Team S

Brief on the Merits

No. 15-1245

IN THE SUPREME COURT OF THE UNITED STATES

March Term, 2016

JASON ADAM TAYLOR,
Petitioner

v.

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

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

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

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

and

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

Respondents.

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

Brief for Petitioner

Team S
Counsel for Petitioner

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 violate 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 THE CASE

This case involves the foundational rights of American citizens to choose *not* to express themselves in the face of government coercion, and to be free of government action mandating participation in, and support of, religious ceremonies in which they do not believe. The Petitioner, Jason Adam Taylor, co-owns Taylor's Photographic Solutions with his wife. *Taylor v. Jefferson (Taylor I)*, No. 2:14-6879-JB, slip op. at 3 (D. Madison 2015). For his entire adult life, Taylor has maintained the belief that all religions are "detriment[al] to the future of humanity" and accordingly describes himself as a "militant atheist." *See id.* Nevertheless, Mr. Taylor has explained that he does not harbor any personal hard feelings toward people of faith or of any particular faith, *id.*, a proposition well-supported by both his own statements and the supportive statement of one of his religious employees. *Id. at 4*. Furthermore, as evidenced by his employee's statement and the entirety of the record, it has never been suggested that Mr. Taylor has never exhibited discriminatory conduct of any sort toward his employees or his customers. *Id.*

Mr. Taylor's business performs photography services for a variety of customers, including numerous special occasions like birthday parties, weddings, and graduations. *Id.* at 3. However, pursuant to his personal beliefs, Mr. Taylor objects to supporting the practice of religion and therefore has a longstanding policy of not photographing "any event which is religious in nature," including religious weddings. *Id.* Taylor notifies the public of this policy by posting a sign stating his company's policy in front of his business. *Id.* at 4-5. The sign also clarifies that the company will not discriminate on the basis of any customer's personal religious beliefs, limiting its refusal to active participation in religious *events* and welcoming people of all religions into his place of business. *Id.* at 5.

After Taylor followed this longstanding policy by declining to photograph two separate religious weddings (one in a church and one in a synagogue), *id.* at 2, Taylor was fined $1,000 per week for the refusal by the Madison Human Rights Commission ("the Commission"), *id.* at 5. The Commission is a state entity authorized to enforce the anti-discrimination provisions contained within the Madison Human Rights Act of 1967 ("the Act"). *Id.* at 2. The Act prohibits certain forms of discrimination in "places of public accommodation," including religious discrimination. *Id.* Furthermore, the Commission sent Taylor a cease and desist letter warning him that it would initiate a civil enforcement action to enjoin Taylor from following the photography policy if he did not end the policy within sixty days. *Id.*

In response, Mr. Taylor sued in the United States District Court for the District of Eastern Madison to enjoin the Commission's enforcement actions against him and to recover punitive and compensatory damages for violating his constitutional rights. *Id.* at 3. The district judge subsequently granted the Commission's Motion for Summary Judgment and awarded judgment in the Commission's favor. *Id.* Mr. Taylor subsequently appealed the decision to the United States Court of Appeals for the Fifteenth Circuit, which affirmed the district court's decision. *Taylor v. Jefferson (Taylor II),* Appeal No. 15-1213, slip op. at 5 (15th Cir. 2015). Mr. Taylor now appeals to this Court, seeking protection of his First Amendment rights to abstain from participating in religious practices in which he does not believe, and compelled speech in support of those same religious practices.

ARGUMENT

The Commission's enforcement violates the Free Speech Clause of the First Amendment for three reasons. First, the enforcement burdens Petitioner's right to freedom of speech by compelling him to create images and representations which he does not believe in. Second, strict scrutiny should apply here because this case falls precisely within the Supreme Court's jurisprudence on speech compulsion. Third, the enforcement action is not narrowly tailored to protect the government's compelling interest in preventing religious discrimination.

Additionally, the Commission's enforcement violates the Free Exercise and Establishment Clauses of the First Amendment for three reasons. First, the enforcement burdens the Petitioner's right to practice or not practice religion by compelling him to attend a place of worship and take photographs *in support* of that religious ceremony. Second, heightened scrutiny should apply in this case because this squarely falls within Smith's "hybrid rights" paradigm. This is because the Petitioner's freedom of association and free speech rights are gravely burdened. Third, the enforcement action is not narrowly tailored to protect the government's purported interest to prevent discrimination.

I. THE COMMISSION'S ENFORCEMENT ACTION VIOLATES THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT

The First Amendment requires that "Congress shall make no law…abridging the freedom of speech. . . ." U.S. Const. amend. I. Through the Due Process Clause of the Fourteenth Amendment, this freedom is incorporated to the states as well. *Duncan v. Louisiana,* 391 U.S. 145, 148 (1968). Here, the Commission's law violates Petitioner's free speech rights and consequently warrants a review under a strict scrutiny standard.

A. The Commission's Law Limit Petitioner's Free Speech Rights And Thus Warrants Strict Scrutiny.

The Madison Commission's law clearly burdens Petitioner's First Amendment right to freedom of expression for three reasons. First, under its First Amendment jurisprudence the Supreme Court has generally treated speech compulsions the same as speech restrictions. Second, under *Wooley v. Maynard* those protections also extend to expressions of speech through photography. Third, *Wooley*'s protections extend to compelled speech as exemplified by the Madison Commission's law. As a result, the commission's law should trigger strict scrutiny.

1. Under the First Amendment, Speech Compulsions Are Generally Treated the Same as Speech Restrictions

The United States Supreme Court has long held that the First Amendment prohibits both speech compulsion and speech restriction. "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley*, 430 U.S. at 714 (quoting *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

In *Wooley*, the Maynards were forced to show the state motto on their government-issued license plates and they sought to freely disassociate with the motto by blocking it. *Wooley*, 430 U.S. at 707–08, 715. Despite the fact that a casual observer probably would not have associated the state motto with the Maynards' own words or beliefs, the Court nonetheless held for the Maynards. A driver's "individual freedom of mind," the Court stated, guarantees her "First Amendment right to avoid becoming the courier" of speech that she does not wish to communicate. *Id.* at 717. Drivers can "decline to foster . . . concepts" to which they are antithetical, even if the state requirement is merely that drivers display a motto on a government-issued license plate. *Id.* at 714.

Even "the passive act of carrying the state motto on a license plate," *id.* at 715, may not be compelled, because it "'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to re-serve from all official control.'" *Id.* (quoting *Barnette*, 319 U.S. at 642). Forcing drivers to display the slogan, the Court reasoned, required them "to be an instrument for fostering public adherence to an ideological point of view [they] find[] unacceptable," which is clearly unconstitutional. *Id.* "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Id.*

People can choose to adhere to speech compulsions even if they disagree with what is being compelled, but those that choose to not adhere to such compulsions are constitutionally protected in that refusal. "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714.

2. *Wooley v. Maynard*, 430 U.S. 705 (1977) Extends to Photography Created for Money

Photography is fully protected by the First Amendment including photography that does not have a political message. *See, e.g. United States v. Stevens*, 130 S. Ct. 1577, 1584, 1592 (2010) (striking down ban on commercial creation of photographic depictions of animal cruelty); *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (striking down part of law that prohibited photographic reproductions of money). This is simply another case regarding the broader understanding that visual expression is as protected as verbal expression. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (holding that video games which have been commercially distributed are fully protected speech); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) (using Jackson Pollock paintings as an

example to conclude that even works that express no "clear social position" are constitutionally protected). This full protection also extends to photography that is created to be distributed for money. *See, e.g.*, *Stevens*; *Regan*. As a result, photographs cannot be restricted by the government without triggering strict scrutiny. Following *Wooley*, if the government may not suppress photographs, it also may not compel their sale, distribution or display.

For example, the state could have just as easily forced the Maynards to have a license plate with a picture of an historical figure on it. That claim would still be just as strong as it was in *Wooley*. Requiring the display of an image intrudes on the individual's first amendment rights as much as requiring the display of a slogan does. The "First Amendment right to avoid becoming the courier" for speech that one does not want to communicate applies whether the speech is visual or verbal. *Wooley*, 430 U.S. at 717.

West Virginia State Board of Education v. Barnette, the Court's first compelled speech case, included nonverbal expression. 319 U.S. 624, 632 (1943). The Court in *Barnette* struck down not only the requirement that students in school must say the Pledge of Allegiance but also the requirement that students have to salute the flag. 319 U.S. at 628, 632–34. Furthermore in *Hurley*, the Court held that St. Patrick's Day Parade organizers had a constitutional right to exclude marchers who wanted to carry a banner that read, "Irish American Gay, Lesbian and Bisexual Group of Boston." 515 U.S. at 570. Although Massachusetts state courts had held that this exclusion violated state laws by discriminating in a place of public accommodation, the Court held that in this case, applying those laws would unconstitutionally compel speech. The government, the Court held, "may not compel affirmance of a belief with which the speaker disagrees," and likewise generally may not compel even "statements of fact the speaker would

rather avoid." 515 U.S. at 573. If parade organizers have the right to exclude verbal depictions of ideas and facts that they disagree with, they must also be able to exclude visual representations.

Moreover, *Hurley* treated "the unquestionably shielded painting of Jackson Pollock" as equivalent to verbal poetry for First Amendment purposes, and as fully protected from restriction. *Id.* at 569. *Hurley* also reinforced what *Wooley* had made clear, that speech compulsions are as unconstitutional as speech restrictions, because "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley*, 515 U.S. at 573 (quoting *Pac. Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 16 (1986) (plurality opinion) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say.")). It necessarily follows then that compelling the display of paintings and photographs, even those taken for money, is just as unconstitutional as compelling the display of text.

3. *Wooley* Extends to Compelled Creation of Speech and Compelled Distribution of Speech

The First Amendment equally protects both the creation of speech and the dissemination of speech, even when done for money. *See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (holding that an author who writes for money is fully protected by the First Amendment); *United States v. Stevens*, 130 S. Ct. 1577, 1583–85 (2010) (striking down a restriction on the commercial creation and distribution of material depicting animal cruelty, with no distinction between the ban on creation and the ban on distribution); *Citizens United v. FEC*, 130 S. Ct. 876, 917 (2010) ("The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech.") (internal quotation marks omitted).

This equal treatment of speech creation and speech dissemination possesses clear logic. Restricting the creation of speech, even for money, also interferes with the dissemination of speech. The general goal of speech is to communicate in some way shape or form, thus, whether restricting what individuals can say or who they can say it to, the ultimate goal of communication is burdened.

Creation and dissemination are not identical, but compelled creation and compelled dissemination are similar in that they both involve a person being required "to foster . . . concepts" with which he disagrees. *Wooley*, 430 U.S. at 714. It requires someone "to be an instrument for fostering public adherence" to a view with which he does not agree. *Id.* at 715. In fact, requiring someone actively to create speech is likely more burdensome on their individual freedom than requiring the person to simply engage in "the passive act of carrying the state motto on a license plate." *Id.*

Requiring people to actually create speech is even more intrusive than requiring them to be a "conduit" for such speech. Creating expression, including pictorial expression through photography, involves many intellectual and artistic decisions central to the essence of the artist. It also can require sympathy with the intellectual or emotional message that the expression conveys, or at least an absence of disagreement with such a message.

Consider for instance the very sort of public accommodations discrimination law involved in this case. If this law is interpreted as the Court of Appeals interpreted it, then it would apply not just to photographers but also to other contractors who work for profit such as freelance writers, singers, and painters. Thus, for instance, a freelance writer who thinks Pastafarianism is a fraud would be violating Madison law if he refused to write an article

covering a Pastafarian event. A painter would be violating the law if he refused to take on a commission for a religion he disagrees with.

All such requirements unconstitutionally force the speakers to "becom[e] the courier[s] for . . . message[s]" with which they disagree." *Wooley*, 430 U.S. at 717. All interfere with speech creators' "right to decline to foster . . . concepts" that they disapprove of. *Id.* at 714. All interfere with individuals' First Amendment freedoms by forcing writers, actors, painters, singers, and photographers to communicate sentiments that believe are wrong.

This logic is just as sound for wedding photographers as for the other speakers. The taking of wedding photographs, like other forms of artistic expression, involves countless hours of effort and a large range of expressive decisions: about lighting, shading and posing, about selecting which of the hundreds or thousands of shots to include in the final work product, and about editing the shots. *See, e.g.*, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884) (concluding that photographs are protected expression for copyright purposes because they embody the photographer's creative choices). Even if the couple ultimately can choose which photographs they want or from which area the photographer should shoot, the hundreds of decisions leading up to each shot require the artistic experience and excellence of the photographer.

Moreover, the photographs at a wedding do implicitly express a particular viewpoint. Wedding photographers are hired to create pictures that convey an understanding that the wedding is a beautiful, laudable, and even holy event. A wedding photographer's business would not survive long if he was unable to provide aesthetically pleasing photographs conveying a positive view of the ceremony. Forcing someone to make such expressive decisions, and create photographs that depict as sacred that which he views as profane, burdens that person's First

Amendment rights at least as much as would mandating that he display on his license plate "Live Free or Die."

Receiving payment for such expression does not make it any less protected. The First Amendment fully protects both the dissemination and the creation of material for money. The compelled speech doctrine applies to commercial businesses, both newspapers, *see, e.g.*, *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), and non-media corporations, *see, e.g.*, *Pac. Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986). This protection makes sense because a huge number of industries rely on the ability to make money off of creative expression from newspapers to movies to architecture and more.

The potential for financial gain gives an incentive to many creators of speech to create, and the profit they earn off of their creations gives them the ability to create more. *United States v. Nat'l Treasury Emp.'s Union*, 513 U.S. 454, 469 (1995) (treating speech for money as fully protected because "compensation [of authors] provides a significant incentive toward more expression"). This is also the essence copyright law. *See Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."). If earning a profit from one's work meant giving up one's First Amendment rights to choose what to create and what not to create, then many if not most speakers would be stripped of their constitutional rights.

II. THE COMMISSION'S ENFORCEMENT ACTION VIOLATES THE ESTABLISHMENT AND FREE EXERCISE CLAUSES OF THE FIRST AMENDMENT.

The First Amendment also requires that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Here, the Commission's actions violate the Establishment and Free Exercise Clauses for two reasons. First, the action fits within the hybrid rights and thus warrants strict scrutiny because it gravely

burdens the Petitioner's free speech, free exercise, and associative rights. Second, applying strict scrutiny, the action is not narrowly tailored to protect a compelling state interest, as applied to the Petitioner because of the low risk of widespread religious discrimination by photographers and the availability of alternative services.

A. The Court should apply heightened scrutiny because the statute burdens the Petitioner's Free Exercise rights, freedom of speech rights, and free assembly rights.

Generally, a facially-neutral law that incidentally burdens the free exercise of religion does not violate the Free Exercise Clause. *Emp't Div. v. Smith*, 494 U.S. 872, 878-79 (1990). However, even facially-neutral laws that burden religious rights along with "other constitutional protections, such as freedom of speech" or freedom of association, violate the Free Exercise Clause. *Id.* at 881. *See also Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940) (striking down a discretionary licensing apparatus for religious and charitable outreach programs, where the system's administrator could deny any license to organizations that he decided were "nonreligious," thus burdening Free Speech rights as well); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (sustaining an as-applied challenge to a tax scheme that tolled dissemination of religious information); *Follett v. McCormick*, 321 U.S. 573 (1944) (same), *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (invalidating statute that precluded parents from enrolling their children in private parochial schools, thus burdening their free exercise rights and compelling public association); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating statute that compelled Amish parents to send their children to public high schools). In such cases—unlike in cases where facially-neutral laws only incidentally burden Free Exercise rights—state action must be invalidated unless it is *narrowly tailored* to protect a *compelling* governmental interest. *See, e.g.*, *Murdock*, 319 U.S. at 117 ("The ordinance is not narrowly drawn to prevent or control abuses or evils arising from th[e undesired] activity."); *Cantwell*, 310 U.S. at 311 ("[I]n the absence of a

statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace . . . .”). Such exceptions are widely known as “hybrid rights” exceptions.

Three circuits have erroneously categorized the hybrid rights exception in *Smith* as dicta. *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 247 (3d Cir. 2008); *Knight v. State Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001); *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 240 F.3d 553, 561 (6th Cir. 2001). However, at least one of those circuits has logically contradicted its own classification by suggesting that it would apply the exception upon further clarification by this Court. *See Combs*, 540 F.3d at 247 (“The criterion applicable to a free exercise claim combined with a companion constitutional right was left undefined . . . . Until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta.”). Such a request obviously (and correctly) implies that the hybrid rights exception is indeed valid law if its application were clarified by this Court, a proposition neither necessary nor appropriate if the exception is considered dicta. In contrast, seven circuits have correctly recognized the hybrid rights exception. *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 764 (7th Cir. 2003); *Parker v. Hurley*, 514 F.3d 87, 97 (1st Cir. 2008); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996); *Swanson by & Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 698 (10th Cir. 1998); *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999); *Soc’y of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1216 (5th Cir. 1991); *Cornerstone Bible Church v. Hastings*, 948 F.2d 464, 472 (8th Cir. 1991).

The majority approach in recognizing the hybrid rights exception must be the correct approach if *Smith* is to be read in harmony with case law that *Smith* itself recognizes as valid.

"[A]n opinion is to be read as a whole," especially when reading it narrowly would overturn a large body of prior precedent. *Grable & Sons Metal Products, Inc. v. Darue Engineering and Manufacturing*, 545 U.S. 308 (2005). Defining the hybrid rights exception as dicta plainly contradicts the well-established body of case law discussed in *Smith*. In *Smith*, Justice Scalia discussed no less than eight prior decisions where governmental conduct burdening both Free Exercise and "other constitutional protections" were invalidated. *See Smith*, 494 U.S. at 881 (recounting five cases striking down provisions on Free Exercise grounds, two striking down provisions on freedom of speech grounds that also burdened Free Exercise rights, and at least one where freedom of association concerns were implicated in conjunction with Free Exercise rights). Thus, *Smith* clearly did not announce a new *exception* at all in its hybrid rights discussion. Rather, *Smith* simply counseled that its new doctrine generally precluding Free Exercise challenges to facially-neutral statutes incidentally burdening a plaintiff's freedom of religion only applied in the narrow circumstances where such statutes *solely* burden a plaintiff's free exercise of religion.

Thus, *Smith's* new approach to Free Exercise claims involving no other constitutional rights was also wholly compatible with those prior decisions involving multiple constitutional burdens. To read *Smith's* hybrid rights discussion as dicta would therefore be reading *Smith* to *overrule* the large body of prior decisions it was in fact discussing as *compatible* with its new holding. Thus, *Smith's* discussion of the hybrid rights exception cannot be read as dicta without also reading *Smith* to overrule those well-established cases, something that *Smith* clearly did not intend to do and in fact explicitly declined to do in recognizing those cases as validly upholding Free Exercise rights "in conjunction with other constitutional protections." *Id.* Accordingly, the hybrid rights approach is clearly not dicta and must be recognized in cases where—as here—

numerous constitutional questions of grave concern are implicated by a single statute, even where that statute appears neutral on its face.

1. The petitioner's free exercise rights are burdened because the statute compels him to both attend a place of worship and actively participate in a religious ceremony held there.

In dismissing the Petitioner's complaint, the district court centered its analysis solely on whether "entry to a place with religious ties" constitutes religious coercion. *See* R–011. It thus made reference to the Petitioner's "read[]y admi[ssion] to entering places with religious ties as he pleases." The Fifteenth Circuit similarly focused solely upon the Petitioner's entrance to the church and upon his previous entry into "houses of worship for events at his own free will." *See* R–043. This cursory analysis overlooks the critical fact that the statute, as applied, both coerces his entry into places of worship *and* his participation in religious ceremonies.

The Free Exercise and Establishment Clauses of the First Amendment prohibit not just direct state establishment of churches, but also state action that coerces religious participation. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947) ("Neither can [federal or state government] force nor influence a person to go to or to *remain away from church* against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance *or non-attendance*.") (emphasis added). Furthermore, numerous court decisions in diverse contexts unmistakably demonstrate that government action mandating *participation* in religious activities constitutes compelled religion for purposes of the Free Exercise Clause and is unconstitutional. *See, e.g.*, *Inouye v. Kemna*, 504 F.3d 705, 712 (9th Cir. 2007) (mandating parolee to participate in religion-based drug treatment programs); *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (compelling public school students to participate in religious exercises); *State v. Barclay*, 708

P.2d 972, 976 (Kan. 1985) (mandating minister to officiate over an interracial couple's wedding ceremony).

Here, the Petitioner is coerced not only into entering places of worship, but also taking part in religion-based wedding ceremonies by serving as photographer for such ceremonies. Because he is being required to actively *participate*, his involvement is no different from the parolee who must attend religion-based drug treatment, even where such treatment does not require him to profess allegiance to that program's religious beliefs or "convert" to a particular faith. That is because participation is key, and participation alone is enough to violate the First Amendment. *See Inouye*, 504 F.3d at 712 ("For the government to coerce someone to *participate* in religious activities strikes at the core of the Establishment Clause of the First Amendment, whatever else the Clause may bar.") (emphasis added). Furthermore, the Petitioner's participation reaches beyond mere attendance: he is then asked to produce those photographs for widespread dissemination, a clear expression of support for a religious activity. Accordingly, the Madison Human Rights Statute—as applied to the Petitioner's photography business—coerces him into both church attendance and religious support in violation of his Free Exercise rights. Therefore, the Fifteenth Circuit erred in arguing that the conduct prescribed in the statute did not burden the Petitioner's First Amendment rights.

2. The Petitioner's freedom of speech and freedom of association rights are burdened in addition to his free exercise rights, thus triggering heightened scrutiny under the hybrid rights exception.

Heightened scrutiny must apply to the Madison Human Rights statute because the statute squarely falls within *Smith's* hybrid rights exception by burdening the Petitioner's Free Exercise rights in conjunction with his Free Speech and Free Association rights. The burden on Taylor's Free Speech rights is onerous, as he is being coerced to disseminate artistic, photographic

expression in support of religion, in direct contrast to his own beliefs.[1] Such a correlative burden upon two independent constitutional rights is enough to satisfy the *Smith* exception alone. Nevertheless, the statute burdens yet another constitutional protection by burdening Taylor's freedom of association protected by the First and Fourteenth Amendments. *See Smith*, 494 U.S. at 882 (noting that "it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns"). It is well-established that freedom of association "plainly presupposes a freedom *not* to associate. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (emphasis added). This freedom includes protection from involuntarily supporting causes with which a person disagrees. *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (holding that freedom of association is violated when drivers were compelled to display a license plate displaying the motto "Live Free or Die"); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977) (invalidating state collective bargaining contract conditioning public school teacher employment upon payment of union fees that funded political campaigning not related to the union's collective bargaining function).

Here, Taylor's freedom of association rights are plainly burdened by forcing him to attend religious services in order to photograph them. Just as his participation alone is enough to burden his Free Exercise rights, so too does that participation gravely implicate his right not to associate. And just as compelled payment of membership dues (and necessarily compelled membership itself) burdens freedom of association by forcing support, so too does compelled dissemination of photographs force support of the religious ceremonies to which Taylor objects. Accordingly, the burdens imposed by the statute upon Taylor's constitutional rights go far beyond Free Exercise alone, and much farther than is required to trigger strict scrutiny under *Smith's* hybrid rights classification.

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[1] *See generally supra* Part I.

3. The Court should apply strict scrutiny because the Petitioner's freedom of association and freedom of speech claims are burdened, regardless of its approach to assessing the viability of those claims.

The seven circuits that have correctly recognized the hybrid rights exception are divided with respect to the proper method of analyzing claims alleging coextensive constitutional burdens in conjunction with Free Exercise rights. Two have arguably required that such coextensive claims must independently *violate* constitutional rights. *See Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 539 (1st Cir. 1995) ("Their free exercise challenge is thus not conjoined with an independently protected constitutional protection."); *EEOC*, 83 F.3d at 467 (invalidating statute that burdened Free Exercise only after finding other completely valid constitutional infractions). Two others have mandated that the claims joined with a plaintiff's Free Exercise claims must be "colorable" constitutional claims. *See Swanson*, 135 F.3d at 700 ("Whatever the Smith hybrid-rights theory may ultimately mean, we believe that it at least requires a colorable showing of infringement of recognized and specific constitutional rights . . . ."); *Miller*, 176 F.3d at 1207 ("[T]o assert a hybrid-rights claim, a free exercise plaintiff must make out a colorable claim that a companion right has been violated–that is, a fair probability or a likelihood, but not a certitude, of success on the merits.") (quotations omitted). The remaining circuits have recognized the validity of the hybrid rights exception but have not specified their chosen evaluation protocol for conjunctive claims. *See, e.g., Civil Liberties*, 342 F.3d at 765 (refusing to recognize a valid hybrid rights claim because plaintiffs' conjunctive constitutional claims were found meritless); *Cornerstone Bible Church v. Hastings*, 948 F.2d 464, 473 (8th Cir. 1991) (recognizing the validity of the hybrid rights exception and instructing district court to consider the claim on remand, but refusing to adopt any particular analytical approach).

Here, the Court need not delineate which analysis standard is necessary, because the statute gravely burdens both the Petitioner's Free Speech and freedom of association rights, regardless of the Court's chosen approach. The only approach that could preclude this case from falling within the hybrid rights exception would be the "independently viable" approach, and only then if the Court held that the Petitioner's Free Speech and freedom of association rights were not violated. However, the "independently viable" approach is clearly erroneous because it necessarily contradicts *Smith's* reasoning and implicitly seeks to invalidate the hybrid rights exception altogether. Simply put, if a provision independently violates another constitutional protection other than a plaintiff's Free Exercise rights, there would be no reason to conduct a Free Exercise inquiry at all. Were that the case, the *Smith* Court would have had no need to identify an exception to the general bar on Free Exercise challenges to facially-neutral statutes, because such an exception is obviously unnecessary where a statute violates some other unrelated constitutional right. Accordingly, the "independently viable" approach cannot be adopted without eviscerating the hybrid rights doctrine altogether and thus destroying any need for *any* analytical approach to conjunctive violations in hybrid rights claims whatsoever.

Therefore, whether the Court applies a "colorable claim" approach or some other independent approach is superfluous to the case at issue here. Here, the Petitioner's Free Speech and freedom of association claims are clearly *burdened*, if not violated, because the Petitioner is clearly compelled by the statute to associate with religious groups by attending religion-based ceremonies. Likewise, his freedom of speech is burdened by the statute's requirement that he *disseminate* photographic content in support of those ceremonies. Thus, any analytical standard short of requiring independent violation of an unrelated constitutional right—a standard clearly inconsistent with the hybrid rights exception—requires only that a Petitioner's non-Free Exercise

rights be burdened. Here, multiple burdens are unquestionably imposed. Accordingly, the Human Rights Ordinance should be strictly scrutinized.

III. THE ENFORCEMENT ACTION MUST FAIL BECAUSE IT IS NOT NARROWLY TAILORED TO PROTECT A COMPELLING GOVERNMENTAL INTEREST.

In order to survive strict scrutiny, a challenged regulation must be narrowly tailored to protect a compelling state interest. *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). In order to qualify as narrowly tailored, the statute must employ the available method that is least restrictive upon the plaintiff's First Amendment rights. *Boos v. Barry*, 485 U.S. 312, 329 (1988). As this Court has recognized, "[t]he least-restrictive-means standard is exceptionally demanding." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014). Thus, even the compelling interests contained within an otherwise valid state public accommodation law are not sufficiently compelling to justify a disproportionately burdensome restriction of a plaintiff's associational and expressive First Amendment rights. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) (holding that "[t]he state interests embodied in New Jersey's public accommodations law" were not sufficiently compelling to "justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association," where the statute was interpreted to mandate the Boy Scouts' acceptance of a homosexual member, in violation of the organization's core beliefs).

Here, the state's interest in preventing discrimination is not sufficiently compelling to justify such grave burdening of the Petitioner's expressive, religious and associational rights. There is little risk of widespread photographer discrimination with respect to religious weddings. There are an estimated 100,000 dedicated wedding photographers in the United States. Christopher Lin, *Business—The Wedding Photography Market Size (Estimating the Number of Wedding Photographers in the United States*), SLR LOUNGE, Feb. 9, 2009, http://www.slrlounge.com/business-the-wedding-photography-market-sizeestimating-the-

number-of-wedding-photographers-in-the-united-states. Accordingly, wedding participants would be wise to turn to the large population of photographers whose work would not be negatively impacted by forced participation.

Furthermore, the potential harm sought to be avoided by the Commission's enforcement is minimal as compared to the harms wrought by other forms of discrimination in public accommodations. For example, employment discrimination cripples the earning ability of entire classes of citizens, housing discrimination reduces safety and limits upward mobility, and educational discrimination stands to hamper generations of societal advancement and earning power. *See* Motion for Leave to File Brief of Amici Curiae: The Cato Institute, Prof. Dale Carpenter, and Prof. Eugene Volokh at 24, *Elane Photography, LLC v. Willock,* 309 P.3d 53 (N.M. 2013). In contrast, while the stigmatizing effect of being rejected by a photographer solely on the basis of one's religion should not be understated, such stigmatization is comparatively small as compared to those traditional forms of discrimination. Therefore, the state interest in preventing such discrimination cannot fairly be deemed sufficient to gravely impair the foundational democratic values incorporated in the First Amendment. *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 780 (1978) ("Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause . . . .").

In summary, practicalities must count. While preventing religious discrimination is unquestionably a legitimate and compelling state interest in the abstract, state action that gravely burdens the free speech, free exercise, and associative rights of photographers by compelling them to enter places of worship and participate in religious ceremonies is disproportionately severe, given the minimal threat of discriminatory bias against wedding participants and the

widespread availability of alternate photographers. Accordingly, the Commission's enforcement cannot pass strict scrutiny and must be invalidated as applied to the Petitioner.

CONCLUSION

Because the Madison Commission's law forces Petitioner to give up his First Amendment rights to speech, religion, and association; because the Commission's law necessarily triggers strict scrutiny under Supreme Court jurisprudence; and because the Commission's law does not employ the least restrictive means available, the decision of the Fifteenth Circuit should be reversed.

Certificate of Compliance

The work product contained in all copies of this brief is in fact the work product of the team members. This team has complied fully with it' school's governing honor code. This team has complied with all Rules of the Competition.