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

IN THE DISTRICT COURT OF TOUROVIA
COUNTY OF SUFFOLK

THE STATE OF TOUROVIA, on Behalf of Hank and Cody Barber, *Plaintiff,* vs. **MAMA MYRA'S BAKERY,** *Defendant.*	Case No.: 17-tc-455

Stevens, Fred K., Judge:

I. BACKGROUND

In August 2012, Hank and Cody Barber entered Mama Myra's Bakery ("Bakery"), a small shop in Suffolk County, Tourovia. Hank and Cody wanted the Bakery to create for them a custom made wedding cake that they would serve at a family party later in the month at a local catering hall. Earlier that summer they had wed in P-Town, Massachusetts, where same-sex marriage was legal, and many family members were unable to attend. At that time, Tourovia did not allow same-sex marriages. When the couple asked the Bakery to make the cake, and to sculpt a figure of the couple hand-in-hand on the top tier of the cake, the Bakery declined, telling the Barbers that they would not create wedding cakes for same-sex weddings because it would violate the sincerely-held religious beliefs held by all Bakery employees. The baker did, however, offer to make and sell any other baked good to the Barbers for their family party. Hank and Cody Barber both became visibly upset and stormed out of the Bakery without saying a word.

The owner of Mama Myra's Bakery, in addition to all of his family member employees, are Christians and have been outwardly expressing such for over twenty-seven years. 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.

A few weeks after the Bakery had refused to sell the couple their specially-created wedding cake, the Barbers filed charges of discrimination pursuant to the Tourovia Civil Rights Act, claiming that Mama Myra's Bakery violated § 22.5(b) by not selling them a wedding cake due to their sexual orientation. Tourovia § 22.5(b) of their Civil Rights Act regulates places of public accommodation. In relevant part, it 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[1] because of their sexual orientation.[2]

II. DISCUSSION

The parties do not dispute any of the material facts noted above, including that the Bakery is a place of public accommodation as defined by the Act, and that in August of 2012 it declined to sell Hank and Cody Barber a wedding cake because the cake would be used in celebration of a same-sex marriage. Nevertheless, there are two issues before the court today. First, Defendant contends that § 22.5(b) of the Act does not apply to Mama Myra's Bakery with respect to its actions with Hank and Cody Barber. The Defendant argues that the reason it refused to sell the Barbers a wedding cake was not because of their sexual orientation, but because of the Bakery's employees' religious opposition to same-sex marriage. Under the Act, a violation of § 22.5(b) can only occur if the discrimination is *because of* sexual orientation

[1]Place of Public Accommodation is defined 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."

[2]Sexual Orientation is defined as "an individual's orientation toward hetero, homo, or bi sexuality, or transgender status, or another individual's perception thereof.

discrimination. Defendant distinguishes between discrimination based on a person's status and discrimination based on a person's conduct that may be closely related with that status. If the Court finds that the discrimination Defendant engaged in is based solely on a person's conduct (even if closely related to their status), but there is no intertwining of both forms of discrimination, then Defendant contends that it could not have violated § 22.5(b) of the Act.

For this contention, Defendant relies on *Bray v. Alexandria Women's Health Clinic*, which declined to equate opposition to voluntary abortion with discrimination against women. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). Defendant claims that since the act of abortion was not exclusively held to be discrimination of a person's status as a woman, then the court should not hold that the act of same-sex marriage is discrimination of a person's status as a homosexual, bisexual, or transsexual.

Plaintiffs, Cody and Hank Barber, rely on U.S. Supreme Court precedent, arguing that discrimination based on a person's status and discrimination based on a person's conduct is so closely correlated that the distinction lacks legal recognition. *See Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 689 (2010) ("[The Christian Legal Society] contends that it does not exclude individuals because of sexual orientation, but rather 'on the basis of a conjunction of conduct and the belief that the conduct is not wrong.' . . . Our decisions have declined to distinguish between status and conduct in this context."); *Lawrence v. Texas*, 539 U.S. 558, HN 11 (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."); *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) (concluding that prohibiting admission to students married to someone of a different race was a form of racial discrimination, although the ban restricted conduct). Additionally, Plaintiff argues

the bright-line rule from *Obergefell v. Hodges*, where the Supreme Court equated laws precluding same-sex marriage to discrimination on the basis of sexual orientation, stating that "laws that burden the liberty of same-sex couples…abridge central precepts of equality." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2605 (2015).

III. CONCLUSION

This Court holds the State of Tourovia has met its burden of showing that Mama Myra's Bakery refusal to create a wedding cake for Hank and Cody Barber violated the public accommodation provision of the Act. This Court finds that there is no distinction between discrimination engaged in because of a person's status, in this case the Plaintiffs' sexual orientation, 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. As a result, Hank and Cody Barber's Equal Protection rights, under the Tourovia State Constitution[3] were violated.

Date: September 30, 2015.
/s/ Fred K. Stevens.
Tourovia District Court Judge

[3] The Tourovia State Constitution mirrors the language of the First and Fourteenth Amendments of the Federal Constitution. References will be solely to the federal Constitution.

IN THE DISTRICT COURT OF TOUROVIA
COUNTY OF SUFFOLK

THE STATE OF TOUROVIA, on Behalf of Hank and Cody Barber, *Plaintiff,* vs. **MAMA MYRA'S BAKERY,** *Defendant.*	Case No.: 17-tc-455

Notice of Appeal

PLEASE TAKE NOTICE that Mama-Myra's Bakery hereby appeals to the Appellate Division of the Supreme Court of Tourovia, Fourth Department, from the judgment entered in this action on September 30, 2015.

Dated: October 8, 2015

/s/ Briana Johnson
Fullbrook State Attorney's Office
45 Fairway Road
Fullbrook, Tourovia, 19191
531-555-8762
B.Johnson@fbk.gov

APPELLATE DIVISION OF THE SUPREME COURT OF TOUROVIA,
FOURTH DEPARTMENT

MAMA MYRA'S BAKERY, *Defendant-Appellant,* vs. **THE STATE OF TOUROVIA, on Behalf of Hank and Cody Barber,** *Plaintiff-Appellee,*	Case No.: 19-jf-270

Memorandum Opinion and Order

McDermott, Thomas A. Appellate Judge:

This matter is before the Court on Defendant-Appellant's motion to set aside judgment. After briefing, a hearing was held on October 20, 2015. All facts are accepted from the District Court of Tourovia's Opinion. For the reasons set forth below, the Defendant-Appellant's motion is **DENIED.**

I. OPINION

A. Freedom of Speech

Appellant Bakery argues that the District Court's holding violated § 22.5(b) of Tourovia's Civil Rights Act, by violating its right to free speech and to free exercise of religion under the First Amendment of the U.S. Constitution. The Bakery contends that wedding cakes convey celebratory messages about marriage, and that if it forced to comply with the Act, it would be unconstitutionally mandated to convey celebratory messages about same-sex marriages, conflicting with its religious beliefs. The First Amendment of the United States Constitution prohibits laws "abridging the freedom of speech." U.S. CONST. amend. I; *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969); *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117 (2011). Appellant turns to *Wooley v. Maynard* and *Rumsfeld v. Forum*

for Academic & Institutional Rights, Inc., and cites to those Court decisions to support their position that the First Amendment speech clause prohibits the government from telling people what they must say. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006); *Wooley v. Maynard*, 430 U.S. 705 (1997). Specifically, Appellant relies on the compelled speech doctrine's interpretation in *Rumsfeld*, which prohibits the government from requiring that an individual "speak the government's message," and bans the government from requiring individuals to "host or accommodate another speaker's message." *FAIR*, 547 U.S. at 63; *see also Wooley*, 430 U.S. at 715-17; *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) (holding that West Virginia could not require students to salute to the American flag and recite the Pledge of Allegiance); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (invalidating a Florida law which provided that if a local newspaper criticized a candidate for public office, the candidate could demand that the newspaper publish his or her reply to the criticism free of charge); *see also Pacific Gas and Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986).

Moreover, Appellant looks to the Supreme Court's legal differentiation between speech and conduct, and its recognition that some forms of conduct are symbolic speech and deserve First Amendment protections. *United States v. O'Brien*, 391 U.S 367 (1968). This Court, however, must then determine whether the conduct is "inherently expressive," meaning there is "an intent to convey a particularized message that was present, and whether the likelihood was greater that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397 (1989); *see also Spence v. Washington*, 418 U.S. 405 (1974). In order to trigger First Amendment protection for Appellant's conduct, it must be conduct that is sufficiently expressive. *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 438 (9th Cir. 2008). Additionally, the

Appellant has the burden of demonstrating that the First Amendment applies and Appellant must advance more than a mere "plausible contention" that its conduct is expressive. *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288 (1984). We find that Appellant has not met that burden.

We rely on the Court's analysis in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. at 47. The Tourovia Act prohibits all places of public accommodation from discriminating against customers because of their sexual orientation. It is unlikely that the public would view Appellant's baking of a cake for a same-sex wedding celebration as the Bakery's endorsement of said conduct. It is the opinion of this Court that 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.

B. Freedom of Religion

Additionally, Appellant argues that Tourovia's Civil Rights Act violates its First Amendment free exercise rights. The Free Exercise Clause of the First Amendment, which is binding on the States via the Fourteenth Amendment, provides in relevant part: "Congress shall make no law … prohibiting the free exercise of religion." U.S. CONST. amend. I; U.S. CONST. amend. XIV; *See also Cantwell v. Connecticut*, 310 U.S. 296 (1940). Appellant relies on the interpretation of the Free Exercise Clause in *Employment Division Department of Human Resources v. Smith* which states that "the free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." In order to prove that a state law violates the Free Exercise Clause, a challenger, in this case Appellant, must show that that the law is one of general applicability and that it is not rationally related to a legitimate governmental interest. *Smith*, 494 U.S. at 879. However, if a law burdens a religious practice and

is not neutral or generally applicable, as Appellant contends, the burden shifts to the State, Appellee, to show the law is justified by a compelling government interest that is narrowly tailored to advance that interest. *Smith*, 494 U.S. at 883. We disagree with Appellant's argument that this law targets religious practice and therefore should be subject to strict scrutiny.

First, we find that the Act at issue is neutral and one of general applicability. A law is not neutral "if the object of the law is to infringe upon or restrict practices because of their religious motivation." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 562 (1993). A law is not generally applicable when it imposes burdens on religiously motivated conduct while permitting exceptions for secular conduct or for favored religions. *Id*. at 543. We do not find the Act analogous to the non-neutral law in *Lukumi* which targets a particular religious practice, but instead find that because it regulates all discriminatory conduct, only religiously-motivated conduct, it is neutral and generally applicable. *Id*. at 542-44. The Act does not discriminate on the basis of religion or target religious groups who may not discriminate, but merely exempts certain public accommodations that are "principally used for religious purposes." TCRA § 22.5(b). Thus, the Act can be deemed a law of general applicability.

Next, we find that the Act does not impede the free exercise of religion. The Act has an exemption carved out for "places solely used for religious purposes" which reflects an attempt by Tourovia to reduce legal burdens on religious organizations and comport with Free Exercise doctrine. U.S. CONST. amend. I. These exemptions exist throughout Tourovia law, and clearly demonstrate that Tourovia statutes expressly recognize the protections of the Free Exercise clause in specific circumstances; the Tourovia legislature, and this Court, have determined that the anti-discrimination public accommodation provision of the Act is not one of those circumstances where an exemption is warranted.

The Bakery is a secular entity. Its primary purpose is to produce and sell baked goods, not to impart religious messages or infuse its religious beliefs into its products. Since the Act does not exempt secular conduct from its reach, and Mama Myra's Bakery is not used primarily for religious purposes, but rather baking all kinds of bakery goods for all types of occasions, including some religious ones, we find that the act is generally applicable and neutral and that it survives rational basis scrutiny. *Id.*; *see also Priests for Life v. Dep't of Health and Human Servs.*, 772 F.3d 229, 268 (D.C. Cir. 2014). Mama Myra's Bakery may not hide behind its First Amendment protections to engage in discrimination in their public accommodations business.

II. CONCLUSION

This Court concludes that the Act does not violate Appellants' First Amendment rights to freedom of speech or freedom to freely exercise their religion. Therefore, the Act is constitutional and, as a result, Hank and Cody Barber's Fourteenth Amendment Equal Protection rights, were violated.

Date: October 15, 2015.
/s/ Thomas A. McDermott.
Appellate Court Judge

Snyder, Jeffery M. Dissenting Appellate Judge:

I dissent from my fellow Judges only with respect to the free exercise issue, not the freedom of speech portion of the decision, and the reason is simple. The Act at issue is similar to the law the Supreme Court found to be neither neutral nor generally applicable in *Church of Lukumi*. The law at issue in that case applied to any individual or group that "kills, slaughters, or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animals to be consumed." *Church of Lukumi*, 508 U.S. at 527. The ordinance's terms such as "sacrifice" and "ritual" could either be secular or religious, yet the Court found that the law was not neutral because its purpose was to impede certain practices of the Santeria religion. *Id*. at 534.

The *Lukumi* case is analogous to Appellant's case. Like *Lukumi*, some of the conduct that falls within the Act may be secular while some may be religious; and, the baked goods produced by Mama Myra's Bakery may or may not be for religious purposes or have religious meaning behind them. The Court in *Lukumi*, concluded that the law was not generally applicable despite the fact that not all of the prohibited or exempted conduct targeted Santeria. This case is no different. The Act is not generally applicable because its prohibitions, like *Lukumi*, target the religious of beliefs of some Christians. If the Court upheld exemptions in *Lukumi* for the killing of animals for several secular purposes, why should we not uphold exemptions in the Tourovia Act for the practice of Christian religious beliefs. *Id*. at 526-28.

For this reason, I dissent, finding that the Act is neither neutral nor generally applicable and therefore violates the Appellant's First Amendment right to free exercise of religion.

Date: October 15, 2015.
/s/ Jeffery M. Snyder.
Appellate Court Judge

APPELLATE DIVISION OF THE SUPREME COURT OF TOUROVIA,
FOURTH DEPARTMENT

MAMA MYRA'S BAKERY, *Defendant-Appellant,* vs. **THE STATE OF TOUROVIA, on Behalf of Hank and Cody Barber,** *Plaintiff-Appellee,*	Case No.: 19-jf-270

Notice of Appeal

PLEASE TAKE NOTICE that Mama-Myra's Bakery hereby appeals to the Supreme Court of Tourovia from the judgment entered in this action on October 26, 2015.

Dated: October 30, 2015

/s/ Monique Base
Fullbrook State Attorney's Office
45 Fairway Road
Fullbrook, Tourovia, 19191
531-555-8762
M.Base@fbk.gov

SUPREME COURT OF TOUROVIA

MAMA MYRA'S BAKERY *Defendant-Appellant,* vs. **THE STATE OF TOUROVIA, on Behalf of Hank and Cody Barber,** *Plaintiff-Appellee,*	Case No.: 12-mk-112

Grossman, Hannah D., Justice of the Supreme Court of Tourovia:

The Supreme Court of the State of Tourovia **AFFIRMS** the decisions of both the District Court of Tourovia and the Appellate Division for the Supreme Court of Tourovia, Fourth Department.

THE SUPREME COURT OF THE UNITED STATES
MARCH TERM, 2018

MAMA MYRA'S BAKERY *Defendant-Appellant,* vs. **THE STATE OF TOUROVIA, on Behalf of Hank and Cody Barber,** *Plaintiff-Appellee,*	Case No.: 12-mk-112

Order

The petition for a Writ of Certiorari to the Supreme Court of the State of Tourovia is hereby granted.

IT IS ORDERED that the above-captioned cause be set down for argument in the April term of 2018, with argument limited to the following issues:

1. Does Tourovia's Civil Rights Act § 22.5(b) violate Mama Myra Bakery's First Amendment right to freedom of speech?

2. Does Tourovia's Civil Rights Act § 22.5(b) violate Mama Myra Bakery's First Amendment right to the free exercise of religion?

Dated: January 31, 2018