Brief on the Merits
No. 15-1245

IN THE SUPREME COURT OF THE UNITED STATES
March Term, 2016

JASON ADAM TAYLOR,

Petitioner,

v.

TAMMY JEFFERSON, CHAIRMAN, MADISON COMMISSION ON HUMAN RIGHTS, in her official capacity; and THOMAS MORE, OLIVIA WENDY HOLMES, JOANNA MILTON, and CHRISTOPHER HEFNER, COMMISSIONERS, MADISON COMMISSION ON HUMAN RIGHTS, in their official capacities,

Respondents.

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

BRIEF FOR PETITIONER

Team E
Counsel for Petitioner

QUESTIONS PRESENTED

1. 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.

2. 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 of the Constitution.

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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 (Taylor II)*, No. 15-1213, slip op. at 1 (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).

STATEMENT OF THE CASE

Petitioner Jason Adam Taylor ("Taylor") brought these civil rights claims under 42 U.S.C. § 1983 against Respondents Tammy Jefferson in her official capacity as Chairman, and Thomas More, Olivia Wendy Holmes, Joanna Milton, and Christopher Heffner, in their official capacities as Commissioners, of the Madison Commission on Human Rights (collectively, the "Commission"), after the Commission issued an Enforcement Action against Taylor on September 15, 2014. R. at 1–2. Contained in the Enforcement Action were a cease-and-desist letter from the Commission to Taylor, and the fines associated with a failure to comply. R. at 2. Taylor brought suit seeking to enjoin the Commission from the Enforcement Action, to collect fines and attorney's fees, and for compensatory and punitive damages. R. at 2–3. The Commission moved for summary judgment on May 25, 2015, and it was subsequently granted by the District Court. R. at 3. The District Court held that the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment had not been violated when the Commission compelled Taylor to cease his alleged discriminatory practices by offering his services to the public, regardless of religious affiliation. R. at 3.

Taylor timely submitted an appeal to the United States Court of Appeals for the Fifteenth Circuit, seeking reversal of the District Court's grant of summary judgment to the Commission. R. at 39. On November 12, 2015, the Fifteenth Circuit affirmed the District Court's decision. R. at 44. The Fifteenth Circuit held that Taylor's First Amendment rights were not violated because Taylor failed to show that photography was a form of speech, and further, that the Commission did not violate Taylor's rights under the Free Exercise or Establishment Clause. R. at 42–43. Taylor timely filed a petition for writ of certiorari, which this Court granted. R. at 47.

STATEMENT OF THE FACTS

I. Factual Background.

Taylor's business, Taylor's Photographic Solutions ("TPS"), was investigated by the Commission beginning July 31, 2014, after Patrick Johnson and Samuel Green each filed a complaint against him. R. at 4. The complaints arose when Taylor declined to photograph weddings for both Johnson and Green. R. at 4. Taylor declined these offers because the weddings would take place in houses of worship—one in a synagogue and one in a church. R. at 4. The Commission specifically pointed to a disclaimed sign in TPS's window that states:

> The management of this business firmly 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.

R. at 4–5. Taylor was contacted by the Commission on August 11, 2014, and was put on notice of the two complaints filed against TPS. R. at 20. These complaints were based on alleged religious discrimination in violation of the public accommodation laws of the Madison Human Rights Act of 1967. R. at 20–21. Taylor, believing he had done nothing wrong, chose not to file a position statement or have a hearing to address this issue. R. at 21.

Subsequently, on September 15, 2014, the Commission contacted Taylor again and informed him that it had determined that his practices were in violation of the public accommodation law. R. at 25. This letter stated that Taylor needed to immediately abate his discriminatory practices, as well as pay $1,000 per week since July 14, 2014, when his discriminatory practices began (hereinafter, this letter and associated fines are referred to as the

"Enforcement Action"). R. at 2, 26. The Commission further warned Taylor that it would bring a civil enforcement action against him in Madison Circuit Court should he fail to comply with its orders. R. at 26. In response, Taylor refused to pay the requested fines or alter his business practices, and brought this civil rights action under 42 U.S.C. § 1983. R. at 5, 21.

II. Taylor and Taylor's Photographic Solutions.

Taylor and his wife, Kimberly, own TPS, a closely held, for-profit corporation in Madison City, Madison that has been open since 2003. R. at 14. Taylor owns 90% of the business, with the remaining share for his wife. R. at 14. Taylor makes all of the management decisions for TPS, and Kimberly does the accounting and can sign checks, but has little involvement in the photography or other aspects of the business. R. at 14.

TPS offers a range of photography services to the public, covering events such as proms, graduations, birthdays, festivals, photo shoots, and weddings. R. at 3, 14. Taylor believes that photography is inherently an expressive, artistic form. R. at 15. He believes that when he sells his photographs, the customer is purchasing more than just the print of the photograph itself—the customer is paying for the talent and creativity of TPS employees. R. at 15.

III. Taylor's upbringing.

Taylor grew up in a mixed-faith household, with a Jewish mother and Catholic father. R. at 16. Despite neither parent being extremely religious, many of his relatives endeavored to impose their respective religions upon him. R. at 16. He was told that he was "not Jewish enough" for not keeping a Kosher diet, but then referred to, along with his sister, by his Catholic grandmother as her "only Jewish grandchildren." R. at 17. These strained familial relationships soured Taylor's perspective of religion as he grew up. R. at 17. He felt unhappy due to people only being able to view him as what they viewed his religion to be. R. at 17.

By age nineteen, Taylor denounced religion and identified as a "full blown militant atheist." R. at 17. While he will still attend certain religious services for family members, he tunes out prayers and feels uncomfortable in religious settings. R. at 17. Personally, Taylor now asserts that he views religion as hostile to the future of society. R. at 4.

IV. Taylor's business policies regarding religion.

The only limitation Taylor places on his business is that he will not "photograph any event which is religious in nature." R. at 3. Taylor does not discriminate based on religion, and observes a strict policy to not deny services to any customer based upon religion. R. at 4, 15. Under this policy, Taylor will not deny services to customers based on their faith; however, Taylor also will not provide services at any event that "celebrates or endorses any religion." R. at 15–16. When asked to photograph in a religious setting, Taylor suggests the customer visit CM's Snaps, across the street from TPS. R. at 19. Taylor never deviates from this policy; he even refused to make an exception for his cousin's wedding because it was in a church. R. at 17. Additionally, Taylor does not allow his employees to use TPS equipment or work on company time, if such equipment or work is endorsing a religion in any way. R. at 15.

V. Taylor's employment of religious individuals.

Notwithstanding his own lack of religion, Taylor's employees at TPS are from a variety of religious backgrounds and he endeavors to accommodate them in any way possible. R. at 4. TPS employs seventeen individuals, all from various religious backgrounds, including Judaism, Christianity, Islam, Scientology, Buddhism, Hinduism, Wiccan, and atheism. R. at 18. Taylor has never forced an employee to photograph a subject that makes him or her uncomfortable, or clashes with his or her religion. R. at 18. He has always permitted employees to leave early in order to observe religious holidays. R. at 31. Though Taylor often discusses the politics of religion in the

workplace, these conversations stem from curiosity or ways to abide by certain religions when he does have to enter places of worship. R. at 27–28, 32.

Taylor also defends his employees against discrimination from customers. R. at 29. When a customer refused to take the photographic services offered by current employee Ahmed Allam because he is a practicing Muslim, Taylor told the customer that, "[d]iscrimination based on religion has to be 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. You will have Ahmed or no one." R. at 29. This contract would have been for $10,000, yet Taylor viewed this as "hate money" and refused to accept it. R. at 29–30.

VI. Taylor's performance in secular events.

Taylor has photographed events performed by clergy members that were secular in nature. R. at 15. For example, he photographed a wedding between two men that was officiated by an ordained minister in the Church of Life. R. at 15. Although both men belonged to different religions and an ordained minister presided, it did not offend Taylor's personally-held beliefs because it was a civil ceremony and not inherently religious. R. at 15–16.

Taylor also photographed a wedding that took place at the Monroe County Clerk of Court's Office, with a reception following in a social hall located on, but detached from, church property. R. at 16. Other than the bride's father offering a non-denominational, general prayer, this wedding did not actively celebrate any religion. R. at 16. Thus, Taylor felt comfortable offering his photographic services knowing that he was not endorsing any religion. R. at 16.

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the United States Court of Appeals for the Fifteenth Circuit and nullify the Enforcement Action, as it violates Taylor's rights under the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment.

The Enforcement Action violates Taylor's First Amendment right to engage in free speech because it compels him to communicate a message with which he disagrees. In applying the *Spence* test, Taylor had a communicable message, and an audience to receive it, thus warranting constitutional protection. Photography naturally mandates expressive association, and forcing Taylor to photograph in a religious setting requires him to expressively associate with a perspective that he does not endorse. The Free Speech Clause unmistakably protects this activity, because no American citizen can be forced to embody, or expressively associate with, another speaker's message. Taylor has chosen to refrain from speaking through his photography. Reversing the Fifteenth Circuit's decision will ensure that an artist's unique perspective—as seen through their artistic product—will not fall victim to inappropriate regulation by the government.

Additionally, the Enforcement Action violates Taylor's Free Exercise Clause rights. Because the Enforcement Action targets Taylor's religious conduct for distinctive treatment, strict scrutiny applies. Ensuring the widespread availability of photography services to the public is not a compelling governmental interest, and, even it was, the means used to achieve it were not narrowly tailored. Furthermore, the Enforcement Action violates the Establishment Clause because it fails two of the three *Lemon* test requirements. First, by forcing Taylor to participate in religious ceremonies, the Enforcement Action has the primary effect of inhibiting his religious choice. Second, the Enforcement Action creates an excessive entanglement between government and religion, because the Commission is constructively declaring that it supports religion.

ARGUMENT

I. THE ENFORCEMENT OF A PUBLIC ACCOMODATION LAW THAT REQUIRES A PERSON TO COMMUNICATE A MESSAGE HE WOULD NOT OTHERWISE ENDORSE VIOLATES THE FREE SPEECH CLAUSE.

The Enforcement Action violates Taylor's First Amendment right to engage in free speech. Requiring Taylor to photograph in a religious setting, thus promoting that religion, amounts to constitutionally-condemned "compelled speech," because it induces adherence to a belief with which Taylor firmly disagrees. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This Court has long recognized that the protection of speech "does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Rather, a person's conduct may be so permeated by elements of communication that it falls within the protections afforded by the First Amendment. *Id.* In this case, Taylor's photography is so permeated by expressive elements that his conduct is deserving of the constitutional protection guaranteed to speech.

The overarching theme of the First Amendment is that the government can neither curtail nor compel expression. James M. Gottry, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 Vand. L. Rev. 961, 971 (2011). As an American citizen, one has a constitutional right to embody perspectives and beliefs different from those of the majority, and one cannot be compelled to "speak the government's message." *Rumsfeld*, 547 U.S. at 60; *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Additionally, individuals and businesses cannot be compelled to endorse a belief with which they disagree, because American citizens have the constitutional discretion to partake in, or refrain from, expressive conduct. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573 (1995); *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Taylor's choice not to photograph Johnson's and Green's weddings is akin to his right to refrain from speaking at all. In this case, Taylor is being instructed to use his unique photography skills to express the message that he endorses religion—a message he clearly denounces. *Taylor v. Jefferson (Taylor I)*, No. 2:14-6879-JB, slip op. at 3 (E.D. Mad. July 13, 2015). Compelling a viewpoint with which Taylor strongly disagrees violates his First Amendment right to free speech.

A. Photography is a form of speech.

Though this Court has not specifically addressed a photographer's rights under the First Amendment realm of free speech, there is precedent indicative of a strong inference between photography and expressive conduct. *See Rumsfeld*, 547 U.S. at 49 (noting that inherently expressive conduct warrants First Amendment protection). In *Spence v. Washington*, this Court laid out a test for determining whether certain conduct fell within First Amendment protections: first, discern whether there was an intent to convey a particular message; and second, determine the likelihood that an audience would understand such message. 418 U.S. 405, 410 (1974).

In that seminal case, this Court developed a method to classify previously-unrecognized modes of expression as speech for purposes of First Amendment protection. *Id.* This Court should continue to utilize this method, and find photography—another previously-unrecognized mode of expression—as speech under the First Amendment.

1. Taylor's photography qualifies as speech under the *Spence* two-part test.

This Court devised a test in *Spence* to discern where First Amendment protection is properly afforded, even where the method of communication is not the standard form of spoken or written word. *See id.* at 410–11 (holding that the state infringed protected expression by requiring Appellant to take down an American flag on which he had affixed a peace symbol). The test is

whether (1) there was a message that was intended to be communicated, and (2) there was an available audience, or intended third party, to receive this message. *Spence*, 418 U.S. at 410–11.

First, though photography is not always considered speech, where it is intended to be communicated, it should be subject to the protections guaranteed by the First Amendment. As a photography business with a reputation for certain artistic expressions, customers solicit the unique services of TPS employees. A skilled photographer should understand the mood of the targeted event, *i.e.*, whether it is joyful, celebratory, or sad. Such a photographer will convey these themes or moods through the lighting, setting, and angles, for instance, and it will be done intentionally. A wedding, for example, will be photographed in such a manner as to convey love and celebration, while a funeral may be photographed to convey sadness and familial ties. Professional photography is performed with a certain perspective in mind—a specific message to be extended to those who view the photographs. Thus, Taylor naturally intends for a message to be communicated through the photography he is hired to perform.

Second, after it has been deemed that a message is being communicated, there must be a showing that an audience is receiving the message, regardless of the medium used for expression. *Id.* Here, Taylor's audience is comprised of his customers—the ones who solicit his particular artistic expression. This is in sharp contrast to a photographer taking photographs as a hobby, or for purely aesthetic and recreational purposes. *Porat v. Lincoln Towers Cmty. Ass'n*, No. 04 CIV. 3199 (LAP), 2005 WL 646093, at *5 (S.D.N.Y. Mar. 21, 2005) *aff'd*, 464 F.3d 274 (2d Cir. 2006). In *Porat*, the Second Circuit held that the First Amendment does not protect private, recreational, non-communicative photography. *Porat v. Lincoln Towers Cmty. Ass'n*, 464 F.3d 274, 276 (2d Cir. 2006). In that case, Porat was detained for taking photos of a public building. *Id.* Porat contended that his First Amendment rights were violated, but he admitted the photographs were

purely private and recreational. *Porat*, 464 F.3d at 276. Holding that Porat's First Amendment rights were not violated, the Second Circuit reasoned that a communicative property to a third party is necessary to warrant protection. *Id.*; *see also Larsen v. Fort Wayne Police Dep't*, 825 F. Supp. 2d 965, 965 (N.D. Ind. 2010) (holding that photography without a communicative purpose does not fall within the scope of First Amendment protection). Taylor's photographs would be tainted by feelings of discomfort—a message that would be conveyed to his customers—should he be compelled to photograph in a religious setting.

As a professional photographer, Taylor offers unique, artistic expression in each of his photographs. Taylor Aff. ¶ 58, June 16, 2013. For comparative purposes, an op-ed columnist, who writes for the editorial audience, should not be compelled to endorse a political figure that he strongly condemns. Likewise, Taylor, a photographer who performs services for an audience, should not be compelled to endorse a system with which he disagrees. The audience intended to receive Taylor's communicated messages is his clients—the ones who seek his particular, professional services. Thus, since photography is speech, and the *Spence* elements are satisfied, this Court should reverse the decision of the Fifteenth Circuit and nullify the Enforcement Action.

2. There is sufficient precedent to imply the connection between photography and speech.

In *Hurley*, this Court held that communications amounting to speech need not be "succinctly articulable," meaning the Constitution looks beyond standard mediums of expression. *Hurley*, 515 U.S. at 569. This Court has previously noted that symbolism is an effective form of communication, *Barnette*, 319 U.S. at 632, later expanding this notion to include choosing whether to salute a flag, wear an armband in protest, display certain flags, or participate in political parades, as forms of symbolism that fall under the umbrella of communication. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969); *Stromberg v. Cal.*, 283 U.S. 359, 369

(1931); *Nat'l Socialist Party of America v. Skokie*, 432 U.S. 43, 43 (1977). Further, for expressive purposes, the context surrounding a symbol matters. *Spence*, 418 U.S. at 410. This Court in *Hurley* did not require "succinctly articulable" messages as a prerequisite for First Amendment protection. *Hurley*, 515 U.S. at 569. This Court reasoned that confining speech to such a narrow description would never afford protection to works that unquestionably deserve it, *e.g.*, works by Jackson Pollock, Arnold Schöenberg, or Lewis Carroll—artists with abstract artistic messages. *Id.*

Photography has also been deemed a form of speech because of its nature of expressive activity. *See id.* (holding that protected expression is not limited to spoken or written communications). When Taylor takes photographs, he is engaging in expressive activity by incorporating his unique talents and creativity into the project. Taylor Aff. ¶ 16. A "speaker's rights are not lost merely because compensation is received;" regardless of compensation, the person performing the job is fulfilling the performance requested and thus payment is not dispositive of whether conduct is any less expressive. *Riley v. Nat't Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988). Additionally, simply looking at the exchange of a good for compensation overlooks that customers are drawn to TPS specifically because they are seeking the specific talents of TPS. *Taylor II*, slip op. at 6 (Davis, J., dissenting).

Photography is a type of conduct that is protected by the First Amendment when it has a communicative or expressive purpose. *Gilles v. Davis*, 427 F.3d 197, 211 (3d Cir. 2005). The recreational or private act of taking photos is not protected; instead, the First Amendment is implicated when the camera is "a means of engaging in protected expressive conduct." *Larsen*, 825 F. Supp. 2d at 979. For Taylor, his photography is not merely a means of earning money, but a way of expressing his opinions, values, and what he endorses through his own lens. *See Hurley*, 515 U.S. at 573 (reasoning that the government cannot force someone to speak in a manner with

which he disagrees, which covers messages of value, opinion, or endorsement). This Court in *Hurley* stressed that the state "may not compel affirmance of a belief" not owned by the speaker, which is exactly what the Commission is imposing on Taylor. *Hurley*, 515 U.S. at 573.

The First Amendment exists to ensure that "individual freedom of mind" is free from governmental coercion. *Wooley*, 430 U.S. at 714; *see also Gottry* at 975. If the government can require expressive professionals to create a product that does not comply with their beliefs, the result would be an infringement upon the professionals' right to a freedom of mind. In *Wooley*, this Court held that an individual cannot be forced to endorse a motto with which he disagrees on his license plate. *Wooley*, 430 U.S. at 715. In that case, George Maynard covered the state motto on his state license plate, "Live Free or Die," and brought suit after being told to adhere to the state's point of view. *Id.* at 707. This Court reasoned that individuals cannot be forced to foster "an idea they find morally objectionable." *Id.* at 715. Further, no matter how acceptable an idea appears—such as religious tolerance and acceptance—the state's interest in this idea "cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Id.* at 717. This applies to organizations as well; the government cannot compel an organization to relay certain messages even where the organization is not typically a courier for such a message.

3. The business of photography and the product being sold are speech.

The actual business of photography and the selling of such byproducts are inherently creative, expressive, unique to the artist, and ultimately culminate in speech deserving of First Amendment protection. The First Amendment protects "pictures, films, paintings, drawings, and engravings." *Kaplan v. Cal.*, 413 U.S. 115, 119–20 (1973). Simply regarding what ought to deserve protection, artistic expression has long been within First Amendment boundaries. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (1998). Thus, the "inherently artistic and

expressive" act of photography, which results in a picture, seamlessly implies a practice warranting constitutional protection. Taylor Aff. ¶ 58.

Taylor firmly believes that "[p]hotography is inherently an artistic form of expression." Taylor Aff. ¶ 16. Purchasing a photograph far surpasses the mere exchange of goods for money, because the purchaser is paying for the photographer's talent and creativity. Taylor Aff. ¶ 16. Taylor acknowledges that certain photographers possess different strengths, as seen in his distinction between offering employee Ahmed Allam outdoor jobs, and taking indoor lighting for himself. Allam Aff. ¶ 23, June 12, 2013. Despite the customer ultimately choosing the photos, Taylor is still the one producing the creative variety for the customer. *Taylor I*, slip op. at 8. This creativity is analogous to the "particularized message" described in *Johnson*—a particular message sought out by customers that would be understood by the customer that viewed it. *Johnson*, 491 U.S. at 404; *Taylor II*, slip op. at 6 (Davis, J., dissenting). Therefore, photography's foundation in artistic expression, combined with the sale of such expression, amounts to speech that warrants protection under the First Amendment.

B. Photography is expressive association that implies the artist is endorsing its message.

Requiring Taylor to photograph in a setting that promotes religion requires him to expressively associate with a message he does not wish to convey. In *Boy Scouts of America v. Dale*, this Court allowed a private organization—the Boy Scouts—to exclude a homosexual scoutmaster from membership. 530 U.S. 640, 647 (2000). This Court reasoned that requiring the Boy Scouts to retain such a scoutmaster was equivalent to requiring the Boy Scouts to expressively associate with a message that they endorse homosexuality—which, at the time, was inconsistent with their values. *Id.* at 648. This notion of "expressive association" is closely intertwined with speech; just as one cannot be forced to speak on a matter with which one disagrees, one also should

not be mandated to expressively associate with an idea that conflicts with one's values. Similarly, although public accommodation laws seek to prevent religious, and any other kind of, discrimination, a government's disagreement with TPS's expressed values does not warrant the government's compulsion of TPS to embody such opposing values.

Judge Davis, in dissenting from the Fifteenth Circuit's majority, urged the Court to consider how forcing Taylor to photograph religious events that he does not endorse is equivalent to compelling him to "expressively associate himself with and endorse religion." *Taylor II*, slip op. at 7 (Davis, J., dissenting). As Judge Davis noted, Taylor's situation should be examined in the same light afforded the petitioners of *Hurley*—the petitioners were not required to "alter the expressive content of their parade" because the Court ruled that the state could not coerce thought. *Hurley*, 515 U.S. at 572–73; *Taylor II*, slip op. at 7 (Davis, J., dissenting). In keeping with *Hurley*, Taylor should not be forced to alter the expressive content of his photographs.

C. The Enforcement Action amounts to compelled speech and forced expressive association.

The Enforcement Action amounts to compelled speech and forced expressive association, inasmuch as Taylor has been deprived of his choice of what to say or not to say through his photography. An important aspect of the First Amendment is that speech inherently is this choice of whether and what to speak. *Pacific Gas & Electric Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 11 (1986). According to this Court's precedent, Taylor's photographs are speech—a form of symbolism embedded in communication. *Barnette*, 319 U.S. at 632. While a government can prescribe an optimal course of dealing, it ultimately cannot compel communication with which the speaker disagrees. *Id.* at 642. As Judge Davis correctly stated in his dissent, forcing Taylor to speak through photographs that he does not wish to take infringes his First Amendment rights. *Taylor II*, slip op. at 6 (Davis, J., dissenting). Further, as established in *Barnette*, a speaker has the

absolute right to "refrain from speaking at all." *Barnette*, 319 U.S. at 645. Thus, Taylor's choice to not photograph a particular event, regardless of its religious affiliation, is protected by the First Amendment. For these reasons, the Enforcement Action violated the Free Speech Clause and this Court should reverse the Fifteenth Circuit's decision and nullify the Enforcement Action.

II. THE ENFORCEMENT ACTION VIOLATES TAYLOR'S RIGHTS UNDER BOTH THE FREE EXERCISE AND ESTABLISHMENT CLAUSES.

The Enforcement Action amounts to a governmental endorsement of religion over non-religion, and has the primary effect of inhibiting Taylor's free choice of whether to participate in religion. The scope of the Free Exercise and Establishment Clauses covers the choice to participate in, or abstain from, religious practices. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). This includes the freedom to choose whether to assemble in a place of worship. *Id.* Additionally, a for-profit corporation enjoys the same religious freedoms as an individual. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767 (2014). A corporation is merely a means used by individuals to achieve their business ends; when constitutional rights are extended to a corporation, it is done for the purpose of protecting the rights of the individuals who comprise that corporation. *Id.* Thus, TPS is entitled to the same protections as Taylor, its owner, under the Free Exercise and Establishment Clauses. Because the Enforcement Action violated these rights, this Court should reverse the decision of the Fifteenth Circuit and nullify the Enforcement Action.

A. The Enforcement Action violates Taylor's right to free exercise because it cannot survive strict scrutiny review.

The Enforcement Action was not narrowly tailored to achieve a compelling governmental interest. The First Amendment states that "Congress shall make no law. . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. Where a governmental action infringes on one's right to free exercise, strict scrutiny applies. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993). On one hand, while anti-discrimination is a compelling governmental

interest, on the other, a clear discriminatory practice needs to be present, which is not the case here. Even if this Court accepts the need to ensure availability of photography services to the public as a compelling governmental interest, the means used to accomplish that interest here were not narrowly tailored.

1. Strict scrutiny review applies because the Enforcement Action targets Taylor's religious conduct for distinctive treatment.

A law that is neutral and of general applicability does not need to be justified by a compelling governmental interest, even if the law incidentally burdens a particular religion. *Smith*, 494 U.S. at 886, n. 3. Requiring all laws that incidentally burden religion to satisfy strict scrutiny would create an unsustainable standard, effectively allowing persons to ignore neutral laws on religious grounds. *Id.* at 886. However, as applied to Taylor, the Enforcement Action will do more than incidentally burden his religion—it will force him to alter his religion. Taylor is not simply challenging a neutral law, but rather the Commission's direct actions targeting his choice to abstain from religion. Therefore, strict scrutiny review should apply.

In *Smith*, this Court held that individuals terminated from their employment for illegal drug use were not entitled to unemployment benefits even though their religion required drug use. *Id.* at 890. This Court reasoned that, even where a religion endorses an illegal act—drug use—the Free Exercise Clause does not exempt one from complying with a neutral law that is applicable to the general public. *Id.* at 882. However, in *Hialeah*, this Court held that a statute that was arguably neutral on its face was nevertheless subject to strict scrutiny review where it was applied in a non-neutral manner. *Hialeah*, 508 U.S. at 547. This Court reasoned that the neutrality determination is not limited to the statute on its face, but that the Free Exercise Clause can be asserted to challenge the specific application of a statute to an individual. *Id.* at 534. Mere compliance with the facial

neutrality requirement does not protect governmental action that singles out specific conduct for "distinctive treatment." *Hialeah*, 508 U.S. at 534.

In this case, Taylor does not challenge the facial neutrality of Madison Code § 42-501 nor Title II of the Madison Human Rights Act of 1967, but rather the Enforcement Action as applied to him. Whereas in *Smith*, the petitioner argued that an otherwise neutral and valid criminal law should not apply to him on religious grounds, Taylor's case is distinguishable in that he merely asks that a governmental agency not force him to participate in religious ceremonies against his will. As was the case in *Hialeah*, here the Enforcement Action is not neutral when it specifically orders Taylor to participate in religion or pay substantial fines. By attempting to force Taylor to alter his religious conduct, the Commission's actions have targeted his conduct for distinctive treatment, and therefore the mere facial neutrality of the statute does not shield the Enforcement Action from the strict scrutiny standard. Taylor's deeply held beliefs are not at issue before this Court, and his prior voluntary entrance into a house of worship does not amount to a waiver of his religious freedom rights. Because Taylor's religious conduct is being targeted for distinctive treatment, this Court should apply strict scrutiny review to the Enforcement Action.

2. The Commission's interest was not compelling as applied to Taylor.

The Commission did not have a compelling governmental interest to levy this Enforcement Action. No bright-line test exists for determining whether a governmental interest is compelling. *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984). Rather, one must look to this Court's past decisions to discover the framework within which to make this determination. For example, this Court has held that remedying past discrimination, *Fullilove v. Klutznick*, 448 U.S. 448, 492 (1980), or achieving diversity in schools, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978), is a compelling governmental interest. While the Commission has a compelling interest to prevent discrimination, this interest cannot be asserted where no discrimination is present.

The Commission contended that its compelling interest was to prohibit discrimination. *Taylor I*, slip op. at 12. However, Taylor was not discriminating based on religion. Taylor never intimated that he would not perform photography services for religious persons; rather, he refused to participate in "any religious services of any kind." *Id.* at 4. In fact, Taylor had previously photographed a wedding presided over by an ordained minister, and a wedding in which the bride's father offered a non-denominational, general prayer. He simply refuses to photograph a ceremony that is religious in nature. Likewise, Taylor did not deny services to Johnson and Green because of their religion; on the contrary, Taylor made clear to both men that he would not photograph their weddings due to the religious locations and nature of the ceremonies. Had Johnson and Green told Taylor that they were Catholic and Jewish, respectively, but that their weddings were secular ceremonies, Taylor would not have denied them his services. Therefore, the Commission's allegedly compelling interest of prohibiting discrimination is not applicable here, because Taylor was not discriminating based on the religion of his prospective clients.

As no discrimination occurred here, preventing discrimination could not have been the Commission's reason for levying the Enforcement Action. The only other apparent interest that the Commission had was to ensure the availability of photography services to the public, and this is not a compelling governmental interest. *See Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263 (1974) (holding that "conservation of the taxpayers' purse" by refusing public services to non-residents was not a compelling governmental interest). If this Court holds that the Commission's interest in making photography services available to the public is compelling, this would set a dangerously low standard for what amounts to a compelling governmental interest. Therefore, this Court should reverse the decision of the Fifteenth Circuit and nullify the Enforcement Action.

3. The Enforcement Action was not narrowly tailored to achieve the Commission's desired end.

The Enforcement Action was not narrowly tailored to achieve the Commission's interest. Assuming, *arguendo*, that the Commission's interest to make photography services widely available to the public is compelling, the means used to achieve this interest are not narrowly tailored. In *Burwell v. Hobby Lobby*, this Court held that requiring a for-profit corporation to provide insurance coverage for contraceptive services, in violation of its religious beliefs, was not narrowly tailored to achieve a compelling governmental interest. 134 S. Ct. at 2775. This Court reasoned that the existence of even one other viable alternative to achieve the same goal—*e.g.*, the government's assumption of the costs of contraceptive coverage—was sufficient to show that there were less restrictive means available. *Id.* at 2780–81; *see also Holt v. Hobbs*, 135 S. Ct. 852, 867 (2015) (holding that requiring a prison inmate to shave his beard in violation of his religious beliefs was not narrowly tailored to achieve the governmental interest of preventing contraband where a guard's physical search would have served the same interest). Thus, the means used to achieve a governmental interest are not narrowly tailored where less restrictive, viable means are available.

In this case, there are less restrictive means available for the Commission to achieve its interest. Namely, TPS is not the only provider of photography services in the Madison area. Specifically, CM's Snaps, located just across the street from Taylor's business, is a viable alternative for photography services. Further, Taylor personally recommends that potential clients, to whom he is denying services for a religious event, visit CM's Snaps. Because the Commission did not have a compelling interest and did not use means narrowly tailored to achieve its interest, this Court should reverse the decision of the Fifteenth Circuit and nullify the Enforcement Action.

B. The Enforcement Action fails the *Lemon* test, and therefore amounts to a violation of the Establishment Clause.

The Enforcement Action violates the Establishment Clause because it advances religion and fosters an excessive entanglement between government and religion. The Establishment Clause states that "Congress shall make no law respecting an establishment of religion," meaning that the government can neither condone nor discriminate against any religion. U.S. Const. amend. I.; *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). To determine whether an Establishment Clause violation occurred, this Court has applied a three-part test (hereinafter the "*Lemon* test"): (1) the governmental action must have a secular legislative purpose; (2) the primary effect must be one that neither advances nor inhibits religion; and (3) the governmental action must not foster an excessive governmental entanglement with religion. *Lemon*, 403 U.S. at 612–13.

Even if governmental action does not overtly establish a state-sponsored religion, any action favoring a religion is a violation of the Establishment Clause. *Id.* at 612. Moreover, any minimal step towards the establishment of a state-sponsored religion is constitutionally impermissible. *Id.* As to the first prong of the *Lemon* test, this Court has generally accepted the government's stated purpose, absent clear evidence to the contrary. *Id.* at 613. Accepting the Commission's stated goal of preventing discrimination as a permissible legislative purpose, the Enforcement Action still fails the last two prongs of the *Lemon* test because it has the primary effect of inhibiting religion and fosters an excessive governmental entanglement with religion.

1. The Commission's Enforcement Action against Taylor had the primary effect of inhibiting religion.

The primary effect of the Commission's Enforcement Action was that it inhibited Taylor's constitutional right to abstain from participating in religion, thus failing the second prong of the *Lemon* test. No governmental agency may force any person to endorse or practice any religion. *Lee v. Weisman*, 505 U.S. 577, 587 (1992). In *Weisman*, this Court held that including religious

invocations and benedictions in a public school graduation violated the Establishment Clause. *Weisman*, 505 U.S. at 599. This Court reasoned that, even though there was no representative of the government overtly supporting a specific religion or religion in general, the fact that the prayer was included could be perceived by the audience as "inducing a participation [in religion] they might otherwise reject." *Id.* at 590. One's ability to refrain from actively participating in the prayer—*e.g.*, by allowing one's mind to wander—does not inoculate the government's impermissible promotion of religion. *Id.* at 593–94; *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (holding that a pregame prayer impermissibly advanced religion even though participants could have simply chosen not to listen). Therefore, one's choice not to listen to a religious service is not dispositive of whether a violation has occurred; the mere compulsion of one's attendance at such an event can constitute a violation.

Here, the Commission's attempts to force Taylor to attend religious ceremonies amounted to the exact governmental advancement that the Establishment Clause prohibits. As this Court held impermissible in *Weisman*, the Commission induced Taylor's participation in religious ceremonies he would have otherwise not attended. The Fifteenth Circuit concluded that "requiring [Taylor] to enter these places to perform his business is hardly requiring him to adopt the religion." *Taylor II*, slip op. at 1. But that assertion is contrary to the reasoning in *Weisman* and *Santa Fe*: merely including a prayer amounted to governmental advancement of religion, regardless of whether those present chose to listen. Though Taylor could have entered these places of worship and not listened to the ceremony or ignored the religious setting around him, this does not make the Commission's coercion any less a violation of his rights. The Enforcement Action levied by the Commission against Taylor had the primary effect of inhibiting his choice of religious practice.

2. The Enforcement Action constituted an excessive entanglement between government and religion.

The Commission's attempt to force Taylor to enter into religious settings creates an unconstitutionally excessive entanglement between the state and religion. There is no bright-line test to determine where entanglement between government and religion becomes excessive; rather, the determination is one of "a blurred, indistinct, and variable" nature. *Lemon*, 403 U.S. at 614. This Court considers the "institutions that are benefited, the nature of the [State action], and the resulting relationship between the government and the religious authority." *Id.* at 615. In light of institutions that would be benefitted by Taylor's compelled attendance at a religious ceremony, the Enforcement Action fails the third prong of the *Lemon* test.

In *Lemon,* this Court held that providing state aid to church-related schools violated the Establishment Clause due to the resulting excessive entanglement between the state and religion. *Id.* at 625. This Court reasoned that the need for continuing state surveillance of the parochial schools—to ensure compliance with the statute—would create an impermissible long-term relationship between church and state. *Id.* at 619. These "sustained and detailed administrative relationships" are just the sort of excessive entanglement barred by the Establishment Clause. *Id.*

Although the governmental actions in this case differ in form from those challenged in *Lemon*, they are like in kind. In Taylor's situation, the government chose to uphold the rights of individuals to have a specific photographer at their weddings over Taylor's right to abstain from religious practices. The Commission has chosen to favor religion at the expense of Taylor's rights, illustrating an excessive entanglement between government and religion. This excessive entanglement comprised a violation of the Establishment Clause, and therefore this Court should reverse the decision of the Fifteenth Circuit and nullify the Enforcement Action.

3. The District Court failed to conduct the level of factual inquiry required to grant summary judgment on an Establishment Clause issue.

Notwithstanding the failure of the Enforcement Action to comply with the *Lemon* test, the District Court's grant of summary judgment was improper because the requisite standard of factual inquiry was not met. Whether a particular practice violates the Establishment Clause is a fact-specific inquiry that mandates courts to view the facts of a case in the context of the surrounding circumstances. *Santa Fe*, 530 U.S. at 315. Here, the District Court's analysis stopped when they perceived that a religious person was being denied public services, and failed to consider that conduct, not a protected group, was at issue. The lower court failed to recognize that the Enforcement Action was a governmental endorsement of religion.

Currently, the Circuits are in disagreement over the level of factual inquiry required to award summary judgment in an Establishment Clause case. For example, in *Doe ex rel. Doe v. Elmbrook School District*, the Seventh Circuit held that the lower court erred in granting summary judgment to a school district that held graduation ceremonies in religious facilities. 687 F.3d 840, 856 (7th Cir. 2012). The Seventh Circuit reasoned that summary judgment was improper where the court failed to allow factual development to a point that no reasonable trier of fact could find for the plaintiff. *Id.* The factual inquiry did not suffice to show that the totality of the circumstances would not be offensive to a person who was not a practitioner of that faith. *Id.*; *see also Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 590 (6th Cir. 2015) (reversing the lower court's decision that an Establishment Clause violation did not occur after assessing the case in "a rigorous, fact-specific manner"). These Circuits have required a heightened level of factual inquiry before a grant of summary judgment may be deemed appropriate.

On the contrary, the Tenth Circuit has applied a less-stringent standard for the level of factual inquiry required. *See generally Otero v. State Election Bd. of Okla.*, 975 F.2d 738 (10th

Cir. 1992) (affirming District Court's dismissal of Establishment Clause claim). In *Otero*, the Tenth Circuit held that a lower court did not err in dismissing a plaintiff's claim that using a church facility as a voting location violated the Establishment Clause. *Otero*, 975 F.2d at 741. The Tenth Circuit reasoned that the facts underlying the defendant's decision to use the church facilities—*i.e.*, the availability of parking lots, lack of other viable alternatives, and convenient locations of the church facilities used—were sufficient for a reasonable trier of fact to conclude that the government actions were not in violation of the Establishment Clause. *Id.*

Notably, *Otero* was decided prior to this Court's decision in *Santa Fe*. In *Santa Fe*, this Court reasoned that an in-depth, case-specific factual inquiry is necessary before a court can decide an Establishment Clause challenge, whereas the Tenth Circuit, in *Otero*, affirmed a grant of a motion to dismiss based only on the facts contained in the pleadings. The reasoning of the Seventh Circuit in *Elmbrook*—that Establishment Clause cases are due a heightened level of factual inquiry before a grant of summary judgment—comports more closely with this Court's prior decisions and should be the reasoning that this Court applies here. Specifically, the record from the lower court lacked the factual development necessary for a determination that, as a matter of law, no reasonable trier of fact could find that an Establishment Clause violation occurred. Therefore, because the Enforcement Action violated the Free Exercise and Establishment Clauses, this Court should reverse the Fifteenth Circuit's decision and nullify the Enforcement Action.

CONCLUSION

For the foregoing reasons, Taylor respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Fifteenth Circuit and nullify the Enforcement Action due to its violation of Taylor's constitutional rights guaranteed by the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment.

APPENDIX

The First Amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

CERTIFICATION

We, Team E, hereby certify that all work contained in all copies of this brief are in fact the work product of the team members. We further certify that we have complied fully with our school's governing honor code and acknowledge that we have complied with all Rules of the Competition.

Team E
Counsel for Petitioner