ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

October 15, 2018

**VIA CM/ECF**

Mr. Michael E. Gans
Clerk, Eighth Circuit Court of Appeals
Thomas F. Eagleton Courthouse
Room 24.329
111 South Tenth Street
St. Louis, MO 63102

**Re: Response to Supplemental Authority**
***Telescope Media Group, LLC v. Lindsey***
**Eighth Circuit File No. 17-3352**

Dear Mr. Gans:

Appellants file this response to Appellees' notice of supplemental authority about *Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d 426 (Ariz. Ct. App. 2018), *petition for review filed*. In that case, a state appellate court held that Phoenix could apply its public-accommodation law to force two artists to create custom artwork—wedding invitations and signs—expressing messages contrary to the artists' religious beliefs. But this decision is not binding or persuasive and contradicts U.S. Supreme Court precedent in at least two respects.

First, the *Brush & Nib* court incorrectly held that public accommodation laws are immune to First Amendment scrutiny. It concluded that Phoenix's law "regulates conduct, not speech"—even when applied to words—because its "main purpose" is prohibiting discrimination. *Id.* at 437. But that purpose is not relevant to the question of whether the law can compel speech. In *Hurley v. Irish-Am Gay, Lesbian & Bisexual Group of Boston*, the Supreme Court barred Massachusetts from applying a public-accommodation law to "speech itself" in a manner that altered the content of the speaker's message, even though that law's main purpose was to stop discrimination. 515 U.S. 557, 572-73 (1995). A law's facial validity does not justify unconstitutional applications. Appellants' Reply Br. 5-11.

Second, the *Brush & Nib* court incorrectly found the act of creating speech was unprotected. It held that the "act of creating design-to-order wedding announcements, invitations, and the like is not inherently expressive." 418 P.3d at 439. The Supreme Court disagrees: "Whether government regulation applies to creating, distributing, or consuming speech makes no difference." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 792 n.1 (2011). The act of creating speech is protected as much as the final expressive work.

In the present case, Minnesota reaffirmed its position that its public-accommodation law can compel any speech whatsoever—including words, images, films, and other forms of speech. Because the First Amendment guarantees "that each person should decide for himself or herself the ideas and beliefs deserving of expression," *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994), this Court should reject Minnesota's position.

Sincerely,

s/ Jeremy Tedesco

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**Certificate of Service**

I hereby certify that on October 15, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Jeremy Tedesco
Jeremy Tedesco
*Attorney for Appellants*