Team No. 16

No. 18-321

In the

Supreme Court of the United States

October Term, 2017

MAMA MYRA'S BAKERY,

Petitioner,

v.

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

Respondents.

On Writ of Certiorari to the
Supreme Court of Tourovia

BRIEF FOR PETITIONER

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1. Does the creation of a custom-made wedding cake constitute expressive activity such that state compulsion to conduct that activity results in a violation of the Free Speech Clause?

2. Does the Free Exercise Clause, which protects against laws that discriminate against religious beliefs, allow a law to infringe on one's religious beliefs where (1) the law is not generally applicable to all members of society; (2) the law is not neutral because it allows many religious businesses to practice their religion freely but not others who are similarly situated; and (3) the law forces a business to choose between compromising its religion or participating in the public marketplace?

STATEMENT OF THE CASE

Mama Myra's Bakery (Myra's) is a small bakery located in Suffolk County, Tourovia, which designs and creates custom wedding cakes. (R. at 2). Myra's is owned by a devout Christian family, who have owned and operated the bakery for over twenty-seven years. (R. at 2). Over those years, Myra's and its employees have openly expressed their Christian beliefs. (R. at 2). In line with their beliefs, Myra's has never created a wedding cake for a same-sex marriage, as it believes that creating the cake would violates its beliefs. (R. at 2-3).

During the summer of 2012, Hank and Cody Barber got married in P-Town, Massachusetts. (R. at 2). In August, Hank and Cody Barber came to Myra's to commission the creation of a wedding cake. (R. at 2). The wedding cake would be served at a wedding party later that month for the family members were not able to attend their ceremony earlier that summer. (R. at 2). The Barbers asked Myra's to construct a wedding cake with a figure of the couple hand-in-hand at the top of the cake. (R. at 2). Myra's declined to create the cake, because it would compromise their sincerely held Christian belief that same-sex marriage violates the teachings of Jesus Christ. (R. at 2). Instead, Myra's offered to sell and make any other baked goods for their wedding party. (R. at 2). The Barbers stormed out of the bakery without saying a word and subsequently filed charges of discrimination, claiming that Myra's violated §22.5(b) of the Tourovia Civil Rights Act (hereinafter "TCRA") by not designing a wedding cake because of their sexual orientation. (R. at 2-3).

On September 30, 2015, the District Court of Tourovia held that Myra's discriminated against the Barbers because of their sexual orientation. (R. at 5). On October 8, 2015, Myra's appealed to the Appellate Division of the Supreme Court of Tourivia, Fourth Department, for a motion to set aside the judgment of the lower court. (R. at 6). The Appellate Division of the

Supreme Court of Tourovia affirmed the lower court judgment, concluding that the TCRA did not violate Myra's First Amendment rights. (R. at 11). On October 30, 2015, Myra's appealed to the Supreme Court of Tourovia, who affirmed the decision. (R. at 14-15). Myra's petitioned to the Supreme Court of the United States for a Writ of Certiorari, which was granted on January 31, 2018. (R. at 16).

SUMMARY OF THE ARGUMENT

This Court should reverse the Supreme Court of Tourovia's decision because the court improperly found that the TCRA was in compliance with the Free Exercise and Free Speech Clauses.

The TCRA violates the Free Speech Clause because it forces Myra's to create a message which violates its sincerely held religious beliefs. The Free Speech Clause states that "Congress shall make no law…abridging the freedom of speech." In analyzing whether a law offends the Free Speech Clause, courts apply strict scrutiny if the law targets an expressive medium such as pure speech or when the law compels expressive conduct. In the instant case, the TCRA targets Myra's creation of custom-made wedding cakes which convey a particularized message that would likely be understood by anyone who views it. Since the creation of a wedding cake constitutes pure speech and expressive conduct, the TCRA does not comply with the Free Speech Clause.

The TCRA also violates the general applicability and neutrality mandated by the Free Exercise Clause by adopting exemptions which discriminate against religious businesses and allows for the government to make individualized exemptions. The Free Exercise Clause of the First Amendment provides, "Congress shall make no law…prohibiting the free exercise of [religion]." A law that substantially burdens a religion and is not neutral or generally applicable must satisfy strict scrutiny. Here, the TCRA impermissibly hinders Myra's ability to freely exercise its religion and thus, cannot survive strict scrutiny. Respondents have failed to prove that the TCRA complies with the Free Exercise Clause because: 1) The exemptions do not apply equally to places of public accommodation which are similarly situated; 2) Myra's is not given the same allowance to practice its religion as other establishments; and 3) the TCRA places a

significant burden on Myra's by giving them the choice between compromising its religion and continuing its crafts.

Since the TCRA violates both the Free Speech and Free Exercise Clause, this Court should therefore reverse the lower court's decision.

ARGUMENT

I. THE TCRA §22.5(b) VIOLATES APPELLANT'S FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH BECAUSE CUSTOM MADE WEDDING CAKES ARE EXPRESSIVE ACTIVITY PROTECTED BY THE FREE SPEECH CLAUSE.

This Court should reverse the Supreme Court of Tourovia and grant Myra's motion to set aside judgment because the TCRA forces Myra's to create a message which violates its sincerely held religious beliefs. The Free Speech Clause of the First Amendment states that "Congress shall make no law … abridging the freedom of speech." U.S. Const., amend. I. The Constitution protects written or spoken words as well as other forms of expressive mediums. *Hurley v. Irish-American Gay,* 515 U.S. 557, 569 (1995). "'Since all speech involves choices of what to say and what to leave unsaid,'" the principle of free speech is that one who decides to speak may also choose what not to say. *Id.* at 573 (citing *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 11 (1986)). Accordingly, the Free Speech Clause does not give the government the power to restrict expression because of its message. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Since there is no strict requirement that a message be narrowly succinct and articulable, speech such as artwork, music, and poetry is "unquestionably shielded" by the First Amendment. *Hurley*, 515 U.S. at 569. In analyzing whether a law offends the Free Speech Clause, courts have applied strict scrutiny when a regulation targets pure speech or when expressive conduct is being compelled by a government law. *Turner Broad. Sys. V. FCC*, 512 U.S. 622, 642 (1994). In the

instant case, the TCRA targets pure speech and unconstitutionally compels Myra's to create a message through its artistic expression, and thus triggers strict scrutiny. Since the TCRA unconstitutionally compels Myra's artistic expression, this Court should reverse the judgment of the lower court.

A. The First Amendment Applies to Myra's Custom Wedding Cakes Because the Cakes are Artistic Expression Protectable Under the Free Speech Clause.

The First Amendment protects Myra's wedding cakes because the creation of the cakes is expressive conduct and the wedding cakes, themselves, are artistic expression. The First Amendment protects both artistic expression and expressive conduct. *See Hurley*, 515 U.S. at 569 (holding that the First Amendment protection applies to artwork, music, and poems); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (stating that symbolic acts are "akin to 'pure speech'" and within the protection of the First Amendment). An artistic expression does not lose its First Amendment protection because a new and unconventional medium of communication is being used. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011). In analyzing whether an act is protected by the Free Speech Clause, courts first determine whether the act is (1) pure speech or (2) conduct that is expressive. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010) (citing *O'Brien*, 391 U.S. at 376 and *Cohen*, 403 U.S. at 18).

1. Creating wedding cakes constitutes pure speech.

Myra's creation of custom wedding cakes constitutes pure artistic expression and is entitled to full constitutional protection under the First Amendment. The First Amendment's protection does not end at spoken or written ideas, *Texas v. Johnson*, 491 U.S. 397, 404 (1989), but also extends to mediums like "pictures, films, paintings, drawings, and engravings." *Kaplan v. California*, 413 U.S. 115, 119–20 (1973). It also includes conduct that may be "sufficiently imbued

with elements of communication that fall within the scope of the [First Amendment]." *Id.* Symbolism is an age-old medium to effectively convey ideas, with shorthand references to commonly understood concepts. *W. Va. State Bd. of Educ. V. Barnette*, 319 U.S. 624, 632 (1943). Symbols themselves can be speech, because association with that symbol establishes approval of it. *Id.* at 632. "A person gets from a symbol what meaning he puts into it [,]" even if that idea comforts some while discomforting others. *Id.*

This Court has found that the government may not interfere with speech to promote an approved message or dishearten a disfavored one. For example, in *Hurley*, 515 U.S. at 581, this Court held that "the disapproval of a private speaker's statement does not legitimize use of the [government's] power to compel the speaker to alter the message by including one more acceptable to others." In that case, private organizers planned to hold a Saint Patricks' Day parade in Boston. *Id.* at 560. The organizers refused to allow an LGBT group of Irish descent to participate in their parade because they feared it would alter the expressive content of the parade. *Id.* at 561. After the organizers refused, the LGBT group sued the council alleging violations of the state public accommodations law, which prohibited discrimination or restriction on account of sexual orientation. *Id.* This Court held that compelling parade organizers to propound a particular point of view interfered with the content of the organizers' message and thus, was beyond the government's power to control. *Id.* at 581.

Relying on this Court's decisions, courts have trended towards granting greater First Amendment protection for non-traditional forms of pure speech. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (holding that video games are expression protected by the First Amendment), *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) (holding that the sale of original paintings is expression protected by the First Amendment). In *Anderson*, 621 F.3d 1051,

1060–61, the Ninth Circuit found that both a tattoo and the act of tattooing were protected under the First Amendment. In that case, a city banned tattoo parlors within its confines because of the health risks associated with the art of tattooing. *Id.* at 1058. The plaintiff sought injunctive and declarative relief alleging that tattooing and tattoos are protected expressions under the First Amendment. *Id.* at 1057. The court found that tattoos are pure expression because tattoos generally consist of other forms pure speech, which are entitled to full First Amendment protection, such as words, realistic or abstract images, and symbols. *Id.* at 1061. The court noted that "a form of speech does not lose First Amendment protection based on the kind of surface it is applied to." *Id.* Additionally, the Ninth Circuit found that the tattooing process was similarly protected because "the entire purpose of tattooing is to produce the tattoo, and the tattoo cannot be created without the tattooing process any more than the Declaration of Independence could be created without a quill … and ink." *Id.* at 1062. Thus, the process of tattooing, conduct that is completed only for the purpose of producing the tattoo itself, is so intertwined with the purely expressive product that is the tattoo, that the act becomes entitled to full First Amendment protection. *Id.*

The TCRA is not allowed to interfere with Myra's custom wedding cakes because the cakes, as well as the process of making the cakes, constitute pure speech. As in *Anderson*, where the court found that tattoos are pure expression because they consist of other forms of pure speech, wedding cakes also routinely consist of forms of speech such as words, images, and symbols. *See* Haley Holik, *You Have the Right to Speak by Remaining Silent: Why a State Sanction to Create a Wedding Cake Is Compelled Speech*, 28 Regent U.L. 299, 302–04 (2015) (discussing the tradition and history of the wedding cake). Indeed, this is evident by the fact that Myra's was asked to design and sculpt a figure of the couple hand-in-hand, which would promote the speech that same sex marriage should be celebrated. (R. at 2). Similarly, the cake making process also constitutes pure

speech because the process of making the cake is so intertwined with the purely expressive product. Haley Holik, *You Have the Right to Speak by Remaining Silent: Why a State Sanction to Create a Wedding Cake Is Compelled Speech*, 28 Regent U.L. 299, 302–04 (2015) (discussing the tradition and history of the wedding cake) (stating that creating a cake needs "considerable skill and artistry"). Since speech does not lose First Amendment protection based on the type of surface it is applied to, and because the wedding cake is pure speech, Myra's conduct falls outside the government's power to regulate.

2. Creating wedding cakes is expressive conduct**.**

The Constitution guarantees the right to not only engage in pure speech, but also expressive conduct. *O'Brien*, 391 U.S. at 376–377. This Court has found conduct to be expressive when: (1) there is an intent to convey a particularized message; and (2) it is reasonably likely that the message would be understood by third-party observers. *Spence v. Washington*, 418 U.S. 405, 410–11. Expressive conduct need not be a "narrow, succinctly articulable message [.]" *See Hurley*, 515 U.S. 557 (1995). Rather, the conduct merely needs to communicate a message identifiable to a reasonable observer. *See Texas v. Johnson*, 491 U.S. 397, 409 (1989) (focusing on the perspective of a reasonable onlooker); *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 294 (1984) (describing expressive conduct as that which "would be reasonably be understood by the viewer to be communicative").

In *Spence*, this Court faced the issue of whether adhering tape to the American flag, in the shape of a peace sign, was considered expressive conduct. 418 U.S. 405, 405-08. The appellant, who hung the described flag from an apartment window, testified that he put a peace symbol on the flag and displayed it as a means of protesting against the invasion of Cambodia and the killings at Kent State University, events which occurred a few days prior to the appellant's arrest. *Id.* at

408. This Court held that an intent to convey a particularized message was present, because most viewers of the flag would attribute it to the disapproval of the United States' domestic and foreign policy under the particularized circumstances in which the message was conveyed. *Id.* at 410–14. This Court further held that the appellant's message was "direct, likely to be understood, and within the contours of the First Amendment." *Id.* at 415; *see also Tinker*, 393 U.S. 503 (1969) (holding that students wearing black armbands to protest the Vietnam War was expressive conduct protected under the First Amendment); *Hurley*, 515 U.S. at 569 (holding that the First Amendment protects abstract expression like a "painting by Jackson Pollock [or] the music of Arnold Schoenberg").

In *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc*., 547 U.S. 47, 66 (2006) (*FAIR*), this Court held that allowing military recruiters access to law school campuses was not inherently expressive because the public would not be able to associate the military's message with the law schools. In that case, an association of law schools wanted to restrict military recruiting on their campuses because of the government's policies on LGBT persons in the military. *Id. at 47*. The government enacted a law stating that if an institution of higher education denies military recruiters access to their campuses, they would lose certain federal funds. *Id.* at 51. The association contended that by treating military recruiters differently from other recruiters they were expressing their disagreement with government's policies. *Id.* at 66. This Court held that the law schools' open disapproval of military policy did not constitute expressive conduct because an "observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing disapproval of the military[.]" *Id.*

The design and creation of Myra's wedding cake constitutes expressive conduct because Myra's intent to portray a message through its cakes is likely to be understood by a third party.

Like the flag in *Spence*, Myra's creation of wedding cakes is also expressive conduct and entitled to protection under the Free Speech Clause. A cake when used at a wedding, is more than a celebration of a union between two people, and has been a traditional image associated with that union. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). As This Court held in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599–601 (2015), marriage implies four fundamental premises which include the concepts of individual autonomy, support of a two-person union, protection of children and families, and social order. Here, Myra's wedding cakes are created, not merely to celebrate a union, but to celebrate these fundamental principles that this Court has found to exist within marriage. (R. at 2–3.). Indeed, Myra's was willing to sell any other item within the store to the Barbers. (R. at 2). Thus, a wedding cake is symbolic of the legal and social rights of marriage, and not merely celebrating a union between two people. By creating a wedding cake and presenting it at a celebration, the baker has the intent to convey the messages that are associated with marriage.

FAIR is inapposite to the instant case. In *FAIR*, this Court found that reasonable observers would not be able to associate law school approval with military recruiters on campus. 547 U.S. at 66. Unlike *FAIR*, where there were a plethora of reasons why military recruiters could be on campus, here, there is only one associated reason a wedding cake would be at a wedding ceremony: to celebrate the marriage. A reasonable person would be able to, at the very least, associate the cake with a celebratory message. This is unlike the law schools' open disapproval of military policy because once the cake is seen the message would be readily identifiable to a third party.

B. The Appropriate Standard Of Review Is Strict Scrutiny Because TCRA Is Content Based And The Government Has Unconstitutionally Compelled Mama Myra's Speech.

Having determined that the creation of a wedding cake constitutes speech, the appropriate standard of review is strict scrutiny because the TCRA compels speech that Myra's would

otherwise not make. The First Amendment protects a speaker's right to choose the content of his or her own message. *Hurley*, 515 U.S. at 573. This protection includes the right to speak, as well as the right to not speak. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). By compelling speech that a speaker would not otherwise make, the government is altering the content of the speech itself. *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988). Here, strict scrutiny applies because the TCRA becomes a content-based restriction when it is coercively used to compel a message that a speaker finds morally objectionable. Myra's not only has the right to speak, but also the right not to convey a message. Compelling Myra's to create a wedding cake for a same-sex wedding requires Myra's to engage in speech that contravenes its sincerely held religious beliefs. (R. at 2). Thus, the TCRA acts as an impermissible exaction that forces Myra's to choose between its business and its religious beliefs.

1. The TCRA is content based because the law unconstitutionally compelled speech.

The TCRA is a content-based regulation of speech that compels Myra's to speak in favor of same-sex marriage through its artistic expression. A law is content based if it mandates speech that a speaker would otherwise not make and results in the alteration of the speech's content. *Riley*, 487 U.S. 781, 795 (1988). The central premise of the First Amendment is that a speaker has the autonomy to choose the content of his own message. *Hurley*, 515 U.S. at 573. The First Amendment does not give government the government the power to restrict expression because of its message, ideas, or content. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Laws that compel a speaker to utter a particular message are also subject to strict scrutiny. *Turner*, 512 U.S. at 642.

This Court has assessed content-based restrictions with respect to a federal act that required cable broadcasters to allocate a percentage of their channels to local, public television stations this

violated the cable company's rights under the First Amendment. *Turner Broad. Sys. v. FCC*, 512 U.S. at 626–30. In *Turner,* this Court explained that government action that suppresses speech because of its message, or that compels a particular message, goes against the principles of the First Amendment. *Id.* at 640. This Court stated that "the most exacting scrutiny" will be used for "regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Id.* at 642. Laws that compel a speaker to utter a particular message are also subject to strict scrutiny. *Id.* In contrast, intermediate scrutiny applies to laws that are unrelated to the content of speech. *Id.*; *see Hurley*, 515 U.S. 557 (1995); *see also Pacific Gas & Electric Co. v. Public Utilities Com.*, 475 U.S. 1 (1986) (holding that a regulation that granted a public interest company access to a company newsletter was content based and subject to strict scrutiny); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a law which compelled speech was content based and subject to strict scrutiny); *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241 (1974) (holding that a right-to-reply law compelled speech and was subject to strict scrutiny).

Similarly, This Court has ruled that individuals have a constitutional right not to speak. For Example, In *Wooley* 420 U.S. at 705 this Court held that a person cannot be punished for concealing a part of his license plate. This Court considered whether the state may constitutionally punish people who cover the state motto, "Live Free or Die," on a license plate, because it is "repugnant to their moral and religious beliefs." *Id.* at 706–07. This Court ruled that a state cannot require an individual to speak an ideological message that is "repugnant to their religious beliefs." *Id.* at 714–15; *see also W. Va. State Bd. of Educ. V. Barnette*, 319 U.S. 624 (1943) (holding that a state may not compel a student to salute the flag).

The TCRA acts as a content-based regulation of speech, because it compels Myra's to support same-sex marriage through its artistic expression. Laws compelling speech pose a risk that the government is not seeking to advance a legitimate regulatory goal. *Turner*, 512 at 641. Instead, compelling speech suppresses ideas and manipulates public debate by coercing citizens instead of persuading them. *Id.* The TCRA became a content-based regulation when the government compelled Myra's to use its artistic expression and create a message it does not agree with. By doing so, Tourovia forced bakers to choose between their livelihood and their sincerely held beliefs. As per *Turner*, any law requiring a speaker to make a particularized message is subject to strict scrutiny. *Id.* at 642.

Similar to *Wooley*, Tourovia is compelling Myra's to create a message that would violate its sincerely held religious beliefs. (R. at 2). Despite Myra's opinion being different from the change in social perceptions towards same sex marriage, *Lawrence v. Texas*, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting), the First Amendment protects the citizens' right to hold a point of view that is contrary to majority opinion. *Id.* at 715. People do not have to foster an idea that they find morally objectionable. *Id.*

Lastly, the TCRA imposes an even greater limit on speech than the restriction this Court found unconstitutional in *Hurley*. In *Hurley*, 515 U.S. at 581, this Court held that parade organizer cannot be compelled to include an LGBT group in their parade, because by doing so, it would alter the expression of the parade. However, the law at issue in *Hurley* was attempting to compel someone else's speech to be included in the parade. *Id.* at 559. Here, however, the TCRA is being used to compel Myra's to *create* a message that conflicts with sincerely held religious beliefs and the wedding cake will not provide an avenue for conflicting viewpoints to be aired. (R. at 2). The most fundamental principle of First Amendment protection is that the speaker has the autonomy

to choose the content of his own message. *Id.* at 573. Compelling a baker to create speech that is morally objectionable to his faith violates the First Amendment.

2. Respondents cannot satisfy strict scrutiny because the government does not have a compelling interest and it is not narrowly tailored.

Because the TCRA infringes on Myra's First Amendment rights, the appropriate standard of review in assessing the constitutionality of the TCRA is strict scrutiny. Strict scrutiny applies when a law suppresses, disadvantages, or imposes differential burdens on speech because of its content, or when a law is used to compel speech. *Turner*, 512 U.S. at 642. To withstand strict scrutiny, the state must show that the law in question furthers a compelling interest and is narrowly tailored to achieve that interest. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

In *Hurley*, 515 U.S. at 578, the state of Massachusetts claimed that the compelling governmental interest was to eliminate discriminatory biases related to sexual orientation. This Court ruled against this, stating that without a further, legitimate end, the law contravenes the First Amendment. *Id.* Compelling speech against the speaker's interest "amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *Id.* "The Speech Clause has no more certain antithesis." *Id.* This Court further reasoned that while the law is free to promote an orthodox message, it is not free to interfere with speech for "no better reason than promoting an approved message or discouraging a disfavored one." *Id.* Thus, the state did not have a compelling interest. *Id.* at 581.

Similar to *Hurley*, the government interest is to eliminate discrimination based on sexual orientation. Although the government has an interest in eliminating discrimination, this Court should rule the same way it did in *Hurley*, because eliminating discrimination is not a compelling enough reason to strip away Myra's First Amendment protection. *Hurley*, 515 U.S. at 578–79. The fundamental premise of the First Amendment is to protect a speaker's autonomy to freely choose

what to say and what not to say. *Id.* at 573. Thus, allowing a state to coercively use public accommodation law to compel speech would strip away this fundamental premise.

Additionally, the TCRA would not meet the narrowly tailored requirement under strict scrutiny. The TCRA fails the narrow tailoring requirement because less restrictive alternatives exist that would better achieve the state's interest. As written, the TCRA may be understood as to allow anyone who serves all people to refuse to create speech, because of the message it would communicate. In this situation, the TCRA would still prevent a baker, for example, from declining a request for a wedding cake if that baker also refuses to serve people of the LGBT community in general. In the instant case, Myra's serves all customers, but declines to create a message that conflicts with their sincerely held religious beliefs, for all people. If the TCRA was interpreted as above, it would not protect against discrimination, but also not infringe on the First Amendment rights of speakers. For these reasons, the TCRA fails to meet strict scrutiny because there is not a sufficient compelling government interest and it is not narrowly tailored to achieve that interest.

II. THE TCRA §22.5(b) VIOLATES APPELLANT'S FIRST AMENDMENT RIGHT TO FREELY EXERCISE ITS RELIGION BECAUSE THE LAW DISCRIMINATES BETWEEN RELIGIOUS BUSINESSES AND DOES NOT APPLY EQUALLY TO ALL MEMBERS OF SOCIETY.

This Court should reverse the Supreme Court of Tourovia's decision because the TCRA impermissibly hinders Myra's ability to freely exercise its religion by not protecting its right to endorse a religious view.[1] The Free Exercise Clause of the First Amendment, which has been

[1] This Court has acknowledged that for-profit corporations can bring claims to protect its Free Exercise rights. *See Burwell v. Hobby Lobby Stores, Inc.*, 1134 S.Ct. 2751, 2768 (2014) ("A corporation is simply a form of organization used by human beings to achieve desired ends….When rights, whether constitutional or statutory, are extended to corporations the purpose is to protect the rights of these people….And protecting free-exercise rights of corporations…protects the religious liberty of the humans who own and control those companies.")

applied to the States through the Fourteenth Amendment, provides that "Congress shall make no law… prohibiting the free exercise [of religion]." *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 893 (1990) (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940)). The protections of the Free Exercise Clause are triggered if the law at issue discriminates against religious beliefs or "regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). A law that substantially burdens a religion and is not neutral or generally applicable must satisfy the strictest scrutiny. *Id.* at 532. In the instant case, the Act is not neutral or generally applicable and places a substantial burden on Myra's ability to freely exercise its religion. Specifically, TCRA is not generally applicable because, by exempting certain "public accommodations that are principally used for religious purposes," as well as places "solely used for religious purposes," it does not apply generally to all members of society. The TCRA also is not neutral because while many religious businesses are allowed to practice their religion freely, the same allowance is not given to Myra's. Moreover, the TCRA places a significant burden on Myra's by forcing the business to choose between compromising their religion or participating in the public marketplace. Accordingly, the TCRA places an unconstitutional encumbrance on Myra's Free Exercise rights and this Court should reverse the judgment of the Supreme Court of Tourovia.

A. The TCRA Is Not Generally Applicable.

The TCRA is not generally applicable because it exempts some religious places of accommodation while not exempting others. Courts have declared that laws burdening religious practice must be generally applicable. *Lukumi*, 508 U.S. at 542. The generally applicable inquiry focuses on whether a legislature treats religious conduct inferior to nonreligious conduct, which burdens the governmental interest in a similar or greater degree. *Compare Lukumi* at 542–43

(holding that the ordinances were not generally applicable because they failed to prohibit nonreligious killings that infringed on the government interest in a similar or greater degree as the Santeria religion); *with Smith*, 494 U.S. at 890 (stating that the law's prohibition on peyote was generally applicable because it was a prohibition that was applied equally across the board). If the law burdening religiously motivated conduct is not generally applicable, it must satisfy the most rigorous of scrutiny. *Lukumi*, 508 U.S. at 546.

This Court illustrated in two cases, *Lukumi* and *Smith*, its analysis on whether a law is neutral or generally applicable. In *Smith*, 494 U.S. at 872, this Court upheld a criminal ban on the use of peyote. In that case, two employees were fired from their jobs and were subsequently denied unemployment compensation because they ingested peyote as a part of its religious ceremonies in their Native American Church. *Id.* The employees contended that their religious motivation for the use of peyote placed them outside the reach of a generally applicable law that forbids the commission of an act which his religious belief requires. *Id.* at 878. This Court noted that while courts must not presume to determine the place of a particular belief in religion or the plausibility of the religious claim, "if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment is not offended." *Id.* at 878, 887. This Court upheld the law against the Free Exercise challenge, stating that the prohibition on peyote was generally applicable because it was an "across-the-board criminal prohibition on a particular form of conduct." *Id.* at 884.

This Court's more recent decision in *Lukumi* further clarified what constitutes a neutral and generally applicable law. This Court struck down several ordinances, which restricted the killing of animals. *Lukumi*, 508 U.S. at 547. The ordinances were put into effect by the city after learning

that Santeria practitioners, who participate in religious animal sacrifices, had plans to establish a church in the city. The city ordinances punished "whoever…unnecessarily… kills any animal." *Id.* at 537. The Court held that the ordinances were not generally applicable because the ordinances gave officials discretion to define an "unnecessar[y]" killing, and thus, allowed the government to exempt actions such as hunting on a *per* se basis. *Id*. at 537.

Based on this Court's decisions in *Lukumi and Smith,* Courts of Appeals have found laws not generally applicable when the law gives the government the discretion to arbitrarily decide who the exceptions apply to. For example, in *Blackhawk v. Pennsylvania*, 381 F.3d 202, 210-11 (3d. Cir. 2004) (Alito, J.), the Third Circuit Court of Appeals found that a fee requirement was not generally applicable because there was open ended language within the statute, which gave the government the power to exempt conduct on a case by case basis. In that case, Blackhawk, a Lakota Indian who used black bears in his religious ceremonies, sought an exception from the Wildlife Code, which required permits in order to engage in the possession of exotic wildlife. *Id.* at 205. While the code generally required persons wishing to keep wildlife in captivity to have a permit and pay the accompanying fee, the ordinance contained language, which exempted the "keeping of animals in captivity [that] provide[d] some other tangible benefit for the welfare and survival of Pennsylvania's existing wildlife population." *Id.* at 210. The Court found that although the declaration suggested that the keeping of wild life animals was inconsistent with the wildlife policy unless doing so provided a "tangible benefit" for the state's wild animals, the "tangible benefit" was not a "self-defining" concept and the Commonwealth's failure to explain what the concept meant created a regime of individualized, discretionary exemptions which triggered strict scrutiny. *Id.* The Third Circuit noted that such regimes create the opportunity for a "facially neutral and generally applicable standard to be applied in practice in a way that discriminates against [certain]

religiously motivated conduct." *Blackhawk*, 381 F.3d at 210 –11; *see also Smith*, 494 U.S. at 884 ("where the state has in place a system of individual exemptions, it may not refuse to extend that system to cases of ['] religious hardship ['] without compelling reason").

In the cases preceding *Smith* and *Lukumi*, this Court has also ruled that when government has the discretion to make individualized exemptions, those decisions are subject to strict scrutiny. For example, in *Sherbert v. Verner*, 374 U.S. 398, 409-410 (1963), this Court held that a state could not constitutionally apply eligibility provisions of an unemployment compensation statute, which in effect denied benefits to a claimant who refused employment because of her religious belief. There, the government denied a claimant unemployment benefits if he failed "without good cause" to accept available work when offered by an employment office or an employer. *Id.* at 400-01. As this Court stated in *Smith*, 374 U.S. at 884, the "good cause" language in the *Sherbert* statute created a mechanism for individualized exemptions and thus, was subject to strict scrutiny. *See also Sherbert*, 374 U.S at 400–10.

The TCRA is not generally applicable because by exempting certain "public accommodations that are principally used for religious purposes," as well as places "solely used for religious purposes", it gives the government the discretion to arbitrarily choose who fits within the exceptions. TCRA § 22.5(b). Like in *Lukumi*, 508 U.S. at 537, where the open ended language,"unnecessar[y]" killing created a regime for individualize exemptions; *Blackhawk*, 381 F.3d at 210, where the Third Circuit found the fee requirement was not generally applicable because the "tangible benefit" language within the exception impermissibly allowed for a regime of individualized discretionary exceptions; and *Sherbert*, 374 U.S. at 884, where the "good cause" language in statute created a mechanism for individualized exceptions, the TCRA's arbitrary language similarly creates a mechanism for the government to pick and choose which religious

activities fit within the exemption. Here, the TCRA fails to explicitly define what constitutes a place of "public accommodation that [is] principally used for religious purposes." In applying the statute, the Court of Appeals of Tourovia stated that Myra's failed to meet this exception because "its primary purpose is to produce and sell baked goods, not to impart religious message." (R. at 11). However, this assessment ignores the fact Myra's is a Christian bakery with only Christian employees and has been outwardly expressing its belief for over twenty-seven years. (R. at 2-3). Moreover, Myra's does not sell or make items which violate its sincerely held religious beliefs. (R. at 3). Indeed, given the nature of Myra's and the religious aspects of wedding cakes, it is evident that a person could find that this bakery fits into a place of public accommodation, which is principally used for religious purposes. Since the TCRA's exemptions fail to define the criteria for fitting within the exemptions and allows the government to arbitrarily pick who fits within the exceptions, this statute is not generally applicable and is subject to strict scrutiny.

B. The TCRA Is Not Neutral.

The TCRA is not neutral because while many religious businesses are allowed to practice their religion freely, the same allowance is not given to Myra's. "Neutrality and general applicability are interrelated, and, as becomes apparent…failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. A law is not "neutral" if it targets religiously motivated conduct either on its face or as applied in practice. *Blackhawk*, 381 F.3d at 209 (citing *Lukumi*, 508 U.S. at 533-40). The Free Exercise Clause forbids subtle departures from neutrality and concealed suppression of particular religious beliefs. *Lukumi*, 508 U.S at 534 (citing *Bowen v. Roy*, 476 U.S. at 703 and *Gillette v. United States*, 401 U.S. at 437). Laws that make explicit and deliberate distinctions between different religious organizations are not neutral. *Larson v. Valente*, 456 U.S. 228, 246 n. 23 (1982). If the law burdening religiously

motivated conduct is not neutral, the law must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. *Lukumi*, 508 U.S. at 533.

This Court's decisions have confirmed the principle that anything other than the neutral treatment of religions is subject to strict scrutiny. For example, in *Larson v. Valente*, 456 U.S. 228, 231-32 (1982), this Court invalidated a statute that imposed special registration requirements on any religious organizations which did not receive more than half of its total contributions from its members or affiliated organizations. There, the statute was discriminatory against religions which depended heavily on receiving donations from the general population. *Id.* at 246 n. 23. The Court held that this was not a facially neutral statute because it made explicit and deliberate distinctions between different religious organizations. *Id.* The Court noted that "Free Exercise thus can be guaranteed only when legislators… are required to accord to the very same treatment given to small, new, or unpopular denominations." *Id.* at 245. *See also Lukumi,* 508 U.S. at 534 (stating that the First Amendment prohibits laws which have the object of suppressing religious practice as well as official action which targets religious conduct for distinctive treatment).

Similarly, Courts of Appeals have also invalidated laws which discriminate among and within religions. For example, in *Colorado Christian University v. Weaver,* 534 F.3d 1245, 1269 (10th Cir. 2008), the Tenth Circuit struck down a Colorado scholarship program that excluded "pervasively sectarian" institutions. The defendants in *Weaver* argued that the Colorado law did not distinguish between types of religions but rather between types of institutions. *Id.* at 1259. The defendants stated that any religion could establish an institution that is or is not "pervasively sectarian." *Id.* at 1259. The Tenth Circuit found that the inquiry into whether a university was "pervasively sectarian" impermissibly discriminated based on the "religiosity of the institution and the extent to which that religiosity affects its operations." *Id.* The court stated "the inquiry into

the recipient's religious views…is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." *Id.* at 1262 (quoting *Mitchell v. Helms*, 530 U.S. at 828 (citing *Smith*, 494 U.S. at 887)); *see also University of Great Falls v. N.L.R.B.*, 278 F.3d 1335, 1342–43 (2002) (stating that it is not appropriate for judges to determine the centrality of religious beliefs in the free exercise field) (quoting *Smith*, 494 U.S. at 886-87). The court held that statutes which discriminate on the basis of religion, including interdenominational discrimination, are subject to strict scrutiny under the Free Exercise Clause. *Weaver*, 534 F.3d at 1245 (citing *Lukumi*, 508 U.S. at 546).

The TCRA is not neutral because it discriminates by making deliberate distinctions between religious organizations and partakes in the impermissible act of measuring the adequacy of an organizations religious beliefs. Like in *Larson*, 456 U.S. 231-32, where this Court invalidated a facially non-neutral statute because it made explicit and deliberate distinctions between religious organizations and *Weaver*, 534 F.3d at 1245, 1258, where the scholarship program impermissibly inquired about the adequacy of one's religious beliefs, the TCRA makes deliberate distinctions between religious organizations and forces government to determine the sufficiency of the businesses' religion. Here, the TCRA's exemptions, "public accommodations that are principally used for religious purposes," and places "solely used for religious purposes," creates an untenable distinction between religious organizations. While the statute fails to define what is a place that is solely used for religious purposes or a place of public accommodation that is principally used for religious purposes the exemptions work under the notion that one loses their Free Exercise rights when the government decides that the business does not fall into one of the two exemptions. Additionally, the exemption which excuses places of "public accommodations that are principally

used for religious purposes," forces the government to inquire, using whatever metric they so choose, when a business is used principally for religious purposes. In other words, in order to prove whether or not a business is used *principally for religious purposes*, the Court would be cast in the role of arbiter as to whether the business is sufficiently religious. Since the TCRA does not allow a business's Free Exercise rights to exist beyond these two exemptions and allows the government to inquire into whether a business is adequately used for religious purposes, the TCRA is not neutral and is subject to strict scrutiny.

C. The TCRA Is Also Subject To Strict Scrutiny Because It Implicates Hybrid Rights.

The TCRA is also subject to strict scrutiny because it involves "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as [F]reedom of [S]peech[.]" *Smith,* 494 U.S. at 881. Even if a law is found to be generally applicable and neutral, a claim involving "hybrid rights" is subject to strict scrutiny. *Id.* at 881-882.

This Court has consistently invalidated laws that infringe on multiple constitutional protections. For example, in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 626-28 (1943), the Board of Education adopted a resolution which ordered that the salute to the nation's flag be required by all students and teachers as a part of a regular public school program. The resolution punished anyone who failed to conform with expulsion from the institution until compliance was met. *Id.* at 629. Appellees, Jehovah's Witnesses, refused to salute in conformance with the resolutions because it went against their religious beliefs and practices. *Id.* at 629-30. Subsequently, the appellees sought injunctive relief stating that the resolution was an unconstitutional denial of their right to freely exercise their religion and infringed on their freedom of speech. *Id.* at 630. The Court noted that while "censorship or suppression of expression of

opinion is tolerated by our Constitution only when the expression…present[s] danger….It would seem that involuntary affirmation could be commanded only on even more immediate grounds than silence." *Barnette*, 319 U.S. at 633. The Court held that the First Amendment was designed to avoid such compulsion and that "no official…can prescribe what shall be orthodox in politics, nationalism, [or] religion….If there are any circumstances which permit an exemption, they do not now occur to us." *Id.* at 641, 642. In the instant case, the TCRA similarly infringes on Myra's rights, Freedom of Exercise and Freedom of Speech, by forcing it to provide services which go against its religious beliefs. The TCRA, in practice, forces Myra's to utter, through its services, an approval of same-sex marriages which violates their sincerely held religious beliefs. Since Myra's has demonstrated that their Free Exercise and Free Speech rights to refrain from providing a service have been violated, Myra's hybrid rights claim merits strict scrutiny.

D. The TCRA Places A Substantial Burden On Myra's And Cannot Survive Strict Scrutiny.

1. The TCRA places a substantial burden on Myra's Free Exercise rights

The TCRA places a substantial burden on Myra's ability to freely exercise its religion because it requires Myra's to engage in conduct that seriously violates its religious beliefs. In *Burwell v. Hobby Lobby Stores, Inc.*, 1134 S.Ct. 2751, 2768 (2014), this Court held that a law requiring a business to provide health insurance coverage for abortion-inducing drugs placed a substantial burden on business whose religion conflicted with providing such coverage. In that case, the plaintiffs had a sincere religious belief that life started at conception; the Court found that by mandating that the company provide this type of coverage, the plaintiffs would be forced to engage in conduct that seriously violated their religious beliefs. *Id.* at 2275. Additionally, the Court noted that failure to comply with this law would bring about severe economic consequences that

could amount to $475 million worth in taxes. *Id.* at 2275-76. The Court held that forcing the plaintiffs to choose between seriously violating their religious beliefs and paying a significant fine constituted a substantial burden. *Id.; see also Trinity Lutheran Church of Colombia, Inc., v. Comer*, 137 S.Ct. 2012, 2024 (2017) (stating that a condition which imposes a penalty on the free exercise of religion must be subjected to the most rigorous scrutiny).

In the instant case, the TCRA forces Myra's to make a similar decision. Myra's has been an outwardly expressing Christian bakery for over twenty-seven years, and through the business' history has never made a cake for couples whose marriage goes against the teachings of Jesus Christ, the Bible, and all things Christian. (R. at 3). If Myra's does not yield to the TCRA's mandate to provide such a service, it would force the bakery to choose between violating its sincerely held religious beliefs and the loss of one's livelihood. Since the TCRA places Myra in an impermissible bind, the burden is substantial.

2. The TCRA Cannot Withstand Strict Scrutiny

Since the TCRA is not neutral or generally applicable, and places a substantial burden on Myra's, the statute must satisfy strict scrutiny. In order for a law to be upheld under strict scrutiny, the law must: (1) "advance interest of the highest order" and (2) be "narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546. Strict Scrutiny is the most demanding test known to constitutional law. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Without a compelling reason, a law cannot provide exemptions for some religious businesses and deny the same to another party who is similarly situated. *Lukumi*, 508 U.S. at 537. "Only the gravest abuses, endangering paramount interest, give occasion for permissible limitation [.]" *Sherbert*, 374 U.S. at 406.

This Court has held that a law fails strict scrutiny when the law is underinclusive in various aspects. For example, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), a religious sect brought a suit in order to preliminarily enjoin the government from enforcing a law which banned the sect's use of a hallucinogen in its religious ceremonies. The state argued that the hallucinogen was exceptionally dangerous and that it had a compelling governmental interest in protecting the health and safety of its citizens. *Id.* at 426, 432. The Court found that there was already an exception for religious use for Native American churches, and that it is difficult to see how other religious groups could be precluded from having a similar exemption. *Id.* at 433.; *See also Lukumi*, 508 U.S. at 547 ("It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest "of the highest order"… when it leaves appreciable damage to that supposedly vital interest unprohibited'"). In the instant case, the TCRA is underinclusive to a substantial extent because it allows an exemption for some places of public accommodations but fails to do so for others which are similarly situated. (R. at 10–11). Like in *Gonzales*, the government already has an exemption for religious groups but is choosing not allow a business which is used for religious purposes to fit within that exception. *See Gonzales*, 546 U.S. at 433. The Record is silent as to how exempting Myra's would create a different harm than any other place of accommodation which is principally used for religious purposes. Moreover, the TCRA's failure to define the exemptions do not even give a business like Myra's the chance to conform to the statute and practice its religion in the public sphere. While the government may allege a compelling interest in preventing discrimination, the TCRA is not narrowly tailored because the law is underinclusive in that it allows an exemption for some religious businesses but fails to offer the same protection for other entities who are designed for religious purposes.

Because the TCRA is not neutral or generally applicable and substantially burdens Myra's Free Exercise Rights, this Court should reverse the lower court's decision.

CONCLUSION

For the forgoing reasons, the Petitioners, Mama Myra's Bakery, Inc., respectfully requests that this Court reverse the Tourovia Court of Appeals and grant the motion to set aside judgment.

Respectfully submitted

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By: /s/ Team No. 16

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