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

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INTRODUCTION

Recent Supreme Court decisions reaffirm "that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018). This latter right stops government from telling people what they must say. Not surprisingly, when governments force people "to mouth support for views they find objectionable," they violate this "cardinal constitutional command" against compelled speech. *Id.* Such coercion is always "presume[d] unconstitutional." *Nat'l Inst. of Family & Life Advocates v. Becerra*, (*NIFLA*) 138 S. Ct. 2361, 2371 (2018).

And for good reason. Forcing people "to endorse ideas they find objectionable is always demeaning;" indeed, it inflicts even more "damage" than laws "demanding silence." *Janus*, 138 S. Ct. at 2464. But Minnesota[1] and the district court downplay this damage, seeking new ways to force two Christian filmmakers to create films promoting messages that violate their faith. To them, laws that target conduct on their face but compel speech as-applied inflict less damage—or no damage at all—on speakers who create speech for a living. But that's wrong. Speakers suffer severe damage when forced to promote messages

[1] "Minnesota" refers to all Defendants-Appellees.

they oppose regardless what law makes them do it or whether anyone else knows about it. Compelled speech itself is the harm.

If Minnesota had its way, people like the Larsens who decline to voice opposing views on important social issues like marriage would forfeit their right to live and work consistent with their deepest beliefs.[2] But the Supreme Court has affirmed that people like the Larsens hold "decent and honorable" beliefs about marriage, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015); and they have every right to "carr[y] [these beliefs] into the public sphere or commercial domain." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018). *See id.* (criticizing statements comparing Christian beliefs about marriage "to defenses of slavery and the Holocaust").

The Larsens offer a better way. They serve everyone but just cannot promote every message. Their decisions to accept or decline film projects always turn on *what* the film will promote; never *who* asks for it. By accepting this distinction, as the Supreme Court has done before, the Court preserves First Amendment freedoms, protecting speakers *when they speak* while still allowing Minnesota to stop person-based discrimination. *See Hurley v. Irish-Am Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995) (distinguishing an "intent to exclude

[2] "The Larsens" refers to all Plaintiffs-Appellants.

homosexuals" from a "disagreement" with a message). The Court should take this better way.

ARGUMENT

I. As recent Supreme Court decisions affirm, laws that compel speech deserve strict scrutiny.

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). From this principle comes the "cardinal constitutional command" that government may not force people to promote ideas that violate their deepest beliefs. *Janus*, 138 S. Ct. at 2463. When government violates this command, its action is "presum[ed] unconstitutional" and strict scrutiny applies. *NIFLA*, 138 S. Ct. at 2371.

This principle controls this case. The Larsens want to create wedding films that promote biblical marriage. But Minnesota says if they do so, the Minnesota Human Rights Act (the "Act") requires them to create wedding films promoting different conceptions of marriage that conflict with their Christian beliefs. By forcing the Larsens to create films promoting messages about marriage they oppose, Minnesota compels speech and must therefore satisfy strict scrutiny.

1.

Laws that compel speech deserve strict scrutiny for two reasons: (1) they "alter[ ] the content of [speakers'] speech," *NIFLA*, 138 S. Ct. at

2371, and (2) they impose severe burdens on speakers, forcing them to "betray[ ] their convictions" and "endorse ideas they find objectionable," *Janus*, 138 S. Ct. at 2464. The Act does both here.

First, by compelling the Larsens to create wedding films that promote ideas about marriage they oppose, Minnesota "plainly 'alters the content' of [their] speech." *NIFLA*, 138 S. Ct. at 2371. This logic tracks *NIFLA* where the Court criticized laws forcing pregnancy centers to publish notices promoting messages they opposed. The Court did not change its analysis based on the speakers' identity or what third parties might think, focusing instead on how the laws worked. "By compelling individuals to speak," the laws "alter[ed] the content of [their] speech." *Id*. This "content-based" application triggered strict scrutiny. *Id.*

Because no one disputes—in fact, the district court found—the Act forces the Larsens to create films they oppose, this Court should apply the same principle here. Add. to Appellants' Opening Br. ("Add.") 43-44 (district court acknowledging the Act forces the Larsens to "make videos they might not want to make"). *See* Appellants' Opening Br. 35-36; Appellants' Reply Br. 11-18 (explaining many ways that Minnesota's application of the Act is content-based).

Second, by compelling the Larsens to create wedding films that promote messages they oppose, Minnesota severely burdens the Larsens' speech and conscience. Besides eroding "democratic" ideals and thwarting society's "search for truth," compelled speech inflicts

"additional damage:" speakers are "coerced into betraying their convictions." *Janus*, 138 S. Ct. at 2464. "Forcing [people] to endorse ideas they find objectionable is always demeaning, and for this reason, one of [the Supreme Court's] landmark free speech cases said that a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more [justification]' than a law demanding silence." *Id*. (citing *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943)). Minnesota's application of the Act therefore severely burdens the Larsens' speech.

But Minnesota and the district court downplay this burden. *See* Add. 43-44 (dismissing this burden as "immaterial"); Appellees' Br. 8 (arguing the Act imposes only "incidental burdens" on speech and thus falls outside First Amendment scrutiny). That is incorrect. If forcing people "to subsidize … speech" they oppose can be described as "tyrannical," then compelling people to first create and then publish speech they oppose—far more intimate activities—must be unthinkable; indeed Minnesota's application of the Act should be "universally condemned." *Janus*, 138 S. Ct. at 2463-64. For this reason, strict scrutiny is the rule, not the exception for compelled speech.

2.

Although laws that compel speech trigger strict scrutiny, Minnesota and the district court try to sidestep this rule, urging new exceptions that would reduce or eliminate scrutiny.

Minnesota, for example, says the Act can compel speech as-applied because it facially regulates "economic activity and conduct" and thus "pose[s] [no] First Amendment issue at all." Appellees' Br. 11, 21; *see id.* at 10-16 (arguing the Act regulates only conduct, not speech). This argument sounds familiar. The respondents in *Masterpiece* made the same one. *See* Br. for Resp'ts Charlie Craig & David Mullins, *Masterpiece*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4838415, at *20 (arguing "generally applicable regulations of commercial conduct … do not violate the First Amendment"). But neither the Court's majority nor dissent embraced this all-or-nothing approach.

Rather, the one concurrence that addressed this issue rejected it, using precedent this Court should follow: "Although public-accommodation laws generally regulate conduct, particular applications of them can burden protected speech. When a public-accommodations law 'has the effect of declaring … speech itself to be the public accommodation,' the First Amendment applies with full force." *Masterpiece*, 138 S. Ct. at 1741 (Thomas, J., concurring) (citing *Hurley*, 515 U.S. at 573). *See* Appellants' Reply Br. 5-11.

To illustrate, on Minnesota's logic, the Act could force a for-profit minister to perform a wedding that conflicts with his beliefs. If the Act only regulates conduct and poses no First Amendment problems at all, this minister's speech and free exercise rights disappear the moment he offers his wedding service for hire. But *Masterpiece* says no law, including

a generally applicable one, could force this minister "to perform [a wedding] ceremony" he opposed. 138 S. Ct. at 1727. So although "innumerable goods and services" do not "implicate the First Amendment," some do—this minister's wedding service and the Larsens' wedding films included.

The district court at least acknowledged that Minnesota's application of the Act compels speech; it just created a new exception to avoid strict scrutiny. *See supra* Add. 43-44. It reasoned that commissioned speakers like the Larsens deserve less protection because no one will "attribute the [films'] message[s]" to them and they "may easily disclaim the message of [their] customers." Add. 43. Minnesota mimicked this. Appellees' Br. 15-16 ("As correctly noted by the district court, … [the Larsens' films] 'showcas[e] the messages and preferences of [others]'…. Appellants are free to disassociate themselves from the[ir] [clients'] views.").

But the Supreme Court rejects using third-party perceptions to justify compelling speech. In *NIFLA*, the Court only reviewed how compelled speech affected the pregnancy centers, not once surveying what others might think about who was speaking. *See NIFLA*, 138 S. Ct. at 2371-76 (declining to mention third-party perceptions in its compelled-speech analysis); Br. for Resp't, *NIFLA*, 138 S. Ct. 2361 (2018) (No. 16-1140), 2018 WL 1027815, at *43-44 (defending compelled disclosures because speakers can "expressly disavow" them and no one would think

the disclosures "represent[ ] [their] personal choice"). And for good reason. Doing so would not only "flout[ ] bedrock" free-speech principles but "justify virtually any law that compels individuals to speak." *Masterpiece*, 138 S. Ct. at 1740 (Thomas, J., concurring). Compelled speech always inflicts severe "damage" on speakers regardless what others might think. *Janus*, 138 S. Ct. at 2464.

3.

This damage highlights that dignity is a two-way street. While states may enact laws like the Act "to protect the rights and dignity of gay persons," *Masterpiece*, 138 S. Ct. at 1723, they may not apply them in a way that "demean[s]" speakers, *Janus*, 138 S. Ct. at 2464. But Minnesota and the district court ignore this harm, refusing to see both sides. "States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified." *Masterpiece*, 138 S. Ct. at 1746 (Thomas, J., concurring). *See Hurley*, 515 U.S. at 579 (deeming this a "decidedly fatal objective"). Minnesota must protect speakers too.

Only the Larsens offer a way forward that protects the dignity of both speakers and customers. Unlike some who refuse serving certain people because of who they are, the Larsens serve everyone; they just cannot promote every message. *See* Appellants' Opening Br. 26-31. Their decisions to accept or decline film projects always turn on *what* the film will promote; never *who* asks for it. The cake artist in *Masterpiece* made

this same distinction. And while the Court decided that case without reaching this issue, it has affirmed this line before. *See supra Hurley*, 515 U.S. at 572. This Court should draw the same line here.

4.

The Supreme Court in *Masterpiece* did not decide the cake artist's free-speech claim and thus declined to mark this line (as it did in *Hurley*) where public accommodation laws become an unconstitutional "demand" for commissioned speakers to promote messages they oppose. But the Court still recognized the free-speech "freedoms" at stake and affirmed that states may not banish commissioned speakers who hold Christian beliefs about marriage from the marketplace.[3] *Masterpiece*, 138 S. Ct. at 1723. *See id.* at 1727. These beliefs, the Court said, are "protected views and in some instances protected forms of expression." *Id.*

The Larsens hold these "protected views" about marriage and create wedding films, a "protected form[ ] of expression." *Id.* So this case presents no hard line. Under any Justice's theory, the Larsens win. If context matters—and it should—Justice Thomas's concurrence provides the way, protecting commissioned speakers when they speak. *See id.* at

[3] The Court did not "address this claim because it" questioned whether the cake artist "refused to create a *custom* wedding cake…, or whether he refused to sell … *any* wedding cake (including a premade one)." *Masterpiece*, 138 S. Ct. at 1740 (Thomas, J., concurring). The Larsens erase doubts here, seeking protection only for producing and publishing their *custom* wedding films, not any pre-made items.

1740-48 (Thomas, J., concurring). If context means nothing, as Justice Kagan suggests, the Larsens still win. *See id*. at 1733 (suggesting cake artists may decline to create a cake "that they would not [create] for any customer" because, in this situation, they would be "treat[ing the customer] in the same way they would have treated anyone else").

None of the Larsens' wedding films are the same. Or as Justice Kagan might say, films depicting and celebrating opposite-sex weddings are simply not "suitable for use at same-sex and opposite-sex weddings alike." *Id*. at 1733, n*. The Larsens' films depicting and celebrating biblical marriages necessarily contain different content—different images, different text, different messages—from films depicting and celebrating same-sex marriage. So by forcing the Larsens to create the latter content, Minnesota alters the content in the Larsen's films. Strict scrutiny therefore applies. *NIFLA*, 138 S. Ct. at 2371.

II. As *Masterpiece* affirms, laws that allow enforcement officials to disfavor religious reasons for declining expressive projects violate free exercise.

Just as states cannot use their public accommodation law to force commissioned speakers to promote messages they oppose, *Masterpiece* confirms that states may not through these same laws allow enforcement officials to disfavor religious reasons for declining expressive projects. The Court there criticized Colorado for applying its public accommodation law in a discriminatory way, accepting message-based

objections for some speakers but rejecting them for others with religious motivations. *Masterpiece*, 138 S. Ct. at 1730.

But Minnesota sets up a similar system here, allowing enforcement officials leeway to disfavor religious reasons in many ways. For example, because Minnesota excludes decisions made for "legitimate business purpose[s]," speakers may decline expressive work. Minn. Stat. § 363A.17, subd. 3. This, of course, can be stretched to include any favored speech or shrunk to exclude any disfavored speech. And while Minnesota allows commissioned speakers like ghostwriters to decline expressive work if they oppose the requested message, they refuse this same right to commissioned speakers like the Larsens with religious motivations.[4] Minnesota thus treats the Larsens' "religious objection" different from "other objections." *Masterpiece*, 138 S. Ct. at 1730. But *Masterpiece* condemned this kind of discrimination. *Id*.

CONCLUSION

Recent Supreme Court cases confirm that Minnesota cannot use its public accommodation law to force speakers to promote messages they oppose. Free expression and this law can coexist. A ruling saying Minnesota cannot coerce artists like the Larsens to speak contrary to

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[4] *Compare* Add. 42-46 (rejecting the Larsens' compelled-speech claim) *with id*. at 32-33 n.21 (rejecting any interpretation of the Act "to mean that a ghost-writer operating as a public accommodation would be prohibited from turning down a request to write a book when the writer disagrees with the message the book would convey.").

conscience, as the First Amendment mandates, will not prevent Minnesota from stopping businesses who discriminate against people solely because of who they are.

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Respectfully submitted,

s/ Jeremy D. Tedesco

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s/ Jeremy D. Tedesco
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Date: July 20, 2018

s/ Jeremy D. Tedesco
Jeremy D. Tedesco

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Upon approval from the Court, I certify that I will also send 10 paper copies of the foregoing 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: July 20, 2018

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