No. 18-321

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

MAMA MYRA'S BAKERY, INC.,
Petitioner,

vs.

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

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TOUROVIA

BRIEF FOR RESPONDENTS

Team 8
Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

QUESTIONS PRESENTED

1. Does Tourovia Civil Rights Act § 22.5(b) violate Mama Myra Bakery's First Amendment right to freedom of speech when the Act requires businesses open to the public to treat all customers equally, does not mandate the act say anything, and it is unlikely that those who would view the Barber's cake would perceive it to be Mama Myra Bakery's endorsement of same sex marriage?

2. Does Tourovia Civil Rights Act § 22.5(b) violate Mama Myra Bakery's First Amendment right to free exercise of religion when the Act is neutral, generally applicable, and furthers the State's compelling interest in protecting their citizens from discrimination based on their sexual orientation?

STATEMENT OF THE CASE

In the early summer of 2012, Hank and Cody Barber, a same-sex couple, wed in P-Town, Massachusetts. R. at 2. Unfortunately, many of their family members were unable to attend. *Id.* So, in August 2012 they entered Mama Myra's Bakery (the "Bakery") in Suffolk County, Tourovia. *Id.* The Barbers wanted the Bakery to create a custom-made wedding cake that they would serve at a family party later in the month at a local catering hall. *Id.* When the couple asked the Bakery to make a cake for them and sculpt a figure of the couple hand-in-hand at the top of the cake, the Bakery declined. *Id.* The Bakery maintained that they refuse to make wedding cakes for same-sex wedding celebrations because it would violate their religious beliefs, but they would sell the Barbers anything else in the store. *Id.* In fact, Mama Myra's Bakery has never baked a wedding cake for a same sex couple because they believe that same-sex marriage violates the teachings of Jesus Christ, the Bible, and all things Christian. R. at 3. Visibly upset that they had been denied a wedding cake, the Barbers stormed out of the Bakery. R. at 2.

Following their encounter at Mama Myra's Bakery, the Barbers filed discrimination charges against the Bakery pursuant to Tourovia Civil Rights Act § 22.5(b) (the "Act"), alleging that the Bakery violated the provision by refusing to sell them a wedding cake because of their sexual orientation. R. at 3. Tourovia Civil Rights Act § 22.5(b) states:

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

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

The Act defines "place of public accommodation" as "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale/retail sales to the public." *Id.* Likewise, the Act defines "sexual orientation" as "an individual's orientation toward hetero, homo, or bi-sexuality, or transgender status, or another individual's perception thereof." *Id.* The Bakery does not dispute that they are a place of public accommodation as defined by the Act. *Id.*

At the trial level, the Bakery argued that it refused to sell the Barbers a wedding cake because of their religious opposition to same-sex marriage, not because of the Barber's sexual orientation. *Id.* However, the District Court of Tourovia ruled in the Barber's favor, holding that there is no distinction between discrimination engaged in because of a person's status and discrimination based on conduct that is closely related to sexual orientation, such as the refusal to make a wedding cake to celebrate a same-sex marriage. R. at 5.

On October 8, 2015, Mama Myra's Bakery filed a Notice of Appeal to the Appellate Division of the Supreme Court of Tourovia. R. at 6. On appeal, the Bakery argued that both their free speech and free exercise rights under the First Amendment were violated because wedding cakes convey celebratory messages about marriage, and that if forced to comply with the Act, it would be unconstitutionally mandated to convey celebratory messages about same-sex marriage, conflicting with

its religious beliefs. R. at 7. The Appellate Division rejected this argument, holding that there was no free speech violation because it is unlikely that the public would view the Bakery's baking of a cake for a same-sex wedding as the Bakery's endorsement of said conduct. R. at 9. Similarly, the Court held that there was no free exercise violation because the Act is neutral and one of general applicability and survives rational basis scrutiny. R. at 10-11. On the other hand, the dissent noted that the Act is not generally applicable or neutral because it targets the religious beliefs of some Christians. R. at 12. Following the Appellate Division's decision, the Supreme Court of the State of Tourovia affirmed the two lower court decisions without opinion. R. at 15.

On January 31, 2018, The Supreme Court of the United States granted Mama Myra Bakery's petition for a Writ of Certiorari to the Supreme Court of the State of Tourovia. R. at 16. Hank and Cody Barber request that this Court affirm the determination that Tourovia Civil Rights Act § 22.5(b) does not violate Mama Myra Bakery's First Amendment rights to freedom of speech and exercise of religion.

SUMMARY OF THE ARGUMENT

First, this Court should uphold the Supreme Court of the State of Tourovia's ruling affirming the decisions of both the District Court of Tourovia and the Appellate Division for the Supreme Court of Tourovia in favor of Hank and Cody Barber on the First Amendment free speech claim. In deciding whether Tourovia Civil Rights Act § 22.5(b) violates the Free Speech Clause of the First Amendment, this Court should adopt the identical two-part analysis used by the Appellate Division of the Supreme

Court of Tourovia. It must be determined (1) whether the Act unconstitutionally compels speech in violation of the Compelled Speech Doctrine and (2) whether Mama Myra Bakery's conduct is inherently expressive, warranting First Amendment protection.

Tourovia Civil Rights Act § 22.5(b) does not unconstitutionally compel speech because it does not require Mama Myra's Bakery nor any other business to "speak the government's message" or "host or accommodate the message of another." The Act only requires that businesses open to the public, like Mama Myra's Bakery, not deny service to an individual or group of individuals based on their sexual orientation. In fact, the Act does not require Mama Myra's Bakery to say anything. Also, Mama Myra Bakery's conduct is not considered inherently expressive speech protected by the First Amendment because it is unlikely that anyone who saw the wedding cake would understand it or perceive it to be Mama Myra Bakery's endorsement of same-sex marriage.

Second, this Court should uphold the Supreme Court of the State of Tourovia's ruling affirming the decisions of both the District Court of Tourovia and the Appellate Division for the Supreme Court of Tourovia in favor of Hank and Cody Barber on the First Amendment free exercise claim. In deciding whether Tourovia Civil Rights Act § 22.5(b) violates the Free Exercise Clause of the First Amendment this Court should adopt the *Smith* analysis, created by the Supreme Court, and adopted by the lower courts in this matter. It must be determined that the Act is (1) neutral and generally

applicable and (2) that even if the Act is not, then it must be rationally related to a legitimate governmental interest.

Tourovia Civil Rights Act §22.5(b) does not unconstitutionally restrict the Bakery's free exercise rights because it is neutral and generally applicable, thus the Act is not targeted or created to suppress the expression of any religion. Continuing, the Act was not created to specifically suppress the exercise of Christianity. Additionally, even if this Court were to find that the Act is not neutral and generally applicable, the Act is rationally related to legitimate governmental interest. Tourovia has an interest in protecting their citizens from unlawful discrimination, especially in places of public accommodation. Thus, this Court should find as the lower courts have, in that the Act does not restrict Mama Myra Bakery's speech or free exercise rights.

ARGUMENT

I. Tourovia Civil Rights Act § 22.5(b) does not violate Mama Myra Bakery's First Amendment right to freedom of speech because it does not compel speech and the Bakery's conduct is not inherently expressive.

The Free Speech Clause of the First Amendment states, "Congress shall make no law… abridging the freedom of speech." U.S. Const. amend. I. The right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). To determine whether Tourovia Civil Rights Act § 22.5(b) violates the Free Speech Clause, this Court should adopt the identical two-part inquiry utilized by the Appellate Division of the Supreme Court of Tourovia. Part one

of the inquiry asks whether the Act unconstitutionally compels speech. *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47 (2006). Part two asks whether Mama Myra Bakery's conduct is inherently expressive to warrant First Amendment protection. *Spence v. Washington*, 418 U.S. 405 (1974).

Mama Myra's Bakery contends that wedding cakes convey a celebratory message about marriage and that if they are forced to comply with the Act, it would be unconstitutionally mandated to convey celebratory messages about same-sex marriage conflicting with its religious beliefs. R. at 7. Nonetheless, this Court should affirm the Supreme Court of the State of Tourovia's determination that there was no First Amendment free speech violation because Tourovia Civil Rights Act § 22.5(b) does not unconstitutionally compel speech and Mama Myra Bakery's conduct is not inherently expressive to warrant First Amendment protection.

A. Tourovia Civil Rights Act § 22.5(b) does not unconstitutionally compel speech in violation of the Compelled Speech Doctrine.

The Compelled Speech Doctrine prohibits the government from requiring an individual to personally "speak the government's message" or forcing one speaker to "host or accommodate another speaker's message." *Rumsfeld*, 547 U.S. at 63. "The right to speak and the right to refrain from speaking are complementary components of the 'individual freedom of mind.'" *Wooley*, 430 U.S. at 714. Likewise, "a system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Id.* Thus, regulations that do not fall under either of these classifications are not considered to compel speech in violation of the Free Speech Clause of the First Amendment. *Id.*

1. Tourovia Civil Rights Act § 22.5(b) does not require Mama Myra's Bakery to "speak the government's message."

The first classification under the Compelled Speech Doctrine establishes that the government may not require an individual to "speak the government's message." *Rumsfeld*, 547 U.S. at 63. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 622, 642 (1943). A state may not invade the sphere of intellect and spirit which it is the purpose of the First Amendment to reserve from official control. *Id.*

In *Rumsfeld*, a group of law schools known as the Forum for Academic and Institutional Rights (FAIR) sued the Secretary of Defense alleging that the Solomon Amendment unconstitutionally compelled them to "speak the government's message." *Rumsfeld*, 547 U.S. at 47. The Solomon Amendment specified that if any part of an institution of higher education denied military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds. *Id.* at 51. FAIR members had adopted policies opposing discrimination based on sexual orientation and wanted to restrict military recruiters on their campuses because they objected to the ban on homosexuals in the military. *Id.* FAIR argued that the Amendment was unconstitutional because they had to choose whether to accommodate the military recruiter's message through emails and flyers or ensure the availability of federal funding. *Id.* at 53. Nonetheless, the Supreme Court rejected this argument and held that the Solomon Amendment neither limited what the

schools could say, nor did it require them to say anything. *Id.* at 60. The Amendment merely required that FAIR provide military recruiters with the same services that they provide other types of recruiters. *Id.* at 60. Thus, accommodating the military's message did not affect the law schools' speech because the schools were not speaking when the military was hosting interviews and recruiting sessions. *Id.* at 64.

Furthermore, in *Wooley*, the Supreme Court was confronted with the question of whether the State of New Hampshire could criminally penalize persons who covered or obstructed the motto "Live Free or Die" on their license plate because the motto was "repugnant to their moral and religious beliefs." *Wooley*, 430 U.S. at 706-707. Analyzing the New Hampshire statute, the Court noted that in effect, the statute impermissibly required that Mr. Maynard use his private car as a "mobile billboard" for the State's ideological message. *Id.* at 715. Moreover, the First Amendment protected Mr. Maynard's right to hold a different point of view than the majority and refuse to foster the "Live Free or Die" motto. *Id.* Therefore, a state is not permitted to require its citizens to publicly display their motto or suffer the consequence of criminal punishment. *Id.*

Here, Tourovia Civil Rights Act § 22.5(b) makes it unlawful for businesses that are open to the public to deny service to someone because of their sexual orientation. R. at 3. In August 2012, Mama Myra's Bakery declined to sell Hank and Cody Barber a wedding cake with a figure of the couple hand-in hand on top because the cake would be used in celebration of same-sex marriage. *Id.* Mama Myra's Bakery has never made a wedding cake for a same-sex couple because they believe that same-sex

marriage violates the teachings of Jesus Christ, the Bible, and all things Christian. R. at 2-3.

Similar to *Rumsfeld*, Tourovia Civil Rights Act § 22.5(b) does not limit what Mama Myra's Bakery can say nor does it require them to say anything. The Act only requires that Mama Myra's Bakery provide the same services to the Barbers (and those like them) as they would any other customer. Moreover, providing the Barbers with a wedding cake does not affect Mama Myra Bakery's speech because they are not speaking when the Barbers are hosting their family party. Prohibiting businesses from denying service to an individual based upon their sexual orientation does not require the business to "speak the government's message." Thus, Tourovia Civil Rights Act § 22.5(b) does not unconstitutionally compel Mama Myra's Bakery to "speak the government's message."

Contrary to *Wooley*, Tourovia Civil Rights Act § 22.5(b) does not demand Mama Myra's Bakery to display any type of state motto or message. Prohibiting the Bakery from denying service to same-sex individuals does not amount to any type of "mobile billboard" or display of the government's ideological message like a license plate. Therefore, this court should affirm the lower court's ruling that Tourovia Civil Rights Act § 22.5(b) does not violate the Compelled Speech Doctrine because it does not require Mama Myra's Bakery to "speak the government's message."

2. Tourovia Civil Rights Act § 22.5(b) does not require Mama Myra's Bakery to "host or accommodate the message of another."

The second classification under the Compelled Speech Doctrine establishes that the government may not force one speaker to "host or accommodate another speaker's message." *Rumsfeld*, 547 U.S. at 63. Challenges under this prong of the Compelled Speech Doctrine frequently involve public accommodation laws which prohibit discrimination on the basis of race, color, religious creed, national origin, sex, or sexual orientation in the admission of any person in any place of public accommodation, resort or amusement. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995). Public accommodations are described as businesses that engage in the provision of publicly available goods, privileges, and services. *Id.* Moreover, "anti-discrimination laws have important purposes that go beyond expressing government values: they ensure that services are freely available in the market, and they protect individuals from humiliation and dignitary harm." *Elane Photography, LLC v. Willock*, 309 P.3d 53, 64 (N.M. 2013).

For instance, in *Elane Photography, LLC*, a same-sex couple sought to secure a photographer for their commitment ceremony but were denied service because the photographer was opposed to same-sex marriage and would not photograph any event that violated her religious beliefs. *Id.* at 59-60. The New Mexico Human Rights Act ("NMHRA") prohibited discriminatory practices by public accommodations against certain classes of people with one of the classes being "sexual orientation." *Id.* at 59. The photographer argued that by requiring her to accept a client who is having a

same sex wedding, the NMHRA compels her to facilitate the messages inherent in the event. *Id.* at 65. The Supreme Court disagreed, and noted that the NMHRA did not, nor could it regulate the content of the photographs that Elane Photography produces. *Id.* at 66. The NMHRA did not "require any affirmation or belief by regulated public accommodations; instead, it required businesses that offer services to the public at large to provide those services without regard for race, sex, sexual orientation, or other protected classifications. *Id.* at 65. Thus, the NMHRA did not unconstitutionally compel Elane Photography to support same-sex marriage, it only required that they not deny service to customers due to their sexual orientation. *Id.*

On the other hand, a state may not require private citizens who organize parades to allow groups whose message they do not wish to convey. *Hurley*, 515 U.S. at 559. GLIB, an organization that promoted pride in their Irish heritage as openly gay, lesbian and bisexual individuals wanted to march in the St. Patrick's Day Parade organized by the South Boston Allied War Veterans Council. *Id.* at 561. After being refused participation in the Parade several times, GLIB filed suit alleging multiple violations of Massachusetts's public accommodations law. *Id.* The Court held that "every participating unit affects the message conveyed by the private organizers" and requiring the organizers to admit GLIB would essentially mandate them to alter the content of the parade. *Id.* at 572-73. By ordering the organizers to admit GLIB, the State violated their First Amendment right to choose the content of their own message. *Id.* at 573. Thus, because the South Boston Allied War Council was a private

organization, the State of Massachusetts could not require them to host GLIB's message. *Id.*

In this case, Tourovia Civil Rights Act § 22.5(b) specifically bans any place of public accommodation from denying the full and equal enjoyment of the goods, services, privileges, facilities, advantages, or accommodations to individuals because of their sexual orientation. R. at 3. The Act defines "place of public accommodation" as "any place of business engaged in any sales to the public, including but not limited to any business offering wholesale/retail sales to the public." *Id.* The parties do not dispute that Mama Myra's Bakery is a "place of public accommodation." *Id.* Moreover, "sexual orientation" is defined as "an individual's orientation toward hetero, homo, or bisexuality, or transgender status or another individual's perception thereof." *Id.*

Like *Elane Photography, LLC*, Mama Myra's Bakery argues that forcing them to comply with Tourovia Civil Rights Act § 22.5(b) unconstitutionally compels them to host or accommodate the Barber's celebratory messages about same-sex marriage. R. at 7. Again, Tourovia Civil Rights Act § 22.5(b) does not regulate the content of Mama Myra Bakery's speech nor does it mandate them to adopt or host another person's message. The Act only requires that Mama Myra's Bakery not deny a person service based upon their sexual orientation.

Furthermore, unlike *Hurley*, Mama Myra's Bakery is not a private organization, but a public accommodation in Suffolk County, Tourovia. R. at 2. Tourovia Civil Rights Act § 22.5(b) does not compel Mama Myra's Bakery to alter the content or type of baked goods they sell to accommodate a message they do not believe

in. The Act merely ensures that places open to the public do not discriminate against persons because of their sexual orientation, a concept totally unrelated to speech. Thus, because Tourovia Civil Rights Act § 22.5(b) does not dictate Mama Myra's Bakery to "speak the government's message" nor "host or accommodate another speaker's message," this Court should affirm the Supreme Court of the State of Tourovia's determination that the Act does not unconstitutionally compel speech as prohibited by the Compelled Speech Doctrine.

B. Mama Myra Bakery's conduct does not warrant First Amendment protection because it is not inherently expressive.

The Supreme Court of the United States has identified that certain conduct is inherently expressive under the First Amendment where (1) there is an intent to convey a particularized message and (2) there is a great likelihood that the message would be understood by those who viewed it. *Spence*, 418 U.S. at 411-12. The conduct in question must be sufficiently expressive to warrant the protection of the First Amendment. *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 438 (9th Cir. 2008). Moreover, the Court has "declined to accept the view that an apparently limitless variety of conduct cannot be labeled "speech" whenever the person engaging in the conduct intends to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Likewise, it is the obligation of the person desiring to engage in the assertedly expressive conduct to demonstrate that the First Amendment is applicable. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

In *Spence*, a college student was arrested and charged when he hung a United

States flag with peace signs affixed on each side upside down from his apartment window. *Spence*, 418 U.S. 405. The student claimed that he "put the peace symbol on the flag and displayed it to public view as a protest against the invasion of Cambodia and the killings at Kent State University…to associate the American flag with peace instead of war and violence." *Id.* at 408. Analyzing the student's conduct using the two-prong test, the Court held that he had an intent to convey a particularized message because he wanted people to know that America stood for peace. *Id.* at 409. Moreover, there was a great likelihood that those who saw the flag would understand the message because his conduct "was roughly simultaneous with and concededly triggered by the Cambodian incursion and Kent State tragedy…. which would have been difficult for the great majority of citizens to miss the drift of his point at the time that he made it." *Id.* at 410. Thus, because the student's conduct satisfied the two-prong test it was considered inherently expressive, triggering First Amendment protection. *Id.* at 415.

Conversely, in *Turner Broad. Sys., Inc.*, cable television providers challenged the "must carry provision" of the Cable Television Consumer Protection and Competition Act of 1992 which required the providers to air local stations on cable systems. *Turner Broad. Sys., Inc. v. Fed. Commc'n Comm'n*, 512 U.S. 622, 626 (1994). Analyzing the provider's First Amendment claim, the Court found that, "given cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." *Id.* at 655. Therefore, there

was not a great likelihood that cable customers would understand the provider's airing of local stations as their endorsement of the station's message. *Id.*

Here, the Barbers requested that Mama Myra's Bakery make them a wedding cake and sculpt a figure of the couple hand-in-hand on the top tier. R. at 2. Despite this, Mama Myra Bakery's conduct is not inherently expressive because, as the Appellate Division of the Supreme Court of Tourovia stated, "it is unlikely the public would view Appellant's baking of a cake for a same-sex wedding celebration as the Bakery's endorsement of said conduct….a reasonable person would find and understand the Bakery's actions as mere compliance with the law and not a reflection of its own beliefs." R. at 9.

Unlike *Spence*, Mama Myra's Bakery does not have an intent to convey a particularized message by baking a cake for the Barbers in compliance with Tourovia Civil Rights Act § 22.5(b). Treating every customer equally regardless of their sexual orientation does not require the Bakery to celebrate or convey any type of celebratory message in support of same-sex marriage. Moreover, the audience for the Barber's cake is much smaller than that of the "great majority of citizens" in *Spence*. The only potential audience to the Barber's wedding cake would be their family. R. at 2. Thus, there would not be a great likelihood that those who saw the wedding cake would understand or perceive any type of message coming from Mama Myra's Bakery, which fails to meet the threshold of inherently expressive.

Similarly, Mama Myra's Bakery may also be considered a conduit for their customer's message like in *Turner Broad. Sys., Inc.* There is little, if any, risk that

the guests at the Barber's family party would assume that baking a cake for the couple was Mama Myra Bakery's endorsement of any type of celebratory message of same-sex marriage. This establishes that Mama Myra Bakery's conduct is not inherently expressive speech protected by the First Amendment. Therefore, this Court should affirm the Supreme Court of the State of Tourovia's holding that Tourovia Civil Rights Act § 22.5(b) does not violate the First Amendment Free Speech Clause because it does not unconstitutionally compel speech nor is Mama Myra Bakery's conduct inherently expressive conduct protected by the First Amendment.

II. Tourovia Civil Rights Act § 22.5(b) does not violate Mama Myra Bakery's First Amendment free exercise rights because the law is neutral and generally applicable and is rationally related to a legitimate governmental interest.

The Free Exercise Clause of the First Amendment, binding on all states alike, states: "Congress shall make no law… prohibiting the free exercise of religion." U.S. Const. amend. I. Likewise, Congress shall make no law respecting an establishment of religion or prohibiting speech. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). It has been long held that this right does not free an individual from an obligation to follow "valid and neutral laws of general applicability on the ground that the law proscribes conduct that his religion proscribes." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990).

Prior to 1990, when a citizen made a claim alleging violation of their free exercise rights the Supreme Court used a balancing test. *See Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). The *Sherbert* balancing test considered whether an action imposed a substantial burden on the

practice of religion, and if so, was it justified by a compelling government interest. *Id.* at 403.

In 1990, the Supreme Court disposed of the *Sherbert* balancing test after finding it obsolete and realizing that weighing state interests against religious claims was an impossible task for the Court. *Smith*, 494 U.S. at 879. In its place, the Court created the following analysis which provides that "…neutral laws of general applicability need only be rationally related to a legitimate governmental interest in order to survive a constitutional challenge." *Id.*

While *Smith* does not explicitly mention the term "rational basis," lower courts have interpreted it as imposing a similar standard of review on neutral laws of general applicability. *See, e.g. Segar v. Ky. High Sch. Athletic Ass'n*, 453 Fed. App'x 630, 634 (2011). Under rational basis review, laws will be upheld if they are "rationally related to furthering a legitimate state interest." *Id.* at 635; *see also Fed. Commc'n Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (stating generally that laws subject to rational basis review must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification").

The Court in *Smith* then found that if a law burdens a religious practice and is not neutral or generally applicable, then it must be "justified by a compelling state interest" and must be narrowly tailored to advance that interest. *Smith,* 494 U.S. at 883.[1] The Court then revisited their 1878 opinion in *Reynolds v. United States*, where

[1] *Smith* recognized upon finding a law neutral and generally applicable, a rational basis test would be applied, however there are two kinds of claims that may still trigger strict scrutiny under

they found that granting a free exercise exemption from a general law would be to permit the religious believer by "virtue of his beliefs, to become a law unto himself," which would result in a contradiction of both common sense and constitutional law. *Id.* at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

In the instant case, Tourovia Civil Rights Act §22.5(b) does not warrant a free exercise claim seeing as the Act is (A) neutral and generally applicable because it does not target a certain religion and simply makes discrimination in a place of public accommodation unlawful and (B) is rationally related to a legitimate governmental interest because Tourovia has an interest in eliminating discrimination based on an individual's sexual orientation.

A. Tourovia Civil Rights Act § 22.5(b) is neutral and generally applicable because it does not target a particular religious practice.

The first requirement to merit a free exercise claim is that the law in question not be neutral or generally applicable seeing as it is created, specifically, to infringe upon a group's religion. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993); *see also, Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643 (10th Cir. 2006). Additionally, a law is not generally applicable when it imposes a burden on religiously motivated conducted while permitting exceptions for

---

the Free Exercise Clause: (1) laws that are not neutral and generally applicable, but target religious exercise and invalid unless they satisfy strict scrutiny or (2) "hybrid claims" involving free exercise and another constitutional right can also trigger strict scrutiny. *Smith*, 494 U.S. at 881-82. However, the facts at hand do not support either exception and therefore a strict scrutiny analysis is not appropriate.

secular conduct or favored religions. *Id.* at 543. When analyzing whether a law is neutral and/or generally applicable, the Court has found the terms to be interrelated. *Church of Lukumi,* 508 U.S. at 531.

The requirements for a free exercise claim are rarely met, if ever, with one of the last times a claim was successfully made being the early 1990s. *Id.* at 531-32, 546-47. In 1993, the Supreme Court invalidated a set of ordinances that had been adopted by the City of Hialeah, Florida as a result of a Santeria church's claiming their free exercise rights had been violated. *Id.* There, Hialeah made it a crime to sacrifice an animal. *Id.* The statute stated, "[w]hoever ... unnecessarily or cruelly ... kills any animal," which has been interpreted to reach killings for religious reasons, and defined "sacrifice" as "to unnecessarily kill ... an animal in a ... ritual ... not for the primary purpose of food consumption." *Id.* The statute further prohibited the "possession, sacrifice, or slaughter" of an animal if it is killed in "any type of ritual." *Id.* The city created this ordinance as a direct response to the growing Santeria church presence, whose principal form of devotion was animal sacrifice. *Id.* The Court held that the ordinance was not generally applicable because it "pursue[d] the city's governmental interests only against conduct motivated by religious belief." *Id.* at 544.

Had the city simply created a general ban against animal killing, there would not have been a free exercise issue. However, due to the fact that this ordinance specifically targeted the Santeria faith, the Court found that the burden imposed was direct, substantial, and discriminatory. *Id.* The Court continued by explaining that a

law does not need to apply to every individual or entity to be generally applicable, just that the law cannot regulate religious conduct. *Id.; see also Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 276 (3d Cir. 2007) ("What makes a system of individualized exemptions suspicious is the possibility that certain violations may be condoned when they occur for secular reasons but not when they occur for religious reasons.").

Here, Tourovia Civil Rights Act § 22.5(b) makes it unlawful and an act of discrimination for anyone to deny an individual goods or services at any place of accommodation because of their sexual orientation. R. at 3. In creating the Act, Tourovia was attempting to suppress discrimination based on one's sexual orientation and in doing so was not targeting a specific religion. As stated above, in order for a free exercise claim to survive, the law cannot be neutral and generally applicable. Here, Tourovia Civil Rights Act § 22.5(b) is neutral because it does not target a specific religion, and unlike *Lukumi*, was not created with the intent of suppressing a specific religion. Likewise, the Act does not specifically identify acts of Christianity or particular forms of devotion a Christian may perform. The law simply is in place to create equality and prevent discrimination in businesses that are open to the public.

Additionally, the word "discrimination" is not inherently religious like the words, "prayer", "worship", "sacrifice" and "ritual", or any other similar words used in the statute at issue in *Church of Lukumi*. Tourovia Civil Rights Act § 22.5(b)'s non-discrimination policy passes the general applicability and neutrality requirement on

its face due to the language used in its target audience being "for any persons or persons". R. at 3.

Following the *Obergefell* decision legalizing same-sex marriage in 2015, Kentucky issued an order requiring all county clerks to issue marriage licenses to same-sex couples. *Miller v. Davis*, 123 F. Supp. 3d 924, 929 (E.D. Ky. 2015). Davis, a clerk, refused to issue marriage licenses to same-sex couples due to her religious beliefs. *Id.* Davis argued that issuing marriage licenses to same-sex couples was an endorsement of same-sex marriage, which violated her religious beliefs. *Id.* Davis then unsuccessfully argued that the Governor's order should be subject to strict scrutiny because it "substantially burdens her free exercise rights by requiring her to disregard her sincerely-held religious beliefs," and additionally that "it does not serve a compelling state interest." *Id.* The Court relied on *Smith* and rejected Davis's free exercise argument, finding that all legal rules Davis was subjected to were generally applicable and that Davis was not entitled to any special accommodation from her legal duties. *Id.*

In our case, Mama Myra's Bakery argues that Tourovia Civil Rights Act § 22.5(b) is not generally applicable and that this Court should therefore apply strict scrutiny. However, even assuming *arguendo* that the Act would be subject to a strict scrutiny analysis, the law would nonetheless survive because it furthers a compelling state interest and is narrowly tailored to that interest. Thus, the Bakery's free exercise claim fails.

B. Tourovia Civil Rights Act § 22.5(b) furthers a compelling state interest because the State has an interest in protecting their citizens from discrimination.

The law of public accommodations finds its roots in early English Common Law. *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1286 (1996). Dating back to sixteenth century England, early case law required innkeepers to admit guests if the inn was not already full which gave birth to the concept of what is now known as "public accommodations law." *Id.* It was based on the idea that "one that has made [a] profession of a public employment is bound to the utmost extent of that employment to serve the public." *Id. (*citing *Lane v. Cotton*, 88 Eng. Rep. 1458 (K.B. 1701)). The common-law duty to serve the public without discrimination as an absolute responsibility was bound inextricably in the "profession of a trade which is for the public good." *Id.*

Modern law has identified that public accommodation laws are "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination." *Hurley,* 515 U.S. at 557. The creation of these laws is rationally related to the government's legitimate interest in ensuring equal access to public accommodations. *See Vill. Of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) (law "must be reasonable and not arbitrary and it must bear a rational relationship to a state objective); *Bd. of Dir.'s of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) ("public accommodations laws plainly serve compelling state interests of the highest order"); *Swanner v. Anchorage Equal Rights Comm'n*, 874

P.2d 274, 282-83 (Alaska 1994) (discussing that public accommodation laws serve the important purpose of protecting minority group members from incidents of discrimination).

In the past, the Supreme Court of the United States has been faced with issues regarding public accommodations, especially those involving a new constitutionally protected group. *See Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 549 (government had a compelling interest in eliminating discrimination against women in places of public accommodation); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (government had a compelling interest in eliminating racial discrimination in private education).

Furthermore, the Supreme Court has found multiple times that barring a religion from a certain act is a necessity if faced with the potential for discrimination. *See, e.g., Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (State's interest in "improving health, safety, morals and general well-being of citizens" warranted denying Jewish storeowners religious exemption from Sunday closing law); *Roberts*, 468 U.S. at 624 (Minnesota's public accommodation laws reflect the State's commitment to eliminating discrimination and assuring equal access to publicly available goods and services); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) ("The lessons of our constitutional history are clear: inclusion strengthens, rather than weakens, our most important institutions. When we integrated our schools, education improved. When we opened our juries to women, our democracy became more vital. When we allowed lesbian and gay soldiers to serve openly in uniform, it enhanced unit cohesion, when

same-sex couples are married, just as when opposite-sex couples are married, they serve as models of loving commitment to all.").

Similar to the cases above involving women, race, and religion, the Supreme Court has found that the Constitution entitles same-sex couples to civil marriage on the same terms and conditions as heterosexual couples. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). There, the Supreme Court legalized gay marriage, and with it, gave those of all sexual orientations equal rights under the Constitution. *Id.* In doing so, the Court held that "the nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation." *Id.* at 2599. In concurring with the Court's opinion Justice Kennedy stated:

> Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and *neither they nor their beliefs are disparaged here*. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. *Id.* at 2603 (emphasis added).

In our case, Tourovia has a legitimate interest in protecting its citizens from sexual orientation discrimination. As shown above, sexual orientation is a newly protected group, as were women and people of color at one point in history. The Court has seen issues with public accommodations and newly recognized groups and has always found for the individual's protection over a business. Furthermore, Tourovia is not alone in this mission to uphold one's sexual orientation or, more particularly, constitutional rights. *See Gifford v. McCarthy*, 137 A.D.3d 30 (N.Y. App. Div. 2016)

(holding that the owners of a popular wedding venue in New York could not ignore state law that prohibited public accommodations from engaging in sexual-orientation discrimination); *State v. Arlene's Flowers, Inc.,* 389 P.3d 543, 557 (Wash. 2017) (Washington Supreme Court rejected florist's claims that she had free exercise rights to refuse to provide flowers for a gay couple's wedding. The Washington Supreme Court held, by comparing to other religions, that "[p]roviding flowers for a wedding between Muslims would not necessarily constitute an endorsement of Islam, nor would providing flowers for an atheist couple endorse atheism."); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination."); *Id.* at 583 (O'Connor, J., concurring in the judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is ... directed toward gay persons as a class.").

Mama Myra's Bakery argues that although unwilling to make the cake, the business is more than happy to sell the Barbers any cake within the store. However, allowing this kind of selective behavior would unwind everything the Court has found and held over the last century. *See Elane Photography, LLC*, 309 P.3d at 62 ([I]f a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve them appetizers.... Elane Photography's willingness to offer some services to [a woman entering a same-sex marriage] does not cure its refusal to provide other services that it offered to the general public."). Similarly,

while Mama Myra's Bakery may in fact be willing to sell any cake aside from those created especially for a same-sex couples, the business is still stripping the Barbers of their constitutional rights and imposing sexual orientation discrimination on the citizens of Tourovia.

Finally, it need be reiterated that Tourovia Civil Rights Act § 22.5(b) does not compel Mama Myra's Bakery to support or endorse any particular religious views, but merely prohibits Mama Myra from discriminating against potential customers on account of their sexual orientation. Thus, because Tourovia Civil Rights Act § 22.5(b) does not violate Mama Myra Bakery's First Amendment rights under both the Free Speech Clause and the Free Exercise Clause, this Court should affirm the ruling of the Supreme Court of the State of Tourovia.

CONCLUSION

For these reasons, this Court should uphold the Supreme Court of the State of Tourovia's decision affirming the rulings of both the District Court of Tourovia and the Appellate Division for the Supreme Court of Tourovia in favor of Hank and Cody Barber.

Respectfully submitted,

Date: February 26, 2018

Team 8
ATTORNEYS FOR RESPONDENTS