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 THE UNITED STATES

BRIEF FOR PETITIONERS

Dated March 4, 2018

Team 11

Counsel for the Petitioners

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QUESTIONS PRESENTED

1. Whether the law violates the Free Speech Clause by compelling a private actor to endorse and embrace the message of another, contrary to sincerely held religious beliefs.
2. Whether the law violates the Free Exercise Clause by enforcing a non-neutral and not generally applicable law that limits a person's religious liberty.

STATEMENT OF THE FACTS

Mama Myra's Bakery (hereinafter "Mama Myra's") is operated by a Christian family in Suffolk County, Tourovia (hereinafter "Tourovia" or "the State"). Record (hereinafter "R") at 2. For over twenty-seven years, Mama Myra's and its employees have outwardly expressed their religious beliefs in operating their bakery. *Id*. at 2. These religious beliefs include following the teachings of Jesus Christ, the Bible, and Christianity. *Id.* at 3. Mama Myra's makes a wide selection of baked goods for sale to the public; however, the bakery also sells specially-created, custom wedding cakes. *Id.* at 2, 3. The bakers at Mama Myra's meet with couples prior to crafting wedding cakes, and they carefully sculpt the cake according to clients' demands. *Id.*

Hank and Cody Barber (hereinafter "the Barbers" or simply "Barbers"), a same-sex couple married in P-Town, Massachusetts in the early summer of 2012, are citizens of Tourovia. *Id.* That August, the Barbers sought to celebrate their wedding with friends and family in Tourovia, and they sought a traditional wedding cake to accompany that celebration. *Id.* The couple went to Mama Myra's to purchase a cake, which Mama Myra's was happy to provide. *Id.* However, when the baker learned of the Barbers' intention to include a depiction of a same-sex couple in the traditional place atop the cake, the baker informed the Barbers that would not be a possibility. *Id.* The baker informed the Barbers that due to sincerely held religious beliefs, the bakery would be unable to engage in the kind of artistic expression the couple was seeking. *Id.* However, Mama Myra's would happily provide any other baked goods available for sale in the store. *Id.*

After Mama Myra's offered to bake and sell goods for the Barbers instead of creating a specialty wedding cake, the Barbers filed discrimination charges under §22.5(b) of the Tourovia Civil Rights Act (hereinafter "the Act"). R at 3. The charge claimed Mama Myra's violated the

Act when the Mama Myra's employees, religiously opposed to same-sex marriage, did not create and sculpt a custom-made wedding cake for the Barbers. *Id.* The public accommodation provision of the Act states the following:

> 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.

Id. The parties do not dispute that Mama Myra's is a place of public accommodation for the purposes of the statute. *Id.*

DISPOSITION OF THE CASE

The District Court held that Mama Myra's violated the Civil Rights Act when it did not offer to create a specialty wedding cake for the Barbers. *Id.* at 5. The District Court further held that the Tourovia State Constitution did not shield Mama Myra's actions. *Id.* On appeal to the Appellate Division of the Supreme Court of Tourovia, the Appellate Court denied the Bakery's motion to set aside judgment, notwithstanding Mama Myra's First Amendment rights to freedom of speech and freedom to freely exercise their religion. *Id.* at 11. The Supreme Court of Tourovia affirmed the appellate court's decision, and this appeal followed. *Id.* at 15, 16.

SUMMARY OF THE ARGUMENT

As the bakers employed by Mama Myra's Bakery engage in expressive conduct when they craft a specialty, celebratory wedding cake, this expression should be protected from the government's attempt to prescribe and compel the creation of content. Although the act of baking a cake is conduct, in this case it is sufficiently expressive conduct to trigger First Amendment, free speech protection. The employees of Mama Myra's craft a shared message with the couple to express the joy and celebration the couple experiences when they marry. The Act also restricts expressive conduct on the basis of viewpoint by compelling those who are not in favor of same-sex marriages to communicate their support for the weddings of same-sex couples. This Act compels speakers on one side of the debate to engage in expressive conduct in a manner contrary to their own beliefs. This violates Mama Myra's First Amendment right of free speech and is unconstitutional because its effect is to select a winner in this inherently religious, social, and moral debate.

When a law involves the constitutional protection of freedom of speech, the First Amendment bars application of even a neutral and generally applicable law. Here, by forcing Mama Myra's to engage in expressive, protected conduct, the Act violates Mama Myra's freedom of speech. Furthermore, the law compels speech contrary to Mama Myra's sincerely held religious belief opposing same-sex marriage, the Act violates the Free Exercise Clause and should be barred by the First Amendment.

The law violates the Free Exercise Clause of the First Amendment, which applies to the states through the Fourteenth Amendment's Due Process Clause. The Free Exercise Clause protects people's religious freedom, and ensures that the government does not impose undue

restrictions on a person's religious belief that would contravene a person's protected religious freedom.

The test for whether a law violates the Free Exercise Clause requires that, so long as the government's interest is rational, a person must follow a neutral and generally applicable law. However, when the Act could be addressed in ways that would not force Mama Myra's to act in discordance with their religious beliefs, the Act may be found as not neutral and generally applicable.

The Act here is not neutral and generally applicable. It is underinclusive in that it does not include secular conduct, such as actions done in private association, that would endanger the proposed interest to a similar degree. Furthermore, the Act is overbroad when it it could be limited to providing goods and services in the ordinary course of business.

When a law is not neutral and generally applicable, it must satisfy the rigors of strict scrutiny by showing that the law advances a compelling interest that is narrowly tailored. Here, the government's interest in preventing discrimination is not compelling when it forces Mama Myra's to act contrary to their religious belief. The Act is also not narrowly tailored when it is both overbroad and underinclusive as described above. Therefore, the Act does not meet the rigors of strict scrutiny and is unconstitutional.

ARGUMENT

I. MAMA MYRA'S PROFESSIONAL BAKERS ARE ENGAGED IN INHERENTLY EXPRESSIVE CONDUCT, WHICH IS PROTECTED BY THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

The specialty cakes crafted at Mama Myra's are forms of artistic, expressive speech protected from excessive regulation and from compelled speech by the First Amendment. Although Tourovia's stated interest in enacting the Civil Rights Act is to ensure all citizens are afforded access to places of public accommodation regardless of sexual orientation, the application is not narrowly tailored and does not satisfy First Amendment scrutiny. *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968); R. at 5. Furthermore, that interest is not effectively accomplished through this excessive regulation when the regulation restricts speech on the basis of viewpoint, which triggers a narrow tailoring analysis. *Tex. v. Johnson*, 491 U.S. 397, 403-04 (1989). The Act fails narrow tailoring because it restricts more speech than necessary to achieve its goal.

The Act also amounts to compelled speech because it requires Mama Myra's not only to endorse same-sex marriage, but to share in the experience with a same-sex couple during the crafting of the cake. This requirement to host the message of another conflicts with First Amendment principles and amounts to unconstitutional, compelled speech. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). Finally, although Mama Myra's is a corporate actor, it is participating in the expression of a viewpoint, which is speech the First Amendment "both fully protects and implicitly encourages." *Pac. Gas and Elec. Co. v. Pub. Util. Comm'n of Cal. (Pacific Gas)*, 475 U.S. 1, 9 (1986).

If the government forecloses all debate on an issue, it thwarts a primary objective of the First Amendment, which is to foster a vibrant marketplace of competing ideas. *See, U.S. v.*

Rumely, 345 U.S. 41, 56-57 (1953) (Douglas, J. concurring) (discussing the value of allowing many speakers from many viewpoints participate in the context of the press); *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (articulating the idea that the free trade in ideas is the best test for what is true). The government should not be at liberty to foreclose all debate on any issue, much less one which is a "contemporaneous issue of intense public concern." *Spence v. St. of Washington*, 418 U.S. 405, 410 (1974); *see also Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). Regardless of how committed the government is to an idea, "if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth." John Stuart Mill, *On Liberty* 34 (Elizabeth Rapaport ed., 3rd prtg. 1981). Justice Brandeis also agreed to the proposition that the drafters of the First Amendment had an eye towards protecting this marketplace; he wrote:

> Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Whitney v. Cal., 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

By closing discussion on this fundamentally religious debate, and forcing Mama Myra's to take a position contrary to its own religious beliefs, the government leaves Mama Myra's with only two options: engage in expressive conduct which is contrary to the sincerely held religious beliefs of the owners and employees of the company, or withdraw from the market of creating custom wedding cakes. A primary purpose of the First Amendment is to protect and foster the marketplace of ideas, and this law, as applied to Mama Myra's, unconstitutionally restricts one viewpoint in what is fundamentally a religious debate.

A. When Mama Myra's bakes a wedding cake for a couple, the bakers create art that expresses sincere religious beliefs and shared emotion, and that expression is unconstitutionally restricted by the State of Tourovia because the Act restricts speech on the basis of its content, and it restricts more speech than necessary to further its interest.

The bakers at Mama Myra's Bakery create art, which is an expressive form of speech protected by the First Amendment. Although the First Amendment only guarantees the "freedom of speech," courts have long recognized that conduct, when expressive in nature, is still protected by this clause. U.S. Const. amend. I; *see also O'Brien*, 391 U.S. at 376. The First Amendment is extended to restrict State action through the Fourteenth Amendment. *Gitlow v. People of the St. of N.Y.*, 268 U.S. 652, 666 (1925). While most conduct has some expressive value, not all expressive conduct receives First Amendment protection. *Spence*, 418 U.S. at 409. "[T]he nature of . . . activity, combined with the factual context, and the environment in which it was undertaken, [may] lead to the conclusion that [conduct is] a form of protected expression." *Id*. at 409-10.

The cakes created at Mama Myra's are precisely this kind of protected expression. Expressive conduct receives First Amendment protection when it is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Id.* at 409. Courts also consider if "an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 410-411). Another significant factor is if whether the message communicates a "contemporaneous issue of intense public concern." *Spence*, 418 U.S. at 410; see also *Johnson*, 491 U.S. at 405-06 (the speaker burned a flag in protest of the nomination of Ronald Reagan for President); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509-10 (1969) (holding students wearing black armbands in silent protest of the current conflict in Vietnam constitutes as expressive conduct). These factors help

guide the court in determining whether speech is sufficiently expressive to invoke the protections of the free speech clause of the First Amendment. *U.S. v. Swisher*, 811 F.3d 299, 310-11 (9th Cir. 2016) (discussing the varying factors considered by the United States Supreme Court when considering the extent of the expressive nature of conduct). Furthermore, as a general principle, "in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression." *Miller v. Cal.*, 413 U.S. 15, 22-23 (1973) (considering to what extent the free speech principles of the First Amendment protect pornography).

In this case, Mama Myra's conveys a religious message of celebration and rejoice of a wedding when its employee helps a couple craft a custom wedding cake. This message is conveyed to the couple, as well as being directed towards those attending the wedding reception. However, even if the Court finds it is unlikely Mama Myra's message will be accurately conveyed to the public, and even though many who view the wedding cake are unlikely to know that Mama Myra's created the cake, these uncertainties do not mean the baker has not participated in symbolic expression. While having the intended message accurately conveyed to the listener would indicate that the conduct is expressive, this accurate conveyance is not necessary for the message to be expressive the court recognizes, "[s]ymbolism is a primitive but effective way of communicating ideas." *Barnette*, 319 U.S. at 632. Furthermore, the anonymity of speech does not preclude protection under the First Amendment. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (holding that anonymity can itself advance a central interest of the First Amendment by protecting a speaker with an unpopular view from the "tyranny of the majority").

When conduct is deemed sufficiently expressive to receive First Amendment protection, any law restricting this conduct must pass the four-part test outlined in *O'Brien*. *O'Brien*, 391 U.S. at 377. First, the law must be within the authority of the government to enact. *Id*. Second, the law must advance an important or substantial government interest. *Id*. Third, the government interest must be unrelated to the suppression of speech. *Id*. Finally, any incidental restriction on speech must be "no greater than is essential to the furtherance of that interest." *Id*. The State may only restrict expressive speech if all of these factors are met. *Id*. There is no doubt the first factor is met in this case. Mama Myra's does not contest the State's power to regulate commerce within its own borders.

The government interest advanced by this law, however, is at issue. The State's proffered interest of ensuring all individuals are treated equally by places of public establishment regardless of sexual orientation is well intended, and alone is compelling. However, the Act misses the mark as applied to Mama Myra's. When a government interest is "not implicated on [the] facts . . . the interest drops out of the picture." *Johnson*, 491 U.S. at 403-04. Then, if the remaining interest is related to expression, "we are outside of *O'Brien's* test, and we must ask if the interest justifies [the] conviction under a more demanding standard." *Id*. at 403.

The law analyzed by the Court in *Johnson* provides a sharp example of how an interest offered by the government may not apply in a particular case. *Id.* at 407. In *Johnson*, Texas sought to prosecute a man for burning a flag in front of Dallas City Hall in protest of the Republican party's renomination of Ronald Reagan for president. *Id*. at 406. The State contended that the law, and subsequent prosecution, prevented a disturbance of the peace; however, no such disturbance in fact occurred as a result of the defendant's actions. *Id*. at 408. The Court found that because the State's interest in maintaining order was not implicated, the prosecution could

only rely on their other offered interest, of maintaining the flag as a "symbol of nationhood and national unity." This interest directly implicates free speech due to the nature of the flag as such a symbol. *Id*. As the Court found the government's interest did implicate free speech, the strictures of *O'Brien* did not apply. *Johnson*, 491 U.S. at 408.

This case presents a similar dichotomy of government interests that directly implicate free speech, and moves the Act outside the *O'Brien* test. Although the government contends that its interest is in ensuring all citizens, regardless of sexual orientation, receive equal enjoyment at places of public accommodation, this interest fails as applied to Mama Myra's. This interest, like the interest offered by Texas, is not implicated when all customers are able to purchase any cake or pastry baked at the shop so long as the bakers are not compelled to engage in expressive conduct. These customers may still engage in ordinary business just as any customer might, without compelling their message be carried by Mama Myra's. Therefore, the government's interest fails as applied in this case.

If this interest fails, the only government interest that remains is to ensure all places of public accommodation endorse same-sex marriage, which implicates Mama Myra's First Amendment right to free speech. By requiring that all places of public accommodation take a position in favor of same-sex marriage, Tourovia, like Texas in *Johnson*, implicates First Amendment protections for free speech, in this case by compelling expressive action.

If a law restricts speech on the basis of content, courts apply the "most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312, 322 (1988). That scrutiny requires that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id*. (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). When undertaking this analysis, the First Amendment presents a high hurdle, because "[i]f there is a

bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414; *see also Matal v. Tam*, 137 S.Ct. 1744, 1763 (2017); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 55–56 (1988); *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971); *Bachellar v. Md.*, 397 U.S. 564, 567 (1970); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509–514, (1969); *Cox v. La.*, 379 U.S. 536, 551 (1965); *Edwards v. S.C.*, 372 U.S. 229, 237–238 (1963); *Terminiello v. Chi.*, 337 U.S. 1, 4–5 (1949).

The Tourovian law, as applied, unconstitutionally targets a certain viewpoint of expressive conduct, restricting the marketplace of ideas. The Act also goes beyond a mere restriction on speech, it compels expressive action by private actors, something beyond the mere restrictions of speech in *Johnson*. This law is not narrowly tailored, as there is a clear alternative to the current state of the law, when the State could only require conduct within the ordinary course of business, which lacks true expressive nature, be included in the Act. This would not lead to a slippery slope, because a limited class of businesses and individuals, whose conduct is truly expressive would be exempt. Even so, a painter selling completed works of art, a sculptor selling completed sculptures, and a baker selling already baked loaves of bread, would be required to do business with any individual. The government would only be prohibited from compelling that artist to create something new that would convey the message of another through her artwork.

Finally, even if the court finds that the government interest in affording all individuals equal access to public accommodations is implicated, the Act still fails the *O'Brien* test. The fourth prong of the test requires that any incidental restriction on speech must be "no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. In *Clark*, the Court

further requires that regulations of this kind "are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The Court in *Clark* equated the analysis under the fourth prong to time, place, and manner restrictions on speech. *Id.*

In *Clark*, a group seeking to raise awareness for homelessness sought to erect a display in a public park, and camp there overnight. *Id.* at 291-92. The government prohibited all overnight camping in this park and extended that prohibition to the protesters. A lawsuit ensued with the protesters claiming that the law restricted their First Amendment right to free speech. However, because this was a restriction on the time, place, and manner of the speech, and the law was one of general applicability of a substantial government interest, the Court ruled that such a regulation was valid, because it was "only an incidental impact on speech." *Id.* at 298 n.8.

In this case, the test outlined by *Clark* seems inadequate to capture the full impact of forcing expression by Mama Myra's because the restriction does not stop at merely preventing the bakery from participating in conversation. Instead, the law compels Mama Myra's to engage in expressive conduct, which is more than a mere incidental impact. The result of this law is compelled expressive conduct, which cannot be in accord with First Amendment free speech principles.

B. The government violates Mama Myra's First Amendment rights by compelling the Mama Myra's bakers to promote same-sex marriages with their artistic creations by hosting the message of another, and by participating in expressive conduct.

By compelling Mama Myra's bakery to host the message of the government and same-sex couples, the government is unconstitutionally interfering with the bakery's free speech on the issue of marriage. When expressive conduct has an inherent message, it is unconstitutional for

the government to compel the actor, whether corporate or otherwise, to host a contrary message, regardless of which message the Court views as favorable. *See Boy Scouts of America v. Dale*, 340 U.S. 640, 661 (2000) (holding state public accommodation laws may not compel a private organization to include members of a particular class); *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566 (1995) (holding states may not compel groups to include others in the context of a parade); *Pacific Gas* 475 U.S. at 20–21(plurality opinion); (finding state actor may not require utility companies to include certain information or pamphlets in mailings); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258, (1974) (concluding a right-of reply would foreclose the publisher's choice of what to print).

In *Barnette* and in *Wooley*, the speakers sought to avoid hosting the government's message which was contrary to their own beliefs; indeed, in each of those cases, the government sought to compel individuals to host a government message, a proposition the Court found inimical to First Amendment principals. *Wooley*, 430 U.S. at 715; *Barnette*, 319 U.S. at 627. In *Barnette*, the government sought to compel schoolchildren to recite the pledge of allegiance each day, even if that recital conflicted with their religious beliefs. *Barnette*, 319 U.S. at 627. Similarly, in *Wooley*, the government compelled drivers to travel with their own "mobile billboard" with the state's motto *Live Free or Die* emblazoned on the license plate, despite vehement disavowal of the phrase on religious grounds. *Wooley*, 430 U.S. at 709. In each of these cases, the Court found that the government regulation "invades the sphere of intellect and spirit which is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id*. at 715 (quoting *Barnette*, 319 U.S. at 641).

The Tourovian law requiring Mama Myra's to participate in expressive speech contains a similar restriction. The government seeks to dictate the expressive conduct of a private

organization in a way which affects daily business and life. While it is true, as discussed above, that it is possible that some individuals who sees the cake will fail to interpret the cake as an endorsement of the wedding by the baker; the baker herself, the individuals who purchased the cake, and the other clientele of the bakery will understand what sculpting and designing the cake in collaboration with the same-sex couple implies. As the Court found in both *Wooley* and *Barnette*, this invasion of an individual's right to decide an issue for herself and speak only her own messages is the essence of the First Amendment. *Wooley*, 430 U.S. at 713; *Barnette*, 319 U.S. at 642.

While Mama Myra's Bakery is a corporate actor, that does not foreclose First Amendment protection. The expressive creation of a cake in celebration of a wedding is more than a mere business transaction, this speech is the expression of a viewpoint in the public discourse. This is precisely the sort of speech the First Amendment "both fully protects and implicitly encourages." *Pacific Gas*, 475 U.S. at 9. In *Pacific Gas*, a New York agency sought to regulate and preclude political speech the public utility company wished to include within billing envelopes. *Id.* at 5-6. Although the government proclaimed it was aiding consumers by ensuring they were exposed to a variety of viewpoints, this did not survive strict scrutiny. The Court held that because the law was a content-based restriction on free speech, it failed strict scrutiny. Although the utility was a corporate actor heavily regulated by the government, states are not free to enact content-based restrictions on speech which are not narrowly tailored to address the government interest.

The law in this case bears many similarities to *Pacific Gas*. Mama Myra is also a corporate actor attempting to communicate to customers regarding a prevalent social issue despite a State restriction. However, instead of attempting to offer more viewpoints to

consumers, like *Pacific Gas*, which failed strict scrutiny, the government in this case seeks to foreclose debate on the issue. This restriction violates the free speech rights of Mama Myra's because, as outlined above, the Act is not narrowly tailored.

The government relies on *Rumsfeld v. FAIR* and the proposition that hosting government speech, which significantly removes a person's own speech and expression, does not implicate the First Amendment. *Rumsfeld v. F. for Acad. and Institutional. Rts., Inc. (FAIR)*, 547 U.S. 47, 48 (2006). However, this reliance is misplaced when *FAIR* is distinguishable from this case.

In *FAIR*, the government sought to compel law schools to host military recruiters on campus, in the same manner as other potential employers, as a service to students. *Id.* at 48. The Court ruled that in providing this opportunity for the recruiters, the law school was not itself engaging in any speech with or on behalf of the military recruiters. Furthermore, the Court ruled that by hosting recruiters, law schools do not engage in expressive conduct, because "[n]othing about recruiting suggests that law schools agree with any speech by recruiters," and, "[t]hese actions were expressive not because of the conduct but because of the speech that accompanied that conduct." *Id*. at 49. As there was nothing about the conduct itself, hosting recruiters on campus, which was expressive, Court denied the school's First Amendment claim. *Id.*

As discussed above, sculpting a specialty cake with the intentions and desires of the couple at heart is expressive. Unlike the institutional actions of a law school, the very nature of this communication is inherently different. Great care and emotion is involved when baking specialty cakes, which takes more artistic creativity than an ordinary baked good. This expression is protected under the First Amendment.

II. AS THE TOUROVIAN LAW IS NOT A NEUTRAL, GENERALLY APPLICABLE LAW AND FAILS STRICT SCRUTINY, THE LAW VIOLATES THE FREE EXERCISE CLAUSE.

The First Amendment of the Constitution begins with the words, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. These words created the foundation for the legal doctrines of the Establishment Clause and the Free Exercise Clause in United States jurisprudence.

The Free Exercise Clause applies to the states through the Fourteenth Amendment's Due Process Clause. *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940). Providing people with the freedom to believe and profess whatever religious doctrine they desire; the Free Exercise Clause focuses on religious liberty and the intention to insulate people from attempts to compel or punish religious beliefs. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). This means the government may not compel affirmation of a religious belief, punish religious expression it believes to be false, impose disabilities based on religious views, or lend its power to a side in controversies over religious authority. *Id*.; *see also Torcaso v. Watkins*, 367 U.S. 488, 495 (1961), *U.S. v. Ballard*, 322 U.S. 78, 86-88 (1944), *McDaniel v. Paty*, 435 U.S. 618, 646 (1978), *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449-50 (1969). This sentiment was repeated in *Lee v. Weisman*, where the Court held that the "government may not coerce anyone to support or participate in religion or its exercise." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). The open nature of debate and religion is paramount, and the government must not prescribe speech, nor which ideas individuals must endorse; as Justice Jackson artfully 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. If there are any circumstances which permit an exception, they do not now occur to us.

Barnette, 319 U.S. at 642.

This case involves religion when the employees of Mama Myra's are Christians who oppose same-sex marriage. R. at 2. Provided the historical association between Christianity and opposition to same-sex marriage, Mama Myra's opposition to same-sex marriage "cannot be deemed bizarre or incredible." *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 834 (1989). It is not argued that Christianity or the beliefs of Mama Myra's employees do not constitute religion under the First Amendment when, as described in *Thomas*, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.,* 450 U.S. 707, 714 (1981).

Initially, all aspects of the freedom of religion were considered "absolute." *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961). In *Braunfeld v. Brown*, Chief Justice Warren echoed this conviction in his opinion when he wrote, "Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation. Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden." *Id*. At that point in First Amendment jurisprudence, the First Amendment did not distinguish between religious belief and religious conduct as "belief and action cannot be neatly confined in logic-tight compartments." *Smith*, 494 U.S at 893; *Wis. v. Yoder*, 406 U.S. 205, 220 (1972). Over time, a distinction was drawn between the freedom to believe, which is absolute, and the freedom to act, which is not absolute. *Cantwell*, 310 U.S. at 303-304.

However, a concern regarding restricting the freedom to act still exists. This concern is reflected in *Cantwell*, which held, "The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so

exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell*, 310 U.S. at 304. Therefore, while laws may restrict the freedom to act, these laws must not contravene a person's protected freedom. *Id*.

This distinction between the freedom to believe and the freedom to act becomes important when considering what the State may and may not restrict regarding religious beliefs and actions. While the State may create a law restricting Mama Myra's freedom to act on its religious beliefs, *Cantwell* asks these laws to not restrict the freedom to a point that would contravene a person's protected freedom. Here, the State has restricted Mama Myra's freedom of exercise to a point that contravenes protected freedom when the Act is not neutral or generally applicable and does not meet the rigors of strict scrutiny.

The current test for the Free Exercise Clause is found in *Smith*. *Smith*, 494 U.S. at 884. In *Smith*, the Oregon law in question prohibited the knowing or intentional possession of a controlled substance unless prescribed by a medical practitioner. *Id.* at 874. One of the prohibited drugs was peyote, a hallucinogen sometimes ingested for sacramental purposes by members of the Native American Church, which included the respondents. *Id*. After the respondents were fired from their jobs and denied unemployment compensation due to their discharge for work-related misconduct, respondents sued, arguing the denial of benefits violated their free exercise rights under the First Amendment. *Id*. at 875, 876. The Court held that so long as the government's interest is rational, a person is expected to follow a neutral, generally applicable law. *Id*. at 884. The Court also noted that "a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. *Id*. at 877. Furthermore, in Justice O'Connor's concurring opinion, which was needed to make a majority, O'Connor notes,

"[A] person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion." *Smith*, 494 U.S. at 893. O'Connor also notes "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." *Id*. at 896.

While the Tourovian law seems neutral on its face, unlike *Smith*, the Tourovian law is not neutral or generally applicable in application. The law in *Smith* involved the general prohibition against illicit drugs. Here, the State seeks to compel Mama Myra's to act against their religious beliefs. While the law seems neutral on its face, it unduly burdens Mama Myra's free exercise of religion by forcing Mama Myra's to sponsor a government message. Therefore, while the Oregon law in *Smith* necessitated a general prohibition against the illegal use of drugs, the law here forces Mama Myra's employees to create and sculpt a cake when they have a religious opposition to same-sex marriage.

The law of neutrality and general applicability is discussed further in *Lukumi*. In that case, a broad web of ordinances, described as "the epitome of neutral prohibition" by the Court, banned the "unnecessary killing of animals." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (*Lukumi*), 508, U.S. 520, 526 (1993). This law encompassed the sacrifice of animals pursuant to Santeria teaching, practiced by The Church of the Lukumi Babalu Aye, Inc. (hereinafter referred to as "the Church") that depends on sacrifices at birth, at marriage, at death rites, for curing the sick, and at annual celebrations. *Id*. at 525. The Court describes the interrelation between the requirements of neutrality and general applicability and how a failure to satisfy one requirement likely indicates that the other has not been satisfied. *Id*. at 531. The Court also found that the Free Exercise Clause "protects against governmental hostility which is masked, as well as overt" and that courts must "survey meticulously the circumstances" to

determine whether the government is acting as "religious gerrymanders." *Lukumi*, 508 U.S. at 534; *see also Walz v. Tax Comm'n of N.Y.C.*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring). As the Court found the law attempted to target the Church's religious practices, the law acted as "religious gerrymander" when the legitimate government interests could be "addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice." *Id*. at 535, 538. The Court also found that the law was not generally applicable when it was underinclusive by failing to prohibit non-religious conduct that would endanger the proposed interest in a similar or greater degree than Santeria sacrifice. *Id*. at 543.

Like *Lukumi*, the law here is not neutral and is not generally applicable when the State attempts to act as religious gerrymander by targeting and curtailing the freedom of Mama Myra's religious expression. Like the law in *Lukumi*, the Act here, while seemingly neutral, is a masked action of government hostility when the State forces Mama Myra's to act opposite to their religious practice. Furthermore, the government interest in protecting against discrimination could be addressed far short of the current law by requiring businesses to provide goods and services in the ordinary course of business instead of all goods and services provided at any place of public accommodation. R. at 3. In this way, the law would not impose a law that would force those with a religious opposition or requirement to act in discordance to their beliefs to specially create a good or service. Furthermore, the law is not generally applicable when it is underinclusive and fails to prohibit non-religious conduct such as private associations that would endanger the proposed interest of preventing discrimination to a similar degree. For example, a person could be discriminated against and stopped from joining a parade or a boy scout troop. This discrimination in a private association, would not be protected by the law.

As the law is not neutral and generally applicable, the State must satisfy the rigors of strict scrutiny by showing the law advances "interests of the highest order" and is narrowly tailored to advance that interest. *Lukumi*, 508 U.S. at 546. In *Blackhawk v. Pa.*, the Pennsylvania Game Commission included a permit fee requirement for keeping wildlife in captivity. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 205 (3d Cir. 2004). This caused a Native American owner of black bears to bring suit alleging the Commission violated his right to freely exercise his religion by refusing to grant him an exception to the fee requirement. *Blackhawk*, 381 F.3d at 205. The Court found that it was doubtful whether the Game Commission's interests of promoting the welfare of wildlife populations and maintaining fiscal integrity were compelling when the Court in *Lukumi* held, "[w]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Blackhawk*, 381 F.3d at 213-14; *Lukumi*, 508 U.S. at 546-47. Furthermore, the court found the scheme was substantially underinclusive when it allowed exceptions for secular purposes and did not allow an exception for Blackhawk when he wished to keep an animal in accordance with his Native American beliefs. *Blackhawk*, 381 F.3d. at 210.

While the government may have an interest in preventing discrimination, the government does not have a compelling interest to compel Mama Myra's Bakery to act in opposite their religious beliefs especially when the Act fails to enact feasible measures to restrict other conduct, such as conduct included in private associations, that would produce substantial harm in a similar way. Furthermore, the compelling interest is not narrowly tailored when it is both overbroad and underinclusive. As described above, the law is overbroad in that it could limit the requirement to

providing goods and services in the ordinary course of business. This would protect businesses from forcibly creating specially designed creations that contrast their religious beliefs.

In addition to being not neutral or generally applicable, as the Act involves not only the Free Exercise Clause but the Free Exercise Clause in conjunction with the constitutional protection of freedom of speech, the First Amendment bars application of even a neutral and generally applicable law. *Smith*, 494 U.S. at 881; *see also Cantwell*, 310 U.S. at 304-07. The Act here involves not only the Free Exercise Clause but also the freedom of speech. By creating a specialty, custom wedding cake, Mama Myra's Bakery is engaged in expressive, protected conduct. Furthermore, this Act opposes Mama Myra's free exercise of religion when they are forced to create a specialty cake to celebrate a same-sex marriage in opposition to their religious beliefs. Therefore, the First Amendment bars application of the Act even if the Act is neutral and generally applicable.

CONCLUSION

For the foregoing reasons, Mama Myra's Bakery respectfully requests that this Honorable Court reverse the judgment below.

Respectfully submitted,

Team 11

4 March 2018