UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Telescope Media Group, a Minnesota corporation, Carl Larsen and Angel Larsen, the founders and owners of Telescope Media Group,

Plaintiffs,

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.

Civ. No. 16-CV-04094 (JRT-LIB)

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Plaintiffs' brief misses the mark because it fails to acknowledge the limited and narrow scope of what the challenged provisions of the Minnesota Human Rights Act ("MHRA") actually proscribe. The MHRA does not regulate the content of films or speech, prohibit or compel individual associations, or mandate or prohibit religious beliefs and practices. Rather, the at-issue provisions of the MHRA simply regulate business transactions and ensure individuals have equal access to businesses in the public marketplace by prohibiting discrimination against customers.

Plaintiffs do not cite a single case in which any court has held that the application of a state public accommodation law to a for-profit business selling goods and services to the public violated the United States Constitution. Furthermore, each case that squarely

addressed the same arguments made by Plaintiffs has upheld the state public accommodation laws. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *cert pet. filed* (U.S. July 22, 2016); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014); *Gifford v. McCarthy*, 137 A.D.3d 30, 42 (N.Y. App. Div. 2016); *In the Matter of: Melissa Elaine Klein*, 2015 WL 4868796, at *18 (Or. Bur. Labor & Indust. July 2, 2015). On February 16, 2017, the Washington Supreme Court joined the consensus and unanimously held that Washington's anti-discrimination law "may be enforced" against a florist who argued that she should not be required to use her creative skills to create flower arrangements for a same-sex wedding. *State of Washington v. Arlene Flowers*, 389 P.3d 543, 568 (Wash. 2017).

Because Plaintiffs lack standing, and their claims are not ripe and fail as a matter of law, Defendants respectfully request that the Court dismiss the Amended Complaint with prejudice.

ARGUMENT

I. PLAINTIFFS LACK STANDING AND THEIR CLAIMS ARE NOT RIPE.

A. Plaintiffs Lack Standing To Pursue Their First Amendment Claims.

Plaintiffs allege that they have standing to bring their pre-enforcement First Amendment claims for two reasons, both of which fail.

Plaintiffs first argue that they intend to engage in conduct proscribed by statute and there is a credible threat of prosecution. Pls.' Mem. In Opp. to Mot. to Dismiss [Doc. No. 40], at 8 (hereinafter ("Pls.' Opp'n"). But to establish standing, Plaintiffs must show that the course of conduct they intend to engage in is "arguably affected with a

constitutional interest, but proscribed by a statute." *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016) (citations and quotation marks omitted). As explained *infra* at II, the conduct the MHRA proscribes is business conduct and business transactions *not* Plaintiffs' speech, association, or religion. Plaintiffs cite no case suggesting that a statute prohibiting a business from discriminating against customers "arguably affect[s] a constitutional interest".

In addition, the cases that rely on "credible enforcement threats" typically involve past enforcement against the plaintiff or, at least, a pattern of enforcement actions. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345, 189 L. Ed. 2d 246 (2014) (past enforcement against plaintiff); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16, 130 S. Ct. 2705, 2717, 177 L. Ed. 2d 355 (2010) (the government previously charged "about 150 persons with violating § 2339B, and [] several of those prosecutions involved the enforcement of the statutory terms at issue here"). Here, Plaintiffs have alleged only one prior enforcement action related to denying wedding services to same-sex couples. *See* Am. Compl. ¶¶ 66-71.

Second, Plaintiffs argue that they have standing because the MHRA is causing them to self-censor. Pls.' Opp'n at 8. This requires Plaintiffs to show that the decision "to chill [their] speech in light of the challenged statute was objectively reasonable." *Klahr*, 830 F.3d at 794 (citation and quotation marks omitted). However, Plaintiffs' speech is not chilled. Plaintiffs have spoken about their position publicly on numerous occasions. More to the point, their Amended Complaint actually includes a video that the

Plaintiffs have already created, proving that Plaintiffs are able to engage in the speech, association, and religious exercise they desire.

B. Plaintiffs' Fourteenth Amendment Claims Lack Standing.

Plaintiffs also assert claims under the Fourteenth Amendment to the United States Constitution. As to those claims, Plaintiffs offer no argument that they have standing. Indeed, the cases cited by Plaintiffs exclusively involve First Amendment claims. Pls.' Opp'n at 7 (citing *Klahr*, 830 F.3d at 794) *but see id.*, case no. 14-cv-4287, ECF No. 1 (W.D. Mo. Oct. 30, 2014) (complaint involving only a First Amendment claim); *281 Care Community v. Arneson*, 638 F.3d 621 (8th Cir. 2011) *but see id.*, case no. 8-cv-5215, ECF No. 1 (D. Minn. Sept. 18, 2008) (complaint asserting First Amendment claims).

Plaintiffs provide no support or argument showing Article III standing for their non-First Amendment claims and, as such, concede those claims. *Solum v. Board of County Comm'rs for County of Houston*, 880 F. Supp. 2d 1008, 1016 (D. Minn. 2012) (because the "responsive brief did not address" relevant issue, "these arguments are deemed waived"). In any event, for the reasons set forth in Defendants' Memorandum of Law In Support of Motion to Dismiss at 4 to 7 and 16, Plaintiffs do not meet Article III standing requirements.

C. Plaintiffs' Claims Are Not Ripe.

Plaintiffs also do not meet the separate requirement of ripeness. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300

(1998) (citation and quotation marks omitted). A case that will be clarified through further factual development is not fit for review. *SBA List*, 134 S. Ct. at 2347. This case is contingent on future events and would benefit from further factual development. For example, Plaintiffs allege that they will offer services to the public within the meaning of the MHRA, but then assert facts that could be inconsistent with that legal assertion. *E.g.*, Am. Compl. at ¶ 95-98, 126-129. It is also unclear which customers would seek their services, what services those customers would request, or how exactly Plaintiffs would respond to those requests. Plaintiffs' hypothetical business model, and whether particular circumstances might give rise to discrimination on the basis of religion or sexual orientation, or some other protected class, are not concrete and remain speculative. *Texas*, 523 U.S. at 301.

Finally, to the extent Plaintiffs argue that Defendants would misinterpret or misapply the statute, such a claim is plainly speculative. *See Zanders v. Swanson*, 573 F.3d 591 (8th Cir. 2009) (holding that a claim that law enforcement would misapply statute too speculative).

D. The Attorney General Is Not A Proper Party And Plaintiffs' Claims Against the Attorney General Lack Standing.

For the reasons stated in Defendants' Memorandum in Support of Motion to Dismiss at 7-8, the Attorney General is not a proper party to this case. As Minnesota statute makes clear, the Minnesota Department of Human Rights is the agency charged with enforcement of the MHRA. Minn. Stat. § 363A.32, subd. 1.

Plaintiffs appear to concede that the Attorney General's representation of MHRA is not sufficient to provide standing in a pre-enforcement case such as this one. *See* Pls.' Opp'n at 20-22; *see also* Defs.' Mem. in Supp. of Mot. to Dismiss (hereinafter "Defs.' Mem. in Supp.") [Doc. No. 34] at 7-8; *Balogh v. Lombardi*, 816 F.3d 536, 543 (8th Cir. 2016) (causation element of standing fails as to director because director did not possess statutory authority to enforce a particular law); *see also Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015) (causation element of standing fails against attorney general because "the attorney general does not initiate enforcement or seek relief against a putative defendant").

Plaintiffs' attempts to avoid the Attorney General's representation role are without merit. First, Plaintiffs have not pled any factual basis to assert that the Attorney General has taken or is likely to take any action in a non-representational capacity. *See generally* Am. Compl. Second, county attorneys are by law charged with the authority to prosecute crimes, Minn. Stat. § 388.051, subd. 1, and Plaintiffs plead no support for an assertion that the Attorney General has been asked by a county to prosecute a misdemeanor under the MHRA. Third, Plaintiffs also cite no instance, and plead no facts to support any instance, in which the Attorney General has brought or intervened in a public accommodations case under the MHRA in her own capacity. The Attorney General is simply neither a necessary nor a proper party to this case and therefore should be dismissed.

II. PLAINTIFFS' FIRST AMENDMENT CLAIMS FAIL AS A MATTER OF LAW.

Contrary to Plaintiffs' suggestion, Pls.' Opp'n at 23, 25, the Court is not required to defer to Plaintiffs' legal assertions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While the Court must generally take the factual assertions in the complaint as true on a motion to dismiss, the Court should dismiss because the facts Plaintiffs have pled fail to show a violation of any First Amendment right as a matter of law. Fed. R. Civ. P. 12(b)(6); *Iqbal*, 556 U.S. at 678.

A. Plaintiffs' Amended Complaint Does Not Plead A Cognizable Free Speech Claim.

The MHRA regulates economic activity and conduct that takes place as part of commerce. The United States Supreme Court has plainly recognized that this type of regulation is not precluded by the First Amendment. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566-67 (2011) (explaining that the First Amendment does not prevent regulation of economic activity and conduct and also "does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech"); *see also* Defs.' Opp'n to Mot. for Prelim. Inj. (hereinafter "Defs.' Opp'n") [Doc. No. 35] at 8-16.

Plaintiffs spend significant time arguing about whether a "film" is speech. Pls.' Opp'n at 23-25. *But see* Defs.' Opp'n at 11-14; *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006). But the MHRA does not regulate "what camera to use, what angle to shoot, what subject(s) to include" or any other aspect of how Plaintiffs perform the services they sell. Pls.' Opp'n at 25. Indeed, Plaintiffs do

not, and cannot, identify any language in the MHRA that regulates the content of film or videos.

Instead, the challenged provisions of the MHRA only regulate conduct, requiring that if Plaintiffs chose to sell their products and services to the public at large, they cannot deny them to certain customers based on their protected status. *See* Minn. Stat. § 363A.11, subd. 1(a)(1) (a person providing a public accommodation cannot "deny any person. . . . goods [or] services . . . because of . . . race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex"); Minn. Stat. § 363A.17(3) ("a person engaged in a trade or business or in the provision of a service" cannot "intentionally refuse to do business with, refuse to contract with, or discriminate in the basic terms, conditions or performance of a contract" based on protected status). In short, the MHRA's regulation of economic activity and conduct is "unrelated to . . . expression." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (upholding MHRA against First Amendment challenge.)

As such, it not surprising that the Supreme Court has recognized that public accommodation laws such as the MHRA are "well within the State's usual power to enact" and "do not, as a general matter, violate the First or Fourteenth Amendment." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 572 (1995). The MHRA, and other public accommodation laws, have long been upheld against First Amendment constitutional challenges, whether it be in the context of discrimination on the basis of race, gender or, more recently, sexual orientation. *Jaycees*, 468 U.S. at 624 (upholding MHRA); *State by McClure v. Sports & Health Club, Inc.*, 370

N.W.2d 844, 852, 853 (Minn. 1985) (same)*; see also* Defs.' Opp'n at 6-8 (collecting cases); *Arlene Flowers*, 389 P.3d at 556-60.

The cases Plaintiffs rely on are inapposite. For example, Plaintiffs rely heavily on *Hurley*, 515 U.S. 557. As the Washington Supreme Court recognized, *Hurley* is similar in only "one respect: it involved a public accommodations law." *Arlene's Flowers*, 389 P.3d at 558 & n.11. In *Hurley*, the United States Supreme Court had to defer to the state court's "peculiar" interpretation of the Massachusetts antidiscrimination law; the state had concluded that a parade itself was a public accommodation. *Id.*; *Hurley*, 515 U.S. at 561-62. By contrast, Plaintiffs operation of a business that sells goods and services to the public is the type of quintessential public accommodation that courts have long recognized states may regulate under such laws. *See* Defs.' Opp'n at 6-8; *Hurley*, 515 U.S. at 572 (recognizing that such laws are typically within state's power to enact).

Plaintiffs also rely on two zoning cases: *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010) (considering municipal zoning ban on tattoo parlors) and *Buehrle v. City of Key West*, 813 F.3d 973 (11th Cir. 2015) (same).[1] But those cases involve a question of whether a municipality can completely prohibit a business based on the nature of its product or services.[2] By contrast, the MHRA does not prohibit any

[1] Plaintiffs also fail to acknowledge that the Eighth Circuit Court of Appeals has actually held that a tattoo is *not* protected First Amendment expression. *Stephenson v. Davenport Community Sch. Dist.*, 110 F.3d 1303 n. 4 (8th Cir. 1997) ("declining to imbue [plaintiff's] tattoo with first amendment protections.")

[2] Plaintiffs cite no case from the Ninth or Eleventh Circuits, or from any other court, holding that a state public accommodation law violated the First Amendment by prohibiting a tattoo business from engaging in discriminatory practices.

business or artistic creation, nor does the MHRA regulate in any way the type of goods or services a business offers.

Plaintiffs essentially argue that "artistic" or "creative" businesses are exempt from a Minnesota law that applies to all the other businesses in the State. As the Washington Supreme Court recognized, such a rule would "create a 'two-tiered system'" and "carve[] out an enormous hole from public accommodation laws." *Arlene Flowers* 389 P.3d at 556; *see also McClure*, 370 N.W.2d at 853 (declining to require an exemption for sincerely held religious beliefs for the same reason). Indeed, "under such a system, a "dime-store lunch counter would be required to serve interracial couples but an upscale bistro could turn them away." *Arlene Flowers* 389 P.3d at 556.

Furthermore, Plaintiffs' proposed rule of law is without any limiting principle. Under Plaintiffs' rule, any person or business selling to the public may discriminate based on race or sexual orientation, or any other protected status, by simply claiming a creative purpose. *See id.* (recognizing the difficulty of creating a judicially manageable standard for identifying which businesses would be sufficiently "artistic" to warrant an exemption); *Elane Photography*, 309 P.3d at 71 (same).

Minnesota's public accommodation law has been in place for more than 130 years, and many other states have similar long-standing laws. Yet, Plaintiffs do not and cannot identify a single case that has found that the First Amendment requires an "artistic" exception to a public accommodation law, either in Minnesota or elsewhere.

B. Plaintiffs Free Association Claim Fails As A Matter Of Law.

Plaintiffs do not dispute that their First Amendment Free Association claim is premised on interactions with business customers, not members in an organization. Pls' Opp'n at 29-31; *see also* Defs.' Opp'n at 17-18. Plaintiffs cite no cases in which any court has recognized a First Amendment Free Association claim in the context of a business/customer relationship. To the contrary, the cases Plaintiffs cite expressly rely on the fact that the cases involved a "membership organization," rather than a "clearly commercial entit[y]." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000).

As other courts have recognized, a commercial enterprise, open to the general public, is not an expressive association for purposes of the First Amendment. *See Arlene's Flowers, Inc.*, 389 P.3d 543 ¶ 81 (Wash. 2017). Indeed, Plaintiffs' customers would not become a part of their business—they would not decide how to run Plaintiffs' business; nor would Plaintiffs make decisions about their customers' wedding. *E.g.*, *Rumsfeld*, 547 U.S. at 69 (finding no associational rights where, among other things, the military recruiters did not become part of the law school). Plaintiffs' erroneous argument, if adopted, would mean that a business has a First Amendment right to refuse to serve or hire any person, even for a reason proscribed by the MHRA, Title VII, Title VI, or any other civil rights statute. This is plainly not the law.

Furthermore, Plaintiffs' claim fails even under their own mistaken theory. Plaintiffs argue that their hypothetical future customers would seek Plaintiffs' business

services to join together and speak with Plaintiffs. Plaintiffs do not plead such facts.[3] *See, e.g.*, Am. Compl. ¶ 195 (focusing on the Plaintiffs speech, not their customers, and stating that "[t]he messages Plaintiffs express through their video productions are their own speech") In addition, the purposes and motivations of future third-parties who might seek Plaintiffs services is unknowable at this date, rendering any such decision unripe and advisory. *Supra* at I.C.

Plaintiffs have not alleged a viable First Amendment Free Association claim.

C. Plaintiffs' Free Exercise Claim Also Fails As A Matter Of Law.

As set forth in Defendants' Memorandum in Opposition to Preliminary Injunction at 18-23 and in Defendants' Memorandum in Support of Motion to Dismiss at 11-15, Plaintiffs' Free Exercise claim fails because the MHRA is a valid and neutral law of general applicability. The MHRA does not attempt to regulate religious beliefs or single out religious belief for adverse treatment. *See McClure*, 370 N.W.2d at 852, 851; *see also Geraci v. Eckankar*, 526 N.W.2d 391, 399 (Minn. App. 1995) ("We begin by recognizing that the [MHRA] has been held constitutional on its face and as applied to private companies whose owners held strict religious beliefs.")

Plaintiffs appear to argue, incorrectly, that any law that might impact a religious belief and contains any exceptions "must run the gauntlet of strict scrutiny," *See* Pls.'

[3] Plaintiffs state they want to "collaborate with couples who wish to promote the unique beauty of biblical marriage, and thus speak a message." (Pls.' Opp'n at 31.) Plaintiffs cite Am. Compl. ¶¶126-31, 196, 232. None of those paragraphs addresses their clients' desired speech, but instead allege Plaintiffs "use their clients" and Plaintiffs "tell the stories and express the messages the Larsens seek to convey." (Am. Compl. ¶ 126.)

Opp'n at 32-33 (citing *Ward v. Polite*, 667.3d 727, 740 (6th Cir. 2012). This misstates the Free Exercise standard. Strict scrutiny does not apply to Plaintiffs' claim.[4]

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), a case relied on heavily by Plaintiffs, supports Defendants' position. The Court plainly explained: "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religion." *Id.* at 531. In cases of alleged discrimination against religion, the issue is whether "the law at issue discriminates against . . . religious beliefs or . . . conduct *because it is undertaken for religious reasons*." *Id.* at 532 (emphasis added). In *Lukumi*, the plaintiffs pointed to legislative history and exemptions included in the law to show that the law was intended to outlaw animal sacrifice by the Santeria religion, while allowing animal slaughter for most other purposes. *Id.* at 534-38.[5]

---

[4] Examples of cases that have held that a statute did not require strict scrutiny despite having exemptions include, but are not limited to, the following: *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 (8th Cir. 1991) (zoning ordinance excluding churches and other non-profits from business district had no impact on religious belief and was general law applying to all land use); *Civil Liberties For Urban Believers v. City of Chicago*, 342 F.3d 752, 764-5 (7th Cir. 2003) (ordinance requiring special use approval to operate churches in commercial areas and limiting church operation in manufacturing areas was general law of neutral applicability); *Mount Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 405 (6th Cir. 1999) (city's denial of request to rezone property for use as church cemetery not a burden on free exercise because ordinances was neutral law of general applicability); *First Assembly of God of Naples v. Collier County*, 20 F.3d 419, 423-24 (11th Cir. 1994) (city's ordinance prohibiting church from running homeless shelters in certain areas held neutral and of general applicability because motivated by secular concerns (health and safety considerations), applied to everyone, and did not completely prohibit operation of homeless shelters).

[5] The other cases cited by Plaintiffs, such as *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999), and *Ward v. Polite*, 667 F.3d 727

(Footnote Continued on Next Page)

Plaintiffs can offer no similar evidence as it relates to the MHRA. The MHRA prohibits discrimination by public accommodations and services, regardless of purpose or reason, and it applies to for-profit businesses without regard to religion. The language of the MHRA does refer to religion, but only for the purpose of affirmatively accommodating non-profit religious organizations, not discriminating against them. Minn. Stat. § 363A.26 (providing certain exemptions for any "religious association, religious corporation, or religious society that is not organized for private profit"). Under the MHRA, no "religious practice is being singled out for discriminatory treatment." *Lukumi*, 508 U.S. at 537-38.

Likewise, Plaintiffs incorrectly attempt to argue that the MHRA violates Free Exercise because it allows denial of service "for a legitimate business purpose." Contrary to Plaintiffs' suggestion, this language does not exempt secular discrimination. Instead, it recognizes a situation in which a denial of service is not actually discriminatory. As is well-recognized by cases applying that same language in the *McDonnell-Douglas* analysis, a business that denies service because the business is too busy, for example, is not actually discriminating on the basis of protected status. *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Finally, for the reasons set forth in Defendants' Memorandum in Support of Motion to Dismiss at 13-14, a so-called hybrid rights claim does not apply. But, even if

---

(Footnote Continued from Previous Page)
(6th Cir. 2012), similarly involve unique facts which showed that the law was infected with a discriminatory purpose either on its face or in how it was applied. Plaintiffs provide no similar evidence in this case.

such a doctrine did apply, no court has recognized a hybrid claim based on a mere "plausibility" standard. Pls.' Opp'n at 35. Plaintiffs do not even argue that they can meet any of the higher standards that have been employed by the handful of courts that have recognized a hybrid-claim. *Solum*, 880 F. Supp. 2d at 1016. Indeed, Plaintiffs' cannot meet those standards. Defs.' Mem. In Supp. at 14.

D. The MHRA Satisfies Strict Scrutiny.

Because the MHRA does not violate any protected First Amendment Rights, strict scrutiny analysis is not applicable. But even if it were, the MHRA plainly meets the standard.

As was fully laid out in Defendants' Memorandum in Opposition to Motion for Preliminary Injunction at 2-4 and 14-16, the MHRA was passed to ensure that all people in Minnesota would be entitled to "full and equal enjoyment" of public accommodations and services. Act of March 7, 1885, ch. 224, § 1, 1885 Minn. Laws 295, 296. Both United States and Minnesota Supreme Courts have recognized this as a compelling purpose sufficient to pass strict scrutiny review. *Jaycees*, 468 U.S. at 628-29; *McClure*, 370 N.W.2d at 853.

In *Hurley*, the United States Supreme Court recognized that "when a legislature has reason to believe a given group is a target of discrimination," a state public accommodation law protecting that group will not, "as a general matter, violate the First or Fourteenth Amendment." *Hurley*, 515 U.S. at 572. In Minnesota, the inclusion of sexual orientation as a protected status under the MHRA was based on a record of evidence showing sexual orientation formed the basis for targeted discrimination. A

Governor's Task Force on Gay and Lesbian Minnesotans found "substantial societal hostility to homosexuality" and "overwhelming" evidence that "gays and lesbians are the targets of considerable discrimination in the State of Minnesota." Affidavit of Janine Kimble, Ex. 2 [Doc No. 36-2] at 3, 5-6. Such discrimination was identified as "damaging to society as a whole."[6] *Id.* These are the same types of reasons that led the courts to uphold the MHRA under strict scrutiny in the past. *Jaycees*, 468 U.S. at 624; *McClure*, 370 N.W.2d at 853.

The MHRA is also narrowly tailored. It prohibits only discrimination in the provision of public accommodations and services—the very harm it seeks to address. *Jaycees*, 468 U.S. at 628-29; *McClure*, 370 N.W.2d at 853. It prohibits business owners from discriminating simply because of a customer's race or sexual orientation or other protected status.

Plaintiffs suggest that the law should be tailored to exempt what they call "expressive businesses." As discussed *infra* at II.A., Plaintiffs do not identify any case law recognizing such a distinction nor any judicially manageable standards.[7] In any event, Minnesota has a compelling interest in preventing discriminatory business practices by wedding providers, just as it does for any other business. *E.g.*, *McClure*,

[6] The Governor's Task Force recognized that the harm existed whenever an individual was turned away by a business that otherwise served any other member of the public. *See* Kimble Aff. Ex. 2, at 3, 5-6. As such, there was a compelling reason to prohibit discrimination by all businesses, regardless of the availability of the service at some establishment.

[7] In other cases, plaintiffs have argued that artistic businesses include bakers and florists, albeit unsuccessfully. *See, e.g.*, *Masterpiece Cakeshop Inc.*, 370 P.3d 272; *Arlene's Flowers*, 389 P.3d 543.

370 N.W.2d at 853 (rejecting argument that MHRA should provide an exemption for sincerely held religious beliefs because it "could substantially frustrate" the state's compelling interest in "eliminating discrimination")

Finally, Minnesota law authorizes same-sex marriage and Minnesota does not condition a citizen's right to the benefits or services of government on their sexual orientation, nor does Minnesota state law mandate how education institutions teach sexuality. Plaintiffs' attempt to suggest otherwise is mistaken.

E. Plaintiffs Have Not Pled A Viable Unconstitutional Conditions Claims.

As an initial matter, Plaintiffs do not deny their unconstitutional conditions claim relies entirely on their ability to assert a viable First Amendment claim. For the reasons stated *infra* at II and in Defendants prior briefing, Plaintiffs' First Amendment claims fail as a matter of law. As such, their unconstitutional conditions claim also fails as a matter of law. *Rumsfeld*, 547 U.S. at 60 ("Because the First Amendment would not prevent Congress from directly imposing [a restriction], the statute [conditioning funds based on compliance with that restriction] does not place an unconstitutional condition on the receipt of federal funds.")[8]

Nor do Plaintiffs cite any cases applying the unconstitutional conditions doctrine to a right to follow "one's chosen profession" free of all government regulation. *See* Pls.'

[8] Moreover, the challenged provisions of the MHRA do not impose an indirect condition on business—they do not prohibit a business from opening or require one to close. Rather, the challenged provisions of the MHRA directly prohibits the conduct proscribed by imposing fines or other consequences.

Opp'n at 36. For the reasons set forth in Defendants' Memorandum in Support of Motion Dismiss at 22-24, neither the Eighth Circuit nor the United States Supreme Court has recognized such a broad and amorphous constitutional right.

III. PLAINTIFFS' FOURTEENTH AMENDMENT CLAIMS FAIL AS A MATTER OF LAW.

Plaintiffs erroneously contend that their facial claims do not have to meet the requirements of *United States v. Salerno*, 481 U.S. 739, 745, (1987) because "First Amendment rights are implicated." (Pls.' Opp'n at 40.) Defendants referred to *Solerno* in response to Plaintiffs' Fourteenth Amendment claims, not their First Amendment claims. *See TCF Nat'l Bank v. Bernanke*, 643 F.3d 1158 (8th Cir. 2011) (applying *Solerno* to Fourteenth Amendment claims); Defs.' Mem. in Supp. at 16. Because the MHRA is not unconstitutional in all circumstances, and Plaintiffs do not allege or argue to the contrary, any facial claim must fail as a matter of law. *See also Solum*, 880 F. Supp. 2d at 1016 (arguments not raised in brief are waived).

A. The MHRA Does Not Violate Plaintiffs' Equal Protection Rights.

Plaintiffs have not identified any protected class of which they are a part, and for the reasons stated *supra* at II, they do not allege any fundamental right that is infringed. The MHRA is subject to rational basis review, a standard it plainly passes. *Supra* at II.D.; Defs.' Opp'n at 14-16; Defs.' Mem. in Supp. at 10-11.

Plaintiffs continue to argue that the MHRA violates Equal Protection because it treats videographers who want to follow the law differently from videographers who do not want to follow the law. Plaintiffs do not cite case law to support this circular argument under which all lawbreakers would be deemed "treated differently" from those

who follow the law. Contrary to Plaintiffs' suggestion, Plaintiffs are treated similarly to other Minnesota videographers who likewise must either comply with state law regardless of their personal opinions or face consequences for failing to do so. *See* Defs.' Mem. in Supp. at 16-18.

B. The MHRA Does Not Violate Procedural Due Process.

In *Jaycees*, the United States Supreme Court rejected an argument that the MHRA is unconstitutionally vague because it used "familiar standards" that other courts use, which "ensure[s] that the reach of the statute is readily ascertainable."[9] *See Jaycees*, 468 U.S. at 629-30. That continues to be true today.

Plaintiffs' focus on the phrase "legitimate business purpose" is without merit. As discussed *supra* at II.C, and in scores of cases that have interpreted the phrase, *see* Defs.' Mem. In Supp. at 19-21, Courts have long used the phrase to identify circumstances when a denial of service (or other action) is motivated by a non-discriminatory business purpose and not based on protected status.

Finally, Plaintiffs' suggestion that the phrase legitimate business purposes serves as a "general precondition to speech" is without basis. (Pls.' Opp'n at 39.) The MHRA regulates business conduct; it does not mandate what an individual can or cannot say. *Supra* at II.A.; Defs.' Opp'n at 8-15.

[9] The court did not analyze the phrase "legitimate business purpose" but instead focused on the Minnesota Supreme Court's analysis of other aspects of the law. *Id.*

C. Plaintiffs' Substantive Due Process Claim Also Fails.

Plaintiffs do not contest that their substantive due process claims are a re-pleading of their First Amendment claims. Because a "particular amendment provides an explicit textual source for constitutional protection," Plaintiffs cannot use the more "generalized notion of substantive due process" to pursue their claims. *Albright v. Oliver*, 510 U.S. 266, 273 (1994); Defs.' Mem. In Supp. at 21. Plaintiffs have waived any argument to the contrary. *Solum*, 880 F. Supp. 2d at 1016.

In any event, the cases cited by Plaintiffs do not support a substantive due process right to a chosen profession unencumbered from all government regulation. For example, Plaintiffs cite *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972), Pls.' Opp'n at 41-42, but the language cited was analyzing a former state employee's liberty interest for purposes of his procedural due process claim, and it found the individual had no liberty interest inherent in his employment. For the reasons stated herein, and in Defendants' Memorandum in Support of Motion to Dismiss at 21-24, Plaintiffs Substantive Due Process claim also fails.

CONCLUSION

For the reasons stated in support for Defendants' Motion to Dismiss and in opposition to Plaintiffs' Motion for Preliminary Injunction, Defendants respectfully request the Court dismiss Plaintiffs' Amended Complaint with prejudice.

Dated: March 22, 2016

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

s/ **Alethea M. Huyser**
Alethea M. Huyser
Assistant Solicitor General
Atty. Reg. No. 0389270

Janine Kimble
Assistant Attorney General
Atty. Reg. No. 0392032

Eric Brown
Assistant Attorney General
Atty. Reg. No. 0393078

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 757-1243 (Voice)
(651) 282-5832 (Fax)
alethea.huyser@ag.state.mn.us
janine.kimble@ag.state.mn.us
eric.brown@ag.state.mn.us

ATTORNEY FOR DEFENDANTS