Brief on the Merits
No. 15-1245

IN THE SUPREME COURT OF THE UNITED STATES

JASON ADAM TAYLOR,

Petitioner,

v.

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

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

BRIEF FOR RESPONDENTS

Team L
Counsel for Respondents

QUESTIONS PRESENTED

I. 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.

II. 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 district court for the district of eastern Madison maintained subject matter jurisdiction in this action under 28 U.S.C. §1331 (2015), which grants district courts "original jurisdiction of all civil actions arising under the Constitution . . . of the United States." The district court granted Respondents' motion for summary judgment on July 13, 2015, and Petitioner timely appealed. (R. at 040). The Fifteenth Circuit Court of Appeals maintained subject matter jurisdiction to hear and affirm the appeal under 28 U.S.C. §1291 (2015). This Court has subject matter jurisdiction to grant writ of certiorari and hear the appeal from that judgment under 28 U.S.C. §1254 (2015).

STATEMENT OF THE CASE:

Petitioner Jason Taylor brought this 42 U.S.C. § 1983 action for deprivation of his First Amendment rights against Respondents, the members of the Madison Commission on Human Rights, as a result of an Enforcement Action that was brought against him and his closely held corporation, Taylor's Photographic Solutions, on September 15, 2014. R. at 003. As a result of an investigation of religious discrimination by a place of public accommodation, the Commission imposed an Enforcement Action resulting in a cease and desist letter, $1,000 fines for each week of the continued violation, and a threat of civil action if Taylor did not comply with Title II of the Madison Human Rights Act of 1967, Mad. Code Ann. § 42-101-2a, et seq. R. at 005. Holding that the Plaintiff, as a public accommodation entity, must provide services to all members of the public, the court granted the Commission's motion for summary judgment on July 13, 2015. R. at 012. The court further held that the state law does not violate the Freedom of Expression or Free Exercise and Establishment Clauses of the Constitution because it does not compel a religious message or contribute to the establishment of a religion. *Id.*

The Petitioner filed a timely appeal on November 12, 2015 seeking a reversal of the grant of summary judgment on the basis that the Madison Commission on Human Rights constitutes a violation of the First Amendment right to Free Speech, as well as the claim that requiring Taylor's Photographic Solutions to photograph religious weddings is equivalent to requiring him to practice a religion. R. at 040. The Fifteenth Circuit affirmed the District Court's grant of summary judgment holding that a public business may not "cloak" discrimination towards the public by invoking the "shield" of the First Amendment. R. at 043. The Petitioner timely filed a writ of certiorari, which this Court granted. R. at 047.

STATEMENT OF THE FACTS:

Petitioner James Adam Taylor, a self proclaimed "militant atheist," owns and operates a closely held corporation in Madison City, Madison called Taylor's Photographic Solutions. R. at 014, 017. Taylor owns ninety percent of the corporation, and his wife owns the other ten percent, though she exercises no control over management decisions of the company. R. at 014. Taylor's Photographic Solutions offers photography services to the public for events such as graduations, birthdays, and weddings. Because Taylor believes that "religion is a detriment to the future of humanity," despite being brought up in a Jewish and Catholic household, he refuses to photograph any event which is religious in nature, and has followed that policy since his store opened in 2003. R. at 014-16. Despite his assertion that he cannot support religion with his photography, which he regards as an artistic form of expression, Taylor will photograph weddings performed by religious leaders that are secular in nature, and will voluntarily attend religious services in houses of worship if they involve family members or friends. R. at 015-17.

On July 14, 2014, Patrick Johnson, adorned with a crucifix necklace, asked Mr. Taylor to photograph his wedding, to take place in a Catholic church. Taylor refused stating that he "didn't

like religion" and "didn't want to make it look good." Johnson stated that he believed this was discrimination, and Taylor responded by stating "[y]ou Christians never want anyone to make you do anything, but the moment someone tries it against you, you get flustered." R. at 035. Similarly, on July 22, 2014, Samuel Green, adorned with a kippah, asked Taylor to photograph his wedding which would be taking place in a synagogue. Taylor again refused, and when Mr. Green accused Taylor of religious discrimination, Taylor replied that religion is "a bunch of bunk" and asked Mr. Green to leave the shop. R. at 037. Both Mr. Johnson and Mr. Green felt that they had been deprived of Taylor's specific skillset on the basis of their religion, and both filed complaints with the Madison Commission on Human rights. R. at 036, 025.

The Commission commenced an investigation on July 31, 2014, and interviewed Esther Reuben, a former employee and Modern Orthodox Jew, as well as Ahmed Allam, a current employee and practicing Muslim, during the course of their investigation. R. at 026. Though she stated that Taylor always accommodated her religious needs, and even attended her son's bar mitzvah, Ms. Reuben reported that when discussing religion Taylor often rolled his eyes, made poorly timed jokes, and made inappropriate religious comments in her presence. R. at 031-32. She additionally reported that Taylor was livid about the 2014 *Hobby Lobby* decision and a few days after placed a sign in the window that read:

> 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.
>
> The management of this business holds no personal prejudice against any particular religion or followers of any religion. 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." R. at 033-34.

Mr. Allam similarly stated that Taylor was always accommodating of his religious needs, but still referred to religion as a "fairy tale" in his presence. R. at 029.

Taylor was contacted to file a position statement in response to the complaints, but refused to do so, and signed a waiver to this effect on August 12, 2014. R. at 025. The commission found that the accounts showed a general distaste for religion and "practices which show[ed] a pattern of discriminatory conduct against religious persons," in violation of Mad. Code. Ann. § 42-501, which prohibits unlawful discrimination by places of public accommodation. R. at 026, 013. On September 15, 2014 the Commission demanded "immediate abatement" of Taylor's discriminatory practices and a fine of $1000 per week since July 14, 2014 that the discrimination had been ongoing, to continue until abatement. R. at 026. Taylor contacted his lawyer, refused to pay any fine, and instead brought the instant action against members of the Madison Commission on Human Rights. R. at 021, 001.

SUMMARY OF THE ARGUMENT

This Court should affirm the grant of summary of judgment by the United States Court of Appeals for the Fifteenth Circuit and hold that enforcement of Title II of the Madison Human Rights Act of 1967, Mad. Code Ann. §42-101-2a, et seq. does not violate the Respondents' First Amendment rights under the freedom of expression and the free exercise and establishment clauses.

The Petitioner's claim that forced compliance with Madison's public accommodation law would result in a violation of his First Amendment right of free expression fails because this Court stated in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* that compelled speech occurs when an individual is engaged in expressive speech and is required to participate in inherent speech of the government or a third party. In order for conduct to be considered inherently expressive speech, the Court in *Spence v. Wash.* found that the activity must comprise of both intent to convey a message and the ability to be understood by its audience. When

Taylor's Photographic Solutions engages in the activity of taking photographs in exchange for money, the intent of the business is not to relay a specific personal message other than the message associated with customer's event. Further, even if Petitioner does wish to relay a message through its photographs, viewers will most likely not understand that message but instead will focus on what the customer intended- their specific event.

The First Amendment protection from compelled expression was first established by *West Virginia Bd. of Ed. v. Barnette*, and his been applied in two lines of cases: messages compelling a government message and those compelling a private party message. Petitioner's compliance with the public accommodation law in not discriminating against customers wishing to marry in church is not equivalent to the government mandating a specific message of an individual. Further, because Petitioner's business is not a private entity wishing to engage in specific communication, he is unable to claim that his intended communication would be affected if he was forced to allow his customers to choose churches as a venue for their photographed events.

Petitioner's religious protection claims must fail as well, as *Employment Div., Dept. of Human Resources of Oregon v. Smith* dictates that one may not use his religious beliefs to circumvent otherwise valid laws. In order to find that a law violates the Free Exercise clause, it must be designed to target religious beliefs or prohibit religious conduct, and place a burden on sincerely held religious belief. While Petitioner's Atheism constitutes a sincerely held religious belief, the Madison Public Accommodation Law is a neutral law of general applicability not intended to burden religion. Additionally, the burden placed on Petitioner in being required to enter a church is not substantial enough to outweigh Madison's interest in combatting discrimination in places of business, especially because Petitioner has entered houses of worship

of his own free will on numerous occasions.

The Enforcement Order enforcing the Madison law also does not violate the Establishment clause. This Court stated in *Lemon v. Kurtzman* that a law violates the Establishment clause if it lacks a secular purpose, has a principal effect that advances or inhibits religion, and fosters an excessive government entanglement with religion. The Madison Public Accommodation Law has a secular purpose in that it was designed to protect the citizens of Madison from discrimination, and its principal effect is to do just that. The law neither inhibits nor advances religion in that it treats business owners of all faiths, or lack there-of, equally. Additionally, Madison's law does not entangle government with religion more so than countless other laws that have been held constitutional. However, even if the Madison Public Accommodations Law failed these enumerated tests, it would still be found constitutional, as it is narrowly tailored to serve the compelling state interest of preventing discrimination.

ARGUMENT

I. The Application of the Public Accommodation Law, Which Prevents Petitioner from Discrimination in Providing Commercial Services to the Public, is a Content-Neutral Regulation because it does not Regulate Expressive Conduct and it does not Compel Speech, therefore it does not Violate the Free Speech Clause of the Constitution.

Taylor's Photographic Solutions claims that the enforcement of the public accommodation law, Title II of the Madison Human Rights Act of 1967, Mad. Code Ann. §42-101-2a, *et seq.* directly violates the free speech clause of the United State Constitution. The Respondents request that this Court affirm the grant of summary judgment by the United State Court of Appeals for the Fifteenth Circuit.

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. Const. amend. I. This "freedom of speech" includes the "right to refrain from speaking" as well as the right to refuse to convey the

government's message. *Wooley v. Maynard,* 430 U.S. 705 (1977) (holding that the state may not require vehicles to display the state motto "Live Free or Die.") However, this Court has stated that public accommodation laws that regulate the use of discrimination in the commercial context are likely considered constitutional. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995). *See also Roberts v. United States Jaycees,* 468 U.S. 609, 624-626 (1984); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-262 (1964).

Although Petitioner does not dispute that his photography business is a place of public accommodation as defined by Title II of the civil rights act of 1964, 42 U.S.C. §2000a, *et seq.*, the Petitioner argues that the enforcement of the public accommodation law compels the business to use the expressive art of his trade to convey a statement of approval regarding religion. *See Hurley*, 515 U.S. at 569 (holding that art and music may be covered by the First Amendment); *United States v. O'Brien*, 391 U.S. 367 (1968) (holding that "symbolic speech" may be protected by the First Amendment). The Petitioner claims that this statement would require him to speak in a way that he normally would not. *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988) (stating that "mandating speech that a speaker would not otherwise make necessarily alters the content of the speech.")

The argument that the Petitioner's forced compliance with the law is a violation of his First Amendment right of free speech fails on two fronts: (1) the ordinary conduct being regulated is not "inherently expressive" as to warrant protection by the first amendment, *Texas v. Johnson*, 491 U.S. 397, 406 (1989), and (2) it wrongly asserts that the regulation required by the public accommodation law sufficiently compels a specific message of that expressive conduct. *W. V. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (holding the requirement for students to recite the Pledge of Allegiance and to the salute the flag as unconstitutional.) In light of the

state's interest in prohibiting discrimination by places of public accommodation, the Supreme Court's precedent supports the grant of summary judgment on the grounds that the Title II of the Madison Human Rights Act of 1967 does not violate the Petitioner's freedom of expression.

a. **The Ordinary Conduct of Petitioner is not Inherently Expressive Speech and therefore does not Fall within Constitutional Protection**

The first step to determine whether expressive conduct is being compelled, as claimed by the Petitioner, is to first show whether the ordinary conduct of the Petitioner is sufficiently expressive. *See Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 437-38 (9th Cir. 2008). While it is "possible to find some kernel of expression in almost every activity a person undertakes," *City of Dallas v. Stanlin*, 490 U.S. 19, 25 (1989), this court has found that not all of those "kernels" are sufficient to bring it within the realm of First Amendment protection. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2013) ("it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was . . . carried out by means of language . . . .").

To determine whether conduct is "sufficiently imbued with the elements of communication to fall within the scope of the First and Fourteenth Amendments," this court must first examine two elements of the ordinary conduct: (1) intent to convey a message and (2) the likelihood that the receiving parties will understand the message. *Spence v. Wash.*, 418 U.S. 405, 409-410 (1974) (finding sufficient support to show that the message associated with the act of taping a peace sign to an American flag was both intentional and understandable).

However, establishing that conduct communicates does not automatically protect it from regulation, or render that regulation unconstitutional. *Rumsfeld*, 547 U.S. 47, 65-66 (holding that intending to express an idea is not sufficient to be labeled as speech.) In *U.S. v. O'Brien*, 391

U.S. 367, 376 (1968) this Court found that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." Id. (holding that burning of draft cards as an anti-war protest intentionally conveyed a message.)

i. Petitioner's conduct is not inherently expressive because Petitioner does not have intent to convey a message

Cases where the Court has found intent to convey a message are instances where the actor's ordinary conduct primarily relays a message. *See Hurley*, 515 U.S. at 569 (finding that marching in a parade in support of gay rights sufficiently contains intent to convey a message); *See also, Tinker v. Des Moines Ind.Cmty. Sch. Dist*, 393 U.S. 503 (1969) (holding that displaying an armband in protest of the Vietnam War was sufficient to show an intent to convey the message of discontent with the war.) In the cases of marching in parade and wearing an arm band as a protest, the primary intent of both is to relay a specific message: "parades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration." *Hurley*, 515 U.S. at 568, (*quoting* Susan G. Davis, Parades and Power: Street Theatre in Nineteenth-Century Philadelphia 6 (1986)).

However, cases where the Court has failed to find sufficient intent to relay a message are those where the activity is irrelevant to the alleged message, or the message is imprecise and not "particularized." *Jacobs*, 526 F.3d at 437-38 (wearing a uniform was not sufficiently "particularized" to the purported message of uniformity.) Similarly, courts have found that a "commercial enterprise consisting of a website where prospective parents post profiles for a fee" is not considered "expressive speech" because the website exists to sell prospective parents a

medium in which to share information about themselves. *Butler v. Adoption Media, LLC*, 486 F. Supp.2d 1022 (2007).

Recently, a New Mexico Supreme Court held that the intent of a photography studio in New Mexico that refused to photograph wedding ceremonies of same-sex couples, was not particularized enough to be expressive. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 68 (N.M.S.C. 2013). However, the court also stated that the business would be free to choose which photographs to display for advertisements. *Id.* In those instances, the court surmised, the owner would have discretion to choose which pictures were used for advertising and which were not.

The fact that a business is engaged in commercial activity does not automatically mean that it is not protected by the First Amendment. *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (holding that a business is entitled to the right to free speech.) However, *Johnson* establishes that in order to determine whether the conduct is expressive, it must be examined within "the context in which it occurred." 491 U.S. at 405. Similarly, a court in Colorado held that "the fact that an entity charges for its goods and services reduces the likelihood that a reasonable observer will believe that it supports the message expressed in its finished product." *Craig v. Masterpiece Cakeshop, Inc*., 2015 WL 4760453, at *12 (C.O. Ct. App. Aug. 13, 2015).

In the case of Taylor's Photographic Solutions, the intent of the owner is commercial. The conduct of taking photographs is analogous to the wearing of uniforms (*Jacobs*) and operating a website for customers (*Butler*) in that any expressive effect of the conduct is simply incidental and not particularized to the purported message. Taking photographs for the identified purpose of a customer is distinguished from participation in a gay rights parade (*Hurley*) or displaying an armband in protest of a war (*Tinker*) because the participants engage those activities primarily to relay a message. According to the Petitioner, while his photography is

expressive, that expression is solely related to the desire of the customers to convey the story of a specific event. R at 020.

The difference in a photography business' use of certain photos for advertising and providing services to the general public is that advertisement is intended to relay a message while providing services to a customer is not. If there is intent behind the photographs, that intent surely belongs to the customer rather than the photographer. The Petitioner would be free to choose which photographs to use for advertisement, and he could specifically choose to neglect the use of any pictures of a church wedding. Furthermore, the Petitioner would be free to use his photographs to promote a specific message of the business. Therefore, the act of taking pictures of a wedding does not contain the requisite intent to convey a specific message, but rather his later use, or even his customers' later use of those pictures would.

ii. Petitioner's conduct is not inherently expressive because it is not likely that the public will interpret a specific message in the pictures

In order for conduct to be considered expressive, the expressed message must easily be understood by the public receiving the message. *Spence*, 418 U.S. at 410-11. In a case decided by this Court involving a shopping center owner being required to allow expressive activities by others, the Court held that it was not likely that the expressive activities would be associated with the owner. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980). The Court further explained that because the owner was able to disassociate himself from those views, he was not being compelled to associate himself with that belief. *Id.*

Similarly, in *Rumsfeld*, law schools were required to allow military recruiters on campus or face a loss of Federal funds. 547 U.S at 65. The plaintiffs claimed that the forced inclusion of the military recruiters violated their First Amendment Rights. *Id*. The Court held that "nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing . . .

restricts what the law schools may say about the military's policies." *Id*. "We have held that high school students can appreciate the difference between speech [of] school sponsors and speech the school permits because [they are] legally required to do so, pursuant to an equal access policy." Id. (citing *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

Anyone viewing photographs taken by the petitioner will most likely not see any other message in those pictures aside from the celebration of that specific event. Similar to wearing uniforms in *Jacobs*, an observer of the photographs will not see a message of support of religion, as purported by the petitioner. Rather, the viewer will likely be similar to the high schoolers in *Mergens*, and the Law students described in *Rumsfeld*, in that they will be able to "appreciate the difference between speech" of the business owners and speech that is prescribed by the customer. *Rumsfeld*, 547 U.S. at 65. If law students have the ability to differentiate between speech required by anti-discrimination laws and sponsored messages, then surely adults engaged in ordinary commercial business can.

Finally, while photographs may be seen as inherently expressive, it is the subsequent use of those photographs that makes the message "particularized." *Spence*, 418 U.S. at 410. Any message that may be conveyed by the photographs will be the message of the customers, not the photography studio. Even if the Petitioner has intent to convey the message that "religion is the detriment to the future of humanity," that message will not likely be received by his customers. The Petitioner's business is not designed as an advertisement studio, but rather a place of public accommodation for customers to use the talent and expertise of the photographer to document their special event. Any message that is conveyed is meant only for the specific customers and those whom the customer chooses.

b. The Public Accommodation Laws do not Compel Taylor Photographic Solutions to Speak the Message of the Government or Third Party

This Court has long interpreted the First Amendment as providing protection from compelled expression, absent an important state interest. *Barnette*, 319 U.S. 624; *See also Boy Scouts of Am. V. Dale*, 468 U.S. 640 (holding that the freedom of expressive association may be overridden if regulations were adopted to serve compelling state interests having nothing to do with the suppression of ideas.) Under *Rumsfeld*, however, the Court held that protected compelled speech occurs when an individual is already engaged in expressive speech, and is required to participate in inherent speech of the government or a third party. *Id*. at 62. The compelled speech doctrine does not protect a person from laws which compel the individual "to engage in unwanted expression." *Elane*, 309 P.3d at 64. Rather, the compelled speech doctrine, as articulated in *Barnette*, generally applies to two lines of cases: (1) cases in which a law requires an individual to "speak the government's message," *See Wooley*, 430 U.S. at 715-17, and (2) cases where an individual is required to "to host or accommodate another speaker's message." *Rumsfeld*, 547 U.S. at 63.

This first line of cases establishes that an individual may not be forced to express a message of the government. In *Wooley*, the question for the court was "whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." 430 U.S. at 713. In holding the law unconstitutional, the court equated the requirement of vehicle owner to display the state motto to requiring the owner to "use their own private property as a 'mobile billboard' for the State's ideological message." *Id*. Similarly, the *Barnette* Court found that a law which required students to salute the American flag and recite the Pledge of Allegiance was compelling a specific expression in the students and

therefore a form of speech. 319 U.S. 624. The court held that "a ceremony so touching matters of opinion and political attitude may [not] be imposed upon the individual by official authority under powers committed to any political organization under our Constitution." *Id*. at 636.

In *Rumsfeld*, the Court held that the government was not mandating a specific message or speech, but was simply requiring that the law school provide the military with the ability to recruit on campus. *Id*. This Court stated that the requirement of allowing that sort of recruiting is a "far cry" from compelling the schools to adopt speech of the government. *Id*. The *Rumsfeld* Court further noted that this Court allows anti-discrimination laws in the public marketplace. *Id*. "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Id*. (Citing *R. A. V. v. City of St. Paul*, 505 U.S. 377, 389 (1992)). *Rumsfeld* further states that requiring law schools to allow recruiters on campus is "simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is." Id. The Court further acknowledged "neither limits what law schools may say nor requires them to say anything." *Id*. at 60. The schools in Rumsfeld were merely required to provide the same services to military recruiters that they would to any other recruiter. *Id*. at 61-62.

The fact that the government requires certain action in regards to a business' expressive conduct, such as taking photographs, does not mean the government is mandating the speech of the business. In requiring Taylor Photographic Solutions to provide services to people wishing to get married in a church, the government is not sending a message in support of religion. Rather, the government is simply ensuring equal treatment of its citizens.

The second line of cases that identifies compelled speech establishes that the speaker cannot be forced to "host or accommodate another speaker's message." *Rumsfeld*, 547 U.S. at 63. The Petitioner in the present case claims that being forced to photograph weddings that take place in a church would compel the petitioner to accommodate the message that they supported religion. While public accommodation laws regulating discrimination are generally constitutional, this Court has found constitutional problems with laws that involve private organizations, who are expressive in nature. *Hurley*, 515 U.S. at 566 (invalidating a law requiring a parade's inclusion of certain groups whose message was adverse to the beliefs of the parade organizers).

In *Hurley* the court stated that if a private entity is forced to accommodate the speech or message of another speaker, then "the communication produced by the private organizers would be shaped by all those protected by the law who wish to join in with some expressive demonstration of their own." 515 U.S. at 572-73. Similarly, the Court in *Boy Scouts* held that the Boy Scouts of America's freedom to express their individual message would be affected if they were forced to include a homosexual male as a scoutmaster. 530 U.S., at 655-59.

Compelling Taylor's Photographic Solutions to provide services to members of the public who desire to have photography taken at a church is analogous to the law in *Rumsfeld* which required law schools to permit military recruiters on campus. In the present case, there is no government-sanctioned message being required of the Petitioner; rather, the public accommodation law simply ensures that all members of the public may obtain photography services without being discriminated against based on their religion. The Petitioner is also not required to affirm or support religion, nor is the Petitioner forbidden from sharing his disdain of religion with the customers. Therefore, the Petitioner is not being compelled to express a

government-sanctioned or third-party message.

Not only is this case distinguished from *Barnette* (compelling of a government message) and *Hurley* (compelling of a private party message) because the speakers were private entities engaged in expressive conduct, it also trivializes the claims in those cases to equate having the desire to discriminate against certain customers with the desire to not be forced to speak a government mandated message. *Rumsfeld*, 547 U.S. at 62. As noted in *Elane*, commercial photography is not inherently expressive, and compelling a public accommodation entity, such as Taylor's Photographic Solutions, to comply with a law which requires service to individuals of a protected class, is not an invasion of their Freedom of Speech. Therefore, the Respondents requests that this court affirm the lower court's grant of Summary Judgment. *Id.*, 309 P.3d at 64.

II. The Enforcement of Madison's Public Accommodation Law Does Not Violate Petitioner's First Amendment Rights Under the Free Exercise and Establishment Clauses, as The Law is One of General Applicability, and Petitioner is Not Being Coerced or Disfavored in His Non-Religious Expression.

Much like Petitioner cannot utilize his constitutionally afforded freedom of expression to circumvent the public accommodations clause of Madison's Mad. Cod. Ann. § 42-501, he also cannot utilize the First Amendment's religious protections. The First Amendment dictates, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. While the constitution certainly provides a great deal of protection, which has been amplified by laws such as §42-501 and other laws emulating the federal Restoration of Religious Freedom Act (hereinafter, RFRA), one may not assert religious freedom to rob the state of its ability to generally regulate conduct. *See Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872, 878-79 (1990) ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."); *Michigan Catholic Conference and*

Catholic Family Services v. Burwell, 755 F.3d 372 (6th Cir. Ct. App. 2015) ("[RFRA] does not give parties license to break the law.").

Petitioner contends that his "deeply held belief that religion is a detriment to the future of humanity" precludes him from entering places of worship while engaged in his photography business Taylor's Photographic Solutions, a closely held corporation entitled to share in the religious protections of its owner. *See generally Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014). R. at 016. As previously stated, Petitioner does not dispute that his photography business is a place of public accommodation. He alleges, however, that being required by the public accommodations clause of Title II and the Madison Human Rights Commission to enter and take photographs within places of worship is coercive in violation of the Free Exercise Clause. He additionally asserts that the Commission's enforcement order prioritizes religion over "non-religious activities" such that it violates the Establishment Clause as well. R. at 009. Petitioner's claims should ultimately fail, however, as the enforcement of this law of general applicability does not substantially burden his sincerely held beliefs either through coercion or favoritism, and even if it did, enforcement of the public accommodations clause complies with § 42-501's requirement of least restrictive means to further a compelling governmental interest – prohibition of public discrimination.

a. Madison's Public Accommodation's Law is of General Applicability and Does Not Infringe Upon Petitioner's Free Exercise

Petitioner cannot successfully assert a violation of the Free Exercise clause because the Enforcement Order compels a law of general applicability. In order to successfully establish a claim against Jefferson and the Commission, Petitioner must demonstrate that the Enforcement Order "discriminates against some or all religious beliefs or regulates or prohibits conduct

because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532 (1993). Free Exercise Clause violations depend on a "showing of direct governmental compulsion" placing a burden upon a sincerely held religious belief or system of beliefs. *Engel v. Vitale*, 370 U.S. 421, 430 (1962). A neutral law or policy of general applicability generally lacks the requisite intent on the part of the government to establish a Free Exercise violation. However, where RFRA or a state equivalent applies, such as here, the government may not substantially burden the free exercise of religion even if the burden results from a rule of general applicability. *Burwell,* 134 S.Ct. 2754.

i. Atheism constitutes a sincerely held religious belief that invokes protections under the Free Exercise clause of the First Amendment

While Petitioner without a doubt has a set of sincerely held beliefs which are entitled to the respect and deference of the court, the effect of Madison's law of general applicability does not constitute a sufficient burden on Petitioner's beliefs to require heightened scrutiny. In determining whether a Free Exercise violation exists, "courts must not presume to determine . . . the plausibility of a religious claim," *Smith,* 494 U.S. at 887. Instead must "determine whether the line drawn reflects 'an honest conviction'" *Id.* (quoting *Thomas v. Review Bd. Of Indiana Employment Security Div.,* 450 U.S. 707, 716 (1981)). Petitioner is a self-described "militant atheist" who holds a genuine belief that "organized religion is an impediment to the furtherance of humanity and civilization." R. at 017. Courts have held that religious belief requires neither recognition of a higher power nor a traditional religious organization. *See generally, Torcaso v. Watkins,* 367 U.S. 488 (1961); *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829 (1989). Some courts have gone so far as to explicitly state that atheists should be acknowledged equally under laws implicating religion. *See Streeter v. Brogan,* 274 A.2d 312 (N.J. Ch. Div.

1971) ("A statute against discrimination . . . should protect an atheist as well as a member of a religious faith"). While Petitioner's particular dogma is not what comes to mind initially when considering sincerely held religious belief, his views must be equally as respected under law.

ii. The Madison Public Accommodation Law is a neutral law of general applicability

Petitioner cannot rightly assert, however, that the public accommodation provision of § 42-501 from which the Enforcement Order at issue has originated has underlying discriminatory intent. To discern whether a law is neutral, the text must be analyzed to determine whether the law is discriminatory on its face. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 533. " A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language of context." *Id*. The Madison statute states in pertinent part, "[n]othing in this section shall be construed to permit unlawful discrimination in any form by . . . any place of public accommodation." Mad. Cod. Ann. § 42-501(e). The plain language of the statute is entirely devoid of language with religious connotations, unlike the discriminatory statute in *Church of the Lukumi Babalu Aye, Inc.,* which contained words specific to Santeria such as "sacrifice" and "ritual." *Id.* at 534. Additionally, upon further examination, the statute does not contain "subtle departures from neutrality" or "covert suppression of particular religious beliefs" *Id.* (quoting *Gillette v. United States,* 401 U.S. 437, 452 (1971); *Bowen v. Roy, supra,* 476 U.S. 693, 703 (1986). The pertinent portion of the statute simply places a blanket ban on discrimination of any kind in places of public accommodation, regardless of the particular beliefs of the proprietor, much in the same way as laws prohibiting discrimination based on sexual orientations do. *See generally Craig v. Masterpiece Cakeshop, Inc*., 2015 WL 4760453 (C.O. Ct. App. Aug. 13, 2015).

iii. The balancing test weighs heavily in favor of Madison's interest in preventing discrimination

Even in the face of the statute's general applicability, Petitioner contends that the Enforcement order places a substantial burden on his sincerely held beliefs. The present instance is analogous to the court's decision in *Otero v. State Election Bd. Of Oklahoma,* 915 F.2d 738, 740 (10th Cir. Ct. App. 1992), in which the court held that mere presence in a church does not require one "to attest to the nature of his religious beliefs." In *Otero,* an atheist man declared that being required to cast his ballot in a church was a violation of the Free Exercise Clause of the First Amendment and substantially burdened his beliefs. This Court stated that the burden was 'so slight that it [did] not begin to outweigh the interest of the state in having available to it the additional polling places." *Id.* When engaging in this balancing test, it is difficult in this case to argue that going into a church during working hours is so great a burden on Petitioner as to outweigh the State's interest in combatting discrimination. The case is made stronger when one considers that Petitioner's dedication to abstaining from houses of worship is not so strong as to "occupy a place in [his] life . . . parallel to that filled by the orthodox belief in God." *United States v. Seeger*, 380 U.S. 163, 166 (1965). In his own affidavit, Petitioner testified to attending various services in religious settings for family and friends, and a coworker even attested that his no-church policy seemed to spring from a place of revenge in response to the *Hobby Lobby* decision. R. at 017, 033.

While Petitioner can rightly assert that his opposition to organized religion constitutes a religious belief worthy of protection, his arguments against the statute ultimately fall flat. The Enforcement Order stems from a law of general applicability, and a desire for retaliation in only certain circumstances does not constitute an honest religious conviction that may be substantially

burdened if he is required to take photographs in a church.

b. Madison's Public Accommodation Law Does Not Show Favor or Entangle With Religion in Violation of the Establishment Clause

Petitioner arrives at the same result in asserting that Madison's public accommodation provision constitutes an Establishment Clause violation. In *Lemon v. Kurtzman*, this Court dictated that there are three evils "against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Commission*, 392 U.S. 664, 668 (1970)). At issue in this instance is sponsorship – that is, endorsement of established religion over a lack thereof. In order for Petitioner to demonstrate that the Commission has violated the Establishment Clause, he must demonstrate (1) that the statute lacks a "secular legislative purpose," (2) that its "principal or primary effect" either advances or inhibits religion, or (3) that the statute fosters an excessive entanglement with religion. *Id.* at 612-613.

i. The Madison Public Accommodation Law exists for the secular purpose of combatting discrimination, and elimination of discrimination is its principal effect

The public accommodation clause of the Madison statute clearly has a secular purpose – to combat discrimination of potential customers by proprietors. Public accommodation laws 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,* 515 U.S. at 572. The court has a long history of enacting public accommodations laws for the purely secular purpose of protecting its citizenry, and this is the principal effect of the Madison statute at issue. An incidental encumbrance on acts that discriminate against religious practices does not give rise to invoke

constitutional protection. *See Newman v. Piggie Park Enters., Inc.,* 256 F. Supp. 941, 945 (D.S.C. 1966) ("This court refuses to lend credence or support to [defendant's] position that he has a constitutional right to refuse to serve members of the Negro race in his business establishment upon the ground that to do so would violate his sacred religious beliefs.") *aff'd in relevant part and rev'd in part on other gounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968); *See also Bob Jones Univ. v. U.S.* 461 U.S. 574, 604 (1983) (stating that government has a compelling interest in eliminating racial discrimination in private religious educational institutions).

ii. The Madison Public Accommodation Law in no way fosters an excessive government entanglement with religion

The Madison statute on which the enforcement order is based also does not foster an excessive entanglement with religion. When analyzing government entanglement, one must "weigh[] the governmental interests and motives and the extent to which the action might promote religion." *Otero,* 915 F.2d at 740**.** This balancing test requires an examination of "the character and purpose of the institutions that are benefitted, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority." *Lemon,* 403 U.S. at 615. As previously discussed, the institutions that are benefitted in this situation are underrepresented minorities and protected classes, who have historically been vulnerable to discrimination.

The present case is a pure example of the state choosing to protect its vulnerable citizens. Additionally, the only aid that the state provides is its enforcement power, as evidenced by the Enforcement Order at issue. The fines collected to encourage compliance do not go to supporting any particular religious sect, nor is the law disproportionately applied to favor one religion. The

prohibition against discrimination in public accommodation does not create any new relationship with religious organizations, nor does it damage any existing relationships, as it applies equally to all religious sects, as well as those who reject religious belief. In fact, the Madison law entangles government with religion significantly less than other laws that have been found constitutional and appropriate. *See generally Mitchell v. Helms*, 530 U.S. 793 (2000) (holding that state providing educational materials to parochial schools did not violate establishment clause) *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (holding that private parties may display religious symbols on grounds of state capitol); *Walz . Tax Commision,* 392 U.S. 664 (holding that state providing real property tax exemptions to religion institutions did not violate establishment clause).

c. Even if the Madison Public Accommodation Law Fails the Test for the Free Exercise or Establishment Clause, the Law is Still Constitutional as it Passes Strict Scrutiny

If a law is found to substantially burden free exercise or entangle government and religion, it may still pass muster if it is "justified by a compelling interest and is narrowly tailored to advance that interest. *Church of the Lukumi Babalu Aye, Inc.,* 508 U.S. at 533. Madison's RFRA equivalent, §42-501 closely tracks this language, prohibiting the burden of a sincerely held religious belief absent a "compelling governmental interest in infringing the specific act" and utilization of the "least restrictive means to further that interest." Mad. Cod. Ann. § 42-501(d).

As previously discussed, any burden placed on religion by the Madison Public Accommodation Law "is essential to accomplish an overriding government interest" of discrimination prevention. *United States v. Lee*, 455 U.S. 252, 257 (1982). In fact, this Court has

held that "Public accommodations laws 'plainly serv[e] compelling state interests of the highest order.'" *Board of Directors of Rotary Intern. v. Rotary Club of Duarte,* 481 U.S. 537, 549 (1987). The law is also narrowly tailored in that unlike the law in *Church of the Lukumi Babalu Aye*, *Inc.* it is neither over nor under inclusive. 508 U.S. at 522. The Madison Law prohibits only the actions necessary for preventing discrimination – exclusion based on religion, but does not prevent Taylor in any way from exercising his "constitutional right to espouse the religious beliefs of his own choosing" in his place of business. *Newman v. Piggie Park Enters., Inc.,* 256 F. Supp. at 945. Additionally, the law does not prohibit discrimination in public accommodations by only Atheists – it encompasses all religious sects and prohibits discrimination equally. Because the interest of the Madison Commission is one that has been deemed compelling by this Court, and its law is narrowly tailored to accommodate that interest, the Public Accommodation Law would still be constitutional.

Public policy requires that this Court affirm the grant of summary judgment from the court below and find that the Madison public accommodation law complies fully with the Free Exercise and Establishment Clauses of the First Amendment. Any other result entertains the notion of a country where discrimination is once again the law of the land, setting American jurisprudence back at least forty years, all in the name of "religious freedom." There are no material facts demonstrating that Petitioner's claims are not, as the lower court stated, "a discriminatory horse of a different color."

CONCLUSION

In conclusion, there is no genuine issue of material fact to demonstrate that Petitioner's First Amendment rights have been violated by the enforcement of Madison's public accommodation law. The law does not infringe upon Petitioner's right to free speech. It neither regulates expressive conduct, as photography is not inherently expressive speech, nor does it compel speech either by the government or a third party, as petitioner is not required to advocate a position on religion. Additionally, the public accommodation law does not infringe upon Petitioner's constitutionally guaranteed freedom of religion. There is no burden placed upon Petitioner's free exercise of his sincerely held beliefs, and the law does not endorse any established religion over a particular sect or a lack thereof. Instead, the Madison public accommodation law ensures equal treatment to members of protected classes who have faced a history of discrimination, an interest that has compelled this court on nearly countless occasions. For the foregoing reasons, we ask that this court affirm the decision below in granting summary judgment in favor of Respondents.