IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

TELESCOPE MEDIA GROUP, a Minnesota corporation, CARL LARSEN and ANGEL LARSEN, the founders and owners of TELESCOPE MEDIA GROUP, Plaintiffs, vs. 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.	**Case No. 0:16-cv-04094-JRT-LIB** **Chief Judge John R. Tunheim** **Magistrate Judge Leo I. Brisbois**

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

This case is at the motion to dismiss stage, thus the complaint's allegations must be taken as true and construed in the light most favorable to Plaintiffs Carl and Angel Larsen and Telescope Media Group (hereinafter, the "Larsens"). The court need only be satisfied at this stage that the Larsens have alleged plausible claims—a burden they have easily met in this as-applied challenge. Instead of pointing to factual holes in the complaint—none can be found—Defendants ask the court to make significant findings of law at this embryonic stage of the case. Most remarkable is Defendants' urging that film creation, and commissioned art generally, is not protected expression under the First Amendment—only "conduct." This mischaracterization—in contravention of law and allegations in the complaint—taints Defendants' entire argument in support of their motion to dismiss under both Rules 12(b)(1) and 12(b)(6).

ARGUMENT

I. The Larsens' desired expression—filmmaking—is protected as pure speech under the First Amendment.

Films have long been considered a powerful megaphone of expression and medium of public discourse. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (Films "are a significant medium for the communication of ideas" and "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression."); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("[A]udiovisual recoding[s] are media of expression commonly used for the preservation and

dissemination of information and ideas and thus are included within the free speech and free press guaranty of the First and Fourteenth Amendments.") (internal quotation marks and citation omitted); First Am. Ver. Compl. (hereinafter, "Am. Compl.") ¶¶123-24. That is why expression by means of film is protected speech under the First Amendment—even when the film is produced "for private profit." *Joseph Burstyn*, 343 U.S. at 501; *see id.* at 501-02 ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures."). Transmogrifying films from speech into conduct, Defendants grant themselves limitless discretion to regulate their content. The Constitution protects against this kind of censorship by another name. *Id.* at 502 (holding the government cannot exercise "substantially unbridled censorship" of films).

Defendants cannot rescue this power to censor expression by fracturing the film production process from its end result. The Supreme Court has never drawn a distinction between the *process* of creating a form of pure speech and the *product* of that process. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010); *cf. Citizens United v. FEC*, 558 U.S. 310, 336 (2010) ("Laws enacted to control or suppress speech may operate at different points in the speech process."). "Although writing and painting can be reduced to their constituent acts, and thus described as conduct, [federal courts] have not attempted to disconnect the end product from the act of creation." *Anderson*, 621 F.3d at 1061-62; *see Alvarez*, 679 F.3d at 595 ("The act of *making* an … audiovisual recording is necessarily included within the First Amendment's guarantee of speech and

press rights as a corollary of the right to disseminate the resulting recording."). Here, the court should refuse to accept Defendants' parsing of films from the process of creating them. Otherwise Defendants would have free reign to punish—even imprison—speakers who disagree with them under the guise of regulating "conduct."

Defendants' argument also cannot be justified by claiming that filmmaking is only "symbolic" speech. As with putting a pen to paper or a paintbrush to a canvas, *see Anderson*, 621 F.3d at 1062, the process of filmmaking is not intended to "symbolize" anything; rather, the entire purpose of filmmaking is to produce a film that promotes a particular message. Thus, the filmmaking process is "inextricably intertwined" with the purely expressive product (the film) that results and deserves "full First Amendment protection." *Id.* at 1062. For this reason, the test established in *Spence v. Washington*, 418 U.S. 405, 409 (1974), which is reserved for processes that do *not* produce pure speech, does not apply. *Anderson*, 621 F.3d at 1061; *Cressman v. Thompson*, 719 F.3d 1139, 1153 (10th Cir. 2013). While burning a flag, burning a draft card, or wearing a black armband "can be done for reasons having nothing to do with any expression," *Anderson*, 621 F.3d at 1061, filmmaking always creates a form of pure speech—films—that is protected by the First Amendment, *see Joseph Burstyn*, 343 U.S. at 501-02.

The fact that the Minnesota Human Rights Act ("MHRA") targets public accommodations does not affect whether burdened expression is protected by the First Amendment. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak."). If this were not so, the

First Amendment would not protect "painting by commission, such as Michelangelo's painting of the Sistine Chapel." *Anderson*, 621 F.3d at 1062. Characterizing Michelangelo's commissioned art as "conduct"—because he was paid for it, or worse because the government disagreed with the expression—is untenable. Further, just because a creative professional provides expression as a service does not make him a bondservant who is required to express the messages of every potential patron no matter how objectionable or offensive that message may be. Artists do not forfeit their freedom of speech because they must earn a living. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n. 5 (1988) ("[T]he degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away.").

"Keeping in mind that '[n]o law abridging freedom of speech is ever promoted as a law abridging freedom of speech,'" *Wollschlaeger v. Governor, State of Florida*, __ F.3d __, No. 12-14009, 2017 WL 632740 at *7 (11th Cir. Feb. 16, 2017) (citation omitted), Defendants' dismissive characterization of the Larsens' artistic expression as mere conduct should be rejected for the same reasons explained by the Second Circuit. *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996) ("The [government] apparently looks upon visual art as mere "merchandise" lacking in communicative concepts or ideas. [It] demonstrate[s] an unduly restricted view of the First Amendment and of visual art itself. Such myopic vision not only overlooks case law central to First Amendment jurisprudence but fundamentally misperceives the essence of visual communication and artistic expression."). After rejecting this erroneous premise, which permeates Defendants' arguments against standing and the sufficiency of the Larsens' claims, it naturally follows

that the Court should deny Defendants' motion to dismiss and find that the Larsens have standing and alleged plausible claims for relief.

II. The Larsens' complaint satisfies the requirements for subject matter jurisdiction under Article III when First Amendment rights are implicated.

Defendants did not submit affidavits or other materials outside of the pleadings to support their motion to dismiss under Rule 12(b)(1); therefore, Defendants' jurisdictional challenge is facial, not factual. *See Branson Label, Inc. v. City of Branson, Mo.*, 793 F.3d 910, 914 (8th Cir. 2015). As a result, the Court must accept as true all facts alleged in the complaint and draw all reasonable inferences in the Larsens' favor. *See id.* at 915.

A. The Larsens have standing to bring a pre-enforcement challenge to Defendants' enforcement of the MHRA.

Article III of the Constitution grants federal courts jurisdiction to hear "Cases" and "Controversies." U.S. Const., Art. III, § 2. The doctrine of standing springs from this Constitutional requirement. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff establishes Article III standing by showing "(1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List v. Driehaus*, (*SBA List*) 134 S. Ct. 2334, 2341 (2014).

Defendants perfunctorily argue that the Larsens allege no "concrete non-hypothetical injury," Defs.' Br. 5, and therefore have not alleged an injury in fact. Remarkably, Defendants rely *only* on cases where the plaintiffs' First Amendment rights were not implicated. *See, e.g.*, *Texas v. United States*, 523 U.S. 296, 297 (1998) (State of Texas seeking declaratory judgment that "preclearance provisions of § 5 of the Voting

Rights Act of 1965 … do not apply to implementation of certain sections of the Texas Education Code"); *Iowa League of Cities v. Envtl. Prot. Agency*, 711 F.3d 844, 854 (8th Cir. 2013) (Plaintiff seeking "direct appellate review of [whether] two letters sent by the Environmental Protection Agency … set forth new regulatory requirements" in violation of the Administrative Procedures Act).

This is no slight omission, for claims, like this pre-enforcement challenge, implicating a plaintiff's First Amendment rights are subject to a more relaxed standing inquiry. *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016) ("[W]hen there is a danger of chilling free speech, the concern that constitutional adjudication be avoided … may be outweighed by society's interest in having the statute challenged") (citation omitted); *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) ("[W]hen the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing."). This "leniency … manifests itself most commonly in the doctrine's first element: injury-in-fact." *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013). "Were it otherwise, 'free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser.'" *Bayless*, 320 F.3d at 1006 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)).

1. The Larsens suffer an injury in fact.

Because Defendants' enforcement of the MHRA implicates the Larsens' First Amendment rights, *see supra* Part I, they may present "two types of injuries [that] confer Article III standing" to bring this pre-enforcement challenge. *Klahr*, 830 F.3d at 794

(citation omitted). First, the Larsens can establish standing by alleging "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the MHRA], and there exists a credible threat of prosecution thereunder." *Id.* (quotation omitted). Second, the Larsens can establish standing by alleging a different "injury [] peculiar to the First Amendment context"—self-censorship. *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996); *see 281 Care Comm. v. Arneson*, (*281 Care*) 638 F.3d 621, 627 (8th Cir. 2011) ("Self-censorship can itself constitute an injury in fact."). "Either injury is justiciable," *Gardner*, 99 F.3d at 14, and the Larsens suffer both. Because the threat of enforcement "is a common denominator of both types of injury," the two injuries are interrelated and can be analyzed together. *Id.*

a. The Larsens allege they intend to engage in constitutionally-protected expression, and their expression is presently chilled.

The Larsens allege that they intend to engage in core expression protected by the First Amendment. Filmmaking is protected expression under the First Amendment. *See supra* Part I. Believing in the power of film to change hearts and minds, the Larsens intend to use their talents to create films celebrating God's design for marriage as a lifelong union of one man and one woman. Am. Compl. ¶4. They desire to do so by telling the real-life stories of marriages between one man and one woman. *Id.* at ¶5. The Larsens have even provided the Court an example of the kind of film they desire to create. *See* Am. Compl. Ex. A. At the same time, the Larsens will decline to create films that celebrate any conception of marriage that violates their religious beliefs, including, but not limited to, those between two persons of the same sex. *See* Am. Compl. ¶¶6, 146, 148. This right to

"speaker autonomy"—to "choose the content of [their] own message"—is guaranteed them by the First Amendment. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995).

The Larsens desire to immediately begin producing and promoting films celebrating God's unique design for marriage. Am. Compl. at ¶154. Specifically, the Larsens desire to announce their storytelling services for one-man-one-woman marriages on their website and at wedding expositions. *Id.* at ¶¶155-56. On their website and other promotional materials, the Larsens desire to express their purpose for creating wedding films and therefore disclose the religious beliefs that require them to tell stories celebrating one-man-one-woman marriages and decline to tell stories celebrating same-sex marriages. *See id.* at ¶¶157-58. Desiring to speak as soon as possible in order to impact the culture, the Larsens want to start filming one-man-one-woman marriage stories right away. *See id.* at ¶159. Because of Defendants' interpretation of the MHRA, however, the Larsens have unwillingly forgone making and promoting custom wedding films and thereby chilled their speech. *See id.* at 154-65.

In brief, the Larsens wish to engage in at least the following forms of expression protected by the First Amendment. First, the Larsens intend to communicate a unique religious message through their films, Am. Compl. ¶¶4-5, 93, and "religious speech, far from being a First Amendment orphan, is … fully protected under the Free Speech Clause." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). At the same time, the Larsens also desire to avoid promoting "an ideological … view [they] find[] unacceptable," a right secured by the First Amendment's bar against compelled

speech. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Second, the Larsens intend to collaborate with others who share their expressive purpose of creating wedding films that celebrate God's design for marriage. Am. Compl. ¶¶232-33. The First Amendment protects the Larsens' right "to join together [with others] and speak," *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006), "in pursuit of [both] religious[ ] and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

Thus, the Larsens have been forced to forgo their right to free expression, which the First Amendment guarantees them, because Defendants threaten them with fines, damages awards, and even jail time if they begin to speak. *See* Am. Compl. ¶¶154-66. The Larsens have neither entered the wedding filmmaking industry nor promoted wedding filmmaking services, whether on their website or at wedding expositions, as they desire to do. *Id.* at ¶¶154-60. And no one would in their position under Defendants' rules.

b. The MHRA at minimum "arguably proscribes" the Larsens' constitutionally-protected expression.

The Larsens need not persuade the Court that Defendants' application of the MHRA *actually* proscribes their constitutionally-protected expression—although it plainly does. Rather, the Larsens need only show that Defendants' application of the MHRA *arguably* proscribes their constitutionally-protected expression. *See SBA List*, 134 S. Ct. at 2344 (Petitioners in a pre-enforcement challenge need only show that their intended speech is "arguably proscribed" by the law). And because Defendants' leave no doubt as to how they interpret the law, the MHRA at least "*arguably* proscribes" the Larsens' custom wedding films and appurtenant website and promotional offerings.

The MHRA makes it illegal "to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex." Minn. Stat. § 363A.11(1); *see also* § 363A.17(3) (Prohibiting a business from discriminating "in the basic terms, conditions, or performance of the contract because of a person's race, national origin, color, sex, sexual orientation, or disability"); Am. Compl. ¶¶32, 34. Defendants admit, and the Larsens plead, that the MHRA would apply to the Larsens if they "hold their videography service out to the public[.]" Defs.' Mem. of Law in Supp. of Mot. to Dismiss ("Defs.' Br.") 10 n. 3; *see also* Am. Compl. ¶¶81-82; Defs.' Mem. in Opp. to Pls.' Mot. for Prelim. Inj. 10 n.2 ("To the extent [the Larsens] would hold their videography services out to the public, the Minnesota Department of Human Rights [("MDHR")] agrees the MHRA would apply.").

The MHRA should not affect the Larsens' filmmaking because they decide what films to produce based on their message, not any prospective client's sexual orientation. Thus, they do not discriminate based on a person's sexual orientation. Am. Compl. ¶¶92-97. But Defendants interpret the MHRA's prohibition on sexual orientation discrimination to prohibit creative professionals from declining to create speech celebrating same-sex marriage based on a political, moral, social, or religious objection. *Id.* at ¶¶60-71; *see* Defs.' Mem. in Opp. to Pls.' Mot. for Prelim. Inj. 1 ("Plaintiffs allege First Amendment rights to discriminate against these customers…."). For example, Defendants state, "[T]here is no First Amendment right for a business to discriminate against customers

based on their protected status…." Defs.' Mem. in Opp. to Pls.' Mot. for Prelim. Inj. 2 (incorporated into Defendants' motion to dismiss, *see* Defs' Br. 2). Doubling-down, they assert elsewhere, "Plaintiffs do not … have a First Amendment right to discriminate against customers." *Id.* at 17. And, finally, they claim the Larsens "discriminate against same-sex couples." Defs.' Br. 17.

Defendants unquestionably judge creative professionals who decline to promote a specific message—*i.e.*, celebrating same-sex marriage—as law breakers because they do not distinguish between that message and a person's sexual orientation. *Id.* This interpretation is the tail that wags the dog to the exclusion of the Constitution and even common sense. *See Hurley*, 515 U.S. at 572-73 (Application of anti-discrimination law to petitioner engaged in expression who disclaimed intent to exclude members of protected class was unconstitutional because it "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.").

It forces the Larsens to choose between three unacceptable options: (1) decline to create custom expression celebrating same-sex weddings because of their sincerely-held religious beliefs, and suffer investigation, prosecution, and criminal penalties—even imprisonment—as a result; (2) violate their sincerely-held religious beliefs by creating custom expression celebrating same-sex wedding ceremonies they would not otherwise create in order to comply with the law; or (3) withdraw from the marketplace their service of creating wedding films and violate their religious beliefs by failing to advocate for God's plan and purpose for marriage. Am. Compl. ¶¶72-74, 254. No reasonable person

in the Larsens' position would enter the filmmaking industry under these circumstances. Self-censorship and filing this pre-enforcement challenge is the Larsens' only sensible choice. In sum, there is no question that the MHRA, as Defendants interpret and apply it, proscribes the Larsens' constitutionally-protected expression. The Larsens have standing as a result.

c. The Larsens face a credible threat of enforcement if they engage in their desired constitutionally-protected expression.

The Larsens need not expose themselves to fines, damages awards, and even jail time before filing a pre-enforcement challenge. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) ("[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced."); *see also Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (Federal court's refusal to hear a pre-enforcement challenge "may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity[.]"). It does not matter whether the threat (1) derives from administrative or civil complaints, *SBA List*, 134 S. Ct. at 2345-46 ("We take the threatened Commission proceedings into account because administrative action, like arrest or prosecution, may give rise to harm sufficient to justify pre-enforcement review."); *Bayless*, 320 F.3d at 1007 ("[Plaintiff] faced a reasonable risk that it would be subject to civil penalties for violation of the statute."), or (2) involves the possibility of criminal prosecution, *Doe v. Bolton*, 410 U.S. 179, 188 (1973); *see also Ark. Right to Life*

State Political Action Comm. v. Butler, 146 F.3d 558, 560 (8th Cir. 1998) (Plaintiffs are "not required to expose themselves to arrest or prosecution … in order to challenge a statute in federal court."). So long as the threat of enforcement "is not imaginary or wholly speculative[,]" the Larsens have standing. *Saint Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485 (8th Cir. 2006) (quoting *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 302 (1979)).

First, the Larsens plainly face a credible enforcement threat because Defendants admit the MHRA applies to the Larsens, *see supra* Section II.A.1.b, and have not disavowed enforcement of the statute against them. *SBA List*, 134 S. Ct. at 2345 (failure to disavow enforcement supported finding of credible enforcement threat); *Babbitt*, 442 U.S. at 302 (same). Quite to the contrary, Defendants repeatedly assert the Larsens' desired speech violates the MHRA. *See supra* Section II.A.1.b.

Manifesting the credible threat, the MDHR actively prosecutes businesses, targeting those who provide wedding services but decline to celebrate same-sex weddings. Am. Compl. ¶¶66-68; *cf. SBA List*, 134 S. Ct. at 2345 (relying in part on "history of past enforcement" to find credible enforcement threat). Making its position clear in one press release, the MDHR unequivocally stated, "the [MHRA] does not exempt individuals [or] businesses … based on religious beliefs regarding same-sex marriage." Am. Compl. ¶62. And in one recent enforcement activity, the MDHR even deployed a tester who pretended to be seeking a venue for a same-sex wedding—hardly the behavior of a reluctant enforcement agency charged with enforcing a dormant statute. Am. Compl. ¶¶ 43-47, 70-71.

The Larsens also face a credible enforcement threat from the Attorney General. *See infra* Part III. Although Defendants claim that, "Plaintiffs allege only that the Attorney General acts as the attorney for the [MDHR][,]" Defs' Br. 7, a more accurate reading of the complaint shows that the Larsens allege the Attorney General has independent enforcement power to both investigate and criminally prosecute violations of the MHRA. Am. Compl. ¶¶12-14, 16, 48, 57-59. Because those deemed to violate the MHRA "shall be guilty of a misdemeanor," Minn. Stat. § 363A.30(4); Am. Compl. ¶58, anyone convicted under the MHRA is subject to criminal penalties, including a fine up to $1,000, up to 90 days in jail, or both. Minn. Stat. § 609.02(3); Am. Compl. ¶59.

Absent a wholesale disavowal of intent to prosecute the MHRA, the Larsens have every reason to believe the Attorney General will enforce a valid state law. *SBA List*, 134 S. Ct. at 2345; *Gaertner*, 439 F.3d at 485-86 (Even if enforcement officials have never enforced a law in the past and have never "made any public statements threatening to do so, [they] have not disavowed an intent to enforce the statutes in the future[,]" and plaintiffs "are thus not without some reason in fearing prosecution[.]"). In determining whether there is a credible threat of enforcement, courts "presume[s] that the government will enforce the law." *Hedges v. Obama*, 724 F.3d 170, 200 (2d Cir. 2013). If there were truly no credible threat of enforcement, the Defendants would have pled that the MHRA did not apply to the Larsens' desired expression. Instead, they have admitted that the MHRA fully applies to the Larsens and that their desired expression would violate the statute. *See supra* Section II.A.1.b; *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1217 (8th Cir. 1998) (finding standing because the city "vigorously defended the ordinance and []

never suggested that it would refrain from enforcement."). Because the Attorney General has chosen to "defend[] the challenged law … in court, an intent to enforce the rule may be inferred." *Harrell v. The Florida Bar*, 608 F.3d 1241, 1257 (11th Cir. 2010).

Second, the credibility of the enforcement threat, and thus the reasonableness of the Larsens' self-censorship, "is bolstered by the fact that authority to file a complaint with the Commission is not limited to a prosecutor or an agency." *SBA List*, 134 S. Ct. at 2345. Any person aggrieved by the Larsens' exercise of speaker autonomy may file a complaint with the MDHR. Minn. Stat. § 363A.28(1). "Because the universe of potential complainants is not restricted to state officials who are constrained by … ethical obligations," the risk of complaints from those who vigorously oppose the Larsens' message is significantly heightened. *SBA List*, 134 S. Ct. at 2345. Thus, the MHRA is converted from a shield to protect a vulnerable minority to a weapon wielded at the whim of a majority to silence those who disagree with their view of marriage. Far from fanciful, the combination of "burdensome Commission proceedings" and an "additional threat of criminal prosecution" is more than sufficient to create an Article III injury in this case. *Id.* at 2346. The threat of enforcement is far more than "credible"—here, it is certain.

2. The Larsens' injuries are traceable to Defendants and redressable by the Court.

Not only are the Larsens suffering two types of injuries, those harms are directly attributable to Defendants. "Article III requires a 'causal connection' between the injury and the defendant's conduct[.]" *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957 (8th Cir. 2015). Because this is a pre-enforcement challenge, the Larsens

need only show Defendants "possess authority to enforce the complained-of provision." *Id.* at 957-58. The Larsens' injuries are traceable to Defendants because they both have "authority to enforce the [MHRA]." *Balogh v. Lombardi*, 816 F.3d 536, 543. (8th Cir. 2016); Minn. Stat. §§ 8.01 *et seq.*, 363A.06, -.28, -.29, -.32; *see* Am. Compl. ¶¶10-14, 16, 26-27, 42-43, 48-59.

When government action, like Defendants' application and enforcement of the MHRA here, is "challenged by a party who is a target or object of that action … there is ordinarily little question that the action … has caused [them] injury, and that a judgment preventing … the action will redress it." *Minn. Citizens Concerned for Life v. FEC*, 113 F.3d 129, 131 (8th Cir. 1997) (internal quotation and citation omitted). The redressability requirement is satisfied if "a favorable decision will relieve" a party's injury. *281 Care,* 638 F.3d at 631. Because the Larsens suffer discreet constitutional injuries as a result of Defendants' unlawful application and enforcement of the MHRA against creative professionals, granting the requested declaratory and injunctive relief against Defendants would redress those injuries. *See id.* Importantly, Defendants do not challenge these aspects of standing in their motion to dismiss.

B. The Larsens' pre-enforcement challenge is ripe.

Article III standing and ripeness "boil down to the same question." *SBA List*, 134 S. Ct. at 2347 n.5. Because the Larsens have shown constitutional standing, *supra*, prudential ripeness concerns dissolve. *See id.* at 2347 ("[W]e have already concluded that petitioners have alleged a sufficient Article III injury. To the extent respondents would have us deem petitioners' claims nonjusticiable on grounds that are prudential, rather than

constitutional, that request is in some tension with … the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging.") (internal quotations and citation omitted). Finding the Larsens have satisfied constitutional standing, the Court can stop: this pre-enforcement challenge is ripe for adjudication.

In addition, the old fitness and hardship factors are easily satisfied here. Fitness of the issues depends primarily on "whether a case would benefit from further factual development, and therefore cases presenting purely legal questions are more likely to be fit for judicial review." *Iowa League of Cities*, 711 F.3d at 867. The hardship factor "looks to the harm the parties would suffer" if adjudication is delayed. *Id.* Both factors need only be satisfied to "a minimal degree," *Nebraska Public Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1039 (8th Cir. 2000).

1. The Larsens claims are fit for review.

This case is fit for review because it presents "purely legal" questions that "will not be clarified by further factual development." *SBA List*, 134 S. Ct. at 2347; *see 281 Care*, 638 F.3d at 631 (Where "the issue presented requires no further factual development, is largely a legal question, and chills allegedly protected First Amendment expression[,] … plaintiffs' claim is ripe for review"). In fact, Defendants' concentration on the merits in their motion to dismiss belies their cursory suggestion that the Larsens' claims are not fit for review. Defendants try to dodge the challenge to their censorship power by supposing the Larsens' fears are too "speculative." Defs.' Br. 6. This argument ignores the Larsens' present injury—self-censorship of protected speech—and mischaracterizes as

"assumptions" four inevitabilities Defendants view as underlying the Larsens' claims.[1] *See infra* p. 19.

First, Defendants entirely miss one of the injuries the Larsens claim. When a plaintiff has "chilled" constitutionally-protected expression, his injury "is not based on speculation" but "has already occurred and will continue to occur[.]" *281 Care*, 638 F.3d at 631; *see also Minn. Citizens Concerned for Life*, 113 F.3d at 132 ("Fitness for judicial decision means, most often, that the issue is legal rather than factual. Sufficient hardship is usually found if the regulation … chills protected First Amendment activity."); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1098 (10th Cir. 2006) (plaintiffs' claim was ripe where the allegation was that a requirement "by its very existence, chills the exercise of the Plaintiffs' First Amendment rights"). And the reasonableness of the Larsens' self-censorship in light of Defendants' interpretation of the MHRA and the statute's draconian penalties cannot be questioned. *See NAACP v. Button*, 371 U.S. 415, 433 (1963) (First Amendment freedoms "are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."). Because the Larsens have reasonably chilled their expression, *see supra* Section II.A.1, this pre-enforcement challenge is ripe.

[1] *See* Defs.' Br. 6 (Defendants suppose the Larsens' claims are based on the following "assumptions:" "(a) Plaintiffs begin to offer wedding [filmmaking] services … (b) a same-sex couple seeks to hire Plaintiffs for [wedding filmmaking] services; (c) Plaintiffs have capacity but refuse to provide [wedding filmmaking] services to the couple because of the couple's sexual orientation [according to Defendants' interpretation]; and (d) the MHRA is enforced against Plaintiffs.").

Second, although unnecessary to explore in light of the Larsens' ongoing injury of self-censorship, Defendants' supposed "assumptions" either (1) have already occurred, (2) are entirely within the control of the Larsens, or (3) are enforcement activities that Defendants repeatedly claim they will perform. Taking each in turn, the Larsens have *already* received a request to produce a film celebrating same-sex marriage even though they have not yet entered the industry, *see* Am. Compl. ¶¶169-171, leaving little room to wonder whether they would receive one *after* they enter the industry.

Next, whether the Larsens "begin to offer [wedding filmmaking] services" and "refuse to provide" those services to a person based on an objectionable message—which Defendants interpret as discrimination based on the person's sexual orientation—is entirely within the Larsens' control. Defs.' Br. 6. All doubt on that point has been dispelled: the Larsens desire to enter the wedding filmmaking industry immediately and will decline requests to create films celebrating same-sex marriage. Am. Compl. ¶¶154, 168.

Finally, Defendants leave no ambiguity as to how they interpret and continue to enforce the MHRA. They make no distinction between an objection based on a message and an objection based on a person's sexual orientation—placing expressive professionals like the Larsens who wish to create films expressing a unique message about one-man-one-woman marriage squarely within the crosshairs of their enforcement activity. Because no "further factual development" is required, the Larsens submit "purely legal questions" for the court's consideration; accordingly, this pre-enforcement challenge is fit for review.

2. The Larsens suffer continuing substantial hardship because Defendants' application of the MHRA chills their desired constitutionally-protected expression.

"The touchstone of ripeness is the harm asserted[,]" and self-censorship of constitutionally-protected expression is actual harm, which suffices to dispense any ripeness concerns. *See Klahr*, 830 F.3d at 797 (citing *Bayless*, 320 F.3d at 1007 n. 6). The Larsens desire to only create films that celebrate and promote God's design for marriage as a lifelong union of one man and one woman. Am. Compl. ¶4. Defendants' application of the MHRA forbids this expression and forces the Larsens to choose between refraining from constitutionally-protected expression on the one hand, or engaging in that expression and risking costly administrative proceedings and even criminal prosecution on the other. *See SBA List,* 134 S. Ct. at 2347. In this case, "denying prompt judicial review would impose a substantial hardship" on the Larsens, *see id*., and perpetuate Defendants' power to censor expression they disfavor. This pre-enforcement challenge is therefore ripe.

III. The Attorney General is a proper party under the Eleventh Amendment.

The Attorney General is a proper party to this pre-enforcement challenge because she has at least "some connection with the enforcement of the act." *281 Care*, 638 F.3d at 632; *see Ex Parte Young*, 209 U.S. 123, 157 (1908) (The Eleventh Amendment does not bar suit against a state official to enjoin enforcement of an allegedly unconstitutional statute, provided that "such officer [has] some connection with the enforcement of the act."). As stated *supra*, Defendants are mistaken when they assert that "Plaintiffs allege only that the Attorney General acts as the attorney for the [MDHR]." The Larsens, in fact, allege the Attorney General has enforcement power to both investigate and criminally

prosecute violations of the MHRA in addition to acting as the attorney for the MDHR, *see* Am. Compl. ¶¶12-14, 16, 48, 57-59, rendering the Attorney General a proper party to this suit under *Ex Parte Young*.

Defendants do not dispute that the relief the Larsens seek is prospective; therefore the Attorney General's "three-fold connection" to enforcement of the MHRA is sufficient to bring this suit under the *Ex Parte Young* exception to Eleventh Amendment immunity. *See 281 Care*, 638 F.3d at 632. First, the Attorney General may, upon request of the county attorney assigned to a case, become involved in a criminal prosecution of Minn. Stat. § 363A.11. Minn. Stat. § 8.01; *see* Minn. Stat. § 363A.30(4) (A person who violates § 363A.11 "shall be guilty of a misdemeanor."); *281 Care*, 638 F.3d at 632. The likelihood of the Attorney General prosecuting the criminal portion of the MHRA, as opposed to a local county prosecutor who would have to duplicate work already performed by the Attorney General, is significant considering the Attorney General acts as the attorney for the MDHR in any related civil proceedings. *See* Minn. Stat. § 363A.32(1); Am. Compl. ¶29.

Second, as counsel for the MDHR, the Attorney General may intervene in a private civil action brought under the MHRA that is considered to be a case of "general public importance." Minn. Stat. § 363A.33(5). Because Defendants allege a compelling interest in enforcing the MHRA, *see* Defs' Brief, 14-15,—although there is none as applied to the Larsens—it is a small step to think they would consider most, if not all, alleged violations of the MHRA "of general public importance."

Third, the Attorney General appears to have the power to file a civil complaint in state district court under Minn. Stat. § 363A.33(1), "as Minnesota law gives the attorney general broad discretion to commence civil actions," *see* Minn. Stat. § 8.01, and section 363A.33(1) allows any person to "bring a civil action seeking redress for an unfair discriminatory practice." Minn. Stat. §363A.33(1); *see 281 Care*, 638 F.3d at 632.

Because only "some connection" between the Attorney General and the challenged statute is required, the Attorney General need not have either "primary authority to enforce" the law or "the full power to redress a plaintiff's injury[.]" *Id.* at 632-33 (citations omitted). The Attorney General's three-fold connection to the enforcement of the MHRA "is strong enough to bring this [pre-enforcement challenge] under the *Ex Parte Young* exception to Eleventh Amendment immunity." As a result, the Attorney General is a proper party to this suit. *See id.* at 632.

IV. The Larsens state plausible claims for relief under 42 U.S.C. § 1983.

On a motion to dismiss, the court must "take the [Larsens'] factual allegations as true," *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009), and "construe[] all reasonable inferences most favorably to [them]," *U.S. ex rel. Raynor v. Nat'l Rural Utils. Co-op. Fin., Corp.*, 690 F.3d 951, 955 (8th Cir. 2012). That is, the court must construe the complaint broadly, reading it "as a whole, not pars[ing it] piece by piece," *Braden,* 588 F.3d at 594, to determine only whether it includes enough factual allegations "to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Although a plaintiff must show success on the merits is more than a "sheer possibility," a show of probable success is not required at this early stage. *Braden*, 588 F.3d at 594. The Larsens' claims need only be plausible—containing enough factual content to allow the court to draw a reasonable inference that Defendants are liable for the alleged harm, *see Ashcroft*, 556 U.S. at 678, and the Larsens' detailed complaint easily satisfies this liberal pleading standard.

The Larsens file this pre-enforcement challenge under 42 U.S.C. § 1983, which means that to state a claim, they need only allege a "violation of a right secured by the Constitution" and that the violation "was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). Taking each claim in turn, *infra*, the Larsens allege facts "plausibly" showing Defendants, acting at all relevant times in their official capacity under color of state law, deprive them of their rights secured by the First and Fourteenth Amendments. Consequently, the Larsens have stated sufficient claims for relief under 42 U.S.C. § 1983.

A. The Larsens assert a plausible claim under the Free Speech Clause.

1. The Larsens allege their filmmaking and films are protected speech.

The First Amendment prohibits Congress and, via the Fourteenth Amendment, the States, from abridging freedom of speech. U.S. Const., amend I; *Gitlow v. New York*, 268 U.S. 652, 666 (1925). To state a free speech claim then, a plaintiff must first allege he or she is engaging or desires to engage in a form of protected speech. The Larsens' wedding films are protected speech under the First Amendment because they contain "stories,

imagery, … and messages, even an ideology" about marriage. *Interactive Digital Software Ass'n v. St. Louis Cnty.*, 329 F.3d 954, 957 (8th Cir. 2003) (internal quotation marks omitted); Am. Compl. ¶¶129-34; *see supra* Part I. Speech on "public issues" like marriage has "always rested on the highest rung on the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982).

Recognizing films' unique power to influence people—once proffered as a reason to ban them, *see Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 245 (1915), and now a chief reason to protect them, *see Joseph Burstyn*, 343 U.S. at 502,—the Larsens intend through this powerful medium to celebrate and promote the unique beauty of one-man-one-woman marriage. Am. Compl. ¶¶5, 75, 84-85, 113-25. Speaking this religious message through their films, the Larsens hope to change hearts and minds on the subject of marriage by showing people that marriage reflects a greater spiritual reality outside of the couple themselves and that it is not primarily a means for self-fulfillment or even an arrangement of convenience, which are now popular understandings of that sacred institution. *See id.*

Because the sophistication of a film is not a litmus test for whether it qualifies as protected speech, *see, e.g.*, *United States v. Stevens*, 559 U.S. 460, 468 (2010) (finding lowly animal crush videos protected speech), it does not matter whether the Larsens' work is comparable to that of DeMille or Spielberg; rather all that matters is that their custom films express some message. *Mastrovincenzo v. City of New York*, 435 F.3d 78, 97 & n.14 (2d Cir. 2006) (refusing to take into account a speaker's "bona fides as an artist"). And contrary to the legal assertion on which Defendants mount their attack—that the Larsens'

filmmaking "is not protected by the First Amendment"—controlling precedent shows, and the complaint alleges, that the Larsens through their filmmaking create a form of pure speech protected by the Free Speech Clause. *See Interactive Digital Software Ass'n*, 329 F.3d at 957; *Joseph Burstyn*, 343 U.S. at 501-02; Am. Compl. ¶¶1, 80, 87-112, 129-34, 195.

What is more, like the films they create, the Larsens' cinematography and editing process is protected speech. *See Bery*, 97 F.3d at 695; *Alvarez*, 679 F.3d at 595; *supra* Part I; *cf. Sorrell v. IMS Health Inc*, 564 U.S. 552, 570 (2011) ("This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment"). Federal appellate courts consistently affirm that the process of artistic creation "is inextricably intertwined with the purely expressive product" that results. *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015) (quoting *Anderson*, 621 F.3d at 1062). Each decision the Larsens make in producing wedding films—from what camera to use, what angle to shoot, what subject(s) to include, the extensive video editing process, what text, voiceovers, or animations to create, and what lighting, filters, or soundtrack to employ—profoundly alters the final story and thus cannot be disaggregated from the purely expressive custom film the Larsens create. Am. Compl. ¶¶87, 100-07.

Defendants' baseless contention that an artist's expression becomes something other than his or her own when it is created for compensation, or in collaboration with others, *see* Defs.' Br. 9-10, is likewise wrong. First, it contravenes allegations in the complaint, which the court must accept as true. The Larsens' extensive participation in imagining, creating, editing, publishing, promoting, and distributing their films, *see* Am.

Compl. ¶¶87, 100-07, amply demonstrates that the films they create are "their own speech," as they allege. *See* Am. Compl. ¶196. And federal courts agree. That the Larsens—like many famous film producers—are paid for their work does not sunder the created message from its creator. *See Riley*, 487 U.S. at 801 ("It is well settled that a speaker's rights are not lost merely because compensation is received."); *see also Sorrell*, 564 U.S. at 567 (explaining that "a great deal of vital expression" results from an "economic motive"); *Buehrle*, 813 F.3d at 977 (explaining, in a commercial tattoo artist case, that "the Supreme Court has never drawn a distinction between the process of creating a form of pure speech … and the product of these processes") (quotation omitted). At bottom, the Larsens "plausibly" allege their creative storytelling process and final product are safeguarded expressions under the Free Speech Clause. *See* Am. Compl. ¶¶ 195-96.

2. The Larsens allege Defendants' application of the MHRA unlawfully forces them to create speech they oppose.

The government does not have the plenary power of a puppeteer and thus cannot force private citizens to speak messages they oppose. *See Hurley*, 515 U.S. at 575 ("[T]he choice of a speaker not to propound a particular point of view … is presumed to lie beyond the government's power to control."); *Wooley*, 430 U.S. at 714 (Freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) (State officials have no power "to compel [a person] to utter what is not in his [or her] mind."). Having alleged that they engage in a form of pure speech protected under the

Free Speech Clause, *see supra*, the Larsens assert that Defendants force them to create speech with a message they oppose. *See* Am. Compl. ¶¶8-14, 60-69, 154-66.

The Larsens want to create films that will be played at weddings, published on their website, and shared via social media to tell a story of love, commitment, and vision for the future that encourages viewers to see biblical marriage as the sacred covenant God designed it to be. *Id.* at ¶¶131-38. But if they do so, Defendants require that they also tell stories promoting other types of marriage, including same-sex marriage, in the same way and through the same channels. *See id.* at ¶¶8-14, 60-69, 154-66, 202-03. Promoting marriages other than one-man-one-woman marriage would violate the Larsens' religious beliefs, undermine their desired message, and further "an ideological point of view [they] find[] unacceptable." *Wooley*, 430 U.S. at 715; Am. Compl. ¶¶6, 199, 203. These allegations suffice to state a plausible claim that Defendants have violated the compelled-speech doctrine. *See Hurley*, 515 U.S. at 573 (State's application of anti-discrimination statute "violate[d] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message").

In the meantime, Defendants argue that this case, like *Rumsfeld*, is about equal access—not compelled speech. Finding no distinction between an empty room and an artist's mind, Defendants' reliance on *Rumsfeld* is misplaced. In that case, the law required schools to provide an empty room for student "interviews and recruiting receptions [with military recruiters]" on equal terms with other employers. *Rumsfeld*, 547 U.S. at 64. Because "the schools [were] not speaking," no pure speech was directly at issue. *Id.* The schools merely had to allow "expressive activities by others on [their] property." *Id.* at 65.

Compelling access to a room for an independent speaker to express a message, as a condition for receiving government funds, is far different—in scope of intrusion and potential for constitutional offense—from compelling access to the mind of an artist to marshal his creative talents to promote a message the artist finds objectionable. Defendants' interpretation of the MHRA is a bridge too far. The First Amendment "reserve[s] from all official control" the power of a state to "invade[] the sphere of intellect and spirit" in this way. *Wooley*, 430 U.S. at 715.

3. The Larsens allege Defendants' application of the MHRA burdens their speech based on its content and viewpoint.

The government cannot "restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (citation omitted). Laws that "target speech based on its communicative content are presumptively unconstitutional" and must satisfy strict scrutiny. *Reed*, 135 S. Ct. at 2226. The Larsens allege ample facts to state a plausible claim for content- and viewpoint-based speech discrimination. *See* Am.Ver. Compl. ¶¶8, 12-14, 32, 60-71, 205-27.

In short, the Larsens allege that the MHRA only bars discrimination against some citizens, focusing on a narrow set of protected characteristics that includes "race, national origin, color, sex, sexual orientation, … disability," and a woman's choice of "surname." Minn. Stat. § 363A.17; Am. Compl. ¶206. Only speech containing ideas linked to these characteristics may implicate the statute. Here is how it works. Defendants force the Larsens to create films celebrating the idea that marriage includes same-sex couples because sexual orientation is a protected status. Am. Compl. ¶¶32, 60-69. But Defendants

do not require the Larsens to create films promoting the election of any Minnesota politician they dislike because political affiliation is not protected by the MHRA. *Cf. id.* at ¶207. Thus, whether the MHRA applies depends on the content of the Larsens' films.

Defendants' application of the MHRA to speech is also viewpoint based because they allow filmmakers who favorably view same-sex marriage to create freely, but target those, like the Larsens, who have a different view on marriage for penalties. *See* Am. Compl. ¶¶8, 12-14, 60-69, 205-13. If the Larsens supported same-sex marriages, they could decline to create films critical of that view without violating the MHRA. *Id.* at ¶¶211-12. But they do not hold that view, and Defendants have made clear that the Larsens cannot decline to create films that celebrate same-sex marriage without violating the MHRA. *Id.* at ¶¶60-69. This is paradigmatic viewpoint-based discrimination, which "is presumed to be unconstitutional." *Wishnatsky v. Rovner*, 433 F.3d 608, 611 (8th Cir. 2006).

Because Defendants do not directly address these claims in their motion to dismiss—opting instead to incorporate nearly their entire brief in opposition to the Larsens' motion for preliminary injunction, *see* Defs.' Br. 8—the Larsens incorporate and refer the court to their briefing in that pending matter as it relates to any of Defendants' incorporated arguments the court chooses to consider.

B. The Larsens assert a plausible expressive association claim.

The First Amendment protects the right to "associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622. "Forcing a group to accept certain members [that] impair the

ability of the group to express [their] views, and only those views, … infringes the group's freedom of expressive association." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). Only where a government shows that a law is narrowly tailored to serve a compelling interest, unrelated to the suppression of ideas, may it abridge this freedom. *Id.*

The Larsens allege they desire to collaborate with others who share their expressive purpose of producing wedding films that celebrate a historic, biblically-orthodox definition of marriage. Am. Compl. ¶232-33. Moreover, the Larsens' purpose for entering the wedding industry is to create films that tell "a message about marriage that brings hope and clarity to society about God's design and purpose for marriage." *Id.* at ¶130. Collaborating as artist and patron, the Larsens "engage in some form of expression," and thus enjoy free association protection under the First Amendment. *Dale*, 530 U.S. at 648.

Defendants' argue that the Larsens cannot claim abridgment of expressive association because Telescope Media Group ("TMG") is "not organized for a specific expressive purpose." Defs.' Mem. in Opp. to Pls.' Mot. for. Prelim. Inj. 17 (incorporated into motion to dismiss, *see* Defs.' Br. 11). That is not the law. "[A]ssociations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment." *Dale*, 530 U.S. at 655. For example, the law schools in *Rumsfeld*, 547 U.S. at 68-69, were not specifically organized to oppose the Don't Ask, Don't Tell policy. All the Supreme Court required to raise this claim is that "individuals[] … join together and speak." *Id.* at 68. Besides, the Larsens allege that their aim at TMG is to "to make God look more like He really is through [their] lives, business, and actions." Am. Compl. ¶85. Thus, TMG is, in fact, organized for an expressive purpose.

The Larsens need only "engage in some form of expression … that could be impaired in order to be entitled to protection." *Dale*, 530 U.S. at 648, 655. Here, the Larsens allege they collaborate with couples who wish to promote the unique beauty of biblical marriage, and thus speak a message. Am. Compl. ¶¶126-31, 196, 232. Because this message "could be impaired" by forcing the Larsens to partner with those wishing to speak an opposing message about marriage, *Dale*, 530 U.S. at 655; *cf. Hurley*, 515 U.S. at 573 (The group's own message was affected by the speech it was forced to accommodate, thus the anti-discrimination law "violate[d] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."), the Larsens' expressive purpose in associating with others to create wedding films would effectively be thwarted. In contrast, military recruiters in *Rumsfeld* did not join with law schools to say *anything*, thus the schools' expressive association claim failed. *Rumsfeld*, 547 U.S. at 69.

Accordingly, because Defendants cite cases that involved associations whose expression was completely unaffected by nondiscrimination laws' requirements, their argument cannot bear scrutiny. *See, e.g.*, *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987) (explaining that the association's "ability to carry out [its] [expressive] purposes" was not affected); *Roberts*, 468 U.S. at 627 (confirming that the association could "exclude individuals with ideologies or philosophies different from" its own); *Hishon v. King & Spaulding*, 467 U.S. 69, 78 (1984) (noting firm could not show any way in which its speech "would be inhibited"). In contrast, the Larsens allege Defendants prohibit them from declining to collaborate with those expressing different

views of marriage, which profoundly impacts their own speech. *See* Am. Compl. ¶¶7-9, 60-69, 126-27, 233-37. Thus, the Larsens allege a plausible expressive association claim.

C. The Larsens assert a plausible claim under the Free Exercise Clause.

The Free Exercise Clause of the First Amendment, applied to States via the Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), precludes laws that prohibit the free exercise of religion, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). The Larsens, who are Christians, allege they sincerely believe that marriage is the union of one man and one woman. Am. Compl. ¶¶119, 246, 249. To practice their religion, the Larsens allege they must use their creative talents to celebrate one-man-one-woman marriage. *Id.* at ¶¶72-78, 113-131, 247. Celebrating an opposing conception of marriage would violate their faith. *Id.* at ¶¶6, 199, 203, 248. But the MHRA, as interpreted by Defendants, requires the Larsens to do just that, thus substantially burdening their religious exercise. *Id.* at ¶¶60-64, 234, 251, 265.

1. The MHRA is neither neutral nor generally applicable.

"A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546. Although Defendants argue the MHRA is neutral and generally applicable, Defs.' Br. 11-12, "[t]he problem … is the interpretation given to the [MHRA] by [Defendants]." *Lukumi*, 508 U.S. at 537. The Larsens allege Defendants' application of the MHRA fails on both accounts. *See* Am. Compl. ¶¶250-62. For example, the "legitimate business purpose" exception in Minnesota Statute § 363A.17(3) swallows the already narrow non-discrimination law, which only prohibits discrimination on a few disfavored grounds. Am. Compl. ¶260. This

exception requires Defendants to perform "an evaluation of the particular justification" for every alleged discriminatory activity. *Lukumi*, 508 U.S. at 537. Where "a system of individualized government assessment" has been installed, as is the case here, "the government may not refuse to extend that system to cases of religious hardship without compelling reason." *Id.* (quotation omitted). Instead of making every effort to accommodate religious hardship, Defendants leave no stone unturned in their mission to choke religious expression, consequently singling out "religious practice … for discriminatory treatment." *Id.* at 538; *see* Am. Compl. ¶¶60-71, 261-62.

Moreover, the MHRA provides many categorical exemptions for other secular and religious purposes, although Defendants deny any exemption to the Larsens. Am. Compl. ¶¶256-59; *see 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, the MHRA broadly exempts non-profit religious and service organizations as well as locker rooms and similar places from its reach. *See* Minn. Stat. § 363A.20-.26. (creating seven categorical exemptions outside the reach of the MHRA). The MHRA, therefore, is an "exception-ridden policy" that is "just the kind of state action that must run the gauntlet of strict scrutiny." *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012).

Defendants' reliance on *State by McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985), Defs.' Br. 12, is inapposite. In that case, the Minnesota Supreme Court analyzed the MHRA *before* it was amended to include sexual orientation as a protected characteristic. *Cf. infra* Section IV.H. Here, the Larsens challenge the

amended MHRA, which presents entirely new questions with its greater trespass into First Amendment territory. Besides, key U.S. Supreme Court precedent, like *Lukumi*, which is controlling in this case, has been developed since the *McClure* decision. And last, Defendants' application of the current MHRA bars business owners from objecting to speak messages that violate their sincerely-held religious beliefs, which is a far cry from limiting enforcement to only those who, in fact, discriminate based on a protected characteristic. Thus, this case presents a different statute, a different legal standard, and a different enforcement policy for review.

2. The hybrid-rights doctrine applies.

Defendants argue that because the "hybrid-rights" doctrine has been described by some courts as "controversial," Defs.' Br. 13, the court should reject the Larsens' claim, *cf.* Am. Compl. ¶263, on that basis. But that would be a mistake, especially where the Supreme Court has endorsed the doctrine, *see Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 881-82 (1990), and the Eighth Circuit has recognized the validity of hybrid rights claims, *see Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008) (recognizing *Smith*'s "hybrid rights doctrine" but holding plaintiff's "free exercise claim—alone or hybrid—is barred by collateral estoppel."); *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"). Defendants' statement that "[t]he Eighth Circuit has … never squarely addressed the question" of whether a hybrid-rights claim is recognized in the Eighth Circuit is incorrect.

More to the point, the Supreme Court distinguished cases where "compelled expression" and "free speech" were at issue from *Smith* where there was no such "hybrid situation." *Smith*, 494 U.S. at 882. Here, the Larsens not only allege "free speech" and "compelled expression" claims, but also a "freedom of association" claim, which the Supreme Court in *Smith* easily "envision[ed] … be[ing] reinforced by Free Exercise Clause concerns." 494 U.S. at 882. In fact, the hybrid-rights claim "was not applied in *Smith*," Defs.' Br. 13, because the free exercise claim in that case was "unconnected with any communicative activity," which is not the case here. *Id.*

Federal appellate courts, including the Eighth Circuit, that follow *Smith* allow a hybrid-rights claim where a free exercise claim is connected to a "colorable claim that a companion right has been violated." *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (quotation marks omitted); *see also Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998) ("[W]e believe [the hybrid-rights theory] … requires a colorable showing of infringement of recognized … constitutional rights…."). The Larsens have easily alleged plausible companion claims involving free speech and freedom of association, both of which implicate "communicative activity." *Smith*, 494 U.S. at 882. Thus, they have alleged a plausible hybrid-rights claim.

D. The Larsens assert a plausible claim under the unconstitutional conditions doctrine.

The unconstitutional conditions doctrine bars the state from "deny[ing] a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Defendants argue the doctrine does not apply

because they do not require the Larsens to forfeit a constitutional right in order to receive "a government 'benefit,'" such as money. Defs.' Br. 15. The law is not so narrow. 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 v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004); *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.").

Next, Defendants argue that the "'condition' of having to follow the [MHRA] is not unconstitutional." Defendants miss the point. The problem, once again, is Defendants' unconstitutional *application* of the MHRA. Here, Defendants condition the Larsens' ability to create films celebrating one-man-one-woman marriage on their willingness to create films celebrating other conceptions of marriage. Am. Compl. ¶278. Following one's "chosen profession free from unreasonable government interference" is a benefit that "comes within the 'liberty' and 'property' concepts" of the Due Process Clause. *Greene v. McElroy*, 360 U.S. 474, 492 (1959). For that reason, Defendants cannot condition—even indirectly—the Larsens' participation in their "chosen profession" on their willingness to create films celebrating the viewpoint that same-sex marriage is morally equivalent to one-man-one-woman marriage. Am. Compl. ¶¶279-81; *See Perry*, 408 U.S. at 597 (the government cannot deny a benefit or right to "produce a result [it] could not command directly" (quotation omitted)). Thus, the Larsens state a plausible unconstitutional conditions claim.

E. The Larsens assert a plausible claim under the Equal Protection Clause.

The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Distinctions among similarly-situated groups that affect fundamental rights "are given the most exacting scrutiny," *Clark v. Jeter*, 486 U.S. 456, 461 (1988), and discriminatory intent is presumed, *see 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.'"). The Larsens need only allege that Defendants treat them differently than similarly situated Minnesota filmmakers. *See Ganley v. Minneapolis Park & Recreation Bd.*, 491 F.3d 743, 747 (8th Cir. 2007).

The Larsens easily meet this threshold. They allege "Defendants permit [] other [Minnesota filmmakers] to advocate for and create expression" consistent with their religious, political, or social beliefs but prevent the Larsens "from celebrating and promoting their religious views about marriage." Am. Compl. ¶¶183, 187. Defendants find no problem, for example, with Kay Michael Photography & Video stating on its website, "As ardent supporters of Minnesotans Unite, we are overjoyed that all loving couples in Minnesota are now free to marry." *Id.* at ¶184. Minnesota filmmakers who support same-sex marriage are allowed to both advocate their religious, political, and social beliefs on their website and create films expressing messages consistent with those views. *Id.* at ¶183.

By contrast, Defendants prevent the Larsens from creating films that express messages consistent with their beliefs about marriage. *Id.* at ¶187. As a result, Defendants

have unlawfully created a system that secures the right for some—those who agree with them—to "proselytize religious, political, and ideological causes" through their filmmaking, but they have not guaranteed the "concomitant right" to other filmmakers who disagree with them. *Wooley*, 430 U.S. at 714. Thus, the Larsens are banned from (1) expressing opposing messages through their filmmaking or (2) "refrain[ing] from speaking" objectionable messages once they enter the industry. *See id.* ("A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to refrain from speaking[.]"). The Equal Protection Clause simply does not allow Defendants to pick and choose who can create films in Minnesota based on the filmmaker's beliefs and message.

F. The Larsens assert a plausible procedural due process claim.

The Due Process Clause proscribes impermissibly vague statutes. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."). And when a vague statute, like the MHRA, implicates First Amendment rights, "a heightened vagueness standard" applies. *Brown v. Entm't Merch. Ass'n*, 564 U.S. 789, 793 (2011); *see also Button*, 371 U.S. at 432-33 ("For standards of permissible statutory vagueness are strict in the area of free expression…. These freedoms are delicate and vulnerable, as well as supremely precious in our society.").

The Larsens allege Minnesota Statute § 363A.17(3) violates the Due Process Clause because it is impermissibly vague and invites Defendants to arbitrarily and discriminatorily enforce the law, thus leaving citizens hopeless to know whether their

desired speech actually violates the law. *See* Am. Compl. ¶¶34-37, 297-306. For example, Minnesota Statute § 363A.17(3) permits Defendants to grant exemptions to businesses that discriminate on the basis of a protected characteristic so long as the "discrimination is because of a legitimate business purpose." *See* Am. Compl. ¶¶34, 298. The MHRA neither defines "legitimate business purpose," Am. Compl. at ¶36, nor "include[s] any guidelines or criteria for Defendants" to consult when applying the exemption, *id.* at ¶37. Without such minimal guidance, Defendants are impermissibly granted power to interpret the MHRA however they like, *see Kolender v. Lawson*, 461 U.S. 352, 358-60 (1983), leaving the Larsens and others wondering whether their desired speech violates the law. Am. Compl. ¶305. The Due Process Clause protects the Larsens from being held hostage to the "moment-to-moment judgment" of Defendants. *Kolender*, 461 U.S. at 358-60.

That the "legitimate business purpose" exception is based on one step of the *McDonnell-Douglas* test, Defs.' Br. 18-21, does not mean that it satisfies vagueness scrutiny when First Amendment rights are implicated. The Supreme Court never approved that standard "as a general precondition to protecting … speech." *Stevens*, 559 U.S. at 479. And snippets of judicial standards do not give sufficient "criteria" for Defendants to use "in determining whether" an overbroad speech regulation that allows for viewpoint discrimination applies. *Quarterman v. Byrd*, 453 F.2d 54, 59 (1971). Besides, even anti-discrimination statutes as revered as Title VII "steer[] into the territory of the First Amendment" when "pure expression is involved." *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir. 1995). Hence, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and other cases Defendants cite that do not analyze statutes

implicating First Amendment rights under a "heightened vagueness standard" are inapposite. *Brown*, 564 U.S. at 793.

So too, Defendants' reliance on *United States v. Salerno*, 481 U.S. 739, 745 (1987), is misplaced. The *Salerno* test does not apply where a plaintiff's First Amendment rights are implicated. *See TCF Nat'l Bank v. Bernanke*, 643 F.3d 1158, 1163 (8th Cir. 2011) (stating the Supreme Court "reaffirm[ed] the *Salerno* test outside the context of certain First Amendment challenges"); *Lerman v. Bd. of Elections in the City of New York*, 232 F.3d 135, 144 (2d Cir. 2000) ("*Salerno*, however, does not apply … [where] plaintiffs assert the violation of rights protected by the First Amendment."); *Nat'l Mining Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1406 n.9 (D.C. Cir. 1998) ("The *Salerno* test does not apply in the area of First Amendment free speech rights…."); *cf. City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (casting doubt on the "no set of circumstances" dictum).

G. The Larsens assert a plausible substantive due process claim.

The Supreme Court's decisions in *Obergefell v. Hodges*, l35 S. Ct. 2584, 2596 (2015), and underlying cases have recognized a citizen's right "to have dignity in their own distinct identity." To the extent the Supreme Court has created such a right, the Due Process Clause protects "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs," particularly where sexual preference is concerned. *Id.* at 2597. If personal identity related to sexual preference is constitutionally protected, identity grounded in sincerely-held religious beliefs must be safeguarded as well.

Here, the Larsens allege they are "Christians" whose "religious beliefs are central to their identity, their understanding of existence, and their conception of their personal dignity and autonomy." Am. Compl. ¶¶72-73. The Larsens "believe that everything they do—personally and professionally—should be done in a manner that glorifies God" because "their lives are not their own;" rather their lives "belong to God." *Id.* at ¶¶74-75. Consequently, the Larsens believe they must "use the creative talents God has given to them" only in a manner that honors God. *Id.* at ¶78. The belief that marriage is reserved "only between one man and one woman" is "a core tenant of the Larsen's faith." *Id.* at ¶¶317-18. Thus, using their "creative talents" to celebrate same-sex marriage would violate beliefs that are central to their dignity and identity. *See id.* at ¶¶78, 322-24.

Yet Defendants would exclude the Larsens from "full participation in the economic life of the Nation" because they cannot "in good conscience" create films expressing messages that violate beliefs central to their dignity and autonomy. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014); *see* Am. Compl. ¶¶72-73, 319-27. In effect, Defendants have excluded the Larsens from the marketplace based on their religious beliefs and public message about marriage. *But see Obergefell*, 135 S. Ct. at 2607 ("[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."). The Fourteenth Amendment has long protected citizens' right to engage "in any of the common occupations of life … to worship God according to the dictates of [their] own conscience[s], and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men,"

Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572 (1972) (quotation and alteration omitted). As a result, the Larsens allege at least a plausible substantive due process claim.

H. Defendants' application of the MHRA cannot satisfy strict scrutiny.

The MHRA fails strict scrutiny because its application to the Larsens is neither justified by a compelling interest nor narrowly tailored to serve such an interest. *See Republican Party of Minn. v. White*, 416 F.3d 738, 749 (8th Cir. 2005). Only in rare cases will a law survive this stringent standard. *Id.* This case is not one of them.

"[T]he state's purported interest [must be] important enough to justify the restriction it has placed on the [particular] speech in question." *White*, 416 F.3d at 750. Yet Defendants proffer a generic, broadly-formulated interest—eliminating discrimination—as the compelling reason to force the Larsens to create speech they oppose. *See* Defs.' Br. 2, 10-11. Moreover, Defendants' argument rests on an unreasonable inference—that because the U.S. Supreme Court found the MHRA satisfied constitutional scrutiny in one context as applied to a group who discriminated on the basis of sex and whose ability "to engage in [] protected activities or to disseminate its preferred views" was *unaffected* by the law, it necessarily satisfies scrutiny in every future context, even after the law is amended, expanded, and applied differently. *See Roberts*, 468 U.S. at 627; Defs.' Br. 10. Defendants wrongfully treat the decision in *Roberts* as an immunization against all future as-applied challenges.

Defendants' assumption is fatal for at least four reasons. First, the Larsens allege the MHRA affects their ability to engage in protected expression and disseminate their preferred views, which distinguishes this case from *Roberts*. *See* Am. Compl. ¶¶8-14, 60-

69, 154-66, 202-03. Second, because the Larsens do not discriminate based on sexual orientation, any goal of stopping discrimination is not furthered. Third, the MHRA lacks narrow tailoring. Defendants could respect constitutional freedoms by not applying the MHRA to the small subset of expressive businesses—such as filmmakers, newspapers, publicists, speechwriters, and artists—that provide expressive services and that may have message-based objections to certain work. Fourth, the Legislature amended the MHRA since the decision in *Roberts*, *see* Defs' Br. 2-4,—and notably, not just by adding sexual orientation as a protected class, but also by clarifying that notwithstanding this addition the State does not "condone[] homosexuality … or any equivalent lifestyle[.]" Minn. Stat. § 363A.27(1). If that were not enough, the Legislature also prohibited "the promotion of homosexuality … in education institutions" and precluded teaching in public schools that "homosexuality … [is] an acceptable lifestyle." *Id.* at § 363A.27(2). This kind of disclaimer is unprecedented. No such provision was enacted following other amendments to the MHRA.

Defendants simply cannot show a legitimate, much less compelling, interest in forcing the Larsens—under threats of fines, damages awards, and imprisonment—*to speak a message that the MHRA does not require the State itself to speak*, much less prove that any such interest is promoted by narrowly tailored means.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion to dismiss.

Respectfully submitted this 8th day of March, 2017.

By: /s/Jeremy D. Tedesco

RENEE K. CARLSON, MN 0389675
CARLSON LAW, PLLC
855 Village Center Drive
Suite 259
St. Paul, MN 55127
(612) 455-8950
rcarlson@rkclawmn.com

JORDAN LORENCE, MN 0125210
J. CALEB DALTON, DC 1033291*
ALLIANCE DEFENDING FREEDOM
440 First St. NW, Suite 600
Washington, DC 20001
(202) 393-8690
jlorence@ADFlegal.org
cdalton@ADFlegal.org

**Admitted Pro Hac Vice*

JEREMY D. TEDESCO, AZ 023497*
JONATHAN A. SCRUGGS, AZ 030505*
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
(480) 444-0028 Fax
jtedesco@ADFlegal.org
jscruggs@ADFlegal.org

DAVID A. CORTMAN, GA 188810*
RORY T. GRAY, GA 880715*
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Road, NE,
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
(770) 339-6744
dcortman@ADFlegal.org
rgray@ADFlegal.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of March, 2017, the foregoing was filed with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

KEVIN LINDSEY, Commissioner
Minnesota Department of Human Rights
Freeman Building
625 Robert Street North
Saint Paul, MN 55155

LORI SWANSON, Attorney General
Office of the Minnesota Attorney General
445 Minnesota Street, Suite 1400
Saint Paul, MN 55101-2131

/s/Jeremy D. Tedesco
Jeremy D. Tedesco
Attorney for Plaintiffs

CERTIFICATE OF COMPLIANCE

I hereby certify that that this brief complies with the requirements of Local Rule 7.1(f) because it has been prepared in 13-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Local Rule 7.1 (f), (h) because it contains 11,952 words, excluding the parts of the brief exempted under Local Rule 5.2 according to the count of Microsoft Word 2013.

/s/Jeremy D. Tedesco
Jeremy D. Tedesco