Docket No. 15-1245

In the

Supreme Court of the United States

MARCH TERM, 2016

Jason Adam Taylor,

Petitioner,

Tammy Jefferson, et al.

Respondents,

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

BRIEF FOR RESPONDENT

Team N, Counsel for Respondents

QUESTIONS PRESENTED

1. Does enforcement of the State of Madison's antidiscrimination statute violate Petitioner's free speech rights under the First Amendment, even if Petitioner's photography does not qualify as expression and Madison has a compelling interest in eliminating discrimination against protected classes?

2. Does enforcing Madison's antidiscrimination law violate Petitioner's rights under the Free Exercise and Establishment Clauses of the First Amendment when prohibiting his discriminatory conduct will require him to provide business services at religious events, and may require him to enter places of religious worship?

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[1] As permitted by Supreme Court Rule 24(2), Respondents have elected to forgo including their own sections regarding parties to the preceding, citation of opinions and orders below, constitutional and statutory provisions involved, and the basis of jurisdiction. Respondents are satisfied with those portions of Petitioner's brief.

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[2] The public-domain cite is omitted throughout because it was not included in the 19th edition of the Bluebook, which is the edition required by an email clarifying the competition rules sent by Ms. Hampton on January 27, 2016, to all competitors and coaches.

STATEMENT OF THE CASE

Jason Taylor, Petitioner, sued the Madison Commission on Human Rights ("the Commission") alleging that enforcing the Madison Human Rights Act of 1967 ("the Act") against him and his business, Taylor's Photographic Solutions ("TPS"), violates the religion and Free Speech Clauses of the First Amendment. (R. at 2.) Taylor is an atheist who believes that "religion is a detriment to the future of humanity." (R. at 16–17.) Despite his convictions, Taylor accommodates the religious needs of all TPS employees and attends religious events for friends and family. (R. at 4, 15–18, 27, 31–32.) But since TPS opened in 2003, Taylor has prohibited his employees from photographing religious events because he does not want to "mak[e] religion look good." (R. at 14–15, 33.) In June 2014, Taylor posted a sign vehemently attesting to his beliefs and explaining that TPS would not photograph any religious event. (R. at 4.)

Despite this effort to ward off religious persons, both Patrick Johnson and Samuel Green solicited TPS's services in July 2014 for their religious weddings. (R. at 4, 18–20, 36.) Because the weddings would take place in a Catholic church and a synagogue, Taylor refused them service. (R. at 4, 35–37.) Each then filed a complaint with the Commission. (R. at 4, 25.) The Commission notified Taylor of the complaints, and informed him that he could "file a position statement, have an attorney, and engage in an administrative hearing." (R. at 8, 20–21.) But Taylor refused all three options. (R. at 21, 25.) The Commission found "compelling evidence of discrimination," fined Taylor for each week the sign was in place, and demanded that he take the sign down and cease his religiously discriminatory practice or face a civil-enforcement action (collectively "the Enforcement Action"). (R. at 26.) Taylor concedes that TPS is a public accommodation subject to the Act, and has never contested the Commission's findings. (R. at 4, 11.) Taylor refused to comply with the Enforcement Action and this suit followed. (R. at 21.)

SUMMARY OF THE ARGUMENT

I.

The Fifteenth Circuit properly found that enforcement of Madison's antidiscrimination statute did not violate Taylor's First Amendment right to free speech. Taylor's photography is not used to convey any particularized message, nor do customers interpret Taylor's work as anti-religious. Thus, Taylor's photography is not "expressive" and does not fall within the First Amendment's protective scope. Even if Taylor's photography is expressive, the Act does not violate the First Amendment because it does not compel him to display or accommodate any message with which he disagrees, and does not force him to expressively associate with religious individuals. Madison has a compelling interest in eliminating discrimination. Moreover, the Act itself does not mandate what Taylor may say or not say, but rather regulates his business conduct—in this case, his discrimination against religious persons.

II.

The Fifteenth Circuit properly found that enforcing Madison's antidiscrimination law does not violate the Free Exercise or Establishment Clauses. Taylor fails to show how the Enforcement Action burdens the practice of his deeply held beliefs, thus the Free Exercise Clause does not apply. But even if it did apply, Taylor's claim would fail in light of the Act's neutrality and general applicability, as well as Madison's compelling interest in combatting discrimination in public accommodations. Moreover, neither the Act nor the Enforcement Action violate the Establishment Clause—both are secular in content and purpose, and neither advances or inhibits religion. Though it is understandable that Taylor would dislike the prospect of photographing religious events, nothing in the Act or Enforcement Action infringes on his rights under the religion clauses. Discomfort is the price we pay for a vibrant, plural society.

ARGUMENT

I. MADISON'S PUBLIC ACCOMMODATION LAW DOES NOT VIOLATE THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT BECAUSE TAYLOR'S CONDUCT DOES NOT QUALIFY AS SPEECH AND THE ACT DOES NOT COMPEL HIM TO CONVEY A CERTAIN MESSAGE OR EXPRESSIVELY ASSOCIATE WITH CERTAIN PERSONS.

Pursuant to the First Amendment to the United States Constitution, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. 1. Supreme Court precedent holds that the Fourteenth Amendment similarly protects these First Amendment rights from state intrusion. *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). Moreover, it is universally accepted that the right to free speech consists of "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This free-speech right, however, is not absolute. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). Indeed, the Supreme Court has noted that nondiscrimination laws generally do not violate the First Amendment because such laws do not "target speech," but rather prohibit the act of discriminating against persons of protected classifications. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995).

A. Taylor's Wedding Photography Does Not Constitute "Expression" Protected by the First Amendment.

The primary step when assessing free speech violations is to determine whether or not the regulated medium or conduct is "expressive" and subject to First Amendment protections. *Id.* at 568. It is an obvious point, then, that if a party's conduct is not expressive that party cannot assert any First Amendment rights. *Id.* Indeed, in some circumstances conduct that might otherwise qualify as expressive "may not be intended to express a message" and therefore not fall under the First Amendment. *Id.*

For its part, "[p]hotography . . . that has a communicative or expressive purpose enjoys some First Amendment protections." *Gilles v. Davis*, 427 F.3d 197, 212 n.14 (3rd Cir. 2005). However, the mere fact that some photography is expressive does not mean that all photography is expressive conduct that falls under the First Amendment. *Elane Photography, LLC v. Willock*, 2012-NMCA-086, ¶ 24, 284 P.3d 428, 438, *aff'd*, 2013-NMSC-040, 309 P.3d 53. Thus, the threshold question is whether the photography is sufficiently expressive to trigger First Amendment protections. *Texas v. Johnson*, 491 U.S. 397, 437–38 (1989). For conduct to be sufficiently expressive, "an intent to convey a particularized message" must be present and the "likelihood [must be] great that the message would be understood by those who viewed it." *Id.* at 404.

In *Elane Photography*, the New Mexico Court of Appeals held that Elane's wedding photography did not convey any particular message to the public at large, but merely served as a conduit for its clients' expression. 2012-NMCA-086, ¶ 27, 284 P.3d at 439. The court pointed out that Elane's business conduct of taking pictures for clients was not so expressive as to warrant First Amendment protections. *Id.* ¶ 28, 284 P.3d at 439. Absent any form of "explanatory speech," the court doubted whether a member of the public could infer any message from something so innocuous as wedding photography. *Id.* ¶ 28, 284 P.3d at 440.

Taylor's wedding photography conveys no message, and, absent any kind of explanatory speech, it is highly doubtful that customers could infer a message from his company's work. The record for this case gives no indication that clients visit, or have visited, Taylor's Photographic Solutions specifically because of Taylor's anti-religion views. Indeed, it appears customers' only motivation for soliciting business from TPS is that the company provides photography services for special events. (R. at 35–37.) There is no evidence that potential customers sought out—or

specifically avoided—TPS because of Taylor's anti-religion convictions. (R. at 17–20.) Equally telling is that Johnson and Green (both religious practitioners) separately entered TPS to determine whether the business could photograph weddings at a church and a synagogue. (R. at 35–37.) In each case, both customers looked for alternative photographers only after Taylor informed them that he did not photograph religious events. (R. at 19–20.)

These facts unequivocally indicate that Taylor's photography does not constitute "expressive conduct" that merits First Amendment protections. First and foremost, there is nothing in the record that indicates Taylor intended for his photography to display an anti-religion message. Though Taylor's private views on religion are well documented, there is no evidence to suggest that he wished to express these views in the photographs provided for his clients. (R. at 14–21.)

Even assuming Taylor intended to convey some anti-religion message in his photography, the facts show that third parties—in this case, customers—did not discern such a message from Taylor's work. Had Taylor explained the message he wanted his photography to convey, it is quite possible that people such as Johnson and Green would not have attempted to solicit TPS's services. Surely a religious person would not bother seeking out the services of a photographer whose work contained a very clear anti-religion message.

Far from expressing any "particularized message" regarding religion, TPS's photography merely serves as a conduit for its clients' own expression, in this case, of a time well spent. This is the message potential clients perceive, if they perceive any message at all. Any preference customers may have for TPS over its competitors is strictly business-related. (*See* R. at 20, 30, 36.) For instance, TPS may provide better rates, better service, better photography, or any number of other factors that make it preferable to comparable businesses. The facts show that

customers do not choose TPS because of some TPS-specific message. Therefore, TPS's photography is not sufficiently expressive to warrant First Amendment protections.

B. Madison Has a Compelling Interest in Eliminating Discrimination and the Act Does Not Compel Taylor to Adopt the Government's Views or Express the Views of a Third Party, Thus Enforcing the Act Does Not Violate the First Amendment.

The most basic principle underlying the First Amendment right to free speech is that a speaker not only has the right to tailor his speech to "expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley*, 515 U.S. at 573. That is, a speaker has as much a right to say something as he does to not say anything at all. *Wooley*, 430 U.S. at 714. Consequently, the general rule is that the government (be it state or federal) cannot either compel a speaker to express certain messages, or compel a speaker to accommodate (or host) the message of a third party. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Hurley*, 515 U.S. at 575.

Compelled speech falls into two case-law categories. The first category proscribes the government from requiring that an individual speak the government's message. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006). Cases that fall within this first form of compelled speech are circumstances in which the government requires affirmation of certain beliefs or expression of certain views to the public. *See, e.g.*, *Barnette*, 319 U.S. at 627 (government required students to salute American flag and recite Pledge of Allegiance); *Wooley*, 430 U.S. at 707 (state required that all license plates display state motto).

The second group of compelled speech cases addresses a scenario in which the government mandates that a speaker accommodate another person's message. *Hurley* embodies this second line of cases with the proposition that the government cannot force a private speaker to publicly display a message with which the speaker does not wish to be associated, and which

observers might construe as the speaker's own. 515 U.S. at 572–73. In that case, the Court found Massachusetts violated the right to free speech when it required a privately organized parade to host a gay, lesbian, and bisexual group (known as "GLIB"). *Id.* at 572. This Court found, first, that the parade itself did not qualify as a "public accommodation," and, second, that the presence of GLIB would change the expressive content of the parade. *Id.* at 573.

Regardless of its variety, the proscription against compelled speech has its limits. As this Court has noted, the government may regulate certain "communicative conduct" if it can demonstrate a sufficiently compelling interest "unrelated to the suppression of the message" and if the impact on expression is no more than necessary to achieve that purpose. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Specifically, the Court has found that antidiscrimination laws do not violate the First or Fourteenth Amendments because such laws do not "target speech," but rather prohibit "the act of discriminating against individuals in the provision of publicly available goods, privileges, and services." *Hurley*, 515 U.S. at 572. Courts have applied this rule to uphold antidiscrimination statutes, noting in particular that businesses cannot assert First Amendment protections to avoid serving persons whose conduct is "inextricably tied" to a protected classification. *Lawrence v. Texas*, 539 U.S. 558, 583 (2003); *see also Craig v. Masterpiece Cakeshop, Inc.*, No. 14CA1351, 2015 WL 4760453, at *5 (Colo. App. Aug. 13, 2015) (rejecting argument that antidiscrimination statute violated First Amendment because it would force endorsement of same-sex marriage); *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶¶ 44–47, 309 P.3d 53, 69–70 (same).

In *Elane Photography*, the New Mexico Supreme Court found that the state's antidiscrimination statute did not regulate expressive conduct (in this case taking wedding photographs), but instead the business conduct of the plaintiff. 2013-NMSC-040, ¶ 41, 309 P.3d

at 68. While Elane Photography asserted that forcing it to take pictures of same-sex marriages would compel expressive conduct in violation of the First Amendment, the court disagreed stating that the statute did not force Elane to accommodate a pro-same-sex-marriage message. *Id.* ¶¶ 42–43, 309 P.3d at 68. Rather, the statute merely governed Elane's interactions with customers and forbade Elane from discriminating against those customers on the basis of a protected classification. *Id.* ¶ 43, 309 P.3d at 68. Insofar as the state statute intruded on First Amendment freedoms, the court found a sufficiently compelling state interest in eliminating discrimination against protected classes to justify any slight incursion. *Id.* ¶¶ 41–43, 309 P.3d at 68. Finally, the court doubted that customers would infer approval of same-sex marriage from photographs of same-sex weddings. *Id.* ¶ 47, 309 P.3d at 69. In any case, the court reasoned that Elane could easily employ explanatory speech to disavow any messages it thought its photography might implicitly or explicitly convey. *Id.* ¶ 47, 309 P.3d at 70.

Title II of the Madison Human Rights Act of 1967 states that public accommodations cannot discriminate on the basis of "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 (emphasis added). For its part, TPS has a professedly "strict policy" of not photographing any event that is "religious in nature." (R. at 14–15.) The record also documents two specific occasions when Taylor turned away customers who sought his services for weddings, one in a Catholic church, one in a synagogue. (R. at 19–20.)

1. Religious Events Are Intrinsically Linked to the Practice of Religion, and Madison Has a Compelling Interest in Eliminating Discrimination on the Basis of Religious Practice.

Holding a wedding in a religious building—be it a church, synagogue, or otherwise—is a strong indication that the service will be religiously oriented, and that the participants in that

service will be religiously inclined. It is tautological that those who celebrate religious events are religious themselves, for it would be an odd circumstance indeed if a non-believer wished to hold a religious service in a religious building. Thus, Taylor's policy of refusing to take photographs at religious services was not an exercise of his First Amendment rights, but instead an invidious act of discrimination against religious people.

One cannot separate religious services from religious belief any more than one can separate same-sex marriage from homosexuality. By refusing to take pictures of religious events, Taylor openly gave preference to non-practitioners and discriminated against people of religious convictions in direct violation of Madison law. This Court has previously ruled that states have a compelling interest in eliminating discrimination against protected classes. Because religion is a protected classification, Madison has a compelling interest in applying its antidiscrimination law to prevent Taylor from discriminating on the basis of religious practice.

2. Enforcement of Madison's Antidiscrimination Statute Would Not Compel Taylor to Adopt a Government Message or the Views of Third Parties.

Madison's interest in eliminating discrimination against protected classes does not extend to any kind of limitation on Taylor's First Amendment right to free speech. Indeed, the goal of the Act is not to regulate the communicative conduct of public accommodations, but rather the *business conduct* of those public accommodations.

This is a simple policy. The State of Madison does not compel Taylor to profess a particular government-approved message or host any particular viewpoint; it merely proscribes certain discriminatory conduct. *See* Mad. Code Ann. § 42-101-2a. In this way, the case at hand is distinguishable from both *Hurley* and *Wooley*, and parallel to *Elane Photography*.

Unlike *Wooley*, in which a New Hampshire statute forced all citizens to display the state motto on their license plates, Madison's law does not demand that Taylor profess (or display)

any particular message. 430 U.S. at 715. And, unlike *Hurley*, the Madison statute does not force Taylor to accommodate the message of a group with which he disagrees or whose message he would prefer not to disseminate. Instead, the Act closely resembles the New Mexico statute at issue in *Elane Photography*. The law does not—nor would it—compel a business, including TPS, to accommodate a message with which it fundamentally disagrees. Quite the contrary, the Act preserves Taylor's First Amendment right to espouse whatever message he chooses. In fact, the law simply imposes the same rule on TPS as it does on every other public accommodation, namely, that the business operate and interact with clients in a non-discriminatory matter.

This distinction is important and separates this case and *Elane Photography* from the likes of *Hurely* and *Wooley*. The Act does not tell Taylor what he must (or must not) say, but rather mandates that he treat each customer in a fair, non-discriminatory manner. Governments have a compelling interest in ensuring this kind of equal treatment and it is widely accepted that statutes enforcing this policy do not compel speech in violation of the First Amendment. Thus, the Madison statute does not compel Taylor to express a government message or accommodate the views of other persons.

3. It is Highly Unlikely that Customers of TPS Will Interpret Photographs of Religious Events as Acceptance of Religion Overall.

As the record shows, Johnson and Green sought out Taylor's services even after he put up a sign displaying his (and his business's) views regarding religion. (R. at 17–20.) With this in mind, one could hardly say that photographing religious weddings would have any impact on customers' perceptions of TPS or its views. In any event, the *Elane* court provides a ready-made solution if Taylor genuinely fears his photography will express approval of religion: explanatory speech. Because the Act does not regulate what Taylor may or may not say about religion, he is free to post his views about religion in any way he sees fit and may even place disclaimers on his

photographs of religious events stating, for example, that their content in no way represents the views of TPS. Taylor is free to express his views in whatever way he wants, he simply cannot use his First Amendment rights to discriminate against members of protected classes.

C. Mandating that Taylor Photograph Certain Weddings Would Not Force Him to Expressively Associate with Religious Persons or Groups, nor Would It Force Him to Adopt Viewpoints with Which He Disagrees.

In conjunction with the First Amendment right to free speech is the freedom of association, which is, in essence, a "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622. Along with this freedom of association is the obvious freedom to not associate. *Id.* at 623. This right, however, is not absolute and infringements can be justified by compelling state interests. *Id.* Nor can a person or entity "erect a shield against antidiscrimination laws simply by asserting that [association with certain persons] would impair its message." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

In *Roberts v. United States Jaycees*, the Supreme Court found that Minnesota had a compelling interest in eliminating discrimination against women and therefore did not violate the First Amendment when it forced the Jaycees to admit female members. 468 U.S. at 624. The Court reasoned that admitting women to the Jaycees would not impact the organization's message or its ability to follow its mission. *Id.* at 627. On the other hand, in *Boy Scouts of America v. Dale* the Court found a New Jersey statute that would have forced the Boy Scouts of America to admit a homosexual scoutmaster constituted compelled expressive association that violated the First Amendment. 530 U.S. at 654. Because the Scouts opposed homosexuality, the Court believed that admitting a homosexual scoutmaster would convey a message to outsiders that the organization approved of homosexuality—a view the Scouts did not hold. *Id.*

Taylor employs members of various religions, accommodates those employees' needs, and even takes an active interest in their faith from time to time. (R. at 18, 27, 31–32.) In his actions, then, Taylor demonstrates that he already associates with people of religious convictions with the apparent belief that such associations will have no impact on his ability to express his own opinion or influence customers' perceptions of TPS. It is thus highly unlikely that causing Taylor to photograph religious events would amount to compelled expressive association in violation of his First Amendment rights.

Photographing religious events would not impact Taylor's anti-religion views or his message that religion is bad for society. Unlike *Dale*, it seems highly unlikely that customers will construe photographs of a religious wedding as approval of religion generally. People understand that weddings take place in all kinds of locations. Just because some of Taylor's photographs depict religious services does not mean that customers will attribute a positive view of religion to TPS. More likely, customers will note that Taylor is in the business of taking photographs and that he is willing to render his services for any kind of event—religious or non-religious.

Explanatory speech is once again a viable option if Taylor is truly worried about disseminating a message contrary to his own beliefs. Assuming he retains the copyrights to all of his photographs, Taylor has the ability to display only those photographs of which he approves (that is, photographs of non-religious events). In addition, Taylor has the ability under the First Amendment to make his views on religion clear. He may set out signs, set up disclaimers, and even express his opinion on religion to his customers. The only thing Taylor may not do is discriminate against potential customers on the basis of their religious convictions.

II. THE MADISON HUMAN RIGHTS ACT AND THE ENFORCEMENT ACTION ARE VALID EXERCISES OF STATE LAW AND, AS SUCH, DO NOT VIOLATE THE FREE EXERCISE OR ESTABLISHMENT CLAUSES; THEREFORE, THE FIFTEENTH CIRCUIT SHOULD BE AFFIRMED.

In an effort to salvage his discriminatory policy, Taylor argues that the Enforcement Action violates the religion clauses by requiring his business to enter places of worship and photograph religious events. But Taylor's argument fundamentally misunderstands this Court's First Amendment jurisprudence.

The Free Exercise and Establishment Clauses are distinct provisions that are not violated simply because the state has incidental contact with religion. The Free Exercise Clause focuses on how a government action affects a person's religious exercise, protecting citizens from government interference with religious practices. *Brown v. Gilmore*, 258 F.3d 265, 274 (4th Cir. 2001); *see also Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) (discussing religion clauses). Whereas the Establishment Clause focuses on government action alone, prohibiting the government from establishing a state religion or acting in a way that "tends to do so." *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). Neither Clause "call[s] for total separation between church and state," the Clauses must, and do, allow for some relationship between the two institutions. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

Because the Free Exercise and Establishment Clauses serve two distinct purposes, Taylor's claims must be considered separately.

A. The Enforcement Action Does Not Compel Taylor to Violate His Deeply Held Beliefs, and the Act Serves Compelling State Interests in Eradicating Discrimination; Thus, Taylor's Free-Exercise Claim Fails.

1. The Enforcement Action Does Not Burden Taylor's Deeply Held Beliefs.

The Free Exercise Clause is only implicated if a government action burdens a person's religious practices. *Babalu Aye*, 508 U.S. at 532. Without religious practice, there is no free-

exercise claim. *Welsh v. Boy Scouts of Am.*, 742 F. Supp. 1413, 1436 (N.D. Ill. 1990). Take *Welsh* for example. There, the Boy Scouts excluded plaintiffs from their group because they were atheists. *Id.* at 1416. The Scouts tried to defend the action by asserting their free-exercise rights, but failed to show how admitting the plaintiffs would burden any religious practice of the group. *Id.* at 1435–36. Thus their free-exercise defense failed. *Id.* at 1436. Taylor's claim fails for similar reasons.

Taylor's business policy against entering places of worship or photographing religious events is a commercial practice, not one of conscience. Taylor follows this policy because he does not want to "mak[e] religion look good." (R. at 33.) But the focus of the Free Exercise Clause is on the practices required or prohibited by a person's deeply held beliefs, not on what someone does or does not want to do. If that were the case, the Free Exercise Clause would "permit every citizen to become a law unto himself." *Emp't Div. v. Smith*, 494 U.S. 872, 878–79 (1990) (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)).

Here, Taylor's self-professed, deeply held belief has nothing to do with entering a place of worship or attending religious events. Taylor's deeply held belief is "that religion is a detriment to the future of humanity," but this belief does not require him to avoid religious events or places of worship. (R. at 16–17.) Taylor often enters places of worship to attend religious events for family members. (R. at 17.) He has even photographed weddings where the ceremony starts with a non-denominational prayer and ends with a reception in church buildings. (R. at 16.) Because Taylor's actions show that his beliefs do not prohibit him from entering places of worship or attending religious events, the Enforcement Action does not burden the practice of his deeply held beliefs and his claim fails just like the Scouts's in *Welsh*. To be clear,

Respondents do not question the sincerity of Taylor's beliefs, but his sincerity does not equate to practice. Thus, the Free Exercise Clause does not apply and Taylor's claim must fail.

But even if the Free Exercise Clause did apply, government is free to make laws that incidentally burden religious practices. *Babalu Aye*, 508 U.S. at 532. For decades, public accommodation laws like the one carried out by the Enforcement Action have been upheld as legitimate and even necessary exercises of state power. *E.g.*, *Elane Photography*, 2013-NMSC-040, ¶ 68, 309 P.3d at 75 (holding that the Clause did not permit photographer to discriminate against same-sex couples); *N. Coast Women's Care Med. Grp., Inc. v. Superior Court*, 189 P.3d 959, 967 (Cal. 2008) (holding the Free Exercise Clause did not exempt a medical clinic from complying with state's civil rights act); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 280 (Alaska 1994) (holding that the Clause did not permit landlord to discriminate against same-sex-couple renters against state's civil rights law). Nothing in Taylor's case requires the Court to find differently.

2. The Free Exercise Clause Does Not Relieve Taylor of His Obligation to Comply with Neutral, Generally Applicable State Laws Like the Act.

The Free Exercise Clause is not talismanic. Religious beliefs and practices are protected, but may be regulated: "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Smith*, 494 U.S. at 878–79. Because of this, a neutral, generally applicable state law does not have to satisfy strict scrutiny, even if it incidentally burdens religious practices. *Babalu Aye*, 508 U.S. at 531. It is only when a law is neither neutral nor generally applicable that strict scrutiny applies;

otherwise, the highly deferential rational-basis test applies. *Id.* at 531–32; *accord Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1075–76 (9th Cir. 2015).[3]

The Act is neutral both as to content and purpose. The Act only prohibits conduct that the state is free to regulate—discrimination. *Cf. Roberts,* 468 U.S. at 623–24 (explaining that public-accommodation laws are neutral due to their secular purpose). It is neither focused on, nor hostile to religion. *See Babalu Aye*, 508 U.S. at 533 (explaining that a law is neutral unless its object is to regulate religious conduct). The only time the Act is concerned with religion is when a public accommodation like TPS discriminates against someone because of their religion or lack thereof. And as this Court has repeatedly emphasized, public-accommodation laws aimed at eliminating discrimination "do not, as a general matter, violate the First" Amendment. *Hurley*, 515 U.S. at 572. Moreover, that Taylor is more likely to engage in religious discrimination because of his atheistic beliefs "does not undermine the [Act's] neutrality." *Stormans*, 794 F.3d at 1077. Thus the Act and Enforcement Action are neutral.

The Act is also generally applicable. It admits of no exclusions and applies equally to all public accommodations in Madison. Mad. Code Ann. § 42-101-2a; *see also Babalu Aye*, 508 U.S. at 543–45 (discussing under-inclusiveness as touchstone of generally applicable inquiry). Taylor, on the contrary, aims to undermine the Act's general applicability by seeking an

[3] Strict scrutiny may also apply under the hybrid-rights doctrine; however, the doctrine has largely been rejected by the circuit courts and never affirmed by this Court. *See Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 244–47 (3d Cir. 2008) (noting that the doctrine's validity is not settled); *see also Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) (finding the doctrine was dicta and not binding); *Kissinger v. Bd. of Trs. of the Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) (holding that the circuit does not recognize the doctrine). But the Court does not need to decide the doctrine's fate today, Taylor's free-exercise and establishment-clause challenges fail, thus there are no independent, constitutional violations on which he can rest a hybrid-rights claim. *See, e.g.*, *Craig*, 2015 WL 4760453, at *18 (finding no hybrid-rights when free-speech claims failed); *Elane Photography*, 2013-NMSC-040, ¶ 71, 309 P.3d at 75–76 (finding no hybrid-rights when free-speech and free-exercise claims failed).

exemption so that he may continue to discriminate on the basis of religion. In other words, Taylor asks the Court to carve out an exception just for him. But as the Court has explained, in seeking an exemption from Madison's generally applicable statute, Taylor "seeks preferential, not equal, treatment" and "therefore cannot moor [his] request for accommodation to the Free Exercise Clause." *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 697 n.27 (2010); *see also Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. PN34XB-03008, slip op. at 14–15 (N.J. Div. on Civil Rights Oct. 22, 2012), http://www.nj.gov/oag/dcr/downloads/orders/Bernstein_v_Ocean-Grove_102212.pdf (upholding similar law for the same reason during an administrative process).

Since the Act is neutral and generally applicable, it may be enforced so long as it passes the highly deferential rational-basis test. *See Babalu Aye*, 508 U.S. at 531–322. Despite this fact, Madison's Religious Freedom Restoration Act ("RFRA"), Mad. Code Ann. § 42-501, which requires strict scrutiny in certain free-exercises cases, must still be addressed.

3. Madison's RFRA Does Not Apply Here, but Even If It Did, Taylor's Free-Exercise Claim Would Fail.

Madison's RFRA modifies the level of scrutiny required when state action substantially burdens a citizen's free-exercise rights. *Id.* § 42-501(d). But it does not apply here for two reasons. First, Taylor fails to show that the Enforcement Action burdens any practice of his deeply held beliefs. *See* discussion *supra* Part II.A.1. Second, Madison's RFRA contains a civil-rights exemption, specifically, it does not apply to cases involving "unlawful discrimination in any form by . . . any place of public accommodation." Mad. Code Ann. § 42-501(e). The Enforcement Action is the result of Taylor's unlawful discrimination; therefore, Taylor does not have recourse to Madison's RFRA and its heightened level of scrutiny. But supposing, *arguendo*, that the RFRA did apply, Taylor's free-exercise claim still fails.

Under Madison's RFRA, statutes that substantially burden free-exercise are not valid unless they meet three requirements: the statute must (1) have a secular purpose, (2) reflect a compelling government interest, and (3) use "the least restrictive means to further that interest." *Id.* § 42-501(d). Thus, Madison's RFRA requires strict scrutiny. *See Babalu Aye*, 508 U.S. at 531–32 (detailing strict scrutiny). The Act easily satisfies all three requirements, and in so doing satisfies both strict scrutiny and the rational-basis test.

First, the Act, like its federal analog Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(a) (2012), "is clearly aimed at preventing discrimination, [which evinces] a secular purpose." *EEOC v. Jefferson Smurfit Corp.*, 724 F. Supp. 881, 883 (M.D. Fla. 1989); *see also* R. at 2 (stating that the Act is analogous to Title II). The Act does not target religion nor was it adopted with a religious purpose in mind. Rather, the Act simply prohibits public accommodations from discriminating 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; R. at 2.

Second, as this Court has repeatedly noted, "public accommodation laws [aimed at combatting discrimination] 'plainly serv[e] compelling state interests of the highest order."' *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (quoting *Roberts*, 468 U.S. at 624).

And third, the Enforcement Action is the least restrictive means by which the Commission could effectively enforce the Act. The Enforcement Action requires that Taylor pay a fine for each week that his discriminatory practice was in place—starting with when he posted a sign heatedly explaining his policy—and to cease that practice or face a civil-enforcement action. (R. at 17–18, 26, 33.) Before issuing the fine, the Commission gave Taylor the

opportunity to plead his side of the case, and to do so with counsel. (R. at 20–21, 26.) Taylor, however, chose not to participate in the hearing or submit a written statement. (R. at 21, 25–26.) There is simply no *less* restrictive way for the Commission to pursue the state's interest in combatting discrimination. The Enforcement Action started with a letter—perhaps one of the least offensive modes of communication in today's society—and culminated in a fine, which generously did not cover the entire life (nearly eleven years) of Taylor's discriminatory policy. (R. at 20–21, 25–26.) Were this Court to require the Commission to craft even less restrictive means, it would be requiring the Commission to not enforce the law at all. The Act serves one of the most compelling state interests in a plural society, imposing a fine is the very least the Commission can do to further such just ends.

Accordingly, this Court should affirm the Fifteenth Circuit, finding that neither the Enforcement Action nor the Act offends the Free Exercise Clause of the First Amendment.

B. Both the Act and Enforcement Action Have a Secular Purpose, and Neither Has the Effect of Endorsing Religion, Coercing Taylor into Participating in Religion, or Otherwise Causing Excessive Entanglement Between Church and State, Thus Taylor's Establishment-Clause Claim Fails.

The Establishment Clause prohibits the government from establishing a church or passing laws that "aid one religion, aid all religions, or prefer one religion over another." *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947). But it does not require that church and state remain totally separate. The days of strict separation are long gone, "[i]nteraction between church and state is inevitable," and the Constitution tolerates "some level of involvement between the two." *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (citations omitted).

To discern between acceptable and unacceptable interaction, this Court has developed what may be called the modified-*Lemon* test. A statute or state action does not violate the Establishment Clause if (1) it has a secular purpose and (2) its effect neither advances nor

inhibits religion. *Id.* at 232–33. The "effects" test is violated when a government action can reasonably be viewed as (1) endorsing religion, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000), (2) coercing someone to "support or participate in religion or its exercise," *Lee*, 505 U.S. at 587 (citing *Lynch*, 465 U.S. at 678), or (3) fostering "excessive government entanglement with religion," *Lemon*, 403 U.S. at 613 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

The Act's secular purpose has already been demonstrated, and nothing in the record indicates that it has the effect of endorsing religion, coercing Taylor into the practice of religion, or fostering excessive government entanglement with religion.

1. No Reasonable Observer Could Believe that the Act Endorses Religion.

The endorsement test requires government to remain neutral toward religion or non-religion. *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 869 (2005). Thus endorsement occurs when a reasonable, objective observer, who is acquainted with the history and context of a government action, would perceive the action as incentivizing or otherwise intending to encourage religious participation. *Doe*, 530 U.S. at 308; *see also Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 488–89 (1986) (finding no endorsement when statute did not financially incentivize undertaking religious education). Here, the Act is strictly neutral toward religion and non-religion—it does not incentivize or encourage religious participation.

A law only incentivizes religious participation when it peculiarly benefits religion, either through direct aid or by providing "greater or broader benefits" for those who utilize the law for religious purposes. *Witters*, 474 U.S. at 488. But when a person chooses to invoke a neutral law in a way that benefits religion, she acts alone and the government has not violated the Establishment Clause. *Id.* at 488–89. In *Witters*, for instance, the government did not violate the

Establishment Clause when a blind student chose to use neutrally distributed state funds to attend a religious college and pursue a religious vocation—no objective observer could view the student's choice as conferring "any message of state endorsement of religion." *Id.* at 483, 488–89 (citing *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)).

The Act does not peculiarly benefit Madison's religious citizens. It simply allows all citizens to reap the benefits of the state's neutral, generally applicable antidiscrimination law. And just like in *Witters*, the mere fact that the Act allows people to protect themselves from religious discrimination does not mean that it confers a message of religious endorsement. The only message the Act conveys is disapproval of discrimination.

Moreover, the Act in no way encourages religion over non-religion. A reasonable observer would know and appreciate that the Act was passed to help eliminate discrimination in all its forms, as proven by the Act's broad protections. The Act now protects more classes than its federal counterpart, Title II. *Compare* 42 U.S.C. § 2000a(a), *with* Mad. Code. Ann. § 42-101-2a. The Act is designed to protect *all* Madison citizens, not just the religious ones. And like Title II, it even protects Taylor's atheism. *See Reed v. Great Lakes Cos.*, 330 F.3d 931, 933–34 (7th Cir. 2003) (finding that Title II's protection of religion includes atheism). Because the Act does not favor religion, it cannot reasonably be viewed as endorsing it. Accordingly, the Act neither incentivizes nor encourages religious participation, and thus passes the endorsement test.

2. The Enforcement Action Does Not Coerce Taylor into Religious Practice.

The coercion test protects against "subtle and indirect" coercion to religious exercise, and is clearly violated by "any overt compulsion." *Lee*, 505 U.S. at 593. Neither of which are present here.

Overt compulsion occurs when the government affirmatively requires participation in religion or its exercise. *See Warner v. Orange Cnty. Dep't of Prob.*, 115 F.3d 1068, 1075 (2d Cir. 1997). In *Warner*, for example, a court violated the Establishment Clause by compelling a probationer to take part in religious exercise when it required her to attend Alcoholics Anonymous—an overtly religious group—as part of her probation. *Id.* at 1074–75.

The Enforcement Action does not compel Taylor to take part in religious practice; it merely requires him to offer his services to all, regardless of their religious beliefs. (R. at 25–26.) The probationer in *Warner* was required to buy in to the religious overtones of Alcoholics Anonymous in order to satisfy her probation, 115 F.3d at 1076, but the Enforcement Action does not require Taylor to *participate* in religious events, or to even pay attention to them. It simply requires that he photograph them.

Nor does the Enforcement Action bear any of the hallmarks of "subtle and indirect" coercion. The coercion test was, by and large, intended to protect the most impressionable among us—children. *See Lee*, 505 U.S. at 593 (noting that the inquiry varies for children and adults). But as people mature, the test's protection against subtle and indirect pressure decreases. *See Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) (noting that as people mature they become "less impressionable . . . and should be able to appreciate" a policy's neutrality toward religion). Whereas a prayer said before a high school graduation is coercive, *Lee*, 505 U.S. at 598, hosting a benediction and invocation at a university commencement is not because the "special concerns underlying" the coercion test are not present when dealing with adults who are "free to ignore the cleric's remarks," *Tanford v. Brand*, 104 F.3d 982, 986 (7th Cir. 1997).

Taylor is not a young, impressionable child he is a successful, mature adult, and as such, is more than capable of appreciating the neutrality of an antidiscrimination law. In fact, the

record shows that Taylor is quite used to attending religious events without being coerced into accepting the doctrine. Taylor has attended numerous religious events for family and friends, including his nephew's bris and his cousin's Catholic wedding. (R. at 17.) At these events, when anything "religious" occurred, "such as prayers, [Taylor] 'tuned them out' in [his] head." (*Id.*) The Enforcement Action does not require Taylor to alter his methods. Like the commencement attendees in *Tanford*, Taylor is free to ignore any and all religious remarks made at the events he photographs.

Though religious services will undoubtedly be going on about him, Taylor's attendance at these events will be strictly business—he will be working too much for the setting of the event to do anything more than remind him of religion. And simply "remind[ing] [people] of religion" is not coercive. *Otero v. State Election Bd. of Okla.*, 975 F.2d 738, 740–41 (10th Cir. 1992). The same reasoning applies to any public accommodation that the Commission enforces the Act against. As such, the Enforcement Action does not coerce Taylor into participating in religion or its exercise; it simply compels him to stop discriminating.

3. The Act Does Not Lead to Any Entanglement Between Church and State.

The excessive-entanglement test is concerned with financial and administrative overlap; it forbids "programs, whose very nature is apt to entangle the state in details of administration." *Lemon*, 403 U.S. at 625 (quoting *Walz*, 397 U.S. at 695 (Harlan, J., concurring)); *see also Otero*, 975 F.2d at 741 (noting that paying high fees to rent church space could indicate entanglement).

Neither the Act nor the Enforcement Action touches on either concern. Enforcing the Act does not create financial overlap; it neither directly nor indirectly channels government money to religious institutions. *See* Mad. Code Ann. § 42-101-2a (featuring no discussion of state funds); *see also* r. at 26 (detailing the Enforcement Action). Nor does it create administrative overlap.

The Act only regulates public accommodations, not religious institutions. Mad. Code Ann. § 42-101-2a. And any administrative action under the Act that touches on religion is merely a "routine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no 'detailed monitoring and close administrative contact' between secular and religious bodies," and therefore does not "violate the nonentanglement command." *Hernandez v. C.I.R.*, 490 U.S. 680, 696–97 (1989) (citations omitted). In fact, the Act and its enforcement do not create *any* relationship between church and state.

In sum, the Act and Enforcement Action pass all four establishment-clause tests: both are secular, neither endorses religion, coerces Taylor to participate in religion, or fosters excessive entanglement between church and state.

CONCLUSION

Taylor's photography is not sufficiently expressive to merit First Amendment protections. Even if it is sufficiently expressive, the Act does not compel Taylor to adopt a government message or accommodate the views of a third party. Moreover, the Act does not compel Taylor to expressively associate with religion or the approval of religion. Therefore, enforcement of the Act does not violate the Free Speech Clause of the First Amendment.

Additionally, the Act serves a compelling state interest and is enforced through the least restrictive means possible, therefore any incidental burden it places on free exercise does not violate the Free Exercise Clause of the First Amendment. Similarly, the Act is a neutral, valid state law that does not advance or inhibit religion, and as such, does not violate the Establishment Clause.

Accordingly, the Commission respectfully asks this Court to affirm the Fifteenth Circuit's decision and find both the Act and Enforcement Action valid.

APPENDIX I: RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL PROVISIONS

The First Amendment reads: "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." U.S. Const. amend. I.

FEDERAL STATUTORY PROVISIONS

Title II of the Civil Rights Act of 1964 (42 U.S.C. § 2000a(a) (2012))

"(a) Equal access. 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."

STATE STATUTORY PROVISIONS

Madison Human Rights Act of 1967 (Mad. Code Ann. § 42-101-2a; R. at 2)

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 without discrimination or segregation on the ground of "race, color, religion, national origin, sex, disability, sexual orientation, gender identity or expression, socioeconomic status, political affiliation, or other protected classes."

Madison Religious Freedom Restoration Act (Mad. Code Ann. § 42-501)

(a) The legislature of Madison and any Commission or Agency it lawfully grants enforcement powers, shall not through law show preference to

1. any religious sect, society or denomination;
2. nor to any particular creed or method of performing or engaging in worship or system of ecclesiastical polity.

(b) The legislature of Madison and any Commission or Agency it lawfully grants enforcement powers, shall not, under the color of law, compel any person to attend any place of worship for the purposes of

1. engaging in any form of religious worship or practice;
2. or promoting the continued financial or reputational success of such institution.

(c) Neither the legislature of Madison, nor any Commission or Agency it lawfully grants enforcement or rulemaking powers shall control or interfere with the rights of conscience of any person.

(d) Under this section, the right of any person to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless:

1. the government proves by clear and convincing evidence that the law targets a secular purpose;
2. the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act;
3. and has used the least restrictive means to further that interest.

(e) Nothing in this section shall be construed to permit unlawful discrimination in any form by:

1. any government agency or actor;
2. any place of public accommodation as defined by Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, *et seq*., or Title II of the Madison Human Rights Act of 1967, Mad. Code Ann. § 42-101-2a, *et seq*.

BRIEF CERTIFICATION

The below signed, Team N, hereby certifies that all work product contained in all copies of Team N's brief is the original work product of the members of Team N. Team N further certifies that they have fully complied with Team N's school's honor code. And, Team N certifies that they have complied with all Rules of the Competition.

/s/ Team N

Date: February 9, 2016