No. 17-3352

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TELESCOPE MEDIA GROUP, CARL LARSEN, AND ANGEL LARSEN,

Plaintiffs-Appellants,

v.

KEVIN LINDSEY AND LORI SWANSON,

Defendants-Appellees.

On Appeal from a Final Judgment of the
United States District Court for the District of Minnesota
Case No. 0:16-cv-04094-JRT-LIB, Hon. John R. Tunheim

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ANTI-DEFAMATION LEAGUE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; CENTRAL CONFERENCE OF AMERICAN RABBIS; INTERFAITH ALLIANCE FOUNDATION; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; MUSLIM ADVOCATES; NATIONAL COUNCIL OF JEWISH WOMEN, INC.; PEOPLE FOR THE AMERICAN WAY FOUNDATION; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM AS *AMICI CURIAE* SUPPORTING APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amici are nonprofit corporations. They have no parent corporations, and no publicly held corporation owns any portion of any of them.

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici represent diverse beliefs, experiences, and faith traditions but share a commitment to religious freedom and to ensuring that all Americans remain free from discrimination.

The constitutional protections for religious freedom and equal protection safeguard equal treatment and equal dignity for all persons. *Amici* are dedicated to ensuring that our Nation's fundamental commitment to these values is never eroded or tainted by misusing the language of religious freedom to afford official imprimatur to maltreatment of people based on their religion, race, sex, sexual orientation, or other protected classifications.

The *amici* are:

- Americans United for Separation of Church and State.
- Anti-Defamation League.
- Bend the Arc: A Jewish Partnership for Justice.
- Central Conference of American Rabbis.
- Interfaith Alliance Foundation.
- Lambda Legal Defense and Education Fund, Inc.
- Muslim Advocates.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing.

- National Council of Jewish Women, Inc.
- People for the American Way Foundation.
- Union for Reform Judaism.
- Women of Reform Judaism.

More detailed descriptions appear in the Appendix.

SUMMARY OF ARGUMENT

Like many jurisdictions, Minnesota has enacted laws to ensure that its citizens will not endure "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments" (*Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964)). The State has recognized that, as with discrimination based on race, national origin, or religion, withholding goods and services from customers based on sexual orientation "threatens the rights and privileges of the inhabitants of [Minnesota] and menaces the institutions and foundations of democracy." MINN. STAT. § 363A.02(1).

Telescope maintains that the First Amendment licenses it to disregard these laws. The for-hire videography company and its owners insist that they have free-speech rights to refuse to sell wedding videos to same-sex couples on the same terms as they would for opposite-sex couples because doing so would "promote and celebrate . . . marriage[s] that contradict[] their religious beliefs." Br. 26. The wedding-day celebration belongs to the marrying couple.

Hence, if a wedding video communicates any message, that too, belongs to the couple—not to the caterer, the florist, or the videographer. In all events, the Minnesota Human Rights Act regulates only commercial conduct, requiring businesses to serve customers on nondiscriminatory terms. It does not compel them to speak.

Nor does the Act impede Telescope's rights of expressive association. Because Telescope is not speaking for First Amendment purposes, it also does not "express" anything; and its customers do not "associate" with it and each other to further a shared message. Telescope thus has no colorable expressive-association claim.

The Free Exercise Clause likewise confers no right to violate the Minnesota Human Rights Act, for the Clause has never been interpreted to authorize religious exemptions from generally applicable laws when the exemptions would harm third parties. Indeed, the Establishment Clause strictly prohibits such exemptions.

If Telescope's arguments were sufficient to override antidiscrimination laws, all businesses open to the public would have the right to discriminate. Lesbians, gay men, bisexuals, and their children would not know which businesses will or won't serve them. But they *would* know that the law does not protect their rights to equal access to places of public accommodation. And Telescope's arguments would apply in just the same way to all classes

protected by antidiscrimination laws. Businesses could refuse service based not just on sexual orientation but also on race, national origin, gender, or religion. That result would undermine religious freedom and the entire civil-rights legal regime.

The Constitution does not license discrimination, and Minnesota wisely forbids it. The district court's decision should be affirmed.

ARGUMENT

I. THE MINNESOTA HUMAN RIGHTS ACT COMPORTS WITH FREEDOM OF SPEECH.

A. Requiring videographers to serve customers on nondiscriminatory terms does not compel speech.

Because the Minnesota Human Rights Act regulates commercial conduct—nondiscriminatory service of customers—rather than expression, it does not implicate the compelled-speech doctrine. To be sure, the Free Speech Clause safeguards the right not to speak. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). But there is a world of difference between protected speech (or silence) and unprotected conduct. Thus, although "[i]t is possible to find some kernel of expression in almost every activity a person undertakes . . .[,] such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

Conduct may be considered protected speech only if it reflects the intent to convey a specific message and "the likelihood [i]s great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 411 (1974). No matter how creative a wedding video is, the act of recording it does not convey the *videographer*'s message—and no one understands it that way. *Cf. Elane Photography, LLC v. Willock*, 309 P.3d 53, 69 (N.M. 2013) ("the public [well knows] that wedding photographers are hired by paying customers and . . . may not share the happy couple's views"). The message belongs to the marrying couple. Thus, although Telescope and its owners may broadly wish "to promote God's design for marriage" (Br. 23), that desire does not transform their commercial enterprise into protected free speech for First Amendment purposes. Minnesota law does not require Telescope to proclaim any belief about its customers or their marriages—not on its property, not on its website, and not on any promotional or advertising materials.[2] All that the law requires is nondiscrimination.

Telescope attempts to divide this regulation into a "message/person distinction," contending that by refusing to serve same-sex couples, the company is opposing marriages of those couples (the "message") but is not discriminating based on the couple's sexual orientation (the "person[s]"). Br.

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[2] Telescope's assertion to the contrary (Compl. ¶ 138) notwithstanding, the Act does not require that Telescope promote videos of same-sex couples. That requirement, if it really existed (*see* Appellants' Add. 19), would come from Telescope's own service contracts, which the company could easily modify.

26–27. That distinction—usually phrased as between conduct and status—is one that the Supreme Court has repeatedly rejected. *See, e.g.*, *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 689 (2010) ("Our decisions have declined to distinguish between status and conduct"); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (criminalizing conduct engaged in by gay people is discrimination against gay people); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews").

In *Christian Legal Society*, for example, a student group argued that a public university's nondiscrimination policy violated the group's First Amendment rights because the group excluded individuals based not on sexual orientation but on "homosexual conduct." 561 U.S. at 672. The Court rejected this distinction and affirmed enforcement of the nondiscrimination policy, explaining that when "'the conduct targeted . . . is conduct that is closely correlated with being homosexual[,]'" the object of the discrimination is not the conduct but "'gay persons as a class.'" *Id.* at 689 (quoting *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring in the judgment)).

And notably, the Supreme Court has recognized that identity, including sexual orientation, cannot be divorced from the conduct of choosing whether and whom to marry. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (marriage is an "intimate choice[] that define[s] personal identity and

beliefs"). For lesbians and gay men, "same-sex marriage is their only real path to this profound commitment." *Id.* at 2594. Status and conduct, identity and action, person and message, cannot reasonably be disentangled. Thus, discrimination based on conduct (or "message") so closely connected to a person's identity *is* discrimination based on status (or "person").

Moreover, whatever message a wedding video might communicate, there is "little likelihood" (*Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. ("FAIR")*, 547 U.S. 47, 65 (2006)) that anyone would attribute it to anyone other than the marrying couple.

In *FAIR*, several law schools sought to exclude military recruiters from on-campus employment fairs, despite a federal statute requiring that recruiters receive the same access as other employers, because the schools disapproved of the military's policy barring service by openly gay individuals. *Id.* at 52. The schools argued that by requiring them to allow military recruiters on campus (which entailed advertising the recruiters via e-mail and printed fliers), the statute compelled them to express support for the military and its policies. *See id.* at 60–61. The Supreme Court rejected that argument, concluding that "[t]he compelled speech to which the law schools point is plainly incidental to the [statute's] regulation of conduct." *Id.* at 62.

So too here. Marrying couples, wedding guests, and bystanders who happen to see Telescope recording a video would not conclude that the

company was advocating for same-sex relationships any more than they would think that Telescope believes that every couple for whom it records a wedding video is a perfect match. If observers even thought about the videographer or knew who the videographer was, they would likely conclude that the company wished to maximize its revenue by serving all customers, or took no interest in its customers' sexual orientation because that is not pertinent to commercial transactions, or was merely meeting its legal obligation to comply with antidiscrimination laws. *Cf. id.* at 65 (even "high school students can appreciate the difference between speech a school sponsors and speech the school permits . . . pursuant to an equal access policy"); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (no compelled speech where business "could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law"); *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424, __ F.3d. __, 2018 WL 1177669, at *18 (6th Cir. Mar. 7, 2018) (employer's "bare compliance with Title VII . . . does not amount to an endorsement of [employee's] views").

Simply put, people who watch a wedding video attribute the video's message to the couple who planned the wedding, were the central focus of it, and chose to have it recorded. Thus, in *Elane Photography*, the Supreme Court of New Mexico rejected a wedding photographer's argument that

requiring it to comply with state public-accommodations law by photographing a commitment ceremony for a same-sex couple impermissibly compelled speech. *See* 309 P.3d at 65–66. In accordance with *FAIR*, the court correctly concluded that compelled-speech claims arise only from "direct government interference with the speaker's own message, as opposed to a message-for-hire," and that a for-hire photography studio has no free-speech right to refuse service to members of protected classes. *Id.* at 66. What was true for still photography, for which the photographer often poses subjects, is at least as true for event videography, for which the camera operator records the action but does not typically orchestrate it.

Moreover, Minnesota's public-accommodations law does not in any sense regulate Telescope's choices regarding lighting, camera equipment, or editing. *Cf. id.* (upholding enforcement of public-accommodations law that did not "regulate the content of the photographs"). And nor does Telescope's assertion that it has a "great degree of editorial control" (Br. 34) transform "creat[ing] and edit[ing] photographs"—or wedding videos—into protected speech (*Elane Photography*, 309 P.3d. at 63). Virtually all sales other than purely off-the-shelf items require some design choices: A suit may be tailored for a trim or loose fit; a car may be finished with leather or cloth seats, tinted or clear windows; a room may be painted white or beige or blue. Yet no one would seriously contend that tailors, mechanics, or painters engage in

constitutionally protected expression when plying their trades, or that requiring them to serve customers equally compels speech. The same is true of wedding vendors.

Telescope wishes to advertise its disapproval of marriage equality. Br. 9. "The fact that [it believes that] such explanatory speech is necessary is strong evidence that the conduct at issue here[, selling videos,] is not so inherently expressive that it warrants protection . . . " (*FAIR*, 547 U.S. at 66). Telescope remains free to post a disclaimer stating its viewpoint but acknowledging that it complies with applicable antidiscrimination laws. To allow it to post (and act on) a blanket refusal of service would be "akin to a 'White Applicants Only' sign that may be prohibited without implicating the First Amendment" (Appellants' Add. 30–31).

B. Selling wedding videos does not constitute expressive association.

Neither does requiring Telescope to comply with antidiscrimination laws burden expressive association.

To invoke a First Amendment expressive-association right, "a group," *as a group*, "must engage in some form of *expression*." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (emphasis added). Because, as detailed above, Telescope does not speak for First Amendment purposes by serving customers, it does not satisfy the "expression" requirement. And Telescope and its customers do not, in any event, constitute an association—with

expressive interests or otherwise. Telescope is a business that provides goods and services in exchange for money. Its customers are typically strangers to each other and to Telescope's owners. Collectively, they "are not members of any organized association; they are patrons of the same business establishment." *Stanglin*, 490 U.S. at 24; *see also FAIR*, 547 U.S. at 69 (schools "cannot 'erect a shield' against laws requiring access 'simply by asserting' that mere association 'would impair [their] message'") (quoting *Dale*, 530 U.S. at 653). Thus, the argument that Telescope's or its owners' expressive-association rights are violated by "forc[ing] them to join together" (Br. 43) with customers who are in same-sex relationships is even less plausible than the expressive-association claims that the Supreme Court has flatly rejected when made by genuine associations whose members share common goals (*see, e.g.*, *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 612–13 (1984)).

Moreover, the right to expressive association can be infringed only by imposing "serious burdens" on a group's "collective effort on behalf of [its] shared goals." *Roberts*, 468 U.S. at 622, 626. Such a burden may result, for example, from forcing the Boy Scouts to hire a particular youth leader or requiring a parade organizer to allow a particular banner. *See Dale*, 530 U.S.

at 654–55 (youth leader); *id.* (analyzing parade banner at issue in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574–75 (1995)).

Nothing like that is happening here. Telescope's customers purchase videography services in arm's-length transactions; they do not join with other customers or the videographer to convey shared ideals. Because of this dynamic, the Supreme Court held in *FAIR* that law schools' associational rights were not infringed by requiring that military recruiters receive the same access to campuses as other employers; the recruiters were mere "outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association." 547 U.S. at 69. In the same way, people hire a wedding videographer not to broadcast its stamp of approval of the marriage or to become part of the celebration, but to come to the venue to record—usually by blending into the background—an event orchestrated by the marrying couple.

For these reasons, courts have repeatedly rejected association-based challenges to laws, like the one at issue here, that require entering into arm's-length business transactions. *See*, *e.g.*, *Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 269 (D.C. Cir. 2014) ("interacting with [insurance-]coverage providers that must make contraceptive coverage available . . . does not make those providers part of the organization's expressive association or otherwise impair its ability to express its message"),

vacated on other grounds, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir. 2010) (requiring groups to collaborate with City officials to use City Hall does not significantly burden expressive-association rights); *see also Fields v. City of Tulsa*, 753 F.3d 1000, 1012 (10th Cir. 2014) (police officer's freedom of association not infringed by order to attend Islamic Society event because officer "was never required to be anything more than an outsider with respect to the Islamic Society"). Even groups like the Rotary Club—a civic organization that had long denied full membership to women—have no First Amendment right to discriminate in membership unless they can "demonstrate that admitting women . . . will affect in any significant way the existing members' ability to carry out their various purposes." *Rotary Int'l*, 481 U.S. at 548. Nothing about being required to serve all patrons equally, regardless of sexual orientation, "affect[s] in any significant way" a videographer's ability to sell videos. *Id.*; *accord Roberts*, 468 U.S. at 626.

II. THE RELIGION CLAUSES NEITHER AUTHORIZE NOR ALLOW THE EXEMPTION THAT TELESCOPE SEEKS.

A. The Free Exercise Clause does not confer a right to violate antidiscrimination laws.

When a law is religiously neutral on its face, is generally applicable without regard to religion, and does not constitute a religious gerrymander (*i.e.*, is not deceptively drafted so that "almost the only conduct subject to" it

is religious or so that it "proscribe[s] more religious conduct than is necessary to achieve [its] stated ends"), that law is subject to rational-basis review only. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533–35, 538 (1993); *see also Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 878 (1990). It is thus presumptively valid and must be upheld if it is rationally related to a legitimate governmental interest. *See generally*, *e.g.*, *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012). Like all public-accommodations laws of which *amici* are aware, the Minnesota Human Rights Act easily satisfies this standard.

1. The Act does not target religious exercise either on its face or by subterfuge—there is not a whiff of either. And it applies to all similarly situated businesses without regard to religion. *See* MINN. STAT. §§ 363A.11, 363A.17. Rational-basis review applies.

Telescope's contention that the Act is a "religious gerrymander" akin to the one in *Lukumi* (Br. 13, 45) is meritless. *Lukumi* involved a municipal ordinance that banned animal sacrifices—a sacred tradition in the Santeria religion. The ordinance was artfully drafted to prevent a Santeria church from locating in the town , without mentioning Santeria by name. 508 U.S. at 535–36.

By contrast, the Minnesota Human Rights Act generally outlaws discrimination on nine different grounds in places of public accommodation

statewide and does not single out any denomination or religious practice for disfavor. MINN. STAT.§ 363A.11. The prohibition against sexual-orientation discrimination was added not to target religious beliefs but because, "as a group, gays and lesbians are the targets of considerable discrimination in the State of Minnesota." Appellants' Add. 38. And far from disfavoring any faith, the Act includes religion as a protected classification, extending precisely the same protections against religious discrimination as it does for sexual-orientation discrimination.

2. The Act readily satisfies rational-basis review: Barring denials of service to historically marginalized groups is not merely a legitimate governmental interest; it is a critical "protection[ ] against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996); *accord, e.g.*, *Obergefell*, 135 S. Ct. at 2600. And it cannot be gainsaid that prohibiting discriminatory refusals of service in places of public accommodation is rationally related to ending discrimination. Indeed, it is essential to accomplishing that goal.

3. Even under the Supreme Court's free-exercise jurisprudence before *Employment Division v. Smith*, *supra*—which had afforded heightened scrutiny for burdens on religious exercise by neutral, generally applicable laws—Telescope's claim here would have failed as a matter of law. For the

Free Exercise Clause has *never* been held to afford religious exemptions that would shift undue costs or burdens of the claimant's religious exercise onto innocent third parties.[3]

In *United States v. Lee*, 455 U.S. 252 (1982), for example, the Supreme Court held that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Id.* at 261. Accordingly, the Court rejected an employer's request for an exemption from paying social-security taxes because the exemption would have "operate[d] to impose the employer's religious faith on the employees." *Id.*; *see also Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (state's authority to enforce child-labor law "not nullified merely because" seller of religious magazines "ground[ed] his claim [for an exemption] . . . on religion").

4. Preventing harm to nonbeneficiaries of a requested religious exemption is especially important when enforcing antidiscrimination requirements. Because these laws are designed to prevent injuries to

[3] Telescope's claim would also fail even under pre-*Smith* jurisprudence because complying with antidiscrimination laws would not substantially burden the company's religious exercise. *See Harris Funeral Homes*, 2018 WL 1177669 at *17 (requiring employer to "tolerat[e]" transgender employee does not substantially burden employer's religious exercise).

innocent third parties, their whole purpose would be frustrated by exemptions that license and authorize those injuries to occur.

Thus, in *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Supreme Court upheld the denial of tax-exempt status to universities with racially discriminatory admissions policies (*id.* at 603–04), notwithstanding that the policies were premised on sincere religious beliefs (*id.* at 602 n.28). The Court held that the government's interest in preventing the harm caused by race discrimination in education "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." *Id.* at 604. And in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (per curiam), the Supreme Court rejected as "patently frivolous" (*id.* at 402 n.5) a claim by a business owner, whose religious beliefs "compel[led] him to oppose any integration of the races" (*Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D.S.C. 1966), *aff'd*, 390 U.S. 400 (1968) (per curiam)), that the Free Exercise Clause conferred on him a right to violate Title II of the Civil Rights Act, 42 U.S.C. §§ 2000a *et seq.*, which is the principal federal public-accommodations law.[4]

[4] *See also, e.g.*, *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1397–99 (4th Cir. 1990) (requiring equal pay for women did not violate employer's free-exercise rights); *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 1367–69 (9th Cir. 1986) (employer's religious beliefs about gender roles did not support free-exercise exemption from Equal Pay Act or Title VII).

5. Antidiscrimination laws have given way to religious exemptions only when the autonomy of religious institutions or the selection of clergy was at issue. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188–92 (2012) (ministerial exception exempted church from Americans with Disabilities Act for employment of "called" teachers); *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (upholding Title VII's exemption for religious organizations, which Congress enacted to "minimize governmental 'interference with the decision-making process in religions'" (quoting district court) (brackets omitted)). For ordinary businesses like Telescope, constitutional concerns for the integrity of religious denominations and houses of worship have no bearing.

* * *

A bedrock principle of the First Amendment is that the guarantee of free exercise of religion is a shield to protect religious exercise, not a sword to impose on nonadherents one's own beliefs—or the costs and burdens thereof. That principle allows us to live together in relative harmony in a religiously pluralistic society, rather than either segregating into closed religious communities with only those who share precisely the same code of beliefs, or devolving into religiously based social strife that would imperil the religious freedom of all. Though Telescope's owners' religious views here are undoubtedly sincere, recognition of a constitutional exemption from general

laws—and particularly from laws that protect historically marginalized groups against exclusion from ordinary, day-to-day consumer transactions—would undermine the rule of law and "court[ ] anarchy" (*Smith*, 494 U.S. at 888). The Free Exercise Clause has never required that result. Nor should it here.

B. The Establishment Clause forbids the requested religious exemption.

Telescope is not entitled to rewrite settled free-exercise jurisprudence as it wishes, in part because the Establishment Clause forbids it.

1. "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Religious exemptions that detrimentally affect nonbeneficiaries would impermissibly prefer the religious beliefs of the favored individuals or groups over the rights and differing beliefs of others. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) ("[U]nyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle" by having "a primary effect that impermissibly advances a particular religious practice.").

Thus, the Supreme Court has held that religious accommodations are consistent with the Establishment Clause only if no third parties are unduly burdened. In *Sherbert v. Verner*, 374 U.S. 398 (1963), for example, the Court concluded that the Establishment Clause did not forbid—and therefore that

the Free Exercise Clause could require—a judicially created religious accommodation under state unemployment-benefits law for an employee who was fired for refusing to work on her Sabbath, because the requested accommodation would not "abridge any other person's religious liberties." *Id.* at 409. And in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Court held that for accommodations under the Religious Land Use and Institutionalized Persons Act (42 U.S.C. §§ 2000cc *et seq.*) to comport with the Establishment Clause, reviewing courts "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." 544 U.S. at 720.

2. When nonbeneficiaries are harmed, religious exemptions cannot stand. In *Caldor*, *supra*, for example, the Supreme Court invalidated a law requiring employers to accommodate Sabbatarians in all instances, because "the statute t[ook] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." 472 U.S. at 709. And in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), the Court held that a sales-tax exemption for religious periodicals violated the Establishment Clause by shifting a greater tax burden onto other taxpayers. The Court explained that the exemption would have "burden[ed] nonbeneficiaries markedly" by "'provid[ing] unjustifiable awards of assistance to religious organizations' and [therefore could not] but 'convey a message of

endorsement' to slighted members of the community." *Id.* at 15 (quoting *Amos*, 483 U.S. at 348 (O'Connor, J., concurring in the judgment)).

More recently, in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), every member of the Court authored or joined an opinion recognizing that detrimental effects on nonbeneficiaries must be considered when evaluating requests for accommodations under the Religious Freedom Restoration Act (42 U.S.C. § 2000bb *et seq*.). *See Hobby Lobby*, 134 S. Ct. at 2760 ("Nor do we hold . . . that . . . corporations have free rein to take steps that impose 'disadvantages . . . on others' or that require 'the general public [to] pick up the tab.'"); *id.* at 2781 n.37 ("It is certainly true that in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'"); *id.* at 2787 (Kennedy, J., concurring) (religious exercise must not "unduly restrict other persons . . . in protecting their own interests"); *id.* at 2790 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting) ("Accommodations to religious beliefs or observances . . . must not significantly impinge on the interests of third parties."); *see also Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., joined by Sotomayor, J., concurring) (religious accommodation was constitutionally permissible because "accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief").

3. Eliding these Establishment Clause limitations, Telescope contends that businesses that open themselves to the public should have free-exercise rights to refuse to serve same-sex couples on the same terms as other couples. That is discrimination, both in fact and as defined by Minnesota law.

"Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public." *Heart of Atlanta*, 379 U.S. at 292 (1964) (Goldberg, J., concurring). Under Telescope's proposed legal regime, lesbians, gay men, bisexuals, and their children would wake up each day knowing that, wherever they go, they may be turned away as unfit to be served. And they would have no legal recourse as long as the denials were explained in religious terms. They "might be forced to pick their merchants carefully, like black families driving across the South half a century ago." Robin Fretwell Wilson & Jana Singer, *Same-Sex Marriage and Conscience Exemptions*, ENGAGE, FEDERALIST SOCIETY PRACTICE GROUPS, Sept. 2011, at 12, 16–17, https://tinyurl .com/y76yg4zr.

In *Lawrence*, *supra*, the Supreme Court acknowledged that "for centuries there have been powerful voices to condemn homosexual conduct as immoral" and that "[t]he condemnation has been shaped by religious beliefs" that are "profound and deep." 539 U.S. at 571. Yet the Court flatly rejected

the view that "the majority may use the power of the State [or the courts] to enforce these views on the whole society," because "'[o]ur obligation is to define the liberty of all, not to mandate our own moral code.'" *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

Here, Telescope requests a constitutional permission slip to do under the Free Exercise Clause what the Supreme Court held in *Lawrence* is forbidden by the Due Process Clause. Its claim thus raises the same question as in *Lawrence*—and it warrants the same answer: Those who oppose marriage of same-sex couples are entitled to their beliefs, but they "may [not] use the power of the State to enforce these views on the whole society." 539 U.S. at 571. The right to believe, or not, and to practice one's faith, or not, is sacrosanct. But it does not extend to imposing the burden of one's beliefs on innocent third parties. Government should not, and as a matter of law cannot, favor the religious beliefs of some at the expense of the rights, beliefs, and dignity of others. The Establishment Clause, like the Due Process and Equal Protection Clauses, does not allow it.

C. Recognizing the requested exemption would undermine religious freedom.

Far from offending religious freedom, public-accommodations laws advance that fundamental value. Title II of the federal Civil Rights Act of 1964, the Minnesota Human Rights Act, the public-accommodations laws of forty-four other states and the District of Columbia, and countless local

ordinances prohibit discrimination in the provision of goods or services on the basis of religion. *See*, *e.g.*, *State Public Accommodation Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES (July 13, 2016), http://tinyurl.com/ycy9eugt. These essential protections for religious freedom are threatened, not served, by Telescope's claims.

1. When Congress enacted Title II to bar discrimination in public accommodations, it included religion as a protected category (*see* 42 U.S.C. § 2000a(a)) to remedy systematic refusals of service on the basis of religion (*see*, *e.g.*, 110 CONG. REC. H1615 (daily ed. Feb. 1, 1964) (statement of Rep. Teague) (Title II barred discrimination against Jews, who were "not allowed in certain hotels"); *A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce: Hearing on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 735 (1963) (statement of Franklin D. Roosevelt Jr., Under Secretary of Commerce) (in New York "it ha[d] been traditional, among some of our resort places, to refuse to take members of the Jewish faith")). For example, Senate committee hearings identified a hotel in New Hampshire that set aside specific weeks exclusively for Christian guests, and other weeks for Jews. *Id.* at 780 (statement of Sen. Cotton). In other words, the hotel engaged in time-sharing to provide "equal but separate facilities" (*id.* at 1045), which Congress recognized to be a serious harm and a

substantial barrier to full participation in civil society that warranted an equally serious and substantial federal remedy.

Title II, however, is limited both in the classifications for which it affords protections—race, color, religion, and national origin—and in the entities that it covers—hotels, rooming houses, restaurants, gas stations, and entertainment venues that "affect [interstate] commerce." 42 U.S.C. § 2000a(b). State and local public-accommodations laws help fill the gaps in both respects. The Minnesota Human Rights Act, for example, applies to *all* businesses that sell goods or services to the public (MINN. STAT. § 363A.03(34)), and it bars discrimination on the basis of "race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex" (*id.* § 363A.11(1)).

2. The "fundamental object of" these laws is "to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Heart of Atlanta*, 379 U.S. at 250; *see also*, *e.g.*, *Romer*, 517 U.S. at 631; *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 32 (D.C. 1987) (D.C. Human Rights Act advances fundamental value "embodied in our Bill of Rights—the respect for individual dignity in a diverse population").

Hence, if businesses are granted a constitutional license to violate antidiscrimination laws whenever they have a religious motivation, not only

will LGBTQ people suffer harm, but the animus that some people harbor toward racial minorities, women, unwed mothers, people with disabilities, and other groups would likewise receive legal sanction as long as it was premised on religion.[5]

3. What is more, the case law shows, and *amici*'s and our members' experience confirms, that disfavor toward, unequal treatment of, and denials of service to members of minority faiths and persons adhering to a different faith are all too common. And this religious discrimination, like other forms of discrimination, is often premised on religious views or motivations. Hence, Telescope's arguments for a religious exemption permitting denials of service to same-sex couples could also be advanced to support denials of service to people of marginalized faiths.

In *Paletz v. Adaya*, No. B247184, 2014 WL 7402324 (Cal. Ct. App. 2014), for example, a hotel owner in California closed down a poolside event after she learned that it was hosted by a Jewish group. The hotelier told an employee that "I don't want any [f—ing] Jews in the pool" (*id* at *2 (alteration by court)), said that her family would cut off her financing if they learned of

[5] *Cf.*, *e.g.*, *Smith v. Fair Emp't & Hous. Comm'n*, 913 P.2d 909, 919 (Cal. 1996) (rejecting landlord's free-exercise defense and upholding enforcement of law barring discrimination against unmarried couples in rental housing); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 279 (Alaska 1994) (same); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57, 61 (E.D. Pa. 1991) (rejecting religiously affiliated hospital's free-exercise defense and upholding enforcement of Age Discrimination in Employment Act).

the gathering (*id.*), and directed hotel staff forcibly to remove the Jewish guests from the property (*id.* at *4). A jury found that the hotelier violated California public-accommodations law and awarded damages. *Id.* at *3.

In *Khedr v. IHOP Restaurants, LLC*, 197 F. Supp. 3d 384 (D. Conn. 2016), a Muslim family was refused service at an International House of Pancakes in Connecticut: "The restaurant manager started to look at us up and down with anger, hate, and dirty looks because my wife was wearing a veil, as per our religion of Islam." *Id.* at 385. In front of the family's 12-year-old child, the manager told his staff "not to serve 'these people' any food." *Id.* The family sued under Connecticut public-accommodations law, and the court denied IHOP's motion to dismiss, concluding that the incident was, at the very least, "suggestive of discriminatory motive." *Id.* at 388.

And in *Minnesota ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985), a health club allowed "only born-again Christians . . . to be managers or assistant managers"; "question[ed] prospective employees about marital status and religion; terminat[ed] employees because of a difference in religious beliefs; refus[ed] to promote employees because of differing religious beliefs; and fail[ed] to provide 'open' public accommodations." *Id.* at 846–47. Job "applicants were asked whether they attend church, read the Bible, are married or divorced, pray, engage in pre-marital or extra-marital sexual relations, believe in God, heaven or hell,

and other questions of a religious nature." *Id.* Based on the owners' "religious belief that they are forbidden by God, as set forth in the Bible, to work with 'unbelievers,'" the gym "w[ould] not hire, and w[ould] fire, individuals living with but not married to a person of the opposite sex; a young, single woman working without her father's consent or a married woman working without her husband's consent; a person whose commitment to a non-Christian religion is strong; and someone who is 'antagonistic to the Bible,' which according to *Galations* 5:19-21 includes fornicators and homosexuals." *Id.* at 847. The Minnesota Supreme Court denied the gym a free-exercise exemption from state antidiscrimination laws and affirmed findings of statutory violations. *Id.* at 854.

* * *

If the Free Exercise Clause licensed religiously motivated denials of service to same-sex couples, as Telescope contends, then it would appear to sanction and authorize all other religiously motivated denials as well. One could be thrown out of a hotel or barred from purchasing a cup of coffee just for being of the wrong religion (or race, or sex, or sexual orientation), and no federal, state, or local authority or law could do anything to remedy the situation.

Not only would that outcome be the antithesis of religious freedom, but it would also foment civic "divisiveness based upon religion that promotes

social conflict"—the very evil that the Religion Clauses of the First Amendment were meant to forestall. *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment). The fundamental principle of equal treatment under law is as central to the Religion Clauses as to the Due Process and Equal Protection Clauses. It should not be so easily overthrown.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE WITH FRAP 32

The undersigned certifies that this brief:

(i) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,462 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word 2013, set in Century Schoolbook font in a size measuring 14 points or larger.

/s/ *Richard B. Katskee*

CERTIFICATE OF COMPLIANCE
WITH 8TH CIRCUIT RULE 28A(H)(2)

I certify that this brief has been scanned for viruses and that the brief is virus-free.

/s/ *Richard B. Katskee*

CERTIFICATE OF SERVICE

I certify that on March 13, 2018, the foregoing brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ *Richard B. Katskee*

APPENDIX

APPENDIX OF *AMICI CURIAE*

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of church and state. Americans United represents more than 125,000 members and supporters nationwide. Americans United has long fought to uphold the guarantees of the First Amendment and equal protection that government must not favor, disfavor, or punish based on religion or belief, and therefore that religious accommodations must not license maltreatment of, or otherwise detrimentally affect, innocent third parties.

Anti-Defamation League

The Anti-Defamation League was organized in 1913 with a dual mission to stop the defamation of the Jewish people and to secure justice and fair treatment for all. Today, it is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism, and advocating for civil rights for all. To this end, ADL is a steadfast supporter of antidiscrimination laws as well as the religious liberties guaranteed by both the Establishment and Free Exercise Clauses. ADL staunchly believes that the Free Exercise Clause is a critical means to protect individual religious

exercise, but it must not be used as vehicle to discriminate by enabling some Americans to impose their religious beliefs on others.

Bend the Arc: A Jewish Partnership for Justice

Bend the Arc is the nation's leading progressive Jewish voice empowering Jewish Americans to be advocates for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

Interfaith Alliance Foundation

Interfaith Alliance Foundation is a 501(c)(3) nonprofit organization that celebrates religious freedom by championing individual rights, promoting policies to protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance Foundation's members belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance Foundation has a long history of working to ensure that religious freedom is a means of safeguarding the rights of all Americans and is not misused to favor the rights of some over others.

Lambda Legal Defense and Education Fund, Inc.

Lambda Legal is the nation's oldest and largest nonprofit legal organization working for full recognition of the civil rights of LGBT people and everyone living with HIV, through impact litigation, education, and policy advocacy. *See*, *e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evan*s, 517 U.S. 620 (1996). Lambda Legal has represented same-sex couples or appeared as *amicus curiae* in numerous cases in which religious freedom and/or free speech was asserted to justify discrimination against same-sex couples. *See*, *e.g.*, *Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017); *Cervelli v. Aloha Bed & Breakfast*, __ P.3d __, No. CAAP-13-0000806, 2018 WL 1027804 (Haw. Ct. App.); *Klein v. Oregon Bureau of Lab. & Indus.*, No. CA A159899 (Or. Ct. App. filed April 25, 2016); *N. Coast Women's Care Med. Grp., Inc. v. Superior Ct. (Benitez)*, 189 P.3d 959 (Cal. 2008).

Muslim Advocates

Muslim Advocates is a national legal-advocacy and educational organization formed in 2005 that works on the front lines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim Advocates advances these objectives through litigation and other legal advocacy, policy engagement, and civic education. Muslim Advocates also serves as a legal

resource for the American Muslim community, promoting the full and meaningful participation of Muslims in American public life.

National Council of Jewish Women, Inc.

The National Council of Jewish Women is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Laws and policies that provide equal rights for all regardless of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation, gender identity and expression, economic status, immigration status, parenthood status, or medical condition." Consistent with our Principles and Resolutions, NCJW joins this brief.

People for the American Way Foundation

People For the American Way Foundation is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty and free speech. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote

these values. PFAWF strongly supports the principle of the Free Exercise Clause of the First Amendment as a shield for the free exercise of religion, protecting individuals of all faiths. The same is true with respect to the Free Speech Clause. PFAWF is concerned, however, about efforts, such as in this case, to transform this important shield into a sword to obtain accommodations that unduly harm others, which also violates the Establishment Clause. This is particularly problematic when the effort is to obtain exemptions based on religion from antidiscrimination laws, which protect against discrimination based on race, gender, sexual orientation, and other grounds, and which are also an important protection for religious free exercise.

Union for Reform Judaism, Central Conference of Americans Rabbis, and Women of Reform Judaism

The Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews, the Central Conference of American Rabbis, whose membership includes more than 2000 Reform rabbis, and Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, are committed to ensuring equality for all of God's children, regardless of sexual orientation. We oppose discrimination against all individuals,

including gays and lesbians, for the stamp of the Divine is present in each and every human being.