Team X

No. 15-1245

IN THE SUPREME COURT OF THE UNITED STATES

JAMES ADAM 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 FIFTEENTH CIRUIT

BRIEF FOR RESPONDENTS

Team X
Counsel for Respondents

QUESTIONS PRESENTED

1. Whether enforcement of a public accommodation law that requires a business owner who dislikes religion to serve Christian and Jewish customers in the same manner that the business serves other customers violates the free speech clause of the First Amendment of the Constitution.
2. Whether enforcement of a public accommodation law that requires a business owner who dislikes religion to serve Christian and Jewish customers in the same manner that the business serves other customers violates the Free Exercise and Establishment Clauses of the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory Provisions

Constitutional Provisions

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, et. al.*, No. 15-1213 at 6 (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

I. Legal and Factual Background

Petitioner James Adam Taylor owns a photography company called Taylor's Photographic Solutions. *Taylor v. Jefferson, et. al.*, No. 2:14-6879-JB, at *1 (D. Eastern Madison July 13, 2015). Taylor's Photographic Solutions is a place of public accommodation under Madison law, and thus is subject to the Madison Human Rights Act of 1967 that prohibits discrimination based on religion. *Taylor v. Jefferson, et. al.*, No. 15-1213, at *2 (15th Cir. Nov. 12, 2015). In June 2014, Petitioner placed sign in the front window of his business that read, in part:

> "[T]he management of this business will not perform services for any religious services of any kind. Members of all religions are welcome to enter this place of business and will not be denied services based solely upon their affiliations with any particular religion."

Taylor v. Jefferson, et. al., No. 2:14-6879-JB, at *4-5 (D. Eastern Madison July 13, 2015).

The Madison Commission on Human Rights ("the Commission") began an investigation of Taylor's Photographic Solutions on July 31, 2014, after receiving two complaints – one filed by a Christian and one by a Jew – that Taylor's Photographic Solutions refused them photography services on the sole basis that their weddings were religious in nature. *Id.* at *4. Petitioner otherwise provides wedding photography for those who do not get married in religious institutions or by religious officials. R. at 15-16 ("Declaration of Jason Adam Taylor").

The Commission found clear evidence of discriminatory attitudes and practices on part of Petitioner, and Petitioner admitted the reason he refused to take this photography was due to their religious nature. *Taylor v. Jefferson, et. al.*, No. 2:14-6879-JB, at *4 (D. Eastern Madison July 13, 2015). Petitioner was found to be particularly hostile to Christianity and Judaism. *Id.* The Commission determined that Petitioner engaged in unlawful discrimination, sent him a cease-and-desist letter, imposed a fine of $1,000 a week until the business removed the sign, and

threatened to bring a civil enforcement action in a Madison state court within 60 days if he did not immediately change his business practices. *Id.* at *5.

Petitioner brought civil rights claims under 42 U.S.C. § 1983 for deprivation of constitutional rights under color of state law against the Commission. *Id.* at *1. The District Court for the District of Eastern Madison granted summary judgment on behalf of the Commission, and the Court of Appeals for the Fifteenth Circuit affirmed. *Taylor v. Jefferson, et. al.*, No. 15-1213, at *4 (15th Cir. Nov. 12, 2015).

II. Procedural History

Taylor sued Jefferson, More, Holmes, Milton, and Hefner in their official capacity as Commissioners for the Madison Commission on Human Rights in the United States District Court for the District of Eastern Madison, asserting two First Amendment violations under 42 U.S.C. § 1983 against the Commission's Enforcement Action. *Taylor v. Jefferson, et. al.*, No. 2:14-6879-JB, at *1 (D. Eastern Madison July 13, 2015). The District Court granted the Defendants' motion for summary judgment on July 13, 2015. *Id.* at *3; *Taylor v. Jefferson, et. al.*, No. 15-1213, at *2 (15th Cir. Nov. 12, 2015). The District Court held the Enforcement Action did not violate the First Amendment because Taylor's commercial photographs are not expressive speech and the Enforcement Action is neither a compulsion to accept the teachings of a religion nor the establishment of a religion. *Taylor v. Jefferson, et. al.*, No. 2:14-6879-JB, at *8, 12 (D. Eastern Madison July 13, 2015).

Taylor appealed the grant of summary judgment to the United States Court of Appeals for the Fifteenth Circuit. *Taylor v. Jefferson, et. al.*, No. 15-1213, at *1 (15th Cir. Nov. 12, 2015). The Fifteenth Circuit upheld the District Court. *Id.* at *5. The Fifteenth Circuit held the photographs are not speech and the Enforcement Action is not a government endorsement of religion. *Id.* at *2, 5. Taylor subsequently petitioned for writ of certiorari.

SUMMARY OF THE ARGUMENT

Petitioner argues that the Committee violated his First Amendment rights when it enforced a public accommodation law against his photography business – an enterprise that even Petitioner concedes is a place of public accommodation. Each of his claims fail, and the lower court's decision to dismiss the case should be affirmed.

First, Petitioner's free speech argument fails because his commercial photography does not constitute protected "speech." In other words, the Government does not compel him to speak because there is no speech involved. Conduct is expressive speech – and thus deserving of First Amendment protection – only when the speaker has the intent to convey a particular message and viewers would be highly likely to understand that message. Here, Petitioner cannot intend to convey a message when he merely takes photographs at the ultimate direction of his customers, and viewers are not highly likely to understand his commercial photography to convey a particular message. The compelled speech claim is thus extinguished.

Even if the Court finds an issue of material fact as to the speech qualities of Petitioner's commercial photography, enforcement of the public accommodation law is still proper because the Government can enforce such a law to further a compelling interest – namely, protecting people from religious discrimination. The Government's interest in ensuring that places of public accommodation treat religious people the same as they treat non-religious people outweighs the speech concerns of Petitioner and his business.

Petitioner's argument as to expressive association fails as well. Even if his commercial photography business is deemed to be an expressive enterprise, a place of public accommodation cannot discriminate against classes it doesn't like simply by claiming that "forced involvement" with those people would significantly impair associational rights. The brevity of the relationship

between the business and the customer, the general nature of commercial photography, and the compelling policy concerns that would arise if expressive association were deemed to be a valid excuse for discrimination all dismantle Petitioner's expressive association claim.

Second, Petitioner's free exercise and establishment argument fails because compelling his photography business to not discriminate against costumers with religious events neither burdens his religious beliefs nor promotes a religion. The Government may enact a law of general applicability even if it inhibits an individual's religious beliefs. A law is neutral and generally applicable if it is enacted for a secular meaning rather than religious motivations. Madison is attempting to prevent discrimination by places of public accommodation; this is a secular purpose and is therefore a neutral and generally applicable law. Even if the law was not neutral and generally applicable, the law does not burden Petitioner's religious beliefs because he has stated he occasionally attends religious services.

The Government may not promote a religion. A state action satisfies the Establishment Clause if it has a secular purpose, it neither advances nor inhibits religion, and it does not foster excessive entanglement with religion. Madison enacted the statute to prevent discrimination which is a secular purpose. The statute treats all individuals equally regardless of their religious beliefs so it does not advance or inhibit any religion. The statute does not create a relationship between the Government and a religious authority. Therefore the statute is valid under the Establishment Clause.

ARGUMENT

I. ENFORCING A PUBLIC ACCOMODATION LAW THAT REQUIRES A PERSON TO PROVIDE PRIVATE BUSINESS SERVICES DOES NOT VIOLATE THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT OF THE CONSTITUTION.

The Committee's enforcement of a public accommodation law against Petitioner's place of public accommodation is not violative of Petitioner's Free Speech rights, and therefore summary judgment was correct. First, Petitioner does not speak when taking photos for clients through his commercial photography business. Additionally, even if the Court finds Petitioner's photography to be expressive speech, the Government has a compelling interest in preventing blatant discrimination against a protected class that warrants enforcement of the public accommodation law. Finally, the public accommodation law does not impermissibly force Petitioner to expressively associate with a pro-religion viewpoint.

A. Petitioner is not compelled to speak because his photography does not constitute speech.

Petitioner's photography is not sufficiently expressive to trigger the First Amendment protections of speech, and therefore the government does not compel Petitioner to "speak" by enforcing the public accommodation law. While the government may not require an individual "to host or accommodate another speaker's message," *Rumsfeld v. Forum for Acad. and Inst. Rights, Inc.,* 547 U.S. 47, 63 (2006), the individual's conduct must be sufficiently expressive so as to trigger the First Amendment protections. *See Clark v. Cmty. for Creative Non–Violence,* 468 U.S. 288, 294 n. 5 (1984). Conduct is considered expressive when there is (1) an intent to convey a particularized message, and (2) there is a likelihood that the intended message will be understood by those who view it. *Texas v. Johnson,* 491 U.S. 397, 404 (1989). For example, in *United States v. O'Brien,* a man who burned a draft card on the steps of a federal courthouse during the Vietnam War (1) had the intent to convey a particular message that he disagreed with

the Vietnam War draft, and (2) there was a high likelihood, given the context, that the intended anti-war message would be understood by those who viewed the burning of the draft card. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

As to the first prong, Petitioner's photography on behalf of his customers does not convey a particularized message. His customers direct the photography and have ultimate control over the photographs taken and sold. Petitioner does nothing more than convey the customers' message through his publicly available commercial service. While Petitioner adds his photography "style" in capturing the images, this merely changes the manner in which customer's message is conveyed rather than the message itself. Therefore, Petitioner's photography fails as expressive speech on the first prong of *Texas v. Johnson.*

Petitioner fails on the second prong of *Texas v. Johnson* as well because there is not a high likelihood that viewers of Petitioner's commercial photography will understand an "intended message." Petitioner alleges that those who view his photography of religious ceremonies will interpret these images as Petitioner's support of religion, but this is incorrect. Unlike general photography taken for the purpose of conveying an artistic message, commercial photographers like Petitioner are hired by customers to capture the customers' special moments. Viewers of commercial photography are aware that a contracted commercial photographer does not necessarily share his customers' views on the things captured in the photographs, whether that be the birthday party theme or the religion correlated with the building in which the images are taken. Therefore, Petitioner's conduct is not sufficiently expressive and does not fall with First Amendment speech protection.

Additionally, Petitioner remains free to exercise his Free Speech rights by disavowing any messages that he believes the photographs convey. *Rumsfeld*, 547 U.S. at 64–65. This can

easily be done by hanging a disclaimer sign, much like the one already in Petitioner's store, which states that any photos portraying religion do not represent his beliefs.

Because Petitioner merely conveys another's message and those who view the photography would not understand an "intended message" of pro-religion, Petitioner's photography does not constitute expressive speech.

B. Even if Petitioner's photography is seen to be expressive speech, the government has a compelling interest in regulating the non-speech element of the activity.

Even if Petitioner's photography is considered speech, the Government may still enforce the public accommodation law without violating Petitioner's speech rights because the Government has a compelling interest in protecting people from discrimination due to their religious beliefs. Even if the Court finds there to be a genuine issue of fact as to the speech properties of Petitioner's business photography, the Government can regulate expressive speech when there is a compelling interest in regulating the non-speech element of the activity. *Johnson*, 491 U.S. at 406-07. Public accommodation laws are generally constitutional, and are "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination." *Hurley v. Irish-Am. Gay*, 515 U.S. 557, 572 (1995). The Supreme Court has never found a compelled-speech violation arising from the application of antidiscrimination laws to a for-profit public accommodation.

Here, the Commission has a compelling interest in ensuring that people are not denied services by Petitioner's place of public accommodation due to their religious beliefs. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623-24 (1984) (holding that the state has a compelling interest in making sure all members of the public are served, regardless of religion or other class). The MHRA does not seek to regulate the content of Petitioner's photography. Rather, the MHRA merely ensures that Petitioner provide all customers the same services.

Petitioner's willingness to serve religious people in non-religious contexts, such as making a 30th birthday cake for a Jewish man, is not sufficient to avoid claims of discrimination based upon religion. If a restaurant offers a full menu to non-religious customers, it may not refuse to serve entrees to Jews, even if it will serve them appetizers. The anti-discrimination law does not permit businesses to offer a "limited menu" of goods or services to customers on the basis of religion." *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, 309 P.3d 53, 62 (N.M. 2013). Petitioner's willingness to offer some services to religious persons does not cure Petitioner's refusal to provide them the "full menu" of services that he offers to the general public.

Further, there is no distinction between refusing to photograph religious events and refusing to serve members of protected religious classes. As the Supreme Court said in *Bray*, "[a] tax on wearing yarmulkes is a tax on Jews." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). Even if the yarmulke or, as here, synagogue wedding is the stated object of the animus rather than Jewish people in particular, members of the Jewish religion are nonetheless those who will be harmed by the discrimination. This discrimination is illegal under the public accommodation law, and thus enforcing the law is a permissible and logical result. *See* Mad. Code Ann. § 42-501(e)(2).

The government has a compelling interest in ensuring that protected classes are not discriminated against by a public place of accommodation, and Petitioner's actions are discriminatory against religious people. As such, the Commission is justified in enforcing the public accommodation law against Taylor's Photographic Solutions.

C. Enforcing the public accommodation law does not require Petitioner to expressively associate with religion.

The Government unconstitutionally burdens the First Amendment freedom of expressive association by "intru[ding] into the internal structure or affairs of an association." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)). A group must engage in some form of expression to be protected by the expressive association right, and these expressive groups must show that forced involvement with the action they seek to avoid will significantly impair their ability to advocate public or private viewpoints. *Dale*, 530 U.S. at 648. This freedom is not absolute, and can be overridden "by regulations adopted to serve compelling state interests . . . ." *Id.*

Petitioner fails at the outset, because Taylor's Photographic Solutions is not a group that engages in anti-religion expressive activity as Petitioner alleges. Instead, Taylor's Photographic Solutions is a place of public accommodation under Madison law designed to make money by providing photography services for the public.

Even if Taylor's Photographic Solutions is deemed to be an expressive enterprise, the "forced involvement" with religion by taking photographs at religious events does not significantly impair the group's ability to advocate its viewpoints. A customer's association with Petitioner's business for the limited purpose of obtaining photography services—as opposed to becoming part of the business itself—does not trigger constitutional concern. *See Rumsfeld*, 547 U.S. at 69. Merely being hired to take pictures of a wedding, whether it takes place in a church or in a park, does not "associate" Petitioner's place of public accommodation with the wedding location and correlated ideologies. And, as previously stated, Petitioner can easily post a disclaimer sign at the business location and elsewhere to ensure that his anti-religion message is expressed.

Finally, even if Petitioner's expressive association rights are seen to be infringed upon, the public accommodation law was adopted to serve the compelling state interest of preventing discrimination based upon religion and overrides Petitioner's expressive association freedom. *Dale,* 530 U.S. at 648. If the Court gave an exception to public accommodations laws for all commercial photographers and others engaged in inherently expressive businesses, these businesses could freely discriminate against any protected class on the basis that they are only exercising their right not to express a viewpoint with which they disagree. This holding would undermine all of the protections provided by antidiscrimination laws.

As such, enforcement of the public accommodation law does not require Petitioner to expressively associate with religion in violation of the First Amendment.

II. COMPELLING AN INDIVIDUAL TO PROVIDE BUSINESS SERVICES FOR RELIGIOUS EVENTS DOES NOT VIOLATE THE FREE EXERCISE AND ESTABLISHMENT CLAUSES.

The First Amendment states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The First Amendment does not create a complete separation between the government and religion. The Free Exercise Clause restricts the government from interfering with an individual's religious practices. The Establishment Clause restricts the government from preferring specific religious beliefs.

A. The Free Exercise permits the state to compel an individual to provide private business services for religious events.

The Free Exercise Clause does not permit an individual or a business to violate the law because of a religious objection to the law. The Supreme Court has "consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct

that his religion prescribes (or proscribes).'" *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 258-61 (1982)).

To determine if a law is of general applicability and is neutral, the court considers whether the purpose of the law is to restrict actions because of their religious motivations. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993). A law is not neutral "if it refers to a religious practice without a secular meaning discernible from the language or context." *Id.* The Madison Human Rights Act does not restrict religious actions merely because they are religious; rather the act restricts any actions that are discriminatory. The statute does not prevent the petitioner from expressing his "militant atheist" beliefs nor does it require him to express support for houses of worship. The statute merely requires him to not discriminate against customers simply because they desire to utilize his services during a religious ceremony. The act is not designed to oppress religious beliefs rather it is to pursue a secular purpose, therefore it is a law of general applicability.

Both the federal government and the government of Madison have enacted religious freedom statutes that protect an individual from substantial burdens to their exercise of religion. *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a); Mad. Code Ann. § 42-501(d). Madison's RFRA statute allows a burden to occur if there is clear and convincing evidence that the government has a compelling governmental interest and has used the least restrictive means to further the interest. Mad. Code Ann. § 42-501(d). However, the Madison RFRA cannot be used to "permit[] unlawful discrimination by a place of public accommodation." Mad. Code Ann. § 42-501(e)(2).

The petitioner never argues that the requirement for him to photograph events within houses of worship substantially burdens his religious beliefs. *Taylor v. Jefferson, et. al.*,

No. 2:14-6879-JB, at *11 (D. Eastern Madison July 13, 2015). The petitioner does admit however that he is not burdened merely by entering houses of worship; he still occasionally attends religious services and admits to attending to attending two recent religious services in houses of worship. R. at 17.

If the petitioner could establish that his religious beliefs are substantially burdened by entering a house of worship, then there must be clear and convincing evidence of a compelling governmental interest and the statute is the least restrictive means to further the interest. Mad. Code Ann. § 42-501(d). The Madison Commission on Human Rights has a secular and compelling governmental interest for the enforcement of the Madison Human Rights Act against the petitioner: to prevent discrimination in places of public accommodation in order to promote commerce. *Taylor v. Jefferson, et. al.*, No. 2:14-6879-JB, at *12 (D. Eastern Madison July 13, 2015). The federal government and the states have the power to enact legislation necessary to protect citizens from discrimination. *Hurley v. Irish-Am. Gay*, 515 U.S. 557, 572 (1995); *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241, 261-62 (1964).

The state employed the least restrictive means to further its interest in preventing discrimination. The Madison Commission on Human Rights informed the petitioner about the complaint against his business and provided him with the opportunity to file a statement or have an administrative hearing. Only after the petitioner waived these rights did the Madison Commission on Human Rights impose a fine on the petitioner. They also provided him with an opportunity to change the company's practices before seeking any judicial action. In addition, the Madison Commission on Human Rights is only seeking to prevent the petitioner from discriminating against individuals based on their religious practices; the commission is not compelling the petitioner to endorse or engage in the religious practices.

The Madison Human Rights Act is a law of generally applicability. Madison has a compelling governmental interest in restricting the petitioner's actions, and the statute is the least restrictive means to further that interest. Therefore, the Madison Human Rights Act does not violate the Free Exercise Clause of the First Amendment when it requires the petitioner to provide his photography services to all members of the public regardless of whether they take place in houses of worship.

B. The Establishment Clause permits the state to compel an individual to provide business services for religious events.

The Establishment Clause does not require a complete separation between the state and the church. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). Rather, the clause is intended to prevent sponsorship, financial support, and active involvement of the sovereign in religious activity. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 688 (1970)). A state action satisfies the Establishment Clause if (1) it has a secular purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not foster an excessive entanglement with religion. *Id.* at 612-13.

The first step of an inquiry into an Establishment Clause claim is to determine if the state action has a secular purpose. The states have the power to enact legislation in order to prevent discrimination of its citizens. *Hurley v. Irish-Am. Gay*, 515 U.S. 557, 572 (1995). The purpose of the Madison Human Rights Act is to prevent discrimination in places of public accommodation. This is a legitimate secular purpose for Madison to pursue.

The second step of an inquiry into an Establishment Clause claim is to determine if the primary effect of the state action advances or inhibits religion. This step asks whether a particular religious belief is favored or preferred over other beliefs. *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989). It prohibits the government from making an individual's standing based upon

their specific religious belief. *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). The Madison Human Rights Act does not prefer a specific belief over other beliefs; it merely requires individuals be treated equally regardless of their specific religious belief. Therefore the primary purpose of the statute is not to advance or inhibit religion.

The third step of an inquiry into an Establishment Clause claim is to determine if the state action fosters an excessive entanglement of government with religion. When analyzing the state's entanglement with religion, the court "examine[s] the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971). The only benefit to the religious institutions and the government created by the Madison Human Rights Act is that members of the public are not being discriminated against based on their religious beliefs. The Madison Commission on Human Rights is not providing any aid to a religion nor is it establishing a relationship with a religious authority by requiring the petitioner to provide his services to individuals at religious ceremonies. The only involvement into religion by Madison is preventing citizens from being discriminated against based on their religious beliefs. This does not amount to excessive government entanglement with religion.

The Madison Human Rights Act has a secular purpose, does not advance or inhibit religion, and does not create excessive government entanglement with religion. Therefore the statute is not a violation of the Establishment Clause of the First Amendment.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests this Court affirm the decision of the United States Court of Appeals for the Fifteenth Circuit and find that enforcement of the public accommodations law does not violate Petitioner's First Amendment rights.

BRIEF CERTIFICATE

Team X

The work product contained in all copies of this brief is the work product of the team members.

We have complied fully with the University honor code.

We have complied with all Rules of the Competition.