No. 17-3352

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TELESCOPE MEDIA GROUP, a Minnesota corporation, CARL LARSEN and ANGEL LARSEN, the founders and owners of TELESCOPE MEDIA GROUP,
Plaintiffs-Appellants,

v.

KEVIN LINDSEY, in his official capacity as Commissioner of the Minnesota Department of Human Rights and LORI SWANSON, in her official capacity as Attorney General of Minnesota,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
The Honorable Chief Judge John R. Tunheim
Case No. 0:16-cv-04094-JRT-LIB

BRIEF OF *AMICUS CURIAE* SHERIF GIRGIS,
in support of Appellant and urging reversal

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STATEMENT OF IDENTITY OF *AMICUS CURIAE*, HIS INTERESTS IN THE CASE, AND THE SOURCE OF HIS AUTHORITY TO FILE

Your Amicus, Sherif Girgis, J.D., Yale Law School (Ph.D. candidate, M.A., A.B., *summa cum laude*, Princeton University; B.Phil. (M.Phil.), University of Oxford) is a research scholar at The Witherspoon Institute, Inc., which is an independent research center in Princeton, New Jersey, dedicated to applying the fundamental principles of republican government to contemporary moral and political issues.

Your Amicus is interested in this case because it implicates many issues upon which he has conducted extensive research. He has published in law and peer-reviewed journals on marriage, religious liberty, dignitary harm, and related moral and jurisprudential issues. He is author of *Nervous Victors, Illiberal Measures: A Response to Douglas NeJaime and Reva Siegel*, 125 Yale L.J. F. 399 (2016). With Ryan T. Anderson, in counterpoint to John Corvino, he is co-author of *Debating Religious Liberty and Discrimination* (Oxford University Press, 2017), from which portions of this brief are drawn. He is also co-author of "Civil Rights and Liberties," *Cambridge Companion to Philosophy of Law* (Cambridge University Press, forthcoming), a chapter in *What Obergefell v. Hodges Should Have Said* (Jack Balkin, ed., Yale University Press, forthcoming), "What Is Marriage?" (*Harvard Journal of Law and Public Policy*, 2011), and *What Is Marriage? Man and Woman: A Defense* (Encounter Books, 2012).

Your *Amicus* is authorized to file this Brief by consent of all Parties pursuant to Fed. R. App. P. 29(a)(4)(D).

STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)

Pursuant to Fed. R. App. P. 29(a)(4)(E), your *Amicus* states that no Party's counsel authored this brief in whole or part, no Party or Party's Counsel contributed money that was intended to fund preparing or submitting this brief, and no person, other than *Amicus*, or his Counsel, contributed money that was intended to fund preparing or submitting this Brief.

SUMMARY OF THE ARGUMENT

The Appellees (collectively "Minnesota") claim that the government has a compelling interest in eliminating dignitary harms that might result when someone declines to speak as requested by another. Minnesota insists that this explains why Telescope Media Group and its owners Carl and Angel Larsen (collectively "the Larsens") should be coerced to speak via the creation of films even if the Minnesota Human Rights Act is analyzed under strict scrutiny, and even if the Larsens have caused no material harm.

But in several cases, the United States Supreme Court has held that the government has no legitimate interest—much less a compelling one—in blunting negative reactions to moral or political ideas that authorities find offensive or even demeaning to minorities. To allow Minnesota to assert this justification for coercing

speech would cut against decades of First Amendment jurisprudence. It would imperil a wide range of civil liberties. And it would be self-defeating. After all, the ruling of the court below tells the Larsens that choices central to *their* identity are wrong, indeed bigoted.

Context matters under Supreme Court precedent. Here it reveals a difference in kind between (i) the social meaning of the Larsens' practice of making films for all *customers* but declining to make films conveying certain *messages*, and (ii) the dignitary harms rightly disrupted by antidiscrimination laws (against, say, Jim Crow). Only the latter involve cultural assumptions that hamper a group's social, political, or economic mobility by disparaging the group's competence, character, interests, or proper place in society.

But even, assuming counterfactually, the Larsens' decision conveyed truly demeaning ideas, that would not establish the constitutionality of compelling their speech in order to contradict the message that their refusal would have sent. In every case in which the Supreme Court has touted the dignitary benefits of antidiscrimination laws, those laws were coercing only conduct: e.g., a restaurant's refusal to serve African Americans. States were not applying those laws to interfere with expression, as Minnesota has done here.

In fact, in the two cases in which antidiscrimination laws had been applied to coerce expression, the Court held that the First Amendment prevented such coercion

and reversed the lower courts' decisions—over the objection that doing so would reinforce demeaning ideas about LGBT people. The Court did so on the ground that governments may not interfere with expression just because they find it harmful or demeaning.

In strictly scrutinizing burdens on the Larsens' First Amendment rights, then, this Court should not count as a legitimate public interest the goal of reducing any distress caused by ideas that Minnesota deems offensive, harmful, or demeaning. As the Supreme Court has held, coercing otherwise protected expression to prevent dignitary harms would violate the Court's longstanding refusal to do exactly that.

ARGUMENT

I. Minnesota may not override constitutional rights in order to shield citizens from the distress of being confronted with moral or political ideas deemed offensive or demeaning.

A. Minnesota has no legitimate interest in reducing negative reactions to ideas it finds demeaning.

The court below held that Minnesota has a *compelling* interest in reducing citizens' distress at being confronted with moral or political ideas they find offensive. *Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d 1090, ___ (D. Minn. 2017), 2017 WL 4179899 at *16 (using terms such as "discrimination" and "unequal access to goods or services," but only significantly analyzing the parties' dignitary harm arguments). That holding would require drilling through decades of cases to shatter the "bedrock principle underlying the First Amendment, [which] is

that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (speech "cannot be restricted simply because it is upsetting or arouses contempt."). Indeed, in a case quite like this one—involving public accommodations protections for LGBT people—the Supreme Court went so far as to say that "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515, U.S. 557, 574 (1995).

Nor can Minnesota try to separate the offending idea from the reaction it evokes so as to isolate the latter for attack. As the Supreme Court held last year, "[g]iving offense *is* a viewpoint." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality) (emphasis added). In other words, "[t]he emotive impact of speech on its audience is not a 'secondary effect' unrelated to the content of the expression itself" but of a piece with it. *Johnson*, 491 U.S. at 412. For this reason, as Justice Kennedy has warned, the government "may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience." *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring). And so our law protects expression of the vilest slurs, even when their delivery at a funeral is calculated to be so "hurtful" that the term "emotional distress" "fails to capture" the "anguish" of a bereaved

father subjected to those slurs. *Snyder*, 562 U.S. at 456. It is hard to imagine a more direct repudiation of the idea that government can use coercion to reduce the anguish of encountering offensive or demeaning ideas.

Finally, it is no answer to say that some ideas do not merely cause anguish but impugn the dignity of others. The Court has dispatched that argument directly: allowing government to coercively pursue an "interest in protecting the dignity" of those on the receiving end of otherwise protected expression would violate the Supreme Court's constitutionally correct "'longstanding refusal to [punish speech]'" on account of its "'adverse emotional impact on the audience.'" *Boos v. Barry*, 485 U.S. 312, 311 (1988) (quoting *Hustler Magazine*, 485 U.S. at 55) (brackets in original). That is why it "strikes at the heart of the First Amendment" to use regulations to "encourag[e] racial tolerance" or prevent any group—including long-burdened minorities—from being "bombarded with demeaning messages." *Matal*, 137 S. Ct. at 1764 (plurality). Such goals cannot count as "substantial" interests, let alone compelling ones. *Id.*

In short, the Constitution bars governments—including Minnesota—from punishing "expressive activity," let alone—indeed, how much less—pure speech, to blunt audience reactions to "ideas" these governments find offensive or demeaning to minorities. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 385 (1992). Thus, pressed to justify its coercion of the Larsens, Minnesota may not appeal to distress

that may be caused by the Larsens' refusal to make a film, even if Minnesota deems the ideas implicated by that refusal to be insulting to LGBT people's dignity: "[D]isplaying [Minnesota's] special hostility towards the particular biases [it attributes to the Larsens] . . . . is precisely what the First Amendment forbids." *Id.* at 396.

Minnesota remains free to defend the equal dignity of all, sexual minorities included. It remains free to *teach* that this duty requires private business owners to provide film-making services for same-sex weddings. That "officials may *foster* [this view] by persuasion and example is not in question. The problem is whether under our Constitution *compulsion* as here employed is a permissible means for its achievement." *Johnson*, 491 U.S. at 418 (emphasis added). The way for Minnesota to accomplish its goal "is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." *Id.* at 419.

B. Allowing Minnesota to curtail First Amendment rights in order to reduce distressed reactions to offensive ideas would impair civil liberties while making no meaningful difference to whether people might experience such distress.

In a pluralistic society, most religious activities and a great deal of religious speech will convey ideas offensive to some. Curtailing citizens' liberties when they confront others with distressing ideas would require trimming the whole field of religious liberty and pure speech, and not just under the specific facts at issue here. On the other hand, trying to reduce offensive ideas by coercing the Larsens to make

films but compelling no *other* First Amendment conduct would make almost no net difference to the amount of ideological strife in society, ensuring that burdens on film makers like the Larsens were entirely in vain.

Various spoken messages can inflict the kind of distress that Minnesota would coerce the Larsens to prevent. Yet our nation has a "profound . . . commitment" to protecting such messages. *Snyder*, 562 U.S. at 452. How can governments, including Minnesota, have a profound interest in allowing distress when it flows from spoken words in some contexts, and a *compelling* interest in *quashing* distress when it flows from a film maker's choice of which words and images to convey or not convey in a different context, namely making films?

For example, as shocking as it may be to commit to print, Supreme Court precedent demonstrates that people have a constitutional right to tell LGBT citizens that God hates them and sent the 9/11 attacks and IED explosions in Iraq to punish the Nation on their account. *See id.* at 448. And we know people with this message are free to attend events such as the Pride Festival at issue in *Snyder* and "launch[ ] a malevolent verbal attack" against same-sex relationships. *Id.* at 463 (Alito, J., dissenting). But Minnesota claims a compelling interest in preventing the particular margin of distress caused by the Larsens' decision not to make a film.

It is not only extremist protesters and the occasional conscientious film maker that might see their rights eroded if governments can use coercion to reduce the

anguish of encountering offensive ideas. In a diverse society, religious liberty itself, whether writ large or writ small, whether implicated facially or implicated as-applied, will always subject others to ideas they might find offensive. Religious freedom includes nothing if not the rights to worship, proselytize, and convert—forms of expression, including primarily speech components, that can convey the conviction that outsiders are wrong. In a world full of conflicting faiths and denominations, religious freedom is the *ultimate* source of distressing contact with offensive ideas.

Sometimes the Constitution and the Supreme Court's interpretation of the Constitution are in conflict. Not so here. Here, offensiveness or emotional distress are never reasons to override protections afforded core religious activities or spoken messages. Yet the court below believed that it could allow these very same factors to override the Larsens' freedom. That decision was both arbitrary and, as will be explained, pointless, that is to say, ineffective. Therefore it should be reversed.

Presumably, Minnesota would never ask this Court to whittle away at rights to worship or seek converts, or picket or protest, whenever their exercise would imply that others are sinning or immoral. And since this Court certainly wouldn't suppress these far more pervasive exercises of liberty, how much good would it do to stamp out only the negative reactions created by conscientious decisions not to make certain films? The reduction in public rancor would be slight, while the cost

for each person coerced against conscience would be grave, as would be the damage to the integrity of the "bedrock principle" of First Amendment jurisprudence that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414.

C. The goal of avoiding distressing ideas for the sake of dignity cuts both ways in this case.

Here both sides could claim with equal force that a decision against them would stigmatize them. Indeed, the Supreme Court has expressly affirmed that dignity is at stake in religious belief and self-expression, such that guarantees of free expression honor the "individual dignity . . . upon which our political system rests." *Cohen*, 403 U.S. at 24. Religious believers' freedom to live by their convictions is "essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts." *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). That is no less true when believers step into the marketplace or the public square. *See id.* (discussing the right "to establish one's religious (or nonreligious) self-definition *in the political, civic, and economic life of our larger community*") (emphasis added).

Granting, then, that declining to make a film celebrating a same-sex wedding conveys to LGBT citizens that intimacies they regard as central to their identity are wrong, what should this Court do with the request to deny the Larsens the choice of running their business according to their religious convictions? Would not telling

them—and, *ipso facto*, *all* traditional Muslims, Orthodox Jews, and Christians—that acting on beliefs central to their identity is wrong, benighted, even bigoted? This non-hypothetical demonstrates that in most (if not all) cases, any side might feel stigmatized by rival decisions or policies. This reality, this double-edged sword, favors freedom over coercion. Indeed, it strongly, if not dispositively, counsels in favor of reversing the court below.

II. The Supreme Court has noted the intangible dignitary benefits of eliminating discriminatory *conduct*, but it has never approved of coercing *speech*; twice it has done just the opposite.

In the absence of material harms, the court below justified coercing the Larsens by appealing to dignitary harms fought by, e.g., the Civil Rights Act of 1964, which sought to "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (citation omitted), *quoted in* 271 F. Supp. 3d at ___, 2017 WL 4179899 at *16.

But in every case in which the Supreme Court has noted antidiscrimination laws' dignitary benefits those laws were coercing only *conduct*—a point ignored by the court below: for example cases involving restaurants' refusal to serve African Americans, *id.*; or a civic organization's "no women allowed" policy, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). *See also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 141–42 (1994) (lamenting the dignitary harms of excluding women from

juries). After all, as the Court noted in *Hurley*, antidiscrimination laws generally have not "target[ed] speech or discriminate[d] on the basis of its content." 515 U.S. at 572.

To put a finer point on matters, none of the Court's antidiscrimination cases has involved the coercion or compulsion of otherwise protected. None has involved government efforts to prohibit or compel speech in order to muffle or displace the speaker's messages, simply on the ground that those messages were offensive or even bigoted.

To be sure, the Jaycees in *Roberts* did claim that forcing them to accept women would curtail their freedom of expressive association (and, thus, speech). However, the Court did *not* concede that point and then find the burden on expressive association was justified anyway (as such burdens can be, 468 U.S. at 623) by a compelling interest, i.e., fighting misogyny). Rather, the Court held that the Jaycees had not shown that the law imposed "any serious burden[ ] on [their] freedom of expressive association" in the first place. *Id.* at 626. For that reason, *Jaycees* offers no precedent for thinking that a genuine burden on the Larsens' free speech rights could be justified by an interest in stopping the dignitary harm that Minnesota asserts.

Indeed, in the two cases that *did* involve expressive, and therefore speech, burdens designed to achieve the dignitary benefits of fighting sexual-orientation

discrimination, the Court rejected this rationale as illegitimate, and found First Amendment violations. In both cases, the Court noted that ruling otherwise would contradict its precedents against punishing offensive messages *because of their offensiveness*. *See Boy Scouts v. Dale*, 530 U.S. 657, 657–59 (forbidding New Jersey to suppress expressive activity that conveys "oppos[ition]" to "homosexual conduct"); *Hurley*, 515 U.S. at 578–79 (holding that expression may not be coerced under antidiscrimination laws in order to reduce "biases" against LGBT people).

In short, the Supreme Court has never endorsed the use of antidiscrimination law to *coerce* speech so as to silence or contradict a speaker's message, simply on the ground that it's bigoted. Indeed, the Court has done just the opposite in two cases.

III. Even if the government may sometimes compel speech to fight dignitary harms, there is a *difference in kind* between the social meaning of the Larsens' conscientious decision and the social harms addressed in other cases.

Suppose that despite the cases reviewed in Parts I and II, governments may indeed fight dignitary harm by compelling some speech or expression. Suppose they may fight Jim Crow-style "deprivation[s] of personal dignity," in this way. *Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d 1090, ___ (D. Minn. 2017), 2017 WL 4179899 at *16 (quotation marks and citations to Supreme Court opinion citing another Supreme Court opinion, thus showing continuity of precedent, omitted). Even then, the Supreme Court's cases on dignitary harm—read in light of its cases against punishing offensive speech—would show that Minnesota may not compel

the Larsens to create films. For doing so could not offer the *kind* of social effects at issue in cases like *Heart of Atlanta Motel*.

That case was about Jim Crow, i.e., was about Whites avoiding contact on socially equal terms with African Americans, by refusing them any service. This case is about declining a request to speak a particular message through film—regardless of who requests it—while avoiding contact with no one. It is not about refusals to serve sexual minorities, but about the refusal to make films, i.e., about the refusal to convey messages that celebrate events at odds with the Larsens' faith. Their choice may convey ideas that Minnesota finds offensive, but it does not perpetuate the kind of assumptions that might impede social, economic, or political mobility. Affirming the Larsens' freedom of speech here would not inflict the dignitary harm rightly targeted by the Civil Rights Act (and valid state counterparts) and decried in a number of the Supreme Court's opinions.

The divide between the Larsens' decision and Jim Crow-era policies is vast. What sets Jim Crow-style discrimination apart is that it reflects and solidifies cultural assumptions that lock a group (or groups) out of markets, income brackets, social tiers, and political power. That sort of discrimination always rests on unfair assumptions about a group's basic abilities, interests, character, or proper place in society.

Put simply, antidiscrimination laws promote dignity by eroding those humiliating assumptions that also debilitate a group socially, politically, and economically. The dignitary harms that the government may punish do *not* span the full range of demeaning ideas, *see supra* I.A., but only cultural assumptions that "reflect and reinforce" *barriers to a group's social, economic, and political mobility*. *J.E.B.*, 511 U.S. at 141.

Those harms were surely at stake in Jim Crow-era actions and policies, which assumed that African Americans were incompetent, unreliable, and vicious. *See generally* 3 Bruce Ackerman, *We the People: The Civil Rights Revolution* (2014). But above all, Jim Crow was openly premised on the cultural assumption that it was improper for African Americans to mingle with whites on equal terms. That assumption did not simply *lead* to other barriers to social mobility; it *was* such a barrier.

No such dignitary harms are in the offing here because the Larsens' convictions do not reinforce or rest on *any* assumptions about LGBT people's abilities, interests, character, or proper place in society. That is confirmed by context. The Larsens' otherwise serve LGBT patrons and would have made other films for those customers. *See* Appellants' Opening Br. 11, 26, 42, 53 (arguing the point and twice citing the J.A. in support, i.e., not engaging in a mere bald assertion). This

context proves that what motivates the Larsens is their conviction concerning the *message* that they are being asked to convey via film.

Jim Crow could not be in sharper contrast—and not simply because the Larsens' convictions are rooted in sincere faith. It does not matter that some have had sincere religious grounds for thinking that, say, African Americans shouldn't marry Whites. The point is that this idea itself—whatever its roots—*just is* one of the social norms that impedes mobility: it impedes a group's progress in every sphere, by holding that the group ought not to mix with others on equal terms. But whatever the status of the Larsens' religious views, they do not give effect to—or rest on—the idea that it is improper for LGBT people to mingle on the same plane with others.

Thus, we come to a difference in kind between the humiliation of being denied a seat at the table of public life and the distress of sitting next to people who oppose conduct you may prize. The first, rooted in harmful assumptions and implicitly carrying ramifications that drive wider societal exclusions, must be avoided. The second, stemming from conflicting consciences, is unavoidable in a pluralistic society that cherishes First Amendment values. Somewhere behind the first, one will find unfair ideas about a group's basic competence, character, or place in society. Behind the second are—at worst—false and offensive moral convictions that need

not rest on unfair ideas about competence or character. Whatever material harms the law may fight, it brooks no freestanding right not to be offended.

IV. Precedent confirms that the kind of dignitary harms that the Supreme Court has found to satisfy strict scrutiny are not at issue here.

The Supreme Court's antidiscrimination cases—from *Heart of Atlanta* to *Jaycees*—show that the dignitary harms rightly fought by legal coercion are those cultural norms that naturally flow from, and then fortify, *barriers to social, economic, and political mobility*. This specific reading of "dignitary" harm is needed for precedential coherence. It reconciles the Court's approval of laws fighting dignitary harm with its rejection of laws that merely fight the pain of being confronted with offensive or demeaning ideas.

To be precise, precedent shows that when embracing the intangible, dignitary benefits of antidiscrimination laws, the Court has been referring to the disruption of cultural assumptions that (i) deprive a group of social, economic, or political mobility, by (ii) perpetuating unfair ideas about the group's abilities, interests, character, or proper place in society. Thus, in *Jaycees*, 468 U.S. at 625, when the Court spoke of harms to women's "individual dignity," it referred specifically to discrimination (i) that hampered "wide participation in political, economic, and cultural life" by perpetuating (ii) "archaic and overbroad assumptions" about women's "needs and capacities." *Id.* Indeed, the Court noted with approval the state's action to remove "*barriers to economic advancement and political and social*

integration that have historically plagued certain disadvantaged groups . . . ." *Id.* at 626 (emphasis added).

It is easy to see why attacks on a group's basic competence, character, interests, or proper place in society are the cultural assumptions naturally disrupted by antidiscrimination law. These assumptions do not simply offend or provoke; they keep people from climbing socially, economically, and politically. If people think ill of another's abilities, character, or worth—if they assume another is incompetent or beneath them socially—they will be less likely to hire, trust, vote for, or include that other person. They will think it unwise, dangerous, or wrong to mingle with that other person on equal terms at all. Those excluded will have a hard time exchanging freely, rising professionally, participating politically, or doing anything else that hangs on the cooperation of others. That's why antidiscrimination laws—which seek to remove the "barriers to economic advancement and political and social integration," *Jaycees*, 468 U.S. at 626—will naturally disrupt harmful assumptions about people's abilities, interests, character, and proper social role.

These sorts of assumptions are not at play here. Under First Amendment strict scrutiny, courts must consider the *marginal* harms and benefits of granting or denying a *particular kind* of claim. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). That particularized, contextual inquiry proves that the only effect of imposing a burden on First Amendment rights here is

not some material benefit—or even disruption of the kinds of assumptions about minorities that impede mobility—but only a reduction in people's distress at being confronted with offensive ideas. Yet as explained, that is not a permissible public goal, much less a compelling one.

The Larsens' business policy is simple: the messages that they convey through films, they will convey for anyone, but there are some messages—those that conflict with his faith—that they will not convey for anyone. They serve LGBT people in many ways; all they refuse to do is to make films that conflict with thier beliefs about marriage and sex, no matter who orders them. Thus, the only matter at issue here involves a religious objection to conveying a particular message—not to serving a class of people. Affirming the Larsens' right to resist coercion not "reflect and reinforce" the kinds of dignitary harms rightly fought by antidiscrimination laws. *J.E.B.* 511 U.S. at 141

Minnesota might answer that while it was possible for earlier generations to hold views like the Larsens' without animus, it is no longer possible in the twenty-first century, now that same-sex relationships and sexual activity are widely accepted. But the Supreme Court has held that the growing marginalization of traditional religious views on homosexuality only *strengthens* their claim to First Amendment protection. *See Boy Scouts*, 530 U.S. at 660 ("Indeed, it appears that homosexuality has gained greater societal acceptance . . . . But this is scarcely an

argument for denying First Amendment protection to those who refuse to accept these views . . . . [T]he fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.").

This leaves only one basis for allowing Minnesota to coerce the Larsens: that the government finds his convictions offensive or hurtful or biased. But again, our law unambiguously declares that expression "cannot be restricted simply because it is upsetting or arouses contempt . . . . Indeed, 'the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.'" *Snyder*, 562 U.S. at 458 (citations omitted). To justify coercion on the ground that the messages conveyed by Larsens' decision not to print are "too harmful to be tolerated" would be a "startling and dangerous" proposition. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 791–92 (2011). Nor could Minnesota seek to regulate the Larsens' choices *not* as "an end in itself, but [as] a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes." *Hurley*, 515 U.S. at 578–79. *See also Boos*, 485 U.S. at 322 (looking askance at the goal of protecting listeners' "dignity" against hateful messages); *R.A.V.*, 505 U.S. at 396 (pursuing the goal of suppressing "particular biases" in society through coercion "is precisely what the First Amendment forbids").

CONCLUSION

Minnesota claims that its asserted interest in eliminating dignitary harms outweighs the Larsens' First Amendment rights. But the case law is clear: Governments have no legitimate interest in fighting the expression of offensive ideas. *Johnson*, 491 U.S. at 414. They have no legitimate interest in fighting the distress *caused* by those ideas. *Id.* at 412. They even lack the authority to fight ideas the majority finds demeaning or biased toward minority groups. *See Matal*, 137 S. Ct. at 1764 (plurality). They lack that authority even in the context of public accommodations laws, and even when those laws are designed to protect sexual minorities. *See Boy Scouts*, 530 U.S. at 657–58; *Hurley*, 515 U.S. at 572–73.

In short, Minnesota's dignitary-harm argument—accepted by the court below—asks this Court to hold that majorities may punish decisions not to speak that they find abhorrent, just because they deem them abhorrent. Against this plea, First Amendment jurisprudence speaks with one confident voice.

For these reasons, the decision of the court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(5)(A)(i) and 32(a)(7)(B)(i), the attached Brief *Amicus Curiae* has been produced using 14 point Times New Roman font which is proportionately spaced. This brief contains 5,018 words as calculated by Microsoft Word 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2018, I served the foregoing Brief *Amicus Curiae* of Sherif Girgis on all parties or their counsel of record through the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service on those participants will be accomplished by the CM/ECF system.

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