No. 15-1245

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2015

JASON TAYLOR,

Petitioner,

v.

TAMMY JEFFERSON, THOMAS MORE, OLIVIA WENDY HOLMES, JOANNA MILTON, & CHRISTOPHER HEFFNER in their official capacities as Commissioners of the Madison Commission on Human Rights.

Respondents.

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

BRIEF FOR RESPONDENTS

Team T
Counsel for Respondents

QEUSTIONS PRESENTED

1. Whether enforcement of a public accommodation law that requires a person to provide private business services when doing so violates that person's strongly held beliefs violates the free speech clause of the First Amendment of the Constitution.

2. Whether enforcement of a public accommodation law that requires a person to provide private business services for religious events and which may compel that person to enter religious buildings violates the Free Exercise and Establishment Clauses of the First Amendment.

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STATEMENT OF JURISDICTION

The Fifteenth Circuit issued an opinion on November 12, 2015. The petition for a writ of certiorari was later granted. Thus, this Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner Jason Taylor brought this 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 (the Commission) after the Commission issued a fine against Jason Taylor for violation of the Madison Human Rights Act. *Taylor v. Jefferson*, No. 2:14-6879-JB, slip op. at 1-3 (E.D. Madison) (*Taylor I*). The Commission filed a motion for summary judgment, which the District Court granted. *Id.* at 1, 3. The court held that Taylor's First Amendment rights were not violated by the application of Madison's antidiscrimination law to Taylor's photography business. *Id.* at 2-3.

Taylor 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. *Taylor v. Jefferson*, No. 15-1213, at 1 (*Taylor II*). The Fifteenth Circuit affirmed, holding once again that the First Amendment is not violated by a statute that forbids discrimination against individuals on the basis of their religion. *Id.* at 6. Taylor filed a timely petition for writ of certiorari, which this Court granted.

STATEMENT OF FACTS

Jason Taylor refused to serve two patrons, Mr. Johnson and Mr. Green, on the grounds that their weddings were religiously affiliated. Taylor's Dec. ¶ 43, 52. When Mr. Johnson requested that Taylor's Photographic Solutions photograph his wedding, Taylor told Johnson that he would not photograph Johnson's wedding "because it would be a religious wedding and would be in a church" and because he (Taylor) "didn't like religion." Taylor's Dec. ¶ 43; Johnson's Dec. ¶ 12. Further, when Mr. Green, a separate patron, later requested that Taylor photograph his wedding, Taylor again refused "because [the wedding] would be religious and would be in a synagogue." Taylor's Dec. ¶ 52. Despite refusing to photograph Mr. Johnson's and Mr. Green's religiously affiliated weddings, Taylor stated in his declaration that his business routinely "photographs a full range of events, including birthdays, graduations, proms, photo shoots for websites, festivals, and weddings." Taylor's Dec. ¶ 7.

In addition to personally refusing to serve customers based on the religious character of the customer's event, Taylor maintains a company policy of refusing to photograph events based on their religious character. Taylor posted on the window of his store front a sign that reads,

> 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.

Taylor's Dec. ¶ 30. Mr. Taylor also made several offensive comments towards his religious employees—when employees Ms. Reuben and Mr. Allam were discussing the Israel-Palestine situation, "Mr. Taylor jumped in and said something to the effect that 'it was too bad so many people died over debate which fairy tale they liked better.'" Allam's Dec. ¶ 8.

In response to complaints that Mr. Taylor was discriminating against religious individuals, the Madison commission discovered Mr. Taylor's history of intentional

discrimination against religiously affiliated patrons and concluded that Mr. Taylor had violated Madison's antidiscrimination ordinance. Letter from Madison Human Rights Chairman; R-025. Mr. Taylor challenged the fines imposed by the Madison Commission on Human Rights on the grounds that his personal beliefs make him entitled to a religious exemption that permits him to discriminate in violation of Madison's laws. *Taylor I*; *Taylor II*. Both lower courts rejected Mr. Taylor's argument and he now appeals. *Taylor I*; *Taylor II*.

SUMMARY OF ARGUMENT

This Court has long held that the state possesses a compelling interest in ending discrimination in places of public accommodation. *See, e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). As such, an individual's personal disagreement with the law or desire to discriminate cannot be grounds for an exception from antidiscrimination law. Neither freedom of association nor a religious exemption provide viable grounds for Taylor's sought after vindication of a right to discriminate.

Freedom of association may not be successfully invoked when a businessman's conduct is neither expressive nor speech. Here, the taking of a photograph is not protected speech since the photography lacks the "intent to convey a particularized message" and there is no great likelihood that a particularized message "would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Further, the customer ultimately controls the content and nature of the photograph, thus observers would not come to believe that Taylor's photography conveys any underlying message. Even if the Court were to hold that Taylor retained a First Amendment interest in his photography, *O'Brien* makes clear that the government's overriding goals in eliminating discrimination in places of public accommodation justifies any incidental burden on Taylor's means of expression. *United States v. O'Brien*, 391 U.S. 367 (1968).

Further, anti-discrimination legislation has been held to "plainly serve[] compelling state interests of the highest order" for "[discrimination] both deprives persons of their individual dignity and denies society the benefits of wide participation in political economic, and cultural life." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625. Requiring businesses to stop discriminating is therefore both necessary and constitutional—for-profit businesses may not invoke freedom of association to subvert decades of progress from anti-discrimination laws.

As such, courts have also long held that religious objectors may not be granted exemptions from anti-discrimination laws. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). Even more broadly, under *Employment Division v. Smith*, 494 U.S. 872 (1990), there is no religious exemption from neutral laws of generally applicability. Since anti-discrimination laws have been held to be valid and neutral laws of generally applicability,[1] Taylor may not use his personal beliefs to become a "law unto himself" in violation of Madison's antidiscrimination law. *Smith*, 494 U.S. at 874.[2]

Finally, even if this Court were to apply strict scrutiny on either the freedom of association claim or the free exercise claim, this Court has long held that the eradication of discrimination is a compelling state interest and that the denial of a religious exemption is the least restrictive means to further that end. *Bob Jones*, 461 U.S. at 604. Thus, the decision of the lower court and the Madison Commission on human rights should be affirmed.

ARGUMENT

I. APPELLANT'S DISCRIMINATION CANNOT BE JUSTIFIED BY FREEDOM OF SPEECH BECAUSE THE ACTIVITIES OF HIS PHOTOGRAPHY BUSINESS DO NOT CONSTITUTE SPEECH ON HIS PART

The first amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. This protection has long been held to apply not just to the actions of Congress, but also to those of the states as well. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925). While the text of the amendment mentions only speech

[1] *Bob Jones University*, 461 U.S. at 604 n.30 (holding that denying tax benefits to discriminatory institutions was "founded on a 'neutral, secular basis'").

[2] The federal RFRA prescribes that one's religious freedom shall not be burdened by the federal government unless the federal government's denial of a religious exemption is the least restrictive means to serving a compelling governmental interest. 42 U.S. Code §2000bb-1. However, the federal RFRA does not grant religious exemptions to state and municipal laws, as such an extension of the federal RFRA has been held unconstitutional. *City of Boerne v. Flores*, 521 U.S. 507 (1997). As such, RFRA's strict scrutiny is inapplicable.

and the press, courts have also recognized that expressive conduct, though it does not necessarily contain spoken or printed words, may also be protected. The test for whether conduct is sufficiently expressive to count as speech protected by the First Amendment is whether "'an intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

It is not in dispute that photographs may convey a message which can be understood by the viewer. However, simply because they can convey a sufficient message to be protected by the First Amendment, does not mean that they always do. *See, e.g., White v. City of Sparks*, 341 F. Supp. 2d 1129, 1139 (D. Nev. 2004) (holding that the mere fact that something is visual art is not enough to qualify it for First Amendment protection), and *State v. Chepilko*, 965 A.2d 190, 201-02 (N.J. Super. Ct. App. Div. 2009) (holding that a photographer's business was only protected if it served "predominantly expressive purposes"). In the case at hand, any message conveyed by the photographs that Appellant takes for his photography business belongs to his clients, not to the Appellant himself. As stated by the District Court, Appellant "admits that the customer ultimately controls the outcome of the photographs, can direct the way the photograph is taken, and ultimately decides which photographs to purchase." *Taylor v. Jefferson*, No. 2:14-6879-JB, slip op. at 8 (E.D. Madison). When the customers are able to exercise such a high degree of control over the way the allegedly expressive conduct takes place, any "intent to convey a particularized message" is necessarily the intent of Appellant's customers, not of Appellant himself. Furthermore, those viewing the photographs would understand that, as commercially purchased photographs, their outcome would have been controlled by the customer

rather than the photographer, and that any message contained therein would necessarily be the customer's as well.

This was explained in *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013). In that case, the New Mexico Supreme Court reasoned that, when a photographer was compelled by state anti-discrimination law to provide services for same-sex weddings, those who viewed the photos would understand that wedding photographers take pictures because they are paid to do so, not necessarily because they agree with the couple's views or practices. *Id*. at 69-70. The court went on to point out that the photography business remained free to release statements expressing its disapproval of gay marriage, and that it was not required to use any photos of same-sex couples in its marketing activities. *Id*. at 68, 70. A Colorado appellate court reached a similar decision in *Craig v. Masterpiece Cakeshop, Inc.*, No. 14CA1351, 2015 WL 4760453 (Col. App. Aug. 13, 2015). In that case, a bakery refused to make a wedding cake for a same-sex wedding. The court reasoned

> that the act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings likely to be understood by those who view it. We further conclude that, to the extent that the public infers from a Masterpiece wedding cake a message celebrating same-sex marriage, that message is more likely to be attributed to the customer than to Masterpiece.

Id. at *11. The court's reasoning was that merely complying with anti-discrimination law and serving all customers equally does not convey a message; that there are a number of potential reasons, such as monetary gain, to bake a cake for a same-sex wedding, and that Masterpiece remained free to disavow any such message. *Id*. at *11-13.

Rather than engaging in speech, Appellant is simply running a business. Taylor's Photographic Solutions is a for-profit company which, by nature of it being open to the public, is a public accommodation. Appellant does not engage in photography for the purpose of

advocating for a cause or providing information to the public. Rather, he and his employees engage in commercial photography of social events for the purpose of selling the resulting photographs to those who have hired them. Thus, Appellant's business is merely engaged in the commercial sale of goods and services, not any kind of speech protected by the First Amendment. While these activities are not mutually exclusive, Appellant has not provided sufficient evidence to show that his business goes beyond mere commerce into the realm of speech.

While it may be true that customers seek out Appellant's services because of his artistic talents in taking high-quality photographs, this does not make the photographs his speech. At most, he is engaged in enhancing the speech of his customers, not speaking in his own right. There are a number of businesses which center around using artistic ability or skillful communication to enhance the speech of their clients and customers, and the implications of allowing them to be exempt from anti-discrimination law when it would force them to convey messages that conflict with their beliefs could be dire. Businesses as diverse as website designers, print shops, signage manufacturers, graphic designers, and many others would be free to discriminate against clients based on their religious beliefs, political views, or even potentially their race or gender, so long as they had a credible claim that providing that particular service would violate a deeply held belief. On a practical level, these types of businesses are not engaged in their own speech, and the damage caused by treating them as if they are could be incalculable.

A. THE APPLICATION OF THE ANTI-DISCRIMINATION STATUTE TO APPELLANT IS CONSTITUTIONAL EVEN IF HIS CONDUCT WAS EXPRESSIVE

Even if one were to assume that Appellant's actions in operating a commercial photography business did fall within the First Amendment's free speech protections,

Respondent's actions would still be constitutional. It has long been recognized in American jurisprudence that the protection provided by the First Amendment is not absolute. Appellant himself recognizes this and argues that the actions of the Madison Commission on Human Rights amount to an attempt to compel him to speak. The protection against compelled speech is a critical one provided by the First Amendment, and any government attempt to compel speech is therefore subject to the exacting standard of strict scrutiny, per *Riley v. National Federation of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988).

The strict scrutiny standard is not applicable here, however. Another long-recognized doctrine in the American courts is that, under certain circumstances, the protections for expressive conduct are not as strong as those for actual speech. In *United States v. O'Brien*, the Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech elements can justify incidental limitations on First Amendment freedoms." 391 U.S. 367, 376 (1968). The Court went on to explain that "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id*. at 377.

With regard to the first prong of that test, the U.S. Supreme Court has held that the police power of states is sufficient to enact anti-discrimination statutes. *See Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 41 (1948) (Douglas, J., concurring). The Supreme Court has also repeatedly held that eliminating discrimination is a compelling interest, sufficient even to satisfy the more stringent "strict scrutiny" test. *E.g.*, *Bob Jones*, 461 U.S. at 604; *Roberts*, 468 U.S. at

623. With regard to the third prong of the test laid out in *O'Brien*, the government interest in preventing discrimination is entirely unrelated to the suppression of free expression. While carrying out anti-discrimination interests may, in some cases, require some restrictions on free expression, that is not what the basic interest is about. Finally, the Court has also found that levying financial sanctions and enforcing an end to discrimination are means sufficiently justified by that compelling interest and narrowly tailored enough that they are not unconstitutional even when subjected to the more exacting strict scrutiny standard. *See Bob Jones*, 461 U.S. 574 (in which the Court held that revoking a private university's tax-exempt status because of its racially discriminatory policies was permissible); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (in which the Court held that forcing a private charitable organization to accept female members was also permissible). After all, it would be difficult to tailor an anti-discrimination statute more narrowly to its purpose than one that only prohibits and punishes discrimination.

The conclusions that combating discrimination is a compelling interest and that statutes forbidding discrimination are narrowly tailored to that interest are based on some of the most fundamental ideals of American democracy. The idea that all men are created equal, and that they ought to be able to equally enjoy and participate in all the benefits that American society has to offer is at the core of who we are as a country. Courts have said that "discrimination… violates deeply and widely accepted views of elementary justice," *Bob Jones University*, 461 U.S. at 592, and that anti-discrimination statutes "protect[] the… citizenry from a number of serious social and personal harms." *Roberts*, 468 U.S. 625. To make exceptions to these critical statutes based on nothing more than the biased views of private business owners would be a

massive blow to the social progress America has made since the era when widespread segregation pervaded the country.

The idea that the government may require organizations providing speech-related services to provide equal access to all has been well-established by precedent. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, the Court upheld a law requiring universities to provide the same level of access for military recruiters as they did for other recruiters, including posting notices and sending e-mails informing students about the recruiters' presence. 547 U.S. 47, 61-62 (2006). In a case highly similar to the one at hand, the New Mexico Supreme Court upheld a state anti-discrimination statute as applied to a photographer who wished to deny services to same-sex weddings. *Elane Photography,* 309 P.3d 53. In that case, the court held that the state's action was permissible because it did not control the content of the photographs, only the choice of clients, and the state could lawfully require that a business that is open to the public be open to all of the public. *Id*. at 66.

B. APPELLANT'S RIGHT TO EXPRESSIVE ASSOCIATION IS NOT INFRINGED BECAUSE HE IS NOT ENGAGED IN EXPRESSIVE CONDUCT

Appellant also claims that the Enforcement Action taken by the Madison Commission on Human Rights violates his right to expressive association by forcing him to associate with religion and religious practices. Cases like *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), have demonstrated that discrimination can, in some circumstances, be permissible if the inability to do so would "derogate from the organization's expressive message." *Boy Scouts of America*, 530 U.S. at 661. However, beyond that limited exception, the Court has held that "the Constitution… places no value on private discrimination," and that "invidious private discrimination may be characterized as a form of exercising freedom of association protected by

the First Amendment, but it has never been accorded affirmative constitutional protections." *Norwood v. Harrison*, 413 U.S. 455, 469-470 (1973).

Appellant's circumstances differ from those of the Boy Scouts and the Irish parade in that, as discussed above, he is not engaged in expressive conduct. In *Boy Scouts of America*, a gay activist sought reinstatement to a leadership position in the Boy Scouts of America, a group which the Court found to be dedicated to inculcating certain moral values in their members. *Boy Scouts*, 530 U.S. at 640. In *Hurley*, a gay, lesbian, and bisexual group sought to march in a parade, which the Court held to be an inherently expressive event. *Hurley*, 515 U.S. at 557, 568. The Court held in these cases that compelling the asked-for inclusion would necessarily impair the messages that the organizations were attempting to convey through their conduct.

Unlike these organizations, Taylor's Photographic Solutions is a privately owned business dedicated to serving the public. Its conduct of selling photography services is not expressive, and it does not express anything by its association with its customers other than a desire to provide services to them in exchange for monetary compensation. The test, established in *Boy Scouts of America v. Dale*, for whether this type of anti-discrimination action is permissible is stated as follows: "The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." 530 U.S. at 648. The facts at hand do not satisfy this test because Taylor's Photographic Solutions does not "advocate public or private viewpoints" at all. As explained above, there is no evidence of significant expressive activity by the business. Appellant may engage in such activity as an individual, but being required to open his business to another segment of the public does not impair his ability to do so. Given the Court's willingness, as demonstrated in *Roberts v. U.S.*

Jaycees to enforce anti-discrimination statutes even against organizations which do engage in expressive conduct and which are not entirely open to the public, it is difficult to imagine how Appellant's free association rights could prevail against anti-discrimination law here, when those of the Jaycees did not. 468 U.S. 609.

II. GENERALLY APPLICABLE ANTI-DISCRIMINATION LAW DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE MERELY BECAUSE IT REQUIRES AN INDIVIDUAL TO SERVE A RELIGIOUS INDIVIDUAL

Enforcing antidiscrimination law does not violate the First Amendment merely because it requires Taylor to serve a religious individual by taking religiously affiliated wedding photographs. This Court has established that general access laws do not violate the Establishment Clause under the *Lemon* test.[3] *Widmar v. Vincent*, 454 U.S. 263, 264 (1981); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 234-35 (1990) (holding that "equal access" policies do not violate the establishment clause under the *Lemon* test framework). Further, Madison's anti-discrimination law does not require Taylor to take part in a religious ritual, merely to offer the same services to one class of individuals that he would offer to another. Thus, the Madison law does not violate the establishment clause as it is an equal access policy that 1) has a valid secular purpose in ending discrimination, 2) does not have the primary effect of advancing religion, but merely to ensure equal access to places of public accommodation, and 3) does not result in excessive entanglement between government and religion. *Mergens*, 496 U.S. at 235 (reciting the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

In *Mergens*, the challenged statute stated "[i]t shall be unlawful . . . to deny equal access or a fair opportunity to, or discriminate against any students . . . on the basis of the religious . . .

[3] Under the Lemon test, laws are consistent with the constitution so long as the statute "first, ha[s] a secular legislative purpose, second, its principal or primary effect . . . neither advances nor inhibits religion; [and] finally, the statute [does] not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

content of the speech at such [student] meetings." *Mergens*, 496 U.S. at 235.[4] Under the plain text of the statute challenged, schools were be affirmatively required to provide classrooms, advertising space, janitorial services, and any other services to student prayer meetings and rituals so long as those accommodations would be available to other student groups. Thus, Taylor's concern that individuals needing to affirmatively provide services to religious individuals at inherently religious events might violate the Establishment Clause has already been considered by the Supreme Court, and was rejected by eight Justices in *Mergens*. *Id.*

Further, anti-discrimination regimes may not be undermined by arbitrary distinctions—such as Taylor's argument below that Madison law unconstitutionally requires him to "'practice' a religion by entering a house of worship." *Taylor II*, at 4. Taylor is no more obligated to practice a religion by virtue of "entering a house of worship" through his photography than the atheist who delivers and arranges flowers, the agnostic electrician who repairs the church's lighting, the Jewish firefighter who rushes into a burning Mosque, the termite inspector, or, of course, the janitor. The bride and groom will be no less married if a photographer does a poor job capturing the moment and Taylor's obligations inherent in photographing a religious wedding are no different than his obligations inherent in photographing secular weddings, which he voluntarily chose to perform and advertise to paying customers. Taylor's argument has been rejected before and should be again. *See, e.g., Otero v. State Election Bd.*, 975 F.2d 738 (10th

[4] This language closely tracks the Civil Rights Act, which states "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, *religion*, sex, or national origin." 42 U.S.C. § 2000e-2(a) (emphasis added). Further, the language of the Madison statute itself references the Civil Rights Act, stating that there shall be no unlawful discrimination in places of public accommodation as defined by the Civil Rights Act. Mad. Code. Ann. § 42-501(e). To hold that Madison's statute violates the Establishment Clause under the *Lemon* test would not only require an overruling of *Mergens*, it would require an invalidation of the 1964 Civil Rights Act as well—which has long been held to be constitutional.

Cir. 1992) (holding there was no establishment clause violation from placing a voting booth in a church, even though it required people to enter a house of worship). To hold otherwise would paralyze anti-discrimination law and grant people a license to deny core services, safety inspections and even lifesaving emergency aid to religious individuals merely because they happen to be located in a house of worship.

Finally, Madison's anti-discrimination law serves a compelling state interest in eradicating invidious discrimination, and the stigma and shame inherent in the "denial of equal opportunities" that flows inherently from invidious discrimination. *Roberts*, 468 U.S. at 625. This Court has firmly reiterated the importance of ending invidious discrimination countless times, and Taylor is no exception to that rule. Since Madison's anti-discrimination statute complies with the Establishment Clause per the test set forth in *Mergens* and *Lemon*, Taylor may not use the First Amendment as a license to discriminate.

A. UNDER EMPLOYMENT DIVISION V. SMITH, TAYLOR MAY NOT DISCRIMINATE IN VIOLATION OF GENERALLY APPLICABLE ANTIDISCRIMINATION LAW

Setting aside Taylor's novel theory, longstanding precedent makes clear that application of Madison's antidiscrimination law to Taylor does not violate the First Amendment. In *Employment Division v. Smith*, the Supreme Court held religious objectors are not entitled to religious exemptions from neutral, generally applicable laws.[5] 494 U.S. 872 (1990). The Court held,

> "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an

[5] The trial court erroneously rejected the Human Rights Commission's argument that Taylor's spite towards religion was not a "religious" belief; thus the trial court enabled Taylor to invoke religious exemption doctrine before rejecting his claim. *Taylor I*, at 11. Even assuming that Taylor's belief could qualify as "religious," *Smith* makes clear that Taylor may not be granted an exemption from generally applicable anti-discrimination law.

> individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the state's interest is 'compelling'—permitting him, by virtue of his beliefs, to become a law unto himself—contradicts both constitutional tradition and common sense."

Emp't Division v. Smith, 494 U.S. 872, 874 (1990). Here, Taylor seeks, on the basis of his personal beliefs, to transcend the law and discriminate against religious individuals regardless of the harms they will suffer. This, however, is precisely what *Smith* disallows.[6]

Antidiscrimination law has long been held to be a valid and neutral exercise of government power, and thus a failure to comply with antidiscrimination ordinances remains illegal despite religious objections. *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (holding that denying tax benefits to discriminatory institutions was "founded on a 'neutral, secular basis'"). Further, the state does not merely have a legitimate interest in ending discrimination based on protected characteristics, it has a compelling and even fundamental interest in ending such discrimination. *Bob Jones*, 461 U.S. at 604 ("[T]he Government has a fundamental, overriding interest in eradicating [] discrimination."); *Roberts*, 468 U.S. at 624. Given this precedent, there can be no doubt that Madison's antidiscrimination law is a valid, neutral law with which Taylor must comply.

B. MR. TAYLOR CANNOT CLAIM A RELIGIOUS EXEMPTION BECAUSE MR. TAYLOR'S PERSONAL BELIEF THAT ALL RELIGIONS ARE A DETRIMENT TO THE FUTURE OF HUMANITY IS NOT A RELIGIOUS BELIEF

[6] Nor may Taylor discriminate under a hybrid rights theory, as freedom of association does not grant Taylor a right to discriminate. *Smith*, 494 U.S. at 881-82. Courts presented with a hybrid rights challenge to antidiscrimination law have rejected it. *See, e.g., Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014) (holding that Elane Photography could not refuse to photograph a homosexual wedding in violation of state antidiscrimination law); *Craig v. Masterpiece Cakeshop, Inc.*, No. 14CA1351, 2015 WL 4760453, at *17-18 (Col. App. Aug. 13, 2015) (holding that a bakery could not refuse to bake a cake for a homosexual wedding). Finally, denying religious exemptions to anti-discrimination fulfills the hybrid right's balancing test and strict scrutiny. *Smith*, 494 U.S. at 883; *Bob Jones*, 461 U.S. 574.

To assert a claim for a religious exemption, Mr. Taylor must establish that his beliefs are "religious." Here, Mr. Taylor's beliefs are not based on the teachings of an organized church, nor on scripture, nor on the agreement of a devoted group, nor any institution. Taylor neither worships nor preaches about a higher being or even a higher cause. His belief that religion is a detriment to society is no more religious than the belief that Jews are destroying society or that Blacks are an "impediment to the furtherance of humanity and civilization." Taylor's Dec. ¶ 30. Holding otherwise would cloak hatred with the legal and moral shield of a religious exemption.

Merely believing something is not sufficient to make a belief religious,[7] and a mere claim that a belief is religious is insufficient to grant the claimant a religious exemption—the Court must ensure that the claim is not fraudulent, lest people fraudulently claim religious exemptions to evade legal responsibility when their secular beliefs conflict with the law. *Cohen v. United States*, 297 F.2d 760, 765 (9th Cir. 1962) ("[*Ballard*] does not hold that a court or jury cannot decide that the profession of a belief is fraudulent. . . Only Justice Jackson would have gone [so] far . . . ."); *United States v. Seeger*, 380 U.S. 163, 185 (1965) ("[The courts'] task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.").[8]

Here, Mr. Taylor's own declarations prove that he himself does not believe his personal beliefs are religious in nature—instead, Taylor has established that he possesses a secular

[7] Nor would it make Taylor's belief protected by the ambit of the Madison statute, which specifically prescribes that the statute's exemption will only be limited to a "sincerely held *religious* belief" (emphasis added). Mad. Code. Ann. §42-501.

[8] *Cf. United States v. Ballard*, 322 U.S. 78 (1944) (holding that the jury may not inquire into the internal consistency or validity of religious doctrine or whether facts in religious stories actually took place). The Court wrote,

> The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.

Id. at 87.

aversion to religion based on his unpleasant childhood experiences that "soured [his] vision of all religion by the time [he] was 18 years old." Taylor's Dec. ¶ 24. Even a creative lawyer may not transform Taylor personal belief that "any and all religion" is "a detriment to the future of humanity" into somehow a "religious" belief. Taylor's Dec. ¶ 18. Internal consistency aside, it is clear that Taylor does not believe his own beliefs are "in his own scheme of things, religious," and therefore they are not eligible for a religious exemption. *Seeger*, 380 U.S. at 185.

The Court, on occasion, has recognized that—for the purposes of statutory interpretation—a deeply-held philosophical conviction may be similarly situated with a religious exemption if it is "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God." *Welsh v. United States*, 398 U.S. 333, 339 (1970) (granting conscientious objectors exemption from the draft). However, the Court in *Welsh* was concerned with a statutory exemption from military draft registration, and was motivated by "considerations of a pragmatic nature, such as the hopelessness of converting a sincere conscientious objector into an effective fighting man" and the fact that "the legislative materials show congressional concern for the hard choice that conscription would impose on conscientious objectors to war, as well as respect for the value of conscientious action and for the principle of supremacy of conscience." *Gillette v. United States*, 401 U.S. 437, 452-53 (1971). Here, however, pragmatic considerations and legislative intent clearly preclude a finding that Taylor's individual animosity towards social groups be shielded under a religious objection, and Taylor's exemption claim rests on the far more stringent constitutional standards, not merely on statutory interpretation.

First, pragmatic considerations clearly oppose extending the shield of a religious objection to discriminatory personal beliefs as such an interpretation would incentivize and

reward fraudulent claims by secular believers who want exemptions from discrimination law (or merely laws that they do not like). *See, e.g.*, *Gillette*, 401 U.S. 437 (holding that there was no religious exemption from the draft involving particular wars that the claimant was opposed to); *United States v. Lee*, 455 U.S. 252 (1982) (holding that there was no religious exemption to paying social security taxes as an exemption would encourage fraudulent claims and undermine fair administration of the law). Second, this case is distinguishable from *Welsh* since the legislative language of the Madison statute not only limits the carve out to "religious" beliefs—the statute states that the exemption "shall not be construed to permit unlawful discrimination in any form." Mad. Code Ann. § 42-501(e). In doing so, the legislature has clearly valued secular antidiscrimination law above the burden on one's conscience, evincing a very different legislative situation then in *Welsh*.

Here, Taylor merely claims that his experiences soured his view of religion and that he does not want to portray religion in a positive light. Taylor's Dec. ¶ 24, 45. This disillusionment, however, cannot be seen as filling a place parallel to that filled by the God of those admittedly qualifying for the exemption. To hold that mere cynicism, distaste, or disillusionment could give grounds for a religion exemption would be to allow any moral or philosophical objector the right to evade law merely by claiming that it conflicted with their beliefs. To the extent that Taylor seeks to rely on this Court's interpretation of the draft exemption to apply to conscientious objectors,[9] that reliance is misplaced. Spite should not be vindicated as a valid religious objection, least the court endorse hatefulness as paramount to law. Just as animosity towards a particular race or ethnicity is not a religion, a soured view of religion does not a religion make.

[9] *United States v. Seeger*, 380 U.S. 163 (1965).

C. LONGSTANDING PRECEDENT ESTABLISHES THAT RELIGIOUS EXEMPTIONS TO ANTIDISCRIMINATION LAWS MAY NOT BE GRANTED EVEN UNDER EXACTING STRICT SCRUTINY

Ultimately, Jason Taylor seeks to evade antidiscrimination law on the grounds that he personally believes that religion is a detriment to society. However, this justification is no more salient than an individual's desire to discriminate against racial minorities based on their belief that such a group is a detriment to society. To allow an individual to discriminate against a minority group based on personal belief, religious or not, is to legally sanction such discrimination and allow discrimination to flourish. Simply put, Taylor cannot claim a religious exemption to antidiscrimination law without undermining the very foundation of anti-discrimination law. When confronted with the question of whether a religious objection may be granted and an exception made to antidiscrimination law, the Supreme Court empathically held that the rejection of a religious exemption fulfilled strict scrutiny. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

The Court held that the "the Government has a fundamental, overriding interest in eradicating . . . discrimination." *Id.* at 604. Further, it held that granting a religious exemption authorizing discrimination cannot be reconciled with that compelling government interest, and as such, "no 'less restrictive means' . . . are available to achieve the governmental interest" in eradicating discrimination. *Id.* (citations omitted). Moreover, this reasoning extends far beyond the racial discrimination context of *Bob Jones*—this Court, for example, has applied the same reasoning to the issue of gender discrimination. *See Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

In *Roberts*, the Court reaffirmed that antidiscrimination law "plainly serves compelling state interests of the highest order" and that "[discrimination] both deprives persons of their

individual dignity and denies society the benefits of wide participation in political economic, and cultural life." *Roberts*, 468 U.S. at 625. As such, the Court wrote, "the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race." *Id.* It cannot be denied that those discriminated against because of their religion are also denied individual dignity and suffer the denial of equal opportunity. Disallowance of discrimination thereby becomes the only, and the least restrictive means to prevent that harm, and thereby *Bob Jones* and *Roberts* establish that Taylor may not be granted a license to discriminate even under the exacting requirements of strict scrutiny.

Finally, the Court has long recognized the particular danger of allowing religious exemptions to be used to evade legal responsibilities. Given that courts shall not question the inconsistency of a claimant's religious belief, but merely whether it is "truly held," there is great danger of allowing people use religion as a means to justify evading legal responsibilities. *Gillette v. United States*, 401 U.S. 437, 457, 459 (1971) (rejecting a religious exemption from a claimant who sought to avoid service in the Vietnam war under strict scrutiny and holding that "exempting persons who dissent from a particular war, albeit on grounds of conscience and religion in part, would 'open the doors to a general theory of selective disobedience to law' and jeopardize the binding quality of democratic decisions"). Under *Gillette*, Taylor may not use a religious exemption to selectively decide which provisions of antidiscrimination law he wishes to comply with, lest the religious exemption be reduced to a means of evading legal responsibility.

Likewise, similar concerns resulted in the rejection of a religious exemption to social security tax liability—just as it would be too high a burden on the government to "accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of

religious beliefs," the government could not hope to maintain an effective antidiscrimination policy with myriad exceptions flowing from a wide variety of religious claimants. *United States v. Lee*, 455 U.S. 252, 260 (1982). Further, just as the Court found in *Lee* that there was "no principled way . . . to distinguish between general taxes and those imposed under the Social Security Act," there is no principled way to distinguish between a religious exemption to an antidiscrimination ordinance that bans discrimination against religious individuals, that bans discrimination against individuals based on sex or orientation, or that bans discrimination against individuals based on race.[10] If the court were to grant Taylor an exemption to antidiscrimination law, people could then have grounds to turn away or refuse to serve patrons based on the color of their skin, effectively undoing monumental progress made in the last fifty years on civil rights.

Finally,

> "every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."

Id. at 261. Here, Taylor has voluntarily chosen to participate in commercial activity, and thus his religious exemption must give way—his personal beliefs may not be superimposed against the government's fundamental, overriding interest in ending discrimination. The denial of Taylor's claim is thus "essential to accomplish an overriding governmental interest." *Id.* at 257.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the decision of the United States Court of Appeals for the Fifteenth Circuit and find that Madison's antidiscrimination ordinance is consistent with the First Amendment.

[10] Recall *Roberts*, 468 U.S. at 625 ("[T]he denial of equal opportunities that accompanies [discrimination], is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.").