No. 17-3352

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Telescope Media Group, Carl Larsen, and Angel Larson,

Appellants,

vs.

Kevin Lindsey, and Lori Swanson

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

APELLEES' MOTION TO STAY APPEAL PENDING UNITED STATES SUPREME COURT DECISION IN RELATED CASE

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Pursuant to Fed. R. Civ. App. P. 27, Appellees Commissioner of the Minnesota Department of Human Rights Kevin Lindsey and Minnesota Attorney General Lori Swanson move this Court for a stay of this case pending the United States Supreme Court's review of a related case, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111 (U.S. filed Jul. 22, 2016). This case involves similar legal issues to those at issue in *Masterpiece Cakeshop, Ltd.*. As such, both judicial economy and the interests of justice favor a stay pending the Supreme Court's decision.

BACKGROUND

Appellants Telescope Media Group, and its owners Angel and Carl Larson, bring a pre-enforcement challenge to certain provisions in Minnesota's Human Rights Act ("MHRA"), Minn. Stat. Sections 363A.11, subd. 1(a)(1) and 363A.17(3). *Telescope Media Group et al. v. Lindsey et al.*, No. 16-cv-4094 (JRT/LIB), attached as Ex. 1, Am. Compl., Doc. 13. Appellants allege that they wish to begin selling wedding videography someday in the future, but want to deny their services to same-sex couples. *Id.* at ¶¶ 116, 129, 145. Appellants claim that the MHRA, which prohibits businesses offering public services or public accommodations from discriminating on the basis of sexual orientation, is unconstitutional as applied to them. *Id.* at ¶¶ 194-327.

The gravamen of Appellants' claims is that creating wedding videos is artistic, and that a law prohibiting Appellants from refusing services based on a customer's sexual orientation would impair their artistic and religious expression in violation of the First and Fourteenth Amendments. *See generally id.*; *see also* Mem. In Supp. Of Pls.' Mot. for Prelim. Inj, attached as Ex. 2, Doc. No. 16 (hereinafter "*Telescope Media Group* Mem. In Supp. of P.I."); Pls,' Opp. to Defs.' Mot. to Dismiss, attached as Ex. 3, Doc. No. 40 (hereinafter *Telescope Media Group* Opp. to Mot. to Dismiss). In their Statement of the Issues, Appellants identify the issue for this court as follows:

> Whether applying the Minnesota Human Rights Act ("MHRA") to compel cinematographers to create films that conflict with their sincerely held religious beliefs about marriage violates the Free Speech, Free Exercise, or Free Association Clauses of the First Amendment or the Equal Protection or Due Process Clauses of the Fourteenth Amendment.

Plaintiff-Appellants' Statement of the Issues (Nov. 13, 2017), attached as Ex. 4, Entry ID. 4600080.

Appellants are not the only litigants pursuing this type of legal claim. Legal counsel for Appellants have been actively pursuing similar claims in various jurisdictions around the country. *See* Plaintiffs-Appellants Unopposed Motion for Extension of Time To File Opening Brief with Addendum and Appendix (Nov. 13, 2017), attached as Ex. 5, Entry ID 4599987, at ¶¶ 2-3 (hereinafter "App.'s Mot. for Ext."). On June 26, 2017, the United States Supreme Court granted certiorari

review of one of those related cases, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, Docket No. 16-11, (U.S. filed July 22, 2016).

Masterpiece Cakeshop involves a cake baker who refused to provide a wedding cake for a same sex couple's wedding. *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, Brief for Petitioners, attached as Ex. 6, No. 16-111, at 11 (hereinafter "*Masterpiece Cakeshop* Pets.' Br."). The Colorado Civil Rights Commission brought an enforcement action against the baker, alleging that he violated the state anti-discrimination statute by declining to provide services based on the customer's sexual orientation. *Id.* The cake baker argued that the enforcement of the Colorado anti-discrimination law against them violated the First and Fourteenth Amendments because the cakes he creates and sells are his artistic and religious expression. *Id.* at 11-14.

After Colorado state courts upheld the law, the cake baker filed a petition with the United States Supreme Court. *Id.* The Supreme Court granted review, and Petitioners are represented by the same legal counsel appearing for Appellants in this case. *See* App.'s Mot. for Ext., Ex. 5, at ¶ 2. Petitioners frame the issue before the Court as follows:

> Whether applying Colorado's public accommodations law to compel artists to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

Masterpiece Cakeshop Pets.' Br., Ex. 6, at i. Argument in that case is scheduled to occur on December 5, 2017. *See* App.'s Mot. for Ext., Ex. 5, at ¶ 2.

ANALYSIS

The United States Supreme Court's decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* is relevant to, and could possibly be dispositive of, this case. In the interests of judicial economy, Appellees request the Court stay this appeal, and hold all briefing and argument in abeyance, pending the Supreme Court decision.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254, (1936). The Court may consider the conservation of judicial resources and the need to provide for a just determination of the cases pending before it. *Webb v. R. Rowland & Co., Inc.*, 800 F.2d 803, 808 (8th Cir. 1986).

A court may stay an action "to maximize the effective use of judicial resources and to minimize the possibility of conflicts between different courts." 5C Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 1360 (3rd ed. 2017 ed.). For example, a motion for stay may be warranted when a similar action is pending in another court. *Id.*

A comparison of the briefs submitted to the United States Supreme Court by the *Masterpiece Cakeshop* Petitioners with Appellants' district court briefs in this case reveals that that both parties are raising the same legal arguments and issues. For example, the following arguments and issues are presented in both cases:

- Arguments that the wedding service at issue is "artistic expression" entitled to First Amendment Protection. *Compare Masterpiece Cakeshop* Pets.' Br., Ex. 6, at 16-23 with *Telescope Media Group* Mem. In Supp. of P.I., Ex. 2, at 7-12; *Telescope Media Group* Opp. to Mot. to Dismiss 1-5, Ex. 3, 23-26.

- Claims that a law prohibiting a business from discriminating against customers while offering wedding services violates the compelled-speech doctrine. *Compare Masterpiece Cakeshop* Pets.' Br., Ex. 6, at 25-29 with *Telescope Media Group* Mem. In Supp. of P.I., Ex. 2, at 12-20; *Telescope Media Group* Opp. to Mot. to Dismiss, Ex. 3, at 26-28.

- Allegations that the state antidiscrimination law and its application to the wedding service provider constitutes content- and viewpoint-based discrimination. *Compare Masterpiece Cakeshop* Pets.' Br., Ex. 6, at 35-37 with *Telescope Media Group* Mem. In Supp. of P.I., Ex. 2., at 21-24; *Telescope Media Group* Opp. to Mot. to Dismiss, Ex. 3, at 28-29.

- Arguments that the state antidiscrimination law violates the Free Exercise clause because it has not been neutrally or generally applied, or in the alternative, under a so-called "hybrid" claim. *Compare Masterpiece Cakeshop* Pets.' Br., Ex. 6, at 38-48 with *Telescope Media Group* Mem. In Supp. of P.I., Ex. 2, at 26-29; *Telescope Media Group* Opp. to Mot. to Dismiss, Ex. 3, at 32-35, and

- Claims that the state antidiscrimination law does pass the required scrutiny. *Compare Masterpiece Cakeshop* Pets.' Br., Ex. 6, at 49-61 with *Telescope Media Group* Mem. In Supp. of P.I., Ex. 2, at 31-33; *Telescope Media Group* Opp. to Mot. to Dismiss, Ex. 3, at 42-43.

Given these similarities, the United States Supreme Court's decision is very likely to address many of the legal questions raised by this case.[1] As such, it is in the interests of judicial economy that this Court have the benefit of the United States Supreme Court decision *before* deciding the constitutional questions raised in this case. Failure to do so raises the specter that the Court would have to twice adjudicate the current appeal, and that the parties would therefore have to twice brief and argue the same matter.

Furthermore, Appellants litigation of this matter reveals that there is not an urgent need for a disposition of the case. Appellants filed the case on December 6, 2016, but did not serve it at that time. *Telescope Media Group et al. v. Lindsey et al.*, No. 16-cv-4094 (JRT/LIB), Doc. 1. Appellants filed an Amended Complaint and Motion for Preliminary Injunction on January 13, 2017. *Telescope Media Group et al. v. Lindsey et al.*, No. 16-cv-4094 (JRT/LIB), Doc. 13. However, Defendants were not served until January 18, 2017. *Telescope Media Group et al. v. Lindsey et al.*, No. 16-cv-4094 (JRT/LIB), Doc. 28-29. A hearing was not held until May 26, 2017. When a decision issued on September 20, 2017, Appellants waited the full 30 days before filing an Appeal. *Telescope Media Group et al. v.*

[1] Appellants also assert Equal Protection and Due Process claims in this case. As the district court's analysis shows, these are largely derivative of the First Amendment claims. *Telescope Media Group et al. v. Lindsey et al.*, No. 16-cv-4094 (JRT/LIB), Doc. 53, attached as Ex. 7, at 55-62.

Lindsey et al., No. 16-cv-4094 (JRT/LIB), Doc. 55. Appellants now seek a 30 day extension of their time to submit an opening brief. App.'s Mot. for Ext. at 2.

Appellants have indicated they oppose this motion. However, staying the case to ensure the Court and parties have the benefit of the United States Supreme Court review in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* best allows a fair and just determination of this matter.

Dated: November 15, 2017

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

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ATTORNEYS FOR APPELLEES

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because this motion contains 1,567 words, excluding the parts exempted under Fed. R. App. P. 32(f).

2. This motion complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in a 14-point proportionally spaced Times New Roman typeface using Microsoft Word 2010.

3. All required privacy redactions have been made pursuant to 8th Cir. R. 25A(i).

4. Paper copies are not required for this motion.

5. This motion has been scanned and is free of viruses.

Date: November 15, 2017

s/Alethea M. Huyser
ALETHEA M. HUYSER

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2017, a true and accurate copy of the foregoing was electronically filed with the Court using the CM/ECF system, which will send notification of such filing to the following:

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No. 17-3352

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Telescope Media Group, Carl Larsen, and Angel Larson,

Appellants,

vs.

Kevin Lindsey, and Lori Swanson

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

AFFIDAVIT OF ALETHEA M. HUYSER IN SUPPORT OF APPELLEES' MOTION TO STAY APPEAL

STATE OF MINNESOTA)
) ss
COUNTY OF RAMSEY)

I, Alethea M. Huyser, being first duly sworn, deposes and says as follows:

1. I am the Assistant Solicitor General for the State of Minnesota, appearing on behalf of Appellees in this matter.

2. In support of Appellees' Motion To Stay Appeal Pending United States Supreme Court Decision In Related Case, I submit a true and correct copy of the following documents:

A. Attached as Exhibit 1, a copy of Plaintiffs-Appellants' Amended Complaint filed in *Telescope Media Group et al. v. Lindsey et al.*, No. 16-cv-4094 (JRT/LIB) as Document 13.

B. Attached as Exhibit 2, a copy of Plaintiffs-Appellants' Memorandum In Support of Plaintiffs' Motion for Preliminary Injunction filed in *Telescope Media Group et al. v. Lindsey et al.*, No. 16-cv-4094 (JRT/LIB) as Document 16.

C. Attached as Exhibit 3, a copy of Plaintiffs-Appellants' Opposition to Defendants' Motion to Dismiss filed in *Telescope Media Group et al. v. Lindsey et al.*, No. 16-cv-4094 (JRT/LIB) as Document 40.

D. Attached as Exhibit 4, a copy of Plaintiffs-Appellants' Statement of the Issues filed with this Court on November 13, 2017 as Entry ID No. 4600080.

E. Attached as Exhibit 5, a copy of Plaintiffs-Appellants' Motion for Extension of Time To File Opening Brief filed with this Court on November 13, 2017 as Entry ID No. 4599987.

F. Attached as Exhibit 6, a copy of Brief of Petitioners, filed in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, No. 16-111 (U.S. filed July 22, 2016).

G. Attached as Exhibit 7, a copy of the Memorandum Opinion and Order filed in *Telescope Media Group et al. v. Lindsey et al.*, No. 16-cv-4094 (JRT/LIB) as Document 53.

Further your affiant sayeth not.

s/Alethea M. Huyser
ALETHEA M. HUYSER

Subscribed and sworn to before me this
15th day of November, 2017.

Pamela J Hewitt
NOTARY PUBLIC

PAMELA JEAN HEWITT
NOTARY PUBLIC
MINNESOTA
My Commission Expires Jan. 31, 2022

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** **FIRST AMENDED VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. Carl Larsen and Angel Larsen are the owners and operators of Telescope Media Group ("TMG"), a company that tells stories through film and media production.[1]

2. The Larsens are Christians who believe that God has called them to use their talents and their company to create media productions that honor God.

3. The Larsens are deeply concerned that American culture is increasingly turning away from the historic, biblically-orthodox definition of marriage as a lifelong union of one man and one woman, and that more and more people are accepting the view that same-sex marriage is equivalent to one-man, one-woman marriage.

4. Because of their religious beliefs, and their belief in the power of film and media production to change hearts and minds, the Larsens want to use their talents and the expressive platform of

[1] For simplicity's sake, this Complaint refers to all Plaintiffs collectively as "the Larsens" whenever possible.

EXHIBIT 1

TMG to celebrate and promote God's design for marriage as a lifelong union of one man and one woman.

5. Specifically, the Larsens desire to counteract the current cultural narrative undermining the historic, biblically-orthodox definition of marriage by using their media production and filmmaking talents to tell stories of marriages between one man and one woman that magnify and honor God's design and purpose for marriage.

6. The Larsens would violate their religious beliefs about marriage by using their media production and filmmaking talents to produce a video promoting or communicating the idea that marriage can exist between anyone but one man and one woman.

7. But Minnesota law forces the Larsens to produce videos promoting a conception of marriage that directly contradicts their religious beliefs if they produce videos promoting marriages between one man and one woman.

8. Defendant Kevin Lindsey and those under his direction at the Minnesota Department of Human Rights, have repeatedly stated that private businesses violate the Minnesota Human Rights Act (Minnesota Statutes Chapter 363) if they decline to create expressive wedding-related services celebrating same sex weddings.

9. According to Commissioner Lindsey and his agents at the Minnesota Department of Human Rights, Minnesota law requires business owners, like the Larsens who produce videos telling the story of marriages between one man and one woman, to also produce videos celebrating marriages between two men or two women, and to contract in a way to celebrate these marriages. *See* Minn. Stat. Ann. § 363A.11(1) and § 363A.17(3).

10. Commissioner Lindsey investigates charges that a business has violated the Minnesota Human Rights Act, and, if he finds probable cause, has the matter litigated against the business, usually by Attorney General Swanson and her attorneys.

11. Commissioner Lindsey may also himself initiate a charge of discrimination whenever he has "reason to believe that a person is engaging in an unfair discriminatory practice." Minn. Stat. Ann. § 363A.28(2).

12. If the Larsens were to convey their desired messages about marriage, and decline to convey messages that contradict their religious views, they would face costly and onerous investigations and prosecutions by Commissioner Lindsey and Attorney General Swanson, and their agents, that could result in the payment of a civil penalty to the state, as well as treble compensatory damages and punitive damages up to $25,000 to the aggrieved party. Minn. Stat. Ann. § 363A.29(4).

13. In addition, if the State finds the Plaintiffs liable for discrimination under Minn. Stat. Ann. § 363A.11(1), they "shall be guilty of a misdemeanor," a criminal offense. Minn. Stat. Ann. § 363A.30(4).

14. Under Minnesota law, a misdemeanor is punishable by a fine of up to $1,000, up to 90 days in jail, or both. Minn. Stat. Ann. § 609.02(3).

15. Thus, solely because of Minnesota law, the Larsens are refraining from exercising their First Amendment right to publicly promote their cinematic, story-telling services for weddings and to film and tell stories that promote and magnify the historic, biblically-orthodox definition of marriage as a union between one man and one woman.

16. To restore their constitutional freedoms, the Larsens ask this Court to enjoin Defendants from applying Minnesota Statutes Annotated §363A.11(1) and §363A.17(3) to their expressive activity, and to declare that those provisions violate their First and Fourteenth Amendment rights.

JURISDICTION AND VENUE

17. This civil rights action raises federal questions under the United States Constitution, particularly the First and Fourteenth Amendments, and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

18. This Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343.

19. This Court has authority to award the requested declaratory relief under 28 U.S.C. §§ 2201-02 and Federal Rule of Civil Procedure 57; the requested injunctive relief under 28 U.S.C. § 1343 and Federal Rule of Civil Procedure 65; and costs and attorneys' fees under 42 U.S.C. § 1988.

20. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because all events giving rise to the claims detailed here occurred within the District of Minnesota and all Defendants reside in the District of Minnesota.

IDENTIFICATION OF PLAINTIFFS

21. Plaintiffs Carl Larsen and Angel Larsen are Christians who base their beliefs on the Bible.

22. Carl Larsen and Angel Larsen are married to each other. They are both residents of the State of Minnesota and citizens of the United States of America.

23. Both of them are the founders and owners of Telescope Media Group, Inc.

24. Telescope Media Group, Inc. is a for-profit corporation organized under Minnesota law.

25. TMG's principal place of business is located in Minnesota.

IDENTIFICATION OF DEFENDANTS

26. Kevin Lindsey is the Commissioner of the Minnesota Department of Human Rights, as established by Minn. Stat. Ann. § 363A.05(1) and granted powers under Minn. Stat. Ann. § 363A.06, including the authority to "issue complaints, receive and investigate charges alleging

unfair discriminatory practices, and determine whether or not probable cause exists for hearing." Minn. Stat. Ann. § 363A.06(8).

27. Commissioner Lindsay may also "issue a charge" for a perceived violation of the Minnesota Human Rights Act without having received a charge from an aggrieved party. Minn. Stat. Ann. § 363A.28(2).

28. Commissioner Lindsey is named as a defendant in his official capacity.

29. Lori Swanson is the Attorney General of Minnesota. Attorney General Swanson is the attorney for the Minnesota Department of Human Rights. Minn. Stat. Ann. § 363A.32(1).

30. Attorney General Swanson is named as a defendant in her official capacity.

31. The Defendants reside in the District of Minnesota.

STATEMENT OF FACTS

MHRA's Provisions Compelling Speech

32. Minnesota's Human Rights Act ("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. Ann. § 363A.11(1).

33. The MHRA defines a "place of public accommodation" as "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." Minn. Stat. Ann. § 363A.03(34).

34. The MHRA also makes it illegal for businesses "engaged in a trade or business or in the provision of a service" to "intentionally refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person's

race, national origin, color, sex, sexual orientation, or disability, unless the alleged refusal or discrimination is because of a legitimate business purpose." Minn. Stat. Ann. § 363A.17(3).

35. Minnesota statute § 363A.17(3) provides individualized exemptions from prohibited forms of discrimination for "legitimate business purpose[s]."

36. The MHRA does not define "legitimate business purpose."

37. The MHRA does not include any guidelines or criteria for Defendants to abide by in applying the "legitimate business purpose" exemption.

38. The MHRA also contains several other pertinent exemptions.

39. For example, Minnesota Statute Annotated § 363A.26 states that nothing in the MHRA, including § 363A.11(1) and § 363A.17(3), prohibits any "religious association, religious corporation, or religious society that is not organized for private profit" from "taking any action with respect to education, employment, housing and real property, or use of facilities" in "matters relating to sexual orientation." Minn. Stat. Ann. § 363A.26.

40. In addition, Minnesota statute § 363A.24 states that § 363A.11 as it relates to sex "shall not apply to such facilities as restrooms, locker rooms, and other similar places."

41. Minnesota statute § 363A.24 further states that the provisions of § 363A.11 "do not apply to employees or volunteers of a nonpublic service organization whose primary function is providing occasional services to minors, such as youth sports organizations, scouting organizations, boys' or girls' clubs, programs providing friends, counselors, or role models for minors, youth theater, dance, music or artistic organizations, agricultural organizations for minors, and other youth organizations, with respect to qualifications based on sexual orientation."

42. If Commissioner Lindsey or his agents become aware of an alleged violation of the MHRA, they will investigate the alleged violation.

43. Commissioner Lindsey has the authority to use Department officials as "testers" to investigate charges of discrimination.

44. These "testers" present themselves to the business as prospective clients to test whether the business is violating the law.

45. Defendant Lindsey used a tester to investigate a charge of sexual orientation discrimination against a wedding venue that had allegedly declined to host a same-sex wedding.

46. The tester posed as part of a same-sex couple seeking services for their wedding.

47. Defendants relied heavily on the interaction between the tester and the business owner in determining there was probable cause to find that the business violated the MHRA.

48. If Defendants conclude from their investigation that a business has violated the MHRA, Defendants will use their authority under MHRA to prosecute the violation.

49. The Commissioner's power under the MHRA includes the ability to investigate a charge alleging that an individual or business engaged in illegal discrimination under the Minnesota Human Rights Act. Minn. Stat. Ann. § 363.06(8).

50. The Commissioner may issue a charge sua sponte without having received a charge of discrimination from a third party. Minn. Stat. Ann. § 363A.28(2) ("Whenever the commissioner has reason to believe that a person is engaging in an unfair discriminatory practice, the commissioner may issue a charge stating in statutory language an alleged violation of subdivision 10 and sections 363A.08 to 363A.19.").

51. The Commissioner's power under the MHRA includes the ability to determine whether probable cause exists for a charge of discrimination. Minn. Stat. Ann. § 363.06(8).

52. The Commissioner's power under the MHRA includes the ability to subject those accused to administrative hearings regarding charges of discrimination. Minn. Stat. Ann. § 363A.06(9); Minn. Stat. Ann. § 363A.29(1).

53. The Commissioner's power under the MHRA includes the ability to issue subpoenas when evaluating charges of discrimination. Minn. Stat. Ann. § 363A.06(9).

54. The Commissioner's power under the MHRA includes the ability to compel mediation regarding charges of discrimination. Minn. Stat. Ann. § 363A.06(10).

55. The Commissioner's power under the MHRA also includes the ability to issue notices of a right to sue to those alleging a violation of the MHRA. Minn. Stat. Ann. § 363A.28(6).

56. The Commissioner's power under the MHRA includes the ability to file a complaint in state district court to determine whether a business or public accommodation engaged in a practice that violates the MHRA. Minn. Stat. Ann. § 363A.33(1).

57. If Commissioner Lindsey determines to sue a business for discrimination, he turns the case over to Attorney General Swanson and her agents, who then litigate the discrimination case against the business. Minn. Stat. Ann. § 363A.32.

58. If the State finds a business liable for discrimination under Minn. Stat. Ann. § 363A.11(1), they "shall be guilty of a misdemeanor," a criminal offense. Minn. Stat. Ann. § 363A.30(4).

59. Under Minnesota law, a misdemeanor is punishable by a fine of up to $1,000, up to 90 days in jail, or both. Minn. Stat. Ann. § 609.02(3).

Defendants Equate Opposing Same-Sex Marriage with Sexual Orientation Discrimination

60. Defendants interpret the MHRA's prohibition on sexual orientation discrimination as prohibiting businesses from declining to provide services celebrating same-sex marriage because of the business owner's political, moral, social, or religious objections to same-sex marriage.

61. The website of the Minnesota Department of Human Rights, in a section dealing with "Minnesota's Same-Sex Marriage Law," which went into effect August 1, 2013, states in part:

> The law does not exempt individuals, businesses, nonprofits, or the secular business activities of religious entities from non-discrimination laws based on religious beliefs regarding same-sex marriage.
>
> Therefore, a business that provides wedding services such as cake decorating, wedding planning or catering services may not deny services to a same-sex couple based on their sexual orientation.
>
> To do so would violate protections for sexual orientation laid out in the Minnesota Human Rights Act. The individuals denied services could file a claim with the Minnesota Department of Human Rights against the entity that discriminated against them.

MINNESOTA DEP'T OF HUMAN RIGHTS, *Minnesota's Same-Sex Marriage Law*, https://mn.gov/mdhr/yourrights/who-is-protected/sexual-orientation/same-sex-marriage/ (last visited Jan. 10, 2017).

62. On June 28, 2013, the Minnesota Department of Human Rights issued a press release entitled, "MDHR Offers Toolkit on Minnesota's New Same Sex Marriage Law." The press release states in part:

> However, the law does not exempt individuals, businesses, nonprofits or the secular business activities of religious entities from non-discrimination laws based on religious beliefs regarding same-sex marriage. Therefore, a business that provides wedding services such as cake decorating, wedding planning or catering services may not deny services to a same-sex couple based on their sexual orientation.

MINNESOTA DEP'T OF HUMAN RIGHTS, *MDHR Offers Toolkit on Minnesota's New Same Sex Marriage Law*, http://mn.gov/mdhr/news-community/news-releases/news-releases.jsp?id=1061-242752 (last visited Jan. 10, 2017).

63. The Minnesota Department of Human Rights publishes on its website, "Public Accommodations FAQs," which state in part:

> **Can a business owner refuse to provide services to me for my same-sex wedding?**

> No. Denying commercial activity or refusing to enter into a commercial contract with someone on the basis of their sexual orientation has been against the law in Minnesota for more than 20 years under the Minnesota Human Rights Act. A business that provides wedding services such as cake decorating, wedding planning or services may not deny its services to a same-sex couple. Individuals denied any of the above services can file a charge with the Minnesota Department of Human Rights.

MINNESOTA DEP'T OF HUMAN RIGHTS, *Public Accommodations FAQs*, https://mn.gov/mdhr/yourrights/what-is-protected/public-accomodations/pubaccom-faq.jsp (last visited Jan. 10, 2017).

64. On its YouTube channel, https://www.youtube.com/user/mnhumanrights, the Minnesota Department of Human Rights published a video of Commissioner Lindsey speaking about Minnesota law and same-sex marriage. In the video, https://www.youtube.com/watch?v=rVoyfrN6DMM, Commissioner Lindsey says:

> On May 14, 2013, Governor Dayton signed a bill into law legalizing same sex marriage in the State of Minnesota. What that means is that beginning on August 1 [2013], when the law goes into effect, two individuals of the same gender can become lawfully wedded in the State of Minnesota.
>
> ….
>
> Let me take one more moment though and explain something else as it relates to some of the comments when we were going around the state having conversations with various Minnesotans about the impact of this potential new law. And that is this: It has been the case in the State of Minnesota since 1993, under Minnesota law, to prohibit discrimination on the basis of sexual orientation. So that means that businesses that are engaged in commercial enterprise, such as cake making, photography, uh, wedding hall planning, they cannot discriminate against an individual on the basis of their sexual orientation. So, that we're all clear, nothing has changed as it relates to those prohibitions under the law. Denying commercial activity, or denying entering into a commercial contract with someone on the basis of their sexual orientation has been against the law and has been prohibited in Minnesota since 1993, and it continues going forward…. (emphasis added).

Kevin Lindsey, *Commissioner Lindsey on Same Sex Marriage*, YOUTUBE (May 14, 2013), https://www.youtube.com/watch?v=rVoyfrN6DMM.

65. Defendants have publicly taken this same position in official proceedings.

66. On August 22, 2014, the Minnesota Department of Human Rights announced a settlement against a "Little Falls wedding venue that had refused to rent to [a same sex couple] a few months earlier." The name of the company sued by the Department was Rice Creek Hunting and Recreation, Inc.

67. This case was the "Minnesota Department of Human Rights' first same-sex wedding case involving discrimination in public accommodation based on sexual orientation since same-sex marriage was legalized on Aug. 1, 2013," according to the press release issued by the Minnesota Department of Human Rights. MINNESOTA DEP'T OF HUMAN RIGHTS, *MDHR Negotiates Settlement Agreement with Same-Sex Couple, Wedding Venue That Denied Service*, http://mn.gov/mdhr/news-community/case-histories/case-spotlight/?id=1061-242750 (last visited Jan. 10, 2017).

68. Commissioner Lindsey stated that the case "serves as a reminder that businesses may not deny services based on a person's sexual orientation, . . . which is prohibited by the Minnesota Human Rights Act," according to the press release.

69. The Minnesota Department of Human Rights also stated in that press release the following:

> While the same-sex law passed by the Legislature in 2013 provides specific exemptions for religious entities from taking part in the solemnization of same-sex marriages, it does not exempt individuals, businesses, nonprofits, or the secular business activities of religious entities from non-discrimination laws based on religious beliefs regarding same-sex marriage. (emphasis added)

70. The Minnesota Department of Human Rights used a tester in this case who pretended to be seeking a venue for a same-sex wedding.

71. According to the press release referenced above, "[a]s part of the Minnesota Human Rights investigation, the Department posed as a potential customer. The conversation between the

hunting lodge representative and the test caller was very similar to [the complainant's] conversation."

Carl and Angel Larsen and Their Faith

72. Carl and Angel Larsen are Bible-believing Christians who live in St. Cloud, Minnesota.

73. The Larsen's religious beliefs are central to their identity, their understanding of existence, and their conception of their personal dignity and autonomy.

74. As Christians, the Larsens believe that their lives are not their own, but that their lives belong to God (1 Corinthians 6:19-20).

75. The Larsens believe that everything they do—personally and professionally—should be done in a manner that glorifies God. (1 Corinthians 10:31; 2 Corinthians 5:15; Colossians 3:17; 1 Peter 4:11.)

76. The Larsens believe that one day they will give an account to God regarding the choices they made in life, both good and bad. (2 Corinthians 5:10; Romans 14:12.)

77. The Larsens believe that God instructs Christians to steward the gifts He has given them in a way that glorifies and honors Him. (1 Peter 4:10-11.)

78. Therefore, the Larsens believe that they must use the creative talents God has given to them in a manner that honors God and that they may not use them in a way that dishonors God.

Telescope Media Group and its Media Production

79. The Larsens are the sole owners of TMG, a company they started in 2008 and formally incorporated in Minnesota on November 13, 2012.

80. The Larsens offer a wide variety of video and media production related services to the public, including live-event production, commercials, short films, short documentaries, audio/visual messages in various formats, motion graphics, and more.

81. As a business in Minnesota that offers its services to the general public, TMG is a "place of public accommodation" subject to MHRA, Minn. Stat. Ann. § 363A.03(34), and specifically to § 363A.11(1).

82. As a business that is in "engaged in a trade or business or in the provision of a service," and that enters into contracts with its clients to collaboratively create video productions, TMG is also subject to Minn. Stat. Ann. § 363A.17(3), which governs discrimination in contracts.

83. As stated on its website, "Telescope Media Group exists to glorify God through top quality media production." *See* TELESCOPE MEDIA GROUP, https://telescopemediagroup.net/about/ (last visited Jan. 10, 2017).

84. As the Larsens explain on TMG's website, they decided to use the word "Telescope" in their company's name because of Christian theologian John Piper's observation that "God created the universe to magnify His glory the way a telescope magnifies stars."

85. The Larsens proclaim on TMG's website that their aim is "to make God look more like He really is through our lives, business, and actions."

86. The Larsens' specialties are extensive and varied.

87. Carl Larsen is the chief storyteller of TMG and of its creations, and plays roles such as artistic director, producer, cinematographer, animator, scriptwriter, and editor.

88. The Larsens use their unique vision and skills to tell stories in effective, appealing, and impactful ways.

89. To accomplish this mission, the Larsens work closely with their clients to fully understand them, their goals, and their reasons for requesting the Larsens' creative services so that they can tell stories and convey messages in their productions that satisfy their clients while also honoring their religious beliefs.

90. Persons and entities that seek the Larsens' services often have only a very basic idea of the video production they would like them to produce.

91. While the video productions the Larsens produce are often collaborative endeavors between the Larsens and their clients, their clients rely heavily on Carl's unique skill to identify and tell compelling stories through video and film productions and give him substantial freedom to craft and tell that story.

92. Because the Larsens believe that every human is made in the image of God and is loved by God, they gladly work with all people—regardless of their race, sexual orientation, sex, religious beliefs, or any other classification. (Gen. 1:27.)

93. The Larsens simply desire to use their unique storytelling and promotional talents to convey messages that promote aspects of their sincerely-held religious beliefs, or that at least are not inconsistent with them.

94. It is standard practice for the owners of video and film production companies to decline to produce videos that contain or promote messages that the owners do not want to support or that violate or compromise their beliefs in some way.

95. Unless the Larsens believe they can use their story-telling talents and editorial control to convey only messages they are comfortable conveying given their religious beliefs, they will respectfully decline requests for their creative services.

96. Among other things, the Larsens will decline any request to design and create media productions that: contradict biblical truth; promote sexual immorality; support the destruction of unborn children; promote racism or racial division; incite violence; degrade women; or promote any conception of marriage other than as a lifelong institution between one man and one woman.

97. If the Larsens determine that accepting a project would require them to promote messages that contradict or are inconsistent with their beliefs, they endeavor to refer the prospective client to another artistic specialist who can assist them.

98. The Larsens receive more requests than they have the capacity to complete, given their desired size, so even when they are not asked to tell a story that violates their beliefs, they decline to tell certain stories simply so they have the time to create and communicate stories they find more interesting, inspiring, or a better creative fit.

99. Some of the Larsens' work involves storytelling for live event productions.

100. Unlike stationary security cameras capturing footage reflecting events that occurred, the Larsens influence the overarching story of the events, the story portrayed by the events, the media surrounding the events, and how the events are remembered.

101. For example, in designing and creating engaging media to promote events, the Larsens express the message, takeaway, or story that people should seek and find when they attend the events.

102. The Larsens also frequently design and create media content—such as short films—for use at the live events themselves, thereby designing and telling the expressive narrative and message that captivates and moves the audience.

103. At many live events, the Larsens also choose which of the many facets of the event to emphasize on the large screens at the venue and in live streaming to a broader audience through real-time editorial judgments about the focus, scope, and positioning of their cameras and the camera feeds to use.

104. After events, the Larsens often have an opportunity to edit, design and create media content telling a story about the event, choosing which aspects of the events to emphasize and exclude so that they convey the story in a compelling way that is consistent with their religious beliefs.

105. In reviewing footage after events to compose media about the event, the Larsens make numerous editorial judgments from a vast amount of content—sometimes captured from over a dozen videographers simultaneously—to convey their intended message.

106. The Larsens' editorial judgments in crafting and conveying a story often include decisions about what events to take on, what video content to use, what audio content to use, what text to use in a video, the order in which to present content, whether to use voiceovers, what music—if any—to use as an audio track, whether to include animation, whether to include visual effects, whether to use still shots within a video, lighting and color adjustments, and audio mixing and mastering.

107. Each of these decisions affects the story that is produced.

108. Outside of the live-events context, some of the Larsens' work involves promotional media for companies and organizations.

109. Consistent with its mission, the Larsens use their creative expertise and vision to promote messages that promote, or at least are not inconsistent with, their religious beliefs through their multimedia content.

110. For example, the Larsens have created original content for Billy Graham Evangelistic Association, Desiring God (a ministry of John Piper), Secret Church (a ministry of David Platt), Lifelight (the largest outdoor Christian music festival in the nation), Multiply Movement, and other Christian ministries.

111. In addition to creating original media content expressing certain messages, the Larsens sometimes promote that media online and through other mediums.

112. The Larsens promote their original media content online and through other mediums to reach and impact the broadest number of people possible with their message and the stories they tell.

The Larsens Desire to Tell Compelling Stories Promoting God's Design for Marriage

113. The Larsens are saddened and concerned about American culture's current views about marriage.

114. The Larsens believe that many see marriage as a punch line for jokes, a means for personal gratification, an arrangement of convenience, or a method of achieving social status.

115. The Larsens are also deeply troubled by the Supreme Court's *Obergefell v. Hodges* decision, which held that there is a constitutional right to same-sex marriage.

116. The Larsens disagree with the view and message that same-sex marriage is morally equivalent to the historic, biblically-orthodox definition of marriage as between one man and one woman.

117. This view and message about marriage is prevalent in our society and culture today.

118. This view and message about marriage is being promoted by powerful cultural and political forces, including federal governmental officials (up to and including the president), Fortune 500 companies, and media production companies through movies, commercials, short films, and more.

119. The Larsens believe that marriage is a God-ordained, lifelong, sacrificial covenant between one man and one woman with profound spiritual and societal implications.

120. Carl Larsen has even officiated two marriages because of his passion to see strong marriages form and flourish.

121. Because of their passion for strong marriages, Carl and Angel also provided marriage counseling and mentorship to the couples Carl married, and regularly provide marriage advice and mentoring to other married couples as well.

122. The Larsens desire to counteract the current powerful cultural narrative undermining the historic, biblically-orthodox definition of marriage as between one man and one woman by magnifying God's beautiful design and purpose for marriage through their creative storytelling and promotional talents.

123. Films and other media productions are an important medium for communicating ideas.

124. Historically, films and other media productions have been used by their creators to challenge accepted notions of politics, religion, and morality.

125. The Larsens know the power of film — of great story-telling — to change hearts and minds, and they want to impact religious, social, and cultural views about marriage by creating compelling stories celebrating God's design for the institution.

126. In all of its film and media productions, the Larsens use their clients and their events as the raw material to tell the stories and express the messages the Larsens seek to convey.

127. The Larsens cannot convey the message they desire in their film productions if they do not have the freedom to choose the underlying subject matter depicted in the film production.

128. In other words, the Larsens' clients and events are akin to the paint for a portrait artist and the clay for a potter—each affects the creative output and is necessary for it, but the artist crafts the final masterpiece.

129. Thus, to convey its religiously-motivated messages about marriage, the Larsens wish to, and are ready to, use their filmmaking skills to highlight and portray healthy stories of sacrificial

love and commitment between a man and a woman to counter current cultural narratives about marriage with which they disagree.

130. The Larsens desire to use their filmmaking skills to capture the background stories of the couples' love leading to commitment, the joy of the couple and the sacredness of their sacrificial vows at the altar, and even the following chapters of the couples' lives to convey a message about marriage that brings hope and clarity to society about God's design and purpose for marriage.

131. When an engaged couple asks the Larsens to help them celebrate their marriage, the Larsens want to tell a story of their love and commitment that changes hearts and minds.

132. The Larsens wish to do so, for example, by directing and compiling a cinematic piece for use at the wedding that tells a story of love, commitment, and vision for the future that encourages the audience to see marriage as the beautiful covenant God designed it to be.

133. The Larsens also plan to perform on-site editing to weave a story using the perfect clips of the wedding ceremony video, captured audio, and music and then show that film at the wedding reception to enhance the wedding celebration and ensure that those in attendance go home dwelling on the aspects of marriage that the Larsens wish to proclaim and reinforce.

134. The Larsens also desire to use their artistic vision and talents to capture each aspect of the wedding that furthers their desired narrative and then apply their editing and storytelling skills to create a lengthier wedding film that will strengthen the subject couple's marriage and affect the viewers' conception of marriage.

135. The Larsens also desire to not just create these cinematic stories proclaiming God's design for marriage for the couple getting married and those celebrating with them, but to also use their marketing talents to promote these films to a broader audience to achieve maximum cultural impact.

136. For example, the Larsens will publish the wedding videos they create on the TMG website and through their other internet mediums, like Twitter and Facebook, to ensure that the general public can see the Larsens' marriage-related productions.

137. These are just a few examples of the Larsens' plan to affect the cultural narrative regarding marriage.

138. Public promotion of the wedding videos as described in ¶¶ 135-36 will be mandatory in every wedding videography contract into which the Larsens enter.

139. Other than the public promotion of the wedding videos the Larsens produce, clients will be able to select one or more of the additional wedding-related services specified above.

140. The Larsens have produced a marriage story teaser video solely to provide the Court an example of the type of wedding films they desire to create.

141. A true and accurate copy of this marriage teaser story video is attached as Exhibit A to this Complaint.

142. The approximately 1:20 film is solely a teaser video.

143. The full cinematic film would be far longer and more comprehensive of the couple's relationship, story, and special day.

144. It is not financially feasible for the Larsens to tell stories about marriage with the frequency and quality they desire if they cannot charge for their work.

145. But the Larsens cannot offer their services to express their message about marriage in the manner described above because Minnesota has closed the marriage field to those with the Larsens' religious beliefs regarding marriage.

146. By requiring that the Larsens celebrate same-sex weddings if they celebrate weddings between one man and one woman, Minnesota denies to the Larsens the means to convey their

creative, religiously-motivated message about God's design for marriage and compels the Larsens to express the precise message they wish to counter and with which they disagree.

147. Given the nature of the wedding industry and the fact that weddings are typically not open to the general public, the Larsens would not have access to and be able to capture weddings if couples did not hire them for their weddings.

148. Not only would creating films celebrating a same-sex wedding express a message that Plaintiffs are unwilling to express, but it would also undercut the effectiveness of Plaintiffs' desired expression promoting marriage as a union between one man and one woman, harm Plaintiffs' reputation among their Christian clients and friends, and adversely impact Plaintiffs' ability to share additional biblical truths with others.

149. Plaintiffs understand that it is very common to analogize opposition to same-sex marriage to opposition to interracial marriage.

150. Plaintiffs abhor opposition to interracial marriage and would gladly use their video production skills to tell the story of an interracial marriage.

151. Plaintiffs reject any argument that the Bible bars interracial marriage.

152. Plaintiffs believe that interracial marriage is entirely consistent with the Bible because it teaches that all humans are created in the image of God and that all humans in all ethnic groups are descendants of two people – Adam and Eve. (Gen. 1:27, 5:1-3, Acts 17:26.)

153. Plaintiffs simply hold to the historic and biblically-orthodox view that marriage is between one man and one woman, and desire to avoid communicating a contradictory message.

The Larsens' Expression Is Being Chilled and Silenced by MHRA

154. Plaintiffs desire to immediately begin promoting the availability of their cinematic, story-telling services for weddings, and to immediately start providing those services.

155. Specifically, Plaintiffs desire to announce their cinematic, story-telling services for weddings on TMG's website, at wedding expos—where vendors promote their wedding services to future brides, grooms, wedding advisors and others, and through other channels, such as popular wedding-planning websites like The Knot and Wedding Wire.

156. For example, the Larsens desire to participate in the St. Cloud annual wedding expo scheduled for January 15, 2017. But they are unable to plan, prepare for, or participate in this wedding expo until they know whether they can operate in the wedding industry in accordance with their religious beliefs. The Larsens have put their planning and preparation for this expo on hold because the MHRA makes illegal what they desire to do and say.

157. On their website and other promotional materials, Plaintiffs desire and intend to state that their religious beliefs require them to celebrate, promote, and tell the story of marriages between one man and one woman and prevent them from celebrating, promoting, and telling the story of any other type of marriage, including same-sex marriages.

158. Specifically, the Larsens desire to include the following statement on their website announcing their cinematic, story-telling services for weddings and on other promotional materials for their wedding services:

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

159. Plaintiffs also desire to immediately start filming and telling marriage stories that conform to their religious beliefs so that they can impact the culture with powerful and compelling stories celebrating God's design for marriage.

160. Plaintiffs are refraining from promoting and providing their cinematic, story-telling services for weddings in the manner stated above because the MHRA prohibits them from doing so.

161. Plaintiffs know that violating MHRA carries heavy penalties and is a mandatory misdemeanor—which is punishable by criminal fines and even jail time.

162. Plaintiffs are aware of the statements by Commissioner Lindsey and others on the website of the Minnesota Department of Human Rights and thus understand the Defendants stated intent to apply the MHRA to expressive wedding service providers like the Larsens, which would require them to create media promoting same-sex weddings if they do so for opposite-sex weddings.

163. The statements of Commissioner Lindsey and his agents that it is illegal for wedding vendors to decline to tell a positive message about a same-sex wedding inflicts stigma on Plaintiffs and their faith and denies them dignity as equal citizens.

164. The Plaintiffs are aware that Commissioner Lindsey uses testers, and has had testers pose as potential customers in relation to a wedding venue business that declined to rent its facilities for a same-sex wedding.

165. In light of MHRA, the severe penalties for violating it, the statements by the Defendants, the Defendants' power to file a charge sua sponte, and the Defendants use of testers, the Plaintiffs have refrained from promoting or providing their cinematic, story-telling services for weddings in any of the ways described above.

166. If Plaintiffs publicly promote their cinematic, story-telling services by communicating that they will only tell the stories of marriages between one man and one woman, and not those of same-sex marriages, they will be engaging in business practices that Defendants have categorically stated violate MHRA.

167. If Plaintiffs publicly promote their cinematic, story-telling services for weddings they will receive requests to provide those expressive services for same-sex weddings.

168. Pursuant to their religious beliefs and expressive purposes, Plaintiffs will decline those requests, which the Defendants have categorically stated violates MHRA.

169. In fact, on December 15, 2016, the Larsens received a request to produce a wedding video celebrating a wedding between two women in the Fall of 2017.

170. If the Larsens were presently offering their cinematic, story-telling services for weddings, they would desire to decline this request pursuant to their religious beliefs and expressive purposes, which Defendants have categorically stated would violate the MHRA.

171. The Larsens received this request to produce a wedding video celebrating a same-sex marriage even though they are not currently in the wedding industry nor promoting any wedding-related services.

172. If the Larsens were actively promoting their wedding services they would likely receive more such requests.

173. If not for MHRA and Defendants' interpretation and past enforcement of it, Plaintiffs would have already announced their cinematic, story-telling services for weddings on their website and through other channels and begun filming and telling the stories of marriages between one man and one woman.

174. If Plaintiffs obtain the relief requested in this Complaint, they will immediately begin promoting and providing their cinematic, story-telling services for weddings in the manner stated above.

175. Video production celebrating same-sex marriage is widely available from businesses in the State of Minnesota and across the nation.

176. For example, the online directory http://weddingequalitymn.com/ lists approximately 100 MN businesses under its "Photo/Video" category that are willing to tell the story of same-sex marriages through photographs or video productions.

177. Likewise, the online directory http://gayweddings.com lists approximately 40 MN businesses that are willing to create video productions celebrating same-sex marriages.

178. Other video production specialists offer cinematic, story-telling services for weddings that are similar to those the Larsens desire to offer.

179. For example, Anthony Begley Cinematography is listed on http://gayweddings.com as a company that serves Minnesota and that is happy to tell the stories of same-sex marriages through film.

180. On its website, http://anthonybegley.com/, Anthony Begley Cinematography describes its film services as "visual story telling" that "creat[es] powerful stories to last a lifetime." ANTHONY BEGLEY CINEMATOGRAPHY, http://anthonybegley.com/ (last visited Jan. 10, 2017).

181. Anthony Begley Cinematography's website states that "Cinematic Videography" is "a movie-like method to capture your wedding," and as part of its services offers a "Feature Wedding Film," a "Cinematic Wedding Highlight" film, and a "Wedding Teaser" film.

182. Accordingly, persons will be able to easily access video production services to promote and celebrate their same-sex marriages if Plaintiffs are permitted to follow their convictions by declining to promote same-sex marriages while promoting marriages between one man and one woman.

183. Defendants permit these other photography and video production businesses to advocate for and create expression celebrating same-sex marriages.

184. For example, in announcing their desire to provide video and photography services for same-sex marriages on http://weddingequalitymn.com/, Kay Michael Photography & Video states: "As ardent supporters of Minnesotans Unite, we are overjoyed that all loving couples in Minnesota are now free to marry." WEDDING EQUALITY MN, *Kay Michael Photograph & Video*, http://weddingequalitymn.com/businesses/kay-michael-photography-video/ (last visited Jan. 10, 2017).

185. Minnesotans Unite was the political organization that successfully advocated for the legalization of same-sex marriage in MN.

186. In announcing their video services for same-sex marriages on http://weddingequalitymn.com/, Vivid Eye Productions states: "We are overjoyed that ALL Minnesotans finally have the right to marry. Let us help you relive your wedding day over and over again by capturing every precious moment in beautiful HD." WEDDING EQUALITY MN, *Vivid Eye Productions*, http://weddingequalitymn.com/businesses/vivid-eye-productions/ (last visited Jan. 10, 2017).

187. As explained, MHRA is preventing Plaintiffs from celebrating and promoting their religious views about marriage in a similar manner as the businesses above.

188. Plaintiffs support the rights of these expressive businesses and their owners to express their beliefs and conduct their businesses in a way that promotes those beliefs and does not promote contrary beliefs. Plaintiffs simply wish to enjoy those same freedoms. Yet MHRA strips Plaintiffs of these freedoms. That is the foundational reason for this lawsuit – to restore Plaintiffs to an equal footing with other expressive business owners in regard to their right to express messages that are consistent with their beliefs, and to avoid expressing those messages that are not.

ALLEGATIONS OF LAW

189. Plaintiffs are subject to Minnesota laws, including Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3).

190. At all times relevant to this Complaint, each and all of the acts alleged here are attributable to Defendants, who acted under color of a statute, regulation, custom, or usage of the State of Minnesota.

191. The impact of chilling and deterring Plaintiffs Carl and Angel Larsen, and Telescope Media Group from exercising their constitutional rights constitutes imminent and irreparable harm to Plaintiffs.

192. Plaintiffs have no adequate or speedy remedy at law to correct or redress the deprivation of their rights under the United States Constitution by Defendants.

193. Unless the conduct of Defendants is enjoined, Plaintiffs will continue to suffer irreparable injury.

CAUSES OF ACTION

I. First Cause of Action: Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) Violate the First Amendment of the United States Constitution's Right to Free Speech.

194. Plaintiffs repeat and reallege each of the allegations contained in paragraphs 1-193 of this Complaint.

195. Plaintiffs express messages through their video productions.

196. The messages Plaintiffs express through their video productions are their own speech.

197. Plaintiffs intend, through their video productions, to promote and express the beauty of marriage as the exclusive union of one man and one woman.

198. Plaintiffs desire to tell the stories of marriages through their video productions to celebrate and promote their religious understanding of marriage as an institution between one man and one woman and as a fundamental building block of society.

199. It would violate Plaintiffs' religious beliefs and conflict with their message about marriage to force them to tell the story through film of any marriage that conflicts with their religious beliefs that marriage is between one man and one woman, such as a same-sex marriage.

200. Plaintiffs' production of films telling the stories of marriages between one man and one woman, and their decision to decline to produce films promoting any other conception of marriage, are protected by the First Amendment.

201. The First Amendment prevents the government from compelling people to create, express, support, or promote a message not of their own choosing or to speak when they would rather remain silent.

202. Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) require that if Plaintiffs express the message that marriage is and should be the union of one man and one woman through wedding video productions they must also express the contradictory message that marriage is the union of two people of the same sex.

203. Thus, Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) require Plaintiffs to engage in expression that they do not desire to convey—expression that violates their core religious beliefs—by requiring them to create films celebrating and promoting same-sex marriage.

204. If Plaintiffs begin producing films promoting marriages between one man and one woman, as they desire to do immediately, they will be subject to the severe penalties under Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3), up to and including 90 days in jail, for

declining to produce films celebrating and promoting a conception of marriage that violates their deeply held religious beliefs.

205. The First Amendment's Free Speech Clause also prohibits laws that regulate protected speech based on its content or viewpoint.

206. Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) are content based because they regulate speech about a handful of topics—specifically disability, race, color, creed, religion, disability, national origin, marital status, sexual orientation, and sex—while leaving unregulated speech on the virtually unlimited number of other topics not listed therein.

207. For example, Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) do not require a Democrat speech writer to draft a speech for a Republican because political affiliation is not a protected characteristic but sexual orientation is protected and Defendants' interpret its inclusion to require Plaintiffs to produce films telling stories that celebrate and promote same-sex marriages.

208. This is content-based discrimination forbidden by the First Amendment.

209. Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) are also viewpoint discriminatory.

210. Defendants enforce § 363A.11(1) and § 363A.17(3) in a viewpoint discriminatory manner at least in relation to the topic of marriage.

211. According to Defendants' interpretation and enforcement of § 363A.11(1) and § 363A.17(3), whether an expressive business may decline a commission based on its message depends solely on its view of same-sex marriage.

212. For example, expressive businesses that oppose same-sex marriage and decline an order based on its opposing message violate § 363A.11(1) and § 363A.17(3), whereas expressive

businesses that support same-sex marriage and decline an order based on its opposing message do not.

213. The fact that Defendants enforce § 363A.11(1) and § 363A.17(3) in a manner that requires businesses to express messages consistent with government orthodoxy about same-sex marriage, while allowing them to decline to express messages contrary to such orthodoxy, is rank content and viewpoint discrimination.

214. Minnesota Statutes Annotated § 363A.17(3) is additionally constitutionally infirm under the Free Speech Clause because its "legitimate business purpose" exception to prohibited forms of discrimination grants Defendants unbridled discretion to enforce it.

215. Section 363A.17(3) contains no guidelines to govern the decisions of the Defendants in applying and enforcing the "legitimate business purpose" exception to prohibited forms of discrimination, thereby permitting Defendants to use their unbounded discretion to punish disfavored speech and viewpoints.

216. Defendants have wielded this unbridled discretion to punish disfavored views concerning the topic of marriage.

217. For example, Defendants have categorically declared that an expressive business that declines to create speech promoting same-sex marriages based on a religious objection to such marriages is not acting with a "legitimate business purpose" and thus not exempt, yet that same business would be acting with a "legitimate business purpose" and thus exempt if it declined a same-sex marriage request because it did not have sufficient time or the requisite skill.

218. The requirements of Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) chill, deter, and restrict Plaintiffs' speech.

219. Absent their fear of prosecution under Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3), Plaintiffs would immediately announce and promote their entry into the wedding field and begin producing films expressing their beliefs and message about marriage.

220. Plaintiffs currently suffer the ongoing harm of self-censorship of their desired, protected speech, in order to avoid prosecution under Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3).

221. Because Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) violate Plaintiffs' free speech rights, they must further a compelling interest in a narrowly tailored way.

222. The application of Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) to force Plaintiffs to engage in unwanted expression does not further any legitimate, rational, substantial, or compelling interest.

223. Forcing Plaintiffs to promote marriage as the union of two people of the same sex if they promote marriage as the union of one man and one woman does not serve any interest in a narrowly tailored way.

224. Defendants have alternative, less restrictive means to achieve any legitimate interests rather than forcing Plaintiffs to abandon their First Amendment free speech rights.

225. Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) are also underinclusive because they provide numerous exemptions to several forms of prohibited discrimination, including the bar on sexual orientation discrimination.

226. Thus, as applied to Plaintiffs, Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) violate the Free Speech Clause of the First Amendment to the United States Constitution as incorporated and applied to the States through the Fourteenth Amendment.

227. WHEREFORE, Plaintiffs respectfully ask that the Court grant the relief specified in the Prayer for Relief.

II. Second Cause of Action: Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) Violate the First Amendment of the United States Constitution's Right to Expressive Association.

228. Plaintiffs repeat and reallege each of the allegations contained in paragraphs 1-193 of this Complaint.

229. The First Amendment protects the right of persons to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

230. The First Amendment bars the government from compelling persons to expressively associate with others in the process of creating and disseminating speech.

231. The First Amendment also prohibits the government from banning people from expressively associating with others in the process of creating and disseminating speech.

232. Plaintiffs engage in expressive association when they decide to accept a client and collaborate with them to use the client's unique story and wedding event as source material for Plaintiffs' production of films promoting and celebrating marriage as a union between one man and one woman.

233. Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) harm Plaintiffs' ability to promote their beliefs about religion and marriage by requiring them to either decline to associate with clients who share their expressive purpose of promoting marriages between one man and one woman or to willingly associate with clients who desire to promote a view of marriage that directly contradicts their own.

234. Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) requirement that Plaintiffs promote marriage as the union of two people of the same sex, if they promote marriage as the

union of a man and a woman, would significantly impair Plaintiffs' religious message about marriage.

235. The requirements of Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) chill, deter, and restrict Plaintiffs' expressive association.

236. Absent their fear of prosecution under Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3), Plaintiffs would immediately announce and promote their entry into the wedding field and begin associating with those who share their views about marriage to produce films expressing those views.

237. Plaintiffs currently suffer the ongoing harm of self-censorship of their desired, protected expressive association, in order to avoid prosecution under Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3).

238. Because Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) violate Plaintiffs' right to expressive association, they must further a compelling interest in a narrowly tailored way.

239. The application of Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) to force Plaintiffs to associate to express messages they do not want to express does not further any legitimate, rational, substantial, or compelling interest.

240. Forcing Plaintiffs to promote marriage as the union of two people of the same sex if they promote marriage as the union of one man and one woman does not serve any interest in a narrowly tailored way.

241. Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) are also underinclusive because they provide numerous exemptions to several forms of prohibited discrimination, including the bar on sexual orientation discrimination.

242. Defendants have alternative, less restrictive means to achieve any legitimate interests rather than forcing Plaintiffs to abandon their First Amendment right to expressive association.

243. Thus, as applied to Plaintiffs, Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) violate the Plaintiffs' right to expressive association protected by the Free Speech Clause of the First Amendment to the United States Constitution as incorporated and applied to the States through the Fourteenth Amendment.

244. WHEREFORE, Plaintiffs respectfully ask that the Court grant the relief specified in the Prayer for Relief.

III. Third Cause of Action: Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) Violate the First Amendment Right to Free Exercise of Religion.

245. Plaintiffs repeat and reallege each of the allegations contained in paragraphs 1-193 of this Complaint.

246. Plaintiffs sincerely held religious belief is that marriage is and ought to be only the union of one man and one woman.

247. Plaintiffs sincerely held religious belief is that to practice their religion they must use their creative talents to promote marriage as the union of one man and one woman and that they should do this through wedding cinematography.

248. Plaintiffs would violate their religious beliefs if they use their creative talents to promote the message that marriage is anything other than the union of one man and one woman.

249. Plaintiffs' religious beliefs about marriage, expression, and business practice are based on the Bible and Christian doctrine.

250. Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) are not operationally neutral or generally applicable and impose special disabilities on Plaintiffs due to their religious beliefs about marriage.

251. For example, in their application and enforcement of Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3), Defendants specifically target expressive business owners who believe, based on their religious beliefs, that marriage is between one man and one woman by forcing them to create expression promoting a conception of marriage that violates their beliefs.

252. However, Defendants allow those expressive business owners whose religion is consistent with same-sex marriage to own and operate an expressive business in the wedding industry without compelling them to promote messages about marriage that violate their beliefs.

253. This targeting of, and favoritism for, certain religious beliefs about marriage violates the Free Exercise Clause.

254. Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) also force Plaintiffs to choose between three unacceptable options: (1) decline to create custom expression celebrating same-sex wedding ceremonies because of their religious beliefs, and suffer investigation, prosecution, and criminal penalties as a result; (2) violate their religious beliefs by creating custom expression celebrating same-sex wedding ceremonies in order to comply with the law; or (3) withdraw from the marketplace their service of creating wedding videos and suffer artistic and dignity harm in order to stay true to their Biblical beliefs about the definition of marriage as one man and one woman, as well as being deprived of their ability to use their God-given talents to create custom expression promoting their religious views about marriage.

255. Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) do not force nonreligious persons and businesses to choose between these same options when they are faced with a request to promote messages that violate their beliefs.

256. Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3), as applied by Defendants, is also not neutral or generally applicable because it contains several categorical exemptions.

257. For example, one provision states that nothing in the MHRA, including § 363A.11(1) and § 363A.17(3), prohibits any "religious association, religious corporation, or religious society that is not organized for private profit" from "taking any action with respect to education, employment, housing and real property, or use of facilities" in "matters relating to sexual orientation." Minn. Stat. Ann. § 363A.26.

258. Another provision states that § 363A.11 as it relates to sex "shall not apply to such facilities as restrooms, locker rooms, and other similar places." Minn. Stat. Ann. § 363A.24.

259. The same provision states that the provisions of § 363A.11 "do not apply to employees or volunteers of a nonpublic service organization whose primary function is providing occasional services to minors, such as youth sports organizations, scouting organizations, boys' or girls' clubs, programs providing friends, counselors, or role models for minors, youth theater, dance, music or artistic organizations, agricultural organizations for minors, and other youth organizations, with respect to qualifications based on sexual orientation." Minn. Stat. Ann. § 363A.24.

260. In addition, Minnesota Statutes Annotated § 363A.17(3) provides an exemption from the discrimination it bans where the refusal to do business or to contract is "because of a legitimate business purpose."

261. Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3), as applied by Defendants, are not neutral or generally applicable because Defendants enforce it through a system of individualized exemptions under which they assess the reasons for an exemption and grant exemptions for nonreligious reasons but not for religious reasons.

262. Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3), as applied by Defendants, are not neutral or generally applicable because they contain the categorical exemptions listed above, yet Defendants refuse to grant a religious exemption to Plaintiffs.

263. Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) also violate Plaintiffs' free exercise rights under the hybrid rights doctrine because they implicate free exercise rights in conjunction with other constitutional protections, like the rights to free speech, expressive association, due process and equal protection.

264. Plaintiffs' compliance with their religious beliefs constitutes a religious exercise under the First Amendment.

265. Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) substantially burden Plaintiffs' religious exercise.

266. Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) impose severe coercive pressure, up to and including jail time, on Plaintiffs to change or violate their religious beliefs and chills and deters Plaintiffs' religious exercise by suppressing their religiously motivated messages.

267. The requirements of Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) chill, deter, and restrict Plaintiffs' free exercise of religion.

268. Absent their fear of prosecution under Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3), Plaintiffs would immediately announce and promote their entry into the wedding field and begin producing films expressing their beliefs and message about marriage, in accordance with their religious convictions.

269. Plaintiffs currently suffer the ongoing harm of self-censorship of their desired, protected free exercise rights in order to avoid prosecution under Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3).

270. Because Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) violate Plaintiffs' free exercise rights, they must further a compelling interest in a narrowly tailored way.

271. Defendants do not serve any legitimate, rational, substantial, or compelling interest in forcing Plaintiffs to violate their religious beliefs by creating videos that present same-sex weddings in a favorable light.

272. Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) are also underinclusive because they provide numerous exemptions to several forms of prohibited discrimination, including the bar on sexual orientation discrimination.

273. To achieve any legitimate interests that Defendants may assert, Defendants have many alternative, less restrictive mechanisms available.

274. Thus, the MHRA violates Plaintiffs' right to free exercise of religion under the First Amendment to the United States Constitution as incorporated and applied to the States through the Fourteenth Amendment.

275. WHEREFORE, Plaintiffs respectfully ask that the Court grant the relief specified in the Prayer for Relief.

IV. Fourth Cause of Action: Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) Impose Unconstitutional Conditions on Access to Minnesota's Marketplace.

276. Plaintiffs repeat and reallege each of the allegations contained in paragraphs 1-193 of this Complaint.

277. The First Amendment prohibits the government from conditioning a benefit on the relinquishment of a First Amendment right.

278. Through their interpretation and enforcement of Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3), Defendants condition Plaintiffs' ability to participate in the wedding service industry and produce wedding cinematography promoting marriage between one

man and one woman on the unconstitutional requirement that Plaintiffs must also produce wedding cinematography promoting marriages other than between one man and one woman.

279. Plaintiffs have the First Amendment right to choose the content of their expression, to promote the messages they desire to promote, to participate in the creation of the speech they deem desirable, to exercise their religion by promoting messages consistent with their religious beliefs, and to decline to promote messages contrary to their religious beliefs.

280. But Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) mandate that Plaintiffs create films promoting same-sex marriage, thereby unconstitutionally conditioning the receipt of an essential benefit—specifically, the right to make a living in the occupation of one's choice, the right to run a business, and the right to sell speech—on the willingness of Plaintiffs to surrender these First Amendment rights.

281. Thus, Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) violate the unconstitutional conditions doctrine.

282. WHEREFORE, Plaintiffs respectfully ask that the Court grant the relief specified in the Prayer for Relief.

V. Fifth Cause of Action: Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) Violate the Fourteenth Amendment Right to Equal Protection.

283. Plaintiffs repeat and reallege each of the allegations contained in paragraphs 1-193 of this Complaint.

284. Under the Equal Protection Clause, the government may not treat someone disparately as compared to similarly situated persons and businesses when such disparate treatment burdens a fundamental right.

285. Plaintiffs are for all relevant purposes similarly situated to other expressive businesses in Minnesota that provide marriage-related services that express messages about marriage.

286. Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) and Defendants' interpretation and enforcement thereof treat Plaintiffs' religious speech and religious exercise differently from those similarly situated to Plaintiffs.

287. Specifically, Defendants permit those whose beliefs support same-sex marriage to own and operate a marriage-related expressive business according to their beliefs, and to express messages consistent with those beliefs, without fear of punishment.

288. Yet Defendants impose severe penalties on those whose religious beliefs oppose same-sex marriage and who desire to own and operate marriage-related expressive businesses according to their religious beliefs and to express messages consistent with those beliefs which includes avoiding expressing contrary messages.

289. Thus, Defendants treat Plaintiffs differently than similarly situated parties in a manner that infringes several fundamental rights of Plaintiffs, such as their freedom of speech, expressive association, and free exercise of religion.

290. When the enforcement of laws, like Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3), infringe on such fundamental rights, courts presume discriminatory intent.

291. In this case, the presumption of discriminatory intent is borne out by Defendants' intentional discrimination against the rights of free speech and free exercise of religion by Plaintiffs and those like Plaintiffs who hold traditional Christian beliefs about marriage as an institution between one man and one woman.

292. Defendants do not serve any legitimate, rational, substantial, or compelling interest in forcing Plaintiffs to violate their religious beliefs by creating videos that present same-sex weddings in a favorable light.

293. Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) are also underinclusive because they provide numerous exemptions to several forms of prohibited discrimination, including the bar on sexual orientation discrimination.

294. To achieve any legitimate interests that Defendants may assert, Defendants have many alternative, less restrictive mechanisms available.

295. WHEREFORE, Plaintiffs respectfully ask that the Court grant the relief specified in the Prayer for Relief.

VI. Sixth Cause of Action: Minnesota Statute Annotated § 363A.17(3) Violates the Fourteenth Amendment Right to Procedural Due Process.

296. Plaintiffs repeat and reallege each of the allegations contained in paragraphs 1-193 of this Complaint.

297. The Due Process Clause of the Fourteenth Amendment prohibits the government from censoring speech or outlawing behavior pursuant to vague standards that grant unbridled discretion to government officials to arbitrarily prohibit some expression and action and that fail to give speakers and actors sufficient notice whether their speech or actions violate the law.

298. Minnesota Statute Annotated § 363A.17(3) permits enforcement officials to grant exemptions to the forms of discrimination bars if the alleged discrimination is "because of a legitimate business purpose."

299. The MHRA nowhere defines "legitimate business purpose."

300. The MHRA contains no guidelines to govern the decisions of the Defendants in applying and enforcing the "legitimate business purpose" exception to prohibited forms of discrimination, thereby permitting Defendants to use their unbounded discretion to punish disfavored speech and viewpoints.

301. Defendants have wielded this unbridled discretion to punish disfavored views concerning the topic of marriage.

302. For example, Defendants have categorically declared that an expressive business that declines to create speech promoting same-sex marriages based on a religious objection to such marriages is not acting with a "legitimate business purpose" and thus not exempt, yet that same business would be acting with a "legitimate business purpose" and thus exempt if it declined a same-sex marriage request because it did not have sufficient time or the requisite skill.

303. Citizens of common intelligence must guess about whether their desired speech or actions will be treated as a "legitimate business purpose," and thus exempt from § 363A.17(3), or deemed not to be a "legitimate business purpose," and thus not exempt.

304. The "legitimate business exception" provides insufficient warning or notice as to what expression or conduct is prohibited.

305. Therefore, the rights of Plaintiffs and other Minnesotans now turn on the whim of government officials, and Plaintiffs and other Minnesotans therefore cannot know whether their desired speech violates the law.

306. Minnesota Statute Annotated § 363A.17(3) therefore violates Plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

307. WHEREFORE, Plaintiffs respectfully ask that the Court grant the relief specified in the Prayer for Relief.

VII. Seventh Cause of Action: Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) Violate the Fourteenth Amendment Right to Due Process.

308. Plaintiffs repeat and reallege each of the allegations contained in paragraphs 1-193 of this Complaint.

309. The Supreme Court's majority opinion in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015), and other Supreme Court precedent, dictates that the Fourteenth Amendment protects the liberty of individuals to make choices central to their own dignity and autonomy, including "choices that define [their] personal identity and beliefs."

310. The Fourteenth Amendment protects the rights of individuals to serve their God in accordance with the dictates of their own consciences, thereby allowing them to make the decisions that define their personal identity based on religious beliefs.

311. The Fourteenth Amendment guarantees the right to pursue one's entrepreneurial dreams, engage in the common occupations of life, operate a business, earn a livelihood, and continue employment unmolested.

312. The right to pursue one's entrepreneurial dreams is fundamental as a matter of history and tradition.

313. The Fourteenth Amendment protects personal rights essential to individuals' orderly pursuit of happiness.

314. The desire of individuals to use their own talents and imaginations to pursue a livelihood is part of the deeply held ethos of the American dream. To deny that dream to those with certain deeply held religious beliefs is to strip them of their identity, dignity, liberty, and potential to find fulfillment and to impose on them an abhorrent degree of stigma and injury.

315. According to Supreme Court precedent, such as *Obergefell*, while a state can have its own views of the ideal ordering of society, when it imposes those beliefs through law with the necessary consequence of putting the imprimatur of the State on excluding people with certain personal beliefs from the pursuit of basic liberties, they demean and stigmatize those individuals in a manner forbidden by the Fourteenth Amendment.

316. Under the Supreme Court's precedent, to deny people the right to engage in their business in a way that is consistent with their own concepts of existence and identity is to deny them liberty, disparage their intimate personal choices and identity, and diminish their personhood.

317. Carl and Angel Larsen believe that marriage may exist only between one man and one woman.

318. This belief is a core tenant of the Larsen's faith.

319. The Larsen's faith defines them, their identity, and every aspect of their lives, including their business interactions.

320. The Larsens desire to engage in the marketplace to make videos celebrating weddings as they believe God designed them is an intimate choice that defines—and is an expression of—their personal identity and beliefs that are central to their dignity and autonomy.

321. The requirement of Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3), as explained by Commissioner Lindsey, is that all businesses like the Larsen's business, must facilitate, participate in, celebrate, and produce expression favorable to same-sex weddings if they use their business to celebrate and produce expression favorable of weddings they believe are correctly defined as one man and one woman.

322. Thus, Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) deny the Larsen's self-identity, dignity, liberty, intimate personal choices, and personhood by prosecuting them for the messages they choose not to express, strips them of their of dignity, stigmatizes their very identity as social pariah, and punishes them in violation of the Fourteenth Amendment.

323. Because Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) infringe these rights under the Fourteenth Amendment, it must further a compelling interest in a narrowly tailored way.

324. Minnesota Statutes Annotated §363A.11(1) and § 363A.17(3), as applied to Plaintiffs, does not serve any legitimate, rational, substantial, or compelling interest by forcing the Plaintiffs to abandon their religious identity, personal dignity, personal autonomy, and personal liberty, and instead imposes stigma and strips them of dignity.

325. And in addition to Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) not serving a legitimate interest, they are not narrowly tailored to do so regardless.

326. Defendants have alternative less restrictive means to achieve any legitimate interests that do not require them to force the Plaintiffs to abandon their religious identity, personal dignity, personal autonomy, and personal liberty and face government-imposed stigma and denial of dignity.

327. Accordingly, as applied to the Plaintiffs, Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) deny the Plaintiffs the right to make intimate choices that define their religious identity, personal dignity, personal autonomy, and personal liberty and instead stigmatizes the Larsens and denies their dignity in violation of the Fourteenth Amendment of the United States Constitution.

328. WHEREFORE, Plaintiffs respectfully ask that the Court grant the relief specified in the Prayer for Relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs ask this Court to enter judgment against Defendants and to provide the following relief:

1. Preliminary and permanent injunctive relief to stop Defendants and any person acting in concert with them from enforcing Minnesota Statutes Annotated § 363A.11(1) and § 363A.17(3) as-applied to Plaintiffs' business of producing video productions (a) promoting

marriage exclusively as an institution between one man and one woman, and (b) declining to create video productions that express ideas that conflict with their beliefs about marriage;

2. A declaration that Minnesota Statutes Annotated § 363A.11(1) and §363A.17(3) violate the United States Constitution's Freedom of Speech Clause, Free Exercise of Religion Clause, Due Process Clause, and Equal Protection Clause as applied to Plaintiffs' desired communications (a) promoting marriage exclusively as an institution between one man and one woman, and (b) declining to create video productions that express ideas that conflict with their beliefs about marriage;

3. That this Court adjudge, decree, and declare the rights and other legal relations of the parties to the subject matter in controversy here so that these declarations shall have the force and effect of a final judgment;

4. That this Court retain jurisdiction of this matter for the purpose of enforcing its orders;

5. That this Court award Plaintiffs' costs and expenses of this action, including reasonable attorneys' fees, in accordance with 42 U.S.C. § 1988;

6. That this Court issue the requested injunctive relief without a condition of bond or other security being required of Plaintiffs; and

7. That this Court grant any other relief that it deems equitable and just in the circumstances.

Respectfully submitted this 13th day of January, 2017.

By: /s/ Jeremy D. Tedesco

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DECLARATION UNDER PENALTY OF PERJURY

I, CARL LARSEN, a citizen of the United States and a resident of the State of Minnesota, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 13th day of January, 2017, at St. Cloud, Minnesota.

CARL LARSEN
TELESCOPE MEDIA GROUP

DECLARATION UNDER PENALTY OF PERJURY

I, ANGEL LARSEN, a citizen of the United States and a resident of the State of Minnesota, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 13th day of January, 2017, at St. Cloud, Minnesota.

ANGEL LARSEN
TELESCOPE MEDIA GROUP

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2017, a copy of the foregoing First Amended Verified Complaint For Declaratory And Injunctive Relief was filed with the Clerk of the Court using the ECF system. I also certify that the foregoing will be served, along with a copy of the Summons and Complaint, via a private process server upon the following defendants:

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

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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

EXHIBIT 2

INTRODUCTION AND FACT SUMMARY

This case is about whether the Minnesota Department of Human Rights violates the First Amendment when it threatens two filmmakers (and others) with crippling financial penalties and jail time to coerce them to express messages in their films that are acceptable to the majority—but not to them—or to silence their non-majoritarian views to avoid government-coerced speech. First Amendment Verified Complaint ("Ver. Compl.")¶¶8-14, 60-69; Appendix In Support of Pl.'s Mot. for Prelim. Inj. ("App.") 1-15. In so doing, the Department claims a coercive power to direct private expression, or punish dissenters, contrary to our Constitution's distinctive commitment to freedom of thought, speech, and religion. If Minnesota has the power to dictate the content of films, it also has the power to force countless newspapers, writers, photographers, painters, and speakers to promote messages with which they disagree or to stop communicating altogether to avoid expressing government-mandated messages.

Carl and Angel Larsen, talented St. Cloud-based cinematographers who produce films and provide other media production services through their company, Telescope Media Group (hereinafter "TMG"),[1] are in the crosshairs of Minnesota's speech-coercing law. Ver. Compl.¶¶72, 79-89; App.19. The Larsens' religious beliefs are central to their personal and professional lives. Ver. Compl.¶¶73-78; App.18. This is evident from TMG's purpose statement ("[TMG] exists to glorify God through top-quality media production") and their commitment to use their artistic talents to convey only those

[1] For simplicity's sake, this Memorandum refers to all Plaintiffs collectively as "the Larsens" whenever possible.

messages that are consistent with, or at least do not compromise, their sincerely-held religious beliefs. Ver. Compl.¶¶83, 93; Larsen Aff.¶3; App.17. The Larsens tell stories through their films and, consistent with industry practice, decline to tell stories that violate or compromise their beliefs. Ver. Compl.¶95-97.

Based on their religious beliefs, the Larsens adhere to the historic, biblically-orthodox definition of marriage as a lifelong union of one man and one woman. Ver. Compl.¶119. The Larsens are deeply troubled that American culture is increasingly turning away from this view of marriage. Ver. Compl.¶3. Because of their religious beliefs, and their belief in the power of film—of great story-telling—to change hearts and minds, they want to use their artistic talents and expressive business to tell compelling stories about God's design for marriage. Ver. Compl.¶4. They plan to create beautiful cinematic films capturing a couple's background story of love and commitment, the sacredness of their vows at the altar, and more. Ver. Compl.¶¶5, 131-32. The Larsens desire to show these films to their clients, their clients' friends, and the world via the internet and social media, in an effort to reanimate the hearts of people about the distinct virtue of marriage between a man and a woman.[2] Ver. Compl.¶135.

But the Larsens cannot because Department officials enforce the Minnesota Human Rights Act ("MHRA") in a manner that deprives them of their right to tell only those stories about marriage that they want to tell. Ver. Compl.¶¶8-14, 60-69. The MHRA bars

[2] The Larsens produced a marriage story teaser video, attached as Exhibit A to the First Amended Verified Complaint, to provide the Court an example of the type of wedding films they desire to create. Ver. Compl.¶¶140-44.

businesses from discriminating on the basis of a person's race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex. Minn. Stat. § 363A.11(1) and § 363A.17(3). The MHRA should not affect the Larsens' religious expression because they decide what films to produce based on their message, not any prospective client's personal characteristics, *i.e.*, they do not discriminate based on sexual orientation. Ver. Compl.¶¶92-97. But Defendants apply the MHRA's ban on sexual orientation discrimination to require expressive business owners like the Larsens who create expression promoting marriages between one man and one woman to do the same for same-sex marriages. Ver. Compl.¶¶8-13, 60-71; App.1-15. And if the Larsens violate the MHRA, each offense subjects them to civil fines, triple compensatory damages awards, punitive damages up to $25,000, and even up to 90 days in jail. Ver. Compl.¶¶ 12-14; Minn. Stat. § 363A.11(1); Minn. Stat. § 363A.30(4) (violation is a misdemeanor); Minn. Stat. § 609.02(3) (misdemeanor is punishable by up to ninety days in jail).

Minnesota officials responsible for enforcing the MHRA have categorically, publicly, and repeatedly threatened to prosecute expressive business owners who operate in the wedding industry and decline to create speech promoting same-sex marriages. Ver. Compl.¶¶60-71; App.1-15. Kevin Lindsey, the Commissioner of the MDHR and its chief enforcement officer, has also exercised his authority to send "testers" to investigate charges of discrimination, including a complaint of sexual orientation discrimination against a wedding business that declined to host a same-sex wedding ceremony. Commissioner Lindsey relied heavily on the interactions between the testers and the wedding business in finding that the business violated the MHRA. Ver. Compl.¶¶43-47;

App.61-70. State law further empowers Commissioner Lindsey to file a charge of discrimination without receiving any complaint from a third party. Ver. Compl.¶50; Minn. Stat. § 363A.28(2).

The Larsens desire to immediately start promoting the availability of their cinematic, story-telling services for weddings, and to immediately start providing those services. Ver. Compl.¶154. As part of this push into the wedding industry, they plan to announce on their website and other promotional materials that their religious beliefs require them to tell stories of marriages between a man and a woman and to decline to tell stories promoting any other conception of marriage, including same-sex marriage. Ver. Compl.¶¶155-59. But because of (1) the Defendants' official guidance construing the MHRA and many statements promising enforcement against wedding businesses that operate in this manner, (2) the severe penalties for violating the MHRA, (3) the Commissioner's power to file charges without a complaint, (4) his prior use of testers, and (5) his enforcement of the official guidance against another wedding service provider, the Larsens have refrained from offering or providing their cinematic, story-telling wedding services at all. Ver. Compl.¶15, 160-66. This severe chill on the Larsens' desired expression violates their constitutional rights to free speech, expressive association, and free exercise, as well as the unconstitutional conditions doctrine. Absent a preliminary injunction from this Court, these ongoing violations of the Larsens' constitutional rights will persist.

Importantly, since filing this lawsuit on December 6, 2016, the Larsens have received a request to produce a film celebrating a same-sex marriage in the Fall of 2017

even though they are not currently in the wedding industry. Once they start to promote their wedding services they will likely receive more such requests. Ver. Compl.¶169-72. This further highlights the need for immediate relief from this Court. Absent an injunction, the Commissioner's discriminatory enforcement of the MHRA imposes an impossible choice on the Larsens: (1) remain silent on the subject of marriage and abandon their right to produce films about marriage that are consistent with their religious beliefs, (2) exercise their right to promote their cinematic wedding film services and produce the wedding films of their choosing and incur the severe civil and criminal penalties provided for by the MHRA, or (3) produce wedding videos expressing a view of marriage they would not produce absent government coercion.

ARGUMENT

A preliminary injunction is necessary to secure the Larsens' constitutional rights. To obtain one, the Larsens must demonstrate that four factors tilt in their favor: "(1) The probability of success on the merits; (2) The threat of irreparable harm to the movant; (3) The balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) Whether the issuance of an injunction is in the public interest." *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1178–79 (8th Cir. 1998). "No single factor in itself is dispositive; rather, each factor must be considered to determine whether the balance of equities weighs toward granting the injunction." *Id.* But "[w]hen a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied." *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870

(8th Cir. 2012) (quotations and citations omitted). As explained herein, the Larsens satisfy each factor and the balance of the equities requires the issuance of a preliminary injunction.

I. The Larsens' Claims Are Likely to Succeed on the Merits Because the MHRA Violates Their Constitutional Rights to Free Speech, Expressive Association, and Free Exercise, as well as the Unconstitutional Conditions Doctrine.[3]

The Constitution protects the Larsens' right to speak only those messages they wish to communicate. It prohibits the state from compelling them to include stories in their film productions that they do not wish to express. And it safeguards the Larsens' right to collaborate with others for expressive purposes, including celebrating God's design for marriage as a lifelong union of one man and one woman through cinematography and media production. In short, the Free Speech Clause prohibits the state from telling the Larsens "what they must say," whether by "word or act," as it has done here. *Agency for Int'l Dev. v. Alliance for Open Soc. Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2015) (requiring private organizations to oppose prostitution before accessing federal funding unlawfully compelled speech); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 581 (1995) (applying a state public accommodation law to require private parade organizers to include the message of an LGBT group violates the First Amendment).

Likewise, the Free Exercise Clause prohibits the state from imposing burdens on people of faith that it is unwilling to impose on others. But Defendants broadly exempt

[3] The Larsens raised additional claims in their Complaint and reserve the right to pursue them in later filings.

other business owners from their interpretation of the MHRA's speech compelling rules, while denying any possible exemption to the Larsens based on their sincerely held religious beliefs about marriage. This effort to force the Larsens to choose between operating an expressive family business to communicate their viewpoints, and suffering state penalties, or surrender their First Amendment rights, cannot stand. Such a Hobson's choice violates the unconstitutional conditions doctrine and deprives the Larsens of the "freedom of mind" that it is the purpose of the First Amendment to "reserve from all official control." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637, 642 (1943).

A. As Applied to the Larsens, the MHRA Compels Speech, Discriminates Based on Content and Viewpoint, and Grants Unbridled Discretion.

1. The Larsens' wedding films and cinematography and editing process are protected expression.

For nearly the first half of the twentieth century, government censorship boards heavily regulated the content of films. These boards and their censorial power blossomed after the Supreme Court ruled in 1915 that films were not protected by the First Amendment. *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 244 (1915) ("[T]he exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded … as part of the press of the country, or as organs of public opinion."). Advocating for film censorship, the Court expressed concern over films' "capability and power" to be used for "evil." *Id.* at 245; *see also* Samantha Barbas, How the Movies Became Speech, 64 Rutgers L. Rev. 665, 689-90 (2012). Taking their cue from the Court and powerful cultural groups, government censorship boards in the early twentieth century banned or required deletions

from thousands of films "deemed to be immoral, sacrilegious, or otherwise objectionable." Barbas at 666.

It took nearly 50 years for the Supreme Court to reverse *Mutual Film*. It finally did in *Joseph Burstyn v. Wilson*, 343 U.S. 495, 502 (1952), thereby freeing films from government regulation and bringing this universally-condemned era of censorship to an end. Regarding the First Amendment's protection of films, the Court said that:

> motion pictures are a significant medium for the communication of ideas. They 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. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.

Id. at 501. Since then, courts have repeatedly recognized that films are protected speech under the First Amendment. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975) (stating non-obscene "films … are protected by the First Amendment"); *Kaplan v. California*, 413 U.S. 115, 119 (1973) (recognizing non-obscene "films … have First Amendment protection").

The Larsens' wedding films are protected by 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) (quotation omitted); Ver. Compl.¶¶129-34. 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). Hence, the Larsens' wedding films necessarily merit robust constitutional protection.

History matters and it should not be neglected here. Films' unique power to influence people was once proffered as a reason to ban them, but now is a chief reason they are protected. Film censorship historians have remarked how films are "a paramount means for the circulation of ideas and for the carrying on of this nation's dialogue." Grazia & Newman, Banned Films: Movies, Censors, and the First Amendment, xvi-xvii (1982). The Larsens desire, like so many who came before them, to use their emotionally impactful films to change hearts and minds by turning public attitudes and behavior in favor of biblical marriage. Ver. Compl.¶¶2-5. The Larsens' wedding films may not be comparable to the work of DeMille or Spielberg but they nonetheless participate in the broad tradition of filmmakers who use their work to challenge the status quo, *see* Grazia & Newman at xvii (noting that films "have often directly and deliberately struck at the heart of accepted notions of politics, religion, and morality"), as a majority of Americans espouse the view that marriage may include any "two persons." Ver. Compl.¶¶122-25; Larsen Aff.¶¶23-24; App.60. Not only films that qualify as great works of art are protected as speech. Less sophisticated films are as well, as the Supreme Court exemplified by safeguarding even lowly animal crush videos. *See United States v. Stevens*, 559 U.S. 460, 468 (2010).

Like the films they make, the Larsens' cinematography and editing process receive strong free speech protection. *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."). As several courts of appeals have recognized, the Larsens' process of artistic creation through cinematography and film editing "'is inextricably intertwined with the purely expressive" film that results. *Buehrle v. City of*

Key West, 813 F.3d 973, 977 (2015) (quoting *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010)). Couples hire the Larsens to tell a compelling story about their wedding day, not to produce the equivalent of a security video. Producing one of the Larsens' wedding films takes significant amounts of skill and judgment on what footage to use, what camera angels and music to employ, whether to apply filters to the scene, etc. Ver. Compl.¶¶100-07. The artistic nature of the Larsens' process is manifest in the teaser wedding film attached as Exhibit A to the Amended Complaint. Ver. Compl.¶¶140-43. In these circumstances, no First Amendment distinction exists "between the process of creating a form of pure speech," such as producing and making a custom wedding film, "and the product of these processes in terms of the First Amendment protection afforded." *Buehrle*, 813 F.3d at 977 (quoting *Anderson* 621 F.3d at 1061).

Simply put, "the First Amendment protects the right of" cinematographers, like the Larsens, "to craft and control [their own] messages, based on whatever considerations the producers wish to take into account," including "casting" and "content" decisions. *Claybrooks v. Am. Broad. Cos., Inc.*, 898 F. Supp. 2d 986, 1000 (M.D. Tenn. 2012) (First Amendment protects the right of television producers to make even racially-based casting decisions). Courts do not "disaggregate Picasso from his brushes and canvas" but protect the "process of creating a form of *pure* speech (such as writing or painting)" to the same degree as "the product of these processes (the essay or the artwork)." *Anderson*, 621 F.3d. at 1061-62. That concept is equally true of the Larsens' filmmaking:

> Using a camera to create a photograph or video is like applying pen to paper to create a writing or applying brush to canvas to create a painting. In all of

> these situations, the process of creating the end product cannot reasonably be separated from the end product for First Amendment purposes.

Ex parte Thompson, 442 S.W.3d 325, 337 (Tex. Crim. App. 2014).

Like the directors making major motion pictures, each decision the Larsens make in producing films for use at wedding ceremonies—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. Ver. Compl.¶¶100-07. Courts have therefore consistently protected visual art, like the Larsens' wedding films, along with its many constitutive decisions (*e.g.*, what events the Larsens should take on, what video, audio, and text content they use, its order, what music to use, whether to include animation or visual effects, whether to use still shots, how to adjust the lighting and color, and audio mixing and mastering). Ver. Compl.¶¶87, 106. It makes no difference that the Larsens—like many famous film producers—are paid for their work. "[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." *Riley*, 487 U.S. at 801; *see also Sorrell*, U.S. at 567 (explaining that "a great deal of vital expression" results from an "economic motive").

Free speech protection adheres not just to the Larsens' directing and compiling of a cinematic piece for use at the wedding but also their on-site editing. The Larsens' real-time production experience will enable them to compile the perfect clips of video from the wedding ceremony, captured audio, and music to display at the wedding reception to strengthen the bride and groom's marriage vows and communicate their importance to

everyone present. Ver. Compl.¶133. Later on, the Larsens will apply their editing and storytelling skills to create a lengthier wedding film that portrays the couple's marriage as the beautiful covenant God designed it to be. Ver. Compl.¶134. It is not the marrying couple who will dictate the editing and content selection of these films—the Larsens will. Ver. Compl.¶¶91, 95. Posting these films on social media will allow the Larsens to effectively communicate their message about biblical marriage worldwide. Ver. Compl.¶¶135-38. Each of these aspects of the Larsens' creative storytelling process is safeguarded by the First Amendment.

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

a. Free speech exceptions to nondiscrimination laws are routinely mandated by federal courts.

Federal courts have long recognized the potential of nondiscrimination laws to unconstitutionally interfere with protected expression. *See, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657 (2000) (noting "the potential for conflict between state public accommodation laws" and "the First Amendment"); *Hurley*, 515 U.S. at 572 (characterizing as "peculiar" and striking down the application of a state public accommodation law to speech). Defendants' extreme position that the MHRA allows no free speech exception directly conflicts with this precedent. Even antidiscrimination 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). As a result, the Supreme Court has rejected attempts to apply

public accommodation laws to interfere with private speech no less than twice. *Dale*, 530 U.S. at 658; *Hurley*, 515 U.S. at 578.

Lower federal courts have followed suit. Here are just a few examples:

- *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56 (N.D. Ohio 1995): Cleveland prevented Nation of Islam ministers from delivering "separate speeches to men and women" at a conference held in a city convention center pursuant to a state public accommodations law that prohibited sex discrimination. *Id.* at 59. A federal district court held that forcing ministers to speak to a mixed gender audience would necessarily change "the content and character of the speech" and barred that particular application of the law. *Id.*

- *Claybrooks v Am. Broadcasting Cos.*, 898 F. Supp. 2d 986, 989-90 (M.D. Tenn. 2012): African-American men who auditioned for, but were rejected by, the producers of ABC's television show *The Bachelor* sued for racial discrimination under 42 U.S.C. § 1981. *Id.* at 989-90, 1000. A federal district court dismissed the suit because "the First Amendment protects the producers' right unilaterally to control their own creative content" and base their casting decisions "on whatever considerations the producers wish to take into account." *Id.* at 1000.

- *S. Bos. Allied War Veterans Council v. City of Boston*, 297 F. Supp. 2d 388 (D. Mass 2003): Boston officials forced parade organizers to allow a Veterans for Peace group to march at the end of their St. Patrick's Day parade, even though the organizers had previously denied the anti-war group's request to take part. *Id.* at 394. A federal district court held that these private speakers had the right "not [to] have the message of an opposing group forced on them by the state," *id.* at 393, and that a distance of "no less than a mile" between the groups was required to adequately "distinguish the two sets of speech," *id.* at 399.

These cases establish that where free speech and nondiscrimination laws come into conflict, free speech triumphs.[4]

Perhaps the most common scenario in which these laws conflict with speaker autonomy involves newspapers. Whether the question pertains to (1) hiring and firing

[4] If the MDHR properly interpreted the MHRA, there would be no conflict between the statute and the Larsen's free speech rights. The Larsens select their filmmaking projects based on the message requested, not the sexual orientation of the patron. Ver. Compl.¶92.

writers or editorial staff, *see McDermott v. Ampersand Publ'g, Inc.*, 593 F.3d 950, 962 (9th Cir. 2010) (the First Amendment protects a "publisher's choice of writers"); *Newspaper Guild of Greater Philadelphia, Local 10 v. NLRB*, 636 F.2d 550, 560 (D.C. Cir. 1980) ("[E]ditorial control [is] within the First Amendment's zone of protection …."), (2) discretion whether to publish a written work, *Miami Herald Publ'g Co. v Tornillo*, 418 U.S. 241, 256 (1974) ("[A]ny … compulsion to publish that which reason tells them should not be published is unconstitutional" (quotation omitted)); *Novotny v. Tripp County*, 664 F.3d 1173, 1177 (8th Cir. 2011) ("requir[ing] that a privately owned newspaper publish [a] letter to the editor" would "infringe upon the right of the newspaper itself to decide what content it includes on its own editorial page"), or (3) even the rejection of an advertisement, *Miss. Gay Alliance v. Goudelock*, 536 F.2d 1073, 1075 (5th Cir. 1976) (holding "the First Amendment interdicts judicial interference with the editorial decision" to reject an ad), federal courts have answered the same. Private speakers have the autonomy to control their own message. This speaker autonomy equally applies to the Larsens' casting and production decisions.

b. Creative professionals routinely select projects in which to invest their time and energy, and reject others, based on their values and message.

Creative professionals, like the Larsens, regularly exercise their First Amendment right to accept certain projects, and reject others, based on their values. The recent presidential election illuminated this fact. Renowned fashion designer Sophie Theallet, who often dressed first lady Michelle Obama, responded by issuing a public statement that she would refuse to provide her designs to Melania Trump because they are "an expression

of [her] artistic and philosophical ideas."[5] Other dissenters, including members of the Radio City Rockettes and the Mormon Tabernacle Choir followed suit by refusing to perform at President-Elect Trump's inauguration on grounds of conscience.[6] And one internet marketing provider in New Mexico went so far as to say he would not provide any services to Republicans or other supporters of President-Elect Trump because "he has a moral obligation to stand up for what he believes is right."[7] What matters is not the nature of the objection or expressive service. As the lesbian owners of a New Jersey t-shirt company (who would themselves refuse to print shirts for the Westboro Baptist Church) explained, creative professionals commonly refuse "to do something against what they believe in."[8]

Under the First Amendment, they have that right. *Claybrooks*, 898 F. Supp. 2d at 989, for example, involved two African-American men who sued after their auditions for *The Bachelor* television show were rejected. They alleged racial discrimination because

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[5] Rosemary Feitelberg, LA Times, *Sophie Theallet vows not to dress Melania Trump*, http://www.latimes.com/fashion/la-ig-wwd-sophie-theallet-melania-trump-20161117-story.html.

[6] Nick Younker, Inquisitr, *Donald Trump Inauguration: Rockette Willing to Lose Job Not to Perform at Ceremony*, http://www.inquisitr.com/3844671/donald-trump-inauguration-rockette-willing-to-lose-job-not-to-perform-at-ceremony/; Job Eugene Scott, CNN, *Mormon Tabernacle Choir member quits*, http://www.cnn.com/2016/12/30/politics/mormon-tabernacle-choir-member-quits-trump-inauguration/.

[7] KOB4, *Business owner refusing service to Trump supporters*, http://www.kob.com/albuquerque-news/business-owner-refusing-service-president-elect-donald-trump-supporters-matthew-blanchfield-1st-in-seo-internet-marketing-company/4325531/.

[8] Billy Hallowell, The Blaze, *T-Shirt Maker Who Refused to Print Gay Pride Shirt is Being Punished — but These Lesbian Business Owners Reveal Why They're Supporting Him*, http://www.theblaze.com/news/2014/11/07/lesbian-business-owners-tell-glenn-beck-why-they-support-the-t-shirt-maker-whos-now-being-punished-for-refusing-to-print-gay-pride-shirts/.

ABC and the show's producers refused to cast a person of color in any lead role and cast very few as potential suiters. But the court held that "casting and the resulting work of entertainment are inseparable and must *both* be protected to ensure that the producers' freedom of speech is not abridged," even when racial discrimination results. *Id.* at 999. Although the Larsens abhor racial discrimination and would gladly produce a film celebrating an interracial marriage, they have the same "right unilaterally to control their own creative content." *Id.* at 1000. Defendants cannot force them "to employ [sex]-neutral criteria in their casting decisions in order to 'showcase' a more progressive message" about marriage. *Id.*; Ver. Compl.¶¶126-29.

c. Defendants' application of the MHRA to the Larsens' wedding films violates the compelled speech doctrine.

Freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This latter aspect, known as the compelled speech doctrine, "protects the right of individuals to hold a point of view different from the majority and to refuse to foster … an idea they find morally objectionable." *Id.* at 715. State officials have no power "to compel [the Larsens] to utter what is not in [their] mind," *Barnette*, 319 U.S. at 634, including by forcing them to produce custom wedding films that promote any form of marriage not between one man and one woman. Ver. Compl.¶¶113-25. That the Larsens operate a closely-held business is irrelevant. The Supreme Court has explained that the compelled speech doctrine applies to "business corporations generally" and to "professional" speech creators like the Larsens. *Hurley*, 515 U.S. at 574. And it has previously vindicated for-profit businesses' right to

speaker autonomy where government sought to provide ideological rivals with equal access to private mediums of communication. *See Pac. Gas*, 475 U.S. at 20-21 (holding the First Amendment prohibits the state from requiring a for-profit utility to include a consumer group's expression in its newsletter); *Tornillo*, 418 at 258 (ruling the First Amendment prohibits the government from requiring a for-profit newspaper to include a politician's response to editorial criticism).

Here, the Larsens want to direct and create cinematic pieces that will be played at weddings to tell a story of love, commitment, and vision for the future that encourages the audience to see biblical marriage as the sacred covenant God designed it to be. Ver. Compl.¶¶131-32. But if they do so, Defendants require that they also tell stories that promote other types of marriage, including same-sex marriage, Ver. Compl.¶¶8-14, 60-69; App.1-15. That message is antithetical to the Larsens' faith. Ver. Compl.¶¶119, 317-19. The First Amendment forbids the state from applying a public accommodations statute in a way that "essentially require[s] [the Larsens] to alter the expressive content of their" film productions. *Hurley*, 515 U.S. at 572-73. Regardless of the government's view of what content the Larsens should include in their wedding films, it may not force the Larsens "to alter [their] own message as a consequence of the government's coercive action." *Pac. Gas*, 475 U.S. at 16. Weddings are inherently expressive events that celebrate "the uniting of two people in a committed long-term relationship." *See Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012). The Larsens desire to celebrate the stories of weddings between one man and one woman through wedding cinematography, however, Defendants' application of the MHRA requires them to celebrate the stories of same-sex

weddings as well. Ver. Compl.¶¶8-13, 60-71; App.1-15. Doing so would directly contradict the Larsens' religious beliefs about marriage, alter the Larsens' message in exclusive support of biblical marriage, and force the Larsens to further "an ideological point of view [they] find[] unacceptable." *Wooley*, 430 U.S. at 715; Ver. Compl.¶¶6, 199, 203. That violates the compelled speech doctrine.

It is well-established that the government cannot require speakers "to affirm in one breath that which they deny in the next." *Hurley*, 515 U.S. at 576 (quotation omitted). The Larsen's very purpose in telling marriage stories is to celebrate marriage between a man and a woman, its beauty, and distinct virtues. Ver. Compl.¶¶122-24, 197-98. That purpose would be undercut and contradicted by the forced production of custom films celebrating same-sex marriage. Ver. Compl.¶¶7, 199, 203-04.

What is more, every contract the Larsens enter into for wedding cinematography will include a public promotion provision. The Larsens will promote their wedding films on TMG's website as well as social media to promote their biblical view of marriage worldwide. Ver. Compl.¶¶135-138. Defendants' interpretation of the MHRA forces the Larsens to promote same-sex marriage on their website and social media in the same way, which directly contradicts their message about marriage. *See* Ver. Compl.¶¶60-64, 148. Simply put, no one listens to hypocrites. It is impossible for the Larsens to persuasively convey the exceptional nature of traditional marriage when they must simultaneously promote other definitions of marriage as equally valid. Ver. Compl.¶¶ 127, 148. Because the MHRA requires the Larsens to support what they reject before the watching world, it

violates their "autonomy to choose the content of [their] own message." *Hurley*, 515 U.S. at 573.

d. *Hurley* controls the compelled speech analysis in this case.

Hurley is controlling. In that case, Massachusetts authorities determined that the state's public accommodation law required the organizers of a private parade to allow an LGBT contingent to march. *Id.* The Supreme Court determined that this order violated the compelled speech doctrine. The parade organizers did not want to suggest by including an LGBT contingent "that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics." *Id.* at 574. And it was their right to refuse to do so—offensive or not—because, as the Supreme Court explained, "[d]isapproval of a private speaker's statement does not legitimize use of the [State's] power to compel the speaker to alter the message by including one more acceptable to others." *Id.* at 581.

In this case, the Larsens similarly do not wish to tell stories that promote the idea that same-sex unions should be celebrated. Ver. Compl.¶¶6, 95-96. They select each story they tell to ensure that the final message of the production is not inconsistent with their values. Ver. Compl.¶¶93, 97-98. But Defendants maintain that exclusively producing films that promote biblical marriage between one man and one woman violates the MHRA. Ver. Compl.¶¶60-69. The State cannot countermand the Larsens' "autonomy to control [their] own speech" in this way. *Hurley*, 515 U.S. at 574; *see also Claybrooks*, 898 F. Supp. 2d at 1000 (under *Hurley*, television show producers have the right "to craft and

control [their own] messages based on whatever considerations the producers wish to take into account"). Forcing the Larsens' *themselves* to direct, produce, film, animate, script write, and edit a persuasive cinematic piece celebrating same-sex marriage would be the equivalent of forcing the parade organizers in *Hurley* to make the LGBT group's gay pride banners. *Hurley*, 515 U.S. at 570. The compelled speech doctrine allows no such thing.

Significantly, the parade organizers in *Hurley* did not exclude LGBT individuals from the parade but merely rejected including "GLIB as its own parade unit carrying its own banner." *Id.* at 572. The Larsens are likewise happy to serve all individuals regardless of their sexual orientation if the message they are asked to communicate is not inconsistent with their beliefs. Ver. Compl.¶¶92-97. But they cannot promote same-sex marriage and remain true to their faith. Ver. Compl.¶¶6, 199, 203. The Larsen's choice "not to propound [that] particular point of view … is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 575. And the state cannot countermand that decision because it is unpopular. The very purpose of the First Amendment is "to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Id.* at 574. Defendants' application of the MHRA to force the Larsens to create expression against their will is unconstitutional and should be immediately enjoined. *See Dale*, 530 U.S. at 659 (noting that in *Hurley* the Court "applied traditional First Amendment analysis to hold the application of [a] public accommodations law to [protected expression] violated the First Amendment").

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

Content-based laws that "target speech based on its communicative content are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Defendants' application of the MHRA to speech is inherently content based because they allow expression that favors same-sex marriage to flourish, while targeting the Larsens' biblical viewpoint on marriage for punishment, including up to 90 days in jail for each offense. Ver. Compl.¶14.

The Supreme Court has established that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. The MHRA does not bar discrimination against all citizens but focuses 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. Speech containing ideas or messages linked to these characteristics may implicate the statute. No other speech does.

For instance, Defendants require the Larsens to create films expressing the idea that marriage includes same-sex couples because sexual orientation is a protected status. Ver. Compl.¶¶32, 60-69. But the Larsens are not required to create a film promoting the election of any Minnesota politician they dislike because political affiliation is not protected by the MHRA. Whether MHRA applies thus depends on the content of the Larsens' cinematic works. But the state may not impose "special prohibitions on … speakers who express

views on disfavored subjects" without overcoming strict scrutiny. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

Defendants confirm that whether the Larsens may decline a commission based on its message depends solely on their view of same-sex marriage. If the Larsens supported marriages not between one man and one woman, they could decline to create a film critical of same-sex marriage without violating the MHRA. Ver. Compl.¶¶211-12. The Larsens, however, do not support such unions and—according to Defendants—cannot decline to create films telling stories that promote same-sex marriage without transgressing the MHRA. Ver. Compl.¶¶60-69; App.1-15. Because the only distinction between these two scenarios is the Larsens' "motivating ideology or [their] opinion or perspective" on marriage, *Reed*, 135 S. Ct. at 2230 (quotation omitted), Defendants' application of the MRHA is viewpoint based. And such discrimination "is presumed to be unconstitutional." *Wishnatsky v. Rovner*, 433 F.3d 608, 611 (8th Cir. 2006). Hence, Defendants' efforts "to suppress [the Larsens'] disfavored speech" about marriage must "survive strict scrutiny." *Reed*, 135 S. Ct. at 2229, 2231.

Furthermore, "viewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to *protect* against the improper exclusion of viewpoints." *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 384 (4th Cir. 2006); *see also Southworth v. Bd. of Regents of Univ. of Wisc. Sys.*, 307 F.3d 566, 579 (7th Cir. 2002) ("[W]e conclude that the prohibition against unbridled discretion is a component of the viewpoint-neutrality requirement."). Regulations that burden speech must therefore contain "reasonably

specific and objective" guidelines that are "narrowly drawn" and contain "reasonable and definite standards" to prevent viewpoint discrimination from occurring. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 324 (2002) (quotation omitted).

The MHRA's text provides Defendants with unbridled discretion to discriminate based on unpopular viewpoints like the Larsens' biblical views on marriage. It provides that refusal to do business with, or discrimination against, a person based on their "race, national origin, color, sex, sexual orientation, or disability" is unlawful "*unless* the alleged refusal or discrimination is because of a legitimate business purpose." Minn. Stat. § 363A.17(3) (emphasis added). Nothing in the MHRA defines the term "legitimate business purpose." Nor does any state administrative or other authority define that vague term. Defendants have unbridled discretion to pick and choose which professional speech creators have a legitimate business purpose for declining a commission and which do not.

But the First Amendment does not allow the state to "presume" that Defendants will "act in good faith" in wielding such power. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770 (1988); *see also Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (recognizing that the "First Amendment prohibits the vesting of such unbridled discretion in a government official"). Either "by textual incorporation, binding judicial or administrative construction, or well-established practice," states must put defined limits on administrative discretion in place. *City of Lakewood*, 486 U.S. at 770. Minnesota has done none of the above. "Because [the MHRA] allows [Defendants] unbridled discretion to determine who may speak based on the viewpoint of the speaker," the statute "allows for viewpoint discrimination and is therefore unconstitutional." *Roach*

v. Stouffer, 560 F.3d 860, 870 (8th Cir. 2009). That unbridled discretion is particularly troublesome here where Defendants allow any number of exceptions for secular business reasons but refuse to consider even the possibility of granting one to the Larsens on religious grounds.

That is viewpoint discrimination. Defendants categorically declare that a religious objection to creating speech that promotes same-sex marriages does not qualify as a "legitimate business purpose." Ver. Compl.¶¶ 60-69. Accordingly, the Larsens could decline to tell a same-sex-wedding story because they dislike the subjects' hairstyle, tattoos, or attitude, or simply because they are too busy or disinclined. But Defendants have singled out religious objectors to same-sex marriage as lacking a legitimate business purpose even though secular refusals may be commonplace. Ver. Compl.¶¶60-64, 217; App.1-15. This is not mere speculation: Defendants have already wielded their unbridled discretion to punish views on marriage that the state disfavors. Ver. Compl. ¶¶65-71 (explaining Defendants used testers and then prosecuted a venue that hosted marriage ceremonies between one man and one woman but not same-sex ceremonies).

4. Defendants' application of the MHRA violates the Larsens' right to freedom of expressive association.

It is "establish[ed] with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments." *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 233 (1977). The Larsens possess this freedom to "associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S.*

Jaycees, 468 U.S. 609, 622 (1984). Here, the Larsens wish to collaborate with persons who share their expressive purpose of producing wedding films that promote a historic, biblically-orthodox definition of marriage. Ver. Compl.¶¶232-33. Indeed, the Larsens very purpose for entering the wedding industry is to produce films that express "a message about marriage that brings hope and clarity to society about God's design and purpose for marriage." Ver. Compl.¶130. This is an expressive association of the classic sort between artist and patron. *Dale*, 530 U.S. at 648 (noting that only "some form of expression" with others is required to raise a free association claim).

One aspect of the freedom of association is the right "not to associate" with those wishing to express contrary views. *Id.* "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas," as evidenced here. *Id.* at 647–48. Minnesota favors same-sex marriage and disfavors the Larsens' opposing religious view; hence, Defendants require them to oppose their message by producing compelling films that celebrate same-sex marriage. Ver. Compl.¶¶233-34. But forcing the Larsens to tell same-sex wedding stories and publish them on their website and social media accounts, Ver. Compl.¶131-138, would doubtless "significantly burden" the Larsens' ability to promote traditional marriage and thus violates their right to expressive association, *Dale*, 530 U.S. at 641-42.

Dale's concern over preventing the majority from imposing its views on those who hold minority views is especially apropos in regards to film. Early twentieth century film censors regulated films largely at the behest of powerful conservative and traditionalist groups. For example, the censors who barred the film involved in *Joseph Burstyn* did so

in large part because of intense pressure from religious groups that attacked the film as "a sacrilegious and blasphemous mockery of Christian religious truth." 343 U.S. at 511 (Frankfurter, J., concurring). Over fifty years later, progressive rather than traditional groups are clamoring for state regulation of films, but the unlawfulness of their demands remain unchanged. And, importantly, what the Larsens face here is worse than censorship. The government is forcing them to create films against their will.

B. Defendants' application of the MHRA is not neutral and generally applicable and thus violates the Free Exercise Clause.

The Larsens, like many others of good will, sincerely believe, according to their faith, that marriage is the union of one man and one woman. Ver. Compl.¶119; *see Obergefell*, 135 S. Ct. at 2594 ("This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world."). To practice their religion, the Larsens believe they must use their creative talents to promote marriage as the union of one man and one woman and that they should do this through their wedding cinematography. Ver. Compl.¶¶72-78, 113-131. Using their creative talents to promote the message that marriage is anything other than the union of one man and one woman would violate their beliefs. Ver. Compl.¶¶6, 199, 203. But the MDHR's application of the MHRA forces them to do just that, while providing broad exemptions for secular business purposes. Ver. Compl.¶¶60-64; App.1-15.

"A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993). Defendants' application of the MHRA fails

on both counts. In *Lukumi*, the Supreme Court encountered a city ordinance that prohibited the unnecessary killing of animals. *Id.* at 537. That law was "broad [and neutral] on its face" but government officials deemed "[k]illings for religious reasons … unnecessary, whereas most other killings [fell] outside the prohibition." *Id.* As a result, the Supreme Court concluded that the law was not neutral.

The same is true here. In addition to the fact that the MHRA only prohibits discrimination on a narrow list of grounds, its neutrality is fundamentally undercut by the exception for "legitimate business purpose[s]." Minn. Stat. § 363A.17(3). That gaping exception swallows the non-discrimination rule as every denial of a customer's request is legitimate in the business owners' eyes. Defendants must consequently engage in a case-by-case "evaluation of the particular justification for the" business owners' "relevant conduct" in every case. *Lukumi*, 508 U.S. at 537; Ver. Compl.¶¶260-61. The MHRA thus makes a system of "individualized exemptions from [its] general requirement are available." *Lukumi*, 508 U.S. at 537. In these circumstances, "the government may not refuse to extend that system to cases of religious hardship without compelling reason." *Id.* (quotation omitted).

Yet that it exactly what Defendants have done. They have categorically stated, numerous times, that no exception is available for expressive business owners like the Larsens who decline to celebrate same-sex marriage based on their religious beliefs. Ver. Compl.¶¶60-69, 217; App.1-15. Defendants' website, press releases, and online video statements all say the same thing: "The law does not exempt individuals, businesses, nonprofits, or the secular business activities of religious entities from non-discrimination

laws based on religious beliefs regarding same-sex marriage." Ver. Compl.¶¶61-62, 69; App.2, 5, 13. The upshot is that secular objections to promoting a same-sex marriage may be a "legitimate business purpose" but religious objections never qualify. Minn. Stat. § 363A.17(3). Such "discriminatory treatment" is not neutral but profoundly "devalues religious reasons for" not celebrating same-sex marriage in violation of the Free Exercise Clause. *Lukumi*, 508 U.S. at 537-38.

Nor is the MHRA and Defendants' application of it generally applicable. "The Free Exercise clause protects religious observers against unequal treatment." *Id.* at 542 (quotation and alteration omitted). What that means is that Defendants may not "fail to prohibit nonreligious conduct that endangers [the MHRA's interest in non-discrimination] in a similar or greater degree than" the Larsens' actions do. *Id.* at 543. But that is exactly what Defendants have done. They broadly exempt other businesses from the MHRA's non-discrimination ban if they can provide "a legitimate business purpose." Minn. Stat. § 363A.17(3). Any number of secular rationales may satisfy this low bar, including compromising a business' brand; however, Defendants have definitely said that religious reasons *never* qualify for such an exemption. Ver. Compl.¶¶60-64, 302.

Moreover, the MHRA provides a number of categorical exemptions for other secular and religious purposes, although Defendants deny any exemption to the Larsens. Ver. 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, one provision states that nothing in the MHRA, including § 363A.11(1) and § 363A.17(3), prohibits any "religious association, religious

corporation, or religious society that is not organized for private profit" from "taking any action with respect to education, employment, housing and real property, or use of facilities" in "matters relating to sexual orientation." Minn. Stat. § 363A.26. Another provision states that § 363A.11 as it relates to sex "shall not apply to such facilities as restrooms, locker rooms, and other similar places." Minn. Stat. § 363A.24. The same subsection states that the provisions of § 363A.11 "do not apply to employees or volunteers of a nonpublic service organization whose primary function is providing occasional services to minors, such as youth sports organizations, scouting organizations, boys' or girls' clubs, programs providing friends, counselors, or role models for minors, youth theater, dance, music or artistic organizations, agricultural organizations for minors, and other youth organizations, with respect to qualifications based on sexual orientation." Minn. Stat. § 363A.24.

Such sweeping exemptions; including the broad "legitimate business purposes" exception, render the MHRA not generally applicable. Like in *Ward v. Polite*, 667 F.3d 727, 730 (6th Cir. 2012), where a public university permitted counseling students to refer clients to other counselors for mundane reasons, such as an inability to pay, while rejecting religious reasons, the MHRA is an "exception-ridden policy" that is "just the kind of state action that must run the gauntlet of strict scrutiny," *id.* at 740. The MHRA's plain text and Defendants' application of it "have every appearance of a prohibition that society is prepared to impose upon [the Larsens] but not upon itself." *Lukumi*, 508 U.S. at 545 (quotation and alteration omitted). And that is the "precise evil … the requirement of general applicability is designed to prevent." *Id.* at 546.

C. The MHRA imposes unconstitutional conditions on the Larsens' speech.

The MHRA gives the Larsens' three options: (1) create films that violate their deepest beliefs, (2) decline to create such films, and suffer the consequences of investigation, prosecution and possible jail time, or (3) avoid those consequences by censoring their speech and creative output regarding marriage. Ver. Compl.¶ 254. Such limits on the exercise of fundamental liberties are constitutionally impermissible.

The unconstitutional conditions doctrine bars the state not just from prohibiting the Larsens' exercise of their rights to free speech, expressive association, and free exercise outright, but also from "deter[ing], or chilling" the exercise of those rights. *Bd. of Comm'rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 674 (1996) (quotation omitted). Under that doctrine, the state "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Following ones "chosen profession free form unreasonable governmental 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); *cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (expressing concern that the ACA would "effectively exclude [some religious] people from full participation in the economic life of the Nation").

Defendants' mandate that the Larsens must be willing to create films artfully promoting same-sex marriage before entering the marriage industry is an attempt to preclude speech exclusively in favor of biblical marriage "by forcing the inclusion of all views on" marriage. *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 572 (7th Cir. 2001) (citing

Hurley, 515 U.S. at 575-76). This indirect attempt to force the Larsens to design and create speech promoting the moral and societal viewpoint that same-sex marriage is equivalent to marriage between one man and one woman—something Defendants could not do directly—violates the unconstitutional conditions doctrine. *See Perry*, 408 U.S. at 597 (the government cannot deny a benefit to "produce a result [it] could not command directly" (quotation omitted)).

D. The MHRA fails strict scrutiny because its application to the Larsens is not justified by a compelling government interest in the least restrictive means available.

"The strict scrutiny test requires the state to show that the law that burdens the protected right advances a compelling state interest and is narrowly tailored to serve that interest." *Republican Party of Minn. v. White*, 416 F.3d 738, 749 (8th Cir. 2005). "[I]t is the rare case in which…a law survives strict scrutiny." *Id.* (quotations omitted).

This standard "look[s] beyond broadly formulated interests" to the "application of the challenged law 'to the person'—the particular claimant whose" rights are being infringed. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006); *see also Hobby Lobby*, 134 S. Ct. at 2779. The state cannot meet this exacting test simply by proffering a generic interest in eradicating discrimination. Rather, it must show an interest sufficiently compelling to justify requiring the Larsens *themselves* to produce same-sex wedding cinematography in violation of their consciences and First Amendment rights. *Id.* Defendants cannot meet this burden, particularly here where the myriad exceptions to the MHRA demonstrate that the interests it serves are not compelling. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015) (explaining a law

"cannot be regarded as protecting an interest of the highest order … when it leaves appreciable damage to that supposedly vital interest unprohibited" (quotation omitted)).

Applying public accommodation laws to expressive activity does not serve a valid, let alone a compelling, state interest. *Hurley*, 515 U.S. at 578-79 (declaring it a "decidedly fatal objective" to apply a public accommodation law to coerce unwanted speech). That is true here first because the Larsens' decision whether to engage in a filmmaking projects is based on the message not the person and second, wedding cinematography is available from hundreds of providers in Minnesota and across the country, many of whom advertise their services for same-sex weddings. Larsen Aff.¶¶13-22; App.21-59. Very few businesses are willing to turn down the monetary profit gained from producing wedding films. Respecting the Larsens' speaker autonomy will not limit anyone's access to wedding services. In fact, by baring the Larsens from entering the wedding industry through punitive threats, Ver. Comp. ¶¶ 149-79, Defendants' application of the MHRA limits access to wedding cinematographers, rather than expanding it.

It makes no difference that some may find the Larsens' choice of content "offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). "Disapproval of a [public accommodation's] statement does not legitimize use of the [state's] power to compel the speaker to alter the message by including one more acceptable to others." *Hurley*, 515 U.S. at 581. Society's changing views on marriage do not justify burdening First Amendment rights. As the Court noted in *Dale*, "the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view." 530 U.S. at 660.

Further, the MHRA is far from narrowly tailored. Minnesota could, for example, continue to prohibit sexual orientation discrimination but exempt expressive wedding service providers that have a sincere moral or religious objection to celebrating same-sex ceremonies. At bottom, Defendants cannot demonstrate that forcing the Larsens to produce films celebrating same-sex marriages is "actually necessary" to solve "an 'actual problem,'" as the Constitution requires. *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2738 (2011).

II. The Remaining Preliminary Injunction Factors Are Satisfied.

The Larsens have established a likely violation of their First Amendment rights and that generally satisfies "the other requirements for obtaining a preliminary injunction." *Swanson*, 692 F.3d at 870. *Supra* Part I. Nevertheless, the remaining factors also militate in the Larsens' favor. As to the "threat of irreparable harm," the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Johnson v. Minneapolis Park & Recreation Bd.*, 729 F.3d 1094, 1198, 1101–02 (8th Cir. 2013) (quotation omitted). Further, "[t]he balance of equities favors granting the injunction" because permitting the Larsens to speak will halt the irreparable injury to their constitutional rights and will increase access to wedding cinematographers in the marketplace. *Id.* at 1102. Permitting the Larsens to tell marriage stories will harm no one. Lastly, "the potential harm to independent expression … is great and the public interest favors protecting core First Amendment freedoms." *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999).

CONCLUSION

The Supreme Court once observed that "[s]truggles to coerce uniformity of sentiment in support of some end thought essential to their time and country" are not new to man but are foreign to our system of government. *Barnette*, 319 U.S. at 640. Standardization of ideas about any subject—marriage included—"either by legislature, courts, or dominant political or community groups" is fundamentally undemocratic. *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949). The right to speak freely and differ as to things that matter without fear of government punishment is what "sets us apart from totalitarian regimes." *Id*. at 4.

The present coercive impulse our nation faces is affirmative support for same-sex marriage, driven by powerful progressive forces in our society, as this case aptly shows. But as with all other coercive impulses that have previously gripped this nation—like traditionalist demands that films be censored to protect public morals and decency or that school children salute the American flag to cultivate national unity in the face of totalitarian threats—they must give way to the First Amendment. This Court should enter a preliminary injunction to halt the ongoing infringement of the Larsen's constitutional rights to speak, associate, and practice their faith freely.

Respectfully submitted this 13th day of January, 2017.

By: /s/Jeremy D. Tedesco

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2017, a copy of the foregoing Memorandum Of Law In Support Of Plaintiffs' Motion For Preliminary Injunction was filed with the Clerk of the Court using the ECF system. I also certify that the foregoing will be served, along with a copy of the Summons and Complaint, via a private process server upon the following defendants:

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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 (h) because it contains 9398 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

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

EXHIBIT 3

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

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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
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APPEAL NO. 17-3352

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

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

PLAINTIFFS-APPELLANTS' STATEMENT OF ISSUES

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EXHIBIT 4

Appellants intend to submit the following issue in their principal brief for this Court's disposition:

> Whether applying the Minnesota Human Rights Act ("MHRA") to compel cinematographers to create films that conflict with their sincerely held religious beliefs about marriage violates the Free Speech, Free Exercise, or Free Association Clauses of the First Amendment or the Equal Protection or Due Process Clauses of the Fourteenth Amendment.

Dated: November 13, 2017

Respectfully submitted,

s/ Jeremy D. Tedesco

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Date: November 13, 2017

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APPEAL NO. 17-3352

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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

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v.

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Defendants-Appellees,

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

PLAINTIFFS-APPELLANTS' UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE OPENING BRIEF WITH ADDENDUM AND APPENDIX

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EXHIBIT 5

Appellants Telescope Media Group, Carl Larsen, and Angel Larsen respectfully request a 30-day extension of time to file their opening brief with addendum and appendix. This motion is unopposed.

1. Appellants' opening brief with addendum and appendix are currently due on December 19, 2017. A 30-day extension would make them due on January 18, 2018.

2. This extension is justified because Appellants' counsel also represent Petitioners Jack Phillips and Masterpiece Cakeshop which is currently scheduled for oral argument before the United States Supreme Court on December 5, 2017. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111 (U.S. filed Jul. 22, 2016). In particular, Appellants' counsel Ms. Waggoner is lead counsel for Mr. Phillips and Masterpiece Cakeshop and will be arguing on behalf of petitioners on December 5, 2017. Appellants' counsel Mr. Scruggs, Mr. Cortman, Mr. Gray, and Mr. Warner also represent Mr. Phillips and Masterpiece Cakeshop and through November and early December are heavily involved in preparation of the reply brief due November 22, 2017, analysis of the ninety-five *amicus* briefs filed in the case, and participation in the numerous moot courts scheduled in November and early December to prepare for the December 5th argument. The United States Supreme Court case deadlines were set before the appellate briefing deadlines in this case.

3. Appellants' counsel also have many other litigation deadlines in November and December. For example, Appellants' counsel will be filing a reply brief at the United States Supreme Court in the coming weeks in support of the petition for certiorari in *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash.), *petition for cert. filed*, No. 17-108 (U.S. July 14, 2017); have deadlines in *303 Creative LLC v. Elenis*, 1:16-CV-02372-MSK-CBS (D. Colo. Sep. 1, 2017), *appeal docketed*, No. 17-1344 (10th Cir. Sep. 29, 2017), including an opening brief and appendix due on December 18, 2017; and have other deadlines in the instant case, including designations of record, appendix, and statement of issues due on November 13, 2017.

4. Currently, Appellees' response brief is due January 18, 2018. If the deadline for Appellants' opening brief with addendum and appendix is moved to January 18, 2018 as requested, Appellees' response brief would be due on February 20, 2018.

5. This is Appellants' first request for an extension.

6. Counsel for Appellants and Appellees have conferred, and Appellees take no position on this request.

For these reasons, Appellants respectfully request that this Motion for Extension of Time to file their Opening Brief with Addendum and Appendix be granted.

Dated: November 13, 2017

Respectfully submitted,

s/ Jeremy D. Tedesco

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because this motion contains 418 words, excluding the parts exempted under Fed. R. App. P. 32(f).

2. This motion complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in a 14-point proportionally spaced Times New Roman typeface using Microsoft Word 2013.

3. All required privacy redactions have been made pursuant to 8th Cir. R. 25A(i).

4. Paper copies are not required for this motion.

5. This motion has been scanned for viruses with the most recent version of a commercial virus scanning program, Traps version 4.1, and is free of viruses according to this program.

Date: November 13, 2017

s/ Jeremy D. Tedesco
Jeremy D. Tedesco

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2017, a true and accurate copy of the foregoing was electronically filed with the Court using the CM/ECF system, which will send notification of such filing to the following:

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Attorneys for Defendants/Appellees

Date: November 13, 2017

s/ Jeremy D. Tedesco
Attorney for Plaintiffs/Appellants

2017 WL 3913762 (U.S.) (Appellate Brief)
Supreme Court of the United States.

MASTERPIECE CAKESHOP, LTD.; and Jack C. Phillips, Petitioners,
v.
COLORADO CIVIL RIGHTS COMMISSION; Charlie Craig; and David Mullins, Respondents.

No. 16-111.
August 31, 2017.

On Writ of Certiorari to the Colorado Court of Appeals

Brief for Petitioners

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*i QUESTION PRESENTED

Whether applying Colorado's public-accommodation law to compel artists to create expression that violates their sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

*ii PARTIES TO THE PROCEEDING

Petitioner Masterpiece Cakeshop, Ltd. ("Masterpiece") is a small Colorado corporation owned by Petitioner Jack Phillips, an individual and citizen of Colorado, and his wife, Debra Phillips.

Respondent Colorado Civil Rights Commission ("the Commission") is an agency of the State of Colorado. Respondents Charlie Craig and David Mullins are individuals and citizens of Colorado.

CORPORATE DISCLOSURE STATEMENT

Petitioner Masterpiece is a Colorado corporation wholly owned by Jack and Debra Phillips. It has no parent companies, and no entity or other person has any ownership interest in it.

*iii TABLE OF CONTENTS

EXHIBIT 6

*vii TABLE OF AUTHORITIES

Cases

***1** INTRODUCTION

Jack Phillips's love for art and design began at an early age. Discovering that he could blend his skills as a pastry chef, sculptor, and painter, he spent nearly two decades in bakeries owned by others before opening Masterpiece Cakeshop twenty-four years ago. Long before television shows like *Cake Boss* and *Ace of Cakes,* Phillips carefully chose Masterpiece's name: it would not be just a bakery, but an art gallery of cakes. With this in mind, Phillips created a

Masterpiece logo depicting an artist's paint palate with a paintbrush and whisk. And for over a decade, a large picture has hung in the shop depicting Phillips painting at an easel. Since long before this case arose, Phillips has been an artist using cake as his canvas with Masterpiece as his studio.

Phillips is also a man of deep religious faith whose beliefs guide his work. Those beliefs inspire him to love and serve people from all walks of life, but he can only create cakes that are consistent with the tenets of his faith. His decisions on whether to design a specific custom cake have never focused on *who* the customer is, but on *what* the custom cake will express or celebrate.

At issue here is whether Phillips may decline requests for wedding cakes that celebrate marriages in conflict with his religious beliefs. The First Amendment guarantees him that freedom because his wedding cakes, each one custom-made, are his artistic expression. Much like an artist sketching on canvas or a sculptor using clay, Phillips meticulously crafts each wedding cake through hours of sketching, sculpting, and hand-painting. The cake, which serves ***2** as the iconic centerpiece of the marriage celebration, announces through Phillips's voice that a marriage has occurred and should be celebrated. The government can no more force Phillips to speak those messages with his lips than to express them through his art.

The Colorado Court of Appeals and the Commission have conceded that some cakes are artistic expression protected under the First Amendment. Pet.App.34a-35a; Colo. Opp. Br. at 15. But Phillips's custom wedding cakes, they have told us, are not among them. Thus, the Commission ordered him either to create custom cakes that celebrate same-sex marriages or to stop designing wedding cakes altogether. But just as the Commission cannot compel Phillips's art, neither may the government suppress it. The Commission's order violates First Amendment freedoms at every turn.

The Commission's actions have also devastated Phillips and his family. By effectively forcing him to stop designing wedding cakes, the Commission stripped Phillips of roughly 40% of his family income, which caused him to lose most of his employees. As if this were not bad enough, the Commission also ordered Phillips to reeducate his remaining staff, nearly all of whom are his family members, by essentially teaching them that he was wrong to operate his business according to his faith. Moreover, the Commission imposed intrusive reporting requirements that force Phillips to give a running tally to the government detailing how he exercises his artistic discretion.

***3** The Commission dismisses the First Amendment when it is most needed - to help people in a pluralistic society navigate through sincere differences on matters "that touch the heart of the existing order." *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943). Marriage does just that, functioning as a "keystone of our social order" and holding a "sacred" place in the lives of many. *Obergefell v. Hodges,* 135 S. Ct. 2584, 2594, 2601 (2015). The Commission must respect Phillips's freedom to part ways with the current majority view on marriage and to create his wedding cakes consistently with his "decent and honorable" religious beliefs. *Id.* at 2602. Instead, the Commission punished him, demeaned his beliefs, and marginalized his place in the community.

Equally important, a ruling against Phillips threatens the expressive freedom of all who create art or other speech for a living. Respondents Charlie Craig and David Mullins argued below that the Commission can force fine-art painters to create paintings celebrating ideas that they deem objectionable. Pet.App.332a-33a. It is difficult to imagine a view more at odds with the First Amendment and our nation's pluralistic values.

There is a better way - one that allows the Commission to ensure that businesses do not refuse to serve people simply because of who they are, but protects individuals like Phillips from being forced to create expression about marriage that violates their core convictions. The path to civility, progress, and freedom does not crush those who hold unpopular views, pushing them from the public square. It allows free citizens to determine for themselves "the ideas and beliefs deserving of expression, consideration, ***4** and adherence." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.,*

133 S. Ct. 2321, 2327 (2013) (quoting *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 641 (1994) (plurality opinion)). That is the path this Court should take; it is the only one consistent with the First Amendment.

DECISIONS BELOW

The Colorado Court of Appeals' decision is reported at 370 P.3d 272, and reprinted in the Petition for Writ of Certiorari Appendix at Pet.App.1a-53a. The Supreme Court of Colorado's order denying review is not reported, but is available at No. 15SC738, 2016 WL 1645027 (April 25, 2016) and reprinted at JA259-60.

The Administrative Law Judge's ("ALJ") decision is not reported, but is reprinted at Pet.App.61a-91a. The Colorado Civil Rights Commission's order adopting the ALJ's opinion is not reported, but is reprinted at Pet.App.56a-60a.

STATEMENT OF JURISDICTION

On April 25, 2016, the Colorado Supreme Court denied Petitioners' request for review, leaving in place the Colorado Court of Appeals' decision rejecting Petitioners' claims under the First and Fourteenth Amendments. Petitioners timely filed their petition for writ of certiorari with this Court on July 22, 2016, which was granted on June 26, 2017. The Court has jurisdiction under 28 U.S.C. § 1257(a).

*5 PERTINENT CONSTITUTIONAL PROVISIONS

The texts of the First and Fourteenth Amendments to the United States Constitution are found at Pet.App.92a. The relevant portions of the Colorado Anti-Discrimination Act are set forth at Pet.App.93a-95a.

STATEMENT OF THE CASE

A. Factual Background

1. *Phillips's Work as a Cake Artist.* After discovering his artistic talents in high-school art class, Phillips has spent the last forty years honing the craft of elaborate custom cake design. Joint Appendix ("JA") 160. He and his wife own their own family business, Masterpiece Cakeshop, where for the last twenty-four years Phillips has made custom cakes and developed a reputation for his exceptional designs. JA157, 190. Phillips opened Masterpiece to gain greater artistic freedom, better integrate his faith and work, and provide employment for his family and others in the community. JA163-64.

Phillips approaches cake design as an art form. He creates his custom cakes by using several fine-art skills such as sketching, sculpting, and painting. JA160-62; *The Essential Guide to Cake Decorating* 5 (2001) ("*Essential Guide* "). Even Masterpiece's logo, which features an artist's paint palate with a paintbrush and whisk, reflects Phillips's artistic approach. JA160, 172. All who enter his shop are greeted by a drawing of Phillips sketching himself at an easel. JA160, 173.

***6** 2. *Phillips's Wedding Cakes.* Throughout the years, Phillips has focused his custom work on wedding cakes. Before the Commission forced him to stop, custom wedding cakes accounted for approximately 40% of Phillips's business. [1]

The tradition of creating special cakes for weddings dates as far back as Roman times. *Essential Guide, supra,* at 8. The wedding cake developed "not as an integral part of a[] meal but as a festive or celebratory" component of the newlyweds' union. Simon R. Charsley, *Wedding Cakes and Cultural History* at 46 (1992). In modern Western culture, the wedding cake has become the iconic centerpiece of the celebration. *Id.* at 121; Wendy A. Woloson, *Refined Tastes: Sugar, Confectionery, and Consumers in Nineteenth-Century America* 168 (2002). It is "a veritable institution. A wedding without it would be a wedding without protocol, a rite without confirmation." Charsley, *supra,* at Foreword.

Wedding cakes are inseparable from the nearly ubiquitous cake-cutting ritual that accompanies them. Guests gather around as the couple cuts the cake together and feeds it to each other - their "first joint action" as newlyweds. *Id.* at 123. It is a celebratory performance, which itself is infused with rich symbolism and meaning, and which has the specially designed cake at its center. *See* Claire Stewart, *As Long As We Both Shall Eat* 137 (2017) ***7** (explaining that during the "cutting of the cake," the couple feeds "each other a slice in a gesture of unity").

The modern wedding cake is a "highly distinctive structure[]" and "a widely meaningful element of 'western culture' " that serves as a "marker[] for weddings." Charsley, *supra,* at 121; *see also* Woloson, *supra,* at 168 (noting that a wedding cake is "a tangible proclamation of marriage"). It is a "piece[] of custom-made art," Woloson, *supra,* at 178, which typically costs between $400 and $800, *see* Toba Garrett, *Wedding Cake Art and Design* 8 (2010). Wedding cakes are an artistic medium through which cake designers speak using their "expertise and artistry." Woloson, *supra,* at 178.

Phillips's wedding cakes fit squarely within this genre. Each one is a custom-made, elaborately designed, intricately constructed, and typically tiered masterpiece. JA170, 174.

2613

JA174; *see also* Masterpiece Cakeshop Wedding, http://masterpiececakes.com/wedding-cakes/ (last visited Aug. 29, 2017). No matter their precise markings or decorations, the cakes tell all who see ***8** them that "a wedding has occurred, a marriage has begun, and the couple should be celebrated." JA162.

Phillips specially crafts every wedding cake he creates. Before designing it, he meets with the couple to learn their desires, personalities, preferences, and wedding details. JA161. Then he sketches the design on paper (often multiple times), sculpts it into shape, creates ornamental and symbolic details to place on it, and decorates it using artistic techniques like hand-painting, air-brushing, and sculpting, JA161-62; *see also* Garrett, *supra,* at 5 (explaining that wedding cakes involve "sculpting, food painting, and hand-shaped ornaments made out of a sugar material").

Phillips's artwork serves as a focal point of the marriage celebration and, through it, his expression is present there. JA162. Also, Phillips himself is present when he delivers and sets up the cake, *id.,* and sometimes interacts with the couple's family and friends, JA163. Many who have seen Phillips's work at a wedding have later commissioned him to create a custom cake for them. *Id.*

3. *Phillips's Faith.* Phillips is a Christian who strives to honor God in all aspects of his life, including how he treats people and runs his business. JA157, 163. Phillips closes Masterpiece on Sundays so that he and his employees can attend religious services. JA164. And because of his faith, he pays his employees above the market rate and helps them with financial and personal needs outside of work. JA163-64.

Phillips gladly serves people from all walks of life, including individuals of all races, faiths, and sexual ***9** orientations. JA164. But he cannot design custom cakes that express ideas or celebrate events at odds with his religious beliefs. JA158-59, 164-66. For example, Phillips will not design cakes that celebrate Halloween; express anti-family themes (such as a cake glorifying divorce); contain hateful, vulgar, or profane messages (such as a cake disparaging gays and lesbians);

or promote atheism, racism, or indecency. JA165. These limitations on Phillips's custom work have no bearing on his premade baked items, which he sells to everyone, no questions asked.

As core tenets of his faith, Phillips believes that marriage is a sacred union between one man and one woman, and that it represents the relationship of Jesus Christ and His Church. JA157-58. The wedding signifies that the "two [have] become one flesh" and that no one should separate "what God has joined together." *Id.* Regardless of whether Phillips's wedding clients plan an overtly religious event, he believes that all weddings are sacred and that they create an inherently religious relationship. *Id.* Because weddings and marriage have such religious significance to Phillips, he would consider it sacrilegious to express through his art an idea about marriage that conflicts with his religious beliefs. JA157-59. For this reason, he will not design custom cakes that celebrate any form of marriage other than between a husband and a wife. JA159.

4. *Craig and Mullins's Request.* In July 2012, Charlie Craig and David Mullins visited Masterpiece with Craig's mother, Deborah Munn. JA168. At the time, Colorado did not recognize same-sex marriages. JA169.

***10** Craig and Mullins were browsing a photo album of Phillips's custom-design work, JA39, 48, 89, when Phillips sat down with them at his consultation table, JA168. After Phillips greeted the two men, they explained that they wanted him to create a cake for their wedding. *Id.* Phillips politely explained that he does not design wedding cakes for same-sex marriages, but emphasized that he was happy to make other items for them. *Id.* Craig, Mullins, and Munn expressed their displeasure and left the shop. JA43, 168.

Munn called Phillips the next day and asked why he declined their request. JA39-40. Phillips explained that it was because of his religious beliefs about marriage, and he also told her that Colorado did not recognize same-sex marriages. JA169. Over the years, Phillips has declined other requests to design custom wedding cakes that celebrate same-sex marriages, all the while affirming his willingness to create other cakes for LGBT customers. JA62-63, 169.

After Craig and Mullins posted online that Phillips declined their wedding-cake request, people picketed and boycotted Masterpiece. Another local cake artist offered to design a free wedding cake for Craig and Mullins, an offer they accepted. JA184-85. Craig and Mullins then married in Massachusetts (because same-sex marriage was not licensed in Colorado at the time), and they had a multi-tiered, rainbow-layered wedding cake at their reception in Colorado. JA175-76. Following wedding customs, they cut the cake together and fed it to each other in celebration of their union. *Id.*

***11** B. Procedural Background

1. *Division Proceedings.* Craig and Mullins filed formal charges with the Colorado Civil Rights Division ("the Division") - the state agency responsible for enforcing the Colorado AntiDiscrimination Act ("CADA") - alleging that Phillips engaged in sexual-orientation discrimination. JA4752. In March 2013, the Division issued a probable-cause determination against Phillips, JA69-86, explaining that even though Phillips told Craig and Mullins that he would "create birthday cakes, shower cakes, or any other cakes for them," JA73, his decision not to custom design "a cake for a same-sex wedding" violated CADA, JA76.

The Division issued a notice of hearing and formal complaint indicating that a proceeding would be held before an ALJ. JA87-100. After the ALJ granted Craig and Mullins's motion to intervene, JA102, the parties filed cross-motions for summary judgment, which the ALJ resolved through a written decision against Phillips, Pet.App.61a-88a.

The ALJ regarded "as a distinction without a difference" Phillips's argument that he declined Craig and Mullins's request not because of their status as gay men, but because he could not in good conscience create a wedding cake that celebrates their marriage. Pet.App.69a. Based on this, the ALJ held that Phillips violated CADA. Pet.App.69a-72a.

The ALJ then rejected Phillips's free-speech defense even though the ALJ's decision recognized that the First Amendment applies to non-verbal "mediums of expression such as art." Pet.App.74a. Free-speech protection, in the ALJ's view, hinged on ***12** whether a particularized "message or symbol" is part of a cake's design. Pet.App.75a. Where a message or symbol is "offensive," the ALJ determined, a cake artist has a "free speech right to refuse" it. Pet.App.78a. Thus, according to the ALJ, an African American cake designer could refuse to create a cake with a white-supremacist message for the Aryan Nations church, and an Islamic cake artist could turn down a religious group's request for a cake denigrating the Quran. *Id.* But because Craig and Mullins did not specify whether they wanted words or designs on their wedding cake, Pet.App.75a, the ALJ explained that Phillips had "no free speech right" to decline their request, Pet.App.78a. The ALJ also analyzed and dismissed Phillips's free-exercise defense. Pet.App.79a-87a.

2. *Commission Proceedings.* Phillips appealed to the Colorado Civil Rights Commission - an agency composed of seven members. *See* Colo. Rev. Stat. §24-34-303(1). The Commission issued a final order adopting the ALJ's ruling on the same day that the commissioners deliberated about the case. Pet.App.56a-58a; JA196-207. That order requires Phillips to (1) design wedding cakes that celebrate same-sex marriages if he creates cakes that celebrate opposite-sex marriages, (2) reeducate his staff (which includes his family members) on CADA compliance, and (3) submit quarterly compliance reports for two years describing all orders that he declines and the reasons for the denial. Pet.App.57a-58a.

3. *Colorado Court of Appeals.* Phillips appealed the Commission's order to the Colorado Court of Appeals, JA208-16, and that court affirmed, Pet.App.1a-53a. As an initial matter, the court ***13** accepted that Phillips declined Craig and Mullins's request " 'because of' [his] opposition to same-sex marriage, not because of [his] opposition to their sexual orientation." Pet.App.l2a-13a. Nonetheless, the court reasoned that CADA requires no "showing of 'animus' " against individuals, Pet.App.18a, and held that Phillips violated the statute by declining "to create a wedding cake for Craig[] and Mullins' same-sex wedding celebration," Pet.App.21a-22a.

The court then rejected Phillips's free-speech defense, Pet.App.28a-36a, holding that he "does not convey a message supporting same-sex marriages merely by abiding by the law," Pet.App.30a, because "a reasonable observer would understand that [his] compliance with the law is not a reflection of [his] own beliefs," Pet.App.31a. The court distinguished three other cases - decided while this one was pending - in which the Commission found no religious discrimination when cake designers declined a religious man's requests to create custom cakes with religious messages criticizing same-sex marriage or same-sex relationships. JA230-58. The court explained that those "bakeries did not refuse the patron's request because of his creed, but rather because of the offensive nature of the requested message." Pet.App.20a n.8. Yet Phillips's speech-based reasoning - his desire not to create custom cakes that celebrate marriages in conflict with his faith - was grounded on his religious "opposition to same-sex marriage," which the court deemed unlawful. *Id.*

The court then rejected Phillips's free-exercise arguments. It held that "CADA is generally applicable, notwithstanding its exemptions," because ***14** a law "is generally applicable so long as it does not regulate only religiously motivated conduct." Pet.App.42a. Moreover, CADA is neutral, the court concluded, because it "forbids all discrimination based on sexual orientation regardless of its motivation." Pet.App.43a. The court also dismissed Phillips's hybrid-rights argument because even if that theory exists, "it would not apply here" since "the Commission's order does not implicate [Phillips's] freedom of expression." Pet.App.46a.

The court next determined that CADA satisfies rational-basis review. Pet.App.50a. It held that "states have a compelling interest in eliminating [sexual-orientation] discrimination" and explained "that statutes like CADA further that interest," Pet.App.49a, by (1) avoiding "adverse economic effects" and (2) "ensur[ing] that the goods and services provided by public accommodations are available to all of the state's citizens," Pet.App.50a.

4. *Colorado Supreme Court.* Phillips sought but was denied review in the Colorado Supreme Court. Pet.App.242a-53a; JA259-60. This Court then granted Phillips's petition for writ of certiorari on June 26, 2017.

SUMMARY OF ARGUMENT

Phillips serves all people, but cannot convey all ideas or celebrate all events. He seeks to live his life, pursue his profession, and craft his art consistently with his religious identity. The First Amendment guarantees him that freedom.

The Free Speech Clause protects more than words. Phillips's custom wedding cakes - which he ***15** intricately and artistically forms with his own hands for the purpose of celebrating his clients' marriages - are his protected expression. Each of them serves as "a short cut from mind to mind," *Barnette,* 319 U.S. at 632, declaring to all onlookers that the couple is now joined in marriage and that this is an occasion for jubilation. His custom cakes necessarily express ideas about marriage and the couple, and as a result, they are entitled to full constitutional protection.

This Court's compelled-speech doctrine forbids the Commission from demanding that artists design custom expression that conveys ideas they deem objectionable. Thus, a cake artist who serves all people, like Phillips does, cannot be forced to create wedding cakes that celebrate marriages at odds with his faith. This Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557 (1995), guarantees no less. Dismissing that governing authority, the Commission violated the "individual dignity and choice" that the First Amendment promises to artists. *Cohen v. California,* 403 U.S. 15, 24 (1971).

The Free Exercise Clause also forbids the Commission from applying CADA to target Phillips and likeminded believers for punishment. Cake artists who support same-sex marriage may refuse requests to oppose it. But Phillips may not decline requests to support it. Such a one-sided application of CADA - under which people of faith who share Phillips's beliefs always lose - defies the requirements of neutrality and general applicability. Moreover, the Commission has not only ordered Phillips to participate in celebrating what he regards as a religious event, it has forced him to do so through ***16** his expression. This confluence of free-exercise and free-speech rights forms a strong hybrid-rights claim, which subjects the Commission's actions to strict-scrutiny review.

The Commission's application of CADA in this case cannot withstand the rigors of strict scrutiny. While the Commission has an interest in ensuring that businesses are open to all people, it has no legitimate - let alone compelling - interest in forcing artists to express ideas that they consider objectionable. Much less does the Commission have a compelling interest in mandating that people of faith celebrate what they consider to be sacred events. Moreover, the Commission's actions are not narrowly tailored because Respondents have not even shown that protecting Phillips's First Amendment rights would undercut the interests they seek to achieve. Because strict scrutiny is not satisfied, the Commission violated Phillips's freedom under both the Free Speech and Free Exercise Clauses.

Hanging in the balance is more than Phillips's freedom to ply his craft without forfeiting his conscience. At stake is his and all likeminded believers' freedom to live out their religious identity in the public square. The First Amendment promises them that basic liberty.

ARGUMENT

I. Compelling Phillips to Create Artistic Expression that Celebrates Same-Sex Marriage Violates the Free Speech Clause.

Phillips's free-speech analysis proceeds in four parts. First, the Free Speech Clause applies because ***17** Phillips's custom wedding cakes are his artistic expression. Second, this Court's compelled-speech doctrine forbids the Commission from ordering Phillips to express or celebrate what he cannot in good conscience support. Third, no less than strict scrutiny applies because not only has the Commission sought to compel Phillips's artistic expression, it has discriminated based

on both content and viewpoint. Finally, as Part III demonstrates, the Commission cannot satisfy its heavy burden under strict scrutiny.

A. The Free Speech Clause Applies to Phillips's Custom Wedding Cakes.

The Free Speech Clause protects both expression and expressive conduct. This Court must initially decide whether Phillips's custom wedding cakes are artistic expression. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47, 60-68 (2006) (*"FAIR"*) (assessing whether the litigants were engaged in speech before asking if their conduct was expressive). Because his wedding cakes clearly qualify as expression, expressive-conduct analysis is unnecessary. *See Wooley v. Maynard,* 430 U.S. 705, 713 (1977) (declining to reach the expressive-conduct issue). The court below, however, confused these principles by first considering expressive-conduct analysis and never addressing whether Phillips's custom-designed wedding cakes constitute artistic expression. *See* Pet.App.28a-36a. Asking the right questions in the right order leads to the inescapable conclusion that the Free Speech Clause safeguards Phillips in this case.

*18 1. Phillips's Custom Wedding Cakes Are His Artistic Expression.

"[T]he Constitution looks beyond written or spoken words as mediums of expression," *Hurley,* 515 U.S. at 569, and protects artistic expression as pure speech, *see, e.g., Ashcroft v. Free Speech Coal.,* 535 U.S. 234, 246 (2002) (noting that the First Amendment protects expression with artistic value); *Nat'l Endowment for the Arts v. Finley,* 524 U.S. 569, 580 (1998) (accepting as a first principle that "artistic speech" qualifies for full First Amendment protection).

Protected artistic expression is a broad category. It includes traditional forms of visual art such as "pictures, films, paintings, drawing, and engravings," *Kaplan v. California,* 413 U.S. 115, 119 (1973), encompassing even abstract works like the unintelligible "painting[s] of Jackson Pollock," *Hurley,* 515 U.S. at 569. And it extends further still, shielding atonal instrumentals, *see id.* (mentioning Arnold Schoenberg's music), and even sexually explicit materials, *see Jacobellis v. Ohio,* 378 U.S. 184, 191 (1964). To qualify for First Amendment protection, artistic expression need not contain a "succinctly articulable" or "particularized message." *Hurley,* 515 U.S. at 569.

Following this Court's lead, the federal courts of appeals have recognized forms of protected artistic expression as diverse as tattooing, *Buehrle v. City of Key West,* 813 F.3d 973, 976 (11th Cir. 2015); *Anderson v. City of Hermosa Beach,* 621 F.3d 1051, 1061 (9th Cir. 2010), custom-painted clothing, ***19** *Mastrovincenzo v. City of N. Y.,* 435 F.3d 78, 96 (2d Cir. 2006), and stained-glass windows, *Piarowski v. Ill. Cmty. Coll. Dist. 515,* 759 F.2d 625, 628 (7th Cir. 1985); *see also Cressman v. Thompson,* 798 F.3d 938, 952-53 (10th Cir. 2015) (explaining that the First Amendment protects original artistic expression as "pure speech").

Phillips's custom wedding cakes are his artistic expression because he intends to, and does in fact, communicate through them. *See Brown v. Entm't Merchs. Ass'n,* 564 U.S. 786, 790 (2011) (concluding that video games are protected expression because they "communicate"); *Cressman,* 798 F.3d at 952-53 (explaining that "the animating principle behind pure-speech protection" is "safeguarding self-expression"); *White v. City of Sparks,* 500 F.3d 953, 956 (9th Cir. 2007) (similar). Those ornately decorated, elaborately constructed, and typically tiered cakes serve as the centerpiece of wedding celebrations. Their iconic presence at weddings - functioning as temporary monuments to a most memorable occasion - speaks to all who see them. *Cf. Pleasant Grove City v. Summum,* 555 U.S. 460, 470-71 (2009) (discussing the expressiveness of monuments).

In one sense, those cakes announce a basic message: that this event is a wedding and the couple's union is a marriage. JA162. But in another sense, Phillips's wedding cakes - endowed with all their grandeur - declare an opinion too: that the couple's wedding "should be celebrated." *Id.; see Kaahumanu v. Hawaii,* 682 F.3d 789, 799 (9th Cir. 2012) ("The core of the message in a wedding is a celebration of marriage and the uniting of two people …."). Each of his wedding cakes

also expresses unique aspects of ***20** the couple's personalities and abstract messages such as Phillips's "sense of form, topic, and perspective." *White,* 500 F.3d at 956. Like any good work of art, Phillips's wedding cakes convey messages that address not only "the intellect" but also "the emotions" of observers. *Ward v. Rock Against Racism,* 491 U.S. 781, 790 (1989). The end product reflects a vision brought to life by Phillips.

For all these reasons, couples commission Phillips to design a wedding cake for them. Although they and their guests eventually eat it, that happens well after family and friends admire it, the couple takes photographs with it, and all witness the cake-cutting celebration. No one pays significant sums for an ornate wedding cake just for its taste.

As with other visual artists, Phillips's artistic design process involves extraordinary effort: drawing the cake on paper (often many times); painting elaborate designs and decorations on it; and sculpting the cake's form and its decorations. *See* JA161-62; *Essential Guide, supra,* at 5 (noting that the cake artist has "mastered" the arts of "sculpture" and "painting"). It does not matter that Phillips writes, paints, and sculpts using mostly edible materials like icing and fondant rather than ink and clay. "[T]he basic principles of freedom of speech … do not vary when a new and different medium for communication appears." *Brown,* 564 U.S. at 790 (quotation marks omitted). Phillips is as shielded by the Free Speech Clause as a modern painter or sculptor, and his greatest masterpieces - his custom wedding cakes - are just as worthy of constitutional protection as an abstract painting like Piet Mondrian's Broadway Boogie Woogie, a modern sculpture like Alexander ***21** Calder's Flamingo, or a temporary artistic structure like Christo and Jeanne-Claude's Running Fence. [2]

The First Amendment protects Phillips's wedding cakes regardless of whether he writes words on them or adorns them with bride and groom figurines. All his wedding cakes are custom-designed and distinctly recognizable as "markers for weddings." Charsley, *supra,* at 121. Each of them communicates messages about marriage and the couple.

That is why Phillips declined Craig and Mullins's request before learning all the details of the wedding cake they wanted. They were reviewing photographs of custom cakes when they told Phillips that they wanted him to make a cake for their wedding. When he heard this, Phillips immediately knew that any wedding cake he would design for them would express messages about their union that he could not in good conscience communicate. Expressing such messages would contradict the core of his beliefs about marriage.

Indeed, Phillips, like many adherents of the Abrahamic faiths, believes that marriage has a "spiritual significance," *Turner v. Safley,* 482 U.S. 78, 96 (1987), to the point of being "sacred," *Obergefell,* 135 S. Ct. at 2594; *see* JA157-58 (explaining Phillips's ***22** religious beliefs about marriage). What he expresses through his custom wedding cakes carries great religious meaning for him. Consequently, he considers sacrilegious the ideas that he would express if coerced into creating custom wedding cakes that celebrate same-sex marriages. JA158-59.

Evidence indicates that Craig and Mullins intended to ask Phillips to design "a rainbow-layered [wedding] cake" for them. [3] In fact, that is the very cake that another cake artist later created for their wedding. JA175-76. Given the rainbow's status as the preeminent symbol of gay pride, Craig and Mullins's wedding cake undeniably expressed support for same-sex marriage. [4] Because a cake like that is so obviously expressive, it should easily fall within the Commission's concession (and the Colorado Court of Appeals' finding) that a wedding cake "could … be expressive and could therefore implicate the First Amendment," Colo. Opp. Br. at 15, particularly if it "feature[s] specific designs … that are offensive" to its creator, *id.* at 11; *see also* Pet.App.20a n.8, 34a-35a.

This concession raises another problem for the Commission. It leaves no doubt that the Commission's rigid order - which requires Phillips to craft wedding cakes for same-sex marriages if he designs them for ***23** opposite-sex marriages, Pet.App.57a - infringes Phillips's expressive freedom. For example, if Phillips inscribes a Bible verse declaring that a husband and wife become "one flesh" in marriage, JA157, he must write those same words about a same-sex marriage

and express a written message that he believes to be false. Demanding that violates even the Commission's narrow view of what the First Amendment protects.

2. Alternatively, Phillips's Creation of Custom Wedding Cakes Constitutes Expressive Conduct.

Phillips's creation of custom wedding cakes at least qualifies as a form of expressive conduct. This Court has historically used a two-prong test to determine whether someone is engaged in expressive conduct. That test considers, first, whether "[a]n intent to convey a particularized message was present," and second, whether "the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson,* 491 U.S. 397, 404 (1989) (quoting *Spence v. Wash.,* 418 U.S. 405, 410-11 (1974)). *Hurley* modified that test at least for cases involving visual art, explaining that a "particularized message" is not a prerequisite for constitutional protection. 515 U.S. at 569.

Phillips need only show that a viewer would understand his custom wedding cake, set in the broader context of the wedding festivities, as expressing some message. *See Holloman ex rel. Holloman v. Harland,* 370 F.3d 1252, 1270 (11th Cir. 2004). The Colorado Court of Appeals erred in requiring Phillips to meet a higher bar, although it is one that he satisfies in any event. *See* Pet.App.29a- ***24** 30a (requiring that Phillips's actions "convey[] a particularized message celebrating same-sex marriage").

A person viewing one of Phillips's custom wedding cakes would understand that it celebrates and expresses support for the couple's marriage. *See supra* at 19-20. Phillips plays a direct and substantial role in creating that expression. He not only designs and handcrafts the cake, which is a thoroughly artistic process, *see supra* at 8, he delivers it to the event, JA162, and often interacts with the wedding guests, JA163. All this serves to further associate Phillips with his cake and the wedding. In fact, many who view Phillips's designs at a wedding later ask him to create a cake for them. *Id.*

In *Spence,* this Court held that displaying an upside-down American flag with a peace symbol during a time of international and domestic turmoil is expressive conduct. 418 U.S. at 410 (noting the importance of "the context"). Here, this Court should also conclude that handcrafting the centerpiece displayed at an inherently celebratory event like a wedding is expressive conduct.

The Colorado Court of Appeals took a different route, concluding instead "that the act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings." Pet.App.30a. The court, however, considered the wrong question. The expressive-conduct inquiry should ask whether Phillips's custom wedding cakes - which he not only designs but also delivers to the wedding celebration - ***25** constitute expressive conduct. Because they do, the Free Speech Clause applies.

Given that the First Amendment protects Phillips's wedding cakes, the Court next must decide whether the Commission's order contravenes compelled-speech principles.

B. The Commission Has Violated the Compelled-Speech Doctrine.

"The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster … an idea they find morally objectionable." *Wooley,* 430 U.S. at 715. This promise applies with full force to the creation of art, which is why " 'esthetic and moral judgments about art … are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.' " *Brown,* 564 U.S. at 790 (quoting *United States v. Playboy Entm't Grp., Inc.,* 529 U.S. 803, 818 (2000)). Our "cultural life rest[s] upon this ideal." *Turner Broad.,* 512 U.S. at 641 (plurality opinion). No other approach would sufficiently safeguard the "individual freedom of mind," *Wooley,* 430 U.S. at 714, or "comport with the premise of individual dignity and choice" that underlies the First Amendment, *Leathers v. Medlock,* 499 U.S. 439, 449 (1991) (quoting *Cohen,* 403 U.S. at 24).

Upon these principles, this Court has developed the compelled-speech doctrine, which forbids the government (1) from forcing citizens (or businesses) to express messages that they deem objectionable or (2) from punishing them for declining to convey such messages. *See, e.g.,* ***26** *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.,* 487 U.S. 781, 795-801 (1988) (forbidding the state from requiring paid commercial fundraisers to disclose the percentage of money that they give to their clients); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.,* 475 U.S. 1, 9-21 (1986) (plurality opinion) (*"PG&E"*) (forbidding the state from requiring a business to include a third party's expression in its billing envelope); *Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241, 254-58 (1974) (forbidding the state from requiring a newspaper to publish a third party's article).

Of particular note, this Court has recognized that states may not apply public-accommodation laws like CADA to compel or otherwise interfere with expression. *See, e.g., Boy Scouts of Am. v. Dale,* 530 U.S. 640, 656-59 (2000); *Hurley,* 515 U.S. at 572-75. Yet as states have dramatically expanded those laws, the "potential for conflict" between them and First Amendment rights "has increased" substantially. *Dale,* 530 U.S. at 657; *see id.* at 656 n.2 ("Some municipal ordinances have even expanded to cover criteria such as prior criminal record, prior psychiatric treatment, military status, personal appearance, source of income, place of residence, and political ideology").

That conflict manifested itself in *Hurley.* There, the organizers of Boston's St. Patrick's Day Parade invited members of the public to march in their parade, accepted nearly every group that applied, 515 U.S. at 562, permitted LGBT individuals to participate, *id.* at 572, but refused an LGBT group's request to march as a distinct contingent, *id.* at 561-62. The Massachusetts courts held that the parade organizers had engaged in unlawful discrimination ***27** and ordered them to include the group. *Id.* at 561-65.

This Court unanimously reversed. *Id.* at 581. The Court explained that the state applied its public-accommodation law "in a peculiar way," *id.* at 572, when it required the parade organizers to alter the content of their expression to accommodate "any contingent of protected individuals with a message," *id.* at 573. This violated the First Amendment right of speakers "to choose the content of [their] own message," *id.,* and decide "what merits celebration," *id.* at 574, even if the state or some individuals deem those choices "misguided, or even hurtful," *id.* at 573-74.

Hurley establishes that the state cannot apply a public-accommodation law to force individuals engaged in expression to alter what they communicate, much less to celebrate something that they deem objectionable. This is particularly true for speakers, like the parade organizers in *Hurley,* who exclude no class of people but merely decline to express certain ideas. Phillips fits squarely in that mold. He engages in expression through his custom wedding cakes, and he will gladly create art for anyone (including LGBT individuals) so long as the requester does not ask him to create expression that he considers objectionable. JA169. *Hurley* guarantees him that freedom.

The Commission here committed the same error as the state in *Hurley*: it declared Phillips's artistic expression "itself to be the public accommodation." *Hurley,* 515 U.S. at 573. In so doing, the Commission directly interfered with Phillips's artistic discretion. ***28** It effectively declared that if Phillips communicates on a topic that implicates a protected classification, he must express a contrary message upon request. That, however, "mandates orthodoxy" of expression, "not anti-discrimination." *Ward v. Polite,* 667 F.3d 727, 735 (6th Cir. 2012).

In addition, the Commission has "exact[ed] a penalty on the basis of the content" of Phillips's speech and forced him to express views different from his own. *Tornillo,* 418 U.S. at 256. Because he chose to design art celebrating marriages between one man and one woman, the Commission required him to violate his faith by celebrating opposing ideas. Since Phillips cannot do that, the Commission's order has forced him to shut down his wedding business completely, slashing his income by 40%, forcing the loss of most of his staff, and silencing his artistic voice on marriage. By enthroning itself as master of Phillips's artistic voice, the Commission invaded the freedom that the First Amendment promises to artists. *See Playboy,* 529 U.S. at 818.

Worse yet, the Commission's order - which the Colorado Court of Appeals affirmed in full - deepens the compelled-speech injury in two ways. First, the order demands that Phillips report to the Commission every single order that he declines for two years. Pet.App.58a. But the very notion of artistic freedom chafes at a requirement that Phillips must give an account to the government for the use of his artistic discretion. Second, the Commission's order requires Phillips to reeducate his staff, including his family members, by essentially telling them that he was wrong to operate Masterpiece consistently with his religious beliefs. *Id.* No one should ever be compelled ***29** to teach others that religious exercise core to their identity is mistaken. By mandating that, the Commission has doubled-down on its compelled-speech violation. *See Barnette,* 319 U.S. at 634 (noting that the state cannot force an individual "to utter what is not in his mind").

1. The Colorado Court of Appeals Misconstrued the Compelled-Speech Doctrine.

The Colorado Court of Appeals' compelled-speech analysis suffers from a foundational flaw: it placed dispositive weight on what it thought a hypothetical person observing Phillips's decision not to "create [a wedding cake] for a gay couple" might perceive. Pet.App.34a. That analysis misses the mark in two ways.

First, the court focused on the wrong thing. It looked for expression only in Phillips's decision not to create a wedding cake celebrating a same-sex marriage, but it should have analyzed whether "the wedding cake itself [] constitutes … expression." Pet.App.28a. *Hurley,* after all, did not ask whether the parade organizers' "conduct" in declining the LGBT group's request was expressive; it considered whether the parade itself was. *See* 515 U.S. at 568-69; *see also FAIR,* 547 U.S. at 63-64 (discussing *Hurley, PG&E,* and *Tornillo* and focusing on "the expressive quality of a parade, a newsletter, [and] the editorial page of a newspaper").

Second, the court below fixated on third-party perceptions. This Court, however, has not treated that consideration as an essential component of compelled-speech analysis. *Wooley,* for example, ***30** found a compelled-speech violation even though, as the dissent emphasized, no observer of a car would reasonably conclude that the driver "endorse[d]" or affirmed belief in the state motto on the license plate. *See* 430 U.S. at 722. Similarly, *PG&E* struck down a state order requiring a business to transmit a third party's newsletter in its billing envelope, even though the newsletter explicitly stated that it was not the business's speech. *See* 475 U.S. at 6-7, 15 n.11 (plurality opinion). Third-party perceptions are not dispositive in compelled-speech analysis.

That makes perfect sense because the compelled-speech doctrine protects each individual's freedom to decide which ideas are worthy of expression and to refuse to convey contrary views. *See Agency for Int'l Dev.,* 133 S. Ct. at 2327. Whether the Commission invades Phillips's "freedom of mind" does not ultimately depend on what others perceive. *Wooley,* 430 U.S. at 714. Otherwise, the Commission could force a writer to draft a novel if the author's identity remained secret. Nothing supports such a cramped understanding of expressive freedom.

Under its perceptions-focused analysis, the Colorado Court of Appeals reasoned that even if the public would "infer[]" from Phillips's custom wedding cake "a message celebrating same-sex marriage," Pet.App.30a, people would know that this message was not "a reflection of [Phillips's] own beliefs" but merely his "compliance with" CADA, Pet.App.31a. Since all compelled speech is mandated by law, however, that reasoning would negate compelled-speech protection entirely. It would transform legal coercion from a predicate of a compelled-speech violation to its antidote. If "the government made me ***31** do it" eliminates compelled-speech concerns, the doctrine itself would cease to exist.

The court below also suggested that Phillips can alleviate any compelled-speech concerns by publishing a disclaimer that CADA requires him "not to discriminate." Pet.App.36a. Although disclaimers may ameliorate First Amendment concerns in some contexts, *see, e.g., Prune Yard Shopping Ctr. v. Robins,* 447 U.S. 74, 87 (1980), they cannot undo a mandate requiring individuals to create expression they deem objectionable, because the Commission may not "require

speakers to affirm in one breath that which they deny in the next," *Hurley,* 515 U.S. at 576 (quoting *PG&E,* 475 U.S. at 16).

The court below also reasoned that Phillips's custom wedding cakes, to the extent they communicate at all, convey ideas belonging only to his customers. Pet.App.30a. Accepting that argument would effectively create a "commissioned art" exception to the First Amendment. [5] But a professional artist, much like the paid commercial fundraisers in *Riley,* "is no less a speaker because he or she is paid to speak." 487 U.S. at 801. Just as commissioned painters' works are their artistic voice, so too Phillips's custom wedding cakes are his own expression.

***32** Nor did the court below correctly apply this Court's decision in *FAIR. See* Pet.App.30a-31a. In that case, a group of law schools that disagreed with the military's former "Don't Ask, Don't Tell" policy objected to a funding condition that required them to host military recruiters. *FAIR,* 547 U.S. at 51. They claimed that providing those recruiters access to empty rooms would violate their expressive freedom by creating the false appearance that "they see nothing wrong with the military's policies." *Id.* at 65.

This Court analyzed the law schools' speech arguments separately from their expressive-conduct claim. *See id.* at 60-68. The speech arguments lacked merit, this Court held, because the schools are "not speaking when they host interviews and recruiting receptions." *Id.* at 64. Empty rooms do not speak. Here, however, the Commission is hijacking Phillips's artistic expression, forcing him to design wedding cakes celebrating ideas marriage that conflict with his faith. *FAIR* is thus distinguishable.

Nor does *FAIR* foreclose Phillips's expressive-conduct argument. The Court there rejected the law schools' expressive-conduct claim because any expressiveness in the conduct compelled - giving military recruiters equal access to rooms - "is not created by the conduct itself but by the speech that accompanies it." *Id.* at 66. What is compelled here, however - a custom-designed wedding cake - is itself artistic expression. The court below overlooked this critical distinction and misapplied *FAIR.*

***33 2. Respondents' Extreme Arguments Pose Far-Reaching Threats to Expressive Freedom.**

Craig and Mullins, joined by the Commission below, have insisted that the First Amendment does not protect artists or other professionals when they create expression "on behalf of clients." Appellees' Amended Answer Br. at 12 (Colo. Ct. App.) ("Appellees Ct. App. Br."). The compulsion of speech that would result under that theory is staggering, reaching far beyond cake artists. Illustrating the breadth of the coercion that they seek, Craig and Mullins's counsel claimed at oral argument below that CADA would require "a fine art painter" to "paint a commissioned picture that celebrates gay marriages." Pet.App.332a-33a; *see also Arlene's Flowers, Inc. v. Wash.,* Pet. for a Writ of Cert, at 287a, 293a-94a (No. 17-108) (July 14, 2017) ("*Arlene's Flowers* Cert. Pet.") (arguing, in the words of the Washington Attorney General, that the state's public-accommodation law can force a poet to write an objectionable poem and a floral designer to spell out with flowers "God bless this marriage").

The Commission has since backed off the hardline approach taken below. When opposing Phillips's petition for a writ of certiorari with this Court, the Commission admitted that a cake artist's custom wedding work "could … be expressive" and thus entitled to "First Amendment" protection. Colo. Opp. Br. at 15. It also conceded that cake artists have the freedom to refuse "to create cakes that feature specific designs or messages that are offensive" to the creators. *Id.* at 11.

***34** But the Commission's change of heart appears to be litigation posturing since it continues to take its more extreme position in *303 Creative, LLC v. Elenis,* No. 16-cv-02372-MSK-CBS (D. Colo.) (excerpts of relevant filings reprinted in Addendum). There, a custom website designer named Lorie Smith seeks an injunction ensuring that the Commission cannot compel her to design websites that express ideas (such as support for same-sex marriage) in conflict with her conscience. *See* Addendum at 12a-20a (reciting relevant stipulated facts from the case, including the stipulation that

all Smith's "website designs are expressive in nature, as they contain images, words, symbols, and other modes of expression"). The Commission has argued that if Smith creates websites for weddings, CADA requires her to write words and design images that celebrate same-sex marriages. Addendum at 2a-3a. The Commission justifies its position by insisting that Smith's "website design service is … not constitutionally protected speech." Addendum at 6a.

Such a narrow reading of the First Amendment threatens the expressive freedom of countless artists and other professionals who create speech for a living. If Respondents have their way, laws like CADA will empower the government to punish (and banish from entire professions) individuals like Phillips who serve all people but decline to express all ideas or celebrate all events. Consistent with *Hurley,* this Court should firmly reject such a constrained reading of the First Amendment. Artists and other speakers must remain free to create expression as their consciences dictate - not as the state demands. Any other outcome would replace the First Amendment's majestic ***35** guarantees with "a mere shadow of freedom." *Barnette,* 319 U.S. at 642.

C. The Commission's Content-Based and Viewpoint-Based Application of CADA Demands No Less Than Strict Scrutiny.

Ordering citizens to engage in unwanted artistic expression is such an affront to First Amendment freedoms that no less than strict scrutiny will do. *See PG&E,* 475 U.S. at 19-20 (plurality opinion) (applying strict scrutiny in a case of compelled speech). That exacting standard is doubly warranted here because this application of CADA discriminates based on content and viewpoint.

Content-based discrimination occurs in at least two ways. First, this Court in *Riley* recognized that "[m]andating speech that a speaker would not otherwise make necessarily alters the content" and constitutes "a content-based regulation of speech." 487 U.S. at 795. Because this application of CADA mandates artistic expression that Phillips would not otherwise create, it amounts to a content-based application. Second, "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert,* 135 S. Ct. 2218, 2227 (2015). Phillips triggered CADA only because he addressed the topic of marriage through his art (i.e., because he designed custom cakes for opposite-sex weddings). Penalizing an artist because of the topics on which he has chosen to speak is decidedly content based. *See Tornillo,* 418 U.S. at 256 (noting that the right-of-reply statute was content based because it was triggered only when the ***36** newspaper spoke on the topic of politicians). Indeed, by its own terms, CADA applies to a refusal to express something only when the requested topic or message implicates a classification listed in the statute. *See R.A.V. v. City of St. Paul,* 505 U.S. 377, 391 (1992).

Going beyond mere content discrimination, the Commission has engaged in viewpoint discrimination as well. Like the state directive invalidated in *PG&E,* the Commission's order here requires Phillips to express ideas diametrically opposed to his own. 475 U.S. at 12-13 (plurality opinion) (finding viewpoint discrimination where the state forced a business to disseminate speech that was contrary to its views). In addition, the Commission's application of CADA favors cake artists who support same-sex marriage over those like Phillips who do not. Even though CADA forbids discrimination based on religion, JA307, the Commission has allowed three cake artists to refuse a religious customer's request to create custom cakes with religious messages *criticizing* same-sex marriage, *see* Pet.App.20a n.8; JA230-58. In sharp contrast, though, the Commission has harshly punished Phillips for declining to express ideas *supporting* same-sex marriage. Such blatant viewpoint discrimination requires strict-scrutiny review.

By playing favorites on the issue of same-sex marriage, the Commission has undermined Phillips's freedom to engage in an "open and searching debate" on that topic. *Obergefell,* 135 S. Ct. at 2607. Real dialogue cannot exist if one side is compelled to either promote and celebrate the other side's position or face the loss of family businesses, vocations, and (in some cases) even personal assets. *See Arlene's Flowers* Cert. ***37** Pet. at 5 (entering judgment for civil penalties, damages, and attorneys' fees and costs against a floral designer in her personal capacity). That sort of coercion hardens

hearts and steels resolve, and it ostracizes those whose views the government penalizes. Avoiding these sorts of harms is why the First Amendment forbids the government from favoring some speakers over others.

Notably, strict scrutiny applies even if the Court concludes that Phillips's wedding-cake artistry is expressive conduct (instead of artistic expression). The Colorado Court of Appeals implied that if Phillips's protected activity is expressive conduct, the applicable standard would be the test established in *United States v. O'Brien,* 391 U.S. 367, 377 (1968). *See* Pet.App.27a-28a. Not so. Regardless of whether a case involves expression or expressive conduct, "*O'Brien* does not provide the applicable standard" for reviewing a law that discriminates based on content in its application. *Holder v. Humanitarian Law Project,* 561 U.S. 1, 27 (2010) (citing R.A.V., 505 U.S. at 385-86). Just as government action that censors expressive conduct because of its message must survive strict scrutiny, *see Holder,* 561 U.S. at 27-28 (discussing *Cohen,* 403 U.S. at 16-19); *Johnson,* 491 U.S. at 411-12, a state that punishes a person for declining to express certain messages must also satisfy that exacting standard.

Part III of this brief addresses strict scrutiny. Because the Commission cannot satisfy it, Phillips should prevail on his free-speech claim.

*38 II. Compelling Phillips to Design Custom Wedding Cakes that Celebrate Same-Sex Marriage Violates the Free Exercise Clause.

For many, including Phillips, marriage has inherently religious significance. Regardless of whether his clients plan an overtly religious wedding, Phillips views those events as forming and celebrating a fundamentally religious relationship. JA157-58. His role as a cake artist is to design a celebratory centerpiece for the wedding festivities, and he considers himself "an *active* participant" in that sacred event. JA162. The Commission, however, has ordered Phillips to make art for and participate in events that have deep religious meaning to him. For the Commission to get away with that, the Free Exercise Clause must be drained of all its substance. Nothing in this Court's jurisprudence remotely suggests that the government can invade such a hallowed sphere. On the contrary, the Free Exercise Clause exists precisely to ensure that no one should ever have to endure what Phillips has experienced at the hands of the Commission. [6]

A. CADA Is Not Neutral or Generally Applicable as Applied.

The manner in which the Commission applies CADA is neither neutral nor generally applicable, and as a result, it "must undergo the most rigorous of ***39** scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546 (1993). Two cases encapsulate this Court's doctrine on neutrality and general applicability. *Employment Division v. Smith* held that "an across-the-board criminal prohibition" on illegal drug use satisfied both of those requirements, 494 U.S. 872, 884 (1990), while *Lukumi* concluded that ordinances gerrymandered to punish adherents of one faith fell "well below the minimum standard necessary to protect First Amendment rights," 508 U.S. at 543. Here, the Commission's discriminatory application of CADA distinguishes this case sharply from *Smith.* By punishing Phillips while protecting cake artists who support same-sex marriage, the Commission's actions raise many of the neutrality and general-applicability concerns articulated in *Lukumi.*

1. The Commission Has Not Neutrally Applied CADA.

"Official action that targets [specific] religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Lukumi,* 508 U.S. at 534. The Free Exercise Clause "forbids subtle departures from neutrality, and covert suppression of particular religious beliefs." *Id.* at 534 (quotation marks and citations omitted). To unmask this, neutrality analysis considers "the effect of a law in its real operation," *id.* at 535, and "the interpretation given to the [statute]" by the state, *id.* at 537.

The Commission has applied CADA to target Phillips's religious beliefs for adverse treatment. Cake artists who support same-sex marriage may ***40** decline to oppose it, while those who oppose same-sex marriage must support it. *See supra* at 36. In no world is that a neutral interpretation of the law.

Highlighting this differential treatment, the Commission has offered markedly inconsistent analysis when considering whether these two groups of cake artists violate CADA. First, the court below said that the other cake artists could refuse an order because of "the offensive nature of the requested message." Pet.App.20a n.8. But it is undisputed that Phillips declined Craig and Mullins's request because he too did not want to express ideas that offend his religious convictions about marriage. To be sure, the requested cakes criticizing same-sex marriage included words. But that is no basis for treating Phillips worse. His custom wedding cakes are "highly distinctive structures" that function as "markers for weddings," and as such, they inherently express ideas about marriage. Charsley, *supra,* at 121. Accordingly, Phillips's speech-based decision is entitled to at least as much respect as the speech-based decisions of others.

Second, both the Commission and the court below regarded criticism of same-sex marriage as offensive, while dismissing any suggestion that support for same-sex marriage might be offensive to some. Pet.App.20a n.8; JA237, 246-47. Not only does that logic openly disfavor Phillips's views, it rests on a notion - offensiveness - that the state has no business invoking when regulating matters of speech and religion. *See Matal v. Tam,* 137 S. Ct. 1744, 1764 (2017) (plurality opinion).

***41** Third, for the three cake designers who refused to criticize same-sex marriage, the court below considered essential the fact that they served people of all faiths. Pet.App.20a n.8. But for Phillips, his willingness to serve customers of all sexual orientations was dismissed out of hand as a "distinction without a difference." Pet.App.69a; *see also* Pet.App.19a.

Fourth, the court below told Phillips (1) that his custom wedding cakes do not communicate anything, (2) that even if they did, the expression was not his but his clients, and (3) that no one would attribute meaning to his cakes beyond compliance with CADA. Pet.App.29a-31a. Yet the court did not subject the other cake artists to anything remotely resembling that analysis; instead, it readily accepted that their cakes would communicate a message and that they could refuse to express it. Pet.App.20a n.8.

Fifth, the Commission's one-sided construction of CADA affords broader protection to LGBT consumers than to people of faith. Indeed, the Commission has expanded CADA's sexual-orientation protection by refusing to distinguish between speech and status in that context, while simultaneously diminishing the statute's religious protection by distinguishing between the speech and status of religious people. Such preferential treatment for one group over another contravenes basic notions of neutrality.

Furthermore, the Commission's discriminatory reading of CADA extends beyond cake designers. Although CADA does not require expressive professionals to create materials with offensive written designs or words, Pet.App.20a n.8, the ***42** Commission insists in the *303 Creative* case that a graphic designer would violate that statute if she declines to build websites with specific designs or words celebrating same-sex marriage. *See* Addendum at 2a-3a, 6a. The Commission thus applies different rules to all expressive professionals depending on their views about same-sex marriage: supporters get a pass, but opponents get punished.

A review of all these situations reveals something striking: people of faith who do not support same-sex marriage always lose. Whether they are the customer requesting an expressive item or the professional declining to create it, the Commission consistently opposes them. This unequal application of the law impermissibly "single[s] out" a specific religious belief "for discriminatory treatment." *Lukumi,* 508 U.S. at 538; *see also Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly,* 309 F.3d 144, 165-68 (3d Cir. 2002) (holding that a selective application of a law against a particular religious practice triggers strict scrutiny).

The reason for this discriminatory treatment is not difficult to discern, for the Commission hardly conceals its disdain for Phillips's religious views. At a deliberative hearing in this case, one commissioner, with no disagreement from the others, had this to say:

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the [H]olocaust, whether it be - I mean, we - we can list hundreds of situations where freedom of religion has been used to justify ***43** discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to - to use their religion to hurt others.

Pet.App.293a-94a. No one with Phillips's beliefs stands a chance before a government agency that is brazen enough to say such things.

Rather than constraining the Commission's hostility toward Phillips's beliefs with well-defined standards, CADA (at least as the Commission has applied it) permits an " 'individualized governmental assessment of the reasons for the [allegedly unlawful] conduct.' " *Lukumi,* 508 U.S. at 537 (quoting *Smith,* 494 U.S. at 884). As the facts here demonstrate, the Commission deems some reasons for declining a request acceptable and others illegal based in part on the "offensiveness" of the requested speech. *See, e.g.,* Pet.App.20a n.8, 78a; JA237, 246-47; Colo. Opp. Br. at 11. But such a hopelessly vague standard - which entails at least as much discretion as the "good cause" standard that *Smith* mentioned, *see* 494 U.S. at 884, and the "test of necessity" that *Lukumi* addressed, 508 U.S. at 537 - gives the state far too much leeway to "devalue[] religious reasons" for declining a request. *Id.; see also Matal,* 137 S. Ct. at 1764 (plurality opinion) (forbidding government reliance on the offensiveness of speech). And devaluing Phillips's religious reasons for declining Craig and Mullins's request is exactly what the Commission has done.

But the Commission did not stop there. It actually declared Phillips's religious beliefs about marriage to be discriminatory in and of themselves. Pet.App.19a ("[O]ne's opposition to same-sex marriage is discrimination"). And in so doing, it effectively ***44** banned Phillips and all likeminded believers from the wedding industry. *See* Pet.App.45a. Yet construing CADA to exclude people with a specific religious belief from a specific vocation is not neutral in any sense of the word. *Cf. Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012, 2021-22 (2017) (explaining that the government cannot force religious groups or individuals to choose between exercising their faith and pursuing a benefit otherwise available to the public). Nor is that interpretation of CADA consistent with this Court's call to respect, rather than "disparage[]," Phillips's "decent and honorable" beliefs. *Obergefell,* 135 S. Ct. at 2602.

2. The Commission Has Not Generally Applied CADA.

A law is not generally applicable if it fails to prohibit nonreligious conduct that endangers the state's asserted "interests in a similar or greater degree" than Phillips's decision not to celebrate same-sex marriages. *Lukumi,* 508 U.S. at 543. *Lukumi*'s general-applicability analysis focused on the underinclusiveness and selective application of the laws at issue there. *See id.* at 542-45. Both of those factors establish that CADA is not generally applicable here.

First, CADA is substantially underinclusive in its efforts to achieve the Commission's asserted interests. Respondents have emphasized throughout this litigation the state's interest in preventing dignitary harms. See Appellees Ct. App. Br. at 36. Yet the state's anti-religious application of CADA imposes dignitary harm on religious artists like Phillips. *See* ***45** *infra* at 55-56. And more broadly, CADA allows any expressive professional to refuse to create speech of that they deem objectionable, even if those messages are closely associated with a customer's protected status. Pet.App.20a n.8. Allowing professionals to decline those requests permits the same sorts of harms to consumers that the Commission claims an interest in eliminating here. Hence, CADA is not generally applicable. See *also infra* at 56-58 (discussing underinclusiveness in greater detail). [7]

Moreover, "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Lukumi,* 508 U.S. at 543. As discussed in the previous section, the Commission has done just that. It has selectively applied CADA to target artistic and expressive professionals who have a religious objection to celebrating same-sex marriages. Combining this selective application with the substantial underinclusiveness discussed above leads to only one possible conclusion - CADA is not generally applicable.

Smith confirms this. It involved a criminal law that applied across the board and imposed a ***46** straightforward ban on the use of "controlled substances." 494 U.S. at 874, 884; *see also id.* at 879-80 (discussing a law prohibiting all young children from selling publications, *see Prince v. Mass.,* 321 U.S. 158, 160-61 (1944), and a Sunday-closing law that applied to all merchants selling certain goods, *see Braunfeld v. Brown,* 366 U.S. 599, 600 (1961)). CADA is nothing like that. It lacks broad application because of its significant underinclusiveness and selective application. And the Commission's unequal treatment of similarly situated cake artists proves that CADA is anything but straightforward in its application. Thus, CADA is not the sort of generally applicable law that *Smith* intended to insulate from strict-scrutiny review. Accordingly, this application of CADA must satisfy that demanding standard.

B. This Application of CADA Infringes a Hybrid of Phillips's Free-Exercise and Free-Speech Rights.

Phillips's free-exercise claim invokes strict scrutiny for another reason: because the Commission's order infringes a hybrid of First Amendment rights. This is squarely supported by *Smith*'s holding that strict scrutiny applies in "hybrid situation[s]" where a free-exercise claim is linked with "other constitutional protections, such as freedom of speech." 494 U.S. at 881-82.

Two examples of hybrid-rights cases that *Smith* specifically cited were *Wooley* and *Barnette,* noting that the state action in those cases implicated "freedom of religion" and "compelled expression" together. *Id.* at 882. When a person's free-exercise claim is connected with "communicative activity," as ***47** Phillips's is here, *Smith* held that strict scrutiny applies. *Id.; see also Watchtower Bible & Tract Soc'y of N. Y., Inc. v. Vill. of Stratton,* 536 U.S. 150, 159 n.8 (2002) (discussing the hybrid-rights doctrine). The Colorado Court of Appeals thus erred in expressing "doubt on [the] validity" of the hybrid-rights doctrine. Pet.App.46a.

Although the hybrid-rights theory is rooted in *Smith,* this Court has yet to specify the precise framework for analyzing those claims. The standard that best comports with *Smith* requires an individual raising a hybrid-rights argument to present a "colorable claim" that the government's action infringes on a companion right. The Fifth, Ninth, and Tenth Circuits all use that test. *See, e.g., Cornerstone Christian Sch. v. Univ. Interscholastic League,* 563 F.3d 127, 136 n.8 (5th Cir. 2009) (asking whether the party had "a colorable claim" on its companion right); *Miller v. Reed,* 176 F.3d 1202, 1207 (9th Cir. 1999) (explaining that a hybrid-rights claim requires the party to "make out a 'colorable claim' that a companion right has been violated"); *Axson-Flynn v. Johnson,* 356 F.3d 1277, 1295-97 (10th Cir. 2004) (similar).

Applying that standard here, Phillips has established a hybrid-rights claim, and the Colorado Court of Appeals erred in concluding that he did not. Pet.App.46a. As previously discussed, Phillips has demonstrated a strong free-speech interest in declining to create artistic expression that violates his beliefs about marriage. *See supra* at 16-37. Combining that with his robust free-exercise interest produces a hybrid-rights claim that subjects this ***48** particular application of CAD A to strict scrutiny. *See Smith,* 494 U.S. at 881-82. [8]

III. Respondents Cannot Satisfy Strict Scrutiny.

Because this application of CADA infringes Phillips's rights under the Free Speech and Free Exercise Clauses, Respondents must prove that it "furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed,* 135 S. Ct. at 2231 (quotation marks omitted); *see also Playboy,* 529 U.S. at 818 (explaining that the burden rests with the government and the government does not get "the benefit of the doubt"). On multiple occasions, states that have applied public-accommodation laws to infringe First Amendment liberties have been unable to satisfy heightened forms of constitutional review. *See, e.g., Hurley,* 515 U.S. at 578-79; *Dale,* 530 U.S. at 659. The Commission's efforts fare no better.

Respondents argued below that "Colorado has a compelling interest in eradicating discrimination in all forms." Appellees Ct. App. Br. at 36 (quotation marks omitted). Yet that characterization of the state interest is far too broad. Strict scrutiny "look[s] beyond broadly formulated interests justifying the general applicability of government mandates" to see whether that standard "is satisfied through application of the challenged law" to "the particular" party. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 430-31 (2006); *see also* ***49** *Attorney Gen. v. Desilets,* 636 N.E.2d 233, 238 (Mass. 1994) ("The general objective of eliminating discrimination of all kinds … cannot alone provide a compelling State interest ….). In this context, as *Hurley* illustrates, the Court should focus not on CADA's general purpose of preventing "denial[s] of access to (or discriminatory treatment in) public accommodations," but on its "apparent object" when "applied to expressive activity in the way it was done here." 515 U.S. at 578.

The Commission must show that it has a compelling interest in forcing cake artists who otherwise serve LGBT customers to violate their consciences by creating custom wedding cakes that celebrate same-sex marriages. Unlike most applications of CADA, this one would force Phillips to create artistic expression and thus "modify the content" of his speech. *Id.* But as *Hurley* explained, permitting the Commission to compel speech in that manner would "allow exactly what the general rule of speaker's autonomy forbids." *Id.* Even this cursory look at strict-scrutiny analysis thus reveals that Respondents cannot satisfy it.

Diving deeper, it becomes clear that the Commission's broadly cast interest in punishing Phillips includes three specific purposes: (1) the state's concern with ensuring that same-sex couples planning their weddings have ample access to cake artists; (2) its interest in avoiding adverse economic effects that might accompany certain forms of discrimination; and (3) its interest in protecting the dignity of same-sex couples. None of those interests satisfies strict scrutiny under these circumstances.

*50 A. The State's Asserted Access Interest Is Not Undermined Here, and Its Efforts to Advance It Are Not Narrowly Tailored.

The Colorado Court of Appeals referenced the Commission's interest in ensuring that "goods and services … are available to all of the state's citizens." Pet.App.50a. But Respondents have introduced no evidence suggesting that same-sex couples have problems accessing cake artists, or any other creators of expression, willing to celebrate their weddings.

Nor could they. *See* Nathan B. Oman, *Doux Commerce, Religion, and the Limits of Antidiscrimination Law,* 92 Ind. L.J. 693, 721 (2017) ("[T]here is no evidence of widespread denials of service to gay customers"). The evidence shows that Craig and Mullins acquired (free of charge) a custom-made, rainbow-layered wedding cake from another local cake artist. JA175-76, 184-85. Nothing suggests that they had difficulties doing that. And as our amici explain, same-sex couples in the greater Denver area (where Phillips is located) have ample access to cake artists who will design custom cakes for same-sex weddings. *See generally* Am. Br. Law and Economics Scholars at Part II.A.

In light of this, affirming Phillips's religious and expressive freedom in these circumstances does not undermine the Commission's asserted interest in ensuring that same-sex couples have access to custom wedding cakes. And for the same reasons, punishing Phillips is not narrowly tailored to advance that interest. The state need not strip away Phillips's freedom for same-sex couples to obtain the artistic wedding cakes they seek.

***51 B. The State's Asserted Economic Interest Is Neither Implicated Nor Supported by Evidence.**

The court below said that this application of CADA advances the state's interest in avoiding "adverse economic effects," because punishing Phillips "prevents the economic and social balkanization prevalent when businesses decide to serve only their own 'kind.' " Pet.App.50a. But that court itself recognized that when Phillips told Craig and Mullins that "he does not create wedding cakes for same-sex weddings," he also said that "he would be happy to" sell them anything else in his shop. Pet.App.4a. That does not remotely resemble the "your kind isn't welcome here" discrimination that the court below thought would have deleterious economic effects. That interest, therefore, cannot satisfy strict scrutiny because it is not even implicated by these facts. *See Johnson,* 491 U.S. at 407-10 (dismissing an interest asserted by the state because it was "not implicated on the[] facts").

Additionally, strict scrutiny requires the Commission to show that forcing Phillips to create custom wedding cakes for same-sex marriages is "actually necessary" to solve an "actual" economic "problem." *Brown,* 564 U.S. at 799. "[A]mbiguous proof" or a mere "predictive judgment" "will not suffice"; the Commission must demonstrate a "direct causal link" between the allegedly adverse economic effects and allowing Phillips to decline requests for custom wedding cakes that conflict with his faith. *Id.* at 799-800. But the Commission has produced no ***52** evidence whatsoever on that point, and thus it has failed to satisfy strict scrutiny. [9]

C. The State's Dignitary Interest Does Not Satisfy Strict Scrutiny.

Respondents focused much of their arguments below on the Commission's interest in preventing discrimination that "deprives persons of their individual dignity." Appellees Ct. App. Br. at 36. Yet an interest in avoiding some dignitary harms - though a real concern in certain circumstances - cannot override Phillips's First Amendment freedoms and his own equally important dignitary interests.

1. The State's Dignitary Interest Is Not Compelling in this Case.

" '[C]ontext matters' in applying the compelling interest test." *Gonzales,* 546 U.S. at 431 (quoting *Grutter v. Bollinger,* 539 U.S. 306, 327 (2003)). The context here is a conscientious man of faith who does not engage in invidious discrimination against any class of people. He will create his custom art for everyone, including LGBT patrons, but he declines all requests (regardless of the requester's identity) to create custom artistic expression that conflicts with his faith. Phillips did not categorically refuse to serve ***53** Craig and Mullins; he only declined to create a custom wedding cake that would celebrate their marriage, while offering to sell them any other items in his store or to design for them something for another occasion. That is neither invidious nor based on the slightest bit of animosity. Rather, it is a reasonable exercise of his artistic discretion based on a "decent and honorable" religious belief about marriage. *Obergefell,* 135 S. Ct. at 2602. Notwithstanding Craig and Mullins's response, the Commission simply does not have a compelling interest in punishing Phillips in this case.

Indeed, *Hurley* established that the state's interest in eliminating dignitary harms is not compelling where, as here, the cause of the harm is another person's decision not to engage in expression. The Court there recognized that "the point of all speech protection … is to shield just those choices of content that in someone's eyes are … hurtful." 515 U.S. at 574. An interest in preventing dignitary harms thus is not a compelling basis for infringing First Amendment freedoms. *Cf. Johnson,* 491 U.S. at 409 (explaining that "[i]t would be odd" to conclude that the hurtfulness of an expressive decision is the reason both "for according it constitutional protection" and for stripping it of that protection). Some dignitary harms must be tolerated in order to provide "adequate 'breathing space' to the freedoms protected by the First Amendment." *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 56 (1988).

Freedom from compelled speech would be illusory if a person like Phillips could not explicitly decline requests to create custom artistic expression for speech-based reasons. Hence, an artist's statement ***54** that he cannot engage in specific expression must be protected, and avoiding a dignitary harm in the listener cannot override it. *See, e.g., Matal,* 137 S. Ct. at 1764 (plurality opinion) (rejecting an asserted "interest in preventing speech expressing ideas that offend" because "we protect the freedom to express the thought that we hate" (quotation marks omitted)); *Snyder v. Phelps,* 562 U.S. 443, 458 (2011) (" 'If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.' " (quoting *Johnson,* 491 U.S. at 414)); *Boos v. Barry,* 485 U.S. 312, 322 (1988) (expressing grave doubts about the government's "interest in protecting the dignity" of listeners from harmful speech since that is "inconsistent with our longstanding refusal to punish speech because the speech in question may have an adverse emotional impact on the audience" (quotation marks and alterations omitted)).

The broader social context confirms the absence of a compelling dignitary interest here. First, no one is claiming "a right to simply refuse to deal with gay people." Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law,* 88 S. Cal. L. Rev. 619, 643 (2015). Phillips's concern is about the integrity of his own expression - not the inquiring individual's protected status. Second, not only is support for same-sex marriage the majority cultural position; it has reached an all-time high with 62% of Americans favoring it. *Support for Same-Sex Marriage Grows,* Pew Research Center, June 26, 2017, http://pewrsr.ch/2sX3VBN. Third, few cake artists (or ***55** other expressive professionals, for that matter) will decline to celebrate same-sex marriages because anyone who follows that path must be willing to endure steep market costs and the hostile opposition that people like Phillips have experienced. [10] Respondents' asserted dignitary harms thus do not rise to a compelling level. Indeed, this Court has countenanced far worse. *See, e.g., Snyder,* 562 U.S. at 454-56 (permitting outrageous and "particularly hurtful" speech).

The Commission seems to think that it will eliminate dignitary harms through this and similar applications of CADA, but that ignores the dignitary interests on Phillips's side of the case. For the Commission to brand as discriminatory Phillips's core religious beliefs, compel him to stop creating his wedding designs, and ostracize him as a member of the community inflicts untold dignitary harm not only on him, but also on his fellow believers. *See Hobby Lobby,* 134 S. Ct. at 2785 (Kennedy, J., concurring) (explaining that "free exercise is essential in preserving the[] … dignity" of religious adherents). People of faith endure extreme emotional turmoil when their government orders them to do something that they sincerely believe will be "displeasing" to "the sovereign God of the universe." JA159.

Unlike the dignitary harm that Craig and Mullins raise, which results from a private actor's decision not ***56** to create expression, the government itself inflicts the dignitary harm that Phillips must endure. *Cf. Obergefell,* 135 S. Ct. at 2596 (emphasizing that "the state itself" was interfering with the dignity of same-sex couples). Hence, the dignitary interests of Phillips and all others who share similar religious beliefs about marriage weigh strongly against applying CADA under these circumstances.

2. The State's Efforts to Advance Its Dignitary Interest Are Not Narrowly Tailored.

The Commission's attempts to end dignitary harms by punishing business owners who serve all people but decline to express all messages is vastly underinclusive and thus not narrowly tailored. Substantial underinclusiveness "is alone enough to defeat" an asserted state interest. *Brown,* 564 U.S. at 802; *see also Reed,* 135 S. Ct. at 2231-32.

The Colorado Court of Appeals has established, and the Commission has acknowledged, that cake artists may decline requests for cakes with "designs or messages" that they consider objectionable. Colo. Opp. Br. at 11; *see also* Pet.App.20a n.8. If the Commission applies that rule evenhandedly, that means Phillips or another cake artist may decline a same-sex couple's request for a wedding cake that bears written messages or specific designs. But allowing that would have at least as much of an effect on the couple's dignitary interests as what Respondents claim here. In fact, the dignitary harm

asserted in that scenario would likely be greater because the couple would be forced to discuss the ***57** details of their desired custom cake before the cake designer could decline the request.

The court below also found that CADA allows business owners to express their "religious opposition" to "same-sex marriage" when operating in the marketplace. Pet.App.35a, 45a; *see Terminiello v. City of Chi.,* 337 U.S. 1, 5 (1949) ("[T]he gloss which [a state court] place[s] on [a state law] gives it a meaning and application which are conclusive on us"). While CADA forbids business owners from "displaying or disseminating" a "written, electronic, or printed communication" "stating that [they] will refuse to provide [their] services" to people of a particular sexual orientation, Pet.App.35a & n.11, the court below held that business owners may speak their "religious … opposition to same-sex marriage" to all their customers, Pet.App.45a. Yet permitting that would likely inflict greater dignitary harm than politely declining to design a custom cake.

The state has also left the citizenry at large free to express various reasons why "same-sex marriage should not be condoned," *Obergefell,* 135 S. Ct. at 2607, and to engage in "hurtful speech" that "inflict[s] great pain," including virulent anti-gay epithets, *Snyder,* 562 U.S. at 461. Also, CADA permits "church[es], synagogue[s], mosque[s], [and] other place[s] that [are] principally used for religious purposes" to refuse same-sex couples seeking a location to marry or host a reception. Pet.App.93a.

By permitting all this speech and conduct that risks comparable dignitary harm to same-sex couples in both commercial and noncommercial contexts, CADA "is wildly underinclusive when judged against ***58** its asserted [dignity-based] justification." *Brown,* 564 U.S. at 802. As a result, this application of the statute cannot survive strict scrutiny. *See, e.g., Boos,* 485 U.S. at 327 (explaining that the legislature's failure to "protect 'dignity' " in similar contexts demonstrates that the law is not narrowly tailored); *Brown,* 564 U.S. at 801-02 (explaining that a law seeking to limit aggression in children by banning violent video games but failing to ban similar media that also creates aggression is substantially underinclusive); *Reed,* 135 S. Ct. at 2231-32 (explaining that a law forbidding the posting of some signs was "hopelessly underinclusive" in attempting to further the town's interests in "aesthetics" and "traffic safety" because the town allowed other signs to proliferate).

CADA also fails the narrow-tailoring requirement because less restrictive alternatives are available to achieve the state's interest. In particular, the Commission could interpret CADA to allow a professional who serves all people to decline requests to create specific artistic expression or other speech because of what it would communicate. Even if the Commission construed CADA that way, the statute would still prohibit refusals by any professional who categorically declines to work with a class of people. CADA would also apply to artists and other expressive professionals like Phillips when doing something other than creating speech or art. This narrowing construction thus would not exclude Phillips from CADA when, for example, he is selling premade items to the public. *See Hurley,* 515 U.S. at 580-81 (explaining that a state can compel access to a publicly available benefit but not to speech). And finally, this reading of CADA would not affect ***59** employment-nondiscrimination laws or the many professionals who do something other than design artistic expression or otherwise create speech for their clients.

Respondents insist that any interpretation of CADA that does not punish Phillips would fatally undermine the statute's purpose. Appellees Ct. App. Br. at 38-39. That is not true. Again, the court below recognized, and the Commission admitted, that cake artists may decline to create custom cakes with designs or messages that they deem objectionable, even when that speech is intertwined with a customer's protected status. Colo. Opp. Br. at 11; Pet.App.20a n.8; *see also* Pet.App.78a (discussing hypothetical African American and Muslim cake artists who would not be punished under CADA). This existing limitation on CADA's reach disproves Respondents' argument that the statute's effectiveness will be "necessarily undercut" if Phillips's liberty is protected. *Gonzales,* 546 U.S. at 434.

More generally, nondiscrimination laws regularly include exceptions and significant coverage gaps. Title II of the Civil Rights Act of 1964, for example, applies only to a limited category of businesses like hotels, restaurants, and places of

public entertainment. 42 U.S.C. § 2000a(b). And Title VII allows businesses to discriminate in hiring decisions that are "reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1); *see also* 29 C.F.R. § 1604.2(a)(2) (explaining that Title VII allows production studios to make classifications when "necessary for the purpose of authenticity or ***60** genuineness … e.g., [selecting] an actor or actress"). But none of these or similar gaps in coverage have prevented nondiscrimination laws from furthering their purposes.

Undeterred, Respondents speculate that protecting Phillips in this case will open the floodgates to other people of faith seeking similar freedom. Appellees Ct. App. Br. at 38-39. "Yet hardly any of these cases have occurred: a handful in a country of 300 million people." Koppelman, *supra,* at 643. Against this backdrop, this Court should reject, as it has done time and again, the speculative and unsupported slippery-slope arguments that Respondents raise here. *See, e.g., Gonzales,* 546 U.S. at 435-36 (rejecting the government's "slippery-slope" argument that "[i]f I make an exception for you, I'll have to make one for everybody, so no exceptions"); *Holt v. Hobbs,* 135 S. Ct. 853, 866 (2015) (same); *Hobby Lobby,* 134 S. Ct. at 2783 (rejecting the government's argument about "a flood of religious objections" because it "made no effort to substantiate [its] prediction"); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.,* 450 U.S. 707, 719 (1981) (noting the lack of "evidence in the record" to suggest that providing a religious accommodation would create the widespread concerns that the state raised); *Sherbert v. Werner,* 374 U.S. 398, 407 (1963) (dismissing the state's unfounded speculation about "the filing of fraudulent claims by unscrupulous claimants feigning religious objections"). Courts must not "assume a plausible, less restrictive alternative would be ineffective." *Playboy,* 529 U.S. at 824.

Finally, Respondents also have expressed an interest in minimizing the instances in which an ***61** expressive professional like Phillips declines a same-sex couple's wedding-related request. But the market already provides existing means to address this, such as private websites apprising consumers of professionals in a geographical area who will celebrate same-sex weddings. *See* GayWeddings, http://gayweddings.com/ (last visited Aug. 29, 2017); *cf. Brown,* 564 U.S. at 803 (discussing the video-game industry's "rating system"). If the Commission thinks that more must be done, it could make similar resources available to the public. That would provide a ready alternative that protects the interests of all involved. Thus, the Commission's efforts to coerce and punish Phillips are neither necessary nor narrowly tailored.

CONCLUSION

Time and again, this Court has applied the First Amendment to pave the way for people with diverging views on core issues to live together. It should do so again in this case. Robust religious and expressive freedoms advance pluralism, protect other civil liberties, and promote true tolerance and civility. These freedoms benefit everyone, no matter their beliefs about same-sex marriage. To remain on this path toward liberty for all, this Court should reverse the judgment of the Colorado Court of Appeals and hold that the Commission's order fundamentally conflicts with Phillips's First Amendment freedoms.

*1A ADDENDUM TABLE OF CONTENTS

***2A IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO**

Civil Action No. 16-cv-02372-MSK-CBS

303 CREATIVE LLC, a limited liability company; and LORIE SMITH, Plaintiffs,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official capacity; ANTHONY ARAGON, ULYSSES J. CHANEY, MIGUEL "MICHAEL" RENE ELIAS, CAROL FABRIZIO, HEIDI HESS, RITA LEWIS, and JESSICA POCOCK, as members of the Colorado Civil Rights Commission, in their official capacities, and CYNTHIA H. COFFMAN, Colorado Attorney General, in her official capacity; Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [DOC. NO. 6]

****

Plaintiffs, however, seek the Court's permission to discriminate against same-sex couples in services provided to all other members of the general public, in violation of Colorado's Anti-discrimination Act (CADA).

****

***3a** Section 24-34-601(2)(a), of CADA, does not impact Plaintiffs' First Amendment rights because it does not compel them to speak in favor of or against same-sex weddings.

To the contrary, as held in Masterpiece, CADA merely requires that Plaintiffs not discriminate against customers as it concerns the "full and equal enjoyment of the goods, services, facilities, privileges … of a place of public accommodation." *See* § 24-34601(2)(a), C.R.S., (2016); *Masterpiece,* 370 P.3d at 283 and 291 ("We conclude that the Commission's order merely requires that Masterpiece not discriminate against potential customers in violation of CADA ….' " and "[w]e reiterate that CADA does not compel Masterpiece to support or endorse any particular religious views. The law merely prohibits Masterpiece from discriminating against potential customers on account of their sexual orientation.").

Contrary to the Supreme Court's decisions in *Barnette,* 319 U.S. at 642, and *Wooley v. Maynard,* 430 U.S. 705, 715-17 (1977), and as recognized in *Masterpiece,* Section 24-34-601(2)(a) of CADA does not compel a vendor to convey a particular message for or against same-sex weddings; only, that it treat same-sex couples the same as opposite sex couples with the "full and equal enjoyment of the goods, services, facilities, privileges … of a place of public accommodation." *See* § 24-34-601(2)(a), C.R.S., (2016); *Masterpiece,* 370 P.3d. at 286; *see also e.g., Elane Photography,* 309 P.3d at 64 (New Mexico's antidiscrimination law "only mandates that if Elane Photography operates a business as a public accommodation, it cannot discriminate against ***4a** potential clients based on their sexual orientation."); *Brush & Nib Studio,* CV 2016-052251, (Superior Court of Arizona, Maricopa County, Sept. 16, 2016) (holding that the City of Phoenix's anti-discrimination law did not require plaintiffs to speak any message, nor did it prohibit plaintiffs from stating their religious views concerning same-sex marriage).

****

Plaintiffs largely rely on *Hurley v. Irish-American Gay, Lesbian & Bisexual Group,* 515 U.S. 557 (1995), to support their position that Plaintiffs, like the parade organizers in *Hurley,* are entitled to choose the content of their own message and

cannot be compelled to express an unwanted message by CADA. [Doc. No. 7, at p. 16]. Plaintiffs' reliance on *Hurley* is misplaced.

In *Hurley,* a private, non-profit organization that organizes the Boston St. Patrick's Day parade denied the Gay, Lesbian and Bisexual Group of Boston's (GLIB) application to march in the parade. *Id.* at 561. The Massachusetts courts concluded that the parade sponsors violated the state's law prohibiting discrimination in places of public accommodation. *Id.* at 561, 563-64. The Supreme Court first noted that public accommodation laws generally do not violate the First and Fourteenth Amendments, because the focal point of their prohibition is "on the act of discriminating against individuals," not to target speech. *Id.* at 572. It held, however, that because the parade sponsors were required to include GLIB, the state courts were effectively requiring them "to alter the expressive content of their parade," in violation of ***5a** the First Amendment. *Id.* at 572-73. In other words, the Supreme Court found that the government improperly attempted to apply public accommodation law to "speech itself." *Id.* at 573.

Here, however, Section 24-34-601(2)(a), of CADA applies to Plaintiffs' business operation, and their decision to not offer services to same-sex couples as opposed to targeting speech itself. *See e.g., Elane Photography,* 309 P.3d at 68 (distinguishing *Hurley,* and stating, "Defendants cite no reported decision extending the holding of Hurley to commercial enterprise carrying on a commercial activity."); *Masterpiece,* 370 P.3d at 287 (distinguishing *Hurley*). Furthermore, a for-profit company like Plaintiff 303 Creative can hardly be likened to a non-profit organization and parade, and any message that may be attributed to the same.

****

Here, Section 24-34-601(2)(a), of CADA does not mandate that Plaintiffs host a message in support of same-sex marriage, let alone any message. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47 (2006), the Supreme Court rejected arguments by law schools that a statue requiring them to provide access to military recruiters equal to other recruiters violated their freedom of speech by forcing them to accommodate or host another speaker's message. *Id.* at 52-60. Instead, the Court found that the statute regulated "what law schools must *do* … not what they may or may not say." *Id.* at 60 (emphasis in original); *see also e.g., R. A. V. v. St. Paul,* 505 U.S. 377, 389 (1992) ("[W]ords ***6a** can in some circumstances violate laws directed not against speech but against conduct.").

****

In, *Masterpiece,* the Colorado Court of Appeals held that Section 24-34-601(2)(a), of CADA, did not force a wedding cake baker to host or accommodate any particular view on marriage; only that it offer the same services to its customers regardless of their sexual orientation. *Masterpiece,* 370 P.3d at 63 ("Masterpiece does not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally."); *Rumsfield,* 547 U.S. at 64-65 (rejecting law school argument that forcing them to treat military and nonmilitary recruiters the same compels them to send "the message that they see nothing wrong with the military's policies [against gays in the military], when they do," because students "can appreciate the difference between speech a school sponsors and speech the school permits because it is legally required to do so.").

****

Furthermore, to the extent any message is conveyed at all, reasonable observers would attribute that message to the individuals being married, not Plaintiffs. *Masterpiece,* 370 P.3d at 286 ("[T]o the extent that the public infers from a Masterpiece wedding cake a message celebrating same-sex marriage, that message is more likely to be attributed to the customer than to Masterpiece."); *Rumsfield,* 547 U.S. at 64-65; *Elane Photography,* 309 P.3d at 69-70 ("It is well known to the public that wedding ***7a** photographers are hired by paying customers and that a photographer may not share

the happy couple's views on issues ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom.").

Here, Plaintiffs cannot argue that any message being conveyed is anything other than the customers. For example, couples may choose to not put biblical verses on their website; they may choose to put secular photos on the website in lieu of photos of religious symbols; and they may choose the style or size of font, types of graphics, and color scheme. [Doc. No. 1, ¶¶ 128-29] (Plaintiffs recognize that customers have ideas of what they desire to be on their website and Plaintiffs work in close contact with customers to get their ideas to collaborate on the finished product). Indeed, *Masterpiece* recognized that because vendors like Plaintiffs charge for their services, it reduces "the likelihood that a reasonable observer will believe that [Plaintiffs] support the message expressed in [their] finished product." *Masterpiece,* 370 P.3d at 287.

To this end, Plaintiffs' website design service is also not constitutionally protected speech. *See United States v. O'Brien,* 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends to thereby express an idea.").

****

Moreover, Plaintiffs' speech is not chilled, as they allege [Doc. No. 7, at p. 22], and they are not required ***8a** to espouse a particular viewpoint on same-sex marriage merely because they are required to serve same-sex and opposite sex couples equally.

****

As exemplified, Plaintiffs remain free to post disclaimers "in the store or on the Internet indicating that the provision of its services does not constitute an endorsement or approval of conduct protected by CAD A." *Id.; Prune Yard Shopping Ctr. v. Robins,* 447 U.S. 74, 87 (1980) ("[S]igns, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law."); *Elane Photography,* 309 P.3d at 47 ("Elane Photography is free to disavow, implicitly or explicitly, any message that it believes the photographs convey" and it is unlikely that reasonable observers will interpret Elane Photography as sending a message that it supports same-sex marriage by merely treating same-sex and opposite-sex customers alike).

****

Furthermore, the Colorado Court of Appeals distinguished the three bakeries from Masterpiece in its decision when ADF made the same arguments. *Masterpiece,* 370 P.3d at 282, n. 8. Notably, Masterpiece refused to make a wedding cake for a same-sex couple *because of their sexual orientation* based on the owner's religious belief; while the three bakeries refused to make a cake for a patron that would say "Homosexuality is a detestable sin. Leviticus 18:2" because of the derogatory, offensive ***9a** message, not because of the patron's creed. *Id.* Here, Plaintiffs are "in the exact same position" as *Masterpiece,* because they intend to refuse service to a same-sex couples *only because of their sexual orientation.* [Doc. No. 7, at pp. 8, 24]. Plaintiffs' reliance on the three other bakery cases has already been addressed by *Masterpiece,* and is simply inapposite, and CADA does not engage in content based discrimination.

****

Plaintiffs claim that CADA does not survive strict scrutiny. [Doc. No. 7, at pp.25-26]. However, CADA is a neutral law of general applicability, which is not subject to strict scrutiny. "A law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge." *Grace v. United Methodist Church v. City of Cheyenne,* 451 F.3d 643, 649 (10th Cir. 2006). Here, Colorado has not only a legitimate

interest, but a compelling one in erasing discrimination against its citizens. *Masterpiece,* 370 P.3d at 293 (concluding that CADA is rationally related to Colorado's interest in eliminating discrimination in places of public accommodation).

****

Furthermore, the Supreme Court has also held, time and time again that using religion to perpetuate discrimination against individuals, and violate a state's laws, is inappropriate. *Reynolds,* 98 U.S. at 166-67 (noting that religious motivation should not excuse compliance with laws); ***10a** *United States v. Lee,* 455 U.S. 252, 261 (1982) (rejecting religious exercise challenge to law requiring employers to pay social security tax for employees stating, "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."); *Newman v. Piggie Park Enters., Inc.,* 256 F. Supp. 941, 945 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds,* 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds,* 390 U.S. 400 (1968) (finding that while defendant had a constitutional right to espouse the religious views of his choosing, he did not have "a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs."); *see also e.g., Hishon v. King & Spalding,* 467 U.S. 69, 78 (1984) ("Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional relief.") (citation omitted).

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Plaintiffs ask this Court to bar Defendants from enforcing Colorado's public accommodation law so that they can discriminate against same-sex couples on the basis of their religious beliefs.

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***11A IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO**

Civil Action No. 16-cv-02372-MSK-CBS

303 CREATIVE LLC, a limited liability company; and LORIE SMITH, *Plaintiffs,*

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official capacity; ANTHONY ARAGON, ULYSSES J. CHANEY, MIGUEL "MICHAEL" RENE ELIAS, CAROL FABRIZIO, HEIDI HESS, RITA LEWIS, and JESSICA POCOCK, as members of the Colorado Civil Rights Commission, in their official capacities, and CYNTHIA H. COFFMAN, Colorado Attorney General, in her official capacity; *Defendants.*

JOINT STATEMENT OF STIPULATED FACTS

****

***12a** 29. Plaintiff Lorie Smith is a lifelong resident of the State of Colorado and a citizen of the United States of America.

30. Ms. Smith is a Christian.

31. Ms. Smith's religious beliefs, including her religious understanding about marriage as an institution between one man and one woman, are central to her identity, her understanding of existence, and her conception of her personal dignity and identity.

32. Ms. Smith's decision to speak and act consistently with her religious understanding of marriage defines her personal identity.

33. Ms. Smith believes that her life is not her own, but that it belongs to God, and that He has called her to live a life free from sin.

34. Ms. Smith believes that everything she does personally and professionally - should be done in a manner that glorifies God.

35. Ms. Smith believes that what is sinful versus what is good is rooted in the Bible and her personal relationship with Jesus Christ.

36. Ms. Smith believes that she will one day give an account to God regarding the choices she made in life, both good and bad.

37. Ms. Smith believes that God instructs Christians to steward the gifts He has given them in a way that glorifies and honors Him.

***13a** 38. Ms. Smith believes that she must use the creative talents God has given to her in a manner that honors God and that she must not use them in a way that displeases God.

39. Ms. Smith's creative talents include artistic talents in graphic design, website design, and marketing.

40. She developed these skills at the University of Colorado Denver, where she received a business degree with an emphasis in marketing.

41. She was then employed by other companies to do graphic and web design before starting her own company, 303 Creative.

42. Ms. Smith started 303 Creative because she desired the freedom to use her creative talents to honor God to a greater degree than was possible while working at other companies.

43. 303 Creative is a for-profit limited liability company organized under Colorado law with its principal place of business in Colorado.

44. Ms. Smith is the sole member-owner of Plaintiff 303 Creative LLC.

45. Through 303 Creative, Ms. Smith offers a variety of creative services to the public, including graphic design, and website design, and in concert with those design services, social media management and consultation services, marketing advice, branding strategy, training regarding website ***14a** management, and innovative approaches for achieving client goals.

46. All of Plaintiffs' graphic designs are expressive in nature, as they contain images, words, symbols, and other modes of expression that Plaintiffs use to communicate a particular message.

47. All of Plaintiffs' website designs are expressive in nature, as they contain images, words, symbols, and other modes of expression that Plaintiffs use to communicate a particular message.

48. As the sole owner and operator of 303 Creative, Ms. Smith controls the scope, mission, priorities, creative services, and standards of 303 Creative.

49. Ms. Smith does not employ or contract work to any other individuals.

50. Each website 303 Creative designs and creates is an original, customized creation for each client.

51. In her website design work, Ms. Smith devotes considerable attention to color schemes, fonts, font sizes, positioning, harmony, balance, proportion, scale, space, interactivity, movement, navigability, and simplicity.

52. Ms. Smith also considers color, positioning, movement, angle, light, complexity, and other factors when designing graphics.

53. Every aspect of the websites and graphics Plaintiffs design contributes to the overall messages ***15a** that Plaintiffs convey through the websites and graphics and the efficacy of those messages.

54. Ms. Smith personally devotes herself to her design work, drawing on her inspiration and sense of beauty to create websites and graphics that effectively communicate the intended messages.

55. As a seasoned designer, Ms. Smith helps clients implement the ideal websites and graphics - oftentimes by designing custom graphics and textual content for their unique needs - to enhance and effectively communicate a message.

56. Although clients often have a very basic idea of what they wish for in a graphic or a website and sometimes offer specific suggestions, Ms. Smith's creative skills transform her clients' nascent ideas into pleasing, compelling, marketable graphics or websites conveying a message.

57. When designing and creating graphics or websites, Ms. Smith is typically in close contact with her clients as they each share their ideas and collaborate to develop graphics or websites that express a message in a way that is pleasing to both Ms. Smith and her clients.

58. Ms. Smith ultimately has the final say over what she does and does not create and over what designs she does and does not use for each website.

59. For each website 303 Creative makes, Ms. Smith typically creates and designs original text and graphics for that website and then combines that ***16a** original artwork with text and graphics that Ms. Smith had created beforehand or that Ms. Smith receives from the client or from other sources. Ms. Smith then combines the original text and graphics she created with the already existing text and graphics to create an original website that is unique for each client.

60. As required by her sincerely held religious beliefs, Ms. Smith seeks to live and operate 303 Creative in accordance with the tenets of her Christian faith.

61. This means Ms. Smith seeks to use 303 Creative to bring glory to God and to share His truth with its clients and the community.

62. Ms. Smith strives to serve 303 Creative's customers with love, honesty, fairness, transparency, and excellence.

63. Ms. Smith designs unique visual and textual expression to promote the purposes, goals, services, products, organizations, events, causes, values, and messages of her clients insofar as they do not, in the sole discretion of Ms.

Smith, (1) conflict with Plaintiffs' religious beliefs or (2) detract from Plaintiffs' goal of publicly honoring and glorifying God through the work they perform.

64. Plaintiffs are willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender.

***17a** 65. Plaintiffs do not object to and will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites do not violate their religious beliefs, as is true for all customers.

66. Among other things, Plaintiffs will decline any request to design, create, or promote content that: contradicts biblical truth; demeans or disparages others; promotes sexual immorality; supports the destruction of unborn children; incites violence; or promotes any conception of marriage other than marriage between one man and one woman.

67. Therefore, Plaintiffs' "Contract for Services" includes the following provision:

> Consultant has determined that the artwork, graphics, and textual content Client has requested Consultant to produce either express messages that promote aspects of the Consultant's religious beliefs, or at least are not inconsistent with those beliefs. Consultant reserves the right to terminate this Agreement if Consultant subsequently determines, in her sole discretion, that Client desires Consultant to create artwork, graphics, or textual content that communicates ideas or messages, or promotes events, services, products, or organizations, that are inconsistent with Consultant's religious beliefs.

***18a** 68. When considering a potential project, Ms. Smith will view the prospective client's website (if applicable) and ask questions of the prospective client to assist in the vetting process of determining whether the requested project conflicts with Plaintiffs' religious beliefs and whether it is a good fit given Plaintiffs' skills, schedule, preferences, and workload.

69. If Plaintiffs determine that they are unable to assist with a project promoting particular purposes, goals, services, products, organizations, events, causes, values, and messages they find objectionable, Plaintiffs endeavor to refer the prospective client to a different company that can assist them.

****

76. Ms. Smith is compelled by her religious beliefs to use the talents God has given her to promote God's design for marriage in a compelling way.

77. Ms. Smith is compelled by her religious beliefs to do this by expanding the scope of 303 Creative's services to include the design, creation, and publication of wedding websites.

78. Consistent with Plaintiffs' religious beliefs, the wedding websites that Plaintiffs wish to design, create, and publish will promote and celebrate the unique beauty of God's design for marriage between one man and one woman.

79. By creating wedding websites, Ms. Smith and 303 Creative will collaborate with prospective brides ***19a** and grooms in order to use their unique stories as source material to express Ms. Smith's and 303 Creative's message celebrating and promoting God's design for marriage as the lifelong union of one man and one woman.

80. The collaboration between Plaintiffs and their clients who desire custom wedding websites will also allow Plaintiffs to strengthen and encourage marriages by sharing biblical truths with their clients as they commit to lifelong unity and devotion as man and wife.

81. Plaintiffs' custom wedding websites will be expressive in nature, using text, graphics, and in some cases videos to celebrate and promote the couple's wedding and unique love story.

82. All of these expressive elements will be customized and tailored to the individual couple and their unique love story.

83. Viewers of the wedding websites will know that the websites are Plaintiffs' original artwork because all of the wedding websites will say "Designed by 303Creative.com."

****

88. Plaintiffs' intended message of celebration and promotion of their religious belief that God designed marriage as an institution between one man and one woman will be unmistakable to the public after viewing the addition to 303 Creative's webpage.

****

***20a** 90. As part of Plaintiffs' religious calling to celebrate God's design for marriage and due to their sincerely held religious belief that they must be honest and transparent about the services that they can and cannot provide, the webpage also states that their religious beliefs prevent them from creating websites celebrating same-sex marriages or any other marriage that contradicts God's design for marriage.

91. For example, the addition to 303 Creative's webpage states the following:

These same religious convictions that motivate me also prevent me from creating websites promoting and celebrating ideas or messages that violate my beliefs. So I will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman. Doing that would compromise my Christian witness and tell a story about marriage that contradicts God's true story of marriage - the very story He is calling me to promote.

****

94. Plaintiffs believe it would violate Plaintiffs' sincerely held religious beliefs to create a wedding website for a same-sex wedding because, by doing so, Plaintiffs would be expressing a message celebrating and promoting a conception of marriage that they believe is contrary to God's design for marriage.

95. Unwilling to violate their sincerely held religious beliefs, but similarly unwilling to violate CADA and suffer the consequences, Plaintiffs are refraining from publishing the website referenced ***21a** above and from designing, creating, and publishing wedding websites that celebrate and promote marriages between one man and one woman.

96. If not for CADA, Plaintiffs would have already made the addition to 303 Creative's webpage referenced above viewable to the public and begun offering their creative services for the design, creation, and publication of wedding websites that celebrate and promote marriages between one man and one woman.

****

98. There are numerous companies in the State of Colorado and across the nation that offer custom website design services, the areas of 303 Creative's specialization.

99. For example, the online directory http://sortfolio.com/ lists 245 web design companies in Denver alone and hundreds more nationwide.

100. Likewise, the online directory http://www.designfirms.org lists 114 web design companies in Colorado and 5,618 in the United States as a whole.

101. The online directory http://unitedstateswebdesigndirectory.com further lists 127 web design companies in Colorado and 4,097 countrywide.

****

2613

***22a Nathan Woodliff-Stanley, Executive Director Mark Silverstein, Legal Director**

January 9, 2013

SENT VIA ELECTRONIC MAIL

Aubrey Catanach, Investigator

Colorado Civil Rights Division

1560 Broadway, Suite 1050

Denver, CO 80202

Aubrey.Catanach@denvergov.org

Re: *Rebuttal to Respondent's Position Statement regarding David Mullins and Charlie Craig CCRD Charge Numbers P2013007X and P2013008X*

Dear Ms. Catanach:

I am writing to respond to the position statement submitted by Respondent Masterpiece Cakeshop in the above-captioned matter. This is among those rare cases in which the Respondent has clearly articulated its impermissible discriminatory rationale for refusing to provide service to the Charging Parties. While most cases require the fact finder to engage in a complicated analysis to ascertain the business owner's true motivation for denying ***23a** equal access to a public accommodation such analysis is not required here. To the contrary, Respondent has openly admitted that it refused service to Charlie Craig and David Mullins because of their sexual orientation.

Given that all parties agree about the facts supporting the Charging Parties' allegations, and that those facts clearly show that Respondent illegally discriminated against the Charging Parties and maintains a policy of discriminating against all customers who are similarly situated to the Charging Parties, a probable cause finding by the Division is appropriate in this case.

Factual Background

I. Masterpiece Cakeshop Discriminated Against Mr. Mullins and Mr. Craig by Refusing to Provide Equal Access to Goods and Services

On July 19, 2012, David "Dave" Mullins and Charlie Craig, along with Charlie's mother, Deborah Munn, went to Masterpiece Cakeshop to order a wedding cake. Charlie and Dave were planning to travel to Massachusetts to marry, and intended to hold wedding reception in their hometown of Denver when they returned.

When the group walked into the bakery, they were greeted by a man at the counter, who told them to have a seat. After they sat down, the owner of the store, Jack Phillips, approached and sat down. Charlie and Dave began to discuss options for the ***24a** cake and told Mr. Phillips that the wedding cake was for their wedding. Mr. Phillips immediately told the couple that it was his standard business practice not to sell cakes for same-sex weddings. Dave, Charlie and Deborah were extremely offended and let Mr. Phillips know they were upset about his refusal to serve them. Realizing that Mr. Phillips did not intend to provide them service, the group left the bakery.

The following day, Deborah contacted Mr. Phillips by telephone to seek more information about why he had refused service to her son and his fiance. In response to her questions, Mr. Philips stated that it was because he is a Christian that he was opposed to making cakes for the weddings of same-sex couples. Mr. Phillips subsequently commented to news organizations that he has a history of turning away same-sex couples for this same reason, and he made his policy against serving same-sex couples very clear. [1] Masterpiece Cakeshop has not argued that it ***25a** is a business principally used for religious purposes, nor can it do so given its nature as a retail business engaged in the secular function of selling baked goods to the public at large. Thus, Mr. Phillips' purported justification for discrimination does not save Masterpiece Cakeshop from violating the Colorado Anti-Discrimination Act.

****

***26a EXCERPT OF ARTICLE CITED IN FOOTNOTE 1 OF CRAIG AND MULLINS'S REBUTTAL TO PHILLIPS'S POSITION STATEMENT**

Cake shop says business booming since refusal to serve gay couple

POSTED 9:03 AM, JULY 30, 2012, BY MARK MEREDITH AND WILL C. HOLDEN, *UPDATED AT 08:54AM, JULY 31, 2012*

****

LAKEWOOD, Colo. -- A Lakewood gay couple may end up having a masterpiece of a wedding, but they won't have a "Masterpiece" cake to go along with it.

Jack Phillips, the owner of Masterpiece Cakeshop in Lakewood, told the couple they have their sexual orientation to thank for that. It's an event that occurred on the afternoon of July 19, and it's sparking national attention, a petition and a boycott of the local bakery.

Phillips said it has also spiked a boom in his business, which he said has doubled since the incident.

It all started when Dave Mullins, 28, and Charlie Craig, 31, went into the Masterpiece Cakeshop hoping to get a rainbow-layered cake with teal and red frosting for their wedding reception, which will take place in Denver this October after their wedding in Provincetown, Mass., which is set for September.

***27a** Phillips informed the couple his business does not create cakes for gay weddings. Mullins took to his Facebook page.

Describing the ordeal as an "awkward, surreal, very brief encounter," Mullins said he responded by directing an expletive and an obscene gesture at the owner of what he is calling a "homophobic cake shop."

Phillips said he isn't a homophobe, and that he would gladly serve any other baked good to a gay couple -just not a wedding cake.

"I'm a follower of Jesus Christ, so you could say this is a religious belief," Phillips said. "I believe the Bible teaches that (homosexuality) is not an OK thing."

The bakery is family owned and operated. Phillips said since 1993, it has turned away about a half dozen same sex weddings.

While this incident has brought about several death threats - the cake shop was forced to call the police Sunday - Phillips said the boom in publicity hasn't hurt business. Just the opposite, in fact.

"(On Monday) we had about twice as much business as normal," Phillips said. "There are people coming in to support us."

Colorado law says it's illegal to discriminate based on sexual orientation in employment and housing. But when it comes to things like selling cakes, the law is less than clear. Either way, Phillips said he has legal representation if anyone attempts to challenge his right to refuse service to gay couples.

***28a** According to online reviews, this isn't the first time Masterpiece Cakeshop has been discriminatory with its service to individuals besides homosexuals.

In a February 2010 post that began by calling the bakery a "Judgmental Conservative Service," one CitySearch.com commenter said she and her fiance were "met by a friendly woman who quickly turned holy-roller judgmental when she found out we were doing a Halloween-themed wedding."

After being refused service by the Lakewood bakery, Mullins said he and Craig went to the "gayest cake shop we could think of." That was Le Bakery Sensual in Denver. He also said the outpouring out support that he and Craig have received from "around the world" has been "so reassuring."

"It's kind of one of those things that restores your faith in humanity," Mullins said.

****

Footnotes

1 Mark Hemingway, *Is Cake an Artistic Medium?,* The Weekly Standard, Aug. 29, 2017, http://tws.io/2goeHPr (last visited Aug. 29, 2017).

2 The First Amendment shields not only Phillips's custom cakes, but also the process by which he creates them. *See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue,* 460 U.S. 575, 582 (1983) (nullifying a tax on paper and ink used to produce some publications in part because the tax "burden[ed] rights protected by the First Amendment"); *Brown,* 564 U.S. at 792 n.1 ("Whether government regulation applies to creating, distributing, or consuming speech makes no difference.").

3 Mark Meredith and Will C. Holden, *Cake Shop Says Business Booming,* Fox 31 Denver, July 30, 2012, http://bit.ly/2uQZhJO (reprinted in Addendum to Brief at 25a-27a); Craig and Mullins's Rebuttal to Phillips's Position Statement at n.1 (reprinted in Addendum at 23a-24a n.1).

4 *See* Katherine McFarland Bruce, *Pride Parades: How a Parade Changed the World* 170 (2016) (explaining that "cultural symbols like the rainbow flag" are "associat[ed] with the LGBT community").

5 Accepting this argument would also jeopardize the freedom of newspapers, publishing companies, media outlets, and internet corporations, all of which disseminate speech (like articles, books, and advertisements) attributed to others. *But see Tornillo,* 418 U.S. at 258 (holding that the state cannot force a newspaper to print a politician's article).

6 The Free Exercise Clause protects Phillips and his closely held family business. As this Court recently explained, affirming Masterpiece's free-exercise rights "protects the religious liberty of the humans who own and control" that family-owned company, which in this case is Phillips and his wife. *Burwell v. Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751. 2768 (2014).

7 By including exemptions within CADA, the state itself has recognized that it does not have a general or absolutist interest in eliminating discrimination. *See, e.g.,* Pet.App.93a (exempting "church[es], synagogue [s], mosque[s], or other place[s] that [are] principally used for religious purposes" from CADA's scope); Pet.App.95a (permitting public accommodations to treat men and women differently when doing so has "a bona fide relationship" to the goods or services they provide).

8 If the rules established in *Smith* do not protect Phillips here - in other words, if the Commission can compel him to create artistic expression about an inherently religious issue like marriage - then the standards adopted in that case should be reevaluated.

9 The Colorado Court of Appeals cited one document to support its discussion of the state's alleged economic interests. *See* Pet.App.50a (citing Mich. Dep't of Civil Rights Report). That 2013 report discussed the circumstances in a different state (Michigan), relied extensively on anecdotes and anonymous statements, and focused heavily on the limitations facing same-sex couples before they could marry. Such feeble evidence does not come close to carrying the state's heavy burden under strict scrutiny.

10 *See Desilets,* 636 N.E.2d at 238, 240 (explaining that business owners obtain no "financial advantage" by asserting these sorts of religious convictions, and noting that strong "[m]arket forces … discourage" people of faith from declining their customers' requests).

1 Fox 47 News, *Colorado Cake Shop Won't Make Gay Couple's Wedding Cake,* YouTube (Aug. 6, 2012), http://www.youtube.com/watch?v=PmX2-Y3twCU; Billy Hallowell, *Activists Call for Boycott on Cake Shop After Owner Refused to Bake Gay Wedding Cake,* The Blaze (July 30, 2012, 2:20 PM), http://www.theblaze.com/stories/activists-call-for-boycott-on-cake-shop-after-owner-refuses-to-bake-gay-weddingcake/; Lauren Hendrick, *The Owner of Masterpiece Cake Shop Says He'll Close Before Selling Wedding Cake to Gay Couples,* Eater Denver (July 31, 2012), http://denver.eater.com/archives/2012/07/31/the-owner-ofmasterpiece-cakeshop-refuses-gay-couple-wedding-cake-says-hell-close-bakery-before-comp.php; *Lakewood Cake Shop Refuses Wedding Cake to Gay Couple,* CBS Denver (July 28, 2012, 7:06 PM), http://denver.cbslocal.com/2012/07/28/lakewood-cake-shop-refuses-wedding-cake-to-gay-couple/; Mark Meredith & Will C. Holden, *Cake Shop Says Business Booming Since Refusal to Serve Gay Couple,* FOX 31 Denver (July 30, 2012, 9:03 AM), http://kdvr.com/2012/07/30/denver-cake-shop-refuses-service-to-gay-couple/; Erin Udell, *Cake Shop Owner Will Continue to Reject Orders for Same-sex Weddings,* Denver Daily Post (Aug. 2, 2012, 01:00 AM), http://www.denverpost.com/news/ci_21238009/cake-shop-owner-will-continue-reject-orders-same.

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UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

TELESCOPE MEDIA GROUP, *a Minnesota corporation*, and CARL LARSEN and ANGEL LARSEN, *founders and owners of Telescope Media Group*,	Civil No. 16-4094 (JRT/LIB)
Plaintiffs,	
v.	**MEMORANDUM OPINION AND ORDER**
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.	

Jeremy D. Tedesco and Jacob Paul Warner, **ALLIANCE DEFENDING FREEDOM**, 15100 North 90th Street, Scottsdale, AZ 85260, and Renee Carlson, **CARLSON LAW, PLLC**, 855 Village Center Drive, Suite 259, St. Paul, MN 55127, for plaintiffs.

Alethea M. Huyser and Janine Wetzel Kimble, **MINNESOTA ATTORNEY GENERAL'S OFFICE**, 445 Minnesota Street, Suite 1100, St. Paul, MN 55101, for defendants.

Plaintiffs Carl and Angel Larsen and Telescope Media Group ("TMG")[1] bring a pre-enforcement challenge to the ban on sexual orientation discrimination in public accommodations and contracting in the Minnesota Human Rights Act ("MHRA"). The Larsens operate a videography business, and they plan to expand into the wedding video

[1] This Order refers to Plaintiffs collectively as "the Larsens" unless otherwise noted.

EXHIBIT 7

business as a public accommodation. They argue that the MHRA's requirement that they serve same-sex couples seeking wedding video services violates the Larsens' First and Fourteenth Amendment rights to free speech, expressive association, free exercise, equal protection, and due process. The Larsens move for a preliminary injunction, seeking an order from the Court preventing enforcement of the MHRA against them in their future wedding video business. Defendants Commissioner of the Minnesota Department of Human Rights Kevin Lindsey ("Commissioner Lindsey"), and Minnesota Attorney General Lori Swanson ("Attorney General Swanson") (collectively "Defendants") move for dismissal for lack of subject-matter jurisdiction and failure to state a claim.

The Court finds that contrary to Defendants' arguments, Attorney General Swanson is not currently entitled to Eleventh Amendment immunity. However, the Court also finds that to the extent the Larsens claim that the MHRA would require them to publicize videos of same-sex weddings online, the Larsens have no standing because the alleged injury-in-fact is too abstract and hypothetical to present a genuine Article III case or controversy. As to the Larsens' claims regarding the MHRA's requirement that they serve same-sex couples in their wedding video business, the Larsens have standing and their claims are ripe. But the Court will dismiss the Larsens' challenges to this application of the MHRA because all of the Larsens' claims fail as a matter of law. Thus, the Court will grant Defendants' motion to dismiss and will deny the Larsens' motion for preliminary injunction as moot.

BACKGROUND

I. THE MINNESOTA HUMAN RIGHTS ACT (MHRA)

Minnesota has outlawed invidious discrimination in public accommodations since 1885.[2] While the early antidiscrimination law was aimed at protecting African-Americans from denials of equal opportunity in public accommodations and the "stigmatizing injury" that resulted from such discrimination, the MHRA's scope has "progressively broadened" to outlaw discrimination against a number of historically disadvantaged groups. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624-25 (1984). The Minnesota Legislature added "sexual orientation" to the list of protected characteristics more than two decades ago. Act of Apr. 2, 1993, ch. 22, 1993 Minn. Laws 121 (codified as amended at Minn. Stat. §§ 363A.01-363A.44).

Two types of "unfair discriminatory practice" defined in the MHRA are relevant to this case. First, the Public Accommodations Provision: "It is an unfair discriminatory practice . . . to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public

[2] Minnesota modeled its early antidiscrimination law after the federal Civil Rights Act of 1875, which prohibited discrimination against African-Americans in public accommodations during Reconstruction. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (citing *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. Rev. L. & Soc. Change 215, 238-39 (1975)). When the Supreme Court invalidated the federal statute in 1883, *see Civil Rights Cases*, 109 U.S. 3 (1883), a number of states, including Minnesota, responded by enacting legislation to accomplish the same goal, *Roberts*, 468 U.S. at 624; *see also* Act of Mar. 7, 1885, ch. 224, § 1, 1885 Minn. Laws 295, 296. Violation of the law was a misdemeanor, with violators subject to a $100 to $500 fine or imprisonment "not less than thirty (30) days nor more than one (1) year." Act of Mar. 7, 1885, § 2.

accommodation[3] because of . . . sexual orientation . . . ." § 363A.11, subd. 1(a)(1). Second, the Business Discrimination Provision:

> It is an unfair discriminatory practice for a person engaged in a trade or business or in the provision of a service . . . to intentionally refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person's . . . sexual orientation . . . , unless the alleged refusal or discrimination is because of a legitimate business purpose.

§ 363A.17(3).

Commissioner Lindsey leads the Minnesota Department of Human Rights ("MDHR") and is charged with interpreting and enforcing the MHRA's substantive provisions. *See* § 363A.06. MDHR investigates allegations of MHRA violations and may pursue administrative enforcement actions to ensure compliance with the MHRA. *See* § 363A.28. MDHR and private parties may also bring civil actions "seeking redress for an unfair discriminatory practice," § 363A.33, subds. 1, 6, and may pursue declaratory and injunctive relief, monetary damages, and costs and fees, *id.*, subd. 6 (citing § 363A.29, subds. 3-6). In addition to civil enforcement mechanisms, an unfair discriminatory practice in violation of the MHRA is a misdemeanor.[4] § 363A.30, subd. 4.

[3] "Place of public accommodation" is defined as: "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." Minn. Stat. § 363A.03, subd. 34.

[4] In Minnesota, a "[m]isdemeanor" is "a crime for which a sentence of not more than 90 days or a fine of not more than $1,000, or both, may be imposed." Minn. Stat. § 609.02, subd. 3.

II. LEGALIZATION OF SAME-SEX MARRIAGE

In 2013 Minnesota enacted legislation to legalize same-sex marriage. Act of May 14, 2013, ch. 74, 2013 Minn. Laws (codified as amended at Minn. Stat. §§ 363A.26, 517.01-23, 518.07). Subsequently, MDHR publicly announced interpretive guidance for businesses providing wedding-related services, stating:

> [State law] does not exempt individuals, businesses, nonprofits, or the secular business activities of religious entities from non-discrimination laws based on religious beliefs regarding same-sex marriage.
>
> Therefore, a business that provides wedding services such as cake decorating, wedding planning or catering services may not deny services to a same-sex couple based on their sexual orientation.
>
> To do so would violate the protections for sexual orientation laid out in the [MHRA]. The individuals denied services could file a claim with [MDHR] against the entity that discriminated against them.

(First Am. Verified Compl. for Declaratory & Injunctive Relief ("Am. Compl.") ¶ 61, Jan. 13, 2017, Docket No. 13 (quoting Minn. Dep't of Human Rights, *Minnesota's Same-Sex Marriage Law*, https://mn.gov/mdhr/yourrights/who-is-protected/sexual-orientation/ same-sex-marriage/ (last visited Jan. 10, 2017))); *see also id.* ¶¶ 62-64 (citing similar publicly available MDHR guidance).)

III. THE LARSENS' BUSINESS

The Larsens are Minnesota residents; they operate TMG, a for-profit Minnesota company incorporated in 2012. (*Id.* ¶¶ 1, 22-25, 79.) The Larsens create films and other media for clients. (*Id.* ¶¶ 80-82, 89.) The parties do not dispute that because TMG offers

videography services to the general public, it is a "place of public accommodation" as defined in § 363A.03, subd. 34.

The Larsens are Christian. (Am. Compl. ¶¶ 72-78.) In their work at TMG, the Larsens generally exert a large amount of editorial and creative control over the media they produce for clients. (*Id.* ¶¶ 88, 90-91, 100-07.) The Larsens seek to create products that both satisfy their clients' needs and also are consistent with their religious beliefs. (*Id.* ¶¶ 84-85, 89, 93, 109.) The Larsens allege that they will "gladly work with all people" regardless of sexual orientation or religious belief, but they decline requests for their creative services unless "they can use their story-telling talents and editorial control to convey only messages they are comfortable conveying given their religious beliefs." (*Id.* ¶¶ 92, 95.) This means that the Larsens decline requests to work on projects that "promote any conception of marriage other than as a lifelong institution between one man and one woman." (*Id.* ¶ 96.) The Larsens also decline some client requests because they receive more requests than they have capacity to complete. (*Id.* ¶ 98.)

The Larsens allege that they are planning to expand their videography services to include wedding video services with the purpose of "counteract[ing] the current powerful cultural narrative undermining the historic, biblically-orthodox definition of marriage as between one man and one woman" and expressing their opposition to same-sex marriage. (*Id.* ¶ 122; *see also id.* ¶¶ 3-5, 113-21, 123-30, 154-56, 159, 174.) They plan to publicly promote their wedding videos to a broad audience on their website and on "other internet mediums, like Twitter and Facebook," in order "to achieve maximum cultural impact" and to "affect the cultural narrative regarding marriage." (*Id.* ¶¶ 135-36.) The Larsens

allege that "[p]ublic promotion of the wedding videos . . . will be mandatory in every wedding videography contract into which the Larsens enter." (*Id.* ¶ 138.)

The Larsens maintain that the only way that they will be able to achieve their desired expressive goal – to create videos promoting their view of marriage – is if they operate as a provider of wedding video services for paying clients. They argue that (1) "[i]t is not financially feasible . . . to tell stories about marriage with the frequency and quality they desire if they cannot charge for their work"; and (2) "[g]iven the nature of the wedding industry and the fact that weddings are typically not open to the general public, the Larsens would not have access to and be able to capture weddings if couples did not hire them for their weddings." (*Id.* ¶¶ 144, 147.)

The Larsens allege that they are unable to start offering their services "until they know whether they can operate in the wedding industry in accordance with their religious beliefs." (*Id.* ¶ 156.) They claim that if they operate a wedding video service, they will be forced to choose between violating the MHRA – and facing the associated civil and/or criminal consequences – or offering wedding video services to same-sex couples in violation of their religious beliefs. (*See id.* ¶¶ 160-65.) They allege that if they carry out their plan to expand into the wedding video business, they will decline requests to make wedding videos for same-sex couples[5] and will post a statement publicizing this position

[5] The Larsens assert that in fact they have already received one request for a wedding video from a same-sex couple even though they do not currently advertise wedding video services. (Am. Compl. ¶¶ 167, 169, 172.)

on their website[6] – acts that the Larsens acknowledge would violate the MHRA's Public Accommodations and/or Business Discrimination Provisions as interpreted by MDHR. (*Id.* ¶¶ 158, 160, 165-66, 168, 170.) Thus, the Larsens argue the MHRA's prohibition on sexual orientation discrimination is the reason why the Larsens have not expanded into the business of wedding videos. (*Id.* ¶ 173.)

IV. PROCEDURAL HISTORY

On December 6, 2016, the Larsens initiated this action against Defendants in their official capacities. (*Id.* ¶¶ 26, 28-30; *see also* Verified Compl. for Declaratory & Injunctive Relief ¶¶ 26, 28-30, Dec. 6, 2016, Docket No. 1.) The Larsens assert seven as-applied pre-enforcement constitutional challenges to MHRA's Public Accommodations and Business Discrimination Provisions. They argue the law impermissibly infringes their First Amendment rights to free speech, expressive association and free exercise; creates an unconstitutional condition on entry into the wedding video market; and violates their Fourteenth Amendment rights to equal protection and to substantive and procedural due process. (Am. Compl. ¶¶ 194-328.) The Larsens seek injunctive and declaratory relief excepting them from the MHRA's ban on sexual orientation discrimination, as well as costs and fees pursuant to 42 U.S.C. § 1988. (*Id.* at 45-46.)

[6] The statement the Larsens would like to put on their website is: "Telescope Media Group exists to glorify God through top-quality media production. Because of TMG's owners' religious beliefs and expressive purposes, it cannot make films promoting any conception of marriage that contradicts its religious beliefs that marriage is between one man and one woman, including films celebrating same-sex marriages." (Am. Compl. ¶ 158.)

On January 13, 2017, the Larsens filed a motion for preliminary injunction. On February 15, 2017, Defendants filed a motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The Court now considers both motions.

ANALYSIS

I. LACK OF JURISDICTION

The Court first addresses the threshold jurisdictional questions. Defendants make three arguments for dismissal under Rule 12(b)(1): (1) pursuant to the Eleventh Amendment, the Court lacks jurisdiction over the claims against Attorney General Swanson; (2) the Larsens lack standing; and (3) the Larsens' claims are not ripe for review.

A. Standard of Review

Federal courts lack jurisdiction over claims against defendants entitled to immunity under the Eleventh Amendment. *E.g.*, *Roe v. Nebraska*, 861 F.3d 785, 789 (8th Cir. 2017) (finding a complaint against state officials entitled to Eleventh Amendment immunity was properly dismissed pursuant to Rule 12(b)(1)). Similarly, if a plaintiff cannot satisfy Article III's case-or-controversy requirements there is no federal subject-matter jurisdiction. *KCCP Tr. v. City of N. Kan. City*, 432 F.3d 897, 899-900 (8th Cir. 2005) (treating a motion to dismiss for lack of ripeness as a Rule 12(b)(1) motion); *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002) ("[A] standing argument implicates Rule 12(b)(1).").

In a facial attack on jurisdiction under Rule 12(b)(1) such as this, "the court merely [needs] to look and see if plaintiff has sufficiently alleged a basis of subject matter jurisdiction." *Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 914 (8th Cir. 2015) (alteration in original) (quoting *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980)). "Accordingly, 'the court restricts itself to the face of the pleadings and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6).'" *Id.* (quoting *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990)). "In other words, in a facial challenge, the court 'determine[s] whether the asserted jurisdictional basis is patently meritless by looking to the face of the complaint, and drawing all reasonable inferences in favor of the plaintiff.'" *Montgomery v. Compass Airlines, LLC*, 98 F. Supp. 3d 1012, 1017 (D. Minn. 2015) (alteration in original) (quoting *Biscanin v. Merrill Lynch & Co.*, 407 F.3d 905, 907 (8th Cir. 2005)).

B. Eleventh Amendment Immunity

"The Eleventh Amendment generally bars suits by private citizens against a state in federal court." *Balogh v. Lombardi*, 816 F.3d 536, 544 (8th Cir. 2016). In *Ex Parte Young*, the Supreme Court articulated an exception to Eleventh Amendment immunity for state officers who "are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature," holding that such officers may be enjoined from taking unconstitutional enforcement action. 209 U.S.123, 156 (1908). "[T]o be amenable for suit challenging a

particular statute the attorney general must have 'some connection with the enforcement of the act.'" *281 Care Comm. v. Arneson* (*281 Care I*), 638 F.3d 621, 632 (8th Cir. 2011) (quoting *Reprod. Health Servs. v. Nixon*, 428 F.3d 1139, 1145-46 (8th Cir. 2005)). In *281 Care I*, the Eighth Circuit found that the *Ex Parte Young* exception applied in a lawsuit challenging a state statute because of the following three connections between the Attorney General and the statute's enforcement:

> (1) the attorney general "may, upon request of the county attorney assigned to a case, become involved in a criminal prosecution of [the challenged statute]," (2) "the attorney general is responsible for defending the decisions of the [state agency to whom enforcement of the challenged statute is delegated]—including decisions pursuant to [the challenged statute]—if they are challenged in civil court," and (3) "the attorney general appears to have the ability to file a civil complaint under [the challenged statute]."

281 Care Comm. v. Arneson (*281 Care II*), 766 F.3d 774, 796 (8th Cir. 2014) (quoting *281 Care I*, 638 F.3d at 633).

Here, Attorney General Swanson has the same connections to enforcement of the MHRA as the Attorney General in *281 Care I*. First, she "may, upon request of the county attorney assigned to a case, become involved in a criminal prosecution of" the MHRA. *281 Care I*, 638 F.3d at 632; *see also* Minn. Stat. § 8.01 ("Upon request of the county attorney, the attorney general shall appear in court in such criminal cases as the attorney general deems proper."). Second, Attorney General Swanson "is responsible for defending" MDHR's decisions pursuant to the MHRA if they are challenged in civil court. *281 Care I*, 638 F.3d at 632; *see also* Minn. Stat. § 8.06 ("The attorney general shall act as the attorney for all state officers and all boards or commissions created by law

in all matters pertaining to their official duties."); Minn. Stat. § 363A.32, subd. 1 ("The attorney general shall be the attorney for [MDHR]."). Third, Attorney General Swanson "appears to have the ability to file a civil complaint [for violation of the MHRA], as Minnesota law gives the attorney general broad discretion to commence civil actions, *see* Minn. Stat. § 8.01, and [§ 363A.33] allows any person . . . to file a civil complaint." *281 Care I*, 638 F.3d at 632.

The Court is bound by the Eighth Circuit's holding in *281 Care I*. Therefore, the Court has jurisdiction over the claims for injunctive relief against Attorney General Swanson under *Ex Parte Young*.

C. Justiciability

Defendants argue the Court should grant the motion to dismiss on two justiciability grounds, specifically the Larsens lack standing and their claims are not ripe. To evaluate justiciability, the Court distinguishes between two separate alleged injuries. First, the Larsens allege that if they sell wedding video services to the public, the MHRA's requirement that they serve same-sex couples, effectively requiring them to create videos of same-sex weddings, would violate the Larsens' constitutional rights.[7] Second, the Larsens allege that "public promotion of the wedding videos [created by TMG] will be mandatory in every wedding videography contract into which the Larsens enter." (Am. Compl. ¶ 138). Based on this allegation, the Larsens claim the following:

[7] The Larsens allege both the Public Accommodations and Business Discrimination Provisions would compel them to serve same-sex couples.

> 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. 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.

(Pls.' Opp. to Defs.' Mot. to Dismiss ("Pls.' Opp.") at 28, Mar. 8, 2017, Docket No. 40 (citations omitted).) The Larsens argue that if they structure their wedding video contracts as planned – in a manner that contractually obligates them to post **all** TMG wedding videos online – the Larsens would be unconstitutionally compelled to post videos of same-sex weddings online by operation of the Business Discrimination Provision.

1. Standing

"Whether a plaintiff has standing to sue 'is the threshold question in every federal case, determining the power of the court to entertain the suit.'" *McClain v. Am. Econ. Ins. Co.*, 424 F.3d 728, 731 (8th Cir. 2005) (quoting *Steger v. Franco, Inc.*, 228 F.3d 889, 892 (8th Cir. 2000)). "The 'irreducible constitutional minimum of standing' is that a plaintiff show (1) an 'injury-in-fact' that (2) is 'fairly . . . trace[able] to the challenged action of the defendant' and (3) is 'likely . . . [to] be redressed by a favorable decision' in court." *ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters*, 645 F.3d 954, 958 (8th Cir. 2011) (alteration in original) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). The alleged injury-in-fact must be "(a) concrete and particularized" and "(b) 'actual or imminent,'" as opposed to "'conjectural' or 'hypothetical.'" *Lujan*, 504

U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). "A party invoking federal jurisdiction has the burden of establishing standing 'for each type of relief sought.'" *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 793 (8th Cir. 2016) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)).

In the First Amendment context, "two types of injuries may confer Article III standing to seek prospective relief." *Id.* at 794 (quoting *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003)). First, the Larsens could establish an imminent threat of harm sufficient to confer standing by alleging "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.* (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). A plaintiff in such a situation is "not . . . required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe v. Bolton*, 410 U.S. 179, 188 (1973).

Second, "when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984). Thus, self-censorship in the face of a credible threat of future prosecution or civil enforcement constitutes an ongoing injury-in-fact sufficient to confer Article III standing. *Klahr*, 830 F.3d at 794 (discussing a "chilling effect" due to "a credible threat of future [criminal] prosecution" (quoting *Ward*, 321 F.3d at 1267)); *see also 281 Care I*, 638 F.3d at 630 ("[N]on-criminal consequences contemplated by a challenged statute can also contribute to the objective reasonableness

of alleged chill."). But self-censorship founded on alleged subjective chill caused by a statute is not enough to support standing, and "persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *281 Care I*, 638 F.3d at 627 (quoting *Babbitt*, 442 U.S. at 298).

Defendants argue that the Larsens have not alleged an injury-in-fact.[8]

a. Making Wedding Videos for Same-Sex Couples

First, the Court examines the Larsens' desire to sell wedding video services to the public, yet refuse to serve same-sex couples. Here, the Larsens allege both types of injuries courts have found sufficient to establish standing in pre-enforcement First Amendment challenges, as articulated in *Klahr*. First, the Larsens allege plans to operate TMG as a public accommodation in a manner that would clearly violate the Public Accommodations and Business Discrimination Provisions because they would decline to

[8] Defendants briefly argue that the causation element of standing is not met as to claims against Attorney General Swanson because "[w]hen a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision." *Dig. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957-58 (8th Cir. 2015); *accord Balogh*, 816 F.3d at 543. But Attorney General Swanson does have authority to enforce the MHRA, as explained above, unlike the challenged statutes in *Digital Recognition Network* and *Balogh*. *Dig. Recognition Network*, 803 F.3d at 958 (explaining that the challenged statute "provide[d] for enforcement only through private actions"); *accord Balogh*, 816 F.3d at 540, 543.

Otherwise, Defendants do not argue the Larsens have failed to demonstrate Article III's causation and redressability requirements. Further, the Court finds those requirements are easily met regarding the Larsens' claim that the MHRA would compel them to serve same-sex couples if they operated a wedding video business selling services to the public

serve same-sex couples.[9] (Am. Compl. ¶¶ 158, 167-68.) The Larsens allege that at least one same-sex couple already requested that TMG produce their wedding video, (*id.* ¶ 169), only increasing the likelihood that, if they did expand into the wedding video business, they would end up turning away same-sex couples in violation of the MHRA. The Larsens also colorably argue that the operation of the statute would violate their constitutional rights; for purposes of evaluating standing, the Larsens "need[] only to establish that [they] would like to engage in **arguably** protected speech." *281 Care I*, 638 F.3d at 627 (emphasis added).

The Larsens also allege a credible threat of enforcement, contrary to Defendants' argument that the Larsens have asserted only a hypothetical injury-in-fact based on

[9] The Larsens argue that their plan to decline to serve same-sex customers is not "because of" those customers' sexual orientation at all, but rather, "because of" objection to the message conveyed in the videos. Thus, they argue that while MDHR would interpret the MHRA to apply to the Larsens' wedding video business, that interpretation is incorrect.

The Court does not find semantic distinctions about the reason for refusing service to be particularly useful. When the message of the speech-for-hire necessarily varies based on the customer's protected characteristic, such a refusal is at least in part "because of" the customer's protected status, even if the decision is also "because of" an objection to the message of the expressive product that will be created as a result of serving the customer with the "objectionable" characteristic. The MHRA clearly reaches such conduct. *See, e.g.*, *Christian Legal Soc'y Chapter of the Univ. of Ca., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 672, 689 (2010) (determining that excluding LGBT students from a student group because of their "unrepentant homosexual conduct" was, in effect, discrimination based on sexual orientation and not simply exclusion because of conduct or viewpoint); *cf. Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination."); *id.* at 583 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.").

"[s]ubjective concern about how [the MHRA] might apply." (Defs.' Mem. of Law in Supp. of Mot. to Dismiss ("Defs.' Mem.") at 6, Feb. 15, 2017, Docket No. 34.) MDHR's interpretation of the statute's application to wedding vendors is clear. *See* Minn. Dep't of Human Rights, *Minnesota's Same-Sex Marriage Law*, https://mn.gov/mdhr/yourrights /who-is-protected/sexual-orientation/same-sex-marriage/ (last visited Aug. 8, 2017). And the Larsens allege MDHR took enforcement actions against a wedding vendor very recently – in 2014 – after sending testers to investigate business's practices. (Am. Compl. ¶¶ 43-47, 66-71, 164-65.) To the extent Defendants argue there is no credible threat of enforcement simply because there is no telling at this time whether they would ever decide to exercise their enforcement discretion against the Larsens, courts have found that speculation as to whether an entity charged with enforcement will actually choose to enforce a law against a plaintiff does not defeat standing. *See, e.g.*, *281 Care I*, 638 F.3d at 627-31. "We assume [MDHR] would prosecute violators of [the MHRA], given the opportunity, because it has vigorously defended the [statute] and has never suggested that it would refrain from enforcement." *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1217 (8th Cir. 1998). Thus, the Larsens have alleged an imminent, non-hypothetical injury-in-fact based on their plan to engage in conduct proscribed by statute – refusing to serve same-sex couples when operating as a public accommodation providing wedding video services – coupled with a credible threat of prosecution.

Second, the Larsens allege First Amendment chilling based on the notion that their wedding video business would arguably involve exercise of their First Amendment rights, but they have refrained from offering their expressive business services in the

wedding field because, if they did so, they would operate in a way that violates the MHRA. (Am. Compl. ¶¶ 154-74.) The Court finds that because there is a credible threat of enforcement, the Larsens' "decision to chill [their activities] in light of the [MHRA is] 'objectively reasonable.'" *281 Care II*, 766 F.3d at 780-81 (quoting *281 Care I*, 638 F.3d at 627). Therefore, the Larsens have alleged self-censorship sufficient to establish standing regarding their claim that the MHRA would unconstitutionally force them to create videos of same-sex weddings if they operated as a wedding video services public accommodation.

b. Publicizing Videos of Same-Sex Weddings

Next the Court considers whether the Larsens have standing to challenge the validity of the Business Discrimination Provision's ban on "discriminat[ion] in the basic terms, conditions, or performance of the contract because of a person's . . . sexual orientation," § 363A.17(3), as applied to the Larsens' allegation that they will write contracts that mandate them to publicize **all** TMG wedding videos online. The Court concludes that, as for this aspect of the Larsens' pre-enforcement challenge, the Larsens have failed to satisfy Article III's injury-in-fact requirement because: (1) they failed to allege an intention to engage in a course of conduct proscribed by statute; (2) they failed to demonstrate a credible threat of enforcement; and (3) any First Amendment chilling is unreasonable.

First, it is not clear that the Larsens have alleged an intention to engage in a course of conduct[10] that is proscribed by statute. *See Klahr*, 830 F.3d at 794. The Business Discrimination Provision bars sexual orientation discrimination in "the basic terms, conditions, or performance of [a] contract" by a person engaged in a trade, business, or the provision of services. § 363A.17(3). The most plausible reading of the phrase "basic terms" is that it refers to the elements of a contract that make up the core of the deal, or in other words, terms that are necessary in order to make the contract enforceable.[11] For

[10] The Court does not doubt the genuineness of the Larsens' religious objections to same-sex marriage. For this reason, it seems truly incredible that the Larsens would voluntarily structure a contract to obligate themselves to publicize videos of same-sex weddings and to adopt those videos as their own personal speech. *See Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009) (Souter, J., dissenting) (explaining that under the Rule 12(b)(6) standard, "a court must take the allegations [in a complaint] as true, no matter how skeptical the court may be," with "[t]he sole exception" arising when the allegations are "sufficiently fantastic to defy reality as we know it"). In the Court's view, the plan to structure contracts in a manner that obligates the Larsens to publicize these videos is a creative lawyer's attempt to bring the facts of this case closer in line with the facts in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995).

Nevertheless, the Court recognizes that pleadings may contain alternative arguments, "regardless of consistency." Fed. R. Civ. P. 8(d)(3). The Court, therefore, takes caution to construe the pleadings in the non-moving party's favor, given that Defendants only raise facial challenges to jurisdiction. As such, the Court will overlook this fundamental inconsistency in the Amended Complaint and will accept the Larsens' alleged plans as true for purposes of the motion to dismiss.

[11] *See, e.g.*, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (referring to the "basic terms" of a contract to include "price, service, [and] credit," and not including an arbitration clause); *Gander Mountain Co. v. Cabela's, Inc.*, 540 F.3d 827, 831 (8th Cir. 2008) (explaining that under Wisconsin law, the "basic terms and requirements" of a contract are those that are required to make a contract enforceable, including "the essential commitments and the obligations of each party" (quoting *Witt v. Realist, Inc.*, 118 N.W.2d 85, 93 (Wis. 1962)); *Meier v. Wall to Wall Media, LLC*, No. A11-2225, 2012 WL 2079869, at *1 (Minn. Ct. App. June 11, 2012) (explaining that the "basic terms" of an employment contract included "a job description, salary, bonus and incentives plan, and description of benefits").

example, price and services offered are "basic terms" of a contract for the sale of services, so the Larsens would be barred from **charging a higher price** or **declining to provide certain services** because of a customer's sexual orientation.

Additionally, the purpose of the Business Discrimination Provision is to shield people in protected classes from invidious discrimination that prevents them from benefiting from contracts on equal terms as everyone else.[12] But a mandatory requirement that the Larsens post all wedding videos online and adopt them as the Larsens' own speech is not a provision that benefits customers. The allegations in the Amended Complaint demonstrate that the Larsens' plan to post wedding videos online is meant to fulfill their own personal goal of communicating with the public about their religious beliefs. (*E.g.*, Am. Compl. ¶¶ 135-38 (stating that the Larsens plan to promote wedding videos "proclaiming God's design for marriage . . . to a broader audience to achieve maximum cultural impact," including, for example, publishing the videos online, and stating that such public promotion "will be mandatory in every wedding videography contract").) Thus, a contractual provision obligating the Larsens to post wedding videos online – a term wholly unrelated to any consideration exchanged in the contract or any

[12] *See* § 363A.02, subd. 1 (stating that "[i]t is the public policy of [Minnesota] to secure for persons in this state, freedom from discrimination," and explaining that "[s]uch discrimination threatens the rights and privileges of the inhabitants of this state"); § 363A.04 ("The provisions of this chapter shall be construed liberally **for the accomplishment of the purposes thereof.**" (emphasis added)).

benefit provided to the customer – is not a "basic term" as contemplated by the Business Discrimination Provision.[13]

Second, there is no credible threat of prosecution or civil enforcement. This is due, in part, to the low likelihood that MDHR would interpret the MHRA in line with the Larsens' minimally colorable reading of the statute.[14] Furthermore, Defendants' counsel made clear at the hearing that Defendants – charged with interpreting and enforcing the statute – do not believe the MHRA would require the Larsens to post videos of same-sex weddings online. (Tr. of Mots. Hr'g at 25:21-24, June 16, 2017, Docket No. 52

[13] This planned course of conduct also would likely not violate the Public Accommodations Provision, which prohibits denial of "any person['s] full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of . . . sexual orientation . . . ." § 363A.11, subd. 1(a)(1). The posting of videos online is not a service that the Larsens would be selling as a public accommodation; instead, they would be selling the service of creating a wedding video and the physical item that is the finished product – the video itself. Thus, refusing to post videos of same-sex weddings on TMG's website would not deprive same-sex customers of "full and equal enjoyment of" TMG's goods and services.

[14] The Larsens repeatedly compare their case to *Hurley*. The *Hurley* court considered an as-applied challenge to the operation of the Massachusetts public accommodations law that resulted in the state requiring parade organizers to permit an LGBT group to carry a banner in a privately-organized parade. 515 U.S. at 559-63. The Supreme Court noted that the application of the public accommodations law to the activities of a private parade organizer was "peculiar" because it meant that the parade organizer's speech itself (organizing the parade) was considered a public accommodation. *Id.* at 572-73. Interpreting the MHRA to restrict the Larsens' speech online would likely be a similarly "peculiar" application of a public accommodations law. But unlike the case at hand, *Hurley* did not involve a pre-enforcement challenge. Given the "peculiar" nature of the state's application of the statute in *Hurley*, the Court doubts that there would have been standing for the parade organizers to challenge the antidiscrimination law prior to enforcement in lieu of some indication that Massachusetts considered their actions a violation of the law or was considering taking enforcement action against them. The same is true in this case; the Court declines to hypothesize that MDHR would interpret the MHRA in an unlikely, "peculiar" way absent some indication that they are actually considering doing so.

(explaining that what videos the Larsens post online "would be utterly and completely within [the Larsens'] control and discretion").)[15] Additionally, the Larsens have not alleged a history of enforcement or any allegations showing MDHR agrees with their reading of the Business Discrimination Provision.

The fear that MDHR would ever take enforcement action against the Larsens for refusing to post videos of same-sex weddings online is "imaginary or speculative." *Younger v. Harris*, 401 U.S. 37, 42 (1971). Thus, because the Larsens "do not claim that they have ever been threatened with prosecution [or civil enforcement], that a prosecution [or civil enforcement action] is likely, or even that a prosecution [or civil enforcement action] is remotely possible," *id.*, in relation to their plan not to post videos of same-sex weddings online, "they do not allege a dispute susceptible to resolution by a federal court." *Babbitt*, 442 U.S. at 299.[16]

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[15] At times in the hearing, the Larsens' counsel also appeared to concede that the MHRA would not compel the Larsens to post videos of same-sex weddings online. (*E.g.*, Tr. of Mots. Hr'g at 10:22-11:2 ("THE COURT: But would the State require [the Larsens] . . . to place every video online even if they had the contractual right to do that? [THE LARSENS' COUNSEL]: The State is not requiring them to do that. They're choosing to do that, and they have a constitutional right to do that.").)

[16] Just as the Court finds there is no credible threat of an enforcement action based on the Larsens' refusal to post videos of same-sex weddings online, the Court also finds that any chilling of exercise of constitutional rights based on a fear of enforcement is unreasonable. *Zanders v. Swanson*, 573 F.3d 591, 594 (8th Cir. 2009) ("[T]he 'chilling' effect of exercising a First Amendment right must be objectively reasonable."); *Republican Party of Minn. v. Klobuchar*, 381 F.3d 785, 792 (8th Cir. 2004) ("A plaintiff suffers from an objectively reasonable chilling of his First Amendment right to free expression by a criminal statute only if there exists a credible threat of prosecution under that statute if the plaintiff actually engages in the prohibited expression.").

2. Ripeness

Defendants also argue the Larsens' claims are not ripe.[17] "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) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)). The doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977). "It requires that before a federal court may address itself to a question, there must exist 'a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.'" *Neb. Pub. Power Dist. v. MidAm. Energy Co.*, 234 F.3d 1032, 1037-38 (8th Cir. 2000) (quoting *Babbitt*, 442 U.S. at 298).

To show that a case is ripe, a plaintiff must satisfy both of the following two prongs "to at least a minimal degree": (1) the issues presented are "fit[ ] for judicial resolution," and (2) "significant harm" to the parties would result if the court withholds consideration. *Id.* at 1038-39. The first prong "depends on whether [a case] would benefit from further factual development," with ripeness "more likely . . . if [the case] poses a purely legal question and is not contingent on future possibilities." *Pub. Water*

[17] Since the Larsens lack standing regarding injuries tied to the plan to publicize videos online, the Court restricts its ripeness discussion to the Larsens' allegation that the MHRA would compel them to serve same-sex couples.

Supply Dist. No. 10 of Cass Cty. v. City of Peculiar, 345 F.3d 570, 573 (8th Cir. 2003). With respect to the second prong, "[a]bstract injury is not enough. It must be alleged that the plaintiff has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged statute or official conduct." *Id.* (alteration in original) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)).

Under the first prong, Defendants assert that the Larsens' claims are not ripe because "there is uncertainty regarding how [MDHR] would apply [the MHRA] in particular circumstances." (Defs.' Mem. at 6.) To support this argument, Defendants cite *Texas*, in which the Supreme Court dismissed a case as unripe in dramatically different circumstances. There, Texas sought a declaration that potential sanctions for failing school districts under a comprehensive state statutory scheme to improve public schools categorically did not violate the Voting Rights Act. 523 U.S. at 297-99. The Supreme Court held that the inquiry into how Texas might interpret and apply the legislation was "too remote and abstract" in the absence of a concrete case. *Id.* at 301 (quoting *Longshoremen v. Boyd*, 347 U.S. 222, 224 (1954)). Whether such a case might ever arise was "contingent on a number of factors," and Texas's manner of implementing the legislation was not yet clear. *Id.* at 300-01.

Considering the Larsens' allegation that the MHRA would require that they serve same-sex couples in their future wedding video business, the issues presented are fit for judicial decision. Unlike the unimplemented legislation at issue in *Texas*, here the Court considers a long-standing, already-implemented antidiscrimination statute. State agencies regularly apply statutes of this type and courts regularly review them. *See, e.g.*,

Roberts, 468 U.S. 609 (reviewing Minnesota's application of a previous version of the MHRA); *State by McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 853 (Minn. 1985) (same). There is a record of past state enforcement actions, as well as explicit interpretive guidance from MDHR indicating that the Larsens' planned conduct would violate the MHRA. And unlike the abstract future injury in *Texas*, the Larsens allege both imminent and ongoing injuries that do not rest on any hypothetical contingencies, as discussed above. Defendants do not explain how the Court's deliberations would "benefit from further factual development." *City of Peculiar*, 345 F.3d at 573. Legal questions regarding undisputed facts are at the core of this dispute, and thus, the issues presented are fit for judicial decision.

Moving to the second prong, Defendants argue that the Larsens' alleged future injuries are so speculative that no hardship would result if the Court withheld consideration. But as discussed above, the Larsens allege both ongoing injury (chilling) and imminent injury (enforcement if they engage in their intended course of conduct). Courts have rejected ripeness arguments in similar pre-enforcement contexts when there is an allegation of ongoing chilling. *See, e.g.*, *281 Care I*, 638 F.3d at 631. Therefore, the Larsens have satisfied the second prong as to their plan to decline providing wedding video services to same-sex couples if they operate a wedding video business as a public accommodation.

To summarize, the Court finds that Attorney General Swanson is not currently entitled to Eleventh Amendment immunity. However, the Larsens' claim that the MHRA would force them to post same-sex wedding videos online is not justiciable because there

is no injury-in-fact.[18] The Court will reject Defendants' standing and ripeness challenges to the Larsens' claim that they will be unconstitutionally required to serve same-sex couples by creating videos of same-sex weddings if they operate a wedding video business as a public accommodation; the following discussion of Defendants' Rule 12(b)(6) motion addresses this alleged injury only.

II. FAILURE TO STATE A CLAIM

A. Standard of Review

In reviewing a motion to dismiss brought under Fed. R. Civ. P. 12(b)(6), the Court considers all facts alleged in the complaint as true to determine if the complaint "state[s] a claim to relief that is plausible on its face." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). To survive a motion to dismiss, a complaint must provide more than "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Although

[18] Even if there were standing to challenge the application of the MHRA to the Larsens' decision not to post same-sex wedding videos online, the issue would not be ripe. First, a challenge to that alleged application of the statute is not fit for adjudication because, given the lack of a credible threat of enforcement, "we have no idea whether or when [an enforcement action] will be ordered." *Texas*, 523 U.S. at 300 (quoting *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 163 (1967)). The idea that MDHR might interpret the MHRA to compel the Larsens to post certain videos online is simply too remote and abstract a possibility to make the issue fit for judicial review. Second, the Larsens have an obvious, easy way to avoid hardship – the terms of their contracts are within their control, and state law does not compel them to contractually obligate themselves to post videos of same-sex weddings online. *See id.* at 301 (finding there was no hardship sufficient to satisfy the second ripeness prong when "inconvenience [was] avoidable").

the Court accepts a complaint's factual allegations as true, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility,'" and therefore must be dismissed. *Id.* (quoting *Twombly*, 550 U.S. at 557). "In addressing a motion to dismiss, '[t]he court may consider the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record.'" *Illig v. Union Elec. Co.*, 652 F.3d 971, 976 (8th Cir. 2011) (quoting *Mills v. City of Grand Forks*, 614 F.3d 495, 498 (8th Cir. 2010)).

B. Count I: Free Speech

The First Amendment, as applied to states through the Due Process Clause of the Fourteenth Amendment, prohibits states from making laws "abridging the freedom of speech." U.S. Const. amends. I, XIV; *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). The Larsens allege that the Public Accommodations and Business Discrimination Provisions, as applied to the Larsens' wedding video business, violate the Free Speech Clause in three ways, including that the law: (1) is a direct regulation of "pure speech" that is not content- or viewpoint-neutral and fails strict scrutiny; (2) unconstitutionally compels speech and fails strict scrutiny; and (3) imposes an unconstitutional prior

restraint on speech because officials have unbridled enforcement discretion. Defendants move to dismiss the free speech claims, arguing that the Larsens' claims fail as a matter of law because the MHRA is a content-neutral regulation of conduct, it does not compel speech, and it is not a prior restraint. Defendants also argue that even if the MHRA is content-based or compels speech, it survives strict scrutiny because it is narrowly tailored to serve a compelling government interest.

1. Whether the MHRA Unconstitutionally Burdens Free Speech as a Content-Based Regulation

The Court first addresses the Larsens' argument that the MHRA, as applied, violates their First Amendment rights because it is not content- or viewpoint-neutral and fails strict scrutiny. When a law regulating speech is content-based, it is "presumptively unconstitutional and may be justified only if" it survives strict scrutiny – that is, the law is "narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). A law regulating speech is content-based if (1) "'on its face' [it] draws distinctions based on the message a speaker conveys," *id.* at 2227 (quoting *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011)); (2) it is facially content-neutral but "cannot be 'justified without reference to the content of the regulated speech'" *id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); or (3) it was "adopted by the government 'because of disagreement with the message [the speech] conveys,'" *id.* (alteration in original) (quoting *Rock Against Racism*, 491 U.S. at 791).

Content-neutral laws affecting speech and expression are generally subject only to intermediate scrutiny. For example, "'content-neutral' time, place, and manner

regulations [of speech] are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). A similar form of intermediate scrutiny applies when a content-neutral law incidentally affects speech or inherently expressive conduct. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 (1984) (noting the analysis "is little, if any, different").

In *United States v. O'Brien*, the Supreme Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." 391 U.S. 367, 376 (1968); *see also Sorrell*, 564 U.S. at 567 ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech."). Such a regulation will be upheld "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *O'Brien*, 391 U.S. at 377); *cf. Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 578 (1995) (holding a law regulating the content of a parade was unconstitutional when it "simply . . . require[d] speakers to modify the content of their expression . . . . **in the absence of some further, legitimate end**" (emphasis added)). "[A]n incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a

substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985).

But laws that regulate conduct that is, in part, effectuated through language (or some other medium of exercising expression) are generally considered regulations of conduct that do not pose a First Amendment issue at all. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct . . . ."). "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); *see also, e.g.*, *Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47, 62 (2006) ("The fact that [a law barring racial discrimination in hiring] will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct.").

a. The Proper Level of Scrutiny in This Case

As an initial matter, the Larsens plan to post language on their website stating that they will not create wedding videos for same-sex couples. To the extent the Larsens argue such a statement is protected by the First Amendment, and thus the operation of the MHRA would unconstitutionally curtail such speech, the Court finds there is no constitutional problem. While carried out through language, the statement is conduct akin to a "White Applicants Only" sign that may be prohibited without implicating the

First Amendment. *See Rumsfeld*, 547 U.S. at 62. Posting language on a website telling potential customers that a business will discriminate based on sexual orientation is part of the act of sexual orientation discrimination itself; as conduct carried out through language, this act is not protected by the First Amendment. *Id.*; *see also Giboney*, 336 U.S. at 690-91.

The Court next considers the Larsens' argument that the MHRA would unconstitutionally burden their free-speech rights because, as applied, the law affects the content of the Larsens' wedding videos.[19] It is an unremarkable proposition that films are First Amendment-protected speech, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 499-502 (1952), and that creating films involves exercise of First Amendment rights, *see Sorrell*, 564 U.S. at 570 ("[T]he creation and dissemination of information are speech within the meaning of the First Amendment."). The Court assumes for purposes of this motion that the creation and contents of the Larsens' speech-for-hire implicate the Larsens' First Amendment rights.[20] But the Larsens are not immune from generally-

[19] The Court rejects Defendants' argument that the Larsens' wedding videos are commercial speech. The videos are wholly unlike advertisements "proposing a commercial transaction." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562 (1980); *see also id.* at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising."); *Sorrell*, 564 U.S. at 579 ("[T]he government's legitimate interest in protecting consumers from 'commercial harms' explains 'why commercial speech can be subject to greater governmental regulation than noncommercial speech.'" (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993))).

[20] The Court recognizes there is an argument that while the wedding videos are entitled to First Amendment protection, the customer, as opposed to the videographer, is the "speaker" whose speech rights are implicated. The Court need not resolve that potential issue at this time

(Footnote continued on next page.)

applicable or commerce-oriented business regulations simply because they are engaged in First Amendment-protected expression. *See Sorrell*, 564 U.S. at 567 ("[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct."); *cf. Turner*, 512 U.S. at 626, 668 (applying intermediate scrutiny to a law requiring cable operators to save a certain number of channels for local broadcasters even though cable operators engage in First Amendment speech, and remanding to determine whether the law was narrowly tailored as required by the *O'Brien* test); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (finding that while lawyers "make a 'distinctive contribution . . . to the ideas and beliefs of our society,'" Title VII's ban on sex discrimination in hiring and promotions did not unconstitutionally infringe upon a law firm's exercise of First Amendment free expression (alteration in original) (quoting *NAACP v. Button*, 371 U.S. 415, 431 (1963))). Nonetheless, the Court recognizes that the application of the MHRA to expressive businesses may at certain limited times burden the business's exercise of free expression, and the case at hand is one such situation.[21] Therefore, the proper level of scrutiny depends on whether the MHRA is content-based or content-neutral. *Turner*, 512 U.S. at 641-43.

(Footnote continued.)

and assumes the Larsens, as videographers, exercise their First Amendment rights when they create wedding videos for customers.

[21] The Larsens argue that the MHRA, as interpreted by MDHR, would require all public accommodations offering speech-for-hire to create expressive work even if they disagree with the message conveyed; the Court disagrees with this reading of the statute. For example, the Court does not understand the statute to mean that a ghost-writer operating as a public

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The Court concludes that the MHRA is content-neutral. First, the law does not facially "target speech based on its communicative content." *See Reed*, 135 S. Ct. at 2226. The MHRA is a generally-applicable business regulation; the statute applies to all public accommodations and all businesses engaged in the provision of a service, outlawing discrimination against customers or prospective customers on the basis of a protected status. §§ 363A.11, 363A.17. Furthermore, on its face, the MHRA regulates non-expressive conduct – the act of selecting and serving customers – and does not target speech or expression at all. *Roberts*, 468 U.S. at 623-24; *see also Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (noting that Title VII, which prohibits discrimination in employment, is "a permissible content-neutral regulation of conduct").

(Footnote continued.)

accommodation would be prohibited from turning down a request to write a book when the writer disagrees with the message the book would convey. This is true even if the book would be on a topic related to a protected status. Thus, a writer personally opposed to same-sex marriage could decline to ghost-write a book detailing the societal benefits of same-sex marriage if that refusal is genuinely based on an objection to the book's message. A customer of any sexual orientation could request such a book. Absent evidence demonstrating discrimination based on the customer's protected status, the reason for declining the book deal would be "because of" the message of the book, not "because of" the sexual orientation of the customer.

In contrast, the context of expressive businesses depicting marriage is one of just a handful of rare circumstances where public accommodations laws, as routinely applied, will impose burdens on First Amendment expression. Only in a narrow range of situations will the protected status of the customer be inextricably linked with the content of the expressive product – the fact that a hypothetical customer would be a man marrying another man means that the wedding video would necessarily depict a wedding of a man marrying another man. *See Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014) ("[W]hen a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation."). Another example would be a videographer or photographer opposed to interracial marriage who is hired to document an interracial marriage or photograph an interracial family.

Second, the law is not the type of statute that, though facially content-neutral, "cannot be 'justified without reference to the content of the regulated speech.'" *Reed*, 135 S. Ct. at 2227 (quoting *Rock Against Racism*, 491 U.S. at 791). The law applies to all public accommodations and businesses selling services regardless of the type of product or service sold. This includes all public accommodations selling expressive services to the public, regardless of the message expressed.[22]

Third, the MHRA bans discrimination against customers as a way to combat invidious discrimination, not because the government "disagree[s] with the message" any expressive service might convey. *Reed*, 135 S. Ct. at 2227 (quoting *Rock Against Racism*, 491 U.S. at 791); *see* § 363A.02, subd. 1 ("It is the public policy of this state to secure for persons in this state, freedom from discrimination . . . in public accommodations because of . . . sexual orientation . . . ."). "[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—

[22] The Larsens argue that "whether the MHRA applies depends on the content of the Larsens' films," noting that the law would 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." (Pls.' Opp. at 29.) But the Larsens misunderstand how the MHRA operates – it applies equally to public accommodation videographers creating wedding videos, political videos, or any other type of videos. A political candidate seeking a campaign video could not be lawfully turned away because of her race or sexual orientation, just as a couple looking to purchase wedding video services could not be lawfully turned away because of their race or sexual orientation. Thus, whether the law applies to an expressive business operating as a public accommodation clearly does not depend on "the content of the regulated speech," as the law applies to all such businesses. *Reed*, 135 S. Ct. at 2227 (quoting *Rock Against Racism*, 491 U.S. at 791).

wholly apart from the point of view such conduct may transmit." *Roberts*, 468 U.S. at 628.

The Larsens argue that the MHRA would not compel a wedding videographer supportive of same-sex marriage to create a video critical of same-sex marriage, and thus, the law is viewpoint-based. But this comparison is inapt, as Court cannot imagine any situation in which the MHRA would compel a wedding videographer to make a wedding video critical of **any** marriage. It would, however, compel a wedding videographer hostile to opposite-sex marriage to serve opposite-sex couples, which would incidentally require them to create videos depicting opposite-sex weddings. Thus, as applied to wedding videographers, the law incidentally requires creation of wedding videos for all customers regardless of the customers' protected status or the message depicted in the resulting videos. The law also does not prohibit the creation of any videos, and thus does not "raise[] the specter that [Minnesota] may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). Contrary to the Larsens' assertions, the MHRA does not amount to a state effort to stamp out expression opposing same-sex marriage or to privilege only pro-same-sex marriage views.[23]

[23] The Larsens allege that the "MHRA is preventing [them] from celebrating and promoting their religious views about marriage." (Am. Compl. ¶ 187.) The Court considers this a legal conclusion couched as a factual allegation, and finds the legal conclusion untenable. The MHRA does not prevent the Larsens from speaking out as widely as they please against same-sex marriage.

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It is a "bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," *Texas v. Johnson*, 491 U.S. 397, 414 (1989); the MHRA, both facially and as applied to the Larsens, simply does not implicate this fundamental First Amendment concern. As a content-neutral law regulating conduct, strict scrutiny is not the proper standard for evaluating the MHRA as applied to the Larsens' wedding video business.

(Footnote continued.)

The MHRA does not prevent the Larsens from speaking against same-sex marriage simply because it regulates – in a manner to which the Larsens object– activity that the Larsens plan to rely on to fund their speech. (*See* Am. Compl. ¶ 144 ("It is not financially feasible for the Larsens to tell stories about marriage with the frequency and quality they desire if they cannot charge for their work.").) While the Larsens have a right to engage in such speech, they do not have a right to fund that speech through business activities for profit beyond the reach of otherwise valid regulation. *Cf. Regan v. Taxation Without Representation of Wash.*, 461 U.S. 540, 546 (1983) ("We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the state.'" (quoting *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring))).

Additionally, it may be true that the Larsens would not have access to as many private weddings as they would like if they did not sell wedding video services to the public, and in turn, they might not be able to speak against same-sex marriage in the way that desire without selling wedding video services. While some Circuits have recognized a right to film government activities, *see Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017) (holding the First Amendment protects an individual recording police activity in public); *Reed v. Lieurance*, __ F.3d __, Nos. 15-35018, 15-35179, 2017 WL 3122770, at *10 (9th Cir. July 24, 2017) (noting that filming a government operation in public is protected by the First Amendment), the Larsens provide no authority for the idea that there is a corollary First Amendment right to observe the wholly private activities of a non-governmental actor. Thus, even if the MHRA did somehow limit the Larsens' ability to attend the weddings of strangers, this would not implicate the First Amendment.

Instead, recognizing that application of the MHRA to expressive businesses in limited circumstances incidentally affects the content of the expressive product created for the customer, the Court applies the test set out in *O'Brien* to evaluate "content-neutral restrictions that impose an incidental burden on speech." *Turner*, 512 U.S. at 662.

b. Whether the MHRA Survives Intermediate Scrutiny

Applying *O'Brien*, the MHRA as applied to the Larsens easily passes constitutional muster.[24] First, the MHRA furthers a state interest in preventing acts of invidious discrimination in the provision of goods and services provided to the public. The Supreme Court has characterized this interest as not merely "important or substantial," *O'Brien*, 391 U.S. at 377, but "compelling," *Roberts*, 468 U.S. at 628 (upholding the constitutionality of the MHRA).

Though the *Roberts* court upheld an earlier version of the MHRA, the subsequent addition of sexual orientation to the list of protected statuses does not lessen the compelling nature of the state's interest in preventing discrimination. Indeed, the Minnesota Legislature enacted the MHRA only after Minnesota's Governor convened a Task Force on Lesbian and Gay Minnesotans ("Task Force") which "heard 25 hours of public testimony, 15 hours of private testimony and amassed over four inches of written

[24] Other than the three elements discussed here, *O'Brien* also listed a fourth requirement for content-neutral regulations incidentally burdening speech: that the law "is within the constitutional power of the Government." *United States v. Tebeau*, 713 F.3d 955, 962 (8th Cir. 2013) (quoting *O'Brien*, 391 U.S. at 376-77). There is no question that Minnesota had authority to enact the MHRA. *Roberts*, 468 U.S. at 625 ("A State enjoys broad authority to create rights of public access on behalf of its citizens.").

materials." Geraldine Sell et al., Report of the Governor's Task Force on Lesbian and Gay Minnesotans 3 (1991), https://www.leg.state.mn.us/docs/pre2003/other/910436.pdf. The Task Force recommended enactment of a law banning discrimination based on sexual orientation after receiving "overwhelming" testimony demonstrating "that, as a group, gays and lesbians are the targets of considerable discrimination in the State of Minnesota." *Id.* at 5. The amendment to the MHRA adding sexual orientation as a protected characteristic was predicated on the conclusions of the Task Force.[25] Thus, the Court has no doubt that Minnesota has a compelling, and not just a substantial, interest in preventing invidious discrimination in public accommodations and contracting because of sexual orientation, and that interest is present in the context of businesses providing wedding-related services. *Cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (recognizing "the right to marry is a fundamental right inherent in the liberty of the person").

The Larsens argue that because there are many other wedding video vendors in Minnesota who will gladly serve same-sex couples, same-sex couples will not be deprived of access to wedding video services if the Larsens do not provide them, and thus

[25] Articles and written testimony presented to the House Judiciary Committee during its consideration of the MHRA's 1993 amendment demonstrate that the Task Force report was the key research that the Minnesota Legislature considered when enacting that amendment. *E.g.*, Joint Religious Legislative Coalition, JRLC Position on Human Rights with Regard to Sexual Orientation 1-2 (1993); League of Women Voters Minnesota, Statement on HF 585 (1993) (submitting statement to the Minnesota House Judiciary Committee); Lee Bonorden, *Legislators Hear Opposition to Bill Protecting Gays*, Austin Daily Herald, Feb. 21, 1993, at 3A. These documents are in the publicly available Committee books from March 5, 1993, archived in Box 103.E.4.5(B); as public records, they are properly considered on a motion to dismiss.

the state's interest in preventing invidious discrimination is not implicated in this as-applied challenge. (*See* Am. Compl. ¶¶ 175-82.) But "[t]he promise of equality is not real or robust if it means you can be turned away." Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 Harv. J. L. & Gender 177, 190 (2015). The Larsens' argument ignores the fact that an act of discrimination is harmful not merely because it might result in unequal access to goods or services, but also because the act itself "generates a feeling of inferiority as to [one's] status in the community." *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).[26] "That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their [sexual orientation] as by those treated differently because of their race [or sex]." *Roberts*, 468 U.S. at 625. This legally-cognizable harm – "deprivation of personal dignity that surely accompanies denials of equal access to public establishments," *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) – means that an antidiscrimination law fulfills its purpose when it reaches **all**, not simply **most**, public accommodations. Thus, the MHRA serves the compelling state interest of preventing invidious sexual orientation discrimination in public accommodations and contracting both in general and as applied to the Larsens' future wedding video business.

[26] In some instances, when resolving First Amendment issues, courts "can . . . find guidance in . . . equal protection cases." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (Kennedy, J., concurring).

Second, the Court considers whether the state's interest in preventing discrimination in contracting and public accommodations is "unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377. The Supreme Court has explained that the MHRA "reflects [Minnesota's] strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services. That goal . . . is unrelated to the suppression of expression . . . ." *Roberts*, 468 U.S. at 624 (citation omitted); *see also id.* at 628 (explaining that Minnesota's interest in preventing invidious discrimination is "wholly apart from the point of view such conduct may transmit"). Furthermore, when the Minnesota Legislature added sexual orientation to the list of protected statuses under the MHRA, it took pains to clarify that the amendment did not signify an official state policy "condon[ing]" various sexual orientations. *See* § 363A.27(1). The fact that the MHRA's application to expressive businesses may incidentally affect their speech does not change the fact that restricting free expression is neither the goal nor the primary function of the MHRA. Thus, the purpose of the challenged provisions – to provide Minnesota citizens equal access to contracting and public accommodations free from discrimination – is indeed "unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377; *see also* § 363A.02 (describing Minnesota's public policy "to secure for persons in this state, freedom from discrimination").

Third, "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of" Minnesota's interest in preventing invidious discrimination. *Turner*, 512 U.S. at 662 (quoting *O'Brien*, 391 U.S. at 377). It

is clear that the state's purpose "would be achieved less effectively absent the regulation." *Albertini*, 472 U.S. at 689. The challenged provisions only ban acts of discrimination that produce the harm the MHRA seeks to prevent, and "[t]he state's overriding compelling interest of eliminating discrimination . . . could be substantially frustrated if [a business selling services to the public], professing as deep and sincere religious beliefs as those held by [the Larsens], could discriminate against the protected classes." *McClure*, 370 N.W.2d at 853. Thus, any incidental burden on the Larsens' speech caused by the Public Accommodations Provision is no greater than is essential to further the state's compelling interest.

The MHRA's application to the Larsens' wedding video business, as a content-neutral regulation of conduct with an incidental effect on speech, survives intermediate scrutiny.[27]

[27] The Court does not doubt that the challenged provisions, as applied to the Larsens' future wedding video business, would also survive strict scrutiny. The state's interest in preventing invidious discrimination is compelling, as noted above. The statute is also narrowly tailored, as it is only applicable to acts of invidious discrimination in public accommodations and contracting – the very harm the statute is meant to remedy. The Court can conceive of no limiting construction or narrower rule that would not frustrate the statute's purpose to some degree.

While the Larsens ask the Court to carve out a "free speech exception" to the MHRA, such an undertaking would leave a gaping hole in antidiscrimination law for expressive businesses. The fact that endorsing the Larsens' requested exception would leave many customers unprotected from invidious discrimination illustrates that the exception would not make the MHRA more narrowly tailored. Instead, the proposed exception would amount to the Court privileging the rights of expressive businesses to avoid any and all incidental burdens on their speech-for-hire over the rights of customers to be free from discrimination – a compelling state interest. The First Amendment simply does not compel this type of policy decision, which is better left to the Minnesota Legislature.

2. Whether the MHRA Implicates the Compelled Speech Doctrine

Next the Court considers Defendants' argument that the Larsens have failed to plead a plausible claim under the compelled speech doctrine. "[F]reedom of speech prohibits the government from telling people what they must say." *Rumsfeld*, 547 U.S. at 61. The compelled speech doctrine limits the government's ability to force an individual to personally "speak the government's message." *Id.* at 63. Thus, the government may not forbid a driver from covering up the "Live Free or Die" message on a license plate, *Wooley v. Maynard*, 430 U.S. 705, 713, 717 (1977), or force students to recite the pledge of allegiance, *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The doctrine also limits the government's ability to force a speaker to "host or accommodate another speaker's message." *Rumsfeld*, 547 U.S. at 63. For example, unless strict scrutiny is satisfied, the government may not compel private parade organizers to allow specific banners to be carried in a parade, *Hurley*, 515 U.S. at 566, force a newspaper to provide space to a political candidate in the opinion section, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974), or require a utility company to send to customers printed information prepared by the company's critics, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 5-6, 9-18 (1986) (plurality opinion).

Where a business provides a "conduit" that allows others to pay for speech, strict scrutiny is usually unnecessary because there is "little risk" of compelled speech or that

the public will attribute the message to that of the speaker.[28] *Id.* at 655. Further, courts generally do not find compelled speech where the speaker may easily disclaim the message of its customers.[29]

The Court finds the MHRA, as applied to the Larsens' wedding video business, does not implicate the compelled speech doctrine. The law does not compel the Larsens to speak a specific government message, unlike the message on the license plate in *Wooley* or the words of the pledge of allegiance in *Barnette*. The law does not dictate how the Larsens carry out any of their creative decisions regarding filming and editing. While the law does incidentally require wedding videographers to make videos they

[28] *Compare Turner*, 512 U.S. at 636, 655 (rejecting application of the compelled speech doctrine when a law required cable operators "to set aside a portion of their channels for local broadcasters," in part because, "[g]iven cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator"), *and Rumsfeld*, 547 U.S. at 65 (finding that a school's hosting of recruiters was unlikely to constitute compelled speech because students "can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so"), *with Hurley*, 515 U.S. at 577 (explaining that in the context of banners in a parade, "the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole," such that it was likely that viewers would attribute messages on banners in the parade to the parade organizers).

[29] *Compare PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 86-88 (1980) (upholding a state law granting members of the public the right to exercise their speech rights in a privately owned shopping center, reasoning that the law did not unconstitutionally compel the shopping mall to host the speech of another, because "[t]he views expressed by members of the public . . . will not likely be identified with those of the owner," and further noting that the mall could put up signs disclaiming sponsorship of the protesters' message), *with Hurley*, 515 U.S. at 576 (finding that "there is no customary practice whereby private sponsors disavow 'any identity of viewpoint' between themselves and the selected participants," in a parade, and therefore, parade organizers could not easily disclaim ownership of the message communicated by the participants' banner).

might not want to make, the concerns undergirding the application of the compelled speech doctrine to instances of hosting another's message are immaterial.

First, speech-for-hire is commonly understood to reflect the views of the customer.[30] Weddings are expressive events showcasing the messages and preferences of the people getting married and attendees, who do things like speak, dress, and decorate in certain ways. A video of a wedding depicts this expressive event, and while videographers may exercise creative license to fashion such a video, the videographer is a "conduit" for communication of the speech and expression taking place at the wedding. *Turner*, 512 U.S. at 628-29 (noting that while cable operators do engage in and transmit speech, and thus are "entitled to the protection of the speech and press provisions of the First Amendment," when a cable operator selects channels to carry, they "function[], in essence, as a conduit for the speech of [those who produce television programs and sell or license them to cable operators]"). Thus, when a person views a wedding video, there is little danger that they would naturally attribute the video's messages to the videographer. *Matter of Gifford v. McCarthy*, 137 A.D.3d 30, 42 (N.Y. App. Div. 2016) ("[R]easonable

[30] The Larsens have not provided any caselaw in which a court applied the compelled speech doctrine to a business selling speech-for-hire, and the Court is unaware of any such cases. "The cases in which the United States Supreme Court found that the government unconstitutionally required a speaker to host or accommodate another speaker's message are distinctly different because they involve direct government interference with the speaker's own message, as opposed to a message-for-hire." *Elane Photography*, 309 P.3d at 66.

observers would not perceive . . . provision of a venue and services for a same-sex wedding ceremony as an endorsement of same-sex marriage.").[31]

Second, the Larsens can easily disclaim personal sponsorship of the messages depicted in the wedding videos they create for clients. For example, the Larsens could post language on their website stating that while they follow applicable law, and thus serve couples regardless of protected status, they are opposed to same-sex marriage. The simple ability to disclaim support for same-sex marriage sets this case apart from *Hurley*, where there was not a practicable way to disclaim support of participants' messages in the context of a moving parade. *See* 515 U.S. at 576-77.

Third, a major concern in the compelled speech cases is the notion that if a speaker is required to host the message of another, this will inhibit the speaker's ability to communicate his or her own preferred message. *E.g.*, *Tornillo*, 418 U.S. at 256-57. The Larsens' planned wedding video business does not raise this concern, as the MHRA would leave the Larsens free to only publicize videos of opposite-sex weddings and to affirmatively communicate their views to the public in any manner they prefer.

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[31] The Larsens' reliance on *Claybrooks v. American Broadcasting Cos.*, 898 F. Supp. 2d 986 (M.D. Tenn. 2012), is misplaced. In that case, a district court upheld the First Amendment rights of television producers to make race-based casting decisions. *Id.* at 1000. But in a television show, the producer controls the content of the events being filmed, while in a video depicting a wedding, there is no "casting" on the part of the videographer, and the customer makes the creative choices regarding the details of the wedding. While the Larsens allege that they make creative decisions about their videos, including lighting, what footage to include, music, etc., (*e.g.*, Am. Compl. ¶¶ 91, 93, 100, 104-07), the Court does not understand the Larsens to be alleging that they make wedding planning decisions for their customers regarding, for example, what words will be spoken during the wedding or who will speak them. Selecting customers as a public accommodation is simply unlike casting for a television show.

For these reasons, the Court concludes the MHRA need not be subjected to strict scrutiny because the statute, as applied, does not implicate the compelled speech doctrine.

3. Unbridled Discretion

The Larsens allege that the MHRA is not viewpoint-neutral because it grants Defendants unbridled enforcement discretion. The Larsens further allege that "Defendants have wielded this unbridled discretion to punish disfavored views concerning the topic of marriage" by taking the view that a religious objection to same-sex marriage is not a legitimate business purpose, while lack of time or skill is a legitimate business purpose. (Am. Compl. ¶¶ 216-17.)

The Larsens cite caselaw regarding time, place, and manner restrictions on expression that amount to prior restraints. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) (discussing "the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship"). The MHRA is a regulation of conduct with incidental burdens on speech that arise in very narrow circumstances; it is not a licensing statute imposing a prior restraint on speech in a public forum, unlike the prior restraints in the cases provided. *See Thomas v. Chi. Park Dist.*, 534 U.S. 316, 318, 323-24 (2002) (relating to the permitting process for public assemblies); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 124, 132-33 (1992) (same); *City of Lakewood*, 486 U.S. at 752-53, 769-72 (regarding a licensing requirement for placement of newspaper racks in public locations); *Roach v. Stouffer*, 560

F.3d 860, 869-70 (8th Cir. 2009) (concerning applications for specialty license plates). For this reason alone, the Court finds the Larsens' prior restraint claim fails as a matter of law.

Even if the Larsens' unbridled discretion claim were cognizable, it would still fail as a matter of law. The Larsens argue that because the statute does not define the term "legitimate business purpose," this term grants Defendants unbridled discretion to enforce the MHRA in a manner that is not viewpoint-neutral. The key inquiry in determining whether a statute grants unbridled enforcement discretion is whether the statute provides "narrowly drawn, reasonable and definite standards," as opposed to leaving decisions to be made at "the whim of the administrator." *Chi. Park Dist.*, 534 U.S. at 324 (quoting *Forsyth County*, 505 U.S. at 133).

Instead of setting a vague or meaningless standard giving rise to unbridled enforcement discretion, the concept of a "legitimate business purpose" is heavily-trodden ground; the standard is used widely in antidiscrimination law as well as in other contexts in Minnesota law.[32] The Supreme Court approved of the "legitimate nondiscriminatory reason" standard in the *McDonnell-Douglas* burden-shifting framework in 1973.

[32] *E.g.*, Minn. Stat. §§ 325E.59, subd. 1(b), 609.821, subd. 2(4); *Hubbard Cty. Health & Human Servs. v. Zacher*, No. A08-2172, 2009 WL 3364256, at *4-5 (Minn. Ct. App. Oct. 20, 2009) (considering, in a child support case, whether a father retained earnings for a legitimate business purpose); *Walters v. Demmings*, No. C4-01-2, 2001 WL 641753, at *2-3 (Minn. Ct. App. June 12, 2001) (citing *Parkin v. Fitzgerald*, 240 N.W.2d 828, 832 (Minn. 1976)) (considering whether an eviction was motivated by a legitimate business purpose); *Harris v. Mardan Bus. Sys., Inc.*, 421 N.W.2d 350, 353 (Minn. Ct. App. 1988) (finding no violation of a fiduciary duty when the defendant could demonstrate a legitimate business purpose for his action).

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (asking whether an employer accused of unlawful discrimination provided a "legitimate, nondiscriminatory reason" for its actions); *see also, e.g.*, *Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc.*, 690 F.2d 88, 93 (6th Cir. 1982) (discussing the burden-shifting *McDonnell-Douglas* standard using the term "legitimate business purpose"); *Williams v. Boorstin*, 663 F.2d 109, 116-17 (D.C. Cir. 1980) (similar); *Boyd v. Madison Cty. Mut. Ins. Co.*, 653 F.2d 1173, 1178 (7th Cir. 1981) (similar).

The Minnesota Legislature's use of the term "legitimate business purpose" did not occur in vacuum. The Supreme Court decided *McDonnell Douglas* more than fifteen years before Minnesota added the relevant language to the MHRA. Act of May 3, 1990, ch. 567, 1990 Minn. Laws 1738, 1746 (codified as amended at Minn. Stat. §§ 363A.01-363A.44) (adding the Business Discrimination Provision and the term "legitimate business purpose"). At the time of the amendment, Minnesota courts already applied the *McDonnell-Douglas* test to evaluate MHRA claims. *See Danz v. Jones*, 263 N.W.2d 395, 398-400 (Minn. 1978); *see also Sigurdson v. Isanti County*, 386 N.W.2d 715, 720 (Minn. 1986) (explicitly using the term "legitimate business purpose" in the context of the *McDonnell-Douglas* test). Given the preexisting, widespread use of the "legitimate business purpose" concept, the MHRA's use of the term does not grant Defendants unbridled discretion to enforce the statute in a viewpoint-discriminatory way.

To summarize, the Court concludes that the MHRA as applied to the Larsens' future wedding video business is a content-neutral regulation of conduct that occasionally incidentally burdens expression that survives intermediate scrutiny. The law does not

implicate the compelled speech doctrine, nor does it amount to a prior restraint granting Defendants unbridled discretion. For these reasons, the law does not violate the Larsens' free speech rights.

C. Count II: Expressive Association

In Count II of the Amended Complaint, the Larsens argue that the MHRA violates their First Amendment right of expressive association. (Am. Compl. ¶¶ 228-44.) Defendants move to dismiss Count II on the grounds that the act of serving customers is not expressive association protected by the First Amendment, and even if there is some burden on associational rights, that infringement is constitutional because the statute survives strict scrutiny.

"[I]mplicit in the right to engage in activities protected by the First Amendment a corresponding 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 may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, '[f]reedom of association . . . plainly presupposes a freedom not to associate.'" *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (alterations in original) (quoting *Roberts*, 468 U.S. at 623). "But the freedom of expressive association, like many freedoms, is not absolute. [The Supreme Court has] held that the freedom could be overridden 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that

cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* (quoting *Roberts*, 468 U.S. at 623).

The Larsens argue that their relationship with wedding video customers is an expressive association because the Larsens' alleged purpose in operating as a public accommodation is to express their own religious message about marriage. They further allege that the MHRA, as applied to their wedding video business, unconstitutionally infringes on their expressive association rights.

Even assuming that the act of associating with a customer, when the business provides an expressive service, could be considered an "expressive association,"[33] the Larsens' claim fails as a matter of law. As stated above, the MHRA "serve[s] compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 688 (quoting *Roberts*, 468 U.S. at 623). "Even if the [MHRA] does work some slight infringement on [the Larsens'] right of expressive association, that infringement is

[33] The Court highly doubts that the relationship between a public accommodation and a customer could be considered "expressive association." *See Rumsfeld*, 547 U.S. at 69 ("[A] speaker cannot 'erect a shield' against laws requiring access 'simply by asserting' that mere association 'would impair its message.'" (quoting *Dale*, 530 U.S. at 653)); *see also Hishon* 467 U.S. at 78 ("[I]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973))). Applying the MHRA to the Larsens "does not force [TMG] 'to accept members it does not desire,'" *Rumsfeld*, 547 U.S. at 69 (quoting *Dale*, 530 U.S. at 648), because TMG does not have "members." And as discussed above, serving same-sex customers does not inhibit the Larsens' ability to carry out their expressive goal of communicating their own views about marriage. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548-49 (1987).

justified because it serves the State's compelling interest in eliminating discrimination [based on sexual orientation]." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). For this reason, the Court will grant Defendant's motion to dismiss the Larsens' expressive association claim.

D. Count III: Free Exercise

In addition to their free speech and expressive association claims, the Larsens also allege that the MHRA violates their First Amendment right to freely exercise their religion. (Am. Compl. ¶¶ 245-75.) Defendants move to dismiss this claim, arguing that the MHRA does not unconstitutionally limit the Larsens' free exercise of religion because it is a neutral law of general applicability.

The First Amendment's Free Exercise Clause, applicable to the states through the Fourteenth Amendment, prohibits states from making any "law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amends. I, XIV; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Laws burdening the free exercise of religion, as opposed to neutral, generally-applicable laws incidentally burdening religious exercise, must be narrowly tailored to advance a compelling government interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). "A law is not neutral if its object is 'to infringe upon or restrict practices because of their religious motivation.'" *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008) (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 533). "Absent evidence of an 'intent to regulate religious worship,' a law is . . . neutral . . . ." *Id.*

(quoting *Cornerstone Bible Church v. City of Hastings*, 948 F.3d 464, 472 (8th Cir. 1991)). A law is not generally applicable if "in a selective manner[, it] impose[s] burdens only on conduct motivated by religious belief." *Church of the Lukumi Babalu Aye*, 508 U.S. at 543.

The MHRA is a neutral law of general applicability. *See McClure*, 370 N.W.2d at 851. First, the law is facially neutral toward religion. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 533 ("[T]he minimum requirement of neutrality is that a law not discriminate on its face."). There is also no indication that the object of the MHRA's sexual orientation provisions is to infringe upon the free exercise of religion; indeed, the legislative history discussed in detail above demonstrates that the object of the law is to remedy invidious discrimination in contracting and public accommodations writ large. And the law affects all discriminatory acts carried out in public accommodations and contracting, whether motivated by religion or something else. The MHRA does not "fail to prohibit nonreligious conduct that endangers [Minnesota's] interests" in preventing invidious discrimination. *Id.* at 543. Therefore, the MHRA is generally applicable.[34]

[34] The Larsens argue that the MHRA's exemptions for religious associations, *see* § 363A.26, and for gendered restrooms and gendered youth sports teams, *see* § 363A.24, are evidence that the law is not generally applicable. But neither exemption evinces a lack of general applicability. The Supreme Court "has long recognized that the government may . . . accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987). And the exemptions for restrooms and sports teams are narrow and have nothing to do with religion; they simply are not evidence that the law is not generally applicable.

Because the MHRA is a neutral, generally-applicable law that is rationally related to a legitimate government interest, the Larsens' Free Exercise claim fails as a matter of law.[35]

E. Count IV: Unconstitutional Conditions Doctrine

In Count IV of the Amended Complaint, the Larsens allege that the MHRA, as applied, violates the unconstitutional conditions doctrine. (Am. Compl. ¶¶ 276-82.) Defendants move to dismiss this claim because the Larsens have not alleged the denial of a government benefit, and even if the doctrine does apply, the condition that the MHRA imposes – that businesses providing services to the public may not discriminate against customers based on sexual orientation – is constitutional.

Under the unconstitutional conditions doctrine, the government "may not deny a benefit to a person on a basis that infringes his [or her] constitutionally protected interests—especially, his [or her] interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). The Larsens' unconstitutional-conditions claim fails as a matter of law because the Larsens have not alleged the denial of a government benefit. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2329-32

[35] The Larsens ask the Court to recognize the so-called "hybrid rights" doctrine – that is, application of "stricter scrutiny for hybrid situations [involving the Free Exercise Clause in conjunction with other constitutional claims] than for a free exercise claim standing alone." *Leebaert v. Harrington*, 332 F.3d 134, 143 (2d Cir. 2003). The cases discussing this theory rely on Supreme Court dicta, *see id.*, and the Eighth Circuit has never squarely adopted the doctrine, *see Mukasey*, 541 F.3d at 832; *Cornerstone Bible Church*, 948 F.2d at 472-73. The Court declines to do so here. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 566-67 (Souter, J., concurring) (discussing problems with the so-called "hybrid rights" doctrine).

(2013) (receipt of government funds); *Bd. of Cty. Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 678-80 (1996) (renewal of government contract); *Rust v. Sullivan*, 500 U.S. 173, 197-200 (1991) (receipt of government funds); *Perry*, 408 U.S. at 596-98 (government employment).

The Larsens argue that the unconstitutional conditions doctrine applies not only when a government benefit is at stake, but also when the exercise of one's constitutional right is conditioned on forfeiting another constitutional right. In this case, the Larsens argue they have a constitutional right to work in the wedding video business as a public accommodation, but their ability to do so is conditioned on forfeiting their First Amendment right not to make videos of same-sex weddings, as an element of their alleged right "to follow a chosen profession free from unreasonable governmental interference." *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *see also Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977) (striking down a law requiring officers of political parties to waive the constitutional right against self-incrimination in order to exercise their First Amendment right to "participate in private, voluntary political associations").

Even if there could be a cognizable unconstitutional conditions claim in the absence of an alleged denial of a government benefit, the Court sees the Larsens' claim as a repackaging of their Free Speech claims, and the Court similarly repackages its resolution of those claims: while the creation of speech-for-hire may be imbued with First Amendment significance, the incidental burden the MHRA places on the Larsens' free speech is not unconstitutional because the law survives the *O'Brien* test. Calling that

burden an "unconstitutional condition" does not change this outcome. *See Rumsfeld*, 547 U.S. at 60 ("Because the First Amendment [does] not prevent [Minnesota] from directly imposing [the MHRA's antidiscrimination requirement], the statute does not place an unconstitutional condition on [the Larsens' alleged right to engage in their chosen profession].").

For these reasons, the Court will grant Defendant's motion to dismiss Count IV in the Amended Complaint.

F. Count V: Equal Protection[36]

In Count V of the Amended Complaint, the Larsens allege that the MHRA, as applied, violates the Equal Protection Clause of the Fourteenth Amendment. (Am. Compl. ¶¶ 283-95.) Defendants argue that this claim must fail because the Larsens have failed to allege that they are treated differently than similarly-situated individuals, that the Larsens are part of a suspect class, or that the MHRA burdens the Larsens' fundamental rights. Defendants also argue that even if the law implicated equal protection concerns, it is constitutional because it survives strict scrutiny.

[36] Defendants argue that *United States v. Salerno*, 481 U.S. 739 (1987), applies to the Larsens' equal protection and due process claims to the extent the Larsens assert facial challenges. *Salerno* requires that to succeed on a facial challenge to a legislative act, "the challenger must establish that no set of circumstances exists under which the [law] would be valid." *Id.* at 745. It is well-recognized that *Salerno* does not apply to overbreadth claims brought under the First Amendment free speech clause. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 618-19 (1998) (Souter, J., dissenting). The Court need not resolve this issue as to the Larsens' equal protection claim because it is an as-applied challenge.

The Fourteenth Amendment prohibits states from "deny[ing] to any person within [a state's] jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Equal Protection Clause requires courts to review with heightened or strict scrutiny state laws that either (1) discriminate on the basis of a suspect class or (2) deny fundamental rights to some groups but not others. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

The Larsens do not argue that the MHRA discriminates on the basis of a protected class, and it plainly does not. Instead, the Larsens posit that the MHRA treats similarly-situated individuals differently in the exercise of their fundamental right to free speech. *See Ganley v. Minneapolis Park & Recreation Bd.*, 491 F.3d 743, 747 (8th Cir. 2007) ("In general, the Equal Protection Clause requires that state actors treat similarly situated people alike." (quoting *Bogren v. Minnesota*, 236 F.3d 399, 408 (8th Cir. 2000))). The Larsens propose that they are similarly situated to other Minnesota wedding videographers who want to create wedding videos "consistent with their religious, political, or social beliefs." (Pls.' Opp. at 37.) The Larsens argue that, unlike others similarly situated, the Larsens are (1) prevented from "creating films that express messages consistent with their beliefs about marriage,"[37] (*id.*), and (2) forced to create films they disagree with (*see id.* at 38).

[37] As stated above, the MHRA does not prevent the Larsens from creating films, so the Court rejects this argument.

The Larsens' proposed grouping of similarly-situated individuals is unlike any the Court has encountered in precedent: they posit that what makes them similar to other videographers is a desire to express their personal beliefs, or one could say, a desire to express differences. The Court rejects this characterization of what makes people similarly situated. Here, the MHRA clearly applies in exactly the same way to all similarly-situated individuals – all videographers operating as public accommodations must serve all customers regardless of protected status. Because the Larsens have not alleged that they are treated differently than similarly-situated individuals, they have failed to allege a cognizable equal protection claim.[38]

G. Count VI: Procedural Due Process

In Count VI of the Amended Complaint, the Larsens allege that the term "legitimate business purpose," as used in the Business Discrimination Provision, is unconstitutionally vague in a manner that violates their right to procedural due process. (Am. Compl. ¶¶ 296-307.) Defendants move to dismiss this claim on the grounds that the term "legitimate business purpose" is not unconstitutionally vague

[38] Even if the MHRA did implicate equal protection concerns, the Court finds the law would survive strict scrutiny because it is narrowly tailored to serve a compelling government interest. *See Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.*, 345 F.3d 964, 969 (8th Cir. 2003) (explaining that statutes subject to strict scrutiny under the Equal Protection Clause are only constitutional if they are narrowly tailored to support a compelling government interest, and noting that "strict scrutiny is rigorous but not always 'fatal in fact'" (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995)).

The void-for-vagueness doctrine, which stems from the Fourteenth Amendment Due Process Clause, "reflects the principle that 'a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *Roberts*, 468 U.S. at 629 (alteration in original) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). When the literal scope of a law is as written "is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1308-09 (8th Cir. 1997) (quoting *Smith v. Goguen*, 415 U.S. 566, 573 (1974)).

The Larsens argue that the Business Discrimination Provision's use of the term "legitimate business purpose" is unconstitutionally vague, both facially and as applied;[39] the Court disagrees. As explained above, the phrase "legitimate business purpose" has a commonly-understood meaning in antidiscrimination law, and thus it does not grant enforcement officials unbridled discretion to penalize views they disagree with. Furthermore, persons of common intelligence can distinguish between legitimate

[39] The Larsens provide the following example to demonstrate their position that the term "legitimate business purpose" is unconstitutionally vague: "Defendants have categorically declared that an expressive business that declines to create speech promoting same-sex marriages based on a religious objection to such marriages is not acting with a 'legitimate business purpose' and thus not exempt, yet that same business would be acting with a 'legitimate business purpose' and thus exempt if it declined a same-sex marriage request because it did not have sufficient time or the requisite skill." (Am. Compl. ¶ 302.)

business purposes, related to the functions of operating a business,[40] and other purposes. Based on the plain meaning of the words "legitimate business purpose," members of the public generally understand that a religiously-motivated desire to discriminate based on a protected status is not a legitimate business purpose, since this reason has nothing to do with business operations. *Cf. EEOC v. Tree of Life Christian Schs.*, 751 F. Supp. 700, 707-09 (S.D. Ohio 1990) (rejecting a Christian school's argument that "giving witness to a religious belief" that resulted in sex-based discrimination in pay was a "legitimate business reason," even when the school took the position that its "'business' [was] 'nothing more than the practice of religion'"). In contrast, the public generally understands that lack of time or skill to complete a customer's request as a legitimate business reason to decline a customer's request, since this reason relates to the functions involved in operating a business.

Because the Business Discrimination Provision is not unconstitutionally vague, the Larsens' procedural due process claim fails as a matter of law.

H. Count VII: Substantive Due Process

[40] *See, e.g., Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 998 (1988) (explaining that a legitimate business purpose might be related to "'the employer's legitimate interest in efficient and trustworthy workmanship'" (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975))); *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 31 (1967) (listing the following potential legitimate business purposes: "(1) to reduce expenses; (2) to encourage longer tenure among present employees; or (3) to discourage early leaves immediately before vacation periods"); *Branson Label*, 793 F.3d at 919 (referring to "administrative convenience" as a legitimate business purpose).

Lastly, in Count VII of the Amended Complaint, the Larsens allege that the MHRA violates a number of their fundamental rights, and thus, the law is unconstitutional as applied under the theory of substantive due process. Defendants move to dismiss this claim because it is a repleading of the Larsens' First Amendment claims and the Larsens' have otherwise failed to allege the violation of a fundamental right.

In order to plead a cognizable substantive due process claim, among other things, a plaintiff must plead the violation of a fundamental right. *Karsjens v. Piper*, 845 F.3d 394, 408 (8th Cir. 2017). "For purposes of substantive due process analysis, fundamental rights are those 'deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" *Flowers v. City of Minneapolis*, 478 F.3d 869, 873 (8th Cir. 2007) (quoting *Terrell v. Larson*, 396 F.3d 975, 978 n.1 (8th Cir. 2005)).

The Larsens claim that the MHRA's requirement that they serve same-sex couples in their wedding video business violates a number of fundamental rights. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Thus, to the extent the Larsens' substantive due process claim is an objection to the incidental burden on their free speech posed by the MHRA, this claim fails as a matter of law because it is repleading their free speech claim. And to the extent

the substantive due process claim is an objection to the incidental burdens the MHRA places on their ability to live out their own personal identities and beliefs as defined by their religion, this claim fails as a matter of law because it is, in reality, a free exercise claim.

The Larsens also argue for the constitutional recognition of a number of work-related fundamental rights, including the rights "to pursue one's entrepreneurial dreams, engage in the common occupations of life, operate a business, earn a livelihood, . . . continue employment unmolested," and "engage in [one's] business in a way that is consistent with [one's] own concepts of existence and identity."[41] (Am. Compl. ¶¶ 311, 316.)

"The day is gone when [courts] use[] the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955). Neither the Supreme Court nor the Eighth Circuit has recognized that there is a fundamental right to work or operate a business free from regulations that one dislikes. *Cf. Doe v. Rogers*, 139 F. Supp. 3d 120, 156 & n.23 (D.D.C. 2015) (noting that "numerous federal circuit courts have concluded that the right to engage in a chosen profession is not a fundamental right" and collecting cases). Absent some authority to the contrary, the Court declines to

[41] The MHRA does not prevent the Larsens from participating in the economy or earning a livelihood.

expand the reach of substantive due process on these facts, as the doctrine is "reserved for truly egregious and extraordinary cases." *Myers v. Scott County*, 868 F.2d 1017, 1018 (8th Cir. 1989); *see also Albright*, 510 U.S. at 271-72 ("As a general matter, the [Supreme] Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992))).

Because the Larsens have failed to plead the violation of a fundamental right, and because their First Amendment arguments are not cognizable under the rubric of substantive due process, the Larsens' substantive due process claim fails as a matter of law.

Defendants have met their burden to demonstrate that Counts I-VII in the Amended Complaint all fail as a matter of law. The MHRA does not violate the Larsens' First Amendment speech, association, or free-exercise rights. Nor does the MHRA implicate the unconstitutional conditions doctrine. The Larsens' Fourteenth Amendment claims also fail because the Larsens have not alleged that they are treated differently than similarly-situated individuals, they have not alleged the infringement of a fundamental right, the MHRA is not unconstitutionally vague, and their First Amendment-related claims are not separately cognizable under the rubric of substantive due process. For these reasons, the Court will grant Defendant's Rule 12(b)(6) motion and enter judgment against the Plaintiffs.

III. MOTION FOR PRELIMINARY INJUNCTION

Because the Court will grant Defendants' motion to dismiss the Amended Complaint in its entirety, the Court will deny as moot the Larsens' motion for preliminary injunction.

ORDER

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED**:

1. Defendants Kevin Lindsey and Lori Swanson's Motion to Dismiss [Docket No. 31] is **GRANTED**. All claims against Defendants are **DISMISSED with prejudice.**

2. Plaintiffs Carl and Angel Larsen and Telescope Media Group's Motion for Preliminary Injunction [Docket No. 14] is **DENIED as moot.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: September 20, 2017
at Minneapolis, Minnesota.

s/John R. Tunheim
JOHN R. TUNHEIM
Chief Judge
United States District Court