Team B

No. 15-1245

Supreme Court of the United States

JASON ADAM TAYLOR,
Petitioner,

—v.—

TAMMY JEFFERSON, Chairman,
Madison Commission on Human Rights, *et al.,*
Respondents.

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

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

I. Was the Fifteenth Circuit correct when it affirmed the District Court's holding that the Madison Commission on Human Rights did not violate Petitioner Jason Taylor's First Amendment free speech rights in fining him for violating the Madison Human Rights Act of 1967's nondiscrimination in public accommodation provisions after he refused to photograph two weddings because they would be religious ceremonies and would take place in a religious building?

II. Was the Fifteenth Circuit correct when it affirmed the District Court's holding that the Madison Commission on Human Rights did not violate Petitioner Jason Taylor's rights under the First Amendment's Free Exercise and Establishment Clauses in fining him for violating the Madison Human Rights Act of 1967's nondiscrimination in public accommodation provisions if he continued to refuse to photograph religious wedding ceremonies or weddings set to take place in religious buildings?

PARTIES TO THE PROCEEDING

Petitioner in the proceeding below in *Taylor v. Jefferson* was Jason Adam Taylor.

Respondents in the proceeding below in *Taylor v. Jefferson* were Tammy Jefferson, in her official capacity as Chairman, Madison Commission on Human Rights, and Thomas More, Olivia Wendy Holmes, Joanna Milton, and Christopher Hefner, in their official capacities, Commissioners, Madison Commission on Human Rights.

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinions of the United States District Court for the District of Eastern Madison and the United States Court of Appeals for the Fifteenth Circuit are unreported.

STATEMENT OF JURISDICTION

Following the judgment of the United States Court of Appeals for the Fifteenth Circuit, the Petitioner subsequently filed a petition for certiorari, which this Court granted. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (2012).

CONSTITUTIONAL PROVISIONS INVOLVED

The text of U.S. Const. Amend. I. is set forth in the Appendix to this Brief.

STANDARD OF REVIEW

This Court reviews questions of law *de novo*. *See Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014).

STATEMENT OF THE CASE

This case centers on two occasions on which the Petitioner, Jason Adam Taylor ("Mr. Taylor"), refused to photograph the weddings of two couples, both of whom wished to marry in a religious ceremony in a religious building. Mr. Taylor describes himself as a "full blown militant

atheist" who believes that "the ultimate goal of humanity should be a fading of religion[.]"[1] R. at 17–18. Patrick Johnson ("Mr. Johnson"), who asked Mr. Taylor to photograph his wedding in a Catholic church, and Samuel Green ("Mr. Green"), who asked Mr. Taylor to photograph his wedding in a Jewish synagogue, each filed a complaint against Mr. Taylor with the Madison Commission on Human Rights ("Commission"), alleging that Mr. Taylor discriminated against them based on their religion. *Id*. at 25, 35, 37. Following an investigation into both parties' claims, the Commission concluded that Mr. Taylor had engaged in unlawful discrimination in refusing his services based on Mr. Green's and Mr. Johnson's religions and that his business, as a place of public accommodation, had violated the Madison Human Rights Act of 1967 ("Madison Act"). *Id*. at 25–26.

Mr. Taylor and his wife, Kimberly Taylor ("Mrs. Taylor"), opened Taylor's Photographic Solutions ("business"), a closely held corporation, in 2003. *Id*. at 14. Mr. Taylor is the majority shareholder in the business and makes all of the business's management decisions. *Id*. The business's staff includes 17 full-time employees and 2 part-time employees, all of whom follow a variety of religious practices, including Judaism, Christianity, and Islam, among others. *Id*. at 14, 18. The business prohibits discrimination against employees based on their religious beliefs, and Mr. Taylor has a consistent record of accommodating his employees' time-off or alternate assignment requests for religious reasons. *Id*. at 18, 29, 32.

The business offers photography services to the public for a variety of occasions, including weddings. *Id*. at 14. However, the business maintains a strict policy of not

[1] Though Mr. Taylor grew up in a mixed faith household, other family members criticized him for not sufficiently observing their respective religious practices. R. at 17. Mr. Taylor feels that these relationships "soured" his view of religion, and he stated that he attends religious services only if they involve family members but admitted that he tunes out prayers and does not today otherwise engage in any religious practice. *Id*. at 17.

photographing any event that is "religious in nature" or in a religious building. *Id*. at 15–16. Mr. Taylor does "not want to be seen as endorsing a religion in any way" and believes that "religion is a detriment to the future of humanity." *Id*. The business does not otherwise deny services based on a customer's religion, as the policy extends only to religious events. *Id*. at 18, 23.

In June 2014, Mr. Taylor posted a notice in the business's storefront window containing the following statement:

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

Id. at 23.

On July 14, 2014, Mr. Johnson asked Mr. Taylor to photograph his wedding in a Catholic church. *Id*. at 18–19, 35. Mr. Taylor refused, citing the business's policy against photographing religious events. *Id*. at 19. On July 22, 2014, Mr. Taylor refused to photograph Samuel Green's wedding because it would be held in a synagogue and performed by a rabbi. *Id*. at 20, 37.

On August 11, 2014, Mr. Taylor received a letter from the Commission informing him of Mr. Johnson's and Mr. Green's complaints. R. at 20, 25–26. The letter alleged that Mr. Taylor discriminated against Mr. Green and Mr. Johnson based on their religion, thereby violating the Madison Act's nondiscrimination in public accommodation provisions. *Id*. at 25. The letter advised Mr. Taylor of his right to an administrative hearing, but he declined. *Id*. at 21, 25. Thereafter, the Commission issued an Enforcement Action indicating a finding of "compelling evidence of discrimination" based on the sign in Mr. Taylor's business's storefront window and interviews of one former and one current employee. R. at 21, 25–26. The Enforcement Action

ordered that Mr. Taylor immediately cease discriminating against prospective customers based on their religion and imposed a $1000 per week fine until Mr. Taylor ceased those practices. *Id*. Mr. Taylor refused to pay the fines and contacted his lawyer to evaluate his options. *Id*. at 21.

Mr. Taylor subsequently brought suit in the United States District Court for the District of Eastern Madison ("District Court") to preliminarily and permanently enjoin the Commission from further imposing the Enforcement Action. *Id*. at 1–3. Mr. Taylor also raised civil rights claims under 42 U.S.C. § 1983 for deprivation of his constitutional rights under color of state law. *Id*. The District Court granted the Commission's Motion for Summary Judgment. *Id*. at 12. Thereafter, the United States Court of Appeals for the Fifteenth Circuit affirmed the District Court's decision, and this Court granted certiorari. *Id*. at 43, 46.

SUMMARY OF THE ARGUMENT

This case focuses on the balance between a state's compelling interest in preventing discrimination against members of a protected class and the ability of private groups and businesses to fully exercise their First Amendment rights. The Respondents respectfully ask this Court to uphold the Fifteenth Circuit's decision affirming the District Court's grant of the Respondents' Motion for Summary Judgment because the application of the Madison Act to Mr. Taylor's business, a place of public accommodation, neither infringes upon Mr. Taylor's free speech rights under the First Amendment, nor does it violate that Amendment's Free Exercise or Establishment Clauses.

Throughout its history, this Court has repeatedly affirmed a person's ability to engage in protected speech or avoid the government compelling him to speak under the First Amendment. While this right is substantial, it is not absolute. The government may limit a person's rights of free expression or speech when that limitation serves a compelling interest by the least restrictive

means. Examples include the federal Civil Rights Acts and similar state and municipal human rights acts, which generally prohibit discrimination based on religion, national origin, sex or gender, and a spectrum of other protected classes, depending on the jurisdiction. While these laws prevent a place of public accommodation such as a restaurant or hotel from providing its services to one group while excluding another, they generally do not regulate the owner of a place of public accommodation's ability to exercise his or her rights of free speech or expression.

Though this Court has declined to extend these requirements to private, non-public, members-only organizations, it has enforced such nondiscrimination provisions against groups that have no specific membership requirements or businesses who advertise their services and cater to the general public. Such nondiscrimination provisions neither compel a business owner to engage in government speech nor do they violate that business owner's ability to communicate his personal beliefs; they merely require the business to provide its services without discriminating against members of a protected class. As such, the Commission's enforcement of the Madison Act requiring that Mr. Taylor's business, a place of public accommodation, provide photography services to customers planning a religious wedding or a wedding set to occur in a religious building did not violate Mr. Taylor's free speech rights under the First Amendment.

Furthermore, the Commission did not violate Mr. Taylor's First Amendment rights under the Free Exercise or Establishment Clauses. The Commission did not violate the Free Exercise Clause when it imposed an Enforcement Action pursuant to the Madison Act because the Madison Act has a neutral purpose, is generally applicable, and does not aim to suppress Mr. Taylor's religious beliefs. Even if this Court finds that the Madison Act is not neutral or generally applicable, the Commission nevertheless had the authority to compel Mr. Taylor to provide services to individuals regardless of their religion. The Commission has a compelling

interest in prohibiting discrimination in places of public accommodation and the Enforcement Action was sufficiently narrowly tailored to further that interest.

Finally, the Commission did not violate the Establishment Clause under the *Lemon*, endorsement, or coercion tests in potentially compelling Mr. Taylor to enter religious buildings to photograph religious events. Madison did not adopt or endorse religion through the Madison Act, and the Enforcement Action did not coerce Mr. Taylor to practice religion or engage in religious practice. Therefore, the Commission did not violate the Establishment Clause.

ARGUMENT

I. The Fifteenth Circuit was correct when it affirmed the District Court's grant of summary judgment in the Commission's favor because Taylor's Photographic Solutions, as a place of public accommodation, is not entitled to expressive association rights under the First Amendment that would allow it to refuse to photograph a religious wedding or a wedding in a religious building.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This guarantee extends to state actions through the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925). While a traditional view may limit the freedom of speech to individual people, businesses and organizations can also exercise free speech rights. *See Citizens United v. FEC*, 558 U.S. 310, 371–72 (2010); *see also Hurley v. Irish Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572–74 (1995).

Just as the First Amendment prevents the government from punishing a person for his speech in most cases, the First Amendment also prevents the government from forcing a person to engage in speech, particularly when the government-induced speech conflicts with that person's beliefs. *See Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969); *see also W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The freedoms of speech and expression are not absolute, however. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). The government can,

through regulation, interfere with one's ability to speak, so long as the regulation serves a compelling governmental interest, "unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Boy Scouts of America v. Dale*, 530 U.S. 640, 640–41 (2000). An example of such regulation is the Civil Rights Act of 1964. 42 U.S.C. §§ 2000a–2000a-6 (2012).

Congress passed the Civil Rights Act of 1964 ("Act") to "[r]emove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." *Daniel v. Paul*, 398 U.S. 298, 307–08 (1969). As such, the law provides for the "full and equal enjoyment . . . of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin." *Id*. § 2000a(a). Following the federal Act's enactment, many state legislatures and local municipalities elected to draft and pass their own human rights acts. *See Romer v. Evans*, 517 U.S. 620, 628 (1996).

Over time, many of these local laws have provided additional protections from discrimination in places of public accommodation at the state level by expanding the range of businesses that qualify as a public accommodation. *See Hurley*, 515 U.S. at 571–72. As a result, the number of businesses subject to public accommodation nondiscrimination protections today has grown substantially since the Act's passage fifty-two years ago. 42 U.S.C. §§ 2000a(b)(1)–(3); *Dale*, 530 U.S. at 657 (noting that New Jersey's statutory nondiscrimination protections include "taverns, restaurants, retail shops, and public libraries," as well as potentially non-public "summer camps and roof gardens" as places of public accommodation). The Madison Act is similarly all-encompassing in that it "prohibit[s the] denial of service [in] a place of public accommodation based on a discriminatory purpose against a protected class of individuals." Mad. Code Ann. § 42-101-2a, *et seq*. Though the Madison Act does not specifically articulate

that a photography business is a place of public accommodation, the Commission found that it was subject to the Madison Act's requirements; furthermore, Mr. Taylor "does not contest that Taylor's Photographic Solutions is a place of public accommodation." R. at 11.

A. Mr. Taylor's beliefs as expressed through his business are not entitled to First Amendment free speech protection because his business does not engage in expressive association that would entitle it to an expressive associational right.

To qualify for a First Amendment expressive associational right, a group must be engaged in some manner of public or private expressive association; for photography to fall within this protection, it must sufficiently communicate or express a message or idea. *See Dale*, 530 U.S. at 648; *Elane Photography, LLC v. Willcock*, 309 P.3d 53, 66–67 (N.M. 2013).

A public accommodation law that compels a private group to endorse a message or belief that conflicts with that group's expressed view or belief violates the group's First Amendment right of expressive association. In *Dale*, a "private, not-for-profit organization engaged in instilling its system of values in young people" revoked the membership of one of its adult leaders ("leader") after he publicly declared that he was homosexual. 530 U.S. at 644–45. The leader then filed a state court complaint alleging unlawful discrimination under a state public accommodation law, which prohibited discrimination based on sexual orientation. *Id*. at 645. This Court ultimately held that forcing the private organization, an expressive association, to readmit the leader would amount to "a severe intrusion on the [organization's] rights to freedom of expressive association" not to "promote homosexual conduct as a legitimate form of behavior." *Id*. at 650, 652, 654–55, 660–61 (internal quotation marks omitted).

The First Amendment protects written and spoken speech, as well as conduct and art that is expressive; however, producing photographs that communicate a message or idea that is sufficiently expressive to qualify for this protection does not exempt one from compliance with

nondiscrimination laws. In *Willcock*, a photography business refused to photograph a same-wedding of two women. 309 P.3d at 59–60. The photography business had a policy of refusing to photograph same-sex weddings based on the owner's religious beliefs, though it did not otherwise deny its services to homosexuals. *Id*. Thereafter, one of the women filed a complaint alleging a violation of the state's human rights act ("state act"), which prohibited discrimination based on sexual orientation. *Id*. at 60. The agency concluded that the photography business, a place of public accommodation, unlawfully discriminated against the woman in refusing to photograph her wedding. *Id*. The state supreme court held that the state act did not compel the photography business to affirm same-sex marriages or engage in speech that otherwise conflicted with the owner's views; it merely obligated the photography business to provide the same services to a same-sex couple it would to an opposite sex couple. *Id*. at 60, 63–65. Furthermore, the photography business's photographs were not sufficiently expressive to merit First Amendment protection, and even if they were, refusing to photograph the couple's wedding was an unlawfully discriminatory decision rather than an artistic one. *Id*. at 67, 71. Subsequently, this Court denied the photography's business's petition for certiorari, leaving the state supreme court's decision intact. *Elane Photography, LLC v. Willcock*, 134 S. Ct. 1787 (2014).

The Commission did not violate Mr. Taylor's free speech rights under the First Amendment in compelling him to photograph religious events or events set to occur in a religious building because Mr. Taylor's business, as a place of public accommodation, is not entitled to a right of expressive association. Unlike the organization's selective membership requirements and expressed rejection of homosexual persons as qualified members in *Dale*, Mr. Taylor's business markets and provides its services to the general public and does not otherwise communicate a distinct anti-religious message through its photography. *See Dale*, 530 U.S. at

652, 661; R. at 14. In *Dale*, mandating the readmission of a homosexual leader would have interfered with the organization's right not to endorse homosexuality as a legitimate behavior. *See Dale*, 530 U.S. at 651. In contrast, the Commission's requirement that Mr. Taylor photograph religious weddings or weddings in religious buildings just the same as he would a non-religious wedding or a wedding in a non-religious building does not prevent him from continuing to speak out against religion or compel him to endorse it. R. at 25–26. He may post a new notice in his storefront window that he does not wish to promote religion and does not believe in it, but his business, as a place of public accommodation, cannot deny services to people seeking photography services for a religious event or an event in a religious building because it would amount to discrimination based on religion. *See Dale*, 530 U.S. at 648–49.

Furthermore, the Madison Act's nondiscrimination provisions do not violate his free speech rights in the form of artistic expression because his photographs are not sufficiently expressive such that they communicate a message or idea. Similar to the photography business in *Willcock*, Mr. Taylor's business is a place of public accommodation and is therefore prohibited from discriminating against members of protected classes. 309 P.3d at 60; R. at 11. Furthermore, just as the photography business's refusal to photograph a same-sex wedding in *Willcock* constituted unlawful discrimination under that state's human rights act, Mr. Taylor's refusal to provide his business's photography services for religious events or events in religious buildings is equally violative of the Madison Act. 309 P.3d at 63–65; R. at 14–15. While the general public may seek Mr. Taylor's or his employees' services based on their particular photography skill sets, their photographs do not communicate a message or idea that is sufficiently expressive to merit First Amendment protection; and, even if they did, Mr. Taylor could not lawfully discriminate against a protected class in deciding which customers to photograph. *Willcock*, 309

P.3d at 63–65; R. at 14, 20.

Because Mr. Taylor's business is subject to the Madison Act's nondiscrimination in public accommodation requirements and is not entitled to a right of expressive association, the Madison Act does not violate Mr. Taylor's free speech rights under the First Amendment.

B. Even if Mr. Taylor's anti-religious beliefs were entitled to a right of expressive association, compelling Mr. Taylor to photograph religious weddings or weddings in religious buildings would still not violate his right of expressive association because it would not impair his ability to express his anti-religious views or ideas through his business.

An organization that is not selective in who may participate in its activities or become a member cannot exclude people in a protected class as a matter of expressive association; a public accommodation law's nondiscrimination requirements will apply. *Roberts*, 468 U.S. at 628–29.

Excluding members of a protected class from a group when including them would not interfere with the group's ability to exercise its expressive association or free speech rights is not entitled to First Amendment protection. In *Roberts*, a national non-profit organization sanctioned two local chapters for violating rules prohibiting the induction of women as full members; it threated revocation of the local chapters' charters if they continued to induct women as full, regular members rather than lesser, associate members. *Id*. at 614. The chapters filed complaints with the state human rights agency, alleging that the organization's required exclusion of women as regular members violated the state human rights act's prohibition on discrimination in public accommodations. *Id*. The agency concluded that the organization was a place of public accommodation and that the organization had violated the state human rights act. *Id*. at 615. Following subsequent appeals, this Court held that the organization lacked the requisite characteristics for First Amendment protection to exclude women from full membership, that the state met its interest in affording women equal access by the least restrictive means, and that

allowing women full membership in the organization did not abridge the male members' ability to engage in protected speech. *Id*. at 621, 626, 628.

Even if Mr. Taylor's business were entitled to a right of expressive association, the Madison Act's requirement that Mr. Taylor not discriminate based on customers' religion would still not violate this right. Although it was not a business, the organization in *Roberts*, like Mr. Taylor's business, did not communicate a specific message and catered to the general public. *Id*. at 615; R. at 14. Just like the inclusion of women as full members in the organization in *Roberts* did not infringe upon male members' right of expressive association, requiring Mr. Taylor to photograph religious events and events in religious buildings would not prevent him from exercising a right of expressive association to declare his disapproval of religion. 468 U.S. at 628; R. at 5. Furthermore, even if this requirement negatively impacted Mr. Taylor's right, it is the least restrictive means of satisfying the government's compelling interest in preventing discrimination against people based on their religion, just like the state law in *Roberts* was the least restrictive means of preventing discrimination against women. 468 U.S. at 626.

Because requiring that Mr. Taylor's business photograph religious weddings equally with non-religious weddings would not interfere with his free speech rights, or his expressive associational right if it existed, the application of the Madison Act's nondiscrimination in public accommodation requirements to Mr. Taylor's business did not violate the First Amendment.

II. The Fifteenth Circuit was correct in affirming the District Court's finding that the Madison Act did not violate the Free Exercise or Establishment Clauses because the Madison Act is a neutral law of general applicability that does not require Mr. Taylor to engage in religious practice, and the Madison Act has a legitimate secular purpose, does not endorse one religion over another, and did not coerce Mr. Taylor to adopt a religion or engage in religious practice.

While religion is afforded significant protections under federal and state law, not all burdens on religious liberties are unconstitutional. *See Bowen v. Roy*, 476 U.S. 693, 702 (1986); *United*

States v. Lee, 455 U.S. 252, 260–61 (1982). In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Supreme Court held that neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the First Amendment's Free Exercise Clause. 494 U.S. 872, 878 (1990).[2] To qualify for the Free Exercise Clause's protections, a person must claim a cognizable religious belief. *See Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 712 (1981). Mr. Taylor practices atheism and believes that religion is "a detriment to the future of humanity." R. at 16–17. The Respondents do not contest that Mr. Taylor is exercising a religious belief in expressing his dislike of religion.

Despite his legitimate beliefs, the Madison Act does not violate Mr. Taylor's Free Exercise rights for two reasons. First, the Madison Act does not violate the Free Exercise Clause because the Madison Act is a neutral law of general applicability aimed at preventing discrimination in places of public accommodation. Second, even if this Court finds that the Madison Act is not facially neutral and is not generally applicable, Madison has a compelling interest in prohibiting

[2] After *Smith*, Congress sought to strengthen the Free Exercise Clause's religious liberty protections by passing the Religious Freedom Restoration Act of 1993 (RFRA). *Burwell v. Hobby Lobby Stores, Inc.*, 134 S Ct. 2751, 2761 (2014). RFRA provides that the government may not "substantially burden" a person's religious liberties even under a "rule of general applicability" unless the government has a compelling interest and uses the least restrictive means to further that interest. 42 U.S.C. § 2000bb-1(a)–(b). After this Court's decision in *City of Boerne v. Flores*, in which the Court held that Congress lacked the authority under the Fourteenth Amendment to extend RFRA to the States, RFRA currently applies only in the federal context. *See* 521 U.S. 507, 532–33 (1997).

However, in response to *Flores*, many states imposed their own RFRAs, including the State of Madison. *See* Mad. Code Ann. § 42-501(d). Madison's RFRA provides that the Government may substantially burden a person's religious beliefs when the Government has a compelling interest and uses the least restrictive means to further that interest. *Id.* Although the Madison RFRA affords heightened religious liberty to its citizens, it expressly prohibits any kind of unlawful discrimination in a place of public accommodation. *See* § 42-501(e). However, issues in this case that may arise under Madison's RFRA are not addressed in this Brief.

discrimination in places of public accommodation and both the Madison Act and the Commission's Enforcement Action were sufficiently narrowly tailored to further that interest.

A. While the Madison Act requires Mr. Taylor to enter religious institutions to provide his photography services, it does not require Mr. Taylor to act contrary to his religious beliefs, engage in religious practices, or suppress his religious beliefs, and therefore, under *Smith*, the Madison Act is a neutral law of general applicability that does not violate the Free Exercise Clause.

The right of free exercise "does not relieve an individual of an obligation to comply with a valid or neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879; *see also Hurley*, 515 U.S. at 572 (noting that public accommodation laws are well within a state's power to enact and as a general matter do not violate the First Amendment).

A governmental action that has a neutral purpose and deters socially harmful conduct does not violate the Free Exercise Clause. In *Smith*, a private drug rehabilitation organization fired two Native American employees after they ingested peyote, an illegal hallucinogenic drug, as part of a religious ceremony. 494 U.S. at 872. The state denied their applications for unemployment compensation under a state law that disqualified employees for workplace "misconduct." *Id*. On appeal, this Court held that the claimants' religious beliefs did not relieve them from compliance with a valid, neutrally applicable law. *Id*. at 890. This Court reasoned that the state did not seek to ban certain religious practices when it passed its drug law and that it had the ability to enforce "generally applicable prohibitions of socially harmful conduct." *Id*. at 885. *But see Church of the Lukumi Babalu, Inc. v. City of Hialeah,* 508 U.S. 520, 547 (1993) (explaining the effect of several non-facially neutral city ordinances passed after a church that practiced animal sacrifice announced that it planned to open a house of worship; the ordinances, taken together, prohibited animal sacrifice and suppressed the religion's central practices).

State courts have held that forcing an individual to comply with neutral, generally applicable public accommodation laws, even if doing so violates the individual's religious beliefs, does not violate the Free Exercise Clause. *See Willcock*, 309 P.3d at 53; *Craig v. Masterpiece Cakeshop, Inc.*, 2015 WL 4760453, *18–19 (Co. Ct. App. Aug. 13, 2015). In *Willcock*, a customer alleged that a photography business unlawfully discriminated against her based on her sexual orientation when the photography business refused to photograph the customer's same-sex wedding. *Willcock*, 309 P.3d at 58–59. The court held that the state's public accommodation law was a neutral law of general applicability and therefore did not offend the Free Exercise Clause. *Id*. at 75. The court explained that businesses do have the right to express their religious beliefs by posting disclaimers that they oppose same-sex marriage or by any other reasonable method, but they must comply with applicable non-discrimination laws. *Id*. at 59.

In the present case, the Madison Act does not target Mr. Taylor's religion; rather, it serves a broader legislative and public interest in giving all individuals access to commercial services. R. at 12. Similar to the state controlled substance law in *Smith*, which incidentally burdened the claimants' religious exercise but was a generally applicable and neutral law, but unlike the city ordinances in *City of Hialeah*, which were passed to suppress the fundamental religious practices of a church that practiced animal sacrifice, the Madison Act is facially neutral and does not aim to suppress Mr. Taylor's religious practices or beliefs. *See* 494 U.S. at 890; 508 U.S. at 534–35. The Madison Act does not, by its plain language and overall purpose, target religion like the city ordinances in *City of Hialeah*. *See* 508 U.S. at 533–35. Instead, the Madison Act, like the state controlled substance law in *Smith*, serves a strong legislative interest. *See* 494 U.S. at 890. Here, the Commission sought to end a twelve-year policy of religious discrimination. R. at 12. Mr. Taylor even prevents his employees from photographing religious

events even though they do not share in his anti-religious beliefs. *Id*. at 14–15. The Madison Act may incidentally burden Mr. Taylor's religious exercise, but it serves a neutral purpose, is generally applicable, and does not target a specific religion or its practices.

Furthermore, the Madison Act is substantially similar to the public accommodation law in *Willcock*, which led the court to hold that the law required the photography business owner to provide services to a same-sex couple, despite the owner's objections based on his religious beliefs. *See* 309 P.3d at 75. Here, Mr. Taylor refused to photograph religious ceremonies in violation of the Madison Act. R. at 18–21. The court in *Willcock* held that forcing the owner to comply with the public accommodation law did not violate his free exercise right because the law did not promote any "animus toward religion by the Legislature that would render the law non-neutral." 309 P.3d at 74. This Court, while not bound by the *Willcock* decision, should similarly hold that Mr. Taylor's Free Exercise rights were not violated because there is no evidence of non-neutrality in the Madison Act's plain language or its application. [3]

The Madison Act does not compel Mr. Taylor to enter a religious building in a personal capacity. He willingly chose to offer his services to the public, and he is required to provide those services in a non-discriminatory manner. Requiring Mr. Taylor to provide his photography services without taking religion into account fulfills the neutral purpose of the Madison Act.

[3] The Record contains evidence of the Madison Act's neutral purpose. Specifically, Mad. Code Ann. § 42-501 includes Madison's RFRA and a provision that expressly prohibits "unlawful discrimination in any form" in "any place of public accommodation." R. at 13. This non-discrimination provision, enacted alongside Madison's RFRA, demonstrates Madison's strong legislative interest in prohibiting discrimination and that Madison's legislature determined that religious liberty may succumb to the government's interest in preventing discrimination in certain circumstances.

B. Assuming *arguendo* that this Court finds the Madison Act and the Enforcement Action were not facially neutral and generally applicable, the Commission nevertheless had a compelling interest in prohibiting discrimination, and the Madison Act and Enforcement Action were sufficiently narrowly tailored to further that interest.

A governmental action that is not neutral or generally applicable does not violate the Free Exercise Clause when the government demonstrates that it has a compelling interest and that the action taken is narrowly tailored to advance that interest. *City of Hialeah*, 508 U.S. at 531–32.

i. The Commission had a compelling interest in ending discriminatory practices in commercial businesses.

A state can limit religious liberty if it can prove that doing so is necessary to achieve a compelling government interest. In *United States v. Lee*, a member of the Amish faith failed to file quarterly social security tax returns required of employers and to pay the employer's share of social security taxes based on his religious beliefs. 455 U.S. 252, 254–55 (1982). The Court held that "compulsory participation" in the social security system interferes with the employer's free exercise rights; however, the Court held the Government's interest in "assuring mandatory participation in and contribution to the social security system is very high." *Id*. at 258–59. This Court stated, "Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." *Id*. at 253.

In the present case, Madison has a compelling interest in prohibiting discrimination. Similar to the situation in *Lee*, in which a member of the Amish faith was compelled to pay social security taxes due to the overwhelming governmental interest in the social security and tax systems, the Commission is requiring Mr. Taylor to provide his services to all individuals regardless of their religion. *See* 455 U.S. at 254–55; R. at 25. The Commission made clear in its September 15, 2014, letter to Mr. Taylor that it had an interest in preventing discrimination in

places of public accommodation and that it had determined through its investigation that Mr. Taylor had discriminated on the basis of religion on multiple occasions. R. at 25. He had denied his services to two known individuals, Mr. Johnson and Mr. Green. *Id*. at 25. He made discriminatory remarks to his employees regarding their religions. *Id*. at 25. Specifically, on one occasion, he said that "it was too bad so many people died over debating which fairytale they liked better," regarding the Israel-Palestine conflict. *Id*. at 27. On another occasion, he wished his office a "Happy Zombie Jesus Day" around Easter. *Id*. at 32. The Commission's actions demonstrate that it sought to stop Mr. Taylor from denying services to religious people, not to infringe on Mr. Taylor's Free Exercise rights. The Court in *Lee* held that the government's interest in a sound tax system was high and justified mandatory participation by individuals whose religion may be offended by such participation. 455 U.S. at 258–59. Similarly, Mr. Taylor's mandatory participation and compliance with the Madison Act contributes to the compelling governmental interest in anti-discrimination.

ii. The Commission's Enforcement Action was narrowly tailored to further its interest in prohibiting discrimination in places of public accommodation.

A regulation is not narrowly tailored if it targets a specific religion or suppresses a religion's fundamental practices. In *City of Hialeah*, the claimant-church and its congregation practiced Santeria, a religion whose followers practice animal sacrifice. 508 U.S. at 520. The church leased land in Hialeah and announced that it would open a church; immediately after the announcement, the city held an emergency public session and passed several ordinances that banned animal brutality and sacrifice for any purposes other than for food consumption. *Id*. The Court held that the ordinances were not narrowly tailored to meet the town's interests in public health and prevention of cruelty to animals. *Id*. at 522. The Court reasoned that the city's

interests could be achieved with narrower ordinances that burdened religion to a lesser degree and that the governmental interests could be addressed by "restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice." *Id*. at 521.

The facts in the present case are drastically different than the facts offered in *City of Hialeah*. Unlike the city's ordinances in *City of Hialeah*, which were over-inclusive and over-burdened the claimants' religious practices, the Madison Act is incapable of further restriction. 508 U.S. at 578 (Blackmun, J., concurring). The Commission sent Mr. Taylor a cease-and-desist letter, imposed a fine of $1000 per week upon him until he removed the sign, and threatened to bring a civil enforcement action against him if he did not comply with the Madison Act within 60 days. R. at 25–26. The Commission's compelling interest is satisfied only through the Enforcement Action; anything less would not satisfy Madison's compelling interests. For example, a verbal reprimand or warning would not be adequate to serve the government's compelling interests because Mr. Taylor could choose to ignore the warning and would have no incentive to comply with the Madison Act. The Commission's Enforcement Action was therefore narrowly tailored to adequately carry out its interests.

C. The Madison Act and the Enforcement Action did not violate the Establishment Clause because the Madison Act had a legitimate secular purpose, did not endorse one religion over another, and did not coerce Mr. Taylor into engaging in religion or religious practices.

This Court has used three tests to determine whether a law violates the Establishment Clause. In *Lemon v. Kurtzman*, the Court explained that a governmental action must have a secular purpose, must not advance or inhibit religion, and must not "foster excessive governmental entanglement with religion." 403 U.S. 602, 612–13 (1971). To confront the *Lemon* test's weaknesses, this Court developed the endorsement test. Justice O'Connor's concurrence in *Lynch v. Donnelly* explained that whether a governmental action endorses a religion or

disapproves of religion should be the touchstone of the Establishment Clause inquiry. 465 U.S. 668, 687 (1984). Subsequently, Justice Kennedy advanced the coercion test, which provides that a governmental action violates the Establishment Clause if it coerces an individual "to support or participate in religion or its exercise," in *Lee v. Weisman*. 505 U.S. 577, 587 (1992).

While this Court has expressed dissatisfaction with *Lemon*, it has not altogether abandoned its test. *See Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (criticizing the *Lemon* test in its analysis of a monument that Texas erected on its Capitol grounds). All three tests continue to appear in this Court's Establishment Clause jurisprudence. Therefore, Mr. Taylor's claims fail the *Lemon*, endorsement, and coercion tests, and as a result, neither the Madison Act nor the Enforcement Action violated the Establishment Clause.

i. Under the *Lemon* test, the Madison Act does not violate the Establishment Clause because its secular purpose is to prohibit discrimination against protected classes, its primary effect is to provide equal access to the business market for all individuals, and it does not foster excessive governmental entanglement with religion.

To survive an Establishment Clause claim, a statute must pass three tests under *Lemon*. First, "the statute must have a secular legislative purpose;" second, "its principal or primary effect must be one that neither advances nor inhibits religion;" and third, the statute must not "foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612–13.

A legislature's stated secular purpose for enacting a statute will generally warrant a court's deference so long as the secular purpose is genuine and "not secondary to a religious objective." *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 864 (2005). In *McCreary County*, two Kentucky counties posted the King James Version of the Ten Commandments in their respective courthouses. *Id*. at 850. The ACLU sued the counties for the religious display. *Id*. at 852. A month later, the counties' legislatures authorized a second display

that was more extensive than the first display. *Id*. at 852. The second display showed that the Ten Commandments were Kentucky's "precedent legal code" and Christ is the "Prince of Ethics." *Id*. at 844. The counties then mounted a third display that quoted more of the religious language of the Ten Commandments than the first two displays and also placed the Ten Commandments in the company of other historically significant documents. *Id*. The Court held that placing the Ten Commandments on the walls of the public courthouses violated the Establishment Clause. *Id*. at 881. The Court explained that the counties' secular purpose in mounting the displays was clearly secondary to their religious objective based on the evolution of the displays. *Id*. at 865, 881.

When a statute's involvement with religion is negligible, then a State does not become excessively entangled in religion. *See Brown v. Gilmore*, 258 F.3d 265, 278 (4th Cir. 2001). In *Brown*, several Virginia students and their parents challenged a Virginia statute that mandated that every school division in the State establish a "minute of silence" so that "each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice." *Id*. at 270. The court held that the statute did not violate the Establishment Clause because the State's involvement in religion was negligible. *Id*. at 278. The court reasoned that the statute was, at most, a "minor and nonintrusive accommodation of religion" that does not endorse a religion. *Id*.

The first prong of the *Lemon* test is satisfied in the present case. Unlike the situation in *McCreary County*, in which two Kentucky counties displayed the Ten Commandments on the walls of the counties' courthouses and then described the Ten Commandments as the "precedent legal code" and Jesus as the "Prince of Ethics," Madison made no such attempt to endorse a religion with the enactment of the Madison Act. *See* 545 U.S. at 844, 850. The Madison Act

prohibits discrimination in a place of public accommodation based on "race, color, religion, national origin, sex, disability, sexual orientation, gender identity or expression, socioeconomic status, political affiliation, or other protected classes." R. at 2. The purpose of the displays in *McCreary County* was to celebrate a religious message; but in this case, the Madison Act and the Enforcement Action serve an anti-discriminatory and secular purpose. *See* 545 U.S. at 872–73. The goal of the Enforcement Action was not to compel Mr. Taylor to enter places of worship and endorse religion but to prohibit Mr. Taylor from denying services to potential customers based on their religion.

The second prong of the *Lemon* test is also satisfied here. The Madison Act neither advances nor inhibits religion. Unlike the displays in *McCreary County*, which advanced Christianity over other religions, the Madison Act does not aim to establish any religion; instead, it aims to equalize all religions so that no individual is denied services based on his religion. *See* 545 U.S. at 851–56. The District Court noted that the Commission enforces anti-discriminatory actions against commercial businesses "for the purposes of promoting a fair and just society that is accessible to all, regardless of religion." R. at 12. The Madison Act does not compel Mr. Taylor to accept the teachings of a religion or enter into a religious institution for the purpose of participating in religious practices. Mr. Taylor readily admitted that he has attended religious ceremonies in the past without subscribing to the religion's practices. R. 15–16, 17. He can do the same now to comply with the Madison Act.

Finally, the third prong of the *Lemon* test is satisfied because the Madison Act does not foster an excessive government entanglement with religion. Similar to the Virginia statute in *Brown*, which mandated that schools establish a minute of silence for students to meditate or pray, the Madison Act negligibly interferes with religion. *See* 258 F.3d at 270. In fact, it does not

interfere with Mr. Taylor's religious liberties at all because it does not force him to engage in religion or its practices. The interference with Mr. Taylor's religious practice is not the intended effect of the statute, but rather, a side effect of a greater purpose to prevent discrimination. Therefore, the Madison Act does not foster government entanglement with religion.

ii. Under the endorsement test, the Madison Act and the Enforcement Action do not communicate a governmental endorsement of religion because they do not show preference for religion and primarily endorse non-discrimination in places of public accommodation.

Under the endorsement test, a governmental action violates the Establishment Clause if it has the "effect of communicating a message of government endorsement or disapproval of religion." *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (quoting *Lynch*, 465 U.S. at 692 (1984) (O'Connor, J., concurring)). In *Lynch*, the claimants alleged that the city of Pawtucket, Rhode Island's inclusion of a nativity scene in its annual Christmas display in the city's shopping district violated the Establishment Clause. 465 U.S. at 671. This Court held the Christmas display did not violate the Establishment Clause. *Id*. at 685. Justice O'Connor explained in her concurrence that the city of Pawtucket did not intend to endorse Christianity or disapprove of other non-Christian religions because the purpose of the Christmas display was to celebrate Christmas as a public holiday through symbols that are traditionally associated with the holiday. *Id*. at 687–88.

In the present case, the Madison Act and the Commission's Enforcement Action did not amount to a government endorsement of religion. The Christmas display in *Lynch* is similar to the Enforcement Action in the present case. The Christmas display had the incidental effect of promoting religion although its purpose was to promote secular purposes to endorse Christmas as a public holiday. *See id*. at 681–85. Although there is no display of religious symbols in the present case, this Court's message is still the same. A governmental action that may cause

discomfort or give individuals no choice but to view religious symbols for a limited time does not necessarily endorse religion. The Enforcement Action in the present case may require Mr. Taylor to enter places of worship, but it does not show preference for religion. It simply requires Mr. Taylor to provide services without discrimination. If anything, the Madison Act and the Enforcement Action endorse anti-discrimination, which is a legitimate governmental interest.

iii. Under the coercion test, the Madison Act and the Enforcement Action do not coerce Mr. Taylor to accept or practice religion by requiring him to offer his photography services to individuals who wish to marry in a religious institution.

Under the coercion test, a governmental practice does not violate the Establishment Clause unless it acts in a way that "establishes a [state] religion or religious faith" or coerces an individual "to support or participate in religion or its exercise." *Weisman*, 505 U.S. at 587.

"Offense does not equate to coercion." *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1815 (2014). In *Galloway*, citizens of Greece, New York brought suit to challenge the town board's practice of opening all meetings with a prayer given by a clergy member. *Id*. at 1816–17. In that case, the claimant-citizens argued that the public might feel coerced to participate in prayers that violate their religious beliefs to receive a favorable ruling from board members. *Id*. at 1825. This Court held that opening town board meetings with prayer that invoked the name of Jesus, the Heavenly Father, and the Holy Spirit did not coerce non-adherents and therefore did not violate the Establishment Clause. *Id*. at 1828. The Court reasoned that legislative bodies do not coerce individuals by merely exposing individuals "to prayer they would rather not hear and in which they need not participate." *Id*. at 1827.

In the present case, the Madison Act does not coerce Mr. Taylor to participate in religion or its exercise. Similar to the Establishment Clause challenge in *Galloway*, in which citizens complained that they were forced to listen to prayers at the town board meetings and that their

failure to do so would result in unfavorable treatment from the councilmen, Mr. Taylor's challenge rests on the fact that he is being forced to enter into houses of worship, which he contends is a violation of the Establishment Clause. *See id*. at 1825. However, Mr. Taylor has not shown that the Madison Act coerces him to accept a religion or participate in religious practices when he enters into religious institutions. Mr. Taylor readily admitted that he voluntarily entered into religious facilities prior to the Enforcement Action and did not participate in any religious exercise. R. at 15–17. He also admitted that he was able to tune prayers out when he attended his newborn nephew's bris in March 2015. *Id*. at 17. He is clearly capable of distancing himself from religion while in religious facilities. The Madison Act does not require Mr. Taylor to engage in religious practice when he enters a religious building; he is only required to provide services to all individuals, regardless of their religious beliefs.

CONCLUSION

Because the Court of Appeals for the Fifteenth Circuit did not err in affirming the District Court's grant of the Commission's Motion for Summary Judgment, the Respondents respectfully request that this Court affirm the decision of the Fifteenth Circuit.

Respectfully submitted,

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The Advocates for Team B
Attorneys for Respondents

CERTIFICATE OF SERVICE

We, the advocates of Team B, attorneys for the Respondents, certify that on February 5, 2016, have served upon the Petitioner a complete and accurate copy of this Brief for Respondents, by placing a copy in the United States Mail, sufficient postage affixed and properly addressed.

DATE: Feb 5, 2016

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The Advocates for Team B
Attorneys for Respondents

APPENDIX

U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.