STATE OF MINNESOTA
COURT OF APPEALS
A23-0374
A23-0484

Andrea Anderson,

Appellant,

v.

Aitkin Pharmacy Services, LLC d/b/a Thrifty White Pharmacy; George Badeaux,

Respondents.

On appeal from Aitkin County, Ninth Judicial District
Honorable David F. Hermerding, Judge Presiding

BRIEF OF RESPONDENT GEORGE BADEAUX

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STATEMENT OF THE LEGAL ISSUES

I. Whether Andrea Anderson established *per se* sex discrimination in violation of the Minnesota Human Rights Act ("MHRA") where Thrifty White Pharmacy and George Badeaux, its chief pharmacist, sought to ensure that Anderson could obtain her not-in-stock prescription for ella from a different pharmacist—either at Thrifty White or another pharmacy—the next day and respect Badeaux's conscience rights.

II. Whether the district court abused its discretion in denying Anderson's motion for a new trial where the jury and trial court found that neither Thrifty White nor Badeaux discriminated against Anderson because of her sex, that conclusion was amply supported by the evidence, barring Badeaux from stating the religious reasons for his action would be unlawful, and Anderson cannot show any alleged errors at trial caused her prejudice.

Issues raised in the district court:

Anderson raised a *per-se*-sex discrimination theory in the memoranda supporting her post-trial motions for judgment as a matter of law and new trial. *E.g.*, Doc. 156 at 14–15; Doc. 159 at 5.

Anderson's memorandum supporting her motion for a new trial argued that the verdict was not supported by the evidence, various errors marred the jury instructions, and certain evidentiary rulings were an abuse of discretion. *See generally* Docs. 156 & 159.

District court's ruling:

The district court rejected Anderson's *per-se*-sex-discrimination argument for five principal reasons: (1) Anderson experienced no material disadvantage, change in conditions, or refusal to do business; (2) Badeaux's actions were motivated by his religious beliefs, not discriminatory intent; (3) Anderson's theory would effectively create a disparate-impact action, which the MHRA does not allow, and knee-cap the jury's role as fact-finder; (4) Thrifty White and Badeaux have the right to offer legitimate, non-

discriminatory reasons for their actions; and (5) ignoring Badeaux's conscience rights would violate the Minnesota or United States Constitutions. Add.43–52.

The district court denied Anderson's motion for a new trial because the verdict was amply supported by the evidence, and the trial court's evidentiary rulings and jury instructions were justified or non-prejudicial. Add.58–73.

Manner preserved:

Anderson appealed the denial of her motions for judgment as a matter of law and new trial within 60 days of service of the district court's written order; Docs. 172, 174, 181, 189. The parties then jointly requested a briefing extension, which this Court granted on May 26, 2023.

Most apposite cases, statutes, and constitutional provisions:

- *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993)
- *Rasmussen v. Glass*, 498 N.W.2d 508 (Minn. Ct. App. 1993)
- *Hanson v. Department of Natural Resources*, 972 N.W.2d 362 (Minn. 2022)
- *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001)

STATEMENT OF THE CASE

Plaintiff appeals from a final judgment in Defendants' favor issued by the Aitkin County District Court—the Hon. David F. Hermerding presiding—in accord with the jury's unanimous findings after a five-day trial. Docs. 185, 186.

After a condom failed, Andrea Anderson phoned her doctor's office about "emergency contraception," obtained a prescription for ella, and had it sent to Thrifty White. Trial Transcript ("TrialTr.") at 427–31. Thrifty White had never received a prior request for ella and—like most pharmacies—did not keep the drug in stock. TrialTr.194, 385, 432, 472–73, 729–30. Yet Thrifty White had no objection to providing "emergency contraception." It stocked and dispensed Plan B and made that drug available over-the-counter. TrialTr.613–14, 679–80. So a Thrifty White pharmacy tech placed ella on the drug-order list.[1] TrialTr.432, 592. If Anderson had maintained her prescription at Thrifty White, a pharmacist would have dispensed it upon delivery the next day. TrialTr.711.

The only concern was a forecast of snow and ice. TrialTr.441, 602–06. Normally, there would be two pharmacists at Thrifty White the following day—Anthony Grand, who dispensed emergency contraception, and George Badeaux, who did not on conscience grounds. TrialTr.602, 611, 615. Both pharmacists lived an hour or more away from Thrifty White. TrialTr.611. So it was impossible to know which pharmacist—if either—would make it through the projected storm to work. TrialTr.197, 435.

[1] Anderson's doctor's office prescribed ella—instead of Plan B—because ella may be more effective for women who weigh over 165 pounds. TrialTr.323, 431.

Based on the Minnesota Board of Pharmacy's guidance that conscientious objectors make "alternatives . . . immediately available" to clients, Add.1, Badeaux called Anderson to let her know that ella would arrive at Thrifty White the next day; another pharmacist who dispenses "emergency contraception" was scheduled to work; but if that pharmacist was unable to make it through the snowstorm, Badeaux's personal beliefs precluded him from dispensing ella; TrialTr.601–03.

Badeaux wanted Anderson to have all the relevant facts, so that she could make an informed decision and obtain her prescription from another pharmacist at Thrifty White or elsewhere. TrialTr.250, 603—05. At the earliest opportunity, Badeaux gave Anderson three alternatives: keep her prescription at Thrifty White, transfer it to the nearby CVS in Aitkin, or transfer it to another pharmacy of her choice. TrialTr.310, 601–07. Once Anderson opted to send her prescription to the Walgreens in Brainerd, Minnesota, Badeaux immediately made the transfer. Only then did Badeaux remove ella from Thrifty White's order list because he was confident she wouldn't come in the next day. TrialTr.607, 617.

Anderson obtained ella from Walgreens the very next day. TrialTr.449, 513–14. Despite Badeaux having made that option "immediately available," Anderson sued Thrifty White and Badeaux under the MHRA, alleging public-accommodation and business discrimination based on sex, as well as aiding and abetting liability for sex discrimination. Doc. 1. Yet Badeaux never acted to interfere with Anderson obtaining ella. TrialTr.568, 604–05. He merely sought to refer prescriptions for "emergency contraception" to another pharmacist and be excused from dispensing those prescriptions himself. TrialTr.568. And this decision was based on Badeaux's religious beliefs, *not* Anderson's sex. TrialTr.684.

Badeaux is a Christian who believes that an embryo—with DNA from each parent—is a new human life. TrialTr.567, 595–98. Preventing an embryo's implantation in the uterus would end that human life. So Badeaux objects on conscience grounds to participating in any conduct that might take a human life. TrialTr.597–98. That includes—but is not limited to—dispensing "emergency contraception" like ella, TrialTr.618, which the FDA recognizes "may affect implementation" or "work by preventing attachment (implantation) to the uterus," Def.'s Ex. 12 at 6, 11.[2]

The jury credited Badeaux's testimony, finding that he did not refuse to do business with Anderson based on her sex, aid or abet public-accommodation or business discrimination against Anderson based on her sex, or attempt to do so. Add.32. And the district court agreed, concluding that "George Badeaux testified to the jury his actions were motivated by his conscience, not because of Andrea Anderson's sex, and there exists a reasonable theory of the evidence for the jury to have believed him." Add.50. This Court should affirm.

STATEMENT OF FACTS

A. Badeaux's pharmacist career

Badeaux has served as a licensed pharmacist since 1982. TrialTr.556. Badeaux has served thousands of customers and respected each of them as human beings with "great high value." TrialTr.567. The Minnesota Board of Pharmacy never disciplined Badeaux for any reason. TrialTr.617. His career record is pristine.

[2] Defendant's Exhibit 12 is the 2018 ella patient package insert, which the FDA makes available online at https://bit.ly/3QCQt2I.

From 2014 to 2019, Badeaux worked at Thrifty White Pharmacy, serving most of that time as the pharmacist-in-charge. TrialTr.677. He was "a very good pharmacist" and "[a]ll the patients really seemed to like him." TrialTr.677. Importantly, this lawsuit had no impact on Badeaux's tenure at Thrifty White. Badeaux left the pharmacy because he was driving over an hour to work each way and found a job closer to home. TrialTr.679.

B. Badeaux's religious beliefs

Badeaux is a Christian. TrialTr.567. In everything he does, Badeaux seeks to live the way God "would want [him] to live." TrialTr.567. That means "respecting every human being," TrialTr.567, including those knit together in their mother's womb (Psalm 139:13) but not yet born, TrialTr.597.

Badeaux's faith teaches that each human life is of "great high value" to God, TrialTr.567, and that life begins when an egg is fertilized, TrialTr.597. At that point, "DNA from the father and DNA from the mother come together and form a brand new DNA that did not exist before and could not exist before." TrialTr.597. Badeaux believes that his own life began when an egg was fertilized and that the same is true of every person. TrialTr.597. He objects to personally participating in anything that may prevent "a fertilized egg from implanting in the uterus successfully" because "new life will cease to exist." TrialTr.598.

Badeaux's conscientious objection to dispensing "emergency contraception" is consistent and longstanding. Though he was previously unaware of ella, TrialTr.260, 592,

Badeaux had declined to personally dispense Plan B—another form of "emergency contraception"—because it operates in similar ways, TrialTr.191–92, 565, 571–72.[3]

Yet Badeaux was happy to refer prescriptions for "emergency contraception" requests to another pharmacist at Thrifty White or elsewhere. TrialTr.566, 584–85, 618–19, 684. And he intentionally hired another Thrifty White pharmacist (Grand) who had no objection to dispending "emergency contraception" upon request. TrialTr.615.

Badeaux's religious beliefs are not "bizarre or incredible." *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 834 n.2 (1989). They are shared by many people, *cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 701–02, 720 (2014), including many women, *cf.* TrialTr.370–71, of diverse faiths here in America and around the world.

C. Thrifty White's referral policy

Prior to Anderson's request for ella, neither Thrifty White's owner, Matthew Hutera, nor its lead pharmacist, Badeaux, were familiar with that drug. TrialTr.260, 301, 592. But they were aware of a different form of "emergency contraception" known as Plan B or "the morning after pill," which is available through the pharmacy and over-the-counter. TrialTr.236–37, 301. Accordingly, they formulated a policy to address Badeaux's conscientious objections to dispensing Plan B. TrialTr.681–84.

Thrifty White's policy was informed by advice offered in the Minnesota Board of Pharmacy's October 1999 newsletter about Plan B. TrialTr.578–79, 682–83. At its core,

[3] Anderson faults Badeaux's handling of these requests. AppellantBr.21. Yet Badeaux learned from these past experiences, TrialTr.568, 570–71, 575, and his call with Anderson wasn't remotely similar, TrialTr.601–05. What's more, Anderson lacks standing to raise others' historical complaints.

that guidance makes two points clear. Pharmacists may object to personally dispensing Plan B for "personal, moral, ethical, or religious reasons." Add.1. If they do, pharmacists should have "alternatives . . . immediately available," so that customers may have "the prescription filled by another staff person at the pharmacy or by another pharmacy." Add.1.

Hutera and Badeaux's policy followed that guidance. Thrifty White would respect Badeaux's conscientious objection to dispensing Plan B. In turn, Badeaux would make every effort to have a non-objecting pharmacist at Thrifty White fill a Plan B prescription. If that proved unworkable, Badeaux would transfer the prescription to a pharmacy of the customer's choice,[4] TrialTr.585, 684, as many people have two pharmacies and customers travel to Thrifty White from up to 60 miles away, TrialTr.587–88, 685–86.

D. Anderson's ella prescription

Anderson resides in McGregor, Minnesota TrialTr.426. Because she has endometriosis, Anderson was told that she would likely never have children. TrialTr.458. With the help of fertility drugs, Anderson and her partner had one son. Trial.Tr.459. But due to her long and difficult labor, Anderson and her partner decided not to have more biological children and, instead, serve children in foster care. TrialTr.428, 523.

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[4] Plaintiff's counsel argued that the guidelines required Badeaux to make advance "arrangements with a nearby pharmacy to fill . . . prescriptions" for emergency contraception. Add.1; *e.g.*, TrialTr.266–67. Yet that recommendation only applies "[i]f a pharmacy *chooses not to honor* such prescriptions." Add.1 (emphasis added). Thrifty White's policy honored prescriptions for emergency contraception in-house, TrialTr.681–84, as verified by its dispensing and sale of Plan B, TrialTr.679–80, and readiness to fill Anderson's ella prescription the next day, TrialTr.611, 617. What's more, Badeaux was unaware of ella's existence, so he couldn't make advance arrangements to fill those prescriptions elsewhere, TrialTr.266–68, and doing so would be impractical and ineffective regardless, TrialTr.587–88, 620, 685–86.

On a Sunday night in January 2019, Anderson's partner's condom broke. TrialTr.427–28. They decided to call Anderson's doctor on Monday and ask about the morning after pill. TrialTr.428. Anderson spoke with a nurse over the phone who inquired about the contraception failure's timeline and her weight. TrialTr.430–31. The nurse then sent a prescription for ella to Thrifty White at Anderson's request because it was the closest pharmacy to her house. TrialTr.431. The nurse advised Anderson to take the drug "in as timely a manner as possible" in the next five days. TrialTr.431.

Anderson called Thrifty White and spoke with a pharmacy tech who told her that although ella was not in stock, ordering it was "not a problem" and that the drug's cost "would be covered by [her] insurance." TrialTr.432.

E. Badeaux's referral and call with Anderson

Badeaux was on duty at Thrifty White when Anderson's ella prescription arrived. TrailTr.592. He saw ella on the pharmacy's order list, was unfamiliar with it, and looked up the drug. Badeaux learned that ella is "emergency contraception." TrialTr.592. So Badeaux set out to determine how ella works. TrialTr.594. The FDA-approved package insert informed him that ella works either by (1) delaying or preventing the release of an egg, and/or (2) inhibiting a fertilized egg's implantation in the uterus.[5] TrialTr.594–95; Def.'s Ex. 12 at 6, 11. The former "mechanism of action" does not violate Badeaux's religious beliefs, but he objects to personally dispensing drugs that do the latter because they may terminate a unique and valuable human life. TrialTr.596–98.

[5] A Patient Package Insert is "part of the FDA-approved prescription drug labeling." FDA, Patient Labeling Resources, *What are Patient Package Inserts?*, https://bit.ly/43Y7eZl.

Badeaux knew that Thrifty White did not have ella in stock and would not arrive until the next day. TrialTr.602. Two pharmacists were scheduled to work that day: Badeaux, who objects to dispensing "emergency contraception," and Grand who does not. TrialTr.602. Badeaux was happy to refer Anderson's ella prescription to Grand. TrialTr.602–03. His only concern was the weather forecast, which predicted major snow and ice, and Grand's ability to make the drive. TrialTr.441, 603, 606.

Badeaux and Grand both lived an hour or more away, so it was impossible to know which pharmacist (if either) would make it to Thrifty White through the storm. TrialTr.611. Grand had only worked at the pharmacy for about three months. TrialTr.615, 678. So his ability to make that drive in extreme weather conditions was unknown. TrialTr.198. Badeaux thought Grand would likely make it to Thrifty White the next day, but he knew there was a possibility he could not.[6] TrialTr.603, 605–06.

To avoid filling prescriptions for "emergency contraception" himself, Badeaux felt he had a "responsibility to not get in the way of [Anderson's] prescription getting dispensed" by another pharmacist the following day. TrialTr.603. That included informing Anderson of Grand's possible absence due to inclement weather, so she knew the situation ahead of time and had sufficient opportunity to "plan for other options." TrialTr.603. So Badeaux called Anderson directly. TrialTr.601.

[6] Plaintiff's counsel argued that Thrifty White should have brought in a *third* pharmacist. But Grand was already scheduled to work and made it to Thrifty White the next morning. TrialTr.303, 605, 611. So there was no need. What's more, if Grand could not make it through the projected storm, there was no reason to think Thrifty White's occasional fill-in pharmacists would be willing and able to do so. Trial.Tr.244, 678.

During the call, Badeaux never described his religious beliefs, so as not to make Anderson feel judged. TrialTr.603. He merely stated four facts: (1) Thrifty White did not have ella in stock, (2) ella would be delivered the next day, (3) Badeaux would not personally dispense ella due to his personal "beliefs," and (4) another pharmacist who would dispense ella was also scheduled to be at Thrifty White in the morning, but there was a possibility he would not make it through the projected storm. TrialTr.601–02.

When asked what she was "supposed to do," TrialTr.435, Badeaux informed Anderson that she had the option of transferring the prescription to another pharmacy, TrialTr.435–36, 604. He recommended the CVS in Aitkin—which normally has multiple pharmacists on staff—but not the Shopko because she might run into trouble there. TrialTr.304, 436, 604. Badeaux offered this advice because Shopko was going out of business and having difficulty obtaining drug orders. TrialTr.604–05. He was trying to help Anderson avoid any "stumbling block and time delay." TrialTr.605.

Badeaux never indicated that Anderson could not obtain ella from Thrifty White. TrialTr.607. And he was happy to continue discussing the matter with her. Trial.Tr.268–69, 616. But Anderson got angry, shouted "This is b*llsh*t," apologized to Badeaux, and ended the call before further dialogue could occur. TrialTr.453, 616.

F. Anderson submits complaints and obtains ella from Walgreens

After recalling Badeaux to get his name and declare her intent "to do something about this," TrialTr.609, Anderson registered a series of complaints about Badeaux's religious objection. TrialTr.483–89. She contacted advocates for unlimited access to "emergency contraception," including NARAL Pro-Choice, the National Women's Law

Center, and Gender Justice. TrialTr.483–84. Anderson also called the Minnesota Board of Pharmacy. TrialTr.484. Last but not least, Anderson called Thrifty White's headquarters and obtained the phone number for Hutera—Badeaux's employer. TrialTr.484, 487–88.

Anderson chose to transfer her prescription from Thrifty White. TrialTr.436–39. She called CVS in Aitkin but was unable to fill her prescription there. TrialTr.436. Walgreens in Brainerd could order ella and dispense it the next day, provided the storm did not delay shipment. Trial.Tr.436–38. Anderson opted to fill her prescription at Walgreens and Badeaux immediately fulfilled that transfer request. TrialTr.436–48, 607. Only after the transfer was complete did Badeaux delete ella from Thrifty White's order list because, he was certain Anderson wouldn't "change her mind . . . and . . . decide to . . . fill [her prescription] at Thrifty White the following morning." TrialTr.617; *accord* TrialTr.607.

Weather conditions the next day were not extreme. TrialTr.475, 479, 610–11. So Grand and Badeaux both made it to work. TrialTr.611. If Anderson hadn't transferred her prescription, she could have filled it at Thrifty White that day. But instead, she called Thrifty White's owner—Hutera—that morning to complain about Badeaux's referral of her prescription to another pharmacist. TrialTr.442–43, 445. Anderson regarded Badeaux's religious beliefs irrelevant because he has "a job to do." TrialTr.461. And she considered that job personally dispensing any prescribed medication she wanted—no questions asked, no conscientious objections allowed. TrialTr.462.

Hutera was apologetic and told Anderson that he did not share Badeaux's beliefs. TrialTr.445. Yet he later confirmed that Badeaux's actions fully complied with Thrifty White's referral policy. TrialTr.728–29. Hutera did not like Badeaux's referral of

Anderson's prescription to another pharmacist. TrialTr.445. But he recognized an employer's duty not to discriminate against religion and Thrifty White's legal obligation to reasonably accommodate Badeaux's religious practice. TrialTr.699; *accord* Doc. 91 at 8. After Anderson informed Hutera that she planned to obtain ella from Walgreens instead of Thrifty White, he requested her address and sent a card in the mail with a $100 gift card for gas—which Anderson chose not to use. TrialTr.480–81.

Later that day, Anderson packed her son in the truck, TrialTr.446, and drove past Thrifty White towards Brainerd because she had "a pharmacy and pharmacist who were willing and able to fill it, and [she] felt confident in [her] ability to get it there." TrialTr.448. On the way to Walgreens, Anderson stopped at an urgent care in Aitkin due to a suspected sinus infection. TrialTr.448. Next, Anderson made her way to Walgreens where she obtained ella and took that drug in the parking lot. Trial.Tr.449, 513–14. Then Anderson stopped at Walmart before driving safely home. TrialTr.449.

G. Anderson files suit against Thrifty White and Badeaux

Ten months later, Anderson filed suit against Thrifty White and Badeaux in the Aitkin County District Court. Doc. 1. Her complaint states three claims under the MHRA: (1) public-accommodation discrimination based on sex, (2) business discrimination based on sex, and (3) aiding and abetting sex discrimination. Doc. 1 at 10–12. Anderson never claimed to be pregnant. TrialTr.490. Her prayer for relief merely sought declaratory and injunctive relief, compensatory damages for emotional distress, treble and punitive damages, a civil penalty, and attorney fees and costs. Doc. 1 at 12–13.

H. District court proceedings

At the pleadings stage, Badeaux maintained that Thrifty White "was willing to fill [Anderson's] prescription." Doc. 10 at 1. Badeaux also insisted that the complaint "fail[ed] to state a claim upon which relief can be granted." Doc. 10 at 3. Likewise, Thrifty White's answer stated it "was willing to fill [Anderson's] prescription." Doc. 13 at 1. And Thrifty White asserted the complaint "fails to state a claim of 'sex' discrimination under the [MHRA]" and "fails to state a claim upon which relief may be granted." Doc. 13 at 7.

On summary judgment, Thrifty White—joined by Badeaux, Doc. 80 at 2 n.1—argued that Anderson could not show "she was discriminated against . . . because of [ ] sex," Doc. 91 at 3. They argued that Anderson's claims failed

> because Mr. Badeaux's religious beliefs are not a pretext for discrimination. Mr. Badeaux's objection to filling prescriptions for emergency contraception is not based on sex; it is an exercise of his religious beliefs. He would refuse to dispense emergency contraception to anyone, regardless of their sex. (Badeaux Aff. at ¶ 3.) [Doc. 81 at 1] This result is consistent with the protections in the Minnesota Constitution, . . . as well as Minnesota and United States Supreme Court opinions protecting such rights. [Doc. 91 at 12.]

But the district court denied Thrifty White and Badeaux's summary judgment request based on an alleged factual "dispute [as to] whether Defendant Thrifty White refused to serve the Plaintiff." Doc. 99 at 6.

At trial, the district court sharply limited any discussion of Badeaux's conscience rights and religious liberties. Add.86–87; *accord* TrialTr.699–710. It conceded that Badeaux must be "allowed to inform the jury of his religious beliefs surrounding Ella." Add.87. But the court barred Badeaux from expressing his religious view that ella is "an abortifacient" that may "terminat[e] a pregnancy." Add.94. It also forbad Badeaux from

testifying that he objects to dispensing ella to a man or a woman, characterizing this important evidence that sex discrimination was lacking as "irrelevant and prejudicial." Add.88.

The jury deliberated for over nine hours, TrialTr.960–62, 971, 1008, and concluded—despite these impediments—that Badeaux and Thrifty White did not discriminate against or refuse to do business with Anderson based on her sex, and that Badeaux did not aid and abet, or attempt to aid and abet, either form of sex discrimination. Add.31–32. Separate from the matter of MHRA liability, the jury found that Badeaux caused Anderson $25,000 worth of emotional harm, but that Thrifty White caused none. Add.32–33.

Post-trial, Anderson filed a motion for judgment as a matter of law based on her per-se-sex-discrimination theory, Docs. 155, which the court rejected. It was for "the jury to decide whether . . . Badeaux acted out of his personal, religious beliefs (his conscience) or if he acted with unlawful discriminatory intent against women" and the evidence "allow[ed] the jury to find that . . . Badeaux's interactions were motivated by his personal beliefs and not unlawful discriminatory intent." Add.46. Anderson's theory, the court said, conflicts with "the Minnesota and United States Constitutions," Add.47, and the "*McDonnell-Douglas* test for discrimination," Add.49, both of which enable "Badeaux to offer his conscience and his personal, religious beliefs in explanation of his interactions with . . . Anderson," Add.50.

Anderson also filed a motion for new trial, Doc. 158, which the court denied because "the jury's verdict was based on the evidence presented and on an accurate

interpretation of the law, Add.59. Various evidentiary rulings, the court said, were within its broad discretion and Anderson failed to show prejudice. Add.59–61. And, taken as a whole, the jury instructions were accurate and non-prejudicial. Add.62–74. In particular, a jury instruction that did "not allow . . . Badeaux to offer his conscience and his personal, religious beliefs in explanation of his interactions with . . . Anderson would violate the Minnesota and United States Constitutions," Add.72, as well as "[t]he *McDonnell-Douglas* test," which allows defendants "to offer a legitimate, non[-]discriminatory reason for their actions, Add.71.

Accordingly, the district court ruled that no MHRA violation occurred, awarded no damages, and entered final judgment in Defendants' favor. Add.75–79.

INTRODUCTION

Minnesota is home to nearly six million people with a broad range of beliefs and values. "[T]olerance, not coercion," is the principle that enables them to live together. *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2322 (2023). Yet too often, individuals and governments seek to force others to "defy [their] conscience about a matter of major significance." *Id.* at 2321. One of their favorite tools is public-accommodation laws, which have many noble purposes but are subject to misuse. *E.g.*, *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752–53, 758 (8th Cir. 2019). Perhaps for the first time, an individual pharmacist—George Badeaux—is in the crosshairs of such a law. His alleged offense: referring a request for "emergency contraception" to another pharmacist based on his religious beliefs. The Court should stop this abuse of the MHRA in its tracks, reject Anderson's novel theories, and affirm the district court's judgment.

ARGUMENT

I. Anderson failed to state a valid claim for sex discrimination.

Appellees like Badeaux "cannot assign error upon appeal." *Kafka* v. *O'Malley*, 22 N.W.2d 845, 849 (Minn. 1946). Reviewing courts will not "reverse on appeal a correct decision simply because it is based on incorrect reasons." *Kahn v. State*, 289 N.W.2d 737, 745 (Minn. 1980). Consequently, this Court may affirm the judgment in Defendants' favor based on "any ground appearing as a matter of law in the record." *Kafka*, 22 N.W.2d at 849; *accord VanGelder v. Johnson*, 827 N.W.2d 430, 435 (Minn. Ct. App. 2012) ("[W]e may affirm . . . on any basis supported by the record."). That includes "different grounds than those cited by the [district court]." *Louis v. Louis*, 636 N.W.2d 314, 316 (Minn. 2001).

The district court held that Anderson stated a valid claim for sex discrimination. Add.87–88. But the court was wrong. Doc. 91 at 3, 5–6, 12. And this Court should review its construction of the MHRA's scope de novo. *Henry v. Indep. Sch. Dist. #625*, 988 N.W.2d 868, 880 (Minn. 2023).

A. The MHRA's bar on sex discrimination

Anderson alleged two forms of sex discrimination under the MHRA: public-accommodation discrimination and business discrimination. The former makes it "an unfair discriminatory practice" to "deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of . . . sex." Minn. Stat. § 363A.11(1). The latter renders it "an unfair discriminatory practice for a person engaged in . . . the provision of a service" to

"intentionally refuse to do business with" a person "because of [that] person's . . . sex . . ., unless" the defendant shows "a legitimate business purpose." Minn. Stat. § 363A.17(3).

In both cases, the MHRA's definition of sex "includes, but is not limited to, pregnancy, childbirth, and disabilities related to pregnancy or childbirth." Minn. Stat. § 363A.03(42). The MHRA does not define "pregnancy" or "childbirth." So courts "look to dictionary definitions to determine the common and ordinary meanings of these terms." *Douglas v. State*, 986 N.W.2d 705, 709 (Minn. 2023).

Pregnancy is ordinarily defined as "the quality of being pregnant," "the condition of being pregnant," or "an instance of being pregnant."[7] Childbirth's usual definition is similarly straightforward: it means "the act or process of giving birth to a baby."[8]

Taken together, the statute's "plain and unambiguous language" and these "dictionary definitions" make "the Legislature's intent [ ] clear." *State v. Haywood*, 886 N.W.2d 485, 488 (Minn. 2016) (cleaned up). The MHRA prohibits denying a person the full and equal enjoyment of a place of public accommodation or intentionally refusing to do business with a person based on her sex. And that bar includes discriminating against a person based on her personal trait of being pregnant, pregnancy condition, or occurrence of being pregnant, as well as her participation in the act or process of giving birth.

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[7] *Pregnancy*, Merriam-Webster Dictionary Online, https://bit.ly/3KvJHrO; *accord Pregnancy*, American Heritage Dictionary Online, https://bit.ly/3DOE981.

[8] *Childbirth*, Merriam-Webster Dictionary Online, https://bit.ly/3YvhzLp; *accord Childbirth*, American Heritage Dictionary Online, https://bit.ly/3OPo744.

B. Because Anderson never claimed to be pregnant and sought to *avoid* pregnancy and childbirth, her sex discrimination claim fails.

Anderson's complaint of sex discrimination is based on the theory that "[e]mergency contraceptives are only used by people who may become pregnant to *prevent pregnancy*," so the MHRA bars public accommodations and businesses from "refus[ing] to provide a person their prescribed emergency contraceptive." Doc. 1 at 10–11 (emphasis added). But this upside-down view of pregnancy discrimination fails. The Court should decline Anderson's invitation to walk, like Alice, through the looking glass and hold that she failed to state a valid sex-discrimination claim.

The MHRA bars discrimination based on a woman's characteristic or status of being pregnant, as well as her involvement in the act or process of giving birth. But Anderson never claimed to be pregnant, TrialTr.490, and she disclaimed any interest in childbirth, TrialTr.428. And that means Anderson failed to state a valid sex-discrimination claim.

Anderson sought ought ella to *avoid* pregnancy and childbirth. TrialTr.428–31. But non-pregnancy is the opposite of pregnancy and non-childbirth is the inverse of childbirth. So preventing pregnancy and childbirth fall squarely outside the MHRA's terms. They are the polar opposites of what the statute protects. In ruling otherwise, the district court ignored the MHRA's plain language, s*upra* Part I.A., and "intru[ded] upon the policy-making function of the legislature," *Goins v. W. Grp.*, 635 N.W.2d 717, 723 (Minn. 2001).

The legislature knew how to cast a wider pregnancy-discrimination net and opted against it. Consider the MHRA's definition of sex, which includes "disabilities *related to* pregnancy or childbirth." Minn. Stat. § 363A.03(42) (emphasis added). That provision

does not apply because nothing suggests Anderson was pregnant or suffered a related disability. But it is highly relevant to statutory construction: if the legislature wanted to bar discrimination "*related to* pregnancy or childbirth," it knew how to say so. *Id.* Yet the MHRA bars only discrimination based on "pregnancy or childbirth"—full stop. *Id.*

Anderson resorts to word games to try and make pregnancy discrimination fit. She claims that Badeaux "singled out women seeking medication *related to* pregnancy for refusals." AppellantBr.17 (emphasis added). But, as just discussed, the MHRA doesn't bar every action "related" to pregnancy in some broad sense. It forbids discrimination based on "pregnancy, childbirth, and disabilities related to pregnancy or childbirth." Minn. Stat. § 363A.03. Anderson never claimed to be pregnant or approaching childbirth, or to have a pertinent disability "related to" those conditions. *Id.* So the MHRA does not apply.

What's more, the district court's reliance on the fact that "only women have the ability to become pregnant" is misplaced. Add.88. It's true that "[p]hysical differences between men and women . . . are enduring." *United States v. Virginia*, 518 U.S. 515, 533 (1996). But this biological fact merely shows that men and women aren't "similarly situated" when it comes to prescriptions for "emergency contraception."[9] *City of Minneapolis v. Richardson*, 239 N.W.2d 197, 202 (Minn. 1976). Women may receive one but men never will. To the extent that's relevant, it simply demonstrates the circumstances are "so unique that . . . a [direct] comparison is impossible." *Id.*

[9] Accordingly, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), is irrelevant.

In those circumstances, courts don't assume that unlawful discrimination exists; they require the plaintiff to establish a prima facie case by showing "treatment so at variance with what would reasonably be anticipated absent discrimination that discrimination is the probable explanation." *Id.*; *accord Doucette v. Morrison Cnty.*, 763 F.3d 978, 983–85 (8th Cir. 2014). Anderson cannot make that showing. Religious people, like Badeaux, object to abortion for reasons that are unrelated to sex. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273–74 (1993); *infra* Part II. So Anderson's sex-discrimination claim fails, as the MHRA does not require this Court "to treat things that are different in fact or opinion as though they were the same in law." *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553, 568 (Minn. Ct. App. 2020) (cleaned up).

C. MHRA caselaw rejects the notion that sex discrimination includes avoiding pregnancy and childbirth.

For decades, the MHRA has barred sex or pregnancy discrimination. But Anderson and the district court cited no prior case that suggests *avoiding* pregnancy and childbirth is protected. None exists.

The MHRA "prohibits disparate treatment of pregnant women." *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 624 (Minn. 1988). So courts applying the MHRA ask whether the plaintiff was "treated differently because of her pregnancy or a pregnancy-related condition." *Tong v. Am. Pub. Media Grp.*, No. A05-432, 2005 WL 3527273, at *3 (Minn. Ct. App. Dec. 27, 2005) (cleaned up); *Hietala v. Real Estate Equities/Vill. Green, LLC*, 998 F. Supp. 1065, 1068 (D. Minn. 1998) (cleaned up); *Deneen v. Nw. Airlines, Inc.*, 132 F.3d 431, 435 (8th Cir. 1998) (cleaned up). And they look to

whether the defendant "treated the pregnant plaintiff differently than *nonpregnant*" persons who are similarly situated. *Dahl v. Regents of Univ. of Minn.*, No. A12-1076, 2013 WL 1187996, at *4 (Minn. Ct. App. Aug. 6, 2013) (cleaned up); *Deneen*, 132 F.3d at 437 (cleaned up).

Anderson's claim is that she was not pregnant and needed ella to ensure she stayed that way. TrialTr.428, 459, 490. Because Anderson was not a pregnant woman, had no pregnancy or pregnancy-related condition, and qualified as a non-pregnant comparator herself, MHRA caselaw shows that she failed to state a valid sex-discrimination claim.

Anderson suggests that *Minnesota Mining and Manufacturing Co. v. State*, 289 N.W.2d 396 (Minn. 1979), justifies her sex-discrimination claim. AppellantBr.17. Not so. 3M's disability plan treated men better than women by covering "injuries resulting from voluntary participation in sports" but not "unforeseen and involuntary complications of pregnancy." *Minn. Mining*, 289 N.W.2d at 400. The Supreme Court held this pregnancy exclusion "from an otherwise comprehensive income maintenance plan [was] per se sex discrimination" because it treated "[w]omen in their childbearing years . . . as temporary members of the labor force" and "reflect[ed] traditional sexual role stereotypes," *i.e.*, that women "will eventually quit their jobs to become mothers." *Id.*

Badeaux's religious objection isn't remotely similar. He declines to personally dispense "emergency contraception" to anyone because of *how* it works. TrialTr.594–98; Add.87. *Who* requests the drug is irrelevant. Doc. 81 at 1. Whether the individual picking up and paying for the drug is a woman or her male partner, Badeaux refers requests for "emergency contraception" to another pharmacist at Thrifty White or elsewhere.

TrialTr.584–85, 684; Doc. 81 at 1; Add.87. And this effort to be "excused," TrialTr. 568, 571, is based on Badeaux's understanding of the origins and value of human life, not sex stereotypes, TrialTr. 567, 597–98; Doc. 81 at 1.

D. Federal precedent confirms that Anderson failed to state a valid sex-discrimination claim.

In construing the MHRA, this Court often considers decisions under federal non-discrimination laws, such as the Pregnancy Discrimination Act ("PDA"). *E.g.*, *Kolton v. County of Anoka*, 645 N.W.2d 403, 407 (Minn. 2002). The PDA contains sweeping language not found in the MHRA that bars discrimination based on "pregnancy, childbirth, or *related medical conditions*." 42 U.S.C. § 2000e(k) (emphasis added). Even with the PDA's broader language, the Eighth Circuit "rejected the argument that a causal connection, by itself, results in a medical condition being 'related to' pregnancy for PDA purposes." *In re Union Pac. R.R. Emp. Practices Litigation*, 479 F.3d 936, 941 (8th Cir. 2007).

The Eighth Circuit recognized that "contraception may certainly affect the causal chain that leads to pregnancy." *Id.* But that wasn't enough. The court held that "contraception is not 'related to' pregnancy for PDA purposes." *Id.* at 942. And it did so based on Anderson's view of how "emergency contraception" works, which is that ella "is not a medical treatment that occurs when or if a woman becomes pregnant; instead, [ella] prevents pregnancy from even occurring." *Id.*; *accord* TrialTr.334–35.

Anderson claims that *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Johnson Controls, Inc.*, 499 U.S. 187

(1991), supports her pregnancy-discrimination claim. Yet it actually supports Badeaux. That case involved Johnson Controls' policy of excluding women capable of bearing children from jobs involving lead exposure. *Id.* at 192. Because the employer gave "[f]ertile men, but not fertile women, . . . a choice as to whether they wish to risk their reproductive health for a particular job," its disability policy facially discriminated based on sex. *Id.* at 197.

The problem wasn't accounting for effects on unborn children. It was Johnson Controls' *selective* "concern[ ] only with the harms that may befall the unborn offspring of its female employees," despite evidence of "the debilitating effect of lead exposure on the male reproductive system." *Id.* at 198. Johnson Controls' policy did "not apply to the reproductive capacity of the company's male employees in the same way as it applies to that of the females," which is sex discrimination. But if the employer had sought "to protect the unconceived children of *all* its employees," the Supreme Court said no sex discrimination would have occurred. *Id.* at 198–99 (emphasis added). And protecting all unborn life is Badeaux's reason for objecting to dispensing ella here. TrialTr.596–98.

II. Badeaux's conscientious objection isn't discrimination based on sex, pregnancy, or any other protected ground in any event.

Badeaux's reason for not dispensing ella is clear: he does not wish "to participate in the death of a brand new human life." Doc. 81 at 1. No one contests Badeaux's sincere religious belief that life begins at conception, Add.97, or the FDA's concession that ella may work by preventing an embryo's implantation in the uterus, TrialTr.594–95; Def.'s

Ex. 12 at 7, 12. In short, Badeaux regards ella as an abortifacient that may terminate a pregnancy. Doc. 144 at 12.

In addition, Badeaux's objection to participating in abortion isn't discrimination based on sex, pregnancy, or any other protected ground.[10] The U.S. Supreme Court recently confirmed this principle in *Dobbs*. Abortion, the court said, "is a unique act" because it "destroys" what Badeaux regards as "an unborn human being." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2258 (2022) (cleaned up). Consequently, Badeaux's refusal to dispense an abortifacient drug "does not constitute 'invidiously discriminatory animus' against women." *Id.* at 2246 (quoting *Bray*, 506 U.S. at 273–74).

"Emergency contraception" like ella is "inherently different from other" drugs because it may "terminat[e]" what Badeaux regards as a unique human life. *Harris v. McRae*, 448 U.S. 297, 325 (1980). That "presents a profound moral question." *Dobbs*, 142 S. Ct. at 2284. Is it "wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another?" *Hobby Lobby*, 573 U.S. at 724. Badeaux answered that "important question of religion and moral philosophy" in the affirmative. *Id.* That's conscience, not discrimination. *Cf. Rasmussen v. Glass*, 498 N.W.2d 508, 516 (Minn. Ct. App. 1993) (holding Glass didn't discriminate, he "just exercised his constitutionally protected right of 'freedom of conscience' by refusing to enter" an abortion facility).

[10] De novo review also applies here. *Supra* Part I.

Courts agree that "abortion services are rationally distinct from other routine medical services, if for no other reason than the particular gravitas of the moral . . . aspects of the abortion decision." *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 173 (4th Cir. 2000). Drugs like ella are "fraught with consequences for the life or potential life that is aborted" and "who cannot consent to the [decision] to terminate her or his life or potential life." *EMW Women's Surgical Ctr. v. Beshear*, 920 F.3d 421, 430 (6th Cir. 2019). Roughly half of those terminated lives are female and would soon benefit from the same MHRA protections that Anderson claims here. Badeaux's refusal to participate in the destruction of any unborn life and referral of requests for "emergency contraception" to another pharmacist does not reflect "'a [discriminatory] purpose that focuses upon women *by reason of their sex*.'" *Portland Feminist Women's Health Ctr. v. Advocs. for Life, Inc.*, 62 F.3d 280, 284 (9th Cir. 1994) (quoting *Bray*, 506 U.S. at 263).

In sum, Badeaux's conscientious objection is "manifestly based on the prospect of abortion, not on the fact that the person who would obtain an abortion is a woman." *ACLU of Kan. & W. Mo.*, 863 F. Supp. 2d 1125, 1135 (D. Kan. 2012). That is not sex or pregnancy discrimination. Badeaux's "reasons for opposing [abortion]" are "common and respectable" and they reflect no "view at all concerning[ ] women as a class—as is evident from the fact that men and women are on both sides of the issue." *Bray*, 506 U.S. at 270.

III. Judgment as a matter of law is often unwarranted in MHRA cases and Anderson is not entitled to it here.

This Court reviews the district court's denial of Anderson's post-trial motion for judgment as a matter of law "de novo, viewing the evidence in the light most favorable to"

Defendants. *Vermillion State Bank v. Tennis Sanitation, LLC*, 969 N.W.2d 610, 618 (Minn. 2022). It will affirm "unless no reasonable theory supports the verdict." *Id.* at 618–19. "This means that to reverse, the evidence must be so overwhelming on one side that reasonable minds cannot differ as to the proper outcome." *Id.* at 619 (cleaned up).

Judgement as a matter of law is often unwarranted in MHRA cases because "whether discrimination occurred is a question of fact." *Aromashodu v. Swarovski N. Am. Ltd.*, 981 N.W.2d 791, 796 (Minn. Ct. App. 2022). Discrimination "cases often involve intricate factual issues in which only the trial court, with its opportunity to observe the witnesses firsthand, can meaningfully assess the weight and credibility of the evidence." *Sigurdson v. Isanti Cnty.*, 386 N.W.2d 715, 721 (Minn. 1986). Accordingly, this Court "accord[s] great deference to the trial court" because an appellate court "cannot judge the credibility of a witness or the weight, if any, to be given to testimony." *Id.*

Anderson is not entitled to judgment as a matter of law here. Thrifty White was willing and able to dispense ella upon delivery the next day and would have done so if Anderson had not transferred her prescription. TrialTr.585, 611, 615, 684. Accordingly, the jury found that neither Thrifty White nor Badeaux discriminated against or refused to do business with Anderson based on her sex. Add.31–32.

A. Thrifty White and Badeaux did not deny Anderson the full and equal enjoyment of a place of public accommodation.

The MHRA makes it "an unfair discriminatory practice" for a place of public accommodation like Thrifty White to "deny any person the full and equal enjoyment of [its] goods, services, facilities, privileges, advantages, and accommodations . . . because of

sex." Minn. Stat. § 363A.11(1). Anderson claims that she is entitled to judgment as a matter of law on her public-accommodation discrimination claim. AppellantBr.14–18. But her effort to overturn the jury's verdict and district court's findings is unfounded.

Anderson is right about one thing: it is possible to deny a person the full and equal enjoyment of a public of public accommodation without denying that person service. *E.g.*, *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415, at *19, *27–28 (D. Minn. Mar. 16, 2015). Where she goes astray is in adopting a definition of "full and equal enjoyment" that includes anything a customer doesn't like.

Not every interaction that a customer regards as "demean[ing]" or "offensive" is "actionable discrimination under the MHRA." *Bilal v. Nw. Airlines, Inc*., 537 N.W.2d 614, 619 (Minn. 1995); *cf. Bahr v. Capella Univ.*, 788 N.W.2d 76, 83 (Minn. 2010) ("Not everything that makes an employee unhappy is an actionable adverse employment action." (cleaned up)). The facts matter. This Court should reject Anderson's limitless theory of public-accommodation discrimination, which is ripe for abuse.

Sometimes no threshold for a MHRA claim is required. For instance, sexual harassment claims always involve materially adverse conduct, such as "unwelcome sexual advances, requests for sexual favors, [or] sexually motivated physical contact." Minn. Stat. § 363A.03(43). No other benchmark is necessary. *Longen v. Fed. Express Corp.*, 113 F. Supp. 2d 1367, 1376–77 (D. Minn. 2000). Yet, in the employment context, no starting line would allow plaintiffs to sue based on practically any workplace conduct, "transform[ing] the [MHRA] into a general civility code." *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d

222, 232 (Minn. 2020). So those plaintiffs must show a materially adverse employment action to prevail. *Henry*, 988 N.W.2d at 883–84; *Bahr*, 788 N.W.2d at 83.

The MHRA's public-accommodation provision is more like the statue's general ban on employment discrimination than the MHRA's more precise ban on sexual harassment. *Compare* Minn. Stat. § 363A.11(1) (barring sex discrimination in "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation"), *and* Minn. Stat. § 363A.08(3) (prohibiting sex discrimination "with respect to hiring, apprenticeship, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment"), *with* Minn. Stat. § 363A.03(43) (confining sexual harassment to "unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature" in specific egregious contexts).

So it made sense for *Rumble* and the district court to consider employment-discrimination law and apply a "tangible change in conditions" or "material disadvantage" threshold in the public-accommodation context.[11] *Rumble*, 2015 WL 1197415, at *19 (cleaned up); Add.65. It's true that *Bray v. Starbucks Corp.*, No. A17-0823, 2017 WL 6567695, at *7 (Minn. Ct. App. Dec. 26, 2017), declined to set "a threshold level of adverse conduct necessary to sustain a public-accommodation discrimination claim." But this Court's unreported ruling was restricted to "the alleged conduct in" *Bray*. *Id.* at *8. It

[11] Anderson contends that a discriminatory act is "sufficient injury for the law to provide a remedy, AppellantBr.41 (cleaned up), and she is correct as far as standing goes. But that doesn't mean a plaintiff is exempt from establishing the substantive elements of her claim.

established no hard and fast rule, as this Court acknowledged by saying that "it may be that *in another case*, we could be persuaded that some threshold severity level is necessary to sustain a public-accommodation discrimination claim." *Id.* (emphasis added).

This case is the textbook example of why a threshold is necessary. Anderson could have obtained ella from a non-objecting Thrifty White pharmacist after the drug was delivered the next day. TrialTr.611, 615. That didn't happen because Anderson voluntarily transferred her prescription to Walgreens. TrialTr.439, 448, 607. And that transfer occurred because Anderson was offended when Badeaux—out of an abundance of caution and due to a predicted snowstorm—tried to ensure that she would have prompt access to ella from another pharmacist. TrialTr.461–62, 603, 606. Just because Anderson disliked Badeaux's religious beliefs and felt slighted does not mean Thrifty White denied her the full and equal enjoyment of its services, privileges, and accommodations. *Cf. Bilal,* 537 N.W.2d at 619 (rejecting a similar argument).

Anderson may have subjectively believed that Badeaux wasn't doing his job. TrialTr.461–62. But that isn't enough to state an actionable public-accommodation claim. Anderson is not Badeaux's employer, and she misstates the law. Whereas customers like Anderson have no right to have their prescriptions filled by a particular pharmacist, employers like Thrifty White do have a legal obligation under Title VII and the MHRA to reasonably accommodate the religious beliefs and practices of employees like Badeaux. *Benjamin v. Cnty. of Hennepin*, No. C8-96-1122, 1996 WL 679690, at *3 (Minn. Ct. App. Nov. 26, 1996) (MHRA); *Groff v. DeJoy*, 143 S. Ct. 2279, 2296 (2023) (Title VII). It

would be incongruous for this Court to hold that Thrifty White violated one MHRA provision by complying with another. *But see* AppellantBr.25 n.9.

Anderson cannot show that her telephone conversation with Badeaux—which she prematurely ended—caused a tangible change in conditions or material disadvantage. Badeaux sought to ensure Anderson's ability to formulate a backup plan in case Grand couldn't make it through the predicted snowstorm such that Badeaux was the only pharmacist at Thrifty White the next day. TrialTr.602–03. Ensuring a customer's ability to fill her prescription is *providing* the full and equal enjoyment of Thrifty White's services, privileges, and accommodations, not *denying* them. The only material disadvantage would have been if Badeaux had left Anderson in the dark and, as a result, she was unable to obtain ella the next day. That's the opposite of what happened.

(Anderson says Badeaux didn't tell her ella is time sensitive, and that she drove two hours round trip to Walgreens. AppellantBr.15. But Anderson knew ella was time sensitive: she sought the "morning after pill," TrialTr.428–29, 459, 522, and when a nurse prescribed ella, she told Anderson to take it "in as timely a manner as possible" in the next five days, TrialTr.431. What's more, Anderson passed by Thrifty White on her way to Walgreens and could have obtained ella from a non-objecting pharmacist there. TrialTr.448, 611, 615. Once Anderson chose to transfer her prescription, it was not Defendants' fault that Anderson was unable to obtain ella at the Aitkin CVS. TrialTr.436.)

Moreover, Anderson cannot show that Thrifty White or Badeaux "treated [her] differently." *Aromashodu*, 981 N.W.2d at 796. Badeaux would refer any prescription for "emergency contraception" to another pharmacist; he treated all customers the same.

TrialTr.584–85, 684; Doc. 81 at 1; Add.87. Anyone who has ever been to a pharmacy knows that there may be delays. Pharmacists often call doctor's offices to seek clarification or make substitutions. And pharmacies make referrals for myriad reasons. Whether the pharmacy does not have a drug in stock, experiences a problem with its wholesaler, or has a delivery delay; or the pharmacist gets sick, can't make it through the weather; or has a conscientious objection; every customer faces the *possibility* of referral or delay. *E.g.*, TrialTr.695. It's the nature of the pharmacy business.

Nor did Anderson have to arrange her own referral. AppellantBr.15. Badeaux testified that if the need arose, he would have been happy to help Anderson find another pharmacy. TrialTr.261, 268–69. But Thrifty White's efforts to fill Anderson's prescription in-house would have succeeded. TrialTr.611, 615. So there was no need for Thrifty White to transfer Anderson's prescription to another pharmacy. In any case, Anderson ended the conversation prematurely before Badeaux could make further offers of help. TrialTr.616. And, when Anderson called back, she was only interested in obtaining Badeaux's name so that she could lodge complaints, TrialTr.438, 483–89, 609, and "do something about" his conscientious objection to dispensing "emergency contraception," TrialTr.609.

In sum, Anderson's public-accommodation claim fails because she "does not provide any evidence demonstrating that others outside the protected class would not have experienced the same [possibility of] delay." *Porter v. Children's Health-Care Minneapolis*, No. C5-98-1342, 1999 WL 71470, at *5 (Minn. Ct. App. Feb. 16, 1999). Thrifty White and Badeaux treated Anderson like any other valued customer: no better, no worse. And that's all the MHRA commands. *Aromashodu*, 981 N.W.2d at 796–97. The

statute doesn't require Thirty White and Badeaux to treat Anderson *better* by excusing her from the possibility of referral that all other customers face. *Cf. Deneen*, 132 F.3d at 436–37 (the PDA doesn't require "preferential treatment," employers must simply "treat pregnant women" the same as "similarly affected but nonpregnant employees") (cleaned up).

The district court was right to reject Anderson's request for judgment as a matter of law on her public-accommodation discrimination claim. Add.43–50.

B. Thrifty White and Badeaux did not intentionally refuse to do business with Anderson.

The MHRA renders it an "unfair discriminatory practice for a person engaged in . . . business or in the provision of a service" to "intentionally refuse to do business with" a person because of that "person's . . . sex . . ., unless the alleged refusal or discrimination is because of a legitimate business purpose." Minn. Stat. § 363A.17(3). Anderson insists that she is entitled to judgment as a matter of law on her business-discrimination claim. AppellantBr.18–25. But the record does not support Anderson's assertion that Thrifty White and Badeaux refused to do business with her, let alone that they did so intentionally.

Courts have not often considered the MHRA's business-discrimination provision. *E.g.*, *Krueger v. Zeman Constr. Co.*, 781 N.W.2d 858, 863–64 (Minn. 2010). Nevertheless, the statue's language is clear: a refusal to do business is required. The ordinary meaning of refusal is "the act of refusing or denying."[12] Refusing normally means "to express oneself as unwilling to accept," "to show or express unwillingness to do or comply with," or "to

[12] *Refusal*, Merriam-Webster Dictionary Online, https://bit.ly/47qnANj.

not allow someone to have or do (something)."[13] Additionally, what the MHRA means by "business" is plainly "dealings or transactions especially of an economic nature."[14]

Together, the MHRA's business-discrimination provision requires Anderson to prove, in part, that Thrifty White and Badeaux either would not accept or were unwilling to do economic dealings with her, or would not allow her to have something through an economic transaction. But it's impossible for Anderson to make that showing. Thrifty White's policy was to *fill* prescriptions for "emergency contraception" in-house. Trial.Tr.585, 684. The pharmacy filled prescriptions for Plan B during Badeaux's tenure. TrialTr.679–80. And a non-objecting Thrifty White pharmacist was ready and willing to dispense ella to Anderson the same day the drug would have arrived. TrialTr.611, 615.

So, Badeaux's conscientious objection did not affect Anderson's opportunity to do business with Thrifty White. The pharmacy accepted Anderson's prescription and placed ella on its drug-order list. TrialTr.592, 602. A non-objecting Thrifty White pharmacist was available to dispense ella to Anderson at the earliest opportunity. TrialTr.611, 615. And Badeaux did nothing to prevent Anderson from obtaining ella from a different pharmacist—at Thrifty White or elsewhere. TrialTr.568, 606; *cf. Rasmussen*, 498 N.W.2d at 516 ("Glass did nothing to either hinder or interfere with the activity of the medical facility."). In fact, Badeaux's call to Anderson was to ensure that she could still obtain ella on the off-chance he was the only pharmacist at Thrifty White the next day due to the projected storm. TrialTr.602–03, 606. The only "refus[al] to do business," Minn. Stat. § 363A.17(3), was

[13] *Refusing*, Merriam-Webster Dictionary Online, https://bit.ly/3OP6Ckm.
[14] *Business*, Merriam-Webster Dictionary Online, https://bit.ly/3Qyqk58.

Anderson's decision to no longer use Thrifty White because she was offended by Badeaux's religious beliefs, TrialTr.455–56.

What's more, Anderson cannot show that any perceived "refusal to do business" on her part was caused "intentionally" by Thrifty White and Badeaux. Minn. Stat. § 363A.17(3). Anderson spills much ink debating what "intentionally" means. But the Eighth Circuit has already held that "intentional" is "a term of art" with "a fixed, technical meaning." *In re Geiger*, 113 F.3d 848, 852 (8th Cir. 1997). In those circumstances, this Court applies a term's "special meaning." Minn. Stat. § 645.08(1); *State v. Jonsgaard*, 949 N.W.2d 161, 164 (Minn. Ct. App. 2020) (cleaned up).

The correct definition of "intentionally" is therefore "a deliberate or intentional" refusal to do business. *In re Geiger*, 113 F.3d at 852. As such, a business must "desire[ ] to cause [those specific] consequences." *Id.* (cleaned up). It is not enough that a business "merely [engages in] a deliberate or intentional act" that a court later deems a refusal to do business. *Id.* A business must "act with intent to cause" that specific result. *Id.* (cleaned up); *accord Casanova v. Tri-Cnty. Cmty. Corr.*, No. A19-1996, 2020 WL 4280999, at *7 (Mich. Ct. App. July 27, 2020) ("intentionally," means that the actor wants to cause the consequence of his act or knows [it] is substantially certain").

The record shows the exact opposite of Anderson's claim that Thrifty White or Badeaux *wanted* to refuse her business. Thrifty White's policy was to fill prescriptions for "emergency contraception" in house. TrialTr.611, 615. Hutera, the pharmacy's owner, made a concerted effort to placate Anderson and win back her business. TrialTr.305–06, 480–81, 688–93. And Badeaux, the pharmacist-in-charge, left ella on the pharmacy's order

list until Anderson transferred her prescription to Walgreens, and he was certain Anderson wouldn't "change her mind . . . and . . . decide to . . . fill [her prescription] at Thrifty White the following morning." TrialTr.617; *accord* TrialTr.607. There is no evidence that Thrifty White or Badeaux deliberately chose to turn Anderson's business away.

What's more, Anderson cannot prevail even under a less demanding reading of "intentionality." AppellantBr.20–22. No reasonable theory of the evidence supports Anderson's argument that Thrifty White and Badeaux knew the latter's conscientious objection would result in Anderson being turned away. AppellantBr.20–22. In fact, Anderson was *not* turned away; she voluntarily chose to transfer her prescription. TrialTr.439, 607. So Anderson's theory is counterfactual. Badeaux also testified that he could not make advance arrangements for another pharmacy to fill ella prescriptions for myriad reasons, including that he didn't know of ella's existence. TrialTr.260, 266–67, 620. And, as far as the Minnesota Board of Pharmacy's guidance is concerned, Badeaux testified that he called Anderson to comply with that guidance and ensure she could obtain ella from another pharmacist, not obstruct her path. TrialTr.603, 606.

Because Anderson cannot show "a refus[al] to do business," let alone an "intentional[ ]" one, the district court correctly denied Anderson's request for judgment as a matter of law on her business-discrimination claim. Add.51–53.

(The jury did not reach the legitimate-business-purpose issue, Add.32, and this Court need not either. But the record establishes legitimate business purposes for Thrifty White's referral policy, including (1) the MHRA's and Title VII's religious-accommodation requirements, TrialTr.699, 716, (2) avoiding a violation of the Minnesota

or United States Constitution's free-exercise provisions, *infra* Part IV.A, and (3) Thrifty White's small size and difficulty hiring pharmacists in a rural location, TrialTr.696–97. *Accord* Add.52–53.)

C. Badeaux is not liable for aiding and abetting sex discrimination.

The MHRA makes it "an unfair discrimination practice for any person" either to "intentionally . . . aid, abet, incite, compel, or coerce a person to engage in any of the practices forbidden by this chapter" or attempt to do so. Minn. Stat. § 363A.14(1) & (2). Anderson requests judgment as a matter of law on her claim that Badeaux intentionally aided or abetted sex discrimination or attempted to do so. AppellantBr.24–25. But that request fails for three independent reasons.

First, "a viable discrimination claim is a prerequisite to a claim of aiding and abetting discrimination." *Matthews v. Eichorn Motors, Inc.*, 800 N.W.2d 823, 830 (Minn. Ct. App. 2011). The jury found that neither Thirty White nor Badeaux engaged in sex or pregnancy discrimination. Add.31–32. That finding was correct for the reasons described above. *Supra* Parts I–II.B. Consequently, Anderson's aiding-and-abetting claim necessarily fails. Add.54.

Second, for aiding-and-abetting liability to apply, a person must "know[ ] that another person's conduct constitutes a violation of the MHRA." *Matthews*, 800 N.W.2d at 830 (cleaned up). Whereas Anderson cites no prior case in which a court has classified a religious objection to abortion as sex discrimination, Badeaux catalogues a line of cases holding the opposite. *Supra* Part II. Given this precedent, and the Pharmacy Board's

direction, Badeaux lacked knowledge that his religious objection could potentially violate the MHRA.

Last, Anderson claims that Thrifty White's referral policy is facially discriminatory. AppellantBr.25. But that argument rings hollow. Direct evidence shows that "discrimination [is] purposeful, intentional or overt." *Hanson v. Dep't of Nat'l Res.*, 972 N.W.2d 362, 373 (Minn. 2022). Two examples of direct evidence are an "employer announc[ing] he will not consider females for positions," *Sigurdson*, 386 N.W.2d at 720; or "[a]t least five people testif[ying] that they heard" the company president state that "older employees have problems adopting to changes and to new policies" where the president "actively participated in the personnel decisions at issue," *Beshears v. Asbill*, 930 F.2d 1348, 1354 (8th Cir. 1991).

Thrifty White's actions aren't even remotely comparable. There's nothing facially discriminatory about the referral policy, which says nothing about sex or pregnancy and respects pharmacists' conscience rights while ensuring customers may obtain "emergency contraception." *Cf. Monson v. Rocester Athletic Club*, 759 N.W.2d 60, 64 (Minn. Ct. App. 2009) (rejecting a similar facial-discrimination argument). Accordingly, the only alleged "discriminator" is Badeaux. Yet it is well-established that Badeaux "cannot aid and abet his own [allegedly] discriminatory conduct." *Rasmussen v. Two Harbors Fish Co.*, 817 N.W.2d 189, 203 (Minn. Ct. App. 2012), *aff'd in relevant part by Rasmussen v. Two Harbors Fish Co.*, 832 N.W. 2d 790, 800–01 (Minn. 2013).

IV. Badeaux's conscience rights aren't an affirmative defense; they explain why Defendants didn't violate the MHRA in the first place. Ignoring them would eliminate basic rules of statutory construction and flip the MHRA on its head.

Anderson paints Badeaux's religious beliefs and freedom of conscience as an affirmative defense. AppellantBr.28. She is mistaken. Affirmative defenses "excuse[ ] conduct that would otherwise be punishable." *Iromuanya v. Frakes*, 866 F.3d 872, 880 (8th Cir. 2017). Badeaux's argument has always been that Anderson can't show a MHRA violation in the first place. *Supra* p.14. No constitutional defense is necessary because there's no punishable conduct to "exempt[ ]." AppellantBr.28.

(Badeaux's argument has always been that courts should construe the MHRA in accord with its plain language to avoid a constitutional violation, not that he violated the MHRA but merits a constitutional exemption. So Minn. R. Civ. P. 5A does not apply. It's unclear what "constitutional question" Anderson and the Attorney General think Badeaux should have "stat[ed]" or what "document" they believe Badeaux should have "identif[ied]." Minn. R. Civ. P. 5A(1). Regardless, there's no prejudice: the Attorney General's Office was plainly aware of this high-profile matter and could have moved to intervene below or on appeal, but instead chose to participate by filing two amicus briefs.)

Badeaux's conscience rights inform both this Court's interpretation of the MHRA and the standard analysis of Anderson's discrimination claim.[15] Anderson's contrary argument is untenable because it eliminates basic rules of construction and flips the MHRA on its head. In any case, this Court may reach the constitutional issues because the district

[15] De novo review also applies here. *Supra* Part I.

court ruled on them, *Thorp v. Price Bros. Co.*, 441 N.W.2d 817, 819 (Minn. Ct. App. 1989); Add.47–50, 69–72, and Badeaux's "conscience is too important not to be considered," *Rasmussen*, 498 N.W.2d at 515.

A. The constitutional avoidance doctrine applies because forcing Badeaux to dispense "emergency contraception" would conflict with his rights under the U.S. and Minnesota Constitutions.

Under the constitutional avoidance doctrine, courts "construe statues to avoid a constitutional confrontation if it possible to do so." *Limmer v. Ritchie*, 819 N.W.2d 622, 628 (Minn. 2012) (per curiam) (cleaned up); *accord* Minn. Stat. § 645.17(3). "[E]ven if the construction that avoids a constitutional confrontation is . . . less natural," the doctrine applies "so long as the construction is a reasonable one." *Limmer*, 819 N.W.2d at 628 (cleaned up).

Anderson's novel interpretation of sex discrimination under the MHRA poses a "potential constitutional conflict" that "reinforces [the] plain meaning" of the statue's language that Badeaux described above. *State v. Holmes*, 787 N.W.2d 617, 622 (Minn. Ct. App. 2010); *accord supra* Part I–III.B. Courts have long recognized that laws like the MHRA "cannot be construed so broadly as to violate the . . . constitution." *Rasmussen*, 498 N.W.2d at 514; *accord Telescope Media Grp.*, 936 F.3d at 755.

The U.S. Supreme Court underscored that principle last term in *303 Creative*, holding "that no public accommodations law is immune from the demands of the Constitution." 143 S. Ct. at 2315. Consequently, Anderson's lack-of-relevant-MHRA-exemptions argument is beside the point. AppellantBr.26–27. "When a state public

accommodations law and the Constitution collide, there can be no question which must prevail. U.S. Const., Art. VI, cl. 2." *303 Creative*, 143 S. Ct. at 2315.

Anderson's position that the MHRA bars healthcare providers like Badeaux from objecting to participating in abortion is constitutionally problematic for several reasons. First, the U.S. Supreme Court has placed text, history, and tradition at the forefront of constitutional analysis. *E.g.*, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428–29 (2022) (First Amendment); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126–29 (2022) (Second Amendment); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242–43, 2248–49 (2022) (Fourteenth Amendment).

Textually, the First Amendment to the U.S. Constitution bars "prohibition[s] on the free exercise of religion" and "protect[s] the ability of those" like Badeaux "who hold religious beliefs . . . to live out their faith[ ] in daily life through the performance of (or abstention from) physical acts." *Kennedy*, 142 S. Ct. at 2421 (cleaned up). That includes abstaining from personally dispensing "emergency contraception," which Badeaux believes may end a human life to which God ascribes high value. TrialTr.567, 596–98.

Historically, the founding generation was highly protective of conscientious objectors, specifically, those whose faith barred taking oaths in court, serving in the military, or paying religious assessments. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1466–73 (1990). For instance, the Continental Congress excused those who objected to killing from

military service—even when American independence was at stake.[16] *Id.* at 1468–69. And Congress did so because free-exercise principles required it. *Id.* at 1473. The same principles require excusing Badeaux from participating in abortion.

Second, even under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), it violates the Free Exercise Clause to "prohibit[ ] religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). Minnesota could not constitutionally bar Badeaux's religious conduct while allowing sex discrimination to occur for secular reasons in restrooms and locker rooms, youth programming, and sports teams. Minn. Stat. § 363A.24.

Last, the Minnesota Constitution "grants far more protection of religious freedom than the broad language of the United States Constitution." *State v. French*, 460 N.W.2d 2, 9 (Minn. 1990). Under the state's free exercise clause, "[t]he right of every man to worship God according to the dictates of his own conscience shall never be infringed . . . nor shall any control of our interference with the rights of conscience be permitted." Minn. Const. art. I, § 16. The only exception is if the state shows a compelling interest in either "peace or safety" or preventing "acts of licentiousness" and that "no less restrictive alternative exist[s]." *State v. Hershberger*, 462 N.W.2d 393, 397–98 (Minn. 1990).

Minnesota couldn't satisfy that demanding test here. In *Rasmussen*, the Minneapolis Commission on Human Rights found a restaurant owner liable for discrimination based on

[16] *Accord* Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 EMORY L.J. 121, 130–32 (2012).

his religious objection to delivering food to an abortion facility. 498 N.W.2d at 509–10. So he was forced to choose between "associat[ing] with an entity that engages in conduct which he finds to be morally offense, thus compromising his conscience, or . . . refus[ing] and be[ing] found guilty of discrimination and fined." *Id.* at 515–16. This Court ruled that the city's non-discrimination ordinance didn't apply. *Id.* at 512–14. But even if it did, this Court held that the restaurant owner's "rights of conscience, which are jealously guarded by the Minnesota Constitution, are entitled to priority." *Id.* at 516. Just as Minneapolis lacked a pertinent compelling interest in forcing the restaurant owner to "enter upon the [abortion facility's] premises," Minnesota couldn't show a compelling interest in forcing Badeaux to personally dispense "emergency contraception" here. *Id.* at 516.

B. Anderson's interpretation of the MHRA should be rejected because it conflicts with federal law and puts the MHRA at war with itself.

Federal law prevails over conflicting state laws. U.S. Const. art. VI, cl.2. When there is "a theoretical conflict between two laws" and "a state law can be interpreted" in a way that "conflict[s] with federal law" and a way that does "not," this Court "will generally" construe the law to "avoid[ ] the conflict." *Nat'l Council on Teacher Quality v. Minn. State Colls. & Univs.*, 837 N.W.2d 314, 318 (Minn. Ct. App. 2013).

That principle applies here, as Anderson's interpretation of the MHRA conflicts with federal law in two ways. First, Title VII requires employers like Thrifty White to reasonably accommodate their employees' religious beliefs absent undue hardship. *Groff*, 143 S. Ct. at 2286. Not every burden counts: the employer must show "a burden [that] is substantial in the overall context of [its] business." *Id.* at 2294. Badeaux simply referred

requests for "emergency contraception" to another pharmacist happy to dispense them. TrialTr.585, 615. And that accommodation caused no substantial burden on Thrifty White's business. Hence, it would have violated Title VII for Thrifty White to rescind Badeaux's accommodation, as Hutera understood. TrialTr.699; *accord Vandersand v. Wal-Mart Stores, Inc.*, 525 F. Supp. 2d 1052, 1054–57 (C.D. Ill. 2007) (objecting pharmacist put on unpaid leave stated a Title VII claim).

Second, the Weldon Amendment is an appropriations rider that Congress has included every year since 2004. U.S. Dep't of Health & Human Servs., Conscience and Religious Nondiscrimination, https://bit.ly/3OSsKdB. The Amendment bars certain federal agencies from providing funds to a "State or local government" that "subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Consolidated Appropriations Act, 2005, Pub. L. No. 108–447, 118 Stat. 2809 (2005). The definition of "health care entity" includes any "health care professional" *Id.* Subjecting objecting pharmacists like Badeaux to MHRA liability would likely constitute discrimination based on their refusal to provide abortions, which could result in Minnesota "losing billions in federal aid." *California ex rel. Lockyer v. United States*, 450 F.3d 436, 439 (9th Cir. 2006).

What's more, this Court construes statutes "as a whole," "give[s] effect to all of [their] provisions," and "interpret[s] each section in light of the surrounding sections to avoid conflict[s]." *City of W. St. Paul v. Krengel*, 768 N.W.2d 352, 356 (Minn. 2009). The MHRA doesn't just protect customers, it also protects religious workers by mandating

reasonable accommodations[17] and barring employers from seeking "information" about applicants' or employees' "religion" or "creed."[18] Yet Anderson seeks to render Badeaux's accommodation *unlawful* and legally compel employers to *interrogate* pharmacists about their faith, so they can "weed out" religious objectors at the start. *Cf.* TrialTr.455–56. Her construction would put the MHRA "at war with itself." *Groff*, 143 S. Ct. at 2296.

C. Standard features of MHRA analysis requires consideration of Badeaux's religious beliefs and conscience rights.

Anderson insists that Badeaux's conscientious objection is irrelevant unless he concedes MHRA liability and raises an exemption or defense. AppellantBr.29. She is wrong. Three standard features of MHRA analysis require the fact finder to consider Badeaux's religious objection. First, because the MHRA bars discrimination on specific grounds, it doesn't so much regulate *what* people do as *why* they do it. *Richardson*, 239 N.W.2d at 201–02. The main question is whether a "protected trait actually motivated the [challenged] decision." *Goins*, 635 N.W.2d at 722 (cleaned up). "Proof of discriminatory motive is critical," *id.*, as proof of disparate impact fails, *Monson*, 759 N.W.2d at 67. Badeaux's argument that he wasn't "motivated by intentional discrimination" depends on explaining his true motives. *Burchett v. Target Corp.*, 340 F.3d 510, 519 (8th Cir. 2003). And those motives are Badeaux's religious beliefs about life's beginnings and objection "to participat[ing] in anything that might cause a fertilized egg to die," TrialCt.598.

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[17] Minn. Stat. § 363A.08; *Maroko v. Werner Enters., Inc.*, 778 F. Supp. 2d 993, 998 n.5 (D. Minn. 2011); *Benjamin*, 1996 WL 679690, at *3; Amicus Br. of Comm'r of Minn. Dep't of Human Rights at 14 n.8

[18] Minn. Stat. § 363A.08(4).

Second, direct evidence of discrimination is rare, so the *McDonnell-Douglas* framework applies to nearly all MHRA claims. *Hanson*, 972 N.W.2d at 372–73. Under that scheme, if the plaintiff makes out a prima facie case, the defendant must offer "a non-discriminatory rationale," *Taylor v. LSI Corp. of Am.*, 781 N.W.2d 912, 917 (Minn. Ct. App. 2010), or "legitimate, non-discriminatory reason for" its actions, *Sigurdson*, 386 N.W.2d at 720. Badeaux's bias-free reason is his conscientious objection to participating in the destruction of human life. TrialTr.597–98. "[A]bundant and uncontroverted" evidence supports that "non[-]discriminatory reason for" Badeaux's actions here. *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 546 (Minn. 2001).

Last, a defendant isn't liable for business discrimination if its "alleged refusal or discrimination is because of a legitimate business purpose." Minn. Stat. § 363A.17. Title VII and the MHRA impose a legal obligation on Thrifty White to reasonably accommodate Badeaux's religious practice. *Supra* Part IV.B. So Badeaux's free-exercise rights are key to showing a legitimate business purpose for Thrifty White's referral policy too.

V. Anderson is not entitled to a new trial.

This Court reviews the denial of a new trial for an abuse of discretion. *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018). Whether the verdict is justified by the evidence is "a factual question" over which the district has "the broadest possible discretion[ ]" because it "may properly weigh the evidence." *Clifford v. Geritom*, 681 N.W.2d 680, 687 (Minn. 2004) (cleaned up). "The district court [also] has broad discretion in determining jury instructions," and this Court will affirm so long as they "overall fairly and correctly state the applicable law." *Christie*, 911 N.W.2d at 838 (cleaned up). An

erroneous instruction doesn't merit a new trial. This Court will affirm unless the error was "prejudicial" or "would have changed the outcome." *Id.* (cleaned up). Similarly, the district court has "broad discretion" when it comes to the admission or exclusion of evidence. *Jennie-O-Foods, Inc. v. Safe-Glo Prods. Corp.*, 582 N.W.2d 576, 580 (Minn. Ct. App. 1998). Evidentiary errors don't justify a new trial unless the complaining party shows they had a prejudicial effect. *Id.*

Anderson raises a laundry list of reasons why she is entitled to a new trial. AppellantBr.30–49. None have merit.[19] In fact, most simply duplicate Anderson's arguments for judgment as a matter of law. So the Court need not dwell on them and may affirm based on a lack of prejudice, as the district court explained. Add.58–74.

A. The jury's verdict is justified by the evidence and accords with the law.

Anderson's claim that the jury's verdict isn't justified by the evidence rehashes her arguments for judgments as a matter of law. ApppellantBr.31–33. As explained, the district court was correct to set a threshold for Anderson's public-accommodation claim, and Badeaux prevails on that claim regardless.[20] *Supra* Part III.A. Thrifty White's referral policy isn't facially discriminatory. *Supra* Part III.C. Badeaux's religious beliefs and conscience rights must be considered. *Supra* Part IV.C. And the district court correctly

[19] Badeaux relies on, and incorporates by reference, Thrifty White's responses to Anderson's claims regarding agency and subsequent remedial measures. AppellantBr.33–37, 43–46.

[20] Anderson disputes the threshold requirement again in Part II.E of her brief. But her arguments are equally flawed this time around, *supra* Part III.A, and she fails to demonstrate prejudice, Add.64–66.

defined intent, though Defendants prevail under any reasonable definition of that term.[21] *Supra* Part III.B.

Likewise, Anderson's direct-evidence argument is just another variation of her claim that Thrifty White's policy is facially discriminatory. It's true that "proof of a discriminatory motive may be established by direct evidence." *Goins*, 635 N.W.2d at 722. But "[d]irect evidence [of] . . . discriminatory motive," *id.*, is exceptionally rare, *Hanson*, 972 N.W.2d at 372–73, and Anderson didn't provide any, *supra* Part III.C. So the district court correctly applied the *McDonnell-Douglas* framework. *Cf. Hanson*, 972 N.W.2d at 372–74 (rejecting a direct-evidence argument and applying *McDonnell-Douglas*).

Anderson also claims that the Minnesota Board of Pharmacy's guidance was compelling evidence of an "alternative polic[y] or practice[ ]." AppellantBr.33. But, as previously explained, that guidance doesn't apply because Thrifty White was willing to "honor" Anderson's prescription and had a pharmacist on staff who was happy to fill it. Add.1; *supra* p.8 n.4.

In sum, the jury's verdict is amply supported by the evidence, the district court did not abuse its discretion, and Anderson is not entitled to a new trial.

B. The jury instructions make clear that sex is a protected class.

Anderson complains that the jury instructions didn't say "sex is a protected class." AppellantBr.42 (cleaned up). Her objection is meritless. This Court considers the jury

[21] Anderson makes another intentionality argument in Part II.D of her brief, which fails for the same reasons. *Supra* Part III.B. She also cannot show prejudice. Add.72–73.

instructions "taken as a whole." *Engquist v. Loyas*, 803 N.W.2d 400, 403 (Minn. 2011). Considered together, the jury instructions make clear that sex is a protected class.

Take the public-accommodation-discrimination instruction, which told the jury to determine whether Anderson "is a member of a protected class" and whether "Thrifty White denied her full and equal enjoyment in goods or services because of her sex." Add.15. The court would hardly ask the jury to determine whether Defendants discriminated "because of" Anderson's sex if sex wasn't a protected classification. What's more, the instruction goes on to define "sex" and "because of her sex." Add.17. So the jury was well aware that discriminating based on sex violates the MHRA. Logically, that could only be true if sex is a protected class.

Also relevant to the big picture is the business-discrimination instructions, which explained that Defendants were liable if they "[i]ntentionally . . . [r]efused to do business with" Anderson "[b]ecause of her sex," asked whether Anderson had made that showing, and defined "sex" and "because of her sex." Add.18–21. None of this guidance would be relevant if sex wasn't a protected classification.

Those jury instructions also make references to the special verdict form, which asked the jury to decide whether Defendants acted "because of [Anderson's] sex" three separate times. Add.31–32. The jury was well aware that Anderson's sex made her a member of a protected class. Otherwise, Anderson could not have filed suit, and the five-day trial would have made no sense.

C. The district court correctly admitted Anderson's therapy records, and that evidentiary ruling caused no prejudice.

Anderson challenges the district court's admission of her therapy records, AppellantBr.46–49, which are essentially self-reports of her progress, TrialTr.643, 650–51, 653. But her objections fail. In the complaint, Anderson alleged three times that she "suffered emotional distress" as a direct "result of Defendants' illegal conduct." Doc. 1 at 11–12. Defendants could only counter that argument by showing that any emotional distress Anderson experienced was caused by something else. The best—and perhaps only—evidence of other reasons for Anderson's alleged emotional distress was her therapy records. So Defendants had a real need for those records and the district court had legitimate grounds to admit them into evidence. Naming just one example, Anderson's counseling records divulged that her dog went missing, and that Anderson was more upset about her lost dog than her conversation with Badeaux. TrialTr.453–55, 644.

Plaintiffs make certain choices in deciding whether to file suit. One of those choices is whether to "voluntarily place[ ] in controversy" their "mental . . . condition" and "waive[ ] any privilege [they] may have in that action regarding the testimony of every person who has examined [them]." Minn. R. Civ. P. 35.03. Anderson may regret waiving any privilege. But that does not mean the district court erred.

Instead, the district court's evidentiary ruling is firmly grounded on *Navarre v. South Washington County Schools*, 652 N.W.2d 9 (Minn. 2002). That case involved a similar emotional-distress claim. *Id.* at 16–20. "[T]he district court did not allow any impeachment of [the plaintiff's] testimony by cross-examination or the introduction of [the

plaintiff's] . . . prior medical and psychological history." *Id.* at 30. And the Minnesota Supreme Court held this was reversible error because the plaintiff sought "emotional damages . . . and put[ ] her emotional state at issue." *Id.* So the defendant "should be allowed to introduce probative evidence of the plaintiff's preexisting condition, treatment and prognosis, including . . . medical records." *Id.*

Anderson counters with this Court's decision in *Gillson v. State Department of Natural Resources*, 492 N.W.2d 835, 842 (Minn. Ct. App. 1992), which held that "[a] sexual harassment plaintiff does not automatically place her mental condition in issue." But Anderson isn't a sexual-harassment plaintiff. So *Gillson* is beside the point.

In any case, Anderson cannot show prejudice. Defendants attempted to show other reasons for Anderson's emotional distress. *E.g.*, TrialTr.949. But they weren't entirely successful. Though the jury found that Badeaux didn't discriminate against Anderson based on sex, it accepted that he caused her $25,000 worth of emotional harm. Add.33. The admission of Anderson's counseling records clearly had no adverse effect.

CONCLUSION

Anderson had a full and fair opportunity to try her case before a jury of her peers. After a five-day trial, that jury found Badeaux and Thrifty White did not discriminate against Anderson based on her sex or otherwise violate the MHRA. The trial court agreed and denied Anderson's motions for judgment as a matter of law and new trial. George Badeaux respectfully requests that this Court affirm the district court's judgment.

Respectfully submitted,

Dated: August 14, 2023

s/Charles Shreffler

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the following requirements:

1. The brief was drafted using Microsoft Word 365 word-processing software;
2. This brief was drafted using Times New Roman 13-point font, compliant with the typeface requirements in Rule 132.01; and
3. There are 13,747 words in this brief.

Dated: August 14, 2023

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