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

Respondents.

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

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Counsel for Petitioners

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit entered final judgment on this matter on September 26, 2015. *Taylor v. Jefferson*, No. 15-1213, at 1 (15th Cir. Sept. 26, 2015). Petitioner timely filed a Petition for Writ of Certiorari, which this Court granted on November 30, 2015. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Madison Human Rights Commission's Enforcement Action deprive Petitioner of his constitutional right against compelled speech under the Free Speech Clause of the First Amendment by imposing heavy monetary sanctions when the Petitioner refused to create photographs in settings that violate his strongly held beliefs?
2. Did the Madison Human Rights Commission's Enforcement Action violate Petitioner's constitutional rights under the Free Exercise and Establishment Clauses of the First Amendment when it imposed draconian fines and threatened civil action to compel his provision of photography services at religious ceremonies and does the Enforcement Action withstand strict scrutiny?

STATEMENT OF THE CASE

Factual Background

For the past twelve years, Petitioner Jason Taylor and his wife have personally owned and operated a small business, Taylor Photographic Solutions, which offers professional, creative photography to the public. R. at 14. Mr. Taylor employs both a religiously and culturally diverse staff of 17 employees who are educated and trained in providing quality photographic images. *Id.* at 18. He routinely extends liberal accommodations to the exercise of their faith. *Id.* at 29, 32. For example, Mr. Taylor arranges the work schedule to provide a day off for an observant Jewish employee in accordance with the Jewish Sabbath. *Id.* at 32. Moreover, upon discovering that he assigned a Muslim employee to cover an event that directly conflicted with the employee's belief

system, Mr. Taylor apologized and worked the event in his employee's stead. *Id.* at 29. In response to a potential patron's disparaging comments towards this same Muslim employee, Mr. Taylor declined the customer's $10,000 job. *Id.*

Mr. Taylor and his staff photograph a wide variety of celebrations, including birthdays, graduations, festivals, and other special events. *Id.* at 3. However, due to his long-standing, personally-held beliefs, Mr. Taylor's has implemented a policy from his business's inception which does not make his professional services available for religious events. *Id.* at 15. Religious celebrations which Mr. Taylor does not provide support for include, inter alia, bar mitvahs and marriages solemnized with a faith-based ceremony. *Id.* at 14. In June 2014, Mr. Taylor publically displayed his policy for the benefit of potential patrons. *Id.* at 17. The policy stated, "the management of this business will not perform services for any religious services of any kind." *Id.*

Over succeeding weeks in July 2014, after 11 years of practicing this policy, two men individually requested that Mr. Taylor photograph a religious wedding ceremony – one at a church, and the other at a synagogue. *Id.* at 18-19. Mr. Taylor reiterated his policy to each of them individually, declining both requests. *Id.* Three weeks later, Mr. Taylor received an Enforcement Action from the Madison Commission on Human Rights ("Commission") alleging discrimination on the basis of religion pursuant to Title II of the Madison Human Rights Act of 1967, Mad. Code Ann. § 42-101-2a, *et seq*.,. *Id.* at 2, 20.

The Enforcement Action ordered an "[i]mmediate abatement" of what the Commission deemed "discriminatory practices" and imposed hefty $1,000 per week fines to compel Mr. Taylor's compliance with the order. *Id.* at 25. The Commission additionally threatened civil action should Mr. Taylor "not submit sufficient proof" within 60 days showing that his allegedly discriminatory behavior had ceased. *Id.*

Proceedings Below

Petitioner brought these civil rights claims under 42 U.S.C. § 1983 for deprivation of constitutional rights under color of state law against Respondents Tammy Jefferson, Chairman of the Madison Commission on Human Rights, in her official capacity, and the members of the Commission not individually named here, in their official capacities as members of the Commission in response to the Board's Enforcement Action, which demanded immediate abatement of Petitioner's practices, the payment of $1,000 per week until such point, and the threat of civil action if Petitioner refused. *Taylor v. Jefferson*, CA No. 2:14-6879-JB, at *1 (E.D. Madison July 13, 2015) ("*Jefferson I*"). These constitutional rights claims apply to the states pursuant to the Due Process Clause. *See Gitlow v. New York*, 268 U.S. 652 (1925). The Commission filed for summary judgment, which the District Court granted. *Jefferson I* at *12.

Petitioner filed a timely appeal to the United States Court of Appeals for the 15th Circuit Court seeking reversal of the District Court's decision. *Jefferson*, Appeal No. 15-1213, at *1 (15th Cir. Sept. 26, 2015) ("*Jefferson II*"). The Fifteenth Circuit upheld the motion on appeal. *Id.* at *5. Petitioner timely filed petition for writ of certiorari to the United States Supreme Court, which the Court granted on November 30, 2015.

SUMMARY OF THE ARGUMENT

This is a case about preventing overzealous government action from compelling a small business owner who has dedicated his life to perfecting the art of photographic expression to endorse a message that is an affront to his conscience. The Circuit Court clearly erred when determining that original photographs created through Petitioner's skill are simply fungible goods offered at a customer's behest. Much more than typical peddled wares, photographs are constitutionally protected forms of expression and copyrightable forms of creativity. Respondent's draconian Enforcement Actions strike at the heart of the fundamental First

Amendment principle that "each person should decide for himself or herself the ideas and beliefs deserving of expression[.]" *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, __ U.S. __, 133 S. Ct. 2321, 2327 (2013) (internal quotation marks omitted).

Petitioner's right to speak his own mind through photography cannot be altered by an untenable government action to "compel him to utter what is not in his mind," be it the message of the government or a customer. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). The Court has repeatedly held that photography is a valid form of speech. *See, e.g. Regan v. Time*, 468 U.S. 641, 648 (1984) ("[T]he value of a photograph cannot help but be based on … the message it delivers."). Even a business's classification as a public accommodation cannot overcome the well-established right to free speech. *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 568 (1995).

Furthermore, this is a case about continuing to forbid a government from coercing its citizens to unwillingly support the reputational success of a religious institution. The Circuit Court wrongfully found that a government action which compels Petitioner to celebrate faith-based worship services through his photographic talent did not violate the first principles of the Establishment Clause. Instead of recognizing the elemental First Amendment principle that "government may not coerce its citizens to support or participate in religion or its exercise," *Lee v. Weisman*, 505 U.S. 577, 587 (1992), the Madison government imposes oppressive fines that force Petitioner to enter into a sacred house of worship and participate in solemn religious traditions. The Enforcement Action additionally fails the *Lemon* test because it has the primary effect of endorsing religion and inhibiting Petitioner's belief of abstaining from religious practice. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Petitioner's assertion of a valid free speech and free exercise claim establishes a hybrid-rights claim entitled to *Sherbert v. Verner,* 374 U.S.

398, 402-03 (1963), strict scrutiny analysis. The Enforcement Action substantially burdens Petitioner's beliefs as to the validity of organized religion and does not further a narrowly tailored compelling government interest.

ARGUMENT

I. THE GOVERNMENT'S ENFORCEMENT ACTION IS UNCONSTITUTIONAL BECAUSE IT INFRINGES ON PETITIONER'S RIGHT OF FREE SPEECH BY COMPELLING HIM TO EXPRESS OTHERS' MESSAGES.

By forcing Petitioner to express a message that is antithetical to his belief system, Madison infringes on his freedom of speech. "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I, cl. 1. The First Amendment bars the government from creating laws that have the effect of restricting expression or compelling a citizen or organization to express another's message in any form. *Id.* This brief will show (1) photography is a protected form of speech, (2) freedom of speech applies to Taylor's photography business, and (3) Madison's Enforcement Action unconstitutionally compelled speech.

A. Taylor's photographs are protected speech because they are personally-crafted expressions of thought.

Expressing a message, regardless of the method employed to convey it is constitutionally protected speech. *See Spence v. Washington*, 418 U.S. 405, 414 (1974) (holding that the act of burning an American flag is protected speech because it was a means of expressing discontent with American foreign policy). An expression is protected regardless of whether the message is easily articulable. *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 568-69 (1995) (holding that a parade, like a musical composition or poetry, is protected expression even though it may not contain an easily understandable message because the selection of participants allows the organizers to make a "collective point"). Moreover, a unanimous Court in *Hurley* held that constitutional protections are not limited to expressions

with a "narrow . . . 'particularized message.'" *Hurley* at 569 (quoting *Spence*, 418 U.S. at 411) (holding that requiring a message clearly understandable to others would discount protected symbolic speech such as paintings and musical compositions because they cannot be objectively reduced to a single message or belief).

In this case, by using *Spence*'s "particularized message" standard, 418 U.S. at 411, the Fifteenth Circuit misapplied the standard used to determine what constitutes speech. *Taylor v. Jefferson*, Appeal No. 15-1213, at *2 (15th Cir. Sept. 26, 2015) ("*Jefferson II*"). Like the flag used in *Spence* to convey discontent with the government, Taylor's photographs are symbols to express the emotion of a special event. 418 U.S. at 414. Like the musical composition the *Hurley* court references, Taylor's Photographic Solutions creates images that are not easily condensed into phrases or overt messages, but are creative ways of memorializing events or thoughts. 515 U.S. at 569. A Taylor photographer frames her subject and combines spacing, lighting, and a creative eye to portray her subject in a positive light; and only then selling this unique expression back to the client. The Fifteenth Circuit errs when it suggests that the client controls the outcome of the photo because, even though she may be the subject of the image, the client only chooses which of the skillfully and artistically crafted expressions of herself she prefers to buy from the photographer. *Jefferson II* at *4. Petitioner does not attempt to limit his photographs to individual messages; he uses his skills and medium to express positive and encouraging messages about its subjects, whether it is cheering on a recent high school graduate or venerating a newly-wed couple. Taylor's photographs do not need to offer any overt message for them to be protected speech.

B. Taylor's products are speech because photography is a form of protected speech and copyright law encourages the protection of photographic expression.

A photographer is directly and permanently engaged in expressive activity. *Regan v. Time*, 468 U.S. 641, 648 (1984) ("[T]he value of a photograph cannot help but be based on … the message it delivers."). The Court regularly finds photographs to be protected expressions of speech. *See United States v. Stevens*, 559 U.S. 460, 468 (2010) (striking down ban on photographs of animal cruelty because they are forms of expression protected by the First Amendment); *Time*, 468 U.S. at 648 (1984) (striking down, as limitations on free speech, elements of a law that prohibited photographic reproductions of currency); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002) (affirming the right to create pornography portraying adults that is marketed as underage material because photographing consenting adults is a form of speech). This Court has held that a photographer's method evokes his "desired expression." *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884). An artist does not curb his speech when he photographs his subjects; he merely arranges his "original mental conception . . . [into] visible form[.]" *Id.* at 55.

Further, a photograph is so strongly considered an expression of its creator, that it is protected under copyright law. Copyright is founded on preserving one's own expressions, and the purpose of copyright is to encourage and protect free speech. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) ("[C]opyright's purpose is to *promote* the creation and publication of free expression.").

Photographs have long been held as forms of protected speech; Taylor's work should be treated no differently when it disseminates images of its clients. Like in *Time* and *Stevens*, a photographic replication of a subject is protected as if it were spoken word, whether it be paper bills or people and events. 468 U.S. at 648; 559 U.S. at 468. When clients consent to have

Taylor's Photographic Solutions photograph themselves or events, the byproduct, like in *Free Speech Coalition*, is speech. 535 U.S. at 246. The Fifteenth Circuit ignores *Burrow-Giles* by saying that when a customer requests a photograph of a particular subject, the photographer does not make speech. *Jefferson II* at *2; 111 U.S. at 60. The photographer's method necessarily evokes expression in her work. 111 U.S. at 60. As a medium of expression, Taylor's photography is protected speech.

By protecting the inherently creative expression of commercial photographers through copyright law, Congress encourages citizens like Taylor to produce and promulgate new and interesting photography. With this in mind, the *Eldred* Court explicitly encouraged photographers like Taylor to continue to produce expressive works. 537 U.S. at 219. A copyright holder expresses a unique and personal message when she performs her work. The patron does not dictate the message of a photograph; through rendition and timing, a photographer conveys her own message. The protections behind copyright encourage the innovation of creative expression; photography like Taylor's should promote his own free expression, and the law rewards him for crafting a message based on his experiences and the unique way he expresses the emotion of a landmark life moment. *Id.* Photographers like Taylor deal in the business of speech, and copyright law corroborates the importance of free expression in photography.

C. For-profit businesses, including those whose work is commissioned by others, retain First Amendment freedom of speech.

Taylor must not be compelled to express another's point of view because a for-profit business's speech is protected by the First Amendment as if it were an individual's. Like a private citizen, a for-profit business has freedom of speech and may refuse to convey others' belief systems. *See, e.g.*, *Citizens United v. Federal Election Commission*, 557 U.S. 310, 342 (2010) (holding that a corporation's political speech is entitled to the same First Amendment

protection as that of a private individual because for-profit businesses retain the freedom of speech) (citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778 (1978)).

Further, the First Amendment protects for-profit businesses that are compensated to make speech for others. *See Simon & Schuster, Inc., v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (holding that commissioned articles are protected speech for both the writer and the publisher that purchases them); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (holding that a newspaper ad is the newspaper's protected speech though it is paid to print it). This includes private businesses that are paid directly by their clients to express the client's narrative. *See Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 800 (1988) (holding that a door-to-door fundraiser's sales pitch is protected speech even if she speaks on behalf of another).

A for-profit business like Taylor's Photographic Solutions retains First Amendment speech protection when its clients pay the business for its work. Like the authors in *Simon & Schuster*, Taylor's expression through photography is no less his own merely because it is commissioned by others. 502 U.S. at 116. Like in *Riley*, speech for which patrons pay a business to craft is still the business's speech. 487 U.S. at 795. Taylor plays the role of the door-to-door solicitor, putting his own spin on his patron's subject matter and the message, regardless of the source of income, is entitled to the highest standards of constitutional protection under the First Amendment. *Id.* Taylor's photos are no less speech than the New York Times, which also recreates a patron's subject matter through its own expert medium. 374 U.S. at 266. As a for-profit business that accepts commissions, Taylor should not be compelled to speak.

D. Madison's Enforcement Action is unconstitutional because it compels Taylor's business to promote another citizen's message against his will.

Just as the government may not prohibit a citizen's freedom to express himself, the government may also not compel a citizen to express a message with which the citizen disagrees. Prohibitions against compelled speech come in two varieties.

First, the government may not compel an individual to express a message. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (holding state legislation unconstitutional when it required the phrase "Live Free or Die to be printed on all vehicles' license plates because the message affirms a belief system that Jehovah's Witnesses do not espouse). *Wooley* also signifies that a citizen is protected from publicly displaying a message even if it is obvious to the general public that the message was not necessarily an individual opinion. *Id.* An individual has a "First Amendment right to avoid becoming the courier for such a message." *Id.* at 716.

Second, a government action may not compel an individual to express another's message. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (striking down requirement that a publisher must make column space available for responses to opinion pieces); *see also Hurley*, 515 U.S. at 569 (affirming the right of parade organizers to refuse inclusions of participants that sought to publicly endorse homosexual civic rights).

Like the statute struck down in *Wooley*, Madison's Enforcement Action effectively requires Taylor to publicly espouse a view with which he disagrees. 430 U.S. at 715. The lower court's demand that Taylor memorialize a religious ceremony is fundamentally at odds with *Wooley*, which affirmed that while the First Amendment "secures the right to proselytize religious…causes [it] must also guarantee the concomitant right to decline to foster such concepts." *Id.* at 714. Even if and, perhaps because Taylor's world view and corresponding

message are unpopular with the general public, Taylor should be protected from having to endorse ideologies that are not his own.

Like the editorial board of the Miami Herald, Taylor should not lose discretion to choose which messages to express and, through his creativity and talent, how to express them. 418 U.S. at 258. Like the organizers in *Hurley*, Taylor should not have to espouse others' beliefs if their beliefs diminish his own. 515 U.S. at 569. By fining Taylor for declining to create and sell photographs of religious ceremonies, the Enforcement Action unconstitutionally compels Taylor Photographic Solutions to express speech it does not support.

E. Public accommodations that are inherently expressive must not be compelled to speak.

Though Taylor's Photography is a public accommodation, he should not be forced to promote potential patrons' organized religion because his work is inherently expressive conduct worthy of First Amendment protection. A government may not force a public accommodation that creates protected expressive content to convey the messages of others. *Hurley*, 515 U.S. at 569 (holding that a parade organizer that is a public accommodation should not be required to change the parade's message to accommodate others' views because "[a]lthough the State may at times 'prescribe what shall be orthodox in commercial advertising' . . . outside that context, it may not compel affirmance of a belief with which the speaker disagrees.") (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). A public accommodation creates protected expression when it proffers messages through symbolic or physical acts that portray its point of view to others. 515 U.S. at 569. The unanimous *Hurley* Court determined that a parade committee that was categorized as a public accommodation had a protected right to decide whose messages to portray because editing the make-up of the parade is expressive conduct. *Id.* at 568. Thus, while a public accommodation may not refuse, without

good reason, to serve a customer, the government may not compel it to create or express the customer's message.

By requiring Petitioner to express others' messages in his photography, the Circuit Court failed to correctly apply *Hurley*. *See generally Jefferson II*; 515 U.S. at 569. Like a parade-organizing committee that is in the business of offering carefully-edited points of view to the public, Taylor's Photographic Solutions, also a public accommodation, is solely in the business of creating expressive messages through its photography. 515 U.S. at 569. As Massachusetts was prohibited from requiring a public accommodation in the form of a parade committee to amend its expressions to include others groups' opinions, Madison may not compel Taylor to portray others' views as his own. *Id.* at 568. Further, the parade committee in *Hurley* did not refuse inclusion of certain types of people, but refused to relinquish editorial and creative control of the product the public was going to see; Taylor seeks only the same Constitutional right to be free from influence in choosing what photographic messages to present and how to portray them. *Id.*

Madison's Enforcement Action is an unconstitutional breach of Petitioner's First Amendment rights because it compels him to express others' points of view; his photographs are forms of speech and the government may not force him express a message that is not his own.

II. THE ENFORCEMENT ACTION VIOLATED THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT BECAUSE IT FAILS THE COERCION TEST UNDER *LEE*.

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I, cl. 1. While "government coercion is not necessary to prove an Establishment Clause violation," religious coercion "is an obvious indication that the government is endorsing or promoting religion." *Lee v. Weisman*, 505 U.S. 577, 604 (1992) (Blackmun, J., concurring). The Court has made clear "[i]t is an elemental

First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" *Town of Greece, N.Y. v. Galloway*, __ U.S. __, 134 S. Ct. 1811, 1825 (2014) (quoting *Lee*, 505 U.S. at 577).

The Enforcement Action fails the coercion test under *Lee* because it (A) coerces Petitioner through oppressive fines and confinement in a religious setting, to (B) participate, with attendance and entry into a place of worship, in (C) religion, through faith-based ceremonies.

A. The Enforcement Action fails the coercion prong under *Lee* because the draconian fine imposed by the Madison government and the coercive effects of effective confinement at faith-based rituals created for the primary purpose of celebrating religious tradition.

It is unconstitutional for the government to "coerce anyone to support or participate in religion or its exercise." *Lee*, 505 U.S. at 587 (holding "the State has in every practical sense compelled attendance and participation in an explicit religious exercise" when a rabbi invokes a prayer at a public high school graduation ceremony because the prayer exerted "subtle coercive pressure" on students to participate in religion). Government exercising power in order to compel religious observance is indisputably coercion. *Id.* at 640 (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion . . . *by force of law and threat of penalty*.") (emphasis in original).

Moreover, the coercion test under *Lee* considers the coercive effects of "both the setting in which [a faith-based exercise] arises and the audience to whom it is directed." *Town of Greece*, 134 S. Ct. at 1827 (holding that a brief prayer to open monthly town hall meetings was not coercive because citizens understand the historical context of legislative prayer as part of "our [governmental] heritage and tradition" and disapproving adult constituents are "free to enter and leave with little comment and for any number of reasons").

Here, the Fifteenth Circuit erred in ruling the Establishment clause is violated only when government action requires the adoption of religion. R. at 43. The Madison Enforcement Action far exceeds the subtle coercive pressures of participating in a prayer at a public graduation ceremony in *Lee,* 505 U.S. at 587. Indeed, the draconian, $1,000 per week, recurring fines were leveled at Petitioner by the Madison government specifically as a measure to induce compliance. R. at 26. Similar to the force of law or threat of penalty that Justice Scalia recognized as the "hallmark of historical establishment of religion," *Lee*, 505 U.S. at 640, the Enforcement Action's oppressive fines and threat of civil litigation is the archetype of direct coercion.

Furthermore, the coercive effects of religious ceremonies are far greater than a prayer at town hall meetings in *Town of Greece*, where an attendee is free to leave without repercussions and the prayer merely furthers a minor historical function as part of the greater legislative purpose of the gathering. 134 S. Ct. at 1827. Here, Petitioner's provision of photography services requires his full-time presence and attention which forecloses the option to leave and the faith-based ritual is the primary purpose of the event.

The Enforcement Action fails the coercion prong under *Lee* because the draconian fines imposed by the Madison government is a coercive measure and the overwhelming coercive effects of confinement at a faith-based ritual created for the primary purpose of celebrating religious tradition.

B. The Enforcement Action fails the participation prong under *Lee* because it mandates attendance at a faith-based ritual and entering a house of worship.

The freedom of a citizen to choose their own means of religious participation stems from first principles. *See* H.R. 514, 114th Cong. (2015) ("'The liberty enjoyed by the people of these states of worshiping Almighty God agreeably to their conscience, is not only among the choicest of their blessings, but also of their rights.'") (quoting George Washington). Nothing can compel

an individual's conscience to believe or disbelieve in any religious, political, or philosophical idea, rather the outward conduct reflects an inner belief. *See Davis v. Beason*, 133 U.S. 333, 342 (1890) (recognizing "the folly of attempting . . . to control the mental operations of persons, and enforce an outward conformity to a prescribed standard.").

Photography of a faith-based ceremony is religious participation because (1) attendance signifies approval and (2) entry into a house of worship is a religious act.

1. Participation is the attendance of faith-based rituals because it signifies approval of the worship service.

Participation in a religious exercise occurs when a reasonable person in a particular environment could believe that compliance with a group exercise signified her own approval of religious worship. *See Lee*, 505 U.S. at 593 ("[T]he act of standing or remaining silent was an expression of participation in the rabbi's prayer [during a high school graduation ceremony]. That was the very point of the religious exercise."). Indeed, several circuit courts have held that attending a program with faith-based undertones is religious participation. *See, e.g.*, *Kerr v. Farrey*, 95 F.3d 472, 479 (7th Cir. 1996) (holding that "requir[ing] inmates to attend [Narcotics Anonymous] meetings (at the very least, to observe)" is participation because the exposure explicit religious content that permeated the meetings).

In this case, the Fifteenth Circuit erred in holding that Petitioner's presence at a faith-based ceremony to perform photography services did not require participation in a religious event. *See Jefferson II* at *5. Petitioner's conduct is similar to *Lee*, where remaining silent during a prayer invocation at a high school graduation signified to a reasonable person her own participation in the religious tradition. 505 U.S at 593. Here, Petitioner's photography of religious events similarly signified his own participation in solemn traditions that perpetuate particular religions. At minimum, photographing a faith-based ritual actively memorialized the

celebration of a religious exercise, which to Petitioner or another reasonable person could signify supporting the reputational success of a religious institution. Petitioner's unwilling presence at a religious ceremony is akin to the prisoners' in *Kerr* attendance at meetings where religious undertones permeated the content and the court found that obligated participation. 95 F.3d at 479. The faith-based focus of religious ceremonies raises well above the undertones present in a recovery program. Petitioner's presence at a faith-based ceremony requires his participation in the event because it signifies approval of a worship service.

2. Participation is entering a house of worship because the religious significance of the act.

"Neither a state nor the Federal Government . . . can force nor influence a person to go to or to remain away from church against his will." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947); *see also Zorach v. Clauson,* 343 U.S. 306, 314 (1952) (the government may not "coerce anyone to attend church").

Houses of worship hold such a revered place in religious exercise that Congress has granted them special protection. *See* Religious Land Use & Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc *et seq*. (heightened protection for religious uses of property); Church Arson Prevention Act of 1996, 18 U.S.C. § 247 (federal criminal penalties for defacing or damaging religious property). Some faiths believe that it is impossible to decouple the physical structure of a place of worship from its religious significance. *See, e.g., Does v. Enfield Pub. Sch*., 716 F.Supp.2d 172, 200 (D. Conn. 2010) ("'To pass through the door of a church already constitutes a religious act which signifies entry into the sacred. A church is the temple of God. It is not a meeting place of men but the place of worship of God.'") (quoting The Latin Mass Society of England and Wales, The Kingdom of the Beloved Son (2007)); *id.* ("For some Jews, it is 'forbidden to enter the sanctuary of a church, even when prayer is not conducted.'") (quoting

Rabbi Chaim Tabasky, Prohibition to Be in a Church, Yeshiva.Org.Il, May 27, 2008, www.yeshiva.org.il/ask/eng/print.asp? id=3859).

The Fifteenth Circuit misapplied the *Lee* coercion test when it held that entry into a place of worship "hardly require[ed] him to adopt the religion." *Jefferson II* at *5. Instead, the correct question is whether entry into a building, erected for the sole purpose of conducting religious worship and adorned with symbols of the faith, sufficiently constitutes the *practice* of religion. Entry alone constitutes a religious act because the primary function of a religious building is to offer a place of worship and crossing the threshold into a "temple of God" is conduct undertaken to practice traditions of that faith.

The inquiry is exponentially magnified for Petitioner because the Enforcement Action mandates entry into a place of worship *and* entry during the performance of a religious rite. Petitioner's attendance at a faith-based ritual, particularly one performed in a place of worship, is participation in religion which the Establishment Clause prohibits any government action from mandating a citizen to do.

C. The Enforcement Action fails the religious exercise prong under *Lee* because solemnizing a marriage through a faith-based ceremony is a religious act.

Couples desiring a ceremonial marriage "can be married in two steps: first they obtain a license, and then they have the marriage solemnized[.]" *Center for Inquiry, Inc. v. Marion Circuit Clerk*, 758 F.3d 869, 873 (7th Cir. 2014). A couple's choice to solemnize their marriage with a religious ceremony is itself an exercise of religion. *See Turner v. Safley*, 482 U.S. 78, 96 (1987) (finding "many religions recognize marriage as having spiritual significance" "therefore, the commitment of marriage may be an exercise of religious faith"); *see also Kitchen v. Herbert*, 755 F.3d 1193, 1227 (10th Cir. 2014) *cert. denied*, 135 S. Ct. 265 (2014) (recognizing "the right

of the various religions to define marriage according to their moral, historical, and ethical precepts").

Here, Petitioner's refusal to provide photography services to religious weddings is based entirely on the religious exercise inherent in marriage ceremonies solemnized in a particular faith. Indeed, Petitioner photographs secular weddings of same-sex couples and adherents of diverse religious faiths. *See* R. at 15-16.

The Fifteenth Circuit failed to apply the coercion test under *Lee* and applied an immeasurable and untenable adoption of religion standard. *See Jefferson II* at *5. The Enforcement Action clearly violates the Establishment Clause and unconstitutionally "coerces [Petitioner] to participate or support religion or its exercise," *Lee*, 505 U.S. at 587.

III. THE ENFORCEMENT ACTION IS UNCONSTITUTIONAL BECAUSE IT IMPROPERY ENDORSED AND INHIBITED THE PRACTICE OF RELIGION UNDER *LEMON*.

Another tool courts use to analyze Establishment Clause claims is a three-pronged test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). A governmental practice complies with the *Lemon* test only when it (1) has a legitimate secular purpose; (2) does not have the primary effect of advancing or inhibiting religion; and (3) does not foster an excessive entanglement with religion. *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 610, 592 (1989) (holding a nativity scene displayed on a county courthouse grand staircase surrounded by Christmas decorations is unconstitutional because it endorsed "a patently Christian message"). Under the second prong, a government action must "not have the effect of communicating a message of government endorsement or disapproval of religion" or make "a person's religious beliefs relevant to his or her standing in the political community." *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) ("It is only [government] practices having [an endorsing] effect,

whether intentionally or unintentionally, that make religion relevant, in reality or public perception[.]")

In this case, the Fifteenth Circuit erred in finding the Enforcement Action did not fail the primary effects prong of the *Lemon* test. *See Jefferson II* at *4-5. Although the *Lemon* test prohibits "communicating a message of government endorsement of religion, *Lynch*, 465 U.S. at 688, here, the Enforcement Action compels Petitioner's endorsement of religion through photography of religious ceremonies, R. at 26. Far exceeding the endorsement of a Christian message with a nativity display in *County of Allegheny*, 492 U.S. at 610, the Enforcement Action not only communicates a sonorous endorsement of religious beliefs over non-religious beliefs, but goes so far as to compel a non-believer to celebrate and support the same message. This is the equivalent of the County of Allegheny mandating that a citizen display a nativity scene on her own private property. *Id.* Moreover, the effect of Petitioner's beliefs lower his status in the Madison community because the Enforcement Action values the religious exercise of the wedding participants over his own.

The Enforcement Action unconstitutionally endorses to the practice of organized religion and inhibits Petitioner's conscious beliefs in refusing to make the same endorsement.

IV. THE ENFORCEMENT ACTION UNCONSTITUTIONALLY VIOLATED PETITIONER'S FREE EXERCISE RIGHTS BECAUSE IT MISAPPLIED A STRICT SCRUTINY ANALYSIS

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law" "prohibiting the free exercise" of religion. U.S. Const. amend. I, cl. 1. In order to state a valid First Amendment free exercise claim, a party must either (a) show that the government action in question is not neutral and of general applicability, *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990), or (b) present a "hybrid" claim which implicates both the

Free Exercise Clause and an independent constitutional protection, *id.* at 881. The Court applies a strict scrutiny analysis to a valid free exercise claim where government action substantially burdens a religious belief or practice and therefore, it must be justified by a compelling state interest and narrowly tailored to serve that interest. *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963).

Petitioner's case (A) presents a classic hybrid rights claim and is therefore entitled to *Sherbert* strict scrutiny which (B) the Enforcement Action fails.

A. Petitioner presents a hybrid-rights claim under *Smith* because both his free exercise and companion free speech claim have substantial merit.

The Court distinguished a hybrid-rights case that entitles a claim which stems from "the Free Exercise Clause in conjunction with other constitutional protections" to the strict scrutiny test in *Sherbert,* 374 U.S. at 402. *See Smith* at 881-82 (citing *Wooley*, 430 U.S. 705, a case decided on compelled expression free speech grounds which also involved freedom exercise, as an "easy to envision" hybrid claim). In interpreting hybrid-rights, several circuits adopted a "colorable claim" standard that requires a free exercise plaintiff to assert a companion constitutional right claim that has "a fair probability or a likelihood, but not a certitude, of success on the merits." *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004); *see also Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998) ("[W]e believe that [a hybrid-rights claim] at least requires a colorable showing of infringement of recognized and specific constitutional rights.").

Here, Petitioner presents a classic hybrid rights case. Petitioner's case, conjoining free exercise and free speech claims that both invoke constitutional protections, is the type easily envisioned by Justice Scalia when carving out a hybrid rights in *Smith*. Petitioner's specific

constitutional rights to be free from government compelled speech violated his rights. *See supra* Part.I.

A claim under the Free Exercise Clause is stated when the government "compel[s] affirmation of religious belief, punish[es] the expression of religious doctrines it believes to be false, impose[s] special disabilities on the basis of religious views or religious status, or lend[s] its power to one or the other side in controversies over religious authority." *Smith*, 494 U.S. at 877 (internal quotation marks and citations omitted). Petitioner's free exercise of his conscience is infringed by the Enforcement Action's order compelling him to photograph religious ceremonies, where his presence during a faith-based ritual constitutes participation and affirmation of religious belief. *See supra* Part II.1.B. The Enforcement Action punishes Petitioner's expression of beliefs toward organized religion by forcing him to endorse religious exercise through his artistic vision and considerable photography talent. R. at 18-19. Moreover, the Enforcement Action lends its power to organized religion over Petitioner's beliefs because it weighs a religious adherent's desire to obtain photographic services at a faith-based ritual over the significant burden the provision of those services places on Petitioner's conscience.

Because Petitioner states a colorable free exercise claim in conjunction with a companion constitutional right claim under the Free Speech Clause, the Court should apply the highest level of scrutiny to any government action that infringes those rights.

B. The Enforcement Action fails the *Sherbert* strict scrutiny test because Petitioner's sincerely held belief against perpetuating organized religion is burdened and compelling religious conduct is not a compelling government interest.

Once a valid free exercise claim is stated under *Smith*, the Court should apply the *Sherbert* balancing test which applies strict scrutiny and weighs "whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to

serve a compelling government interest." *Burwell v. Hobby Lobby Stores, Inc.*, __ U.S. __, 134 S. Ct. 2751, 2760 (2014). The Enforcement Action substantially burdens Petitioner's beliefs against the endorsement of organized religion and does not further a narrowly tailored, compelling government interest.

1. The Enforcement Action substantially burdens Petitioner's conscience because it compels attendance and support of religious ceremonies against his sincerely held beliefs.

"[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 714 (1981) (holding that a claimant's belief prohibiting the production of armaments is entitled to First Amendment protection). The "exercise of religion" involves "not only belief and profession but the performance of (or abstention from) physical acts" that are "engaged in for religious reasons." *Smith*, 494 U.S. at 877 (holding that the ceremonial ingestion of peyote merits First Amendment protection). The Court's "narrow function" in determining a sincerely held belief is "whether the line drawn reflects an honest conviction." *Hobby Lobby Stores, Inc.,* 134 S. Ct. at 2779 (holding the belief that life begins at conception is sincerely held). The substantial burden inquiry "asks whether the government has substantially burdened religious exercise," not whether "other forms of religious exercise" are available to the claimant. *Holt v. Hobbs*, __ U.S. __, 135 S. Ct. 853, 862 (2015) (holding that a policy forbidding the growth of a half-inch beard significantly burdened religious exercise).

Here, the lower courts erred in determining Petitioner's admission to "entering places with religious ties as he pleases" negated the substantial burden the Enforcement Action forced on his sincerely held belief as to the validity of organized religion. *Jefferson I* at *11. The "narrow function" of the Court in evaluating the sincerity of a religious belief looks to conduct

that reflects an "honest conviction." *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2779. Petitioner does not offer photography services to religious ceremonies as part of a policy he has imposed since the inception of his small business, R. at 14, and recently posted a public display clearly communicating this policy to prospective clients, R. at 23. His honest conviction against practicing religion has limited his business options. R. at 18-20.

Furthermore, Petitioner's willingness to support individuals to whom he has a personal connection through his attendance at major life events memorialized in a religious ceremony does not outweigh his honest conviction regarding the validity of organized religion. R. at 17. The application of a personal balancing test that weighs being a supportive friend or family member more heavily than a sincerely held belief in no way diminishes the sincerity of that belief. It merely allows an individual to apply her own strict scrutiny to decide if, or when, the compelling interest of another should justify burdening her beliefs.

Because the Enforcement Action mandates attendance at religious ceremonies antithetical to Petitioner's beliefs, it is a substantial burden.

2. <u>The Enforcement Action does not further a narrowly tailored, compelling government interest because it is an overbroad preventative measure that compels Petitioner's unwilling participation in conduct he deems offensive.</u>

A government action that is restrictive of a religious practice must advance "interests of the highest order and must be narrowly tailored in pursuit of those interests." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (internal quotations omitted) (holding legitimate government interests in public health and preventing cruelty to animals were not narrowly tailored when only prohibiting sacrificial animal killings). "While preventive rules are sometimes appropriate remedial measure, there must be a congruence between the means used and the ends to be achieved." *City of Boerne v. Flores*, 521 U.S. 507,

530 (1997) ("The appropriateness of remedial measures must be considered in light of the evil presented" because "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one.").

The primary purpose of Title II of the Civil Rights Act of 1964 (codified at 42 U.S.C. §2000a) was to eliminate "the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because a protected characteristic." S. Rep. No. 88–872 (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2370. Discrimination against specific conduct is not distinguishable from discrimination based on status. *Christian Legal Soc'y Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 689 (2010) (holding discrimination against homosexual conduct equated to discrimination against homosexual persons); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

In this case, the Fifteenth Circuit erred in holding the government's broadly stated interest in prohibiting discrimination justified burdening Petitioner's sincerely held beliefs. *Jefferson II* at *5. Like the remedial measures warned against in *City of Boerne*, 521 U.S. at 530, the Enforcement Action is a strong measure that is an unwarranted response in light of the "evil" of indiscriminate refusal to offer photography services at religious ceremonies. R. at 18-20. The draconian means of oppressive fines and threat of litigation used by the government to achieve a preventative end to a non-pervasive community problem is incongruent. R. at 26.

Moreover, the Enforcement Action, as applied to Petitioner, is inapposite to the goals of the Civil Rights Act because Petitioner's objection to providing photography services as a public accommodation lie in his unwillingness to participate in religious conduct rather than refuse a customer as "unacceptable" for her religious beliefs. Although the Court has made clear that

discrimination against specific conduct amounts to discrimination on the basis of status, Petitioner's refusal to provide services is because his unwillingness to *participate* himself in the conduct. His policy against photographing religious ceremonies is not, like in *Bray*, an objection to the donning of yarmulkes in general, 506 U.S. at 270, but rather an unwillingness to wear one himself.

Because the Enforcement Action is an overbroad preventative measure that compels Petitioner's unwilling participation in conduct he deems offensive, it does not further a narrowly tailored, compelling government interest.

Petitioner has stated a valid free exercise claim that triggers a hybrid-rights strict scrutiny analysis which the Enforcement Action fails because it does not further a narrowly tailored, compelling government interest.

CONCLUSION

For the foregoing reasons, Petitioner respectfully request this Court vacate the decision of the United States Court of Appeals for the Fifteenth Circuit and find that Madison's Enforcement Action violates Petitioner's constitutional rights under the Free Speech, Free Exercise, and Endorsement Clauses of the First Amendment.

INTEGRITY CERTIFICATE

- Per our law school code of integrity, we submit this work in good faith and pledge that we have never given nor received improper aid in its completion.
- Further, the word product contained in all copies of this team's brief are the work product of the members of the team only.
- This team has complied with all the Rules of the Competition.

On this day, February 9, 2016

/s/Team W