No. 18-321

IN THE SUPREME COURT OF THE UNITED STATES

MAMA MYRA'S BAKERY, INC.,

Petitioner,

-v.-

THE STATE OF TOUROVIA,

ON BEHALF OF HANK AND CODY BARBER

Respondents.

On Writ of Certiorari To the Supreme Court of Tourovia

BRIEF FOR THE PETITIONER

Team 2

Counsel for Petitioner

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QUESTIONS PRESENTED

I. Whether the Tourovia Civil Rights Act § 22.5(b) which, as applied compels Mama Myra's Bakery to convey a message of endorsing same-sex marriage, violates The First Amendment right to freedom of speech.

II. Whether the application of the Tourovia Civil Rights Act § 22.5(b), requiring Mama Myra's Bakery, Inc. to take an active role in a wedding celebration, violates The Free Exercise Clause.

STATEMENT OF THE CASE

A. Proceedings Below

Hank and Cody Barber ("the Barbers") initiated this action against petitioner Mama Myra's Bakery, Inc. ("Mama Myra's") in Tourovia State District Court, stating that Mama Myra's was in violation of the Tourovia Civil Rights Act § 22.5(b) ("The Act."). The District Court in Tourovia found for the Barbers, holding that Mama Myra's refusal to bake a cake for the Barbers violated The Act. Mama Myra's appealed, arguing that The Act, as applied, was a violation of its First Amendment rights to Free Speech and Free Exercise.

The Appellate Division of the Supreme Court of Tourovia, Fourth Department, held that The Act did not violate the Free Speech or the Free Exercise Clause. The Supreme Court of Tourovia affirmed the ruling of the District Court and the Court of Appeals. Mama Myra's now seeks review from this Court.

B. Facts

This Court is being asked to reverse a Tourovia Supreme Court ruling that the Tourovia Civil Right Act § 22.5(b), as applied, is not a violation of the petitioners free speech and free exercise rights.

For twenty-seven years Mama Myra's Bakery has been providing custom made cakes and baked goods for the Suffolk County, Tourovia area. R. at 2. Mama Myra's wedding cakes are truly a work of art, that require hours of planning, crafting and baking. Customers often "commission" cakes with Mama Myra's because of the high quality and artistic value that the bakery provides. In addition

to custom made wedding cakes, Mama Myra's also offers various other "off-the-shelf" bake goods and desserts. R. at 2.

The owners of Mama Myra's love their community and their business, and they cling tightly to their faith. Since they opened their doors in 1991, employees and owners of Mama Myra's have been outspoken about their belief in Jesus Christ. R. at 3. Their faith is not contained in a church or place of worship, rather they bring their conviction to carry out the gospel of Jesus Christ into all areas of their lives. Because of this strong religious conviction, the owners and employees of Mama Myra's, respectfully, do not condone same-sex marriage. R. at 3. Due to this belief, Mama Myra's has never made, or been asked to make, a cake for a same-sex wedding celebration. R. at 3. The owners of Mama Myra's believe that wedding cakes convey a celebratory message about the marriage and they believe that taking an active role in a same-sex wedding would violate their interpretation of the teachings of Jesus Christ. R. at 3.

In August of 2012, Hank and Cody Barber, a recently married couple approached Mama Myra's about baking a cake for their wedding celebration. R. at 2. The Barbers requested that Mama Myra's craft them a custom-made wedding cake. R. at 2. They specifically asked that Mama Myra's Bakery employ their artistic talent to sculpt a figurine of the couple on the top tier of the cake, as part of their custom order. R. at 2. The Barbers requested that the custom figures be made in the image of the couple, holding hands, appearing as they did on their wedding day. R. at 2.

While the Barbers were previously wed in Massachusetts, where same-sex marriage was legal, they intended to celebrate the wedding in Tourovia with their family. R. at 2. While Tourovia had in place a public accommodations statute intended to protect the equal rights of LGBT individuals, the state was not nearly as progressive in its efforts to protect same-sex individuals equal right to marriage. R. at 2-3. In August of 2012, Tourovia still prohibited same-sex marriage. R. at 2. Because Mama Myra's believed that participation in the wedding would convey a celebratory message about same-sex marriage, it politely refused the artistic commission. R. at 2. Even though the bakery refused to craft the couple a custom wedding cake, Mama Myra's offered to cater the couple's family celebration with all other baked goods and desserts from their store. R. at 2.

Weeks later, the owners of Mama Myra's were notified that the Barbers filed charges of discrimination pursuant to the Tourovia Civil Rights Act § 22.5(b), claiming that refusal to craft for them a custom wedding cake violated The Act. R. at 3. The Act reads in relevant part:

> 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.

Tourovia Civil Rights Act § 22.5(b); R. at 3.

The District Court in Tourovia found that the failure to craft a custom wedding cake for the Barbers violated The Act. The Appellate Court affirmed and the Supreme Court of Tourovia denied review. R. at 7, 15. The owners and

employees of Mama Myra's bakery are now faced with choosing between their business or their faith.

SUMMARY OF THE ARGUMENT

While our Founding Fathers constructed this government on the guiding principle of separation of church and state, they in no way sought to divorce law from religion in its application to citizens of this nation. In the name of liberty, they preserved and protected a right to religion in both the beliefs and practices thereof. Just as the law cannot be divorced from religion one cannot ignore the inherent nexus of religion and speech because the right to religion is worthless without the ability to express it and the right to speech is meaningless without the protection of the belief behind it. This Court has recognized both the awesome magnitude of these protections while also acknowledging the delicate balance necessary to protect the individual rights of all citizens. The law in question before this Court compels Mama Myra's Bakery to speak when it rather not speak and compels it to act when religious convictions forbid the Bakery from doing so. The American rule of law protects citizens from government compulsion to speak and act when the liberty derived from the First Amendment protects their right not to do so. Mama Myra's Bakery should in no way be an exception to this fundamental protection.

Both the Trial Court and Appellate Court erred in ruling that the Tourovia Civil Rights Act did not violate Mama Myra's First Amendment right to free speech as well as Mama Myra's First Amendment right to the free exercise of religion.

I. Custom-made wedding cakes are a form of speech that should be afforded the full protection of the First Amendment. Wedding cakes that are crafted to the degree of specificity requested by Respondents amount to "pure speech" or sometimes phrased as "purely expressive speech." Many forms of art have been categorized as pure speech. Each custom-made wedding cake created by Mama Myra's is specifically particularized and requires artistic talent to meet the needs of each order. Recently, tattoos have been held to constitute purely expressive speech. Due to the heightened protection, pure speech is afforded and the additional factor of government compelled speech, *Hurley* is the controlling authority to decide this case. Applying the strict scrutiny analysis in *Hurley*, this Court should find that the state interests embodied in The Act do not justify the severe intrusion on Mama Myra's First Amendment rights, and therefore render The Act unconstitutional.

If this Court should choose not to categorize the baking of custom-made wedding cakes as pure speech, this Court should categorize Mama Myra's custom-made wedding cakes as symbolic speech. For symbolic speech to be protected, the speech must be inherently expressive with a likelihood that the message would be understood by those who viewed it. An additional factor that is weighted heavily in determining whether the speech is inherently expressive is the context in which the symbol is used. Here, wedding cakes are an objectively aesthetic centerpiece that convey a message of celebration for the couple to be wed. In this case, Respondents requested a custom wedding cake that specifically conveyed the message of same-sex marriage. Mama Myra's should not be compelled to convey such a message.

Since the restriction on Mama Myra's right to free speech far surpasses Tourovia's interest, The Act fails to meet its burden in the *O'Brien* test and therefore is unconstitutional.

II. Not only are the free speech rights of Mama Myra's violated, but The Act also violates the Free Exercise Clause and the Establishment Clause. The Act, as applied, is neither neutral nor generally applicable, and thus is subject to strict scrutiny review. The Act is not neutral in its application because it is being disproportionately used to target religious action. The effect of the law burdens the beliefs of Christians, and is therefore non-neutral. Additionally, The Act is not generally applicable because it would potentially allow for secular, non-religious, conduct to go unregulated. Even if this Court determines The Act to be both neutral and generally applicable, the intertwined nature of free speech and free exercise claims in this case give rise to a hybrid rights theory. The application of this theory would nevertheless submit The Act to strict scrutiny review.

Tourovia will be unable to overcome the rigorous test of strict scrutiny. No state interest rises to the level necessary to justify burdening the religious rights of Mama Myra's. Additionally, the state has a multitude of less restrictive ways to draw this law which would be less burdensome on religious practices. Because The Act fails strict scrutiny review, the state has violated Mama Myra's free speech and free exercise rights.

Additionally, by requiring participation in a wedding ceremony, the State has violated the Establishment Clause. Mama Myra's views marriage and weddings as

inherently religious activities, and thus the state may not compel their participation in such an event.

ARGUMENT

I. The Tourovia Civil Rights Act § 22.5(b) violates the right to freedom of speech.

"Liberty is the state of being free within society from oppressive restrictions imposed by authority on one's way of life, behavior, or political views."[1] This Court's decision in *Obergefell*, to make same-sex marriage legal in all fifty states of the United States, adhered to the fundamental concept of American liberty. This Court held that the fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to intimate choices defining personal identity and beliefs. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015). The result was an advancement of individual freedom that sent the message that in many circumstances the government should not instruct individuals how to live their lives.

The First Amendment provides that Congress shall make no law abridging the freedom of speech. U.S. CONST. amend. I. Asserting this right to freedom of speech was made applicable to the states through the Fourteenth Amendment by this Court's decision in *Gitlow*. *Gitlow v. New York*, 268 U.S. 652, 664 (1925). As applied, the First Amendment serves as a common denominator that does not determine the legality of speech based on how popular the opinion may be. The First Amendment determines the legality of speech based on whether the thought behind the speech is deserving of protection.

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[1] *Liberty, noun*. OED Online. Oxford University Press, March 2018. Web. 1 March 2018.

The *Obergefell* decision emphasized that:

> Religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.

Obergefell, 135 U.S. at 1284. As we stand here today, regardless of one's opinion on same-sex marriage, you are not only entitled to have an opinion – you are constitutionally protected to speak it.

This case asks the question: to what extent can government compel you to speak. More specifically, to what extent should the government compel speech that one has the constitutional protection of the First Amendment to disagree with.

A. A specially designed wedding cake that signifies and celebrates same-sex marriage constitutes purely expressive speech.

This Court should categorize Mama Myra's cake artistry, specifically pertaining to their wedding cakes as pure speech. Pure speech is difficult to succinctly confine to a bright-line definition. To determine whether speech should be afforded pure speech protection, courts must assess whether the disseminators of the image are genuinely and primarily engaged in self-expression. *Cressman v. Thompson*, 798 F.3d 938, 953 (10th Cir. 2015). This Court has held the following to be purely expressive subject to the full protection of the First Amendment: music without words, *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); dance, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981); and parades,

Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Bos., Inc., 515 U.S. 557, 568 (1995).

The United States Court of Appeals, Ninth Circuit, recently dealt with the question of whether tattoos are speech. In *Anderson*, a tattoo artist sought to establish a tattoo parlor but was prohibited due to a city municipal code. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1055 (9th Cir. 2010). The court in *Anderson* began their analysis by determining whether tattoos and the business of tattoo parlors qualified as purely expressive activity or conduct merely containing an expressive component. *Id*. at 1059. Since tattoos are generally composed of words, realistic or abstract images, symbols, or a combination of these, the *Anderson* decision held that tattoos are forms of pure expression that are entitled to full First Amendment protection. *Id*. at 1061. The holding went further stating that the entire business of tattooing constitutes purely expressive activity fully protected by the First Amendment. *See id*. at 1061-1063.

Here, custom wedding cakes, as well as the process of crafting custom wedding cakes, should, like tattoos, be interpreted as pure speech. *Anderson* noted that the surface on which the speech appears should have no significance in deciding whether constitutional protections should be afforded. *See id*. at 1061. The fact that a cake is edible and soon to be consumed after leaving the bakery does not make the speech the cake conveys any less pure. Every tattoo is unique to the person getting the tattoo. Similarly, every custom wedding cake requires extensive planning and preparation to meet the specific needs of the cake. Respondents did

not go to Mama Myra's to get a generic cake from the bakery's shelves. Respondents requested a custom-made wedding cake specifically sculpted with a figure of the same-sex couple hand-in-hand on the top tier of the cake. R. at 2.

While the speech must be particularized, such a message need not be succinctly narrow to be considered pure speech. *See Hurley*, 515 U.S. at 569. However here, the request for a sculpted same-sex figurine goes so far as to portray a succinctly narrow and particularized message. The cake would not just celebrate marriage, it would more narrowly celebrate same-sex marriage.

If music, dance, parades and especially tattoos are purely expressive speech, encompassing custom-made wedding cakes as purely expressive speech is not a stretch but rather a logical conclusion.

B. Mama Myra's should not be compelled to endorse same-sex marriage.

A firm principle of free speech is that one who chooses to speak may also decide "what not to say." *Id*. at 573. The compelled speech doctrine as examined in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* prevents an individual from having to host or accommodate the government's message. *Rumsfeld v. Forum for Acad. and Inst. Rights, Inc.*, 547 U.S. 47, 63 (2006). However, the issue of compelled speech has been addressed well before *Hurley* and *Rumsfeld*. In *Barnette*, this Court ruled that a state could not require students to salute the American flag. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943). The decision emphasized that while the government power to censor expression is very limited, the government power to compel expressions is even

more limited. *Id*. Writing for the majority, Justice Jackson stated, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

This Court echoed this sentiment in *Wooley v. Maynard* in that the right to refrain from speech meant a state could not force its citizens to adhere to or promote an ideological view. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that a state statute requiring license plates to contain the state motto of "Live Free or Die" was unconstitutional). Additionally, this Court in *Wooley* stated that for the law to be considered constitutional, it must be narrowly tailored to serve a compelling government interest using the least restrictive means available. *See id*. at 716.

1. **Strict scrutiny can be utilized "as applied" for facially neutral laws.**

This Court has applied the strict scrutiny standard of review for state public accommodation statutes where the law appears generally neutral on its face, but when applied requires certain speakers to modify a form of pure speech. *See Hurley*, 515 U.S. at 578. *Hurley* was not decided under the framework of symbolic speech analysis. By qualifying the wedding cake artistry of Mama Myra's as purely expressive speech, this Court would not need to engage in the analysis of symbolic conduct-based speech. Baking a cake, to the specifications requested by Respondents is much more than symbolic of the celebration of same-sex marriage; it is a statement that directly conveys the celebration of same-sex marriage.

The facts of *Hurley* closely mirror the current dispute. In *Hurley* this Court examined if a state anti-discrimination based on sexual orientation statute violated a parade organization's First Amendment right to freedom of expression. More specifically, whether Massachusetts could require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey. *Id.* at 559. Ultimately the parade organizers would prevail.

Hurley found that a parade as a whole is inherently expressive. Additionally, each individual unit or group that partakes in the parade is inherently expressive. The parade organizers did not permit the Irish-American gay, lesbian, and bisexual group to participate in the parade because the parade organizers felt the message sent by the contesting group would materially alter and be inconsistent with the overall message of the parade. Since every participating unit affects the message conveyed by the private organizers of the parade, the state's application of the Massachusetts public accommodations law in this context essentially required the parade organizers to alter the expressive content of the parade.

2. Compelled speech is speech that endorses conduct.

In the decision by the lower court, the majority stated that, "it is unlikely that the public would view Appellant's baking of a cake for a same-sex wedding celebration as the Bakery's endorsement of said conduct." *Mama Myra Bakery, Inc. v. State*, No. 19-jf-270 (Touro. Civ. App. 2015); R. at 9. We cannot so swiftly agree with this conclusory rationale. A custom wedding cake is a work of art inherently bringing with it the artists' stamp of authenticity and approval. Each custom

wedding cake Mama Myra's creates and carries with it the bakery's name and symbolic representation of the celebration of marriage. This Court acknowledged in *Hurley* that compelling a parade to incorporate parties whose message was inconsistent with the content of the message of the parade would ultimately alter the parade's message. *See Hurley*, 515 U.S. at 578. The same reality applies to Mama Myra's. With each wedding cake that leaves the Bakery doors, Mama Myra's sends the message of celebration and inherent approval of a marriage ratified in religion. A wedding cake that celebrates marriage Mama Myra's cannot condone speaks volumes. Seeing as in reality no disclaimer could have the effect of Mama Myra's not endorsing the wedding cake they are being compelled to create, the collective message of the Bakery's beliefs would be forever altered.

3. The Act will fail under a strict scrutiny analysis.

In both *Hurley* and *Dale* this Court employing a strict scrutiny analysis concluded that because the state interests embodied in the public laws could not justify compelling individuals to modify their expression, the laws could not be enforced. Such should be the case here. In dealing with a similar state anti-discrimination statute as in *Hurley*, this Court in *Boy Scouts of America v. Dale* held that the state interests embodied in the public accommodation law did not justify such severe intrusion to freedom of expressive association. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) (where applying a public accommodation law requiring the Boy Scouts to readmit an openly gay scoutmaster would violate the Boy Scouts' First Amendment right of expressive association). The precedent of

Hurley and *Dale* make it clear that this Court has the authority to declare an anti-discrimination public accommodation law as applied unconstitutional because it violates an individual's First Amendment protection.

The Act if enforced will modify the content of Mama Myra's speech every time they are forced to bake a cake that signifies and celebrates same-sex marriage. Tourovia can amend The Act to provide for a religious exemption in the case that The Act operates to compel a form of modified speech. The reality is that compelling speech that is directly violative of one's constitutionally protected beliefs amounts to an insurmountable burden for a state interest to overcome. Thus, compelling speech, in this case, fails strict scrutiny.

C. A specially designed wedding cake that signifies and celebrates same-sex marriage also constitutes symbolic speech.

A picture is still worth a thousand words. This Court acknowledges a distinction between speech and conduct, both of which can be entitled to First Amendment protection. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). For symbolic speech to be protected under the First Amendment, the speech must be inherently expressive, meaning there is an intent to convey a particularized message and a likelihood that the message would be understood by those who viewed it. *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *See e.g. Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (Holding that wearing an armband to express disapproval of the Vietnam War is a symbolic act protected within the free speech clause of First Amendment).

Respondents requested a custom-made wedding cake. Respondents specifically asked for a sculpted figurine of the same-sex couple hand-in-hand on the top tier of the cake. R. at 2. Based on the intent Respondents sought to convey, the final product would serve as a symbol that inherently expresses the celebration of same-sex marriage.

In determining whether there is a likelihood that those who view it would understand the message, this Court has emphasized that the context of the symbol is important as to give the symbol meaning. *Spence v. State of Wash.*, 418 U.S. 405, 410 (1974). Wedding cakes are among the most prominent features on display at a wedding. Wedding cakes are objectively an aesthetic centerpiece representative of the careful consideration by both the couple to be wed and the artist that sculpted it. In no other occasion where cakes are customary, does a cake play a more significant role than in a wedding. Additionally, the request for a sculpted same-sex figurine goes so far as to portray a succinctly narrow and particularized message. The cake would not just celebrate marriage; it would more narrowly celebrate same-sex marriage.

Considering the facts of this case, the context and Respondents request for the cake to convey a particular message, this Court can confidently qualify the disputed cake as inherently expressive symbolic speech.

D. The Act is unconstitutional because the state fails to establish a sufficiently justified government regulation under the *O'Brien* test.

O'Brien establishes that certain conduct based symbolic speech deserves First Amendment protection. *O'Brien*, 391 U.S. at 367. *O'Brien* also operates as a test

which evaluates when a governmental interest in regulating the non-speech element can justify limitations on First Amendment freedoms. *Id*. at 376. Under *O'Brien* a government regulation is sufficiently justified if: (1) it is within the constitutional power of the government; (2) it furthers an important governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Id*. at 377.

The Act is not on its face beyond the constitutional power of the State. Additionally, Mama Myra's concedes that anti-discrimination based on sexual orientation is an important governmental interest. However, as applied, the governmental regulation is not unrelated to free speech and creates the burden of a compelled requirement to speak opposite of one's sincerely held beliefs. Because The Act fails to meet the required threshold in element three and four of the *O'Brien* test, this Court should hold that the government interest is not sufficiently justified therefore rendering The Act unconstitutional.

This Court should find that The Act as applied specifically operates beyond simply suppressing speech – it compels it. Laws compelling the public how to speak with regard to sexual orientation are lockstep with the issue of sincerely held religious beliefs that disavow homosexuality. To conclude homosexuality and religious ideology are not related would be disingenuous to the greater social and cultural dialogue of our nation. The fact that the two are intertwined is a reality. *See Obergefell*, 135 U.S. at 1284.

Compelling speech that runs counter to a sincerely held constitutionally protected belief operates as such a gross violation of the First Amendment that it disavows the fundamental principles of freedom and liberty. As stated in *Barnette*, the while the power to sensor expression is already limited, the power to compel expression is even more limited. *Barnette*, 319 U.S. at 633. The Act places an unconscionable burden on a bakery to act in a way that they cannot with a clear conscious. While The Act does not explicitly state that religious individuals must abandon their faith, as applied, The Act has that effect. This Court stands on firm precedent to interpret The Act as applied under the *O'Brien* test. *See Hurley*, 515 U.S. at 578; *see also Dale*, 530 U.S. at 659.

Perhaps sufficient rationale in government compelled speech may exist when the government seeks to protect a minority of individuals from the overwhelming power of a majority faction. However, that is not the case here. Recent estimates show as much as 4.1% of the population identify as LGBT (Lesbian Gay Bisexual Transgender).[2] While many Americans identify as Christian, only a small minority would have such sincerely held beliefs to feel unable to condone and actively celebrate same-sex marriage. Application of The Act has the effect of creating preferential treatment for one small minority at the direct expense of another small minority. Forcing one minority to condone action contrary to their sincerely held and constitutionally protected beliefs is in no way merely incidental; it is

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[2] *5 key findings about LGBT Americans*, Pew Research Center (March 2, 2019, 2:18 PM), http://www.pewresearch.org/fact-tank/2017/06/13/5-key-findings-about-lgbt-americans/.

substantial and proportionally more significant to the Tourovia's well-intended but ultimately unconstitutional law.

II. The Tourovia Civil Rights Act § 22.5(b) violates both Free Exercise rights and the Establishment Clause.

The Tourovia Civil Rights Act, as applied, not only violates free speech rights but it also impermissibly burdens Mama Myra's free exercise rights and The Establishment Clause. Despite the owners of Mama Myra's sincerely held belief that marriage is between one man and one woman, Tourovia requires their participation in a same-sex wedding celebration. This requirement now places the owners of Mama Myra's in a position where they must choose between their business and their faith.

However, Mama Myra's First Amendment protections should shield them from such an impossible dilemma. The Free Exercise clause, states in part, "[c]ongress shall make no law respecting an establishment of religion or prohibiting the Free Exercise thereof." U.S. CONST. amend. I. This First Amendment guarantee was incorporated to the several states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 302 (1940).

If a state statute burdens free exercise of religion, but the law is neutral and generally applicable, the state need only show a rational relationship between the statute and state interest. *Emp't Div. v. Smith*, 494 U.S. 872, 876-90 (1990); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531 (1993). However, if the statute is not neutral or generally applicable, the state statute must pass strict scrutiny review. *Id*. Here, the Tourovia Civil Rights Act, as applied, is neither

neutral nor generally applicable, therefore strict scrutiny applies. Due to this heightened scrutiny, Tourovia will be unable to carry its burden in proving a compelling state interest in discriminating against Mama Myra's sincerely held religious beliefs.

A. The Act, as applied, is neither neutral nor generally applicable.

Two Supreme Court cases, *Smith* and *Lukumi* shape the law of state statutes burdening free exercise rights.

In *Smith*, Native American religious groups challenged a state-wide prohibition of smoking peyote, a Schedule I drug. *Smith*, 494 U.S. at 874. The religious groups claimed that the general prohibition impermissibly burdened their free exercise rights. *Id*. This Court held that the State had no duty to justify the burden on Native American's religion because the "across the board criminal prohibition" was both "neutral" and "generally applicable." *Id*. at 894. Soon after the decision in *Smith*, this Court examined the dispute in *Lukumi*. In *Lukumi*, the city of Hialeah passed various city ordinances that prohibited the killing of animals in a ritual or ceremony, one of the essential practices of the Santeria religion. *Lukumi*, 508 U.S. at 526. This Court struck down the ordinances, holding that the laws were neither neutral or generally applicable. *Id*. at 545-46. This Court recognized that the ordinances were "gerrymandered" with precision to target the practices of the Santeria church. *Id* at 536.

One scholar summarized the holdings in *Smith* and *Lukumi* as: "[t]he law in *Smith* regulated religious use and every conceivable secular use; there were no

exceptions. The ordinances in *Lukumi* regulated religion and nothing but religion." Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1 (2016). *Smith* and *Lukumi* stand at two opposite ends of a spectrum, and somewhere between these two extremes lies the case at issue.

The distinction of whether The Act, as applied, is generally applicable and neutral, is the crux of this issue. Generally applicable law need only pass a rational basis test, while a law that is not generally applicable or neutral must hold up in the face of strict scrutiny review. *Id.* at 546.

1. The Act, as applied, is non-neutral.

"If the *object* of the law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Smith*, 494 U.S. at 878 (emphasis added). The court in *Lukumi* began its analysis of neutrality by examining the text of the laws. *Lukumi,* 508 U.S. at 533. This Court stated, "the minimum requirement of neutrality is that the law not discriminate on its face." *Id*. This court must look beyond the text of the law to determine the object and circumstances of the law. Facial neutrality is the bare minimum requirement, because the inquiry of neutrality goes well beyond its text. *Lukumi* specifically rejected the notion that the inquiry of neutrality must end with the text of the law. *Id*. at 534. Targeting religious action cannot be shielded by a facially neutral law.

Therefore, in order to determine neutrality, this Court must determine the "object" of The Tourovia Civil Rights Act. However, this Court has given little guidance as to the meaning of "object." Justice Scalia, in *Lukumi*, stated, "apart

from the text, the *effect* of a law in its real operation is strong evidence of its object." *Id*. at 535 (emphasis added). Therefore, if the *effect* of the law, in its real operation, is an infringement on religious belief, then the law should be ruled non-neutral.

Examining the *effect* of The Act, as applied to Mama Myra's, it is clear that it is non-neutral. We know of one application of this statute, and it targets the religious beliefs of the owners of Mama Myra's, who are devout Christians. While the Act *could* apply secularly, it is being disproportionately applied to religious beliefs. As the dissent noted in the Tourovia Appellate Court, this case is analogous to the regulations in *Lukumi* because this act targets the beliefs of *some* Christians. R. at 12. Additionally, if The Act continues to burden religious beliefs it will inevitably be used as a weapon of discrimination against Christians, Catholics, Jews, Muslims, and all other religions that do not condone same-sex marriage. This Court should find that the disparity in application in Tourovia constitutes the same religious gerrymandering found in *Lukumi*.

Additionally, this Court in *Lukumi* equated neutrality in the free exercise context to rights arising under the Equal Protection clause. *Lukumi*, 508 U.S. at 540. The opinion quoted Justice Harlan who stated, "neutrality in its application requires an equal protection mode of analysis." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970). Tracking equal protection law, one who is challenging a law as violating equal protection rights may show either facial discrimination or discriminatory application of a neutral law.

In the case at hand, The Act is being used to target religious belief. This Court has held in various equal protection cases that a facially neutral law or employment practice that disproportionately effects a class, may still be a violation of equal protection rights. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Applying the same to free exercise rights, if a religiously neutral law is applied to disproportionately effect a class, it should be deemed a violation of that right.

In the case at hand, The Act is applied disproportionately to persons of sincere religious convictions, and Mama Myra's is suffering as a result. This rises to the level of "religious gerrymandering."

2. The Act, as applied, is not generally applicable.

A statute will be deemed to be generally applicable only if the burdens on religious practices are equal to the burdens placed on analogous secular conduct. *Lukumi*, 508 U.S. at 546. The first step in determining whether non-religious and religious conduct are similar in how they endanger a state interest is the identification of that state interest. *Id*. While Tourovia has given little guidance as to the interest behind The Act, we infer that it was intended to shield groups from discrimination. However, the statute is not generally applicable because Tourovia failed to generally apply The Act to religious and non-religious action. Additionally, The Act is clearly under-inclusive in its efforts to protect groups from discrimination.

This Court determined that the ordinances in *Lukumi* fail to prohibit nonreligious conduct that endangers the same interest in a similar or greater

degree. *Id*. at 543. For example, the city cited “cruelty to animals” as one of the interests for passing the law, yet exempted out fishing, hunting, extermination, and medical research. *Id*. These carved out exemptions tailored the law specifically to target the Santeria religion and essentially no one else. Thus, the court found that the law was “religiously gerrymandered.”

Similar to the ordinances in *Lukumi*, the Tourovia Civil Rights Act is now being used to target the religious beliefs of Mama Myra’s. If Tourovia is intending to avoid discrimination in all forms, then The Act is substantially under-inclusive in its pursuit. As applied, The Act is used for the very purpose of discrimination against religious dissenters, while potentially allowing analogous secular conduct to go unregulated. This Court stated in *Lukumi*, “Government in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief.” *Id*. Yet, Tourovia is now selectively imposing burdens on Mama Myra’s by requiring expressive speech in the name of state interest.

Additionally, this Court made clear that laws need not be as blatantly egregious as those found in *Lukumi* to be deemed non-generally applicable. *Id* at 544. Recognizing the extreme nature of the law, the opinion stated, “these ordinances fall well below the minimum standard necessary to protect first amendment rights.” *Id*. While it is hard to imagine another law being as facially egregious as those found in *Lukumi*, this Court provided a standard. Here, The Act still rises well above the minimum standard required necessary to protect Mama Myra’s first amendment rights.

3. Forced religious speech implicates the "Hybrid Rights Theory."

Even if this Court finds that The Act is both neutral and generally applicable, the proper standard of review remains strict scrutiny. This case goes well beyond the isolated rights of free speech or free exercise. This case intertwines these constitutionally protected rights because Tourovia is now forcing *religious speech*. Triggering both rights simultaneously raises the standard of review for each claim. *Smith*, 494 U.S. at 882. Justice Scalia, in *Smith*, differentiated isolated free exercise claims from hybrid rights claims, stating, "the present case does not present such a hybrid situation, but a free exercise claims unconnected with any communicative activity." *Id*. This differentiation in *Smith* has given rise to the "hybrid rights theory."

This Court in *Smith* envisioned a scenario where free exercise claims would be bolstered by additional constitutional rights. However, since the holding in *Smith*, the application of the "hybrid rights theory" has been fuzzy at best. Various circuit courts are split as to the application of the hybrid rights theory. However, we urge this court to adopt the approach of the Fifth, Ninth, and, Tenth Circuit Courts.

The Fifth, Ninth, and, Tenth Circuit Courts have applied a "colorable claims" test for the hybrid rights theory. When examining the theory, the Tenth Circuit Court stated that a hybrid rights claim "at least requires a colorable showing of infringement of recognized and specific constitutional rights." *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 1277, 1295 (10th Cir. 1998). That court made clear that a proper application of this theory only requires a *probability* of

prevailing on the companion claims. *Id*. Additionally, the court stated that analysis of the colorable claims requirement is fact intensive and must be determined on a case by case basis. *Id*.

This case is the perfect vehicle for this Court to adopt the colorable rights framework in applying the hybrid rights theory. Not only does The Act impermissibly burden the freedom of speech and expression of Mama Myra's, but it also burdens free exercise rights. Each claim is more than viable on its own, but, at the very least, the claims bolster one another. Mama Myra's has more than made a "*colorable showing*" of infringement of each protected right. Indeed, forcing an artist to express their work in an inherently religious ceremony should at least raise an inquiry that both rights have been violated. Therefore, Petitioner urges this Court to adopt the "colorable claims" test and apply the hybrid rights theory in this case.

4. The Act fails strict scrutiny review.

A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. *Lukumi*, 508 U.S. at 546. A law, that targets religious conduct, will survive strict scrutiny only in rare cases. *Id*. Additionally, to satisfy the commands of the First Amendment, a law restrictive of religious practice "must be narrowly tailored in pursuit of those interests." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

The state interest of Tourovia must be more than simply "avoiding discrimination." This Court has recognized the need to focus on the specific state interest in each individual case. *Id* at 218. Here, two potential interests arise: equal

access rights for same-sex couples to obtain wedding cakes and the potential embarrassment or dignitary harm that a same-sex individual would experience when being turned away by a religious dissenter. Neither interest can be proven by the State to be adequately compelling, and thus The Act fails strict scrutiny review.

First, it is important to note, Respondents were only denied the request of crafting a custom wedding cake. The Bakery made clear that they would happily bake them anything else for their family party. R. at 2. Therefore, the state interest in protecting same-sex couples equal access and dignitary rights is less compelling. Surely the couple would be able to find other bakeries that would gladly bake them a cake for their wedding. Equal access to obtaining wedding cakes falls short of being a legitimate state interest that justifies burdening religion.

Second, the interest in protecting the dignity of same-sex compels who are denied service by religious dissenters does not rise to the level of a compelling state interest. At issue, in this case, is the dignitary and emotional harm of both The Barbers and Mama Myra's. On one hand, you have the potential embarrassment of being denied service because of your sexual orientation, and on the other, you have the emotional harm that comes with a belief that you are defying gods will. However, this court has made clear that dignitary harm is not a compelling interest when free speech rights are at stake. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 50-57 (1988). The state has no compelling interest in restricting the free exercise of one's religion, even if practicing that religion is found to be offensive to some.

Lastly, The Act is not narrowly drawn. The Tourovia legislature has various other reasonable means of accomplishing the stated interests, without infringing on religious beliefs. The state could easily narrow the definition of "public place of accommodation" to mirror similar provisions found in federal law. *See* 42 U.S.C. § 2000a. This Federal statute narrowly defines "public places of accommodation" as places like hotels, restaurants, and places of entertainment. Applying this construct to this case would prohibit Mama Myra's from denying service for goods bought in the store, while still allowing the Bakery to selectively choose when to make custom cakes. Additionally, the Tourovia State legislature could define "discriminate" in such a way that exempted out certain religiously motivated action.

Therefore, because Tourovia will be unable to prove a compelling state interest, and The Act is not narrowly defined, The Tourovia Civil Rights Act fails strict scrutiny review.

B. Requiring Mama Myra's to participate in a wedding violates the Establishment Clause.

Not only does The Act, as applied, violate Mama Myra's Free Exercise rights, but compelling its action in a religious ceremony violates the Establishment Clause.

The owners of Mama Myra's Bakery believe that a wedding is an inherently religious event. If Tourovia prevails, the owners of Mama Myra's will be forced to either partake in the wedding or stop baking cakes altogether. Compelling or coercing "religious dissenters" to participate in a religious event is a clear violation of the Establishment Clause. *Lee v. Weisman*, 505 U.S. 577, 594 (1992).

In *Weisman*, this Court held that a school requirement that graduates stand silently for a prayer was a violation of the Establishment Clause. *Id*. This Court viewed compelled standing as "required participation in a religious exercise." *Id* at 595. Furthermore, it reasoned that a "reasonable dissenter" would view the act of standing or even remaining silent during a prayer as coerced participation in an inherently religious event, and thus a violation of the Establishment Clause. *Id*.

Similar to *Weisman*, Mama Myra's, a "reasonable dissenter," is now being forced to participate in a religious exercise. Crafting a custom cake for a wedding, like standing for a prayer, can be viewed as active participation in a religious event. Despite the holding in *Weisman*, the Tourovia Court of Appeals stated:

> "It is unlikely that the public would view appellant's baking of a cake for a same-sex wedding celebration as the Bakery's endorsement of said conduct. It is the opinion of this Court that a reasonable person would find and understand the Bakery's actions as mere compliance with the law and not a reflection of its own beliefs."

Supra. at 12. However, the same could have been said of a religious dissenter in *Weisman*. If the same logic is applied, then a reasonable person would simply see standing for a prayer as compliance with school policy. However, this Court held exactly the opposite. The proper inquiry is not whether a reasonable person perceived the action as religious, but rather, whether the coerced party would view the requirement as participation in a religious event. *Weisman*, 505 U.S. at 594.

If standing silently could be viewed as participation, then surely this Court would view crafting a custom-made wedding cake as participation in a religious event. Mama Myra's is being forced to take an active role in an inherently religious

ceremony which conflicts with its sincerely held beliefs. This forced action goes well beyond the action seen in *Weisman*, and therefore should be viewed as a clear violation of the Establishment Clause.

CONCLUSION

For the foregoing reasons, this Court should find in favor of Mama Myra's Bakery, Inc. and reverse the ruling of the Supreme Court of Tourovia.

Dated: March 4, 2018

Respectfully submitted,

Team # 2

Attorneys for Petitioner