Team H

No. 15-1245

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,

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 RESPONDENT

Team H
Counsel for Respondent

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STATEMENT OF JURISDICTION

The United States District Court for the District of Eastern Madison granted Respondent's motion for summary judgment on this matter on July 13, 2015, pursuant to a 42 U.S.C. § 1983 civil rights action by Jason Adam Taylor, Petitioner. *Taylor v. Jefferson, et. al.*, No. 2:14-6879-JB (E.D. Mad. July 13, 2015). Petitioner sought to preliminarily and permanently enjoin the Madison Commission on Human Rights (MCHR) from imposing its Enforcement Action, and to bring two First Amendment challenges to the Enforcement Action. Petitioner further sought from Respondents, Tammy Jefferson, Thomas More, Olivia Wendy Holmes, Joanna Milton, and Christopher Heffner, all in their capacity as members of the MCHR, damages in the sum of his fines and attorney's fees, as well as compensatory and punitive damages from Respondents for deprivation of constitutional rights under color of state law. The United States Court of Appeals for the Fifteenth Circuit affirmed the district court's decision on November 12, 2015. *Taylor v. Jefferson, et. al.*, App. No. 15-1213 (15th Cir. Nov. 12, 2015). Petitioner Taylor timely filed a Petition for a Writ of Certiorari, which this Court granted. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1) (2012).

STATEMENT OF THE ISSUES

I. DOES ENFORCEMENT OF A PUBLIC ACCOMMODATION LAW THAT REQUIRES A PERSON TO PROVIDE PRIVATE BUSINESS SERVICES EQUALLY TO ALL CUSTOMERS, EVEN IF DOING SO VIOLATES THE PERSON'S STRONGLY HELD BELIEFS, VIOLATE THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT?

II. DOES A PUBLIC ACCOMMODATION LAW THAT REQUIRES A PERSON TO PROVIDE EQUAL PRIVATE BUSINESS SERVICES TO ALL CUSTOMERS, REGARDLESS OF THE CUSTOMER'S RELIGION OR THE RELIGIOUS NATURE OF THE EVENT OR VENUE, VIOLATE THE FREE EXERCISE AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT?

STATEMENT OF THE CASE

Petitioner Taylor brought this 42 U.S.C. § 1983 action against Respondents seeking a challenge to the Enforcement Action, preliminary and permanent injunction of the Enforcement Action, damages in the sum of his fines and attorney's fees, and compensatory and punitive damages from Respondents for deprivation of constitutional rights under color of state law. Petitioner claims that his First Amendment rights to Free Speech and Free Exercise were violated, as was the First Amendment's Establishment Clause. *Taylor*, No. 2:14-6879-JB, slip op. at 1. Respondents moved for summary judgment on May 25, 2015. *Id.* The district court granted their motion on July 13, 2015. *Taylor*, App. No. 15-1213, slip op. at 2. The court applied the standards in *Texas v. Johnson*, 491 U.S. 397 (1989), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), because Petitioner's photographs are products whose outcomes are controlled by his customers. *Taylor*, No. 2:14-6879-JB, slip op. at 8. The court also applied the standard in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), because the law's primary purpose was not to inhibit religion or religious practices but had, instead, a secular purpose, *Taylor*, No. 2:14-6879-JB, slip op. at 10.

Petitioner submitted a timely appeal to the United States Court of Appeals for the Fifteenth Circuit, seeking reversal of the district court's grant of summary judgment for the Respondents. *Taylor*, App. No. 15-1213, slip op. at 2. The court of appeals affirmed the district court's decision using the same case law and reasoning as the lower court. *Id.* at 3-5. Petitioner then filed a timely petition for Writ of Certiorari, which this Court granted.

STATEMENT OF FACTS

Petitioner's closely held corporation, Taylor's Photographic Solutions (TPS) provides publicly available business services photographing a wide variety of events. Taylor Aff. at ¶ 6. The business has a reputation for its various styles of photography of both indoor and outdoor events. Allam Aff. at ¶¶ 28-30. Petitioner has a reputation for "utilizing indoor lighting to create spectacular photography." Johnson Aff. at ¶ 20. Petitioner insists that photography is "an inherently artistic form of expression," and when a customer purchases his photographs, they also pay for his talent and creativity and that of his staff. Taylor Aff. at ¶ 16.

A self-described "full blown militant atheist," Petitioner has long maintained a policy that TPS will not photograph any event which is religious in nature. *Id.* at ¶¶ 12, 26, 30-31. This policy extends not only to Petitioner, but also to his 19 total staff members, who may not photograph any religious event on company time, or using company equipment. *Id.* at ¶ 14. After the decision in *Burwell v. Hobby Lobby Stores*, 134 S.Ct. 2751 (2014), Petitioner placed a sign on the door of his shop, Reuben Aff. ¶¶ 23-25, that read:

> 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.

Taylor Aff. Ex. A. By displaying the sign, Petitioner intended to alleviate questions about the policy's general applicability. *Id.* at ¶ 31.

Petitioner claims that his policy regarding religion does not extend to people of faith specificically, just religious events and venues, and that he makes accommodations for his employees' religious beliefs. *Id.* at ¶¶ 32-34. Petitioner also occasionally attends religious

services involving family members. *Id.* at ¶¶ 27-29. At an employee's request, Petitioner attended that employee's son's bar mitzvah, where he gave the child a large check and congratulated him. Reuben Aff. at ¶ 22.

On July 14, 2014, Patrick Johnson visited TPS and asked Petitioner to photograph his wedding at a Catholic church. Johnson Aff. at ¶¶ 3- 9. Petitioner refused, stating that he did not want to make religion look good. *Id.* at ¶ 12. On July 22, 2014, Samuel Green visited TPS and specially requested Petitioner to photograph his wedding at a Jewish Synagogue, which Petitioner also declined, again stating that he did not want to make religion look good. Green Aff at ¶ 10. Mr. Johnson noted that Petitioner's refusal to photograph his wedding denied him the ability to utilize Petitioner's photography skills to document his event. Johnson Aff. at ¶ 21.

Mr. Johnson and Mr. Green filed individual complaints with the MCHR alleging religious discrimination. Taylor Aff. Ex. B. at ¶ 1. On July 31, the MCHR launched a formal investigation. *Id.* On August 11, Yvette Leary of the MCHR contacted Petitioner to inform him of the complaints and requested that he submit a formal position statement in response. *Id*. Petitioner refused to do so, and filed a formal waiver of his right to file a position statement with the MCHR. *Id.* On September 15, 2015, the MCHR sent the Petitioner a formal letter informing him of a legal Enforcement Action per the Commission's authority under Madison Human Rights Act of 1967 (MHRA), requiring the "immediate abatement" of Petitioner's discriminatory practices; a $1000 per week fine since July14, when the practices began; and threat of civil legal action if Petitioner did not comply within 60 days. Taylor Aff. Ex. B.

Petitioner filed a complaint in the U.S. District Court for the Eastern District of Madison alleging that the Enforcement Action brought against him and TPS violated two of his First Amendment rights. *Taylor v. Jefferson, et. al.*, No. 2:14-6879-JB (E.D. Mad. July 13, 2015). He

claimed that photography constitutes speech, and the Enforcement Action violated his right to free speech by compelling him to photograph religious events, in effect, forcing him to speak in a manner violating his strongly held beliefs. *Id.* at 7. Additionally, Petitioner asserted that the Action violates the Establishment and Free Exercise Clauses of the First Amendment by requiring him to photograph religious events and compelling him to enter houses of worship. *Id.* at 9. The Court granted summary judgment to the MCHR, which the Court of Appeals for the Fifteenth Circuit upheld, stating that "Appellant, and others who may follow in his footsteps, may not cloak invidious discrimination in a place of public accommodation in the powerful shield of the First Amendment." *Id.* Petitioner now seeks review by the Supreme Court of the United States.

SUMMARY OF THE ARGUMENT

This is a case about the government's ability to protect the civil rights of its citizens as a whole without impediment from individual citizens who may suffer marginal burdens of emotional and intellectual discomfort when required to comply with antidiscrimination laws. Petitioner claims that the Madison Human Rights Commission, through its Enforcement Action, violated the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment, thereby violating his civil rights. However, Petitioner's actions are not entitled to First Amendment protection. *See Boy Scouts of America*, 530 U.S. at 678, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988).

The State may, in order to advance a compelling state interest, justify incidental limitations on First Amendment rights caused by generally applicable, facially neutral laws. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968), *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990). The Madison Human Rights Act of 1967, the enforcement of which Petitioner claims violates his civil liberties, is a generally applicable law with a secular purpose. It does not seek to compel speech or association and does not establish, promote, or compel religious practice. Its primary purpose is to eliminate discrimination within the state. This Court should look to its well established doctrines and affirm the district court's grant of summary judgment.

ARGUMENT

This Court has repeatedly held that an individual's First Amendment rights may be limited by generally applicable laws, provided the State has a compelling interest and uses the least restrictive means possible to achieve it. *Compare O'Brien*, 391 U.S. at 376, *Smith*, 494 U.S. at 878-79 *with R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The Madison Human Rights Act of 1967 (MHRA) is a generally applicable law that is neutral on its face; any violations of Petitioner's First Amendment rights are incidental and far outweighed by the societal value the Act provides. The Madison Commission on Human Rights (MCHR) commenced the Enforcement Action because the Commission found the Petitioner to be discriminating against members of the public in a place of public accommodation, a determination Petitioner did not contest. Though Petitioner sincerely believes that religion is a detriment to human society, those beliefs do not entitle him use the First Amendment to shield his invidious religious discrimination. This Court's First Amendment jurisprudence recognizes that the Free Speech, Free Exercise, and Establishment Clauses do not allow individuals to ignore regulations which the State is authorized to set. *O'Brien*, 391 U.S. at 376, *Smith*, 494 U.S. at 878-79. Therefore, summary judgment in favor of the Respondents is proper.

I. STANDARD OF REVIEW

Summary judgment is a question of law which this Court must review *de novo*. In order to grant summary judgment, this Court must find no genuine dispute about the material facts of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The evidence must be such that a reasonable jury could, viewing the facts in the light most favorable to the nonmoving party, return a verdict for the nonmoving party. *Id.* at 255-56. The Respondents moved for summary judgment and if this Court finds that there is no genuine dispute regarding any material

fact and that Respondents are entitled to judgment as a matter of law, it should uphold the district court's decision. *See* Fed. R. Civ. P. 56(c).

II. THE MADISON COMMISSION ON HUMAN RIGHTS DID NOT VIOLATE PETITIONER'S RIGHT TO FREE SPEECH WHEN IT ENFORCED TITLE II OF THE MADISON HUMAN RIGHTS ACT OF 1967 AGAINST PETITIONER BECAUSE HIS SERVICES ARE NOT SPEECH AND ARE NOT LIKELY TO BE VIEWED AS A PERSONAL ENDORSEMENT OF THE ACTIVITIES DEPICTED.

Free speech serves as the bedrock of the First Amendment and this Court has long recognized its broad scope, noting that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). However, when regulating a place of public accommodation, the broad protections allotted to an individual's freedom of speech must be balanced with the similarly fundamental right to equal protection of the law guaranteed by the Fourteenth Amendment.

Petitioner argues that the MCHR Enforcement Action of Title II of the Madison Human Rights Act of 1967 (Madison's version of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, *et seq.*, codified as Mad. Code Ann. § 42-101-2a, hereafter MHRA) prohibits the government from requiring him to offer publicly available business services photographing religious events because it compels him to produce religious speech and endorse religion, thus violating his strongly held atheist beliefs. In *O'Brien*, the Supreme Court established a test to determine that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. *O'Brien*, 391 U.S. at 376. Any burden the MHRA places upon the Petitioner's atheism by requiring him to photograph religious events, both inside and outside houses of worship, is purely incidental in light of the State's vital

need to ensure that religion-based discrimination is eliminated in all realms of public life. Other state courts have already held that the government burden placed, in the interest of eliminating discrimination, on the owners of closely held business "fall[] on [their] conduct and not [their] beliefs . . . [T]he burden on [their] conduct affects [their] commercial activities." *Swanner v. Anchorage Equal Rights Commission*, , 874 P.2d 274, 283 (Alaska 1994); *see also Elane Photography v. Willock*, 309 P.3d 53, 68 (N.M. 2013). The MHRA does not unduly burden any expressive speech because it is limited to the purely nonspeech realm of commercial conduct and only applies in a place of public accommodation. Mad. Code Ann. §42-101-2(a). Photographing a religious event in this purely commercial, publicly available context does not infringe upon the Petitioner's freedom to refrain from religious speech, nor does it compel him to endorse religion writ large. Any impact it may have on potential expressive elements of the photography is incidental. Petitioner's interest in eliminating that impact pales in comparison with the State's vital interest in ensuring equal protection of the law for all its citizens.

While some expressive and artistic conduct can merit First Amendment protection, the Petitioner's photography services are exclusively commercial activities devoid of any personal artistic expression or expertise. *Cf. Elane Photography*, 309 P.3d at 68; *see also Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."). Furthermore, members of the community are unlikely to view Petitioner's photographs as Petitioner's personal endorsement of religion. While Petitioner's name is part of his business's name, any endorsements flowing from the images depicted in photographs created at the request of customers are far more likely to be identified with the owner of the photographs, rather than with the business commissioned to take them.

See, e.g., *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (stating that views on pamphlets passed out on private property, such as a shopping center, are unlikely to be identified with the owner of the property).

A. The MHRC's enforcement of its anti-discrimination law does not compel Petitioner to speak because Petitioner engages in exclusively commercial conduct, devoid of any of the elements of expressive speech warranting First Amendment protection.

While some conduct, in addition to spoken and written words, can constitute symbolic speech, only inherently expressive conduct merits protection under the First Amendment. *Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47, 66 (2006). To qualify as expressive conduct, the actor must intend to convey a particularized message that would very likely be understood as such by those who viewed it. *Spence v. Washington.*, 418 U.S. 405, 410, (1974). In Petitioner's case, the predominant, if not sole, message conveyed belongs to the customer; she controls the end product of the photographs, how they are taken, and, ultimately, which ones to purchase. Petitioner openly acknowledges that the purpose of his business is to sell photographs for profit. This reality negates Petitioner's assertion that the nonspeech element of his claim, his photograph-selling business, is inseparably intertwined with the speech element, the individual expressive viewpoint he claims to convey in the images.

Far from being inherently expressive, Petitioner's conduct is inherently commercial. Although almost any action could be construed, however peculiarly, to contain elements of speech, this Court has rejected the view that conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea. *See Dallas*, 490 U.S. at 25. In *Elane Photography*, a New Mexico case with strikingly similar facts to the instant case, a photographer refused to photograph a same sex wedding, citing her established policy, based on her sincerely held religious beliefs, as her reason. *Elane Photography*, 309 P.3d at 59-61. The New Mexico

Supreme Court found that jurisprudence qualifying some photography as expressive conduct entitled to First Amendment protection does not confer First Amendment protections on "the operation of a photography business." *Id.* at 68. Similarly here, Petitioner's photography, as a commercial product sold by his business, is not entitled to First Amendment protections.

This Court has already given guidance as to what constitutes expressive conduct, stating that "[i]t is easy enough to identify expressive words or conduct that are strident, contentious, or divisive, but protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service." *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984). Moreover, "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Spence*, 418 U.S. at 410; *see also Tinker v. Des Moines School District*, 393 U.S. 503, 847 (1969). Here, the Petitioner is paid by customers to document their events through images, not create art. This is analogous to a court reporter documenting the events at a trial through words. While he may take liberties to type "(Witness crying uncontrollably)" instead of "(Witness visibly upset)", he is not authoring a creative work. No purpose other than financial gain and photographic documentation notably factors into the conduct surrounding the Petitioner's photography business. As such, the petitioner cannot be compelled to speak through his hired photography because his conduct does not constitute speech.

B. **Compliance with the law will not cause Petitioner to endorse religion because a reasonable observer would not attribute the subject matter of Petitioner's commercial product to his beliefs and endorsements.**

Petitioner's claim that compliance with the MHRA will force him to endorse religion against his will is thoroughly unfounded in First Amendment jurisprudence. The Court has noted that a reasonable observer would not equate "compliance with the law" on the part of a business

to be "a reflection of [the owner's] own beliefs." *Rumsfeld*, 547 U.S. at 65 ("there [is] little likelihood that the views of those engaging in the expressive activities would be identified with the owner, who remain[s] free to disassociate himself from those views and who [is] "not . . . being compelled to affirm [a] belief in any governmentally prescribed position or view." (quoting *Pruneyard Shopping Ctr.*, 447 U.S. 88)); *see also Mullins v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, ¶ 64 ("it is unlikely that the public would view Masterpiece's creation of a cake for a same-sex wedding celebration as an endorsement of that conduct.").

Although broad, "the right to associate for expressive purposes is not . . . absolute." *Boy Scouts of America*, 530 U.S. at 678 (citing *Roberts*, 468 U.S. at 623). Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. *See Id.* at 679 (". . . we have squarely held that a State's antidiscrimination law does not violate a group's right to associate simply because the law conflicts with that group's exclusionary membership policy."). State governments undoubtedly have a compelling interest in eliminating discrimination in places of public accommodation. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964) ("the fundamental object of [civil rights] was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" (internal citations omitted)). The government already has a broader authority to restrict expressive conduct than it has to restrict written or spoken speech. *Johnson,* 491 U.S. at 399. That authority, coupled with a more expansive power to create public rights of access in places of public accommodation, allows incidental state limitations on the non-communicative aspect of publicly accessible business services. *See Roberts,* 468 U.S. at 625 (citing *Pruneyard Shopping Ctr.*, 447 U.S. at 81-88).

Petitioner acknowledges that he operates a business of public accommodation. When he holds his services out to the public, he places himself within the scope of the MHRA. Madison's government has a compelling interest in eliminating discrimination in places of public accommodation and, as such, any incidental limitations the MHRA causes Petitioner to suffer on his freedom to not associate with religion are justified. His policy of uniformly refusing publicly available business services to customers solely on the basis of their religious beliefs creates a unique harm independent of its communicative effect. Petitioner's discriminatory conduct should not be shielded by the First, or any other, Amendment. *Cf. Id.* at 628 (". . . acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent. . . . Accordingly, . . . such practices are entitled to no constitutional protection.")

III. ENFORCEMENT OF A LAW THAT REQUIRES PRIVATE BUSINESSES TO PROVIDE THE SAME SERVICES TO CUSTOMERS, REGARDLESS OF THEIR RELIGION OR THE RELIGIOUS NATURE OF THEIR EVENT, DOES NOT PROMOTE, DISPARAGE, OR COERCE THE EXERCISE OF RELIGION SUCH THAT IT VIOLATES THE FREE EXERCISE OR ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT.

Respondents did not violate his rights of conscience when they sought to enforce the MHRA against Petitioner because they did not force Petitioner to engage in religious worship, because they did not advance one religion at the expense of another religion or non-religion, and because any offense to Petitioner's rights of conscience was incidental and not significantly burdensome. Petitioner asks the Court to entertain a great irony by claiming that Respondents violated his First Amendment right to the free exercise of his religion by requiring that he offer religious patrons the same commercial services he offered to nonreligious patrons. The First Amendment, however, is not a blanket protection for any conduct that flows from sincerely held religious beliefs.

Madison Code Annotated § 42-501 (Madison's version of the Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb, hereafter Madison's RFRA) prohibits the government from substantially burdening an individual's religious freedoms unless the government has selected the least restrictive means to promote a compelling government interest that it can prove is secular. Mad. Code. Ann. § 42-501 (d). It also states that the law should not be construed to allow discrimination of any kind by the government or by a public accommodation. Mad. Code. Ann. § 42-501(e). Petitioner does not contest that his business is a public accommodation and thus this analysis will assume that it is.

The Madison Human Rights Act (MHRA) allows generally applicable, facially neutral laws to incidentally tread on First Amendment rights, so long as the intrusion does not significantly burden the individual. Alternatively, should the measure indeed burden the individual, the government must show that it has used the least restrictive means to further its compelling interest. Mad. Code. Ann. § 42-501. The State of Madison's Human Rights Act has an exception carved out for discriminatory practices. Such practices are not defensible under the law. Discrimination is defined as "the effect of a law or established practice . . . that denies privileges to a certain class because of race, age, sex, nationality, religion, or disability." *Discrimination*, *Black's Law Dictionary* (10th ed. 2014). Petitioner's practice of not providing services for religious events or in religious buildings, an established practice evidenced by a notice displayed prominently on the door to his shop, denies the privilege of his services to members of the public who are religious and could, were it not for his policy, hire him for the services he advertises. Taylor Aff. at ¶¶ 11, 30. The only basis for Petitioner's refusals is that the event or venue is religious. Thus, because Petitioner is denying service on the basis of religion, Petitioner's actions clearly fall within the parameters of *Black's* definition of discrimination. *See*

Id. It is not important that he treats members of all religions alike. This Court has found that promoting religion or non-religion, one over the other, is equally as unacceptable as promoting one religion over another. *Lee v. Weisman*, 505 U.S. 577,d 610 (1992). Even if the MHRA did not have its discrimination exception, Petitioner's behavior would still not be protected. The MHRA does not place a substantial burden on Petitioner's religious beliefs and therefore would not invoke the Madison RFRA's protection.

Furthermore, Petitioner's actions are not protected by the First Amendment's Free Exercise Clause or Establishment Clause. The Free Exercise Clause does not give individuals carte blanche to break any law their religion opposes. *Reynolds v. United States*, 98 U.S. 145, 161 (1878). Nor does it allow individuals to shape the direction of government policy and the scope of government action through litigious defense of their beliefs. *Lyng*, 485 U.S. at 452. The State does not violate the Establishment Clause every time a person is offended by actions that are contrary to his religious views.

While the Respondents respect Petitioner's sincerely held beliefs, they cannot favor them over the sincerely held beliefs of others, which is what Petitioner asks this Court to do. Petitioner seeks an impermissible favoring of non-religion over religion. He asks this Court to support religious intolerance under the guise of Constitutional rights. This Court, however, should adhere to its precedents, thereby protecting minorities (be they religious, racial, sexual, or gender) from disparate treatment and invidious discrimination committed in the name of God.

A. **Madison's RFRA law does not protect Petitioner's exclusionary actions because there is an exception for discriminatory actions in the Act and because the MHRA does not significantly burden Petitioner.**

Petitioner's actions fit well within the bounds of the discrimination definition laid out previously in this brief, and, therefore, are not protected by Madison's RFRA. *See, e.g.*,

Discrimination, *Black's Law Dictionary*. Though he would photograph secular events for religious patrons, Taylor Aff. at ¶ 17, this Court does not distinguish between conduct and status in discriminatory exclusion cases. *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 689 (2010) (hereafter *Christian Legal Soc.*) ("Our decisions have declined to distinguish between status and conduct in this context."). In *Christian Legal Soc.*, a student group wished to exclude gay students based on their conduct not their status. *Id.* at 689. The group argued that it would accept gay students into the group so long as they did not commit homosexual acts and believe that those acts were permissible under the group's religious affiliation's teachings. *Id.* The Court found that even though the group was not technically discriminating based on gay students' status, the effect and process of its exclusions amounted to the same thing as status discrimination. *Id.* at 688-89.

Similarly, while Petitioner attempts to exclude religious events rather than religious people, the effect and process of his exclusions amounts to religious discrimination. If a person of any religion wishes to be married in her faith, Petitioner will deny that customer service because she chooses to practice her religion. Petitioner's statements that he will photograph religious people, so long as they are not practicing their religion, Taylor Aff. at ¶ 17, are akin to the student group's statements that it will include gay students, so long as they do not act in accordance with their sexual orientation. Petitioner's actions are discriminatory and as such they do not invoke Madison RFRA protection.

Furthermore, Madison's RFRA does not protect Petitioner's actions because the MHRA does not significantly burden his religious beliefs or practices. Petitioner placed more burdens on his own religious beliefs than the MHRA does when he entered churches and synagogues for family events, Taylor Aff. at ¶¶ 27-28; when he congratulated an employee's son on his bar

mitzvah and gave him a sizeable gift, Reuben Aff. at ¶ 22; when he voluntarily attended services which he knew would involve prayer. Taylor Aff. at ¶¶ 27-28. The MHRA directs Petitioner to enter religious buildings as a non-participant in the service. Mad. Code Ann. § 42-101-2a.

Petitioner is simply there to document the event, much as wedding planner is there to ensure that the event goes as planned. Thus, because Petitioner has voluntarily attended religious services and events on multiple occasions, even those in religious buildings, it is difficult to believe that being paid to document an event in which he takes no part is a significant burden upon his religious beliefs.

B. The MHRA does not violate Petitioner's rights under the Free Exercise and Establishment Clauses because the First Amendment does not protect Petitioner's exclusionary actions.

Petitioner's right to freely exercise his religion does not empower him to dictate anti-discrimination policy for the government. Nor does his right to be free of a state-established religion prevent the government from protecting religious liberties in a general manner. Constitutionally speaking, "the needs of the many outweigh the needs of the few," *Star Trek II: The Wrath of Khan* (Paramount Pictures 1982), and the protection of religious freedom on a grand scale may, at times, permissibly clip the wings of an individual's sincerely held religious beliefs.

1. *The Free Exercise Clause does not allow individuals to break the law or to control government policy and action.*

The First Amendment does not give Petitioner the right to exercise his religion in a way that disparages or harms others' religious rights. As it is here, the Free Exercise Clause is often invoked with Freedom of Speech. Given the similarities of the two claims, it is appropriate and fitting to recite once more the old legal adage, "Your right to swing your arms ends just where

the other man's nose begins." Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 Harv. L. Rev. 932, 957 (1919). Adapting it to the instant issue, it may read, "Your right to practice your religion ends where another man's Constitutional rights begin." Individuals may not use Free Exercise claims to change generally applicable laws, especially those that protect others' rights.

Case law preventing religion from granting liberty to break the law extends back well over 100 years. In *Reynolds v. United States*, a man intentionally broke an anti-bigamy law and defended himself by stating that according to his sincerely held religious beliefs, the law never should have been made and therefore he did not need to adhere to it. *Reynolds*, 98 U.S. at 161. The Court, however, found that no matter the religious conviction involved, the man had knowingly and intentionally committed a crime and thus was subject to punishment under the law. *Id.* at 167 ("it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made."). Similarly, in *Smith*, Justice Scalia, writing for the Court, stated, "We have never held that an individual's religious beliefs 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. Perhaps most analogous to the instant case, this Court held that a government interest in eradicating racial discrimination in education outweighed the burden placed on a university's free exercise of religion through denial of tax benefits. *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

Petitioner asks the Court to excuse him from his responsibility to abide by the MHRA because he believes religion-writ-large is a threat to humanity. Taylor Aff. at ¶ 18. However sincerely he holds this belief, this Court has stated time and time again that religious convictions (and, to be clear, that is what Petitioner claims his beliefs on religion are) do not excuse

individuals from abiding by generally applicable laws that have a secular purpose. *See Reynolds*, 98 U.S. at 161, *Smith*, 494 U.S. 872; *see also*, *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) ("When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs."), *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("a law targeting religious beliefs as such is never permissible").

Petitioner's views on religion do not give him the right to break the MHRA by denying services based on religious status. The law is generally applicable, facially neutral, and has a secular purpose. Furthermore, granting him an exception that allowed him to discriminate on the basis of religion would render the exception *prima facie* invalid (assuming the exception was severable). This Court has held that if a law's purpose or effect is invidious discrimination, the law is rendered invalid. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("'(i)f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.'" (citing *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)). Any exception to the MHRA's anti-discrimination sections for religious beliefs would allow owners of places of public accommodations, such as Petitioner, to invidiously discriminate against patrons on the basis of religion. Such an exception would be invalid under *Sherbert*.

This Court has long recognized that issues like the one at hand require a balancing of individuals' rights and has created limits on how far an individual right to Free Exercise can extend. The First Amendment applies equally to all and this Court declines to reconcile individuals' competing demands on the government; these issues are best left to the political

process. *Lyng*, 485 U.S. at 452. Thus, rather than bring his grievances to the Court, Petitioner should look to his legislators to guard his interests in religious belief. Legislators are in a far better position than the judiciary to adequately represent their constituents' varying interests.

2. *The MCHR did not violate the Establishment Clause by enforcing the MHRA and requiring that public accommodations treat all patrons equally.*

Historically, establishing a state religion involved coercion, often through force or threat of punishment under the law. *Lee*, 505 U.S. at 640-41 ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.* Typically, attendance at the state church was required," (emphasis in original)). In *Everson v. Board of Education of Ewing Township*, *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 14 (1947), and again in *Lee*, *Lee*, 505 U.S. at 610, this Court held that it is not enough, in terms of the Establishment Clause, for the state to not favor one religion over another; it must also not favor religion over non-religion. Thus, it stands to reason that the state should also not favor non-religion over religion.

The Court's most recent Establishment Clause jurisprudence finds that a prayer, an overtly religious act, is permissible in state legislatures, so long as it is not used to disparage or advance any one belief, and no coercion or exclusion exists. *Greece v. Galloway*, 134 S. Ct. 1811, 1821-24 (2014) (hereafter Greece). The Court further held that prohibiting sectarian prayer in legislatures would entangle the legislators and courts in religious matters to a much higher degree than they are now. Id. at 1822; *see also Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (finding that "excessive government entanglement" in religion is a part of Free Exercise and Establishment Clause violations). The decision in *Greece* signals that since American life is not devoid of religion, neither can government be completely divorced from religion. The mere act

of creating more secularism, in some ways, promotes non-religious belief systems over religious ones. This is a quagmire into which the Courts may not wish to wade.

Petitioner's claim that the anti-discrimination MHRA violates the Establishment Clause is not only blatantly inconsistent with this Court's decisions, but also brazenly charges beyond the bounds of common sense. Protection of religion-writ-large is also a protection of Petitioner's right to receive equal treatment, such as when a closely held public accommodation's owner decides that it cannot support his "militant atheism" and denies him services on that basis alone. Taylor Aff. at ¶ 26. Were the State of Madison to protect his rights of conscience opposing all religion over protecting the rights of conscience of all religions, that in itself would be an endorsement of non-religion over religion. The MHRA is facially neutral and in no way coerces the Petitioner to adhere to any belief; it does not endorse religion or disparage non-religion. It simply requires him to provide the same services to all of his customers, regardless of their religion.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the Court affirm the decision of the United States Court of Appeals for the Fifteenth Circuit granting the Madison Commission on Human Rights' motion for summary judgment.

Brief Certificate

Team H certifies the following:

i. The work product contained in all copies of the team's brief is in fact the work product of the team members;

ii. Team H has complied fully with our school's governing honor code; and

iii. Team H has complied with all Rules of the Competition.