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 RESPONDENTS

Team 10

Counsel of Record

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QUESTIONS PRESENTED

I. Is an anti-discrimination law violative of First Amendment rights to free speech when the speech at issue is not considered speech or symbolic conduct?

II. Is a neutral and generally applicable law prohibiting sexual orientation discrimination a violation of an individual's First Amendment right to free exercise?

STATEMENT OF THE CASE

In 2012, in P-Town, Massachusetts, respondents Hank and Cody Barber (hereinafter "Respondents") were married in a small ceremony which most of their family and friends were unable to attend due to the fact that most of their family and friends lived in Tourovia, where same-sex marriages were not allowed. (R. at 2). Accordingly, the ceremony took place in Massachusetts, where same-sex marriage was legal. Wanting nothing more than to include their family and friends in a celebration of their nuptials, they planned to share their happiness with friends and family at a catering hall later that summer. (R. at 2).

As is custom with most wedding celebrations, a cake needed to be made for the event that was taking place. The Barbers decided that they wanted a cake with a sculpted figure of the two of them hand-in-hand on the top tier of the cake. (R. at 2). The Barbers had seen the masterpieces that had been created for previous weddings and events by a small bakery in Tourovia known as Mama Myra's Bakery, the petitioner in this matter. Deciding that they too wanted their event to be part of Mama Myra's Bakery's repertoire, the Barbers set out to see if Mama Myra's Bakery would design yet another breathtaking cake that was tailored to their decided upon specifications.

The Barbers were understandably devastated when Petitioners refused to make the Barber's wedding celebration cake to their specifications. (R. at 2). Petitioners stated that the designing of the Barber's cake and the sculpture on the top tier of the cake would violate their sincerely-held belief that homosexual marriages violate the teachings of the Bible and Christianity, (R. at 3) a belief they have been outwardly expressing for over twenty-seven years. (R. at 2). The Barbers were not consoled when the Bakery offered to make and sell any other baked goods for the Barber's family party and they stormed out of Mama Myra's Bakery without another word. (R. at 2).

The Barbers then filed suit against Mama Myra's Bakery a few weeks later, claiming that the Bakery violated § 22.5(b) of Tourovia's Civil Rights Act; which states, 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 accomodation of any place of public accommodation because of their sexual orientation.

(R. at 3). The Petitioners argued in the District Court of Tourovia that they did not violate the Act because they were only refusing to design wedding cake based on the Barber's conduct of getting married, not because or their status as homosexuals. (R. at 3). Respondents countered with the argument that status discrimination and conduct discrimination are so closely related that a distinction between the two lacks legal recognition. (R. at 4). Accordingly, the District Court of Tourovia held that the burden of showing that petitioners refusal to create a wedding cake for the Barbers was met by the State of Tourovia; and as such, the court determined that the Bakery violated the provision of the Act that regulated places of public accommodation because there is no distinction to be made between status discrimination and conduct discrimination. (R. at 5).

In an appeal that took place in the Fourth Department of the Appellate Division of the Supreme Court of Tourovia, Petitioners argued that the District Court of Tourovia violated the Act, by violating their right to free speech and their right practice their religion under the Free Exercise clause of the First Amendment of the U.S. Constitution. (R. at 7). Petitioners argued that the Act mandated them to convey positive messages about same-sex marriages which would be in conflict their religious beliefs being homosexual is against everything taught in Christianity. (R. at 7). In addition, Petitioners argued that the Act targets their religion thereby

placing a burden on their ability to freely practice their religion. (R. at 9). The court of appeals subsequently held that the Act does not violate Petitioner's First Amendment rights to freedom of speech; nor does the Act inhibit Petitioner's ability to practice its religion. (R. at 11).

Petitioner, Mama Myra's Bakery filed a petition for a Writ of Certiorari which was subsequently granted in the Supreme Court of the State of Tourovia. (R. at 14).

SUMMARY OF THE ARGUMENT

The decision of the Appellate Division of the Supreme Court of Tourovia should be affirmed for the following reasons.

The designing and baking of a cake by a place of public accommodation is conduct, not speech. Furthermore, the act of designing and baking a cake is not symbolic conduct and is therefore not protected by the First Amendment. Following the guidelines set in *Rumsfeld*, this form of expression is not speech nor is it speech given the surrounding circumstances. Cake design is not inherently expressive and not every idea expressed through conduct is considered speech and afforded protection. The Bill of Rights is not without exceptions especially given the exemptions made for religious entities in §22.5(b) of the Tourovia Civil Rights Act, and Mama Myra's Bakery (hereinafter "Petitioner") is not considered a religious entity within the meaning of the Act.

Despite the fact that most conduct is not protected by the First Amendment, there is some conduct that is protected known as symbolic speech. In order to determine if the conduct is symbolic it must be shown by the complaining party that there is more than a mere contention that the conduct is inherently expressive and that there was an intention to convey a particularized message. Petitioners do not meet this burden. Therefore, no First Amendment protection is afforded.

Additionally, the Tourovia Civil Rights Statute does not violate Petitioner's First Amendment right to free exercise because the 22.5(b) is neutral and generally applicable. Under *Smith*, this Act is neutral and generally applicable, and it need not be justified by a rationally related interest. § 22.5(b) of Tourovia's Civil Rights Act (hereinafter "the Act") is neutral since the object of the law does not infringe upon or restrict Petitioner's ability to practice Christianity. This law is also neutral because it is not discriminatory on its face as no mention is made to a religious practice in the language or in the context of its application to Petitioner.

The Act does not place a burden on religiously motived conduct while making exemptions for similar conduct of a secular nature. The Act at issue regulates all discriminatory conduct regarding sexual-orientation and has an exemption for all religions, thus making the Act generally applicable. Since the Act is neutral and generally applicable, petitioners have failed to prove their burden that the Act is invalid and as such, the state has no burden to show that there was a rationally related government interest in enacting the Act. Accordingly, the Act does not violate petitioner's First Amendment right to free exercise of religion nor to their freedom of speech.

ARGUMENT

I.THE APPELLATE DIVISION PROPERLY HELD THAT § 22.5(b) OF TOUROVIA'S CIVIL RIGHTS ACT DOES NOT VIOLATE PETITIONERS'S FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH

The First Amendment right of Mama Myra's Bakery to freedom of speech is not violated by §22.5(b) of Tourovia's Civil Rights Act because the Act is not a content-based compulsion of speech that is forcing Petitioners to convey a government message that is in conflict with their beliefs and the act of designing a cake for a wedding is conduct that is not symbolic and as such, is not afforded the First Amendment protection given to particular messages characterized as symbolic speech because it is not inherently expressive and it is not likely that the public would view the Petitioner's baking and designing of a cake for a same-sex wedding celebration as endorsement for the same-sex wedding.

"Congress shall make no law…abridging the freedom of speech." U.S. Const. amend. I, § 1. Since 1971, "…the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.' *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382-383 (1992). The plain terms of the First Amendment protect "speech," not conduct. However, in *United States v. O'Brien*, the Supreme Court has held that some forms of conduct are symbolic speech and they too deserve First Amendment protections. *United States v.*

O' Brien, 391 U.S. 367 (1968). When speech and non-speech elements are combined in the same course of conduct, such as preparation of a cake and the verbal refusal of services, a sufficiently important governmental interest in regulating the non-speech element could justify incidental limitations on First Amendment freedoms. *See United States v O'Brien*, 391 US 367, 376-377 (1968).

Historically, the First Amendment has never been interpreted to be without limits; nor has prior case law interpreted the First Amendment to include protections for the design of custom edible goods. "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea" *United States v O'Brien*, 391 US 367, 376-377 (1968). Several constitutional provisions of the Bill of Rights are subject to exceptions, recognized prior to its adoption, and not interfering at all with its purpose, and such exceptions were intended to be respected. *Mattox v United States*, 156 US 237, 39 L. Ed. 409, 15 S. Ct. 337 (1895).

The Fourteenth Amendment makes First Amendment applicable to states. *Murdock v. Pennsylvania*, 319 U.S. 105, 87 L. Ed. 1292, 63 S. Ct. 870, 146 ALR 81 (1943). As a state, Tourovia has the right to regulate the general welfare of its citizens regarding areas of health, safety and morality. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997); U.S. Const. Amend. X.

A. Petitioner's Are Not Being Forced To Convey The Government's Message Because The Act Regulates Conduct, Not Speech

The Act at issue regulates conduct, not speech. Therefore, Petitioners should not be afforded the protections which are typically afforded to content-based laws that compel speech. The First Amendment speech clause bars the government from telling people what they must

say; the First Amendment speech clause is silent in regards to the government telling citizens what they can and cannot do. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) (citing *West Virginia Bd. Of Ed. v. Barnette*, 319 U.S. 624, 642 (1943); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

In *Rumsfeld*, the Supreme Court held that the Solomon Act, which was a statute enacted by Congress that threatened to take away federal funding from law schools unless they allowed military recruiters access to students on campus equal to the access which was provided to other recruiters was constitutional and not violative of the law schools' First Amendment right of expression and association. The Court said that the Solomon Act affected "what law schools must *do*…not what they may not *say*." *Id.* at 60 The Court further held that laws that do not dictate the content of the speech at issue are also constitutional. Additionally, the Court held that limitations should be placed on speech only when the speaker's message is affected by the speech it was forced to accommodate. *Id.* at 63. (citing *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 568 (1995). However, the Court held that "Nothing about recruiting suggests that law schools agree with any speech by recruiters." *See Id.* at 65. Thus, speech is not compelled speech if it is simply being accommodated or hosted by another party who does not agree with the speech at issue. See *Id.* at 64.

The Act at issue in this case modifies the conduct, not belief or expression, of businesses that are places of public accommodation. On its face, this law places no limit on freedom of speech or expression. The limits on speech argued here by the petitioner are too far attenuated and incidental to a compelling government interest to limit discrimination in places of public accommodation. Just like the Solomon Act in *Rumsfeld*, which gave law schools a choice to either allow military recruiters the same access to their students that any other employment

recruiter would have or forgo federal funding, the Act in this matter prohibits places of public accomodation from engaging in the conduct of discriminating against persons based on their sexual orientation.

The Act affects what Mama Myra's Bakery must *do*--afford equal access everyone regardless of their sexual orientation--not what Mama Myra's Bakery may not *say*. The Act at issue does not regulate the content of what petitioner's closely-held belief is. The Act is not saying that petitioners must support same-sex marriage. Petitioners are absolutely free to say that they do not support same-sex marriage or that they do not support being homosexual, the Act does not limit their freedom to say such things. Furthermore, Mama Myra's Bakery is not an institution or an organization whose sole purpose is to convey a particular message. Like in Rumsfeld, the speech being accommodated in this matter is not altering any message that the petitioners are trying advance. The only message that petitioners are advancing when designing and baking cakes for customers is that they design and bake cakes for public consumption and that is the only message that will be conveyed to an outside observer.

A. The Conduct Of Designing And Baking a Cake Is Not Symbolic Conduct And Should Therefore Not Be Afforded First Amendment Protection

Although it has been determined above that the Act at issue in this matter does not regulate speech but rather regulates conduct, Petitioners argue that the designing and baking of a cake is symbolic conduct which is protected under the First Amendment. *O'Brien*, 391 U.S. at 382. Petitioners have the burden of proving that the designing and baking of a cake in symbolic conduct. *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288 (1984). However, they will not be able to meet this burden of proof due to the fact that the act of designing and baking a

cake for a paying customer is not inherently expressive and it is not likely that the designing and baking of this cake will be seen by the public as a message of support for same-sex marriage.

Symbolic conduct is protected by the First Amendment when a court determines that the conduct is inherently expressive and the likelihood that the message would be understood by the public was greater than the likelihood that the message would not be understood. *Texas v. Johnson*, 491 U.S. 397 (1989); *see also Spence v. Washington*, 418 U.S. 405 (1974). Conduct is inherently expressive when there is an intention to convey a particularized message present. *Spence v. Washington*, 418 U.S. 405, 410-11, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974).

In *Rumsfeld*, the Court held that the "expressive component of [conduct] is not created by the conduct itself but by the speech that accompanies it." *Id.* at 66. In *Barnette*, a state statute requiring saluting the flag was struck down as unconstitutional as it applied to certain student's religions. *Id.* This Court reasoned that the act of saluting combing with the words served as an effective form of communication. *West Virginia Bd. Of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). In *Hurley*, the court held that the Government could not force parade organizers to hold an inclusive parade because the court reasoned that the nature and purpose of a parade is to convey a message and is considered inherently expressive speech, the content of which the government could not modify to be inclusive, and was therefore protected under the First Amendment. *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 568 (1995). Lastly, In *Dale*, an adult Eagle Scout member and assistant scout master had both titles removed upon the organization learning that he was gay. This Court held the nature of the organization in imparting ethical values in young people made it indisputable that it was an expressive activity and therefore the forced inclusion of the plaintiff would infringe on their freedom of expressive association. *BSA v. Dale*, 530 U.S. 640, 644 (2000).

In this case, the First Amendment protections afforded to the particular forms of conduct that can be considered symbolic speech do not apply to petitioners here because they are unable to meet their burden of showing that the act of designing and baking of a cake is symbolic conduct because the act of designing and baking a cake and selling it a customer is not inherently expressive. Unlike the statute requiring school children to recite the Pledge of Allegiance and salute the flag, in *Barnette*, the baking and designing of a cake is not conduct that requires saluting same-sex marriage nor does it require reciting any words that are in support of same-sex marriage. Similarly, the parade in *Hurley*, the baking and designing of a cake is not speech that is inherently expressive. A parade involves hundreds of people participating in a very publicized manner for a certain cause or holiday. The baking and designing of a cake is not a publicized display that involves hundreds of people gathering together expressing one viewpoint for a cause. Lastly, unlike *Dale*, a bakery is not an organization tasked with the expressive activity of "imparting ethical values in young people" the baking and designing of a cake should not be held as inherently expressive conduct.

"To the extent that the…Amendment incidentally affects expression, the…schools' effort to case themselves as just like the school children in *Barnette*, the parade organizers in *Hurley*, and the Boy Scouts in *Dale* plainly overstates the expressive nature of their activity and the impact of the Amendment on it, while exaggerating the reach of our First Amendment precedents. *Rumsfeld*, 547 U.S. at 70. It has never been held that a customized good that is meant for consumption was intended to convey a particularized message. The designing and baking of a cake for a paying customer is solely conveying a message that the customer has told a baker that they, the customer, want to convey. A baker that is in business as a place of public

accommodation designs and bakes a cake only with the intention of conveying a message that was specified by the customer and that the customer, not the baker wants to convey.

Furthermore, the designing and baking of a wedding cake is not expressive unless there is a speech element that comes with it. *See Id.* Since nothing needs to be said during the process of designing and baking a cake, it is not likely that outside observers would find the petitioner's act of designing and baking a cake for a same-sex wedding celebration was conveyed as an "overwhelmingly apparent," message of support for same-sex marriage. Reasonable minds would agree the message comes from the purchaser of the good to the recipient and not from the creator to the recipient.

Supreme Courts in New Mexico and Washington have upheld anti-discriminatory laws in places of public accommodation that have come into conflict with First Amendment protections. *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013); *State v. Arlene's Flowers, Inc.*, 187 Wash. 2d. 804 (2017). In *Elane Photography*, the Supreme Court of New Mexico required a photographer, who's business was also a place of public accommodation, to provide full and equal services offered to heterosexual couples pursuant to anti-discriminatory laws set by the state. *Elane Photography, LLC*, 309 P.3d 53 N.M. In a factually similar case to the one currently at issue, the Supreme Court of Washington held, "the proprietor of a commercial business who refuses to provide services for the wedding of a same-sex couple on religious freedom grounds. the protection against sexual orientation discrimination by a place of public accommodation under the Washington Law Against Discrimination does not violate the Cont. Art. I, § 11 protection of religious freedom under strict scrutiny review." *State v. Arlene's Flowers, Inc.*, 187 Wash. 2d. 804, 814, 389 P. 3d. 543, 548 (2017). The Washington court reasoned that the public accommodations provision of the law prohibiting discrimination was a neutral health and safety

regulation which served a compelling government interest. Id. The court in Arlene's Flowers further stated that the statutory protection did not merely ensure access to goods or services but served a greater societal purpose of creating a commercial marketplace in which all citizens could equally enjoy participation in. *Id.*

In light of the foregoing reasons, respondents urge this Court to affirm the holding of the Appellate Division and hold that § 22.5(b) of Tourovia's Civil Rights Act does not violate Mama Myra's Bakery's First Amendment right to the free speech because the act of designing and baking a cake is not compelled speech; nor is it symbolic speech because it is not inherently expressive in that the conduct of designing and baking a cake does not come with the intention to convey a particularized message and furthermore, the likelihood that an outside observer would be under the impression that Petitioners support same-sex marriage just by seeing a cake designed by petitioners is very low.

II.THE APPELLATE DIVISION OF THE SUPREME COURT OF TOUROVIA PROPERLY HELD THAT § 22.5(b) DOES NOT VIOLATE PETITIONERS RIGHT TO THE FREE EXERCISE OF RELIGION UNDER THE FIRST AMENDMENT OF THE U.S. CONSTITUION

The religion clauses in the First Amendment state that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I, § 2. "The fundamental concept of liberty embodied in [the fourteenth] amendment embraces those liberties guaranteed by the First Amendment." *Cantwell v. Connecticut.*, 310 U.S. 296, 303 (1940) (citing *Schneider v. State*, 308 U.S. 147, 160 (1939)). Thus, the First Amendment is applicable to the states by incorporation to the Fourteenth Amendment. *See Id.* "The Free Exercise Clause protects religious observers against unequal treatment by legislators."

Church of Lukumi Bablau Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993) (*quoting Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987)) and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation. *Id.*

In *Employment Div. Dept. of Human Res. of Ore. v. Smith*, 494 U.S. 872, 879-881 (1990), the Supreme Court held that the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws. "[T]he general proposition [is] that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of Lukumi*, 508 U.S. at 531 (quoting *Smith*, U.S. 508 at 879-881). In response to the holding in *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), which prohibited the government from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, unless the government can prove that the law is valid under strict scrutiny. *See City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). However, the court in *City of Boerne* held that RFRA was unconstitutional saying that RFRA was "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Id.* Accordingly, it was held in that case that RFRA cannot apply to the states because "RFRA is not designed to identify and counteract state law likely to be unconstitutional because of their treatment of religion." *Id.* Thus, the test set forth in RFRA is invalid as applied to the states and this Court should adhere to the tests applied in *Smith* and *Church of Lukumi*. *See Id.* at 534-535; *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006) and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014).

According the holdings in *Smith* and *Church of Lukumi*, the burden is first on the party challenging the statute to show that the Act is not neutral or generally applicable. *See Smith*, 494 U.S. at 879. If it is shown that the law is not neutral or generally applicable, the burden then shifts to the state to show that the statute at issue is valid because there was a compelling government interest in enacting the law. *See Id.* at 883. See also *Church of Lukumi*, 508 U.S. at 531.

The Appellate Division did not err when it held that the Act does not violate petitioners First Amendment right to the free exercise religion. Thus, this Court should affirm the judgment of the Appellate Division. Because the Petitioners are unable to show that the Act is not neutral or generally applicable, respondents are not required to show that the Act was justified by a compelling state interest.

A. The Appellate Court Properly Held That The Act Is Neutral and One of General Applicability

The Appellate Division correctly held that the Act in this case was neutral because the object of the Act was not "to infringe upon or restrict practices because of their religious motivation." *Church of Lukumi*, 508 U.S. at 542. Furthermore, the Act is generally applicable because it does not impose "burdens on religiously motivated conduct while permitting exceptions for secular conduct or for favored religions." *Id.* at 542-44.

The Supreme Court held in *Church of Lukumi* that a law is not neutral if the object of the enactment of the law is to regulate religious practices. *See Id.* at 533 (quoting *Smith*, 494 U.S. at 878-79). In order to determine the object of the law, a court should look at the text of the challenged law because the law being challenged must not be facially discriminatory, which is

the minimum requirement of neutrality. *See Id.* at 533. When a law refers to a religious practice without a secular meaning that can be distinguished from the language or context, the law is discriminatory on its face and thus, is not neutral. *See Id.* However, a law that a law that is found to be facially neutral does not pass the neutrality requirement solely based on that determination alone. *See Id.* at 534. A court should additionally analyze the circumstances which prompted the legislature to enact the challenged law in or to determine if the law is in favor or disfavor of a particular religion. *See Id.* (*quoting Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970). A court must also look to the cases that used Fourteenth Amendment equal protection violation analysis in order to determine if the object of a challenged law is discriminatory and not generally applicable. *See Id.* at 540. This evidence can include the historical background of the decision to enact the law and the series of events leading up to the enactment of the law. *See Id.*

If a party is claiming that a law is in violation of the Free Exercise Clause, the second requirement is a showing that the law is not generally applicable. *See Id.* at 542. Laws that are not generally applicable are unequal in their application. *See Id.* When a legislature decides that the interests a government seeks to advance are worthy of being pursued only against conduct with a religious motivation, the application of that law is considered unequal and thus, not generally applicable. *See Id.* at 543.

In *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879-881 (1990), the Supreme Court held that a law that is neutral and of general applicability need no be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. In that case, the respondents were terminated from their jobs for ingesting peyote for religious purposes at a ceremony of the Native American Church. The use of peyote as a religious ritual fell within the reach of Oregon's controlled substance law

and was therefore illegal. Both respondents were denied unemployment compensation following their termination because it was determined that they were ineligible because they had been terminated for work related misconduct. The respondents appealed claiming that their Free Exercise right in the First Amendment was violated because there was no exception for the use of peyote for religious purposes in the Oregon drug law. In response to this claim, Justice Scalia writing the majority opinion, stated that the Supreme Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878-879. If a law is a valid and neutral law of general applicability, the right of free exercise does not relieve an individual of the obligation to comply with that law. *Id.*

In *Church of Lukumi*, the Supreme Court struck down a Florida city ordinance prohibiting the "unnecessary killing" of any animal in any type of ritual unless that animal was killed for the purposes of food consumption. *Id.* at 527. The Court held that the ordinance was a violation of the free exercise right to practice their religion because the petitioner, the Church of Lukumi, was able to show that the various ordinances enacted by the city were not neutral and not generally applicable. Because the Church was able to show that the ordinances were not neutral and not generally applicable, the City of Hialeah was required to show that they had a compelling and rationally related government interest in enacting the ordinances and they were unable to do so. *See Id.* at 546.

The Court stated that the ordinances were not neutral or generally applicable because it was determined that the object of the ordinances was to target the Santeria religion by regulating the animal sacrifice component of the Santeria religion. *See Id.* at 542. In order to determine the object of the ordinances, the Court first looked at the legislatures choice of the words "sacrifice"

and "ritual" and found that the legislature's choice to use those words supported the Court's conclusion that the ordinances targeted the Santeria religion. *Id.* at 535. The Court further considered the effect of the ordinances in their operation, because evidence of the object of the law could be found when the effects of the law are analyzed. *See Id.* The Court also found that the legislature targeted the Santeria religion in the way that the ordinances were drafted. One of the ordinances defined the word "sacrifice", as used in the ordinance, as "the unnecessary killing of an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." *Id.* at 535-536.

The Court determined that this language was only directed at the killings of animals for religious purposes and it also excluded any other purpose for the unnecessary killing of animals, such as hunting or fishing. *See Id.* at 536. Lastly, the Court also determined the object of the law can also be determined by using both direct and circumstantial evidence, such as the series of events leading up to the enactment of the law and patterns of animosity towards the religion that is claiming that the law targeted them. *See Id.* at 535. The Court found that the ordinances were enacted in direct response to the announcement of the opening of the church and thus it was found that the ordinances were a violation of the church's free exercise rights. *See Id.* at 538. In doing this, the Court concluded the ordinances were "underinclusive" in regards to the government interests being pursued by the City because the ordinances only prohibited conduct motivated by religious belief. *See Id.* at 544. While protecting the public health and preventing cruelty to animals are important interests, the ordinances were not conducive to the application of the government interest because the ordinances do not prohibit animal killings for non-religious reasons, only religious reasons. *See Id.*

The statute in this case is neutral and generally applicable and, according to the holding in *Smith*, does not need to be justified by a compelling state interest. Unlike the ordinances in *Church of Lukumi*, the Act is neutral and generally applicable. The Act is neutral because it does not refer to a religious practice without a secular meaning. Furthermore, the Act does not mention any religious practice because the words used in the language of the statute have no religious meaning on its face or in the context in which it was enacted. Therefore, unlike the ordinances in *Church of Lukumi* that used the words "sacrifice" and "ritual" which referred to a religious practice that was a central component to the practice of Santeria, the Act at issue in this case does not use any words that refer to a central religious component of Christianity, nor was the statute enacted with the intention to do so. The Petitioners are free to pray in their bakery; they are free to tell people that they believe in God; they are even free to tell people that they do not support homosexuality; however, what petitioners cannot do is deny an individual the right to equal treatment by a public business who chose to serve the entire public when they decided to enter into the flow of commerce. As stated in *Church of Lukumi*, the fact that a law is facially neutral is not enough to determine if it is neutral, as applied to the tests set forth in *Smith* and *Church of Lukumi*. *See Id.* at 534. A court must also look at the series of events leading up to the enactment of the law, the context in which it was enacted, and the effect of the law after it was enacted. *See Id.* In this case, the Act does not historically or contextually target Christianity or any other religion.

When a legislature decides that the interests a government seeks to advance are worthy of being pursued only against conduct with a religious motivation, the application of that law is considered unequal and thus, not generally applicable *Church of Lukumi Babalu Ave. v. City of Hialeah*, 508 U.S. 520, 543 (1993). The ordinances in *Church of Lukumi* were not generally

applicable because they targeted a particular religious practice. In that case, the ordinances defined "sacrifice" as the "unnecessary killing of animals" and the "unnecessary killing of animals" was defined as the "killing of an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." *See Id.* at 537. Exemptions were carved out for secular conduct like the hunting and fishing of animals and religious conduct like kosher establishments. *See Id.*

The Court in *Church of Lukumi* found that the ordinances were not generally applicable because they imposed burdens on religiously motivated conduct while allowing secular and specific religious conduct to be exempt. *See Id.* at 543-544. In this case, the Act at issue regulates all discriminatory conduct within the Tourovia sphere of commerce. Unlike the ordinances in *Church of Lukumi*, The Act does not refer to any one group or religion; it states generally that discrimination based on sexual orientation by "any person or persons" is against the law. Additionally, unlike the ordinances in *Church of Lukumi*, the Act at issue in this matter does not have any exemptions that favor secular conduct, nor does it have any exemptions that favor one religion. The exemptions in the Act exclude "places solely used for religious purposes" from having the Act enforced against them. Mama Myra's Bakery is a place of public accomodation as defined in the Act; it is not a place used solely for religious purposes. Therefore, petitioners are not exempt from complying with the Act.

CONCLUSION

Hank and Cody Barber's rights to Equal Protection under the Tourovia State Constitution were violated when they were denied the "full and equal enjoyment of the goods" on the basis of their sexual orientation when Petition, Mama Myra's Bakery refused to create a cake for the celebration of their marriage. in violation of their Equal Protection right, under the Tourovia

State Constitution. This was in violation of §22.5(b) of the Tourovia Civil Right Act which is constitutional and not violative of Petitioner's First Amendment free speech and free exercise rights.

While a limit that sufficiently respects both the First Amendment rights of those who are legitimately being compelled to create speech, and the legitimate interests of states that enact anti-discriminatory laws, accepting the notion that preparation of an element equates to participation would convert the First Amendment into a vehicle for anti-complicity that would create a loophole for non-compliance to state's various anti-discrimination laws. Antidiscrimination laws, not unlike other laws, should not be undercut by attenuated claims of circumstantial burden. The First Amendment does not provide private individuals or institutions right to engage in discrimination. *Grove City College v. Bell* (1982, CA3 Pa) 687 F2d 684. 31 CCH EPD P 33395, *affd.* (1984) 465 US 555, 104 S Ct 1211, 79 L. Ed. 2d 516, 33)).

By choosing to own or operate in a place of public accommodation, under Tourovia law, the baker had agreed through conduct to provide his full and equal service despite the nature of the customer. He was effectively put on notice when Tourovia law was instated and just because he finds the law in conflict with his religion it does not grant him the right to ignore it. *Davis v. Miller*, 136 S. Ct. 23, 192 L. Ed. 2d 994 (2015). *See also Employment Div. Dept. of Human Res. Of Ore. v. Smith,* 494 U.S. 872, 879-881 (1990). As applied here, the interest in providing equal treatment to customers, regardless of sexual orientation, by employees in places of public accommodation outweighs the potential limits on employees' speech in such places.

The Court has "never held that an individual's religious beliefs excuse [them] from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate." *Employment Div. Dept. of Human Resources of Ore. V. Smith*, 494 U.S. 872, 879-881 (1990).

Since petitioners are unable to show that this law is not valid under the tests set forth in *Smith* and *Church of Lukumi* and because the State of Tourovia has the right and "general authority to regulate for the health and welfare of [its] citizens" *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), respondents urge this Court to affirm the holding of the Appellate Division and hold that § 22.5(b) of Tourovia's Civil Rights Act does not violate Mama Myra's Bakery's First Amendment right to the free speech because the act of designing and baking a cake is not compelled speech; nor is it symbolic speech because it is not inherently expressive in that the conduct of designing and baking a cake does not come with the intention to convey a particularized message and the likelihood that an outside observer would be under the impression that petitioners support same-sex marriage just by seeing a cake designed by petitioners is very low. Additionally, Respondents urge this Court to affirm that holding of the Appellate Division and hold that §22.5(b) of Tourovia's Civil Rights Act does not violate Mama Myra's Bakery's First Amendment right to the free exercise of religion because the Act is neutral and generally applicable and is therefore valid and as such, compliance the petitioner is required by law.