APPEAL NO. 17-3352

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

TELESCOPE MEDIA GROUP, a Minnesota corporation, CARL LARSEN and ANGEL LARSEN, the founders and owners of TELESCOPE MEDIA GROUP,

Plaintiffs-Appellants,

v.

KEVIN LINDSEY, in his official capacity as Commissioner of the Minnesota Department of Human Rights and LORI SWANSON, in her official capacity as Attorney General of Minnesota,

Defendants-Appellees,

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

APPELLANTS' OPENING BRIEF

KRISTEN K. WAGGONER
DAVID A. CORTMAN
JEREMY D. TEDESCO
JONATHAN A. SCRUGGS
RORY T. GRAY
JACOB P. WARNER
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
jtedesco@ADFlegal.org

RENEE K. CARLSON
CARLSON LAW, PLLC
855 Village Center Drive
Suite 259
St. Paul, MN 55127
(612) 455-8950
rcarlson@rkclawmn.com

Attorneys for Plaintiffs/Appellants

Oral Argument is Requested

SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellants Carl and Angel Larsen and Telescope Media Group challenge the application of a Minnesota law for violating the First and Fourteenth Amendments because that law both compels them to create and publish wedding films promoting a view of marriage they do not hold and prevents them from publicly explaining their religious beliefs.

The Larsens urged the court below to rule quickly, moving for a preliminary injunction. This was necessary because they were and are presently chilling their speech—refraining from creating wedding films at all—to avoid severe civil and criminal penalties including fines, civil penalties, treble compensatory damages awards, punitive damages up to $25,000, and even up to 90 days in jail. Defendants-Appellees responded with a motion to dismiss. After oral argument, the court below entered an order dismissing all of the Larsens' claims and denying as moot their motion for preliminary injunction. The Larsens appealed.

This case concerns important constitutional rights including free speech, free exercise of religion, expressive association, equal protection, and due process. Because of the important rights at stake, the Larsens request oral argument of 30 minutes.

CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants Telescope Media Group and Carl and Angel Larsen, by and through counsel, and pursuant to Federal Rule of Civil Procedure 7.1, hereby state as follows:

Telescope Media Group is a Minnesota corporation wholly owned by Carl and Angel Larsen. It has no parent companies, and no entity or other person has any ownership interest in it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

Statutes

Constitutions

INTRODUCTION

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994). From this principle comes "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995). Yet Minnesota violates this rule with respect to two filmmakers who want to create and publish films that are consistent with their religious beliefs.

Carl and Angel Larsen are Christians. They believe that marriage is between one man and one woman and want to promote God's design for marriage through what they do best: filmmaking. But Minnesota[1] has applied its public accommodation law (the Minnesota Human Rights Act or "MHRA") to hamper this. For as Minnesota interprets it, MHRA requires the Larsens[2] and their film studio—under threat of fines, damages awards, and even up to 90 days in jail—to create films promoting different conceptions of marriage, including same-sex marriage, if they create films promoting biblical marriage.

---

[1] "Minnesota" refers to all Defendants-Appellees unless context dictates otherwise.

[2] "The Larsens" refers to all Plaintiffs-Appellants unless context dictates otherwise.

The district court upheld Minnesota's application of as an "incidental" burden on speech. It did so despite recognizing that both "the creation and contents of the Larsens' [films]" deserve First Amendment protection. J.A.706. But compelling filmmakers "to make [films] they might not want to make" imposes much more than an incidental burden—it imposes a direct and substantial burden on speech. J.A.718-19. The district court tried to sidestep this issue by framing the Larsens as discriminators who decline to create films based on the sexual orientation of those who request them. But that misses the mark.

The Larsens will create films for anyone. They just cannot create films promoting every message. Their decision turns on *what* a film promotes, never *who* requests it. This shows the Larsens are no different from "a ghost-writer" who declines to "write a book [concerning a person's protected status] when the writer disagrees with the message the book would convey." J.A.707-08 (n.21). According to the district court, that would be objecting to "the message of the book, not … the sexual orientation of the customer." *Id.* Yet it refused to accept this same distinction for the Larsens.

The Larsens deserve protection too. They have been waiting over a year for their expressive freedoms to be restored. To alleviate this ongoing, irreparable harm, the Larsens ask this Court to reverse the district court's order dismissing all claims, and instruct it to issue a

preliminary injunction to protect the Larsens from Minnesota's application of MHRA.

JURISDICTIONAL STATEMENT

The district court had jurisdiction to hear this case under 28 U.S.C. §§ 1331 and 1343 because the Larsens raised claims under the First and Fourteenth Amendments. This Court has jurisdiction to review this appeal under 28 U.S.C. § 1291 because the district court entered an order on September 20, 2017 dismissing all claims and denying as moot the Larsens' motion for preliminary injunction and a final judgment on September 21, 2017. The Larsens filed a notice of appeal on October 20, 2017.

STATEMENT OF THE ISSUES

1. Standing. A MHRA provision makes it illegal to "refuse to do business with, refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person's … sexual orientation…." Minn. Stat. § 363A.17(3). Can filmmakers challenge this provision if they want to contract to create and publish online films promoting their religious beliefs about marriage, but they will not contract to create and publish films promoting any other conception of marriage, including same-sex marriage?

Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014)
Missourians for Fiscal Accountability v. Klahr, 830 F.3d 789 (8th Cir. 2016)
U.S. Const. art. III, § 2

Minn. Stat. § 363A.17

2. *First Amendment*: Does MHRA violate the First Amendment as-applied when it (a) forces for-profit filmmakers to create and disseminate films promoting views about marriage against their religious beliefs and (b) bans those filmmakers from posting a statement on their website declining to create such films?

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995)
Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)
Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)
U.S. Const., amend. I
Minn. Stat. §§ 363A.11 & 363A.17

3. *Equal Protection*. Does MHRA violate equal protection as-applied when it forces religious filmmakers to create films that contradict their religious beliefs about marriage, while imposing no penalty on filmmakers who support different definitions of marriage?

Clark v. Jeter, 486 U.S. 456 (1988)
Police Dept. of City of Chi. v. Mosley, 408 U.S. 92 (1972)
U.S. Const., amend. XIV
Minn. Stat. §§ 363A.11 & 363A.17

4. *Unconstitutional Conditions*. Does MHRA violate the unconstitutional conditions doctrine as-applied when it conditions the Larsens' First Amendment right to promote their religious views about marriage through their films on their willingness to forfeit their rights to

be free from government-compelled speech, to freely exercise their religion, and to equal protection of the laws?

Perry v. Sindermann, 408 U.S. 593 (1972)
Minn. Stat. §§ 363A.11 & 363A.17

5. *Vagueness & Unbridled Discretion*. Is MHRA facially invalid under the vagueness and unbridled discretion doctrines because it allows exceptions for a "legitimate business purpose" without providing any guidance as to what this means?

Kolender v. Lawson, 461 U.S. 352 (1983)
Forsyth Cty. v. Nationalist Movement, 505 U.S. 123 (1992)
U.S. Const., amend. I and XIV
Minn. Stat. § 363A.17

6. *Preliminary Injunction*. Should a preliminary injunction issue?

Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864 (8th Cir. 2012)

STATEMENT OF THE CASE

I. The Larsens

Carl and Angel Larsen are Minnesota-based filmmakers who own and operate Telescope Media Group. J.A.65 (¶1). The Larsens are also devout Christians. J.A.76 (¶¶72-73). They aim to glorify God in everything they do. *Id.* (¶75). Their faith teaches that every talent comes from God and must be used consistent with His teachings. *Id.* (¶¶77-78). This includes their filmmaking. *Id.* (¶75).

Their business name, Telescope Media Group ("Telescope"), reflects this vision. J.A.77 (¶84). As stated on their business website, the Larsens aim to "magnify [God's] glory the way a telescope magnifies stars"—that is, "to make God look more like He really is through [their] lives, business, and actions." *Id.* (¶¶84-85). This vision impacts both how the Larsens treat their clients and what stories they choose to tell through their films. J.A.78-79 (¶¶92-97).

II. Telescope Media Group

Through Telescope, the Larsens offer to create films to the public. J.A.76-77 (¶¶80-81). The Larsens use their unique vision and skills to tell stories through the films they create. J.A.65,77 (¶¶1, 88). When the Larsens accept any film project, they work closely with their clients to share ideas and to collaborate to develop a film that expresses a message that is pleasing to both. J.A.77-78 (¶¶89-91). But the Larsens have the ultimate say over what films they do and do not create, the ultimate authority over the message in each film, and only create films that promote ideas that are consistent with their religious beliefs. J.A.78 (¶¶92-96).

Although their clients often have a basic idea of what they want in a film, the Larsens use their creative skills to transform their clients' ideas into compelling films that convey the intended message. J.A.77-78,82 (¶¶88-91, 126, 128). It is the Larsens' personal inspiration and editorial judgments—their real-time decisions about camera focus, scope,

and positioning, and what to film, coupled with their post-event decisions about content selection, presentation order, lighting and coloring, audio mixing and mastering, whether to use text, voiceovers, music, animations, visual effects, or still shots, and what story, message, or takeaway will be conveyed—that create the final film. J.A.79-80 (¶¶100-01, 103-07).

The Larsens' faith influences the films they create. J.A.78 (¶93). They gladly work with all people—regardless of their race, sexual orientation, sex, religious beliefs, or any other personal characteristic—because their faith teaches that everyone is made in the image of God. *Id.* (¶92). But because of their faith, they cannot promote every message through their films. *Id.* (¶¶93, 95). For example, the Larsens cannot create messages that promote sexual immorality, support the destruction of unborn children, promote racism or racial division, incite violence, degrade women, or promote any conception of marriage other than a lifelong institution between one man and one woman. *Id.* (¶96). The Larsens' decisions on whether to create a specific film never focus on *who* the client is, but on *what* message or event the film will promote or celebrate. J.A.78-79 (¶¶92-97).

III. Wedding Films

The Larsens have been creating films promoting Christian views on topics for years. J.A.76,80 (¶¶79, 109-10). They now want to promote Christian ideas about marriage. J.A.82 (¶122). They believe God's design

for marriage is beautiful. J.A.81-83 (¶¶119, 122, 132). And they want to use their talents to convey that beauty. J.A.82-84 (¶¶122, 129-137). Creating and publishing wedding films gives them the opportunity to both support new marriages and promote God's design for marriage. *Id.*

The Larsens witnessed the cultural redefinition of marriage with concern. J.A.81 (¶¶113-19). They have seen the debate and want to take part in that public dialogue. J.A.66,82 (¶¶3-5, 122). Specifically, the Larsens want to tell stories through their films of marriages between one man and one woman that magnify God's design and purpose for marriage. *Id.* The Larsens would communicate their message about marriage by highlighting the couples' background stories, their sacred marriage covenant and celebration, and even the following chapters of their lives. J.A.83 (¶130). By creating these films, the Larsens hope to affect cultural views on marriage. J.A.82 (¶125).

To enter this debate, the Larsens desire to announce on their website the expansion of their services to wedding films. J.A.85-86,88 (¶¶154-55, 157, 173-74). This new webpage would explain the Larsens' vision for creating films to promote the idea that marriage is between one man and one woman. J.A.86 (¶157). Promoting a competing concept of marriage would violate their deeply held religious beliefs. J.A.66 (¶6). The Larsens prepared (but because of MHRA did not publish) a proposed website statement explaining these beliefs and what they mean for their business:

> Telescope Media Group exists to glorify God through top-quality media production. Because of TMG's owners' religious beliefs and expressive purposes, it cannot make films promoting any conception of marriage that contradicts its religious beliefs that marriage is between one man and one woman, including films celebrating same-sex marriages.

J.A.86 (¶158). The Larsens desire to immediately start creating wedding films that promote their religious beliefs about marriage, publish these films online, contract with others to do so, and launch their new webpage. J.A.83-86,88 (¶¶135-36, 154-55, 159, 173-74).

IV. The Challenged Law

The Larsens have refrained from engaging in these First Amendment-protected activities because of MHRA. J.A.66,87-88 (¶¶7-9, 136, 138, 160-65, 173-74). MHRA makes it unlawful to:

> deny any person the full and equal enjoyment of the … services … of a place of public accommodation because of … sexual orientation ….

Minn. Stat. § 363A.11(1); J.A.69 (¶32). MHRA also makes it unlawful to:

> refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person's … sexual orientation … unless the alleged refusal or discrimination is because of a legitimate business purpose.

Minn. Stat. § 363A.17(3); J.A.69-70 (¶34). Violators face severe civil and criminal penalties including fines, civil penalties, treble compensatory damages awards, punitive damages up to $25,000, and even up to 90 days in jail. J.A.67 (¶¶12-14).

Although the Larsens do not discriminate against anyone, they learned that Minnesota interprets MHRA to require business owners to create messages promoting objectionable conceptions of marriage, including same-sex marriage. J.A.78,87 (¶¶92, 160-65). Minnesota's enforcement history—which includes the use of testers who pretended to be seeking wedding services—confirms this application, J.A.71,75-76 (¶¶43-47, 66-71), as does its positions in this case. *See, e.g.*, J.A.278 (characterizing the Larsens' efforts to live out their faith as seeking to "discriminate" against their customers); J.A.303 (same).

V. The Larsens' Lawsuit

After learning that Minnesota applies MHRA to compel creative professionals to promote ideas about marriage that conflict with their faith, the Larsens decided the risk was too great: they did not begin creating wedding films and did not publish their desired website statement. J.A.87-88 (¶¶156, 160-65, 173-74). This was the right decision. For after making it, the Larsens received a request to create a film promoting same-sex marriage. J.A.88 (¶169). If the Larsens were creating wedding films at that time and declined to create this film, Minnesota would deem this to violate MHRA. J.A.67,88 (¶¶12, 169-70).

But the Larsens cannot stay silent about God's design and purpose for marriage. J.A.66,98 (¶¶5, 247). Their religious beliefs compel them to use their creative talents to promote the idea that marriage is the union of one man and one woman. J.A.98 (¶247). So they filed this lawsuit and

moved for a preliminary injunction. J.A.90 (¶188), 117-25. They challenged §§ 363A.11(1) and 363A.17(3) because those provisions compel them to create and publish films to which they object and forbid them from explaining their religious beliefs on their website. J.A.85-88,90 (¶¶154-60, 173-74, 188).

VI. The District Court's Order

The Larsens sought prompt relief by requesting a preliminary injunction. *See* J.A.163. Minnesota moved to dismiss, confirming the Larsens' fears about MHRA. J.A.278. After full briefing, the district court held a hearing on the motions to dismiss and for preliminary injunction. J.A.9 (ECF No. 49). Four months later, the district court entered an order granting Minnesota's motion to dismiss all claims and denying the Larsens' motion for preliminary injunction as moot. *See* J.A.676-77. The Larsens appealed. J.A.740.

SUMMARY OF ARGUMENT

The Larsens serve all people. They just cannot convey all messages. Because of their religious beliefs, they cannot celebrate any vision of marriage other than one between one man and one woman. At the same time, the Larsens' faith requires them to use their talents to express messages that honor God. They want to do this by producing wedding films, publishing them online, and posting a statement explaining their religious views. But these plans are on hold because Minnesota will punish them if they post their statement or create wedding films

consistent with their faith while declining to create wedding films promoting contrary views.

Standing. This chilled expression led the district court to conclude that the Larsens had standing to challenge all but one aspect of their claims because people need not violate the law before challenging it. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). But this same logic properly extends to that one aspect—the requirement under § 363A.11(1) (overlooked by the district court) and § 363A.17(3) (misinterpreted by the district court) that if the Larsens offer to publish wedding films promoting their religious beliefs about marriage online, they cannot decline to publish wedding films conflicting with those beliefs. This is true despite Minnesota's litigation position suggesting that such online publication is not required. *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000).

Free Speech. The government may not "compel [an individual] to utter what is not in his mind." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). Doing so interferes with "the fundamental rule of protection under the First Amendment" that speakers have "the autonomy to choose the content of [their] own message." *Hurley*, 515 U.S. at 573. But Minnesota forces the Larsens to create and publish films promoting conceptions of marriage they do not support, including same-sex marriages, if they create and publish films for any marriage. And it does this in an egregious way: based on content and viewpoint.

Just as the government cannot compel speech, it cannot ban speech. But § 363A.11(1) does this too: it forbids the Larsens' desired website statement because of its message critical of same-sex marriage.

Expressive Association. Minnesota further "impair[s]" the Larsens' ability "to express [their] views" on marriage by compelling expressive association. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). It forces the Larsens to "join together and speak" with others who do not share their expressive purpose of celebrating God's design for marriage. *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 68 ("*FAIR*") (2006).

Free Exercise. In compelling and banning religious speech, Minnesota also violates the Larsens' free exercise rights, applying MHRA in a manner that is neither neutral nor generally applicable—but a religious gerrymander, targeting only the religious belief in one-man/one-woman marriage. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

Equal Protection. This targeting also violates equal protection by treating similarly situated persons differently. While Minnesota filmmakers who support same-sex marriage can create and sell wedding films that align with their views on marriage, the Larsens and other filmmakers sharing their beliefs cannot.

Unconstitutional Conditions. In all of these ways, Minnesota conditions the Larsens' First Amendment right to promote their religious

views about marriage through their films on their willingness to forfeit their rights to be free from government-compelled speech, to freely exercise their religion, and to equal protection of the laws. States cannot condition the exercise of one constitutional right on the forfeiture of other constitutional rights in an attempt to do indirectly what they cannot do directly. *Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004); *see also Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

Unbridled Discretion and Vagueness. Beyond these as-applied problems, MHRA has facial flaws. Specifically, § 363A.17(3) does not define "legitimate business purpose" or explain what reasons for declining business satisfies this exception. Accordingly, this phrase violates the vagueness and unbridled discretion doctrines.

Strict Scrutiny. Each of the above constitutional violations triggers strict scrutiny. *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997). But Minnesota cannot show that forcing two filmmakers to create undesired speech and to forgo desired speech satisfies a compelling state interest in a narrowly tailored way. *Id*. In fact, compelling and banning the Larsens' speech causes irreparable harm. Preventing this harm benefits the Larsens and others too. Everyone wins when speakers can choose what messages they can and cannot say.

STANDARD OF REVIEW

This Court reviews dismissals under Rules 12(b)(1) and 12(b)(6) de novo. *See Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 914 (8th

Cir. 2015); *United States ex rel. Ambrosecchia v. Paddock Labs., LLC*, 855 F.3d 949, 954 (8th Cir. 2017). And though this Court reviews preliminary injunction denials for abuse of discretion, an error of law constitutes an abuse of discretion. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 872 (8th Cir. 2012). This Court also makes "a fresh examination of crucial facts" when a preliminary injunction appeal raises constitutional claims. *Johnson v. Minneapolis Park & Recreation Bd.*, 729 F.3d 1094, 1098 (8th Cir. 2013) (citation and quotations omitted).

ARGUMENT

The Larsens have been waiting over a year to exercise their expressive freedoms. They want to immediately start producing and publishing wedding films but cannot because of Minnesota's "peculiar" application of MHRA. *Hurley*, 515 U.S. at 572. That law, like the one in *Hurley*, works to "alter the expressive content" of the Larsens' films: if they create and publish wedding films consistent with their beliefs about marriage, they must also create and publish films that contradict their beliefs. *Id.* So the Larsens have chilled their speech to avoid serious penalties, including fines, damages awards, and up to 90 days in jail.

I. The Larsens have standing to challenge § 363A.17(3).

The district court ruled that the Larsens established standing for all their claims except one: their challenge to MHRA's mandate that they publicize same-sex wedding films on their website and social media

channels. J.A.688-97. That was wrong. The Larsens have standing to challenge this application of the MHRA to their speech for the same reasons they have standing to bring the rest of their claims.

It is well-settled that Plaintiffs need not wait to violate a law before challenging it. *See Steffel*, 415 U.S. at 462. To show standing and ripeness, the Larsens must prove an injury-in-fact. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014).[3] In the pre-enforcement context, that requires showing an intent to engage in an activity "arguably" affected with a constitutional interest, but "arguably" proscribed by a statute, and there exists a credible threat of prosecution thereunder. *Id.* at 2342-44, 2341 n.5.

The Larsens want to exercise their constitutional rights by creating wedding films promoting their religious beliefs about marriage, publishing these films to their clients, and publishing these films on the internet. J.A.83-84 (¶¶135-36). These are all services the Larsens desire to provide to their wedding clients. *Id.* (¶¶135-39). They also plan to specify in their wedding contracts that they provide each of these services. J.A.84 (¶¶138-39). At the same time, they desire to decline to create and publish films that promote conflicting ideas about marriage and to avoid entering into contracts committing them to do the same.

[3] The district court did not doubt the other requirements for standing (traceability and redressability). J.A.690 (n.8),693. Nor is there any reason to do so.

J.A.88 (¶¶167-68). But Minnesota's interpretation of §§ 363A.11(1) and 363A.17(3) prevents this.[4] *Id.* It is undisputed that Minnesota interprets MHRA to require businesses to provide the services and contract provisions it offers to some to all. In the wedding context, this means a business violates MHRA if it declines to provide services, or the same contract terms, in the same-sex wedding context as it would in the one-man/one-woman wedding context.

The district court rightly concluded that Minnesota's interpretation of the MHRA, coupled with the protected nature of the Larsens' filmmaking activities and the credible threat of enforcement, established standing. *See* J.A.690-93. Yet the court then inexplicably found that its holding did not apply to their objection to publishing wedding films they find objectionable on their website and social media channels. J.A.693-97. This is plain error.

Businesses determine what services they provide and what terms they include in contracts. Here the Larsens have determined that publishing wedding films on their website and social media channels is a service they will provide and memorialize through contractual language. And this decision makes sense. Most, if not all, creative professionals and artists showcase their talent in this way to promote their ideas to a wider audience and to attract new clients. It's true that Minnesota's attorney

[4] Because §§ 363A.11(1) and 363A.17(3) operate similarly, this brief will refer to both as MHRA unless the provisions need to be distinguished.

stated at the preliminary injunction hearing that MHRA does not apply to the films the Larsens publicize through these channels, J.A.696, but this post-litigation position directly contradicts the state's undisputed interpretation of MHRA. The district court was wrong to accept the state's attempt to wiggle out of what they appear to understand is a particularly unpalatable consequence of their speech-coercing interpretation of the law. And it erred in accepting the state's claim that it would look the other way if the Larsens decline to publish a same-sex wedding film on an equal basis with one from a wedding between one man and one woman. As this would clearly violate the law, the court was in no position to accept such litigation tactics by the state.

The lower court compounded its error by drawing a line between publishing objectionable films to clients and publishing them to a broader audience. J.A.693. This is an artificial distinction. First Amendment rights do not turn on the size of one's audience. *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674, 742 (D.C. Cir. 2016) ("The constitutionality of common carriage regulation of a particular transmission medium thus does not vary based on the potential audience size."). The district court concluded that the Larsens had standing to challenge §§ 363A.11(1) and 363A.17(3)'s requirement that they publish wedding films they find objectionable to their clients. For the same reasons they have standing to challenge the requirement that they publish these same films on the internet.

The district court further erred by focusing exclusively on the "basic terms" phrase in § 363A.17(3) when analyzing whether the Larsens had standing to challenge the requirement that they post films they do not want to post on the internet. This was a fatal mistake because § 363A.11(1) requires the same thing, *see supra*, a fact the court ignored. But even under the district court's own logic, the Larsens still satisfy standing requirements.

The district court read "basic terms" to mean elements that make up the "core of the deal." J.A.694. But that narrow reading contradicts MHRA. MHRA requires its language to be "construed liberally." Minn. Stat. § 363A.04. The district court's narrow reading also contradicts pre-litigation statements from Minnesota officials; as they made clear, they consider differential treatment of same-sex couples in the wedding context to be sexual orientation discrimination. *See* J.A.72-76 (¶¶60-71). Indeed, anti-discrimination laws like MHRA could easily be circumvented if they only forbid differential treatment in basic terms but not for important yet optional conditions like arbitration clauses. *Cf.* J.A.694 (n.11) (adopting this interpretation of MHRA based on cases outside the anti-discrimination context).

Regardless, the district court's interpretation does not defeat standing. The Larsens' desired provision is a basic term or service. The provision is bargained for, benefits both the Larsens and clients, and allows the Larsens to charge higher fees. Moreover, § 363A.17(3) does not

simply cover "basic terms"; it forbids changes to the "conditions, or performance of the contract…." The Larsens' provision does exactly that. It changes the conditions and performance of the film contracts for same-sex marriages. This broad statutory language at least *arguably* forbids what the Larsens want to do. That is all the Larsens must show. *See, e.g.*, *281 Care Comm. v. Arneson*, 638 F.3d 621, 628 (8th Cir. 2011) (finding standing where law "could reasonably be interpreted as" covering plaintiffs).

The remaining question then is whether the Larsens meet the "extremely low" bar to show a credible enforcement threat. *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003). This Court should "presume[ ] that [Minnesota] will enforce the law." *Hedges v. Obama*, 724 F.3d 170, 200 (2d Cir. 2013). But the court below did not because Minnesota's counsel stated at the hearing that the law would not be enforced in this manner. J.A.696. This nonbinding, post-litigation position, however, does not defeat standing in the First Amendment context. *See Sorrell*, 221 F.3d at 383 (hearing First Amendment challenge even though state disavowed enforcement because plaintiff's interpretation of statute is "reasonable enough" and "nothing … prevents the State from changing its mind"); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710-11 (4th Cir. 1999).

The Larsens, however, have even more reasons to fear enforcement. Minnesota has already investigated other businesses under the law.

J.A.71,76 (¶¶ 45-47, 66-71). And almost anyone can trigger enforcement proceedings. *See* Minn. Stat. § 363A.28(1). The credibility of enforcement "is bolstered by the fact that authority to file a complaint with the Commission is not limited to a prosecutor or an agency" but includes any person. *Driehaus*, 134 S. Ct. at 2345. The Larsens therefore have standing to challenge this application of § 363A.17(3) for the same reasons they have standing for the rest of their claims.

II. The Larsens not only state claims that MHRA violates their constitutional rights, but show they deserve a preliminary injunction to stop ongoing, irreparable harm.

For a 12(b)(6) motion to dismiss, courts must accept as true all pleaded facts and all inferences reasonably drawn from those facts. *McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 811 F.3d 998, 1002 (8th Cir. 2016). To overcome this motion, the Larsens need only allege facts that plausibly suggest a violation of the applicable law. *Id.* The Larsens not only meet this low bar as they have plausibly suggested the violation of their First and Fourteenth Amendment rights, but also meet the requirements for an injunction given the current violation of these rights.

To obtain a preliminary injunction, the Larsens must show a threat of irreparable harm, the balance of equities weighs in their favor, a probability of success on the merits, and the public will benefit from it. *Swanson*, 692 F.3d at 870. But when plaintiffs show a "likely violation" of their "First Amendment rights, the other requirements for obtaining a

preliminary injunction are generally … satisfied." *Id.* This is true here. By establishing viable legal claims, the Larsens necessarily establish likely success on the merits since there are no factual disputes. *See* J.A.700 ("Legal questions regarding undisputed facts are at the core of this dispute."). Indeed, Minnesota responded to the preliminary injunction motion below by raising the same legal arguments as its motion to dismiss; Minnesota could have but did not dispute any facts. *See* J.A.287-315. In this scenario, this Court can and should instruct the district court to enter a preliminary injunction. *See McGlone v. Cheek*, 534 F. App'x 293, 299 (6th Cir. 2013) (issuing this instruction in same procedural context).

A. MHRA compels the Larsens' speech as-applied.

The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This latter right means the government cannot compel unwanted expression. Indeed, "the fundamental rule of protection under the First Amendment" is "that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. MHRA violates this rule by forcing the Larsens to create and publish wedding films promoting ideas about marriage they object to if they choose to create and publish wedding films promoting their religious beliefs about marriage (which they have already decided they want to do).

This triggers the compelled speech doctrine for three reasons: (1) the Larsens engage in protected speech (filmmaking); (2) MHRA compels them to speak (create and publish films); and (3) the Larsens object to doing so. *See id.*, 515 U.S. at 573 (assessing these factors); *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015) (identifying these elements for compelled speech claim). And this stark infringement on speaker autonomy deserves what laws compelling speech normally receive—strict scrutiny. *See Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 19 (1986) (plurality) ("*PG&E*") (applying strict scrutiny to law compelling speech).

1. The Larsens' films and filmmaking are protected speech.

The Larsens want to immediately create wedding films to promote God's design for marriage and impact cultural views on the subject. J.A.83-86 (¶¶134-36, 154, 159). These films are pure speech fully protected by the First Amendment. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) ("[E]xpression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."); J.A.82 (¶¶123-24).

Because the Larsens' films are pure speech, their process of creating films—their filmmaking—is also pure speech. Courts protect the "process of creating a form of *pure* speech (such as writing or painting)" to the same degree as "the product of these processes (the essay or the

artwork)…." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010). *See also Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 582 (1983) (protecting use of paper and ink products under First Amendment when used to publish newspapers).

The same logic applies to filmmaking. "It defies common sense to disaggregate the creation of the video from the video or audio recording itself. The act of recording is itself an inherently expressive activity; decisions about content, composition, lighting, volume, and angles, among others, are expressive in the same way as the written word or a musical score." *Animal Legal Defense Fund v. Wasden*, __ F.3d __, No. 15-35960, 2018 WL 280905, at *13 (9th Cir. Jan. 4, 2018).[5] So for good reason, the court below assumed that "the creation and contents of the Larsens' speech-for-hire implicate the Larsens' First Amendment rights." J.A.706.

2. MHRA compels the Larsens' speech, not conduct.

Minnesota interprets MHRA to require the Larsens to create and publish wedding films promoting conceptions of marriage they object to if they create wedding films promoting their religious beliefs about marriage. J.A.66,87 (¶¶6-7, 160-162). This requirement compels speech, not conduct.

[5] *See also Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017) ("[T]he First Amendment protects the act of making film, as there is no fixed First Amendment line between the act of creating speech and the speech itself.").

In *Hurley*, Massachusetts applied its public accommodation law in a "peculiar way" to treat "speech itself" (a parade) as "the public accommodation," thereby forcing the parade organizers to accept a message in their parade they did not want. 515 U.S. at 572-73. Minnesota has done the same thing, just for a different medium—applying its public accommodation law to speech itself (films) in a way that forces two filmmakers to convey content they cannot. As the district court acknowledged, this application results in compelled speech—the creation of films the Larsens do not want to create. *See* J.A.718-19 (district court stating that MHRA "require[s] wedding videographers to make [films] they might not want to make.").

Nor does this conclusion change just because MHRA regulates conduct on its face. *Cf.* J.A.707 (district court finding that although MHRA generally regulates conduct, as applied here, it "burden[s] [the Larsens'] exercise of free expression"). Generally applicable laws can unconstitutionally compel speech as applied. As *Hurley* noted, while public accommodation laws "do not, as a general matter, violate the First or Fourteenth Amendments," they can if *applied* to compel speech. 515 U.S. at 572; *see also Turner*, 512 U.S. at 640 ("[T]he enforcement of a generally applicable law may … be subject to heightened scrutiny.").

Like the public accommodation law in *Hurley*, MHRA facially regulates conduct; yet, as applied, it compels the Larsens to speak

messages they would not want to convey. That triggers First Amendment scrutiny.

3. MHRA compels the Larsens to create and publish films with content they object to.

Not only does MHRA compel the Larsens to create and convey speech; it compels them to create and convey speech with a message they object to.

Specifically, the Larsens object to creating films that promote and celebrate any marriage that contradicts their religious beliefs, including same-sex marriage. J.A.78 (¶96). But this objection does not turn on the sexual orientation of the requestor. The Larsens would not create a film celebrating same-sex marriage no matter who requested it. J.A.66,78 (¶¶6, 92, 96). Meanwhile, the Larsens serve all people "regardless of their race, sexual orientation, sex, religious beliefs, or any other classification." J.A.78 (¶92). They will gladly work with their LGBT clients to create films as long as they can do so "while also honoring their religious beliefs." J.A.77 (¶89). But the Larsens cannot promote all messages, a policy that applies in or outside the wedding context. J.A.78 (¶ 96).

In this way, the Larsens mimic the parade organizers in *Hurley*. They "disclaim[ed] any intent to exclude homosexuals as such" and allowed individual members of the excluded LGBT group to march in the parade. 515 U.S. at 572-73. The organizers only objected to the LGBT group marching as a unit under its own banner, which altered the

parade's message as a whole. *Id.* By protecting this objection, *Hurley* recognized that public accommodation laws barred person-based, but not message-based, objections.

Other courts recognize this message/person distinction too. *See, e.g.*, *World Peace Movement of Am. v. Newspaper Agency Corp.*, 879 P.2d 253, 258 (Utah 1994) (holding that newspaper did not discriminate by declining religious person's religious advertisement because newspaper "may discriminate on the basis of content even when content overlaps with a suspect classification…").

But the court below did not recognize this distinction, calling it instead "semantic" and forbidden under *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010) and *Lawrence v. Texas*, 539 U.S. 558 (2003). J.A.691 (n.9). That, however, misreads these cases. Both *Martinez* and *Lawrence* occurred outside the marriage context and rejected distinctions between a person's homosexual conduct and homosexual status. *See Martinez*, 561 U.S. at 667-68, 689; *Lawrence*, 539 U.S. at 562-63, 575. In the marriage context though, the Supreme Court has already distinguished between good faith objections to same-sex marriage and invidious objections to a person's homosexual status. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (finding opposition to same-sex marriage to be "based on decent and honorable religious or philosophical premises").

Even more important, the Larsens do not seek to distinguish between their *clients'* conduct and their *clients'* homosexual status; the Larsens distinguish between *their speech* (i.e. their films) and *their clients' status* — the same distinction accepted in *Hurley* and *World Peace*. In other words, there is a difference between disagreement with a message and discrimination against a person. To equate the two—speech and status, disagreement and discrimination—not only contradicts *Hurley*, it marginalizes one particular viewpoint on marriage and imperils public debate about a vital social issue.

While the district court rejected the Larsens' message/person distinction as mere semantics, a few pages later it actually makes the same distinction, claiming that MHRA could not force "a ghost-writer operating as a public accommodation" to "write a book when the writer disagrees with the message the book would convey … even if the book would be on a topic related to a protected status." J.A.707-08 (n.21). That would be objecting to "the message of the book, not … the sexual orientation of the customer." *Id*. Yet that is exactly the distinction the Larsens draw.

The district court distinguishes the Larsens from the ghost-writer because the former object in the marriage context, one of the "rare circumstances where … the protected status of the customer [is] inextricably linked with the content of the express[ion]." J.A.708 (n.21). But that distinction runs into multiple problems. For one, Minnesota has

never adopted it. Nothing in MHRA mentions it, and Minnesota has never advanced it. To the contrary, Minnesota claims it can compel the speech of any for-profit speaker, whether their speech is linked to a protected status or not. J.A.270-71, 297-99. A distinction that enforcement officials do not use offers little solace to speakers in Minnesota and cannot justify their ongoing unconstitutional application of MHRA.

Second, the district court's distinction is factually incorrect. A client's sexual orientation is not necessarily linked to the wedding film he requests. A heterosexual father, for example, could ask the Larsens to create a film for his gay son. But the Larsens would decline because they cannot promote certain content *no matter who asks them*. And of course the Larsens would create wedding films requested by homosexual parents for their son marrying a woman. The Larsens policy applies to everyone. Not to mention that the Larsens will also create films for anyone of any sexual orientation on any topic that would not violate their beliefs. Sexual orientation is simply not a factor in their decisionmaking.

Third, the district court's "inextricably linked" exception cannot be limited to marriage. A Jewish writer, for example, should not be forced to write a biography chronicling a man's Muslim faith. A feminist web designer should not be forced to create websites promoting a fraternity. An atheist filmmaker should not be forced to create a documentary promoting the Catholic Church's mission trips. An African American

photographer should not be forced to photograph Aryan Nation Church rallies. For many important subjects, expression may in part overlap someone's protected status. That is not reason to withdraw First Amendment protection. That is reason to uphold it.

Finally, the district court's "inextricably linked" exception contradicts precedent. In *Hurley*, for example, the parade organizers forbade a banner that said "Irish American Gay, Lesbian and Bisexual Group of Boston" which sought "to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women …." 515 U.S. at 570 (emphasis added); *id* at 574 (noting that banner conveyed message "that some Irish are gay, lesbian, or bisexual"). The banner's message, therefore, was directly linked with the homosexual status of the GLIB members. Yet the *Hurley* Court still found that the parade organizers objected to the message of the banner, not the status of group members.

There is no "inextricably linked" exception to the First Amendment. Giving speakers the freedom to control what they say may come at a cost when that freedom overlaps important topics that may be connected in some way to protected classes. That freedom may prove offensive, even hurtful, to some and may allow some unfortunate thoughts and ideas to linger. But the effort "to produce thoughts and statements acceptable to some groups … grates on the First Amendment, for it amounts to nothing

less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis." *Hurley*, 515 U.S. at 579.

4. MHRA deserves strict scrutiny for compelling the Larsens to create and publish films with content they object to.

"Outside [the commercial speech] context," the government "may not compel affirmance of a belief with which the speaker disagrees."[6] *Hurley*, 515 U.S. at 573. The "general rule" is that speakers have "the right to tailor" their speech. *Id.* It follows that laws compelling speech trigger strict scrutiny. *Cf. Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795-98 (1988) (applying strict scrutiny); *PG&E*, 475 U.S. at 19 (same). That too is the "general rule." *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 245 (2d Cir. 2014).

This general rule makes sense for two reasons. First, "the fundamental rule of protection under the First Amendment, [is] that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. Only strict scrutiny can safeguard such a fundamental freedom. Second, laws "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795. Such laws are therefore "content-based" and

[6] The district court correctly rejected Minnesota's argument that the Larsens' films are commercial speech. Their films are nothing like advertisements that only propose a commercial transaction. *See* J.A.706.

receive strict scrutiny. *Id*. *See also Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014) (noting that a "regulation compelling speech is by its very nature content-based …").

These reasons also explain why the Supreme Court analyzes compelled speech differently than restricted speech. *See, e.g., Barnette*, 319 U.S. at 633 (noting that "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence"). The district court therefore erred when it analyzed § 363A.11(1) like a restriction on speech, asking whether it restricted speech based on content or did so in an incidental, content-neutral way justifying intermediate scrutiny. *See* J.A.703-05 (citing cases like *United States v. O'Brien*, 391 U.S. 367 (1968) that analyzed restrictions on expressive conduct). Contrary to that analysis, laws that compel speech (or association that affects speech) do not impose incidental burdens; they imperil speaker autonomy and alter content by definition. They "directly and immediately" affect First Amendment freedoms. *Dale*, 530 U.S. at 659 (declining to apply *O'Brien* intermediate scrutiny test to law compelling association that impacted speech).

The only time that the Supreme Court applied intermediate scrutiny to a law that was claimed to compel speech was in *Turner*, 512 U.S. at 662, which involved a monopoly over an entire conduit for cable television that resulted in certain speech being shut off. But that decision cannot withstand the weight the district court put on it. J.A.717-21.

i. MHRA deserves strict scrutiny because *Turner* does not control this case.

In *Turner*, the Supreme Court encountered a law forcing cable companies to use some of their channels to transmit local broadcast stations' programming. 512 U.S. at 626-34. Although this "must-carry" requirement infringed on the cable companies' editorial freedom, the Supreme Court found this burden minimal and applied intermediate scrutiny for the following reasons.

First, the cable companies acted as "a conduit for the speech of others [the broadcasters], transmitting it on a continuous and unedited basis…" *Id.* at 629. Pure conduits exercise less editorial control than other speakers. Second, the cable companies "unlike speakers in other media" had the monopoly "bottleneck" power to exclude broadcasters because of the unique nature of the cable medium. *Id.* at 656. Third, the must-carry requirement was content-neutral. *Id.* at 644. The requirement was not "activated" by any particular programming the cable companies transmitted and did not grant access to particular "content" from broadcasters. *Id.* at 655. And fourth, the cable companies did not actually object to any content from the broadcasters. *See id.* at 647 (noting that law did "not compel cable operators to affirm points of view with which they disagree").

Take away any one of these reasons, and here all must be taken away, and *Turner*'s case for intermediate scrutiny falters. *Cf. Hurley*, 515

U.S. at 575-78 (declining to extend *Turner* when conduit and bottleneck factors absent); *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 640 (5th Cir. 2012) (noting that *Turner* applied intermediate scrutiny "only because the cable medium uniquely allowed for the bottleneck control …"); *Jian Zhang v. Baidu.com Inc.,* 10 F. Supp. 3d 433, 439 (S.D.N.Y. 2014) (declining to extend *Turner* on similar grounds). None of these reasons apply to the Larsens.

The Larsens are creators, not conduits. Unlike cable companies who transmit secondhand speech "on a continuous and unedited basis," the Larsens create original content. *Turner*, 512 U.S. at 629. And like most speech creators, the Larsens exercise a great degree of editorial control: deciding what stories to tell, which projects to accept, what content to capture, which angles to shoot, which clips to keep, and more. J.A.77-80, 83 (¶¶89-91, 99-107, 130-34). In this situation, the conduit "metaphor is not apt," because the Larsens are much "more than a passive receptacle" for someone else's message; they actively "choose the content" of their films and create that content. *Hurley*, 515 U.S. at 573, 575. If newspaper editors exercise enough editorial control to warrant strict scrutiny when they select pieces written by others, then surely the Larsens exercise enough editorial control to warrant strict scrutiny when they create speech from scratch. *Id.* at 575 (distinguishing cable companies from newspaper editors).

The Larsens cannot silence other speakers. Unlike cable companies, the Larsens do not exercise "bottleneck, or gatekeeper, control"; they cannot "silence the voice of competing speakers with a mere flick of the switch." *Turner*, 512 U.S. at 656. Indeed, the Larsens cannot hinder, much less silence, anyone else. Regardless, what the Larsens choose, other filmmakers can create films they want, and same-sex couples can get films they want. *See* J.A.87-90 (¶¶166-86) (detailing these options).

MHRA compels speech in a content and viewpoint-based way. Unlike the must-carry rules in *Turner*, MHRA operates in a content and a viewpoint-based way in three respects.

First, by compelling the Larsens to convey a message they disagree with—recognizing and celebrating same-sex marriage—MHRA "necessarily alters the content" of what the Larsens want to say. *Riley*, 487 U.S. at 795. That constitutes a "content-based regulation of speech." *Id*.

Second, MHRA only applies to the Larsens if they convey particular content elsewhere. If the Larsens avoid promoting their views about marriage through their films, they are safe. Only if the Larsens create wedding films promoting their religious views about marriage must they create films promoting opposing views. MHRA is thus triggered or activated by the content of the speech the Larsens create earlier. And when a law is triggered by the content of speech elsewhere, that law is content-based. *See PG&E*, 475 U.S. at 13-14 (explaining how law

regulates based on content if "it was triggered by a particular category of … speech" or has "conditioned [access] on any particular expression" conveyed earlier); *Missouri Broad. Ass'n v. Lacy*, 846 F.3d 295, 303 (8th Cir. 2017) (finding compelled speech where the business's obligation to speak was triggered by its decision to "include the name and address of a retailer in an advertisement"); *Baidu.com*, 10 F. Supp. 3d at 441.

Third, MHRA awards access to the Larsens' films only to particular viewpoints they oppose. If the Larsens create films promoting their religious beliefs about marriage, MHRA does not require the Larsens to create films advocating child safety locks or immigration reform. It only requires the Larsens to create films promoting same-sex marriage, the exact opposite viewpoint of what they want to convey. In this way, MHRA is viewpoint-based because it awards "access … only to those who disagree with [the Larsens'] views." *PG&E*, 475 U.S. at 14.

MHRA compels the Larsens to speak a message they object to. Finally, unlike the cable companies in *Turner*, the Larsens actually object—on moral and religious grounds—to the content they are forced to convey. *See supra* § II.A.3. Nothing of the sort arose in *Turner*; the cable companies there apparently acted out of economic motives. In fact, "the FCC has acknowledged" that cable companies "may decline to carry an unaffiliated network … because it opposes the views expressed by the network …" *Time Warner Cable Inc. v. F.C.C.*, 729 F.3d 137, 156 (2d Cir. 2013). As this concession suggests, compelling someone to speak an

objectionable message raises different and much greater concerns than those raised in *Turner*.

ii. MHRA deserves strict scrutiny because there is no commissioned speech exception to the First Amendment.

Unlike the actual conduit found in *Turner*, the district court instead re-defined a "conduit" to include someone paid to "exercise creative license to fashion" speech for someone else. J.A.719 (calling this "speech-for-hire"). But that is not a conduit. That is a commissioned speaker. And commissioned speakers deserve just as much protection from compelled speech as non-commissioned ones.

Indeed, compelling objectionable speech imposes the same unacceptable burden on commissioned speakers as it imposes on others—it trespasses their "freedom of mind." *Wooley*, 430 U.S. at 714. The Supreme Court has already extended compelled speech protection to such speakers. *See Riley*, 487 U.S. at 784 (protecting for-profit fundraisers paid to speak someone else's message); *Hurley*, 515 U.S. at 574 (noting that right not to speak covered "professional publishers"). And courts have repeatedly explained that commissioned speakers retain just as much interest in their speech as those who receive it. *See, e.g., Simon & Schuster, Inc. v. Members of the N.Y. Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (acknowledging that both author and publisher had First Amendments rights); *Anderson*, 621 F.3d at 1062.

While the district court justified its commissioned-speech exception on the grounds that no one would attribute commissioned speech to its creator. J.A.719-20. That is wrong. No one attributes the Sistine Chapel to Pope Julius II. They attribute it to Michelangelo.

But even more important, attribution perceptions are irrelevant. The Supreme Court has repeatedly found compelled speech regardless of what observers think a speaker affirms. Thus, Minnesota cannot force newspapers to print someone else's editorial, whether readers think newspapers agree with that editorial or not. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 243-46. Minnesota cannot force companies to put someone else's statement in their newsletter, whether readers think those companies agree with that statement or not. *PG&E*, 475 U.S. at 15 n.11. And Minnesota cannot force individuals to display the state's motto on their car, whether observers think the car owner agrees with that motto or not. *See Wooley*, 430 U.S. at 721 (Rehnquist, J., dissenting) (criticizing majority because car owner never put "in the position of either apparently to, or actually 'asserting as true' the message" objected to). As these cases show, the right to not speak does not turn on what "a bystander would think…." *Frudden v. Pilling*, 742 F.3d 1199, 1204-05 (9th Cir. 2014) (citations and quotations omitted).

Newspapers exemplify this point. When newspapers (or internet companies) accept advertisements from the general public for a fee, they publish someone else's speech for profit. The newspapers do not create or

change the message. They merely publish the advertiser's message so that the advertiser can speak to the newspaper's audience. No one thinks these advertisements speak for the newspaper. But courts nonetheless protect the newspapers' right to decline advertisements as they see fit. *See, e.g., Groswirt v. Columbus Dispatch*, 238 F.3d 421, *2 (6th Cir. 2000) (holding that anti-discrimination law could not force newspaper to publish someone's paid letter because of First Amendment); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007) (concluding that Google had First Amendment right to decline request to publish advertisement on search engine).

The irrelevance of third-party perceptions also explains why disclaimers do not alleviate the Larsens' injury like the district court thought. J.A.720. No matter what third parties think, the Larsens still know what they are crafting and must convey what they cannot. That internal, psychological harm—creating and speaking the very thing you oppose—harms the freedom of mind and spirit in a way no disclaimer solves. *See, e.g., PG&E,* 475 U.S. at 15 n.11 (rejecting argument that disclaimer solved compelled speech); *Hurley*, 515 U.S. at 576 (stating the government cannot force "speakers to affirm in one breath that which they deny in the next").

Nor can commissioned speakers just slough off compelled speech by publishing someone else's speech or by speaking elsewhere like the district court claimed. J.A.720. While the Larsens can express their views

elsewhere or publicize wedding films that others create, they still cannot create and publish their own commissioned wedding films—the very thing they want, J.A.82-84 (¶¶125-38, 144)—without fear of speaking an objectionable message. The government need not deter the Larsens from speaking in every possible venue and every medium before the compelled speech doctrine protects them.

Finally, the district court's commissioned speech exception is both limitless and dangerous. Its logic does not stop at the public accommodation context; or at certain mediums or certain topics. If commissioned speakers speak only for clients, can always disclaim, and can always speak their views elsewhere, the mediums and topics compelled do not matter. That would allow the government to compel any commissioned writer, painter, attorney, web designer, tattoo parlor, printer, publisher, photographer, sign maker, advertising firm, or search engine to convey speech requested on any topic. But the First Amendment means little if Democratic speechwriters must write a Republican's campaign speech or if an African American graphic designer must create logos for the KKK's fundraising letters. The affront to these speakers' dignity is difficult to even imagine. No speaker should have to suffer this. And no legal theory should allow it.

B. Minn. Stat. § 363A.11(1) bans speech based on content and viewpoint as-applied.

Minnesota applies § 363A.11(1) not only to compel the Larsens to speak, but to ban their desired message. Such content and viewpoint discrimination triggers strict scrutiny. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (imposing such scrutiny on restriction against speech based on "its message, its ideas, its subject matter, or its content").

Strict scrutiny is warranted because MHRA forbids the Larsens from posting a website statement explaining their religious beliefs about marriage and how these beliefs affect their expressive decisions. J.A.86-87 (¶¶ 158-60). And MHRA does so because of the statement's content and viewpoint. Indeed, MHRA would allow the Larsens to post a statement accepting films promoting same-sex marriage or declining to create films criticizing climate change; they just cannot post a statement declining to create films promoting marriages that contradict their religious beliefs, like same-sex marriage. The only difference is the content and viewpoint of those statements. *See Reed*, 135 S. Ct. at 2231 ("[A] speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed."); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (finding viewpoint discrimination when restriction singles out "particular views on a subject").

Unable to dispute this, the district court upheld § 363A.11(1) by equating the Larsens' statement to a "White Applicants Only" sign. J.A.705. But this comparison fails for at least two reasons. First, the Larsens' statement does not commence illegal activity. While the government may restrict speech "intended to induce or commence illegal activities," *United States v. Williams*, 553 U.S. 285, 298 (2008), the Larsens do not violate any (constitutional) law by declining to create films they disagree with. Far from it. The Larsens have the right not to create these films. *See supra* § II.A. Minnesota cannot ban the Larsens from describing what they are constitutionally permitted to do.

Second, the Larsens' statement is categorically different than the racist "White Applicants Only" sign. That latter tries to deter African Americans as a class from ever seeking employment; the former declines to create films promoting certain content. The Larsens serve all people. J.A.78 (¶92). Racists do not. The Larsens believe everyone—including LGBT people—deserve respect. They will therefore create films for LGBT people (and anyone else) as long as its content is consistent with their religious beliefs. J.A.77-78 (¶89, 92). This policy is a far cry from "straights only." Lumping the Larsens in with the racists does nothing but disparage everyone who shares the Larsens' "decent and honorable" beliefs about marriage. *Obergefell*, 135 S. Ct. at 2602.

C. MHRA compels expressive association as-applied.

Besides protecting the right to speak, the First Amendment also protects the right to "associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). The Larsens seek this very thing: to "join together and speak" with others who share their expressive purpose of producing wedding films that celebrate God's design for marriage. *FAIR*, 547 U.S. at 68; J.A.78,82-84 (¶¶91, 122, 126-36). But MHRA forces them to join together and speak with those who wish to express an opposing message about marriage. This "impair[s]" their ability "to express [their] views, and only those views" and thus infringes their "freedom of expressive association." *Dale*, 530 U.S. at 648. MHRA must therefore satisfy strict scrutiny. *Id*.

This conclusion does not change because the Larsens own a business and join with clients as co-creators to speak. *Cf*. J.A.725 (n.33) (district court doubting whether expressive association could cover the relationship between an expressive business and its customer). Businesses enjoy a right to expressive association the same as individuals. *See Lacy,* 846 F.3d at 303. A newspaper, for example, cannot be forced to associate with customers who want to print editorials or advertisements the newspaper objects to. *Tornillo*, 418 U.S. at 256-58. Nor can newspapers be forced to associate with editors who affect the newspaper's editorial judgment. *See McDermott v. Ampersand Pub.,*

LLC, 593 F.3d 950, 959–63 (9th Cir. 2010). As these cases show, some businesses can raise expressive association claims.

D. MHRA violates free exercise as-applied.

The Larsens believe marriage "is by its nature a gender-differentiated union of man and woman" ordained by God. *Obergefell*, 135 S. Ct. at 2594; J.A.81 (¶119) This belief has long "been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." *Id*. Equally important, the Larsens believe they must use their creative talents to create wedding films that promote this idea about marriage. J.A.76,81-83,98 (¶¶72-78, 113-31, 247). As a result, they cannot participate in a religious ceremony celebrating different conceptions of marriage, create wedding films celebrating different conceptions of marriage, or decline to use their talents to celebrate biblical marriage without violating their faith. But MHRA requires the Larsens to do exactly this.

This violates the Free Exercise Clause because weddings have deep religious meaning to the Larsens. *See* J.A.81 (¶119) (Marriage creates "a God-ordained, lifelong, sacrificial covenant" between two people). And by forcing the Larsens to create films celebrating same-sex marriages, MHRA necessarily forces the Larsens to attend and participate in what they perceive as a religious ceremony—a same-sex wedding. J.A.83 (¶¶130, 133-34). The First Amendment, however, does not tolerate forced

attendance, much less forced participation in a religious ceremony. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 586 (1992) (holding that school could not force students' "attendance and participation" in a graduation benediction).

Besides compelling participation, MHRA also targets one particular religious view. And though courts often uphold neutral and generally applicable laws, they apply strict scrutiny to laws hostile towards religion—either facially or as-applied. *See Lukumi*, 508 U.S. 520, 534 (1993) (invalidating facially neutral law that in application created a "religious gerrymander[ ]" to suppress a particular disfavored religious ritual). Minnesota's application of MHRA raises similar concerns as those addressed in *Lukumi*.

For example, Minnesota shows its favoritism by creating a system of individualized assessments and exemptions to enforce MHRA. This lacks neutrality. *Id.* at 537 (condemning law enforced though "individualized governmental assessment of the reasons for the [allegedly unlawful] conduct" because individualized assessments too easily target religious beliefs in application). Minnesota employs an individualized assessment to determine whether businesses have a "legitimate business purpose" to decline work. Minn. Stat. § 363A.17(3); J.A.15-16 (¶¶34-37, 260). This vague standard gives Minnesota leeway to "devalue [ ] religious reasons" for declining to create speech. *Lukumi*, 508 U.S. at 537.

Minnesota's public statements confirm their targeting of this particular religious view: "The law does not exempt … businesses … based on religious beliefs regarding same-sex marriage." J.A.719-21 (¶¶61-62, 69). Yet this provision would presumably protect decisions to decline work to protect a business's brand, to take a day off, and to make more money doing something else. Such "discriminatory treatment" profoundly "devalues religious reasons for" not celebrating same-sex marriage in violation of the Free Exercise Clause. *Lukumi*, 508 U.S. at 537-38.

Worse, these same officials who enforce the "legitimate business" exception will now be deciding who benefits from the district court's newly minted "inextricably intertwined" rule which also creates a system of individualized assessments. Consider that the district court thought that a ghost-writer could decline to write a book promoting same-sex marriage for an LGBT person. J.A.707-08 (n.21). But according to Minnesota's public statements, and under their theory advanced in the court below, this writer would not be protected. *See* J.A.19,21,271 (arguing commissioned speech can be compelled because it is "conduct"), 19,21 (¶¶ 61-62, 69). The Larsens simply will not receive a fair shake in this discretionary system.

Moving from neutrality to general applicability, MHRA fails because it categorically exempts others based on religious beliefs but not the Larsens. This under-inclusiveness is fatal. *See Lukumi*, 508 U.S. at

543; *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (explaining that categorical exemptions may show discriminatory intent).

For example, Minnesota claims that it enforces MHRA to stop the dignitary harm caused when a public accommodation declines an expressive project. But this harm presumably also occurs when a ghost-writer declines to write a book promoting same-sex marriage for an LGBT person. Yet MHRA allows this says the district court. It therefore is not generally applied to serve its stated purpose. This triggers strict scrutiny.

MHRA also triggers strict scrutiny under the hybrid-rights doctrine. In *Employment Division v. Smith*, the Supreme Court found that strict scrutiny applies in "hybrid situation[s]" where a free-exercise claim is linked with "other constitutional protections, such as freedom of speech." 494 U.S. 872, 881-82 (1990). Although this Court has acknowledged the doctrine before, it has yet specified the precise framework for analyzing those claims. *See, e.g.*, *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008) (recognizing *Smith*'s "hybrid rights doctrine" but declining to rule on it for estoppel reasons); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472-73 (8th Cir. 1991) (noting *Smith*'s recognition of hybrid-rights claim and directing district court to "consider this claim on remand").

The standard that best comports with *Smith* requires someone raising a hybrid-rights argument to present a "colorable claim that a

companion right has been violated." *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999); *see Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295-97 (10th Cir. 2004) (similar). The Larsens meet this standard because they have already shown that MHRA compels and restricts their speech. *See supra* §§ II.A-B. That makes their claims far more than just colorable and triggers strict scrutiny under the hybrid-rights doctrine.

E. MHRA violates equal protection as-applied.

The Equal Protection Clause guarantees "that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Laws that make distinctions among similarly situated groups that affect fundamental rights receive "the most exacting scrutiny," *Clark v. Jeter*, 486 U.S. 456, 461 (1988), and discriminatory intent is presumed. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) ("[W]e have treated as presumptively invidious those classifications that … impinge upon the exercise of a 'fundamental right.'"). Minnesota's application of MHRA impinges the Larsens' fundamental rights to free speech and free exercise, so strict scrutiny applies.

The Larsens are similarly situated to other Minnesota wedding filmmakers, but Minnesota treats these groups differently depending on their view or message about marriage. Filmmakers who support same-sex marriage are free to create and sell wedding films that align with

their views on marriage. J.A.89-90 (¶¶178-187) (citing examples). Filmmakers like the Larsens who believe in biblical marriage are not.

While the district court found this argument "unlike any [it] encountered in precedent," J.A.732, courts frequently find equal protection violations when laws treat speakers unequally. *See Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 94-98 (1972) (holding that unequal treatment of picketers based on message violates equal protection).

F. MHRA violates the unconstitutional conditions doctrine as applied.

The government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech." *Perry*, 408 U.S. at 597.

When the government requires citizens to relinquish one constitutional right as a condition of exercising another constitutional right, that condition "presents an especially malignant unconstitutional condition." *Bourgeois*, 387 F.3d at 1324; *see also Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977) (explaining that the unconstitutional conditions doctrine applies to forfeiting "one constitutionally protected right as the price for exercising another").

Here, Minnesota conditions the Larsens' First Amendment right to promote their religious views about marriage through their films on their willingness to forfeit their rights to be free from government-compelled

speech, to freely exercise their religion, and to equal protection of the laws. *Cf. supra* §§ II.A-E. To allow this "would in effect … penalize[] and inhibit[]" these freedoms by letting the government "produce a result" indirectly that it "could not command directly." *Perry*, 408 U.S. at 597. That is an unconstitutional condition.

G. Minn. Stat. § 363A.17(3) is vague and allows unbridled discretion.

Section § 363A.17(3) prohibits a business from refusing to do business with someone because of their protected characteristics unless their discrimination is for a "legitimate business purpose." Minn. Stat. Ann. § 363A.17(3). MHRA does not define "legitimate business purpose" or explain when refusals satisfy this exception. J.A.69-70 (¶¶34-37). Compliance is left to Minnesota's sole discretion. Accordingly, § 363A.17(3) violates the vagueness and unbridled discretion doctrines.

Vagueness. The Due Process Clause requires laws to give a person of ordinary intelligence an understanding of what the law prohibits and what it allows. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). It also requires the "legislature [to] establish minimal guidelines to govern law enforcement." *Id.* at 358. These principles apply even more forcefully when a statute implicates First Amendment rights. *Brown v. Entm't Merch. Ass'n*, 564 U.S. 789, 793 (2011) (recognizing "a heightened vagueness standard" in such circumstances).

Minnesota has nonetheless left its people in the dark. Ordinary people simply cannot know what qualifies as a legitimate business purpose for discrimination and what does not. *See Gray v. Kohl*, 568 F. Supp. 2d 1378, 1388 (S.D. Fla. 2008) (dooming 'legitimate business' language because the uncertainty "about what 'legitimate business' is covered by the statute and what is not" jeopardizes "First and Fourteenth Amendment rights"). Searching for light, the district court connected this language to the "legitimate business practice" definition from the *McDonnell Douglas* test. J.A.722-24. But the Supreme Court has never approved the *McDonnell-Douglas* standard "as a general precondition to protecting … speech." *United States v. Stevens*, 559 U.S. 460, 479 (2010). And the mere use of the term in a separate judicial standard does not remedy MHRA's vagueness. Snippets of judicial standards do not inform citizens about the law and they do not give Minnesota sufficient "criteria" to use "in determining whether" the overbroad speech regulation that allows for viewpoint discrimination applies. *Quarterman v. Byrd*, 453 F.2d 54, 59 (4th Cir. 1971).

Unbridled Discretion. A law violates the unbridled discretion doctrine if it (1) "delegate[s] overly broad … discretion to a government official" or (2) "allows arbitrary application," because "such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Section 363A.17(3) does both. Its undefined "legitimate business

purpose" exception gives enforcement officials unbridled discretion to punish speech critical of same-sex marriage while upholding speech that supports it. This kind of arbitrary enforcement power is facially unconstitutional.

To remedy this problem, the district court invoked the *McDonnell Douglas* framework described above; but that rationale does not remedy unbridled discretion for the same reasons it did not remedy vagueness. The district court also limited the unbridled discretion doctrine to laws governing public forums. J.A.721-24. But courts are not so stingy; they conceive "the prohibition against unbridled discretion [as] a component of the viewpoint-neutrality requirement." *Southworth v. Bd. of Regents of the Univ. of Wis. Sys.*, 307 F.3d 566, 579 (7th Cir. 2002). It follows that the unbridled discretion doctrine applies wherever the prohibition against viewpoint discrimination does—everywhere. Therefore, § 363A.17(3) must indeed comply with the unbridled discretion doctrine; it just fails to do so.

H. MHRA fails strict scrutiny as-applied.

Because applying MHRA to the Larsens violates their constitutional rights, this application must survive strict scrutiny, the "most demanding test known to constitutional law." *Flores*, 521 U.S. at 509 (1997). To clear this bar, Minnesota must prove that MHRA's application is narrowly tailored to serve a compelling interest.

Republican Party of Minn. v. White, 416 F.3d 738, 749 (8th Cir. 2015). It cannot do so.

As for compelling interest, Minnesota and the district court emphasize the need to stop "invidious discrimination." *See* J.A.288,713. But "broadly formulated interests justifying the general applicability of government mandates" do not suffice. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 420. (2006). Strict scrutiny requires the government to justify the application of the challenged law "to particular … claimants…" *Id*. Minnesota cannot do this because the Larsens do not discriminate. They serve all people; they just cannot convey all messages. *See supra* § II.A.3. The alleged discrimination interest is therefore not implicated here. *Cf. Texas v. Johnson*, 491 U.S. 397, 407-10 (1989) (dismissing interest asserted by state because it was "not implicated on the[] facts").

Rather, Minnesota must show a compelling interest in forcing the Larsens to convey objectionable messages despite their willingness to serve LGBT clients. But public accommodation laws do not serve a legitimate much less compelling interest when they compel speech. *See, e.g., Dale*, 530 U.S. at 659 (concluding that "state interests embodied in … [the] public accommodations law do not justify … intrusion on [First Amendment rights]"); *Hurley*, 515 U.S. at 578-79 (ruling that applying a public accommodation law to compel speech and to "produce a society free of the corresponding biases" is a "decidedly fatal objective"). Indeed, the

Supreme Court has *never* found a compelling interest to justify forcing an individual to speak a noncommercial message to which they objected.

Minnesota's application of MHRA also fails to serve a compelling interest because others will create films the Larsens cannot. Hundreds of wedding cinematographers in Minnesota and across the country can do so, many of whom specifically advertise their services for same-sex weddings. J.A.88-90,199-237 (¶¶175-86). For example, just one online directory lists around 40 Minnesota businesses willing to create films celebrating same-sex marriages. J.A.89 (¶177). When so many others will create these films, forcing the Larsens to do so makes little sense.

Unable to refute this access point, the district court dismisses it, claiming that every act of "discrimination" generates feelings of inferiority, stigma, and dignity loss that justify prohibition. J.A.714. But to support this point, the district court only cited cases involving discriminatory conduct, not speech. *Id*. In the speech context, alleviating such harms never justifies burdening speech. *See Boos v. Barry*, 485 U.S. 312, 322 (1988) (doubting that dignity interest could justify speech restriction since that interest is "inconsistent with our longstanding refusal to punish speech because the speech in question may have an adverse emotional impact on the audience" (quotation marks and alterations omitted)). Indeed, if dignity loss, stigma, and feelings of inferiority could justify compelling speech, *Hurley* would have come out

differently. *See Hurley*, 515 U.S. at 578-79 (protecting content-based choices, including ones that others consider "misguided, or even hurtful").

Minnesota's application of MHRA also fails the narrow tailoring demanded by strict scrutiny because Minnesota or the district court have left other activities unregulated that also implicate Minnesota's dignity interest. *See White*, 416 F.3d at 751 (narrow tailoring lacking where a law "leave[s] significant influences bearing on the [state's] interest unregulated"). For example, Minnesota or the district court allows

- non-profit religious corporations to decline "goods, services, facilities, or accommodations" to same-sex couples in the wedding context. Minn. Stat. § 363A.26(3).

- businesses to discriminate in the non-basic (and basic) terms of a contract because of someone's sexual orientation. *Supra* § I.

- some expressive businesses (e.g. commissioned writers) to decline gay client's requests to create speech promoting same-sex marriage. J.A.707-08 (n.21).

If Minnesota leaves all these activities unregulated despite their bearing on its interests, including recognizing the right of a creative professional to decline work for message-based reasons, it can allow the Larsens to do the same. Nothing justifies targeting the Larsens for inferior treatment.

Even worse, Minnesota forces the Larsens to speak a message that the MHRA does not require the state itself to speak. For MHRA announces that it does not "condone[]homosexuality," "permit the

promotion of homosexuality" in schools, or recognize "the right of marriage between persons of the same sex." Minn. Stat. § 363A.27. The state itself recognized that not promoting or condoning same-sex marriage does not violate MHRA. Yet the irony should not be lost: Minnesota exercises its freedom to disavow same-sex marriage while compelling the Larsens to promote same-sex marriage.

Finally, MHRA's application lacks tailoring because Minnesota could use less restrictive alternatives to achieve any legitimate goal. For example, Minnesota could track the federal public accommodation law and not apply MHRA to expressive businesses. 42 U.S.C. § 2000a(b) (defining public accommodations narrowly to apply to hotels, restaurants, theaters). Or Minnesota could interpret MHRA to not apply to inherently selective businesses, like an expressive business that accepts projects based on numerous artistic and moral factors. *See Vejo v. Portland Pub. Sch.*, 204 F. Supp. 3d 1149, 1168 (D. Or. 2016) (interpreting state cases to conclude that university program was too selective to constitute a public accommodation). *Cf. U.S. Jaycees v. McClure*, 305 N.W.2d 764, 771 (Minn. 1981) (evaluating group's selectivity to determine if public accommodation law covered it).

Minnesota could also interpret MHRA not to apply to expressive businesses when they make expressive classifications necessary to the normal operation of their business. Title VII already does this. *See* 42 U.S.C. § 2000e-2(e)(1) (permitting classifications that are "reasonably

necessary to the normal operation of that particular business or enterprise"); 29 C.F.R. § 1604.2 (interpreting Title VII bona fide occupational qualification to allow production studios to make sex classifications when "necessary for the purpose of authenticity or genuineness … e.g., [selecting] an actor or actress"). In other words, Minnesota could simply interpret MHRA to comply with the First Amendment: allow businesses to make message-based judgments yet still restrict status-based discrimination. *See World Peace*, 879 P.2d at 258 (adopting this interpretation for Utah's public accommodation law).

Nor would this interpretation "leave a gaping hole in anti-discrimination law," as the district court feared. J.A.716 (n.27). The district court *already* embraced this interpretation for commissioned writers in some circumstances. J.A.707-08 (n.21). As did *Hurley,* 515 U.S. at 574. Those decisions didn't create problems. Extending the interpretation to the Larsens will not either. Indeed, the district court acknowledged that the Larsens' situation arises "[o]nly in a narrow range of situations"—"one of just a handful of rare circumstances where public accommodations laws, as routinely applied, will impose burdens on First Amendment expression." J.A.707-08 (n.21). That hardly sounds like a gaping hole. Rather, Minnesota can easily adopt an alternative interpretation that simultaneously protects the Larsens' First Amendment rights and enables widespread enforcement of MHRA to

stop status discrimination. Minnesota is constitutionally required to follow this win-win path.

CONCLUSION

The Larsens have been waiting over a year for their expressive freedoms to be restored. Minnesota need not compel filmmakers to convey a message about marriage they disagree with to stop discrimination. MHRA and free speech can co-exist. Minnesota just needs to let them. To restore their freedoms, the Larsens ask this Court to reverse, reinstate their lawsuit, and instruct the lower court to enter a preliminary injunction protecting their constitutional freedoms.

Dated: January 18, 2018

Respectfully submitted,

s/ Jeremy D. Tedesco

RENEE K. CARLSON
CARLSON LAW, PLLC
855 Village Center Drive
Suite 259
St. Paul, MN 55127
(612) 455-8950
rcarlson@rkclawmn.com

KRISTEN K. WAGGONER
JEREMY D. TEDESCO
JONATHAN A. SCRUGGS
JACOB P. WARNER
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax
kwaggoner@ADFlegal.org
jtedesco@ADFlegal.org
jscruggs@ADFlegal.org
jwarner@ADFlegal.org

DAVID A. CORTMAN
RORY T. GRAY
1000 Hurricane Shoals Road, NE
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
(770) 339-6744 Fax
dcortman@ADFlegal.org
rgray@ADFlegal.org

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,985 words, excluding the parts of the brief 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 it has been prepared in a 14-point proportionally spaced Times New Roman typeface using Microsoft Word 2013.

Date: January 18, 2018

s/ Jeremy D. Tedesco
Jeremy D. Tedesco

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the forgoing APPELLANTS' OPENING BRIEF, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the most recent version of a commercial virus scanning program, Traps Version 4.1.2, and are free of viruses according to that program. In addition I certify all required privacy redactions have been made.

Date: January 18, 2018

s/ Jeremy D. Tedesco
Jeremy D. Tedesco

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2018, a true and accurate copy of the foregoing was electronically filed with the Court using the CM/ECF system, which will send notification of such filing to the following:

ALETHEA M. HUYSER
MINNESOTA ATTORNEY GENERAL'S OFFICE
445 Minnesota Street, Ste. 1100
St. Paul, MN 55101-2128
(651) 757-1243
(651) 282-5832 Fax
alethea.huyser@ag.state.mn.us

ERIC V. BROWN
MINNESOTA ATTORNEY GENERAL'S OFFICE
445 Minnesota Street, Ste. #1100
St. Paul, MN 55101-2128
(651) 757-1217
(651) 282-5832 Fax
eric.brown@ag.state.mn.us

JANINE WETZEL KIMBLE
MINNESOTA ATTORNEY GENERAL'S OFFICE
445 Minnesota Street, Ste. #1100
St. Paul, MN 55101-2128
(651) 757-1415
janine.kimble@ag.state.mn.us

Attorneys for Defendants/Appellees

Date: January 18, 2018

s/ Jeremy D. Tedesco
Attorney for Plaintiffs/Appellants

ADDENDUM

1) District Court's Memorandum Opinion and Order (9/20/17).

2) District Court's Judgment (9/21/17)