APPEAL NO. 17-3352

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

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

APPELLANTS' REPLY BRIEF

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

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

Attorneys for Plaintiffs/Appellants

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Carl and Angel Larsen seek the freedom "to choose the content" of their own films. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995). This freedom is the "general rule," not the exception, in our democracy. *Id.* But Minnesota imperils this freedom. By applying its Minnesota Human Rights Act ("MHRA") unusually—to "speech itself," *id.* at 573—Minnesota seeks to force the Larsens to create and publish films that violate their religious beliefs.[1]

No one disputes this is the result of Minnesota's interpretation of MHRA. The district court acknowledged that films and filmmaking are pure speech and that MHRA requires the Larsens to "[create films] they might not want to [create]." Add. 31, 43-44.[2] Yet Minnesota claims it can compel this speech anyway, citing the unremarkable proposition that MHRA facially regulates conduct but then improperly recasting the Larsens' pure speech as "conduct" to fit their legal theory.

But Minnesota cannot strip pure speech of First Amendment protection by mislabeling it. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 26-28 (2010) (rejecting government's attempt to recast activity that involved "communicating a message" as "conduct"). Nor can it ignore precedent holding that laws that regulate conduct on their face

---

[1] "Minnesota" refers to all Defendants-Appellees, and "the Larsens" refers to all Plaintiffs-Appellants as the context permits.

[2] "Add." refers to Addendum to Appellants' Opening Brief ("Appellants' Br.").

violate the First Amendment when they compel or restrict speech as applied. *See infra* Part II.A.

If accepted, Minnesota's position would grant the government limitless power to compel any speaker to create undesired content – regardless of the medium of expression, the message requested, or the protected status at issue. *See* Appellees' Br. 21 (claiming MHRA "does not pose a First Amendment issue at all"). The Larsens' desired relief is far narrower – an injunction forbidding Minnesota from coercing them, with threats of fines and jail time, to create speech that contradicts their beliefs. And unlike Minnesota's proposal, this relief also strikes the proper constitutional balance, regulating discriminators who object to serving people because of who they are (something the Larsens emphatically *do not* do (J.A. 78 (Compl. ¶92))), while protecting speakers who object to conveying messages. The First Amendment demands nothing less.

ARGUMENT

I. The Larsens have standing.

The Larsens face an impossible decision: choose to create and publish films promoting messages they oppose or risk jail time. They have chilled their speech instead. This demonstrates standing for all their claims.[3] *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974)

[3] Minnesota claims the Larsens lack standing for their Fourteenth Amendment claims (Appellees' Br. 35 n.13), but the district court thought

(acknowledging plaintiffs need not expose themselves to criminal and civil penalties before vindicating their constitutional rights). The district court agreed, except as to MHRA's requirement that the Larsens contract to publish objectionable wedding films on the internet.

The Larsens explained why this parsing was improper. Appellants' Br. 15-21. But Minnesota ignores this explanation, content to reference the district court's position once and characterize the Larsens' contract term as "unusual." Appellee's Br. 17 n.7; Appellee's Br. 10 n.4. But at this procedural stage, Minnesota must accept as true that the Larsens structure their contracts this way. *Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 914-15 (8th Cir. 2015). And this is not unusual. The terms benefit both the Larsens and their clients and are common in the industry. *See* Jane Porter, *What Creative People Need To Do To Protect Their Work*, Fast Co. (Jul. 17, 2014) (explaining such terms "clarify everyone's expectations upfront" and ensure that creative professionals

---

otherwise. For good reason. Pre-enforcement review is proper where First and Fourteenth Amendment claims and injuries are closely tied together. *See, e.g.*, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 301-06 (1979) (permitting pre-enforcement review of a statute challenged on First and Fourteenth Amendment grounds).

can publish their work "on [their] website without issue").[4] The Larsens therefore have standing to challenge the contract provision.[5]

II. The Larsens state claims that MHRA violates their constitutional rights and deserve a preliminary injunction.

The Larsens state claims and deserve a preliminary injunction to restore their expressive freedoms. Minnesota does not dispute the low bar that the Larsens must meet to state claims: they need only allege facts that plausibly suggest a violation of the applicable law. *McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 811 F.3d 998, 1002 (8th Cir. 2016). The facts alleged in the Larsens' complaint, none of which Minnesota disputes, easily meet this standard.

To obtain a preliminary injunction, the Larsens must show a threat of irreparable harm, the balance of equities weighs in their favor, a probability of success on the merits, and the public will benefit from it. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012). But when plaintiffs show a "likely violation" of their "First Amendment rights, the other requirements … are generally …

---

[4]https://www.fastcompany.com/3033114/what-every-creative-person-needs-to-do-to-protect-their-work.

[5] Minnesota also resurrects its argument that the Attorney General is not a proper party to this case. Appellee's Br. 17 n.7. That is incorrect. She only needs "some connection with the enforcement of [MHRA]" to be a proper party. *281 Care Comm. v. Arneson*, 638 F.3d 621, 632 (8th Cir. 2011). As the district court correctly found, she has multiple connections with enforcement. *See* Add. 11 (finding three connections).

satisfied." *Id*. Here, there are no disputed facts and Minnesota's coercion of the Larsens to create and publish films that violate their beliefs establishes not just a likely, but a certain, violation of their First Amendment rights. The Court should therefore direct entry of the requested injunction. *See id.*

A. MHRA compels the Larsens' speech as applied.

MHRA compels speech by forcing the Larsens to create and publish films that promote messages they oppose. Minnesota defends its power to do this because MHRA facially regulates conduct. But the Supreme Court rejected that argument in *Hurley*, holding that although public accommodation laws "do not, as a general matter" regulate protected expression, when they treat "speech itself [as] the public accommodation," they violate the First Amendment. 515 U.S. at 572-73. The same rationale controls here.

1. MHRA compels the Larsens' speech, not their conduct.

Minnesota claims that MHRA "does not pose a First Amendment issue at all" because it is a generally applicable law that regulates "economic activity and conduct." Appellees' Br. 11, 21. That is legally incorrect. The Supreme Court has repeatedly admonished that "the enforcement of a generally applicable law may … be subject to heightened scrutiny" under the Free Speech Clause. *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 640 (1994).

Courts frequently stop generally applicable laws that *facially* regulate conduct or economic activity from compelling or restricting speech or from interfering with editorial judgment *as applied*:

- The National Labor Relation Act: *Ampersand Publ'g, LLC v. NLRB*, 702 F.3d 51 (D.C. Cir. 2012) (vacating application of NLRA because it infringed newspaper's editorial judgment);

- The 1866 Civil Rights Act: *Groswirt v. Columbus Dispatch*, 238 F.3d 421 (6th Cir. 2000) (refusing on First Amendment grounds to use 42 U.S.C. § 1981 to compel publication of advertisement); *Claybrooks v. Am. Broad. Cos., Inc.*, 898 F. Supp. 2d 986 (M.D. Tenn. 2012) (stopping enforcement that infringed television studio's editorial judgment);

- Criminal laws: *Cohen v. California*, 403 U.S. 15 (1971) (stopping breach-of-the-peace law from criminalizing wearing jacket that communicated offensive message); *Holder*, 561 U.S. at 26-39 (law restricting giving aid to terrorists triggered First Amendment scrutiny for regulating teaching and legal aid activities);

- Public Accommodation laws: *Hurley*, 515 U.S. at 572 (public accommodation law was unconstitutionally applied to force parade organizers to alter their speech by including another group's message); *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433 (S.D.N.Y. 2014) (public accommodation law could not be applied to force website company to publish particular search results).

As these cases show, Minnesota cannot evade First Amendment scrutiny by hiding behind MHRA's facial scope or target. Nor can they do so by improperly recasting the Larsens' protected speech as proscribable conduct. No matter what MHRA facially regulates or how Minnesota

mislabels the Larsens' protected speech (calling it "discrimination," "selling wedding video services," "business services"), Minnesota still compels the Larsens to create and publish wedding films promoting messages they oppose. To say otherwise is a mere labeling game. And "a State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963). *See also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570-71 (2011) (rejecting state's effort to cast "sales, transfer, and use" of "information" as "conduct, not speech.").

No one doubts Minnesota's authority to regulate unlawful discrimination in the commercial context; MHRA's *application* to protected speech poses the problem. If the Larsens create and publish wedding films that promote biblical marriage, MHRA forces them to create and publish wedding films that promote different conceptions of marriage which they oppose. That is compelled speech. The only way the Larsens can avoid this requirement is by refraining from creating any wedding films at all. But that is no solution. It's the problem.[6]

---

[6] By forcing the Larsens to create objectionable films, Minnesota deters them from entering the wedding industry to create their desired films. That is both a right and benefit Minnesota cannot condition. *Compare* Appellees' Br. 37 (ignoring these benefits) *with Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977) (explaining government cannot condition "one constitutionally protected right as the price for exercising another"); *Greene v. McElroy*, 360 U.S. 474, 492 (1959) (identifying one's "chosen profession free from unreasonable government interference" as a benefit that "comes within the 'liberty' and 'property' concepts" of the Due Process Clause).

Minnesota argues that MHRA imposes only "incidental burdens" on the Larsens' speech and thus falls outside First Amendment protection. Appellees' Br. 8 (citing *Sorrell*, 564 U.S. at 567). But there is nothing "incidental" about requiring the Larsens to create films celebrating messages about marriage that conflict with their faith. Minnesota stretches the "incidental burdens" concept beyond recognition. *Sorrell* explained that this concept applied narrowly to laws that proscribe speech incidental to criminal conduct or that proscribe expressive conduct in a content-neutral way. 564 U.S. at 567. MHRA does neither here. It compels pure speech and does so based on content as applied. Laws that do this violate free speech.

Hurley proves the point. Massachusetts made, and the state court embraced, the exact same incidental burden argument Minnesota urges. *See Hurley*, 515 U.S. at 563 (noting state court's claim that burden imposed by public accommodation law was "only 'incidental' and 'no greater than necessary to accomplish the statute's legitimate purpose' of eradicating discrimination."); Br. for Resp't, *Hurley*, 515 U.S. 557 (1995) (No. 94-749), 1995 WL 143532, at *14 (claiming law only "target[ed] conduct, not speech" and thus only burdened parade organizers' expression "incidentally"). But the Supreme Court was unconvinced, finding the application of the law too severe, violating "the fundamental rule of protection under the First Amendment…" *Hurley*, 515 U.S. at 573.

In a key respect, the compelled-speech violation here is worse. In *Hurley*, the state forced the parade organizers to alter their own speech by including another's. Here, Minnesota commands the Larsens to create the expression in the first place—to design, craft, edit, and deliver it. That is a greater affront to their "individual freedom of mind." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Laws that do this—compel pure speech and alter content as applied—"directly and immediately" affect speech; they do not create incidental burdens. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000); *see Holder*, 561 U.S. at 26-27 (rejecting argument that law "only incidentally burdens their expression" where law "regulate[d] speech on the basis of its content"). And they deserve strict scrutiny. *See Hurley*, 515 U.S. at 575-81 (applying strict scrutiny); *Dale*, 530 U.S. at 659 (contrasting scrutiny used in *Hurley* from that used for laws imposing incidental burdens); *Claybrooks*, 898 F. Supp. 2d at 995 n.11 (concluding *Hurley* applied strict scrutiny).[7]

This intrusion harms commissioned speakers the same as other speakers. *See* Appellants' Br. 37-40. Although Minnesota disagrees, claiming that the Larsens convey only "[their] clients' messages" (Appellees' Br. 15), that is incorrect. The Larsens convey their own

[7] Minnesota cites numerous cases that do not contradict this point or apply here. *See* Appellees' Br. 12-13 (string cite). Those cases either did not involve compelled speech, involved a facial challenge, involved associational claims with no burden on speech, or involved free exercise claims with no speech claims.

message through their wedding films. J.A. 82 (Compl. ¶125 ("The Larsens … want to impact … views about marriage by creating compelling stories celebrating God's design for [marriage]."). *See also* J.A. 77-78, 80, 82-85 (Compl. ¶¶89, 93-95, 104-06, 126-29, 146). At best, Minnesota can say film creation is joint expression. But courts protect all speakers involved in collaborative expression. *Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015) (artistic expression "frequently encompasses a sequence of acts by different parties, often in relation to the same piece of work"). Yet Minnesota cannot even prevail under its own theory; courts repeatedly hold that government cannot force people to speak "another speaker's message." *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, ("*FAIR*") 547 U.S. 47, 63 (2006). *See also Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (newspaper cannot be forced to print third-party's op-ed).

That conclusion holds even though the Larsens' clients "choose the location of the wedding, the guests, the food served, the decorations, [and] the music played at the weddings they film." Appellees' Br. 15. The Larsens still choose which weddings to film and how their films depict those weddings. J.A. 82-83 (Compl. ¶¶125-134). Much as paid biographers speak through their creations without controlling the details of their subject's life, the Larsens do too. *See Simon & Schuster, Inc. v. N.Y. Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (acknowledging that both author and publisher had First Amendments rights).

Finally, a disclaimer would not cure the free-speech violation here; it would exacerbate it. Appellees' Br. 16. *See* Appellants' Br. 35-36 (explaining problems with disclaimers); *Planned Parenthood v. Rounds*, 530 F.3d 724, 746 (8th Cir. 2008) (disclaimers do not cure "the constitutional defects inherent in compelled … speech."). Refusing to respond, Minnesota cites irrelevant cases (Appellees' Br. 16 (citing *FAIR* and *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980))) that suggest disclaimers for groups not compelled to speak, or for cable companies that did not object to the message required of them. *See* Appellants' Br. 35 (distinguishing *Turner*). The disclaimer Minnesota suggests is precisely the type *Hurley* condemned, requiring the Larsens "to affirm in one breath that which they deny in the next." *Hurley*, 515 U.S. at 576.

2. MHRA compels speech based on content and viewpoint as applied.

Adding to its problems, MHRA compels the Larsens to speak based on content and viewpoint as applied. *See* Appellants' Br. 35-36 (explaining three ways MHRA does so). Minnesota refuses to accept this because it claims MHRA is "facially" content-neutral. Appellees' Br. 16. But that misunderstands the Larsens' argument: whether MHRA is facially neutral does not answer the question whether it is content-based as applied. *See Hurley*, 515 U.S. at 572, 578 (finding public accommodation law can "modify … content" when it is "*applied* to

expressive activity" even though "it does not, *on its face*, target speech or discriminate on the basis of its content" (emphases added)).

Laws that compel pure speech or regulate content as applied are content-based. *See* Appellants' Br. 35-36. MHRA does exactly this. It forces the Larsens to create films with content they would otherwise not create. *See, e.g.*, *Hurley*, 515 U.S. at 572-73 (noting "application of the statute … essentially requir[ed] petitioners to alter the expressive content of their parade"); *Claybrooks*, 898 F. Supp. 2d at 993 (applying facially neutral anti-discrimination law to compel television studio's speech "regulates speech based on its content…"). And because MHRA forces them to create films promoting a view of marriage that contradicts their preferred message, it is also viewpoint-based. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, ("*PG&E*") 475 U.S. 1, 14 (1986) (law awarding access "only to those who disagree with [speaker's] views" was viewpoint-based).

Despite Minnesota's claim otherwise, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), does not contradict this principle. In *Roberts,* MHRA forced the Jaycees to include women in their group; it did not compel access to any expressive medium or even "impede the organization's" speech at all. *Id.* at 627. *See Dale*, 530 U.S. at 657 (distinguishing *Roberts* this way). While MHRA may be constitutionally applied in situations where it never compels or affects speech, it cannot be constitutionally

applied here, where it compels speech and therefore violates speaker autonomy.

3. *Hurley*, *PG&E*, and *Tornillo* control this case; *Rumsfeld* and out-of-jurisdiction cases do not.

To restore the Larsens' expressive freedom, the Court need only affirm a well-established principle: government cannot force speakers—paid or unpaid—to create and promote speech they oppose. This principle flows from *Hurley* and controls this case. 515 U.S. at 572-75. Minnesota's attempt to jettison *Hurley* in favor of irrelevant or out-of-jurisdiction cases fails.

For starters, *Hurley* did not turn on whether the parade organizers operated a for-profit "business" or "a private organization." Appellees' Br. 20. *Hurley* never even mentioned the word "non-profit" much less rested its analysis on that factor. To the contrary, *Hurley* said that speaker autonomy encompasses "business corporations generally" as well as "professional publishers." 515 U.S. at 574.[8] Moreover, there is nothing "peculiar" about public accommodation laws applying to private organizations. *See, e.g.*, *Roberts*, 468 U.S. at 612 (applying MHRA to private "nonprofit" organization). Rather, *Hurley* found it "peculiar" that a public accommodation law would treat "speech itself" as "the public

[8] Courts routinely apply *Hurley* to protect for-profit entities. *See McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950, 962 (9th Cir. 2010) (newspaper); *Claybrooks*, 898 F. Supp. 2d at 1000 (television producer); *Baidu.com Inc.*, 10 F. Supp. 3d at 437-38 (website company).

accommodation." 515 U.S. at 572-73. And for-profit organizations can engage in "speech itself" just as much as non-profits.

Minnesota concedes this is true for newspapers and electric companies; they cannot be "commandeered" while reaching their audience. Appellees' Br. 19 (citing *PG&E* and *Tornillo*). But those principles don't reach the Larsens, says Minnesota, because they are not "publishers," do not exercise "editorial control," and merely "sell videography services...." Appellees' Br. 19. Those assertions either make no sense or beg the question. First Amendment protections extend beyond print publishers. And far from selling off-the-shelf videos, the Larsens create original content. J.A. 77-81 (Compl. ¶¶87-91, 100-12). The Larsens also exercise as much editorial judgment as publishers.[9]

To buttress its assertion that MHRA reaches only the Larsens' "conduct," Minnesota repeatedly claims that MHRA does not regulate the way in which the Larsens edit their films. Appellees' Br. 11, 15, 18-19. But that is wrong. The most critical editing decision is the very first one — choosing the film's subject matter. *See* J.A. 80 (Compl. ¶106 (identifying "what events to take on" as the first decision in the editorial process)). Minnesota does not dispute, nor could it, that MHRA strips the Larsens of this editorial control in the wedding context. If they choose to promote biblical marriages through their films, MHRA compels them to

[9] *See* J.A. 80 (Compl. ¶106 (explaining some of the many ways that the Larsens exercise editorial judgment)).

promote marriages that contradict their beliefs as well. And critically, subject matter selection impacts every other aspect of the editing process (e.g. how to portray the subject, which shots to remove, etc.). In this way, Minnesota initially and continually infringes the Larsens' editorial judgment, which is the essence of how they speak.

The Larsens exercise editorial judgment for a reason. They want to reach their audience—their clients, their clients' audience, and anyone else who sees their films—with their message just like any other speaker. *See* J.A. 77-81, 82-84 (Compl. ¶¶87-112, 123-36). The Larsens' target audience may partially overlap their clients' audience. But that does not matter. *See Hurley*, 515 U.S. at 560-61 (protecting parade organizers from compelled speech even though their message and participants' message were conveyed to same audience); *Riley v. Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781 (1988) (protecting paid fundraisers from compelled speech even though they only spoke to their clients' audience).

Minnesota also cannot limit speech protection to situations where the government compels specific text. Appellees' Br. 19. The laws in *Hurley*, *Tornillo*, and *PG&E* did not require speakers to utter specific text. But they still forced speakers to convey messages they opposed. MHRA works the same way. If the Larsens create films only with particular content (about biblical marriage), MHRA requires them to create films only with particular content (about a different conception of marriage). MHRA's application is therefore triggered by content and

awards access to particular viewpoints, which violates the First Amendment. *See PG&E*, 475 U.S. at 14 (law content-based where the obligation to speak was "triggered" by content of the compelled speaker's prior expression).

FAIR cannot justify this interference. Appellees' Br. 14-16. The law in *FAIR* required law schools to open their rooms to military recruiters. 547 U.S. at 52. But empty rooms do not communicate anything; the Larsens' films do—they are inherently expressive. Compelling access to them compels speech. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 456 n.10 (2008) (distinguishing *FAIR* from cases where law forces parties "to reproduce another's speech against their will" or "co-opt[s] the parties' own conduits for speech"). Indeed, *FAIR* would have turned out differently had the government applied its equal access law to force schools to teach a class favoring the "Don't Ask Don't Tell" policy after teaching a class against that policy.

Finding no help from *FAIR*, Minnesota turns to out-of-state wedding cases. Appellees' Br. 13-14. But many of those are distinguishable. One concerned a wedding venue, not speech. *Gifford v. McCarthy*, 137 A.D.3d 30 (N.Y. App. Div. 2016). Three others support the Larsens—they suggest that compelling pure speech like words and images would produce a different result. *See State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 559 n.13 (Wash. 2017) (distinguishing flowers from "words, realistic or abstract images, symbols … all of which are forms of

pure expression"); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. App. 2015) (distinguishing non-descript cake from cake with "written inscriptions"); *Klein v. Or. Bureau of Labor & Indus.*, 410 P.3d 1051, 1069 (Or. Ct. App. 2017) (noting that if law required speakers to "create pure 'expression' that they would not otherwise create, it is possible that the Court would regard [that law] as a regulation of content, thus subject to strict scrutiny…").

The other case Minnesota cites—*Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013)—involves a photographer. But that case illustrates the problem: it clothes the government with power to compel any commissioned speaker—*no matter their medium*—to speak messages they oppose. That is a reason to reject *Elane*, not follow it.

As a last-ditch effort, Minnesota likens the Larsens to racists. Appellees' Br. 14 n.6 ("Courts have also rejected similar objections in race-based cases."). That comparison is offensive. The Supreme Court has already distinguished invidious objections to interracial marriage from good-faith opposition to same-sex marriage. *Compare Loving v. Virginia*, 388 U.S. 1, 11 (1967) (characterizing miscegenation laws as invidious, "designed to maintain White Supremacy"), *with Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (affirming that opposition to same-sex marriage is "based on decent and honorable religious or philosophical premises"). Scholars and civil rights leaders agree. *See* Br. for Ryan T. Anderson,

Ph.D., & African-American & Civil Rights Leaders as *Amici Curiae* Supporting Appellants 5-18 (explaining this distinction).

Minnesota's comparison also overlooks that the Larsens create films for everyone; they just cannot promote every message. *See* Appellants' Br. 26-31 (explaining message/person distinction). The Supreme Court already recognized this distinction in the sexual orientation context. *Hurley*, 515 U.S. at 572 (distinguishing an "intent to exclude homosexuals" from a "disagreement" with a message). *See also Obergefell*, 135 S. Ct. at 2607 (distinguishing private speakers' First Amendment right to not "condone" same-sex marriage from government's obligation to recognize it). But Minnesota ignores it. The Court should not. This distinction allows courts to strike the proper balance: protect speakers who object to conveying messages; restrict discriminators who object to serving people.

4. Minnesota continues to advocate for the unlimited power to compel speech.

Unlike the Larsens, Minnesota advances a dangerous and limitless argument. It claims the power to compel *any* commissioned speaker to speak when applying a facially neutral law. Appellees' Br. 8-21. Not even the district court could stomach that, at least trying to limit the government's power by protecting ghostwriters. Add. 32-33 n.21. But Minnesota's theory would compel ghostwriters and every other example cited in the Larsens' opening brief too (e.g. compelling Jewish biographer

to chronicle "a man's Muslim faith"). Appellants' Br. 29-30. Despite ample opportunity, Minnesota offers no limit on its power to use MHRA to compel speech.

In contrast, the Larsens advocate a narrow rule that most courts already enforce: governments cannot compel commissioned speakers to speak messages they oppose. This rule is narrow, only protecting the few businesses that create speech. *See* Add. 32-33 n.21 (district court acknowledging the Larsens' situation is "one of just a handful of rare circumstances where public accommodations laws … will impose burdens on First Amendment expression"). And even then, the Larsens' rule only protects businesses when they *speak* and *object to messages, not persons*. In so doing, it appropriately protects speakers while also permitting the state to stop person-based discrimination.

B. Minn. Stat. § 363A.11, subd. 1 bans the Larsens' speech as applied.

Minnesota's attempt to restrict speech fails just like its attempt to compel speech. *See* Appellants' Br. 41-42. MHRA forbids the Larsens from posting a specific statement identified in the Larsen's complaint. J.A. 86 (Compl. ¶158). This statement is neither "hypothetical" nor criminal. Appellees' Br. 17; *see id.* at 18 (citing *FAIR*).

Minnesota tries to justify restricting this statement anyway, likening it to a "White Applicants Only" sign. Appellees' Br. 18. But that comparison fails because the latter "is intended to induce or commence

illegal activities"—race-based employment discrimination. *United States v. Williams*, 553 U.S. 285, 298 (2008). In contrast, the Larsens' statement does not discuss much less commence anything illegal. It explains their religious beliefs and constitutional right to not promote certain messages. Minnesota can no more ban this statement than Massachusetts could bar the parade organizers in *Hurley* from posting a statement declining to accept objectionable messages in their parade.

C. MHRA violates free exercise.

Minnesota's application of MHRA also violates the Larsens' free-exercise rights. Although Minnesota stresses MHRA's facial neutrality (Appellees' Br. 27-29), courts apply strict scrutiny to laws hostile towards religion *as applied* too. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) ("Facial neutrality is not determinative."). Minnesota's application of MHRA raises similar concerns as those addressed in *Lukumi*.

For example, Minnesota plays favorites by creating an individualized assessment to determine whether businesses have a "legitimate business purpose" to decline work. Minn. Stat. § 363A.17, subd. 3; J.A. 69-70, 100 (Compl. ¶¶34-37, 260). This lacks neutrality, not only because the standard is uncommon or vague (Appellees' Br. 29-30), but because "it requires an evaluation" of the reasons behind every decision declining work and gives Minnesota leeway to "devalue[ ] religious reasons" for doing so. *Lukumi*, 508 U.S. at 537.

Minnesota favors "nonreligious reasons" over religious ones. *Id*. It does not dispute that this provision "protect[s] decisions to decline work to protect a business's brand, to take a day off, and to make more money doing something else." Appellants' Br. 46. Yet Minnesota has categorically announced that "religious beliefs regarding same-sex marriage" will *never* qualify as a "legitimate business purpose" for declining to create speech under MHRA. J.A. 73-75 (Compl. ¶¶61-62, 69). This shows that "religious practice is being singled out for discriminatory treatment." *Lukumi*, 508 U.S. at 538. Strict scrutiny applies.

MHRA also triggers strict scrutiny under the hybrid-rights doctrine. Minnesota asks the Court to reject this doctrine because other circuits have. Appellees' Br. 31-32. But this Court has been more open-minded. *See* Appellants' Br. 47 (citing on-point Eighth Circuit cases that Minnesota never distinguishes).

This case offers an ideal opportunity for the Court to apply the hybrid-rights doctrine. Indeed, *Employment Division v. Smith* identified religious objections to "compelled expression" as prototypical hybrid situations. 494 U.S. 872, 881-82 (1990). And the district court already conceded that MHRA harms the Larsens' expression enough to trigger intermediate scrutiny. Add. 32. That marks the Larsens' speech claim as more than colorable and at least justifies raising the scrutiny level to strict. *See* Appellants' Br. 47-48 (identifying standard).

Finally, Minnesota claims waiver to circumvent the problem with MHRA compelling the Larsens to attend and participate in a religious ceremony they oppose. Appellees' Br. 33-34. But this is a free-exercise argument, not a freestanding waivable claim. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010) (allowing plaintiffs to raise new argument on appeal to support a "consistent claim" that law violated First Amendment).

Minnesota wants to avoid this claim for good reason. The harm imposed could not be greater: forcing the Larsens to attend and participate in events (wedding ceremonies) that are and the Larsens consider to be "spiritual[ly] significan[t]." *Turner v. Safley*, 482 U.S. 78, 95–96 (1987); *cf. Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012) ("Couples often express their religious commitments … in their wedding ceremony."). No law can compel this, even a facially neutral one. *See Lee v. Weisman*, 505 U.S. 577, 587 (1992); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943) (government cannot force someone to "engage in any ceremony" to acknowledge ideas he opposes).

D. MHRA compels expressive association.

Minnesota's attempt to compel expressive association fails too. The First Amendment protects the Larsens' right to "join together and speak." *FAIR*, 547 U.S. at 68. This freedom also entails the right "not to associate." *Dale*, 530 U.S. at 648. Minnesota tries to restrict these rights by creating an exception for businesses "not organized for a specific

expressive purpose." Appellees' Br. 26. But this Court and the Supreme Court disagree. *See Dale*, 530 U.S. at 655 (finding groups need not "associate for the 'purpose' of disseminating a certain message in order to" form an expressive association); *Missouri Broad. Ass'n v. Lacy*, 846 F.3d 295, 303 (2017) (acknowledging alcohol producers and wholesalers can form expressive associations with retailers).

That exception would not apply here anyway. The Larsens' business is organized for an expressive purpose: "to glorify God through top quality media production." J.A. 77 (Compl. ¶83). They seek to join together and speak with others who share their expressive purpose of producing films celebrating biblical marriage. *Cf. Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010) ("As with all collaborative processes, both the [filmmaker] and the person receiving the [film] are engaged in expressive activity."). But MHRA forces them to join together and speak with those who wish to express opposing views about marriage. This "impair[s]" their ability "to express [their] views, and only those views" and thus infringes their "freedom of expressive association." *Dale*, 530 U.S. at 648.

Unable to limit associational freedom to advocacy groups or businesses organized for expressive purposes, Minnesota tries to limit protection to internal membership selection and nothing else. *See* Appellees' Br. 26 (distinguishing customer interaction from membership selection). But "the freedom of expressive association protects more than

just a group's membership decisions." *FAIR*, 547 U.S. at 69. Indeed, this Court has already held that businesses cannot be compelled to expressively associate with other businesses. *Lacy*, 846 F.3d at 303. Compelling association with clients is no different. The expressive association doctrine does not turn on whom the government compels association with but whether the association unduly affects or alters the organization's message. Because MHRA does this, it violates the Larsens' right to expressive association.

E. MHRA violates equal protection.

Minnesota's application of MHRA also violates equal protection. "When speakers and subjects are similarly situated, the state may not pick and choose." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983). MHRA does this by discriminating among speakers with the same message. For example, the Larsens offer speech services the same as a ghostwriter. But under the district court's logic, the ghostwriter can decline to create speech promoting same-sex marriage because he opposes its message; the Larsens cannot. *See* Add. 32-33 n.21.

This unequal treatment infringes the Larsens' speech and free exercise rights. *Cf. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev.*, 460 U.S. 575, 585 (1983) (invalidating tax that singled out newspapers but no other speakers). Minnesota cannot single out filmmakers for disfavored treatment without a compelling interest.

Appellants' Br. 48 (explaining standard). Minnesota has no legitimate, much less compelling interest in making this distinction.

F. Minn. Stat. § 363A.17, subd. 3 is vague and allows unbridled discretion.

MHRA's "legitimate business purpose" exception suffers from vagueness and permits unbridled discretion.[10] Minn. Stat. § 363A.17, subd. 3. Minnesota mistakenly argues that the Larsens have not identified any protectable interest. Appellees' Br. 39 n.14. But "free speech is [both] a liberty interest protected by due process" and an "independent source of [the] vagueness doctrine." *Finley v. NEA*, 100 F.3d 671, 675 n.4 (9th Cir. 1996), *rev'd on other grounds*, 524 U.S. 569 (1998). By chilling the Larsens' speech (and others'), MHRA deprives that interest.

Minnesota fares no better on the merits. The "*McDonnell-Douglas* framework" may be useful for determining statutory rights between private parties. Appellees' Br. 40. But the Supreme Court has never approved it "as a general precondition to protecting … speech." *United States v. Stevens*, 559 U.S. 460, 479 (2010). MHRA is vague, "not in the sense that it requires a person to conform his [activities] to an imprecise but comprehensible normative standard," but rather because ordinary

[10] Minnesota attempts to evade the unbridled discretion problem by claiming waiver (Appellees' Br. 41), but the Larsens briefed this issue below. J.A. 151-53, 587-88 (Pls.' Mem. in Supp. of Mot. for Prelim. Inj. & Pls.' Opp. to Defs.' Mot. to Dismiss).

people cannot know what legitimate business purpose is good enough to satisfy enforcement officials. *City of Chicago v. Morales*, 527 U.S. 41, 60, (1999). The Larsens' current dilemma bears this out.

Although the Larsens want to decline to create certain films, they cannot know whether that decision falls under MHRA's legitimate business purpose exception. Everywhere they turn they receive a different answer:

Audience	**Answer**
The Larsens	"We hope so but cannot know for sure"
Minnesota	"No."
Supreme Court	"Yes."[11]
District Court	"No, but if the Larsens took to writing books, then yes."[12]
ACLU	"We side with the district court but prefer Minnesota's answer."[13]

[11] *See Virginia v. Hicks*, 539 U.S. 113, 122-23 (2003) (interpreting "legitimate business … purpose" to include expressive activities protected by First Amendment).

[12] *See* Add. 32-33 n.21 ("[A] writer personally opposed to same-sex marriage could decline to ghost-write a book … based on an objection to the book's message.").

[13] *Compare* Br. for ACLU & ALCU of Minn. as *Amici Curiae* Supporting Resp'ts 26-27 ("MHRA still permits public accommodations … to decline to offer services if they disagree with the message….") *with id.* at 13 ("TMG's contention that the MHRA compels it to express a message with which it disagrees does not alter the constitutional analysis or result.").

This discrepancy proves that the answer falls "to the moment-to-moment judgment" of enforcement officials. *Kolender v. Lawson*, 461 U.S. 352, 360 (1983). And though Minnesota trusts the "intuitive abilities" of its officials to referee speech, "such paramount freedoms as speech and expression cannot be stifled on the sole ground of intuition." *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 974 (5th Cir. 1972); *see Brown v. Entm't Merch. Ass'n*, 564 U.S. 789, 793 (2011) (recognizing "heightened vagueness standard" when law implicates First Amendment rights). Minnesota officials and citizens need some "guideposts." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988). Until they come, MHRA violates due process.

G. MHRA fails strict scrutiny.

Because MHRA violates the Larsens' constitutional rights, strict scrutiny applies. This means Minnesota must show that MHRA's application to the Larsens is the least restrictive means of serving a compelling state interest. Appellants' Br. 52-58.

But in response, Minnesota ignores the Larsens' arguments that (1) they do not discriminate based on sexual orientation; (2) Minnesota must but does not provide a particularized rather than a generalized interest; (3) there are less restrictive alternatives the state could use to serve its interests short of violating the Larsens' First Amendment rights; and (4) MHRA is under-inclusive in minimizing dignity harm. Instead, Minnesota spends pages reciting the evils of discrimination and the value

of public accommodation laws. But these arguments do not justify compelling the Larsens' speech when they serve everyone and decline requests based on their message.

Instead of distinguishing the Larsens' on-point cases that distinguish speech from status-based objections (Appellants' Br. 26-28), Minnesota touts *Roberts* and *McClure*. Appellees' Br. 22-24. But these cases did not involve compelled speech. Nor did they involve applications that affected expression. Just because MHRA passed constitutional scrutiny before does not mean it passes strict scrutiny in all other applications for all time—especially ones that affect speech.

Finding no help from case law, Minnesota invokes the legislative record. Appellees' Br. 23 (referencing Task Force report (J.A. 325-461)). But Minnesota cannot lean only on legislative reports to meet its burden. *Brown*, 564 U.S. at 799-800 (requiring higher burden of proof to satisfy strict scrutiny). It does not suffice here anyway. The Task Force report does not mention expressive businesses and only briefly discusses non-expressive businesses like "hotel[s]" and "inn-keepers." J.A. 332. This just reinforces Minnesota's lack of a legitimate, much less compelling interest in compelling the Larsens' speech.

It also ignores what is far more relevant—the face of the law, which expressly states that Minnesota does not have to promote the very message it is forcing the Larsens to speak. Minn. Stat. § 363A.27(1-4) (by adding sexual orientation to MHRA, Minnesota is not obligating itself to

"condon[e]" homosexuality … or any equivalent lifestyle," "promot[e] … homosexuality" in schools, or authorize "marriage between persons of the same sex").

CONCLUSION

Peeling off the labels, Minnesota seeks one thing: the power to compel the Larsens to create speech that violates their beliefs. Yet a government that can coerce the Larsens' speech can coerce anyone's – regardless of medium, message, or protected status. Society is more civil, more pluralistic, and more free when speakers on all sides get to decide what they say—and what they do not. That is all the Larsens ask for here.

Dated: March 21, 2018

Respectfully submitted,

s/ Jeremy D. Tedesco

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

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

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

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,499 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a 14-point proportionally spaced Century Schoolbook typeface using Microsoft Word 2013.

Date: March 21, 2018

s/ Jeremy D. Tedesco
Jeremy D. Tedesco

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the forgoing APPELLANTS' REPLY BRIEF, as submitted in Digital Form via the court's CM/ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the most recent version of a commercial virus scanning program, Traps Version 4.1.3, and are free of viruses according to that program. In addition I certify all required privacy redactions have been made.

Date: March 21, 2018

s/ Jeremy D. Tedesco
Jeremy D. Tedesco

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2018, a true and accurate copy of the foregoing was electronically filed with the Court using the CM/ECF system. Advisement of this filing will be sent via e-mail to all parties, including *amici curiae*, by operation of this Court's CM/ECF system.

Upon approval from the Court, I certify that I will also send 10 paper copies of this Appellants' Reply Brief to the Court via UPS and paper copies to all parties, including *amici curiae*, to the addresses listed on this Court's docket sheet via USPS.

Date: March 21, 2018

s/ Jeremy D. Tedesco
Attorney for Plaintiffs/Appellants