NO. A23-0374
NO. A23-0484

State of Minnesota

In Court of Appeals

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 AMICUS CURIAE UPPER MIDWEST LAW CENTER IN SUPPORT OF RESPONDENTS

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AMICUS CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE[1]

Amicus curiae Upper Midwest Law Center's (the "Center") interest is public. The Center is a non-partisan, public-interest law firm founded in 2019 which litigates for individual liberty and to limit governmental, special interest, and public union overreach. The Center is a non-profit, tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code.

The Center has appeared as counsel of record before this Court and the Minnesota Supreme Court in a number of important recent cases, including *Spann v. Minneapolis City Council*, No. A21-0931; *Energy Policy Advocates v. Ellison*, No. A20-1344; *Snell v. Walz*, No. A21-0626; *Minnesota Voters Alliance v. Minnesota Secretary of State*, No. A22-0111; and *Minnesota Automobile Dealers Association v. Minnesota Pollution Control Agency*, No. A22-0796.

The Center has also appeared as counsel of record in recent cases before this Court specifically related to individual religious liberty rights and rights of conscience under the First Amendment to the United States Constitution and Article I, section 16 of the Minnesota Constitution. *E.g., McConnell v. Federal Reserve Bank of Minneapolis*, No. A22-0934; *Quarnstrom v. Berkley Risk*

[1] No party or counsel for a party authored this brief in whole or in part. No person or entity other than *amicus curiae*, its members, or its counsel made monetary contributions to the preparation or submission of this brief. Minn. R. Civ. App. P. 129.03.

Administrators Company, LLC, No. A22-1040. The Center routinely takes on cases like these related to individual religious liberty rights and rights of conscience.

POSITION OF THE CENTER

The Center supports Respondents' position on appeal. The Center believes that the district court correctly held, in denying Appellants' motion for judgment as a matter of law, that "a jury instruction that does not allow Respondent George Badeaux to offer his conscience and his personal, religious beliefs in explanation of his interactions with Andrea Anderson would violate the Minnesota and United States Constitutions." Add. 17 (Order Denying Pl.'s Mot. for J. as a Matter of Law, Jan. 12, 2023, p. 17 ("JMOL Order")). The Center believes the district court had no choice but to include consideration of Respondents' constitutional rights in instructing the jury as to the motivation for denying a prescription to Appellant. That instruction is essential to a Title VII or MHRA defendant's ability to "articulate" a "legitimate, nondiscriminatory reason" for refusing to take an action demanded by a member of the public. *See Bd. of Trs. v. Sweeney*, 439 U.S. 24, 25 (1978) (*McDonnell Douglas* burden shifting requires only "articulation," and does not create an affirmative defense for defendants to "prove").

If the district court had failed to so instruct the jury, that failure would have been "state action"—an application by a court of the Minnesota Human Rights

Act—that violated Respondents' religious liberty rights and rights of conscience protected under the Minnesota and U.S. Constitutions. *See, e.g., Shelley v. Kraemer*, 334 U.S. 1, 16 (1948) ("The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law."); *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 999-1002 (C.D. Ill. 2006) (rule requiring pharmacists to dispense emergency contraception may fail strict scrutiny under the First Amendment); *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990) ("Minnesotans are afforded greater protection for religious liberties against governmental action under the state constitution than under the first amendment of the federal constitution.").

ARGUMENT SUPPORTING AFFIRMANCE

I. Badeaux Did Not Challenge a Minnesota Statute or the Minnesota Constitution, so He Had No Obligation to Notify the Attorney General of His Nondiscriminatory Reasons for His Actions.

The Minnesota Rules of Civil Procedure and Civil Appellate Procedure require a party challenging the constitutionality of a statute or the state constitution itself—through certain actions by that party—to notify the Attorney General of the challenge, in order to afford the Attorney General the "right to intervene and defend" their constitutionality. Minn. R. Civ. P. 5A; Minn. R.

Civ. App. P. 144; *City of Grant v. Smith*, No. A16-1070, 2017 Minn. App. Unpub. LEXIS 231 at *1, *23 (Mar. 13, 2017).

These rules of civil and appellate procedure, however, depend on a party *actually challenging* the constitutionality of a state statute or the state constitution. These rules do not apply where the Attorney General merely disagrees with a party—and the district court—about the interpretation of a statute, or the propriety of jury instructions related to that interpretation. These rules do not convert statutory interpretation which *avoids* a constitutional problem into a default constitutional challenge by the prevailing party which might justify intervention and opposition. Choosing a statutory interpretation that would create constitutional conflict, as the Attorney General appears to urge, violates basic Minnesota interpretive rules. *Limmer v. Ritchie*, 819 N.W.2d 622, 628 (Minn. 2012) (avoiding constitutional conflict even where "the construction that avoids a constitutional confrontation is the less natural construction so long as the construction is a reasonable one") (internal quotation marks omitted).

Here, the Attorney General inappropriately calls Respondent Badeaux's explanation of his intent a "constitutional-based defense to the MHRA." Br. of *Amicus Curiae* Minn. Att'y Gen. at 6. But that would only be true if the MHRA were interpreted *to violate* Respondents' constitutional rights, as Appellant and (apparently) the Attorney General urge. Respondents simply could not

have known whether the district court would do so. There is no reasonable interpretation of these rules that could stretch them to require a litigant to predict the district court will interpret the applicable law to "spring" a constitutional challenge and notify the Attorney General of that potential, but dormant, challenge.

The statute at issue here, the Minnesota Human Rights Act ("MHRA"), states that "[i]t is an unfair discriminatory practice to deny any person the full and equal enjoyment of the goods, services, . . . and accommodations of a place of public accommodation *because of* . . . sex[.]" Minn. Stat. § 363A.11 subd. 1(a)(1) (emphasis added). The verbiage "because of" implies and has been interpreted to require the consideration of the allegedly discriminatory party's intent. *Babcock v. BBY Chestnut L.P.*, No. CX-03-90, 2003 Minn. App. LEXIS 899 at *1, *3 (July 29, 2003). In *Babcock*, this Court held that to "contend that a refusal to participate in the Section 8 program constitutes a per se violation of section 363.03 is to disregard the importance of the landlord's intent under the statute." *Id.* The Court went on: "In its plain terms, the statute requires a showing of both a refusal to rent and a failure to do so '*because of* [the prospective tenant's] status with regard to public assistance.'" *Id.* at *3-4 (emphasis in original).[2]

[2] We discuss the application of the *McDonnell Douglas* test to the Appellant's MHRA claims at trial in more detail below.

In finding that the jury could reasonably determine "that George Badeaux's interactions were motivated by his personal beliefs and not unlawful discriminatory intent," the district court employed a correct, intent-based interpretation of the MHRA. Add. 46 (JMOL Order 13). By following precedent and instructing the jury to use the *McDonnell Douglas* test to assess Badeaux's intent, the district court rejected the Appellant's interpretation that the MHRA ignores intent and infers a *per se* discriminatory intent. Add. 45, 47 (JMOL Order 12, 14). The district court's and Respondents' interpretation of the MHRA does not give rise to a constitutional challenge.

Rather, as the district court correctly noted, the Appellant's preferred jury instruction would "violate the Minnesota and United States Constitutions." Add. 47, 50 (JMOL Order 14, 17). Truly, the only situation in this case which would necessitate notifying the Attorney General would be if the Appellant's interpretation of the MHRA and accompanying jury instruction prevailed. But the district court's rejection of the Appellant's preferred jury instruction as unconstitutional does not convert the Respondents' argument into their own constitutional challenge. Add. 47, 50 (JMOL Order 14, 17); Add. 69, 72 (Order Den. Pls.' Mot. for a New Trial 15, 18 ("New Trial Order")). Instead, because the district court correctly interpreted the MHRA, this "springing" constitutional challenge does not exist at present. The rules of civil and appellate procedure

did not and do not require the Respondents to notify the Attorney General of their positions in this case.

II. Even if Respondents' *Arguments* Were Interpreted by the District Court as a Challenge to a Minnesota Statute or the State Constitution, the Minnesota Rules of Civil and Appellate Procedure Do Not Require Them to Notify the Attorney General.

Rule 5A of the Minnesota Rules of Civil Procedure states that only "[a] party that *files* a pleading, written motion, or other *document*" challenging the Minnesota Constitution or a state statute is required to serve notice to the Attorney General. (emphasis added). This describes a proactive, explicit action by the challenging party to file something with the court which triggers a subsequent obligation to inform the Attorney General that there is something concrete to potentially oppose. *See, e.g., D'Costa v. D'Costa*, No. A15-0655, 2016 Minn. App. Unpub. LEXIS 115, at *4 (Feb. 1, 2016) ("Second, father did not comply with the notice requirements of Minn. R. Civ. P. 5A when he filed notice of his challenge to the Minnesota Attorney General because he did not include a timely *pleading, written motion, or other paper* challenging the constitutionality of chapter 518.") (emphasis added).

Rule 144 of the Minnesota Rules of Civil Appellate Procedure states that "[w]hen the constitutionality of an act of the legislature is questioned . . . the party *asserting* the *unconstitutionality of the act* shall" serve notice to the Attorney General. (emphasis added). *See City of Grant*, 2017 Minn. App. Unpub.

LEXIS 231, at *23 (holding that relator's constitutional challenge to a Minnesota statute mentioned in his statement of the case would not be considered due to failure to notify attorney general); *see also Losen v. Allina Health Sys.*, 767 N.W.2d 703, 711 (Minn. Ct. App. 2009) (holding that appellant's constitutional challenge to the Minnesota Commitment and Treatment Act raised on appeal would not be considered due to failure to notify attorney general).

Like the civil procedure rules, this rule is not triggered absent a party's proactive move to "assert[]" a constitutional challenge to a statute on appeal. The specific form of an "assertion" is unclear, but in *City of Grant*, the Court held that a constitutional argument was "asserted" in a Statement of the Case, yet the litigant failed to notify the Attorney General. 2017 Minn. App. Unpub. LEXIS 231, at *23. Here, Badeaux's Statement of the Case expressly states that he did *not* raise a constitutional defense. Respondent Badeaux's Statement of the Case, Apr. 12, 2023, at 1. And below, as the district court stated, "[Respondents] did not raise a constitutional or affirmative defense." Add. 47 (JMOL Order 14). Respondents have not asserted a constitutional defense yet because there is none to assert at this time given the district court's proper interpretation of the MHRA.

Further, as this Court has held, even if civil rule 5A and appellate rule 144 were applicable here, Respondents would still have the right to challenge the constitutionality of the MHRA *as applied to them*. *Clay v. Clay*, 397 N.W.2d

571, 576 (Minn. Ct. App. 1986) (construing civil appellate rule 144 as applying only to challenges to "prima facie constitutionality" and, despite a failure to notify the Attorney General, allowing a challenge to "the constitutionality of the statute as applied") (citing *Markert v. Behm*, 394 N.W.2d 239, 243 (Minn. Ct. App. 1986) (same premise)). As as-applied challenge to the MHRA would only have arisen had the district court followed Appellant's urging, which it did not.

These rules do not allow the Attorney General to put a constitutional challenge into a litigant's mouth to trigger a notice requirement. As discussed herein, Respondents and the district court correctly interpreted the MHRA as requiring consideration of the defendant's nondiscriminatory intent, consistent with well-established precedent. This precedent recognizes Badeaux's right to refuse to act in a way that violates his conscience-based and religious beliefs, in keeping with, not contrary to, the Minnesota and United States Constitutions. Add. 48 (JMOL Order 15 (citing *State by Cooper v. French*, 460 N.W.2d 2, 8 (Minn. 1990) (en banc))). Badeaux's explanation of his actions to the jury is not a constitutional challenge even if his ability to explain his conscience vindicates his constitutional rights.

III. To Instruct the Jury Based on the Appellant's Interpretation of the MHRA Would Prejudice the Respondent.

The district court correctly held that "[t]he *McDonnell-Douglas* test for discrimination allows a defendant to offer a legitimate, nondiscriminatory reason for [his] actions." Add. 49 (JMOL Order 16). To prevail in an MHRA disparate treatment action at trial, a plaintiff, who carries the ultimate burden in sex-discrimination claims, must prove to the jury that it is more likely than not that the alleged discrimination was because of the alleged victim's sex. *E.g., Peterson v. City of Richfield*, No. A18-1080, 2019 Minn. App. Unpub. LEXIS 287, at *1, *9 (Apr. 8, 2019). Minnesota courts use the *McDonnell Douglas* test to instruct the jury that a defendant in such cases is not liable for sex discrimination when the defendant can show a legitimate, nondiscriminatory purpose for refusing an accommodation, which is not pretextual. *Id.* at *9-10. This is known as the "motivating-factor test." *Id.*

Minnesota courts have applied federal case law related to Title VII, and have specifically employed the test from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in cases of alleged MHRA disparate-treatment actions. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) ("In construing the MHRA, we apply law developed in federal cases arising under Title VII of the 1964 Civil Rights Act…."); *Sigurdson v. Isanti Cnty.*, 386 N.W.2d 715, 720-21 (Minn. 1986) (applying the *McDonnell Douglas* test to MHRA

claims and noting the test's importance for adequately reviewing a district court decision); *see also Dietrich v. Canadian Pac.*, 536 N.W.2d 319, 323 n.3, 324 n.5 (Minn. 1995) (applying the *McDonnell Douglas* test to MHRA age-discrimination claims). The district court in the instant case also employed this test, which entails (1) the plaintiff establishing a prima facie case of discrimination; (2) the defendant then proving a non-discriminatory rationale for his actions; and (3) the plaintiff then demonstrating that the defendant's proffered rationale was merely a pretext for discrimination. Add. 46 (JMOL Order 13); *Fletcher*, 589 N.W.2d at 101-02.

And while Minnesota courts often follow federal case law related to Title VII, our Supreme Court has departed from some federal precedent applying different standards to mixed-motive and single-motive disparate treatment claims *in favor of* the test from *McDonnell Douglas*:

> Courts of this state should continue to apply the *McDonnell Douglas* analysis in employment cases involving claims of disparate treatment brought under the Minnesota Human Rights Act regardless of whether a claim has the label of being a "single-motive" or "mixed-motive" case.

Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 626-27 (Minn. 1988). In fact, so strong is the preference for the *McDonnell Douglas* test in MHRA disparate treatment claims that our Supreme Court has stated that

> the *McDonnell Douglas* analysis, employed by this court in the past and by the trial court in this case, better effectuates the underlying policy of the Human Rights Act to protect victims of

> discrimination while simultaneously affording the alleged perpetrator the opportunity to articulate legitimate undiscriminatory reasons for the employment actions taken….

Id. at 626.

This rule expressly applies to trial as well as summary judgment. *Peterson*, 2019 Minn. App. Unpub. LEXIS 287, at *9. In *Peterson*, the Court analyzed and applied its precedential decision as modified by the Minnesota Supreme Court in *McGrath v. TCF Bank Sav., FSB*, 502 N.W.2d 801 (Minn. Ct. App. 1993), *aff'd as modified*, 509 N.W.2d 365 (Minn. 1993), related to what a jury should be instructed in an employment discrimination case.[3] The Court held that *McGrath* stands for the following:

> Citing its own precedent, the supreme court held that, "even if an employer has a legitimate reason for the discharge, a plaintiff may nevertheless prevail if an illegitimate reason 'more likely than not' motivated the discharge decision." *Id.* Thus, the supreme court modified our opinion to say that, on remand, the jury should be instructed consistent with the motivating-factor test in supreme court precedent.

Peterson, 2019 Minn. App. Unpub. LEXIS 287, at *9. The motivating-factor test "tells the jury to determine whether the plaintiff has proven that 'an illegitimate reason "more likely than not" motivated'" the alleged discrimination—just as the district court instructed here. *Id.* at *9-10. *McGrath*, as modified by the Minnesota Supreme Court, thus holds that, at *trial*, the plaintiff "bears the

[3] It makes no difference that this is a public-accommodations case, as discussed more below.

burden of proving [the defendant's] proffered reasons [for alleged discrimination] are pretextual." 502 N.W.2d at 807.

Appellant also argues that this is a "direct" discrimination case, not an "indirect" case, so they argue the *McDonnell Douglas* test does not apply. Appellant's Br. 32. This is incorrect—there is no evidence in the record (direct or circumstantial), cited by Appellant, which would give rise to a direct discrimination claim. *See* Appellant's Br. 6-8. Rather, Appellant admits that Respondent Badeaux has consistently stated his reasons for his declination to prescribe emergency contraception as based on his own beliefs and not on any discriminatory intent toward Appellant because of her protected-class status. *Id.* Respondent Badeaux's brief makes this patently clear. Br. of Resp't George Badeaux, Aug. 14, 2023, 9-13.

As the Minnesota Supreme Court has held in describing what constitutes direct evidence of discrimination:

> Direct evidence establishes "that the employer's discrimination was purposeful, intentional or overt," *Goins v. W. Grp.*, 635 N.W.2d 717, 722 (Minn. 2001), "such as where an employer announces he will not consider females for positions," *Sigurdson v. Isanti County*, 386 N.W.2d 715, 720 (Minn. 1986).

Hanson v. Dep't of Nat. Res., 972 N.W.2d 362, 373 (Minn. 2022). In *Hanson*, this Court, affirmed by the Minnesota Supreme Court, observed that the evidence of discrimination presented by the plaintiff-whistleblower was not direct

evidence of discrimination, but indirect, requiring the application of the *McDonnell Douglas* test[4] under the binding authority as described herein:

> Hanson's evidence does not show that the commissioner (or any other person at the DNR with input into the termination decision) ***expressed a desire*** to suppress reports of unlawful activity in general or suspected child abuse in particular. Furthermore, Hanson's evidence does not show that ***the commissioner expressed a retaliatory motive*** for Hanson's termination. The DNR submitted evidence that the termination decision was motivated by concerns about Hanson's unprofessional conduct at the hotel and the fact that, in making her report, she attempted to circumvent the proper law-enforcement authorities on the Bois Forte Indian Reservation, thereby threatening the DNR's relationships with a tribal government and with the BIA, an outcome that would be directly contrary to one of her job responsibilities. ***That evidence is not direct evidence of a retaliatory motive because it does not prove retaliation without the benefit of an inference***. *See Friend*, 771 N.W.2d at 38. Hanson's evidence is merely circumstantial evidence because it would require a fact-finder to infer that the commissioner or another person retaliated against Hanson because she had made a report of suspected child abuse.

Hanson v. State Dep't of Nat. Res., No. A20-0747, 2021 Minn. App. Unpub. LEXIS 374, at *1, *11-12 (Apr. 19, 2021) (emphasis added).

Like in *Hanson*, nothing in the record appears to come close to direct evidence of discrimination, and, in fact, Respondent Badeaux expressly testified

[4] As Amicus National Employment Lawyers Association notes, Justice Chutich, joined by Justice Thissen, noted that the *McDonnell Douglas* test has its own issues, and would have "paused" before applying it to the Minnesota Whistleblower Act. *Hanson*, 972 N.W.2d at 373 (Chutich, J., concurring). This only applies to these justices' analysis of the Whistleblower Act. And unless and until the Minnesota Supreme Court overrules its precedent applying *McDonnell Douglas* to public-accommodations MHRA cases, its formula is still required for jury instructions in cases like these.

that his reason for not doing what Appellant wanted him to do was nondiscriminatory—purely based on his own conscience, with nothing to do with Appellant's sex. This is an indirect-evidence, disparate-treatment case.

The Appellant's reading of the law also defies the plain meaning of the text of the MHRA, which states there is a violation when there is a denial of a good, service, or accommodation "*because of*…sex." Minn. Stat. § 363A.11 subd. 1(a)(1) (emphasis added). The district court rightly characterized a misstatement of the law of the kind offered by Appellant below as "erroneous" and even serious enough to warrant a new trial if the erroneous error "result[s] in substantial prejudice." Add. 61 (New Trial Order 7 (quoting *Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*, 896 N.W.2d 115, 129, 132 (Minn. Ct. App. 2017)). Consistently, if the district court had not instructed the jury according to the *McDonnell Douglas* test, this Court would have to reverse for prejudicial error had Appellant prevailed below. That is exactly what happened in *McGrath*: the district court instructed the jury that it could find in favor of the plaintiff in an MHRA action even if the plaintiff had not proven that the employer's legitimate, nondiscriminatory motives for termination were pretextual. *McGrath*, 502 N.W.2d at 803 ("The instruction given was in error because it did not require the jury to determine whether the reasons for McGrath's discharge offered by TCF were pretextual.").

Finally, it makes no difference that this is a public-accommodations case, and not an employment discrimination case, under the MHRA. In 2022 and 2023, this Court and the Eighth Circuit, applying Minnesota law, have both acknowledged the application of the *McDonnell Douglas* test to public accommodations, with the following formulation of the test:

> Johnson claims discrimination on account of his race, in violation of the MHRA. "It is 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 race…." Minnesota courts use the *McDonnell-Douglas* framework to assess MHRA claims….The *McDonnell-Douglas* framework "consists of a prima facie case, an answer, and a rebuttal." In the public-accommodations context, the elements of a prima facie case are: (1) the plaintiffs are members of a protected class; (2) the defendant discriminated against plaintiffs regarding the availability of its facility; and (3) the discrimination was because of plaintiffs' membership in the protected class."

Johnson v. Schulte Hosp. Grp., Inc., 66 F.4th 1110, 1114 (8th Cir. 2023) (internal citations omitted); *accord Aromashodu v. Swarovski N. Am.*, 981 N.W.2d 791, 795-96 (Minn. Ct. App. 2022).

Treating the MHRA as essentially a strict-liability statute, as Appellant does, simply misinterprets the text of the MHRA and Minnesota precedent allowing a public-accommodations defendant to explain his reasons for his actions. *See* Add. 66 (New Trial Order 12). Moreover, if the jury had been instructed to read the elements of an MHRA violation as a sort of strict-liability, *per se* claim, it would have been forced to ignore Badeaux's intent in refusing

to provide Anderson with emergency contraception, and therefore prejudiced his defense. Add. 50 (JMOL Order 17); *see also Peterson,* 2019 Minn. App. Unpub. LEXIS 287, at *7 (construing *McGrath*, 502 N.W.2d at 807).

This is where a real constitutional challenge—unlike the one invented by the Attorney General—could arise, had things proceeded differently below. If the district court instructed the jury not to consider Badeaux's conscience-based reason for refusing to fill the emergency contraception prescription, this would have been error because the instruction would have been unconstitutional, as we discuss in the next section. But it bears emphasizing that even assuming, incorrectly, that the correct instruction was not given, the jury found that no intentional discrimination took place at all by answering Questions 3A, 4A, 4B, 4C, 4D of the Special Verdict Form with "No." Add. 32 (Special Verdict Form 2). As such, Appellant's case fails under the harmless error rule.

IV. If the District Court Had Instructed the Jury to Not Consider Mr. Badeaux's Conscience, That "State Action" Would Have Deprived Him of His Religious Liberty and Conscience Rights.

A party deprived by state courts of a right guaranteed by the U.S. Constitution has a claim against the state for that deprivation. *Shelley,* 334 U.S. at 14 (1948); 42 U.S.C. § 1983. In this case, the state power in question is the district court's instruction to the jury as to how to assess Respondent Badeaux's behavior in refusing to dispense emergency contraception. *Shelley* confirmed that all government mechanisms—including courts—by which

states operate yield to the constitutional protections owed to all Americans and Minnesotans. 334 U.S. at 14. Importantly, *Shelley* condemned unconstitutional state action both by way of an unconstitutional state statute itself *and* a "state court['s]" enforcement of a state-created rule which violates constitutional rights. *Id.* at 17. This extends to lawsuits excluding the state as a party but employing state law incorrectly to resolve a dispute between private parties. *Thomas Oil, Inc. v. Onsgaard*, 215 N.W.2d 793, 298 Minn. 465, 469 (1974) (citing *Edwards v. Habib*, 397 F.2d 687, 691 (D.C. Cir. 1968)).

Pursuant to *Shelley* and the Minnesota Supreme Court's adoption of its reasoning in *Thomas Oil*, the district court could not have submitted Appellant's preferred instruction to the jury.

First, if the MHRA truly required an instruction—in every circumstance of alleged public-accommodations discrimination—which forbids a defendant from explaining his religious or conscience-based reason for his actions, the MHRA itself would violate the Minnesota and U.S. Constitutions. *Shelley*, 334 U.S. at 20. As *Shelley* and its predecessors clarified, "judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy." *Id*.

Moreover, it would contradict the even stronger protections guaranteed by Minnesota's constitution. Add. 48 (JMOL Order 15); *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990) ("Minnesotans are afforded greater protection

for religious liberties against governmental action under the state constitution than under the first amendment of the federal constitution."). There is no way such an instruction can pass constitutional muster when the *McDonnell Douglas* test itself provides a less restrictive means by which the state's interest in enforcing the MHRA may be achieved where defendants claim a religious or conscience-based reason for their allegedly discriminatory actions: the pretext instruction. *See, e.g., Goodman v. Archbishop Curley High Sch., Inc.*, 149 F. Supp. 3d 577, 585-86 (D. Md. 2016) (quoting *Redhead v. Conference of Seventh-Day Adventists*, 566 F. Supp. 2d 125, 134 (E.D.N.Y. 2008)) ("an employer's simple assertion of a religious motive usually will not prevent a reviewing court from asking whether that motive 'was in fact pretext' within the meaning of *McDonnell Douglas*").

Second, the *instruction itself*, beyond the improper[5] interpretation of the MHRA it would create, would violate Badeaux's federal and state constitutional rights as applied to his defense, for similar reasons. *See Shelley*, 334 U.S. at 16 ("These cases demonstrate, also, the early recognition by this Court that state action in violation of the Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official in the absence of statute."); *see also State by Balfour v.*

[5] Appellant's interpretation is also improper because it seeks constitutional conflict, instead of avoiding it. *See supra* pp. 4-9.

Bergeron, 187 N.W.2d 680, 683 (Minn. 1971) (finding that, for the court to hold the statute of frauds barred a given remedy for racial discrimination "could well be construed to be state action perpetuating racial discrimination in violation of the Fourteenth Amendment") (citing *Shelley*, 334 U.S. 1); *see also American Federation of Labor v. Swing*, 312 U.S. 321, 326 (1941) (improper court enforcement of state policy triggered Fourteenth Amendment action); *see also Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940) (conviction by court based on "a common law concept of the most general and undefined nature" triggered First Amendment freedom of religion violation). This type of "action of the state courts cannot stand." *Shelley*, 334 U.S. at 20.

To summarize, a jury instruction which omits consideration of a public-accommodations defendant's religious or conscience-based explanation of his nondiscriminatory intent simply would not survive constitutional scrutiny. The district court did the right thing by refusing to take Appellant's suggested path and instead instructing the jury to consider Respondent Badeaux's intent in refusing to prescribe emergency contraception to Appellant.

CONCLUSION

In MHRA public-accommodations cases, Minnesota courts instruct juries to find facts consistent with the three-part *McDonnell Douglas* test. A defendant has the right to raise a nondiscriminatory basis for his actions. And where that defendant explains his conscience-based or religious reason for refusing to fill

a highly controversial prescription, that explanation does not create a constitutional issue—the Attorney General has no right to intervene. The Court should affirm the jury verdict and judgments below.

Respectfully submitted,

Date: August 18, 2023

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