No. 18-321

IN THE

SUPREME COURT OF THE UNITED STATES

April Term 2018

MAMA MYRA'S BAKERY, INC.,

Petitioner,

v.

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

Respondent.

On Writ of Certiorari to the
Supreme Court of Tourovia

BRIEF FOR RESPONDENT

Team 14

ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

I. Did the State of Tourovia violate Mama Myra Bakery's First Amendment right of to freedom of speech when it charged the Bakery for violating the Barber's Equal Protection rights after the Bakery refused to create a bespoke celebratory wedding cake for them?

II. Did the State of Tourovia violate Mama Myra Bakery's First Amendment right of to the free exercise of religion when it charged the Bakery for violating the Barber's Equal Protection rights after the Bakery refused to bake their celebratory cake due to their personal religious beliefs?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Hank and Cody Barber are a married same-sex couple, who wed in P-Town, Massachusetts in the summer of 2012. R. at 2. At the time of their marriage, the State of Tourovia did not allow for same-sex marriages. R. at 2. Further, because of their out of state marriage, many family members were unable to attend. R. at 2.

The Discrimination. In August 2015, Hank and Cody sought to purchase a custom wedding cake. R. at 2. They wanted to serve this cake at a family party near the end of August, as many of their extended family were unable to attend their marriage in Massachusetts. R at 2. Hank and Cody entered Mama Mayra's Bakery (hereinafter referred to as "Bakery") and sought a bespoke cake. R. at 2. Specifically, the couple asked the Bakery to sculpt a figure of the couple hand-in-hand as the top tier of the cake. R. at 2. The Bakery declined. R. at 2. Citing their religious beliefs, the Bakery outright refused to create wedding cases for same-sex weddings. R. at 2. However, the Bakery did offer to bake and sell other goods to Hank and Cody for their upcoming party. R. at 2. Upset, Hank and Cody left the Bakery without response. R at 2.

The Bakery. For the entire twenty-seven-year existence of the Bakery, both the owner and all of his employees have outwardly expressed their Christian faith. R. at 2. The Bakery has never made a wedding cake for same-sex couples. R at 2-3. This is because they believe that it violates their beliefs. R. at 3.

The charges. The Barbers filed charges of discrimination against the Bakery. R. at 3. Pursuant to the Tourovia Civil Rights Act § 22.5(b), the Barber's claim the Bakery discriminated

against them because of their sexual orientation. R. at 3. Tourovia § 22.5 (b) is an anti-discrimination statute that regulates places of public accommodation. R. at 3.

II. PROCEDURAL HISTORY

The District Court. The State of Tourovia charged the Bakery for violating § 22.5(b) of the Tourovia Civil Rights Act. R at 3. Both parties agree that the Bakery is a place of public accommodation under the Statute. R. at 3. The District Court held that the State had met its burden, showing the Bakery's refusal to serve the Barber's as a violation of the Act. R. at 5. The Court found no distinction between discrimination of status and their closely related conduct. R. at 5. The Court then held that the Barber's Fourteenth Amendment Equal Protection Rights under the State's Constitution[1] were violated. R at 5.

The Court of Appeals. Mama Myra's Bakery appealed the order to the Appellate Division of the Supreme Court of Tourovia. R at 7. Affirming the decision, the appellate court held that the Act did not violate the Bakery's First Amendment rights of freedom of speech and free exercise of religion. R at 11. The Court concluded that the Barber's Equal Protection rights were violated by the Bakery. R at 11.

[1] The State Constitution of Tourovia mirrors the language of the First and Fourteenth Amendments of the Federal Constitution. References will be made solely to the Federal Constitution.

SUMMARY OF THE ARGUMENT

I.

Mama Myra's Bakery wants a new right to say "no." Specifically, to same-sex couples, like Hank and Cody Barber. Yet, the State of Tourovia and its Public Accommodation Statute will not let them. As a result, the Bakery argues that the statute violates their free speech First Amendment rights, by compelling them to use art to speak the State's message. But this argument is without merit.

Remedial statutes, like Tourovia's Public Accommodation Statute, require broad power and application in order to effectuate its narrow purpose. Remedial legislation is enacted to rectify wrongs and protect the dignity of each citizen. Each State has a compelling interest in protecting the dignity and equality of its citizens and tailoring their laws to eliminate discrimination fulfils this. Further, past First Amendment challenges like the Bakery's have been repeatedly denied by this Court. In seeking special exemption, the Bakery attempts to remove the duty held by businesses to refrain from discrimination, subverting the compelling interest held by the State.

This Court has consistently held content-neutral, generally applicable laws which regulate conduct as constitutional. Even if the law results in incidental encroachments on free speech. The Bakery brings no new argument, and instead claims that it's speech now compelled by the government. But the government is not forcing the Bakery to speak or carry any specific message. The State merely requires the Bakery not to discriminate, and the Statute simply focuses on the Bakery's conduct. A public accommodation statute prohibiting discrimination does not constitute compelled speech.

In arguing for a speech exemption, the Bakery assumes it is constitutionally protected as an artist. But, as a commercial entity, seeking monetary exchanges in the public market, its constitutional protections lessen. This is to ensure the constitutional rights of the individual citizens enter and exit the marketplace. Further, the Bakery seeks to distinguish its discrimination of the Barbers based on their conduct. But there is no distinction between the personal status of the Barber's, and their closely related conduct. Allowing the Bakery a right to say "no," based on free speech rights provided by the First Amendment would provide them a limitless right. This exemption would quickly erode the individual protections in place by the State and would result in rampant discrimination by more businesses.

II.

The Free Exercise Clause protects the conscience. It allows each citizen to believe in whatever religion they choose, without government interference. But this does not give one free reign to act on those beliefs. To do so would violate both religion clauses in the First Amendment.

This Court's jurisprudence of the Free Exercise Clause provides a simple guideline. Religious beliefs cannot be governed. Religiously motivated acts can. If a State enacts a content-neutral, generally applicable law related to the welfare of the State, and as long as the law is not religiously gerrymandering a religious act, then this Court has found the law to be constitutional. Because the State of Tourovia's Statute is content-neutral and generally applicable, minor encroachments on religiously motivated acts are acceptable.

Further, the Establishment Clause denies the Bakery the religious exemption it seeks. Because the Establishment Clause ensures that the government chooses no winner or loser religious denominations, it ensures all religious groups stand on equal ground. Enacting an

exemption for the Bakery is picking a winner, at the very least, in appearance if not in action. Should the Court provide the exemption, it would effectively forward the Bakery's religious views and superior to the Barbers, or any other individual in Tourovia.

This Court could decline the Bakery's requested exemption. The Bakery has violated a constitutional right held by the Barbers. As a result, they have suffered real and painful discrimination. The Bakery is not entitled to a new right to say "no" simply because it was caught bullying and belittling Hank and Cody Barber.

ARGUMENT AND AUTHORITIES

The State courts resolved the case by holding in favor of the State and the Barbers. The Bakery challenges the holding on two issues. First, whether the State has violated the Bakery's First Amendment free speech right, and secondly, whether the state has violated the Bakery's First Amendment free exercise right. In both issues, the Bakery has raised constitutional interpretation issues that present purely legal questions regarding the scope the State's Public Accommodation Statute, as well as the Constitutional protections provided to the Bakery and the Barbers.

The Supreme Court applies the standard of de novo review when assessing constitutional claims. *Bose Corp. v. Consumers Union,* 466 U.S. 485, 499 (1984). De novo review requires an independent examination of the whole record to ensure that the judgment of a lower court does not constitute a "forbidden intrusion into the field of free expression." *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

I. THE TOUROVIA STATE COURTS PROPERLY CONSTRUED THE STATE OF TOUROVIA'S PUBLIC ACCOMMODATION STATUTE IN LIGHT OF THE BAKERY'S FREE SPEECH CLAIM.

The Bakery claims that the Public Accommodation Statute is unfair because it stops it from discriminating against same-sex couples and compels them to use their artistic skills to bake a cake. But both the trial and appellate courts have properly identified the statute as a generally applicable, content-neutral law, and upheld the duty attached to public services to refrain from discrimination. This Court should too.

A. The Public Accommodation Statute Promotes Civil Rights and Therefore, Requires an Expansive Application To Fulfill Its Purpose.

The Bakery wants to limit the use and application of the statute. In its view, the statute limits free speech by undercutting its ability to ignore and belittle a protected class of customer. But, not only is the statute in question a generally applicable, content-neutral law, it also falls within the realm of civil rights legislation, a form of legislation that seek sand is given liberal interpretation.

This Court has recognized a "familiar cannon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepinin v. Knight*, 389 U.S. 332, 336 (1967). At their very essence, civil rights statutes fall under this category. *See, e.g.*, *Dudly v. Hannaford Bros. Co.,* 333 F.3d 299, 307 (1st Cir. 2003) (applying *Tcherepnin* to interpret the Americans with Disabilities Act). Public accommodation laws fit within the realm of civil rights statutes.

As applied, the statute under attack by the Bakery falls under the umbrella of a remedial civil rights statute. It seeks to eliminate discrimination of a protected class of citizen, by ensuring their ability to access public goods and services. The Court must construe and apply the statue broadly to effectively fulfill its purpose.

1. **The expansive nature and purpose of remedial legislation, like the State of Tourovia's Public Accommodation Statute, is to further the compelling government interest of eliminating discrimination.**

The State of Tourovia has a compelling interest in eliminating discrimination. It has acknowledged the unique evils of discrimination and has a duty to ensure the dignity and equality of its citizens. This duty is facilitated by a generally applicable, content-neutral public accommodation law; a statute aimed to protect and provide for all its citizens, bringing unfettered access to public goods and services within the state.

The challenge proposed by the Bakery sadly reflects similar claims from our past. When racial discrimination ran rampant, States responded by passing broad statutes to eliminate the practice, even in the face of legal attacks. This Court defended the remedial measures enacted by the States then and should continue to uphold them today.

States have a compelling interest in eliminating discrimination for all protected classes of citizens. *See, e.g., EEOC v. Miss. Coll.*, 626 F.2d 477, 489 (5th Cir. 1980) ("[T]he government has a compelling interest in eradicating discrimination in all forms"); *see also Russell v. Belmont Coll.*, 554 F. Supp. 667, 677) (M.D. Tn. 1982) (holding a national public policy against discrimination in all forms). Further, this Court previously held that states have a compelling interest in preventing the "unique evils" which result from "discrimination in the distribution of available publicly available goods, services, and other advantages." *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984). Remedial legislation in the mold of civil rights statutes is intended to prevent the "depravation of personal dignity that surely accompanies denials of equal access to public establishment." *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964). Public accommodation statutes fulfill this compelling interest.

2. This compelling interest to eliminate discrimination includes sexual orientation discrimination

Tourovia has a compelling interest; the elimination of discrimination toward a protected class of citizen. This protected class includes a wide variety of citizens, and in this case, includes same-sex couples.

Eliminating sex-based discrimination is well within a state's compelling interest. *E.g., Bd. of Dirs. of Rotary Int'l. v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) ("Even if the Unruh Act does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women."); *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of New York*, 502 F.3d 136 (2d. Cir. 2007) ("[The state's] interest in applying its non-discrimination policy are substantial… '[t]here is undoubtedly a compelling interest in eradicating discrimination based on gender."). This interest includes "sex stereotyping" discrimination against those who do not match gender specific roles and stereotypes. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). This rule against stereotyping includes stereotypes about 'proper' roles in relationships and attractions. *EEOC v. Scott Med. Health Ctr.*, 217 F. Supp.3d 834, 841 (W.D. Pa. 2016).

Further, this Court has found governmental efforts to attack and target same-sex oriented persons unconstitutional. *See Obergefell v. Hodges*, 135 S.Ct. 2584, 2602 (2015) ("[L]aws excluding same-sex couples from marriage right impose stigma and injury of a kind prohibited by our basic charter."); *see also United States v. Windsor*, 133 S.Ct. 2675, 2693 (2013) ("[I]interference with the equal dignity of same-sex marriages… [is] more than an incidental effect…"); *Lawrence v. Texas*, 539 U.S. 558, 581 (2003) (O'Connor, J., concurring) ("The Texas Statute makes homosexuals unequal in the eyes of the law by making particular conduct—

and only that conduct—subject to criminal sanction."); *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("[T]he amendment [preventing protection of same-sex and bisexuals by anti-discrimination statutes] seems inexplicable by anything but animus toward the class it effects.").

Regardless of the Bakery's position, there is a clear historical interest in protecting citizens who cannot protect themselves. Tacit or explicit affirmation, in the form of government inaction, toward sex and sexual orientation discrimination is strictly against the public policy of our society. For these reasons, the Court should affirm Tourovia's compelling interest in protecting the rights of same-sex couples as a protected class.

3. . The Bakery's exemption would undermine the State's compelling interest and the duty held by public businesses to refrain from discrimination.

The Bakery seeks an exemption that would turn back time. But such an exemption would, not only undermine the duty of public businesses to refrain from discrimination, but also offend the state's compelling interest.

This longstanding duty owed by businesses finds its origins in the common law. In 1837, the Supreme Court of New Hampshire held that an inn allowing some stagecoach drivers access to public rooms could not bar another, simply because it could. *Markham v. Brown,* 8 N.H. 523, 530 (1837). This duty has survived the test of time. "[P]laces of public accommodation such as retail stores, restaurants, and the like render a 'service which has become of public interest' in the manner of innkeepers and common carriers of old." *Lombard v. Louisiana*, 373 U.S. 267, 279 (1963) (Douglas, J., concurring opinion). Public accommodation laws allow any citizen to be treated equally, by allowing every dollar used for every good and service in the public marketplace to have the same value. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968).

Tourovia's public accommodation law is rooted in history, one that effectuates a compelling government interest. It requires businesses in the public sphere to treat every person

equally, by treating every dollar equally. The Bakery seeks to revise this objective duty by treating every dollar held by every citizen differently. This it cannot do.

B. The First Amendment Free Speech Clause Does Not Unconditionally Protect Free Speech.

The Bakery argues that its discriminatory act is an extension of their free speech because a bespoke cake is a form of artistic expression. But, the right to freedom of speech and expression is not unconditional. This Court has held previously, that when speech and conduct are tied together, a distinction applies.

It is accepted that the First Amendment cannot "restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002). Inasmuch as the government cannot restrict speech, nor can it compel certain speech. *Rumsfeld v. Forum for Acad. & Inst. Rights*, 547 U.S. 47, 61 (2006) ("[F]reedom of speech prohibits the government from telling people what they must say."). Yet, when it comes to generally applicable, content-neutral laws regulating conduct, the First Amendment hums a softer tune. "[I]t has never been deemed abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidence, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Moreover, when examining the effect of a public accommodation law in *Robert v. United States Jaycees*, this Court stated, "even if enforcement of the Act causes *some incidental abridgement* of protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purpose. 468 U.S. at 628 (emphasis added). As a result, when the focus is on the conduct, incidental infringements on speech has been found acceptable.

Tourovia's compelling interest supersedes any minor infringement on the Bakery's speech. The public accommodation statute is a generally applicable, content-neutral law

regulating conduct in the public marketplace. It does not focus on art, nor does it focus on any ideals behind art. The statute focuses on conduct alone. The law only requires the Bakery to uphold its longstanding duty to treat every person equally. This Court should require the same.

1. The Bakery's challenge ignores this Court's precedent upholding the constitutionality of public accommodation statutes.

After the Civil War, many states began writing public accommodation laws to block discrimination of the newly freed slaves. *See* Milton R. Konvitz, *A Century of Civil Rights* 157 (1961).

From then until now, opponents of these laws have challenged them on First Amendment Grounds. But, courts have refused to remove them. Instead, this Court established a precedent for public accommodation laws, claiming they are "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and the do not, as a general matter, violate the First or Fourteenth Amendments". *Hurley v. Irish-Am. Gay, Lesbian, and Bi-sexual Grp. of Boston*, 515 U.S. 557, 572 (1995).

This Court faced a similar argument to this present case in *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 943-44 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds,* 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds,* 390 U.S. 400 (1968), when the owner of a restaurant refusing to serve African Americans claimed that service would violate both his conscience and faith. The owner argued that the state could not compel him to serve African Americans, an argument this Court found ""patently frivolous." 390 U.S. at 402 n.5.

Race is not the only form of discrimination tackled by this Court. Sex and sexual orientation discrimination have also been tried. In the sex discrimination case of *Robert v. U.S. Jaycees*, a Minnesota law prohibiting gender discrimination by places of public accommodation

was upheld when challenged by club owners under a First Amendment claim of expressive association." 468 U.S. at 612. Explaining its holding, this Court stated that the law "does not aim at the suppression of speech," or distinguish actions "on the basis of viewpoint." *Id*. at 623. Instead, the law simply "eliminat[es] discrimination and assur[es]… citizen equal access to publicly available goods and services." *Id.*at 624. "That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order." *Id*. "[E]ven if enforcement of the act causes *some incidental abridgement* of protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes." *Id.* at 628 (emphasis added).

In *Christian Legal Soc'y v. Martinez*, this court declined to provide an exemption when a First Amendment challenge by student groups against a school rule barring sexual orientation and religious discrimination enrollment in these groups. 561 U.S. 661, 669 (2010). This Court held that the school policy was content-neutral, and "help[ed]… to police the written terms of [the school's] Nondiscrimination Policy." *Id.* at 688; *id*. at 701 (Stevens, J., concurring) (noting university rules could "safeguard students from invidious forms of discrimination, including sexual orientation discrimination"). While admitting the potentially unequal effect of the policy, this Court accepted "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* at 695. Further, this Court noted the school's policy "aims at the act of rejecting," and is "reasonable and viewpoint neutral." *Id*. at 696-97; *id.* at 703-704 (Kennedy, J., concurring) ("[T]he school policy in question is not content based either in its formulation or evident purpose; and were it shown to be otherwise, the case likely should have been a different outcome.").

The Bakery's First Amendment challenge ignores this Court's prior holdings. In answering similar discrimination claims against generally applicable, content-neutral laws, the Bakery fails to distinguish itself to warrant a special exemption. It is another public accommodation, in the public marketplace, subject to the same law as every other bakery in Tourovia.

2. The Bakery's Compelled Speech Doctrine claim fails because enforcement the Statute does not constitute the Government requiring the Baker to affirm a government mandated message.

The Bakery wants to use the compelled speech doctrine as a shield to its discrimination. The Bakery relies on alternative interpretations of *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006) and *Wooley v. Maynard*, 430 U.S. 705 (1997). However, the Bakery's fails to distinguish these cases, and this Court should refuse to accept their analysis.

The First Amendment precludes the government from telling individuals what they must say. *Rumsfeld*, 547 U.S. at 61. The compelled speech doctrine prohibits the government from forcing individuals to "speak the government's message," and bans the government from forcing individuals to "host or accommodate another speaker's message." *Id*. at 63; *W.V. State Bd. of Edu. v. Barnette*, 319 U.S. 624 (1943) (holding the State could not require students to both salute the U.S. flag and recite the Pledge of Allegiance).

In citing *Rumsfeld*, the Bakery fails to distinguish its application from this present case. In *Rumsfeld*, an association of law schools challenged the Solomon Amendment which required the Department of Defense to deny federal funding if military recruiters were not given the same school access as others. *Rumsfeld*, 547 U.S. at 51-53. To provide equal assistance, the schools were sometimes forced to advertise the military interviews, by sending emails and posting notices. *Id*. at 61. In analyzing the amendment, this Court treated it as if it directly required

schools to provide equal treatment to the military. *Id.* at 59-60. In an 8-0 opinion written by Chief Justice Roberts, this Court rejected the schools' First Amendment argument that it mandated government message, and instead characterized the required acts as "plainly incidental to the Solomon Amendment's regulation of conduct." *Id.* at 62. The Chief Justice explained, "there is nothing in this case approaching a Government-mandated pledge or motto that the school[s] must endorse." *Id.* The Solomon Amendment focused solely on equal opportunity and fair conduct.

Further, instead of helping the Bakery, *Wooley* distinguishes itself from their claim. In *Wooley*, George Maynard covered the New Hampshire motto "Live Free or Die" on his license plate. *Wooley*, 430 U.S. at 708. When examining the act, the main concern of this Court was Maynard was being forced to advertise the State slogan. *Id.* at 713. Maynard, a Jehovah Witness, found the slogan "morally, ethnically, religiously, and politically abhorrent." *Id.* In his opinion, Chief Justice Berger noted, "we are faced with a state measure which forces an individual, as part of his daily life indeed constantly while his automobile is in public view to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* at 715. Chief Justice Berger further wrote that the "First Amendment protects the rights of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable." *Id.* *Wooley* decided that individuals are not couriers for an ideological government message.

Applying *Wooley* and *Rumsfeld* shows where the Bakery's argument fails. Unlike *Wooley*, Tourovia is not mandating an ideological message with its public accommodation statue. The statute does not force the Bakery to expressly affirm same-sex marriage. It focuses solely on the conduct of the Bakery. Like *Rumsfeld*, the statute focuses on equal access. It

ensures transactional relationship between businesses and the public marketplace remain equal for all individuals. The statute regulates conduct. There is no pledge or motto being endorsed. Because the Bakery fails to distinguish itself from *Rumsfeld*, and because *Wooley* is not applicable, this Court should refuse to accept the Bakery's compelled speech claim.

A. Petitioner's Theories Create Unwarranted Distinctions Without Limiting Principles, Eliminating the Equal Protections Available to All Citizens.

The Bakery forwards two theories to defend its discrimination. First, it attempts to create a legal distinction between the Barber's status and their closely connected conduct of marriage. Second, the Bakery argues that, because their goods are artistically designed, any association with the Barbers would be construed as affirmation of their lifestyle. If accepted, these theories would provide exemptions for businesses to discriminate against a protected class of citizen.

This Court has consistently upheld a clear rule that commercial entities selling in the public marketplace must adhere to content-neutral regulations. Clear rules denying businesses any protection for discriminatory acts are necessary to avoid "doubt[s] on the power of State's to pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society. *Jaycees,* 468 U.S. at 635. (O'Connor, J., concurring). The Bakery seeks to destroy that clarity.

The Bakery's distinction between status and conduct is without merit. It merely wants this distinction, so it can discriminate against same-sex couples. Further, providing anti-discrimination exemptions for commercial businesses with artistic goods and services would result in the death of public accommodation laws and lead to unintended consequences. It would force the courts to call balls and strikes on every form of good and service. The Bakery is not entitled to compel the courts to perform this duty. This Court should decline both theories.

1. Sex orientation, and a marriage are so intertwined, that legal distinction between the two is unwarranted.

Analyzing the difference between sexual orientation status and connected conduct, this Court held in *Christian Legal Society* that distinctions between the two were unwarranted. 561 U.S. at 689 ("[The Christian Legal Society] contends that it does not exclude individuals because of their sexual orientation, but rather 'on the basis of a conjunction of conduct and the belief that the conduct is not wrong.'… Our decisions have declined to distinguish between status and conduct in this context.");S*ee also Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of that State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in public and private spheres."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) (holding that a prohibition of students married to someone of another race as a form of racial discrimination). Further, in *Obergefell v. Hodges*, this Court equated blocking same-sex marriage to sexual orientation discrimination, stating "laws burden[ing] the liberty of same-sex couples… abridge central precepts of equality." 135 S.Ct. 2584, 2590 (2015).

The act of marriage is so connected to Barber's inherent sexual identity status that a legal distinction is unwarranted. Holding for the Bakery would ignore cases like *Obergefell*, *Lawrence*, and *Christian Legal Society.* Discriminating against same-sex marriage by withholding services is a market place extension of the law prior to *Obergefell*. Like *Lawrence*, it would be a marketplace extension of finding same-sex relationships illegal. Discrimination against the Barber's because of their marriage celebration is the same as turning them away for being a same-sex couple. The underlying cause is the same. The effect is the same. The Bakery's discrimination against the Barber's marriage celebration is pretext to the root cause; the discrimination of their personhood.

2. **The Bakery is not a non-commercial entity dedicated solely to artistic expression and is not sufficiently expressive to trigger First Amendment.**

Constitutional protection from anti-discrimination laws lessen as one moves from being a private, expressive entity to a public commercial entity. Because businesses invite the public marketplace to them, their First Amendment interests lower. This Court has consistently upheld nondiscrimination rules in commercial relationships.

Because the Bakery is a retail business, it functions within "the marketplace of commerce." *Jaycees,* 468 U.S. at 636 (O'Conner, J., concurring). This marketplace is subject to the broad power of the state creating rights of equal access for its citizens. *PruneYard Shopping Ctr. V. Robins*, 447 U.S. 74, 87 (1980); *see also Bell v. Maryland*, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) ("The broad acceptance of the public in this and in other restaurants clearly demonstrates that the proprietor's interest in private or unrestricted association is slight."). As a commercial business, seeking commercial transactions, the Bakery has "only minimal constitutional protection" and cannot justify an exemption. *Jaycees*, 468 U.S. at 634 (O'Connor, J., concurring).

When this Court has found First Amendment protections, it has clearly noted that the protections applied only to associations with purposeful noncommercial speech. In *Hurley*, this Court held a parade as a quintessential form of noncommercial expression, and the parade sponsors could control the message of their event. Similarly, in *Boys Scouts of America v. Dale*, this Court protected the association rights of the Boy Scout's strict ideological mission to "instill values" through "expressive activity." 530 U.S. 640, 649-50 (2000). In both instances, the organizations were noncommercial entities, with purposeful noncommercial speech. The Bakery cannot make the same claim.

Whatever artistic element is involved in its pastries, Mama Myra's Bakery cannot present itself as a noncommercial entity dedicated to expression. It is a commercial enterprise, seeking business opportunity in the public market. The State has a compelling interest in eliminating discrimination. It is therefore subject to the State's broad anti-discrimination law. This Court should continue to hold the Bakery to the same standard as all other businesses.

3. The Bakery's broad theory of association would encourage other commercial entities to act in the same discriminatory manner.

This Court has consistently sought to uphold an individuals' rights, with "protections against exclusion from an almost limitless number of transaction and endeavors that constitute ordinary civil life in free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996). But, the Bakery argues a theory of association that damages that principle. Its theory claims that a business associating with an event inherently signs support for that event. This theory, and the subsequent exception, would give any business in the public marketplace a platform to discriminate. Any business with artistic aspirations could therefore refuse service of same-sex couples, and any other protected class of citizen, because they believe the public would unreasonably associate them together.

States have seen many of these broad association claims already and have consistently rejected them under the First Amendment. *See Telescope Media Grp. v. Lindsey*, No. 16-4094 (JRT/LIB), 2017 WL 4179899 (D. Minn. Sept. 20, 2017) (rejecting the association claim when a videographer refused to serve a same-sex couple); *State of Washington v. Arlene's Flowers, Inc.*, 389 P/3d 543 (Wash. 2017) (rejecting a florists First Amendment claim when refusing to serve a same-sex couple); *Elaine Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (rejected a photographer's First Amendment claim when refusing to serve a same-sex couple), *cert. denied*, 134 S.Ct. 1787 (2014). This Court should too.

The Bakery argues multiple First Amendment theories to defend its discrimination of the Barbers, but none of them pass muster. It argues that the statute is too broad, but this Court has given broad powers to public accommodation laws. The Bakery argues that the statute is content-based and compels them to speak a government message, but the statute includes no ideology and focuses solely on conduct. The Bakery argues associating with the Barber's marriage celebration would broadcast support of their lifestyle, but courts have find this argument unreasonable. Because the Bakery's arguments have no First Amendment ground to stand on, this Court should deny the Bakery the right to discriminate against the Barbers.

II. THE TOUROVIA STATE COURTS PROPERLY CONSTRUED THE STATE OF TOUROVIA'S PUBLIC ACCOMMODATION STATUTE IN LIGHT OF THE BAKERY'S FREE SPEECH CLAIM.

The Bakery argues that the Free Exercise Clause gives them an exemption to Tourovia's Public Accommodation Statue, thereby giving them free license to discriminate. The Free Exercise Clause gives them no right. This Court's religious clause jurisprudence understands both clauses work in tandem to protect an individual's religious conscience. A guarantee to free exercise grants no right to freely discriminate. This Court should refuse to give the Bakery this right.

A. This Court's Free Exercise Jurisprudence Does Not Grant the Religious Exemption Sought by the Bakery.

Free exercise of religion allows a person to believe in any religious doctrine they choose, without government intervention. Yet, this court's Free Exercise Clause jurisprudence understands that while religious beliefs may not be governed, some religiously motivated actions can be governed.

This Court has consistently noted a fine line between religious belief, government action, and religious acts. *See, e.g., Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494

U.S. 872 877 (1990) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."); *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such," citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)); *Wisconsin v. Yoder*, 406 U.S. 205, 219-20 (1972) (noting a difference between belief and action, stating "[i]t is true that activities of individuals, even when religiously based, are often subject to regulation by the States and in the exercise of their undoubted power to promote the health, safety and general welfare…"; *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person to 'profess a belief or disbelief in any religion.'").

In examining the effects of a law on religiously motivated acts, this Court acknowledges content-neutral, generally applicable laws as constitutional even if there is some incidental effect on religious acts, so long as the law is not targeting religious conscience. *See, e.g., EEOC v. Roman Catholic Diocese of Raleigh, N.C.,* 213 F.3d 795, 801 (4th Cir. 2000) ("[T]he First Amendment does not stay the application of a generally applicable law such as title VII to the religious employer unless Congress so provides."); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp 57 (E.D.Pa. 1991) ("[N]eutral statutes of general applicability do not violate the Free Exercise Clause unless directed specifically at religious practices… The [Age Discrimination Employment Act] is a neutral law of general applicability…").

Illustrative to this Court's jurisprudence is the *Smith* case, where a religious group claimed the Free Exercise Clause exempted their peyote use from a content-neutral, generally applicable law. *Smith*, 494 U.S. at 878. Holding against the group, this Court noted, "[w]e 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 878-79. "To permit [the exemption] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* (quoting *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878)).

Similar to the claims made in *Smith*, the Bakery seeks to use the Free Exercise Clause to preclude them from Tourovia's Statute. Just like in *Smith*, the Bakery argues for an expansive free exercise ideology which would unconditionally protect religious acts, even to the detriment of third parties. This ignores this Court's precedent. In asking for a special religious exemption, the Bakery urges this Court to ignore both *Smith* and decades of case law. This Court should refuse to do so.

B. The Establishment Clause Precludes Petitioner's Requested Religious Exemption, As It Would Favor the Bakery's Religious Interests Over Others.

The First Amendment states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. This Court has long held both religious clauses as co-equals in protecting religious freedom. A ruling in favor the Bakery would violate the Establishment Clause and undermine this Court's longstanding principles regarding both clauses.

The Establishment Clause works to ensure that "one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Applying any sort of exemption would ignore this clause's very purpose: "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592-94 (1989) (citing *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

Further, this Court notes and understands "the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *see also Estate of Thorton v. Caldor*, 472 U.S. 703, 710 (1985) ("[U]nyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle" and has "a primary effect that impermissibly advances a particular religious practice."). Clearly, this Court has consistently effectuated the Establishment Clause's true purpose.

Because the Bakery wants this Court to re-write the religion clauses in their favor, it seeks to impose its own religion on every individual in the State. By arguing for a special exemption, seeking an action in favor of its own interests above all, it advances their religious practice. But the government cannot and should not favor the Bakery's beliefs at the expense of every other citizen and their beliefs, rights, and dignity. The Establishment Clause plainly does not allow it. At the very least, the government should refuse to apply a rule that appears to take a favorable position to one religion over all others. This Court should too.

Both religion clauses work together to protect the religious beliefs of individuals. This Court's understanding of the Free Exercise Clause provides that the government cannot govern a person's religious beliefs. But, under generally applicable, content-neutral laws, some religious acts can be halted, under the broad power of the state. Further, the Establishment Clause must be effectuated to ensure no religion is given favor over any other, both in appearance and in action. This Court's current and historical jurisprudence allows the Bakery to keep its personal beliefs, but it cannot favor the Bakery's beliefs at the expense of those like the Barbers.

Both religion clauses work together to protect religious beliefs of individuals. This Court's understanding of the Free Exercise Clause provides that the government may not govern

an individual's religious beliefs. But, when generally applicable, content-neutral laws are enacted, some religious acts may be impinged by the broad power of the state. Further, under the Establishment Clause, no religion can be favored over any other, either in appearance or in action. Therefore, this Court's jurisprudence allows the Bakery to hold onto its sincerely held beliefs, but not it's discriminatory actions. This Court should affirm the constitutionality of Tourovia's Statute.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgement of the Appellate Division for the Supreme Court of Tourovia, Fourth Department.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT