No. 18-321

IN THE

Supreme Court of the United States

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 RESPONDENTS

TEAM 17

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Tourovia was correct in finding Tourovia's Civil Rights Act § 22.5(b) does not implicate Petitioner's right to freedom of speech because it is not expressive speech?
2. Whether the Supreme Court of Tourovia properly found that Tourovia's Civil Rights Act § 22.5(b) is a neutral and generally applicable law that passes rational basis scrutiny, and thus does not violate Petitioner's right to the free exercise of religion?

STATEMENT OF THE CASE

In the summer of 2012, Hank and Cody Barber decided, as committed couples do, that it was time to celebrate their love for each other by getting married. R. 2. Unfortunately, the laws of Tourovia at the time did not allow same-sex marriages, and Hank and Cody were required to go out of state to be legally married. *Id.* Because of this, many of their friends and family missed out on the joyful occasion, and so the Barbers decided to have a party celebrating their marriage at a local catering hall in Tourovia. *Id.*

For this event, the newlyweds approached the Petitioner's bakery to order a custom wedding cake with a figure of the couple holding hands on the top tier. *Id.* The bakery, which has made wedding cakes for opposite-sex couples in the past, refused the Barbers' request, claiming that the sale of this cake would violate their religious beliefs. *Id.* The Petitioner's refusal to provide them with a basic service left the Barbers understandably upset, and they left the bakery. *Id.*

The Barbers then filed charges against the Petitioner under Tourovia's Civil Rights Act ("TCRA") § 22.5(b), which prohibits discrimination on the basis of sexual-orientation in places of public accommodation. The relevant part of the statute states:

> It is unlawful and an act of discrimination for any person or persons, directly or indirectly, to refuse, withhold, or deny an individual or group of individuals, the full and equal enjoyment of the goods, services,

> privileges, facilities, advantages, or accommodations of any place of public accommodation because of their sexual orientation.

Id. at 3.

The statute goes on to define sexual orientation as "an individual's orientation toward hetero, homo, or bi sexuality, or transgender status, or another individual's perception thereof." This category of individuals is commonly referred to as the lesbian, gay, bisexual and transgender ("LGBT") community. *Id.*

The statue also defined public accommodation as "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale/retail sales to the public." *Id.* Petitioner's bakery, which opens its doors to all members of the public, qualifies as a place of public accommodation. *Id.*

SUMMARY OF THE ARGUMENT

The Petitioner has appealed the Supreme Court of Tourovia's decision to uphold the Tourovia Civil Rights Act § 22.5(b), claiming that it violates both the Free Speech and Free Exercise Clauses of the First Amendment.

The Act does not infringe upon Petitioner's right to freedom of speech because the conduct in question here is not speech. Though Petitioner claims the act of baking a cake is necessarily expressive, there is no "inherent message" being delivered by the commercial transaction. The Petitioner is a bakery. Baking cakes is their job, not a message of support for a cause.

However, even if the Court finds that this is speech, the Act should be upheld because its purpose is to regulate commercial conduct. The effect it may have on expressive speech is only incidental to that purpose, making the Act subject to intermediate scrutiny under the *O'Brien* test. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The Act easily meets intermediate scrutiny, which balances a legitimate, important governmental interest against the incidental restriction on free speech. Tourovia's interest in eliminating discrimination against its citizens is not only important, it is compelling. Allowing this incidental restriction to create an exception would defeat the entire, compelling purpose. Thus, the Act not only meets intermediate scrutiny, it also satisfies the heightened standard of strict scrutiny.

As Petitioner was not precluded from speaking or prosecuted for something it said, it relies on the compelled speech doctrine in its freedom of speech claim. However, an action is not compelled speech when no reasonable person would

interpret it as Petitioner's speech, or that person would understand such speech was in compliance with the law. In the context of a commercial transaction, no reasonable person would believe that a bakery was conveying its own personal message in a cake for which it was paid.

In Petitioner's claim under the Free Exercise Clause, it must first establish that the Act is not neutral or generally applicable. However, the Act does not in either text or context address a specific religious practice, and there is no evidence of a hidden agenda to use anti-discrimination as a pretext to outlaw religious practices. The Act operates exactly as it was intended to: it outlaws discrimination against LGBT citizens in secular public accommodations. Even if the law is neither neutral or generally applicable, the State's purpose in eradicating such discrimination is so compelling that it meets the burden of strict scrutiny.

The Supreme Court of Tourovia did not err in finding that TCRA § 22.5(b) violates no provisions of the U.S. Constitution. Anti-discrimination laws neither compel speech nor unfairly burden a religious practice, and ought to be upheld to protect states' compelling interest in eradicating unequal treatment for their citizens.

ARGUMENT

I. DISCRIMINATION ON THE BASIS OF SAME-SEX MARRIAGE IS BY DEFINITION DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION.

The discrimination that occurred when the Barbers were refused service by the Petitioner was based solely on the couple's sexual orientation as defined in the Act. In this instance, denying service to the Barbers because of their conduct - getting married - is indistinguishable from denying service to the Barbers because of their status as a homosexual couple. The Barbers were refused service solely because of their sexual orientation. Only same-sex couples engage in same-sex weddings. Discriminating against the latter inherently involves discriminating against the former.

This Court's precedent establishes that the distinction between discrimination based on a person's status – such as sexual orientation – and discrimination based on that person's conduct – such as a same-sex wedding or celebration – is so thin that it deserves no legal recognition. In *Christian Legal Society Chapter of University of California, Hastings College of Law v. Martinez,* the Court refused to recognize this distinction between status and conduct when the school's Christian Legal Society chapter argued that its exclusion of homosexual individuals was not based on the sexual identity of those individuals but rather on the combination of the "conduct and the belief that the conduct is not wrong." 561 U.S. 661, 689 (2010). Seven years earlier, the Court held that "When homosexual conduct is made criminal by the law of the state, that declaration in and of itself is

an invitation to subject homosexual persons to discrimination." *Lawrence v. Texas*, 539 U.S. 558, 575 (2003). And most recently in *Obergefell v. Hodges*, the Court eviscerated this distinction when it held that laws burdening the conduct of same-sex individuals, such as those denying them the benefits of marriage available to heterosexual couples, were tantamount to burdening homosexual individuals on the basis of their sexual orientation, as they are barred from exercising a fundamental right. 135 S. Ct. 2584, 2589-90 (2015).

This Court's jurisprudence has, in the last generation, consistently erased any distinction between an individual's status and conduct. One cannot discriminate based on same-sex marriage without discriminating based on the sexual orientation of the individuals who were wed. Here, the Petitioner discriminated against the Barbers because of their sexual orientation. This Court's precedent demands no other conclusion.

II. PETITIONER'S FREEDOM OF SPEECH IS NOT VIOLATED BECAUSE ITS CONDUCT DOES NOT QUALIFY AS SPEECH, AND THE ACT DOES NOT COMPEL SPEECH AND SATISFIES THE *O'BRIEN* SCRUTINY TEST.

A. First Amendment protections do not apply to the sale of a wedding cake because there is no inherent message in a commercial transaction.

The Petitioner's conduct in refusing to serve a same-sex couple does not qualify as protected speech under the First Amendment. The burden to prove that its conduct qualifies as speech falls squarely on the Petitioner. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 292 n.5. (1984). For the First Amendment to apply to conduct, that conduct needs to consist of enough elements to qualify as

speech. *Spence v. Washington*, 418 U.S. 409 (1974). Beyond that, the conduct also needs to be inherently expressive, in that the conduct itself conveys a message. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. ("FAIR")*, 547 U.S. 66 (2006).

To plead that conduct is protected under the First Amendment, the burden to prove that the conduct is expressive falls on the Petitioner. The Petitioner is required to advance that there is a plausible contention that its conduct is expressive. *Clark,* 468 U.S. at 292 n.5. To meet this burden, the Petitioner needs to show that its conduct is intended to and, in the context in which it takes place, will express a message. *Id.*

For conduct to qualify as speech, it needs to be "sufficiently imbued with elements of communication." *Spence*, 418 U.S. at 409. Relevant elements include whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Id.* at 410-11.

However, not all conduct that intends to express an idea qualifies as speech. Instead, First Amendment protection applies only to conduct that is inherently expressive, in that the expressive aspect of the action comes from the conduct itself and not any accompanying speech. *FAIR*, 547 U.S. at 66. Using an item that is deeply symbolic in nature to convey a political message, such as attaching a peace symbol to a flag, would be an example of inherently expressive conduct that is protected under the First Amendment.

In this case, the conduct in question is the sale of baked goods, specifically a wedding cake. The Petitioner argues that a wedding cake expresses celebratory messages about marriages, and to sell a wedding cake to a same-sex couple would be viewed as an endorsement of their union. Going back to the factors outlined above, the first issue we need to look at is whether a wedding cake expresses an intent to convey a particularized message. *Spence*, 418 U.S. at 409. The Petitioner's message is not one that articulates the intent of the maker of the cake, but that of the person who ordered it. No reasonable person, looking at a cake, would assume that a cake or any message on it is a manifestation of the Petitioner's beliefs because it took place as part of a commercial interaction.

However, even if this Court finds that the cake expressed the intent of the bakery, it cannot find that the likelihood is great that the message would be understood by those who view it. *Id.* This could be because, first, it is rare for wedding cakes to contain any identification marks on them that would lead someone to know the identity of the bakery. Second, the sale of this cake is not an independent demonstration by the bakery, and it is not something that the bakery is doing in a particularized setting that might imbue its actions with a specific meaning. Instead, the bakery is selling this cake in the course of a regularly conducted business activity. The chances are remote that a reasonable person who views the sale of this cake would see it as anything more than a bakery carrying out its primary function, making baked goods for special occasions. The Petitioner's bakery is known for selling wedding cakes, and the sale of this cake is not a

deviation from its standard practice, and thus, falls squarely within the parameters of its typical business activity. Therefore, this Court cannot find that there is any likelihood that those viewing the cake would see it as an endorsement of same-sex marriages.

Furthermore, the Petitioner cannot meet the burden of showing even a plausible contention that its conduct is expressive. At its face, any form of selling is not a political statement, but rather is a mode of commercial conduct. Nothing inherent to baking and selling of cakes suggests that the conduct endorses a particular social or political view. The Petitioner's conduct here took place in a commercial context, and a regular sale in a commercial context cannot be viewed as expressing a particular message.

Finally, to set a low standard as to what qualifies as expressive conduct, especially in the context of commercial behavior, will set a dangerous precedent that gives license to other businesses to freely discriminate in the provision of services. Many products could be deemed expressive, and to deem that all of these products express a message that is reflective of their sellers' beliefs will be detrimental to commerce and civil rights as it would allow businesses to pick and choose whom they serve based on any protected characteristics. This court has had a long tradition of preserving free commerce and protecting individuals from being discriminated against in the course of regular commerce. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 259 (1964) (a public accommodations law outlawing discrimination on the basis of race was a valid use of Congressional power under

the Commerce Clause). To rule that the Petitioner's bakery can choose not to serve an entire class of people would overturn decades of precedent that have protected the rights of people to solicit businesses wherever they choose. Therefore, this Court, in keeping with its tradition and looking to the future, should affirm the Supreme Court of Tourovia's decision.

B. Even if the sale of a wedding cake is deemed expressive speech, the Act primarily regulates non-expressive conduct, making any effect on speech purely incidental.

Even if cakes are deemed expressive conduct, the Act in issue here is one that regulates commercial conduct, and for that reason is consistent with the First Amendment. The Act's purpose is to prevent discrimination in a broad commercial context, and no business is entitled to special treatment in the application of a law that applies to all commercial activity.

Courts have held repeatedly that the First Amendment does not render businesses immune from laws and acts that regulate commerce. *Associated Press v. United States*, 326 U.S. 1, 20 (1945). Furthermore, simply because the Act affects conduct that can be construed as speech does not make it illegal. *FAIR*, 547 U.S. at 62. For the Act to be illegal, it needs to target protected speech rather than just incidentally affect it, which is not as broad a category as the Petitioner argues. *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 121 (2011).

An act would be unconstitutional under the First Amendment if it directly restricted the specific content of speech. For instance, if the Act mandated that only pink or blue cakes be sold for baby showers, and thus put forth an agenda that can

be associated with such conduct, then that Act would violate the First Amendment for forcing people to express a message in a very particularized way. However, the TCRA, like the Sherman Act in *Citizen Publishing Company v. United States*, does not regulate the actual substantial service that the business provides, but rather the manner in which it provides the service. 394 U.S. 131, 139 (1969). All the TCRA does is implement a blanket restraint on places of public accommodation, which encompass a broad category of businesses and other services providers, from discriminating against the LGBT community.

This rule directly applies to TCRA § 22.5(b), which is designed to prevent discrimination from all businesses regardless of the nature of goods or services they provide. It does not regulate speech, in that it does not tell the Petitioner what to say, but rather regulates conduct, by requiring that the Petitioner equally serve all customers. Just because the Petitioner agrees to sell all other baked goods to the Barbers does not mean that the Petitioner is not acting in a discriminatory manner by refusing to sell them a wedding cake. By denying the Barbers a service that the Petitioner would provide an opposite-sex couple, it is acting in a manner that is discriminatory.

Furthermore, the Act is neither content- nor viewpoint-based. It prevents discrimination regardless of the expressive conduct, nature, or intent of the commercial entity open to the public. The law requires no place of public accommodation to sell goods expressing particular messages nor prohibits places of public accommodation from selling goods expressing particular messages. Even if it

is established that the Act imposes restrictions on expressive aspects of conduct, this Court has previously found that a strong governmental interest can justify incidental limitations on First Amendment freedoms. *O'Brien*, 391 U.S. at 377. In this case, because the purpose of the Act is not to limit free speech but to prevent discrimination, any limitation on First Amendment freedoms is purely incidental. Because the impact on speech is only incidental, the form of scrutiny that should apply to the TCRA is intermediate scrutiny as outlined by *O'Brien*.

C. The Act satisfies the *O'Brien* scrutiny test, as well as strict scrutiny, as it furthers a compelling governmental interest.

Tourovia's Civil Rights Act regulating places of public accommodation, the primary goal of which is to prevent discrimination, has, at most, only an incidental impact on speech. Because the purpose of the law is not related to regulating or suppressing speech, the test for scrutiny set by *O'Brien* is the appropriate standard by which to judge the public accommodations law. 391 U.S. at 377.

O'Brien sets out a four-part test for First Amendment scrutiny. It asks if the law or regulation:

> is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id.

TCRA § 22.5(b) satisfies each prong of this test.

Tourovia's public accommodations law is "within the constitutional power of the Government" because this Court has recognized that states may prohibit private commercial businesses that are open to the public from using customers' identities as a basis for refusing to sell goods or provide services. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (upholding a Minnesota law prohibiting discrimination in places of public accommodation to protect the state's citizens "from a number of serious social and personal harms"); *O'Brien*, 391 U.S. at 377. The law "furthers an important or substantial governmental interest" as this Court has recognized that anti-discrimination statutes as applied to commercial businesses serve the goal of "eliminating discrimination and assuring its citizens equal access to publicly available goods and services," an objective that is not merely important or substantial, but a "compelling interest of the highest order." *Roberts*, 468 U.S. at 624; *O'Brien*, 391 U.S. at 377. No governmental interest can be more important, more substantial, or more compelling than protecting the equal access of all individuals to the public spheres that form the very foundations of our civil society. Pursuing the happiness that our founding document reminds us is our inalienable right can scarcely be contemplated otherwise. Equally apparent, however, is that no action, whether taken by the state or a private individual, can be more invidious, more demeaning, and more detracting to our founding principles than turning away someone merely for who they are and whom they choose to love.

Section 22.5(b) satisfies the third prong of the *O'Brien* test because the Court has recognized in *Roberts* that the goal of public accommodations laws –

"eliminating discrimination and assuring its citizens equal access to publicly available goods and services" – is "unrelated to the suppression of expression." *Roberts*, 468 U.S. at 624; *O'Brien*, 391 U.S. at 377. Finally, the law is "no greater than essential to the furtherance of" this critical governmental interest because it does no more than require commercial entities and places of public accommodation to treat LGBT individuals the same as they would treat any other individual. *O'Brien*, 391 U.S. at 377. Permitting the Petitioner to refuse service to individuals on the basis of their sexual orientation would do far more than simply make § 22.5(b) less effective; it would undermine the entire purpose of the law and subject these individuals to discriminatory treatment. Therefore, the law passes the *O'Brien* scrutiny test.

While the *O'Brien* test for scrutiny is the appropriate standard by which to determine the constitutionality of Tourovia's Civil Rights Act, the Petitioner may argue that it should be subject to strict scrutiny. For reasons expounded above, strict scrutiny is the wrong test to apply in these circumstances. Nevertheless, should the Court apply strict scrutiny to the Act, it must still be upheld because preventing discriminatory sales based on customers' sexual identity is a "compelling" governmental interest. Because strict scrutiny imposes a higher standard than the *O'Brien* intermediate test, meeting the former necessarily entails exceeding the latter.

D. The compelled speech doctrine has no bearing on this case because the Act only requires places of public accommodation to serve customers equally and does not compel speech.

Tourovia's Civil Rights Act regulates places of public accommodation, which has been applied in this instance merely to prevent a business from discriminating against customers on the basis of their sexual orientation and to require a business to treat all its customers equally. Because Petitioner is neither forced to express any particular message favored by the government or another group nor to provide a platform for the expression of a message to which it objects, the compelled speech doctrine has no bearing on this case. Applying it in this instance requires a severe misconstruction of the purpose and meaning of the doctrine and would effectively grant the Court's imprimatur to attempts by commercial businesses and places of public accommodation to refuse to serve or sell to customers solely because of protected characteristics such as sexual orientation.

This Court has recognized two instances in which the government's attempts to regulate the speech of private individuals or entities implicate the compelled speech doctrine: when the government forces an individual or entity to speak a particular ideological or factual message; or when the government forces a private forum or outlet, such as a news medium, to serve as a platform for a particular speaker. *FAIR*, 547 U.S. at 63 (2006); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). Both of these situations violate the compelled speech doctrine, but neither are factually analogous to the case at bar.

In *Barnette*, school children in the state of West Virginia were forced to recite the pledge of allegiance in public schools. 319 U.S. at 626. Refusals to do so were deemed acts of insubordination punishable by expulsion and the possibility of prosecution against the child and his parents or guardians. *Id.* at 629. The Court refused to enforce this requirement, finding that the government cannot compel individuals to speak an ideological message approved by the government. *Id.* at 642. *See also Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (the Court found that a New Hampshire statute requiring residents to display the state motto, "Live Free or Die," on vehicle license plates was unconstitutional and a violation of the First Amendment, as the state could not compel individuals to express a favored ideological message by displaying it on private property).

In *Tornillo*, Florida's "right of reply" statute required newspapers to provide political candidates an opportunity and space to reply to editorials that attacked the candidate's personal character or record. 418 U.S. at 241. The Court found this law unconstitutional and a violation of the First Amendment as the government cannot force private entities that are not open to public participation to provide a platform for a particular speaker's message. *Id.* at 258.

The TCRA, which regulates places of public accommodation, does not fall under the compelled speech doctrine because it does not force places of public accommodation to speak a government-favored message or provide a forum for a particular speaker to express a message that it finds objectionable. Unlike in *Barnette* where individuals were required by law to express message specifically

selected by the state, the Petitioner is not required by TRCA § 22.5(b) to speak, advance, or promote any message designed, preferred, or advocated by the government. 319 U.S. at 626. And unlike in *Tornillo*, where newspapers were forced to provide space for individuals to express messages with which the newspaper disagreed, TRCA § 22.5(b) does not require the Petitioner or any other individual or entity to provide a platform for others to express ideas with which it disagrees or that it finds objectionable. 418 U.S. at 241. To construe these and similar cases otherwise would allow businesses that serve and sell to the public to use the compelled speech doctrine as a sword to justify denying service to protected classes of citizens.

According to the Court's decision in *FAIR*, the key determination for the compelled speech doctrine is whether the regulation in question interferes with the individual's or entity's desired message and whether the public at large would view the individual's or entity's actions as an endorsement of a particular message. 547 U.S. at 64-65. *See also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Pac. Gas and Elec. Co. v. Pub. Utils. Comm'n of California*, 475 U.S. 1, 16-18 (1986). The TCRA in no way directs or forces the Petitioner or any other place of public accommodation to say anything at all, nor does it require places of public accommodation to alter the content of its speech. The bakery owner, as well as his staff and family members, remains free to express his views on marriage equality to the public and can also "disassociate himself" from his customers and their views on this or any other subject. *FAIR*, 547 U.S. at 65. And because the Petitioner offers its

goods and services to the public at large, it is unlikely that the public will view the sale of a wedding cake to a customer as an endorsement or celebration of that customer's wedding or views. In fact, the public is unlikely to view the sale of a wedding cake to a customer as an expression of anything because the products are made available to anyone who is willing to purchase them. The way that the customer uses the product sold by the place of public accommodation bears no reflection on the place of public accommodation itself. Furthermore, the Petitioner remains free to post signs and tell customers and the public at large that it does not endorse the activities of the customers to whom it sells its goods.

TCRA § 22.5(b) does not compel the Petitioner to express ideas it finds objectionable, provide platforms for third-parties to express ideas it finds objectionable, or alter the content of its speech. And, because it remains free to express its own messages and disassociate from customers who express objectionable messages, no reasonable person would find the Petitioner's sale of goods to same-sex couples to be anything other than mere compliance with the law, rather than a reflection of its own beliefs. The public accommodations law only requires that places of public accommodation treat patrons equally and not discriminate on the basis of protected characteristics like sexual orientation.

III. PETITIONER'S FREE EXERCISE OF RELIGION IS NOT VIOLATED BECAUSE THE ACT OUTLAWS ALL DISCRIMINATORY CONDUCT IN SECULAR PLACES OF PUBLIC ACCOMMODATION, WHICH IS A COMPELLING GOVERNMENTAL INTEREST.

The Petitioner raises a second count, that the Act violates Petitioners' freedom of religion under the First Amendment. This court ought to affirm the Supreme Court of Tourovia in denying this claim, as the Act is neutral, generally applicable, and rationally related to the legitimate government interest of protecting its citizens from discrimination. And, even if this Court finds that the law is not neutral and generally applicable, it does meet the strict scrutiny standard required for laws that may interfere with a religious practice, as the government's interest in ensuring citizens' full equality is compelling, and the law was narrowly tailored to achieve such a purpose. *Employment Div., Dep't of Human Res. of Oregon v. Smith,* 494 U.S. 872, 878 (1990).

A. <u>The purpose of the Act is to protect citizens from discrimination, not to outlaw a religious practice, so strict scrutiny does not apply.</u>

TCRA § 22.5(b) only needs to be rationally related to a legitimate government purpose because it protects LGBT persons from all forms of discrimination, not just religiously motivated discrimination. As long as the law in question is neutral and generally applicable in its text, purpose, and operation, rational scrutiny will apply rather than strict scrutiny. *Id.* at 878.

1. The text of the statute never mentions religion or a religious practice by name, only a protection for a specific group of people, thus it is facially neutral.

The text of the law never mentions religion or any religious practice. TCRA § 22.5(b). A law is facially neutral if its text has a discernable secular meaning. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 533 (1993). The law neither refers nor even alludes to a specific religious practice. TCRA § 22.5(b). Sexual orientation has no particular religious meaning or connection and is thoroughly defined in the statute in secular terms. R. 3. Thus, the fact that the law is about sexual orientation does not make it about any religious practice.

2. The purpose of the Act endorses no animus towards any religion or religious practice.

Merely being facially neutral is not enough for a law to be neutral and generally applicable. *Id.* at 534. It must also be neutral in purpose and practice. *Id.* The legislature's unambiguous purpose in passing § 22.5(b) is clear from the text: the protection of the gay, lesbian, bisexual, and transgender citizens of Tourovia from discrimination in public accommodations. R. 3. Tourovia showed its dedication to being a state that does not relegate its LGBT citizens to second-class status. Such a dedication endorses no animus towards any religion – there is no requirement a person be anti-religion to be anti-discrimination. As of May 2017, a majority of Christians in the U.S. were in favor of same-sex marriage. Justin McCarthy, *U.S. Support for Gay Marriage Edges to New High*, GALLUP (May 15, 2017). And while there is a correlation between the extent of a person's religious practice and their opposition to same-sex marriage, over half of those who opposed same-sex marriage

in 2012 did not explicitly base their animus in religion. Frank Newport, *Religion Big Factor for Americans Against Same-Sex Marriage,* GALLUP (December 5, 2012); Frank Newport, *Religion, Race and Same-Sex Marriage,* GALLUP (May 1, 2015). No religion, or even religion as a category, has a monopoly on discriminating against LGBT persons.

The State's interest in banning discrimination was also not a pretext for banning a religious practice. The majority of states have public accommodations anti-discrimination laws and have since the 1960s – this is not an unusual type of law. *Heart of Atlanta*, 379 U.S. at 259. In *Lukumi*, the Court found that the law was not neutral even though it outlawed secular conduct alongside religious conduct, because the thinly-veiled purpose of that law was to outlaw practices of the Church of Lukumi. 508 U.S. at 542. However, the Church of Lukumi introduced affirmative evidence, including a previous resolution disapproving of "certain religions" and tapes of city council meetings where councilmembers showed "significant hostility" towards the religion, to show the law was a pretext. *Id*. at 533-35, 540-42. The Petitioner has no such evidence of any hidden anti-Christian agenda in this case.

3. The law does not operate against religions in general or a single religion, nor does it stop people from practicing their faith in their personal or religious lives.

The law also does not operate to exclude the practices or beliefs of a particular religious group. The operation of a law can be used as evidence of its neutrality. *Id*. at 535. While § 22.5(b) may, at times, conflict with a person's

personal religious beliefs, the intent of the law and the effect of the law are the same: the equal protection of LGBT citizens. R. 3. It is a civil right, and it is part of a Civil Rights Act. TCRA § 22.5(b). The ordinance in *Lukumi* prohibited all animal sacrifices, not merely ones that violated health and safety, so it exceeded its alleged purpose. *Id.* at 535-37. Here, the parameters of the Act were specifically public accommodations. Such parameters are targeted narrowly at the purpose to be achieved – equality in public life for all citizens.

Additionally, the majority of religious practices related to LGBT people are not infringed upon by this law, so the protection of such persons from all manner of discrimination does not, in practice, exclusively or wholly ban a religious practice. The TCRA exempts places "principally used for religious purposes" from § 22.5(b). R. 10. Churches, mosques, and synagogues remain free to turn away LGBT wedding ceremonies. Pastors who preach against homosexuality remain free to not perform wedding ceremonies between people of the same sex. People who disapprove of marriages between people of the same sex remain free to not attend or send gifts. All remain free to practice their beliefs in their personal lives and their religious lives. But when a business opens itself up to the public as a secular business, such as the Petitioner's bakery, it must be subject to the laws of public accommodations of the state. *Heart of Atlanta*, 379 U.S. at 259. If the Petitioner does not feel it can follow the law, it is free to shutter the bakery instead.

But there is also a logical inconsistency in Petitioner's claim. Petitioner's claim requires the Court accept that both (1) the Petitioner has a sincere religious

belief that same-sex marriage is wrong and (2) baking a wedding cake would make Petitioner complicit in the violation of that sincerely-held religious belief. *Burwell v. Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751, 2759, 2778 (2014).

The law may not be in the business of determining the sincerity or validity of a religious practice (*Smith*, 494 U.S. at 886-87), but eminent jurists have argued it should assess the logical relation of that practice or belief to the conduct from which the Petitioner wishes to be exempt. *Hobby Lobby*, 134 S. Ct. at 2798-99 (Ginsburg, R., dissenting); Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. Chi. L. Rev. 1897, 1913 (2015). This is particularly important where the effect of the requested exemption is not only the freedom to be left alone to practice a religious belief, but also a deprivation of others' rights. Sepinwall, *supra,* at 1925. Petitioners seek not only to avoid baking a cake, but also to preserve "a culture that is inhospitable to the practices and lifestyles that they deplore on religious or ideological grounds." *Id.* at 1926. The logic of Petitioner's belief in their complicity is starkly lacking. A bakery selling a wedding cake is a commercial transaction. Even crafting a custom cake, when the bakery is being adequately compensated for such a craft, is merely a commercial transaction. And importantly, that transaction in no way facilitated the Barbers' wedding. The couple was not looking for an officiant, merely a dessert to eat at their celebration. R. 2.

B. Because protecting minorities from discrimination is a compelling governmental interest, the Act passes strict scrutiny even though it need not.

In the case this Court finds the Act is not neutral and generally applicable, it will pass the then-required strict scrutiny test, and thus also meets the rational basis test that ought to apply. *Lukumi,* 508 U.S. at 546. Strict scrutiny requires that the law advance a compelling government interest, be narrowly tailored to such an interest, and be the most restrictive means possible to achieve that interest. *Id*.

Tourovia has a compelling interest in preventing the unequal treatment of its citizens, as this Court has found eradicating discrimination against a class of its citizens to be a compelling state interest. *Roberts*, 468 U.S. at 623. Recently, this Court recognized the right of same-sex couples to marry, to give those couples "equal dignity in the eyes of the law." *Obergefell,* 135 S. Ct. at 2608. While that was a huge step towards ending second-class status for LGBT citizens, the Court there recognized that LGBT citizens had long been subjected to discrimination on the basis of their sexual orientation. *Id.* at 2596-97. The TCRA sought to remove just one of those barriers, unequal treatment in public accommodations. R. 3.

This Court has at numerous times found that discrimination in public accommodations can cause incredible barriers and difficulties for those who endure discriminatory treatment. *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964); *Heart of Atlanta*, 379 U.S. at 257. This law, tailored as it is to only discrimination *because of* sexual orientation in public accommodations, is the least intrusive possible

means of giving LGBT people this limited amount of social equality. TCRA § 22.5(b). It does not seek to extend protections outside this sphere, into wholly religious activities, nonpublic activities, or people's personal thoughts and beliefs. It does not seek to regulate religious practices or thoughts, merely the actions of a proprietor of a public accommodation towards its customers.

As this law meets strict scrutiny, it also easily passes the rational scrutiny test, which merely requires a law be rationally related to a legitimate government interest. *Smith,* 494 U.S. at 879. The compelling interest at stake – protecting a historically-marginalized class of people from humiliating discrimination debilitating to the achievement of full equality – can only be accomplished by disallowing discrimination on the basis of sexual orientation in public accommodations.

CONCLUSION

For these foregoing reasons, the Court should affirm the Supreme Court of Tourovia's judgment and uphold Tourovia's right to protect its citizens from discrimination on the basis of sexual orientation in public accommodations.