Dillon* Rule, as discussed below. In response to Bono's complaint, the Commission asserted that the ordinance did not prohibit content-based discrimination, and therefore there could be no harm to Bono Film and Video, as the video store was free to refuse to duplicate videos with content that was contrary to the Bono's values. As such, refusing services where content was genuinely at issue, which was not the case with Vincenz's films, would not violate the ordinance. The Court dismissed the plaintiffs' case due to lack of standing, as their position became moot with the Commission's reversal. In its press release following the Court's dismissal of the case, Liberty Counsel stated, "Although we are pleased

[1] The Arlington County Code includes "sexual orientation" in its list of protected groups. *See* https://commissions.arlingtonva.us/wp-content/uploads/sites/5/2014/01/HRC_Countycode-ch13.pdf.
[2] *Bono v. Arlington County Human Rights Comm'n*, 72 Va. Cir. 256 (2006).
[3] Staver later represented the former Kentucky County Clerk Kim Davis who, in 2015, defied a U.S. federal order to issue marriage licenses to same-sex couples following the Supreme Court's decision in *Obergefell*. Staver co-authored the book, *Under God's Authority, The Kim Davis Story* with Davis in 2018.

the Commission dismissed the . . . frivolous complaint against Bono, we will continue to challenge Arlington County's attempt to recognize 'sexual orientation' as a civil right."[4]

While Arlington County has a non-discrimination ordinance in place to this day, and one that provides for protections for LGBTQ citizens as well as others, future plaintiffs have a clear path to challenge its authority if they take issue with providing services to LGBTQ customers. According to former Arlington County Board Chair, Jay Fisette, while the Bono case was the only case filed challenging the authority of the Commission to enforce discrimination protections on the basis of sexual orientation, the Commission knew that if the case proceeded to verdict, sexual orientation as a protected class under the non-discrimination ordinance risked being stripped from the law because of the Dillon Rule. The Commission and County Board were "disappointed and frustrated, but pragmatic" about the Bono case; they felt their hands were tied. Mr. Fisette stated that the Dillon Rule is "alive and well" in Virginia, that nothing has changed in Arlington in the last decade, and that the sexual orientation protections contained in the non-discrimination ordinance remain unenforceable even today. In a note of hope, however, Mr. Fisette speculated that he thought if Democrats could take over both chambers of State government in Virginia, there would be "a strong likelihood" for a state-wide non-discrimination ordinance including sexual orientation and "possibly" gender identity.

*What Can Be Learned from Lilli Vincenz's Experience?*

The story of "Second Largest Minority" and "Gay and Proud" and Vincenz's legal battle related to Bono's refusal to provide copying services to her highlights three important aspects of non-discrimination laws in the United States: (1) even today, the majority of states lack statewide protections for LGBTQ individuals; (2) though some local municipalities have passed ordinances prohibiting discrimination against LGBTQ individuals, these ordinances are vulnerable to legal attacks because of limitations on local governments' authority to pass laws that provide protections beyond what is provided under state law; and (3) so-called "religious freedom" challenges threaten non-discrimination laws and ordinances on every level.

First, the lack of protections for LGBTQ individuals continues today. Even though the Supreme Court granted LGBTQ individuals the right to marry in 2015, this is just one step in the work to be done to ensure that an LGBTQ individual can live without fear of persecution based on his, her or their sexual orientation. And while the Supreme Court's ruling in the *Obergefell*[5] case included all of the rights and responsibilities attendant to marriage, some states have chipped away at those rights in an effort to diminish the breadth and importance of marriage equality as the law of the land. Currently, twenty-eight states[6] do not have any laws that prohibit discrimination against LGBTQ individuals in employment, housing, or public accommodation. This means that by revealing that he, she, or they is gay, a person can legally be fired, lose an apartment, or be denied service at a place of public accommodation in most states. There are even fewer protections for transgender individuals.

Second, while a number of local municipalities have passed ordinances prohibiting discrimination based on sexual orientation, Vincenz's case demonstrates how these ordinances, if challenged, face uphill legal battles. Plaintiffs can challenge these local ordinances as an unlawful exercise of municipal power, particularly in states like Virginia that follow a legal doctrine known as the *Dillon* Rule. The *Dillon* Rule,[7] which is observed in some form in forty states and the District of Columbia, provides that

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[4] Press Release, Liberty Counsel, "Human Rights Commission Dismisses Complaint Against Christian Businessman After Liberty Counsel Files Suit" (June 13, 2006).
[5] *See Obergefell v. Hodges*, 576 U.S. ___ (2015).
[6] Alaska, Idaho, Montana, Wyoming, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Arizona, Missouri, Arkansas, Louisiana, Michigan, Indiana, Kentucky, Tennessee, Mississippi, Alabama, Ohio, West Virginia, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, and Florida currently have no state-level LGBT non-discrimination protections.
[7] The Dillon Rule was first articulated in *City of Clinton v. Cedar Rapids & M.R.R.*, 24 Iowa 455, 475 (Iowa 1868) ("Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may

local governing bodies "have only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those which are essential and indispensable." In other words, a state legislature must explicitly give the local government the right to pass a non-discrimination law. Since most states do not have non-discrimination laws on the books, it may be argued that those states have not provided local governments with the power to create their own such laws. This was the very claim asserted by Bono against the Arlington Human Rights Commission. Even in states that do not follow the *Dillon* Rule, local non-discrimination ordinances face challenges. While in some cases, municipalities may "enlarge upon" state statutes they feel do not provide adequate protection, in other cases, they may find attempts to expand non-discrimination laws inadvertently conflict with areas of broad state legislative authority. For example, a Minnesota court invalidated a local ordinance that granted healthcare benefits to same-sex couples who were public employees, holding that the issue of benefits to same-sex partners is a statewide matter and the local ordinance went beyond the power granted to municipalities.[8]

Finally, religious freedom challenges threaten all forms of non-discrimination laws on any level. The constitutional issue of whether Bono's First Amendment rights were infringed by an order directing Bono Film and Video to reproduce films, the content of which Bono disapproved on religious grounds, is similar to an issue raised before the Supreme Court in the *Masterpiece Cakeshop* decision, though this specific issue was not ultimately addressed by the Court.[9] In *Masterpiece Cakeshop*, a baker claimed that the application of the Colorado non-discrimination statute violated his First Amendment rights to free speech and exercise of religion by compelling him to use his artistic talents to express a message with which he disagreed, *i.e.*, marriage of a same-sex couple. The Court ultimately sided with the baker, holding that the statements made by members of the Colorado Civil Rights Commission during its proceedings and rulings made by that Commission in other cases allowing bakers to refuse to make cakes that contained "offensive" anti-gay messages showed a lack of neutrality to the baker's religious views, to which he was entitled. Thus, the Court held that the Colorado Civil Rights Commission's actions violated the Free Exercise Clause of the First Amendment.[10] Cases raising these types of issues and challenging the rights of LGBTQ individuals to basic human rights are bound to continue in the coming years and are likely, in some instances, to make their way to the Supreme Court.

*What Is the Path Forward?*

Those concerned with the ease and legality of discrimination meted out against LGBTQ individuals should work to pursue non-discrimination protections at the local, state, and federal levels of government. Just as the subjects of Vincenz's films advocated against LGBTQ individuals and advancement of their civil rights in the 1970s, LGBTQ Americans and their allies must fight for acceptance and civil rights in every aspect of society so that full equality under the law can be achieved.

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destroy, it may abridge and control."). It was reinforced later that year in *Merriam v. Moody's Executors*, 25 Iowa 163, 170 (Iowa 1868) ("[A] municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation not simply convenient, but indispensable [*sic*]; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation against the existence of the power.") It was first followed in Virginia in the *City of Winchester v. Redmond*, 93 Va. 711, 25 S.E. 1001 (Va. 1896).

[8] *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 108 (Minn. Ct. App. 1995).

[9] *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 584 U.S. ___ (2018).

[10] The Majority holding in the *Masterpiece* case was a narrow one and did not reach the broader constitutional issue of the intersection between anti-discrimination laws and the First Amendment protections to freedom of speech and the free exercise of religion, an issue that will no doubt be before the Supreme Court in the future.