No. 18–321

In the Supreme Court of the United States

April Term, 2018

MAMA MYRA'S BAKERY, INC.,

Petitioner,

v.

THE STATE OF TOUROVIA, on BEHALF of HANK AND CODY BARBER,

Respondents.

On Writ of Certiorari from
The Supreme Court of Tourovia

BRIEF FOR PETITIONER

Team Number: 6
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1. Whether a state public accommodation law can infringe on the pure artistic speech of a business and compel that business to convey a state approved message in violation of its First Amendment rights?

2. Whether the Free Exercise Clause of the First Amendment entitles a small business to a limited exemption from Tourovia's Civil Rights Act § 22.5(b) when the Act's enforcement would compel the business to create a custom-sculpted cake celebrating a same-sex wedding against the business's sincerely held religious beliefs?

Statement of the Case

This Court is asked to grant Mama Myra's Bakery ("Mama Myra's") a limited exemption under the Tourovia Civil Rights Act (the "Act" or the "public accommodation law") so that Mama Myra's may continue to run its small shop without being compelled by the Act to sculpt a wedding cake for same-sex couples because it violates the bakers' sincerely held religious beliefs. R. at 2-3. While the Act exists to prevent discrimination, the Free Exercise Clause of the First Amendment exists to protect individuals like the employees of Mama Myra's from being compelled to act in violation of their sincerely held religious beliefs.

For over twenty-seven years, the owner of Mama Myra's and all of his family member employees have outwardly expressed themselves as Christians. R. at 2. In line with its employees' beliefs, Mama Myra's has never made a wedding cake for a same-sex couple because the owner and employees believe same-sex marriage violates the teachings of the Bible and Christianity. R. at 2-3. In August 2012, the Barbers came into Mama Myra's to order a custom-sculpted wedding cake created to celebrate their same-sex marriage. R. at 2. At the time, Tourovia did not allow same-sex marriage, so the Barbers had wed earlier that summer in another state. R. at 2. As part of their request, the Barbers wanted Mama Myra's to sculpt a figure of the couple hand-in-hand on the top tier of the cake. R. at 2. Mama Myra's declined to do so, explaining that creating a wedding cake for a same-sex wedding would violate the sincerely held religious beliefs of Mama Myra's employees. R. at 2.

However, Mama Myra's offered to make and sell any other baked goods to the Barbers for their party. R. at 2. Despite Mama Myra's explanation and offer, the Barbers left Mama Myra's without responding. R. at 2. A few weeks later, the Barbers filed charges of discrimination, claiming Mama Myra's violated § 22.5(b), the public accommodation provision

of the Act, by "not selling them a wedding cake due to their sexual orientation." R. at 3. On September 30, 2015, the District Court of Tourovia entered a judgment finding that the State of Tourovia (the "State") had met its burden of showing that Mama Myra's violated the public accommodation provision of the Act. R. at 5.

On October 8, Mama Myra's appealed to the Appellate Division of the Supreme Court of Tourovia, Fourth Department. R. at 6. Mama Myra's moved to set aside the judgment by arguing that § 22.5(b) of the Act violates Mama Myra's right to free speech and to free exercise of religion under the First Amendment of the U.S. Constitution. R. at 7. On October 26, after briefing, the Appellate Court denied the motion, holding that Mama Myra's First Amendment rights to freedom of speech and free exercise of religion had not been violated. R. at 11.

On October 30, Mama Myra's appealed to the Supreme Court of Tourovia, which affirmed both lower court decisions. R. at 14-15. Mama Myra's now respectfully requests this Court to reverse the Supreme Court of Tourovia, and find that Mama Myra's is entitled to a limited exemption from the Act because its enforcement violates Mama Myra's freedom of speech and free exercise of religion.

Summary of the Argument

This case is about a small business whose First Amendment rights to freedom of speech and free exercise of religion are being violated by a state public accommodation law compelling speech and coercing the small business to act against its sincerely held religious beliefs.

The Supreme Court of Tourovia erred in affirming the Appellate Division of the Supreme Court of Tourovia, Fourth Department, because both courts failed to properly evaluate the Act's unconstitutional effects on a small business's constitutional right to free speech. Historically, courts have afforded great protection to the free speech defined in the First Amendment of the Constitution. This protection applies to both pure speech or expressive conduct. A law is presumed unconstitutional if it compels a business to engage in speech that expresses a message it deems objectionable and punishes it for refusing to express such a message. When the Supreme Court analyzes such a law, it must pass muster under strict scrutiny.

Tourovia's public accommodation law cannot. Mama Myra's speaks through its art. Mama Myra's art will never be hung on the wall of a museum or be studied by students, but its art will be the cornerstone of one of if not the most important days of a couple's lives. Mama Myra's cakes are unique artistic creations. Its artistic speech conveys a celebratory message that cannot be removed from the context in which that speech is made. Mama Myra's religious beliefs compel it to use its artistic talents to speak in conformity with its beliefs. Tourovia does not have that power, and the First Amendment of the Constitution ensures that. Tourovia's public accommodation law prevents Mama Myra's, and other businesses like it, from exercising its autonomy granted by the free speech clause. The law implicates Mama Myra's right to freedom of speech, and as such, Tourovia's public accommodation law should be found unconstitutional since the government has not met its substantial burden.

This Court should also find that enforcing the Act against Mama Myra's violates its free exercise of religion. Under this Court's established precedent, when a law is challenged for a free exercise of religion violation it must be evaluated for neutrality and general applicability. A law fails to be neutral if either the overt or covert object of the law is to target actions that are religiously motivated. A law fails general applicability if it is over or under-inclusive or if it grants exemptions to certain groups while denying similar groups exemptions. If deemed to be both neutral and generally applicable, the Act is evaluated under rational basis review. However, if the Act fails either neutrality or general applicability, or both, then it must be evaluated under strict scrutiny. Strict scrutiny requires the state to have a compelling interest that, when enforced by the Act, is narrowly tailored as applied to the entity challenging the law's constitutionality.

The Act fails neutrality because the object of the Act is to inhibit actions that are religiously motivated: namely, the religious motivation not to condone same-sex marriage. The Act further fails general applicability because it grants exemptions to certain religious public accommodations but not to other public accommodations with the very same sincerely held religious beliefs. Under strict scrutiny, the enforcement of the Act against Mama Myra's is not justified by a compelling state interest because broad government interests fail to rise to the level of compelling. The Act also fails to be narrowly tailored because it grants exemptions to certain religious public accommodations but fails to do so for other public accommodations with similar sincerely held religious beliefs. Granting a limited exemption to Mama Myra's would not contravene the entire purpose of the Act but would rather narrowly tailor the Act by uniformly granting exemptions to similarly situated public accommodations. As such, the Act violates Mama Myra's First Amendment Free Exercise right since the State has no compelling interest and the Act is not narrowly tailored. As such, this Court should reverse.

Argument

I. THIS COURT SHOULD REVERSE THE HOLDING OF TOUROVIA'S APPELLATE COURT BECAUSE THE STATE'S PUBLIC ACCOMMODATION LAW UNCONSTITUTIONALLY RESTRICTS AND COMPELS MAMA MYRA'S SPEECH.

A State's public accommodation law cannot flout the Constitution and restrict and compel free speech. The First Amendment to the United States Constitution provides "Congress shall make no law … abridging the freedom of speech …." U.S. Const. amend. I. In recognition of Mama Myra's First Amendment rights, this Court should reverse the lower court's holding and continue to protect the autonomy and freedom of the individual mind that has been a part of our American legal history since our country's founding.

Mama Myra's free speech analysis proceeds in three parts. First, Mama Myra's custom design of cakes involving drawing, painting, and sculpting are unique artistic speech deserving the full protection of our nation's Constitution. Second, Tourovia's unconstitutional Act compels Mama Myra's to alter its pure speech in conformity with a government approved message that forces Mama Myra's to speak in contravention of its sincerely held religious beliefs. Third, the state's unconstitutional Act cannot withstand strict scrutiny because the Act cripples Mama Myra's First Amendment right to free speech.

A. Mama Myra's cake artistry is constitutionally protected speech deserving the full protection of the First Amendment.

This Court has historically taken a broad view of the speech protected by the First Amendment and should apply those same protections to Mama Myra's artistic speech. As a threshold matter, the lower court erred in deciding that Mama Myra's wedding cake was not protected First Amendment speech. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 60-68 (2006) ("FAIR")* (analyzing whether an individual engaged in speech before determining if their conduct was expressive). In reaching its decision, the lower court

incorrectly relied on *FAIR*, bypassing the essential analysis that this Court's precedent requires. Under this precedent, the custom drawing, painting, and sculpting Mama Myra engages in as a cake artist is clearly protected, artistic speech.

1. Mama Myra's cake artistry involves drawing, painting, and sculpting, and therefore cake artistry is pure speech deserving the full protection of the First Amendment.

Cake artistry is an inherently artistic activity involving the custom drawing, painting, and sculpting of cake that qualifies for First Amendment protection as pure speech. *See Ashcroft v. Frees Speech Coal.*, 535 U.S. 234, 246 (2002) (noting that the First Amendment protects expression with artistic value); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1996) (finding that the First Amendment endows full protection to artistic speech). It has been long held by this Court that "the Constitution looks beyond written or spoken words as mediums of expression." *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). This protection applies to both individuals and business corporations generally. *Id.* at 574. Seeking to regulate the individual artistic choices of artists violates the "individual dignity and choices" that the First Amendment promises. *Cohen v. California*, 403 U.S. 15, 24 (1971).

Protected artistic speech includes "pictures, films, paintings, drawings, and engravings." *Kaplan v. California*, 413 U.S. 115, 119 (1973). This Court has not limited protection of artistic speech to "succinctly articulable" art or a "particularized message," but rather has extended protection to creative mediums that communicates ideas. *Hurley*, 515 U.S. at 569. Such ideas include the intelligible and abstract. *See id.*; *see also Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (protecting the artistic expression of video game creators); *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964) (protecting the artistic expression of pornography creators).

Circuit courts have understood this Court's precedent to apply First Amendment protections broadly, reinforcing the finding that Mama Myra's speech should be afforded the utmost protection. The Eleventh Circuit recently held that the artistic process and product of "artist[s] practicing in a visual medium" is pure speech. *Buehrle v. City of Key West*, 813 F.3d 973, 978 (11th Cir. 2015); s*ee also Cressman v. Thompson*, 798 F.3d 938, 952-53 (10th Cir. 2015) (recognizing that the First Amendment protects unique artistic expression as "pure speech"). In *Buehrle*, the court analyzed a statute that regulated tattoo artists. *Id.* In striking down the statute, the court recognized that the First Amendment protects all forms of artistic expression, including tattooing. *Id.* at 976. *See also Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010) (recognizing the artistic value of tattooing); *Mastrovincenzo v. City of N.Y.*, 43 F.3d 78, 96 (2d Cir. 2006) (recognizing the artistic value of custom-painted clothing).

Speech does not lose protection based on the kind of surface to which it is applied. *Anderson*, 621 F.3d at 1061. Whether it is a tattoo or some other artistic expression, art does not lose its protection because it is drawn on a surface other than paper. *Id.* The dual contribution of customer and artist to the creative process reinforces the notion that the creation is a unique artistic expression. *Id.* This analysis demonstrates a broad view of artistic expression as pure speech, in line with the historical precedent of this Court. *See Kaplan*, 413 U.S. at 117 (recognizing that the First Amendment defines pure speech to include art).

Mama Myra's cake artistry, like the unique artistic creations in *Buehrle*, *Anderson* and *Mastrovincenzo*, deserves the full protection of the First Amendment. When the couple came into Mama Myra's, they asked for a custom designed cake and a sculpted figure of the same sex couple hand-in-hand on top tier of the cake. R. at 2. The couple was not asking for a ready-

made cake, but rather, because of the skill of Mama Myra's cake artists, a custom drawn, painted, and sculpted multi-tier cake to serve as a monument to their marriage and a centerpiece to their celebration. R. at 2. Like the tattoo artists in *Buehrle* and *Anderson*, Mama Myra's staff's artistic speech and creative process would be intertwined with the vision of the couple. R. at 2. The speech could not be separated. *See* R. at 2. To Mama Myra's staff, the creation of a custom-made cake for the same sex couple would lend their artistic endorsement to an act that would violate their sincerely-held religious beliefs. R. at 2.

In declining to lend their artistic talents to the couple, Mama Myra's offered to make and sell any other baked good to the couple and their family. R. at 2. However, Mama Myra's would not create a custom designed, painted, and sculpted artistic expression that celebrated something that conflicted with their religious view of marriage – a view they have outwardly expressed for over twenty-seven years as cake artists. R. at 2. *See Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012) ("The core of the message in a wedding is a celebration of marriage and the uniting of two people …."). Mama Myra's unique wedding cakes express the message of celebration for a marriage. Mama Myra's religious beliefs prevented them from expressing such a message for the couple's wedding. But a wedding cake is different, a wedding cake, more than any other baked good, plays a critical role in the ritual of marriage. *See* Simon R. Charsley, *Wedding Cakes and Cultural History*, 46 (1992).

The First Amendment should protect Mama Myra's wedding cakes because each cake communicates a message and involves extraordinary effort to draw the design, paint the elaborate decorations, and sculpt the cake's form and decorations. It does not matter that Mama Myra's uses an edible medium, because "the basic principles of freedom of speech … do not vary when a new and different medium appears." *Brown*, 564 U.S. at 790.

2. Even if this Court finds that Mama Myra's cake artistry does not qualify as pure speech, Mama Myra's business to design and sculpt custom cakes is still expressive conduct deserving constitutional protection.

Even if this Court does not find that Mama Myra's artistic creations constitute pure speech, Mama Myra's should still be afforded First Amendment protections because Mama Myra's engages in expressive speech when they draw, paint, and sculpt custom cakes for their clients. To determine whether communicative elements exist that might trigger First Amendment protection, courts look to whether the speaker had "an intent to convey a particularized message," and whether the "likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Wash.*, 418 U.S. 405, 410-11 (1974)). *Hurley* modified that analysis for cases involving visual art, explaining that a "particularized message" is not a prerequisite for constitutional protection. 515 U.S. at 569. In order for Mama Myra's to demonstrate that the conduct is expressive, Mama Myra's has the burden of demonstrating more than a mere "plausible contention" that its conduct is sufficiently expressive. *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 316, n. 5 (1984) (internal quotations omitted).

In reaching its conclusion that Mama Myra's did not meet its burden, the lower court incorrectly relied on *FAIR*, focusing on the perception of third parties while neglecting the intent of the individual or business to convey a particularized messaged. *See FAIR*, 547 U.S. at 64-65 (holding that providing a room for military recruiters in law schools does not create the perception of an endorsement of the military policies because the schools are not speaking when they host interviews). The lower court ignored this court's explicit finding that artistic expression is considered expressive conduct. *See Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("[Art like] [m]usic, as a form of *expression* and communication, is protected under the First Amendment.") [emphasis added].

Additionally, the lower court's analysis would have benefited from examining *Spence,* the case in which the elements of the *Johnson* analysis were first articulated by this Court. *See Spence*, 418 U.S at 410-11. In *Spence*, this Court found that a symbol as nebulous as an upside-down peace sign on an American flag carried expressive intent. *Id*. at 410. The Court found the symbol to constitute expressive conduct deserving the protection of the First Amendment because the expressive intent was considered in the greater context of the situation in which it was displayed, namely the Vietnam War. *Id. See also Tinker v. Des Moines School District,* 393 U.S. 503 (1969).

Further, as the Ninth Circuit stated in *Anderson*, providing a service does not make the creative process any less expressive. 621, F.3d at 1062. In finding that tattooing was an expressive activity, the court found that the expressive work, the process of creating the expressive work, and the business of creating the work are "purely expressive activities fully protected by the First Amendment." *Id.* at 1060. This conclusion was premised on the fact that the process of creating the work was intertwined with the completed work and accompanying message. *Id.*

While a third party may not view the work of a cake artist like Mama Myra's as an endorsement, the first prong of the *Johnson* test focuses on the intent of the speaker. The speech then must be viewed in its context. The wedding cake developed "not as an integral part of a[] meal but as a festive or celebratory" component of the newlyweds' union. Charsley at 46. As such, Mama Myra's creation cannot be separated from the event that it celebrates. The communicative intent of the cake and the greater expression it conveys has been an integral part of the wedding ritual and to believe otherwise, as the Tourivia court's holding seems to imply, would ignore historical precedent. *Id.*

Unlike in *FAIR*, where the law school was simply hosting recruiters, Mama Myra's contends that wedding cakes convey celebratory messages about marriage. R. at 7. The creation of the cake for the same-sex couple not only involved the drawing, painting, and sculpting of the cake itself, but also a custom-sculpted cake topper of the same sex couple holding hands. R. at 2. The process of designing the wedding cake and sculpting the homosexual couple holding hands with one another, like the tattooing process in *Anderson*, intertwines completed cake and accompanying celebratory message. *See* R. at 2. In applying *FAIR*, the lower court ignored a critical distinction – that a wedding cake is itself an artistic expression. R. at 7. Therefore, the expressive speech here—a custom designed cake and accompanying sculpture—goes beyond the alleged speech in *FAIR* and clearly conveys a particular message that celebrates and endorses same-sex marriage. R. at 7. This expression conflicts with Mama Myra's sincerely held religious beliefs and their views of the purpose of wedding cakes as key monuments of the wedding ritual. *Id.* Accordingly, the work of Mama Myra should be afforded the full protection of the First Amendment.

B. Tourovia has unconstitutionally compelled Mama Myra's to engage in speech that would require Mama Myra's to alter their expressive conduct.

The compelled speech doctrine presumes that when a government forces its citizens, or a business like Mama Myra's, to express a message they deem objectionable or punish them for refusing to express such a message, the government acted unconstitutionally. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.,* 487 U.S. 781, 795-801 (1988)*; Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.,* 475 U.S. 1, 9-21 (1986); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974). The First Amendment prohibits the government from telling private individuals or businesses "what they must say." *Agency for Int'l Dev. v. Alliance for Open Soc. Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013). Freedom of speech "includes both the right to speak

freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 716 (1977). Additionally, this Court has explicitly held that state public accommodation laws may not compel or interfere with individual expression. *Hurley*, 515 U.S. at 572-75.

This is true even for individuals who "hold a point of view different from the majority and refuse to foster … an idea they find morally objectionable." *Wooley*, 430 U.S. at 715. The greatest protection granted by the First Amendment is the "individual freedom of mind" that the First Amendment "reserve[s] from all official control." *Id.* at 714; *see also Boy Scouts of America v. Dale*, 530 U.S. 640, 645 (2000) (finding that forcing speech that would affect the purported message of an individual or business organization is compelled speech).

In *Wooley*, a member of the Jehovah's Witnesses covered the New Hampshire state motto "Live Free or Die" on his vehicle's license plate because he found the motto morally repugnant and offensive to his sincerely held religious beliefs. *Wooley*, 430 U.S. at 706. In affirming the holdings of the lower courts, this Court found that the First Amendment prevents a state from compelling a person to endorse or celebrate a message that violates their sincerely held beliefs, especially when this message will be seen by the public. *Id.* at 714.

Requiring private citizens or businesses to endorse a message that the speakers do not wish to convey through a public accommodation law is a violation of the First Amendment. *Hurley*, 515 U.S. at 559. In *Hurley*, the Supreme Court reviewed a Massachusetts Supreme Court decision which found parade organizers violated a public accommodation law prohibiting discrimination against LGBT citizens when the parade organizers permitted the LGBT individuals to participate in the parade, but not march as distinct contingent. *Id.* at 561-65. In overruling the lower court's decision, this Court found a public accommodation law that required the parade organizers to alter the content of their expression to be unconstitutional. *Id.* at 572-

73. The state cannot decide what merits celebration and co-opt an individual's message despite apparent good intentions. *Id.* at 574. *See also Boy Scouts of Am.*, 530 U.S. at 653 (finding a public accommodation law that compelled the organization to admit homosexual members would significantly burden their desire not to endorse homosexuality and convey a message contrary to the fundamental beliefs of their organization).

Here, Mama Myra's artistic expression, or choice to not create an artistic expression, is protected by the First Amendment. The cake artists at Mama Myra's did not decline to make the expression because of the couple's homosexuality, but because creating that artistic expression would celebrate something that went against their religious orthodoxy. *See* R. at 2. This analysis should center on what the cake artists at Mama Myra's believe – namely, that marriage is a religious celebration between a man and a woman. *See* R. at 2. Like the driver in *Wooley* who found a statutorily required speech element morally repugnant, Mama Myra's does not wish to make a cake celebrating a religious event contrary to their deeply held beliefs. R. at 2. Forcing Mama Myra's to endorse the same sex couple's marriage would be unconstitutional based on the Supreme Court's standard in *Wooley*. Like the message to the parade goers in *Hurley*¸ the message of Mama Myra's wedding cake has a significant impact on the audience and Mama Myra's has a constitutional right to refrain from participating in that message.

Mama Myra's would gladly serve homosexual couples in any other capacity, so long as that couple does not ask them to create an expression that they consider morally repugnant or offensive to their sincerely held religious beliefs. R. at 2. Mama Myra's artistic craft is inherently expressive; indeed, their speech does not just encapsulate the moment, but plays an intimate part in the celebration – the two cannot be separated and the wedding cake entails the creative cake design and sculpting of the couple's cake topper. *See* R. at 2; *compare Elane*

Photography, LLC v. Willock, 309 P.3d 53, 54 (2013) (holding that a public accommodation law requiring photographers to photograph same sex couples at their weddings did not violate the First Amendment because a photographer did not convey a message through photographing a couples' event). By requiring that sincere, devout individuals celebrate a message that contradicts the fundamental and core beliefs of their religion, this Court would be neglecting to protect the type of speech that requires the utmost protection.

C. Tourvia's public accommodation law silences the sincere, religiously motivated artistic speech of Mama Myra's and others similarly situated cannot pass muster under strict scrutiny.

The Act does not pass strict scrutiny and is therefore unconstitutional because it does not grant a limited exemption to those whose sincerely held religious beliefs are implicated in enforcement and discriminates on the content and viewpoint of Mama Myra's Constitutionally protected speech. Strict scrutiny applies in "hybrid situation[s]" where a free-exercise claim is linked with "other constitutional protections, such as freedom of speech." *Employment Division v. Smith*, 494 U.S. 872, 881-82 (1990).

Where free exercise and a communicative activity are intertwined, any state action that compels expression is presumed unconstitutional and must pass muster under strict scrutiny analysis. *Id.* at 882 (discussing *Wooley, supra*). Under strict scrutiny, the burden lies with the government to prove that the act "furthers a compelling interest and is narrowly tailored to achieve that interest. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (quoting *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010).

Similar public accommodation laws have been analyzed under strict scrutiny when they involve hybrid rights claims, and consistently this Court has found that First Amendment liberties take precedent. *See Hurley*, 515 U.S. at 559; *Boy Scouts of Am.*, 530 U.S. at 659.

Courts have found these laws do not pass strict scrutiny because to hold otherwise would deliver a devastating blow to First Amendment rights. *See Hurley*, 515 U.S. at 559.

Among the most enduring, basic principles of the First Amendment is the proposition that "[a]s a general matter, . . . [the] government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown*, 564 U.S. at 790-91 (quoting *Ashcroft*, 535 U.S. at 573)

Tourovia's public accommodation law seeks to straddle the fence between addressing a serious social problem and helping a protected class of individuals from discrimination. While both ends are legitimate, the protection of these rights must be both narrowly tailored and have a compelling reason. *See Id.* at 805 ("[W]hen public accommodation law affect[s] First Amendment rights they must be pursued by means that are neither seriously under inclusive nor seriously over inclusive."). Here, the Act is not narrowly tailored because it is over-inclusive and does not grant a specific exemption to religious individuals like the staff at Mama Myra's who do not wish to celebrate same-sex marriage on the grounds of their faith, not "because of" a discriminatory purpose.

Moreover, *Hurley* established that a state's interest in eliminating dignitary harms is not compelling where, as here, the cause of the harm is another person's decision not to engage in expression. *See Hurley*, 515 U.S. at 574 ("The point of speech protection … is to shield just those choices of content that is someone's eyes are … hurtful.") An interest in preventing dignitary harms thus is not a compelling basis for infringing speech. *See Johnson*, 491 U.S. at 409. The Act infringes on basic First Amendment principles through seeking to compel the staff of Mama Myra's to speak in a way the State does not view as harmful, while ignoring the harm done to Mama Myra's as a result of this compulsion.

While this Court established a constitutional right for homosexual couples to wed, the Court did not establish a constitutional requirement for all to be happy with that decision. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) ("[T]hose who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.") Indeed, *Obergefell* explicitly allowed people like the cake artists at Mama Myra's to continue to hold and express their viewpoint without the government seeking to censor the content of or compel speech that conflicted with their sincerely held religious beliefs.

Therefore, this Court should hold that the Act is unconstitutional because it does not pass strict scrutiny and seeks to regulate the viewpoint and content of Mama Myra's speech. A limited exemption to the Act as applied to religious individuals or organizations like Mama Myra's may provide the necessary remedy, as explained below.

II. THIS COURT SHOULD REVERSE THE HOLDING OF THE LOWER COURT AND GRANT MAMA MYRA'S AN EXEMPTION FROM THE ACT BECAUSE ENFORCING TOUROVIA'S ACT VIOLATES THE SMALL BUSINESS'S FREE EXERCISE OF RELIGION.

Mama Myra's is entitled to a limited exemption from the Act because its enforcement would violate Mama Myra's free exercise of religion. Enforcing the act would compel Mama Myra's to create a custom-made wedding cake celebrating a same-sex wedding against the owner's religious beliefs. The Free Exercise Clause of the First Amendment is applied to the states by incorporation into the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (explaining that the Fourteenth Amendment rendered state legislatures as incompetent as Congress when creating laws in contravention of the First Amendment). This fundamental right provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*." U.S. Const. amend. I. [emphasis added].

Thus, the First Amendment prohibits the government from punishing the expression of religious doctrines it believes to be wrong or even fabricated. *See United States v. Ballard*, 322 U.S. 78, 86-88 (1944) (holding that a jury cannot be asked to determine the truth or verity of a person's religious doctrines or beliefs).

While the Act exists to regulate places of accommodation, it fails to be neutral because its object is to inhibit certain practices because of their religious motivation. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 562 (1993) (holding that when a statute covertly targets a specific action because of its religious motivations, it is not neutral). The Act is not generally applicable because its prohibitions target common and fundamental beliefs of some Christians. *See Id.* In the spirit of the Free Exercise Clause, the Act already exempts "places solely used for religious purposes" from having to comply with certain public accommodations. TCRA § 22.5(b).

In the present case, the Free Exercise Clause of the First Amendment entitles Mama Myra's to a limited exemption from the Act. U.S. Const. amend. I. It is undisputed that Mama Myra's owner and employees sincerely believe that creating a custom-made cake to celebrate a same-sex wedding violates their religious beliefs because they share the common Christian belief that marriage only exists between a man and a woman. R. at 2-3. By forcing Mama Myra's to create a custom-made cake against its religious beliefs, the State of Tourovia imposes a substantial burden on Mama Myra's free exercise of religion without any compelling interest. *See Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (holding that when government places a substantial burden on a central religious belief or practice, a compelling government interest must justify the burden). The lower court erroneously enforced this constitutional violation by finding the Act to be neutral and generally applicable. R. at 9-11. The Act fails

both characterizations because the object of the Act is to target religiously motivated actions and the Act does not apply to all public accommodations. R. at 10-11.

The lower court in turn erroneously applied rational basis review to find Mama Myra's was not entitled to an exemption rather than requiring the State to demonstrate it has a compelling interest that can be achieved only by denying Mama Myra's limited exemption. R. at 10-11. It is well established that broad anti-discrimination statutes such as this Act are not grounded in sufficiently compelling governmental interests. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) (holding that government interests couched in broad terms are insufficient to prove a compelling government interest). The State has further failed to narrowly tailor the Act by granting exemptions to certain religious public accommodations, but not to other public accommodations with the same sincerely held religious beliefs. *See Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (holding that exemptions for some groups but not others indicated the law to be under-inclusive and therefore not narrowly tailored). Since the Act has no compelling governmental interest that is narrowly tailored, Mama Myra's is entitled to a limited exemption from the Act. The lower court erred in holding to the contrary, and thus, this Court should reverse.

A. <u>The Act is neither neutral nor generally applicable because it targets Mama Myra's religious beliefs by coercing Mama Myra's to act in a way that violates its sincerely held beliefs.</u>

This Court should analyze the Act under strict scrutiny analysis because it is neither neutral nor generally applicable. When a law is not neutral or not general applicable, it must be evaluated under the most rigorous of scrutiny. *See Lukumi*, 508 U.S. at 521. Free Exercise rights are invoked if the law at issue discriminates against some religious beliefs or regulates conduct because it is done for religious reasons. *See, e.g. Braunfield v. Brown*, 366 U.S. 599,

607 (1961) (proscribing Sunday retail sale of certain goods); *Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953) (providing that no person shall address any religious meeting in any public park). Essentially, if the object of the Act is to infringe upon practices because of their religious motivation, the law is not neutral. *See Smith*, 494 U.S. at 878-79 (differentiating between laws that directly target religiously motivated practices and laws that incidentally impact religiously motivated practices). In evaluating whether a law is generally applicable, courts review whether the law is over or under-inclusive in scope and whether such scope actually addresses the problem the law seeks to solve. *See Fraternal Order*, 170 F.3d at 366. Under this Court's precedent, the Act is neither neutral nor generally applicable and the lower court failed to evaluate the Act properly under strict scrutiny.

Under this Court's well-established precedent, if a law's object is to "infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Lukumi*, 508 U.S. at 533. This was demonstrated in *Lukumi*, where the ordinance at issue prohibited sacrifice or slaughter of an animal in any type of ritual. *Id.* at 520. The followers of the Santeria religion were negatively affected by this ordinance because their central element of worship involved animal slaughter and sacrifice. *Id.* at 534. This Court examined the ordinance not only for facial neutrality, but also for covert partiality or bias because the Free Exercise Clause "'forbids subtle departures from neutrality.'" *Id.* at 534 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)). While the terms "sacrifice" and "ritual" were not deemed conclusive for a lack of neutrality, the object of the ordinance was to target Santeria sacrifice because the only conduct subject to the ordinance was the religious exercise of Santeria Church Members. *Id.* at 535. This Court found the ordinance not to be generally applicable because it was under-inclusive. *Id.* at 545. For instance, the city's stated interest in public health was not being met with concerns

about animal carcass disposal by restaurants or other non-religious individuals. *Id.* Instead, the city was providing exemptions for other groups while not granting such exemptions to the Santeria church members. *Id*. As such, this Court held the ordinance to not be neutral nor one of general applicability. Upon applying strict scrutiny, this Court voided the ordinance. *Id.* at 547.

Similarly, the Third Circuit followed *Lukumi's* precedent in finding a police department to have violated the free exercise rights of its officers. *See Fraternal Order*, 170 F.3d at 360. The Newark Police Department had a policy prohibiting uniformed male police officers from growing beards. *Id.* While the order itself was facially neutral, the Third Circuit found the order to not be generally applicable because the police department granted exemptions for medical reasons but refused exemptions for religious reasons. *Id.* at 365. The Third Circuit further held that even though the medical exemption was not an "individualized exemption," as in *Lukumi*, the law still failed general applicability and forced the court to apply strict scrutiny. *Id.*

When this Court has found a challenged statute to be both neutral and generally applicable, the object of the law was not to prohibit actions of a religious group and exemptions were not granted for other groups. *See Smith*, 494 U.S. at 874. In *Smith*, the law at issue was an Oregon state law that generally prohibited use of peyote, a drug that incidentally was used religiously by Native Americans for religious purposes. *Id.* However, the object of the law was to prohibit illicit drug use and not to prohibit Native Americans from practicing their religion. *Id.* at 872. Rather, the law was neutral because it "incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids)." *Id.* at 872, 892. This Court further found that because the law applied to all, with no exemptions provided for one group over another, it was deemed generally applicable. *Id.* at 873. Under the lowered standard of

rational basis review, this Court found an exemption to be constitutionally permissible, but not constitutionally required. *Id.*

In the instant case, the Act is more analogous to those in *Lukumi* and *Fraternal Order* because the Act is neither neutral nor generally applicable. Instead, as in *Lukumi*, the Act covertly targets the specific religious beliefs of most religions and is not generally applicable because the law grants exemptions to certain religious public accommodations, but not for those with similar religious convictions. R. at 10. On its face, the Act appears neutral because it does not reference any specific religious groups or actions. R. at 3. However, similar to *Lukumi*, the Act covertly targets religious organizations and beliefs because it directly conflicts with the sincerely held beliefs of many of the largest U.S. religious institutions. *See* David Masci and Micahel Lipka, *Where Christian churches, other religions stand on gay marriage*, Pew Research Center (Dec. 21, 2015) http://www.pewresearch.org/fact-tank/2015/12/21/where-christian-churches-stand-on-gay-marriage/.[1] In fact, a recent study from the Pew Research Center has found that 85% of non-religious individuals support same-sex marriage, whereas only 35% of white evangelical Protestants support same-sex marriage. *Changing Attitudes on Gay Marriage*, Pew Research Center (June 26, 2017) http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/. Taken in conjunction, these two studies indicate that the object of the Act, which prohibits discrimination because of sexual orientation, is to target the religiously motivated actions of religious individuals and groups. As such, the Act is not neutral because it targets and infringes upon practices because of their religious motivation and must be found

[1] Finding that, of the major religions, the Conservative Jewish Movement, Episcopal Church, Evangelical Lutheran Church in America, Presbyterian Church (U.S.A.), Reform Jewish Movement, Society of Friends (Quaker), Unitarian Universalist Association of Churches, and United Church of Christ all sanction same-sex marriage, while the American Baptist Churches, Assemblies of God, Church of Jesus Christ of Latter-day Saints (Mormon), Islam, Lutheran Church-Missouri Synod, National Baptist Convention, Orthodox Jewish Movement, Roman Catholic Church, Southern Baptist Convention, and United Methodist Church all prohibit same-sex marriage. Only Buddhism and Hinduism were found to have no clear position.

invalid unless it is justified by a compelling interest and is narrowly tailored to that interest. *See Smith*, 494 U.S. at 897-79.

Unlike *Smith*, the Act is not generally applicable because it grants exemptions to "places principally used for religious purposes" but not to all organizations, or even individuals, refraining from certain conduct based on similarly shared religious convictions. R. at 10. Rather, this Act is similar to the order in *Fraternal Police*, where exemptions were granted to certain groups but not others, indicating discrimination between non-religious and religious bases for conduct. *See Fraternal Order*, 170 F.3d at 365.

The Act and the lower court failed to recognize that the very same religious exemption applied to accommodations "principally used for religious purposes" should be applied to all accommodations operated by owners with the very same sincere religious beliefs. Mama Myra's refusal to craft a cake for a same-sex couple is no different than a church-run bakery's choice to refrain from doing the same: both are grounded in a sincerely held religious belief that same-sex marriage is sinful. *See* R. at 3. As such, this Court should find the Act fails general applicability because it indicates the same discriminatory intent from *Fraternal Police* that triggers strict scrutiny.

B. <u>This Court should apply strict scrutiny and find that Mama Myra's First Amendment right to free exercise was violated because there is no compelling state interest and the Act is not narrowly tailored.</u>

The State has failed to demonstrate a compelling interest to justify the substantial burden placed on Mama Myra's sincerely held religious beliefs, thereby failing to satisfy the requirements of strict scrutiny analysis. In evaluating a statute under strict scrutiny, courts have held that general anti-discrimination statutes like the Act are not sufficiently compelling to override Free Exercise rights. *See Attorney General v. Desilets*, 636 N.E.2d 233, 238 (Mass.

1994) (holding that general objective of eliminating all discrimination cannot alone provide a compelling governmental interest). Additionally, the Act is not narrowly tailored because the Act itself contains exemptions for religious organizations and the State fails to meet its burden to prove that the same exemption could not be offered to Mama Myra's based on its religious objections. Ultimately, "[a] law that targets religious conduct for distinctive treatment or *advances legitimate government interests only against conduct with a religious motivation* will survive strict scrutiny only in rare cases." *Lukumi*, 508 U.S. at 546 [emphasis added]. This Court should grant Mama Myra's a limited exemption because the State advances no compelling interest and the Act fails to be narrowly tailored by granting exemptions to some groups but not others with the same sincerely held religious beliefs.

1. The State has no compelling interest to justify substantially burdening Mama Myra's sincerely held religious beliefs.

By erroneously categorizing the Act as neutral and generally applicable, the lower court failed to properly analyze whether the State had a compelling interest in the elimination of discrimination in public accommodations against a same-sex married couple who want to buy a custom-made cake in celebration of their same-sex wedding. Establishing a compelling government interest is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Both the lower court and the State have failed to offer any compelling government interest in support of the State's unjust enforcement of the Act against Mama Myra's because exemptions were already provided for other religious public accommodations. R. at 2, 10.

This Court has held that broad government interests do no rise to the level of compelling. *See Barnwell*, 134 S. Ct. at 2779. Additionally, this Court found that when exemptions are granted, then the law "cannot be regarded as protecting an interest of the highest order." *Lukumi*,

508 U.S. at 547 (1993) (citation and internal quotation marks omitted). The Massachusetts Supreme Court evaluated a similarly broad anti-discrimination statute that prohibited a landlord from discriminating based on the marital status of a couple. *Desilets*, 636 N.E.2d at 238. The court held that the state "must demonstrate that it has a compelling interest in the elimination of discrimination in housing against an unmarried man and an unmarried woman who have a sexual relationship and wish to rent accommodations." *Id.* The court noted that because Massachusetts had a criminal statute prohibiting fornication, such a statute diminished the state's interest in eliminating housing discrimination based on marriage status. *Id.* at 240. While the court did not make a definitive ruling but rather remanded, the court required the state to establish that "it has a compelling state interest that can be fulfilled only by denying the defendants an exemption." *Id.* at 241.

Here, both this Court's precedent and the Massachusetts's Supreme Court are instructive in evaluating the Act. The record is entirely void of any attempt by the State to demonstrate a compelling interest. R. at 2-16. The State would most likely set forth the interest of removing discrimination, a broad interest that this Court has held does not rise to the level of compelling. *See Barnwell*, 134 S. Ct. at 2779. The State would need to have a compelling interest in regulating Mama Myra's religiously motivated actions that requires the State to deny Mama Myra's an exemption. The State has failed to meet any such specific burden. Rather, the State has conceded that the Act includes exemptions for public accommodations "principally used for religious purposes," yet another indication that the Act does not protect an interest of the highest order. TCRA § 22.5(b). Similar to *Desilets*, the practices that the State are attempting to compel, the sculpting of a custom-made wedding cake to celebrate a same-sex marriage, encourage a form of marriage prohibited in Tourovia at the time. R. at 2. As such, the State has

failed to meet its burden showing that it had any compelling interest in coercing Mama Myra's to sculpt a custom-made wedding cake celebrating same-sex marriage against its sincerely held religious beliefs.

2. The Act is not narrowly tailored because it grants exemptions to certain religious public accommodations but not to other public accommodations with the same sincerely held religious beliefs.

The State's interest could be achieved by a narrower statute that burdened religious freedom to a lesser degree and as such Mama Myra's is entitled to a limited exemption. Under the First Amendment, "a statute is narrowly tailored if it targets and eliminates no more than the exact source of" evil" it seeks to remedy. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). Here, the Act's aim at targeting discrimination is not contravened by granting Mama Myra's a limited exemption.

This Court has held, and the Act reinforces, that business owners should not be discriminated against if they desire to run their businesses in a manner required by their religious beliefs. *See Barnwell*, 134 S. Ct. at 2759 (holding that when exemptions are provided for religious nonprofits, there is no reason why the same religious exemption cannot be provided for owners of for-profit businesses with similar religious objections). Even in light of *Obergefell*, this Court held "that religions, and 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." 135 S. Ct. at 2607. In *Trinity Lutheran*, this Court found that a church could not be forced to renounce its religious beliefs so that it could receive funding for a secular purpose. *Trinity Lutheran Church of Colombia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017). In doing so, this Court recognized that a primarily religious institution, such as a church, could have secular actions and purposes that do not prohibit it from receiving secular benefits from the state. *Id.*

Here, the Act has exemptions built into it for public accommodations that are "principally used for religious purposes." TCRA § 22.5(b). However, the State has failed to grant such an exemption to Mama Myra's, and the lower court has affirmed this finding because Mama Myra's is a "secular entity." R. at 11. However, as this Court's precedent indicates, owners of for-profit businesses, and thus the business themselves, may act in accordance with their religious beliefs. *See Barnwell*, 134 S. Ct. at 2759. Here, Mama Myra's owner and all of its employees are outwardly expressing Christians who have never made a wedding cake for a same-sex couple because it would violate their sincerely held religious beliefs. R. at 2-3. By recognizing that a religious entity can act in a secular way for secular purposes, this Court must also recognize that a secular entity, such as Mama Myra's, can act in a religious manner for a religious purpose. Mama Myra's decision to decline the making a cake in celebration of a same-sex marriage was solely motivated by Mama Myra's sincerely held religious beliefs. R. at 3. By permitting churches and other public accommodations an exemption when used "primarily for religious purposes," the Act violates the Free Exercise Clause by not extending the same exemption to non-religious entities comprised of people sharing the same sincerely held religious beliefs. By denying Mama Myra's the same limited exemption granted to religious public accommodations, the State has failed to narrowly tailor the Act in violation Mama Myra's First Amendment right to free exercise of religion. This Court should reverse the lower court's erroneous holding to the contrary.

C. Even under rational basis review, denying Mama Myra's a limited exemption is not rationally related to the state's general interest in eliminating discrimination.

Even if this Court determines the Act to be neutral and of general applicability, the State still fails to meet the burden of showing that enforcement of the Act in this particular instance is rationally related to the State's interests. A court's review of a law requires "that a purpose may

conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker." *Nordlinger v. Hahn*, 505 U.S. 1, 16 (1992) (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528-29 (1959)). Here, the record is entirely void of the government or the lower court setting forth any purpose for granting an exemption to some religious public accommodations but not to those public accommodations with the same sincerely held religious beliefs. R. at 2-16. Without any such rational purpose for denying Mama Myra's a limited exemption, this Court should reverse the lower court and grant Mama Myra's the limited exemption that other public accommodations with the same sincerely held religious beliefs have been granted.

Conclusion

As set forth above, enforcing the Act against Mama Myra's will compel them to choose between violating its sincerely held religious beliefs or violating the law. Because Tourovia's public accommodation law restricts and compels Mama Myra's artistic speech and expression, the Act violates Mama Myra's First Amendment right to free speech. Additionally, because the Act is neither neutral nor generally applicable, the Act violates Mama Myra's First Amendment Free Exercise right since the State has no compelling interest and the Act is not narrowly tailored. As such, the Petitioner respectfully requests that this Court reverse the judgment of the Supreme Court of Tourovia.

Respectfully Submitted,
Team Number 6

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Attorneys for Mama Myra's Bakery, Petitioner