No. 15-1245

In The

Supreme Court of the United States

JASON ADAM TAYLOR

Petitioner,

-against-

TAMMY JEFFERSON
In her official capacity as Chairman of the
Madison Commission on Human Rights, *et al.*

Respondent.

On Writ of Certiorari To The
United States Court of Appeals for the Fifteenth Circuit

BRIEF OF PETITIONER

Team O
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

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

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

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit entered final judgment on this matter on November 12, 2015. *Jason Adam Taylor v. Tammy Jefferson*, No. 15-1213, slip op. at 1 (15th Cir. Nov. 12, 2015). Petitioner timely filed a petition for writ of certiorari, which this court granted. This court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Jason Adam Taylor ("Mr. Taylor") has identified as a "militant atheist" since the age of 19, after his mixed-faith upbringing "soured his vision of all religion." Taylor Aff. At ¶¶ 24, 26. Mr. Taylor grew up with a Jewish mother and a Catholic father, and due to this mixed faith upbringing, a number of Mr. Taylor's relatives had negative comments about how he should live his life. Taylor Aff. At ¶¶ 20, 21. For example, Mr. Taylor's Jewish uncle and grandfather did not believe he was "Jewish enough" for not keeping a kosher diet and his Catholic grandmother negatively commented on the fact that Mr. Taylor was not baptized. Taylor Aff. At ¶¶ 22, 23. The constant fighting between Mr. Taylor's family members made much of his childhood unhappy "due to the people who followed religion being unwilling to see [him] as anything but what they perceived [his] religion to be." Taylor Aff. At ¶ 25. Mr. Taylor has deeply held that any sort of religious belief is a detriment to the future of humanity. Taylor Aff. At ¶ 18.

Mr. Taylor, with his wife as a minority owner, owns and operates a closely held corporation in Madison City, Madison called Taylor's Photographic Solutions. Taylor Aff. At ¶¶ 1-2. Out of Taylor's Photographic solutions 17 employees, Judaism, Christianity, Islam, Scientology, Buddhism, Hinduism, Wiccan and atheism are followed. Taylor Aff. At ¶ 32. Mr. Taylor has a strict policy prohibiting discrimination against employees due to their religions, and makes every effort to accommodate the religious needs of employees. Taylor Aff. At ¶¶ 33, 34. There is no evidence before the Court that Mr. Taylor has ever denied a religious accommodation requested by an employee.

Taylor's Photographic Solutions offers photography services to members of the public, providing services to a full range of events including birthdays, graduations, proms, photo shoots for websites, festivals, and weddings. Taylor Aff. At ¶ 7. Under a policy enacted by Mr. Taylor

as owner and manager, Taylors Photographic Solutions does not photograph any event that is religious in nature. Taylor Aff. At ¶ 8. Under this policy, Taylor's Photographic Solutions does not provide services for official religious events such as a religious wedding, baptism, confirmation, or a bar mitzvah, because Mr. Taylor does not want to be seen as endorsing a religion in any way. Taylor Aff. At ¶¶ 8, 15. This policy extends only to events that are religious in nature and Taylor's Photographic Solutions has a strict policy of not denying service to any individual based upon his or her particular religion. Taylor Aff. At ¶¶ 10, 11. In the window of Taylor's Photograph Solutions, the policy is clearly stated on a sign, which reads:

> 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.

Taylor Aff. Ex. A.

On July 31, 2014, the Madison Commission of Human Rights ("Commission") began an investigation of Taylor's Photographic Solutions after receiving two complaints filed by Patrick Johnson and Samuel Green. Taylor Aff. Ex. B at 1. On July 14, 2014, Patrick Johnson ("Mr. Johnson") entered the store, specifically requesting to speak with Mr. Taylor and asked him to photograph his wedding. Taylor Aff. At ¶¶ 37-39. Mr. Taylor's only follow up question was asking where the wedding would be held and who would be performing it, and Mr. Johnson replied that a priest would perform it at St. Anthony's Catholic Church. Taylor Aff. At ¶¶ 40, 42. On July 22, 2014 Samuel Green ("Mr. Green)"entered Mr. Taylor's store and specifically asked to speak with Mr. Taylor, asking him to photograph his wedding. Taylor Aff. At ¶¶ 48-49. As is

his common practice to ask, Mr. Green told Mr. Taylor the wedding would be held at Beth Shalom Synagogue and performed by a Rabbi. Taylor Aff. At ¶¶ 50-51. Mr. Taylor told both Mr. Johnson and Mr. Green that he would not be able to photograph their respective weddings because he does not want to take part in framing religion in a positive light. Taylor Aff. At ¶¶ 45, 52. He stated this was standard practice, directed them to his sign, and suggested they should seek services elsewhere, such as CM Snaps nearby. Taylor Aff. At ¶¶ 45-47, 52-55. Mr. Johnson stated that he sought to use Taylor's Photographic Solutions because of Mr. Taylor's reputation for utilizing indoor lighting to create spectacular photography. Johnson Aff. At ¶ 20.

Mr. Taylor received a cease and desist letter from the Madison Human Rights Commission on August 11, 2014, informing him that two complaints had been filed against Taylor's Photographic Solutions as well as against him personally for alleged discrimination based on religion in violation of the public accommodation laws of the Statute. Taylor Ex. B. He has also been fined $1,000 per week until he demonstrates that he has stopped these practices. Taylor Ex. B. Due to Mr. Taylor's confidence that he had not violated the law, he forewent the opportunity to file a position statement with the Madison Commission on Human Rights or to engage in an administrative hearing. Taylor Aff. at ¶¶ 62-64. Mr. Taylor filed suit claiming that the Enforcement Action violates his First Amendment rights of Speech and Free Exercise, that the Enforcement Action violates the Establishment Clause of the First Amendment, and that the members of the Madison Commission on Human Rights violated his constitutional rights under color of state law via a policy.

SUMMARY OF THE ARGUMENT

I. This Court should find that the enforcement of the Statute which requires Mr. Taylor to provide his photography services in violation of his strongly held beliefs against condoning or

associating with religion is a clear violation of the free speech clause of the First Amendment of the Constitution. To achieve First Amendment protection, the court must first determine whether the conduct at issue is sufficiently imbued with elements of communication to fall within the scope of the First Amendment. Next, this Court must analyze whether the state action at issue significantly affects the group's ability to advocate its viewpoints. Finally, this Court must weigh the state's interest implicated in its action against the burden imposed on the associational expression to determine if the state interest justifies the burden. Mr. Taylor's photography is sufficiently imbued with elements of communication to earn First Amendment protection as he communicates that he does not support religion through his photography business to his clients, those who view his photographs, and those who know his reputation as a photographer. The enforcement of the Madison public accommodation law amounts to compelled speech and forced expressive association.

II. The Statute violates the Establishment Clause and meets all three prongs of the *Lemon* test. Here, the Statute has the non-secular purpose of favoring those who have faith over those who do not, advances religion by forcing public businesses to service religious groups during indoctrinating ceremonies, and ultimately entangles government and religion by doing so. Because the Statute additionally fails the neutrality test as the end result prioritizes religious groups, the Commission must justify the Statute by explaining that it is a compelling government interest and can be narrowly tailored to achieve that. Given the position that Mr. Taylor is placed in because of this Statute, the government has failed to show a strong compelling interest in limiting his ability to practice and has not so in the least restrictive means.

I. MR. TAYLOR HAS ESTABLISHED THAT THE ENFORCEMENT OF COMMISSION'S PUBLIC ACCOMODATION LAW FORCING HIM TO PHOTOGRAPH RELIGIOUS CEREMONIES VIOLATES HIS STRONGLY HELD BELIEFS IN VIOLATION OF THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

Implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural means. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas. *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). The right to expressive association is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. *Roberts*, 468 U.S. at 622.

While the First Amendment literally forbids abridgement only of "speech", it has long been recognized that its protection does not end at the spoken or written word. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). There is no doubt that the protection granted by the First Amendment extends beyond political speech and verbal expression. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952). Visual art is entitled to the same First Amendment Protection accorded to written language. *Bery v. City of New York*, 97 F.3d 689 (1996). The ideas and concepts embodied in visual art have the power to transcend the limitations of language and reach beyond a particular language group to both the educated and the illiterate. *Id.*

When deciding a First Amendment violation, the court must first determine whether the conduct at issue is sufficiently imbued with elements of communication to fall within the scope of the First Amendment. *Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh*, 229 F.3d 435 (2000). To achieve First Amendment protection, a plaintiff must show that he possesses: (1) a message to be communicated; and (2) an audience to receive that message, regardless of the

medium in which the message is to be expressed. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995). Next, the court must analyze whether the state action at issue significantly affects the group's ability to advocate its viewpoints. *Pi Lambda Phi Fraternity* 229 F.3d at 445. Finally, the court must weigh the state's interest implicated in its action against the burden imposed on the associational expression to determine if the state interest justifies the burden. *Id.*

The First Amendment's fundamental purpose is to protect all forms of peaceful expression in all of its myriad manifestations. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1976). The enforcement of Mad. Code. Ann. §42-101-2a ("Statute") that requires Mr. Taylor to provide his photography services in violation of his strongly held beliefs against condoning or associating with religion is a clear violation of the free speech clause of the First Amendment of the Constitution.

A. Mr. Taylor has established his right to First Amendment Protection because his photography has the intent to convey a particularized message with a great likelihood that the message will be understood by those who view it.

First Amendment jurisprudence counsels that speech does not consist merely of spoken words, but also includes conduct sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. *Texas*, 491 U.S. at 404. The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind. *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988).

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, it must be established whether the intent to convey a particularized message was present and whether the likelihood was great that the message would be understood by those who viewed it. *Texas*, 491 U.S. at 404. Visual images are a primitive but

effective way of communicating ideas. *West Virginia State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 632 (1943). Mr. Taylor firmly believes that religion is a detriment to the future of humanity. He has clearly established that he intends to communicate that he does not support religion through his photographs and that his photographs far exceed recreational purposes. He communicates this message to a wide audience, consisting of anyone who views his photos and knows about his reputation as a photographer, and therefore should be considered as "speech" for the purposes of the First Amendment.

Visual art is wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing and is similarly entitled to full First Amendment protection. *Bery*, 97 F.3d at 695. In the case of *Bery,* visual artists moved for preliminary injunctions against enforcement of a city regulation prohibiting visual artists from exhibiting or selling their work at public places without general vendors licenses. *Id* at 692. The court reasoned that visual artwork is as much an embodiment of the artist's expression as is a written text, and the two cannot always be readily distinguished. *Id.* The court stated that paintings are not mere merchandise lacking in communicative concepts or ideas. *Id* at 695. Perceiving paintings as such would be an unduly restricted view of the First Amendment and of visual art itself, and such myopic vision not only overlooks case law central to First Amendment jurisprudence but also fundamentally misperceives the essence of visual communication and artistic expression. *Id.*

Mr. Taylor's conduct clearly exceeds the *de minimus* threshold for expressive activity claims. In the *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), the plaintiff claimed they had an expressive associational interest in mingling at a dance hall. The Supreme Court rejected this claim, holding that the patrons were only associating with one another and not engaging in First Amendment protected expression while doing so. *Id* at 25. The Court held that there was no suggestion that

the plaintiffs took positions on public questions and the Constitution does not recognize a generalized right of "social association" that includes chance encounters in dance halls. *Id*.

There must be an element of expression in order to establish risk to the "speaker" or creator of art that his or her ideas or messages will be unlawfully extinguished by governmental action in contravention of the First Amendment, and photography is inherently an artistic form of expression. *Bery* 97 F.3d at 696. Mr. Taylor has chosen photography as his medium to express his deeply held belief that religion is a detriment to the future of humanity. Similarly to the case in *Bery*, Mr. Taylor's photographs are not mere merchandise lacking in communicative concepts or ideas. Perceiving his photographs as such would be an unduly restricted view of the First Amendment and of visual art itself.

Associations do not have to associate for the purpose of disseminating a certain message in order to be entitled to the protections of the First Amendment. *Dale,* 530 U.S. at 655. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection. *Id.* Mr. Taylor has made a reputable career through his passion for photography, Mr. Taylor does not want to use his reputation to endorse religion in any way. Mr. Taylor has made his message clear through his sign on his store window, which clearly states that the management of Taylor's Photographic Solutions firmly believes that organized religion is an impediment to the furtherance of humanity and civilization and that the management of this business will not perform services for any religious services of any kind. Unlike the plaintiff in *City of Dallas*, Mr. Taylor clearly takes a stance on religion and his photography far exceeds the *de minimus* threshold for expressive activity.

Mr. Taylor is able to achieve First Amendment protection because he is able to show that: (1) through his business of photography he is communicating that he does not endorse any religion

due to his firmly held belief that it is an impediment to the furtherance of humanity and civilization; and (2) Mr. Taylor is received by his clients, those who view his photographs, and those who know his reputation as a photographer.

B. Forcing Mr. Taylor to photograph religious ceremonies would significantly affect his ability to advocate his private viewpoints.

After determining that Mr. Taylor's photography is able to achieve First Amendment protection, the court must then determine whether the forced photography of religious ceremonies would significantly affect his ability to advocate his viewpoints. Government actions that unconstitutionally burden the First Amendment take many forms, one of which is intrusion into a group's internal affairs by forcing it to accept a member it does not desire. *Roberts*, 468 U.S. at 623.

Deference must be given to an association's view of what they believe would impair its expression. *Dale*, 530 U.S. at 653. The inclusion of clients requesting services for their religious ceremonies significantly affects Taylor's Photographic Solutions' ability to advocate his private viewpoints amounts to unconstitutional forced membership. Forcing Mr. Taylor to photograph religious ceremonies against his firmly held beliefs would amount to both compelled speech and forced expressive association.

i. The Commission's actions amount to compelled speech as Mr. Taylor is being obliged personally to express a message he disagrees with as imposed by the government, infringing upon Mr. Taylor's right to refrain from speaking at all.

If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit expression of an idea simply because society finds the idea itself offensive or disagreeable. *Texas,* 491 U.S. at 404. The government may not interfere with expressions of First Amendment freedoms on the ground that it views a particular expression as unwise or irrational. *Id*. It is well established that "the right of freedom of thought protected by the First Amendment

against state action includes both the right to speak freely and the right to refrain from speaking at all". *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

True compelled speech cases are ones in which an individual is obliged personally to express a message he disagrees with, imposed by the government. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005). To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government. *Riley,* 487 U.S. at 791. The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224 (1986). Mr. Taylor knows best both what he wants to say and how he wants to say it.

In the case of *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), the Court invalidated an outright compulsion of speech. It was required of every schoolchild to recite the Pledge of Allegiance while saluting the American flag, on pain of expulsion from the public schools. *Id.* The Court held that the First Amendment does not "leave it open to public authorities to compel a person to utter" a message with which he does not agree. *Id.* Similarly to *West Virginia Bd. Of Ed.,* in forcing Mr. Taylor to photograph religious ceremonies the Commision is compelling him to utter time and time again a message he fundamentally does not believe in.

The sale of protected materials is also protected by the First Amendment. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 (1988). It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak. *Riley*, 487 U.S. at 801. Mr. Taylor and his wife make a living from Taylor Photography Solutions, however this does not make his expressive speech any less meaningful.

Mr. Taylor's message, which he conveys through his photographs, is not diminished due to the fact that he receives compensation for them. The photographs that Mr. Taylor takes are unique to his skill set. Every event and photograph he captures requires him to put his own expertise, style and talent into the photograph. Mr. Taylor's talent for the use of indoor lighting for photography indoors has allowed him to develop a reputation, and clients come to him specifically because he is known for this talent. It is not persuasive to argue that just because the customer purchases a photograph, that the customer is therefore in control of the outcome of the photograph and Mr. Taylor's First Amendment rights are somehow extinguished. While the customer decides the sizes and quantity of their photo order, it is in the expertise and skill of the photographers at Taylor's Photographic Solutions that is ultimately determinative of the outcome photo.

The First Amendment does not leave it open to public authorities to compel a person to utter a message with which he does not agree. *West Virginia Board of Education,* 319 U.S. at 632. Mr. Taylor's opposes all religion, and forcing him to photograph religious ceremonies compels him to utter a message with which he does not agree and therefore infringes upon Mr. Taylor's right to refrain from speaking at all.

ii. The Commission's actions amount to forced expressive association as photographing religious events compels Mr. Taylor to expressively associate and endorse religion against his firmly held beliefs.

The First Amendment's protection of expressive association is not reserved for advocacy groups, and there is no requirement that an organization be primarily political (or even primarily expressive) in order to receive constitutional protection for expressive associational activity. *Pi Lambda*, 229 F.3d at 444. The First Amendment does not require that every member of a group agree on every issue in order for the group's policy to be "expressive association". *Dale*, 530 U.S. at 655.

It remains clear that under the First Amendment, the government may not force an individual to speak in a manner with which it disagrees, and this proposition extends to expressions of value, opinion, or endorsement. *Hurley,* 515 U.S. at 573. Indeed the general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion or endorsement, but equally to statements of fact that the speaker would rather avoid. *Id*. The rule's point is simply the point of all speech protection, which is to shield those choices of content that in someone's eyes are misguided, or even hurtful. *Id* at 574.

In the case of *Hurley*, the Court considered whether the application of Massachusetts' public accommodation law to require the organizers of a private St. Patrick's Day parade to include an LGBT group violated the parade organizers First Amendment right of expressive association. *Hurley,* 515 U.S. at 573. The Court held that they could not force the parade organizers to associate with the message conveyed by would-be parade participants because such a requirement would have required plaintiffs to alter the expressive content of their parade. *Hurley,* 515 U.S. at 572-73. The purpose of the St. Patrick's Day parade in *Hurley* was not to espouse any views about sexual orientation, but the Court held that the parade organization had a right to exclude certain participants nonetheless. *Dale*, 530 U.S. at 655.

In the case of *Dale*, the plaintiffs asserted that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, and the organization did not want to promote homosexual conduct as a legitimate form of behavior. *Id* at 641. The Court inquired whether the presence of a homosexual assistant scoutmaster would significantly burden the expression of those viewpoints. The Court held requiring that the plaintiffs to retain a homosexual assistant scoutmaster would significantly burden their right to oppose or disfavor homosexual conduct. *Id* at 659. The Court reasoned that first, an association need not associate for the purpose of

disseminating a certain message in order to be protected, but must merely engage in expressive activity that could be impaired. *Id* at 655. Second, even if the plaintiffs discouraged Scout leaders from disseminating views on sexual issues, its method of expression is protected. *Id*. And finally, the First Amendment does not require that every member of a group agree on every issue in order for the group's policy to be "expressive association." *Id*. Public or judicial disapproval of an organization's expression does not justify the state's effort to compel the organization to accept members in derogation of the organization's expressive message. *Id* at 641.

Alike to *Hurley*, although Taylor's Photographic Solutions is a business before it is an advocacy organization, Mr. Taylor has a right to exclude or deny certain participants nonetheless. Just as Massachusetts could not force parade organizers to associate with the message conveyed by would-be parade participants because it would have "required petitioners to alter the expressive content of their parade," demanding Mr. Taylor to photograph religious ceremonies similarly alters the expressive content of his work.

Similarly to *Dale*, although Taylor's Photographic Solutions is not associated for the purpose of disseminating a certain message, they are still protected as they engage in the expressive activity of photography that would be impaired by the enforcement of the Statute. Although every one of Mr. Taylor's employees does not agree with his viewpoints, Mr. Taylor accommodates their religions and it is not required that every member of a group agree on every issue in order for the group's policy to be "expressive association."

Enforcing the Statute unconstitutionally burdens Mr. Taylors First Amendment right by intruding upon his business's internal affairs. Forcing Mr. Taylor to accept clients requesting services for their religious ceremonies significantly burdens his right to not expressively associate with religion.

C. The Commission Lacks a Compelling Interest in Order to Justify Such a Severe Intrusion on Mr. Taylor's Right to Freedom of Speech.

After establishing that the Statute would significantly burden Mr. Taylor's right to oppose or disfavor religion, this Court must weigh the Commission's interest implicated in its action against the burden imposed on the associational expression of Mr. Taylor determine if the state interest justifies the burden. The First Amendment protects expression, be it of the popular variety or not. *Dale,* 530 U.S. at 660. While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government. *Id, Quoting Hurley*, 515 U.S. at 579. In this case, the Statute directly and immediately affects Mr. Taylor from advocating his viewpoints and the Commission lacks a compelling interest to justify this direct burden on his associational expressive rights.

In *Dale*, the Court was presented with a public accommodation law that significantly burdened the organization's right to oppose or disfavor homosexual conduct. *Dale*, 530 U.S. at 660. The Court in *Dale* abandoned the compelling interest test established in *Roberts v. United States Jaycees*, which held that a state's interest in eradicating discrimination always trumped expressive association rights. *Roberts*, 468 U.S. 609; *Dale,* 530 U.S. at 642. The Court held that the state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the freedom of expressive association. *Dale*, 530 U.S. at 642. Not one of the dissenters in the 5-4 holding in Dale argued for the use of the *Roberts*-style compelling interest test, and this Court should not either. See *Id.* at 663-700 (Stevens, J., dissenting); *Id.* at 700-02 (Souter, J., dissenting).

As stated by the lower court, the First Amendment is indeed a powerful shield and Mr. Taylor is using the First Amendment as a shield to protect his right to free speech. Mr. Taylor

both employs and photographs clients of many different religions, and while he has a strict policy not to photograph religious ceremonies, he also has a strict policy to never discriminate against any person based on their religion. His policy is limited to photographing religious ceremonies as he does not want to "frame religion as good." The Commission lacks a compelling interest to force him to photograph religious ceremonies against his strongly held beliefs that religion is to the detriment of humanity. The State's interest in providing service to all members of the public is not convincing, as those seeking photography for their religious ceremonies are able to seek services elsewhere. In fact, members of the public are able to seek photography services right next door to Taylor's Photographic Solutions at a neighboring competitor. Most importantly, services can be found elsewhere without infringing upon Mr. Taylor's First Amendment right to free speech. Similarly to *Dale*, the state interests embodied in the Statute do not justify such a severe intrusion on Mr. Taylor's freedom of expressive association.

The enforcement of the Statute requiring Mr. Taylor to provide his photography services in violation of his strongly held beliefs against condoning or associating with religion is a clear violation of the free speech clause of the First Amendment of the Constitution. Therefore, this Court should reverse the lower court's holding and preliminarily and permanently enjoin the Commission from further imposing its Enforcement Action.

II. THIS COURT SHOULD REVERSE THE FIFTEENTH CIRCUIT'S HOLDING BECAUSE THE STATE'S PREFERENCE FOR RELIGON OVER NON-RELIGION VIOLATES BOTH THE ESTABLISHMENT CLAUSE AND FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT BY ADVOCATING FOR THOSE WHO CELEBRATE FAITH.

The First Amendment provides that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. This Amendment not only protects those who practice faith, but the nonbelievers as well. *Engel v. Vitale*, 370 U.S. 421, 443 (1962) ("The philosophy is that the atheist or agnostic-the nonbeliever-

is entitled to go his own way."). The Establishment Clause mandates that the government serve "a secular legislative purpose and provide a primary effect that neither advances no inhibits religion" while the Free Exercise Clause prevents civil authorities from intruding. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 222-23 (1963). The balance between the Establishment and Free Exercise Clauses is delicate because group exemptions for violations of the latter can be seen as embracing that particular group and a violation of the former. *Wallace v. Jaffree*, 472 U.S. 38, 81-82 (1985). In the case at bar, the Petitioner seeks protection of his atheistic views as the Madison Commission on Human Rights has imposed an Enforcement Action that included a cease and desist letter and a fine of $1,000 per week until he agrees to provide his photography services for religious events. This Court will find that protecting his Free Exercise rights is not difficult because permitting Mr. Taylor's abstention from religion as an atheist does not promote religion, but follows the guidelines under which this nation was founded.

Though the Petitioner is a self-described "militant atheist," he remains entitled to protection under Establishment Clause and Free Exercise Clause. The Supreme Court of the United States has previously found that governments, both federal and state, are prohibited from "influenc[ing] a person to go to or to remain away from church against his will." *Everson v. Bd. of Ed. of Ewing Twp*., 330 U.S. 1, 15-16 (1947). Rather, the First Amendment mandates neutrality from the state "in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Id.* at 18; *see Epperson v. State of Ark*., 393 U.S. 97, 104 (1968); *see also Kaufman v. Pugh*, 733 F.3d 692, 696 (7th Cir. 2013) (noting a violation because "government favors one religion over another (or religion over non-religion)

without a legitimate secular reason for doing so."). Simply, the First Amendment protects "the right to select any religious faith or none at all." *Kaufman*, 733 F.3d at 696.

The definition of religion within the First Amendment is merely "a 'way of life,' even if that way of life is inspired by philosophical beliefs or other secular concerns." *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972). The First Amendment protection goes beyond mainstream faiths and is not dependent on a belief in a higher being. *Kaufman v. McCaughtry,* 419 F. 3d 678, 681 (7th Cir. 2005). Instead, the protection extends to whether or not the "religious beliefs" are considered "acceptable, logical, consistent, or comprehensible to others." *Thomas v. Review Bd. of Indiana Employment Sec. Div*., 450 U.S. 707, 713-714 (1981).

A. Madison's Statute must be overturned because it violates the First Amendment Establishment Clause by permitting the government to favor religion over non-religion.

The Establishment Clause is rooted in "the belief that a union of government and religion tends to destroy the government to degrade religion." *Engel*, 370 U.S. at 430-31. When claiming that the Establishment Clause has been violated, the Petitioner must demonstrate that the statute at issue has (1) a non-secular purpose; (2) the primary effect of advancing or inhibiting religion; and (3) an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). To determine whether there is a secular legislative purpose, the court looks to the language of the statute. *Edwards v. Aguillard*, 482 U.S. 578, 597-98 (1987) (Powell, J. concurring) (internal cites omitted). Next, the Court relies on the totality of the circumstances to determine if a reasonable person would understand the government effort as a message of endorsing or disapproving religion. *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849-50 (7th Cir. 2012); *see Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J. concurring). Alternatively, this Court recognizes that the Constitution grants protection from government

coercion toward "anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith.'" *Lee v. Weisman*, 505 U.S. 577, 577-78 (1992), *quoting Lynch*, 465 U.S. at 678. Finally, the Court decides whether excessive entanglement is present by evaluating the "character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Lemon*, 403 U.S. at 615; *see Lynch*, 465 U.S. at 684 (describing entanglement as a "question of kind and degree").

To evaluate the first *Lemon* prong, look to *Edwards*, where the Louisiana Legislature invoked the Creationism Act and permitted education on evolution in public schools only if "creation science" is also provided. 482 U.S. at 581. Plaintiffs brought suit and, although the Louisiana officials defended the act under the secular purpose of academic freedom, the Court found that the results aimed at discrediting evolution. *Id.* at 582. The Court held that this statute violated the First Amendment Establishment Clause because the Creationism Act advanced a particular religious belief – one that opposes evolution. *Id.* at 593. The Court reasoned that the Creationism Act supported belief in a "supernatural creator" and the legislative history demonstrated intent to change the science curriculum with the inclusion of religious doctrine. *Id.* at 592.

Madison Code § 42-501 ("Statute") similarly states a two-sided purpose. While the Louisiana statute mandates the teachings of both evolution and creationism to undermined the former, the Statute here specifies that neither "any religious sect, society or denomination," nor worship style or structure of "ecclesiastical polity" shall be preferred. R. 13. But, in vowing not to discriminate against religion, the act has the purpose and effect of elevating religion, just as teaching creationism weakened the secular teachings of evolution in *Edwards*. Just as the Court

found that the Creationism Act violated the Establishment Clause, this Court should recognize the similar danger in the Statute in Madison that prioritizes religious practices over those who abstain or identify as atheist.

In *Doe ex rel. Doe*, plaintiffs brought suit because the public high school graduation took place in "a local Christian evangelical and non-denominational religious institution." *Doe ex rel. Doe*, 687 F.3d at 844. Although the graduation program lacked references to religion and the church removed any temporary religious banners, the church still had various crosses adorning it, a lobby "filled with evangelical literature" directed towards young people, and graduates seated in pews filled with Bibles and hymnal books. *Id.* at 845-47. The court found that the venue was "indisputably and emphatically Christian" and its "sheer religiosity" resulted in a likelihood that students would interpret a connection between the state and the church. *Id.* at 845, 853. Such connection is a message of endorsement. *Id.* In particular, the court emphasized that school officials chose the church over other options for an event that essentially required attendance. *Id.* at 854.

By mandating Mr. Taylor photograph religious events, the state is subjecting him to a variety of devout images and communicating a message of endorsement. While certain religious aspects of the *Doe ex rel. Doe* church were covered or removed and the program itself lacked religious references, the faith-based events he is hired for will be in full celebration. Therefore, rather than accommodating those who may be uncomfortable, like Mr. Taylor or the *Doe ex rel. Doe* plaintiffs, a non-believer entering a religious ceremony will be inundated with that faith. Undoubtedly, forcing an atheist to enter a religious event communicates an endorsement of religion.

Pure separation of government and religion is nearly impossible, as the Establishment Clause seeks too draw a line and prevent aid toward religion but the Free Exercise Clause inherently works to protect it. *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 679 (1970). In *Walz*, the plaintiff sought to enjoin the state tax commission from granting exemptions to religious groups because he believed it indirectly mandated him, as a taxpayer, to contribute to these religious bodies. *Id.* at 666-67. The Court affirmed the lower court's summary judgment decision for the defendant. *Id.* at 667. The Court reasoned that there is no perfect solution to constitutional neutrality regarding religion, but that "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* at 669. By exempting religious groups from taxes, the government is not giving revenue to churches, "but simply abstains from demanding that the church support the state." *Id.* at 675. The Court emphasized that it is the history of a church supporting a government that the First Amendment aims to avoid. *Id.* at 675. In avoiding excessive entanglement, this approach minimizes both church and state involvement and the "hazards of churches supporting government." *Id.* at 674-75.

In the case at bar, the application of the Madison Statute poses an excessive entanglement between church and state. Rather than remain uninvolved in the daily affairs of businessmen, such as Mr. Taylor, this statute goes beyond determining whether a tax should be paid and enables the state to monitor one's religious or non-religious choices and endorse faith over nonbelief. A mandate to photograph religious events serves as a state sponsorship of religion, the specific situation that the *Walz* Court aimed to avoid. Although the statute does not have the *Walz* effect of passing money between church and state, it results in policing society to ensure that certain individuals become subject to an inundation of religion.

B. By forcing Mr. Taylor to attend religious ceremonies for work, Madison violates the Free Exercise Clause eliminating his right to abstain from religious ceremonies and subjecting him to the indoctrination of faith.

The First Amendment Free Exercise Clause grants the right to believe or disbelieve any religious doctrine of one's choice and prohibits the governmental regulation of such beliefs. *Employment Div. Dept. of Human Res. v. Smith*, 494 U.S. 872, 876-77 (1990), *quoting Sherbert v. Verner*, 374 U.S. 398, 402 (1963). The Supreme Court of the United States applied the Clause to the states in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The exercise of religion is not limited to protecting the belief itself, but extends to performing or abstaining from physical acts and "unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978); *see Smith*, 494 U.S. at 877.

Although religious toleration does not excuse an individual from obeying laws "not aimed at the promotion or religious beliefs," the First Amendment provides certain accommodations. *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878). Thus, "neutral law[s] of general applicability are permissive." *Smith*, 494 U.S. at 878-79 (excluding laws that have an incidental effect of burdening a particular practice); *see Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2767 (2014); *see also Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (noting the factors are "interrelated"). A law fails the facial neutrality test "if it refers to a religious practice without a secular meaning discernable from the language or context." *Church*, 508 U.S. at 533 (noting that it also fails if the statute lacks neutrality in a masked or overt way). The First Amendment provides a minimal standard for the general application and "does not invalidate every incidental burdening." *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972). The Court understands that the "secular rules of general application are drawn from the non-adherent's vantage and, consequently, fail to take such practices into account." *Lee*, 505 U.S. at 628-29. Therefore, the accommodation of religion through the Free Exercise Clause

"reveals nothing beyond a recognition that general rules can unnecessarily offend the religious conscious when they offend the conscious of secular society not at all. *Id.*

If the law passes the test of neutral, general applicability and is "rationally related to the government objective," then it is permitted under the First Amendment. *Brown v. City of Pittsburgh*, 586 F.3d 263, 284 (3rd Cir. 2009) (internal cites omitted). But, if the law is neither neutral nor generally applicable, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church,* 508 U.S. at 531-32.

i. Neutral Law of General Applicability

The language of the statute at issue determines the neutrality. In *Epperson*, Arkansas law prohibited teachers in state-funded schools and universities to teach evolution. *Epperson*, 393 U.S. at 99. The Court found that it violated the First Amendment. *Id.* at 109. The Free Exercise Clause prohibits hostility towards both religion and non-religion, but the statute at issue existed to prevent sectarian teaching. *Id.* at 106, 108. For these reasons, the law lacked neutrality. *Id.* at 109. In the case at bar, Mr. Taylor is subject to a Statute that favors the exercise of religion over the exercise of non-religion and, though it specifically aims not to "show preference to" religious groups, the effect of the Statute clearly results in such. Despite the fact that there are other photographers offering the same services such as CM's Snaps, Mr. Taylor's atheistic views are infringed because he is forced to put his First Amendment abstention rights aside to attend religious services.

Contrarily, the state of Washington offered scholarships but prohibited applying the award toward a degree in devotional theology. *Locke v. Davey*, 540 U.S. 712, 715 (2004). The plaintiff received a scholarship and wanted to pursue devotional theology, so brought action under the Free Exercise Clause. *Id.* at 718. The Court rejected his claim and found the law facially neutral. *Id.* at 720. The Court noted that the ban neither resulted in criminal or civil

sanctions nor forced students to choose between religious beliefs and government funding because students studying devotional theology could apply the scholarship to simultaneously study a secular degree at a different school. *Id.* at 720-21, n. 4. In Mr. Taylor's case, the government will provide an inconsistent message if it forces him and other atheists to submit to religious groups in society while refusing to provide scholarships for devotional education. Although the Court previously stated that it could not fund the devotional study of a particular faith, fining Mr. Taylor for refusing to attend and photograph religious ceremonies is contradictory. By forcing Mr. Taylor to attend religious ceremonies in fulfillment of his job and livelihood, it teeters toward both establishing religion over non-religion and violating his rights to abstain from religion altogether. The Statute here though generally applicable is not neutral.

ii. Compelling Government Interest and Least Restrictive Means

Government agencies often alter regulations to ensure the least restrictive approach is applied to certain groups. Plaintiff, a religious group that "receives communion by drinking a sacramental tea…that contains a hallucinogen" regulated by the Controlled Substances Act, sought an injunction to end the government's ban on their use of *hoasca*. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006). The District Court granted the injunction, but the Government appealed claiming that it had a "compelling interest in the *uniform* application of the Controlled Substances Act." *Id.* at 423 (emphasis in original). Although the Government conceded this particular application of the Controlled Substances Act would constitute a substantial burden, it claimed it did not violate the Religious Freedom Restoration Act of 1993 ("RFRA") because it is the most narrowly tailored method of advancing the government interests of public health, preventing recreational drug use, and complying with a United Nations Convention on such substances. *Id.* at 426. But the Supreme Court held the

Controlled Substances Act failed the compelling interest test because the government did not demonstrate that such harms come from *hoasca*. *Id.* at 432. Additionally, the Controlled Substances Act provides exceptions for religious use – such as peyote by members of the Native American Church – and the Court found another exception here. *Id.* at 433. Because the courts must "strike sensible balances" regarding a compelling interest so that the government acknowledges the practice at issue, the government failed to demonstrate a compelling interest in banning the religious use of hoasca. *Id.* at 439.

In the case at bar, this Court must recognize that removing the choice from businesses of public accommodation regarding who they service because of its impact on atheistic beliefs equates to the hindrance of practices of the religious sect in *Gonzales* because it was a key component to the belief itself. If such exceptions can be made regarding the Controlled Substances Act, they can be made in regards to the Madison Statute. Furthermore, the Madison Statute contains a RFRA clause that places a standard of clear and convincing evidence on the government if it either infringes on a specific act or a refusal to act. The government fails to meet this burden when it mandates Mr. Taylor's attendance at religious services.

The Religious Land Use and Institutionalized Person Act ("RLUIPA") is the sister statute to RFRA and operates under the same test. *Holt v. Hobbs*, 135 S.Ct. 853. 860 (2015). In *Holt*, the plaintiff, a prisoner, sought to grow a half inch beard to follow his religious beliefs but was prohibited from doing so due to prison grooming policies regarding contraband issues and the ability to quickly change appearances. *Id.* at 859-61. Because the defendant does not dispute that beard growth stems from a sincere belief and the Court agreed that shaving substantial burdens his free exercise, the defendant must demonstrate the government's compelling interest in prohibiting the petitioner from growing his beard and that it is accomplished in the least

restrictive method. *Id.* at 862-64. The Court found that the defendant could follow the policies of other prisons and take pictures of prisoners both with and without beards. *Id.* at 865. Additionally, the prison permits quarter-inch beards for those with dermatological conditions and the government failed to distinguish the danger stem from the extra quarter-inch of facial hair. *Id.* at 865. For these reasons, the defendant failed to overcome the RLUIPA. *Id.* at 867.

The Madison Statute at issue for Mr. Taylor applies to places of public accommodation, just as RLIUPA applies to a particular category under governmental control. By mandating that the plaintiff in *Holt* shave his beard, the Court found that the government was violating Free Exercise Clause through RLIUPA and the effects of the Statute in the case at bar similarly cause Mr. Taylor to violate his personal beliefs by forcing him to attend, photograph, and portray religious events. It would be inappropriate to prioritize the rights of a religious person over the rights of an atheist because then the government endorses religion over non-religion. Ultimately, the Statute should carry the RFRA and RLUIPA standards and, if mandated that the government find a compelling interest, it must be tailored against the particular claimant, such as Mr. Taylor. Here, it would fail because as an atheist, a member of a protected class under the Free Exercise Clause, Mr. Taylor's rights are violated for the government interest of providing service for all and removing aspects of discrimination. But more importantly, these interests are not tailored to best protect Mr. Taylor's rights.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests this Court reverse the decision of the United States Court of Appeals for the 15th Circuit.

Mad. Code. Ann. § 42-501

(a) The legislature of Madison and any Commission or Agency it lawfully grants enforcement powers, shall not through law show preference to
    1. any religious sect, society or denomination;
    2. nor to any particular creed or method of performing or engaging in worship or system of ecclesiastical polity.

(b) The legislature of Madison and any Commission or Agency it lawfully grants enforcement powers, shall not, under the color of law, compel any person to attend any place of worship for the purposes of
    1. engaging in any form of religious worship or practice;
    2. or promoting the continued financial or reputational success of such institution.

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

(d) Under this section, the right of any person to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless:
    1. the government proves by clear and convincing evidence that the law targets a secular purpose;
    2. the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act;
    3. and has used the least restrictive means to further that interest.

(e) Nothing in this section shall be construed to permit unlawful discrimination in any form by:
    1. any government agency or actor;
    2. any place of public accommodation as defined by Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, *et seq*., or Title II of the Madison Human Rights Act of 1967, Mad. Code Ann. § 42-101-2a, *et seq*.