Brief on the Merits
No. 15-1245

IN THE SUPREME COURT OF THE UNITED STATES

JASON ADAM TAYLOR,

Petitioner,

v.

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

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

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

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

and

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

Respondents.

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

BRIEF FOR RESPONDENTS

Team P
Counsel for Respondents

QUESTIONS PRESENTED

1. Whether enforcement of a public accommodations law that prevents a commercial entity from discriminating against customers on the basis of religion when doing so contravenes the proprietor's strongly held beliefs violates the Free Speech Clause of the First Amendment of the United States Constitution.

2. Whether enforcement of a public accommodations law that prevents a commercial entity from discriminating on the basis of religion and that may require the proprietor and its employees to enter religious buildings violates the Free Exercise or 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. (R. at 1.) Petitioner timely filed a petition for writ of certiorari, which this Court granted. (R. at 47.) This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, Jason Adam Taylor, asserted claims under 42 U.S.C. § 1983 for deprivation of his constitutional rights under color of state law against Respondents Tammy Jefferson, the Madison Commission on Human Rights, and all of its Commissioners (R. at 1) in response to an Enforcement Action brought by Respondents against Petitioner pursuant to a finding of compelling evidence of religious discrimination by Petitioner's business, in violation of Title II of the Madison Human Rights Act of 1967, Mad. Code Ann. § 42-101-2a. (R. at 25.) Petitioner alleged that the Enforcement Action violated his constitutional rights under the Free speech, Free Exercise, and Establishment Clauses of the First Amendment. (R. at 2.) The district court granted Respondents' motion for summary judgment in its entirety, (R. at 12) and the Court of Appeals for the Fifteenth Circuit affirmed (R. at 43.) Petitioner timely filed a petition for writ of certiorari, which this Court granted.

STATEMENT OF FACTS

Taylor's Photographic Solutions is a closely held corporation in Madison City, Madison owned by Petitioner, Jason Taylor, and his wife, Kimberly Taylor. (R. at 14.) Petitioner is solely responsible for all management decisions, and since the company's inception, has maintained a policy of refusing to provide services for any event that is religious in nature. (R. at 14.) This

policy extends to events that are photographed by Petitioner personally, as well as to any events that may be photographed by Petitioner's employees in the scope of their duties. (R. at 14, 33.)

On July 14, 2014, Patrick Johnson of Madison City, Madison visited Taylor's Photographic Solutions to request photography services for his upcoming wedding. (R. at 35.) Upon learning that the wedding would take place in a Catholic church, Petitioner refused to provide photography services for Mr. Johnson and professed his dislike for religion. (R. at 35.) On July 22, 2014, Samuel Green of Madison, City, Madison visited Taylor's Photographic Solutions to solicit photography services for his upcoming wedding, which would take place in a synagogue. (R. at 37.) Petitioner also denied services to Mr. Green, indicating that he refused to photograph religious events and that he thought religion was "a bunch of bunk." (R. at 37.)

Pursuant to complaints filed by Mr. Johnson and Mr. Green, Respondent, the Madison Commission on Human Rights, undertook an investigation of Petitioner's business and requested a position statement regarding these reported incidents of discrimination. (R. at 25.) Petitioner refused to respond and formally waived his right to a position statement. (R. at 25.) Respondent subsequently found compelling evidence of discrimination by Petitioner's business, in violation of Title II of the Madison Human Rights Act of 1967, Mad. Code Ann. § 42-101-2a. (R. at 25.) On September 15, 2014, Respondent Tammy Jefferson, Chairman of the Commission, ordered immediate abatement of Petitioner's discriminatory practices and the payment of $1,000 per week effective July 14, 2014. (R. at 26.) Respondent also informed Petitioner that absent proof that he had ceased his discriminatory practices within 60 days, the Commission would bring a civil Enforcement Action against him in Madison Circuit Court. (R. at 26.)

Petitioner challenged the pending Enforcement Action and asserted claims under 42 U.S.C. § 1983 for deprivation of his constitutional rights under color of state law against

Respondents Jefferson, the Commission, and all of its Commissioners. (R. at 1.) Petitioner contends that the fines and threatened enforcement suit amount to compelled speech in violation of his First Amendment rights, and additionally violate the Free Exercise and Establishment Clauses of the First Amendment. (R. at 2.)

The district court granted Respondents' motion for summary judgment in its entirety. (R. at 12.) The court found that Petitioner's inability to establish that his photographs constitute expressive speech foreclosed his Free Speech claim, and recognized that the state has a compelling interest in preventing discrimination in places of public accommodation. (R. at 8-9.) Additionally, the court held that the facts could not sustain Petitioner's Free Exercise claim, as requiring Petitioner to enter a religious institution is not tantamount to forcing him to adopt a religion or its practices. (R. at 9.) The court also found no Establishment Clause violation, as the Enforcement Action does not contribute to the advancement of any religion. (R. at 12.) The Court of Appeals for the Fifteenth Circuit affirmed the grant of summary judgment to Respondents, finding that Petitioner "may not cloak invidious discrimination in a place of public accommodation in the powerful shield of the First Amendment." (R. at 43.)

SUMMARY OF THE ARGUMENT

The order of the Court of Appeals affirming summary judgment for Respondents should be affirmed because Petitioner's Free Speech, Establishment Clause, and Free Exercise Claims do not enjoy any plausible foundation in constitutional doctrine, and Respondents are entitled to judgment as a matter of law.

Petitioner first contends that his photographs are speech, but absent any likelihood that a reasonable observer would interpret his refusal of photography services to constitute expressive conduct, Petitioner is not entitled to First Amendment protection for his discriminatory behavior.

And because Title II of the Madison Human Rights Act is a content-neutral regulation and Respondents have satisfied intermediate scrutiny, Petitioner cannot overcome the State of Madison's important interest in eliminating discrimination in places of public accommodation. Petitioner's compelled speech claim is similarly futile because Title II does not require Petitioner to host the government's or any third party's message in a manner that infringes on Petitioner's message. This is especially apparent in commercial photography, where the customer controls the final product. Petitioner's freedom of association claim also fails. Not only does Petitioner not meet the threshold requirement of operating an expressive association, but the cases in which the Court has extended freedom of association protection stand inapposite to these facts.

Despite Petitioner's additional contention that Title II violates the Establishment Clause, Petitioner presents no evidence showing that the statute has the effect of advancing or endorsing religion, or entangling the government in religious affairs. And because a wedding photographer need not observe or participate in any spiritual tradition in order to fulfill his professional responsibilities, Petitioner cannot argue that the State has coerced him into religious practice.

Petitioner's Free Exercise claim also lacks merit because this Court's Free Exercise doctrine does not excuse Petitioner from compliance with a neutral law of general applicability such as Title II. Even if he could establish that Title II is not neutral or generally applicable, Respondents have satisfied strict scrutiny, and the State of Madison's compelling state interest in proscribing discrimination enjoys significant authority under this Court's precedent. Indeed, even under the most generous protections afforded by the First Amendment, Petitioner could not prevail in establishing that Respondents have burdened Petitioner's free exercise of religion.

ARGUMENT

I. PETITIONER HAS FAILED TO MAINTAIN A COGNIZABLE CLAIM UNDER THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT

This Court has never held that commercial enterprises that engage in discriminatory conduct are entitled to First Amendment exceptions to generally applicable public accommodation laws. Accordingly, the First Amendment does not protect Taylor's Photographic Solutions' discriminatory conduct in violation of the Madison Human Rights Act. Petitioner's claims to the contrary are erroneous as a matter of law. First, Petitioner's denial of service does not constitute protected "speech" under the First Amendment. Second, even if Petitioner's discriminatory conduct was found to be protected "speech" under the First Amendment, the Madison Human Rights Act is a content-neutral public accommodation law that meets intermediate scrutiny. Third, enforcement of the Madison Human Rights Act does not implicate this Court's compelled speech or freedom of expressive association doctrines.

A. A denial of service is not inherently expressive conduct protected by the First Amendment

The First Amendment protects against government encroachments on the freedom of speech. U.S. Const. amend I. ("Congress shall make no law . . . abridging the freedom of speech"). However, this Court has held that some forms of conduct are "sufficiently imbued with elements of communication" to constitute speech within the coverage of the First Amendment. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). This Court has cautioned that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel of expression is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Accordingly, the Court has rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person

engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Instead, this Court has "extended First Amendment protection only to conduct that is inherently expressive." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). To determine whether conduct is inherently expressive, the Court evaluates "whether 'an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.'" *Johnson,* 491 U.S. at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)).

In *Rumsfeld*, this Court considered whether the Solomon Amendment, which required law schools to provide access to military recruiters equal to that provided to other recruiters, violated the First Amendment. *Rumsfeld*, 547 U.S. at 51. The Court rejected the claim that a school's denial of equal access to military recruiters was inherently expressive conduct because there was no "overwhelmingly apparent" message and an observer who observed the denial of access would have no way of knowing the reason for the school's conduct. *Id*. at 66. Additionally, *Rumsfeld* established that accompanying conduct with explanatory speech does not transform ordinary conduct into inherently expressive conduct. *Id*. Recognizing that petitioner's position was untenable, the Court emphasized that an individual's refusal to pay income tax would not become inherently expressive conduct if he or she merely accompanied that conduct with statements that expressed disapproval of the Internal Revenue Service. *Id*.

There is nothing inherently expressive about Petitioner's denial of photography services on the basis of religion. Petitioner's discriminatory conduct alone does not send an "overwhelmingly apparent" message and a typical observer would have no way of knowing Petitioner's specific reason for refusing to photograph a customer's event. Petitioner's commercial sale of photography services, or refusal thereof, does not convey a particularized

message that would be understood by an observer. As noted above, accompanying regulated discriminatory conduct with an expressive message, such as posting a sign (R. at 23), does not transform Petitioner's conduct into inherently expressive conduct. *See Rumsfeld*, 547 U.S. at 66 ("If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it"). Since Petitioner's refusal of service is not inherently expressive conduct, it is not conduct protected as "speech" under the First Amendment.

B. Title II of the Madison Human Rights Act is a content-neutral public accommodation law that meets intermediate scrutiny

Assuming that Petitioner's conduct is found to be "speech" under the First Amendment, this Court has established that content-neutral regulations that implicate protected speech are subject to intermediate scrutiny. *See Turner Broad. Sys., Inc. v. FCC.*, 512 U.S. 622, 642 (1994) ("[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny"). "[A] restriction is content based only if it is imposed because of the content of the speech, and not because of offensive behavior identified with its delivery." *Hill v. Colorado*, 530 U.S. 703, 737 (2000) (internal citation omitted); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys").

This Court has recognized that public accommodations laws are "well within the State's usual power to enact . . . and they do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995); *see also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (Rejecting challenges to Title II of the Civil Rights Act of 1964 under the Commerce Clause,

Fifth Amendment and Thirteenth Amendment). This is because public accommodation laws do not on their face "target speech or discriminate on the basis of its content, the focal point of [their] prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds." *Hurley*, 515 U.S. at 572.

Title II of the Madison Human Rights Act is a public accommodation law that does not target speech and is content-neutral on its face. The law merely requires that a place of public accommodation that chooses to provide goods or services to the public not discriminate on prohibited grounds. *See* Mad. Code Ann. § 42-101-2a (prohibiting discrimination in places of public accommodation on the basis of "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 Act was not enacted to target the content of certain speech; rather, it was enacted to preserve access to public accommodations irrespective of the particular goods or services provided. Accordingly, the statute is a content-neutral regulation subject to intermediate scrutiny.

Under the intermediate scrutiny standard established in *O'Brien*, "a content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broad. Sys., Inc.*, 520 U.S. at 189 (citing *O'Brien,* 391 U.S. at 377.) "[A]n incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien,* so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Rumsfeld*, 547 U.S. at 67 (quoting *United States v. Albertini,* 472 U.S. 675, 689 (1985)). The issue is not

whether alternative means of addressing the governmental interest might be adequate; that is a judgment for Congress, not the Courts. *Rumsfeld*, 547 U.S. at 67; *see also Albertini*, 472 U.S. at 689 (regulations are not "invalid simply because there is some imaginable alternative that might be less burdensome on speech"); *Heart of Atlanta Motel, Inc.*, 379 U.S. at 261 ("It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress not with the courts").

Here, the Madison Human Rights Act advances the government interest of eliminating discrimination in the provision of access to public accommodations. This Court has held that "eliminating discrimination and assuring its citizens equal access to publicly available goods and services" is an objective "which is unrelated to the suppression of expression, [and] plainly serves compelling state interests of the highest order." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (finding that the Minnesota Human Rights Act reflects the State's strong historical commitment to eliminating discrimination, and that assuring its citizens equal access to publicly available goods and services serves a compelling state interest); *see also Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 543 (1987) (finding that California's Unruh Civil Rights Act serves a compelling state interest of the highest order in requiring the California Rotary Club to admit women). Additionally, the objective of ensuring equal access to places of public accommodation would be achieved less effectively without laws that prohibit discrimination on the basis of race, sex, religion and other protected characteristics. Accordingly, Title II of the Madison Human Rights Act meets intermediate scrutiny.

C. Title II of the Madison Human Rights Act is not unconstitutional under this Court's compelled speech or freedom of association doctrines

This Court has never held that enforcement of a public accommodation law against a commercial entity violates the First Amendment under the compelled speech or free association doctrines. As was the case in *Rumsfeld*, Petitioner attempts to extend what constitutes "compelled speech" and "free association" well beyond the sorts of activities that these doctrines protect. *Rumsfeld*, 547 U.S. at 70. Petitioner's effort to cast himself *"*as the parade organizers in *Hurley,* and the Boy Scouts in *Dale* plainly overstates the expressive nature of [his] activity and the impact of the [statute] on it, while exaggerating the reach of our First Amendment precedents." *Id*.

1. Enforcement of Title II does not implicate the compelled speech doctrine

This Court has identified two distinct lines of compelled speech precedent. First, this Court has found statutes unconstitutional when the government has required people to "speak the government's message." *Rumsfeld*, 547 U.S. at 63; *see e.g.*, *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (holding a statute that required school children to recite the Pledge of Allegiance and to salute the flag unconstitutional); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (holding a statute that required motorists to display the motto "Live Free or Die" on their license plates unconstitutional). Second, the Court has limited the government's ability to force one speaker to host the speech of another when "the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld*, 547 U.S. at 63; *see also Hurley*, 515 U.S. at 566 (finding that because every participating unit affects the message conveyed by a parade, a law dictating that a particular group be included alters the expressive content of the parade). Subjecting Petitioner's discriminatory conduct to enforcement of Title II of the Madison Human Rights Act implicates neither line of compelled speech cases.

Title II does not require Petitioner to speak a message chosen by the government. First, the law does not require the business to disseminate any particular message. Thus, compliance with the law does not force Petitioner to express the government's message. Second, the law does not require Petitioner to take any photographs; it only requires that whatever services Taylor's Photographic Solutions chooses to offer while operating as a place of public accommodation not be offered in a discriminatory manner. As this Court reaffirmed in *Rumsfeld*, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Rumsfeld*, 547 U.S. at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). Title II of the Madison Human Rights Act does not dictate the content of speech at all, and merely requires that Petitioner provide his expressive services in a nondiscriminatory manner. Petitioner has not been compelled to speak the government's message. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, 309 P.3d 53, 72 (concluding that the New Mexico Human Rights Act "has not required Elane Photography to promote the government's message" by requiring the photography business to comply with a public accommodations law that prohibited discrimination on the basis of sexual orientation).

Providing photography services on a nondiscriminatory basis does not require Petitioner to host another's message in a manner that interferes with Petitioner's own message. In *Hurley*, this Court concluded that a public accommodation law violated the First Amendment when its application required parade organizers to include a group that planned to display a message with which the private organizers disagreed. *Hurley*, 515 U.S. at 566. Crucial to the Court's decision was the Court's conclusion that a law that requires parade organizers to include a group

expressing a distinct message would inevitably alter the expressive content of the parade since "every participating unit affects the message conveyed by the parade's private organizers." *Hurley,* 515 U.S. at 572-73. The Court emphasized that a parade does not consist of discrete unrelated segments; rather, "each is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow 'any identity of viewpoint' between themselves and the selected participants." *Id*. at 576.

However, Petitioner's photography services are distinct from a public parade. First, Petitioner maintains a commercial business serving, at most, as a conduit for its customers' speech. Petitioner "admits that the customer ultimately controls the outcome of the photographs, can direct the way the photograph is taken, and ultimately decides which photographs to purchase." (R. at 8.) Unlike in *Hurley*, where the Court found that the group's participation would likely be "perceived as having resulted from the Council's customary determination about a unit admitted to the parade" that its message was worthy of presentation and support, *Hurley*, 515 U.S. at 575, in the commercial setting, members of the public appreciate the difference between speech a business sponsors and speech it is legally required to provide. In *Rumsfeld*, this Court noted, "[w]e have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy. Surely students have not lost that ability by the time they get to law school." *Rumsfeld*, 547 U.S. at 65 (internal citations omitted). The public is perfectly capable of making that same determination in the commercial context. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (holding that because the shopping center was a business open to the public, views expressed by individuals on its property "will not likely be identified with those of the owner").

Second, the Circuit Court correctly distinguished the parade in *Hurley* from Petitioner's photography services, since the manner in which Petitioner provides photography services to customers is discrete and would not be understood to contribute to a common theme. (R. at 42.) Third, Petitioner is free to and can easily disavow any presumed support for the events captured in his commercial photographs with disclaimers prominently placed in his store or on the back of his photos. *See Elane Photography, LLC*, 309 P.3d at 70 ("As in *Rumsfeld* and *PruneYard,* Elane Photography is free to disavow, implicitly or explicitly, any messages that it believes the photographs convey").

In a misguided attempt to distinguish *Rumsfeld*, Petitioner states that his business is "necessarily intertwined" with speech. (R. at 8.) However, this Court has rejected the claim that businesses that provide goods or services with expressive elements may engage in discriminatory practices by claiming their conduct is expressive. Specifically, this Court has upheld neutral regulations on business conduct that apply to media companies, *see Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), and commercial law firms, *see Hishon v. King & Spalding*, 467 U.S. 69 (1984). In *Hishon*, when a commercial law firm that stood accused of discriminating against female employees claimed that the First Amendment exempted it from Title VII of the Civil Rights Act of 1964, this Court rejected the argument and stated that when a law prohibits a commercial business from engaging in "invidious private discrimination," such discrimination "has never been accorded affirmative constitutional protections." *Hishon*, 467 U.S. at 78.

2. Enforcement of Title II does not implicate the freedom of expressive association doctrine

This Court has recognized a First Amendment "right of expressive association," which protects an individual's right to associate for the purpose of speaking. *See Rumsfeld*, 547 U.S. at 68. In *Boy Scouts of America v. Dale*, this Court held that the Boy Scout's freedom of expressive

association was violated when the organization was required to accept a homosexual scoutmaster since the Boy Scouts are an expressive association and the association's message would be significantly affected by the forced inclusion of a homosexual scoutmaster. *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000). The Court stated, "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648. Unlike the Boy Scouts, Petitioner fails to meet the doctrine's threshold requirement, since he operates a commercial business and not an expressive association. (R. at 9.) Additionally, to the extent Petitioner expresses a message by operating his business, that message is not significantly affected by being required to offer services in a nondiscriminatory fashion. In *Rumsfeld*, the Court found that the distinction between being required to accept an individual as a member in an expressive association and being required to interact temporarily with an outsider was critical to the Court's determination of whether associational rights have been violated. 547 U.S. at 69. Thus, the Court rejected the claim that the equal access requirement of the Solomon Amendment infringed on a law school's associational rights by requiring it to provide recruiting services on behalf of military recruiters. *Id*. Similarly, the association required by Title II between Petitioner and his customers is not one of membership, but of temporary commercial interaction. Therefore, requiring Petitioner to provide photography services on a nondiscriminatory basis does not implicate this Court's freedom of expressive association doctrine.

II. PETITIONER HAS FAILED TO MAINTAIN A COGNIZABLE CLAIM UNDER THE ESTABLISHMENT OR FREE EXERCISE CLAUSES OF THE FIRST AMENDMENT.

"The Religion Clauses of the First Amendment provide: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'" *Locke v. Davey*, 540 U.S. 712, 718 (2004); U.S. Const. amend I. "[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984)). Together, the Clauses protect two discrete types of governmental interference with religious freedom. The Establishment Clause proscribes the enactment of laws that establish an official religion, as well as the investment of the "power, prestige, and financial support of government" in a particular religious belief. *Engel v. Vitale*, 370 U.S. 421, 431 (1962). The Free Exercise Clause bars the compelled affirmation of religious beliefs and affords protection from laws that regulate or prohibit religious conduct. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 402 (1963); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

Because Title II and the challenged Enforcement Action do not contribute to the promotion or establishment of any religion, and because the law Petitioner seeks to enjoin neither compels religious practice nor targets the suppression of religious conduct, Petitioner's claims cannot be sustained under either of the Religion Clauses of the First Amendment.

A. Respondents' enforcement activities do not offend the Establishment Clause because the anti-discrimination orders imposed on Petitioner do not advance or contribute to the establishment of any religion

"The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002)

(internal citation omitted). The Constitution confers immunity against government '"sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 668 (1970)). These safeguards are grounded in the understanding that governmental preference for one faith contravenes the religious tolerance that freedom and social stability demand. *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005).

In *Lemon v. Kurtzman*, this Court struck down two statutes that provided state aid to church-affiliated educational entities. The Court then announced its foremost test for ensuring agreement with the Establishment Clause, which requires: 1) that the challenged statute or government action "have a secular legislative purpose"; 2) that its "principal or primary effect … be one that neither advances nor inhibits religion"; and 3) that the statute or action "not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-13 (quoting *Walz*, 397 U.S. at 674). The Court has frequently accorded deference to governmental statements of purpose, excepting those "unusual cases where the claim was an apparent sham, or the secular purpose secondary[.]" *McCreary*, 545 U.S. at 865. However the test has not been applied uniformly; nor has this Court divined a "single mechanical formula that can accurately draw the constitutional line in every case." *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring); *see also McCreary*, 545 U.S. at 859-60 (recognizing that the "secular purpose" function of the *Lemon* test is a "common, albeit seldom dispositive, element of our cases").

Many courts adhere to the *Lemon* test verbatim, while others employ a derivative inquiry. For instance, under the "primary effects" test, the critical issue is that the '"government practice not have the effect of communicating a message of government endorsement or disapproval of religion.'" *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849 (7th Cir. 2012) (quoting

Lynch, 465 U.S. at 692 (O'Connor, J., concurring)). Under a related test, an Establishment Clause violation can also be found "if a reasonable observer would think that the activity is a governmental endorsement of religion." *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 590 (6th Cir. 2015), *appeal docketed*, No. 15-553 (U.S. Oct. 29, 2015). A third test asks "whether the state has applied coercive pressure on an individual to support or participate in religion." *Elmbrook*, 687 F.3d at 850. More recently, the Court has also indicated that the challenged activity must be interpreted in the context of "the tradition long followed in Congress and the state legislatures." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014).

Elmbrook reveals the outer limits of Establishment Clause protection. There, the Seventh Circuit held that hosting a public school graduation in a church that featured "information booths laden with religious literature and banners with appeals for children to join 'school ministries'" violated the First Amendment. *Elmbrook*, 687 F.3d at 850. The court found the display and distribution of religious material constitutionally objectionable because it did "more than provide public school children with *knowledge* of Christian tenets, an obviously permissible aim of a broader curriculum[,]" and instead presented a risk of pressuring children into the adoption of religious beliefs. *Id.* at 851-52 (emphasis in original). But other decisions reveal that such a holding does not extend beyond its facts. *See, e.g.*, *Jefferson Cty.*, 788 F.3d at 592-93 (distinguishing the public use of a chapel from *Elmbrook* by the absence of a proselytizing atmosphere); *see also Otero v. State Election Bd. of Oklahoma*, 975 F.2d 738, 741 (10th Cir. 1992) (finding no Establishment Clause violation in the use of a church for a state and municipal election); *Parker v. Hurley*, 514 F.3d 87, 100 (1st Cir. 2008) (citing cases for the proposition that the impressionability of young school children is relevant in the Establishment Clause context).

Petitioner does not maintain a plausible Free Establishment claim because Title II of the Madison Human Rights Act satisfies the *Lemon* test and all of its variations. Title II proscribes a place of public accommodation from denying service on the basis of unlawful discrimination. *See* Mad. Code Ann. § 4-101-2a; (R. at 2). Consistent with *Lemon*, Title II: 1) reveals a discernable secular purpose of preventing discrimination against protected classes of individuals; 2) engenders effects that are divorced from any effort to advance or inhibit a particular religion; and 3) does not facilitate government "entanglement" with religion. The first element is satisfied on its face. The second is fulfilled because the statute applies uniformly to all instances of religious discrimination and plainly lacks the intent to elevate the stature of any religious group. Finally, the third prong is met because the state has not entangled itself in religious affairs; this does not resemble the paradigm case of a state allocating public funds for sectarian ends.

For similar reasons, Petitioner's claim fails the remaining Establishment Clause tests. Enjoining religious discrimination is not equivalent to a state endorsement of religion. In none of its correspondence with Petitioner has Respondent ever assumed a position or conveyed a message that would come close to suggesting an overt or implicit ratification of religion in any iteration. (R. at 25-26.) Nor has Respondent placed any coercive pressure on Petitioner to support or participate in religion. This case is patently distinguishable from the concerns that animated *Elmbrook*, where the vulnerability of school children was central to the court's holding.

A wedding photographer need not observe or honor any prayer, receive any holy bread or wine, or otherwise take part in any spiritual tradition in order to fulfill his professional responsibilities. If Petitioner is concerned that he might be asked to do so as a matter of good will, he is free to articulate those reservations to clients once a business arrangement has been made. Respondent does not seek to regulate the specific nature of Petitioner's interactions in a

house of worship; the Commission merely requires that he not deny his services outright based on the religious affiliation of the customer or of the venue in which his services are sought.

Additionally, the Enforcement Action upholds practices long honored by Congress and the State of Madison. The federal Civil Rights Act and Madison Human Rights Act have been in place for approximately fifty years, embodying a long-standing tradition whose enforcement, absent any non-secular purpose by the state, does not offend principles of Free Establishment. Although such anti-discrimination laws were not present at the Founding, this Court should not adopt such a regressive reading of the First Amendment.

B. Petitioner's free exercise claim fails because the enforcement action derives from a neutral law of general applicability and Respondents have a compelling interest in eliminating discrimination in places of public accommodation

1. Petitioner cannot be excused from compliance with the Commission's neutral law of general applicability

"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990). "[T]he 'exercise of religion' often involves not only belief and profession but the performance of . . . physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine . . . ." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (quoting *Smith*, 494 U.S. at 877). While Free Exercise embraces both freedom to believe and freedom to act, only the former enjoys absolute protection. *Stormans, Inc. v. Selecky (Stormans I)*, 586 F.3d 1109, 1128 (9th Cir. 2009) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940)).

For many years, this Court applied a balancing test to claims alleging Free Exercise violations, which required governmental actions that substantially burden religious exercise to be justified by a compelling governmental interest. *See, e.g.*, *Smith*, 494 U.S. at 883. In *Smith*, the

Court narrowed this protection, affirming that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id*. at 879 (internal citation omitted). The Court rejected the idea that the government's ability to enforce general prohibitions against socially harmful conduct need be constrained by individual beliefs. *Id.* at 885-86. Strict scrutiny thereafter became reserved for instances in which a law is specifically targeted at suppressing religious conduct. *Lukumi*, 508 U.S. at 533.[1]

"Absent evidence of an 'intent to regulate religious worship,' a law is a neutral law of general applicability." *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008) (internal citation omitted). "Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. As an initial matter, courts must look to the text of a law; facial neutrality is lacking if the law "refers to a religious practice without a secular meaning discernable from the language or

[1] In response to *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993, which provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014) (quoting 42 U.S.C. § 2000bb-1(a)). Under RFRA, if a law burdens the exercise of religion, the affected person can enjoy an exemption unless the government satisfies strict scrutiny. *Id*. at 2671. But this Court subsequently abrogated RFRA as applied to the States, holding that the statute exceeded Congress's remedial powers under the Fourteenth Amendment. *See, e.g., Cutter*, 544 U.S. at 715 (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997)). Congress then passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc. RLUIPA restored strict scrutiny to a more limited category of governmental actions involving land use regulations and the religious exercise of institutionalized persons. *Hobby Lobby*, 134 S. Ct. at 2761; *Cutter*, 544 U.S. at 715.

This history generates a "patchwork" of protections, where RFRA continues to govern claims against the federal government, statutory remedies are available to institutionalized persons and to churches challenging land use laws, and claims against state governments must look to state law. *See* Richard B. Collins, *Too Strict?*, 13 First Amend. L. Rev. 1, 12 (2014). At the constitutional level, and thus in petitioner's case, *Smith* remains good law.

context." *Id.* at 533. But facial neutrality is not dispositive, and '"[o]fficial action that *targets religious conduct for distinctive treatment'* must also satisfy strict scrutiny." *Cent. Rabbinical Cong. of U.S. & Canada v. New York City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 194 (2d Cir. 2014) (quoting *Lukumi*, 508 U.S. at 534) (emphasis in original); *see also Bronx Household of Faith v. Bd. of Educ.*, 750 F.3d 184, 191 (2d Cir. 2014) *cert. denied*, 135 S. Ct. 1730 (2015) (citing *Lukumi* for the proposition that legislation that claims secular goals but is belied by exceptions that undermines those goals cannot properly be deemed neutral).

In *Lukumi*, the city of Hialeah criminalized certain types of animal slaughter, which this Court found to unconstitutionally target ritualistic animal sacrifices of the Santeria religion, despite ostensible public health and animal safety aims. *Locke*, 540 U.S. at 720 (citing *Lukumi*, 508 U.S. at 535). The Court found it instructive that the city enacted the ordinance in response to the announced opening of a Santeria church; it had not addressed the alleged problem of animal sacrifice prior to this inciting event. *Lukumi*, 508 U.S. at 541. But the Court has declined to extend *Lukumi* beyond its facts. *See Locke*, 540 U.S. at 724 (finding no Free Exercise violation in a statute denying state aid to a student pursuing a devotional theology degree, and distinguishing from *Lukumi* based on the absence of hostility toward religion reflected in the state's action); *see also Bronx Household*, 750 F.3d at 192 (finding that the total absence of evidence that the challenged action derived from state disapproval of religion or religious practice made a "crucial difference" in determining the reach of *Lukumi's* reasoning).

As for the general applicability requirement, the Free Exercise Clause prohibits the "inequality [that] results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukumi*, 508 U.S. at 542-43. "A law is not generally applicable if its prohibitions substantially

underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect." *Stormans, Inc. v. Wiesman (Stormans II)*, 794 F.3d 1064, 1079 (9th Cir. 2015), *appeal docketed*, No. 15-862 (U.S. Jan. 6, 2016); *see also Lukumi*, 508 U.S. at 543 (finding the ordinances underinclusive toward their stated ends, as they were "drafted with care to forbid few killings but those occasioned by religious sacrifice").

Title II is facially neutral because it references religion solely in the secular context of enjoining discrimination. The law is also neutral in its application and does not resemble the type of superficially secular legislation that triggers Free Exercise concerns. Petitioner cites no evidence that would indicate that the law is designed to mask some underlying pro-religious purpose, or that the State of Madison sought to target atheists in its enactment. The law is also generally applicable because it is not substantially underinclusive. Title II targets all places of public accommodation that discriminate on the basis of "race, color, religion, national origin, sex, disability, sexual orientation, gender identity or expression, socioeconomic status, political affiliation, or other protected classes," not merely businesses that maintain an atheist worldview, such as that of Petitioner's. *See* Mad. Code Ann. § 42-101-2a; (R. at 2.). In other words, the state has not enforced a secular governmental interest that burdens places of public accommodation with either an atheist, or religious, orientation more than others.

Since Title II is not directed at a religious practice and applies generally to all places of public accommodation, the Enforcement Action need only satisfy rational basis review.[2] And

[2] In *Smith*, the Court acknowledged that the only decisions in which the First Amendment had been held to bar application of a neutral, generally applicable law involved a Free Exercise claim in conjunction with another alleged constitutional violation. *Smith*, 494 U.S. at 881. Some courts have construed the Court's dicta in *Smith* as giving rise to a "hybrid rights" doctrine that demands strict scrutiny be applied to alleged Free Exercise violations coupled with some other constitutional claim. *See, e.g.*, *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 33 n.5 (10th Cir. 2013) (recognizing the theory with reservations). Others have declined to honor the doctrine. *See, e.g.*, *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 440, n.45 (9th Cir. 2008) (citing cases

because the Action, derived from Title II, is rationally related to a legitimate governmental purpose of preventing discrimination, Petitioner presents no viable constitutional claim.

2. Even if this Court were to find that the Enforcement Action is not neutral or generally applicable, Respondents have satisfied strict scrutiny

"The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981); *see also Lukumi*, 508 U.S. at 546 (noting that strict scrutiny requires that a law restricting religion "advance 'interests of the highest order' and… be narrowly tailored in pursuit of those interests" (internal citation omitted)). As discussed in the context of Petitioner's Free Speech claim, for this years this Court has acknowledged that state efforts to prevent discrimination constitute compelling interests. *See, e.g.*, *Jaycees*, 468 U.S. at 623; *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (finding a compelling governmental interest in eliminating racial discrimination in higher education that substantially outweighs whatever burden the policy places on religious exercise).

There is no question that the State of Madison maintains a compelling interest in terminating religious discrimination in places of public accommodation. The law is narrowly tailored, as it is does not require the businesses that it regulates to perform a religious ritual or affirmatively honor any religion. And there is no less restrictive way of enforcing the state's interest, absent narrowing the definition of "place of public accommodation," which would completely undermine the statute's purpose of enabling all citizens to enjoy the equal enjoyment of services offered by public establishments such as Petitioner's. The law is also enforced on a

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that describe the theory as illogical, untenable, and based on a misreading of *Smith*). Because courts generally reject hybrid claims of this nature and due to the deficiencies in Petitioner's other constitutional claims, Petitioner fails to procure strict scrutiny on this basis.

case-by-case basis pursuant to a comprehensive investigation that provides ample opportunity for response before civil sanctions are imposed.

Finally, even under the more generous protections that this Court afforded plaintiffs pre-*Smith* and that survive at the federal level under RFRA, courts have repeatedly held that government actions that merely offend one's religious beliefs do not activate First Amendment concerns and warrant strict scrutiny. *See, e.g.*, *Navajo Nation v. U.S. Forest Serv*., 535 F.3d 1058, 1063 (9th Cir. 2008) ("[a] government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion" does not constitute a "substantial burden"); *Parker*, 514 F.3d at 107 (rejecting claim brought by parents against a school district for exposing children to anti-discriminatory school curricula that portrayed families with same sex parents); *Mozart v. Hawkins Cnty Bd. of Educ*., 827 F.2d 1058, 1065 (6th Cir. 1987) (finding no substantial burden on Free Exercise in requiring students to read materials that offended their religious views, absent a compelled affirmance or performance).

Not only has Respondent not compelled an affirmance or performance of religion, but Petitioner has admitted to engaging in the precise behavior that he now finds so objectionable by attending events at churches and synagogues for his own family. (R. at 11, 17.) If such appearances did not infringe on the exercise of his belief that religion is a detriment to humanity, it is difficult to fathom how compliance with Title II would pose a higher threat.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the decision of the United States Court of Appeals for the Fifteenth Circuit granting the motion for summary judgment in its entirety.

BRIEF CERTIFICATE

The work product contained in all copies of team P's brief is in fact the work product of the team members, conforms with our school's governing honor code, and complies with all Rules of the Competition.