No. 15-1245

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2015

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 ON THE MERITS FOR RESPONDENTS

Team J

Counsel for Respondents

QUESTION PRESENTED

1. Does a government action requiring a privately owned photography business to comply with a public accommodation law violate the Free Speech Clause of the First Amendment of the Constitution when the purpose of the photography is not to convey a message but instead to photograph an event, which is ultimately controlled by customer input and direction?
2. Does ordering a private photography business to comply with a public accommodation law prohibiting discrimination against customers solely because their events take place in religious buildings violate the Free Exercise and Establishment Clauses of the First Amendment?

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STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

Petitioner John Adams Taylor brought this 42 U.S.C. § 1983 suit against Respondents Tammy Jefferson, Chairman of the Madison Commission on Human Rights and the other commissioners of the Madison Commission on Human Rights: Thomas More, Olivia Wendy Holmes, Joanna Milton, and Christopher Heffner (collectively, "The Commission"). Taylor filed suit in the District Court of Eastern Madison. Taylor brought civil rights claims under 42 U.S.C. § 1983 for deprivation of his constitutional rights under color of state law. Taylor alleged that: (1) the Enforcement Action violates his First Amendment rights of Free Speech, and (2) that the Enforcement Action violates the Free Exercise and Establishment Clauses of the First Amendment. Record at 002. He asserts these claims under 42 U.S.C. § 1983, for deprivation of constitutional rights under color of state law. The Madison Commission on Human Rights, organized under state law, qualifies as a state actor. Taylor sought to preliminarily and permanently enjoin the Commission from further imposing the Enforcement Action against him. The Madison Commission on Human Rights filed for summary judgment on May 25, 2015. The court granted this motion on July 13, 2015. R. at 001.

Taylor filed a timely appeal to the Court of Appeals for the Fifteenth Circuit, seeking a reversal of the district court's grant of summary judgment. R. at 040. The Court of Appeals reviewed the case de novo and affirmed the district court's grant of summary judgment in favor of the Madison Commission on Human Rights. The court held that the Enforcement Action did not violate the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment. R. at 043. This Court granted Taylor's timely petition for writ of certiorari. R. at 046.

STATEMENT OF THE FACTS

I. The Circumstances Leading to the Enforcement Action.

On July 14, 2014, Patrick Johnson entered Taylor's Photographic Solutions with the intent to hire Taylor to photograph his upcoming wedding. However, after learning that Johnson's wedding would be held at a Catholic church, Taylor denied his photography services. When Johnson asked why Taylor refused to photograph his wedding, Taylor explained that he "didn't like religion" and "didn't want to make it look good." Johnson expressed his concern that Taylor's refusal was discrimination. Taylor then laughed, made a statement referring to Johnson as "you Christians," and again refused to photograph the wedding. Record at 035.

One week later, Samuel Green visited Taylor's Photographic Solutions. Like Johnson, Green approached Taylor to hire him to photograph his wedding. When Green informed Taylor that his wedding would take place in a synagogue, Taylor again replied that he did not like religion and did not want "to make it look good." Upset at Taylor's response, Green inquired as to the reason for Taylor's denial of services. Taylor said he believed "religion is a bunch of bunk." R. at 037.

As a result of these interactions, Johnson and Green each filed complaints with the Madison Commission of Human Rights alleging that Taylor and his business Taylor's Photographic Solutions refused services on the basis of religion. These complaints prompted the Madison Human Rights Commission to conduct an investigation. R. at 025.

II. Taylor's Background.

Taylor grew up in a mixed-faith household with a Catholic father and a Jewish mother; neither of his parents actively practiced their religions. Taylor states that much of his childhood

was unhappy "due to people who followed religion being unwilling to see [him] as anything but what they perceived [his] religion to be." R. at 017.

By the time he turned 19, Taylor identified himself as a "full blown militant atheist." R. at 017. A militant atheist is a person who is "actively hostile to religion" and "is characterized by a desire to wipe out all forms of religious beliefs" stemming from the belief that religion is harmful to society. Baggini, Julian, *Atheism: A Very Short Introduction* (New York: Oxford University Press, 2003). Taylor has a "deeply held belief that religion is a detriment to the future of humanity." Because of these personal beliefs, as the owner of Taylor's Photographic Solutions, Taylor does not allow his business to photograph any event that is religions in nature or held at a religious house of worship. R. at 016.

Taylor's reason he refuses to provide photography services at any event with a religious component is because he "does not want to be seen as endorsing religion in any way." R. at 015. Despite his business restrictions, Taylor does occasionally attend religious ceremonies for family or friends outside of work. When he attends these religious events, Taylor states that he tunes out anything religious and does not participate in any prayers. R. at 017. Taylor insists that he does not discriminate based on religion, but only denies service to religious events. R. at 018.

III. The Enforcement Action.

On August 11, 2014, the Madison Commission of Human Rights responded to the complaints filed by Johnson and Green by sending a letter to Taylor's Photographic Solutions. The letter informed Taylor of the two complaints filed against both himself and his business for alleged discriminatory business practices prohibited by the public accommodation laws of the Madison Human Rights Act of 1967. R. at 020. The letter also explained that the Madison Commission on Human Rights would begin investigating these allegations. R. at 021.

Taylor immediately contacted the Madison Commission on Human Rights and spoke to a representative. The representative informed him that he had the right to file a position statement, the right to have an attorney, and the option to engage in an administrative hearing. He elected to waive his rights to file a position statement or to have an administrative hearing regarding this matter. Taylor signed and returned the document verifying his waiver of rights the very next day. R. at 021.

Following the original letter and Taylor's waiver of rights, the Madison Commission on Human Rights sent Taylor a cease and desist letter ("The Enforcement Action") on September 15, 2014. The Enforcement Action informed Taylor that the Madison Commission on Human Rights completed the investigation and found that he and his business discriminated based on religion. The Enforcement Action stated that Taylor's Photographic Solutions is a place of public accommodation as defined by Title II of the Madison Human Rights Act of 1967. Pursuant to this act, Taylor's Photographic Solutions may not refuse service to any member of the public based on his or her religion. The investigation found Taylor's discriminatory actions to be an ongoing pattern in his business. The investigation specifically found issue with a sign posted outside of Taylor's shop that states, in part, "The management of this business firmly believes that organized religion is an impediment to the furtherance of humanity and civilization . . . . This business will not perform services for any religious services of any kind." R. at 025. Additionally, the investigation included interviews with two of his employees (one current and one former) who both stated that Taylor and Taylor's Photographic Solutions have a long-standing practice of discrimination based on religious beliefs. R. at 026.

The Enforcement Action required Taylor to immediately stop his discriminatory practices, and fined his business $1,000 per week beginning on July 14, 2014 until the business

removed its sign. If Taylor did not cease these practices within 60 days, the Madison Commission on Human Rights, under the powers granted by the Madison Human Rights Act, threatened to bring a civil enforcement action against Taylor in a Madison state court. R. at 026. Taylor refused to comply with the requirements set forth in the Enforcement Action. Instead, he filed suit in the District Court of Eastern Madison. R. at 005.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the United States Court of Appeals for the Fifteenth Circuit and find that the Enforcement Action does not violate the Free Exercise and Free Establishment clauses of the First Amendment of the Constitution.

Taylor voluntarily operates a business offering photography services for a full range of events, including birthdays, graduations, proms, photo shoots for websites, festivals, and weddings to members of the public. R. at 014. As a place of public accommodation, Title II of the Madison Human Rights Act of 1967 prohibits Taylor from denying services to customers on the basis of religion among other protected classes of individuals. R. at 006. However, according to company policy, Taylor automatically refuses services to all customers with events that are religious in nature with no consideration or questions asked. R. at 014. Taylor asks this Court to allow him to continue denying services to customers with religious events based on his discriminatory beliefs. Taylor claims the Enforcement Action violates his rights under the Freedom of Speech and the Free Exercise and Establishment Clauses of the First Amendment.

The First Amendment of the United States Constitution is meant to protect citizens' rights to freedom of speech and religion from unreasonable government interference. The Enforcement Action at issue here does not violate Taylor's rights, as his photographs meet neither the definitions of speech nor expressive conduct as defined by this Court in *Texas v. Johnson*. *Texas v. Johnson*, 491 U.S. 397 (1989). In *Johnson*, this Court established the test to determine whether or not something is considered protected speech under the First Amendment. The test looks to whether a party intends to convey a particular message and the likelihood that the viewers will understand that message. *Id*. The focus of the test is on the message conveyed, if any. When viewers look at Taylor's photos, they see a bride and a groom on their wedding day,

these pictures do not serve as a medium for Taylor to convey a particular message. The pictures are commissioned by a couple wanting to preserve a particular memory, not to convey a message. Taylor photographs weddings in non-religious buildings, but the content of the photos remain the same whether or not the event involves religion. This idea holds true for other types of events that Taylor photographs, such as graduations. When the viewer looks at photos of a student in a cap and gown, they see a student and his family. The viewer does not wonder what message the photographer or his photography business conveys.

Taylor's clients ultimately choose and direct the message of the photographs and all other aspects of the photos, not Taylor. When photographing an event, Taylor does not have an intent to convey a particular message, unless at the direction of his clients. Furthermore, even if Taylor had a particular message to convey, it is unlikely that a viewer would see a message. Photographs of these types of events do not typically have a particular message; the content is very predictable and expected. Therefore, Taylor's photographs do not qualify as speech or expressive conduct.

Taylor incorrectly asserts that photographing a particular religion expressly associates himself with that religion. This claim is not viable because his photographs do not meet the definition of expressive activity, as defined by the *Johnson* test above. *Id*. Taylor's photographs reflect a business arrangement between Taylor and the client. The client purchases photography services that Taylor makes available for the public. The clients dictate their expectations for the photographs to Taylor. Thus, the Enforcement Action requiring Taylor to photograph events in religious locations does not violate his rights under the Freedom of Speech Clause of the First Amendment.

The Enforcement Action does not violate the Freedom of Exercise and Establishment Clauses of the First Amendment. Taylor equates his physical presence in a religious building with government interference of his closely held beliefs and government endorsement of religion. When Taylor takes photographs of a graduation or prom inside of a school, his presence in the school does not mean that he becomes a student of that school. Regardless of the location or content, Taylor's role is to photograph the event, not participate in it.

Taylor explains that he has attended his cousin's wedding in a Catholic church and nephew's bris, both events involving religious ceremonies and prayers. In these scenarios, Taylor chose to tune out the prayers. R. at 017. Taylor's attendance at his cousin's wedding did not mean he must adopt Catholicism or participate in the prayers. Taylor's presence in the church did not result in him being forced to denounce his personal beliefs about religion and identity as a militant atheist. However, Taylor argues that his presence in a Catholic church as a photographer renders a different result than his presence in the church as a wedding guest. The Enforcement Action does not force Taylor to adopt any religious beliefs nor does it endorse or support any religion. The Enforcement Action only requires Taylor to refrain from discriminating against his customers based on their religious beliefs.

Both the District Court and Court of Aappeals correctly held that the Enforcement Action did not violate Taylor's First Amendment Rights. Taylor's photographs do not amount to compelled speech. Taylor's presence in a church does not amount to government compulsion of beliefs or endorsement of religion. For these reasons, this Court should affirm the holding of the United States Court of Appeals for the Fifteenth Circuit.

ARGUMENT

The First Amendment reads, in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…or abridging the freedom of speech." U.S. Const. amend. I. These First Amendment guarantees were incorporated to the states through the Due Process Clause of the Fourteenth Amendment through a variety of cases. See, *Gitlow v. New York*, 268 U.S. 652, 45 S. Ct. 625 (1925) (incorporating freedom of speech), *Cantwell v. Conn.*, 310 U.S. 296, 60 S. Ct. 900 (1940) (incorporating the free exercise of religion), and *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (incorporating the establishment clause).

I. Strict Scrutiny is the Appropriate Standard of Judicial Review.

The Fifteenth Circuit Court of Appeals found that Taylor's First Amendment rights were not violated by the Enforcement Action because: (1) his actions did not constitute speech, and (2) the requirement that he photograph religious services did not constitute a forced adoption or practice of religion. R. at 041-42. In cases concerning a restriction on the constitutionally protected rights, the correct standard of judicial review is strict scrutiny. *Boos v. Barry*, 485 U.S. 312, 321 (1988). Under the strict scrutiny standard of review, the court must (1) determine whether the regulation is necessary to promote a compelling state interest, and (2) that the regulation is narrowly tailored to achieve that specific goal. *Id.* Under the strict scrutiny standard, the Court is also "obliged to make a fresh examination of crucial facts," employing a de novo standard whereby all conclusions made by the Appellate Court must be reevaluated. *Hurley v. Irish-Am. Gay*, 515 U.S. 557, 567 (1995).

II. Requiring a Private Business to Provide Services Against One's Personal Beliefs Does Not Violate the Free Speech Clause of the First Amendment of the Constitution.

Taylor asserts that the Enforcement Action requiring him to provide photography services for religious events from the Madison Commission on Human Rights constitutes compelled speech in violation of his First Amendment right to Freedom of Speech. In writing this Constitutional amendment, the framers sought to protect the right to freedom of speech and thought from state actions forcing someone to speak or to prevent them from doing so. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

A. Taylor's Photos Do Not Constitute Speech.

Taylor incorrectly asserts that the photographs constitute protected non-verbal speech as defined in *Texas v. Johnson. Tex.* at 397 (1989). In this case, the Court determined that a Texas statute criminalizing the burning of the American flag was unconstitutional because it infringed upon the actor's First Amendment right of Free Speech. *Id.* The Court began its analysis with the contention that speech "does not end at the spoken or written word." *Id*. It also stressed that it rejected the view that "an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea," while acknowledging that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First Amendment." *Id.* at 404. The Court looks to a party's intention to convey a particular message and the likelihood that the viewers would understand that message in determining whether the conduct should qualify as speech. *Id*. (quoting *Spence v. Washington*, 418 U.S. 405 (1974))).

Consider the difference between the two photos below. The photo on the left resembles a photo Taylor may take as part of his photography services. The photo on the right depicts a protest rally as part of the "Black Lives Matter" movement. The analysis from *Johnson* indicates that only photo on the right would be considered speech under the First Amendment.

Source: Perfect-Wedding-Day.com

Source: Odyssey Online

In this case, Taylor's photographs fail to qualify as speech under the *Johnson* test. Although photography can be utilized to communicate a particular idea, Taylor operates a business that sells a service to the public. Taylor's photos do not send a message like the photo of the protest above. Taylor does not take these pictures to convey a larger message as other photographers in different settings do. The photos at issue convey the message that his customers desire, not a message that Taylor decides. Therefore, they do not qualify as a form of protected speech as defined in *Johnson.*

B. Taylor's Photos Do Not Constitute Expressive Conduct.

Taylor's photos also do not fall under the definition of expressive conduct from *Johnson. Id*. In *Johnson*, the Court accepted Johnson's flag burning as expressive conduct because the action communicated his opinion about a political issue. *Id.* at 406. The Court utilized a three step test to determine whether specific conduct invoked the First Amendment rights to Freedom of Speech and Expression: (1) whether the act constituted expressive conduct; (2) if the conduct

was expressive and if the state's regulation related to free expression; and (3) if the state's interest in suppressing free expression was justified. *Id.* at 403. In that case, the state's asserted interest in the suppression of flag burning tied directly with its interest in preserving the peace. However, their claim ultimately failed to meet the reasonableness standard because there was never an actual disturbance of the peace. *Id.* at 408.

Using this three-step test, Taylor arguments fail at step one because Taylor's photography is not expressive conduct. While Taylor asserts numerous times that photography is "inherently an artistic form of expression," he fails to prove that his photography services provided by his business constitute expressive conduct. Record at 015. Customers hire Taylor and his business for the sake of obtaining prints that the customers desire; they are not paying for Taylor's artistic vision of the event. The customers pay for a photographer to show up at a certain place, at a certain time, and to execute an assigned task. Ultimately, the customers have as much say—perhaps more so—in the final product as the photographer does. The photography service at issue, therefore, does not amount to expressive conduct and Taylor's argument fails under the *Johnson* test.

Alternatively, even if Taylor's photography met the first step of the test, his claim against the Madison Commission on Human Rights would still ultimately fail at step three. In *Johnson*, the state of Texas failed to convince the court that its interest in prohibiting flag burning was compelling because it had no evidence that Johnson's actions actually caused any damage or breached the peace. *Johnson* at 420. Here, the Commission's interest is to eliminate discrimination in places of public accommodation. Mad. Code Ann. §42-501. The Enforcement Action advances this goal by requiring that Taylor provide services equally to all members of the public regardless of his personal religious beliefs. The two sworn affidavits and complaints that

Patrick Johnson and Samuel Green filed with the Commission support a showing of actual harm resulting from Taylor's practices. Therefore, the Commission has a justified interest in infringing upon Taylor's right to free speech.

C. The Enforcement Action is Valid If Analyzed under the O'Brien Test for Regulations of Uncommunicative Conduct.

In *Texas v. Johnson*, the court explained that if a state's regulation is not expressive conduct, then the correct test to apply is the one adopted in *United States v. O'Brien* for analysis of regulations of uncommunicative conduct. *Johnson* at 403. The Court in *O'Brien* established a four-part test: whether (1) the governmental regulation is within its constitutional power; (2) the regulation furthers an important or substantial governmental interest; (3) the interest is unrelated to the suppression of free expression; and (4) the incidental restriction on the alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

The first provision of the *O'Brien* test looks at whether a constitutional grant of power sufficiently justifies the governmental regulation. Here, the test looks at whether Title II of the Civil Rights Act of 1964 sufficiently justifies the Commission's Enforcement Action. Title II of the Civil Rights Act of 1964 states 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 on the ground of race, color, religion, or national origin," 42 U.S.C. §2000a**.** In *Heart of Atlanta Motel*, the Court scrutinized the validity of Title II of the Civil Rights Act after a hotel owner refused to rent rooms to African Americans. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 243 (1964) The hotel owner filed suit alleging that Congress exceeded its power to regulate commerce under Article I Section 8 of the United States Constitution. *Id.* The Court concluded that even though

the hotel's operations were localized in nature, the power of Congress over commerce is not limited to the regulation of commerce between the states, but "also includes the power to regulate the local incidents thereof." *Id.* at 258. It follows that the Court also held that Title II of the Civil Rights Act of 1964 did not violate Congress's constitutional power under the Commerce Clause. *Id.* at 262. Therefore, the first element of the *O'Brien* test is satisfied through the holding in *Heart of Atlanta Motel*. Title II of the Civil Rights Act of 1964 sufficiently justifies the Madison Commission on Human Rights' Enforcement Action.

The second component of the *O'Brien* test looks to determine whether the government regulation furthers an important or substantial governmental interest. *O'Brien*. at 377. The Court again noted that this determination needed to be made on a case-by-case basis. *Id.* at 376. Even if there is no specific standard, the Court has upheld Civil Rights legislation in a wide array of cases; finding that eradication of discriminatory practices constitutes a substantial interest that the government must further. See *Katzenbach v. McClung* 379 U.S. 294 (1964). Because of these precedents, it follows that the Court should find that the Commission's Enforcement Action acts with the intent to eradicate discriminatory practices in Taylor's business.

The third element under the *O'Brien* test looks at whether the governmental interest is unrelated to the suppression of free expression. This means that the government cannot enact a measure with the intention of suppressing a person's or entity's right to freedom of expression under the Constitution. Here, the governmental interest in enacting Title II, which the Madison Commission on Human Rights seeks to enforce, was to discourage discrimination in places of public accommodation, such as Taylor's Photographic Solutions. The government did not seek to suppress Taylor's right to freedom of expression in doing so, it only sought to ensure that places of public accommodation did not discriminate against members of the public 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." R. at 002. Therefore, the governmental interest at issue here is unrelated to the suppression of the free expression and meets this component of the *O'Brien* test.

Finally, under the *O'Brien* test, the restriction of the First Amendment must be only that which is necessary to further the government's compelling interest. *O'Brien* at 377. Even if the court determined that the Enforcement Action violates the first three components of the test, Taylor's claim would still fail under the last part of the *O'Brien* test, as the Enforcement Action does not extend beyond the government's interest in preventing discrimination. The Madison Commission on Human Rights fined Taylor only after two separate incidents were filed against his business, after it conducted a thorough investigation, and after it offered him the opportunity to challenge its findings and hold an administrative hearing. Taylor was dutifully informed of his rights, yet he still decided to sign a waiver of his rights to a position statement. It was only after this that the Madison Commission on Human Rights sent the Enforcement Action. Although Taylor claimed that his First Amendment rights were threatened, he only after forgoing several opportunities the Madison Commission on Human Rights made available to him to state his position. The Commission seeks nothing more than for the discriminatory practices to stop, and seeks no other infringement on Taylor's rights pursuant to the Enforcement Action. For these reasons, the Madison Commission on Human Rights and its Enforcement Action meet the standard established in *O'Brien* that permits the government to regulate uncommunicative conduct. Therefore, the Enforcement Action is valid and Taylor should be held accountable for his failure to seize his discriminatory practices.

D. Taylor's Photography of Religious Events Does Not Require Him to "Expressly Associate" with a Message He Does Not Wish to Convey.

Taylor analogizes his claim to that of the *Boy Scouts of America*, in which the Court found that New Jersey's public accommodation laws violated the organization's First Amendments rights when it required the organization to admit James Dale, a homosexual man, as a troop leader. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 640-46 (2000). The Boy Scouts claimed that Dale's position as a troop leader would expressly associate the organization with Dale's homosexual lifestyle in direct violation of the group's values, and the organization's continued association with Dale constituted an expressive activity. *Id*. The Court read the Boy Scout's mission statement and concluded that the mission of the organization is to instill certain values in young men, and thus the Court determined that the organization engages in an expressive activity. *Id*. at 650. The Court was careful to state that it must review each case independently, but it ultimately determined that the New Jersey statute exceeded its scope because the Boy Scouts were a private, not-for-profit organization and because the public accommodation statute unlawfully impeded on the Boy Scout's mission. *Id*. The organization's continued association with Dale would significantly affect its ability to communicate its values to the public, and therefore the Court ultimately held that the organization must not be forced to reinstate Dale as a troop leader. *Id*. at 648.

Taylor's claims under the *Dale* decision are ineffective because the Enforcement Action does not force Taylor to expressly associate with a religious message. Unlike the Boy Scouts of America, Taylor is an individual that operates a for-profit business that solicits services to the public. Taylor's business was not created for the purpose of communicating any sort of message to his customers, it was created solely for the purpose of generating a profit. If Taylor's Photographic Solutions were to provide its services to a religious event, it would not be

communicating any message to the public about Taylor or his business, just about his customers. For this reason, Taylor's expressive association claims are not analogous to the Boy Scouts of America, and should be dismissed.

III. Requiring a Private Business to Provide Services for Religious Events Does Not Violate the Free Exercise and Establishment Clauses of the First Amendment.

Taylor claims that the Enforcement Action violates the Free Exercise and Establishment clauses of the First Amendment because compliance with the action would force him to enter religious buildings to photograph events against his will. The First Amendment prohibits the government from "mak[ing] [a] law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. However, in *Lemon v. Kurtzman*, the Supreme Court held that a statute may infringe on the protections in the Establishment and Free Exercise Clauses if the government can prove: (1) the statute has a secular purpose; (2) the statute must not advance or inhibit religion or religious practices as its principal or primary effect; and (3) the statute must not foster "an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

Madison's Religious Freedom Restoration Act requires the government to meet certain conditions before the government substantially burdens an individual's sincerely held religious belief. Mad. Code Ann. § 42-501. The Religious Freedom Restoration Act prohibits the Madison legislature, and any Commission or Agency granted enforcement powers, from acting in a way that violates an individual's religious beliefs. This includes compelling a person to attend any place of worship for the purpose of "engaging in any form of religious worship or practice" or "promoting the continued financial or reputational success of such institutions." *Id*. However, the Act contains an exception allowing that, in certain situations, the government may substantially burden "the right of any person to act or refuse to act in a manner motivated by a

sincerely held religious belief." *Id*. This exception is met when the government proves the following by clear and convincing evidence: (1) that the law targets a secular purpose; (2) the government has a compelling governmental interest in infringing the specific act or refusal to act; and (3) the government has used the least restrictive means to further that interest. *Id*. These three requirements reflect the requirements of the test set forth in *Lemon* to determine if the government may infringe on Taylor's rights under the Free Exercise and Establishment Clauses of the First Amendment. Subsection (e) of the act also states, "Nothing in this section shall be construed to permit unlawful discrimination in any form by any place of public accommodation as defined by Title II of the Civil Rights Act of 1964 or Title II of the Madison Human Rights Act of 1967." *Id*. This Court has considered similar issues in other cases with regard to violating sister states' own Religious Freedom Reformation Acts.

A. Requiring that Taylor Enter a Place of Worship Does Not Impede the Free Exercise of His Personal Beliefs.

As a self-described militant atheist, Taylor has a "deeply held belief that religion is a detriment to the future of humanity…regardless of what the religion is." R at 016. Taylor asserts that by simply entering a building, he is forced to accept the religious practices and beliefs of those around him as his own, despite his own personal beliefs. The Free Exercise Clause protects against a government compulsion of religion on individuals, and in light of this, the Court has considered similar issues with regards to similar free exercise claims asserted against other states' Religious Freedom Reformation Acts. *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

In *Holt*, the issue before the Court was whether a prison rule preventing an inmate from growing a short beard in accordance with his religious beliefs violated the Religious Freedoms Reformation Act and its sister statute, the Religious Land Use and Institutionalized Persons Act. *Holt v. Hobbs*, 135 S.Ct. 853, 859 (2015). The prison asserted that the compelling government

interest for forbidding beards was to prevent inmates from hiding contraband within their beards. *Id*. at 863. In response to this argument, the Court stated "that this interest would be seriously compromised by allowing an inmate to grow a one half inch beard is hard to take seriously." *Id*. The Court held that this rule failed under the least restrictive means test imposed by the Religious Freedoms Reformation Act. *Id*. at 853. Therefore, the Court held the rule was void. *Id.*

The Court used the same analysis in *Burwell v. Hobby Lobby* when presented with determining whether the Religious Freedom Reformation Act permitted the U.S. Department of Health and Human Services to impose significant fines on Hobby Lobby if it did not provide health insurance coverage for contraception. *Burwell v. Hobby Lobby Stores, Inc.* 134 S. Ct. 2751 (2014). Hobby Lobby initiated this claim against the U.S. Department of Health and Human Services asserting that the requirement to provide coverage for contraceptives went against Hobby Lobby's religious beliefs. *Id*. at 2759. The Court first determined that although Hobby Lobby is a private, for-profit corporation, it is still regarded as a person under the Religious Freedom Reformation Act. *Id*. Next, the Court concluded that the U.S. Department of Health and Human Services regulation substantially burdened the exercise of religion, focusing primarily on the financial impact that non-compliance would have on Hobby Lobby. If Hobby Lobby did not comply, then they would be forced to pay as much as $475 million per year in penalties. *Id*. The Court found this financial burden too substantial to allow. Additionally, the Court determined that although the U.S. Department of Health and Human Services had a significant interest in providing health insurance to company employees, less restrictive means existed for the department to advance this interest. This is illustrated by the fact that the U.S. Department of Health and Human Services already implemented a separate system respecting the religious freedom of non-profit organizations. *Id.* The Court ultimately held that the regulations

imposing an obligation on companies to cover contraception in their health insurance coverage in conflict with the company's religious beliefs were unlawful. *Id*.

The Enforcement Action prohibits Taylor from discriminating based on religion by denying his services to people with events that take place in buildings with religious affiliations in accordance with Title II of the Madison Human Rights Act of 1967. The Enforcement Action does not require Taylor enter into religious buildings to participate in the religious activities therein, only that he provide his photography services to those participating. Title II of the Madison Human Rights Act of 1967 targets a non-secular purpose of eliminating discrimination by a place of public accommodation. The law not only addresses discrimination based on religion but also prohibits discrimination of a number of other protected classes including race, color, national origin, sex, disability, sexual orientation, gender identity or expression, socioeconomic status, and political affiliation. R. at 002. (quoting Title II of the Madison Human Rights Act of 1967). The government has a compelling interest in protecting its citizens from discrimination by places of public accommodation. This interest is rooted in the history of this country and has advanced over time. The government's compelling interest, enacted through the Commission's Enforcement Action, is to prohibit Taylor's practice of discriminating against customers with religious beliefs by refusing to photograph events that are religious in nature.

The Enforcement Action does not require that Taylor participate in the religious practices that take place during the ceremony, it only requires that Taylor not deny someone services on the sole basis of religion. This may require Taylor to walk into a church or synagogue to photograph a wedding, baptism, or some other event, but it does not require anything more than that. Taylor's argument assumes that by walking into a building affiliated with a religion he is forced to adopt all of the beliefs and practices of that religion. However, Taylor himself

contradicts this argument by the fact that he attends religious ceremonies in his personal time and is able to "tune out" any prayers or religious practices that take place. In his personal time, Taylor's attendance at religious ceremonies in churches or synagogues do not result in forced adoption of these beliefs. R. at 017. The Madison Commission on Human Rights is not asking Taylor to take communion, bow his head in prayer, recite the Lord's Prayer, or deny his own closely held beliefs. Therefore the Enforcement Action employs the least restrictive means to further the interest of prohibiting discrimination by places of public accommodation, as required by the Madison Religious Freedoms Restoration Act. Therefore, the Enforcement Action does not violate the Free Exercise Clause of the First Amendment.

B. The Enforcement Action Requiring Taylor to Enter Places of Worship is Not in Violation of the Establishment Clause.

Taylor claims that the Enforcement Action enforces and endorses a religion therefore violating the Establishment Clause of the First Amendment. The Establishment Clause prohibits state or federal governments from forming a church or passing any laws that help either one religion or all religions. *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). The state and federal government cannot compel a person to believe in religion, nor can they penalize a person for not believing in a religion. *Id.* See also, *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (The Establishment Clause builds a "wall of separation between church and state."); *Walz v. Tax Com. of N.Y.*, 397 U.S. 664, 669 (1970) (The purpose of the Establishment Clause "is to insure that no religion be sponsored or favored, none commanded and none inhibited").

In *Lemon*, taxpayers brought suit challenging a state statute that provided financial support to religiously affiliated schools by reimbursing the cost of teacher's salaries, textbooks, and other materials in specific secular subjects. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This Court ruled that the statute was unconstitutional because it violated the Establishment Clause. *Id.*

The Court refers to “three main evils” against which the Establishment Clause was meant to protect: “sponsorship, financial support, and active involvement of the sovereign in religious activity.” *Id*. at 612. (quoting *Walz* at 668).

However, in this case, the Enforcement Action’s purpose does not advance any religious objectives, but rather stops Taylor’s practice of religious discrimination. The Enforcement Action utilizes the least restrictive means available to advance their compelling interest in prohibiting discrimination. The effect of the Enforcement Action on Taylor does not require that he give money to a church or synagogue, attend religious services, exclusively photograph events in religious locations, nor even prioritize religious events. The government does not require Taylor actively engage in the religious practices of any certain religion. The Enforcement Action only requires that Taylor treat all of his customers equally without regard to their race, color, national origin, sex, disability, sexual orientation, gender identity or expression, socioeconomic status, or political affiliation. The Enforcement Action does not further governmental sponsorship, financial support, or active involvement of the government in religious activity. Therefore, the Enforcement Action does not violate the Establishment Clause of the First Amendment.

CONCLUSION

For the foregoing reasons, the Madison Commission on Human Rights respectfully requests this Court affirm the decision of the United States Court of Appeals for the Fifteenth Circuit and find that the Enforcement Action does not violate Taylor's rights under the First Amendment Freedom of Speech, Freedom of Religion, and Establishment Clauses of the United States Constitution.

CERTIFICATE OF COMPLIANCE

This brief is the sole work product of the Team J members and is in compliance with the official rules of this competition. Team J has complied fully with the honor code of our law school.