**TEAM: Q**

**No. 15-1245**

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IN THE

# Supreme Court of the United States

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JAMES ADAM TAYLOR,
*Petitioner,*

v.

TAMMY JEFFERSON, in her official capacity
as Chairman Madison Commission On Human Rights *et al.,*
*Respondent.*

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**On Writ of Certiorari To**
**The United States Court of Appeals**
**For The Fifteenth Circuit**

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BRIEF FOR THE PETITIONER

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## QUESTIONS PRESENTED

1. Whether enforcing the State of Madison's public accommodation law requiring private business owners to offer services to customers contravening their strongly held beliefs violates the free speech clause of the First Amendment?
2. Whether enforcing the State of Madison's public accommodation law compelling private business owners provide services for inherently religious events and enter houses of worship violates the Free Exercise and Establishment Causes of the First Amendment?

## JURISDICTION

The United States District Court for the District of Eastern Madison issued its decision granting Respondents' motion for summary judgment finding that the application of the State of Madison's public accommodation law does not violate Petitioner's federal constitutional rights. The United States Court of Appeals for the Fifteenth Circuit affirmed the decision of the District Court. Petitioner timely filed a petition for writ of certiorari pursuant to 28 U.S.C. §1254(1). This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

## STATEMENT OF THE CASE

Petitioner, Jason Adam Taylor, brought this 42 U.S.C. §1983 action against 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 ("Commission"). Petitioner instituted this action after the Commission threatened an Enforcement Action against the Petitioner on September 15, 2014. The District Court for the District of Eastern Madison ("District Court") granted Respondents' motion for summary judgment on May 25, 2015. The District Court found that the Commission's Enforcement Action ("Enforcement Action") did not violate the Petitioner's First Amendment rights. On November 12, 2015, Petitioner filed an appeal in the United States Court of Appeals for the Fifteenth Circuit ("Fifteenth Circuit"). The Fifteenth Circuit affirmed the District Court's decision. Petitioner timely filed a petition for writ of certiorari which this court granted on May 20, 2012.

## STATEMENT OF THE FACTS

Petitioner, Jason Adam Taylor ("Taylor"), is the majority owner of a closely held corporation, Taylor's Photographic Solutions ("TPS"). R. 14. TPS provides photographic services for indoor and outdoor events, including birthdays, graduations, and weddings. *Id*. Taylor is a "militant atheist," and his company reflects his principles. R. 4, 17. Accordingly, Taylor set forth and adheres to a strict policy regarding religious services. R. 23.

### Taylor Photographic Solutions' Policy Upholds Taylor's Closely Held Beliefs

Since its inception in 2003, TPS set forth a policy to reflect Taylor's Atheistic beliefs. R. 14. Specifically, TPS does not photograph events that are inherently religious, regardless of the customer's religious affiliation. R. 23. Taylor established this policy to prevent any appearance of personal endorsement of religion. *Id*. TPS communicated this policy to all potential costumers

in a sign outside its storefront. *Id*. In this notice, Taylor distinguished his policy of refraining from photographing religious services from a policy of religious discrimination, and included that "[m]embers 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." *Id*.

Taylor only denies his services when an event is religious in nature and his participation in photographing the event endorses that religion. R. 15. Not all weddings are inherently religious, even if they incorporate religious practices. *Id.* Taylor considers a number of factors in enforcing his policy, including the venue's common use, the promotion of religion at the service, and whether the celebration endorses religion. R. 16. For instance, in April 2015, Taylor photographed a wedding ceremony between two men of the Jewish and Episcopalian faiths that was officiated by an ordained minister of the Church of Life; he photographed this wedding because it was civil in nature, and therefore did not undermine his Atheistic beliefs and practices. R. 15-16.

Taylor believes religion is a "detriment to the future of humanity," and has only attended religious ceremonies involving family members. R. 3, 16. This attendance was in Taylor's personal capacity, and did not involve his use of expressive photography. R. 4, 17. When attending any religious ceremonies as part of his familial obligations, Taylor actively tunes out religious rhetoric. R. 17. Taylor consistently applied TPS' policy to even his cousin's wedding which was held in a Catholic Church. *Id*. Taylor refused to photograph this religious wedding, because it violated company policy and promoted Catholicism. R. 4, 17.

**Taylor's Refusal to Promote Religion by Photographing Religious Services**

In June 2014, Taylor posted a notice of the company's policy towards religious events in the front of his store in an effort to make the policy clear to all current and potential customers.

R. 18, 19, 23. Despite the notice, two individuals sought to employ TPS' services for their religious weddings on separate occasions. On July 14, 2014 Patrick Johnson ("Johnson") sought out Taylor to photograph his Catholic wedding officiated by a priest at St. Anthony's Catholic Church. R. 19. On July 22, 2014, Samuel Green ("Green") sought out Taylor's services for his Jewish wedding at the Beth Shalom Synagogue to be officiated by a Rabbi. R. 20. In each instance, Taylor concluded that the weddings were religious in nature because they took place in houses of worship and were officiated by only religious personnel. R. 19. Taylor determined photographing these events would undermine his Atheistic beliefs and practices, and so Taylor respectfully declined to tender his services. *Id*. In each case, Taylor explained his policy and recommended the couples solicit CM Snaps' services, a photography business just across the street from TPS. *Id*.

**Intervention by The Madison Human Rights Commission**

On September 15, 2014, the Commission sent Taylor a letter instructing Taylor to either provide his services for religious events or pay ongoing fines of $1,000 per week. R. 26. Taylor refused to provide services because he did not want to photograph religious events in light of his sincere convictions. R. 21. Subsequently, Taylor initiated the current action against Tammy Jefferson, Thomas More, Olivia Wendy Holmes, Joanna Milton and Christopher Hefner in their official capacities as the Commissioners of the Madison Commission on Human Rights under under 42 U.S.C. §1983 for the deprivation of his First Amendment Rights under color of state law. R. 1.

## SUMMARY OF THE ARGUMENT

Enforcing Title II of the Civil Rights Act of 1967, Mad. Code. Ann. 42-101-2a ("the public accommodation law"), unconstitutionally forces Taylor to engage in expressive conduct in favor of religion. Taylor engages in expressive conduct when he takes photographs for his customers. Taylor is conveying a message through the manipulation of lighting and arrangement in his photographs, and that message is understood by his customers. Taylor's expressive conduct is protected by the First Amendment regardless of any pecuniary interest.

The Commission unconstitutionally compels Taylor to espouse a government approved message which is contrary to the purpose of the public accommodation law. Taylor and his closely held corporation espouse a purely secular message, and fining Taylor infringes on his ability to proffer his Atheistic beliefs. The Commission is impermissibly coercing Taylor to engage in expressive activity that favorably reflects religion, contrary to his beliefs.

Additionally, the Commission's Enforcement Action unconstitutionally compels Taylor to enter houses of worship and violates his rights under the Free Exercise Clause and the Establishment Clause of the First Amendment, as well as the Mad. Code. Ann. §42-501. This is a substantial burden on Taylor because he must choose between paying excessive fines leading to financial ruin and surrendering his sincere Atheistic beliefs of refraining from religion. This Enforcement Action does not pass constitutional muster because under the color of state law, Madison County failed to articulate a compelling state interest and employ the least restrictive means possible to achieve that interest. The Commission also violates the Establishment Clause because it endorses religion and excessively entangles the Government with religion by coercing Taylor to engage in religious services in a house of worship.

## ARGUMENT

### I. THE FIRST AMENDMENT PROTECTS TAYLOR'S EXPRESSIVE COMMERCIAL PHOTOGRAPHY

Taylor engages in expressive conduct when he employs his experience and unique vision to his photographs. This Court has recognized that a person engages in expressive conduct when one intends to convey a message and the circumstances show a likelihood that the message is understood by another. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989); *Spence v. State of Wash.*, 418 U.S. 405, 411-12 (1974). Expressive conduct is not limited to traditional forms of communication such as verbal or written speech, but rather "the Constitution looks beyond written or spoken words as mediums of expression…" *Hurley v. Irish-Am. Gay Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995). Photography is a medium for expression, and photographers are entitled to the same protections as any speaker espousing his beliefs. *Id*. Artists use photography to deliver a message of their expression; however that message conveyed need not be "a narrow succinctly articulable message" to qualify for constitutional protection. *Id*. Rather, an expression need only convey something to an audience to qualify for protection. *Id*. (stating that a particularized message requirement would deny First Amendment protection to works of art by artists such as Jackson Pollack).

The District Court and the Fifteenth Circuit improperly characterized expressive conduct too narrowly, forgoing the constitutional protections that photographers are afforded by the First Amendment. Taylor's sought after experience, creativity, and unique vision constitute an intent to convey a message, and his commercial photography expresses that message. Taylor's commercial photography is an artistic medium that should be recognized as expression, and thus protected under the First Amendment.

A. Taylor's Commercial Photographs Are Expressive Because The Photographs Convey His Message

When Taylor photographs events for his clients, he does more than simply take snapshots. A wedding album is more than a photographic record; in the case of a wedding in a house of worship, the wedding album is a positive account of the holy sacrament of marriage. As the photographer, it is Taylor's job to make creative decisions and implement his unique vision and knowledge of photography to execute this vision. Taylor is not a passive observer of the event, but views the event through an artistic lens for opportunities to capture the decisive moment. As the pre-eminent photographer Henri Cartier-Bresson stated, "[t]here is a creative fraction of a second when you are taking a picture. Your eye must see a composition or an expression that life itself offers you, and you must know with intuition when to click the camera."[1]

The customers in the instant case want to hire Taylor to express the story of their marriages, which reflect their journey culminating in their religious union. R. 19-20. Taylor cannot divorce his personal beliefs about religion from his work because the decisions involved in taking a photograph - the lights, the arrangement of the subjects, the framing - all involve Taylor's intention to portray a positive message. R. 16. In *Spence,* this Court considered the constitutionality of a state statute that prohibited superimposing symbols onto the American flag. *Spence v. State of Wash*., 418 U.S. 405 (1974). This Court determined that superimposing a peace sign onto an American flag was expressive conduct, because it "was not an act of mindless nihilism. Rather, it was a pointed expression of anguish…" *Id*. at 410. Taylor is not mindlessly

[1] The Acknowledged Master of the Moment, *Adam Bernstein*, Washington Post Thursday, August 5, 2004; http://www.washingtonpost.com/wp-dyn/articles/A39981-2004Aug4.html.

taking pictures for his clients, but rather makes intentional choices to create a finished product that tells a story.

B. Taylor's Customers Understand The Message Taylor Conveys Through His Photographs

The First Amendment protects artistic expression when it conveys a message that is likely understood by its viewers. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989). Taylor is engaging in expression in his photography, and his message is likely understood by his customers. R. 20. Customers employ Taylor's services for his expertise in developing a message using indoor lighting. *Id*.; *see also Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884) (finding that a photograph is an expression of the photographer). Customers likely understand the message Taylor expressed in his photography, which is evidenced by his longstanding customer satisfaction. *Johnson*, 491 U.S. at 404.

C. The First Amendment Protects For-Profit Photography

Contrary to the assertions of the District Court and the Fifteenth Circuit, the for-profit nature of Taylor's business does not undermine the expressive protections enumerated in the First Amendment. Photography as a medium of expression is historically protected by the First Amendment, regardless of the pecuniary interests of the photographer. *See Kaplan v. Cal.*, 413 U.S. 115, 120-21 (1973) ("pictures, films, paintings, drawings, and engravings ... have First Amendment protection"); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (1998) (Souter, dissenting) (artistic expression is protected by the first amendment); *Regan v. Time, Inc.*, 468 U.S. 641, 658-59 (1984) (photographic reproductions of currency are protected speech). Furthermore, photography that is created for the purpose of making a profit is also protected. *See Brown v. Entm't Merch. Ass'n.*, 131 S.Ct. 2729, 2733 (2011) (videogames made for-profit are protected under the First Amendment); *U.S. v. Stevens*, 559 U.S. 460, 481-82 (2010) (for-profit

depictions of animal cruelty are protected by the First Amendment). The District Court and Fifteenth Circuit failed to consider that the First Amendment protects for-profit plays, movies, books, and other vehicles for expression. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975) (for-profit theater productions are protected by the First Amendment); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. at 602 (Souter, *dissenting*) (quoting *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981)).

Public policy also counsels in favor of protecting commercial artistic expression. If artists lost their First Amendment protections by accepting commissions for their work, it would inhibit the development of American artistry. If this Court accepted the lower courts' contention that Taylor's commercial photography is not expressive by dint of Taylor's pecuniary motivations, it would create a chilling effect on artists' expressive speech. No court would believe that the famous photograph, "Raising The Flag On Iwo Jima" lacks expression conduct because a client commissioned.[2] Applying this principle to the instant case, Taylor's expression commercial photography is expressive conduct regardless of any commission he received.

### D. The Madison Commission Unconstitutionally Compels Taylor To Speak And Associate With Beliefs Contrary To His Conscience

Enforcing the public accommodation law unconstitutionally compels Taylor to convey a message with which he disagrees. In *Wooley v. Maynard*, this Court held that forcing a couple to display the New Hampshire state motto, "live free or die," contrary to the couple's closely held beliefs, constituted impermissibly compelled speech. *Wooley v. Maynard*, 430 U.S. 705, 706 (1977). This Court found that forcing the Maynards to display the state motto violated the Maynards' individual freedom of mind to refrain from speaking. *Id*. at 715. Contrary to the

[2] Thom Patterson, *The Inside Story of The Famous Iwo Jima Photo*, (Feb. 9, 2016), available at http://www.cnn.com/2015/02/22/world/cnnphotos-iwo-jima/.

assertions of the District Court and Fifteenth Circuit, the case at bar is substantially similar to *Wooley* because Taylor too is being compelled to take and compose religious photos in contradiction to his closely held beliefs. This Court should apply the reasoning in *Wooley* to the instant case, and find that enforcing the public accommodation law unconstitutionally compels Taylor's speech.

1. The Madison Commission unconstitutionally compels Taylor to adopt a government approved message contrary to his firmly held beliefs

Taylor is an Atheist who believes that religion is a detriment to society, and his closely held corporation's policy reflects his beliefs. R. 16. As a "firm believer that the ultimate goal of humanity should be a fading of religion," compelling Taylor to use his photographic talents to "frame religion as positive" violates Taylor's individual freedom of mind and compels him to espouse a belief with which he disagrees. R. 18-19. Just as this Court found in *Wooley*, the Government may not compel an individual to express a belief that he finds "morally, ethically, religiously and politically abhorrent." *Wooley*, 430 U.S. at 714.

In *Hurley*, this Court found that application of a Massachusetts public accommodation law compelling parade organizers to include an LGBT organization to march in a parade constituted compelled speech. *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557 (1995). This Court recognized that the council's selection of parade participants did not conform to a cognizable message, yet nonetheless, "the council clearly decided to exclude a message it did not like from the communication it chose to make." *Id*. at 574. Even if this Court finds that Taylor's photographs do not contain a particularized message, Taylor's conscious effort to prevent his work from interfering with his closely held beliefs, "is enough to invoke [his] right as a private speaker to shape [his] expression by speak[ing] on one subject while remaining silent on another." *Id*. In the case at bar, Taylor refused to tender his

services to the Johnsons and Greens because he did not want to portray religion in a positive light. R. 19. As a speaker, Taylor has the right to choose the content of his speech and the right to refrain from speaking; the Government has no claim to compel Taylor to speak on subjects to which he opposes. *See Hurley*, 515 U.S. at 574; *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Because Taylor's commercial photography is expressive he has the right to shape his communication as he pleases. *Hurley*, 515 U.S. at 574.

> 2. Enforcing the public accommodation law unconstitutionally interferes with Taylor's right of Expressive Association, detrimentally affecting his ability to advocate his atheistic beliefs

Within First Amendment protections of free speech is the right "to associate with others in pursuit of a wide variety of political, social, educational religious and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). In the instant case, Taylor and his closely held corporation have Atheistic beliefs; in accordance with those beliefs Taylor seeks to associate his photography and its underlying expression solely to secular events. The Government may not compel Taylor's expression that detrimentally affects Taylor's ability to associate and pursue Atheist and secular ends. *Id*.

This Court recognizes that closely held corporations are multifaceted and are often organized for a variety of purposes in addition to profit. In *Burwell v. Hobby Lobby Stores, Inc*., a corporation that sold craft supplies asserted its association with Christian values. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2766 (2014). Similar to *Hobby Lobby Stores, Inc*., where the company's Christian beliefs were inextricably intertwined with their pecuniary goals, Taylor's photography business does not exist solely for the purpose of taking photographs. Taylor's Atheistic beliefs are ingrained within the fabric of the business. Taylor's photography business engages in expressive conduct and that is sufficient for Taylor to decide with whom and

what he and the business wish to associate. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 660 (2000).

An association does not need to meet for a specific purpose of conveying a message to be protected by the First Amendment; an association need only engage in expressive activities which could be stifled. *See id*. at 655. In *Dale*, this Court held that compelling the Boy Scouts to include a gay scout master unconstitutionally interfered with the group's freedom of association. *Id.* at 653. Similarly, the Commission's Enforcement Action significantly affects Taylor's ability to espouse his profound rejection of religion. Compelling Taylor to use his skills to portray religion in a positive light interferes with his ability to espouse his Atheistic beliefs because Taylor would be thrust into the impossible situation of both opposing and tacitly endorsing religion simultaneously.

The Fifteenth Circuit improperly characterized this Court's decision in *Dale* as requiring an association to convey an overarching message. R. 42. In *Dale*, this Court made clear that "…associations do not have to associate for the purpose of disseminating a certain message in order to be entitled to the protections of the First Amendment." *Boy Scouts of America v. Dale*, 530 U.S. 640, 655 (2000). Looking back to *Hurley*, this court pointed out that, "…the purpose of the St. Patrick's Day parade in *Hurley* was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude certain participant's nonetheless." *Id*. (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557 (1995)). Taylor's business engages in expressive conduct; thus, Taylor is constitutionally entitled to choose to associate with messages that are in line with his beliefs.

### E. The Government's Use Of The Madison Public Accommodation Law Unconstitutionally Compels Taylor To Espouse A Government Approved Message

Mad. Ann. Code. § 42-101-2a was created to prevent discrimination in places of public accommodation based on religion. R. 2. While Taylor does not contest the state's power to enact prophylactic legislation to prevent discrimination,[3] however in the instant case the public accommodation law unconstitutionally interferes with Taylor's right as a speaker ". . . choose the content of his own message." *Hurley*, 515 U.S. at 573. In *Hurley*, this Court held that states may not apply public accommodation laws when that application interferes with an individual's freedom of expression and association. *Id*.; *see also Dale*, 530 U.S. at 659. Even if this Court finds that Taylor's photography does not have a particularized message, he is constitutionally entitled to convey messages of his choosing. In the instant case, the application of the public accommodation law interferes with Taylor's right to control the content of his message because it mandates him to provide photographic services to customers seeking to promote religion contrary to his beliefs.

Taylor's policy does not discriminate against customers based on their religion; rather, it serves to preserve the sanctity of his closely held beliefs. R.15, 23. Furthermore, Taylor was not engaging in the type of discrimination that Mad. Code. Ann. § 42-101-2a intended to dispel. R. 2. Taylor's objection in the case at bar was only with respect to photographing the Greens' and the Johnsons' specifically religious ceremonies in houses of worship, which consequently infringes on his own closely held beliefs. R. 15. Taylor did not refuse to photograph these events based on their individual religious affiliations, but rather the nature of the event to be photographed. *Id*. Despite this, the Commission required Taylor to use his talents to photograph religious events, compelling him to alter the expressive content of his work, and unconstitutionally violating Taylor's freedom of expressive association.

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[3] *See Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964).

## II. THE STATE OF MADISON'S PUBLIC ACCOMMODATION LAW UNCONSTITUTIONALLY COMPELS TAYLOR TO ENTER RELIGIOUS BUILDINGS, VIOLATING HIS FIRST AMENDMENT RIGHTS UNDER THE FREE EXERCISE AND ESTABLISHMENT CLAUSES

The Commission violated Taylor's First Amendment rights under the Free Exercise and Establishment Clauses, because the Madison Human Rights Act of 1967 unconstitutionally compels Taylor to enter houses of worship. The application of the public accommodation law resulted in the Commission's Enforcement Action that forces Taylor to choose between operating his business and adhering to his sincere beliefs.

The Free Exercise Clause of the First Amendment states that Government "shall make no law… prohibiting the free exercise [of religion]..." U.S. Const. Amend. I. Under color of state law, this Court must analyze the public accommodation law under strict scrutiny.[4] *See* Mad. Code. Ann. § 42-501(d). In accordance with strict scrutiny, the government may not substantially burden an individual's religious liberty unless the government articulates a compelling state interest and employs the least restrictive means to achieve those interests. *Id*. In the instant case, the public accommodation law violates Mad. Code. Ann. § 42-501(d) by substantially burdening Taylor's right to free exercise. As such, the law only passes constitutional muster if the Commission can articulate a compelling, secular interest and show that it has employed the least restrictive means to achieve that interest. *Id*. The Commission has failed to prove by clear and

[4] In addition to the protections under the color of state law, this Court should review the public accommodation law on the bases of two alternative theories: first, the statute is not neutral nor generally applicable, because the law mandates nonreligious minorities such as Taylor accommodate the religious majority; second, under the hybrid rights theory, the strict scrutiny standard of review is automatically triggered because the Government simultaneously violated Taylor's right to the free exercise of religion and some other constitutional protection, in this case his Free Speech rights. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881 (1990).

convincing evidence that there is a compelling state interest, and that mandating Taylor to photograph religious ceremonies is the least restrictive means of preventing discrimination. *Id*.

### A. The State of Madison Substantially Burdens Taylor's First Amendment Right To Free Exercise By Coercing Taylor To Violate His Sincerely Held Religious Beliefs.

The Commission's Enforcement Action against Taylor substantially burdens his free exercise of Atheism. Taylor is a fervent Atheist who refuses to endorse religion through his commercial photography. R. 17. Taylor's First Amendment right to free exercise is substantially burdened because the Commission has given him an ultimatum between financial ruin and contradicting his sincerely held beliefs. Under the strict scrutiny framework, the Commission may not substantially burden Taylor's right to free exercise without articulating a compelling state interest and employing the least restrictive means to achieve that interest. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

Taylor's sincere Atheistic beliefs stem from his tumultuous upbringing and his own views on the progress of humanity; these beliefs are afforded the same First Amendment protections as any other religious beliefs. R. 16-17; *see Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are . . . Secular Humanism . . ."); *see also Kaufman v. McCaughtry*, 419 F.3d 678, 681 (7th Cir. 2005). Although Taylor has attended family members' religious ceremonies in the past, he has consistently refused to photograph these events because of his closely held beliefs. R. 17. The Enforcement Action unconstitutionally burdens Taylor's sincere belief in Atheism that is protected by both the First Amendment and the Mad. Cod. Ann. §42-501.

This Court may not consider the sincerity of Taylor's beliefs, and must only evaluate whether Taylor's practices have been substantially burdened. The policy Taylor instituted at TPS

reflects his belief that "religion is an impediment to the furtherance of humanity and civilization." R. 23. This belief is protected by the Free Exercise Clause of the First Amendment, just as this Court has respected other closely held corporations' beliefs. *See Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2759. In *Hobby Lobby Stores, Inc.*, this Court held that a closely held corporation's right to free exercise was substantially burdened when the Government mandated the company provide its employees with health insurance that included "abortifacients," contraceptives that the corporation's management believed facilitated abortions. *Id*.. This Court refused to evaluate the sincerity of the company's beliefs, stating, "[i]t is not for the Court to say that the religious beliefs of the plaintiffs are mistaken or unreasonable." *Id*. at 2757. In the instant case, this Court should not consider whether "the religious belief asserted… is reasonable." *Id.* at 2778. Instead, this Court must accept Taylor's religious convictions, and only evaluate whether his convictions are substantially burdened.

The Enforcement Action imposes a substantial burden on Taylor because it compels him to act in a way contrary to his Atheistic beliefs or face financial ruin. In *Hobby Lobby Stores, Inc*., this Court recognized that an individual's right to free exercise is burdened when the Government presents an ultimatum between paying exorbitant fines and violating one's closely held beliefs. *Id*. at 2759; *see also Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981) (substantial burden exists when the Government exerts pressure to modify one's behavior violating his beliefs); *Korte v. Sebelius*, 735 F.3d 654, 683-84 (7th Cir. 2013) (substantial burden exists when "[r]efusing to comply means ruinous fines, essentially forcing the petitioners to choose between saving their companies and following the moral teachings of their faith").

### B. The Commission Unconstitutionally Burdened Taylor's Religious Exercise Because It Failed To Articulate A Compelling Government Interest And Employ Only The Least Restrictive Means Of Achieving That Interest

The Commission unconstitutionally burdened Taylor's free exercise of religion because it failed to articulate a compelling government interest and failed to employ only the least restrictive means of achieving that interest. Mad. Code. Ann. § 42-501(d). The Government's asserted interest in preventing discrimination is insufficiently compelling and overly broad. Forcing Taylor to enter religious houses of worship to photograph religious events is not the least restrictive means of prohibiting discrimination. Once this Court finds the Commission's conduct has substantially burdened the free exercise of Taylor's beliefs, the burden shifts to the Government to prove, by clear and convincing evidence, that "the law targets a secular purpose," that "it has a compelling governmental interest in infringing the specific act or refusal to act," and that it "has used the least restrictive means to further that interest." Mad. Code. Ann. § 42-501(d); *see also Korte v. Sebelius*, 735 F.3d 654, 673 (7th Cir. 2013) (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006)). The Government failed to articulate its compelling interest in mandating Taylor photograph religious events in houses of worship.

1. The Commission failed to articulate a compelling government interest

The Government's stated interest in ensuring nondiscrimination in places of public accommodation is not compelling to impinge on Taylor's constitutional rights. The Government fails to prove that the "compelling government interest in infringing… [a] refusal to act" justifies the substantial burden on Taylor's free exercise of religion. Mad. Code. Ann. § 42-501(d). This Court should not accept an interest that is a "sweeping claim." *Wisconsin v. Yoder,* 406 U.S. 205, 221 (1972). Rather, it is the Government's burden to "establish a compelling and specific justification for burdening *these* claimants." *Korte*, 735 F.3d at 685 (7th Cir. 2013) (emphasis in original). The Commission has only articulated a broad interest in "prohibiting discrimination."

R. 12. The Commission failed to articulate why it has a compelling interest in *Taylor's* "refusal to act," and in burdening *his* free exercise of religion. Mad. Code. Ann. § 42-501(d)(2); *Korte*, 735 F.3d at 685.

The Government's interest in prohibiting discrimination is not furthered because Taylor's policy includes a nondiscrimination clause, stating that his company will not "den[y] services based solely upon [potential clients'] affiliations with any particular religion." R. 23. When Taylor refused to photograph the Johnsons' and the Greens' weddings, he was not discriminating against them based on their religious affiliations. Taylor denies providing his services to events he categorizes as religious in nature, which is not improper discrimination under the Title II of the Madison Human Rights Act of 1967. R. 2 (prohibiting discrimination in places of public accommodation based on "race, color, religion, or national origin"). The Commission failed to show that the public accommodation law as applied to Taylor through the Enforcement Action prohibits discrimination based on religion, because he is only considering the nature of events, not his potential customers' religious affiliation.

2. The Commission failed to employ the least restrictive means to prohibit discrimination

The Commission fails to prove that it employed only the least restrictive means to achieve the Government's asserted substantial interest. This Court has the authority to weigh alternatives to the Enforcement Action, and determine if lesser restrictive means effectuate the Commission's interest. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2759-60 (2014). This Court should engage in a least restrictive means analysis, and find that the Commission should employ less restrictive means to prohibit discrimination, without burdening Taylor's right to free exercise..

Taylor invites this Court to consider obvious alternatives that constitute less restrictive means of achieving the goal of nondiscrimination without burdening Taylor's right to free exercise. Just as it has done in previous cases, this Court should consider alternatives that constitute the least restrictive means of achieving the goal of nondiscrimination without burdening Taylor's right to free exercise. In both *Hobby Lobby Stores, Inc*. and *Gonzales*, this Court found that the Government did not use the least restrictive means where it refused to exempt religious actors from engaging in practices that violated their beliefs. *See id*. at 2781-82; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 420-21 (2006). Additionally, this Court found that legitimate government interests could be achieved even when exemptions were made for the sake of religious liberty. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2759-60 (2014). As applied to the case at bar, the Commission can prohibit discrimination without infringing on Taylor's religious liberty.

This Court should consider the less restrictive means of prohibiting discrimination of exempting Taylor from the public accommodations law. In the instant case, it is already standard procedure for TPS to refer any customers who implicate the company policy to CM Snaps. R. 19. If Taylor is provided an exemption, he could refer customers to this or other local photographers that will photograph religious services in houses of worship without undermining the state's interest. Mandating Taylor to refer customers to other local photographers is a less restrictive means than compelling Taylor to enter houses of worship in spite of his religious convictions. This is just one example demonstrating how the Commission failed to employ the least restrictive means of prohibiting discrimination.

The First Amendment protects Taylor's right to the free exercise of his Atheistic beliefs and protects him from being forced to enter houses of worship to photograph religious

ceremonies. The Government has failed to prove, by clear and convincing evidence, that it substantially burdens Taylor's First Amendment right with both a compelling interest and the least restrictive means of achieving such interest. Therefore, its Enforcement Action does not pass constitutional muster.

### C. Forcing Taylor To Enter Religious Houses of Worship and Photograph Religious Ceremonies Unconstitutionally Violates His Right to Religious Freedom Under the Establishment Clause

The government "shall make no law respecting an establishment of religion…" U.S. Const. Am. I. The public accommodation law, Mad. Code Ann. § 42-101-2a, and its application through the Enforcement Action violate Taylor's right to freedom from religion under the First Amendment's Establishment Clause because it forces him to enter houses of religious worship contrary to his closely held Atheistic beliefs. The Establishment Clause of the First Amendment assures that "neither a state nor the Federal government can set up a church, and neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15 (1947).

Legislation violates the Establishment Clause if the law at issue fails on any of the following grounds: (1) lacks a legitimate secular purpose; (2) has the primary effect of advancing or inhibiting religion; or (3) fosters an excessive entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). The public accommodation law violates the Establishment Clause because it has the primary effect of advancing religion by impermissibly endorsing religion and excessively entangling the state's role in religious affairs.

The public accommodation law impermissibly endorses religion because the Commission coerces private employees to enter houses of worship and photograph religious ceremonies. R. 26. Under the second prong of the *Lemon* test, an unconstitutional endorsement of religion exists

where "a government practice [has] the effect of communicating a message of government endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984); *see Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter,* 492 U.S. 573, 592–93 (1989). In the case at bar, the Commission endorses religion because it compels actors to witness events in houses of worship replete with religious symbolism, rituals, and personnel, encouraging religious over nonreligious practices.

The lower courts erred in holding that the Commission did not violate the Establishment Clause simply because Taylor was not forced to actively participate in religious rituals. Government enforced exposure to religious rituals and imagery is sufficient to show impermissible endorsement. *See Doe ex rel. Doe v. Elmbrook School Dist.*, 687 F.3d 840, 850-51 (7th Cir. 2012) (holding that the use of a church for a public school graduation violated the Establishment Clause even though students did not participate in actual religious prayer); *see generally Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992). Under the *Doe ex rel. Doe* reasoning, the Commission may not compel Taylor to witness religious rituals under the guise that he does not actively participate in the rituals.

The lower courts incorrectly relied on *Otero*; however, the instant case is distinguishable. *See Otero v. State Election Board of Oklahoma*, 975 F.2d 738 (10th Cir. 1992) (holding that use of a church as a polling place did not violate the Establishment Clause). In *Otero*, the Tenth Circuit found that "treating atheists as having the same status as members of a religion for purposes of protection from state action, plaintiff makes no showing that a tenet of atheism is a refusal to enter a church building." *Id*. at 740. However, in the instant case, one tenet of his beliefs is to refuse to photograph religious events to achieve the ultimate goal of eradicating

religion from humanity. R. 17-18. The Commission is not compelling Taylor to simply enter a church to access a voting booth, but rather it is compelling him to enter houses of worship, observe sacred ceremonies, and actively capture religious moments in a positive light with his photography; unlike *Otero*, the Commission compels Taylor to act in direct violation of his closely held beliefs.

Compelling Taylor to enter houses of worship and photograph religious ceremonies amounts to endorsement, because it exerts pressure on Taylor to conform to religious practices, because "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel v. Vitale,* 370 U.S. 421, 431 (1962). As a religious minority, Taylor is vulnerable to state pressure.

The Government also unconstitutionally, excessively entangled itself with religion by investigating Taylor's business practices and Atheistic beliefs. Under the third prong of the *Lemon* test, a government action is unconstitutional if it excessively entangles the state with religious affairs. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). This Court should not consider the Commission's interest in passing the public accommodation law, but should only consider an "inquiry into a statute's effect." *Agostini v. Felton*, 521 U.S. 203, 206 (1997). Regardless of its intention, the Commission unconstitutionally applied its power to coerce Taylor to conform to the religious majority. As applied to the case at bar, the question is not whether the Government is making a good faith effort to ensure nondiscrimination in public accommodations, but whether in doing so, it has become excessively entangled by forcing Taylor to attend a full range of religious services and provide photography. *See id*. It suffices that

entering a church or a synagogue or a mosque strikes deeply against his moral and philosophical belief that religion should not exist. R. 20.

This case fails any conceivable Establishment Clause inquiry, as there is nothing in the record to show that the symbolism, imagery, and content of these religious ceremonies is limited in any way. Taylor is susceptible to the Commission's unlimited coercion to attend and participate in religious ceremonies, so long as there is a customer to pay for it. This is a case of first impression regarding Establishment Clause jurisprudence where an individual who is staunchly against the exercise of any and all religions is forced to actively and artistically photograph them. *See Cnty. of Allegheny*, 492 U.S. at 597 (stating that "the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends on its context"). For these reasons, the Taylor has been able to show that the government impermissibly endorses and excessively entangles itself with religious affairs to an unconstitutional degree.

## CONCLUSION

For the following reasons this Court should reverse the District Court and Fifteenth Circuit to find that the Commission's Enforcement action against Taylor violates the First Amendment.

## Certificate

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

Team Q has fully complied with its school's governing honor code.

Team Q has fully complied with all Rules of the Competition.

/s/ Team Q