Team D

IN THE

SUPREME COURT OF THE UNITED STATES

No. 15-1245

JASON ADAM TAYLOR,

Petitioner

v.

TAMMY JEFFERSON, THOMAS MORE, OLIVIA WENDY HOLMES, JOANNA MILTON, in their official capacity as Commissioners of the Madison Commissions on Human Rights,

Respondents

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

BRIEF FOR RESPONDENTS

Team D
Counsel for Respondents

QUESTIONS PRESENTED

1. Whether a public accommodation law that requires a private business to provide services non-discriminatorily violates a business owner's free speech clause of the First Amendment of the Constitution.

2. Whether enforcing a public accommodation law requiring a business to provide equal services for religious events which may compel that business to enter religious buildings violates the Free Exercise and Establishment Clauses of the First Amendment.

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OPINIONS AND ORDERS BELOW

The opinion of the United States District Court for the District of Eastern Madison is reported at *Taylor v. Jefferson*, Civ. Act. No. 2:14-6879-JB, (). The opinion of the United States Court of Appeals for the Fifteenth Circuit is reported at *Taylor v. Jefferson*, Appeal No. 15-1213 (15th Cir. Nov. 12, 2015).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit entered final judgment on this matter on November 12, 2015. *Taylor v. Jefferson*, Appeal No. 15-1213 (15th Cir. Nov. 12, 2015). Petitioner timely filed a petition for writ of certiorari, which this Court granted. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1).

STANDARD OF REVIEW

This Court reviews questions of law de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

STATEMENT OF THE CASE

Jason Adams Taylor ("Petitioner"), of his own volition, chose to enter the commercial market when he opened Taylor's Photographic Solutions, a for-profit business offering photography services to the public. (R. at 14). As an owner of 90% of the business, Petitioner makes all of the management decisions for the business and, in essence, ultimately decides how the business is run. (*Id*.)

Petitioner was raised in a mixed faith family, having a Jewish mother and a Catholic father. (R. at 3). The divergent views of the two sides of Petitioner's family caused Petitioner's view of religion to go "sour." (R. at 3,17). Petitioner, because of his view on religion caused by his upbringing, became a self-proclaimed "militant atheist." (R. at 3).

Petitioner's status as a "militant atheist" and his deep-seated resentment towards religion caused Petitioner to run his business based on a policy of excluding religious events. The policy explicitly states that if an event is an "official religious event" of any kind, including weddings, baptisms, and bar mitzvahs, then Taylor Photographic Solutions will not provide photography services. (R. at 4, 14). This policy does not apply only to the services of Petitioner himself, but to the services offered by any of the employees working at Taylor Photographic Solutions. (R. at 15). Although Petitioner claims not to hold prejudice against any particular religion, he and his business refuse to provide services to events that are within the very nature of religion. *Id.* Petitioner went so far as posting a notice on the exterior of his business that refused service to any religious event. (R. at 4, 23).

Petitioner's disdain for religion is not only apparent in how he operates his business but also in the disparaging comments he has made to employees in the workplace. (R. at 4). These

comments include referring to Easter as "Zombie Jesus Day," and several other remarks highlighting stereotypes in Judaism. (R. at 32).

The Madison Commission on Human Rights ("the Commission") launched an investigation on the discriminatory attitudes and practices of Petitioner's business after receiving complaints from two individuals who were refused service. (R. at 4). Patrick Johnson and Samuel Green approached Petitioner in hopes of having their respective weddings photographed. (R. at 4). Mr. Johnson, a member of the Catholic religion, informed Petitioner that his wedding would be held in a Church. (R. at 35). Once this was revealed, Petitioner stated that he "did not like religion" and would not photograph Johnson's wedding. (*Id*). Before the conversation had ended, Petitioner made a criticizing statement where he referred to Johnson as "You Christians" and again refused to perform the photography services. (R. at 35, 36). Mr. Green endured a similarly reproachful experience when Petitioner refused to photograph his wedding, taking place at a synagogue, referring to religion as a "bunch of bunk." (R. at 37). Throughout the investigation, Petitioner chose neither to file a position statement nor to engage in an administrative hearing. (R. at 5).

Based on these factors, the Commission sent Petitioner a cease-and-desist letter and imposed a fine of $1000 per week until the aforementioned sign was removed. (*Id*.) Further, the Commission gave Petitioner notice of a potential civil enforcement action in a Madison state court within sixty days if the business practices of Taylor's Photographic Services were not changed. (*Id.*) Petitioner claims that the Enforcement Action violated both his Free Speech and Free Exercise rights under the First Amendment. (*Id.*) Finding no genuine dispute of material fact, the Commission has moved for summary judgment, which has been granted by the District Court and affirmed by the Circuit Court. (R. at 3, 44).

SUMMARY OF THE ARGUMENT

This case is about preventing public accommodations from using the First Amendment as a shield when invidiously discriminating against members of the public based on religious belief. This Court should find that the U.S. Court of Appeals for the Fifteenth Circuit properly granted the Commission's motion for summary judgment, and that Petitioner's First Amendment rights were not violated.

The photographs taken by Petitioner and his business are not "speech" within the meaning of the First Amendment. Petitioner operates his photography business, Taylor's Photographic Solutions, in order to earn a profit, not to convey any particularized messages or viewpoints. Further, since it is the customer who dictates the scenes and subjects of the photography, Petitioner is merely serving as a conduit for any message that the customer wishes to convey. Any expressive element derived from Petitioner's services is therefore attributable to the customer and not to Petitioner or his business. Petitioner is free to disavow himself from any scenes or messages captured in his photography.

Further, even if this Court finds Petitioner's services to be inherently expressive, the Enforcement Action is still constitutional because it satisfies the four prongs of the *O'Brien* test. The Commission's interest in eliminating discrimination in places of public accommodation is unconnected to the suppression of expression. Moreover, this Court has found that eliminating discrimination is a compelling interest of the highest order. Eliminating discrimination would be achieved less effectively without the Enforcement Action. Thus, any incidental burden placed on Petitioner's "speech" is permissible.

Petitioner's claim that his associational rights under the First Amendment have been violated must also fail. Providing a public service to all members of the public, regardless of

religion, does not compel Petitioner or his business to expressively associate with any group. The relationship between Petitioner and his customers is temporary and for the limited purpose of providing products, namely photographs, in return for monetary compensation. Therefore, this Court should find that Petitioner has not suffered a violation of his free speech rights under the First Amendment.

Petitioner's claim that Title II of the Madison Human Rights Act ("Title II") violates the establishment clause fails under any test this Court has pronounced for making that determination. Title II passes the three pronged *Lemon* test because: it has a secular purpose in eliminating discrimination; its principle or primary effect is not to advance or inhibit religion; and it does not result in excessive governmental entanglement with religion. Title II also passes the endorsement test because a reasonable observer would not believe that the law would constitute an endorsement of religion by the government. It requires petitioner, a mature adult, to go to religious places and perform his services as he voluntarily does for the rest of the public. This does not rise to the level of compulsion prohibited by the coercion test.

Further, Title II is not a violation of the Free Exercise Clause because it is a neutral law of general applicability. As such, the Petitioner is not entitled to an exemption under the Clause that would provide Petitioner with a shield to violate the law. It is clear that Title II is a valid law of general applicability and is rationally related to a legitimate governmental interest. Title II does not violate the Establishment Clause or the Free Exercise Clause under any of the tests this Court has articulated.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE FIFTEENTH CIRCUIT'S DECISION BECAUSE PETITIONER'S PHOTOGRAPHY BUSINESS IS NOT EXPRESSIVE ACTIVITY AND THE GOVERNMENT HAS A SUBSTANTIAL INTEREST IN ELIMINATING DISCRIMINATION

Enforcement of a public accommodation law that ensures equal access to publicly available goods and services does not violate Petitioner's right to free speech rights under the First Amendment. Petitioner's business, Taylor's Photographic Solutions, provides customers with products, namely photographs, in exchange for monetary compensation.

In order for Petitioner to successfully argue that his First Amendment right to Free Speech is being violated, he must establish that by taking photographs he is "speaking." It is well established that "speech," within the meaning of First Amendment protections, is not limited to spoken words and can include conduct which expresses ideas or positions. *Tex. v. Johnson*, 491 U.S. 397 (2001). However, Petitioner's photography is not expressive in nature. The photography services are provided in order to garner a profit, not to express any position or affirm any belief.

Further, to the extent any expressive messages can be derived from the photographs, such messages are attributable to the customers and not to Petitioner or his business. Although Petitioner is hired for his "talents" those talents are merely technical and it is the customers who ultimately control the subject and outcome of the photographs. Petitioner merely transmits the message through a specific medium that he offers to those members of the public willing to pay.

Even if this Court finds that the activities of Petitioner and his business are "inherently expressive," government regulation of that activity is constitutional under the *O'Brien* standard. *U.S. v. O'Brien*, 391 U.S. 367 (1968). The first two prongs of the *O'Brien* test are satisfied

because it is within the government's power to regulate public accommodations and eliminating discrimination is an important state interest. The third prong of *O'Brien* is satisfied because ensuring that all members of the public, regardless of religion, have equal access to a public accommodation is unrelated to the suppression of expression. Lastly, any restriction on speech occurs incidentally and is no greater than necessary to ensure the elimination of discrimination.

Petitioner's final argument that the Enforcement Action violates his First Amendment expressive association rights also fails for several reasons. Petitioner's business is not a private organization but a public accommodation owned and operated in the pursuit of commercial profit. Customers approach Petitioner for the limited purpose of obtaining a publicly available service. Any relationship between Petitioner and his customers ends as soon as the photographs are paid for and thus the Enforcement Action is not compelling Petitioner or his business to expressively associate with any religion. Therefore, this Court should affirm the Federal Circuit and find that Petitioner's free speech rights under the First Amendment have not been violated.

A. Petitioner's Photography Is Conduct And Not Speech Attributable To Petitioner Or His Business Requiring Protection Under The First Amendment

The photography in this case is conduct and not expressive "speech" that is attributable to Petitioner or his business. In order for the Petitioner to successfully argue that the Enforcement Action has compelled him to speak, he must first demonstrate that his business's photographs are speech. Here, Petitioner chose to open a commercial business offering photography services to the public. Petitioner is providing the customer with a product in exchange for monetary compensation. Further, the customer largely controls the settings and subjects of Petitioner's photographs. In providing photography services, Petitioner is not the

speaker but merely a "conduit" for the message of the customer. *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622 (1994).

Petitioner operates a photography business in order to make a profit and not to convey any particularized message. In order for conduct to qualify as speech under the First Amendment, the conduct must be "sufficiently imbued with elements of communication." *Johnson*, 491 U.S. at 406 (2006) (quoting *Spence v. Washington*, 418 U.S. 405 (1974)). In *Johnson*, this Court held that burning the American flag as a form of protesting the government was sufficiently expressive to warrant First Amendment protection. *Id*. Likewise, in *Tinker*, the Court found that wearing black armbands to protest the Vietnam War was inherently expressive in nature and thus deserved First Amendment protection. *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 509-10 (1969). However, the activities in *Tinker* and *Johnson* are readily distinguishable from the activity of Petitioner. Here, Petitioner and his business photograph various events with the intent to earn money, not to convey a stance or a position regarding those events. Petitioner is not engaging in any type of core political speech simply by taking photographs that he was hired to take. The photographs taken by Taylor's Photographic Solutions are not speech, but simply the products that Petitioner and his business sell for profit.

Further, any message that can be derived from the business's photographs is not reasonably attributable to Petitioner or to his business. In *Turner Broadcasting*, the Court held that a cable operator is "merely a conduit for speech" for the local public broadcast stations, and not the speaker itself. *Turner Broadcasting System, Inc.*, 512 U.S. at 628. Here, Petitioner, like the cable operator in *Turner Broadcasting*, is simply transmitting a message for the speaker. Petitioner admits that the customer principally controls the results of his business's photography. Customers initiate the relationship by seeking out and hiring Petitioner's publicly available

commercial service. The event being photographed is the event that the customer desires to have photographed. Whether it is a prom, wedding, or festival, Petitioner does not dictate the nature of the event he has been hired to document. The customer is the one who ultimately decides how the photograph is taken and which photographs to purchase.

The point that Petitioner is trying to make by refusing photography services in certain settings is not "overwhelmingly apparent," and therefore should not be afforded First Amendment protection. In *Rumsfeld*, this Court held that a law school's prohibition on military conducting interviews on campus lacked the expressive component to warrant First Amendment Protection. *Rumsfeld v. F.A.I.R.*, 547 U.S. 47, 67 (2006). This Court stated that a reasonable person "who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own" to interview somewhere else. *Id*. Absent the accompanying speech, the purpose of the law school's actions was not "overwhelmingly apparent" and thus did not call for first amendment protection. *Id.*

Courts have applied the same logic in cases involving photography services. In *Elane Photography*, a case with largely similar facts as the case at hand, the court rejected Elane Photography's argument that photographing a same-sex wedding is so inherently expressive as that it would be taken as outward approval of same-sex couples. *Elane Photography, LLC v. Willock*, 284 P.3d 428,439 (2012). Instead, the court surmised, "such an observer [viewing photographs of a same-sex weddings] might simply assume that Elane Photography operates a business for profit and will accept any commercially viable photography job." *Id*. at 440. Likewise, a reasonable person viewing Petitioner's photographs would not be able to decipher whether a lack of religious settings conveyed Petitioner's disapproval of religion. That

reasonable person may simply conclude that the opportunity to take photographs in these settings never presented itself. Accordingly, a person viewing Petitioner's photographs taken in religious settings could not reasonably decipher Petitioner's stance on those settings in any meaningful way. Thus, Petitioner's argument that taking photographs of religious events could be misconstrued as approval for those religions must fail.

Nothing about taking photographs in a religious setting suggests that Petitioner or his business identifies or affirms a belief in that religion. In *Hurley*, this Court found that a parade organizer's free speech under the First Amendment was violated when ordered to allow any and all groups access to march in the parade. *Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557 (1995). This Court held that the parade organizers, in selecting the expressive units of the parade, are intimately connected with the communication being advanced by the display. *Id.* at 2348. Moreover, parades, like protest marches and demonstrations, are neither neutrally presented nor selectively viewed. *Id.* at 574. Therefore, forceful inclusion of all groups would alter the message of the speaker. *Id.* In contrast, Petitioner's photographs as a whole do not carry a common theme that would be destroyed by requiring him to provide his services to members of all religious faiths.

The Enforcement Action against Petitioner regulates the conduct of Petitioner's business in its commercial practice, not its right to express personal views about religion. Petitioner can expressly disavow any connection with the message that the customers wish to communicate by simply posting a sign or a disclaimer where the photographs are available for public view. In order to cure any fear of misattribution, Petitioner need only post a disclaimer on his website or on the wall of his business rejecting any sponsorship of the events within his photographs. In *PruneYard Shopping Center*, this Court found that a shopping center, which by choice of its

owner was open to the public, was not compelled to speak by allowing members of the public to pass out pamphlets around the shopping center. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980). This Court based its decision partly on the ability of the shopping center to expressly dissociate itself from hand-billers' messages. Here, although Petitioner cannot plausibly place a disclaimer on each of the photographs sold, the enforcement of the public accommodations law is not stopping Petitioner and his business from placing a general disavowal within its storefront or other places where the business is advertised.

B. Even If Petitioner's Photography Is "Expressive Conduct," It Is Not Sufficient For First Amendment Protection Under The *O'Brien* Test

Even if Petitioner's photography is seen as inherently expressive, it does not warrant First Amendment protection under the four-part *O'Brien* test. Under the *O'Brien* rules, government regulation that applies to a form of expression is constitutional if: (1) it is within the Constitutional power of government, (2) it furthers an important or substantial governmental interest, (3) that interest is unrelated to the suppression of speech, and (4) the restriction it incidentally imposes on speech is no greater than necessary to further that interest. *U.S. v. O'Brien*, 391 U.S. 367, 376-77 (1968).

Eliminating discrimination and assuring equal access to publicly available goods and services is a "compelling state interest . . . of the highest order." *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). In *Roberts*, this court found that the government had a compelling interest in implementing a public accommodation law to eliminate gender discrimination. *Id*. This Court stated that invidious discrimination in places of public accommodation poses a "unique evil" that the state has a compelling interest in eliminating. *Id*. at 628. Here, the purpose of the public

accommodation law and the Enforcement Action against Petitioner was to ensure equal access and eliminate instances of discrimination against any member of a protected class.

A government interest in ensuring equal access to public accommodations is unrelated to the suppression of expression. In *Johnson*, the proposed governmental interest in prohibiting flag burning was to preserve the United States flag from desecration. *Johnson*, 491 U.S. at 407. However, this Court found that the government's interest in preserving the flag's symbolic value was "directly related to expression in the context of activity." *Id*. at 410 (quoting *Spence v. Washington*, 418 U.S. 405 (1974)). Here, the governmental interest is completely unrelated to the suppression of expression. In implementing the public accommodation law, the Madison Commission on Human Rights had an interest in ensuring equal access to public accommodations.

Any incidental burden on speech is no greater than is essential, and is permissible under the *O'Brien* standard, "so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *U.S. v. Albertini*, 472 U.S. 675, 689 (1985) (holding that a statute prohibiting reentry onto a military base, even in order to protest, after have being barred is valid in order to achieve an interest in a secure military base). If this Court allows Petitioner's photography services to be exempt from the public accommodation rule because of the incidental burden it places on Petitioner's speech, the exceptions can potentially swallow the rule. As the court noted in *Elane Photography*: "It is possible to find some kernel of expression in almost every activity a person undertakes . . . ." *Elane Photography*, 284 P.3d at 438-39 (quoting *City of Dallas v. Stranglin*, 490 U.S. 19, 25 (1989)). Allowing Petitioner to claim his business warrants an exception will allow other violators of the public accommodation law to argue that the services or goods they supply are

expressive as well. As a result, the government's goal in eliminating discrimination against members of protected classes will be significantly stifled.

C. Providing Commercial Photography Services To All Classes Of People, Regardless Of Religion, Does Not Compel Petitioner Or His Business To Expressively Associate With Any Group

Providing commercial photography services to all classes of people, regardless of religion, does not compel Petitioner or his business to expressively associate with any group. Unlike other cases where this Court has found expressive association violations, Petitioner's motive in operating Taylor's Photographic Solution was not to associate with others in pursuit of a political, social, educational, religious or cultural end. *See e.g., N.A.A.C.P. v. Ala.*, 357 U.S. 449 (1958) (concerning non-profit group associating in pursuit of civil rights and the advancement of African Americans); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (concerning non-profit association seeking to instill a positive moral code for living in the community).

Petitioner and his business "associate" with customers only in the sense that he interacts with them in the course of a business relationship. In *Rumsfeld*, this Court found that requiring campus access to military recruiters was not violating a law school's associational rights. *Rumsfeld*, 547 U.S. at 69. This Court reasoned that by requiring a law school to allow military recruiters on campus and to assist them in whatever way the school assists all other employers, there was only association in the sense of interaction between them. *Id*. Here, the analysis is the same. The Enforcement action against Petitioner is merely requiring Petitioner and his business to allow the same services to those individuals partaking in religious events that it chooses to allow to all other clients. Just as the recruiters in *Rumsfeld* were not part of the law school, the individuals requesting photography services in religious settings are wholly outsiders. These

outsiders approach Petitioner for the limited purpose of obtaining photography services. As the record indicates, any relationship created between Petitioner and his customers ends when those customers pay for the end product.

Further, Petitioner plays no role in the community other than that of a vendor selling photographs to those members of the public who choose to pay for them. In *Dale*, this Court placed great emphasis on the Boy Scouts' community involvement when analyzing the presence of an expressive association violation. *Dale*, 530 U.S. at 647-48. The Boy Scouts is a private, non-profit organization that seeks to instill – both expressly and by example – "good morals," including reverence, patriotism, and a desire for self-improvement, on its youth members. *Id*. at 649. This Court found that an order requiring the Boy Scouts to accept a scout leader living a lifestyle in direct opposition of its clear expressive mission burdened the organization's freedom to associate. *Id*. at 661.

This Court's analysis, and ultimate decision, in *Dale* is completely inapposite to the case at hand. Here, Petitioner is not a member of a private association. As previously discussed, Petitioner, through his business, offers a publicly available service to those that are willing to pay. Further, Petitioner is not instilling any message onto the community. The customers control any message that can be derived from the photographs by dictating the settings as well as choosing what photographs are ultimately developed and sold. Petitioner's argument that the Enforcement Action has violated his associational rights is unsuccessful. Therefore, this Court should affirm the ruling of the Federal Circuit and find that the Free Speech Clause of the First Amendment does not shield Petitioner's discriminatory actions.

II. THIS COURT SHOULD AFFIRM THE FIFTEENTH CIRCUIT'S DECISION BECAUSE THE MADISON HUMAN RIGHTS ACT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OR PETITIONER'S FREE EXERCISE RIGHTS

Petitioner's claim that Title II of the Madison Human Rights Act ("Title II") violates the establishment clause fails under any test this Court has articulated for making that determination. Further, Title II is not a violation of the Free Exercise Clause because it is a neutral law of general applicability and as such the Petitioner is not entitled to an exemption under the Clause. The First Amendment to the United States Constitution prohibits the government from, "making a law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. 1. The Establishment Clause has been referred to as erecting a wall of separation between church and state, but in reality it is more of blurred line. *Lemon v. Kurtzman,* 403 U.S. 602, 614 (1971). It is also clear that not every state action that implicates religion is unconstitutional. *Lee v. Weisman,* 505 U.S. 577, 597 (1992). The determination is very case-specific and must be judged in light of unique circumstances. *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 315, (2000).

Under the three-pronged *Lemon* test, this Court must ask whether: (1) the governmental action has a secular purpose; (2) the governmental action's primary effect is one that neither advances nor inhibits religion; and, (3) the governmental action does not result in an excessive entanglement with religion. *Lemon,* 403 U.S. at 612–13. Governmental action violates the Establishment Clause if it fails to meet any of these three criteria. *See Edwards v. Aguillard,* 482 U.S. 578 (1987). Title II passes the *Lemon* test because: it has a secular purpose, eliminating discrimination; its principle or primary effect is to eliminate discrimination; and it does not result in excessive governmental entanglement with religion.

The endorsement test asks whether a reasonable observer would view the governmental action in question as state endorsement of religion given the context and history of the state action. *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 620 (1989). Title II passes the endorsement test because a reasonable observer would not believe that the law constitutes an endorsement of religion by the government.

Finally, this Court has used the coercion test to assess whether a given governmental action violates the Establishment Clause. *Lee*, 505 U.S. 577. This Court held that, "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise. . . ." *Id.* at 587. Title II survives the coercion test because it does not coerce petitioner to support or participate in religion or its exercise. It only requires petitioner, a mature adult, to go to religious places and perform his services as he voluntarily does for the rest of the public.

Finally, the Free Exercise Clause does not provide Petitioner with a shield to violate the law because of a religious objection. As this Court stated, "[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Div. of Or. v. Smith*, 494 U.S. 872, 879 (1990).

Title II's stated purpose is to prohibit discrimination and it applies to all places of public accommodation. Thus, it is clear that Title II is a neutral law of general applicability and is rationally related to a legitimate governmental interest. Title II does not violate the Establishment Clause or the Free Exercise Clause under any of the tests this Court has articulated.

A. Under the *Lemon* Test, Title II Does Not Violate The Establishment Clause

The *Lemon* test requires that the challenged governmental action have a valid secular purpose, not have the effect of advancing or inhibiting religion, and not foster excessive government entanglement with religion. *Lemon.* at 612–13. While the *Lemon* test has often been criticized, it has not been overruled. *See generally, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993). Therefore, it is necessary to evaluate Title II using the *Lemon* test.

1. Title II has the secular purpose of eliminating discrimination

Title II serves the secular and meaningful purpose of eliminating discrimination. Only when there was no doubt that legislation or governmental activity was motivated entirely by religious considerations that this Court has struck down such laws because they lacked a secular purpose. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). *See, e.g., Stone v. Graham*, 449 U.S. 39, 41 (1980) (finding no secular purpose for posting Ten Commandments in school rooms); *Engel v. Vitale*, 370 U.S. 421, 424–425 (1962) (finding no secular purpose for opening each school day with a prayer). In contrast, this Court has held that even laws that benefit religion are constitutional if they are motivated by some secular purpose. *See, Bd. of Educ. v. Allen*, 392 U.S. 236 (1968). (loaning textbooks to parochial schools had the secular purpose of....); *Lynch*, 465 U.S. at 680 (displaying nativity scene in public park had the secular purpose of....).

Here, Title II is analogous to Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a. (R. at 6). It is uncontroverted that the object of Title II of the Civil Rights Act of 1964 "was 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). Laws that protects certain classes of individuals from discrimination by places of public

accommodation are well within a state's powers. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995). This Court has continuously found that legislation, similar to Title II here, does not violate the First or Fourteenth Amendments. *See Hurley*, 515 U.S. at 572; *Roberts v. United States Jaycees*, 468 U.S. 609, 624-626 (1984). Because Title II is well within a state's powers and serves the secular purpose of eliminating discrimination, it satisfies the first prong the *Lemon* test.

2. Title II of the Madison Human Rights Act does not have the primary effect of advancing or inhibiting religion

Under *Lemon's* second prong, the principal or primary effect of the law must be one that neither advances nor inhibits religion. 403 U.S. at 612. This prong focuses on the effect or result as opposed to the purpose in the first prong. *Id.* This Court has stated that incidental benefits to religion do not offend the establishment clause. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 768 (1995). Allowing incidental benefits to religion to exist is the basis for the constitutionality of a broad range of laws, and it would have a radical effect on public policy if every incidental benefit to religion amounted to State endorsement. *Id*. at 768.

Here, the primary effect of Title II is to eliminate discrimination. The law serves this purpose by requiring places of public accommodation, like Taylor's Photographic Solutions, to provide services to all people and treat all people equally. Under the second prong of *Lemon* it does not matter that religion receives an incidental benefit.

3. Title II does not foster excessive entanglement with religion

The third and final prong of the *Lemon* test prohibits the government from acting in a manner that would excessively entangle government with religion. *Lemon*, 403 U.S. at 613. This Court defined excessive entanglement as "comprehensive, discriminating, and continuing

state surveillance" or action potentially igniting controversy. *Id.* at 919. In *Lemon*, this Court struck down two state statutes based on excessive governmental entanglement with a religious institution. *Id. at 624-25.* One law provided a supplemental salary to teachers of secular subjects in private schools, and the other provided financial aid directly to parochial schools. *Id.* at 621, 624-25. This Court has held that these contacts would constitute excessive and enduring entanglement between church and state. *Id.* at 619. It further recognized that the financial aid would have to be continually audited to make sure that it went only to secular education, and that this type of aid would foster the kind of enduring relationship between church and state that the establishment clause was designed to prevent. *Id.* Additionally, this Court noted that both of these programs have the potential to create divisive political situations. *Id.* at 622. This Court found that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Id.*

On the other hand, merely monitoring or auditing religious groups does not contravene the Establishment Clause. *See e.g., Bowen v. Kendrick,* 487 U.S. 589, 615–17 (1988); *Roemer v. Board of Public Works of Md.,* 426 U.S. 736, 764–65 (1976). Here, enforcing Title II involves very little government involvement in religion. It would not require constant government surveillance, it does not involve state aid to religious schools or institutions, nor does it foster a divisive political climate based on religion.

B. Under The Endorsement Test, A Reasonable Observer Would Not Believe That Title II Constitutes An Endorsement Of Religion By The Government

This Court in *Lynch* articulated that, "[T]he Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch,* 465 U.S. at 687. The government can do this in one of two ways: by

fostering excessive entanglement with religion or either endorsing or inhibiting religion. *Id.* The endorsement test turns on whether a reasonable observer would believe that the governmental action constitutes an endorsement of religion by the government. *Id. at* 620.

The reasonable observer must take context into account. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). In *Allegheny*, this Court examined the constitutionality of a crèche display on a county courthouse's steps and a Chanukah menorah on a county building. *Allegheny*, 492 U.S. 573 (1989). This Court held that the crèche was a violation of the establishment clause, while the Chanukah menorah was permissible. *Id.* The crèche display, reading "Glory to God in the Highest," had an unmistakably religious meaning. *Id*. at 598. The crèche stood alone in the grand staircase, it was not part of a larger display or presentation. *Id*. at 599. Thus, this Court concluded that the county was supporting and promoting the Christian message. *Id.* at 600. In contrast, the menorah stood next to a Christmas tree and a sign saluting liberty. *Id*. at 614. This Court stated the relevant question for the Establishment Clause was whether the combined display had the effect of endorsing the Christian and Jewish faiths, or if the display was simply recognizing the holiday season. *Id.* at 619. This Court concluded that the reasonable observer would not believe that the display was an endorsement of religion, but rather a recognition of the diverse ways to celebrate the holidays. *Id.* at 620. Thus, this Court found the menorah display to be constitutional. *Id.* at 619.

If a reasonable observer would not conclude that a menorah and Christmas tree display were a governmental endorsement of religion, then a reasonable observer would similarly not conclude that Title II is an endorsement of religion. It is much more likely that the reasonable observer would view it as the State's attempt to eliminate discrimination in places of public

accommodation. Title II does not contain an overtly religious message and instead conveys a message of inclusiveness and tolerance.

C. The Madison Human Rights Act Does Not Coerce Petitioner To Support Or Participate In Religion Or Its Exercise

Title II only requires petitioner, a mature adult, to go to religious places and perform his services like he voluntarily does for the rest of the public. In addition to the *Lemon* test and the endorsement test, this Court has used a coercion test for determining Establishment Clause violations. *See Lee*, 505 U.S. 577; *Santa Fe*, 530 U.S. 290. In *Lee*, this Court stated that "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise. . . ." *Lee*, 505 U.S. at 587. Title II does not violate the Establishment Clause because requiring a mature adult to enter religious buildings to perform services he does voluntarily for the rest of the public does not coerce him into supporting or participating in religion or its exercise.

In *Lee*, this Court invalidated a public school's practice of giving a nonsectarian prayer to begin its graduation ceremony. *Lee*, 505 U.S. at 577. This Court's holding in *Lee* was limited to the secondary school setting. *Id.* at 593. This Court explained that "[t]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Id.* at 592. This Court also noted a psychology study that confirmed a teenager's susceptibility to peer pressure, especially in conforming to society. *Id.* at 593-94.

This Court has also struck down a public school's practice of providing a nonsectarian and non-proselytizing prayer before football games. *Santa Fe*, 530 U.S. at 290. The school district policy allowed for two student elections. In the first the students decided if there would

be any prayer at the football games at all, and in the second the students elected a spokesperson. *Id.* This Court held that the school district's election process did not save it from being coercive. Requiring students to choose in the first place was a choice that the district was not supposed to be able to provide and this was clearly the type of political fight over religion that the establishment clause was supposed to prevent. *Id.* at 311. The district also tried to argue that it was not coercive because attending a football game was voluntary. *Id.* However, for some students, such as cheerleaders, members of the band, and the team members themselves, attendance was mandatory. *Id.* Additionally, it was reasonable to conclude that many of the students would feel the social pressure to attend the football games despite the fact that it was not necessarily mandatory for them to do so. *Id.* at 312. The District could not force students to choose between the football game and avoiding the offensive prayers. *Id.*

In contrast to *Lee* and *Santa Fe*, this Court in *Galloway* upheld the town's practice of opening its meetings with a prayer. *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1828 (2014). In *Galloway* this Court noted that members of the public were not dissuaded from leaving the meeting during the prayer, arriving late, or making a later protest. *Id.* at 1827. This Court stated that if members of the public chose to be present during the prayer, "their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed." *Id.* This Court emphasized that these are mature adults who are not susceptible to peer pressure or religious indoctrination. *Id.* This Court noted that the analysis would be different if the public was ordered to directly participate in the prayers, but said that was simply not the case. *Id.* at 1826. Central to the court's holding was the fact that "offense…does not equate to coercion." *Id. See also Marsh v. Chambers*, 463 U.S. 783 (1983)

(Upholding the constitutionality of the practice of the Nebraska legislature to open up its sessions with a prayer).

The case at bar can be readily distinguished from *Lee* and *Santa Fe* as the facts are much more analogous to *Galloway.* Here, the petitioner is an adult, not a school child; he is not susceptible to peer pressure or religious indoctrination like the secondary school students in *Lee* and *Santa Fe.* Additionally like *Galloway* his presence as a photographer at the ceremonies would not be interpreted as an agreement with the words or ideas expressed. The mere fact that he is offended by the wedding ceremony that does not make Title II an endorsement of religion. The government here is not asking Petitioner to participate in the religious ceremonies; he is only being asked to photograph them. Here, the Petitioner voluntarily chooses to offer wedding services and requiring him to abide by Title II merely requires him to provide services to all.

D. The Madison Human Rights Act Is A Neutral Law Of General Applicability And Under *Smith* This Court Should Apply Rational Basis Review And Find That Petitioner's Free Exercise Rights Were Not Violated

The Free Exercise Clause does not entitle Petitioner to violate the law because of a religious objection. As this Court has stated, "[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Div. of Or. v. Smith,* 494 U.S. 872, 879 (1990). Title II's purpose is not "to infringe upon or restrict practices because of their religious motivation" and thus should not be reviewed under strict scrutiny. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 533 (1993).

Title II is a law of generally applicability, as it does not discriminate against a particular religion. *Id.* at 533. It is therefore a neutral law of general applicability and is governed by *Smith* as many other courts have found similar human rights laws to be. *See Gifford v. McCarthy*, No. 520410, 2016 WL 155543, at *5 (N.Y. App. Div. Jan. 14, 2016); *Elane Photography, LLC, v. Vanessa Willok,* 2012 WL 10819555, at *40 (N.M.); *Craig v. Masterpiece Cakeshop, Inc.*, No. 14CA1351, 2015 WL 4760453 (Colo. App. August 13, 2015).

Because Title II is a valid law of general applicability and it is rationally related to a legitimate governmental interest, it does not offend Petitioner's free exercise rights under the First Amendment.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Fifteenth Circuit in granting summary judgment.

BRIEF CERTIFICATE

The work product contained in all copies of Team D's brief is in fact the work product of Team D's members. This team has complied fully with our school's governing honor code as well as all Rules of this Competition.