No. 15-1245

IN THE

Supreme Court of the United States

JASON ADAM TAYLOR,
Petitioner,

v.

TAMMY JEFFERSON,
in her official capacity as Chairman, Madison Commission on Human Rights,

THOMAS MORE,
in his official capacity as Commissioner, Madison Commission on Human Rights,

OLIVIA WENDY HOLMES,
in her official capacity as Commissioner, Madison Commission on Human Rights,

JOANNA MILTON,
in her official capacity as Commissioner, Madison Commission on Human Rights,

and

CHRISTOPHER HEFNER
in his official capacity as Commissioner, Madison Commission on Human Rights,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT

BRIEF FOR PETITIONER

Team A
Counsel for the Petitioner

STATEMENT OF THE ISSUES

I. Whether enforcement of a public accommodation law that requires a person to provide private business services when doing so violates that person's strongly held beliefs violates the Free Speech Clause of the First Amendment of the Constitution.

II. Whether enforcement of a public accommodation law that requires a person to provide private business services for religious events and which may compel that person to enter religious buildings violates the Free Exercise and Establishment Clauses of the First Amendment.

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STATEMENT OF JURISDICTION

The United States District Court for the District of Eastern Madison properly exercised jurisdiction in this matter under 28 U.S.C. § 1331. The United States Court of Appeals for the Fifteenth Circuit had jurisdiction under 28 U.S.C. § 1291. Petitioner Jason Adam Taylor timely filed a petition for writ of certiorari, which this Court granted. The jurisdiction of this Court rests in 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Jason Adam Taylor ("Mr. Taylor") brought this federal civil rights action under 42 U.S.C. § 1983 against Tammy Jefferson in her official capacity as chairman of the Madison Commission on Human Rights ("The Commission"), as well as the remaining commissioners in their official capacities. Mr. Taylor seeks injunctive relief to enjoin the Commission's Enforcement Action against his private conduct in violation of his First Amendment rights of freedom of speech and religion. *Taylor v. Jefferson*, No. 2:14-6879-JB, slip op. at 1-3 (D. Eastern Madison 2015) ("*Taylor I*"). He also requests damages, including the sum of fines imposed against him since September 13, 2014, as well as attorney's fees, compensatory and punitive damages. *Id*. at 2-3.

The Commission filed a motion for summary judgment on May 25, 2015. *Id*. at 1. The District Court for the District of Eastern Madison granted the motion for summary judgment. *Id*. at 12. Writing for the majority, Judge Jackson Blewitt determined the Enforcement Action furthers the state interest in ensuring all members of the public are served. *Id*. at 8-9, 12.

Mr. Taylor timely appealed the district court's order to the United States Court of Appeals for the Fifteenth Circuit, which affirmed the district court's grant of summary judgment. *Taylor v. Jefferson*, No. 15-1213, slip op. at 6 (15th Cir. 2015) ("*Taylor II").*

Mr. Taylor timely filed a petition for writ of certiorari, which this granted.

STATEMENT OF THE FACTS

Mr. Taylor's Mixed Faith Household Sours His View of Religion

Petitioner Jason Adam Taylor ("Mr. Taylor") grew up in a home ridden with religious conflict and turmoil. His home was mixed faith: his mother is Jewish and his father is Catholic. R. at 16. While neither parent was "extremely religious," many of Mr. Taylor's relatives were devoutly so and resented him for how he lived, or chose not to live, his life. *Id*. During Christmas holidays, his Catholic grandmother would comment, disparagingly, about how Mr. Taylor and his sister were her "only Jewish grandchildren." *Id.* at 17. He also experienced bitterness from his grandfather and uncle, who disliked him for not keeping a kosher Jewish diet and "resented that [he] was not 'Jewish enough.'" *Id*.

Being constantly perceived and defined by his religion "soured [Mr. Taylor's] vision of all religion by the time he was 18 years old." *Id.* Less than a year later, Mr. Taylor adopted a deeply held religious belief—militant atheism. *Id.* Jason Taylor believes, with sincerity, that "religion is a detriment to the future of humanity." *Id.* at 16. Mr. Taylor has attended a few religious ceremonies on occasion, but only in support of his family members. *Id.* at 17. In fact, he refrained from participating in any prayers and "felt uncomfortable." *Id.* However, while family is important to Mr. Taylor, his sincere belief takes priority. When asked to photograph his cousin's religious wedding—to be held in a Catholic church, in a Catholic service, by a Catholic priest—Mr. Taylor refused. *Id.*

Taylor's Photographic Solutions

Mr. Taylor is the owner of the closely held corporation Taylor's Photographic Solutions. *Id*. at 14. Madison residents frequent Mr. Taylor's studio because he is known for his "specific talents" in his photography style. *Id*. at 20. He has a particular reputation for his "expertise in the use of indoor lighting for photography indoors." *Id.*

Rather than being discriminatory to any particular faith or religious person, Mr. Taylor strives to maintain a religiously diverse workforce and accommodate the religious needs of his employees. *Id.* at 28. For example, Mr. Taylor once asked Ahmed Allam, who is known for his expertise in "outdoor lighting" to photograph a local "Beer, Bacon and Babes" festival. *Id*. Ahmed informed Mr. Taylor that since his religion forbids the consumption of pork, photographing the event would make him "uncomfortable." *Id*. Mr. Taylor understood and photographed the event himself. *Id.* at 29. To Mr. Taylor, asking Ahmed to photograph the festival is akin to someone "asking him to photograph the Pope and make him look good." *Id.* Mr. Taylor empathized with the discomfort of photographing an event that compromise one's beliefs. *Id.* In a sworn statement, Ahmed testified that "Mr. Taylor has always accommodated me regarding my photography of certain events where religious beliefs might be affected." *Id*. at 28.

While Mr. Taylor disapproves of organized religion, he refuses to tolerate any religious discrimination, even when it hurts his bottom-line. Once a customer refused to let Ahmed photograph their event because he is Muslim and they assumed "he hates America." *Id.* Mr. Taylor reprimanded the customer, telling her that "[d]iscrimination based on religion [is] the stupidest concept in the world. Religions claim to preach love and betterment of humanity, but all they do is try to tear each other down." *Id*. The customer "stormed out" and Mr. Taylor missed out on a $10,000 contract that day. *Id.* Mr. Taylor refuses to tolerate discrimination against religion—even if it costs him business. *Id.*

As Mr. Taylor is personally responsible for the company's daily operations, his religious beliefs influence the management policies. *Id* at 15-17. Despite his willingness to accommodate his employees, Mr. Taylor prefers for his business to not photograph "any event which is religious in nature." *Id*. at 14. This policy has existed since the business opened in 2003. *Id*. On two specific occasions, Mr. Taylor was seeking to operate his business in line with his religion and would not agree

to photograph weddings that would take place in religious buildings with religious leaders and were equivalent to religious ceremonies. *Id*. at 18-20. Mr. Taylor posted a sign[1] outside out of his business after the result of *Burwell v*. *Hobby Lobby* case as a political stance. *Id*. at 33. He was "absolutely livid" with the decision. *Id*. The sign was posted "to alleviate any questions as to the general applicability of [his] policy." *Id.* at 18. Mr. Taylor desired for the public to know he harbored no animus toward "individuals who follow religions." *Id*. at 18.

Patrick Johnson and Samuel Green Visit Taylor's Photographic Solutions

Despite the sign, two customers of different faiths—Patrick Johnson, who is Catholic, and Samuel Green, who is Jewish—requested Mr. Taylor to photograph their religious ceremonies. *Id*. at 35-37. For his religious wedding, Mr. Johnson sought "Mr. Taylor's reputation for utilizing indoor lighting to create spectacular photography." *Id*. at 36. Mr. Taylor asked both gentlemen where their weddings would take place and who would officiate the ceremony. *Id.* at 19. Upon learning both ceremonies were religious in nature, Mr. Taylor respectfully informed Mr. Johnson and Mr. Green that it was against his business practices to photograph religious ceremonies because he does not want to "make [religion] look good." *Id*. at 37. Both gentlemen angrily accused Mr. Taylor of discrimination against their religion. *Id*. at 35-37. Mr. Taylor explained his policy was generally applicable to all religious events and that he was not discriminating against them. *Id*. at 20. He further provided the information

[1] The management policy sign reads as follows:

> The management of this business believes that organized religion is an impediment to the furtherance of humanity and civilization. As a firm believer that the ultimate goal of humanity should be a fading of religion, the management of this business will not perform services for any religious services of any kind.
>
> The management of this business holds no personal prejudice against any particular religion or followers of any religion. Members of all religions are welcome to enter this place of business and will not be denied services based solely upon their affiliations with any particular religion.

for alternative photographers. *Id*. at 19. In response, the couples filed complaints with the Commission against Taylor's Photographic Solutions and Mr. Taylor personally. *Id*. at 25.

The Commission and the "Enforcement Action"

In response to these complaints, the Commission informed Mr. Taylor by letter that the filed complaints alleged discrimination in violation of the Madison Human Rights Act (MHRA). *Id*. at 20-21. The Commission's letter informed him that he could file a position statement, have an attorney, and engage in an administrative hearing. *Id*. at 21. Mr. Taylor opted not to file a statement or have a hearing "because [he] had done nothing wrong." *Id*.

Following this exchange, the Commission underwent an investigation and determined he had discriminated on the basis of religion. *Id*. The Commission required Mr. Taylor to immediately discontinue his policy, or pay $1,000 per week per violation under the MHRA. *Id*. at 26. They also issued a cease and desist letter informing the business and plaintiff that it would "bring a civil enforcement suit against this business and the manager/officer responsible for the unlawful conduct in sixty days if the illegal conduct was not immediately and permanently abated." *Taylor I*, at 2. The letter and fines are referred to as the "Enforcement Action." *Id*. The Commission is impermissibly requiring Mr. Taylor to choose between his constitutional rights, his conscience, and the manner in which he conducts his closely held business. *Id*. at 26.

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the United States Court of Appeals for the Fifteenth Circuit and hold that the Commission's Enforcement Action violates the Free Speech, Free Exercise and Establishment Clauses of the First Amendment.

The First Amendment protects photographs because they are a unique medium of expression for both the photographer and the photographed individual. Because photography is inextricably intertwined with the production of pure expression, the First Amendment fully protects photography. The Enforcement Action contravenes the Free Speech Clause because it compels Mr. Taylor to convey, through photography, religious-endorsing messages. This mandate violates Mr. Taylor's conscience and unconstitutionally burdens his right to be free from government-compelled speech and government compelled expressive association.

As the Enforcement Action mandates speech that Mr. Taylor would not otherwise create, it necessarily alters the content of his expression. Consequently, this application of Madison's public accommodations law constitutes a content-based regulation and warrants the application of strict scrutiny, which it cannot survive. The Commission's general interest in ending discrimination in places of public accommodation is not implicated in this case because Mr. Taylor did not discriminate on the basis of religion. He excluded messages, not people. Yet, even if the Commission's interest was implicated, the Enforcement Action is not narrowly tailored to further that end.

The Enforcement Action also violates the Free Exercise Clause because it forces Mr. Taylor to choose between violating his sincere belief or paying substantial Commission fines and losing full control over his business operations. For First Amendment purposes, Mr. Taylor's sincerly held belief that religion is a detriment to the furtherance of humanity constitutes a religion. This case presents a "hybrid rights" situation because the Enforcement Action infringes more than one of Mr. Taylor's

constitutional rights. Government regulations implicating the Hybrid Rights Doctrine must satisfy strict scrutiny. The Enforcement Action cannot meet this heightened scrutiny because the Commission fails to advance a compelling interest for substantially burdening Mr. Taylor's right to freely practice his belief. Even if a compelling rationale was present, the Enforcement Action is not the least restrictive means necessary to further that interest. This Court has previously explained that the governmental bodies cannot further an interest by forcing individuals to adopt messages they oppose.

Should this Court reject the hybrid rights implication of this case, Mr. Taylor and his business still retain the right to free exercise of religion under Madison's Religious Freedom Restoration Act (RFRA). The Commission cannot sustain its regulation because, for the reasons discussed previously, the Enforcement Action cannot satisfy strict scrutiny. Rather than inquiring into what affects an individual's personal beliefs, courts should determine whether an honest, sincere conviction exists.

This Court should also hold the Enforcement Action violates the Establishment Clause, which requires the government to maintain neutrality regarding the endorsement of various religions. This clause further prevents government endorsement of religion over nonreligion. As the Enforcement Action favors religion over non-religious activities, and promotes one religion over the other, the Commission's regulation is respecting an establishment of religion. By forcing Mr. Taylor to photograph religious ceremonies, the Enforcement Action violates the Establishment Clause.

The Enforcement Action unconstitutionally burdens Mr. Taylor's rights to freedom of expression and religion and conflicts with this Court's precedent. By reversing the holding of the Fifteenth Circuit Court of Appeals, this Court has an opportunity to extend First Amendment protection to Mr. Taylor's creative expression and his right to practice his sincerely held belief.

ARGUMENT

The First Amendment prohibits laws "abridging the freedom of speech" and laws "respecting an establishment of religion." U.S. Const. amend I. It is incorporated to the states through the Due Process Clause of the Fourteenth Amendment. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). As Mr. Taylor raises a First Amendment claim for each issue, this Court should review both the factual determinations and legal conclusions of the Court of Appeals *de novo* and make an independent examination of the record to determine whether grant of summary judgment was proper. *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

I. The Enforcement Action violates the Free Speech Clause because it compels Mr. Taylor to express a viewpoint that violates his conscience

The lower courts' dismissals of Mr. Taylor's compelled speech claim summarily dispatched an important constitutional issue at the expense of First Amendment freedoms. The First Amendment shields Mr. Taylor's affirmative decision to refrain from photographing religious events because his omission is inherently expressive. This Court should invalidate the Enforcement Action because it compels Mr. Taylor to create expressive works that violate his sincerly held belief. The Enforcement Action is also invalid because Mr. Taylor's omission does not implicate the Commission's general interest in preventing discrimination in public accommodations. Even if it were implicated, the Enforcement Action cannot pass strict scrutiny. Thus, this Court should reverse the Fifteenth Circuit.

A. Mr. Taylor's affirmative decision to refrain from photographing events in religious settings is inherently expressive

1. *Photography is a medium of creative expression for both the photographer and the photographed individual*

Photography warrants robust First Amendment protection, as it is a unique medium through which messages are conveyed and understood at a level beyond mere words. This Court, and numerous others, has held the First Amendment protects photographs. *See Hurley v. Irish-Am. Gay*, 515 U.S. 557,

569 (1995) ("[T]he Constitution looks beyond written or spoken words as mediums of expression."); *Kaplan v. California*, 413 U.S. 115, 119-120 (1973) ("[Pictures, films, paintings, drawings, and engravings…have First Amendment protection[.]"); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) ("The protection of the First Amendment . . . includes other mediums of expression, including . . . photographs[.]"); *Bery v. City of N.Y.*, 97 F.3d 689, 696 (2d Cir. 1996) (noting that "paintings, photographs, [and] prints and sculptures . . . are entitled to full First Amendment protection").

Since photographs are protected, the process of creating photographs is also protected. This Court has never distinguished between the process of creating a form of speech and the speech itself. On the contrary, this Court has noted a burden on the means of production of speech is a burden on the speech itself. *See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue,* 460 U.S. 575, 582 (1983) (holding that a tax on ink and paper "burdens rights protected by the First Amendment."). Just as printing is inseparable from publishing newspapers, photography is inseparable from producing photographs. Photography is so inextricably intertwined with expression that "for practical purposes it partakes of the same transcendental constitutional value as pure speech." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 588 n.5 (1980) (Brennan, J., concurring).

The district court's attempt to differentiate between a professional who creates images on his own initiative and a professional who is hired to created images by a customer is flawed. *Taylor I*, at 8. In both instances, the photographer creates and endorses the embedded message by (1) making subjective decisions regarding what images to capture; (2) capturing those images through a unique perspective; (3) editing the images with his personal style; and (4) getting paid for his creative skill.

The Ninth Circuit's analysis in *Anderson v. City of Hermosa Beach*, 621 F.3d. 1051 (9th Cir. 2010), is instructive. In the context of tattoos and tattooists, the *Anderson* court found even if clients

have "ultimate control over" the tattoo design and even if the tattooist simply "provide[s] a service," those facts do "not make the tattooing process any less express activity, because there is no dispute that the tattooist applies his creative talents as well." *Id*. at 1062. Contrary logic, the court explained, would result in "Michelangelo's painting of the Sistine Chapel"—which was commissioned by the Pope—losing First Amendment protection. *Id.* The court concluded that, "[a]s with all collaborative creative processes, both the tattooist and the person receiving the tattoo are engaged in expressive activity." *Id.* Thus, even if Mr. Taylor was directed in the capture and production of his images, they are nevertheless protected expression. After all, "First Amendment protection [does not] require a speaker to create, as an original matter, each item featured in the communication." *Hurley*, 515 U.S. at 570. The appellate court's ruling allows the government to stifle speech by breaking that speech into its constituent parts—divorcing the click photographer's camera from the image—and banning those parts individually. Such a result is antithetical to the First Amendment.

2. *Mr. Taylor's omission is itself speech and a political viewpoint*

This Court's precedent makes clear that the First Amendment protects an individual's right to express viewpoints by refraining from discourse. "The right to refrain from speaking" is a part "of the broader concept of 'individual freedom of mind'" guaranteed by the First Amendment. *Wooley v. Maynard*, 430 U.S. 705, 714 (1976) (quoting *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943)). Mr. Taylor's decision to refrain from expressing certain messages is akin to a student's decision to refrain from saluting the flag in *Barnette*. 319 U.S. at 624. Declining to photograph events endorsing religion is within Mr. Taylor's right to "avoid becoming the courier" for a message with which he disagrees. *Wooley*, 430 U.S. at 717. This omission of religious settings is also protected because it is based on political grounds.

In fact, it is undisputed that most of Mr. Taylor's discussions about religion are "in the context of politics." R. at 27. "[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Landmark Commc'ns v. Va.*, 435 U.S. 829, 838 (1978). In *Wooley*, this Court recognized the Maynards' objection to displaying "Live Free, or Die" was political because they believed "life is more precious than freedom." 430 U.S. 705, 707 n.2 (1977). Likewise, Mr. Taylor's objection is political because he believes "the ultimate goal of humanity should be a fading of religion." R at 23. When the expression is political, courts should protect political speech from far-reaching public accommodation laws. In *Citizens United v. FEC*. ,130 S. Ct. 876, 898 (2010), this Court held "political speech must prevail against laws that would suppress it, whether by design or inadvertence." For Mr. Taylor, choosing which images to capture is a process by which he communicates political values in accordance with his sincerely held belief to an audience that is willing and able to interpret his communication. As a consequence, the First Amendment protects his conduct.

B. The Enforcement Action contravenes this Court's compelled speech jurisprudence

1. *The Enforcement Action compels Mr. Taylor to express, through photography, religion-endorsing messages*

The Enforcement Action contravenes this Court's compelled speech jurisprudence because it forces Mr. Taylor to convey, through photography, religion-endorsing messages. In *Wooley*, the Maynards sought to hide the state motto on their license plate. 430 U.S. at 707-08, 715. In ruling for the Maynards, this Court reasoned a driver's "individual freedom of mind" protects his "First Amendment right to avoid becoming the courier" for the communication of speech that she does not wish to communicate. *Id*. at 717. Thus, even "the passive act of carrying the state motto on a license plate," may not be compelled because it too "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id*.

Wooley applies as much when the speech is visual as when it is verbal. Indeed, *Barnette* included nonverbal expression. 319 U.S. 624 (1943). *Barnette* struck down not only the requirement that schoolchildren say the Pledge of Allegiance, but also that they salute the flag. *Id*. at 632-34. That case treated compelled verbal expression the same as compelled symbolic and visual expression. Hence, the government may not compel distribution or display of visual expressions because doing so intrudes on the "individual freedom of mind" as much as requiring the display of a slogan.

Hurley is illustrative of this point. In *Hurley*, this Court held that St. Patrick's Day Parade organizers had a right to exclude marchers who wanted to carry a banner that read, "Irish American Gay, Lesbian and Bisexual Group of Boston." 515 U.S. at 570. This Court ruled in favor of the parade organizers reasoning that the government "may not compel affirmance of a belief with which the speaker disagrees[.]" *Id*. at 573. Requiring Mr. Taylor to photograph religious events intrudes on the "individual freedom of mind" as much as does requiring the display of a slogan. Thus, the First Amendment protects his refusal to distribute expression "which [he does] not completely accept[.]" *Id*. Therefore, the Commission's compulsion to photograph religious events is unconstitutional.

2. *The Enforcement Action forces Mr. Taylor to associate with religion-endorsing messages*

The First Amendment guarantees the "right to associate with others in pursuit of a wide variety of political . . . ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000). Similar to the right not to speak, the "[f]reedom of association…plainly presupposes a freedom not to association." *Id.* at 648. The government unconstitutionally burdens this freedom by "intru[ding] into the internal structure of affairs of an association" and "forc[ing] the group to accept members it does not desire." *Id*. at 623. The Enforcement Action's mandate to photograph religious events impairs Mr. Taylor's ability to oppose religion and curtails his right to expressive association.

Mr. Taylor's engagement in pure expression triggers the right to expressive association R. at 14; *See infra* Section I.A. While his business association is religiously diverse, there is no condition that they associate for the "purpose" of disseminating a unified message. *Hurley,* 515 U.S. at 655; R. at. 18. For example, in *Hurley*, the purpose of the parade was not to promote a particular view about sexual orientation, but this Court nonetheless held the parade organizers could exclude certain participants.

Mr. Taylor does "not want to be seen as endorsing a religion in any way." *Id.* at 15-16. The forced inclusion of pro-religious photos significantly burdens Mr. Taylor's ability to advocate his sincerely held belief that "religion is a detriment to the future of humanity." *Id.* at 16. Courts must defer to an association's contentions regarding the nature of its expression and regarding what would impair its expression. *Dale*, 530 U.S. at 653. At a minimum, producing pro-religious photographs, would force Mr. Taylor to send a message that he and his company accept organized religion as a legitimate form of behavior. Such a mandate would severely intrude on expressive association right. Thus, the First Amendment bars the state from using its public accommodations law to impose such a requirement.

C. Mr. Taylor's omission does not implicate the Commission's interest in eliminating discrimination in public accommodations

1. *Mr. Taylor excluded religion-endorsing messages, not religious people*

The Commission alleges it uncovered "direct evidence" of impermissible discrimination on the basis of religion. *Taylor I* at 4. It specifically points to (1) the company policy of not photographing events in religion settings, (2) the window sign explaining this policy and (3) an assertion that Mr. Taylor engages in "pattern[s] of discriminatory conduct against religious persons." R. at 25-26. That evidence, however, is uncharacteristic of direct proof of discriminatory animus. Direct evidence is evidence that "does not require the fact finder to draw an inference to reach th[e] conclusion" that unlawful discrimination was 'a motivating factor' in the challenged actions." *Amini v. Oberlin Coll.*, 440 F.3d 350, 359 (6th Cir. 2006). "This evidence usually requires an admission from the

decisionmaker about [his] discriminatory animus[.]" *Nagle v. Vill. Of Calumet Park*, 554 F.3d 1106, 1114 (7th Cir. 2009). Mr. Taylor made no such admission. He merely objects to producing photographs that endorse religion. R. at 15. His only animus was towards certain locations. This is not based on discrimination against the individual, but is rather a refusal to endorse a particular message.

The sign the Commission relies on merely "alleviates any questions" about the aforementioned company policy. *Id*. at 18. The sign is political, rather than discriminatory. Mr. Taylor erected the sign only days after this Court issued the *Hobby Lobby* ruling—which he "livid[ly]" opposed. *Id*. at 33. More so, the sign expressly states the company "holds no personal prejudice against any religion or followers of religion." *Id*. at 23. Rather, the company welcomes "members of all religions" and guarantees they "will not be denied services based solely upon their affiliations with any particular religion." *Id*. The Commission failed to consider the context of Mr. Allam's and Ms. Reuben's statements. Both employees aver that Mr. Taylor always accommodated their needs whenever photographing a certain event implicated their personal religious beliefs. *Id*. at 28, 31-32. Thus, the interest is not implicated here.

2. *Even if the Commission's interest was implicated, the Enforcement Action cannot survive strict scrutiny*

"Mandating speech that a speaker would not otherwise make," as this application of the public-accommodations statute threatens to do, "necessarily alters the content of the speech." *Riley v. Nat'l Fed. of the Blind,* 487 U.S. 781, 795 (1988). Consequently, this application of the statute is "consider[ed] ... a content-based regulation of speech" that requires the application of strict scrutiny. *Id*.; *See also Turner Broad. Sys. v. FCC*, 512 U.S 622, 642 (1994) (noting that government actions that compel private speech are subject to strict scrutiny). The Enforcement Action is presumed unlawful unless it a "narrowly tailored means of serving a compelling state interest." *Pacific Gas & Elec. Co. v. P.U.C. of California,* 475 U.S. 1 (1986).

This Court has twice addressed this issue in the context of public accommodations. In *Hurley*, this Court found that although the government enacted the law to further its interest in "prevent[ing] any denial to (or discriminatory treatment in) public accommodations on proscribed grounds," the application of that law to compel an organization to engage in expression that it found objectionable did not satisfy strict scrutiny. 515 U.S. at 578-79. Similarly in *Dale*, after concluding that the application of the public accommodation law "would significantly burden the organization's [First Amendment rights]," this Court held "[t]he state interests embodied in [the] public accommodation[] law"—which included "a compelling interest in elimination discrimination"—did "not justify such a severe intrusion on the [organization's First Amendment] rights." *Dale*, 530 U.S. at 657-59. Thus, this Court has already performed the relevant constitutional review, and in doing so, has resoundingly declared that the government's interest in preventing discrimination does not justify encroachment on an organization's First Amendment rights, such as requiring it to engage in unwelcome expression.

When MHRA is applied to expressive activity, its apparent object is to require speakers "to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it" with messages of their own. *Hurley*, 515 U.S. at 578. However, in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker autonomy forbids. As this Court explained in *Hurley*, "while the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one." *Id*. at 579. The very idea that a speech restriction be used to produce thoughts and statements acceptable to some groups, or indeed, all people is antithetical to the First Amendment. *Id*. at 578-79. Thus, the Commission's Enforcement violates the Free Speech Clause by infringing Mr. Taylor's right not to use his expressive constitutional rights to promote or commemorate a message about religion that conflicts with his sincerely held belief.

II. The Enforcement Action Violates the Establishment Clause and Free Exercise Clause Because It Prohibits Mr. Taylor From Practicing His Deeply Held Belief.

The lower courts erred by dismissing Mr. Taylor's Free Exercise and Establishment claims because the Enforcement Action does not pass strict scrutiny as required by the Hybrid Rights Doctrine and Madison's RFRA. The First Amendment protects Mr. Taylor's ability to freely exercise his religion and protects him from government coercion to conform to a particular religion. This Court should invalidate the Enforcement Action because it does not allow Mr. Taylor to operate his business in line with his deeply held belief. Additionally it confers benefits to some religions and therefore violates the Establishment Clause. Therefore, this Court should reverse the Fifteenth Circuit.

A. Militant Atheism is a Religion

The "[f]reedom of thought, which includes freedom of religious belief, is basic in a society of free men." *United States v. Ballard*, 322 U.S. 78, 87 (1944). This "freedom of thought" is not limited to conventional religions. In *Ballard*, this Court clarified that the freedom of religion "embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths." *Id*. While this Court has refrained from defining religion, it has articulated a test for determining when conduct qualifies as a religion. In creating the sincerity test, this Court explained:

> Local boards and courts in this sense are not free to reject beliefs because they consider them 'incomprehensible.' Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious . . . we hasten to emphasize that while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.'

United States v. Seeger, 380 U.S. 163, 184-85 (1965). Therefore, the government cannot determine what constitutes a religion based on merit. Rather, it must rely on the sincerity of the particular belief.

Mr. Taylor identifies as a "full blown militant atheist" and harbors the deeply held belief that "religion is a detriment to the furtherance of humanity." R. at 16-17. In fact, he believes "the ultimate goal of humanity should be a fading of religion." *Id*. at 23. While his belief may be unpopular to some,

the constitution nevertheless protects his right to live in accordance with his sincerely held belief. A democratic society that protects an individual's right to believe an ideology inherently protects the complementary right not to believe in certain ideologies.

B. Given the Enforcement Action burdens both Mr. Taylor's right to free speech and right to free exercise, it must receive heightened scrutiny under the Hybrid Rights Doctrine

The general rule of *Employment Division v. Smith*, 494 U.S. 872, 878 (1990)—that neutral laws of general applicability may not be justified by a compelling state interest because its prohibition of the exercise of religion is merely incidental effect of a generally applicable law—has some exceptions. *See also Church of Lukumi Babalu Aye, v. City of Hialeah*, 508 U.S. 520, 531 (1993). The Hybrid Rights Doctrine is one of these exceptions. Under that doctrine, this Court must subject the Enforcement Action to heightened scrutiny because it infringes upon both Mr. Taylor's right to the free exercise of religion and his right to be free from government-compelled speech. *See Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No.*, 135 F.3d 694, 700 (10th Cir. 1998).

This Court has held "the First Amendment bars application of a neutral, generally applicable law to religiously motivated action" if the case involves a Free Exercise Clause "in conjunction with other constitutional protections[.]" *Smith*, 494 U.S. at 881. Therefore, *Smith*'s general rule is inapplicable because the Commission's actions involve a free speech and a free exercise violation, which triggers application of the Hybrid Rights Doctrine. *Id.* In "hybrid rights" cases, the plaintiff must establish a plausible free exercise claim and a "colorable showing of infringement" of another constitutional right. *Swanson*, 135 F.3d at 700. Once established, the government must show its actions are narrowly tailored to further a compelling governmental interest in order to sustain its regulation. *Cantwell v. Conn.*, 310 U.S. 296, 304-07 (1940)); *see also Wis. v. Yoder*, 406 U.S. 205, 233 (1972) (asserting that heightened scrutiny applies when other interests are combined with a free exercise claim).

In a "hybrid rights" situation, free exercise cases weigh two fundamental rights against the interest of the government, therefore the free exercise right or the conjoining claim need not be able to stand alone but both must present plausible claims. *Swanson,* 135 F.3d, at 700 ("Whatever the *Smith* hybrid-rights theory may ultimately mean, we believe that it at least requires a colorable showing of infringement of recognized and specific constitutional right, rather than the mere invocation of a general right."). A hybrid-rights claimant must "show that the companion constitutional claim is colorable." *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004). Colorable simply means that "the plaintiff must show a fair probability or likelihood, but not a certitude, of success on the merits." *Id*.

The Enforcement Action infringes Mr. Taylor's right to free exercise of religion and freedom of expression. *See infra* § I.A.-B. Mr. Forcing Mr. Taylor to photograph religious ceremonies against his sincerely held belief implicates the compelled speech doctrine and violates free speech rights. This constitutes a colorable showing under the hybrid-rights theory, which demands that the Enforcement Action be subjected to heightened scrutiny under this Court's precedent in *Cantwell*.

C. The Enforcement Action bars Mr. Taylor's right to freely exercise his deeply held belief

1. *The Enforcement Action fails strict scrutiny*

Application of the hybrid rights doctrine demands strict scrutiny. *Cantwell*, 310 U.S. at 304-07. The government has substantially burdened Mr. Taylor's rights and therefore must demonstrate a compelling state interest and use the least restrictive means necessary to further that interest. The Enforcement Action furthers no compelling state interest and is not narrowly tailored. Consequently, Mr. Taylor is entitled to an exception from the MHRA.

a. Mr. Taylor's religious freedom rights are substantially burdened

Mr. Taylor's right to the free exercise of religion has been substantially burdened. In *Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751 (2014), the business owners were forced to either violate their religious beliefs or pay a fine. This Court stated "the question that RFRA presents [is], whether the

. . . mandate imposes a substantial burden on the ability of the objecting parties, to conduct business in accordance with their *religious beliefs*[.]" *Id*. at 2759 (emphasis in original). This Court found choosing between violating one's religion or paying a fine substantially burdens the right to free exercise. *Id.* at 2778-79.

In *Sherbert v. Verner*, 374 U.S. 398, 399-401 (1963), a member of the Seventh Day Adventist Church was terminated and denied unemployment for refusing to work on Saturdays due to her religious beliefs. This Court found the termination violated her right to freely exercise her religion and that her choice between violating her religion or being without money was a substantial burden. *Id.* at 404. This Court explained "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [them] for [maintaining their religious beliefs]." *Id*. This Court has recognized being required to choose between violating one's religion and a fine is a substantial burden. *Id.*

Mr. Taylor's situation is analogous to the circumstances in *Hobby Lobby* and *Sherbert.* Mr. Taylor is being forced to either violate his religion by allowing his business to photograph religious ceremonies or pay $1,000 per week for operating his business within his religious beliefs. R. at 26. Under *Sherbert* and *Hobby Lobby*, this choice is a substantial burden to Mr. Taylor's right to freely exercise his religion. Therefore, the Enforcement Action must be motivated by a compelling state interest and executed in the least restrictive means necessary in order to survive invalidation.

b. The Enforcement Action furthers no compelling state interest and it is not the least restrictive means necessary

To survive strict scrutiny, the government's interest must not only be generally compelling, the state interest must be satisfied in the specific situation. In *Hobby Lobby*, this Court explained, "RFRA . . . requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the person—the particular claimant whose sincere exercise of

religion is being substantially burdened." 134 S. Ct. 2779. This Court explained the state interest must be achieved, which "requires us to look beyond broadly formulated interests and to scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Id.* Madison's RFRA is identical to the federal RFRA discussed previously. Therefore, the same standard applies.

The Commission indicated that its interest is to prevent discrimination. R. at 11-12. In this case, that interest is not achieved. Ironically, the government's interest in preventing discrimination is only achieved by discriminating in this case. In order to prevent Mr. Taylor's decision to abide by his deeply held beliefs, the government must discriminate against Mr. Taylor's ability to freely practice his religion. Therefore, the state interest is not compelling because it is not achieved in this case. This also shows the Enforcement Action is not the least restrictive means necessary. In *Hurley*, this Court concluded that the state could not enforce a nondiscrimination statute by forcing people to promote views they oppose. *Hurley*, 515 U.S. at 578-59. Thus, the Enforcement Action fails strict scrutiny and Mr. Taylor deserves an exception.

2. *The Enforcement Action does not comport with Madison's RFRA*

a. Mr. Taylor and his business still have the right to free exercise

This Court has rejected the flawed argument that companies "forfeit[] all RFRA protection when they decide[] to organize their business as corporations." *Hobby Lobby*, 134 S. Ct. at. 2759. Rather, a plain reading "of RFRA makes it perfectly clear that Congress did not intend to discriminate …against men and women who wish to run their business as for-profit corporations in the manner required by their religious beliefs." *Id.* When a business owner decides to form a corporation they do not forego all of their freedom of expression rights. Mr. Taylor has stipulated the public accommodation status of his business, but this does not affect his ability to decline photographing religious ceremonies because he is not discriminating on the basis of religion. *See infra* § I.C.1.

b. Courts should not draw the line between what Mr. Taylor considers his business and his personal beliefs

In *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), this Court determined courts should not inquire whether the line drawn by a person between themselves and business is unreasonable. *Thomas* involved a Jehovah's Witness who was terminated for objecting, on religious grounds, to participate in the manufacture of war weapons. *Id*. at 710. The state court ruled against the employee because they did not agree with the line that he drew between work that was not against his religion, and work that was. *Id.* at 714-15. On appeal, this Court held that "it is not for us to say that the line he drew was an unreasonable one." *Id.* at 715.

Further, this Court found this reasoning compelling in *Hobby Lobby*, in which it expanded the protection for religious freedoms for businesses. Reviewing the sincere belief of the Hobby Lobby owners that providing insurance coverage contravened their religion, this Court stated "it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our 'narrow function ... in this context is to determine' whether the line drawn reflects 'an honest conviction[.]'" 134 S. Ct. at 2779. Therefore, the test to determine if the belief of the business is in essence the belief of the business owner is "an honest conviction."

Much like the employee in *Thomas* believed that making weapons was against his religion because it aided the war, Mr. Taylor believes that photographing religious ceremonies endorses religion. R. at 15. Mr. Taylor draws the line and believes that this is against his religion to aid organized religions by participating in their ceremonies and producing photographs of what takes place.

The question is not if it is reasonable for the two to be inseparable, but if this is "an honest conviction." In Mr. Taylor's case it is. Mr. Taylor's only goal in not photographing religious ceremonies is to avoid something his religion is against. He makes it very clear that he does not deny service based on hatred of a particular religion or the people who practice religions. *Id.* at 18. The only

goal is to not violate his religion. It would be plausible for this to not be an honest conviction if, somehow, Mr. Taylor benefitted from denying service, but he does not. Mr. Taylor loses profits by refusing to photograph religious services. The only thing he gains is the benefit of not violating his religion. This is by definition an honest conviction.

c. The Enforcement Action does not satisfy Madison's RFRA

Even if the court rules that the Hybrid Rights Theory does not apply to this case, the actions of the Commission against Mr. Taylor must be evaluated under Madison's RFRA in order to determine if they violated Mr. Taylor's right to the free exercise of his religion. *Hobby Lobby*, 134 S. Ct. at 2759. To justify its substantially burden on Mr. Taylor's deeply held belief the Commission must show (1) a compelling state interest and (2) that it used the least restrictive means necessary. Mad. Code. Ann. § 42-501(d). Mr. Taylor's rights are substantially burdened, the state does not have a compelling state interest, and the least restrictive means necessary were not used. *See infra* § II.C.a. Therefore, the infringements on Mr. Taylor's First Amendment rights necessitate an exception.

D. By placing religion and religious practices over non-religion, the Enforcement Action violates the Establishment Clause

The Establishment Clause does more than prohibit the establishment of a state church, it prohibits *any* law respecting the establishment of any religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (emphasis added). The Establishment Clause further requires the government to maintain neutrality among religions, and between religion and nonreligion. *Sch. Dist. v. Ball*, 473 U.S. 373 (1985).

This Court has articulated the main evils the Establishment Clause was intended to guard against: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Com. of N.Y*, 397 U.S. 664, 668 (1970). In *Lemon*, this Court articulated a three-part test to determine when laws violate the Establishment Clause: (1) the statute must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion, and

(3) the statute must not foster "an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612, (1971); *see also Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968).

The Enforcement Action cannot withstand the *Lemon* test. First, *Lemon* requires first that the law in question serve a secular legislative purpose. As this Court has held, under the *Lemon* test: "[the] 'purpose' requirement aims to prevent the relevant governmental decision maker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987). Requiring Taylor to photograph religious services that transgress his deeply held belief, the Enforcement Action abandons neutrality. Rather, it protects traditional religious beliefs while simultaneously depriving Mr. Taylor's belief protection. The statute therefore fails the first prong of *Lemon*.

The second requirement under *Lemon* is that the law's principal or primary effect must be one that neither advances nor inhibits religion. *Lemon*, 403 U.S. at 612. Advancement is connoted as "sponsorship, financial support, and active involvement of the in religious activity." *Walz,* 397 U.S. at 668. However, "[f]or a law to have forbidden 'effects' under *Lemon*, it must be fair to say the government itself has advanced religion through its own activities and influence." *Id.* A law that forces a photographer to advance a religious service or ceremony by using his craft (photography) has in essence advanced the religion itself. The Enforcement Action requires Taylor to act against his own deeply held belief to advance the beliefs and therefore fails the second prong of *Lemon*.

The final requirement of *Lemon* is that the statute must not foster an excessive government entanglement with religion. Forcing Mr. Taylor to participate in religious activities that contradict his deeply held belief is endorsement and sends the message that he is an outsider, that his religious belief (not to believe) does not deserve the same protection as other religions. Direct government action

endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985). To force Mr. Taylor to act against his own conviction to protect the religious freedoms of others shows excessive government entanglement and as applied the Enforcement Action violates the third part of the *Lemon* test.

The Establishment Clause is violated when a law advancing a particular religious belief indirectly pressures religious minorities to conform to the prevailing officially approved religion. *Engel v. Vitale*, 340 U.S. 421, 421 (1962). The MHRA, as interpreted, pressures Mr. Taylor to conform to the dominant religion. The Enforcement Action's effect "is to convey the message that their views are not similarly worthy of public recognition nor entitled to support." *Lynch v. Donnelly*, 465 U.S. 668, 701 (1984) (Brennan, J., dissenting). This result is "precisely the sort of religious chauvinism that the Establishment Clause was intended forever to prohibit." *Id.* Forcing Taylor to offed his deeply held belief says to him that his views are not worthy of public recognition. The Enforcement Action violates the Establishment Clause because it advances religion over non-religious activities, and promotes one religion over the other.

CONCLUSION

For the reasons stated above, the judgment of the Fifteenth Circuit should be reversed.

Respectfully submitted,

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Team A
Counsel for Petitioner

APPENDIX

Mad. Code Ann. § 42-501

The Madison Religious Freedom Restoration Act provides:

(a) The legislature of Madison and any Commission or Agency it lawfully grants enforcement powers, shall not through law show preference to
    1. any religious sect, society or denomination;
    2. nor to any particular creed or method of performing or engaging in worship or system of ecclesiastical polity.

(b) The legislature of Madison and any Commission or Agency it lawfully grants enforcement powers, shall not, under the color of law, compel any person to attend any place of worship for the purposes of
    1. engaging in any form of religious worship or practice;
    2. or promoting the continued financial or reputational success of such institution.

(c) Neither the legislature of Madison, nor any Commission or Agency it lawfully grants enforcement or rulemaking powers shall control or interfere with the rights of conscience of any person.

(d) Under this section, the right of any person to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless:
    1. the government proves by clear and convincing evidence that the law targets a secular purpose;
    2. .the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act;
    3. and has used the least restrictive means to further that interest.

(e) Nothing in this section shall be construed to permit unlawful discrimination in any form by:
    1. any government agency or actor;
    2. any place of public accommodation as defined by Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, *et seq*., or Title II of the Madison Human Rights Act of 1967, Mad. Code Ann. § 42-101-2a, *et seq*.

CERTIFICATE OF COMPLIANCE

The members of Team A hereby certify that this brief conforms to the requirements of the Rules of the Competition and our law school's governing honor code. Additionally, this brief contains only the work product of Team A.

Respectfully submitted,

_____

Team A
Counsel for Petitioner