STATE OF WISCONSIN | CIRCUIT COURT BRANCH ____ | DANE COUNTY

Amy Lynn Photography Studio, LLC; and **Amy Lawson**, Plaintiffs, v. **City of Madison; the Wisconsin Department of Workforce Development**; **Ray Allen**, in his official capacity as Secretary for the Wisconsin Department of Workforce Development; and **Jim Chiolino**, in his official capacity as Administrator for the Equal Rights Division of the Department of Workforce Development, Defendants.	Case No. _____ **Case Type:** Declaratory Judgment **Case Code** 30701

Brief in Support of Plaintiffs' Motion for Temporary Injunction

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Introduction and Facts

The City of Madison and the State of Wisconsin seek the power to tell a commissioned photographer what to put in her photographs and what to write on her websites. This power has no limit and offers no refuge. It enables bureaucrats to compel photographers, writers, and other speakers to create and publicly promote messages they oppose and to withhold messages they desire to express. The Wisconsin Constitution does not permit this unbounded attack on free speech or freedom of conscience. Plaintiffs therefore seek to temporarily enjoin this unconstitutional attack on their right to speak, to create, and to publish — freely.

Plaintiff Amy Lawson is a commissioned photographer and writer who owns and operates Amy Lynn Photography Studio, a Madison-based limited liability company that photographs for individuals, events, and organizations, posts those photographs on the Studio's blog and social media sites, and then writes comments alongside those photographs on those sites. Verified Compl. ¶¶ 2-3, 16, 30. Amy started the Studio in 2015 to fulfill her passion for visual storytelling and to publicly promote images and ideas she values. *Id*. at ¶¶ 38-41. Throughout her process of photographing and posting for clients, Amy constantly uses her artistic and editorial judgment to take, edit, and select photographs and to write particular comments in ways that effectively depict and tell stories of what Amy considers beautiful and honoring. *Id*. at ¶¶ 190-91.

What Amy considers beautiful and honoring comes from her religious beliefs. *Id*. at ¶¶ 28. 81. Amy is an evangelical Christian. *Id*. at ¶ 24. Because of her Christian beliefs, Amy hopes people would see her photographs and words and come to value the praiseworthy things promoted in them. *Id*. at ¶ 85. For example, Amy has photographed numerous weddings and posted about them to beautify and celebrate marriages that Amy believes honors God — marriages between one man and one woman (biblical marriage). *Id*. at ¶¶ 206-08. Amy also desires to photograph and post about pro-life crisis pregnancy centers to beatify and promote the efforts of these clinics to protect the sanctity of newborn life. *Id*. at ¶¶ 212-15.

Because Amy seeks to promote particular values through her Studio, she does not automatically create everything requested of her. *Id*. at ¶ 67. Amy receives requests from the general public, evaluates each request, and declines requests that violate her religious, artistic, or political beliefs. *Id*. at ¶¶ 66-68, 101. For example, Amy will not create any photographs or words that promote pornography, racism, violence, abortion, or any marriage not between a man and woman. *Id*. at ¶ 5. While Amy happily creates for anyone regardless of their religion, race, sexual orientation, or political positions, she cannot create photographs or words that promote messages or organizations that violate her beliefs. *Id*. at ¶¶ 222, 228-29. In an effort to be upfront, Amy even explained some of her beliefs on her Studio's website for a time. *Id*. at ¶¶ 238-40. But she quickly removed that explanation for fear of violating the law. *Id*. at ¶¶ 251-52.

That fear was well-founded. Madison and Wisconsin have laws that make it illegal for any public accommodation to deny someone "equal enjoyment" because of certain traits or to publish any communication to the effect that denies facilities or that a person's patronage is unwelcome, objectionable, or unacceptable because of those traits. *Id*. at ¶¶ 257-58, 300-02. These protected traits include sexual orientation and political beliefs. *Id*.

Although these laws apply to some businesses without problem, Madison and Wisconsin interpret these laws to prevent Amy from publishing a statement on her Studio's website explaining why she will create photographs and words for weddings between a man and woman and for pro-life groups but not for same-sex weddings and pro-abortion groups. *Id*. at ¶¶ 286-96, 326-33. Likewise, Madison and Wisconsin interpret these laws to require Amy to create and publish photographs and words for same-sex weddings and pro-abortion groups because she creates and publishes the same for one-man/one-woman weddings and pro-life groups. *Id*. And if Amy violates these laws, she faces fines up to $10,000; injunctions; loss of her business license; an uncapped amount of economic, non-economic, and punitive damages; expenses; and attorney's fees. *Id*. at ¶¶ 281-85, 318-19, 322-25. To avoid these penalties, Amy has stopped creating and publishing photographs and words for all weddings and organizations and has not

posted her desired website statement.[1] *Id*. at ¶¶ 341-42. Amy has chilled her desired speech. *Id*.

This result violates Amy's rights under the Wisconsin Constitution's Free Speech and Freedom of Conscience Clauses. Under these clauses, speakers have the right to choose the content of their speech consistent with their consciences. And that means Madison and Wisconsin cannot compel people to speak against their consciences or silence messages because of their content. The government should not have the power to reach into people's minds, forcing speakers to utter messages they oppose, or the power to repress ideas, forcing speakers to withhold viewpoints they want to promote.

These principles apply with particular force to Amy who uses the power of images and words to advocate her position on important topics like marriage and abortion. In our image-soaked culture, Amy must visually beautify her beliefs and avoid glamorizing the opposite to advocate her message effectively. If a picture is worth a thousand words, then censoring a photograph amounts to burning a thousand words. And compelling a photograph amounts to requiring a thousand pledges. This kind of government coercion contradicts the fundamental constitutional freedoms that make our system of government so great. Because the Madison and Wisconsin public accommodation laws are being applied to the Studio in a manner that violates these essential constitutional freedoms, Amy asks this Court to grant its temporary injunction motion so that she can once again control what her words say and what her photographs depict.[2]

Argument

Amy needs a temporary injunction to avoid the imminent loss of her constitutional rights. To obtain an injunction, Amy must establish three factors: (I) a sufficient probability that her rights will be violated, (II) irreparable harm without an injunction, and (III) the balance of hardships favoring an injunction. *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.,* 90 Wis. 2d 781, 800, 280

[1] To see the entire statement Amy wants to post, see Exhibit 1 to the Verified Complaint.
[2] While this motion seeks relief for both Amy and her Studio, it refers to Plaintiffs collectively as Amy unless context indicates otherwise. Plaintiffs' verified complaint, affidavits, and appendix supporting this motion contain all other relevant facts not mentioned in this motion.

N.W.2d 691, 700 (1979). Amy can satisfy each factor.

I. Amy will show a sufficient probability that the public accommodation laws violate her rights under Wisconsin's Speech and Conscience Clauses.

The Wisconsin Speech and Conscience Clauses protect Amy's rights to create and publish photographs, to not create and publish photographs, and to explain her religious, political, and artistic beliefs. But the Madison and Wisconsin public accommodation laws restrict these rights. They (1) ban Amy from posting a statement on the Studio's website explaining her religious, artistic, and political beliefs concerning marriage and life; (2) compel Amy to create and publish words and photographs that contradict her views about marriage and life; and (3) deter Amy from promoting her views about marriage and life through words and photographs. As such, "the burden shifts to" Madison and Wisconsin "to prove beyond a reasonable doubt that" their statutes "pass[] constitutional muster." *State v. Stevenson*, 2000 WI 71, ¶ 10, 236 Wis. 2d 86, 91, 613 N.W.2d 90, 93. And to pass muster, these laws must satisfy a high standard called strict scrutiny. These laws cannot meet this standard.[3]

A. The public accommodation laws must satisfy strict scrutiny because they ban Amy's speech based on content, compel Amy to speak objectionable messages, and deter Amy from expressing her desired messages.

The Wisconsin Speech Clause says "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press." Wisc. Const. Art. I, § 3. Wisconsin courts interpret this Clause to be "coextensive" with the First Amendment. *Madison Teachers, Inc. v. Walker*, 2014 WI 99, 358 Wis. 2d 1, 29 n.9, 851 N.W.2d 337, 351. And under that standard, the Madison and Wisconsin public accommodation laws deserve strict scrutiny for four reasons: 1) they regulate Amy's speech; 2) they restrict this speech based on content; 3) they compel Amy to speak; and 4) they deter Amy from speaking.

[3] Besides her speech and conscience claims, Amy raises other claims in her complaint and reserves the right to pursue them in later filings.

1. The public accommodation laws regulate Amy's pure speech — her words, photographs, photography, and photography business.

When analyzing a free speech claim, courts must "first consider whether conduct alone or speech…is being regulated." *State v. Baron*, 2009 WI 58, ¶ 16, 318 Wis. 2d 60, 69, 769 N.W.2d 34, 38. And here the challenged laws regulate activity at the core of free speech — the words, photographs, photography, and photography business that Amy wants to create and did create in the past before stopping to avoid violating the Madison and Wisconsin laws.

Starting with words, Amy wants to do two things. First, she wants to post words on the Studio's internet sites describing and celebrating events depicted in Amy's photographs. Compl., ¶¶ 3, 113-18. For example, Amy in the past posted wedding photographs on the Studio's blog and alongside them posted words describing and celebrating the marriages in those photographs. Compl., ¶¶ 172-75. *Cf.* Affidavit of Amy Lawson supporting her motion for temporary injunction, ¶¶ 32-35 ("Its been lovely getting to know these two a little better and a joy to be a part of their God-honoring ceremony"). Amy posted these words as part of her services to her clients so that clients and the general public can share in the joy of the event and Amy can share her message with as many people as possible. Compl., ¶ 121. Second, Amy wants to post a statement on her Studio's website explaining what photographs Amy can and cannot create and why. Compl., ¶¶ 350-51, Ex. 1. Among other things, this statement explains why Amy will photograph pro-life groups and weddings between a man and woman but not same-sex weddings or pro-abortion groups. *Id*.

In her website statement and internet posts, Amy uses words either to describe and celebrate an event or to explain and advocate her beliefs on artistic, religious, or political issues. By using words to describe, celebrate, explain, and advocate, Amy engages in pure speech. *See Kaplan v. California*, 413 U.S. 115, 119–20 (1973) (concluding that "both oral utterance and the printed word have First Amendment protection…").

And to make matters even clearer, Amy's words promote a particular viewpoint on certain "public issues" like marriage, religion, abortion, same-sex marriage, or photography's role in

shaping culture. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). Discussion about such "public issues" has "always rested on the highest rung on the hierarchy of First Amendment values." *Id.*[4]

Moving from words to photographs, Amy wants to create and display certain photographs on her Studio's internet sites to advocate her beliefs about truth and beauty. Compl., ¶¶ 82-86. These photographs also constitute pure speech. *See Stevenson*, 2000 WI 71, ¶ 20 (invalidating statute against taking photographs with nudity for regulating speech); *State v. Oatman*, 2015 WI App 76, ¶ 18, 365 Wis. 2d 242, 255, 871 N.W.2d 513, 519 (noting that photographs shared with others "would have First Amendment protection."). As the Second Circuit has noted, "photographs… always communicate some idea or concept to those who view [them], and as such are entitled to full First Amendment protection." *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996).[5]

This conclusion makes sense because visual images such as photographs convey numerous ideas and emotions that cannot be distilled to one textual message. The power of photographs comes from an ability to capture a single moment in time, convey multiple ideas simultaneously, and reach beyond cognitive reasoning to persuade on an emotional level:[6]

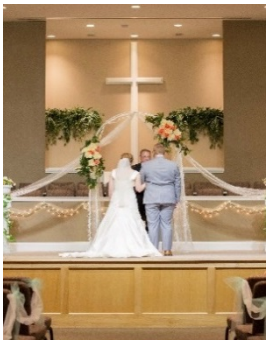
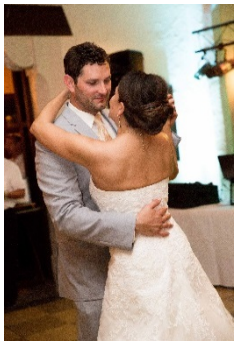
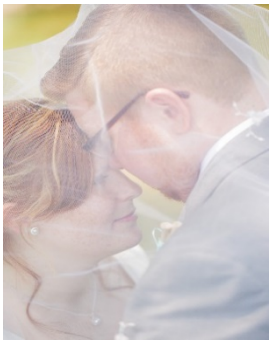


[4] *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (holding that "religious speech…is as fully protected under the Free Speech Clause as secular private expression."); *Wisconsin Right to Life, Inc. v. Paradise*, 138 F.3d 1183, 1184 (7th Cir. 1998) ("But almost everything related to abortion has political implications…"); *Hill v. Pub. Advocate of the United States*, 35 F. Supp. 3d 1347, 1357 (D. Colo. 2014) (noting that same-sex marriage is a "matter of public concern" and a "politically charged issue…").

[5] Many other courts agree. *See Kaplan*, 413 U.S. at 119 ("The Court has applied…First Amendment standards to moving pictures, to photographs, and to words in books."); *Ex parte Thompson*, 442 S.W.3d 325, 336 (Tex. Crim. App. 2014) ("We conclude that photographs and visual recordings are inherently expressive…").

[6] The three iconic photographs below depict (from left to right) a struggling mother and children during the Great Depression, first responders after the September 11 terrorist attack, and a couple kissing to celebrate the end of World War II.

Amy's photographs operate the same way. Amy's prior wedding photographs, for example, depict one-man/one-woman marriage in beautiful moments to reveal the value, joy, and importance of such marriage.

Lawson Aff., ¶¶ 23-24; Appendix in support of motion for temporary injunction 55, 57, 60. These photographs in turn persuade others cognitively and emotionally of the value and importance of such marriage. *Cf. Hill*, 35 F. Supp. 3d at 1356-57 (describing how group used photograph of same-sex couple to advocate against same-sex marriage); *Protectmarriage.com v. Courage Campaign*, 680 F. Supp. 2d 1225, 1229 (E.D. Cal. 2010) (noting that group used "photos of homosexual couples together" on its website to advocate for same-sex marriage). People pay large sums to wedding photographers for this very reason. Photographs often speak louder than words.

Photographs and visual images outside the wedding context bolster this point. From bureaucrats criticizing cigarettes to advertisers pitching products to prosecutors haranguing juries, advocates use visual images to move audiences.[7] Amy uses her photographs to do the same, a fact that confirms their expressive quality. *Cf. City of Madison v. Baumann*, 162 Wis. 2d 660, 670, 470 N.W.2d 296, 300 (1991) (finding "all music" to be protected speech because of its

[7] *See R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1217 (D.C. Cir. 2012) (noting that government-mandated anti-smoking images were "unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting."); *State v. Williams*, 2015 WI 75, ¶ 85, 364 Wis. 2d 126, 164, 867 N.W.2d 736, 753 (admitting that "photographs likely were useful in helping the jury garner a more thorough understanding of the events on the night of the killings."); Linda J. Demaine, *Seeing Is Deceiving: The Tacit Deregulation of Deceptive Advertising*, 54 Ariz. L. Rev. 719 (2012) (explaining how advertisers use a "visual approach to consumer persuasion" because studies demonstrate persuasive power of visual images).

"expressive and persuasive power").

Because Amy's photographs constitute pure speech, her process of creating photographs — her photography — also constitutes pure speech. This process of creating pure speech cannot be separated from the final expressive work. They are "inextricably intertwined." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010). Courts do not "disaggregate Picasso from his brushes and canvas…" but protect the "process of creating a form of *pure* speech (such as writing or painting)" to the same degree as "the product of these processes (the essay or the artwork)…"*Id.* at 1061-62.[8]

The same logic applies to photography. "Using a camera to create a photograph or video is like applying pen to paper to create a writing or applying brush to canvas to create a painting. In all of these situations, the process of creating the end product cannot reasonably be separated from the end product for First Amendment purposes." *Thompson*, 442 S.W.3d at 337. Courts have therefore consistently protected the act of taking photographs with its many constitutive decisions (what, whether, how, and when to photograph) as pure speech. *Id.*[9] Amy's photographic process deserves the same protection.

This protection also extends to Amy's photography business. Speakers do not lose their speech rights when they go into business. "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 801 (1988). Just as the expressive process deserves protection because it is intertwined with the expressive product, the "sale" of

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[8] *See Minneapolis Star & Tribune Co. v. Minn. Com'r of Revenue*, 460 U.S. 575, 582 (1983) (protecting use of paper and ink products); *Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015) (tattooing process); *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 595-96 (7th Cir. 2012) (making audiovisual recordings); *Anderson*, 621 F.3d at 1061–62 (tattooing process); *Baumann*, 162 Wis. 2d at 670-71 (concluding that "making of music" was protected).

[9] *Stevenson*, 2000 WI 71, ¶ 20 (invalidating statute on First Amendment grounds for outlawing the taking of photographs with nudity); *Oatman*, 2015 WI App 76, ¶ 18 (acknowledging First Amendment right of parents to "photograph[] their child with classmates on the first day of kindergarten for sharing with grandparents"); *State v. Bonner*, 61 P.3d 611, 614 (Idaho Ct. App. 2002) ("[I]t is clear that the creation of photographs…is expressive activity that ordinarily qualifies for First Amendment protection.").

that expressive product deserves protection because it "is intertwined with the process of producing" expression. *Anderson*, 621 F.3d at 1063. Not many people would speak if they had to give their speech away. And speech made for profit can contribute to the marketplace of ideas just as much as speech given away. Based on these points, courts have correctly protected the right of newspapers, painters, and tattoo artists to sell their speech and to engage in the business of creating speech.[10] Photographers deserve the same. *See Bery*, 97 F.3d at 691, 695-96 (protecting act of selling photographs). In this respect, Amy's photography business, like her photographs, her photography, and her words, constitute pure speech.

2. The public accommodation laws ban Amy's desired website statement based on content and viewpoint.

Because Amy speaks through its words and photographs, the Madison and Wisconsin public accommodation laws deserve scrutiny for regulating these words and photographs. And these laws regulate speech in multiple ways. For one, they ban Amy's desired website statement because of its content. This content-based ban deserves strict scrutiny.

This ban appears on the face of the Madison and Wisconsin laws. Both these laws make it illegal to publish "any written communication" known to have the effect of denying a public accommodation's facilities to anyone by reason of protected traits like sexual orientation, or of communicating that the patronage of a person is unwelcome, objectionable, or unacceptable for any of those reasons.[11] The Madison law goes even further and adds political beliefs as a protected trait.[12] As a result, the Madison and Wisconsin laws prohibit what public accommodations in Madison can say about sexual orientation and political beliefs.

When applied, this prohibition encompasses Amy's desired website statement in two ways:

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[10] *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n. 5 (1988) ("the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away"); *Anderson*, 621 F.3d at 1063 ("Thus, we conclude that the business of tattooing qualifies as purely expressive activity…"); *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) (protecting sale of painting); *Coleman v. City of Mesa*, 230 Ariz. 352, 360 (2012) ("the business of tattooing is constitutionally protected.").

[11] Wis. Stat. § 106.52(3)(a)(3); Madison Code § 39.03(5)(b).

[12] Madison Code § 39.03(2) (defining protected class membership to include political beliefs).

1) the statement declines to create works promoting what the government considers "protected" traits (same-sex marriage and beliefs on abortion) and 2) the statement promotes particular religious and political positions to the exclusion of others, thereby potentially making people of some sexual orientations and political beliefs feel unwelcome. In a sea of state-mandated diversity, Amy wants to say that some ideas about photography, marriage, abortion, and religion are right and some are wrong. The challenged laws prohibit this.

And they prohibit this speech because of its content. Laws that regulate speech based on content deserve greater scrutiny than laws that do not. *See Baron*, 2009 WI 58, ¶ 14 (describing content-based, content-neutral distinction). A law regulates speech based on content if it facially "draws distinctions based on the message a speaker conveys" or if it cannot be justified without reference to the regulated speech's content. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). The Madison and Wisconsin laws cannot even clear this first hurdle. They facially ban speech on some topics (sexual orientation, political beliefs) but allow speech on other topics (scientific beliefs, the weather, someone's car, etc.). For example, Amy can decline to photograph an event because of disagreement with an event's color scheme but not because of disagreement with the event's message promoting same-sex marriage or abortion. Courts have found laws like Madison's and Wisconsin's laws to be content-based. *See Campbell v. Robb*, 162 F. App'x 460, 468 (6th Cir. 2006) (finding publication ban in Fair Housing Act to be content-based).[13] Madison's and Wisconsin's laws must be content-based as well.

In fact, the Madison and Wisconsin laws go beyond content discrimination to inflict viewpoint discrimination — an "egregious form of content discrimination" where the government targets "particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). This viewpoint discrimination occurs

[13] Although this and other cases have upheld narrower content-based publication bans, those cases involved statements advocating illegal conduct, i.e. an employer posts a "White Applicants Only" sign. *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006). In contrast, Amy wants to post a statement not about illegal conduct (refusing to hire) but about her constitutional right to not create and publish speech.

because the laws allow some viewpoints on a subject but ban other viewpoints on the same subject. For example, Amy can say she will photograph and promote same-sex weddings; she cannot say she will not photograph and promote same-sex weddings. Amy can say she will photograph and promote pro-abortion groups; she cannot say she will not photograph or promote pro-abortion groups. This is classic viewpoint discrimination, allowing one viewpoint on a topic but banning the opposite viewpoint on the same topic. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992) (finding restriction on fighting words based just on race, color, creed, religion, and gender to be viewpoint-based); *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 571–72 (7th Cir. 2001) (finding viewpoint discrimination when city required "that a party's civic speech be diluted by forcing the inclusion of all views on that topic."). Such viewpoint and content discrimination is presumptively unconstitutional and must survive strict scrutiny. *R.A.V.*, 505 U.S. at 382, 391-92. *See Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 248 (6th Cir. 2015) (en banc) ("Both content- and viewpoint-based discrimination are subject to strict scrutiny.").

3. The public accommodation laws compel Amy to speak by forcing her to create and publish objectionable words and photographs.

The public accommodation laws not only deserve strict scrutiny for banning speech based on content. They deserve strict scrutiny for compelling speech against the speaker's will.

Because the Wisconsin Speech Clause and the First Amendment protect speech to the same extent, the former like the latter protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). These rights to speak and to not speak are "concomitant." *Id*. And for a simple reason. They safeguard the same thing — "the broader concept of 'individual freedom of mind.'" *Id*. (citation omitted). To protect this sacrosanct space, "[p]ublic authorities" simply do not have the power to "to compel [someone] to utter what is not in his mind." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 634, (1943). Any attempt to compel speech must therefore overcome strict scrutiny. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 19 (1986) (applying strict scrutiny to law compelling speech).

But the Madison and Wisconsin laws compel speech by forcing Amy to create and publish words and photographs. Both these laws make it illegal for public accommodations to deny someone "equal enjoyment" based on sexual orientation.[14] And Madison's law makes it illegal to deny "equal enjoyment" based on political beliefs.[15] Although these requirements typically raise no constitutional concern, they compel Amy to speak in two ways. First, the laws require her to create photographs and internet posts promoting same-sex weddings because she creates the same promoting one-man/one-woman weddings. Second, these laws require Amy to create photographs and internet posts promoting pro-abortion groups since she creates the same promoting pro-life groups. In both situations, the laws compel speech by forcing Amy to open her inherently expressive mediums — her words and photographs — to objectionable content.

a. The public accommodation laws compel Amy to speak by forcing her to open her inherently expressive mediums.

Although the U.S. Supreme Court has applied the compelled speech doctrine in many contexts, this doctrine reflects "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573 (1995). With this core in mind, one thread runs through compelled speech cases: the government compels speech whenever it forces speakers to open their inherently expressive mediums to someone else, whether to the government or a private party.

This principle focuses on the nature of the final work regulated — whether that work is expressive or not. When a work expresses a message and the government requires access to that work, the speaker no longer determines that work's content. The government does. In this scenario, the Supreme Court has repeatedly found compelled speech. Thus, the Court has

[14] Wis. Stat. § 106.52 (3)(a)(1); Madison Code § 39.03(5)(a). *See also* Madison Code § 39.03(1) (defining protected class membership to include sexual orientation). The Wisconsin law also makes it illegal to "[g]ive preferential treatment…in providing services or facilities in any public place of accommodation…because of…sexual orientation…" Wis. Stat. § 106.52 (3)(a)(2).
[15] Madison Code § 39.03(2) (defining protected class membership to include political beliefs).

stopped the government from compelling access to expressive mediums like:

- Words and a flag salute. *Barnette*, 319 U.S. at 626.
- Words in company newsletter. *Pac. Gas*, 475 U.S. at. 4-7.
- Words in newspaper. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).
- Words spoken by fundraisers. *Riley*, 487 U.S. at 795.
- A parade. *Hurley*, 515 U.S. at 559.

In contrast, the Supreme Court has typically not found compelled speech when the government compelled access to non-expressive locations where speech could occur. *See Rumsfeld*, 547 U.S. at 64-65 (access to rooms for recruiting); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (access to a mall for protests). Even though someone spoke messages in those rooms, the rooms themselves did not convey any message. Empty rooms don't speak. So the room owners did not speak through those rooms, and the government did not compel speech by opening access to those rooms. Thus, these cases turned on the non-expressive nature of what the government mandated access to. The Supreme Court in *Rumsfeld* even acknowledged this point, saying its prior compelled speech cases turned on what the government required access to and whether that work was inherently expressive. 547 U.S. at 63 ("The expressive nature of a parade was central to our holding in *Hurley*…); *id* at 64 ("[u]nlike a parade organizer's choice of parade contingents [in *Hurley*], a law school's decision to allow recruiters on campus is not inherently expressive.").

Applying this principle here, the Madison and Wisconsin laws compel speech by forcing Amy to open her inherently expressive mediums — words and photographs — to objectionable content. And this is problematic because words and photographs have the same "expressive quality of a parade, a newsletter, or the editorial page of a newspaper…." *Rumsfeld*, 547 U.S. at 64. *See supra* §I.A.1 (showing these mediums to be pure speech). So when Madison and Wisconsin force Amy to create and publish words and photographs, she no longer controls when she speaks or what she says. The government does. That's compelled speech.

b. The public accommodation laws compel Amy to speak by forcing her to alter and contradict her own message.

Unfortunately, the Madison and Wisconsin public accommodation laws do not merely compel Amy to open her expressive mediums. They force her to alter and contradict her own message, making the constitutional violation all the more egregious.

For example, Amy wants to post words and photographs celebrating biblical marriage on her Studio's internet sites. Compl., ¶¶ 3, 172-75, 205-08. These desired posts include statements like "It's been a joy…to be a part of their God-honoring ceremony"; "Shannon and Ryan, thank you for trusting me with your wedding day"; "Ageless beauty. Stunning"; "We wish you a long and happy marriage…"; "It [the wedding] was beautiful in every possible way" that discuss and promote biblical marriages and that appear alongside photographs of biblical marriages. Lawson Aff., ¶¶ 32-36. But because Amy offers to post such statements as part of her wedding services, the challenged laws compel her to post similar statements promoting same-sex marriages alongside photographs of same-sex marriages. Compl., ¶¶ 286-96, 326-33. These compelled statements would include things like "Look at this beautiful marriage"; "Rejoice in the marriage of John and Jim"; "It was a joy to celebrate this God-honoring marriage."

In terms of practical effect then, the challenged laws not only change the formal content of Amy's words — from celebrate "Shannon and Ryan" to celebrate "John and Jim" — they change the referent and the meaning of those words — from celebrating biblical marriage to celebrating same-sex marriage. And this change bulldozes Amy's ability to control her own message — forcing her to change her words and her message from promoting one idea into promoting the polar opposite idea. *See Pac. Gas*, 475 U.S. at 14 (condemning order that forced company newsletter "to help disseminate hostile views.").[16]

[16] While some courts have allowed public accommodation laws to compel artists to create photographs and cakes for same-sex weddings, even these courts condemned efforts to compel words. *See Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. App. 2015) (noting that "speech protections may be implicated" if wedding cake conveyed a particularized message such as a cake containing "written inscriptions"); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 64 (N.M. 2013) (noting that government could not require photographer to "distribute a newsletter in which the government has required it to print someone else's ideas...).

This same logic applies to photographs Amy creates and posts. Amy wants to create and post photographs depicting the beauty of weddings between a man and woman to promote her religious views about marriage. Compl., ¶¶ 205-08. But because Amy offers to create and post these photographs for weddings between a man and woman, the laws force Amy to create and post photographs depicting the joy of same-sex weddings. The laws in turn change the subject matter of Amy's desired photographs, altering what those photographs depict and transforming what those photographs promote into the opposite of what Amy wants to promote. The change in content, meaning, purpose, and effect could not be starker. *Compare* App. 55-60 (examples of Amy's one-man/one-woman wedding photographs) *with* App. 196-203 (examples of same-sex wedding photographs).

As this change shows, a photograph's subject cannot be divorced from the photograph's message or the photographer's judgment. If Ansel Adams — a famous photographer who photographed nature to promote environmentalism — photographed the Grand Canyon, that photograph would convey a different message than a photograph of a coal plant. And if Madison or Wisconsin forced Adams to photograph both the coal plant *and* the Grand Canyon, they would substantially alter Adams' message and compel his speech. Likewise, by forcing Amy to photograph and write about all marriages — both those she agrees with and those she objects to — Madison and Wisconsin infringe Amy's artistic judgment and force her to convey something she cannot. That is compelled speech.

c. The public accommodation laws compel Amy to speak by forcing her to publicly disseminate objectionable content.

In addition to the compelling Amy to speak by altering and contradicting her message, the Madison and Wisconsin laws also force her to profess objectionable messages to the entire world. This public proclamation intensifies Amy's injury.

This injury occurs because Amy wants to publish photographs and words that promote biblical marriage and pro-life positions on the internet as part of her services to her clients. Compl., ¶¶ 205-08, 212-17. Amy puts this information on the internet intentionally, both to

distinguish her business from others and to publicly promote particular ideas. *Id*. at ¶ 121. But because Madison and Wisconsin categorize her speech as a "service," the laws require Amy to offer the same visual storytelling "services" to same-sex ceremonies and to pro-abortion groups — publishing photographs and words on the internet. Compl., ¶¶ 286-96, 326-33. In effect then, these laws require Amy to speak an objectionable message not just to her clients and to their friends but to the entire world.

But this requirement humiliates Amy in the most public way possible. By forcing a public profession, Madison and Wisconsin ensure that the widest possible audience receives the objectionable message and associates that message with Amy. The mere knowledge of this public exposure harms Amy in much the same way that public disclosure of private information would. No one wants to be forced to publicly declare what they disagree with or have never spoken at all. *See Wooley*, 430 U.S. at 715 (emphasizing the harm created when Jehovah's Witnesses had to act as a "mobile billboard" communicating an objectionable message on license plate "to hundreds of people each day."); *Pac. Gas*, 475 U.S. at 15 (condemning order that forced company "to assist in disseminating" someone else's message and for forcing company "to associate with speech with which appellant may disagree.").

This compelled profession directly contradicts Amy's pro-marriage and pro-life message. Amy cannot persuasively convey those messages when she must simultaneously promote other, conflicting views. No one listens to hypocrites. But the Madison and Wisconsin laws compel public hypocrisy, forcing Amy to repudiate her own desired message. Thankfully, "[t]he state cannot require speakers to affirm in one breath that which they deny in the next." *Pac. Gas*, 475 U.S. at 16. Because the Madison and Wisconsin laws require Amy to affirm what she denies before the watching world, these laws compel Amy to speak in a most egregious way.

d. The public accommodation laws do not trump Amy's constitutional right to not speak.

Since the Madison and Wisconsin laws so clearly compel Amy to speak, these laws deserve strict scrutiny. But a state or local law cannot trump the constitutional right to free speech.

"[W]henever, as in this case, the operation of the statute must cause a deprivation of a right secured by the Constitution, the courts have no alternative — the statute must yield." *Norval v. Rice*, 2 Wis. 22, 30–31 (1853). And this duty to protect constitutional rights "holds true even when protecting individual rights affects issues of the utmost importance and sensitivity." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

Public accommodation laws create no exception. Courts have frequently scrutinized such laws for infringing speech. *See Christian Legal Soc. v. Martinez*, 561 U.S. 661, 680 (2010) ("In the context of public accommodations, we have subjected restrictions on that [First Amendment] freedom to close scrutiny").[17] And the U.S. Supreme Court has twice enjoined such laws for violating the First Amendment, once for compelling speech and once for compelling expressive association. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley*, 515 U.S. at 581.

As this history shows, bureaucrats have long used public accommodation laws as hammers to squash ideas, especially unpopular ones. But courts have just as frequently stopped this abuse. This court should do the same and protect Amy from the unconstitutional application of the Madison and Wisconsin public accommodation laws.

e. The public accommodation laws cannot compel commissioned photographers or writers to speak.

Because the Madison and Wisconsin laws do not trump Amy's constitutional rights, these laws cannot compel Amy to speak. Nor can Madison or Wisconsin avoid this constitutional mandate just because Amy creates expression professionally. Photographers and writers do not lose their free speech rights when they receive a commission. Free speech protects the amateur and professional alike.

This point is so well-established that courts have protected the speech of for-profit painters,

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[17] *See also Apilado v. N. Am. Gay Amateur Athletic All.*, No. C10-0682-JCC, 2011 WL 5563206, at *1 (W.D. Wash. Nov. 10, 2011) (enjoining Washington public accommodation law for violating First Amendment by compelling gay softball team to admit heterosexual players); *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56, 59 (N.D. Ohio 1995) (declaring that city would violate First Amendment by using public accommodation law to exclude all male event from city convention center).

tattoo designers, and writers. *See supra* footnote 10. The fact that the "production, distribution, and exhibition" of speech "is a large-scale business conducted for private profit...." does not prevent that speech "from being a form of expression whose liberty is safeguarded by the First Amendment." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (discussing for-profit movie studios).

Just as the government cannot ban speech made for-profit, the government can't compel it either. The U.S. Supreme Court has repeatedly protected businesses from compelled speech. *See Riley*, 487 U.S. at 784 (for-profit fundraisers); *Pac. Gas*, 475 U.S. at 4 (for-profit electric company); *Tornillo*, 418 U.S. at 243 (for-profit newspaper). And when the Court confronted a public accommodation law in *Hurley*, it reiterated that the right not to speak is "enjoyed by business corporations generally…as well as by professional publishers." 515 U.S. at 574.

Unsurprisingly, courts have used this logic to stop public accommodation and similar anti-discrimination laws from compelling businesses to speak. In Kentucky, for example, a circuit court enjoined a public accommodation law for compelling a for-profit print shop to print t-shirts for a gay-pride festival. *Hands on Originals, Inc. v. Human Rights Comm'n*, No. 14-CI 04474 (Fayette Cir. Ct. Apr. 27, 2015).[18] And in Tennessee, a federal court enjoined part of the 1866 Civil Rights Act for compelling a for-profit television studio to cast actors of a particular race. *Claybrooks v Am. Broadcasting Cos.*, 898 F. Supp. 2d 986 (M.D. Tenn. 2012). As these cases show, anti-discrimination laws don't get a free pass. They cannot compel businesses to speak just as they cannot compel parade organizers to. A speaker's motives for speaking just don't matter. Words and photographs don't lose their constitutional protection when made for money.

Nor do words and photographs lose their constitutional protection when made for someone else. To be sure, some courts disagree, theorizing that, when businesses create speech for paying clients, the businesses cede all control to the client, they stop making their own editorial judgments, and they stop communicating their own message. *Elane*, 309 P.3d at 66-67.

[18] Available at http://perma.cc/75FY-Z77D (last visited March 3, 2017).

But this theory not only contradicts settled case law, it cannot factually apply to Amy because she retains complete control over the photographs and words she creates. In the Studio's client contract, Amy retains this control, reserves the power to reject any client request on artistic, religious, or political grounds, and disclaims any employee or work-for-hire relationship. Compl., ¶¶ 100-01; App. 31-36. Because of these contractual terms, Amy is an independent contractor that formally retains editorial control, ownership, and copyright over her photographs and words. *See Trek Leasing, Inc. v. United States*, 62 Fed. Cl. 673, 682 (2004) ("An independent contractor will generally be the owner of copyrights resulting from his work, absent some agreement to the contrary.").

Amy's practice reflects this contract. Amy ultimately controls all photographic and writing decisions including how and what she photographs and writes about. Compl., ¶¶ 135-38, 164, 171, 176, Thus, even absent her client contract, Amy retains copyright over her works and continually exercises her artistic judgment throughout her creative process. *See Hill*, 35 F. Supp. 3d at 1357 (allowing wedding photographer to pursue copyright infringement claim for wedding photograph because that photograph was "more creative than informational or functional and that Hill, as a professional wedding photographer, took special care in taking the photo and making sure it depicted the appropriate tone for the occasion.").

In this respect, Amy operates just like non-profit or free-lance photographers who entertain requests to create from the general public, who use their editorial judgment to decide which requests to accept, who collaborate with their clients, and who use their artistic judgment to create the requested photographs. Compl., ¶ 231. And like these non-profit or free-lance photographers, Amy then uses the words and photographs that she creates and owns to communicate to her clients, to her clients' friends, and to the world. *Id*. at ¶¶ 110-11. In so doing, Amy is not a mere conduit for her clients' speech. Amy *alone* creates and controls her speech. Amy and her client merely communicate their own messages to many audiences. So when the Madison and Wisconsin laws compel Amy to create words and photographs, these laws necessarily affect Amy's artistic and editorial judgments about what she wants to say and how

she wants to say it. *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60-61 (1884) (considering photographs to be protected expression under copyright law because they embody the photographer's creative choices).

Even more importantly, free speech protections (unlike copyright) do not turn on the creator/buyer relationship. Free speech is not "a mantle, worn by one party to the exclusion of another and passed between them depending on the artistic technique employed, the canvas used, and each party's degree of creative or expressive input…the First Amendment's safeguards are not so neatly cabined. Protected artistic expression frequently encompasses a sequence of acts by different parties, often in relation to the same piece of work." *Buehrle*, 813 F.3d at 977. On this logic, creators and authors speak through and retain interests in their creations, regardless who they create for, how much control they exercise, or how much compensation they receive. As the Ninth Circuit explained, "[t]he fact that both the tattooist and the person receiving the tattoo contribute to the creative process or that the tattooist, as Anderson put it, 'provide[s] a service,' does not make the tattooing process any less expressive activity, because there is no dispute that the tattooist applies his creative talents as well." *Anderson*, 621 F.3d at 1062. This same logic applies to commissioned photography. Indeed, one federal court has already found commissioned photography to be protected speech because "[t]he City cites no authority for the proposition that commissioned works are excluded from the protection of the First Amendment, and common sense and even a casual acquaintance with the history of the visual arts strongly suggest that a commissioned work is expression." *Baker v. Peddlers Task Force*, No. 96 CIV. 9472 (LMM), 1996 WL 741616, at *1 (S.D.N.Y. Dec. 30, 1996).

Any other result would allow the government to ban the speech of every writer, attorney, web designer, tattoo parlor, printer, publisher, photographer, sign maker, and advertising firm hired to create for someone else. But we know the government cannot do that.[19] And if the

[19] *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545-46 (2001) (invalidating law regulating legal services on behalf of clients on speech grounds); *Simon & Schuster, Inc. v. N.Y. Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (acknowledging that both author and publisher had First Amendments rights); *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 86, 92-97 (2d Cir. 2006)

government cannot ban speech made for someone else, the government can't compel it either. *See Riley*, 487 U.S. at 795-98 (protecting fundraisers paid to communicate someone else's message from compelled speech); *Hands on*, No. 14-CI 04474 at 7-13 (holding that public accommodation law could not compel print shop to print customer's t-shirts).

Newspapers exemplify this point. When newspapers accept advertisements or editorials from the general public for a fee, those newspapers publish someone else's speech for profit. The newspapers do not create or change the message. They merely publish the advertiser's message so that the advertiser can speak to the advertiser's audience. No one would think the newspaper necessarily "speaks" or endorses those advertisements. Despite this, the Wisconsin Appellate Court and many other courts have protected the right of newspapers to decline others' advertisements and editorials as the newspapers see fit.[20] In other words, free speech principles protect the editorial judgment of the speaker no matter where their speech came from.

Now if the government cannot compel for-profit newspapers to publish someone else's message when newspapers solicit messages from the general public, charge to publish those messages, and publish those messages unchanged, the government surely cannot compel a for-profit photographer to create a message from scratch and publish it. Photographers and writers contribute much more to photographs and words they make from scratch than newspapers contribute to advertisements made by someone else. For this reason, a storyteller like Amy has a stronger claim to not speak than even a newspaper. By infringing this claim, Madison and

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(holding that street vendors had First Amendment right to create and sell clothing with artwork "customized on the spot according to the client's request"); *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 925 (6th Cir. 2003) ("Publishers disseminating the work of others who create expressive materials also come wholly within the protective shield of the First Amendment.").

[20] *See Tornillo*, 418 U.S. at 256-58 (holding that state statute could not force newspaper to publish someone else's editorial); *Groswirt v Columbus Dispatch*, 238 F.3d 421, *2 (6th Cir. 2000) (holding that newspaper had First Amendment right not to publish someone else's letter); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1075 (5th Cir. 1976) (holding that First Amendment protects newspaper's right to reject advertisement submitted by a homosexual group); *Sinn v. Daily Nebraskan*, 638 F. Supp. 143, 146–47 (D. Neb. 1986) (holding that newspaper could not be forced to print someone else's advertisement seeking a lesbian roommate); *Wisconsin Ass'n of Nursing Homes, Inc. v. Journal Co.*, 92 Wis. 2d 709, 713, 285 N.W.2d 891, 894 (Ct. App. 1979) (holding that newspaper could not be forced to print someone else's paid advertisement because of First Amendment).

Wisconsin compel Amy to speak an objectionable message.

f. The public accommodation laws cannot compel Amy to speak regardless what those laws facially target.

Just as words and photographs remain speech when made for someone else, words and photographs remain speech when regulated by laws targeting conduct. A law cannot transform words and photographs into conduct. For this reason, public accommodation laws may very well seek to prevent "discrimination"; require "equal treatment"; and regulate "business decisions" in many instances. But these laws can still compel speech when applied to speech.

Like many laws, public accommodation laws typically do not mention or target speech on their face and therefore "do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley*, 515 U.S. at 572. But that fact does not tell us whether the government has applied those laws "in a peculiar way," i.e. to speech. *Id*. (invalidating application of public accommodation law for compelling speech). Authorities frequently do just that, taking laws that facially regulate conduct, applying them to speech, and defending this application on the theory that these laws do not regulate speech but "generally function[] as a regulation of conduct." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010). But courts have rejected this argument again and again. "The law here may be described as directed at conduct, as the law in *Cohen* [*v. California*] was directed at breaches of the peace, but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Id*. at 28 (rejecting argument that law forbidding "material support" to terrorist organizations regulated conduct when applied to legal services).[21] For this reason, governments cannot apply labor or anti-discrimination laws to newspapers in ways that affect their editorial judgment.[22] Although

[21] *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 640 (1994) ("[T]he enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment…"); *Alvarez*, 679 F.3d at 601-02 (explaining that generally applicable laws can regulate speech as-applied); *Booth v. Pasco Cty.*, 757 F.3d 1198, 1211 (11th Cir. 2014) ("It is generally believed that laws against status-based discrimination…at least sometimes burden speech on the basis of its content.").

[22] *McDermott v. Ampersand Pub., LLC*, 593 F.3d 950, 959–63 (9th Cir. 2010) (holding that NLRA could not force newspaper to rehire employees seeking to influence editorial decisions);

these laws facially regulate conduct, they regulated newspapers' editorial judgment as applied.

The same logic applies to laws that compel speech. The public accommodation law in *Hurley* was a "law of general applicability [that] banned discrimination in public accommodations based on, inter alia, sexual orientation." *Claybrooks*, 898 F. Supp. 2d at 994. In other words, this law facially restricted "discrimination," regulated "business services," and required "equal treatment." Yet the Supreme Court invalidated it anyway when it compelled access to something inherently expressive — a parade. Applying that law to the parade did not magically strip the parade of its expressive character. In the same way, Madison and Wisconsin do not magically transform photographs and words into conduct by applying their public accommodation laws. Amy's photographs and words remain speech, and the Madison and Wisconsin laws regulate and compel this speech because they force Amy to create and publish words and photographs.

A few examples bolster this point. Imagine if Madison banned businesses from providing all weddings services. That law facially and generally regulates conduct. Could a for-profit wedding photographer enjoin that law on free speech grounds for outlawing his photography of and blogging about same-sex weddings? Of course. *Cf. Anderson*, 621 F.3d at 1057 (enjoining zoning law that prohibited tattoo parlors). Or imagine a newspaper that sold editorial space to the public and a law (like Madison's) that prohibited businesses from discriminating based on political beliefs. That law facially regulates conduct and requires equal treatment. Could that law compel the newspaper to print a customer's editorial supporting Donald Trump if the newspaper published an editorial supporting Hillary Clinton? Hardly. *Cf. Groswirt*, 238 F.3d at *1 (holding that newspaper had First Amendment right to not publish article because of author's "'racial; heritage; political; religious;' status"); *Passaic Daily News v. N.L.R.B.*, 736 F.2d 1543, 1556

Johari v. Ohio State Lantern, 76 F.3d 379, *1 (6th Cir. 1996) (holding that federal anti-discrimination law could not force newspaper to publish letters to editor); *Newspaper Guild v. NLRB*, 636 F.2d 550, 560-61 (D.C. Cir. 1980) (noting that NLRA collective bargaining provision could not be applied to affect editorial control of newspaper); *Treanor v. Washington Post Co.*, 826 F. Supp. 568, 569 (D.D.C. 1993) (refusing to interpret ADA to force newspaper to publish disabled person's book review because contrary interpretation "requiring newspaper editors to publish certain articles or reviews would likely be inconsistent with the First Amendment.").

(D.C. Cir. 1984) (holding that NLRA could not be applied to force newspaper to print journalist's editorial). In both examples, the government applied laws that facially regulated conduct in a way that regulates speech. The same is true of Madison's and Wisconsin's laws because they compel Amy to create photographs and words

g. The public accommodation laws cannot compel Amy to speak regardless who third parties think is speaking or what third parties think is being affirmed.

Unable to transform speech into conduct, bureaucrats sometimes invoke misperceptions to justify compelling speech. This justification takes two forms: 1) laws can compel someone to speak if third parties think someone else is speaking (misattribution) and 2) laws can compel someone to speak if third parties think the speaker never endorses the message spoken (misaffirmation).[23] But these justifications cannot factually apply to Amy and are legally irrelevant as well.

Take misattribution first. Third parties attribute speech to its creator, not its commissioner. No one attributes the Sistine Chapel to Pope Julius II. They attribute it to Michelangelo. Third parties have even more reason to think Amy created and speaks through her photographs and internet posts because they appear on her Studio's internet sites. Compl., ¶ 57. All these sites contain a self-identifying URL as well as the Studio's logo and name. *Id*. at ¶¶ 39-43, 62-64. Observers would surely associate content on the Amy Lynn Photography Studio's own sites with Amy. Indeed, if another photographer's website used Amy's logo, name, and URL, that would violate trademark law precisely because it would confuse the public into associating that website with Amy's Studio. *See GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1205 (9th Cir. 2000) (explaining that trademark infringement claims largely depend on whether the similarity of marks is likely to confuse customers about the source of the products).

But even more important, free speech protections do not turn on accurate attribution. While misattribution may create a free speech violation, it is not necessary for one. For example, artists

[23] *Elane*, 309 P.3d at 68-70.

and writers deserve protection when they speak anonymously through a pseudonym even though no one knows the speakers' identity. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341 (1995) (concluding that First Amendment protects anonymous speech). Tattoo artists also deserve protection even though third parties would associate tattoos with their wearers, not their creators. As the Eleventh Circuit nicely put it, "[t]he First Amendment protects the artist who paints a piece just as surely as it protects the gallery owner who displays it, the buyer who purchases it, and the people who view it." *Buehrle*, 813 F.3d at 977. Even copyright law protects authors who have their works passed off as belonging to someone else. 17 U.S.C. §§ 102, 106 (affording copyright protection to "original works of authorship" including "literary works" and "pictorial...works"). All this shows that authors retain rights in their expressive creations regardless who observers identity those creations with.

This same logic applies to compelled speech. The government could not force tattoo artists to tattoo an offensive message on someone even though third parties would associate the tattoo with its wearer. Likewise, the government could not compel someone to write and publish a book so long as the government listed itself as the author on the book's cover. No matter who third parties perceive to be speaking, the actual author is still speaking, still knows she is speaking, and still knows she is being compelled to speak. The harm on the individual's freedom of mind remains regardless what others think. *See Tornillo*, 418 U.S. at 244 (protecting newspaper from publishing editorial written by and attributed to someone else).

This same logic applies whether third parties think a speaker affirms a particular message or not. First off, observers would think Amy celebrated or at least agreed with an event she photographed, posted about on her own internet sites, and spoke approvingly of. If Amy posted photographs of same-sex weddings on her internet sites and wrote "look at John and Jim's amazing love for each other," readers would naturally think Amy endorsed or at least did not oppose same-sex marriage.

But once again, free speech does not turn on what observers think a speaker agrees with. The New York Times, for example, has the right to publish an article written by and attributed to

someone else. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 257-58 (1964) (protecting New York Times's right to publish paid advertisement criticizing civil rights violations by Alabama officials). Readers would not think the Times automatically agreed with the advertisement. But actual or perceived agreement does not a violation make.

The same holds for compelled speech. The U.S. Supreme Court has repeatedly found compelled speech regardless of what observers think a speaker affirms. Thus, the state cannot force newspapers to print someone else's editorial, whether readers think newspapers agree with that editorial or not. *Tornillo*, 418 U.S. at 243-46. The state cannot force companies to put someone else's statement in their newsletter, whether readers think those companies agree with that statement or not. *Pacific Gas*, 475 U.S. at 15 n.11. And the state cannot force individuals to display the state's motto on their car, whether observers think the car owner agrees with that motto or not. *See Wooley*, 430 U.S. at 721 (Rehnquist, J., dissenting) (criticizing majority because car owner never put "in the position of either apparently to, or actually 'asserting as true" the message" objected to). As these cases show, the right to not speak does not turn on what "a bystander would think.…" *Frudden v. Pilling*, 742 F.3d 1199, 1204-05 (9th Cir. 2014) (citations and quotations omitted) (rejecting argument that bystanders had to think speaker affirmed message for compelled speech claim).

This same point explains why disclaimers do not remedy compelled speech problems. While Amy could post a disclaimer on her Studio's website saying she does not speak through or agree with her own words and photographs, Amy should not be forced to respond to objectionable speech by posting a disclaimer. "That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster." *Pac. Gas*, 475 U.S. at 16.

More fundamentally, a disclaimer never alleviates compelled speech problems. The "disclaimer" that "avoid[s] giving readers [a] mistaken impression" about who speaks did not remedy the problem in *Pacific Gas*, 475 U.S. at 15 n.11. And "a conspicuous bumper sticker" disclaiming agreement with the license plate motto would not solve the problem in *Wooley*. 430 U.S. at 722 (Rehnquist, J., dissenting). These disclaimers did not work because they cannot

remedy the attack on the speaker's freedom of mind. Regardless whom observers think is speaking and what they think a speaker affirms, the Madison and Wisconsin laws still enlist Amy to create and publish a message she does not want to. That alone creates a compelled speech violation. And that means Madison and Wisconsin have compelled Amy to speak.

h. The public accommodation laws create a limitless, dangerous principle by forcing Amy to speak.

Setting aside all the case law, public accommodation laws should not be allowed to compel commissioned speakers like Amy to speak as a matter of policy. If Madison and Wisconsin can compel Amy to speak, they could compel any objectionable message by any for-profit speaker regardless of that speaker's viewpoint. That power imperils too much speech to go unchecked.

The breadth of this power begins with the nature of public accommodation laws themselves. These laws are not talismanic. They have greatly expanded over time, enlarging the definition of public accommodation and adding more protected classifications. *Dale*, 530 U.S. at 656-57 and n.2 (discussing this expansion). Because of this expansion, "the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased." *Id.* at 657.

The Madison and Wisconsin laws exemplify this trend. Not only have they expanded over time, they differ greatly when compared to each other and to other state laws. The majority of states do not have public accommodation laws that include sexual orientation, and no state public accommodation law includes political beliefs, physical appearance, genetic identity, source of income, or arrest record like Madison's law does.[24] This discrepancy shows that governments disagree about what classifications deserve protected status and that governments can extend protected status to anything they wish. Nothing limits their discretion. A government could, for example, make political beliefs contained in the Republican Party's platform a protected class,

[24] Lucien J. Dhooge, *Public Accommodation Statutes, Sexual Orientation and Religious Liberty: Free Access or Free Exercise?*, 27 U. Fla. J.L. & Pub. Pol'y 1, 6-33 (2016) (surveying state public accommodation laws). *Accord* http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx (last visited March 3, 2017).

thereby forcing speakers to promote just Republican political beliefs. But we should not permit such favoritism just because the government happens to put it in a statute.

Even if we take the Madison and Wisconsin laws as set in stone, these laws can still compel speech on many important topics. For example, if these laws can compel Amy to create photographs and words promoting same-sex marriage, then these laws can also compel

- gay musicians to play piano at a Westboro Baptist Church fundraiser;
- atheist singers to sing hymns at a Catholic Easter service;
- Muslim printers to print a synagogue's pro-Israel pamphlets; or
- lesbian web designers to create a Mormon group's website criticizing same-sex marriage.

Likewise, if these laws can compel Amy to create photographs and words promoting pro-abortion groups, they also can compel

- pacifist sign-makers to design signs defending the war in Afghanistan;
- pro-abortion photographers to photograph for a pro-life crisis pregnancy center[25];
- pro-gun-control publishers to print the NRA's advocacy literature;
- pro-LGBT actors to appear in a television advertisement opposing same-sex marriage[26];
- Democratic Rockettes to dance at a Republican politician's campaign rally[27];
- Democratic cartoonists to create cartoons promoting Scott Walker[28]; or
- pro-LGBT writers to write political advertisements opposing the Equality Act.[29]

As these hypotheticals show, the power to compel speech cannot be limited to the power to compel messages we agree with or do not care about. This power means the bureaucrats who happen to gain power get to decide what *every* for-profit speaker must say. And in that situation, everyone eventually loses, both the speakers who no longer have the freedom to control their message and the public who no longer receives diverse, authentic viewpoints.

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[25] Compl., ¶¶ 384-88; App. 213-16.
[26] Compl., ¶¶ 389-92; App. 217-18, 222-23.
[27] http://www.marieclaire.com/politics/a24421/rockette-donald-trump-inauguration/ (last visited March 3, 2017).
[28] Compl., ¶¶ 393-97; App. 225-30.
[29] Compl., ¶¶ 389-92; App. 217-20.

In contrast to the unlimited power Madison and Wisconsin seek, Amy proposes a narrow and administrable principle: governments cannot compel for-profit speakers to create and publish objectionable speech. This principle is narrow because it only protects businesses that create speech. Very few do that. Restaurants, clothing makers, and hotel owners, for example, do not. Likewise, the right to not speak only protects expressive businesses *when they speak*. Because photographers speak when they photograph and not when they hire, the government can compel how photographers hire but not how, when, or if they photograph.

In this respect, Amy merely asks this Court to apply traditional free speech principles to for-profit businesses as courts have always done. And courts have done this without creating widespread problems. Courts have frequently distinguished speech from conduct before and can continue to do so. While this distinction may prove difficult at times, that difficulty does not justify giving the government a blank check to compel speech anytime it wishes. As the Second Circuit has noted, "[c]ourts must determine what constitutes expression within the ambit of the First Amendment and what does not. This surely will prove difficult at times, but that difficulty does not warrant placing all visual expression in limbo outside the reach of the First Amendment's protective arm. Courts have struggled with such issues in the past; that is not to say that decisions are impossible." *Bery*, 97 F.3d at 696.

More importantly, no matter how difficult the fringe case is, this case is not it. No one denies that words and photographs convey messages. So when the Madison and Wisconsin laws compel Amy to create and publish words and photographs, those laws necessarily compel speech. No entity should have this dangerous power, Madison and Wisconsin included.

4. The public accommodation laws deter Amy from creating and publishing her desired words and photographs.

Besides compelling Amy to speak objectionable messages, the Madison and Wisconsin laws also deter her from speaking only her preferred messages. This result creates a separate chilling injury on Amy's right to speak.

As noted, Amy has the right to create and publish words and photographs she wants,

including words and photographs depicting and promoting biblical marriage and pro-life groups. *See supra* § I.A.1. This right extends to Amy's ability to create for, and disseminate to, the world, but also to her clients and their friends. Free speech protections do not depend on audience size, as the Wisconsin Supreme Court has acknowledged. *Baumann*, 162 Wis. 2d at 671 ("Surely, freedom of speech or the right thereto is not to be evaluated by the number of listeners or on their receptivity to the message.").

The Madison and Wisconsin laws deter this right, however, by conditioning the creation and publication of Amy's desired speech on creating and publishing speech she objects to. While these laws may not facially prohibit Amy from creating and publishing words and photographs of biblical marriages and pro-life groups, they require Amy to create and publish speech for same-sex weddings and pro-life groups if she does so for one-man/one-woman weddings and pro-abortion groups. This structure — if you say X you must say Y — deters Amy from speaking what she wants as a means to avoid what she does not want.

Courts recognize this burden in many contexts. For example, courts have invalidated laws requiring speakers to disclose their identity. Although these laws do not prohibit any particular message, they still burden and chill free speech by requiring speakers to say what they do not want to say (their identity). This requirement in turn deters speakers from saying anything at all. *See Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 197-200 (1999) (invalidating law requiring petition circulators to wear identification badges because it deterred participation in the petitioning process); *White v. Baker*, 696 F. Supp. 2d 1289, 1304 (N.D. Ga. 2010) (enjoining law requiring criminals to disclose self-identifying internet information even though "there is no speech restriction at all. Plaintiff can communicate today, in person, over the phone, on the internet in email, and otherwise as he sees fit.").

Likewise, courts have invalidated laws requiring groups to disclose their membership lists to the government or the public. *NAACP v. Alabama*, 357 U.S. 449, 463 (1958). Once again, these laws do not prohibit groups from associating per se. These laws merely require groups to disclose information if they do associate. But in so doing, these laws create a "deterrent effect"

by conditioning the right to associate on speaking information the groups did not want to say. *Id* at 463. That deterrent effect violated the First Amendment. *Id*.

The Madison and Wisconsin laws produce a similar deterrent effect. By requiring Amy to say X if she says Y, the laws have deterred Amy from saying Y at all as a means to avoid saying X. *See Tornillo*, 418 U.S. at 257 (explaining that compelled access requirements can deter people from speaking). And these laws have been successful. Amy has stopped all future wedding and organizational photography and related internet posts to avoid creating photographs and words she objects to. Compl., ¶¶ 341-42, 355-56. In effect then, the Madison and Wisconsin laws have conditioned the right to create and publish wedding and organizational photographs on agreement with same-sex marriage and abortion. That requirement has in turn driven Amy from the market, deterred her from speaking her desired message, and deprived the public of Amy's voice. And this result burdens Amy's speech just as much as Madison and Wisconsin banning her speech outright. Either path gets us to the same place. Amy stays silent.

B. The public accommodation laws must satisfy strict scrutiny because they burden Amy's right to speak and to not speak in accordance with her conscience.

The Wisconsin Conscience Clause says "[t]he right of every person to worship Almighty God according to the dictates of conscience shall never be infringed…nor shall any control of, or interference with, the rights of conscience be permitted…." Wisc. Const. Art. I, § 18. This Clause "uses the strongest possible language in the protection of this right [of conscience].…It is difficult to conceive of language being stronger than this." *Coulee Catholic Sch. v. LIRC*, 2009 WI 88, ¶ 59, 320 Wis. 2d 275, 311-12, 768 N.W.2d 868, 886 (2009). By using such language, the Wisconsin Conscience Clause "provid[es] expansive protections for religious liberty" that exceed even the First Amendment. *Id*.

To safeguard these strong protections, Wisconsin courts apply a four part test for Conscience claims where challengers must prove (1) a sincerely held religious belief, (2) that is burdened by application of the state law at issue, and then the government must prove (3) that the law is based

on a compelling state interest, (4) which cannot be served by a less restrictive alternative. *State v. Miller*, 202 Wis. 2d 56, 66, 549 N.W.2d 235, 240 (1996). Amy can satisfy this test and trigger strict scrutiny because the Madison and Wisconsin laws burden Amy's sincere religious desire to only create photographs and words consistent with her beliefs on marriage and abortion.[30]

In terms of sincerity, Amy believes that God called and equipped her to create and publish photographs and words promoting beauty and truth. Compl., ¶ 79. In fact, Amy views her Studio as her public ministry, her megaphone to proclaim God's beauty and truth to others. *Id*. at ¶ 86. As part of this duty, Amy believes she must proclaim truth and beauty about life and marriage. *Id*. at ¶¶ 205-08, 212-17. Not only do these issues hold an important place in Amy's religion, they are currently under attack from cultural movements favoring abortion and same-sex message. *Id*. To counteract these trends and to speak the truth as she understands it, Amy feels compelled to proclaim her beliefs in biblical marriage and in the sanctity of human life. *Id*. And as a corollary, Amy cannot promote messages that contradict her beliefs in life or in marriage. *Id*. at ¶¶ 222-27. Amy would sin and violate her religious beliefs if she had to beautify or promote abortion or same-sex marriage, whether by photographing same-sex weddings, by writing words promoting same-sex marriage, or by photographing or writing for groups that promote same-sex marriage or abortion. *Id*. Madison and Wisconsin have no reason to doubt the sincerity of these beliefs.

Moving from sincerity to burden, Wisconsin courts look to pre-1990 U.S. Supreme cases to assess burden. *Miller*, 202 Wis. 2d at 66-69. And under those cases, a burden exists whenever the government places "substantial pressure on an adherent to modify his behavior and violate his beliefs." *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981). This burden can either be direct (the state forbids a religiously motivated act or compels a religiously forbidden act) or indirect ("the state conditions receipt of an important benefit upon conduct proscribed by a religious

[30] While Amy has the right to create words and photographs in accordance with her conscience, so does the Studio. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2769-73 (2014) (relying on pre-1990 free exercise cases to hold that for-profit companies can exercise religion).

faith, or where it denies such a benefit because of conduct mandated by religious belief."). *Thomas*, 450 U.S. at 717–18. *See also Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (finding burden when law required Amish to send children to public school); *Miller*, 202 Wis. 2d at 70 (finding burden when law required Amish to display a slow-moving vehicle emblem on their horse-drawn buggies). But either way, courts cannot tell believers whether they "correctly perceived the commands of their common faith." *Thomas*, 450 U.S. at 716. The burden inquiry, in other words, assesses the "sever[ity]" of the "consequences" a law imposes on the adherent's beliefs as the adherent defines those beliefs. *Burwell*, 134 S. Ct. at 2775.

Understood this way, the burden on Amy is both direct and severe. The Madison and Wisconsin laws forbid Amy from photographing and posting statements motivated by her religious beliefs and compel her to photograph and post statements forbidden by her religious beliefs. And if Amy violates these laws, she will be enjoined, pay fines up to $10,000, and pay untold sums in damages and attorneys' fees. Compl., ¶¶ 281-85, 318-19, 322-25. Courts have found a burden on religion for far, far less. *See Yoder*, 406 U.S. at 208 (finding burden when law imposed $5 fine).

C. The public accommodation laws fail strict scrutiny as applied to Amy.

Because the Madison and Wisconsin laws infringe fundamental rights, these laws lose their "normal presumption of constitutionality" and must satisfy strict scrutiny. *Buse v. Smith*, 74 Wis. 2d 550, 579–80, 247 N.W.2d 141, 155 (1976). But "it is the rare case in which we have held that a law survives strict scrutiny." *Oatman*, 2015 WI App 76, ¶ 12 (citation omitted). This rarity makes sense because strict scrutiny places "the burden" on Madison and Wisconsin to show that their regulations serve a compelling state interest and do so in a narrowly drawn way. *Baron*, 2009 WI 58, ¶ 45. Madison and Wisconsin can do neither here.

As for compelling interest, Madison and Wisconsin have no interest in silencing or compelling speech. While the Madison and Wisconsin laws may serve a government interest by preventing discrimination in the abstract, abstract interests do not cut it for a compelling interest.

To meet the standard, laws must serve a specific interest important enough to be compelling, this interest must address a real problem, and restricting and compelling Amy's speech must improve this problem. *See Brown v. Entm't Ass'n* 564 U.S. 786, 799 (2011) (requiring "an 'actual problem' in need of solving…and the curtailment of free speech must be actually necessary to the solution…"); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (explaining that *Yoder* and *Sherbert* "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants."). In other words, the question is not whether Madison and Wisconsin have a compelling interest to stop discrimination. The question is whether silencing and compelling *just* Amy is necessary to stop actual, ongoing, and widespread discrimination. *See Yoder*, 406 U.S. at 221 (explaining that strict scrutiny requires consideration of whether "impediment to those objectives that would flow from recognizing the claimed…exemption.").

The answer is no because Amy does not discriminate. She serves all people regardless of their sexual orientation or political beliefs. Compl., ¶¶ 228-29. Amy just cannot create and convey messages that violate her beliefs. *See Hurley*, 515 U.S. at 572-74 (distinguishing excluding "homosexuals as such" from promoting message of LGBT "social acceptance"); *World Peace Movement v. Newspaper Agency Corp.*, 879 P.2d 253, 258 (Utah 1994) (holding that newspaper did not discriminate and violate public accommodation law by declining to print religious advertisement because "it was the message itself that [the newspaper] rejected, not its proponents.").

So when Madison and Wisconsin prevent Amy from posting her desired website statement because of its content, that censorship achieves only one thing: banning content for fear people will find it offensive. But that's never a compelling interest. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Likewise, when Madison and Wisconsin apply their laws to force

Amy to create photographs and words with certain content, they compel speech without stopping any discrimination. And public accommodation laws do not serve legitimate, much less compelling, interests when they compel speech, as both *Hurley* and *Dale* held. 515 U.S. at 579; 530 U.S. at 659. Indeed, as *Hurley* noted, even if the point of public accommodation laws "is to produce a society free of the corresponding biases," that is "a decidedly fatal objective" when it compels speech. 515 U.S. 578-79. *See also Boos v. Barry*, 485 U.S. 312, 320-22 (1988) (holding that government's attempt to shield group from speech that offends their dignity did not serve compelling interest). Good goals do not justify unconstitutional results.

Another reason the Madison and Wisconsin laws do not serve even a legitimate, let alone a compelling, interest when applied to Amy is that people can easily obtain visual storytelling services elsewhere. Many other photographers photograph and blog about same-sex marriage and abortion. In Madison alone, at least 27 photography businesses photograph or blog for same-sex weddings and in Wisconsin, at least 214 businesses do so. Compl., ¶¶ 366-68; App. 101-84. With all of these alternatives, no one is missing out. In fact, Madison and Wisconsin cannot document a single instance in the past ten years of a writer, photographer, or any other expressive business declining to create speech because of someone's sexual orientation or political beliefs. *Id*. at ¶¶ 297-99, 334-35. This lack of evidence shows that Madison and Wisconsin cannot carry their burden to prove that a problem even exists much less prove a need to harm Amy to resolve that non-existent problem.

Besides not serving a compelling interest, the Madison and Wisconsin laws also lack sufficient tailoring. To be narrowly tailored, these laws must use "the least restrictive means for" furthering an alleged interest. *Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund*, 2005 WI 125, ¶ 61, 284 Wis. 2d 573, 606, 701 N.W.2d 440, 456. But Madison and Wisconsin can achieve any interest in many less restrictive ways.

For one, Madison and Wisconsin could not apply their laws to expressive businesses when they engage in protected speech. This will not allow discrimination to flourish. As *Hurley* noted, Massachusetts's public accommodation law could stop discrimination without restricting speech.

515 U.S. at 578-81. And if that public accommodation law can stop discrimination without restricting speech, so can Madison's and Wisconsin's.

Along similar lines, the Madison and Wisconsin laws could mimic Title VII and add a bona fide occupational exception for classifications that are "reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). Because expressive businesses operate in a line of work that requires them to make content choices about what goes in their speech, these businesses should be allowed to make content classifications to control their speech in ways that other businesses do not and cannot. An occupational exception limited to expressive businesses acknowledges this difference, protects free speech, and prevents other businesses from making any unjustified distinctions. *See* 29 C.F.R. § 1604.2 (interpreting Title VII bona fide occupational qualification to allow production studios to make sex classifications when "necessary for the purpose of authenticity or genuineness…e.g., [selecting] an actor or actress."). In fact, Madison and Wisconsin already have occupational exemptions in their employment and public accommodation laws.[31] There is no reason why they cannot extend these exemptions to cover content decisions that Amy must make.

As another alternative, Madison and Wisconsin could track the federal public accommodations law and narrow its scope to businesses like restaurants, hotels, and stadiums that do not create or convey speech. 42 U.S.C. § 2000a. By limiting itself this way, the federal law ensures that everyone has access to vital services without applying to expressive businesses. Instead of taking this path though, Madison and Wisconsin have chosen to create some of the

[31] *See* Madison Code § 39.03(2) (exempting "requirement of cleanliness, uniforms, or prescribed attire" from rule against physical appearance discrimination when applied "to employees in a business establishment for a reasonable business purpose"); Madison Code § 39.03(8)(e) (exempting advertisement preferences based on religion, sex, age, handicap, arrest or conviction record, and national origin when it "is a bona fide occupational qualification for employment…"); Madison Code § 39.03(8)(i) (exempting employment decisions based on sex, age, or national origin when it is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."); Wis. Stat. § 111.36(2) (exempting employment decision based on sex "if the essence of the employer's business operation would be undermined if employees were not hired exclusively from one sex.").

broadest public accommodation laws in the country and apply them to protected speech.[32] This breadth illustrates how Madison and Wisconsin have over-extended their laws without considering narrower laws that work elsewhere.

Finally, Madison and Wisconsin could ensure the public can obtain photographs by publishing a list of photographers who will create any speech which supports the government's view. While this type of informational literature does not coerce anyone, it could still achieve the government's interests. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (criticizing a ban on displaying liquor prices because "educational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective."). But Madison and Wisconsin have not tried this alternative or shown its inadequacies. They have instead just plowed ahead with laws imposing the most severe burdens conceivable on speech. There are better options out there. By ignoring those options, Madison and Wisconsin cannot justify their decision to restrict and compel Amy's speech.

II. Amy will suffer irreparable harm without an injunction protecting her constitutional rights.

An irreparable harm is a harm "not adequately compensable in damages." *Pure Milk*, 90 Wis. 2d at 800. Amy faces such a harm with the loss of its constitutional rights. No amount of money can compensate for this loss. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013) (noting that violation of Free Exercise rights constitutes irreparable injury).

III. The balance of hardships favors protecting Amy's constitutional rights.

The balance of hardships favors an injunction because the requested injunction will protect constitutional rights. Without an injunction, Amy suffers the irreparable harm of losing her constitutional rights. On the flip side, Madison and Wisconsin suffer nothing from an injunction

[32] *See supra* footnote 24.

requiring constitutional compliance. "[T]here can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute." *Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004). As explained above, Madison and Wisconsin can accomplish legitimate goals without having to violate constitutional rights. The limited scope of the requested injunction bolsters this point. This injunction does not facially enjoin any law or prevent Madison or Wisconsin from enforcing their laws in countless justifiable situations. Amy merely seeks as-applied relief to protect her rights. This narrow scope means Madison and Wisconsin have no reason to fear an injunction.

Conclusion

With this motion, Amy merely seeks what every speaker deserves: the right to control what her words and photographs say. Because the Madison and Wisconsin public accommodation laws usurp this right and currently chill Amy's desired speech, Amy asks this Court to grant her temporary injunction motion to protect her constitutional freedoms.

Respectfully submitted this 7th day of March, 2017.

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**Pro Hac Vice Applications Forthcoming*

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Certificate of Service

I hereby certify that on March 7, 2017, I electronically filed the foregoing paper with the Clerk of Court; and I hereby certify that the foregoing paper will be served via private process server with the Summons to the following participants:

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