Docket No. 15-1245

In The

Supreme Court of the United States

January Term, 2016

JASON ADAM TAYLOR,
Petitioner

v.

TAMMY JEFFERSON,
in her official capacity as Chairman, Madison Commission on Human Rights*, et al.*
Respondents

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

BRIEF FOR RESPONDENTS

Team V
Counsel for Respondents

Oral Argument Requested

QUESTIONS PRESENTED

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

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

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STATEMENT OF JURISDICITON

The United States Court of Appeals for the Fifteenth Circuit entered final judgment on this matter on July 13, 2015. Record 39–45. Petitioner filed a timely petition for writ of certiorari, which this Court granted. Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction over the present matter.

STATEMENT OF THE CASE

The Petitioner, Jason Adam Taylor ("Taylor"), brought this action against the Madison Commission on Human Rights (the "Madison Commission") under 42 U.S.C. § 1983, claiming the Madison Commission deprived him of his constitutional rights under color of state law. Taylor also sought to preliminarily and permanently enjoin the Madison Commission from further imposing its fines and penalties on him.

District Court Decision

The District Court entered a final order granting the Madison Commission's Motion for Summary Judgment in their favor. Record 12. In granting the Madison Commission's Motion for Summary Judgment, the court found the Madison Commission is merely enforcing anti-discriminatory actions against Taylor's commercial business of public accommodation. Record 12. Furthermore, the Madison Commission acted properly within the Free Speech Clause of the First Amendment, Free Exercise Clause, and the Establishment Clause when it enforced a public accommodation law requiring Taylor to provide services for religious events. Record 12.

Appellate Court Decision

Accordingly, Taylor filed a timely appeal, pursuant to 28 U.S.C. § 2107 to the United States Court of Appeals for the Fifteenth Circuit asking the court to overturn the final judgment in granting Madison Commission's Motion for Summary Judgment. Record 39–40. There, the

Court of Appeals for the Fifteenth Circuit affirmed all decisions made by the District Court specifically stating that "[Taylor's] actions are nonetheless discriminatory and one may not cloak invidious discrimination in a place of public accommodation in the powerful shield of the First Amendment." Record 43. Consequently, Taylor applied for Certiorari to the United States Court Supreme Court, which was granted. Record 46.

STATEMENT OF THE FACTS

Taylor and his wife are the owners of Taylor's Photographic Solutions ("Photographic Solutions"), which is located in Madison City, Madison. Record 14 ¶1. Photographic Solutions offers commercial photography services to the public for a variety of events, which includes weddings. Record 14 ¶7. Photographic Solutions has seventeen full-time employees and two part-time employees. Record 14 ¶5.

Photographic Solutions will not photograph any event that is religious in nature. Record 14 ¶8. Under Taylor's policy, if it is an official religious event such as a religious wedding, a baptism or confirmation, or a bar mitzvah celebration, Photographic Solutions will not provide its services. Record 14 ¶8. Taylor claims the policy does not deny service to any individual based on religion—only to events that are religious in nature. Record 15 ¶10–11. Photographic Solutions has followed this policy since its opening in 2003. Record 14 ¶9. Taylor claims to have no personal animosity towards any particular religion or persons who follow religion, but his childhood caused him to believe religion is a detriment to society. Record 16 ¶18.

Taylor has accommodated his employees' religious requirements in the past. Record 18 ¶34. For example, Taylor allowed an employee, Ahmed Allam, to fast for Ramadan, switch hours when needed, and even photographed an event for Allam because it would conflict with his religious beliefs. Record 28 ¶12–16. Furthermore, Esther Reuben, a former employee of

Taylor, declared Taylor accommodated her religious requirements by not scheduling her certain days and respecting that on the Sabbath and holidays she does not light fires, turn on light switches, drive cars, or use the telephone. Record 31 ¶6–9.

Taylor believes his commercial photography is an "artistic form of expression." Record 20 ¶58. Taylor states when a customer purchases photographs from his business, they do not just purchase a photo, they purchase the talent and creativity of the staff. Record 20 ¶59. Taylor claims customers come to his business specifically for his expertise in photography. Record 20 ¶59.

Even though Taylor has stated he will not photograph a religious event, he has photographed religious weddings in the recent past. Record 15 ¶17(a). In April 2015, Taylor photographed a wedding for two men. Record 15 ¶17(a). The wedding was conducted by an ordained minister and took place in the Church of God. Record 15 ¶17(a). The two men were Jewish and Episcopalian. Record 15 ¶17(a). Taylor stated he took pictures at the wedding because it was not "inherently religious." Record 16 ¶17(a). Also, in March 2015, Taylor photographed a wedding for a couple where the bride's father offered a non-denominational prayer. Record 16 ¶17(b). Furthermore, Taylor photographed the wedding reception, which occurred in the Catholic Church of the Blessed Virgin Social Hall. Record 16 ¶17(b).

In addition to photographing religious events, Taylor attends religious events if they involve family members. Record 17 ¶27. In March 2015, Taylor went to his nephew's bris. Record 17 ¶27. Also, in October 2014, Taylor attended his cousin's wedding, which was a catholic service held in a Catholic church. Record 17 ¶28. Taylor's cousin asked him to photograph his wedding, but he would not make an exception. Record 17 ¶29. All these events

occurred after Taylor placed the sign in the front window of his business stating he would not photograph religious events. Record 17 ¶30.

Taylor refused service to two customers in July 14, 2014. Record 18 ¶37. The first was Patrick Johnson ("Johnson") who was seeking Taylor's services to photograph his wedding. Record 19 ¶39. Taylor asked where the wedding would be held and Johnson responded it would be in a Catholic church and performed by a priest. Record 19 ¶42. Taylor told Johnson he "could not perform the wedding because it would be a religious wedding and would be in a church." Record 19 ¶43. Johnson responded by saying Taylor was discriminating against him, but Taylor explained this was standard practice and he did not want to frame religion as positive. Record 19 ¶44–46. A similar event occurred approximately one week later. Record 19 ¶48. Samuel Green ("Green") asked Taylor to photograph his wedding that was occurring at a synagogue and being performed by a Rabbi. Record 19–20 ¶49–51. Taylor responded that he could not photograph the wedding because it would be religious. Record 20 ¶52.

Taylor received a letter from the Madison Commission on August 11, 2014, stating he and his business had two complaints filed against him for alleged discrimination based on religion in violation of the public accommodation laws of the Madison Human Rights Act of 1967 (the "Madison RFRA"). Record 20 ¶60. Taylor called the phone number on the letter and ultimately waived his rights to a statement or hearing because he "had done nothing wrong." Record 21 ¶61–63. On September 15, 2014, Taylor received a letter from the Madison Commission stating upon an investigation it found that Taylor had discriminated based on religion. Record 21 ¶65. The letter stated Taylor must immediately cease his discriminatory practices and would pay a fine of $1,000 per week since July 14, 2014 until he proved the discrimination had stopped. Record 26.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the United States Court of Appeals for the Fifteenth Circuit and find that Taylor's First Amendment rights were not violated by forcing him to photograph religious events. Taylor is subject to strict scrutiny. However, Taylor's acts are unconstitutional no matter which level of review the Court applies.

First, the Madison Commission acted properly under the Free Speech Clause of the First Amendment when it sought to enjoin Taylor from his continued refusal to photograph any religious event in violation of the public accommodation law. Taylor's commercial sale of photography is not speech because it is neither a spoken or written word nor expressive conduct. Also, Taylor's photographs are not speech in its purest form and it is not expressive because he does not have intent to convey a particular message that would be understood by those who view the photographs. Even if this Court finds Taylor's photographs to be expressive conduct, the conduct is on behalf of his customers, not himself.

Second, the Madison Commission acted properly when it enacted the public accommodation law because they have a compelling interest in serving all customers equally. Furthermore, Taylor's conduct falls within the realms of the *O'Brien* test.

Finally, the Madison Commission acted properly under the Establishment and Free Exercise Clauses when it sought to force Taylor from discriminating against certain customers based on religion. Forcing Taylor to photograph religious events does not violate the Establishment Clause because the Madison RFRA does not violate the *Lemon* test. The Madison Commission has a compelling interest in infringing upon Taylor's refusal to act and used the least restrictive means necessary to further than interest.

ARGUMENT

I. The Madison Commission acted properly under the Free Speech Clause of the First Amendment when it sought to enjoin Taylor from his continued refusal to photograph any religious events in violation of the public accommodation law.

A. Taylor's commercial sale of photography is not speech for purposes of the Free Speech Clause of the First Amendment because his photographs are not spoken, written, or expressive conduct.

The First Amendment to the United States Constitution provides, "Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. CONST. amend I. This Court has expressly noted, "The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). This Court has also expressed that, "First Amendment jurisprudence counsels [] that speech is not merely spoken words but also includes conduct if such conduct is 'sufficiently imbued with elements of communications to fall within the scope of the First and Fourteenth Amendments.'" *Id*. (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). Prior to *Johnson*, this Court found it unacceptable to label a person's conduct as "speech" merely because a person intends to express an idea through their conduct. *Spence*, 418 U.S. at 410.

i. Taylor does not speak through the commercial sale of photography because photographs are not speech in its purest form.

Taylor's photographs are not speech in its purest form, which is the spoken or written word. The government is restrained when it comes to restricting the spoken or written word as opposed to expressive conduct. *Johnson*, 491 U.S. at 406. The court in *Cressman* stated, "[p]ure speech is entitled to full First Amendment protection without any need to resort to Spence's "sufficiently imbued" test." *Cressman v. Thompson*, 798 F.3d 938, 961 (10th Cir. 2015). The *Cressman* court went on to find when speech is in its purest form, the spoken or written word, a

particularized message need not be deciphered because the message will be so apparent. *Id*. Furthermore, images are not categorically speech in its purest form, the spoken or written word. *Id*. at 953.

Here, Taylor's conduct, the commercial sale of photography, is not speech. Record 8. Taylor does not speak, for First Amendment purposes, when he or his business photographs events. Record 8. Taylor's photography events do not symbolize Taylor's personal words or ideas. Images portray a message. Neither photographs nor the commercial sale of photographs verbally speak or contain writing, which would allow them to afford protections consistent with speech in its purest form. Thus, since Taylor's conduct is not the written or spoken word, an analysis on whether Taylor's photography business is expressive for purposes of the Free Speech Clause of the First Amendment is necessary.

ii. Taylor's conduct does not qualify as "expressive" because he does not have an intent to convey a particularized message that is likely to be understood by those who view his photographs.

This Court has held, "[t]he party asserting that [the] conduct is expressive bears the burden of demonstrating that the First Amendment applies and the party must advance more than a mere 'plausible contention' that its conduct is expressive." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). This Court, in *Johnson*, created the following test to determine if certain expressive conduct possesses sufficient communicative elements to bring forth First Amendment protections for purposes of the Free Speech Clause. *Johnson*, 491 U.S. at 404. The test in *Johnson* determined it vital for a court to ask: "[1] whether an intent to convey a particularized message was present, and [2] whether the likelihood was great that the message would be understood by those who viewed it." *Id.*

Under this test, the message being conveyed need not be "narrow" or "succinctly articulable." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). For example, this Court has previously found, "[a]biding by the law and serving customers equally does not convey a message to customers that it supports same-sex marriage." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 64–65 (2006).

On the other hand, this Court found an intent to convey a particularized message when a protestor affixed a peace sign to the American Flag. In *Spence*, a protestor was convicted for affixing a peace sign to an American Flag and displaying it outside of his apartment window. *Spence*, 418 U.S. at 405. The protestor altered the flag because of his disagreement with the then-recent government action. *Id*. This Court reversed his conviction finding that the protestor's "message was direct, likely to be understood, and within the contours of the First Amendment." *Id*. at 415. Moreover, this Court held, "there was no risk that [the protestor's] acts would mislead viewers into assuming that the Government endorsed his viewpoint." *Id*. at 414. This Court looked at the context in which the American Flag is commonly used and the symbolism it represents. *Id*. at 410; *see also Johnson*, 491 U.S. at 420 (holding the burning of the American Flag conveyed such powerful, intentional and overwhelmingly symbolic speech enabling it to be expressive conduct).

Furthermore, a particularized message is not conveyed through the commercialized sale of wedding cakes. In *Mullins*, a baker refused to provide a wedding cake for a same-sex couple. *Mullins v. Masterpiece Cakeshop, Inc.,* 2015 COA 115, at 4. The baker believed if he were to decorate and sell a cake to the same-sex couple it would force him to convey a message, which he does not condone. *Id*. The baker believed baking and decorating cakes was a form of art and expression. *Id*. at 4. The court found the Free Speech Clause of the First Amendment does not

protect the baker's conduct because it is not expressive. *Id*. at 62. The court held that, "it is unlikely that the public would view [the baker's] creation of a cake for a same-sex wedding celebration as an endorsement of that conduct." *Id.* at 64.

Here, Taylor's actions are not direct, likely to be understood, or within the contour of the First Amendment as seen in *Spence* and *Johnson*, enabling him to take shelter under the Free Speech Clause of the First Amendment. Taylor argues that photographing religious events would force him to convey a message he does not support. Record 7. However, Taylor and his business merely sell photographs to members of the public who will pay for them. Record 41. Taylor operates a photography business open to the public, he produces photographs for his customers, and the transaction ends when the customers pay for the photographs. Record 42. There is no place in this transaction that compels Taylor or his business to "expressively associate" with any particular religion. Unlike the protestor in *Spence*, there is no risk that the photographs would cause observers to believe that Taylor, or his business, endorse the various religious ceremonies that are conveyed in the photographs.

Also, like the baker in *Mullins*, Taylor argues his photography is speech by a way of expression. Record 8. Taylor claims he is required to put his own expertise and style into the photographs, making them expressive. Record 8. However, like *Mullins*, it is unlikely that an observer viewing Taylor's photographs would believe he is conveying a particularized message on his behalf that he endorses a religion in any form. Taylor's photography business is a closely held corporation and is commercial in nature, not expressive. Record 14 ¶1. Therefore, Taylor has not pled beyond a mere "plausible contention" that taking photographs for sale is expressive conduct, which this Court has previously ruled is not enough to gain the protections of the First Amendment's Free Speech Clause. *Clark*, 468 U.S. at 293.

Assuming, *arguendo*, that Taylor is conveying a message, that message is unlikely to be understood by others. In utilizing the second prong of the *Johnson* test, a court must ask, "whether the likelihood was great that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404. When a business charges for their goods and/or services, the likelihood is substantially reduced that a reasonable observer would believe that the business supports the message expressed in their finished product. *Mullins,* 2015 COA at 66.

In the case *sub judice*, a reasonable observer who views Taylor's photographs is unlikely to believe Taylor supports what he is photographing. Like the baker in *Mullins*, Taylor charges his customers for his product, which substantially reduces the likelihood that a reasonable observer would believe Taylor supports, beyond a mere business standpoint, the events he is being hired to photograph. Record 3. Taylor is engaged in commerce through the commercial sale of his photographs. Record 8. Taylor operates his business for the purpose of earning money, not to "speak." Record 7. The record does not suggest anyone has ever viewed Taylor's photographs and believed he was trying to create a particular message on his behalf through his work. See Record.

iii. Even if this Court found Taylor's photographs to be expressive conduct, it is expressive conduct on behalf of his customers, not himself.

Typically, when conduct is so inherently expressive and commonly used for one very particular, direct purpose, it will be so unreasonable that others would view it any other way. *Hurley*, 515 U.S. 568–570.

For example, a reasonable observer, who watches a parade, would understand the direct message the parade-goers are attempting to promote. In *Hurley*, a gay organization attempted to be a part of a St. Patrick's Day parade in order to "express their pride in their Irish heritage as openly gay, lesbian, and bisexual individuals," but they were denied. *Hurley*, 515 U.S. at 561.

This Court held the private business could exclude the gay organization from the parade. *Id*. at 581. Moreover, this Court stated that the gay organization's message is still expressive conduct. *Id*. at 570. This Court's rationale was that the gay organization had one very specific purpose—to celebrate their identities as openly gay, lesbian, and bisexual Irish descendants. *Id*. Any reasonable observer would understand this was their intended message. *Id*. The word "parade" implies people are marching to make a collective point on their behalf; not the parade organizers'. *Id*. at 568. Thus, any reasonable observer who watches a parade would not construe one group's message to be condoned by the parade organizers themselves.

Similarly, a reasonable observer, viewing Taylor's work, would not believe Taylor himself endorses what is in his photographs. Unlike *Hurley*, a reasonable observer would not view Taylor's photographs of a religious event and believe he is advocating for any religion. His customers control the outcome of Taylor's photographs. Record 8. Thus, because the customers control the outcome, these photographs are unable to show a message on behalf of Taylor. Record 41. As stated above in *Mullins*, any message that a wedding cake connotes is attributed to the customer that ordered the cake, not the baker. *Mullins*, 2015 COA at 64. The same applies to Taylor and his photography. The public who views his work is going to believe the message is representative of the people in the pictures, not the photographer himself. Thus, Taylor's commercial sale of photography is expressive conduct on behalf of his customers, not himself.

B. The Madison Commission acted within their allotted authority when it enacted the public accommodation law because of their compelling interest to serve the public equally.

i. Taylor's conduct falls within the realms of the *O'Brien* Test.

The *O'Brien* test states, "[w]hen speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the

nonspecch elements can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The *O'Brien* test is triggered when a state's regulation is unrelated to the suppression of free expression *Id*.

ii. The Madison Commission has a compelling interest in serving the public equally when it enacted the public accommodation law.

When a group engages in expressive conduct or speech, its freedom of speech via expressive association can be superseded by a lawful public accommodation law. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). Protections on expressive conduct can be overridden "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas that cannot be achieved through means significantly less restrictive of associational freedoms." *Id*. Moreover, "[p]ublic accommodation laws, 'are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination . . . .'" *Id*. at 658 (citing *Hurley*, 515 U.S. at 572).

Furthermore, all places of public accommodation must act in accordance with Title II of the Civil Rights Act of 1964 (the "Civil Rights Act"), which states, "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination on the ground of race, color, religion, or national origin." Record 13; 42 U.S.C. § 2000a(a).

The Civil Rights Act defines a place of public accommodation as an establishment whose operations affect commerce, or if discrimination or segregation is supported by State action. 42 U.S.C. § 2000a(b). Furthermore, it also states "[t]he provisions of this title shall not apply to a private club or other establishment not in fact open to the public." 42 U.S.C. § 2000a(e). Although, the Fifteenth Circuit has not ruled on whether a human rights act can limit the

business practices of a commercial photography business, the Supreme Court in New Mexico has ruled on this issue. The Supreme Court of New Mexico held, "[a] commercial photography business that offers its service to the public, thereby increasing its visibility to potential clients, is subject to the antidiscrimination provisions of the . . . Human Rights Act and must serve their protected class customers the same way that it serves all other customers." *Elane Photography, LLC v. Willock*. 309 P.3d 53, 59 (2013). The court in *Elane* has made clear that a state may adopt public accommodation laws in accordance with the First Amendment via a human rights act, when that state seeks to regulate the discrimination against a protected class. *Id.* In *Elane*, the court further found, "[b]usinesses that choose to be public accommodations must comply with the [Human Rights Act] although such businesses retain First Amendment rights to express their religious or political beliefs." *Id*. In addition " . . . because it is a [place of] public accommodation, its provision of services can be regulated, even though those services include artistic and creative work." *Id.* at 35.

Serving the public equally and eliminating discrimination is a sufficient compelling state interest needed in order to enact a public accommodation law. For example, in *Dale*, New Jersey enacted a public accommodation law in order to combat discrimination within the state. *Dale*, 530 U.S. at 645. This Court was faced with the issue of whether the state of New Jersey could regulate the expressive conduct in a place of public accommodation. *Id.* at 644. This Court held, "eliminating the destructive consequences of discrimination from society," was a compelling state interest; therefore the public accommodation law was permissible. *Id*. at 647. Furthermore, this Court articulated because the public accommodation law "abridges no more speech than necessary to accomplish its purpose," the state may permissibly censor a place of public accommodation's conduct. *Id*.

Here, the Madison RFRA fits within the rules outlined in *Dale*. The Madison Commission has a compelling interest to make sure all members of the public are served, regardless of religion or other class. Record 9. The Madison Commission is merely requiring Taylor to provide photography services to all members of the public. Record 9. Taylor's business is a place of public accommodation defined in the Madison RFRA. The photography services Taylor's business offers to the public include birthdays, graduations, festivals, photo shoots for websites, and weddings. Record 14. However, Taylor's business refuses to offer its services to the public when the event in question is religious in nature. Record 14.

Taylor's business is open to the public, therefore Madison is requiring he treat all the members of the public equally and not discriminate based on religion. Record 9. Furthermore, the Madison Commission is only restricting speech of a discriminatory nature through means of the Madison RFRA. Record 13. Like *Dale*, the Madison RFRA only abridges as much speech as necessary to stop discriminatory business practices within Madison. Taylor's business is open to the public and its services must be offered equally to all members of the public, not merely those whose religious beliefs and lifestyle preferences coincide with Taylor's. Nonetheless, the Madison Commission has a compelling state interest in providing service to all members of the public and regulating discriminatory business practices.

II. The Madison Commission acted properly under the Establishment and Free Exercise Clauses when it sought to enjoin Taylor from discriminating against certain customers based on religion.

A. Instructing Taylor to photograph religious events does not violate the Establishment Clause because the Madison RFRA does not violate the *Lemon* test.

The Establishment and Free Exercise Clauses (the "First Amendment Clauses") state, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. In *Lemon,* this Court established a three-prong test the

("*Lemon* test") for evaluating whether the government violated the First Amendment Clauses. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). The *Lemon* test remains the prevailing analytical tool for the analysis of First Amendment claims. *Doe ex rel. Doe v. Elmbrook Sch. Dist.,* 687 F.3d 840, 850–51 (7th Cir. 2012). The *Lemon* test states the government may violate the First Amendment Clauses, if it takes an action that: (1) has a non-secular purpose; (2) advances or inhibits religion or religious practices as its "principal or primary effect;" and (3) "foster[s] excessive government entanglement with religion." *Lemon*, 403 U.S. at 612–13. All three prongs of the *Lemon* test need to be satisfied in order for a law to be constitutional. *Id.* This Court has also counseled "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Employment Div. Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878–79 (1990). The purpose of the First Amendment Clauses is "to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 669 (1970).

i. The Madison RFRA has a secular purpose because the government does not convey an approval or disapproval for any certain religion.

The first prong of the *Lemon* test requires the court to determine whether the government action had a secular legislative purpose. *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). In *Lynch*, this Court "invalidated legislation or government action on the ground that a secular purpose was lacking, but only when it [also] concluded there was no question that the statute or activity was motivated wholly by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). Also, the secular purpose prong in *Lemon* asks, "whether the government intends to convey a message of endorsement or disapproval of religion." *Id.* at 691. Furthermore, this Court "has invalidated legislation or governmental action on the ground that a secular purpose was

lacking . . . only when it [had] concluded there was no question that the statute or activity was motivated wholly by religious considerations." *Id.* at 680.

The secular purpose prong is violated when the purpose of a statute is plainly religious in nature. In *Stone*, this Court held "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." *Stone v. Graham*, 449 U.S. 39, 41 (1980). There is no supposed secular purpose because "the Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths." *Id.* Also, the Ten Commandments do not confine themselves to secular matters, because the "first part of the Commandments [only] concerns the religious duties of believers." *Id.* at 41–42. Thus, the Ten Commandments conveyed an endorsement of religion and was motivated wholly by religious considerations. *Id.*

Taylor and the Madison RFRA are not conveying an approval or disapproval of religion. Unlike *Stone*, it is clear the Madison RFRA was put into place to cease religious discrimination, not to endorse a particular religion. In fact, each part of the Madison RFRA prohibits a different type of religious discrimination, including showing preference to one religion; compelling anyone to one particular religion; controlling the conscience of any person; and substantially burdening anyone's religious beliefs. Record 13. It is clear the pre-eminent purpose of the Madison RFRA was not plainly religious in nature.

By following the Madison RFRA, Taylor is not conveying approval of any religion. Taylor argues that by requiring him to enter places of worship to photograph religious ceremonies, the government is forcing him to convey approval of religion. Also, Taylor has recently attended religious services, despite believing they are a sham. Record 17 ¶27. In March 2015, he attended his newborn nephew's bris. Record 17 ¶27. In October 2014, he attended a cousin's wedding, which involved a Catholic ceremony in a Catholic church. Record 28. Clearly,

Taylor's hatred of religion will not keep him from neither attending religious ceremonies nor photographing a wedding in a church. A reasonable observer could find Taylor's actions as approving religion, which makes his argument to Johnson and Green as to why he cannot photograph their weddings contradictory.

Also, Taylor has photographed and attended religious ceremonies in the past. Record 17. These religious ceremonies could convey to the public that he approves of religion, however the Madison Commission is not forcing him to do so. Record 15 ¶17(a). In April 2015, Taylor photographed a wedding for two men. Record 15 ¶17(a). This wedding took place in a church, was conducted by an ordained minister, and the two men were of Jewish and Episcopalian faith. Record 15 ¶17(a). Although this is true, Taylor told Johnson he "could not perform his wedding because it would be a religious wedding and it would be in a church." Record 19 ¶43. How is the wedding Taylor performed for the two men at the Church of Life different from the Johnson's wedding he refused? There is no difference. If Taylor is going to have a policy in place that he does not photograph religious ceremonies, there should be no exceptions.

Taylor does not extend his negative feelings about religion to his employees. Record 18 ¶32. Taylor argues he does not want to make religion look good or convey he approves of religion. Record 18 ¶32. However, he is very accommodating to his employee's religious restrictions. Record 28 ¶12–13. His employee, Ahmed Allam, stated in his declaration that Taylor has always accommodated his religious needs, including when he needed to fast for Ramadan and when a photography job conflicted with his religious beliefs. Record 28 ¶12–13. Another employee, Esther Reuban, stated in her declaration that Taylor would always accommodate her extreme religious restrictions, including not working on Saturday's or certain holidays, not driving cars or using the telephone during other times. Record 31 ¶6–8. It is

contradictory that Taylor accommodates his employees to such a severe level, but will not accommodate his customers. Thus, the first prong of the *Lemon* test is satisfied.

ii. The Madison RFRA does not have the primary effect of advancing or inhibiting religion because Taylor has not been forced to endorse a religion, which would also violate the Free Exercise Clause.

In considering the second prong of the *Lemon* test, the court must ask whether "irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Wallace v. Jaffree,* 472 U.S. 38, 61 (1985). This prong of the *Lemon* test is violated whenever government action creates identification with a religion or with religion in general. *Lee v. Weisman*, 505 U.S. 557, 585 (1992). The Free Exercise Clause recognizes "the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963). A violation of the Free Exercise Clause is predicated on coercion and "it is necessary . . . for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Id.* at 223.

The primary effects prong of the *Lemon* test focuses on whether government practice had the effect of endorsement or disapproval of religion. *Lynch*, 465 U.S. at 692. This Court in *Lynch*, held that a governments display of a crèche did not communicate that it endorsed the Christian beliefs represented by the crèche. *Id.* The government was not conveying approval of religious beliefs, but it was merely celebrating "a public holiday with traditional symbols." *Id.* at 693. This Court found it significant that the government had used the crèche in its Christmas display for years and there was "no political divisiveness prior to the filing of the lawsuit." *Id.* Thus, the crèche did not have the effect of endorsing Christianity or any religion. *Id.*

The primary effect of the Madison RFRA was not to advance or inhibit any religion. To violate this prong of the *Lemon* test, this Court would need to conclude the Madison RFRA was put into effect primarily to benefit and endorse religion. In *Lynch*, this Court provided examples of benefiting and endorsing religion as spending large amounts of public money for textbooks to be supplied throughout the country to students attending church-sponsored schools; using public funds to transport students to church-sponsored events; and tax exemptions for church-sponsored colleges. Nothing like the examples in *Lynch* is occurring in this case. The Madison RFRA has been put into place to prohibit discrimination.

Instructing Taylor to take pictures at an inherently religious wedding is not forcing him to endorse religion or coercing him into adopting a certain religion. As mentioned above, the Free Exercise Clause focuses on coercion. Asking Taylor to attend a religious event to carry out the purpose of his business is not forcing him to adopt a religion or its practices. Record 9. Taylor's business involves meeting potential customers, taking photographs for them, and receiving payment. If the customer wants Taylor to photograph an inherently religious ceremony, all Taylor or his employees have to do is take the pictures. The Madison RFRA is not coercing Taylor into endorsing the religion of the ceremony merely by instructing him to do his job. Like the crèche in *Lynch*, the Madison RFRA does not communicate that the Madison Commission wants to advance or inhibit any particular religion. Thus, the second prong of the *Lemon* test is satisfied.

iii. The Madison RFRA does not foster an excessive government entanglement with religion because wanting Taylor to treat all customers the same regardless of religion is not excessive.

This Court in *Lynch* stated "[e]ntanglement is a question of kind and degree." *Lynch*, 465 U.S. at 684. The factors courts use to determine excessive entanglement are similar to those used

in the second prong of the *Lemon* test. *Agostini v. Felton*, 521 U.S. 203, 233 (1997). These include "character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Id.*

Interaction between church and state is inevitable, but entanglement must be excessive before it violates the First Amendment Clauses. In *Agostini*, this Court held sending public school teachers into parochial schools to provide remedial education to disadvantaged students did not involve excessive entanglement between church and state. *Id*. This Court found no excessive entanglement despite requiring administrative cooperation between the public schools and religious schools. *Id.* Furthermore, the relationship was not excessive because the program was open to all students who qualified regardless of their religion. *Id.* at 232. Thus, no excessive entanglement with religion existed. *Id.* at 234.

Cooperation between Taylor and religious customers is not excessive. Asking Taylor to provide services to religious weddings does not foster an excessive government entanglement with religion. Like *Agostini*, even though Taylor will need to cooperate with certain individuals who are religious does not mean the Madison RFRA is excessive. The Madison RFRA simply requires Taylor to perform the services he already voluntarily provides to the public. The society as a whole benefits from laws like the Madison RFRA being in place. The public benefits because Taylor's business will provide its talents and services to those who are seeking to utilize them. The public does not benefit when a business gets to pick and choose which customers it will serve and which ones it will not.

Also, the relationship between Taylor and the Madison RFRA is not excessive because it protects all religions. The resulting relationship between the government and the religious

authority is minimal at most. Madison's RFRA prohibits the "unlawful discrimination by a place of public accommodation." Record 11. Here, the government is not selecting one religion over another. In fact, Madison's RFRA has been put into place so all religions are treated equally and so no religion has to withstand discrimination from businesses in Madison City. The community and the public benefits from this type of discrimination being prohibited. Madison's RFRA does not foster an excessive entanglement with religion. Taylor is not being asked to service one religion over another. Taylor is plainly being asked to treat all of his customers the same. Record 10. Therefore, the Madison RFRA does not violate the *Lemon* test.

B. In accordance with Madison's RFRA, the Madison Commission has a compelling interest in infringing upon Taylor's refusal to act and in so doing used the least restrictive means necessary to further that interest.

This Court has stated "[i]t is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." *Johnson v. California*, 543 U.S. 499, 505–506 (2005). The strict scrutiny standard is satisfied under review when the action is narrowly tailored to achieve a compelling government interest. *Adarand Constructors v. Pena*, 515 U.S. 200, 224 (1995).

i. The Madison Commission has proven that by infringing on Taylor's refusal to act furthers Madison's compelling governmental interest of eliminating discrimination in places of accommodation.

As previous stated, the Madison Commission has a compelling interest in eliminating discrimination in places of accommodation. Strict scrutiny requiring a compelling government interest is reserved for cases in which "the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). This Court has held "that neutral laws of general applicability need only be rationally related to a legitimate government interest in order

to survive constitutional challenge." *Mullins,* 2015 COA at 79. As long as a statute is not actively discriminating against a particular religion, neither the Free Exercise Clause nor the Establishment Clause requires any religious accommodation. *Id.*

Without the Madison RFRA, businesses could discriminate against potential customers based on their religion, sexual orientation, gender, and/or any other protected class. This is exactly what happened here. Johnson and Green walked into Taylor's business to inquire about whether it could photograph their weddings. Record 4. They went to Taylor's business to see if Taylor would photograph one of the most important days of their lives. The sole reason Taylor refused to photograph their weddings is because they took place in places of worship. Record 4. As stated above, Taylor acts contradictory, because he himself has recently photographed a wedding in a church with an ordained minister conducting the ceremony. Record 15. Taylor discriminated against these two individuals based solely on their religions. Taylor should not be able to take pictures at one religious wedding and not another. This kind of discrimination should not be tolerated.

Taylor's actions in places of public accommodation could have damaging economic effects and cause trouble in the community. The Madison RFRA creates a welcoming environment for all consumers by preventing discrimination on the basis of certain characteristics, including religion. This prevents the economic and social problems that are prevalent when businesses decide to serve consumers of their own preference and ensures the goods and services provided by businesses are available to all citizens of Madison. The Madison Commission has a compelling government interest in eliminating Taylor's religious discrimination. Thus, the Madison RFRA is related to the Madison Commission's compelling interest in eliminating discrimination in places of public accommodation.

ii. The Madison Commission has used the least restrictive means to further the interest of eliminating discrimination in places of public accommodation.

Instructing Taylor to enter a place of worship and photograph a religious ceremony is the least restrictive means to further the interest of eliminating discrimination. A law is not neutral if "the object of a law is to infringe upon or restrict practices because of their religious motivation." *Church of Lukumi*, 508 U.S. at 533. This Court has stated that, "[a] law is not generally applicable when it imposes burdens on religiously motivated conduct while permitting exceptions for secular conduct or for favored religions." *Id.* at 543.

The Madison RFRA is neutral and generally applicable. The Madison RFRA states in part (e) "[n]othing in this section shall be construed to permit unlawful discrimination in any form by: (1) any government agency or actor; (2) any place of accommodation as defined by [the Civil Rights Act] or [the Madison RFRA]." Record 13. Therefore, the Madison RFRA forbids all discrimination regardless of its motivation. The Madison RFRA prohibits discrimination based on sexual orientation, skin color, gender, religion, and all other forms as such the Madison RFRA does not single out religion.

Also, the Madison RFRA does not compel Taylor to support or endorse any particular religious view. The law merely prohibits Taylor from discriminating against potential customers on account of their religion. All Taylor has to do is treat all of his customers the same. The Madison Commission is neither forcing Taylor to endorse any particular religion nor is Madison forcing Taylor to only photograph weddings that are religious in nature. All the Madison Commission wants is for Taylor to not discriminate against his customers because they are having a religious ceremony. Taylor remains free to continue believing that religion is a sham. However, if he wishes to operate his business as a place of public accommodation and conduct

business in Madison City, the Madison RFRA will prohibit him from picking and choosing customers based on their religious views.

Finally, the penalties imposed on Taylor were the least restrictive means necessary. The Madison Commission punished Taylor by forcing him to pay $1,000 per week per violation and provided him with a cease and desist letter. Record 2. This fine gives Taylor a reason to cease his discriminatory practices. Furthermore, the $1,000 per week is relatively low compared to the amount Taylor could have to pay in a potential lawsuit if he continues his discriminatory practices. Also, requesting Taylor to comply with the cease and desist is the least restrictive means necessary to accomplish the goal of ending his discrimination. Taylor argues that these penalties are excessive, but his business could potentially be shut down if legal action continues against him. Thus, the Madison Commission has a compelling interest in eliminating discrimination and used the least restrictive means in doing so.

CONCLUSION

Based on the foregoing, the Madison Commission respectfully requests this Honorable Court affirm the judgment of the Fifteenth Circuit Court of Appeals.

Respectfully Submitted,

Dated: February 9, 2016

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Team V
Counsel for Respondents

CERTIFICATES

I hereby certify that the work product contained in all copies of this brief is in fact that work product of the members of Team V. I hereby certify that Team V has fully complied with the governing honor code of Team V's school. I hereby certify that Team V has complied with all rules of the competition.

Team V
Counsel for Respondents

APPENDIX A: FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

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

APPENDIX B: 28 U.S. Code § 2107(a);

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

APPENDIX C: 28 U.S. Code § 1254(1); Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree

APPENDIX D: 42 U.S. Code § 1983; Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX E: VARIOUS TITLES FROM TITLE II OF THE CIVIL RIGHTS ACT OF 1964; Prohibition against discrimination or segregation in places of public accommodation

(a) Equal access
All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments. Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(d) Support by State action
Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.