No. 18-321

IN THE SUPREME COURT OF THE UNITED STATES
APRIL TERM, 2018

Mama Myra's Bakery, Inc.,
Petitioner,

vs.

The State of Tourovia, on Behalf of
Hank and Cody Barber,
Respondents

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TOUROVIA

BRIEF FOR THE PETITIONER

TEAM 15

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STATEMENT OF THE CASE

In August 2012, Hank and Cody Barber ("the Barbers"), a same-sex couple who recently married out-of-state, entered Mama Myra's Bakery ("the Bakery"), a family owned business with sincerely-held Christian beliefs. The Barbers requested that the Bakery create a custom-made wedding cake with a figure of a same-sex couple holding hands to be placed at the top tier. The Bakery refused to create the custom-made wedding cake as it would violate the sincerely-held religious beliefs of the Bakery's owners and family member employees and it had never created a cake for a same-sex marriage celebration. However, the Bakery offered to make any other baked goods for the Barbers, but the Barbers stormed out of the Bakery. The coupled filed charges of discrimination, claiming that the Bakery violated Tourovia's Civil Rights Act § 22.5(b) ("the 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 accommodations of any place of public accommodation1 because of their sexual orientation.

At the trial level, the District Court of Tourovia found that the Bakery's refusal to create a custom-made wedding cake for the Barber's violated the public accommodation provision of the Civil Rights Act. On appeal, the Appellate Division of the

Supreme Court of Tourovia, Fourth Department, also found in favor of the Barbers, concluding that the Act does not violate Appellants' First Amendment rights to freedom of speech or freedom to freely exercise their religion. The Supreme Court of Tourovia then affirmed the decisions of both the District Court of Tourovia and the Appellate Division for the Supreme Court of Tourovia, Fourth Department.

SUMMARY OF THE ARGUMENT

A family-owned bakery should not be forced to comply with a state civil rights law by creating a custom-made wedding cake celebrating a same-sex marriage if creating such a cake abridges the free speech rights and offends the free exercise rights of the Bakery's owners and employees. Accordingly, this Court should provide the Bakery with an exemption to the Act.

This Court's jurisprudence shows that the decision of the Appellate Division of the Supreme Court of Tourvia, Fourth Department, incorrectly denied the Bakery's motion to set aside judgment and failed to provide an exemption for the Bakery.

The Act would require the Bakery, a family-owned business, to provide a custom-made wedding cake celebrating same-sex marriage, which would violate sincerely-held religious beliefs of the Bakery's owners and employees. Creation of such a custom item with a celebratory message would be construed as the Bakery's support of same-sex marriage.

Moreover, if the State of Tourovia ("the State") compels the Bakery to produce such a celebratory message, which is an affront to the sincerely-held religious beliefs of the Bakery's employees and owners, the State would be compelling the Bakery to speak through the creation of the custom-made wedding cake celebrating same-sex marriage. The First Amendment prohibits such compulsion.

Furthermore, even if the State could compel the Bakery to create this custom-made cake celebrating same-sex marriage, the State would have to provide a compelling governmental interest, which it does not have, as this Court's jurisprudence

only allows interference with speech when the government's interests become frustrated. Here, the State's interests are not frustrated by the Bakery's objection to creation of the custom-made wedding cake, as the State itself has not legalized same-sex marriage.

In addition, because the Act impedes both the free speech rights and free exercise of the religious rights of the bakery, the Bakery should be provided an exemption from creating the custom-made wedding cake.

The free exercise rights of the Bakery are also substantially burdened, but providing an exemption to the Bakery owners and employees that would preclude them from creating the custom-made cake would not prove a difficult accommodation, as opposed to providing an exemption from a national scheme, like social security.

The government's interest in creating the Act, most likely to prevent discrimination, is not a compelling governmental interest, as eradicating the discrimination against same-sex marriage does not have the same constitutional history as eradicating other forms of discrimination, such as racial discrimination. Moreover, the State cannot show that it has a compelling governmental interest, because the State has not legalized same-sex marriage.

For the reasons below, this Court should provide an exemption for the Bakery owners and employees, which would preclude them from creating the custom-made wedding cake.

ARGUMENT

I. TOUROVIA'S CIVIL RIGHTS ACT § 22.5(b) VIOLATES TO FREE SPEECH RIGHTS OF THE EMPLOYEES AND OWNERS OF MAMA MYRA'S BAKERY BECAUSE IT FORCES THE FAMILY OWNED BUSINESS TO CREATE A CUSTOM-MADE WEDDING CAKE CELEBRATING SAME-SEX MARRIAGE, WHICH COMPELS THEM TO CONVEY A CELEBRATORY MESSAGE THAT VIOLATES THEIR STRONGLY HELD RELIGIOUS BELIEFS

The First Amendment of the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S Const. amend. I. This right acts as a barrier between government compulsion and individual freedoms. When a Jehovah's witness couple in New Hampshire, who believed the New Hampshire slogan to be "morally, ethically, religiously, and politically abhorrent," were compelled by the New Hampshire government to put the slogan on their license plate, the Court found that the First Amendment extended to this display. Wooley v. Maynard, 430 U.S. 705, 713 (1997). The Court held the statute unconstitutional, as driving an automobile is a "virtual necessity" to most Americans, and the State required individuals to use private property as a "mobile billboard" serving the State's ideological message. Id. at 715. The First Amendment not only secures the right to speech, but also the right to refrain from speaking, which are "complementary components of the broader concept of 'individual freedom of mind.'" Id. at 714 (quoting W. Va. Bd. of Education v. Barnette, 319 U.S. 624, 637 (1943)). In assessing whether or not the government could persecute these students for failing to salute the flag and recite the Pledge of Allegiance, in direct violation of the Jehovah's Witness belief that it is

sacrilege to worship a flag, the Court looked at whether their refusal interfered with the rights of others, and whether the refusal is peaceable and orderly. Barnette, 319 U.S. at 631.

Here, forcing the employees of Bakery to bake a custom-made wedding cake for a same sex couple would violate their moral values taught to them by their religion. The government may not compel someone to disseminate a message that would oppose their own, and making a custom-made wedding cake would "convey a celebratory message" about same-sex marriage, which would violate the sincerely-held religious beliefs of employees and owners of the Bakery (R 7). The First Amendment is intended to protect from government compulsion on individual freedom, and like in Wooley, the government may not force citizens to perpetuate ideas that they find to be morally, ethically, religiously, and politically abhorrent. Additionally, like in the Wooley case, the government cannot require individuals to use their personal property as a "mobile billboard." Similarly, a bakery that produces a custom-wedding cake with a same-sex couple on the top, would in essence be advertising to all of the guests of the party that they support this message, in direct moral opposition with their Christian values. Furthermore, like in Barnette, the First Amendment protects the right to refrain from speech, especially when this speech is inconsistent with religious beliefs. It must be noted that the refusal of speech must be peaceable and orderly, and not infringe on the rights of others. Here, while the Bakery's employees refused to create the custom-made wedding cake because it would violate their sincerely-held religious beliefs, the employees of the Bakery offered the same-sex couple other baked goods. (R 3). They did not infringe on the rights of the Barbers, because they maintained willingness to serve them in other ways.

A. Baking a custom-made wedding cake is conduct that has a communicative intent to convey a particularized message, and is expressive conduct protected by the First Amendment.

The First Amendment right to free speech may extend to a person's conduct if that conduct has the communicative intent to convey a particularized message that would be understood by those who view it. Texas v. Johnson, 491 U.S. 397, 404 (1989). The key concept here is that when conduct conveys a message, whether that be religious, political, ideological, or otherwise, that conduct is sufficiently expressive, and will be considered symbolic speech. For example, placing a peace sign on an American flag shows an intent to convey a message of peace, and while it may be contrasted against governmental interests, this type of expression is protected conduct. See Spence v. Washington, 418 U.S. 405 (1974). In contrast, violating a school uniform policy would not violate free speech, because it is not the type of conduct that is intended to convey a message that would be understood by those who view it. See Jacobs v. Clark Cty. Sch. Dist., 526 F.3d 419 (2008). Symbolism is so deeply rooted in society, it can be seen by the flags—used to represent systems, ideas, institutions, or personalities—crowns, robes, maces, and uniforms to show rank in a State, or even religious symbols such as the cross. Barnette, 319 U.S. at 632-633. It is absolutely necessary that symbols be given the same weight as speech itself, as freedom of expression could not exist without the extension to speech connected activities. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 514 (1969). These symbols are so fundamentally rooted in speech, that when protesters wore black armbands to protest the Vietnam War, the Court ruled that this should be considered "pure speech," and unrelated to the disruptive conduct of violent protesters. Id. at 505. Although the protesters were acting in a form of civil disobedience, the government found that these acts could not be restricted, since they are viewed as speech, and not conduct. Id.

Here, the First Amendment right to free speech and freedoms from compelled speech extend to the making of a

custom-made wedding cake celebrating same-sex marriage. Free speech rights extend to conduct that has the communicative intent to convey a particularized message. While baking an ordinary baked good would not otherwise convey a message, constructing a custom-made cake that showcases figurines of a same-sex couple holding hands, in celebration of their marriage, conveys a particularized message in support of same-sex marriage. (R 2). The intent to convey a particularized message is satisfied when the message would be understood by those who viewed it. In terms of a custom-made wedding cake with a same-sex couple holding hands on the top tier, the message in support of this marriage would be understood by any viewer. The wax figurines of the same-sex couple holding hands symbolize much more than just two men holding hands, but rather the entire ideology behind same-sex marriage. (R 2). The family member employees and owners at the Bakery all hold the same religious beliefs that same-sex marriage violates the teaching of Jesus Christ, the Bible and Christianity. (R 3). It is not that the employees of the Bakery refused service to the couple due to their sexual orientation, but instead, the employees of Bakery refused to perpetuate symbolism in support of an ideology that they do not believe in. The Bakery would have happily provided the couple with other baked goods, but they cannot be forced to create a symbol in support of same-sex marriage. The custom-made wedding cake with a wax figurine of a same-sex couple holding hands on the top tier is sufficiently expressive, as it conveys a particularized message, and is therefore protected speech under the First Amendment.

B. The government may not force the employees of Mama Myra's Bakery to create a custom-made wedding cake celebrating a same-sex marriage because the government does not have a compelling governmental interest.

There are certain instances where the government may regulate speech, but this requires a sufficiently important

governmental interest. United States v. O'Brien, 391 U.S 367, 376-77 (1968). However, this requires that the speech contain elements of "speech" and "non-speech." Id. at 376. When an individual burned his registration certificate to protest the Vietnam War and influence others to adopt his antiwar beliefs, this violated the 1965 Amendment to the Universal Military Training and Service Act of 1948, which prohibited the knowing destruction of these registration cards. Id. at 367. However, the Court found the Act to regulate the conduct itself, and not the associated speech, and then juxtaposed the elements of speech and non-speech against the governmental interest and found that there was nothing inherently expressive about the burning of the draft card. Id. at 391. Instead, the Court found that the defendant frustrated government interest by preventing the efficient functioning of the Selective Service System. *Id.* In order for the government to intervene, there must be a significant governmental interest that outweighs the individual's right to express their beliefs. When conduct becomes "conduct 'sufficiently imbued with elements of communication,'" the government can no longer intervene, and the freedom of expression outweighs governmental interest. Johnson, 491 U.S. at 406 (quoting Spence, 418 U.S. at 409.).

While there are certain times that the government may regulate speech, the government does not have a sufficiently important interest in making sure that the employees and owners of the Bakery provides a same-sex couple with a custom-made wedding cake celebrating same-sex marriage. The government may get involved when its interests are frustrated, such as when a draft card is illegally burned, but when the act is symbolic in nature, the governmental interest cannot outweigh the ideological values of its citizens. The difference between burning and draft card and failure to produce a custom-made wedding cake for a same-sex couple is that the card is a government document, and the governmental interest is in the card itself. A custom-made wedding cake for a same-sex couple represents the marriage of a same-sex couple and does not have nearly the same degree of governmental interest. While the

government has an interest in making sure that all people have the same rights, same-sex marriage is not legal in the State and the Barbers had to go out-of- state to P-Town, Massachusetts for their wedding. (R 2). Therefore, the government interest in equal rights cannot outweigh the rights of the employees of the Bakery's employees and owners to free speech.

II. MAMA MYRA'S BAKERY IS ENTITLED TO AN EXEMPTION FROM TOUROVIA'S CIVIL RIGHTS ACT § 22.5(B) BECAUSE CREATING A CUSTOM-MADE WEDDING CAKE CELEBRATING A SAME-SEX MARRIAGE WILL FORCE THEM TO VIOLATE SINCERELY HELD RELIGIOUS BELIEFS.

"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." Emp't Div. v. Smith, 49 U.S. 872, 877 (1990). The Free Exercise Clause become applicable to the states by incorporation of the Fourteenth Amendment. See Cantwell v. Conn., 310 U.S. 296 (1940). Government interference with one's religious practices can come in two forms: first, interference with religious beliefs. See Sherbert v. Verner, 374 U.S. 398 (1933). Second, interference with physical religious practices, such as "assembling with others for a worship service" or "abstaining from certain foods." Smith, 49 U.S. at 877.

"The determination of what is a 'religious' belief or practice is more than not a difficult and delicate task." Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981). There, Thomas quit his job when he was transferred from a department making steel to a department making turrets for military tanks. Id. at 709. Thomas claimed that his religion as a Jehovah's Witness precluded him from creating any war materials. Id. The Indiana Supreme Court took issue with Thomas' statements about his beliefs, as he would make raw material of steel, but not turrets, which would be made from steel. Id. at 715. However, the Supreme Court found that

Thomas found his work as a steel manufacturer "insulated" from the production of war materials and the Court would not deem unreasonable where Thomas drew the line at permissive and objectionable behavior under his religious beliefs. Id.

The Bakery employees and owners should be granted an exemption from the State's Act as creating a custom-made wedding cake celebrating a same-sex marriage will violate the sincerely-held religious beliefs of the Bakery's owners and employees. The Bakery's owners and employees have sincerely-held Christian beliefs and believe that same-sex marriage violates the teaching of Jesus Christ, the Bible and all things Christian. (R 3). As in Sherbert, requiring the Bakery to produce a cake in very public celebration of same-sex marriage would interfere with the Bakery's free exercise rights. As in Thomas, some may question the religious beliefs of the Bakery, particularly because the Bakery offered to provide other baked goods besides the custom-made wedding cake. (R 2). However, as in Thomas, where the Bakery decides to draw the line in what it will or will not provide to a same-sex couple in terms of baked items should not be deemed unreasonable by this Court.

A. Tourovia's Civil Rights Act § 22.5 impedes both the free speech and free exercise rights of Mama Myra's Bakery employees and owners.

In Smith, the Court has articulated the standard used to evaluate whether a governmental action burdens or interferes with a religious practice and held that exercise rights will not relief a person's obligation to comply with laws deemed to be neutral and generally applicable. Smith, 49 U.S.at 879.

In that case, two individuals belonging to the Native American Church were terminated from their jobs because they consumed peyote for sacramental purposes. Id. at 874. When both individuals applied for state unemployment benefits, they were deemed ineligible, because consuming peyote, a Schedule I controlled substance, was a terminable work-misconduct offense. Id. The respondents claimed "that their religious motivation for

using peyote place[d] them beyond the reach of criminal law." Id. at 877. The Court held that the law in question was generally applicable and neutral despite the effect on respondents' religious beliefs, as it was part of a larger national drug scheme. Id. at 888, 890. The Court surmised that "every regulation of conduct that does not protect an interest of the highest order" surely cannot be struck down. Id. at 888.

Despite the Court's decision, it provided two exceptions where it suggests the Court may avoid application of a "neutral, generally applicable law" in favor of "religiously motivated action." Id. at 881. "[N]eutral, generally applicable" laws may be barred by the First Amendment's Free Exercise Clause if the law impairs "the Free Exercise Clause in conjunction with other constitutional protections such as freedom of speech." Id.

The Court points to Wisconsin v. Yoder, 406 U.S. 205 (1972), as an example of the hybrid situation, where members of the Old Amish Order objected to the state's compulsory-school law. The Court found that the law offended the "deep religious conviction[s]" of the Order and ultimately the parents, who have the right to "direct the religious upbringing of their children." Yoder, 406 U.S at 216, 233. Therefore, the Court provided an exemption for the parents of children in the Old Order Amish, so children can continue their "vocational education under parental and church guidance" of the Order. Id. at 236

Another example of this hybrid situation can be seen in Barnette, where Jehovah's Witnesses were expelled from school for failure to salute the flag, an act of insubordination under the school's rules. Barnette, 319 U.S. at 630. Saluting the flag was deemed a "form of utterance" that directly conflicted with the tenets of the Jehovah's Witnesses' faith. Id. at 632. Ultimately, the Court held that the Board of Education's actions in compelling the flag salute "invade[d] the sphere of intellect and spirit" that the First Amendment protects. Id. at 642.

Because the Act itself impedes the free speech and free exercise rights of the Bakery's employees and owners, the hybrid doctrine exception articulated in Smith is satisfied. Like the parents in Yoder, the Bakery's sincerely-held religious beliefs,

which believe same-sex marriage to violate the teaching of Jesus Christ, the Bible and all things Christians, will be offended if required to create the specially made wedding cake celebrating a same-sex marriage. (R 3). As in Yoder, the Bakery employees and owners should be granted an exemption as to continue operating their business in such a way that aligns with their Christian beliefs.

Similarly, as in Barnette, the Bakery's First Amendment free speech and free exercise rights are implicated. First, as discussed above, the cake which the Barbers wanted the Bakery to create is a form of expression. Because the creation of this custom-made wedding cake would be an artistic expression of the Bakery, it becomes speech that is protected by the First Amendment. Second, the Bakery's free exercise rights are implicated. The Bakery must choose between complying with a state law or adhering to the tenets of their Christian faith. While free exercise alone does not satisfy the standard articulated in Smith, the implication of both free exercise and free speech rights trigger the hybrid exception and would provide the Bakery with an exemption from the State's Act.

B. Tourovia's Civil Rights Act § 22.5 is a governmental action that substantially burdens the free exercise rights of Mama Myra's Bakery employees and owners.

In Smith, the Court articulated a second exception that provides a different standard of review to generally applicable and neutral laws. When a government action substantially burdens a religious practice, the action must be justified by a compelling governmental interest. Smith, 49 U.S. at 883 (citing Sherbert v. Verner, 374 U.S. 398, 402-03 (1963)). However, the Court was clear that it did not "invalidate[] any governmental action on the basis of the Sherbert test, except the denial of unemployment compensation." Smith, 49 U.S. at 883. The Court further stated that it would not provide exemptions to "a generally applicable criminal law," but it acknowledged that it had used the Sherbert test to analyze free exercise challenges to laws. Id. at 885.

In United States v. Lee, 455 U.S. 252, 255 (1982), a member of the Old Order Amish made a free exercise challenge against social security taxes, claiming that his religion "prohibits the acceptance of social security," as the Order believe it is sinful to not support their own needy and elderly. The Court reversed the lower court's decision, finding that Lee's constitutional rights were not violated by the social security scheme, because "it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs." Id. at 259-61.

Like Lee, the Bakery owners and employees' free exercise rights have been substantially burdened by the State's Act. The Bakery owners and employees' sincerely-held religious beliefs find that same-sex marriage violates the teachings of Jesus Christ, the Bible and all things Christian, thus prohibiting them from creating a wedding cake celebrating a same-sex marriage. (R 3). Unlike Lee, it would not be difficult to accommodate the Bakery, because the Bakery is a small, family-owned bakery that has a much smaller reach that the United States social security system. Providing an exemption for the Bakery would not cause a series of exceptions to flow, as this exemption would be limited to the Bakery.

C. Tourovia's Civil Rights Act § 22.5 is a governmental action not justified by a compelling governmental interest.

"[G]overnmental actions . . . substantially burden[ing] a religious practice must be justified by a compelling governmental interest." Smith, 49 U.S. at 883. A Seventh Day Adventist was terminated from her job because she refused to work on Saturdays, the Sabbath day in her faith. Sherbert, 374 U.S. at 399. When she applied for unemployment benefits, Sherbert was denied, as she had been offered other employment opportunities, but turned them down because they required working Saturdays. *Id.* at 401. The state statute, which allowed unemployed individuals to refuse work with "good cause," was challenged by Sherbert as a violation of her Free Exercise rights. Id. The Court found that the statute as-written did not serve a

compelling governmental interest, as the interest, supposedly preventing fraudulent unemployment compensation claims, was not supported by evidence of fraud. Id. at 407.

This can be distinguished from Bob Jones University v. United States, 461 U.S. 574 (1983). There, the IRS revoked the University's tax-exempt status after the University refused to end its ban on interracial dating and marriage. Id. at 581. The University claimed this impeded its free exercise rights, because the sincerely held religious beliefs of the school prohibited interracial marriage and dating. Id. at 580. The Court upheld the revocation of the school's tax-exempt status, finding that the government's interest in having education free from racial discrimination compelling, particularly given the "165 years" of the Nation's constitutional history to eradicate racial discrimination. Id. at 604.

The State's Act does not serve a compelling governmental interest, because the State had not legalized same-sex marriage and, more broadly, the discrimination of a person's sexual orientation is not as protected as other forms of discrimination, such as racial discrimination. While Bob Jones University and our facts seem strikingly similar, they are ultimately two different cases that should be distinguished. Like Bob Jones University, the Bakery argued that it did not discriminate against the Barbers' sexual orientation, but rather the conduct of the same-sex marriage. (R 4). However, unlike Bob Jones University, the governmental interest of the State in protecting the rights of same-sex couples is not compelling, as the Barbers had to leave the State to be married due to the fact that the State had not legalized same-sex marriage. (R 2). Therefore, protecting the rights of individuals in same-sex relationships or marriages from being discriminated against did not seem to be a compelling governmental interest of the State, as it would have created legislation at an earlier point in time to protect these relationships. (R 2). More broadly, courts have only begun to consider whether Title VII of the Civil Rights Act covers sexual orientation, therefore it seems that the United States does not

have a long history in eradicating discrimination against same-sex marriage as it does discrimination against race.[1]

CONCLUSION

For the aforementioned reasons, this Court should reverse the decision of the District Court of Tourovia and grant Mama Myra's Bakery an exemption to Tourovia's Civil Rights Act § 22.5(b).

Respectfully Submitted,

/s/_____

Counsel for Petitioner

[1] *See* Alan Feuer & Benjamin Weiser, *Civil Rights Act Protects Gay Workers, Appeals Court Rules*, N.Y. Times (Feb. 26, 2018), *https://www.nytimes.com/2018/02/26/nyregion/gender-discrimination-civil-rights-lawsuit-zarda.html.*