No. 17-3352

IN THE 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, No. 0:16-cv-04094
The Honorable Chief Judge John R. Tunheim

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

None of *amici* has a parent corporation or is a publicly held corporation.

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STATEMENT OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 1.6 million members dedicated to defending the principles of liberty and equality embodied in the Constitution. The ACLU of Minnesota is one of the ACLU's statewide affiliates with over 32,000 members. As organizations that advocate for First Amendment liberties as well as equal rights for lesbian, gay, bisexual, and transgender ("LGBT") people, the ACLU, the ACLU of Minnesota, and their members have a strong interest in the application of proper standards when evaluating constitutional challenges to civil rights laws. The ACLU is also counsel to Respondents Charlie Craig and David Mullins in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111, which is currently pending before the Supreme Court and which raises many of the same issues presented in this case.

AUTHORITY TO FILE *AMICI* BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amici* state that all parties consent to or do not oppose the filing of this brief.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no party's counsel authored this brief in whole or in part, and that no party or person other than *amici* and their members contributed money toward the preparation or filing of this brief.

SUMMARY OF ARGUMENT

This appeal seeks a constitutional right to deny equal service in violation of the Minnesota Human Rights Act ("MHRA"), a civil rights statute whose origins date to 1885. Like the public accommodation laws of nearly every state in the Union, the MHRA bars businesses that are open to the public from refusing to serve or contract with individuals based on certain aspects of their identity—including, in Minnesota, their sexual orientation. Equal access to goods and services in the commercial marketplace is frequently reserved only for those with privilege, leaving marginalized members of the community out in the cold. For LGBT people, public accommodation laws ensure equal opportunity to participate in the "transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996).

There is no question that Minnesota has the authority to prohibit businesses that choose to operate within its boundaries from discriminating in their sales of goods and services to the general public. But Plaintiffs-Appellants Telescope Media Group, and Carl and Angel Larsen (together, "TMG") argue that because the services TMG sells involve "expression," and because the Larsens object to marriage for same-sex couples on religious grounds, the First Amendment entitles their business to flout state law and discriminate based on sexual orientation with respect to the wedding-related services it intends to offer for sale. What is more,

TMG seeks a constitutional right to post a statement on its website—a sign in its virtual shop window—proclaiming that it provides wedding videos for heterosexuals only.

The MHRA applies to businesses that choose to serve the public at large. It requires that once a business chooses to offer goods and services to the public, it may not refuse to provide those goods and services to customers, to contract with a person, or discriminate in the terms of their contracts based on enumerated personal characteristics, including race, religion, and sexual orientation. TMG's stated intent to offer wedding video services for heterosexual couples—but not same-sex couples—violates those basic rules. It is not an objection to any particular *message* requested by any particular customer, but to providing a particular *service* to customers who are not heterosexual.

This is not the first time a business open to the public has sought to avoid an anti-discrimination law by invoking the First Amendment. In every prior case the Supreme Court has rejected such claims, whether framed as involving the freedom of expression, association, or religion. Discriminatory conduct by business entities "'has never been accorded affirmative constitutional protections.'" *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)); *see also Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258–60 (1964).

Minnesota's prohibition against discrimination in the provision of goods and services to the public is a permissible regulation of commercial conduct that affects expression only incidentally. The Supreme Court has uniformly rejected First Amendment defenses to discrimination lodged by commercial entities that provide expressive goods or services with minimal scrutiny. TMG's attempt to invoke strict scrutiny by arguing that the MHRA is content- and viewpoint-based or compels speech fails. The MHRA does not compel TMG to speak any state-selected message or host any state-selected speaker.

TMG's free exercise claim similarly fails to trigger strict scrutiny. The MHRA is facially valid and neutral, and TMG's as-applied challenge bears no resemblance to the kind of religious gerrymander that could warrant heightened judicial review. Moreover, TMG's unsuccessful free exercise claim cannot avoid rational basis review simply by being paired with an otherwise unsuccessful free speech claim.

Even if strict scrutiny applied, however, applying the MHRA to TMG's provision of commercial services would be constitutional. The MHRA furthers Minnesota's compelling interest in eradicating invidious discrimination, and uniform enforcement is the least restrictive means of achieving that goal.

The implications of TMG's arguments are not limited to sexual orientation discrimination or weddings. If the First Amendment bars a state from applying an

anti-discrimination law to the provision of wedding videos because they involve expression, then videography companies could refuse to provide videos for an interracial or interfaith couple's wedding. Indeed, videographers could refuse to provide videos for women, Muslims, African Americans, or any other group the company's owner does not wish to serve. Because numerous sellers provide goods or services that involve expression (including stationers, printers, and artisans of all kinds), a wide range of businesses could claim a First Amendment exemption from generally applicable regulations of commercial conduct. TMG's free exercise claim presents the same problem. There is no doubt that the owners' religious objections are sincere, but granting such a religious-based exemption would allow every business owner "to become a law unto himself." *Emp't Div. v. Smith*, 494 U.S. 872, 885 (1990) (internal quotation marks omitted).

As the Supreme Court of Nebraska explained in one of the earliest public accommodation decisions:

> A barber, by opening a shop, and putting out his sign, thereby invites every orderly and well-behaved person who may desire his services to enter his shop during business hours. The statute will not permit him to say to one: "You are a slave, or a son of a slave; therefore I will not shave you."

Messenger v. State, 41 N.W. 638, 639 (Neb. 1889). To recognize either of TMG's asserted First Amendment objections would run counter to the basic principle, reflected in over a century of public accommodation laws, that all people,

regardless of status, should be able to receive equal service in American commercial life.[2]

ARGUMENT

I. DISCRIMINATION BASED ON SEXUAL ORIENTATION IN THE PROVISION OF A RETAIL SERVICE VIOLATES THE MHRA.

The MHRA applies to businesses that are open to the public. The Public Accommodation Provision of the MHRA regulates businesses' sales of commercial goods and services by prohibiting businesses from refusing to serve a customer based on certain personal characteristics—specifically, race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex. Minn. Stat. § 363A.11(a)(1). The Business Discrimination Provision of the MHRA makes it unlawful for a business to discriminate in the "basic terms, conditions, or performance" of a contract based on certain personal characteristics, as opposed to a "legitimate business purpose." Minn. Stat. § 363A.17(3). TMG's stated plan to offer wedding videography services to the public at large but refuse them to same-sex couples violates these basic principles.

[2] *Amici* do not address the claim, dismissed by the district court on standing grounds, that the MHRA mandates that TMG publicize same-sex wedding films against its wishes, based on TMG's plan to add a clause in its contracts to require the business to publicize *all* the wedding videos it creates. TMG Br. 16–17. The district court thought it unlikely that TMG would *voluntarily* structure a contract to require itself to do something that it objects to on religious grounds, TMG Add. 19 n.10, and held that a clause to publicize the videos is not a "basic term" of the contract, and that TMG's fear of enforcement is "imaginary or speculative." TMG Add. 19–22 (internal quotation marks omitted).

Although TMG asserts that its decision whether or not to provide its services turns on its objection to "*what* a film promotes, never *who* requests it," TMG Br. 2, that assertion is refuted by the injunction it seeks. TMG seeks a blanket right to refuse service to any same-sex couple seeking a video of their wedding, regardless of the requested style or format. That is an objection to the *who*, not the *what*. A company that refused to provide wedding videos for interracial or Jewish couples would be discriminating based on race or religion, not making a decision about any "message" inherent in the product itself, even if it said it did so because it disapproved of those unions. Indeed, the Supreme Court has rejected the notion that discrimination against gay people who marry can be separated from the status of being gay. *See Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010); *Lawrence v. Texas*, 539 U.S. 558, 583 (2003); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").[3]

[3] TMG resists this conclusion by comparing discrimination against LGBT people to other (hypothetical) business interactions that do not actually implicate the MHRA. For example, the MHRA would not compel "[a] feminist web designer . . . to create websites promoting a fraternity," TMG Br. 29, because membership in a fraternity is not protected under the MHRA. And "writer[s]" or "photographer[s]," TMG Br. 29–30, are free to decline business based on the content of the customer's request, such as "promoting the Catholic Church's mission trips," or covering "Aryan Nation Church rallies," *id.*, as long as they would not create such a product for any customer.

II. THE FREE SPEECH CLAUSE DOES NOT AUTHORIZE A BUSINESS TO ENGAGE IN DISCRIMINATION PROHIBITED BY A REGULATION OF CONDUCT THAT INCIDENTALLY AFFECTS EXPRESSION.

A. Minnesota's Law Regulates Commercial Conduct and Affects Expression Only Incidentally.

A law that regulates commercial conduct and affects speech only incidentally does not trigger strict scrutiny. When confronted with First Amendment challenges to laws that aim to regulate commercial conduct regardless of what it communicates, the Supreme Court has applied minimal scrutiny and upheld the law.[4]

1. Generally applicable laws that regulate commercial conduct and do not target speech receive minimal First Amendment scrutiny.

As an initial matter, "it 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 Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

[4] Even outside the commercial context, the Supreme Court has applied the deferential test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), to determine whether regulation of expressive conduct violates the Constitution. Whether the MHRA is evaluated under the commercial conduct cases or *O'Brien*, the result is the same: The law is a permissible regulation of conduct that does not violate the First Amendment.

Moreover, the First Amendment is not infringed when the government enforces a generally applicable regulation of commercial conduct against a business that is "expressive." Even newspaper publishers, whose very product is protected speech, can be subject "to generally applicable economic regulations" without implicating the First Amendment. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581 (1983). "The fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices." *Associated Press v. United States*, 326 U.S. 1, 7 (1945); *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937); *see also Citizen Publ'g Co. v. United States*, 394 U.S. 131, 139–40 (1969) (no First Amendment immunity from antitrust laws); *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 192–93 (1946) (no First Amendment immunity from Fair Labor Standards Act). In contrast, a law specifically requiring a newspaper to print particular content (or forbidding it from printing such content) directly intrudes on the First Amendment. *See, e.g.*, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

Accordingly, the Supreme Court has uniformly rejected businesses' challenges to laws barring discrimination, even where those businesses dealt in "expressive" goods or services. For example, in *Hishon*, a law firm argued that applying Title VII to require it to consider a woman for partnership "would

infringe [its] constitutional rights of expression or association." 467 U.S. at 78. Although a law firm's work product constitutes "speech," *see, e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001), the *Hishon* Court dismissed the law firm's First Amendment defense, holding that there is "no constitutional right . . . to discriminate." 467 U.S. at 78. By contrast, a law that specifically targeted a law firm's speech by, for example, preventing it from bringing cases that "challenge existing welfare laws," would "implicat[e] central First Amendment concerns." *See, e.g.*, *Velazquez*, 531 U.S. at 547–48.

TMG likens its videos to essays or artwork, TMG Br. 23–24, but businesses that provide these products to the public at large are just as subject to generally applicable regulations of their commercial conduct as newspapers and law firms. A video-game business cannot claim an exemption from the Fair Labor Standards Act to allow it to hire child laborers, and a tattoo parlor cannot claim an exemption from a general health code regulation governing the disposal of needles, simply because video games and tattoos are artistic expression protected by the First Amendment. Nor are such businesses exempt from anti-discrimination laws.

Thus, even though TMG's work product involves "decisions about content, composition, lighting, volume, and angles," TMG Br. 24 (internal quotation marks omitted), that "hardly means" that any regulation of its business operations "should be analyzed as one regulating [TMG's] speech rather than conduct." *Rumsfeld v.*

Forum for Acad. & Institutional Rights, Inc. ("*FAIR*"), 547 U.S. 47, 62 (2006). Individual artists such as Michelangelo, TMG Br. 38, generally do not operate as businesses "whose goods, services, . . . or accommodations are extended, offered, sold, or otherwise made available to the public," and therefore would not be subject to the MHRA. Minn. Stat. § 363A.03, subd. 34. However, artists are not immune from anti-discrimination laws in selling their art when they do open businesses that serve the general public. If Michelangelo had operated a retail store in Minnesota offering custom portraits to the public, he too would have been subject to the MHRA and could not have discriminated in sales to the public based on customers' race, religion, sexual orientation, or other enumerated characteristics. *Cf. Elane Photography, LLC v. Willock*, 309 P.3d 53, 66 (N.M. 2013).

2. The MHRA is not content- or viewpoint-based, so there is no basis for applying strict scrutiny.

Seeking to avoid the minimal scrutiny the Supreme Court has applied to generally applicable regulations of commercial conduct, TMG argues that strict scrutiny should apply because the MHRA is content- and viewpoint-based. TMG Br. 35–36, 41–42.

To the contrary, "federal and state anti-discrimination laws" are "an example of a permissible content-neutral regulation of conduct." *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993). As the Supreme Court explained in *Hurley v. Irish-American*

Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 572 (1995), public accommodation laws do not, on their face, "target speech or discriminate on the basis of its content, the focal point of [their] prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds." *See also Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (public accommodation laws "make[] no distinctions on the basis of [an] organization's viewpoint").

TMG nonetheless contends that the MHRA is content-based because it is triggered by the business's decision to offer wedding videos as opposed to videos for other purposes, such as "criticizing climate change." TMG Br. 35, 41. To the contrary, MHRA is triggered not by the topic of marriage for same-sex couples (or by any topic at all), but by refusals of service based on identity (race, color, creed, religion, disability, national origin, marital status, sexual orientation, and sex). Strict scrutiny would apply if the government passed a law prohibiting companies from creating videos depicting crosses or with audio criticizing the President. It does not apply when the government prohibits a company that produces videos from discriminating against members of the public in its provision of services.

TMG also implies that the MHRA is viewpoint-based because it favors businesses that support marriage for same-sex couples over those that do not. TMG Br. 41. But the statute does nothing of the kind. The MHRA prohibits businesses

from refusing to provide goods and services on grounds of customers' sexual orientation, regardless of a business's views on marriage or any other subject. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("On its face, the Minnesota Act . . . does not distinguish between prohibited and permitted activity on the basis of viewpoint . . . ."). Under the MHRA, it is just as unlawful to refuse to provide a wedding website because a couple is heterosexual as it is to refuse to do so because the couple is gay. TMG's argument would invalidate not only Minnesota's law, but all such laws as "viewpoint-based": a law prohibiting race discrimination could be said to favor businesses that support integration, while a law prohibiting sex discrimination could be said to favor businesses that support women's work outside the home. The Supreme Court has rightly rejected that position. *See, e.g.*, *Mitchell*, 508 U.S. at 487.

B. Any "Compelled Expression" Is Incidental to the MHRA's Regulation of the Conduct of Providing Goods and Services and Does Not Alter the First Amendment Analysis.

TMG's contention that the MHRA compels it to express a message with which it disagrees does not alter the constitutional analysis or result. As shown above, the MHRA is a neutral regulation of commercial conduct. It requires no state-mandated messages from Minnesota businesses. For example, the state does not unconstitutionally "compel speech" when it prohibits a commercial photography studio that offers corporate headshots to the public at large from

providing headshots for men but not women. The same is true here. Minnesota does not impermissibly "compel speech" by prohibiting TMG from refusing to provide same-sex couples with the same service that it provides for heterosexual couples.

TMG's reliance on *Hurley*, TMG Br. 25–31, is misplaced. *Hurley* involved a "peculiar" application of a public accommodation law to a privately organized St. Patrick's Day parade that the Court emphasized was "inherent[ly] expressive[]." 515 U.S. at 568, 572. The Court found this application to be impermissible because, instead of regulating conduct with only an incidental effect on expression, it directly regulated nothing *but* expression—the content of the private parade sponsor's speech. *Id.* at 573. Here, TMG is not a private expressive association, but a commercial establishment that provides services to the general public.[5] *Hurley* itself distinguished the standard application of public accommodation laws to commercial businesses as constitutional. *Id.* at 578.

[5] Even assuming that TMG has expressive association rights, customers "associate" with TMG "in the sense that they interact with them," but come to TMG for the "limited purpose" of soliciting videography services, and "not to become members of the [business's] expressive association. This distinction is critical." *FAIR*, 547 U.S. at 69. Additionally, TMG has not argued that the MHRA creates a "significant burden" on its associational rights, *Royer ex rel. Estate of Royer v. City of Oak Grove*, 374 F.3d 685, 687 (8th Cir. 2004), nor are such rights "absolute"; "consequently there may be countervailing principles that prevail over the right of association," such as countering discrimination. *Walker v. City of Kansas City*, 911 F.2d 80, 89 n.11 (8th Cir. 1990).

TMG's reliance on other compelled-speech cases is equally unavailing. *Wooley* and *Barnette* involved laws requiring citizens to express a specific, state-selected message: a law that required motorists to display the state motto "Live Free or Die" on their license plates, *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), and a law requiring schoolchildren to recite the Pledge of Allegiance, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 628–29 (1943). The MHRA does not require Minnesotans to "personally speak the government's message," *FAIR*, 547 U.S. at 63, or to express a specific, state-chosen message at all. It requires only equal treatment of customers.

Even where, unlike here, a content- and viewpoint-neutral law requires entities to speak particular words or to provide access for third-party speakers, the Supreme Court has rejected First Amendment challenges where the law regulates conduct and any compulsion to speak is incidental. In *FAIR*, for example, the Court rejected a First Amendment challenge to the Solomon Amendment, which required law schools to provide equal access both to military and non-military recruiters on campus. 547 U.S. at 54. A coalition of law schools argued that the Solomon Amendment compelled the schools to endorse the military recruiters' message of discrimination embodied in the Don't Ask, Don't Tell policy. *Id.* at 52–53. The schools specifically objected that they would be required to engage in speech by sending e-mail messages and posting notices on a bulletin board on

behalf of the military. *Id.* at 61–62. The Supreme Court rejected the law schools' claim, reasoning that "[a]s a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*," *id.* at 60, and concluding that "[t]he compelled speech . . . is plainly incidental to the Solomon Amendment's regulation of conduct." *Id.* at 62.[6]

Moreover, because the MHRA is content- and viewpoint-neutral, this case is also dramatically different from two cases in which the Supreme Court struck down content-based laws that required businesses to publish particular messages of others with whom they disagreed. In *Tornillo*, 418 U.S. 241, a right-of-reply statute required newspapers that published articles attacking the character of a political candidate to afford the candidate free space for a written reply. And in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986) ("*PG&E*"), a state agency ordered a utility company to include in its billing envelope the newsletter of an environmental group with which the utility

[6] TMG argues at length that "commissioned speakers deserve just as much protection from compelled speech as non-commissioned ones," TMG Br. 37, but the distinction is of no effect for TMG's ultimate goal to discriminate against same-sex couples. Commissioned speakers have free speech rights, but not boundless rights, and certainly not the right to discriminate in the provision of goods and services as a public accommodation. This Court has held that a law prohibiting a commissioned speaker's speech that is nonetheless content neutral does not run afoul of the First Amendment. *See Fraternal Order of Police v. Stenehjem*, 431 F.3d 591, 596, 600 (8th Cir. 2005).

disagreed. In both instances, the state regulation favored opposing speech in a content-based way: The right of reply was triggered by certain content (editorials critical of political candidates in *Tornillo*; utility's newsletters in *PG&E*), and the regulation imposed a content-based penalty (replies to the criticism in *Tornillo*; environmental newsletters in *PG&E*). Here, the MHRA has merely told all Minnesota businesses open to the public that whatever goods and services they offer to heterosexual couples they must also offer to lesbian and gay customers and vice versa. That is true whether the product offered is wedding videos, web design, tattoos, or signs. *See* TMG Br. 40. The obligation to serve customers equally is determined by the identity of the customer, not the content of the product. Any effect on speech is entirely incidental.

C. The Free Speech Clause Does Not Protect a Public Accommodation's Right to Publish Its Unlawful Policy of Discrimination.

Just as there is no constitutional right to discriminate, there is no concomitant right to advertise an illegal policy of discrimination. As the Supreme Court explained, Congress "can prohibit employers from discriminating in hiring on the basis of race. The fact that this 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." *FAIR*, 547 U.S. at 62. Were it otherwise, longstanding bans on discriminatory advertisements in

employment, housing, and public accommodations throughout the country would have to be struck down on free speech grounds. *See, e.g.*, 42 U.S.C. § 3604(c) (prohibiting discrimination in real estate advertisements). No court has countenanced such a result.

For example, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), the Supreme Court held that Pittsburgh could constitutionally enforce its anti-discrimination ordinance to prevent a newspaper from publishing help wanted advertisements in separate, sex-designated columns. *Id.* at 389 ("Any First Amendment interest . . . is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."); *see also Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1003 (2d Cir. 1991) (holding that a newspaper's "publication of real estate advertisements that indicate a racial preference is . . . not protected commercial speech," and stating that "Congress's power to prohibit speech that directly furthers discriminatory sales or rentals of housing" is "unquestioned").

This case is even more straightforward than *Pittsburgh Press* and *Ragin*. The question here is simply whether a business has a free speech right to publish its own policy of unlawful discrimination. No such right exists. Federal, state, and local governments undoubtedly have the power to prevent invidious

discrimination, regardless of whether it comes in the form of individual discriminatory acts or a publicized discriminatory policy.[7]

III. THE FREE EXERCISE CLAUSE DOES NOT ENTITLE A BUSINESS TO ENGAGE IN DISCRIMINATION PROHIBITED BY A NEUTRAL AND GENERALLY APPLICABLE LAW.

A law that is neutral and generally applicable is constitutionally permissible if it is rationally related to a legitimate government interest. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). As the Supreme Court explained in *Smith*, "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S. at 879 (internal quotation marks omitted). TMG's attempt to invoke a higher standard of judicial review under the Free Exercise Clause fails and, in any event, the MHRA survives even the most searching form of judicial review.

[7] TMG acknowledges that "the Larsens can express their views elsewhere or publicize wedding films that others create," TMG Br. 39–40, as they have done. In addition, TMG is free to post a notice saying that it does not support or endorse customer events for which it has provided video services. *See FAIR*, 547 U.S. at 65. What TMG may not do is enjoy the advantages of serving the public at large while advertising that it categorically "cannot" serve certain members of the public because of their sexual orientation.

A. The MHRA Is Neutral on Its Face and as Applied.

Although the MHRA is neutral on its face, TMG argues that the MHRA was not applied neutrally because of a "system of individualized assessments and exemptions to enforce [the] MHRA." TMG Br. 45. Specifically, TMG maintains that while a business may not "intentionally refuse to do business with" individuals based on their enumerated personal characteristics, a "legitimate business purpose" can provide a basis to decline to serve or contract with them. Minn. Stat. § 363A.17(3).

TMG fundamentally misunderstands the statute's reference to a "legitimate business purpose." The statute does not authorize businesses to discriminate against customers if they have a legitimate business purpose for doing so. The statute simply clarifies that the prohibition on discrimination does not prevent businesses from declining service based on legitimate *nondiscriminatory* reasons. As the district court explained, Minnesota courts apply the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to determine whether a challenged business practice was based on a discriminatory reason or a nondiscriminatory "legitimate business purpose." TMG Add. 47–48, 47

n.32; *see also Scott v. CSL Plasma, Inc.*, 151 F. Supp. 3d 961, 967 (D. Minn. 2015) (collecting cases).[8]

Because TMG misunderstands the MHRA's reference to "legitimate business purpose," TMG's argument that the statute "devalues religious reasons for not celebrating same-sex marriage," TMG Br. 46 (internal quotation marks omitted), misses the mark. The statute's reference to "legitimate business purpose" does not modify its prohibition on discrimination for religious or secular reasons alike.

B. The MHRA Is Generally Applicable.

In determining whether a law is generally applicable, the Supreme Court has looked at whether the government enforces it "in a selective manner [to] impose burdens only on conduct motivated by religious belief" and not on similar conduct motivated by other reasons. *See Lukumi*, 508 U.S. at 543.

The MHRA is generally applicable because it applies across the board to all for-profit businesses open to the public, regardless of the religious commitments of their owners, and it regulates the provision of commercial goods and services to the public, a secular activity. Unlike *Lukumi*, where "almost the only conduct subject to [the challenged ordinances was] the religious exercise of Santeria church

[8] Likewise, although the MHRA "does not define 'legitimate business purpose,'" TMG Br. 50, that does not render the statute unconstitutionally vague nor does it allow for unbridled discretion, TMG Br. 50–52, because the concept "is heavily-trodden ground," "used widely" throughout Minnesota law. TMG Add. 47.

members," *id.* at 535, the MHRA applies to all places of public accommodation doing business in the State—the MHRA does not apply only to religiously motivated discrimination, while permitting the same conduct when engaged in for non-religious reasons. That TMG seeks the right to violate the MHRA because of its owners' religious beliefs does not mean that the law targets religion. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (IRS policy barring racial discrimination does not "prefer[] religions whose tenets do not require racial discrimination over those which believe racial intermixing is forbidden").[9]

IV. THE MHRA SATISFIES EVEN STRICT SCRUTINY.

The MHRA fails to trigger strict scrutiny under the Free Speech or Free Exercise Clauses. But even if strict scrutiny applied, application of the law would be constitutional.

[9] Application of the MHRA also fails to trigger strict scrutiny under the so-called "hybrid rights" doctrine, which ostensibly applies in cases involving "'the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.'" *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 473 (8th Cir. 1991) (quoting *Smith*, 494 U.S. at 881). The Eighth Circuit has never adopted the hybrid rights doctrine, *see id.*; *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008), and this is not the case to do so. Pairing an invalid free exercise claim with an invalid free speech claim does not produce a hybrid-rights claim requiring strict scrutiny.

Similarly, TMG's attempts to invoke strict scrutiny under the Equal Protection Clause and "unconstitutional conditions" doctrine, TMG Br. 48–50, fail because they depend on an underlying infringement on TMG's free speech and free exercise rights.

A. Minnesota Has a Compelling Interest in Eradicating Discrimination in Commercial Goods and Services.

Anti-discrimination laws ensure "society the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U.S. at 625; *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014). The Supreme Court has recognized repeatedly that the government has a compelling interest in "eliminating discrimination and assuring its citizens equal access to publicly available goods and services." *Roberts*, 468 U.S. at 624 (discussing the MHRA); *see also id.* at 628 (discrimination "cause[s] unique evils that government has a compelling interest to prevent"); *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 14 n.5 (1988) (recognizing the "State's 'compelling interest' in combating invidious discrimination"); *Duarte*, 481 U.S. at 549; *Bob Jones Univ.*, 461 U.S. at 604.

Public accommodation laws protect "the State's citizenry from a number of serious social and personal harms." *Roberts*, 468 U.S. at 625. Being turned away from public accommodations like restaurants, doctor's offices, and retail stores because of one's identity "deprives persons of their individual dignity." *Id.* The MHRA thus seeks to "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel*, 379 U.S. at 250 (internal quotation marks omitted); *see also Runyon v. McCrary*, 427 U.S. 160, 179 (1976) (anti-discrimination laws "guarantee that 'a

dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man'" (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968)).

The government's interest in enforcing the MHRA cannot be reduced to access to video services. TMG Br. 54. "Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public . . . ." *Heart of Atlanta Motel*, 379 U.S. at 292 (Goldberg, J., concurring) (internal quotation marks omitted).

Similarly, the harm of being refused service because of one's identity is not erased by obtaining a good elsewhere. "The government views acts of discrimination as independent social evils even if the prospective [customers] ultimately find" the goods or services they sought. *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994). "[D]iscrimination itself, . . . by stigmatizing members of the disfavored group[,] . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984).

TMG contends that Minnesota must show a "compelling interest in forcing the owners to convey objectionable messages despite their willingness to serve

LGBT clients." TMG Br. 53. But TMG is *not* willing to serve LGBT clients if they refuse to offer them wedding video services on the same basis that they are available to other clients. Additionally, that the owners' sincerely held religious beliefs are in tension with an anti-discrimination law that governs their business undoubtedly creates difficulty. That is the case whenever people hold religious objections to complying with anti-discrimination laws or any other generally applicable business regulations. *See Bob Jones Univ.*, 461 U.S. 574 (religious objection to racial integration); *Piggie Park*, 390 U.S. at 402 n.5 (same); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (religious belief that only a man could be the "head of household" entitled to health insurance as employment benefit); *cf. United States v. Lee*, 455 U.S. 252, 261 (1982) (religious opposition to paying Social Security taxes). But that does not negate in any way Minnesota's compelling interest in eradicating discrimination and furthering equal treatment in the commercial marketplace.

B. Uniform Enforcement of the MHRA Is the Least Restrictive Means for Furthering the State's Compelling Interest in Eradicating Invidious Discrimination.

The MHRA is "precisely tailored" to achieve its interest, and therefore would satisfy even strict scrutiny's narrow tailoring requirement. *See Burwell*, 134 S. Ct. at 2783. Every single instance of discrimination "causes grave harm to its victims." *United States v. Burke*, 504 U.S. 229, 238 (1992); *see also Daniel v.*

Paul, 395 U.S. 298, 307–08 (1969) (describing "the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public" (internal quotation marks omitted)). Because of the harms associated with each instance of invidious discrimination, there is simply no "numerical cutoff below which the harm is insignificant." *Swanner*, 874 P.2d at 282.

TMG contends that the MHRA as applied is not narrowly tailored because it leaves "other activities unregulated that also implicate Minnesota's dignity interest," such as non-profit religious groups. TMG Br. 55. To the contrary, the exclusion for a *limited* number of services offered by non-profit religious organizations *demonstrates* that the law is narrowly drawn. As long as "the regulation and the asserted interests" are related, the MHRA need not eliminate all discrimination to be narrowly tailored. *Wersal v. Sexton*, 674 F.3d 1010, 1024 (8th Cir. 2012).

TMG also misconstrues the district court's analysis regarding whether commissioned writers fall within the statute. Assuming, as the district court did, that the "ghost-writer" is even "operating as a public accommodation," TMG Add. 32–33 n.21, the court did not hold that the MHRA contains an exception for commissioned writers to discriminate based on customers' protected characteristics. Rather, the court found that the MHRA still permits public

accommodations—including commissioned writers—to decline to offer services if they disagree with the *message* the product would convey, as long as the refusal was not based on a customer's protected *status*. TMG Add. 32 n.21.[10]

Because it is narrowly tailored to serve a compelling interest in eradicating discrimination in the commercial market, the MHRA satisfies strict scrutiny.

CONCLUSION

The denial of TMG's motion for a preliminary injunction and for summary judgment should be affirmed.

March 13, 2018

Respectfully submitted,

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[10] Finally, there is no merit to TMG's claim that the MHRA is not narrowly tailored because Title II of the Civil Rights Act of 1964 does not reach film studios, and because Title VII permits classifications outside of the public accommodations context. TMG Br. 56–57. Title II and Title VII do not set the limit of anti-discrimination law or narrow tailoring. *See Roberts*, 468 U.S. at 625–26; *Hurley*, 515 U.S.at 572.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this 13th day of March, 2018, the foregoing Brief of the American Civil Liberties Union and American Civil Liberties Union of Minnesota as *Amici Curiae* in Support of Defendants-Appellees and Affirmance was filed electronically through the Court's CM/ECF system. Noting of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. I further certify that ten hard copies of the foregoing brief are being sent to the Court via UPS.

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March 13, 2018

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RE: 17-3352 Telescope Media Group, et al v. Kevin Lindsey, et al

Dear Counsel:

The amicus curiae brief of American Civil Liberties Union and American Civil Liberties Union of Minnesota was filed on March 13, 2018. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

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