Team F

NO. 15-1245

IN THE

Supreme Court of the United States

JASON ADAM TAYLOR,
Petitioner,

v.

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

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

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

JOANNA MILTON,
in her official capacity as Commissioner, Madison Commission on Human Rights,
and
CHRISTOPHER HEFNER
in his official capacity as Commissioner, Madison Commission on Human Rights.

Respondents.

On Writ of Certiorari to
the United States Court of Appeals
for the Fifteenth Circuit

BRIEF FOR RESPONDENTS

Team F
Counsel for Respondents

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CONSTITUTIONAL PROVISIONS AND STATUTORY RULES

The First Amendment of the United States Constitution

"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."

The Madison Code of Annotations §42-501

(a) The legislature of Madison and any Commission or Agency it lawfully grants enforcement powers, shall not through law show preference to

1. Any religious sect, society, or denomination:

2. Nor to any particular creed or method of performing or engaging in worship or system of ecclesiastical polity.

(b) The legislatures of Madison and any Commission or Agency it lawfully grants enforcement powers, shall not under the color of law, compel any person to attend any place of worship for the purposes of

1. Engaging in any form of religious worship or practice

2. Or promoting the continued financial or reputational success of such institution.

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

(d) Under this section, the right of any person to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless:

1. The government proves by clear and convincing evidence that het law targets a secular purpose;

2. The government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act;

3. And has used the least restrictive means to further than interest.

(e) Nothing in this section shall be construed to permit unlawful discrimination in any form by:

1. Any government agency or actor;

2. Any place of public accommodation as defined by Title II of the Civil Rights Act of 1964, 42 U.S. C. §2000a, *et seq*. or Title II of the Madison Human Rights Act of 1967, Mad. Code Ann §42-101-2a, *et seq*.

42 U.S.C. §1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a

"(a) Equal access. All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

1. Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

2. Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

3. Any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

4. Any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which

is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) Operations affecting commerce; criteria; "commerce" defined. The operations of an establishment affect commerce within the meaning of this subchapter if:

1. It is one of the establishments described in paragraph (1) of subsection (b) of this section;

2. In the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers of a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce;

3. In the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and

4. In the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

(d) Support by State action. Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is

carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

(e) Private establishments. The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section."

28 U.S.C. §1254

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy."

QUESTIONS PRESENTED

1. Does the Commission's enforcement of anti-discrimination legislation requiring Petitioner to provide his photography services to individuals holding religious events violate the First Amendment free speech clause when Petitioner does not want to endorse, or appear to endorse religion?
2. Does the Commission's enforcement of anti-discrimination legislation requiring Petitioner to provide photographic services for religious events and that may require him to enter religious buildings violate the Free Exercise and Establishment clauses of the First Amendment?

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit entered final judgment on this matter on November 12, 2015. R. at 39. 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

The dispute between Petitioner Jason Taylor and Respondents Tammy Jefferson, Thomas More, Olivia Wendy Holmes, Joanna Milton, and Christopher Heffner, in their official capacities as Commissioners of the Madison Commission on Human Rights (hereon "the Commission"), arose out the Commission's enforcement actions against Petitioner, imposing a cease and desist order and a $1000 per week per violation fine for non compliance with that order. Petitioner brought this action pursuant to 42 U.S.C. §1983, asserting a violation of his First Amendment rights under the Free Speech Clause and the Free Exercise and Establishment Clause. He sought to preliminarily and permanently enjoin the Commission from its enforcement actions, to collect fines imposed and attorney's fees, and to collect compensatory and punitive damages for the deprivation of constitutional rights. The Commission filed a motion for summary judgment on May 25, 201. R. at 40. On July 13, 2015 the United States District Court for the District of Eastern Madison granted this motion. R. at 40.

Petitioner submitted a timely appeal to the United States Court of Appeals for the Fifteenth Circuit, seeking a reversal of the district court's grant of summary judgment for the Commission. On November 12, 2015, the Fifteenth Circuit upheld the district court's ruling that the Commission's enforcement actions did not infringe upon Petitioner's First Amendment rights; Petitioner's commitment to atheism does not allow him to refuse his photography business services to individuals seeking photography for religious events as that violates 42 U.S.C. §2000a and Mad Code Ann. §42-101-2a. R. at 44. Therefore, the Fifteenth Circuit affirmed the district court's grant of summary judgment for the Commission in light of Petitioner's unavailing claims. *Id*.

Petitioner timely filed a petition for writ of certiorari, which this Court granted.

STATEMENT OF THE FACTS

Petitioner Jason Taylor is the owner and operator of Taylor's Photographic Solutions, a closely held corporation. R. at 14. Petitioner's company offers photography services to members of the public for a full range of events, including birthdays, graduations, proms, and weddings. R. at 14. The company employs seventeen full-time employees, and two part-time employees. R. at 14. Petitioner is considered a skilled member of the commercial photography community with a specialty in indoor photography, and employs photographers who have other specific photography skills. R. at 30.

Under a policy created by Petitioner at the company's inception in 2003, Taylor's Photographic Solutions does not photograph "any event which is religious in nature." R. at 14. Petitioner has refused to photograph religious ceremonies in the past, and also refuses to allow any of his employees to photograph religious events on company time or utilize company equipment. R. at 15. Petitioner cites his status as a "full blown militant atheist" for his hardline stance on photographing any event that might "make religion look good." R. at 17, 37.

The basis of this action involves Petitioner's interactions with two individuals – Patrick Johnson and Samuel Green – who each contacted Petitioner hoping to hire him to photograph their weddings. On July 14, 2014, Patrick Johnson asked Petitioner to photograph his wedding, which would take place at St. Anthony's Catholic Church. R. at 35. Petitioner stated that he would not perform the wedding due to the religious nature of the ceremony and location. R. at 35. On July 22, 2014, Samuel Green asked Petitioner to photograph his wedding, which would take place at Beth Shalom synagogue. R. at 37. Petitioner similarly stated that he would not perform the wedding, citing the religious nature of the ceremony and location as his basis for refusal. R. at 37.

On August 11, 2014, Petitioner received a letter from the Madison Human Rights Commission (hereon "the Commission"), informing him that two complaints had been filed against his business, Taylor's Photographic Solutions, as well as him personally, for discrimination based on religion in violation of the public accommodation laws of Title II of the Madison Human Rights Act of 1967. R. at 25-26. Yvette Leary, of the Commission, then called Petitioner and informed him that he had the right to file a position statement, have an attorney, and engage in an administrative hearing. R. at 25-26. Petitioner informed the Commission that he did not wish to file a statement or want a hearing. R. at 25-26. Petitioner subsequently signed the formal waiver of the right to such a statement and hearing and returned it on August 12, 2014. R. at 25-26.

On September 15, 2014, the Commission notified Petitioner by letter that it had undertaken an investigation and found that he discriminated based on religion. *Id*. He was instructed to cease this practice and pay fines of $1,000 per week since July 14, 2014, when they found his practice of discrimination began. R. at 26.

Petitioner refused to pay the fees and initiated a lawsuit in the United States District Court for the District of Eastern Madison, claiming that the enforcement actions violated his First Amendment Rights under the Free Speech clause and the Free Exercise and Establishment clause, and that the Commission violated his constitutional rights under color of state law, Mad. Code Ann. §42-101-2a. R. at 5. The court granted the Commission's motion for summary judgment on July 13, 2015. R. at 12.

SUMMARY OF ARGUMENT

This Court should affirm the decision of the United States Court of Appeals for the Fifteenth Circuit and find that the Commission's enforcement of Title II of the Madison Human Rights Act of 1967 is consistent with Petitioner's full exercise of his First Amendment rights. Title II is a valid antidiscrimination statute and has been appropriately applied to petitioner's photography business, a place of public accommodation.

Not all communication in which an individual expresses an idea constitutes expression protected by the First Amendment. In order to find expressive conduct, a court must find intent to convey a particular message through actions as well as a great likelihood that bystanders will understand that message. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Petitioner's actions fail to meet this standard. Petitioner's policy refusing to photograph religious events in order to not endorse religion relies on the incorrect premise that commercial photography expresses an idea. Rather, commercial photography is performed at the behest of paying clients who are empowered to control the outcome of the photographs. Furthermore, there is no likelihood that bystanders will understand petitioner's anti-religion stance from photographs taken of non-religious events.

Moreover, even if Petitioner's photography is expressive conduct, his discriminatory practices may still be lawfully regulated because the regulation comports with the requirements of Mad. Code Ann. § 42-501. The regulation does not regulate content; compliance with the statute does not prevent Petitioner from expressing his atheist views or disavowing religion.

The enforcement action similarly does not compel Petitioner to speak. Petitioner offers services to the public. Performing these services-for-hire does not impermissibly require him to host or accommodate another speaker's message, nor does it infringe upon his freedom of association, because Petitioner – not his business – is entitled to those protections. Petitioner's

resistance to compliance with the statute incorrectly conflates his individual rights with a purported freedom to discriminate based on those protections.

Additionally, petitioner's right to free exercise is not infringed by enforcement of Title II. Title II is a neutral law of general applicability and does not implicate an independent constitutional protection, so it does not compel a strict scrutiny analysis of Title II. Petitioner's practice (or non-practice) of religion is not being burdened by requiring him to offer the same services to all customers regardless of the religious or non-religious nature of their events

Finally, Title II passes the *Lemon* test and does not violate the Establishment Clause. Pursuant to *Lemon*, the law has an entirely secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not result in an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Rather, in almost every aspect, Title II seeks to neutralize the effect that one's religion or non-religion has on the ability to conduct public business in public accommodations.

ARGUMENT

This Court must review the district's court's findings of fact and grant of summary judgment for the Commission under the clearly erroneous standard. *See* Fed. R. Civ. P. 52(a)(6). This standard is highly deferential and requires a "definite and firm conviction that a mistake has been committed. *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001). This case also presents the question of whether Mad. Code. Ann. §42-101-2a violates the First Amendment. This is a question of law which requires this Court to independently review the case under the *de novo* standard of review. *See Agyeman v. INS*, 296 F.3d 871, 876 (9th Cir. 2002).

I. THE COMMISSION DID NOT VIOLATE PETITIONER'S FIRST AMENDMENT FREEDOM OF SPEECH.

Title II of the Civil Rights Act of 1964 prohibits the discrimination of individuals in places of public accommodation on the ground of race, color, religion, or national origin. 42 U.S.C. §2000a. In passing this legislation, Congress sought to guarantee to all individuals the full and equal enjoyment of "goods, services, facilities, privileges, advantages and accommodations" in public areas. *Id*. The analogous Title II of the Madison Human Rights Act of 1967 extends the prohibition on discrimination on the basis of race, color, religion, national origin, sex, disability, sexual orientation, gender identity or expression, socioeconomic status, political affiliation, or other protected classes." Mad. Code Ann. §42-101-2a.

Meanwhile, the First Amendment states that Congress shall make no law…abridging the freedom of speech or the right of people…to assemble." U.S. CONST. amend. I. Taken separately, The Civil Rights Act of 1964 and the First Amendment each protect individuals from burdens imposed by invidious discrimination and a tyrannical government. However, beginning in the late 1970's, the tension between free speech and antidiscrimination legislation increasingly played out in courts. David E. Bernstein, *Antidiscrimination Laws and the First Amendment*,

MO. L. REV. 83, 91 (2001). Although it has done so on rare occasions, the First Amendment generally does not invalidate prohibitions on discrimination in places of public accommodation. Rather, the two protections work harmoniously to ensure that a free society of equality endures.

A. Photography produced for profit by Taylor's Photographic Solutions is not a form of expressive speech protected by the First Amendment.

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). The Supreme Court has continuously protected this concept, recognizing that "speech" is a broad category that extends beyond the use of verbiage to express an opinion. See *id*. Conduct may "be sufficiently imbued with elements of communication to fall within the scope of the First... Amendment." *Spence v. Washington*, 418 U.S. 405, 411 (1974).

But, not all communication in which an individual seeks to express an idea constitutes expression protected by the First Amendment. *Spence v. Washington*, 418 U.S. 405, 409 (1974). To determine if a communication is protected speech, a court must consider the nature of the individual's activity, the factual context, and the environment in which the activity took place. *Id*. at 409-10. A court will find conduct expressive, and thus protected under a two-prong analysis, if it finds first, intent to convey a particular message through actions and second, a great likelihood that bystanders will understand that message. *Johnson*, 491 U.S. at 404.

In *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston* (GLIB), the Supreme Court determined that a parade constitutes expressive conduct that enjoys First Amendment protection. *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995). The Court found that a parade was expressive because "real 'parades are public dramas of social relations….[where] performers define…what subjects and ideas are

available for communication." *Hurley*, 515 U.S. at 568 (quoting S. Davis, Parades and Power: Street Theatre in Nineteenth-Century Philadelphia 6 (1986)). Further, the Court explained that a parade, or a group of individuals marching in a procession, without expressing a message beyond the march itself, would "not be much" of a parade. *Id*. These acknowledgements fulfilled the first prong of the *Johnson* test that required intent to express an idea. In analyzing the likelihood that bystanders would understand the message, the Court acknowledged that a parade depends on watchers to the extreme extent that without them, it may as well not have happened. *Id*. In this regard, the parade organizers demonstrated that the nature of a parade relies heavily on bystanders observing and understanding the message of the parade.

Unlike a parade, photography produced by Taylor's Photographic Solutions is not expressive conduct that enjoys First Amendment protection. To grant Petitioner First Amendment protection would first require a finding that Petitioner intended to convey his atheist views by managing a photography business (meeting the first prong of the *Johnson* test). This finding cannot be substantiated.

Petitioner states that he created his policy refusing to photograph religious events because he "does not want to be seen as endorsing a religion in any way." R. at 15. However, this policy assumes that performing photography for profit expresses an idea. While a parade inherently includes a procession of individuals seeking to communicate ideas, running a business does not inherently include the expression of ideas. Petitioner is hired by the public to take photographs for profit. R. at 14. The nature of performing this service includes accepting clients, taking photos for those clients, and allowing those clients to select those photographs for further production. Further, Petitioner himself acknowledges that his customers, not him, control the outcome of his photographs. R. at 41.

Moreover, Petitioner incorrectly identifies the expressive activity at issue when he argues that *photography* is inherently a form of artistic expression and that his clients purchase the talent and creativity of Taylor's staff. R. at 15. While photography itself may be expressive, photos taken for business are produced through the lens of the *clients'* vision. When Taylor's customers determine what photos will be taken, developed, and shared with the world, they use Taylor's staff as a mechanism to create their own desired product. While a parade requires the expression of ideas to constitute an actual parade, a photography business does not require Petitioner's religious views to constitute an actual photography business.

The second prong of the *Johnson* test requires a great likelihood that bystanders will understand the message Petitioner intended to convey. *Johnson*, 491 U.S. at 405. Here, Petitioner fails to prove that when bystanders view Taylor's photos they will understand that he does not endorse religion. R. at 15. First, the photos that result from Taylor's photography services are viewed as snapshots of the events photographed. As explained by Petitioner, Taylor's provides services for events including birthdays, graduations, proms, websites, and weddings. R. at 14. Generally, bystanders understand photos of events as documentation of those events rather than a medium through which a hired photographer seeks to express his ideas. While it is recognized that parades rely on a bystanders understanding of the intended communication, the production of photos documenting customer life events does not rely upon an understanding that the man or woman behind the lens was an atheist.

B. Even if it photography for hire was expressive conduct, a state may still lawfully regulate Petitioner's discriminatory business practices.

While a finding of expressive conduct requires First Amendment protection, expressive conduct is not entirely insulated from state regulation. The government maintains broader power to restrict expressive conduct than it has to restrict written or spoken speech. *Johnson*, 491 U.S at

430. For example, where a state regulates conduct with both expressive and non-expressive elements, a sufficiently important governmental interest in regulating the non-expressive elements may justify an incidental infringement of the expressive conduct. *U.S. v. O'Brien*, 291 U.S. 367, 376 (1968). But, if a statute that regulates speech based on its content, the government must show that the regulation is narrowly tailored to promote a compelling government interest and that no less restrictive means of regulation exist. *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). In Madison specifically, the government, or any agent (such as the Commission), may not substantially burden the right of any person to act or refuse to act in a manner motivated by a sincerely held religious belief unless it: provides clear and convincing evidence that the law targets a secular purpose; 2) provides clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act; and 3) has used the least restrictive means to further that interest. Mad. Code Ann. § 42-501.

The Commission properly brought enforcement action against Petitioner under Title II of the Civil Rights Act of 1964 and the Madison Human Rights Act of 1967, prohibiting him from denying photography services to religious individuals. In bringing this action, the Commission demonstrated interests to both administer the law and protect customers from discrimination due to their religion. *See* R. at 26. The Commission's actions demonstrate a desire to end the discriminatory practices against citizens who seek photography services while in a church, or other place of worship, in accordance with the law. The Commission demonstrated a secular interest because Mad. Code Ann. §42-101-2a seeks to prevent invidious discrimination and it does not favor any particular protected group over any other individual. Further, the Commission demonstrates a compelling governmental interest in preventing the unjust discrimination of individuals on the basis of religion. Finally, requiring Petitioner to cease his discriminatory behavior is permissible and is the least restrictive way to meet anti-discrimination goals.

Anti-discrimination laws, as a general matter, do not violate the First or Fourteenth Amendments. *Hurley*, 515 U.S. at 572; *See e.g., New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 11-16 (1988). However, laws prohibiting discrimination may impermissibly infringe upon the First Amendment rights of private organizations. *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995). In *Hurley*, for example, the private organization that organized a yearly St. Patrick's Day parade challenged the constitutionality of an anti-discrimination statute naming sexual orientation as a protected class. *Id*. at 563. The parade organizers argued that allowing the Irish-American Gay, Lesbian, and Bisexual Group of Boston to present its own banner as a unit in the parade would express an idea that the parade organizers did not support. *Id*. at 572-73.

The Supreme Court agreed with the organizers, and held that the statute unconstitutionally infringed on the parade organizer's right to exclude GLIB's expression of gay, lesbian, and bisexual pride. *Id*. at 568. The Court acknowledged that the law may promote conduct in place of harmful behavior, but that it may not interfere with speech "for no better reason than promoting an approved message or discouraging a disfavored one..." *Id*. at 579. Therefore, the state's anti-discrimination law could not permissibly require a speaker to modify his or her expressive content "to whatever extent beneficiaries of the law" desired. *Id*. at 578.

In contrast, the Supreme Court upheld a state law requiring shopping mall property owners to allow visitors to solicit political petitions whether or not the proprietors agreed with the political message. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). In *PruneYard*, the Court noted that that the proprietor's ran a "business establishment…open to the public," that the solicitations would not likely be identified as solicitations supported by the proprietor, and that the proprietors could effectively post signs disavowing any connection with the political expression occurring. *Id*. at 87.

Unlike *Hurley*, the Commission does not interfere with speech to promote an approved message and discourage a disfavored one. First, Petitioner's photography services do not constitute protected speech. Second, the anti discrimination laws do not require Petitioner to express a view he does not agree with. The prevention of discrimination on the basis of religion does not require Petitioner to endorse religion in any way. Petitioner may still photograph an event that takes place in a church, and express atheist views. Petitioner himself demonstrated this concept when he agreed to photograph a wedding reception that took place in a building owned by the Catholic Church of the Blessed Virgin Hall. R. at 16. Petitioner was not concerned that photographing a wedding in a venue owned by a Catholic church would suggest that he endorse the Catholic Church.

Similar to the proprietors in *PruneYard*, Petitioner does not substantiate that Mad. Code Ann §42-101-2a violates his freedom to express his atheist views and disavow religion. Petitioner, as the owner and manager of Taylor's Photographic Solutions, runs a "business establishment" which is a place of public accommodation under 42 U.S.C. §20000a and Mad. Code Ann 42-101-2a. R. at 40. Further it is unlikely that Petitioner photographing a religious ceremony would induce a bystander to believe that Petitioner himself endorsed religion. Finally, a sign that Petitioner did not endorse religion would sufficiently and substantially allow him to fulfill the anti-discrimination law and disavow a view he does not agree with.

C. The Commission's enforcement action neither compels Petitioner's speech nor requires him to expressively associate with religion.

1. The Commission does not infringe upon Petitioner's speech.

Petitioner asserts that his business is speech, and that Mad. Code Ann. § 41-101-2a compels him to speak in violation of the First Amendment by requiring him to photograph religious ceremonies or other events in places of worship. Petitioner further claims that requiring

him to photograph certain events compels him to "expressively associate" with a particular religion. These claims cannot be substantiated because the statute applies to the operation of petitioner's business, not to the product that he produces.

Petitioner observes that photography is an expressive art form, and that photographs can fall within the constitutional protections of free speech. *Hurley*, 515 U.S. at 569. Petitioner erroneously concludes that by requiring him to photograph religious ceremonies, the statute unconstitutionally compels him to associate with a particular religion, and send a positive message about that religion. Indeed, the United States Supreme Court has never found a compelled-speech violation arising from the application of antidiscrimination laws to a for-profit public accommodation. In fact, in *Hurley*, the Court suggested that public accommodation laws are generally constitutional. *Hurley*, 515 U.S. at 572.

There are two lines of cases in which the Supreme Court has found compelled speech unconstitutional. As described in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, the Supreme Court held that the government may not require an individual to "speak the government's message" or to "host or accommodate another speaker's message." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006). Neither of these prohibitions are betrayed here. By requiring petitioner to provide his services to the public regardless of his customer's religion, the statue does not compel petitioner to facilitate the messages inherent in that event.

In the situations where the Court has found that the government unconstitutionally required a speaker to host or accommodate another speaker's message, there has been direct governmental interference with the speaker's own message as opposed to message-for-hire as is the case here. In *Miami Herald Publishing Co. v. Tornillo*, for example, the Court invalided Florida's "right of reply" statute. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 244

(1974). This statute required newspapers to print responses from any political candidates criticized by the paper. *Id*. The Court expressed concern that the statue might deter editors from printing criticism of candidates, thereby chilling political news coverage and commentary in the state. *Id*. at 257. Similarly, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, a plurality held unconstitutional a decision by the California Public Utilities Commission to allow a third party group to send out messages with a utility's billing statements. *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 4 (1986). In holding that the decision unconstitutionally compelled the utility to accommodate the intervenor's speech, the court recognized competing interests between the utility and the messages presented. *Id*. at 15.

Neither of these situations find an analogue here. The allegedly compelled message is petitioner's own work on behalf of his clients, which he is directly compensated for, and which he distributes only to those paying individuals. If a commercial photography business wishes to offer its services to the public, thereby increasing its visibility to potential clients, it must be subject to the antidiscrimination provisions of the statute. Petitioner's choice to offer his services to the public is a business decision, not a decision about his freedom of speech. The government has not interfered with Petitioner's editorial judgment; the only choice regulated by the statute is Petitioner's choice of clients. The commission does not wish to regulate the content of the photographs that Taylor's Photography Solutions produces, nor could it.

Mad. Code. Ann. § 41-101-2a applies not to Petitioner's photographs, but to its business operation, and in particular, its business decision not to offer its services to protected classes of individuals. Unlike *Pacific Gas*, the Commission is neither requiring that Petitioner support a religious message nor that he facilitate a religious message. By ensuring that Petitioner does not discriminate against individuals on the basis of their religion, the Commission merely requires Petitioner to photograph an event for which he will be compensated for. Petitioner is not

compelled to endorse a message through his photography, and thus cannot take on a message with which he does not agree.

2. Petitioner's business is not entitled to the freedom of expressive association.

The Supreme Court has long recognized that the First Amendment protects the freedom of association, as implicit in the freedoms of speech, assembly, and petition. *Healy v. James*, 408 U.S. 169 (1972). However, freedom of association does not include action that lacks an expressive purpose. *See City of Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989); *see also* Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 1337 (14th ed. 2001). Freedom of association also does not include joining with others to deprive third parties of their lawful rights. *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994).

Here, Petitioner argues that his freedom of association guarantees him the right to dissociate himself from religion. R. at 41. Petitioner incorrectly claims that the Commission's enforcement actions require him to associate himself with the particular religion of potential religious clients. *Id.* While Petitioner himself maintains a freedom of expressive association, a freedom of association as applied to his photography business does not exist. The photography that results from Petitioner's business is not expressive conduct that enjoys First Amendment protection; absent an expressive element, Petitioner may not contend that he maintains a freedom of association in conducting his business.

Even if Taylor's photography was expressive, the freedom of association does not allow an association to deprive individuals of their lawful rights. Here, Taylor's association with only non-religious elements and dissociation with religion denies religious individuals protection from discrimination. Title II of the Madison Code ensures that individuals may not be denied public accommodations on the basis of religion. Patrick Johnson and Samuel Green maintain a right to

the equal protection of the laws, and Petitioner may not unlawfully deny them this right under the guise of a right to association.

II. ENFORCEMENT REQUIRING A PERSON TO PROVIDE PRIVATE BUSINESS SERVICES FOR RELIGIOUS EVENTS DOES NOT VIOLATE THE FREE EXERCISE OR ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

In relevant part, the First Amendment guarantees "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. 42 U.S.C. § 2000a, and the analogous Mad. Code Ann. § 41-101-2a, provide that "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a.

A. Requiring petitioner to attend events that are religious in nature does not violate the Free Exercise clause.

The enforcement of Mad. Code Ann. §42-101-2a, insofar as it requires Petitioner to attend and photograph events that are religious in nature, does not violate Petitioner's First Amendment Free Exercise rights. Under established law, "the 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)." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (internal quotation marks and citation omitted).

In order to state a valid First Amendment Free Exercise claim, a party must show either (a) that the law in question is not a "neutral law of general applicability," or (b) that the challenge implicates both the Free Exercise clause and an independent constitutional protection. *Id*. at 881-82. Absent these factors, Petitioner's claim fails as "an individual's religious beliefs

[do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id*. at 878-79.

1. The laws are neutral and generally applicable.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court addressed ordinances that prohibited religious sacrifice of animals but exempted a variety of other animal killings. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). In finding that the ordinances were neither neutral nor generally applicable, the Court stated, "a law is not neutral if its object is to infringe upon or restrict practices because of their religious motivation. *Id*. at 533. It is not generally applicable if it "impose[s] burdens only on conduct motivated by religious belief" while permitting exceptions for secular conduct or for favored religions. *Id*. at 543. These inquires are related; the Court observed that improper intent could be inferred if the law was a "religious gerrymander" that burdened religion, but exempted similar secular activity. *Id*. at 534-35. If a law is neither neutral nor generally applicable, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id*. at 531-32. In *Daniel v. Paul*, the court acknowledged that the purpose of antidiscrimination statutes such as these is "to [re]move the daily affront and humiliation involved in discriminatory denials of access to facilities open to the general public" and to protect individuals from dignitary harm. *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969).

The law here is neutral – its objective is not to infringe upon or restrict practices because of their religious motivation. Rather, the object of the law is to ensure equal access of all persons to places of public accommodation. Pursuant to the rationale the Court stated in *Daniel*, the purpose of this antidiscrimination statute seeks to remove the daily affront suffered by people of Madison who are discriminated against. *Id*.

The law is also generally applicable. It does not impose burdens only on conduct motivated by religious belief; rather, it imposes permissible burdens that stretch far beyond religious belief. Petitioner is no more able to distinguish his customers on the basis of their religious wedding ceremonies than he is on the basis of their race, color, or national origin. 42 U.S. Code §2000a. Furthermore, there are not exceptions for secular conduct or for favored religions. What Petitioner asks for is the exact opposite of what the Court declared in *Lukumi*. Just as a photographer who steadfastly practices a religion could not refuse to photograph ceremonies outside his religion, petitioner cannot lawfully seek a gerrymander that exempts him from religious ceremonies but allows him to photograph secular ones.

The Court has previously upheld statutes that incidentally burdened certain religious practices where accommodating a religious belief would unduly interfere with fulfillment of the government interest. For example, in *Prince v. Massachusetts*, the Court held that a mother could be prosecuted under the child labor law for using her children to dispense literature in the streets, her religious motivation notwithstanding. *Prince v. Massachusetts*, 321 U.S. 158 (1944). In *United States v. Lee*, similarly, the Court held that an Amish person could not be exempted from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs. *United States v. Lee*, 455 U.S. 252, 258-61 (1982). In both cases, the Court found that religious sentiments could not overcome neutral laws of general applicability. Similarly here, Petitioner's sentiments against religion cannot overcome a neutral anti-discrimination law.

The present situation further does not compel a strict scrutiny analysis pursuant to *Lukumi* because there is not a specific practice burdened. Petitioner's practice does not include not entering places of worship on the basis of his atheism – in recent years he has entered a Catholic Church and attended a bris of his own accord. R. at 17. Unlike the requirement to make

an animal sacrifice in the Santeria religion at issue in *Lukumi*, Petitioner's atheism does have specific requirements which would be violated by photographing religious ceremonies as the statutes require him to do.

2. Petitioner's challenge neither implicates the Free Exercise Clause nor an independent constitutional protection.

In *Smith,* the Court did not foreclose the possibility that a neutral law of general applicability could be unconstitutional if the law infringed both Free Exercise rights and an independent constitutional protection. *Smith*, 494 U.S. at 881. However, the Court also acknowledged that the only instances in which it found that the First Amendment barred application of a neutral, generally applicable law to religiously motivated action involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, *see Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940); *see also Murdock v. Pennsylvania*, 319 U.S. 105 (1943), or the rights of parents to direct the education of their children, *see Wisconsin v. Yoder,* 406 U.S. 205 (1972). *Id.* The Court distinguished such cases as "hybrid situations." *Smith*, 49 US. at 881. Although Petitioner raises both a free exercise claim and a compelled-speech claim, he has not made a hybrid rights claim under which the statutes should receive strict scrutiny.

B. Requiring petitioner to photograph the events with a religious nature does not violate the Establishment Clause.

The Establishment Clause of the First Amendment states, "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. A statute complies with the Establishment Clause if it passes the tripartite tests set forth by the Supreme Court in *Lemon v. Kurtzman*. The *Lemon* test states first that the statute must be motivated by a secular purpose; second, that the statute must not advance nor inhibit religious practice; and third, that the statute must not excessively entangle government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-

13 (1971). The Court later clarified that the essential principle underlying the Establishment Clause is a prohibition on the government "from appearing to take a position on questions of religious belief or form making adherence to a religious relevant in any way to a person's standing in the political community." *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984). The court below properly held that "requiring [Petitioner] to go to religious places to perform the services he voluntarily began offering to the public" does not violate the Establishment Clause. R. at 43.

1. Mad. Code Ann. §42-101-2a is valid.

As stated in the first prong of the *Lemon* test, a law is invalid if it lacks "a secular purpose." *Lemon*, 403 U.S. at 613. Here, Mad. Code Ann. §42-101-2a, and its analogous section, 42 U.S. Code §2000a, serve as a prohibition against discrimination or segregation in places of public accommodation. These statutes have a substantial secular purpose of protecting individuals against all types of discrimination in the provision of publically available goods, privileges, and services. As the Court noted in *Hurley v. GLIB*, "provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination." *Hurley*, 515 U.S. at 572.

The second prong of the *Lemon* test requires that the "principal or primary effect" of the law "be one that neither advances nor inhibits religion." *Lemon*, 303 U.S. at 612. Therefore, a law may advance or inhibit religion so long as such effects are not the primary or principle consequences of the government action. *See, e.g.*, *Corp. of the Presiding Bishop v. Amos*, 583 U.S. 327 (1987). This analysis turns on the actual effects, rather than the mere possibility for advancement or inhibition. *See, e.g.*, *Cnty. of Allegheny,* 492 U.S. at 597. Here, the primary effect of the law does not advance or inhibit religion. Rather, it seeks to ensure that all Madison residents are able to take advantage of their constitutional protections by prohibiting discrimination in places of public accommodation. Just as the law ensures that Petitioner – a

stated atheist – will have access to a grocery store owned by religious people who prefer religious customers, the law also ensures that religious citizens of Madison maintain access to photography services. In this way, the statute takes no position that advances or inhibits religion or religious practices.

Finally, the *Lemon* test prohibits excessive government entanglement with religion. The relevant factors in determining if there is excessive entanglement include the character and purpose of institution benefited, the nature of aid the state provides and the resulting relationship between government, and religious authority. *Lemon*, 403 U.S. at 615. Here, no relationship between government and religious authority is developed, the state provides no aid, and the only people who benefit are individuals seeking services available on the free market. Indeed, these non-discrimination laws seek to remove the significance of religion from the calculus at all.

The Supreme Court has found constitutional problems with some applications of state public accommodation laws, but these problems arose when states applied these laws to free-speech events such as privately organized parades, and private membership organizations. *See Hurley*, 515 U.S. at 566; *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000). No such circumstances exist here. Taylor's Photographic Solutions, unlike the Boy Scouts, is a clearly "commercial entity" that sells goods and services to the public, rendering it an ordinary public accommodation. *Boy Scouts*, 530 U.S. at 657. On this basis, Taylor's Photographic Solutions is clearly distinguishable from cases that exempt private businesses from public accommodation requirements.

As the district court acknowledged, the restriction imposed by Mad. Code Ann. §42-101-2a satisfies a strict scrutiny analysis. R. at 12. There is a compelling interest in prohibiting discrimination. In addition to promoting equality, antidiscrimination laws have an important purpose in ensuring that services are freely available on the market. *Katzenbach v. McClung*, 379

U.S. 294, 299-300 (1964), *see also Hurley*, 515 U.S at 572. The provisions of this law represent the least restrictive means possible to accomplish that goal. Without requiring places of public accommodation to accept all-comers, businesses would be free to discriminate not only based on a customer's religion but also on the basis of their race, sexual orientation, and nationality.

2. Application of Mad. Code Ann. §42-101-2a to Petitioner's business is proper.

There is no precedent to suggest that the First Amendment exempts creative service providers from antidiscrimination laws. In *Employment Division v. Smith,* the Supreme Court made clear that "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Smith*, 494 U.S. at 878-79. Because Mad. Code Ann. §42-101-2a and its federal counterpart are valid, Petitioner's strong opposition to religion fails to render him free to discriminate against customers who desire his services at religious ceremonies, or ceremonies in religious places.

If a commercial photography business such as Taylor's Photographic Solutions wishes to offer it services to the public, thereby increasing its visibility to potential clients, it must be subject to relevant, valid antidiscrimination laws. The conduct required here – to accept customers in a given category regardless of their religious status – does not require petitioner to alter his religious beliefs in the slightest because entering a place of worship does not require one to practice a religion. For example, the Tenth Circuit has specifically held that using a church as a polling place in an election was proper did not violate the Establishment Clause and Free Exercise Clauses because the burden was so slight that it "did not begin to outweigh the interests of the state" in having additional polling places. *Otero v. State Election Bd.*, 975 F.2d 738, 741 (1992). Similarly here, the interest in preventing discrimination is so great that petitioner's discomfort regarding entering places of worship cannot outweigh it.

Finally, Petitioner can comply with the statute in a way that does not require entrance into places of worship or attendance at religious events by refusing to photograph any events in the relevant categories. For example, if Petitioner truly desires to never enter a house of worship, he can choose to not photograph weddings or coming of age ceremonies, religious and non-religious alike. This limitation would allow Petitioner to fully comply with the law. The sole restriction placed on Petitioner at present is that he cannot take the religion or religious nature of an event into account in deciding whether or not to provide services. It is his choice whether or not to prioritize his stance on religious ceremonies over potential profits.

CONCLUSION

The foregoing reasons demonstrate that the Commission's enforcement actions did not infringe upon Petitioner's First Amendment rights under the free speech and Free Exercise and Establishment clauses. It is vital that this Court ensures the protection of all citizens from discrimination under 42 U.S.C. §2000a and Mad Code Ann. §42-101-2a. Therefore, the Commission respectfully requests that this Court affirm the United States Court of Appeals for the Fifteenth Circuit's grant of summary judgment for Petitioner's unavailing claims.