No. 12-mk-112

In the Supreme Court of the United States

MAMA MYRA'S BAKERY

Petitioner,

v.

THE STATE OF TOUROVIA,
ON BEHALF OF HANK AND CODY BARBER

Respondent.

On Writ of Certiorari to the Supreme Court of the United States

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Whether Tourovia's Civil Rights Act § 22.5(b) violates Mama Myra's Bakery, Inc.'s First Amendment right to freedom of speech.

II. Whether Tourovia's Civil Rights Act § 22.5(b) violates Mama Myra's Bakery, Inc.'s First Amendment right to the free exercise of religion.

STATEMENT OF THE CASE

Mama Myra's Bakery Inc. (hereinafter "Mama Myra's"), a small bakery that is fully owned and operated by a devout Christian family, has been a local landmark in Suffolk County, Tourovia for decades. During this time, Mama Myra's has played a meaningful role in the cardinal moments of Tourovians' lives by baking expressive, specially-designed cakes for these occasions. The Mama Myra's family steadfastly believes in the teachings of Jesus Christ, the Bible, and all things Christian. (J.A. at 3). Each family member has committed his or her entire being to Jesus Christ and God. Following the Bible's teachings, the family disapproves of same-sex marriage and does not celebrate or recognize same-sex marriages. As a result, the bakery has never contracted with a same-sex couple to make a specially-designed wedding cake for a same-sex marriage celebration.

Hank and Cody Barber, a same-sex couple, asked Mama Myra's to create a specially-designed wedding cake for their wedding celebration in August 2012. The couple asked the bakery to sculpt a figure of the two men standing hand-in-hand to place on the top tier of the cake. The couple planned to serve the cake at a gathering to formally recognize their wedding. Mama Myra's explained that baking the cake and sculpting the figure would directly conflict with God's teachings—the ideals which are foundational to the Mama Myra's family. Instead of baking a custom-made cake, Mama Myra's offered to make and sell any other baked goods to the couple. In response to this proposal, the couple stormed out of the bakery.

A few weeks later, the couple filed charges and claimed that Mama Myra's had

violated the Tourovia Civil Rights Act § 22.5(b), which states the following:

> It is unlawful and an act of discrimination for any person or persons, directly or indirectly, to refuse, withhold, or deny an individual or group of individuals, the full and equal enjoyment of the goods, services, privileges, facilities, advantages, or accommodations of any place of public accommodation because of their sexual orientation.

The District Court of Tourovia found for the couple, and the Appellate Division for the Supreme Court of Tourovia affirmed the lower court's holding. The Supreme Court of Tourovia affirmed the decisions of both lower courts without an opinion. The Supreme Court of the United States granted certiorari on January 31, 2018.

SUMMARY OF THE ARGUMENT

Tourovia Civil Rights Act (TCRA) § 22.5(b) forces Mama Myra's to engage in speech diametrically opposed to the sincerely held religious beliefs of every Mama Myra's family member. This mandate—which promotes a message contrary to the speaker's opinion—is viewpoint discriminatory. Section 22.5(b) compels Mama Myra's to create a wedding cake in support of same sex-marriage but places no similar requirement on a bakery to create a wedding cake in opposition to same-sex marriage. Section 22.5(b) is content discriminatory because it prohibits places of public accommodation from denying services based on sexual orientation; yet, it allows places of public accommodation to deny services based on any number of other classifications such as religion, marital status, or gender identity. Compelling an individual to engage in speech contrary to his or her sincerely held religious beliefs is not a narrowly tailored means of promoting a government interest; thus, Section 22.5(b) fails strict scrutiny.

In enforcing Section 22.5(b), the State of Tourovia (hereinafter "the State") has forced Mama Myra's employees, who fervently adhere to "the teachings of Jesus Christ, the Bible, and all things Christian," to celebrate same-sex marriage—a practice deeply at odds with their sincerely held religious beliefs. This is an affront to the "full and equal rights of conscience" for which the Framers fought and is a Free Exercise Clause violation. *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 39 (1947). When applied to the present case, the well-worn test that the Court codified in *Employment Division Department of Human Resources of Orego v. Smith* affirms that this case involves a decisive violation of the First Amendment. 494 U.S. 872, 872 (1990). Section 22.5(b) is neither generally applicable nor justified by a compelling government interest that is narrowly tailored to advance a compelling interest. Furthermore, even if Section 22.5(b) were generally applicable, the Court would still find that it violates the Mama Myra's free exercise rights because it is not rationally related to a legitimate government interest. When a law like TCRA § 22.5(b) suppresses an individual's fundamental rights to freedom of speech and free exercise of religion without a compelling government interest, the Court must find that the law is unconstitutional.

ARGUMENT

I. COMPELLING MAMA MYRA'S BAKERY TO CREATE WEDDING CAKES FOR SAME-SEX WEDDINGS IS COMPELLED SPEECH, WHICH VIOLATES THE FIRST AMENDMENT.

Freedom of speech is a fundamental right guaranteed to every American citizen. *See* U.S. CONST. amend. I. This fundamental right applies to expressive conduct intended—and likely understood—to convey a particularized message. *Texas*

v. Johnson, 491 U.S. 397, 403-04 (1989). Government-compelled speech contrary to an individual's sincerely held religious beliefs violates the individual's constitutional right to speak or not speak. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). TCRA § 22.5(b) is subject to strict scrutiny because the statute's constraint on speech is both viewpoint and content discriminatory. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Under this strict scrutiny analysis, Section 22.5(b) is unconstitutional because it is not narrowly tailored to further a compelling government interest. *See, e.g.*, *Reed v. City of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Even under intermediate scrutiny, Section 22.5(b) is unconstitutional because the statute does not further a substantial government interest and is more restrictive than necessary to further any government interest. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968).

A. Creating a Wedding Cake Is Expressive Conduct Because the Cake Conveys a Particularized Message the Public Can Understand.

The Mama Myra's family engages in expressive conduct when it creates custom-made wedding cakes. The First Amendment affords protection to expressive conduct when there is: 1) an intent to convey a particularized message and 2) a great likelihood that the message would be understood by those viewing the message. *Texas v. Johnson*, 491 U.S. at 404. The First Amendment protects expressive conduct in many contexts. *See*, *e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 454 (2011) (ruling that a picket near a service member's funeral is protected speech because it addresses issues of public concern such as homosexuality and war); *Texas v. Johnson*, 491 U.S. at 404 (finding an American flag burning is protected speech when it conveys anti-

governmental messages); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969) (concluding that visible black armbands are protected speech when worn to protest American foreign policy).

The Appellate Division, which held that Mama Myra's does not engage in expressive conduct, erroneously relied on the Supreme Court's decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (*FAIR)*, 547 U.S. 47 (2006). (J.A. 9). In *FAIR*, the Supreme Court held that a federal law, which required law schools to provide military and nonmilitary recruiters equal access to its students in order to receive federal funding, did not regulate inherently expressive conduct. 547 U.S. at 66. Unlike Section 22.5(b), the law at issue in *FAIR* did not mandate that the law schools engage in any form of speech. Rather, the law simply requires that schools provide military recruiters access to students. In contrast, Section 22.5(b) as applied requires Mama Myra's to engage in speech that directly opposes its employees' sincerely held religious beliefs, *See infra ARG. § I(B),* distorting the family's overall message: it is a Christian bakery that believes "same-sex marriage violates the teachings of Jesus Christ, the Bible, and all things Christian." (J.A. 3). Similarly, each individual cake created by Mama Myra's contributes to the bakery's overall message. Compelling Mama Myra's to create a cake contrary to its beliefs would alter the bakery's purpose and overall message.

Assuming Mama Myra's creates a variety of cakes conveying different messages, the government cannot strip the bakery's constitutional protections because its work lacks an exact message. *See Hurley v. Irish-Am. Gay, Lesbian and*

Bisexual Grp. of Bos., 515 U.S. 557, 569-70 (1995) ("a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."). If a narrow, succinctly articulable message was a prerequisite for constitutional protection, such protections would not reach the "unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll." *Id.* at 569. Even if Mama Myra's creates cakes based on the design of others, its conduct is still be expressive. *See id.*; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that First Amendment protection applies to newspapers' opinion pages even when the newspaper is simply conveying the words of others).

The Tourovia Appellate Court also opined that a reasonable person would understand Mama Myra's actions as mere compliance with the law. (J.A. at 9). However, mere compliance with the law is *never* sufficient justification for altering expressive conduct. *See, e.g.*, *Hurley*, 515 U.S. at 557 (determining that parade organizers are not required to accommodate a group, which would alter the overall message of the parade, even if doing so would merely be complying with Massachusetts law); *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (concluding that New Hampshire cannot constitutionally require an individual to participate in the dissemination of an ideological message on his or her license plates, even though such

participation would comply with the law); *Tornillo*, 418 U.S. at 254 (holding that a "right of reply" statute, which requires a newspaper to print the candidate's reply if the newspaper addresses the candidate's character and fitness, is an infringement on First Amendment rights). In short, "mere compliance with the law" has never been a justification for a law forcing an individual to engage in speech he or she would not otherwise make. As with the laws in *Tornillo, Wooley,* and *Hurley*, Section 22.5(b) runs afoul to Mama Myra's constitutional right to dictate its own message and compels Mama Myra's to engage in expressive conduct contrary to its sincerely held religious beliefs. Because Mama Myra's engages in expressive conduct by creating custom-designed wedding cakes, its conduct is subject to First Amendment protections.

B. TCRA § 22.5(b) Compels Speech Because it Forces Mama Myra's to Engage in Speech The Bakery Would Not Otherwise Make.

Section 22.5(b), as applied, forces Mama Myra's to convey a message contrary to its sincerely held religious beliefs. The First Amendment uncontestably protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714; *See also Hurley*, 515 U.S. at 573 ("[o]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say"); *Pac. Gas & Elec. Co. v. Pub. Utilitis Comm'n of Cal.*, 475 U.S. 1, 16 (1986) ("[t]he choice to speak includes within it the choice of what not to say"); *Barnette*, 319 U.S. at 633-34 (holding that freedom of speech includes the right to not recite the Pledge of Allegiance in school).

In *Wooley*, a New Hampshire statute required that all noncommercial license plates included the State's motto "Live Free or Die." 430 U.S at 707. The respondents, who considered the State's motto repugnant to their moral, religious, as well as political beliefs, covered up the motto on their license plates even after receiving fines and jail time. *Id.* at 707-08. The Supreme Court held that the First Amendment protects the right of individuals to refuse to foster ideas they find morally objectionable. *Id.* at 716. Like the New Hampshire statute in *Wooley*, Section 22.5(b) compels Mama Myra's to engage in conduct contrary to their sincerely held religious beliefs. As Christians, the employees of Mama Myra's believe that same-sex marriage violates the teachings of "Jesus Christ, the Bible, and all things Christian." (J.A. 1-2). Compelling Mama Myra's to engage in expressive conduct contrary to its sincerely held religious beliefs violates the right to "refuse to foster an idea they find morally objectionable." *Wooley*, 430 U.S. at 716.

Mama Myra's right to refuse to create a custom-made wedding cake for same-sex couples is not diminished due to the recognition of same-sex marriage as a fundamental right in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The First Amendment's protection to speak or refrain from speaking applies as equally to unpopular ideas as it does to popular ones. *See, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000) ("The First Amendment protects expression, be it of the popular variety or not."); *Texas v. Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or

disagreeable."); *Wooley*, 430 U.S. at 715 ("The First Amendment protects the right of individuals to hold a point of view different from the majority . . .").

The First Amendment has protected forms of speech many would consider repugnant and reprehensible. *See*, *e.g.*, *Snyder*, 562 U.S. at 454 (protecting the Westboro Baptist Church's right to picket near a military service member's funeral with signs saying things like, "God Hates Fags," "Thank God for Dead Soldiers," and "Fag Troops"); *Texas v. Johnson*, 491 U.S. at 414 (validating the right of a demonstrator to burn the American flag as a sign of political protest); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (preserving the Ku Klux Klan's right to advocate unlawfulness as a means of political reform). It is a "principal function of free speech under our system of government . . . to invite dispute," and "it may . . . best serve its . . . purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Texas v. Johnson*, 491 U.S. at 408-09 (quoting *Terminiello v. Chicago*, 337 U.S. 1,4 (1949)).

An important manifestation of free speech is that one who chooses to speak may also decide what not to say. *Hurley*, 515 U.S. at 573 (citing *Pac. Gas*, 475 U.S. at 11). In *Hurley*, a privately-operated parade organizer (the Council) denied a group of openly gay, lesbian, and bisexual individuals of Irish heritage from marching in the annual St. Patrick's Day parade. *Id.* at 561. The Supreme Court held that the parade was a form of speech, and—by engaging in speech—the Council had the right "to exclude a message it did not like from the communication it chose to make . . . ." *Id.* at 570, 574. Similarly, Mama Myra's engages in communication when it creates

custom-made wedding cakes. Like the parade in *Hurley*, Mama Myra's message may be the combination of multifarious ideas customers express when the bakery makes custom-made wedding cakes. Also, like the parade in *Hurley*, Mama Myra's is entitled to refuse a custom-made wedding cake idea that opposes its religious beliefs and thus its overall message.

The right to refrain from speaking applies just as much to facts as it does to opinions. *See id.* at 573 ("this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid"). *See also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995) (determining that an individual may distribute campaign literature anonymously). Although creating a custom-made wedding cake may not affirmatively convey Mama Myra's support for same-sex marriage, compelling Mama Myra's to create a custom-made wedding cake for a same-sex couple forces the bakery to disseminate a fact contrary to its sincerely held religious beliefs.

Requiring Mama Myra's to engage in expressive conduct contrary to its views cannot be rectified with a displayed disclaimer expressing its views on same-sex marriage. The majority in *Wooley* rejected a similar argument. *See Wooley*, 430 U.S. at 722 (Rehnquist, C.J., dissenting) (arguing that the respondents could have placed a bumper sticker on their car saying they did not agree with the State's "Live Free or Die Hard" motto). As in *Wooley*, the appropriate remedy here is to not compel Mama

Myra's bakery to engage in expressive conduct against their sincerely held religious beliefs.

C. TCRA § 22.5(b) Fails Strict Scrutiny Because it is Viewpoint and Content Discriminatory.

Strict scrutiny applies if a regulation is *either* viewpoint or content discriminatory. *See Reed v. City of Gilbert*, 135 S. Ct. 2218, 2230 (2015) ("the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic") (quoting *Consol. Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980)). A regulation is viewpoint discriminatory when it favors one speaker over another. *E.g.*, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). A regulation is content discriminatory if it applies to particular speech because of the topic discussed or the message expressed. *E.g.*, *Reed*, 135 S. Ct. at 2227. A governmental regulation subject to strict scrutiny will not be upheld unless it is narrowly tailored to further a compelling state interest. *E.g.*, *Texas v. Johnson*, 491 U.S. at 398.

1. TCRA § 22.5(b) is Viewpoint Discriminatory Because it Compels Speech in Support of Same-Sex Marriage But Does Not Compel Speech in Opposition to Same-Sex Marriage.

Section 22.5(b) discriminates based on viewpoint because it compels those who oppose same-sex marriage to engage in expressive conduct contrary to their position while placing no restriction on those who support same-sex marriage. Section 22.5(b) forces Mama Myra's employees to violate their religious convictions and create a custom-made wedding cake in support of same-sex marriage. Conversely, if a couple

wanted to have "'Do not be deceived; neither fornicators, nor idolaters, nor sodomites will inherit the kingdom of God" *1 Cor.* 6:9-10,'" written on their wedding cake, another baker would be able to deny this request without offending Section 22.5(b) because the denial would not be based on the couple's sexual orientation.

A regulation may not discriminate based on viewpoint by favoring one speaker over another. *See*, *e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (finding viewpoint discrimination when regulation prohibited pharmacists from selling prescriber-identifying information (PII) for marketing purposes but not from selling PIIs for healthcare research and other educational purposes); *Rosenberger*, 515 U.S. at 828 (determining that a university refusing to extend funds to pay for printing and publication costs to a newspaper with a Christian editorial position is viewpoint discriminatory); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) (finding that a school engages in viewpoint discrimination when it permitts the property to be used for presenting all views on an issue except those dealing with the issue from a religious standpoint).

Under Section 22.5(b), a place of public accommodation must engage in expressive conduct in opposition to its beliefs if that conduct supports same-sex marriage. *See* TCRA § 22.5(b). But a person who supports same-sex marriage under Tourovia law is free to discriminate against persons who oppose same-sex marriage because supporters of same-sex marriage have no obligation to engage in conduct directly opposing their views. This is viewpoint discrimination.

2. TCRA § 22.5(b) is Content Discriminatory Because it Compels Mama Myra's to Engage in Speech.

TCRA § 22.5(b) discriminates based on content because it forces Mama Myra's to engage in expressive conduct it would not otherwise perform. Mandating speech that a speaker would not otherwise make is a content-based regulation on speech because it necessarily alters the speech's content. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). Here, Section 22.5(b) compels Mama Myra's to create a custom-made cake it would not otherwise bake; laws that target speech based on its communicative content are presumptively unconstitutional. *E.g.*, *Reed*, 135 S. Ct. at 2226; *R.A.V.*, 505 U.S. at 395; *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). While the law is free to promote all sorts of conduct to eradicate harmful behavior, the law is not free to promote an approved message and discourage a disfavored one. *Hurley*, 515 U.S. at 580.

A regulation is content discriminatory if it applies to particular speech because of the topic discussed or the message expressed. *E.g.*, *Reed*, 135 S. Ct. at 2224, 2227. (concluding that a town's ordinance, which placed different restrictions on the types of signs that could be displayed based on the sign's content, could not survive strict scrutiny). First, Section 22.5(b) is only implicated because Mama Myra's creates custom-made wedding cakes. As the owner indicated to the respondents, Mama Myra's would sell any other baked good to a same-sex couple. Thus, if Mama Myra's were solely in the business of creating cupcakes and cookies with no affiliation to weddings, there would be no Section 22.5(b) concerns.

Second, the record makes no reference to any other Tourovia provision prohibiting a place of public accommodation from discriminating on another basis—such as sex, religion, creed, or national origin. If no such prohibitions exist, Section 22.5(b) is content discriminatory: it prohibits places of public accommodation from denying service based on sexual orientation but allows places of public accommodation to discriminate for other reasons such as religion, marital status, or gender identity. *See R.A.V.*, 505 U.S. at 391 (finding unconstitutional a Minnesota regulation that prohibits displaying symbols or objects amounting to "fighting words" on the basis of race, color, creed, religion, or gender because the regulation does not likewise prohibit displaying objects on the basis of things like political affiliation or sexual identity).

3. TCRA § 22.5(b) is Not Narrowly Tailored to Further a Compelling State Interest Because There Are Less Burdensome Alternatives to Achieve the State's Interest.

TCRA § 22.5(b) is not narrowly tailored to further a compelling state interest. Assuming, *arguendo*, that preventing the discrimination of its citizens based on sexual orientation is a compelling government interest, the regulation is not narrowly tailored to furthering this interest. Less burdensome alternatives to achieving a state's purported interest indicate that the regulation imposed is too imprecise to withstand First Amendment scrutiny. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 529 (1996) (holding that the State of Rhode Island could accomplish its goal—keeping alcohol consumption low—through means other than a ban on advertising alcohol prices such as 1) establishing minimum prices or 2) increasing

sales taxes on alcoholic beverages); *Texas v. Johnson*, 491 U.S. at 402 (concluding that Texas' flag burning statute is not narrowly tailored because alternative means of addressing the legislature's concerns were not enacted).

TCRA § 22.5(b), like the Texas statute in *Texas v. Johnson* and the Rhode Island statute in *Liquormart*, is overbroad because it requires Mama Myra's to engage in expressive conduct directly opposed to its sincere beliefs. Whereas prohibiting Mama Myra's from refusing to sell baked goods to respondents based on their sexual orientation may be a narrowly tailored means of furthering a compelling state interest, forcing Mama Myra's to create something in opposition to its sincerely held religious beliefs goes too far because the statute would require the bakery to communicate a message it would never communicate without the regulation.

D. TCRA § 22.5(b) Is Overly Restrictive and Fails Intermediate Scrutiny.

TCRA § 22.5(b) would fail even if it were subject to intermediate scrutiny. Under the intermediate scrutiny standard, a regulation is unconstitutional if it does not further a substantial government interest or if it is more restrictive than necessary to further that interest. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968).

The Tourovia Appellate Court mentioned an exemption for religious institutions in Section 22.5(b) as evidence that the regulation is not more restrictive than necessary; however, the record is ambiguous about what organizations would qualify for this exemption. According to Judge McDermott, Section 22.5(b) has an exemption for places of public accommodation that are "principally," "solely," or

"primarily" used for religious purposes. (J.A. at 10-11). If a place of public accommodation must be used "solely" for religious purposes to be exempt from Section 22.5(b) scrutiny, any religious organization engaged in any non-religious activity would lose its exemption. If, for example, Catholic Charities provided legal services that were completely unrelated to religion, would it be exempt? If a church hosted an interview skills workshop, would it lose its exemption? Because this exemption is ill-defined, and because it has the potential to restrict nearly *every* religious organization, Section 22.5(b) is unnecessarily excessive.

II. TCRA § 22.5(b) OBSTRUCTS THE FREE EXERCISE OF A SINCERELY HELD RELIGIOUS BELIEF, A FIRST AMENDMENT RIGHT, ABSENT EITHER A COMPELLING OR A LEGITIMATE GOVERNMENT INTEREST.

If the Court required the Mama Myra's to make a specially-designed wedding cake for a same-sex couple, it would undermine its commitment in *Obergefell*. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) ("Those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."). The Court would also offend the right to free exercise of religion because TCRA § 22.5(b) is not generally applicable, justified by a legitimate or compelling interest, or narrowly tailored to advance a governmental interest. *Emp't Div. Dep't of Human Res. v. Smith,* 494 U.S. 872, 873 (1990) (finding a free exercise violation when a law is (1) not generally applicable and not justified by a compelling interest that is narrowly tailored or (2) generally applicable but not rationally related to a legitimate interest).

A. TCRA § 22.5(b) Is Not Generally Applicable Because It Unduly Burdens Christians—Those with a Profound Theological Conviction that Same-Sex Marriage Is Immoral and Should Not Be Celebrated.

The Court addressed a law like TCRA § 22.5(b) in *Wisconsin v. Yoder* when it noted that a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." 406 U.S. 205, 220 (1972).[1] Section 22.5(b) unduly burdens Christians' free exercise by requiring them to facilitate the celebration of same-sex marriage—a mandate the Court has recognized as conflicting with Christian beliefs.

The Court consistently acknowledges Christians' opposition to same-sex marriage. In *Obergefell*, the Court observed the unique tension between Christian beliefs and same-sex marriage, stating, "many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises." 135 S. Ct. at 2602. Justice Scalia argued in dissent that the opinions of "evangelical Christian[s] (one fourth of the United States' population)" are particularly important when assessing same-sex marriage laws. *Id.* at 2629 (Scalia, J., dissenting).

Prior to *Obergefell,* the Court asserted that "[c]ondemnation of those [homosexual] practices is firmly rooted in Judeao–Christian moral and ethical standards." *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (citing *Bowers v. Hardwick*,

[1] In *Wisconsin v. Yoder*, three Amish parents refused to send their children to school after eighth grade on religious grounds, which led to their prosecution under Wisconsin law. The parents argued that the law violated their free exercise rights. The Court found that the law would "gravely endanger if not destroy the free exercise of their religious beliefs" because it would require them to undermine the basic tenets of their religion. 406 U.S. 205, 205 (1972).

478 U.S. 186, 196 (1986)) (internal quotation marks omitted). The Court also referenced a Christian group's "belief that sexual activity should not occur outside of marriage between a man and a woman" and noted the group's adherence to "God's design for marriage between one man and one woman." *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 672 (2010). Additionally, the Court acknowledged "a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality" when assessing Congress' intent in passing the Defense Against Marriage Act, which defined marriage as a union between a man and a woman. *United States v. Windsor*, 570 U.S. 744, 771 (2013) (internal quotation marks omitted).

Other courts have recognized the incompatibility of Christian belief and same-sex marriage since the early years of the nation. In 1897, the Supreme Court of Illinois referred homosexual intercourse as "the abominable crime not fit to be named among Christians." *Honselman v. People*, 168 Ill. 172, 174–75 (1897), *referenced in Bowers v. Hardwick*, 478 U.S. at 197 (Burger, J., concurring). In 1917, the Criminal Court of Appeals of Oklahoma called homosexuality "a detestable and abominable sin, amongst Christians." *Ex parte De Ford*, 168 P. 58, 59 (Okla. Crim. App. 1917) (internal quotation marks omitted).

TCRA § 22.5(b) regulates behavior that cannot be divorced from its theological associations. The act of baking a "specially-created wedding cake" with a baker-designed figure of a same-sex couple hand-in-hand, (J.A. 2), is an un-Christian act because it involves the celebration of conduct—same-sex marriage—that is sinful

according to the Christian faith. TCRA § 22.5(b) permits individuals who believe that homosexuality is not a sin to act on that belief while denying those who morally oppose homosexuality to act on their belief. *Emp't Div. Dep't of Human Res. v. Smith*, 494 U.S. at 877 (noting that abstinence from a particular behavior can constitute "exercise of religion").

Although this Court has not addressed the iconic significance of wedding cakes, other courts have associated wedding cakes with the celebration of matrimony. *See Kosek v. Osman*, No. FA02-04665181, 2005 WL 758125 (Conn. Super. Feb. 25, 2005) (concluding that a couple was married when they "celebrated at a reception with many guests and cut a multi-tiered wedding cake"); *Al-Mubarak v. Chraibi*, No. 101392, 2015 WL 1255794, at *1 (Ohio Ct. App. Mar. 19, 2015) (finding photographs of a "wedding cake" are evidence of a "wedding celebration"); *Persad v. Balram*, 187 Misc. 2d 711, 713 (N.Y. Sup. Ct. 2001) (same). The connection between marriage celebration and wedding cakes is evident and well-documented.

A law cannot be neutral if it requires a religious group, which fundamentally opposes homosexuality, to contribute to a same-sex marriage celebration. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971) ("The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn."); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (asserting a "Governmental imposition of that choice [between the precepts of one's religion and accepting work] puts the same kind of burden upon the free exercise of religion as would a fine

imposed against appellant for her Saturday worship."). The State is justified in requiring businesses to provide basic services to same-sex couples. Mama Myra's already demonstrated its willingness to sell the Respondents other baked goods. (J.A. at 2). Nevertheless, under TCRA § 22.5(b), Mama Myra's has two options: (1) it can bake specially-made wedding cakes for same-sex couples in opposition to its beliefs, or (2) it could end its twenty-seven-year practice of baking specially-made wedding cakes. (J.A. at 2). Thus, TCRA § 22.5(b) burdens free exercise by imposing a choice between following religious precepts and maintaining one's livelihood; this ultimatum cannot be neutral.

Limitation of religious free exercise is a matter of great sensitivity for the Court. The Court articulated this sensitivity in *Braunfeld v. Brown*: "(i)f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." 366 U.S. 599, 607 (1961). The burden of Section 22.5(b) on Mama Myra's is not only direct; it is also substantial.

B. Blanket Prohibitions on Discrimination that Are Not Otherwise Justified Do Not Meet the Court's High Bar for "Compelling Interests."

The Court has limited its definition of "compelling interests" to objectives that mitigate "(o)nly the gravest abuses, endangering paramount interest." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). Few interests have met this high bar. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521 (1993) (stating "public health and preventing cruelty to animals" are not compelling interests for prohibiting

ritualized animal killing); *Wisconsin v. Yoder*, 406 U.S. 205, 225 (1972) (noting that the interest in ensuring that children have skills needed to be self-reliant in modern society is not sufficiently compelling to require Amish children to abide by compulsory education laws); *Sherbert*, 374 U.S. at 407 (finding the aim to prevent dilution of unemployment funds is not compelling where the state denies benefits to a person who refuses to work Saturdays for religious reasons).

The State purportedly contends that its interest in preventing discrimination is compelling; however, that blanket prohibition is not compelling in cases, like the present case, where others' rights are limited as a result. In fact, at times there is a compelling government interest in promoting conduct that is considered discriminatory. *Johnson v. Transp. Agency, Santa Clara Cty., Cal.,* 480 U.S. 616, 616 (1987) (finding a compelling interest in promoting gender- and race-based differentiation in job promotions); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 267 (1978) (concluding the "goal of achieving a diverse student body is sufficiently compelling" to justify race-based distinctions in university admissions). If a preference for diversity in job promotions or education is sufficient to qualify as a compelling interest in discrimination, free exercise of religion—a value so precious to the Framers that it was included in the first of all the amendments[2]—must be sufficiently compelling to justify distinctions between citizens.[3]

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[2] In *Lee v. Weisman*, the Court asserted that the Framers adopted religious freedom clauses in the First Amendment "in response to a long tradition of coercive state support for religion . . . " 505 U.S. 577, 622 (1992). In this case, the Court noted Thomas Jefferson and James Madison's fierce opposition to "any political appropriation of religion." *Id*.

[3] In *Sch. Dist. of Abington Twp., Pa. v. Schempp*, the Court referred to a Justice Frankfurter opinion where stated, "Framers of the First Amendment were sensitive to the then recent history of those

C. TCRA § 22.5(b) Is Not Narrowly Tailored to Advance the Government's Interests Because the Statute Fails to Exempt Christians from Certain Provisions.

Even if the government's purported interest were compelling, it is not narrowly tailored. A law that prohibits discrimination in cases of sexual orientation without providing a narrow exemption for devout Christians who provide wedding services "infringe[s] upon or restrict[s] practices because of their religious motivation." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. at 533 (holding that proffered government interests can be rejected if they are not compelling and are "not narrowly tailored to accomplish the asserted governmental interests"). *See also Emp't Div. Dep't of Human Res. v. Smith*, 494 U.S. at 894 (O'Connor, J., concurring) ("requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest"). In the present case, the government fails to give any explanation for why an exemption for devout Christians who provide wedding services would prevent the government from achieving its purported anti-discrimination aims. Moreover, the current tailoring of the law undermines the purported governmental aims by permitting discriminatory conduct within private institutions because TCRA § 22.5(b) only applies to "place[s] of public accommodation." (J.A. at 3). If the Respondents sought to hold their reception at a private club or otherwise access a private club, the private club could entirely deny them entry for no reason other than

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persecutions and impositions of civil disability with which sectarian majorities in virtually all of the Colonies had visited deviation in the matter of conscience." 374 U.S. 203, 232–33 (1963) (citing *McGowan v. Maryland,* 366 U.S. 420, 464 (1961)).

their sexual orientation; this discrimination is permissible under Section 22.5(b). To eliminate discrimination based on sexual orientation while conforming to the Free Exercise Clause, the State could prohibit discrimination in both public and private accommodations with a narrow carveout for devout Christians who provide wedding services.

The Appellate Division asserted that the Act is narrowly tailored because it "exempts certain public accommodations that are 'principally used for religious purposes.' TCRA § 22.5(b)." (J.A. at 10). This exemption fails to protect the free exercise rights of institutions with both secular and religious purposes, like Mama Myra's, because religion substantially influences—but does not principally influence—these institutions. While Mama Myra's may serve the secular purposes of satisfying its customers and yielding a profit, it also serves the purpose of fostering Christian values. This purpose is evident; Mama Myra's maintains a twenty-seven-year commitment to only bake custom-made wedding cakes for different-sex couples—despite the dissatisfaction and reduction in profits that such a commitment creates. (J.A. at 2). The purposes cannot be separated; they are integrated into the process of baking cakes. The Court in *Engel v. Vitale* found that a practice which is partially religious cannot be divorced from its theological associations. 370 U.S. 421, 424 (1962) (finding nondenominational prayer that includes secular values is still "religious activity"). Thus, the current exemption in TCRA § 22.5(b) creates a false dichotomy between accommodations "principally used for religious purposes" and

those that are not. Moreover, the exemption fails to protect the Mama Myra's free exercise rights. (J.A. at 2).

D. Assuming TCRA § 22.5(b) Were Generally Applicable, the Statute Is Not Rationally Related to a Legitimate Government Interest Because the Statute Is Solely Premised on Moral Condemnation, Which Does Not Satisfy the Low Bar the Court Established for Legitimacy.

The State has no legitimate reason for denying the Mam Myra's right to free exercise. The Court must dismiss the government's purported interest to prevent discrimination because, as previously explained, the government's blanket anti-discrimination objective lacks necessary justification and the government undermined this objective with its implied exemption for private institutions. After dismissing this purported interest, the Court will identify an alternative interest as it has often done in the past. *Holt v. Hobbs*, 135 S. Ct. 853, 858 (2015) (repudiating the government's proffered security interests as a rationale for beard-length limitations in prisons); *United States v. Virginia,* 518 U.S. 515, 516 (1996) (rejecting the proffered interest in diversity in educational approaches as a justification for single-sex education and finding alternative interests); *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 543 (dismissing the proffered interest in preventing cruelty to animals as a justification for its ban on ritual animal sacrifices and finding alternative interests). Frequently, the Court presumes laws are based on moral grounds where the government has not given valid interests. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (finding a "bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"); *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) (arguing

that states may "try novel social and economic experiments . . . [but] I do not believe that this includes the power to experiment with the fundamental liberties of citizens . . . ").

The Court could find the government's interest in implementing TCRA § 22.5(b) was based on moral opposition to those who reject same-sex marriage, but this interest—which is to harm an unpopular group—is not legitimate. Opponents to same-sex marriage constitute a politically unpopular group; voters from every party have become more supportive of same-sex marriage in the past sixteen years.[4] Yet, the Court's holding in *Moreno* indicates that an aim to harm this unpopular group of same-sex-marriage opponents is not legitimate. 413 U.S. at 524 (1973). When states submit invalid interests, the Court may read interests into policies. Often, the Court will determine that the interest is morally based. In such cases, the interest is ripe for critique. Applying the analysis of *Moreno* and *Griswold*, the Court will find that the State's interest was illegitimate when it passed Section 22.5(b) because the State aimed to harm an unpopular group and experiment with fundamental liberties.

CONCLUSION

The State of Tourovia has forced the Mama Myra's to express notions that would distort its religious message and to choose between its religious belief and his existence. These burdens are not justified by compelling or legitimate governmental interest and are not narrowly tailored. For the foregoing reasons, the Petitioner, Mama Myra's Bakery, Inc. respectfully requests that this Court **REVERSE** the

[4] Today, 62% of Americans support same-sex marriage. Changing Attitudes on Gay Marriage, Pew Research Center (2017), http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/.

Supreme Court of Tourovia's decision and hold Tourovia Civil Rights Act § 22.5(b) unconstitutional.