No. 18-321

IN THE

SUPREME COURT OF THE UNITED STATES

APRIL 2018 TERM

MAMA MYRA'S BAKERY, INC.,

Petitioner,

v.

THE STATE OF TOUROVIA, on Behalf of Hank and Cody Barber,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF TOUROVIA

BRIEF FOR THE RESPONDENT

Team 14
Counsel for Respondent
March 4, 2018

QUESTIONS PRESENTED

I. Does Tourovia's Civil Rights Act § 22.5(b) violate the Bakery's First Amendment right to free speech when the conduct at issue is only providing a good, and the law only regulates who the business must provide goods to and not what opinion the business must hold?

II. Does Tourovia's Civil Rights Act § 22.5(b) violate the Bakery's First Amendment right to free exercise of religion when it is a neutral law of general applicability based on its impartial wording and generous exemption for religious entities, in addition to the fact that the Act passes rational basis review due to the government's legitimate interest in eradicating discrimination based on sexual orientation?

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Statement of the Facts

The State of Tourovia enacted the Civil Rights Act § 22.5(b) ("Act") to protect its citizens from discrimination based on their sexual orientation. Mama Myra's Bakery ("Bakery") now seeks to invalidate this protection as a violation of its constitutional rights.

In 2012, Hank and Cody Barber ("Barbers") married in P-Town, Massachusetts, where same-sex marriage was legal. R. at 2. While same-sex marriage was not legal in Tourovia at this time, the Act disallowed places of public accommodation to discriminate on the basis of sexual orientation.[1] R. at 3. In relevant part, it states:

> It is unlawful and an act of discrimination for any person or persons, directly or indirectly, to refuse, withhold, or deny an individual or group of individuals, the full and equal enjoyment of the goods, services, privileges, facilities, advantages, or accommodations of any place of public accommodation because of their sexual orientation.

R. at 3. The Act defines "sexual orientation" as "an individual's orientation toward hetero, homo, or bi sexuality, or transgender status, or another individual's perception thereof." *Id*. The Act also generously contains an exemption for certain public accommodations that are "principally used for religious purposes." R. at 10.

Because many family members were unable to attend their wedding in Massachusetts, the Barbers decided to have a family party in Tourovia to celebrate. R. at 2. When planning for their party, the Barbers asked the Bakery to create the cake for their special day. *Id*. The Barbers requested a custom made wedding cake with a figure of the couple hand-in-hand at the top of the cake. *Id*. The Bakery bluntly refused to sell such a cake to the Barbers, saying to do so would violate the longstanding religious belief of both the owners and employees that same-sex marriages violate the Bible. R. at 2–3. Rather than agreeing to sell the Barbers their wedding cake, the Bakery retorted by offering other baked goods as consolation. R. at 2.

[1] Same-sex marriage is now legal and constitutionally protected in Tourovia. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that same-sex marriage is a constitutional right under the Fourteenth Amendment).

Procedural History

Due to the denial of service based on their sexual orientation, the Barbers filed a complaint alleging that the Bakery violated Tourovia's Civil Rights Act § 22.5(b). R. at 3. Holding that the Bakery violated the Act due to the lack of distinction between discrimination based on a person's status and discrimination based on conduct related to sexual orientation, the district court entered judgment for the Barbers. R. at 5.

The Bakery appealed the district court's decision to the Appellate Division of the Supreme Court of Tourovia, which affirmed the judgment. R. at 6, 11. On the first issue, the Appellate Division held that baking a cake was not expressive conduct, indicating that a reasonable person would not understand the Bakery's compliance with the Act to be reflective of the Bakery's own ideologies. R. at 7–9. On the second issue, the Appellate Division held that the Act was a neutral law of generable applicability given its inclusive regulation and appropriate religious exemption and, thus, easily passed rational basis review. R. at 9–11.

The Bakery appealed the Appellate Division's decision to the Supreme Court of Tourovia, which affirmed both lower court decisions without issuing a memorandum opinion. R. at 14–15. The Bakery then filed a timely petition for a writ of certiorari to this Court, which was granted. R. at 16.

SUMMARY OF THE ARGUMENT

This case cannot transform into free speech and free exercise violations simply because religion motivates the discrimination at issue. As such, religion cannot be used as a license to thwart antidiscrimination laws enacted to protect against societal evils. The Supreme Court of Tourovia properly affirmed the lowers courts' decisions and validated the Act as constitutional for two reasons: first, the Act adheres to the Free Speech Clause; and second, the Act adheres to the Free Exercise Clause.

First, the Supreme Court of Tourovia correctly held that the Act complies with the Free Speech Clause of the First Amendment. The action of baking a cake is not expressive speech

protected by the First Amendment. Even if there was an intent to convey the message of approving the marriage through baking the cake, it is unlikely that this message would be understood by those who viewed.

Alternatively, because the Act was not intended to suppress the expression of baking a cake, the Act receives and passes intermediate scrutiny as established in *United States v. O'Brien*. The Act was not intended to suppress this expression because it applies generally to all places of public accommodation that provide any good. Additionally, it passes intermediate scrutiny because this restriction falls within the State's police power. Also, it furthers the important government interest of preventing discrimination. Lastly, it is no greater than is necessary because it does not require businesses to hold any particular view and provides an exception to public accommodations that are principally used for religious purposes.

Further, the Act does not compel speech because the Act does not require the Bakery to speak, but instead proscribes conduct. The Act only requires the Bakery to serve same-sex couples to the extent that the Bakery already serves other customers. The Act in no way requires the Bakery to hold or express any particular view. Consequently, the Bakery is free to express its opinion regarding same-sex marriage in any way it sees fit. It is only prohibited from discriminating against a certain set of customers.

Second, the Supreme Court of Tourovia properly affirmed the lower courts' decisions, holding that the Act adheres to the Free Exercise Clause of the First Amendment. Based on the guiding standard discussed in *Employment Division v. Smith*, the Act is a neutral law of general applicability. Looking to the neutrality standard, the Act is both facially neutral and neutral in effect. Far from embracing connotative wording that could indicate animus towards any religion, the Act inclusively applies to all places of public accommodation. As for its effect, the Act does

not commit any "religious gerrymandering" and simply bars all discrimination regardless of basis, much like the myriad of other antidiscrimination laws that have been upheld as neutral. As for its general applicability, the Act offers a generous exemption to religious entities "principally used for religious purposes." Far from revealing any intent to target religious entities, this exemption shows that the Legislature seeks to comport with free exercise rights by decreasing legal burdens on religion. However, to expand exemptions to encompass the Bakery's request would inherently undermine the purpose of the law, while opening the door to similar exemptions for those with sincere religious objections to marriages between people of different races, ethnicities, or faiths.

Furthermore, the Act passes rational basis review as it is legitimately related to the governmental interest of eradicating discrimination. Courts have consistently held that maintaining equal access to public accommodations for all is a notable governmental interest because such discrimination subverts the very dignity that each deserves based on our Constitution. While the Bakery may argue that a hybrid rights claim exists in an effort to subject the Act to strict scrutiny, this Court should reject such an allegation, as the hybrid rights doctrine has consistently come under fire as untenable, controversial, illogical, and mere dicta. However, even if this Court were to subject the Act to strict scrutiny due to a hybrids rights claim or because the Act fails the *Smith* test, it would pass. In application of strict scrutiny, the Act advances the compelling government interest that antidiscrimination laws in general address: eliminating discrimination. As for its narrow tailoring, which courts are less apt to focus on, the Act's provisions are no greater than necessary to achieve its objectives. Therefore, this Court should affirm the ruling of the Supreme Court of Tourovia.

ARGUMENT

It is entirely contradictory to allow same-sex couples to marry, while simultaneously denying them the basic goods necessary for the celebration of their wedding. As a pluralistic, diverse society, it is unreasonable for a public business to hold itself out as such and then refuse to serve a part of the public. To allow the Bakery to refuse service to this protected class would hamper more than fifty years of jurisprudence affording protection to minority groups.

Here, the Supreme Court of Tourovia correctly affirmed the decisions of both the District Court of Tourovia and the Appellate Division for the Supreme Court of Tourovia for two reasons.[2] First, the Act is constitutional because baking a cake is not protected speech under the Free Speech Clause, and the Act does not compel the Bakery to speak. Second, because the Act is a neutral law of general applicability based on its text and inclusive application, it does not violate the Free Exercise Clause. Additionally, the Act passes rational basis review because it furthers the legitimate governmental interest of eradicating discrimination.

I. THE SUPREME COURT OF TOUROVIA PROPERLY UPHELD THE CIVIL RIGHTS ACT § 22.5(B) BECAUSE THE ACT ADHERES TO THE FIRST AMENDMENT RIGHT OF FREE SPEECH.

Cakes are meant to be seen, not heard. The right to refuse to bake a cake for someone with opposing views is not what the Founders intended to protect when they drafted the Free Speech Clause. On the contrary, the Free Speech Clause was intended to protect minority views, such as those held by the Barbers. If Tourovia's Civil Rights Act § 22.5(b) is found to be unconstitutional, and a wedding cake is deemed to be expressive conduct, it will not be long before photos, flowers, food, decorations, and other wedding paraphernalia are deemed

[2] Because this case challenges the constitutional validity of a state statute, this Court has jurisdiction under 28 U.S.C. § 1257 (1988). Additionally, the Supreme Court of Tourovia's judgment, holding that the Civil Rights Act § 22.5(b) was constitutional, presents this Court with purely legal issues for review. Because issues of constitutional interpretation are questions of law, the standard of review is *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 559 (1988).

expressive conduct as well. This will create an environment in which businesses will be allowed to discriminate against any individual because of their constitutionally protected sexual orientation, as long as it is presented under the banner of "free speech."

The Supreme Court of Tourovia correctly affirmed the decisions of both the District Court of Tourovia and the Appellate Division for the Supreme Court of Tourovia for two reasons. First, the Act is constitutional because baking a cake is not expressive conduct under the Free Speech Clause, and, alternatively, the Act passes intermediate scrutiny. Second, the Act is constitutional because it does not compel speech.

A. The Lower Court Properly Held That The Act Complies With This Court's Expressive Speech Jurisprudence Because It Is Not Likely That Others Would Understand The Message The Bakery Was Intending To Convey.

The Free Speech clause, which was applied to the states through the Fourteenth Amendment, *Gitlow v. New York*, 268 U.S. 652, 666 (1925), prohibits "abridging the freedom of speech." U.S. Const. amend. I. This Court has expressly rejected the idea that all conduct is protected; however, there are types of conduct that may be "sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Even though "its protection does not end at the spoken word," the Free Speech Clause forbids the abridgment of literal speech. *Id.* This Court has established a three-part test to determine if conduct warrants free speech protections and if the government is permitted to limit that conduct. *Id.* at 403. First, the conduct must be sufficiently expressive for it to be deemed expressive conduct. *Id.* Next, if the conduct is expressive, a court must determine if the law was intend to suppress the expressive conduct. *Id.* Finally, if the law is not intended to suppress the expressive conduct, the State need only show that the law passes intermediate scrutiny. *Id.*

However, if the law is intended to suppress the expression, then the State will have to overcome a strict scrutiny analysis. *Id.*

1. Baking A Cake Is Not Sufficiently Expressive Conduct And, Therefore, Does Not Warrant Free Speech Protections.

This Court has repeatedly rejected the notion that a limitless variety of conduct can be protected by the Free Speech Clause simply because the person intends to express an idea. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Therefore, an individual's intent to express an idea through conduct is not enough to establish it as symbolic speech. *See Spence v. Washington*, 418 U.S. 405, 409 (1974). However, "a narrow, succinctly articulable message is not required" for conduct to receive Free Speech protections. *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Bos.*, 515 U.S. 557, 579 (1995). In order for conduct to be deemed sufficiently expressive and receive Free Speech protection, a court must find that there was "intent to convey a particularized message," and it must be shown that "the likelihood was great that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404.

This Court has recognized the expressive nature of burning the American flag in protest to the Reagan administration, *id.* at 406, wearing black armbands to protest the Vietnam War, *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 504 (1969), and protesting library segregation policies via silent sit-ins by African-Americans, *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966). "[I]n all these cases there was little doubt from the circumstances of the conduct that it formed a clear and particularized political or social message very much understood by those who viewed it." *Young v. N.Y. City Transit Auth.*, 903 F.2d 146, 153 (2d Cir. 1990). Therefore, it was clear that "the conduct and expression were inexplicably joined." *Id.*

Here, the Bakery likely intends to convey a particularized message because the Bakery views the wedding cake as a symbol of celebration and approval of the same-sex wedding.

However, it is not likely that those who viewed the cake would understand that message. A bakery is in the business of selling goods, like all other businesses. There is not a requirement that a business approve of a customer, his lifestyle, or what he intends to do with the good after purchase. Therefore, it is very unlikely that anyone attending the wedding would have even considered whether the Bakery, whose only presence at the wedding would likely have been the cake itself, approved of the marriage.

Similarly, when attending a wedding, guests do not ask whether the florist approved of the marriage, or if the department store where the guest book was purchased approved of the marriage. Thus, it is unrealistic to say that wedding guests would view the wedding cake and believe that it signified the Bakery's celebration and approval of the wedding itself. Therefore, providing a couple with a wedding cake does not constitute protected speech under the First Amendment.

2. Alternatively, Even If The Cake Is Determined To Be Expressive Conduct, The Act Was Not Attempting To Prohibit This Expression; Thus, The Intermediate Scrutiny Standard Applies, Which The Act Passes.

Tourovia's law was not enacted in an attempt to limit the Bakery's expressive conduct, but rather to protect its citizens from discrimination. Even if the communicative element of an individual's conduct is sufficient "to bring into play the First Amendment," it does not automatically follow that this conduct is constitutionally protected. *O'Brien*, 391 U.S. at 376. In order to determine which level of scrutiny applies, it is necessary to determine if the "governmental interest is unrelated to the suppression of free expression." *Johnson*, 491 U.S. at 407. If it is unrelated, then the relatively lenient intermediate scrutiny standard under *O'Brien* applies; if it is not, then strict scrutiny applies. *Id.* The *O'Brien* standard is for regulations of

noncommunicative conduct, and thus, the "interest in question must be unconnected to expression in order to" fall under this less restrictive test. *Id.* at 401, 407.

In *O'Brien*, Congress passed a law prohibiting O'Brien from destroying his draft card. 391 U.S. at 369. The law in that case constitutionally prohibited O'Brien from burning his draft card because it was necessary for Congress to maintain the integrity of the Selective Service System. *Id.* at 380. Moreover, the law did not restrict any other expression O'Brien wished to convey. *Id.* at 382. He was free to stand in the same place and announce that he did not approve of the war. He was free to write a letter explaining his disagreement and have it published in the local newspaper. He was free to engage in any other form of speech to express his disapproval. The only reason he was not allowed to burn his draft card was because Congress had an important interest in maintaining the draft system.

Tourovia's Act contains the same type of restriction, and therefore, was not intended to suppress expression. The Act was intended to prevent discrimination on the basis of sexual orientation. It does not require individuals to say anything, hold any particular view, or refrain from speaking, similar to the law in *O'Brien*. The Act only requires that public accommodations treat all individuals the same in order to further the important government interest of preventing discrimination. The Bakery is free to speak on any topic, hold any view, and use any other form of speech to express its thoughts. In sum, the requirement to provide goods to all patrons was not intended to suppress expression. Finally, because the expressive conduct is baking a cake, the Act was not enacted to restrict that conduct, nor does it in any way restrict that conduct. Thus, the Act must be analyzed under the less restrictive intermediate scrutiny standard established by this Court in *O'Brien*.

3. The Act Withstands Intermediate Scrutiny Analysis And Is Therefore Valid Under The First Amendment.

The Act was enacted to further the interest of preventing discrimination and is sufficiently narrow to be constitutional. Where speech and nonspeech are both regulated, an incidental limitation on speech can be justified as long as the government can show a sufficiently important interest to regulate the nonspeech element. *Johnson*, 491 U.S. at 407. Further, the government has a freer hand at the regulation of expressive conduct than it does the regulation of literal speech. *Id.* at 406.

For a regulation to be sufficiently justified under intermediate scrutiny, it must: (1) "be within the constitutional power of the Government;" (2) "further an important or substantial government interest;" (3) the interest must be "unrelated to the suppression of free expression;" and (4) "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. Therefore, "[N]onverbal expressive activity can be banned because of the action it entails," but it cannot be banned "because of the idea it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not." *R. A. V. v. St. Paul*, 505 U.S. 377, 385 (1992).

The Act meets all the requirements of the *O'Brien* test. As such, it is therefore sufficiently justified and does not violate the Bakery's free speech rights. First, the Act is within the state's police power which has traditionally allowed laws to "provide for the public health, safety, and morals" of its citizens. *Barnes v. Glen Theater*, 501 U.S. 560, 569 (1991). Second, it furthers the important government interest of preventing discrimination. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984); *see* Part II (explaining the invalidity of Petitioner's free exercise claims and further establishing the legitimacy of this interest). Third, as explained above, the

interest of preventing businesses from discriminating against their customers is not related to the suppression of free expression. The Act allows businesses to freely express their views, and does not require any business to hold a particular view.

Finally, the restrictions are no greater than are necessary to further this important government interest. In *O'Brien*, Congress used an appropriately narrow means to protect its significant interest in maintaining the draft system by requiring men to carry a draft card for easy identification. 391 U.S. at 382. There was no narrower way to ensure the preservation of draft cards than to have a law preventing their destruction. *Id.* at 381. Similarly, there is no narrower means to prevent discrimination by public accommodations than to have a law prohibiting such discrimination. The Act only applies to public accommodations, not to religious organizations or individual persons. The State could not effectively prevent discrimination if it did not require that businesses provide the same goods and services to all individuals equally, and the Act does not stray outside of its constitutional bounds because it specifically limits the application of this requirement.

B. The Lower Court Properly Held That The Act Does Not Compel Speech By Requiring A Public Business To Provide Its Services Equally To All Patrons.

The Act does not compel the Bakery to speak the government's message when it simply requires the Bakery to serve all customers. A law that requires a business to accommodate all people does not violate the Constitution. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006). Further, a law is constitutional when it only regulates conduct, and not speech. *Id.* A law only regulates conduct when it prescribes what a business must do, but does not proscribe what a business must say. *Id.* When a law does not prohibit what can be said nor require something to be said, it does not violate the Free Speech Clause. *Id.*

A state cannot constitutionally require an individual to "participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (holding that it was unconstitutional for the state to require Maynard to display the state motto "Live Free or Die" on his license plate). However, a law must dictate the content of the speech in order for the speech to be constitutionally protected as compelled speech. *See Rumsfeld*, 547 U.S. at 62 (holding that the Solomon Amendment did not violate the First Amendment because it did not dictate the content of the law schools' speech).

This Court recognized in *Rumsfeld* that there was some degree of compelled speech. *Id.* at 60. Specifically, law schools were required to send emails, post notes on bulletin boards, and provide the recruiters with a location on campus. *Id.* However, this Court declined to recognize this level of compelled speech as deserving of First Amendment protections, and noted that the Solomon Amendment only compelled speech to the extent that the schools were speaking on behalf of others. *Id.* at 60, 62. Further, this compelled speech was plainly incidental to the regulated conduct, and "it has never been deemed an abridgment of free speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language either spoken, written, or printed." *Id.* at 62.

Finally, this Court specifically rejected Forum for Academic and Institutional Rights' ("FAIR") contention that "if they treat military and nonmilitary recruiters alike in order to comply with the Solomon Amendment, they could be viewed as sending the message that they see nothing wrong with the military's policies, when they do." *Id.* at 64–65. The Court held that nothing in the Solomon Amendment required law schools to agree with the military or its recruiters, and nothing restricted what law schools could say about the military or its policies. *Id.*

The Act does not compel the Bakery to say anything. Like *Rumsfeld*, all that is required under the Act is that the Bakery provides the same goods to all groups of people that it already provides to some. There is nothing in the Act that requires the Bakery to hold any particular view regarding marriage. Instead, the Act allows the Bakery to freely express its feelings about marriage. Similar to *Rumsfeld*, the Bakery is free to post notices that it does not endorse homosexual marriage, engage in any type of speech on the subject, and express whatever views it feels appropriate. The only act that the Bakery is barred from is refusing to serve certain goods to certain customers. To the extent that it provides a good to heterosexual couples, the Act requires that the Bakery provide the same services to homosexual couples.

As in *Rumsfeld*, the only "compelled speech" is that which is required because the Bakery is already engaged in a specific line of business. This Act does not require bakeries that do not make wedding cakes to start providing this good. It only requires companies, already in the business of creating wedding cakes, to provide that good to all patrons. Furthermore, this requirement is less stringent than that of the law in *Rumsfeld*, which required law schools to send emails, post notes on bulletin boards on behalf of the recruiters, and provide recruiters with a recruitment space on campus. In contrast, the Act only requires that the Bakery provide a good.

Finally, this case is distinguishable from *Wooley* and *Barnette* in that the Bakery is not being required to say anything, nor is it being required to hold a particular view. This is different from the Maynards who were required to display a motto that violated their religious convictions, and the students who were required to salute the flag and recite the Pledge of Allegiance. *Wooley*, at 430 U.S. at 713; *W.V. Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943). The Act does not require the Bakery to post signs endorsing homosexual marriage or post any

statement in agreement with the lifestyle. Instead, it simply requires the Bakery provide all customers with the same service that it already provides others.

II. THE SUPREME COURT OF TOUROVIA PROPERLY UPHELD THE CIVIL RIGHTS ACT § 22.5(B) BECAUSE THE ACT ADHERES TO THE FIRST AMENDMENT RIGHT TO THE FREE EXERCISE OF RELIGION.

A business that markets goods to the public does not get to pick and choose who qualifies as part of the "public." As a multicultural, pluralistic society, which is one of our nation's strengths, compromise is necessary to accommodate others' contrasting values. And that compromise is part of the glue that holds our nation together. The Supreme Court of Tourovia properly understood this principle when upholding Tourovia's Civil Rights Act § 22.5(b).

The Supreme Court of Tourovia correctly affirmed the decisions of both lower courts for two reasons. First, the Act is constitutional because it qualifies as a neutral law of general applicability as discussed in *Employment Division v. Smith*. Second, the Act is constitutional because it passes rational basis review and, alternatively, strict scrutiny.

A. The Lower Court Properly Held That The Act Is Neutral And Generally Applicable Because Antidiscrimination Laws Target Discrimination Rather Than Religion.

Blatant discrimination cannot be sanctioned under the guise of free exercise. *See Klein v. Or. Bureau of Labor & Indus.*, No. A159899, 2017 WL 6613356, at *21 (Or. Ct. App. Dec. 28, 2017) ("[N]either the sincerity, nor the religious basis, nor the historical pedigree of a particular belief has been held to give a special license for discrimination."). In other words, the right of free exercise does not exempt citizens from the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Emp't Div. v. Smith*, 494 U.S. 872, 886 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)), *superseded by statute as recognized in Holt v. Hobbs*, 135 S. Ct. 853 (2015). This Court has

recognized this principle by characterizing antidiscrimination laws as neutral laws of general applicability and, in fact, has only held one law to be neither neutral nor generally applicable. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 290 (Colo. App. 2015), *cert. granted*, 85 U.S.L.W. 3593 (U.S. June 26, 2017) (No. 16-111) (referring to the town ordinances in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)). Thus, the Act is a neutral law of general applicability because similar antidiscrimination laws target discrimination regardless of motive and offer generous exemptions to religious entities.

1. The Act Is Neutral Because Antidiscrimination Laws Target Discrimination Regardless of Motive.

The Act displays its neutrality by clamping down on discrimination regardless of motive in an effort to afford each the dignity that our Constitution requires. A law is not neutral "if the object of a law is to infringe upon or restrict practices because of their religious motivation." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). To assess neutrality, facial neutrality should first be analyzed to determine if the law discriminates on its face. *Id*. A law "lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id*.; *see also id*. at 533–34 (describing how Santeria church claimed that ordinance's use of "sacrifice" and "ritual" revealed strong religious connotations, showing lack of facial neutrality; however, such language also had secular meanings, so that information alone did not reveal a lack of facial neutrality).

Second, when assessing neutrality, the "effect of [the] law in its real operation" is critical. *Id*. at 534–35; *see also Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring) ("The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."). In so doing, the legislative history and contextual background can offer insight. *Lukumi*, 508 U.S. at 540. However, just because the law

burdens religion does not mean that the law targets religion. *Id*. at 535 ("[A]dverse impact will not always lead to a finding of impermissible targeting."). For instance, the only law that this Court has found to be neither neutral nor general applicability was in *Lukumi*. *Craig*, 370 P.3d at 290. In that case, the effect of town ordinances that prohibited ritualistic animal sacrifice for purposes other than food consumption was to impermissibly target the Santeria religion and its practitioners. *Lukumi*, 508 U.S. at 540. This effect was clear in light of the city council's enactment of these obstructionist ordinances that only burdened the Santeria church and because of the use of "sacrifice" and "ritual" in the ordinances. *Id*.

Here, the Act displays facial neutrality and neutrality in effect, as antidiscrimination laws target all discrimination regardless of motivation. First, the Act is facially neutral because the wording does not utilize religious phrasing or charged language that would have no secular meaning. The Act merely applies to the discriminatory act of "any person or persons" regarding the denial of "goods, services, privileges, facilities, advantages, or accommodations" to any "individual or group of individuals." Thus, rather than using connotative wording, as seen in *Lukumi* with the use of "sacrifice" and "ritual" in the ordinances, the Act steers clear of phrasing that could indicate animus towards any religion.

Additionally, the Act is neutral in application because antidiscrimination laws simply bar discrimination regardless of basis. In actuality, a number of religions (including Judaism, Christianity, and Islam), and even secularists, view homosexuality as a sin. George W. Dent, Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 KY. L. J. 553, 555 (2007). So, far from targeting the Bakery for their religious views stemming from Christianity, the Act merely seeks to inclusively regulate all.

In application, courts have readily held that antidiscrimination laws similar to the Act are neutral in application. *See, e.g.*, *Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543, 561 (Wash. 2017), *petition for cert. filed* (U.S. July 21, 2017) (No. 17-108) (holding Washington Law Against Discrimination, which prohibited sexual orientation discrimination for places of public accommodation, was a neutral law of general applicability in the context of floral arrangements for weddings); *Gifford v. McCarthy*, 23 N.Y.S.3d 422, 430 (App. Div. 2016) (same for New York State Human Rights Law in the context of wedding facilities); *Craig*, 370 P.3d at 291 (same for Colorado Anti-Discrimination Act in the context of bakeries); *Elane Photography, L.L.C. v. Willock*, 309 P.3d 53, 75 (N.M. 2013) (same for New Mexico Human Rights Act in the context of wedding photography). In *Arlene's Flowers* and *Craig*, the courts especially pointed out how far-fetched and incompatible it would be to analogize the antidiscrimination laws at issue in those cases with the ordinances in *Lukumi*. *Arlene's Flowers*, 389 P.3d at 561 (distinguishing *Lukumi* as a case in which ordinances "single out for onerous regulation either religious conduct in general or conduct linked to a particular religion, while exempting secular conduct or conduct associated with other, nontargeted religions"); *Craig*, 370 P.3d at 290–91 (dismissing Masterpiece's claim that the antidiscrimination law was like the *Lukumi* ordinances). Thus, just as *Lukumi's* outcome was deemed incompatible with the antidiscrimination laws discussed above, so there is no religious gerrymandering evident in this case, as the Act applies to all places of public accommodation and does not single out religious conduct for regulation.

2. <u>The Act Is Generally Applicable Because Antidiscrimination Laws Target Discrimination Regardless Of Motive And Often Offer Generous Exemptions To Religious Entities.</u>

This case cannot transform into a free exercise violation simply because religion motivates the discrimination at issue. As such, a free exercise violation does not arise because

the Act is generally applicable. A law is not generally applicable when it pursues "governmental interests only against conduct motivated by religious belief;" however, it is helpful to remember that selectivity is somewhat inherent in all laws. *Lukumi*, 508 U.S. at 542, 545; *see also Craig*, 370 P.3d at 291 ("A law need not apply to every individual and entity to be generally applicable."). Thus, a constitutional issue arises when the law "has every appearance of a prohibition that society is prepared to impose upon [a targeted religious group] but not upon itself." *Fla. Star v. B.J.F.*, 491 U.S. 524, 542 (1989).

Religious exemptions do not negate the general applicability standard and are commonly permissible. *Willock*, 309 P.3d at 75; *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012) (holding that the First Amendment precludes the application of employment discrimination laws to disputes between religious organizations and their ministers); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (upholding religious exemption to Title VII of the Civil Rights Act of 1964 against an Establishment Clause challenge). Exemptions do not reveal any animus toward religion or failure to adhere to the standard of general applicability; rather, they show that legislatures seek to comport with free exercise rights by decreasing legal burdens on religion. *Willock*, 309 P.3d at 74–75; *see also Arlene's Flowers*, 389 P.3d at 561 ("[B]lanket exemptions for religious organizations do not evidence an intent to target religion. Instead, they indicate the opposite."); *Gifford*, 23 N.Y.S.3d at 430 (holding that just because certain religious organizations were exempt from an antidiscrimination law did not mean that the law failed the test of general applicability); *Craig*, 370 P.3d at 291 (explaining how exemptions reveal that the General Assembly is complying with free exercise doctrine).

In this case, just as courts deemed the antidiscrimination laws described above generally applicable, so the Act is generally applicable as it appropriately binds all of society inclusively, forbidding all discrimination based on sexual orientation regardless of motivation. Additionally, the Act even includes a magnanimous exemption for public accommodations that are "principally used for religious purposes." Similar exemptions to the Act exist throughout Tourovian law and establish that the Legislature seeks to respect free exercise rights by reducing legal burdens on religion. However, the exemption does not apply to the Bakery because the Bakery is not used for religious purposes. Rather, as a business open to the public to create baked goods, it hardly qualifies as being "principally used for religious purposes."

To provide a further exemption for places of public accommodation (like the Bakery) to refuse certain services to members of a protected class, as was requested by the owner of the florist shop in *Arlene's Flowers*, would inherently undermine the purpose of the law. *Arlene's Flowers*, 389 P.3d at 566 ("[Antidiscrimination laws] serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace. Were we to carve out a patchwork of exceptions for ostensibly justified discrimination, that purpose would be fatally undermined."); *see also Klein*, 2017 WL 6613356, at *21 (explaining how "those with sincere religious objections to marriage between people of different races, ethnicities, or faiths could just as readily demand the same exemption" if further exemptions were permitted).

Ultimately, the Bakery's request is analogous to that in *Smith*, in which the Court declined to find a free exercise violation when stating, "Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have

never held that, and decline to do so now." *Smith*, 494 U.S. at 882; *see also Gillette v. United States*, 401 U.S. 437, 461 (1971) ("Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government."); *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878) ("Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."); *N.Y. State Emp't Relations Bd. v. Christ the King Reg'l High Sch.*, 682 N.E.2d 960, 963 (N.Y. 1997) ("[A] generally applicable and otherwise valid enactment, which is not intended to regulate religious conduct or beliefs but which may incidentally burden the free exercise of religion, is not deemed to violate the First Amendment."). Similarly, this Court should decline to grant the Bakery's request.

B. The Lower Court Properly Held That The Act Survives Rational Basis Review Because Antidiscrimination Laws Are Rationally Related To The Governmental Interest of Eradicating Discrimination.

Laws created to target societal evils should not have to jump through unnecessary hoops in an effort to protect society. As such, in 1990, *Smith* repudiated strict scrutiny for neutral, generally applicable laws that prohibit "socially harmful conduct," recognizing that such laws do not require support from a compelling government interest. *Smith*, 494 U.S. at 884–85, 886 n.3. Thus, neutral laws of general applicability are subject to rational basis review. *Arlene's Flowers*, 389 P.3d at 560. In this case, the Act passes rational basis review because antidiscrimination laws are rationally related to the government's legitimate interest of ensuring equal access to public accommodations for all citizens. Alternatively, even if this Court assessed the Act under strict scrutiny, the Act would still be deemed constitutional because courts have repeatedly

upheld antidiscrimination laws against strict scrutiny due to their narrowly tailored, compelling government interests.

1. The Act Passes Rational Basis Review Because Antidiscrimination Laws Are Rationally Related To The Government's Legitimate Interest In Ensuring Equal Access To Public Accommodations.

As a pluralistic and diverse society, the government retains an understandable interest in ensuring equal access to public accommodations for all. As such, the Act passes rational basis review because antidiscrimination laws are rationally related to the government's legitimate interest in ensuring equal access. *See Reed v. Reed*, 404 U.S. 71, 76 (1971) (explaining how law must have "a rational relationship to a state objective"); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (explaining how laws must be "reasonable, not arbitrary"). More specifically, the states maintain a "long-recognized, substantial interest in eradicating discrimination." *Gifford*, 23 N.Y.S.3d at 430; *see also Roberts*, 468 U.S. at 625 (Discriminatory denial of equal access to goods, services and other advantages made available to the public not only "deprives persons of their individual dignity," but also "denies society the benefits of wide participation in political, economic, and cultural life.").

Ensuring that the Barbers have "equal access to publically available goods and services [thus] plainly serves compelling state interests of the highest order." *Roberts*, 468 U.S. at 624. So, just as the antidiscrimination laws in *Arlene's Flowers*, *Craig*, *Gifford*, and *Willock* were all created to secure equal treatment of all in the marketplace, so the Act in this case serves the same legitimate government interest.

Additionally, this matter does not present a hybrid rights concern that would subject the case to strict scrutiny. When two claims fall flat separately, it is hard to imagine how they would somehow glean potency when considered together. *Willock*, 309 P.3d at 75–76. As such, several

courts have cast doubt on the validity of the hybrid rights exception. *See, e.g.*, *Lukumi*, 508 U.S. at 567 (Souter, J., concurring) ("And the distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule . . . ."); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 656 (10th Cir. 2006) ("The hybrid rights doctrine is controversial"); *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) (describing the hybrid rights doctrine as mere dicta that is not binding on lower courts); *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) (describing hybrid rights doctrine as illogical). Courts are also divided on the strength of the independent constitutional right claim needed to assert a valid hybrid rights claim. *See Axson–Flynn v. Johnson*, 356 F.3d 1277, 1295 (10th Cir. 2004) (holding that court would "only apply the hybrid-rights exception to *Smith* where the plaintiff establishes a 'fair probability, or a likelihood,' of success on the companion claim."); *see also Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998) (explaining that hybrid rights theory "at least requires a colorable showing" of infringement of a fundamental constitutional right).

In the context of antidiscrimination laws, courts are unwilling to validate hybrid rights claims. *See, e.g.*, *Arlene's Flowers*, 389 P.3d at 567 (rejecting hybrid rights claim because free exercise was the only fundamental right implicated); *Craig*, 370 P.3d at 292 (rejecting hybrid rights claim due to doubt regarding the doctrine's validity and because free exercise was the only fundamental right implicated); *Willock*, 309 P.3d at 75–76 (rejecting hybrid rights claim because Elane Photography "offer[ed] no analysis to explain why the two claims together should be greater than the sum of their parts"). This Court should likewise refuse to apply the hybrid rights doctrine in this case, as the Bakery's right to free speech is not burdened. *See* Part I (discussing

the invalidity of the Bakery's free speech claim). Additionally, even if the Act triggered strict scrutiny under a valid hybrid rights claim, it satisfies the standard.

2. Alternatively, Even If This Court Applied Strict Scrutiny, The Act Would Pass Because Antidiscrimination Laws Advance Narrowly Tailored, Compelling Government Interests.

Subjecting an antidiscrimination law to strict scrutiny "contradicts both constitutional tradition and common sense." *Smith*, 494 U.S. at 885. However, even if this Court applied strict scrutiny due to a hybrid rights claim or because the Act fails the *Smith* test, the Act would pass because antidiscrimination laws maintain narrowly tailored, compelling government interests. *See id*. at 883, 885 (describing the strict scrutiny test). When assessing such laws under strict scrutiny, courts emphasize analysis of the interest at stake rather than the narrow tailoring of the law. *See Arlene's Flowers*, 389 P.3d at 566–67 (describing the compelling interest at length without discussion of the law's narrow tailoring).

Based on their focus on the compelling interests at issue, a number of courts have analyzed religious free exercise claims against antidiscrimination laws and upheld the laws under strict scrutiny. For instance, this Court has held that the federal government's denial of tax-exempt status to schools that enforced religiously-motivated, racially-discriminatory policies survived strict scrutiny. *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

State courts have held similarly. The Supreme Court of Washington boldly asserted, "[W]e are not aware of any case invalidating an antidiscrimination law under a free exercise strict scrutiny analysis." *Arlene's Flowers*, 389 P.3d at 566. As an illustration, the Supreme Court of California upheld a statute barring discrimination on the basis of sexual orientation under strict scrutiny as applied to a fertility clinic with religious objections to helping gay patients conceive. *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cty. Superior Court*,

189 P.3d 959, 968 (Cal. 2008). The Supreme Court of Alaska upheld a state antidiscrimination law in the rental housing context against strict scrutiny, meaning that defendants were not entitled to a religious exemption, because "[t]he government views acts of discrimination as independent social evils even if the prospective tenants ultimately find housing." *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994). The District of Columbia Court of Appeals held that the Human Rights Act survived strict scrutiny because "[t]o tailor the Human Rights Act to require less of the University . . . , would be to defeat its compelling purpose[:] [t]he District of Columbia's overriding interest in eradicating sexual orientation discrimination." *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 39 (D.C. 1987). Lastly, the Supreme Court of Minnesota held that a state antidiscrimination law in the employment context passed strict scrutiny in a religious free exercise challenge because "[t]he state's overriding compelling interest of eliminating discrimination based upon sex, race, marital status, or religion could be substantially frustrated if employers, professing as deep and sincere religious beliefs as those held by appellants, could discriminate against the protected classes." *Minnesota v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 852 (Minn. 1985).

Just as these antidiscrimination laws passed strict scrutiny based on their compelling interests, so the Act meets the strict scrutiny burden by advancing the compelling interest of eradicating discrimination based on sexual orientation. This Court has consistently recognized that states have a compelling interest in eliminating discrimination and that antidiscrimination laws further that interest. *See Hurley*, 515 U.S. at 572 (Public accommodation laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination . . . ."); *see also Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987) (government had a compelling interest in eliminating discrimination

against women in places of public accommodation); *Bob Jones*, 461 U.S. at 604 (government had a compelling interest in eliminating racial discrimination in private education). Such interests are especially critical for same-sex couples. *Klein*, 2017 WL 6613356, at *17 ("[The] interest is particularly acute when the state seeks to prevent the dignitary harms that result from the unequal treatment of same-sex couples who choose to exercise their fundamental right to marry."). And while the Bakery may argue that there is no compelling interest because other bakeries could have serviced the Barbers, this is simply an invalid argument. This case is about equal access in *all* places of public accommodation, not *some* access in *some* places of public accommodation. *Arlene's Flowers*, 389 P.3d at 851 ("This case is no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches.").

As for the Act's narrow tailoring, which the courts rarely address, the Act is narrowly tailored to fulfill its objective. Instead of setting a vague or meaningless standard giving rise to unbridled enforcement discretion, the concepts enveloped in the Act are well-trodden and defined, as the Act clearly lays out the appropriate meanings of "public accommodation" and "sexual orientation." In short, the Act's provisions are no greater than necessary. The Bakery is not compelled to support or endorse any particular religious view, as was recognized in *Newman v. Piggie Park Enterprises*:

> Undoubtedly defendant . . . has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. This Court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishment upon the ground that to do so would violate his sacred religious beliefs.

256 F. Supp. 941, 945 (D.S.C. 1968), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968). Rather,

the Bakery is simply asked, along with every other individual in society, to afford each the dignity that our Constitution requires.

CONCLUSION

"This case is no more about access to [cakes] than civil rights cases in the 1960s were about access to sandwiches." *Arlene's Flowers*, 389 P.3d at 566. By affirming the lower court's ruling, this Court would be appropriately solidifying the governmental and Constitutional interest in preserving the dignity of each and every citizen of this diverse and pluralistic society. If this Court were to reverse the ruling of the lower court, it would be effectively ignoring the societal value of antidiscrimination laws, while opening the door to further religiously motivated discrimination of other protected classes, such as race, ethnicity, and gender. The Supreme Court of Tourovia properly affirmed the lower court's decision, holding that the Act did not violate the Bakery's First Amendment rights to free speech or free exercise of religion. Rather, it appropriately held that the Bakery violated the Act by unconstitutionally discriminating against the Barbers and their simple request for a wedding cake. Therefore, this Court should affirm the Supreme Court of Tourovia's decision, and enter judgment for the Barbers.

Dated March 4, 2018.

Respectfully submitted,

Team 14

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