No. 15-1245

IN THE SUPREME COURT OF THE UNITED STATES

JASON ADAM TAYLOR,

Petitioner,

v.

TAMMY JEFFERSON, in her official capacity; and MADISON COMMISSION ON HUMAN RIGHTS, and its members, not individually named, but in their capacity as members of the Board,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

BRIEF FOR PETITIONER

Team U
Counsel for Petitioner

STATEMENT OF THE ISSUES

While remaining faithful to its protection of free speech for all citizens, regardless of their religious views, this Court must decide:

I. Whether enforcement of a public accommodation law that requires a person to provide private business services when doing so violates that person's strongly held beliefs violates the free speech clause of the First Amendment of the Constitution.

II. Whether enforcement of a public accommodation law that requires a person to provide private business services for religious events and which may compel that person to enter religious buildings violates the Free Exercise and Establishment Clauses of the First Amendment.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit affirmed the decision of The United States District Court for the District of Eastern Madison and entered judgment on September 28, 2015. The Supreme Court has jurisdiction of this case pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case asserts a free speech claim pursuant to Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, *et. seq.*, Title II of the Madison Human Rights Act of 1967, Mad. Code Ann. § 42-101-2a, *et seq.*, and a federal civil rights claim under 42 U.S.C. § 1983. R. at 20-21. Taylor, the Petitioner, seeks to preliminarily and permanently enjoin the members of the Madison Commission on Human Rights, including the Respondents, Tammy Jefferson, Thomas More, Olivia Wendy Holmes, Joanna Milton, and Christopher Heffner, the (hereinafter referred to as, the "Commission"), from further imposing its Enforcement Action, to collect the sum of fines imposed against him since September 13, 2014, and for reasonable attorney's fees. R. at 3. Petitioner also seeks compensatory and punitive damages for bringing civil rights claims under 42 U.S.C. § 1983 for deprivation of constitutional rights under color of state law. R. at 40.

On August 11, 2014, Taylor received a letter from the Commission stating that two complaints were filed, alleging discrimination based on religion in violation of the public accommodation laws of the Madison Human Rights Act of 1967. R. at 21. Taylor chose not to file a position statement or have a hearing, and signed a formal waiver of the right to file a statement or have a hearing. R. at 21. The Commission filed a motion for summary judgment on May 25, 2015. The Court granted that motion on July 13, 2015. Petitioner timely appealed. The United States District Court for the District of Eastern Madison heard the case, and found in favor of Respondents. R. at 12. On September 28, 2015, the United States Court of Appeals for the Fifteen Circuit affirmed judgment for Respondents. Defendant appealed the case to the Supreme Court, and the Petition of Certiorari to the United States Court of Appeals for the Fifteen Circuit was granted. R. at 47.

STANDARD OF REVIEW

This is an appeal from the United States Court of Appeals for the Fifteenth Circuit, which declared in summary judgment that the Madison Commission on Human Rights did not violate Jason Taylor's First Amendment Rights. This Court will interpret the law as it pertains to free speech, the Free Exercise and Establishment Clause, and if the alleged discrimination was "unlawful." The facts of this case are not in dispute. Summary judgment is appropriate when the record establishes "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The standard of review for this case is de novo. *See Ornelas v. United States*, 517 U.S. 690 (1996). This Court has held that it is, "compelled to examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946). When the government restricts speech, the burden is on the government to prove the constitutionality of its actions. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

SUMMARY OF THE FACTS

James Adam Taylor is the owner and operator of Taylor's Photographic Solutions (hereinafter, "Business"), in Madison City, Madison. R. at 14. The Business offers a variety of photography services to the public, including birthdays, graduations, festivals, weddings, and more. R. at 14. Taylor believes that photography is inherently artistic and expressive. R. at 20. The Business has a good reputation in the area and he is known for his specific talents, including his expertise in indoor lighting and one of his employee's expertise in photographing outdoor events. R. at 20. The Business does not photograph any event that is religious in nature, regardless of the religion, under a policy enacted by Taylor since the store's opening in 2003. R. at 14-15. The policy also extends to his seventeen employees, who are not permitted to photograph religious events in their capacity as employees of the Business. R. at 14-15.

Taylor grew up in a mixed-faith household, which caused strained family relations that he feels negatively affected his childhood. R. at 16-17. By the time Taylor was 19, he announced that he was a, "full blown militant atheist". R. at 17. However, Taylor has since attended some religious ceremonies to support his family members. R. at 17. Taylor states that he felt uncomfortable during the prayers and did his best to tune them out. R. at 17.

Taylor enforced a strict policy at the Business of not denying service to any individual based on his or her religion. R. at 15. He also has a strict policy prohibiting discrimination against employees due to their religion and employs individuals of multiple religions including Judaism, Christianity, Islam, Scientology, Buddhism, Hinduism, Wiccan, and atheism. R. at 18. While Taylor does not hide his personal distaste for religion and has engaged in controversial conversations, his actions demonstrate fairness and an accommodation of the religious needs of his employees. R. at 18, 27-28, 32. For example, Taylor filmed an event for his Muslim

employee, Ahmed Allam, who asked to not photograph a festival that celebrated alcohol, pork, and scantily clad woman. R. at 18. Taylor also allowed Allam to adjust his work schedule for Ramadan and turned down a $10,000 contract for an event because the customer made a derogatory and racially charged comment towards Allam. R. at 29. Taylor also allowed a Jewish former employee, Esther Reuben, to take certain days off as mandated by her faith. R. at 31-32.

The Business has photographed weddings that were performed by clergy but were secular in nature. R. at 15. The first example of this involved a wedding in March, 2015 in which the bride's father at the County Clerk of Court's Office offered a non-denominational prayer. R. at 16. Taylor also photographed the bride and groom's reception at a social hall owned by a Catholic church because the preceding ceremony did not celebrate or endorse any religion. R. at 16. The second example occurred in April, 2015, when Taylor photographed a wedding between two men (one who was Jewish, and one who was Episcopalian), that an ordained minister in the Church of Life presided over, because it was not religious in nature. R. at 15-16.

In June 2014, Taylor placed a sign in the window of his store stating,

> The management of this business firmly believes that organized religion is an impediment to the furtherance of humanity and civilization. As a firm believer that the ultimate goal of humanity should be a fading of religion, the management of this business will not perform services for any religious services of any kind. The management of this business holds no person prejudice against any particular religion or followers of any religion. Members of all religions are welcome to enter this place of business and will not be denied services based solely upon their affiliations with any particular religion.

R. at 17-18.

On July 14, 2014, Patrick Johnson entered the Business asking Taylor to photograph his wedding. R. at 18. Taylor promptly asked where the wedding would occur, not wanting to

"waste anyone's time," knowing he would not photograph a religious ceremony. R. at 19. Upon learning that the wedding would be performed by a priest at a Catholic church, Taylor stated he would not photograph it. R. at 19. Taylor then recommended that Mr. Johnson visit CM's Snaps, a photography store across the street. R. at 19.

On July 22, 2014, Samuel Green came to the Business asking to have his wedding photographed. R. at 19. Again, Taylor asked where it would take place and who would perform it. R. at 19. After learning it would be performed by a Rabbi at a synagogue, Taylor declined the job, and referred Mr. Green to CM's Snaps. R. at 20.

Both Johnson and Green became angry at Taylor, accusing him of discrimination. R. at 19-20. On August 11, 2014, Taylor received a letter from the Madison Human Rights Commission stating that two complains had been filed, alleging discrimination based on religion in violation of the public accommodation laws of the Madison Human Rights Act of 1967. R. at 20-21. Taylor called the Commission and learned that he had the right to file a position statement, have an attorney, and engage in an administrative hearing. R. at 21. After some consideration, Taylor notified the Commission of his intention not to file a position statement or have a hearing because he believed he did nothing wrong. R. at 21. He was sent, and signed a formal waiver of the right to file a statement or have a hearing. R. at 21. On September 15, 2014, Taylor received a letter from the Commission stating that he was under investigation, and it was found that he discriminated on the basis of religion. R. at 21. He was told to cease what he was doing and pay a number of fines. R. at 21. He then contacted his lawyer and refused to pay the fines. R. at 21.

SUMMARY OF THE ARGUMENT

This case is about a businessman, who treated all religious events lawfully and equally, but is now forced to attend, provide services for, and effectively endorse religious ceremonies against his will. The facts of this case demonstrate that the Lower Courts should have ruled in Taylor's favor, but erred in applying relevant law, and incorrectly prioritized religion above non-religion.

The First Amendment protects both the right to free speech, and the right to refrain from speaking at all, and the Commission's enforcement action constitutes an infringement of the latter. Specifically, First Amendment jurisprudence counsels that governmental actors can neither compel unwanted speech, nor force any expressive association between entities. The Commission's enforcement action compelled the Business to create unwanted speech, and also forced it to associate with religious institutions in order to create speech, representing a violation of both of the aforementioned rights.

The Commission's enforcement of the Madison Statute, and the Circuit Court's interpretation thereof, fails all three factors of the Lemon Test, which tests whether statute is constitutional under the Free Exercise and Establishment Clause. The Commission's enforcement action violates not only the Constitution, but also the Madison statute it is attempting to enforce, and the holdings in relevant case law regarding the Free Exercise and Establishment Clauses.

ARGUMENT

I. THE COMMISSION'S ENFORCEMENT ACTION VIOLATED THE BUSINESS' FIRST AMENDMENT PROTECTIONS AGAINST COMPELLED SPEECH AND FORCED EXPRESSIVE ASSOCIATION

The Commission's enforcement action violates the Business' First Amendment right to free speech for two reasons. First, the enforcement action amounts to compelled speech, as the commission forced the Business to both create, and distribute unwanted speech. Second, the enforcement action represents a forced expressive association, as the Business' photography constitutes expressive activity, and forcing it to photograph religious wedding would inherently force the Business to associate itself, against its will, with religious institutions.

A. The Commission's Enforcement Action Constitutes Compelled Speech

The First Amendment of the U.S. Constitution protects, "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 645 (1943)). Compelled speech violations of the First Amendment occur when government forces an entity to engage in unwanted speech, or alternatively when government punishes an entity for refusing to engage in unwanted speech. Most frequently, compelled speech violations occur in the form of forced distribution, accommodation, or hosting of another's speech, but the doctrine similarly applies to the forced creation or engagement of speech.

On the point of compelled speech, *Wooley* is the seminal case. In *Wooley,* the Supreme Court held that enforcement of New Hampshire statute that punished citizens who refused to display the state motto on license plates constituted compelled speech, and amounted to a violation of First Amendment rights. In reasoning its decision, the court noted that, "[a] system

which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts". *Wooley* 430 U.S. at 714.

Although *Wooley* dealt exclusively with an unconstitutional statute that forced citizens to distribute or display state-sponsored speech, the same principles apply to statutes that compel the forced display or distribution of non-governmental speech. In *Miami Herald Pub. Co, Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court held that a state government could not compel a newspaper to publish a third party's writings on its editorial page without violating the newspaper's First Amendment rights. Notably, *Tornillo* also makes readily apparent the principle that for-profit corporations are protected against compelled speech violations. *Id; See Also, Riley v. National Federation of the Blind of North Carolina,* 481 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received.").

Bearing in mind the case at bar, it is crucial to distinguish the Supreme Court's holding in *Tornillo* with its holding in *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994). In *Turner,* the Supreme Court ruled that a cable provider's refusal to comply with a provision requiring it to carry certain channels did not amount to compelled speech. *Id. at* 629-30. In ruling against the cable provider, the court reasoned that cable providers are not entitled to First Amendment protection from compelled speech as they are not speakers, but rather merely, " conduits for speech… transmitting channels on a continuing and unedited basis to subscribers." *Id.* at 629. The Crucial distinction between *Tornillo* and *Turner* therefore, is that whereas a newspaper creates its own speech and is thus protected against compelled speech violations, a cable provider, which serves merely to broadcast the speech of others, is not.

Turning to the facts, the Business functions in a manner that is more similar to the newspaper in *Tornillo* than the cable provider in *Turner.* Crucially, Taylor does not merely serve as a, "conduit for speech." Taylor not only captures, but also sets up and edits his wedding photographs, rendering him a speaker and not merely a conduit for the speech of others. Certainly, if a speaker cannot be forced to host or accommodate the unwanted speech of another, it cannot be forced to actually create such unwanted speech.

1. **The Business' Photography Constitutes Speech and is Thus Entitled to First Amendment Protection Against Compelled Speech**

Both the District and Circuit Courts reject the assertion that the Madison Commission's enforcement actions amounted to compelled speech, relying heavily on the unfounded grounds that Taylor's photography does not constitute speech.

Myriad case law supports the assertion that, for the purpose of the First Amendment protection from compelled speech, photography typically constitutes speech. *See Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (Supreme Court held that a law banning the photographic reproduction of currency amounted to a First Amendment violation), *See Also, Kaplan v. California,* 413 U.S. 115, 119-20 (1973) ("Pictures… have First Amendment Protection"). Further, an entity engaging in photography for commercial purposes does not effectively waive its First Amendment protection against compelled speech. *Riley*, 481 U.S. at 801. Accordingly, the District and Circuit Courts alike erred in dismissing the assertion that Taylor's photography constitutes speech because, "plaintiff operates his business for the purposes of earning money, not for the purposes of speaking,", "the customer… ultimately decides which photos to purchase," and, "photographs are simply products that appellant and his business sell." R. at 7-8, 41.

While both the District Court and the Circuit Court correctly noted that in order to claim compelled speech, Taylor must demonstrate that he actually engages in speech, the Courts incorrectly rushed to the conclusion that he does not speak through his photography. R. at 8, 40-41. In the context of the First Amendment, speech is not merely spoken words, but also includes conduct that is, "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Tex. v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington,* 418 U.S. 405, 409 (1974)). In order to determine whether particular conduct brings the First Amendment into play, the Supreme Court considers whether, "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404 (quoting *Spence,* 418 U.S. at 410-11).

Taylor's wedding photographs satisfy the requisite intent to convey a particularized message. As a photographer, Taylor acts as a storyteller for the wedding. Taylor is hired to photograph weddings in order to communicate the notion that the wedding is a beautiful, joyous, and commendable event. Customers seek out Taylor's services in order to utilize the talents and creativity of Taylor and his employees in order to portray weddings in a positive manner. R. at 15. Specifically, Taylor and his employees hold a reputation of being highly skilled in utilizing lighting in order to create more beautiful images. R. at 20, 30. Further, viewers will almost certainly understand the message of Taylor's wedding photographs—that the wedding is beautiful, joyous, and commendable.

Accordingly, because Taylor engages in speech through his photography, and the Madison Commission compelled the creation of unwanted speech, as well as the distribution of

unwanted speech, the enforcement action amounts to a violation of the First Amendment protection against compelled speech.

2. The Madison Action Regulates The Speech Element of Business' Activity

In its holding, the District Court noted that, "the government may regulate such expressive speech if there is a compelling interest in regulating the non-speech element of the activity… Here, that non-speech element is service and service to all members of the public." R. at 8. (Internal Citations Omitted). If, for example, the Business refused to allow customers holding certain religious beliefs into the store, Madison could constitutionally regulate such denial of entry as a non-speech element of the Business' activity. However, In the context of the case at bar, photography constitutes speech, and forcing the Business to photograph certain events takes direct aim at the speech element of the Business' activity.

Further, the District Court's argument that the enforcement action furthered a compelling state interest in unavailing. The District Court noted that the compelling interest at stake was, "making sure that all members of the public are served," and opined that, "The state simply requires Plaintiff to open his business to all and provide services to all." R. at 9.

Crucially, the Business provides services to all members of the public. R. at 14. The record indicates that the Business does not discriminate against any individuals for religious reasons, and merely refuses to photograph religious weddings. R. at 15. In fact, the record indicates that the Business will photograph weddings of religious individuals, so long as the event does not take place in a religious setting. R. at 15, 16. The Business serves all members of the public, and discriminates only against events, and not individuals.

B. The Commission's Enforcement Action Constitutes a Violation of the First Amendment Protection Against Forced Expressive Association

By forcing Taylor to engage in expressive conduct that would inherently associate him with religion, the Madison Commission infringed on Taylor's First Amendment protection from forced expressive association. The Supreme Court has consistently held that the First Amendment right to free speech extends to the freedom of entities to associate with one another for the purpose of engaging in expressive speech. *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995). Since governmental actors cannot restrict entities from associating for the purpose of engaging in expressive speech, First Amendment jurisprudence counsels that governmental actors are similarly forbidden from forcing such expressive association. *Wooley v. Maynard*, 430 U.S. at 714..

Hurley is the seminal case on the issue of forced expressive association. In *Hurley,* the Supreme Court unanimously held that Massachusetts could not compel parade sponsors ("the Council") to allow a gay rights organization ("GLIB") to march as an organized group behind a banner. *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995). The court reasoned that, although the Council did not seemingly convey a single, unified expressive message, "the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day." *Id.* at 574. In reasoning its holding, the Court noted that forcing the accommodation of GLIB would effectively force the Council to unwillingly endorse GLIB's expressive message, and this amounted to a violation of the Council's First Amendment freedom from forced expressive association. *Id.*

Especially pertinent to the case at bar, the court in Hurley unanimously agreed that the Council's actions did not amount to unlawful discrimination because it did not wish to bar individual GLIB members from marching. *Id.* Rather, the Council merely wished to prevent the entry of a group which would plainly express a viewpoint that the council did not endorse. *Id.*

Much like the organizers in *Hurley*, the Business did not discriminate against any individuals. Rather, the Business merely refused to photograph religious weddings as doing so would effectively constitute an endorsement of religion, which would severely alter and impair the expressive message that the Business intends to convey through its photography. By forcing the Business to associate with religious institutions for the purpose of creating expressive speech, the Madison Commission infringed upon Taylor's right to freedom from forced expressive association.

1. The Business is Entitled to First Amendment Protection from Forced Expressive Association

Unfortunately, both the District and Circuit Courts rushed to improper conclusions, with both contending that, because Taylor sells his photographs for profit, he is not entitled to protection from forced expressive association. R. at 8-9, 42. Supreme Court case law dictates that commercial entities are often entitled to protection from forced expressive association. *Riley,* 481 U.S. at 801. Additionally, in *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000), the Supreme Court held that, "associations do not have to associate for the purpose of disseminating a certain message in order to be entitled to the protections of the First Amendment." *Id.* at 655. Thus, the lower courts erred in ruling that the Business' activities were not entitled to First Amendment protection merely because they were, "for the purposes of earning money, not for the purpose of speaking." R. at 7.

2. The Court Must Give Deference to the Business Regarding What Would Impair His Expression

Supreme Court case law dictates that, on issues of expressive association, courts must give deference to the organization alleging a First Amendment violation on the issue of what would impair expression. *Dale*, 530 U.S. at 653. In reasoning its decision in *Dale,* the Supreme Court noted that, "a State, or a court may not constitutionally substitute its own judgment for that of the party." *Id. at 653* (quoting *Democratic Party of United States v. Wisconsin,* 450 U.S. 107, 123-24 (1981)).

Accordingly then, the court must give deference to the Business regarding the issue of whether photographing religious weddings would impair its expression. The Business has a compelling argument that such photography would impair its message. When the Business photographs weddings, it does so in a manner that portrays weddings as beautiful, joyous, and commendable occasions. Forcing the Business to photograph religious weddings inherently forces the Business to portray religious weddings, and religion in general as praiseworthy. Because Taylor personally finds religion reprehensible, forcing him to associate with religious entities and events for the purpose of portraying them in positive lights certainly impairs, and alters the expressive content of his work. Accordingly, the Madison Commission's enforcement action constitutes a violation of the Business' First Amendment right against forced expressive association.

3. The Madison Commission's Enforcement Action Suppresses Ideas And Thus Cannot Override the Business' First Amendment Rights

In opining that the Madison Commission could override the Business' First Amendment rights in order to serve a compelling state interest, the lower courts committed a crucial error in interpreting relevant case law. In fact, the District Court misquoted an excerpt from the Supreme

Court's holding in *Hurley*, effectively obscuring the applicability of the stated principle to the case at bar. R. at 9. The District Court noted that First Amendment association rights can be overridden by, "regulations adopted to serve compelling state interests, unrelated to the suppression of ideas that cannot be achieved through means significantly less restrictive of associational freedoms." Id. Crucially, the District Court omitted a comma after "unrelated to the suppression of ideas." *Hurley*, 530 U.S. at 648. The comma serves to emphasize the principle that statutes adopted to serve compelling state interests cannot override First Amendment rights insofar as enforcement would result in the suppression of ideas. Since the enforcement action related to the suppression of the Business' idea that religion and religious events were not events worthy of portraying in a positive light, the enforcement action, no matter its intention to further some compelling interest, is unconstitutional.

II. THE LOWER COURTS WRONGLY HELD THAT A PUBLIC ACCOMMODATION CLAUSE CAN PREEMPT A PERSON'S FIRST AMENDMENT RIGHTS UNDER THE FREE SPEECH AND ESTABLISHMENT CLAUSE

The Commission's enforcement action violated the Free Exercise and Establishment Clause, and accordingly constitutes a First Amendment violation. The Circuit Court's non-secular ruling violates the Constitution, the Madison statute it is attempting to enforce, and is inconsistent with Supreme Court holdings in relevant cases.

A. The Business Did Not Unlawfully Discriminate Against A Protected Class Of Individuals

Although Taylor chose not to photograph religious events, Taylor's actions did not amount to unlawful discrimination. Taylor did not discriminate against a protected class of persons because religious events cannot be classified as "persons". Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, *et. seq.*, and the analogous Title II of the Madison Human

Rights Act of 1967, Mad. Cod. Ann. § 42-101-2a, *et, seq.*, both prohibit unlawful discrimination in a place of public accommodation. The Civil Rights act states,

> 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.

42 U.S.C. § 2000a (West). Unlawful discrimination is the refusal of equal access to persons of a protection class. *Id.* Although persons is not defined in Subchapter II, Subchapter VI of the same Act defines it as follows,

> The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

42 U.S.C. § 2000e(a) (West). While Taylor chose not to photograph religious events, Taylor did not deny his services based on the religious affiliation of the person. As events, ceremonies, and places of worship are not protected persons, Taylor is free to deny his services to them. Taylor's refusal to photograph religious weddings is indistinguishable from Allam's refusal to photograph an event with pork and scantily clad women. R. at 28. In both situations, the photographer refused service not on the grounds of the religion or sex of the client, but due to the nature of the event itself.

Additionally, Taylor's past actions demonstrate that he is happy to provide his wedding services to religious people, as long as the ceremony is secular. For example, on April 2015, Taylor photographed a wedding for two men that was officiated by an ordained minister in the Church of Life. The wedding was between two religious men, one who was Jewish and one who was Episcopalian. R. at 15. On March 15, Taylor provided wedding photography services to a

couple in a ceremony in which a non-denominational, general prayer was given. R. at 16. He also provided his services at that wedding's reception, even though it took place in a building owned by a church, because the ceremony itself did not endorse any religion. R. at 16.

Although Taylor does not hide his personal distaste of religion, he has a history of respecting and protecting people of religious backgrounds and their beliefs. Taylor has seventeen employees who follow a variety of religions and he has a strict policy prohibiting religious discrimination amongst employees. R. at 18. Taylor photographed an outdoor festival in Allam's place, because it conflicted with Allam's religious beliefs. R. at 18. In another instance, Taylor rejected a $10,000 contract because the customer made a derogatory comment concerning one of his employee's religions. R. at 29. He also respects his employees' religions by granting days off for religious reasons. R. at 31. Considering Taylor's past behavior, his decision not to photograph religious events does not constitute unlawful discrimination against religious persons.

Taylor's neutral and secular actions follow both the spirit and the letter of the Free Exercise and Establishment Clause. Both the District Court and the Circuit Court wrongly interpreted the public accommodation exception of the Civil Rights Act and the Madison Human Rights Act in a way that violates Madison's RFRA provision, makes both Acts unconstitutional, and selectively ignores a section of Madison's code that prohibits the Government from contributing to the success of places of worship.

In response to a Supreme Court decision that stated, "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", Congress passed the Religious Freedom Restoration Act ("RFRA") in 1993. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990).

The Act provided that, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a) (West). While the Supreme Court eventually repealed RFRA, the judicial history is important because many states created their own, currently valid, versions of RFRA, including Madison.

Madison's RFRA states, in part:

> 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 it has a compelling governmental interest in infringing the specific act or refusal to act; (2) and has used the least restrictive means to further that interest.

Mad. Code Ann. 42-501(d). The Code also provides a carve-out provision that prohibits unlawful discrimination by a public accommodation. Although compelling state interests is not clearly defined by case law, they are generally a necessary or crucial government interest. *See Grutter v. Bollinger*, 539 U.S. 306 (2003). Because Taylor's actions did not amount to unlawful discrimination, the only state interest pertains to whether photographers can exercise discretion over which events to photograph. Therefore, to lawfully compel Taylor to act in a manner that contradicts his religious beliefs, the Court must prove that its interest in denying photographers such discretion, by clear and convincing evidence, is a necessary or crucial government interest. The Commission fails to meet this high burden.

With regard to the second factor, the Commission's enforcement action does not represent an undertaking of the least restrictive option through which to further some compelling state interest. While at his family member's religious ceremonies, Taylor had to work hard to tune out prayers, and felt very uncomfortable. R. at 17. If Taylor has to concentrate on tuning out the near-constant string of prayers during a wedding ceremony, his work product will clearly suffer, damaging his prestigious reputation in the community. Instead, the Commission could

have requested that Taylor stop photographing weddings of any kind, rather than forcing him to endure, and inherently endorse religious ceremonies. Additionally, Taylor provided a simple alternative by referring his customers celebrating religious ceremonies to a photography store across the street. R. at 19. The Enforcement Action cannot be deemed the least restrictive method when Taylor himself devised, and practiced a less restrictive option.

As Madison's RFRA plainly states, both factors must be satisfied to justify Madison's infringement on one's religious beliefs. Here, the Commission did not prove through clear and convincing evidence that it used the least restrictive means to further a compelling state interest, and therefore, there is no justifiable or legal reason to burden Taylor's religious choices.

B. The Lower Court's Reading Of The Madison Statute Is Unconstitutional Because Its Interpretation Of The Statute Does Not Pass The Lemon Test

If the Courts find that Taylor's actions were unlawfully discriminatory, the statute's carve-out exception for public accommodations would apply as long as the exception would not cause the statute to violate the Free Exercise or Establishment clause. Statutes must pass the "Lemon Test" to determine whether it violates either clause. The test states that the statute, "(1) must have a secular purpose, (2) must not advance or inhibit religion or religious practices as its 'principle or primary effect', and (3) must not 'foster excessive government entanglement with religion'". *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). Here, the Lower Court's interpretation of the Civil Rights Act, and Madison's code renders the statutes unconstitutional because they violate all three factors.

The first factor states that the statute must have a secular purpose; it cannot favor one religion over another. The Supreme Court held that, "The [Lemon] 'tests' are intended to apply to laws affording a uniform benefit to all religions, and not to provisions...that discriminate among religions." *Larson v. Valente*, 456 U.S. 228, 252 (1982). Additionally, "[The]

Establishment Clause doctrine requires not simply the absence of favoritism among religions but of religion over non-religion as well; even atheism falls within the protection of the First Amendment." *O'Connor v. State of Cal.*, 855 F. Supp. 303, 308 (C.D. Cal. 1994). Because a religious ceremony is not a protected class, Taylor should be free to choose if he wants to photograph the event. The Commission had no issue with Allam's decision not to photograph a festival with pork, or with Taylor's turning down of a $10,000 event. R. at 18, 29. Therefore, the Lower Court's decision is non-secular because it favors events with religious affiliations by forcing Taylor to film events that are religious in nature, but allowing him the choice to reject events that are not religious.

The second factor states that the statute cannot advance or inhibit religion. The Court in *Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 238 (1968) created the test for the second factor, which cites the Court's statement in *Everson v. Board of Education of Ewing Township*;

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to 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.

Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 15-16 (1947). The Lower Court's interpretation forces Taylor to attend places of worship against his will, effectively placing religious peoples' desire for a specific photographer over the entire atheist belief system. Such an interpretation plainly constitutes preferential treatment of religious persons over non-religious persons.

The third factor states that the statute cannot entangle government and religion. In *Lemon*, salary supplements benefitting teachers in a nonpublic school were deemed to fail the third factor of the Lemon's test because of the potential for government's entanglement with the school's substantial religious activities and purpose. *Lemon*, 403 U.S. at 616 (1971). If providing salary supplements to teachers is beneficial to a school's religious purpose, then ensuring professional photography services (especially from a highly reputable photographer) likely also benefits the religious purpose of the church in which the ceremony is photographed. The pictures will likely benefit the church by casting it in a positive light, providing free publicity by having the pictures shared amongst friends and family of the person celebrating the ceremony, and bringing more members to the church for religious worship, or as a venue for future religious ceremonies. Therefore, the government will provide a catalyst for the growth of local religions by ensuring that those who celebrate religious ceremonies are provided with expert photographers.

The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the "purpose" or "effect" of advancing or inhibiting religion. In addition to the Lemon test, Justice O'Connor created an "endorsement test" that mirrors the Establishment Clause in her concurrence in the Supreme Court case *Lynch v. Donnelly*, 465 U.S. 668 (1984). The test has been used in subsequent cases in the 7th Circuit, and Middle District of Pennsylvania. *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002). Justice O'Connor's endorsement test states that a government has impermissibly endorsed a religion if its conduct has the purpose or effect of favoring one religion over another. The purpose prong of the test asks if, "the government's actual purpose is to endorse or disapprove of religion." *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1224 (10th Cir.

2005). The effect prong asks, "whether a reasonable observer aware of the history and context of the forum would find the display had the effect of favoring or disfavoring a certain religion." *Id.* at 1228.

Here, the Commission endorses a religion by forcing those who work or own a public accommodation to attend religious wedding ceremonies. Marriages need not be conducted in a church. However, Madison endorses religious wedding ceremonies by forcing a photography business to photograph those ceremonies.

Additionally, the Court's decision also fails the effect test by favoring one religion over another. The 7th Circuit found the Supreme Court's statement in *Wallace v. Jaffree*, 472 U.S. 38 (1985) abundantly clear that atheists and those whose beliefs do not include worship of a supreme being are also protected as religions. The Court held that, "Atheism is 'a school of thought that takes a position on religion, the existence and importance of a supreme being, and a code of ethics,' and it is thus a belief system that is protected by the Free Exercise and Establishment Clauses." *Kaufman v. Pugh*, 733 F.3d 692, 697 (7th Cir. 2013). The Commission's enforcement action, and the lower courts' holdings, prioritizes the practices and beliefs of religious persons over those of the non-religious.

The canon of constitutional avoidance counsels that, if possible, the court should interpret a statute in a way that does not violate the constitution. If the Supreme Court interprets the statute consistent with the Lower Court's decision, the result is an unconstitutional violation of the Free Speech and Establishment Clause per the Lemon test. The only way the Supreme Court can interpret the statute while not violating the First Amendment is to find that Taylor's actions were not unlawful discrimination of a protected class and were a personal choice to avoid a venue that he felt would violate his religious rights.

Additionally, the Lower Court's ruling not only violates the First Amendment, but contradicts numerous sections of the code it is attempting to enforce. The Madison Code states;

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

Mad. Code Ann. § 42-501(b). While the District Court requires a showing that Taylor's entry in a place with religious ties must coerce him to accept the religion or substantially burden his own religious belief, Madison's statute merely states that the Commission cannot compel a person to attend a place of worship to engage in any form of religious worship or practice. R. at 11, 13.

The religious weddings Taylor would have to photograph would, quite obviously, force Taylor to engage in worship and religious practices. Catholic and Jewish wedding include numerous religious activities like prayers, deity worship, and rituals like the peace offering, and guests and photographers must either participate in these rituals, or else risk offending the institution and its adherents. The Lower Court's decision also promotes the continued financial and reputational success of places of worship. Taylor has a reputation in the community for his specific talents, including his expertise in the use of indoor lighting. R. at 20. As pictures are a common form of promotion, it is probable that some who see his photographs will choose to the join the church it was captured at, or will choose to have their own religious ceremony at that venue. Additionally, several religions, including Catholicism, ask for mandatory donations to host wedding ceremonies. Therefore, forcing Taylor to photograph weddings at religious institutions would likely contribute to the reputational and financial success of the institution, in direct contrast to Taylor's atheist belief in fading religion from society.

Taylor did not commit unlawful discrimination by choosing not to photograph religious ceremonies. Regardless, Taylor's position as owner of a public accommodation does not supersede his individual constitutional rights, or the constitutional rights of his employees. The Lower Court's decision unconstitutionally forces Taylor and his employees to attend religious ceremonies. The only way to avoid violating Taylor's constitutional rights is for this Court to reverse the finding of the Lower Courts and rule in favor of the Petitioner, Taylor.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Court to reverse the decision of the Lower Courts.

Respectfully Submitted,

Team U, Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

1. The Work Product contained in all copies of Team U's briefs is the work product of Team U.
2. Team U has fully complied with its school's governing honor code.
3. Team U has complied with all rules of the competition.