NO. 15-1245

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2015

JASON ADAM TAYLOR,

Petitioner,

v.

TAMMY JEFFERSON,
in her official capacity as Chairman, Madison Commission on Human Rights,

THOMAS MORE,
in his official capacity as Commissioner, Madison Commission on Human Rights,

OLIVIA WENDY HOLMES,
in her official capacity as Commissioner, Madison Commission on Human Rights,

JOANNA MILTON,
in her official capacity as Commissioner, Madison Commission on Human Rights,

and

CHRISTOPHER HEFNER,
in his official capacity as Commissioner, Madison Commission on Human Rights,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifteenth Circuit

BRIEF FOR PETITIONER

Attorneys for Petitioner

QUESTIONS PRESENTED

I. Does the First Amendment's Free Speech Clause prohibit government from compelling those providing private business services to make their services available to all regardless of whether doing so in particular circumstances would violate the private business owner's strongly held beliefs?

II. Do the First Amendment's Establishment Clause and Free Exercise Clause prohibit government from compelling those providing private business services to cover religious events and enter religious buildings?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES:

CONSTITUTIONAL PROVISIONS:

STATUTES AND RULES:

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Eastern District of Madison in Civil Action No. 2:14-6879-JB is unreported but appears in the record on pages 1–12. The opinion of the United States Court of Appeals for the Fifteenth Circuit in Appeal No. 15-1213 is unreported but appears in the record on pages 39–46.

STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Madison had original jurisdiction under 18 U.S.C. § 3231 (2012), because this case involves alleged violations of federal law and the United States Constitution. R. at 1–2. The United States Court of Appeals for the Fifteenth Circuit had jurisdiction over this appeal under 28 U.S.C. § 1291 (2012), because the appeal was taken from a final judgment of the district court entered on July 13, 2015. R. at 40. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2012), because this Court granted certiorari. R. at 47.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which is reproduced as Appendix A. U.S. Const. amend. I. This case also involves Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (2012), and Title II of the Madison Human Rights Act of 1967, Mad. Code Ann. § 42-101-2a, which are reproduced as Appendix B. 42 U.S.C. § 2000a(a) (2012); Mad. Code Ann. § 42-101-2a.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This case involves allegations that Taylor's Photographic Solutions and Jason Adam Taylor ("Taylor") unlawfully discriminated against individuals on the basis of religion in violation of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (2012), and Title II of the Madison Human Rights Act of 1967, Mad. Code Ann. § 42-101-2a (the "MHRA"). R. at 2. Taylor owns approximately 90 percent of Taylor's Photographic Solutions, which provides photography services to individuals for a number of events and purposes. R. at 14.

Taylor is a devout atheist who deeply believes that all religion, regardless of what form it takes, "is a detriment to the future of humanity." R. at 3, 16. Although Taylor's Photographic Solutions has a strict policy against denying service to individuals on the basis of their religion, the company also has a policy against photographing religious events. R. at 15. This policy against photographing official religious events, like weddings, has been in place since the business was started in 2003. R. at 14. Taylor created the policy to avoid endorsing religion in any way. R. at 15.

After receiving complaints from two individuals who were refused service in accordance with this policy, the Madison Commission on Human Rights (the "Commission") began an investigation into allegations of discrimination. R. at 2. The complaints resulted when Taylor told two individuals that the company does not photograph religious events and therefore would not photograph either of their wedding services, both of which were to take place in houses of worship, one in a church and one in a synagogue. R. at 2. Upon concluding its investigation, the Commission sent a letter to Taylor ordering him to cease and desist what it believed to be unlawful conduct. R. at 2. The Commission further imposed a fine of $1000 per week to

continue until proof was received that Taylor had stopped refusing to photograph religious events, and unless sufficient proof was submitted within 60 days, the Commission threatened to bring a civil enforcement action against Taylor and his company. R. at 2, 25–26.

In response, Taylor filed this lawsuit seeking to enjoin the Commission from further pursuing its Enforcement Action. R. at 2. Specifically, Taylor alleges that the fines asserted against him by the Commission, as well as the threat of immediate legal action, violated the Free Speech, Free Exercise, and Establishment Clauses. R. at 1.

II. NATURE OF THE PROCEEDINGS

The District Court. The district court granted summary judgment in favor of the Commission on all of Taylor's claims. R. at 3. Regarding the Free Speech claim, the district court found that no evidence established that Taylor's photography was sufficiently communicative to qualify as expressive conduct protected by the First Amendment. R. at 8. Regarding Taylor's Free Exercise and Establishment Clause claims, the district court found that Taylor offered no evidence to show that entry into a place of worship coerces Taylor to accept a religion or substantially burdens his religious beliefs. R. at 11. The district court thus entered judgment in favor of the Commission on all claims. R. at 12.

The Court of Appeals. The court of appeals affirmed. R. at 44. In particular, the court of appeals concluded that the Enforcement Action did not implicate any First Amendment concerns because Taylor failed to show how he "speaks" when he photographs events. R. at 40–41. The court of appeals also agreed that requiring Taylor to enter places of worship does not require him to adopt a religion. R. at 43. The court also held that the law in no way implies that the government endorses any religion. R. at 43. Thus, a majority of the court of appeals affirmed summary judgment on all claims. Judge Davis dissented, reasoning that, based on the facts and

the *de novo* standard of review, a genuine issue of material fact existed as to whether Taylor's First Amendment rights were violated. R. at 44.

SUMMARY OF THE ARGUMENT

I.

Madison's public accommodations law violates the Free Speech Clause of the First Amendment. Taylor's photography is a form of inherently expressive conduct that is entitled to full First Amendment Protection, and in the alternative, it also conveys a particularized message that is likely to be understood by those who view it. As such, Taylor's First Amendment rights to free speech are implicated. The government's actions here constitute compelled speech by requiring Taylor to photograph religious events. Because the government dictates the content of Taylor's message, strict scrutiny must be applied to the MHRA. Madison cannot meet this standard because the law is not the least restrictive means of achieving a compelling government interest. Nevertheless, the law also fails to meet the proper standard for intermediate scrutiny. Therefore, a genuine issue of material fact exists as to whether Taylor's rights under the Free Speech Clause have been violated, and thus, the judgment of the court of appeals should be reversed.

II.

Madison's public accommodations law also violates the Establishment Clause and the Free Exercise Clause. Strict scrutiny should be applied to the MHRA because it discriminates among religions. Madison again cannot meet this standard. The MHRA is also unconstitutional under this Court's decision in *Lemon*. The law does not have a secular legislative purpose. Its primary effect also endorses religion and coerces Taylor into supporting religion and fostering religious ideologies. Furthermore, the law results in excessive entanglement between the government and

the practice of religion. Lastly, as applied in this case, the MHRA also violates Taylor's First Amendment rights under the Free Exercise Clause. The MHRA is not a general law of neutral applicability, and therefore, it must withstand strict scrutiny. Once again, Madison cannot satisfy this burden, and as such, a genuine issue of material fact exists as to whether the MHRA violates Taylor's First Amendment rights. The judgment of the court of appeals should therefore be reversed.

ARGUMENT AND AUTHORITIES

This case is a summary judgment appeal. R. at 12. In reviewing cases decided by summary judgment, the court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in non-movant's favor. *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (citing Fed. R. Civ. P. 56 (c)). In cases involving the First Amendment, this Court is under "a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp.*, 515 U.S. 557, 567 (1995).

I. THE FIRST AMENDMENT'S FREE-SPEECH CLAUSE PROHIBITS 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.

The Free Speech Clause of the First Amendment, made applicable to the states through the Fourteenth Amendment, provides that the government shall make no law "abridging the freedom of speech." U.S. Const. amend. I. The district court found that Taylor failed to show how he "speaks" when he photographs events. R. at 8. Thus, both the district court and a majority of the court of appeals concluded that the Enforcement Action did not implicate any First Amendment concerns. R. at 8, 40–41. In reaching this conclusion, the courts below overlooked and

misapplied basic concepts that lie at the heart of our First Amendment freedoms, and under these basic principles, the Commission's actions in this case violate Taylor's First Amendment rights.

A. Photography Is Protected Speech.

The protections afforded by the First Amendment extend well beyond written and spoken words. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). As this Court has repeatedly stressed, one of the central freedoms protected by the First Amendment is the "freedom of thought." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Indeed, "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Id.* (quoting *Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Thus, requiring Taylor to ignore his deeply held religious beliefs and actively express the religious views of others goes to the heart of the First Amendment. The court's application of the MHRA in this case, thus, "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.* at 715.

1. Taylor's photography qualifies as symbolic speech that is sufficiently communicative to be protected under the First Amendment.

The courts' conclusions that professional photography of weddings lacks the essential communicative element of speech demonstrates "an unduly restricted view of the First Amendment and of visual art itself." *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996). Regardless of whether this Court concludes that there must be a particularized message, Taylor has established that his photography is symbolic speech protected under the First Amendment.

a. **Hurley** ***reaffirmed that some conduct is inherently expressive and always receives First Amendment protection.***

Some conduct is inherently expressive and "always communicate[s] some idea to those who view it, and as such [is] entitled to full First Amendment protection." *Bery*, 97 F.3d at 696; *Ex parte Thompson*, 442 S.W.3d 325, 334 (Tex. Crim. App. 2014). This Court "has applied similarly conceived First Amendment standards to moving pictures, to photographs, and to words in books." *Kaplan v. California*, 413 U.S. 115, 119 (1973). Nevertheless, in determining whether certain conduct possesses "sufficient communicative elements" to require protection under the First Amendment, federal circuit courts disagree about whether, and to what extent, there must be "[a]n intent to convey a particularized message," and whether it must be highly likely "that the message would be understood." *Johnson*, 491 U.S. at 404 (alteration in original) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (per curiam)).

Spence and *Johnson* considered "whether a symbolic act or display was sufficiently imbued with elements of communication to trigger First Amendment scrutiny." *Cressman v. Thompson*, 719 F.3d 1139, 1149 (10th Cir. 2013). In particular, "the Court considered two relevant factors:" (1) whether there was "an intent to convey a particularized message," and (2) whether, under the circumstances, there was "a great likelihood that the message would be understood by those who viewed the symbolic act or display." *Id.* (citing *Spence*, 418 U.S. at 410–11; *Johnson*, 491 U.S. at 404). However, in a unanimous decision, this Court clarified in *Hurley* that a particularized message is not always required because "symbolism is a primitive but effective way of communicating ideas," and several of this Court's cases have recognized that "a narrow, succinctly articulable message is not a condition of constitutional protection." 515 U.S. at 569.

Since *Hurley*, this Court has continued to apply a more liberal approach in determining when conduct is protected under the First Amendment as symbolic speech, and this Court "has

been clear that the arts and entertainment constitute protected forms of expression under the First Amendment." *White v. City of Sparks*, 500 F.3d 953, 955–56 (9th Cir. 2007) (listing cases). Furthermore, five of the federal circuit courts[1] have concluded that the Court's decision in *Hurley* at least liberalized or qualified the inquiry into whether conduct involves sufficient communicative elements to implicate First Amendment protection.[2] Accordingly, this Court should continue to apply the factors from *Spence* and *Johnson* only when the conduct at issue is not inherently expressive.

b. Taylor's photography is inherently expressive and therefore is entitled to full protection under the First Amendment.

Taylor's photography is inherently expressive conduct, which is entitled to full First Amendment protection, regardless of whether a specifically identifiable, particularized message exists. Some paintings are "unquestionably shielded" by the protections of the First Amendment. *Hurley*, 515 U.S. at 569. A "particularized message" is not always required, and

[1] *See Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 160 (3d Cir. 2002) ("*Hurley* eliminated the 'particularized message' aspect of the *Spence-Johnson* test."); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388 (6th Cir. 2005) (quoting *Hurley*, 515 U.S. at 569) (applying *Spence*, but stating, "The threshold is not a difficult one, as 'a narrow, succinctly articulable message is not a condition of constitutional protection.'"); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010) ("[T]he Supreme Court and our court have recognized various forms of . . . visual expression as purely expressive activities . . . . We have afforded these expressive activities full constitutional protection without relying on the *Spence* test."); *Cressman*, 719 F.3d at 1150 ("*Hurley* suggests that a *Spence-Johnson* 'particularized message' standard may at times be too high a bar for First Amendment protection."); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) ("The Court later liberalized this test . . . .").

[2] Only the United States Court of Appeals for the Second Circuit has continued to apply the original two factors from *Spence* and *Johnson* as if they were unchanged by the decision in *Hurley*. *See Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 n.6 (2d Cir. 2004) ("While we are mindful of *Hurley*'s caution against demanding a narrow and specific message before applying the First Amendment, we have interpreted *Hurley* to leave intact the Supreme Court's test for expressive conduct in *Texas v. Johnson*.").

such a strict analysis conflicts with this Court's precedent: "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices. Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication." *Id.* at 569–70. Likewise, even if this Court concludes that Taylor's message is "not wholly articulable," this Court should hold as it did in *Hurley* that the photography is a protected "form of expression," and as such, it is entitled to full First Amendment protections.

c. Taylor's photography is also symbolic speech because it conveys a particularized message likely to be understood by those who view it.

Nevertheless, even under *Spence* and *Johnson*, the act of professionally photographing a religious wedding ceremony is still "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Johnson*, 491 U.S. at 404. There is "an intent to convey a particularized message" that would likely "be understood by those who viewed it." *Id.* This Court has long recognized that "pictures, films, paintings, drawings, and engravings" are entitled to "First Amendment protection." *Kaplan*, 413 U.S. at 119–20. Indeed, because "paintings, photographs, prints and sculptures . . . always communicate some idea or concept to those who view it," a number of courts have found that such visual art qualifies as expressive conduct under *Spence*. *Bery*, 97 F.3d at 696.

Visual art, in many ways, is an even more effective means of expressing ideas than written or spoken words. *Id.* at 695. "Any artist's original painting holds potential to 'affect public attitudes,' . . . by spurring thoughtful reflection in and discussion among its viewers." *White*, 500 F.3d at 956 (finding visual art expresses particularized message) (quoting *Joseph Burstyn, Inc. v.*

Wilson, 343 U.S. 495, 501 (1952)). In a number of ways, "photographs are much like paintings for communicative purposes." *Ex parte Thompson*, 442 S.W.3d at 334.

When Taylor photographs an event for a customer, he intends to convey a particularized message. As Taylor testified, he is "known for [his] specific talents, including [his] expertise in the use of indoor lighting." R. at 20. Mr. Allam further testified that "[c]ustomers come to Taylor's Photographic Solutions because we have a reputation for our photographic styles." R. at 30. Like a painting, each photograph "expresses the artist's perspective." *White*, 500 F.3d at 956. The essential purpose of their photography is to memorialize and re-convey their artistic perspective of an event. The photograph retells the event in picture format from their perspective, and their expertise in expressing that message is the reason why customers choose Taylor's company.

Nevertheless, the district court found that Taylor failed to "show how he does anything other than convey another's message." R. at 8. But First Amendment protection does not require "a speaker to generate, as an original matter, each item featured in the communication." *Hurley*, 515 U.S. at 570. When Taylor photographs an event, he is "more than a passive receptacle or conduit" for the messages of others. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 260 (1974). Customers choose Taylor because of the "expression" and "artistic expertise" he puts into his photographs. R. at 8, 15, 20. Even assuming Taylor merely re-conveys another's message when he photographs a wedding or religious ceremony, the photographs still fall within the full protection of the First Amendment.

Moreover, the entire issue in this case is the fact that the government is forcing Taylor to photograph events that are religious in nature, and in particular, Taylor is being compelled to photograph religious weddings in places of worship. R. at 3–4. This Court's precedent has

firmly established that "religious proselytizing" and "acts of worship" are "fully protected under the Free Speech Clause." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

Wedding ceremonies constitute "speech" protected by the First Amendment. *Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012) ("Couples often express their religious commitments and values in their wedding ceremony."). "The core of a wedding ceremony's 'particularized message' is easy to discern . . . . Wedding ceremonies convey important messages about the couple, their beliefs, and their relationship to each other and to their community." *Id.* Therefore, even assuming Taylor only conveys the messages of others in his photographs, the act of professionally photographing a wedding or other religious ceremony is still a form of symbolic speech.

The district court suggested that Taylor "operates his business . . . for the purpose of earning money, not for the purpose of speaking." R. at 7. But "[i]t is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley v. Nat'l Fed'n for Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988). Indeed, under this Court's well established precedent, Taylor's First Amendment protections are "not diminished merely because the . . . speech is sold rather than given away." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988); *see also Bery*, 97 F.3d at 695 (rejecting government's argument that "the sale of art is conduct, and in order to be constitutionally protected, the sale of protected material must be inseparably intertwined with a particularized message.").

Taylor's photographs always communicate some idea or concept. Regardless of whether it is his message or the message of his customers, his artistic perception of the events and ability to

expressively re-convey that message is entitled to full First Amendment protection. And it makes no difference that he sells the photographs for profit because, like the artists in *Bery*, Taylor's "rights are not lost merely because he . . . is paid to speak." *Id.* (quoting *Riley*, 487 U.S. at 801). Accordingly, summary judgment was improper in this case, and the decisions of the courts below should be reversed.

2. The Commission's enforcement action amounts to compelled speech.

Given that Taylor's photographs are a form of symbolic speech, the Commission's enforcement action, requiring him to photograph religious ceremonies, constitutes compelled speech in violation of the First Amendment. "Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). Also, this Court's "compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message." *Id.* This Court has repeatedly "limited the government's ability to force one speaker to host or accommodate another speaker's message." *Id.*; *see also Hurley*, 515 U.S. at 572 ("The state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade.").

The issue here is that Taylor "will not photograph a 'religious event,' regardless of the religion." R. at 15. Taylor's "feelings about religion do not extend to *individuals* who follow religions." R. at 18 (emphasis added). Instead, the issue is that being required to photograph religious *events* "affects the message conveyed." *Hurley*, 515 U.S. at 572–73. The State "may not compel affirmance of a belief with which the speaker disagrees." *Id.* Indeed, the "point of all speech protection . . . is to shield just those choices of content that in someone's eyes are

misguided, or even hurtful." *Id.* at 574. Accordingly, "this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.*

Application of Madison's public accommodations law constitutes compelled speech in violation of the First Amendment. The MHRA not only requires Taylor to "*alter* the expressive content" of his photographs; it dictates and defines the entirety of that expressive content. Thus, at the very least, requiring Taylor to "host or accommodate another speaker's message," which he deeply disagrees with, constitutes compelled speech that "violates the fundamental rule of protection under the First Amendment"—that Taylor "has the autonomy to choose the content of his own message." *Forum for Academic & Institutional Rights*, 547 U.S. at 61; *Hurley*, 515 U.S. at 573. "In a compelled speech claim" such as Taylor's, "the harm is that the speaker is compelled to convey a particularized message to which he objects." *Cressman*, 719 F.3d at 1154 n.15. And this is exactly what the government is requiring Taylor to do in this case. Taylor "does not *intend* to convey the unwanted message, but is forced to," and in requiring this the government forces Taylor to become an "instrument for fostering" the religious views of others. *Id.* Therefore, because Taylor's First Amendment rights are, at the very least, implicated by the government's actions here, the MHRA must be subjected to the proper level of scrutiny.

B. The MHRA Violates the Free Speech Clause.

Taylor's First Amendment rights are implicated in this case, and therefore, regardless of what standard is applied, the courts' application of the MHRA must withstand the proper level of scrutiny. The First Amendment is "subject only to narrow and well-understood exceptions." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). Laws that regulate the content of protected speech are subject to strict scrutiny. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729,

2738 (2011). Strict scrutiny is required here because application of the statute in this case regulates the content of protected expression. Even under an intermediate level of scrutiny, the MHRA is constitutionally invalid as applied to Taylor.

1. Strict scrutiny applies because the MHRA is a content-based regulation of constitutionally protected speech.

The MHRA regulates the content of protected speech. The law is therefore invalid unless it is narrowly tailored to serve a compelling governmental interest. *Id.* This Court has applied "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad.*, 512 U.S. at 642. Likewise, regulations "that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny." *Id.* Accordingly, as this Court has stated, "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795.

The MHRA is subject to the most exacting First Amendment scrutiny. By requiring Taylor to photograph religious events in places of worship, the Commission and the Courts below mandate symbolic speech that Taylor would not otherwise engage in. This "necessarily alters the content of the speech" at issue. *Id.* at 796.

2. The MHRA fails strict scrutiny because it is not the least restrictive means of promoting a compelling government interest.

The MHRA regulates the content of protected speech, and the government's "interest in this case is directly related to expression." *Johnson*, 491 U.S. at 410. Therefore, the law "is invalid unless" the Commission "can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown*, 131 S. Ct. at 2738. This is "a demanding standard," and "'[i]t is rare that a regulation restricting speech because of its content will ever be permissible.'" *Id.* (quoting *United States v.*

Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000)). This Court has held that "[c]ontent-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

Even assuming there is a compelling government interest, this does not end the inquiry into whether the law is valid. *Johnson*, 491 U.S. at 418. The issue then becomes "whether under our Constitution compulsion as here employed is a permissible means for its achievement." *Id.* The law may be upheld only if the Commission can show that it is the least restrictive means of achieving a compelling government interest. *Brown*, 131 S. Ct. at 2733–34; *Playboy*, 529 U.S. at 813. The Commission cannot meet this standard.

In *Pacific Gas*, this Court invalidated a state's order requiring "a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 4 (1986) (plurality opinion). A majority of the Court agreed that the order violated the Free Speech Clause of the First Amendment for a number of reasons. *Id.* at 19–21. The plurality concluded that the order "impermissibly require[d] appellant to associate with speech with which appellant may disagree," and thus, because "[s]uch one-sidedness impermissibly burden[ed] appellant's own expression," the First Amendment was implicated. *Id.* at 13–15. Accordingly, applying strict scrutiny, the plurality noted how this Court's "cases establish that the State cannot advance some points of view by burdening the expression of others." *Id.* at 20. A majority of the Court also agreed that "burdening the speech of one party in order to enhance the speech of another" violates the First Amendment. *Id.* at 25 (Marshall, J., concurring); *id.* at 21 (Blackmun, J., concurring) ("[T]he infringement of Pacific's right to be free from forced association with views with which it disagrees," alone, violates First Amendment). Moreover, because the order tended "to inhibit expression of appellant's views in order to promote" the views of others, the plurality

held that the order was not the least restrictive means to advance the government's interest. *Id.* at 20.

Just like the order in *Pacific Gas*, the Enforcement Actions in this case impermissibly violates Taylor's First Amendment rights in order to promote the rights of others, and as this Court's precedent has established, Madison "cannot advance some points of view by burdening the expression of others." *Id.* This type of one-sided approach is clearly not the least restrictive means of achieving the government's interest. According to the district court, the governmental interest here is "making sure all members of the public are served, regardless of religion or other class." R. at 9. This interest could easily be achieved in a way that does not violate Taylor's First Amendment rights. As Taylor testified, he refers all customers that wish to have religious events photographed to "Conrad Morgan's store *across the street*." R. at 19 (emphasis added). Therefore, all members of the public can easily be served in this case by simply walking across the street, or going to any other photographer. Requiring Taylor to photograph these events puts the individuals' interest in convenience or choice above Taylor's constitutionally protected rights. Therefore, at the very least, there is a genuine issue of material fact as to whether the MHRA can withstand strict scrutiny as applied in this case.

3. The MHRA fails intermediate scrutiny because the restriction on Taylor's First Amendment freedoms is greater than necessary.

Even if this Court finds that the MHRA is content neutral and should only be subject to intermediate scrutiny, the law is still invalid. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968). Under *O'Brien*, a law is constitutional if (1) "it is within the constitutional power of the government"; (2) "it furthers an important or substantial governmental interest"; (3) "the government interest is unrelated to the suppression of free expression"; and (4) "the incidental

restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 376.

Even assuming the first three requirements are met, the law still fails to meet the standard required under *O'Brien* because the law's restrictions on Taylor's First Amendment freedoms are greater than necessary. Taylor's constitutional right to free speech simply outweighs any individual's right to be served by a place of public accommodation. As Judge Davis concluded in the dissenting opinion below, the courts have assisted "in allowing public accommodations laws to impermissibly deny the constitutional rights of some," while promoting the access to services by others. R. at 46. This Court's "cases establish that the State cannot advance some points of view by burdening the expression of others." *Pac. Gas*, 475 U.S. at 20 (plurality opinion). Therefore, the public accommodation law violates Taylor's free speech rights.

II. THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE AND FREE EXERCISE CLAUSE PROHIBIT 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.

The Religion Clauses of the First Amendment, made applicable to the states through the Fourteenth Amendment, provide that the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. As applied in this case, Madison's public accommodations law violates both the Establishment Clause and the Free Exercise Clause. At the very least, there is a genuine issue of material fact that requires this Court to reverse the decision of the court of appeals.

A. The MHRA Violates the Establishment Clause.

The touchstone of the Establishment Clause "is the principle that the 'First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.'" *McCreary County v. Am. Civil Liberties Union*, 545 U.S. 844, 860 (2005) (quoting

Epperson v. Arkansas, 393 U.S. 97, 104 (1968)). As this Court has stated, the Establishment Clause "means at least this:"

> Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can *force nor influence a person to go* to . . . *church against his will* . . . . No person can be punished for entertaining or professing religious beliefs *or disbeliefs*, for church attendance *or non-attendance* . . . .

Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (emphasis added) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (internal quotation marks omitted)).

Thus, this "Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." *Wallace v. Jaffree*, 472 U.S. 38, 52–53 (1985). Here, the government forces Taylor to enter a house of worship against his will and participate in the wedding by taking photographs the religious ceremony. In requiring Taylor to photograph these events the state is "openly . . . participat[ing] in the affairs of a[] religious" ceremony and dictates minor details of the ceremony by requiring Taylor to be the photographer. In doing so, the government violates the most basic principle of the Religion Clauses of the First Amendment—that the government will remain neutral in religious matters.

1. Strict scrutiny applies because the MHRA discriminates among religions.

The choice to follow and practice a certain religion is treated the same as the choice not too follow or practice any religion at all. *Id.* at 52–53. Therefore, because the Establishment Clause guarantees religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith," the belief in no religion at all is treated as though it were a separate religion of its own. *Id.* at 52.

Furthermore, this Court has consistently held that "laws discriminating *among* religions are subject to strict scrutiny, and that laws affording a uniform benefit to *all* religions should be analyzed under *Lemon*." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (citations omitted) (quoting *Larson v. Valente*, 456 U.S. 228, 252 (1982) (internal quotation marks omitted)). Thus, because atheism is treated as if it were a religion of its own for purposes of the Establishment Clause, the Commission's enforcement of the law in this case discriminates *among* religions.

Taylor adopted and enforces the policy against photographing religious events for the specific purpose of avoiding the actual or apparent endorsement of religion in any way. R. at 15. And in requiring Taylor to photograph religious events in places of worship, this is exactly what the Commission is forcing Taylor to do. It requires him to support and participate in religious activities, and this unjustified favoritism of the religious customers' beliefs over Taylor's beliefs effectively constitutes a governmental discrimination among different religions.

If this Court concludes that there is no independent violation of the Free Speech, Establishment, or Free Exercise Clauses of the First Amendment, the fact that all of these clauses are implicated in this case requires that this Court apply strict scrutiny in its review of the MHRA. In *Smith*, this Court explained that it has "held that the First Amendment bars application of a neutral, generally applicable law" in cases involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech." *Emp't Div. v. Smith*, 494 U.S. 872, 881 (1990). Therefore, even if this Court finds that Madison's law neutral and generally applicable, it still must be narrowly tailored to serve a compelling governmental interest.

Even assuming the law advances a compelling government interest, Madison cannot establish that requiring Taylor to photograph religious events is the least restrictive means of achieving that interest. The government "cannot advance some points of view by burdening the expression of others," and that is exactly what the Commission has done in this case. *Pac. Gas*, 475 U.S. at 20. Accordingly, the law cannot withstand strict scrutiny, and thus, it must be invalidated as applied in this case.

2. The MHRA is also unconstitutional under *Lemon*.

Even assuming strict scrutiny is not required in this case, application of the MHRA is also unconstitutional under *Lemon*. The *Lemon* test provides that "a governmental practice violates the Establishment Clause if it (1) lacks a legitimate secular purpose; (2) has the primary effect of advancing or inhibiting religion; or (3) fosters an excessive entanglement with religion." *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849 (7th Cir. 2012); *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

a. The purpose of the MHRA is not entirely secular because it inherently promotes a particular point of view in religious matters.

Lemon requires first that the law at issue serve a "secular legislative purpose." 403 U.S. at 612. This "purpose" requirement "aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Id.* While the purpose of Madison's accommodations law admittedly does not discriminate against atheists on its face, it does inherently possess the "intent of promoting a particular point of view in religious matters"—especially when applied in situations like the present case. *Id.* By prohibiting individuals from sincerely exercising their right to refrain from participating in religious events, the law in this case takes the side of religion. It requires

individuals who deeply hold beliefs contrary to organized religion to abandon that belief to accommodate individuals who do believe in and participate in organized religion. And this Court's "cases establish that the State cannot advance some points of view by burdening the expression of others." *Pac. Gas*, 475 U.S. at 20 (plurality opinion).

Furthermore, given the inherently expressive nature of activities such as photography, this intent becomes abundantly clear when the statute is applied in cases like this. The law inherently abandons neutrality and promotes a particular point of view in religious matters such as these. This purpose is constitutionally impermissible, and as such, the law fails the first *Lemon* requirement.

b. The primary effect of the MHRA results in a direct endorsement of religion and coerces Taylor to promote religious ideologies.

Lemon next requires that the law at issue not have the primary effect of advancing religion." 403 U.S. at 612. Under the "primary effect" prong of the *Lemon* test, it "is crucial that a government practice not have the effect of communicating a message of government endorsement . . . of religion." *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). As this Court has explained, "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to *support or participate in* religion or its exercise." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000). In other words, a law fails the "effects" analysis when "the government itself has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337.

The Commission not only endorsed religious practices by disregarding Taylor's deeply held beliefs in favor of religion, the state also imposed an absolute duty on Taylor to conform his business practices to the particular religious practices of others. The Commission's application of the law at issue here though goes even further. *Estate of Thornton v. Caldor, Inc.*, 472 U.S.

703, 710–11 (1985) (holding the statute had the primary effect of impermissibly advancing religion because the religious concerns of employees were favored over business practices and the inconveniences of other employees—protected religious beliefs were favored over inconvenience in the name of religious accommodation). The Commission places the inconveniences of potential customers over Taylor's constitutionally protected religious beliefs. In other words, Taylor must accommodate customers who refuse to find another photographer for their religious events, and he must do this at the expense of his own constitutionally protected beliefs—inconvenience is favored over protected religious beliefs in the name of religious accommodation.

As this Court has cautioned, "[a]t some point, accommodation may devolve into 'an unlawful fostering of religion,'" and that is exactly what has occurred in this case. *Amos*, 483 U.S. at 334–35 (quoting *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 145 (1987)). The Commission and the courts below have directly coerced Taylor into supporting and participating in religion by requiring him to photograph religious events in places of worship. In doing so, the government has violated the minimum guarantee of the Establishment Clause—that government may not coerce anyone to support or participate in religion or its exercise.

c. The MHRA fosters an excessive entanglement between the government and the practice of religion.

Lemon finally requires that the law at issue not entangle the government in religious activities. 403 U.S. at 615. In determining "whether the government entanglement with religion is excessive," courts "must examine the character and purpose 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." *Id.* The central concern is that "both religion and

government can best work . . . if each is left free from the other." *Am. Atheists, Inc. v. Port Auth.*, 760 F.3d 227, 244–45 (2d Cir. 2014).

In *Lemon*, this Court held that a number of programs providing government aid to religious schools violated the Establishment Clause because the level of "state inspection and evaluation of the religious content of a religious organization" involved in the programs was "fraught with the sort of entanglement that the Constitution forbids." 403 U.S. at 620. Likewise, the application of Madison's law in this case results in excessive entanglement between the Commission and the religious ceremonies at issue. By requiring Taylor to be the photographer at these weddings, the Commission and the courts below exceed the permissible level of state inspection and involvement in religion. The government is effectively dictating minor details of these religious events by requiring one photographer to provide services when there are several others that would be willing to. This level of entanglement is forbidden under the Constitution, and as such, the law fails the final requirement under *Lemon* and must be invalidated as applied in this case.

B. The MHRA Also Violates the Free Exercise Clause Because It Is Not a General Law of Neutral Applicability.

The MHRA violates Taylor's rights under the Free Exercise Clause of the First Amendment, and is therefore unconstitutional as applied in this case. The "free exercise of religion means, first and foremost, the right to believe and profess whatever" religious ideas one desires. *Smith*, 494 U.S. at 877 (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)). This "obviously excludes all 'governmental regulation of religious beliefs.'" *Id.* The government also may not "lend its power to one or the other side in controversies over religious" issues. *Id.* This Court has also repeatedly held that "the individual freedom of conscience protected by the First

Amendment embraces the right to select any religious faith or none at all." *Wallace*, 472 U.S. at 52–53.

In particular, the MHRA violates the Free Exercise Clause because it is not a "neutral law of general applicability." *Smith*, 494 U.S. at 879. Instead, it operates "in a context that lend[s] itself to individualized government assessment of the reasons for the relevant conduct." *Id.* at 884. If a law is neither neutral nor generally applicable, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993); *Smith*, 494 U.S. at 879–80. Madison's public accommodations law is not narrowly tailored to serve a compelling state interest. Again, even assuming the law serves a compelling state interest, it is not the least restrictive means of serving this interest due to the fact that there are a number of other photographers in the area that are capable of photographing the religious event at issue. Taylor does not discriminate on the basis of religion. Indeed, he has a strict policy prohibiting discrimination against both customers and employees because of their religion. Rather, Taylor only objects to being compelled to expressively re-convey religious ceremonies in places of worship. By allowing the commission to disregard Taylor's firmly held beliefs regarding religion in favor of two customers that refuse to look elsewhere for a photographer, the law directly "lend[s] itself to individualized government assessment of the reasons for the relevant conduct" at issue here. *Smith*, 494 U.S. at 884. The law therefore must be able to withstand strict scrutiny, and because it cannot, the MHRA violates the Free Exercise Clause of the First Amendment, especially as it has been applied in this case.

CONCLUSION

This Court should REVERSE and REMAND the judgment of the Fifteenth Circuit Court of Appeals for a trial on the merits.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

BRIEF CERTIFICATE

Team C certifies that the work product contained in all copies of Team C's brief is in fact the work product of the members of Team C only; and that Team C has complied fully with its law school's governing honor code; and that Team C has complied with all Rules of the Competition.

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TEAM C

APPENDIX TABLE OF CONTENTS

Page

APPENDIX "A"

U.S. Const. amend. I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

APPENDIX "B"

Statutory Provisions

42 U.S.C. §2000a(a) (2012)

"All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

Title II of the Madison Human Rights Act of 1967, Mad. Code Ann. § 42-101-2a, contains identical language. R. at 2. In addition, the Madison Human Rights Act further prohibits discrimination based on "race, color, religion, national origin, sex, disability, sexual orientation, gender identity or expression, socioeconomic status, political affiliation, or other protected classes." Mad. Code Ann. § 42-101-2a.