IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

TELESCOPE MEDIA GROUP, a Minnesota corporation, CARL LARSEN and ANGEL LARSEN, the founders and owners of TELESCOPE MEDIA GROUP, Plaintiffs, vs. KEVIN LINDSEY, in his official capacity as Commissioner of the Minnesota Department of Human Rights and LORI SWANSON, in her official capacity as Attorney General of Minnesota, Defendants.	Case No. 0:16-cv-04094-JRT-LIB Chief Judge John R. Tunheim Magistrate Judge Leo I. Brisbois

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

INTRODUCTION AND FACT SUMMARY

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

> motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.

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

The Larsens' wedding films are protected by the First Amendment because they contain "stories, imagery, … and messages, even an ideology" about marriage. *Interactive Digital Software Ass'n v. St. Louis Cnty.*, 329 F.3d 954, 957 (8th Cir. 2003) (quotation omitted); Ver. Compl.¶¶129-34. Speech on "public issues" like marriage has "always rested on the highest rung on the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). Hence, the Larsens' wedding films necessarily merit robust constitutional protection.

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

Like the films they make, the Larsens' cinematography and editing process receive strong free speech protection. *Cf. Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment."). As several courts of appeals have recognized, the Larsens' process of artistic creation through cinematography and film editing "'is inextricably intertwined with the purely expressive" film that results. *Buehrle v. City of*

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

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

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

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

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

Like the directors making major motion pictures, each decision the Larsens make in producing films for use at wedding ceremonies—from what camera to use, what angle to shoot, what subject(s) to include, the extensive video editing process, what text, voiceovers, or animations to create, and what lighting, filters, or soundtrack to employ—profoundly alters the final story. Ver. Compl.¶¶100-07. Courts have therefore consistently protected visual art, like the Larsens' wedding films, along with its many constitutive decisions (*e.g.*, what events the Larsens should take on, what video, audio, and text content they use, its order, what music to use, whether to include animation or visual effects, whether to use still shots, how to adjust the lighting and color, and audio mixing and mastering). Ver. Compl.¶¶87, 106. It makes no difference that the Larsens—like many famous film producers—are paid for their work. "[A] speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley*, 487 U.S. at 801; *see also Sorrell*, U.S. at 567 (explaining that "a great deal of vital expression" results from an "economic motive").

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

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

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

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

Federal courts have long recognized the potential of nondiscrimination laws to unconstitutionally interfere with protected expression. *See, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657 (2000) (noting "the potential for conflict between state public accommodation laws" and "the First Amendment"); *Hurley*, 515 U.S. at 572 (characterizing as "peculiar" and striking down the application of a state public accommodation law to speech). Defendants' extreme position that the MHRA allows no free speech exception directly conflicts with this precedent. Even antidiscrimination statutes as revered as Title VII "steer[] into the territory of the First Amendment" when "pure expression is involved." *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir. 1995). As a result, the Supreme Court has rejected attempts to apply

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Supreme Court has established that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. The MHRA does not bar discrimination against all citizens but focuses on a narrow set of protected characteristics that includes "race, national origin, color, sex, sexual orientation, … disability," and a woman's choice of "surname." Minn. Stat. 363A.17. Speech containing ideas or messages linked to these characteristics may implicate the statute. No other speech does.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Moreover, the MHRA provides a number of categorical exemptions for other secular and religious purposes, although Defendants deny any exemption to the Larsens. Ver. Compl.¶¶256-59; *see Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (explaining that categorical exemptions may show discriminatory intent). For example, one provision states that nothing in the MHRA, including § 363A.11(1) and § 363A.17(3), prohibits any "religious association, religious

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

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

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

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

The unconstitutional conditions doctrine bars the state not just from prohibiting the Larsens' exercise of their rights to free speech, expressive association, and free exercise outright, but also from "deter[ing], or chilling" the exercise of those rights. *Bd. of Comm'rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 674 (1996) (quotation omitted). Under that doctrine, the state "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Following ones "chosen profession free form unreasonable governmental interference" is a benefit that "comes within the 'liberty' and 'property' concepts" of the Due Process Clause. *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (expressing concern that the ACA would "effectively exclude [some religious] people from full participation in the economic life of the Nation").

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

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

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

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

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

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

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

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

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

II. The Remaining Preliminary Injunction Factors Are Satisfied.

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

CONCLUSION

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

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

Respectfully submitted this 13th day of January, 2017.

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CERTIFICATE OF SERVICE

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

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CERTIFICATE OF COMPLIANCE

I hereby certify that that this brief complies with the requirements of Local Rule 7.1(f) because it has been prepared in 13-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Local Rule 7.1 (h) because it contains 9398 words, excluding the parts of the brief exempted under Local Rule 5.2 according to the count of Microsoft Word 2013.

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