

**Docket Number 18-321**

IN THE

**THE SUPREME COURT OF THE UNITED STATES**

---

MAMA MYRA'S BAKERY, INC.,

Petitioner,

versus

THE STATE OF TOUROVIA,

on Behalf of Hank and Cody Barber

Respondents.

---

**BRIEF FOR THE PETITIONER**

---

ON WRIT OF CERTIORARI TO THE  
STATE OF TOUROVIA COURT OF APPEALS

Team 9  
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES .....iii

QUESTIONS PRESENTED ..... 1

STATEMENT OF THE CASE..... 1

SUMMARY OF THE ARGUMENT ..... 3

ARGUMENT ..... 5

I. TOUROVIA’S CIVIL RIGHTS ACT § 22.5(b) VIOLATES MAMA MYRA BAKERY’S FREEDOM OF SPEECH PROTECTED UNDER THE FIRST AMENDMENT..... 5

A. Tourovia Civil Rights Act §22.5(b) violates Mama Myra Bakery’s First Amendment right to freedom of speech because the Act violates The Compelled Speech Doctrine .....6

1. Tourovia Civil Rights Act §22.5(b) requires the Bakery to “speak the government’s message” .....6

2. Tourovia Civil Rights Act §22.5(b) requires the Bakery to “host or accommodate another speaker’s message” .....8

B. Tourovia Civil Rights Act §22.5(b) violates Mama Myra Bakery’s First Amendment right to freedom of speech because the Bakery’s conduct is inherently expressive .....9

II. TOUROVIA’S CIVIL RIGHTS ACT § 22.5(b) VIOLATES MAMA MYRA BAKERY’S SINCERELY HELD RELIGIOUS BELIEFS ABOUT MARRIAGE PROTECTED UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT..... 11

A. Tourovia Civil Rights Act §22.5(b) Is Neither Generally Applicable Nor Neutral as Applied .....13

B. The Court of Appeals Erred in Applying Rational Basis and Therefore The Court Should Apply Strict Scrutiny .....17

CONCLUSION..... 20

## TABLE OF AUTHORITIES

### CASES

<i>Attorney General v. Desilets</i> , 418 Mass. 316 (1994) .....	18
<i>Cantwell v. Connecticut</i> , 310 U.S. 296 (1940) .....	12, 13
<i>Church of the Lukumi Babalu Aye, Inc. v. City of Hilaleah</i> , 508 U.S. 520 (1993) .....	12, 13, 14, 15, 17, 18
<i>Elane Photography, LLC v. Willock</i> , 309 P.3d 53 (2013) .....	7, 10
<i>Emp't Div. v. Smith</i> , 494 U.S. 872 (1990) .....	12, 13, 18
<i>Hurley v. Irish-American Gay</i> , 515 U.S. 557 (1995) .....	7
<i>Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo</i> , 418 U.S. 241 (1974) .....	9
<i>Obergefell v. Hodges</i> , 135 U.S. 2584 (2015) .....	16, 17
<i>Pac. Gas &amp; Elec. Co. v. Pub. Utils. Com.</i> , 475 U.S. 1 (1986) .....	8, 9
<i>Rumsfeld v. Forum for Acad. &amp; Institutional Rights, Inc.</i> , 547 U.S. 47 (2006) .....	6, 8
<i>Spence v. Washington</i> , 418 U.S. 405 (1974) .....	10
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989) .....	10
<i>Thomas v. Review Bd. Of Ind. Emp't Sec Div.</i> , 450 U.S. 707 (1981) .....	13

*Tinker v. Des Moines Indep. Cmty. Sch. Dist.*,  
393 U.S. 503 (1969).....10

*Trinity Lutheran Church of Columbia, Inc. v. Comer*,  
137 U.S. 2012 (2017).....15

*United States v. O'Brien*,  
391 U.S. 367 (1968).....10

*W. VA. State Bd. of Educ. v. Barnette*,  
319 U.S. 624 (1943)..... 7, 11

*Wis v. Yoder*,  
406 U.S. 205 (1972).....14

*Wooley v. Maynard*,  
430 U.S. 705 (1977)..... 6, 7, 8

**CONSTITUTIONAL PROVISIONS**

U.S. Const. amend. I.....5

**STATUTES**

Tourovia Civil Rights Act §22.5(b) ..... 1, 5, 13

## QUESTIONS PRESENTED

- I. Whether the Tourovia Civil Rights Act § 22.5(b) violated the Bakery's freedom of speech under the First Amendment when the Act compels the Bakery to speak and the conduct of the Bakery is inherently expressive.
- II. Whether the Tourovia Civil Rights Act § 22.5(b) violated the Bakery's freedom of religion under the Free Exercise Clause of the First Amendment when the Act forces religious objectors to participate in a wedding ceremony that violates Bakery's sincerely held religious beliefs about marriage.

## STATEMENT OF THE CASE

### A. The Proceedings Below

Hank and Cody Barber initiated this action of discrimination pursuant to the Tourovia Civil Rights Act, alleging that Mama Myra's Bakery engaged in sexual-orientation discrimination, thus, violating § 22.5(b). R. at 3. The 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, service, privileges, facilities, advantages, or accommodations of any place of public accommodation because of their sexual orientation. R. at 3.

The District Court held that the State of Tourovia had met its burden of showing that the Bakery's refusal to create a custom wedding cake for Hank and Coke Barber violated the public accommodation provision of the

Act. R. at 5. The Bakery did not dispute that it was a place of accommodation defined by the Act. R. at 3. The court found Hank and Cody Barber's Equal Protection rights were violated on the grounds that there was no distinction between discrimination engaged in because of a person's status such as sexual orientation, and discrimination based on conduct that is closely related to sexual orientation. *Id.*

The Court of Appeals denied Appellant's motion to set aside judgment and found for Hank and Cody Barber on the grounds that refusing to create and sculpt a custom wedding cake for them violated their Fourteenth Amendment Equal Protection rights. R. at 7-11. The court also determined that the Act did not violate Appellant's First Amendment rights to freedom of speech or freedom to freely exercise their religion since they found the Act to be generally applicable and neutral, which surpassed rational basis scrutiny. R. at 11.

Appellant appealed to the Supreme Court of Tourovia, the court affirmed the decisions of both the District Court of Tourovia and the Appellate Division for the Supreme Court of Tourovia. R. at 14-15. This Court then granted Mama Myra's writ of certiorari on January 31, 2018.

B. The Facts

Appellant Mama Myra's Bakery ("Bakery") is a small shop in Suffolk County, Tourovia. R. at 2. The owner of Mama Myra's Bakery, including all of his family member employees, are Christians and have been outwardly

expressing their religious faith for over twenty-seven years. *Id.* The Bakery has never made a wedding cake for a same-sex couple throughout their many years in business because they sincerely believe that same-sex marriage violates the teachings of Jesus Christ, the Bible, and all things Christian. R. at 3.

However, in August 2012, a same-sex couple, Hank and Cody Barber visited the Bakery and wanted the bakers to create a custom made wedding cake. R. at 2. During this time, the state of Tourovia did not recognize same-sex marriages. *Id.* The couple had wed in P-Town, Massachusetts, where same-sex marriage was legal. *Id.* Not only did the same-sex couple ask for the Bakery to create a custom wedding cake, they also asked the Bakery to sculpt a figure of the couple hand-in-hand on the top tier of the cake. *Id.* The Bakery politely declined the request to sculpt and create a custom wedding cake because it would violate their sincerely-held religious beliefs by all of the Bakery employees. *Id.* These religious limitations on the Bakery's custom work have no bearing on his other baked goods, which the Bakery happily offered to sell and make Hank and Cody Barber any other item for their family party. *Id.* This did not sit well with the same-sex couple, resulting in both male partners storming out of the Bakery visibly upset without saying a word after the Bakery declined for religious purposes to sculpt and create a wedding cake. *Id.*

## SUMMARY OF THE ARGUMENT

The Court of Appeals erred in finding that the state of Tourovia Civil Rights Act §22.5(b) did not violate the Bakery's freedom of speech or freedom of religion under the First Amendment for the following reasons:

First, the Court of Appeals erred in finding that the Tourovia Civil Rights Act § 22.5(b) does not violate the Bakery's First Amendment right to freedom of speech. The Act is compelling the Bakery to speak the government's message and host or accommodate another speaker's message, which is a violation of the Bakery's First Amendment right to freedom of speech. Furthermore, the Bakery's conduct is inherently expressive and is entitled to First Amendment protection. Requiring the Bakery to bake a cake for a same-sex wedding celebration violates the Bakery's First Amendment right to freedom of speech.

Second, the Court of Appeals incorrectly found that the Tourovia Civil Rights Act § 22.5(b) was generally applicable and neutral. The Act substantially burdens the religious exercise of the Bakery because it fails to make any exemption for religious actors and requires the Bakery to engage in an activity that violates Bakery's sincerely-held religious beliefs.

Furthermore, the Court of Appeals applied a rational-basis standard when it should have applied a strict scrutiny standard, which the State of Tourovia cannot survive. While the State has an interest in minimizing discrimination in places of public accommodation, it has no compelling



interest in forcing religious objectors to use their talents in participation of wedding ceremonies that violate their sincerely-held religious beliefs. The strict scrutiny test requires the State to establish that at the time of the case, it had a compelling interest in requiring the Bakery to create a cake celebrating a same-sex wedding. However, at this time, the state of Tourovia did not recognize same-sex marriages, thus, cannot satisfy the strict scrutiny test.

### **ARGUMENT**

#### **I. TOUROVIA’S CIVIL RIGHTS ACT § 22.5(b) VIOLATES MAMA MYRA BAKERY’S FREEDOM OF SPEECH PROTECTED UNDER THE FIRST AMENDMENT.**

“Congress shall make no law . . . abridging the freedom of speech . . .” U.S. Const. Amend. 1. The Bakery contends that the Tourovia Civil Rights Act § 22.5(b) violates the Bakery’s First Amendment right to freedom of speech, because the Act compels speech. The Bakery contends that the Act compels the Bakery to speak the government’s message and to host or accommodate another speaker’s message. The Bakery also contends that the Bakery’s conduct is inherently expressive which is protected under the First Amendment.

The Supreme Court of the State of Tourovia erred in finding that the Tourovia Civil Rights Act § 22.5(b) does not violate the Bakery’s First Amendment right to freedom of speech. The court also erred in finding that the public would view the baking of a cake for a same-sex wedding celebration as the bakery’s endorsement of said conduct. The court erred in

finding that a reasonable person would find and understand the Bakery's actions as mere compliance with the law and not a reflection of the Bakery's own beliefs. The Act violates the Bakery's First Amendment right to freedom of speech, because the Act is compelling the Bakery to speak the government's message and host or accommodate another speaker's message. The Act also violates the Bakery's First Amendment right to freedom of speech, because the Bakery's conduct is inherently expressive. Requiring the Bakery to bake a cake for a same-sex wedding celebration violates the Bakery's First Amendment right to freedom of speech.

- A. Tourovia Civil Rights Act §22.5(b) violates Mama Myra Bakery's First Amendment right to freedom of speech because the Act violates The Compelled Speech Doctrine.

The Compelled Speech Doctrine states that the government is prohibited from requiring an individual to (1) "speak the government's message" and requiring individuals to (2) "host or accommodate another speaker's message." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006).

1. The Tourovia Civil Rights Act §22.5(b) requires the Bakery to "speak the government's message."

Freedom of speech protects individuals from the government telling them what they must say. *Rumsfeld*, 547 U.S. at 61. Components of the concept of "individual freedom of mind" include the right to refrain from speaking and the right to speak. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). In *Wooley*, it was held that the State of New Hampshire could not

require residents to display the state motto “Live Free or Die” on the residents’ vehicle license plate. *Id.* at 717. Further, “. . . the action of local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which is the purpose of the First Amendment to our Constitution to reserve from all official control.” *W. VA. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

In *Hurley*, it was held that the requirement set by Massachusetts for private citizens who organize a parade to include a group of marchers displaying a message the organizers did not wish to convey, was a violation of the First Amendment. *Hurley v. Irish-American Gay*, 515 U.S. 557, 559 (1995). In *Elane Photography*, the photography business relied on *Wooley* and *Barnette* and read these cases to mean that the government could not compel individuals “to engage in unwanted expression”. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 63 (2013). However, *Wooley* and *Barnette* “. . . are narrower than *Elane Photography* suggests; they involve situations in which the speakers were compelled to publicly “speak the government’s message”.” *Id.* at. 63.

The Tourovia Civil Rights Acts §22.5(b) requires the Bakery to speak the government’s message. Similar to *Wooley*, the Bakery would like to remain silent by not baking the cake, whereas the Act is requiring the Bakery to speak. Like *Hurley*, the Bakery does not wish to display a message

of support for same-sex marriage. Both the owner and the employees believe same-sex marriage violates all things Christian. R. at 3. Unlike *Elane Photography*, the Bakery is being compelled to publically speak the government's message. The wedding cake would be used in the celebration of the same-sex marriage. R. at 3. Further, the cake was to be served at a family party later at a local catering hall. R. at 2. The Act violates the Bakery's First Amendment right to freedom of speech, because the Act requires the Bakery to speak the government's message.

2. The Tourovia Civil Rights Act §22.5(b) requires the Bakery to "host or accommodate another speaker's message."

Compelled speech is not limited to cases where an individual must personally speak the governments message, but also instances where there have been limitations to which the government cannot force a speaker to host or accommodate another's message. *Rumsfeld*, 547 U.S. 47, at 63. "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." *Wooley*, 430 U.S. at 714. Forced association with different viewpoints that in turn burden the expressive views that differ, essentially forces an individual to speak where he or she would prefer to stay silent. *Pac. Gas & Elec. Co. v. Pub. Utils. Com.*, 475 U.S. 1, 18 (1986).

In *Pacific*, the court held "that the Commissioner's order burdened the appellant's First Amendment rights because it forces [the] appellant to associate with the views of other speakers, and because it selects the other

speakers on the basis of their viewpoints.” *Id.* at 20-1. In *Miami Herald*, the court held that the Florida statute that granted a political candidate a space to reply to criticism by a newspaper would reduce electoral and political coverage. *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974). The Florida statute also failed to clear the barrier of the First Amendment because of the statutes intrusion into the function of editors. *Id.* at 258.

The Tourovia Civil Rights Acts §22.5(b) requires the Bakery to host or accommodate another speaker’s message. Similar to *Pacific*, the Tourovia Civil Rights Acts §22.5(b) forces the Bakery to associate with the viewpoints of the Appellees. The Bakery offered to make the Appellees any other baked good but refused to make a custom made wedding cake. R. at 2. Like *Miami Herald*, the Act is intruding into the function of the Bakery. The Bakery has never made a wedding cake for a same-sex couple because they believe same-sex marriage violates all things Christian. R. at 3. The Act violates the Bakery’s First Amendment right to freedom of speech, because the Act requires the Bakery to host or accommodate another’s speakers message.

B. Tourovia Civil Rights Act §22.5(b) violates Mama Myra Bakery’s First Amendment right to freedom of speech because the Bakery’s conduct is inherently expressive.

Mama Mayra Bakery’s conduct is inherently expressive, in which the First Amendment right to freedom of speech protects the Bakery’s conduct. Both the States and Congress, under the Constitution, may not abridge the

right to freedom of speech. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). The First Amendment forbids the abridgment of speech but that protection does end at written or spoken words. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). When determining if conduct is “inherently expressive” there needs to be “an intent to convey a particularized message that was present, and whether the likelihood was greater than the message would be understood by those who viewed it.” *Id.* at 404. In *Elane Photography*, the photography business argued that the business was a creative and expressive profession, however, the court declined to draw the line between “creative” and “expressive” professions. *Elane Photography, LLC*, 309 P.3d at 71. The court did note that “[t]he wedding industry in particular employs a variety of professionals who offer their services to the public and whose work involves significant skills and creativity.” *Id.* at 71.

It is important to determine the context for which a symbol is used for purposes of expression, since the context may give the symbol meaning. *Spence v. Washington*, 418 U.S. 405, 410 (1974). Also, “[a] person gets from a symbol the meaning he puts into it, and what is one man’s comfort and inspiration is another’s jest and scorn”. *Id.* at 632-33. However, it has been held that when there is a significant governmental interest for regulation of one’s expression can justify incidental limitations on First Amendment freedoms. *United States v. O’Brien*, 391 U.S. 367, 376 (1968). Further, the suppression of expression of one’s opinion is tolerated only when there is a

clear and present danger from the expression and the State must prevent or punish. *Barnette*, 319 U.S. at 633.

Mama Mayra Bakery's conduct is inherently expressive. Similar to *Johnson*, symbols are ways to communicate and the Bakery contends that wedding cakes convey celebratory messages. R at 7. Similar to *Elane Photography*, the Bakery's work involves significant skills and creativity. Like *Washington*, the context may give a symbol meaning, which in this case the Bakery was asked to bake a cake that was to be used in celebration of same-sex marriage. R. at 3. Also The Bakery was asked to sculpt a figure of the couple hand-in-hand on the top tier of the cake R. at 2. Similar to *Barnette*, there is no clear and present danger from the expression the Bakery is communicating. Even though the Bakery denied making the wedding cake, the Bakery did offer to sell any other baked good for the wedding celebration. R. at 2. The Act violates Mama Mayra Bakery's First Amendment right to freedom of speech, because the Bakery's conduct is inherently expressive.

## **II. TOUROVIA'S PUBLIC ACCOMMODATIONS ACT VIOLATES MAMA MYRA BAKERY'S SINCERELY HELD RELIGIOUS BELIEFS ABOUT MARRIAGE PROTECTED UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.**

The court should reverse the Court of Appeals' decision because compelling Mama Myra's Bakery to design a custom wedding cake that celebrates same-sex marriage violates the Free Exercise Clause of the First Amendment. The First Amendment states that, "Congress shall make no law

respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech... U.S. Const. amend I. In order to prove a state law violates the Free Exercise Clause, the challenger, in this case Appellant, must first show that the law is not one of general applicability and that it is not rationally related to a legitimate governmental interest. *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990). Second, once a challenger shows a law burdens a religious practice and is not neutral or generally applicable, the burden shifts to the State to show that the law is justified by a compelling government interest that is narrowly tailored to advance that interest. *Smith*, 494 U.S. at 883. Here, the Court of Appeals erred in finding that the Act was generally applicable and neutral. The court also failed to properly apply strict scrutiny to the Act as opposed to the rational basis test that was applied. Mama Myra's Bakery does not seek to discriminate based on the sexual orientation, but rather only desires from being forced to participate in religious activities with which Appellant disagrees. Moreover, the Court of Appeals misapplied the holding in *Lukumi*. Like *Lukumi*, the conduct that falls within the Act, such as baked goods produced by the Bakery, may or may not be for religious purposes or have religious meaning behind them.

In the realm of religious faith, and in that of political belief, sharp differences arise. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The Free Exercise Clause of the First Amendment still protects religious individuals



from penalties and persecution due to the exercise of their sincerely held religious beliefs. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). This First Amendment protection of religious exercise includes the right to abstain from actions that violate one's religious faith and identity. *Thomas v. Review Bd. Of Ind. Emp't Sec Div.*, 450 U.S. 707, 714 (1981).

A. The Tourovia Civil Rights Act §22.5(b) Is Neither Generally Applicable Nor Neutral as Applied.

The Tourovia Civil Rights Act that regulates places of public accommodation states:

It is unlawful and an act of discrimination for any person or person, 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. R. at 3.

The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such. *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940). Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins*, 367 U.S. 488 (1961); nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

Under the Free Exercise Clause, a state may only pass a law that burden religious exercise when the law is facially neutral and of general applicability. *Lukumi*, 508 U.S. at 531. However, when a law burdens

religious exercise and it is not actually neutral or generally applicable, it must be “justified by a compelling governmental interest” and be “narrowly tailored to advance that interest.” *Id.* at 532. Neutrality and general applicability are interrelated, and, a failure to satisfy one requirement is a likely indication that the other has not been satisfied. *Id.*

In *Lukumi*, where a series of exemptions to an animal killing ordinance that resulted in unique burdens on an unpopular religious minority, the Court determined that a law is not neutral or generally applicable when it “infringes upon or restricts practices because of their religious motivation,” or “in a selective manner imposes burdens only on conduct motivated by religious belief.” *Id.* at 533, 543. The Court emphasized that the Free Exercise Clause “forbids subtle departures from neutrality, and covert suppression of particular religious belief.” *Id.* at 534. Likewise, the court in *Wisconsin v. Yoder*, where the court decided that the state’s compulsory school attendance law unduly burdened the free exercise clause of the first amendment by forcing Amish parents to send their children to public school after the eighth grade, violated core Amish religious beliefs requiring them to remain “aloof from the world.” *Wis v. Yoder*, 406 U.S. 205 (1972). The court held that the state must not require an individual “to perform acts undeniable at odds with fundamental tenets of their religious belief.” *Id.* at 220.

Furthermore, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the court held that a state agency that expressly excluded organizations controlled by religious entities from general policy offering grants to nonprofit organizations that installed certain playground surfaces violated the free exercise clause by denying application from the church that operated the playground. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 U.S. 2012 (2017). The court explained that the government cannot force religious groups or individuals to choose between exercising their faith and pursuing a benefit otherwise available to the public. *Trinity*, 137 S. Ct. at 2022.

In the present case, the Court's application of Tourovia Civil Rights Act undoubtedly departs from neutrality. By targeting the enforcement of the Act only against traditional religious views about marriage, the state has proven the law is not neutral and generally applicable. Similar to *Lukumi*, this unequal application of the state of Tourovia's Act singles out a specific religious belief for discriminatory treatment. The court upheld exemptions in *Lukumi* for the killing of animals for several secular purposes. R. at 12. If the Court in that case upheld exemptions for the killing of animals for several secular purposes, why should this court not uphold exemptions in the Tourovia Act for the practice of Christian religious beliefs. R. at 12. Also, similar to *Trinity*, the Court of Tourovia construed its Civil Rights Act to exclude people with a specific religious belief and left those who do not have a specific religious belief unharmed by its application. The Act targets religious

business owners who have a religious objection to celebrating same-sex marriages. This is not neutral or general applicable in any sense of the word. The Supreme Court of the state of Tourovia by ruling in favor of Cody and Hank Barber is essentially requiring a religious individual to choose between following the teachings of their religion on the one hand, and abandoning that same teaching of their religion in order to comply with the Act, leaving no alternative means for the Bakery. This is the exact type of state action the Court ruled against in *Wisconsin v. Yoder*.

The present case is distinguishable from *Obergefell v. Hodges*, 576 U.S. 2584 (2015), where the Court found for a state to refuse to recognize a lawful same-sex marriage performed in another state on the ground of its same-sex character. The Court equated laws precluded same-sex marriage to discrimination on the basis of sexual orientation. *Id.* at 281. However, such a statement makes no sense in the context of this case. One can deal with aspects of the individual without affirming his sexual conduct. This interpretation requires the affirmation of conduct and by doing so makes the Act no longer neutral or of general applicability. Rather, the Act of the state of Tourovia becomes directed at persons of faith who believe that such conduct is immoral, requiring them to affirm such conduct. The court in *Obergefell* may have intended to teach the people that such conduct is socially acceptable. *Obergefell* 135 S. Ct. at 2606. However, the state of Tourovia does

not have a right under the First Amendment to make people affirm such conduct.

Thus, the state of Tourovia Civil Rights Act is neither generally applicable nor neutral as applied.

**B. The Court of Appeals Erred in Applying Rational Basis and therefore the Court Should Apply Strict Scrutiny.**

The Court of Appeals erred in finding that the Tourovia Civil Rights Act as interpreted and applied was neutral and generally applicable. Under the Free Exercise clause, laws that are neither neutral nor generally applicable, laws with individualized assessments, or situations involving a hybrid of constitutional rights, a high level of scrutiny applies. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 536, 542-43 (1993). To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance “interests of the highest order” and must be narrowly tailored in pursuit of those interests. *Lukumi*, 508 U.S. at 546. Religious objections to same-sex marriage have been described as “decent and honorable.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

In *Obergefell*, the court found that same-sex couples had a right to marry. However, the court stated, “reasonable and sincere people here and throughout the world believe in traditional marriage based on decent and honorable religious grounds and those beliefs are not disparaged here. *Obergefell*, 135 S. Ct. at 2594. The court went on to state, “religions, and those who adhere to religious doctrines,” may continue to live their lives in

conformity with the idea that “same-sex marriage should not be condoned.” *Obergefell*, 135 S. Ct. at 2607. “The First Amendment,” the Supreme Court wrote, “ensures that religious organizations and persons are given proper protection.” *Id.*

Because the state of Tourovia Civil Rights Act infringes upon the Bakery’s right under the Free Speech and Free Exercise Clauses, the state has the burden to prove that it “furthers a compelling interest and is narrowly tailored to achieve that interest.” *Emp’t Div. v. Smith*, 494 U.S. 872, 883 (1990). However, a blanket prohibition of discrimination cannot alone provide a compelling state interest. *Attorney General v. Desilets*, 418 Mass. 316, 321 (1994). Furthermore, in *Lukumi*, the court not only looked at how the law was enforced, but noted that the Free Exercise Clause forbids subtle departures from neutrality. *Lukumi*, 508 U.S. at 534.

The State has not met their burden of showing a compelling interest in forcing a Bakery, who would serve any other baked good to the same-sex couple, to violate their sincerely-held religious beliefs by creating and sculpting a wedding cake that celebrates a same-sex marriage. Appellee’s must justify forcing a family-held business to create a customized-designed cake and participate in a deeply symbolic religious ceremony contradictory to the owners’ sincerely-held religious beliefs. Appellees cannot simply assert that the state of Tourovia has a compelling interest in this sort of compulsion. If the state of Tourovia has a compelling interest in eliminating

discrimination in the form of refusing service to individuals based on their sexual orientation, then the State must show that this interest is pursued consistently, not just when the request is made to a religious business owner who opposes same-sex marriage on religious grounds. But the strict scrutiny test requires the State to establish that at the time of this case it had a compelling interest in requiring the Bakery to create a cake celebrating a same-sex wedding. However, at the time of this case the state of Tourovia itself would not issue a license for a same-sex marriage. R. at 2. The Act substantially burdens the religious exercise of Mama Myra's Bakery because it requires the Bakery to engage in an activity that violates Bakery's sincerely-held religious beliefs. R. at 3. Additionally, nothing in the record suggests that Hank and Cody Barber were denied service since the Bakery did, in fact, offer to make and bake any other baked good for the same-sex couple. R. at 2. The state of Tourovia need not strip away the Bakery's religious freedom for a same-sex couple who want a custom wedding cake with a sculpture of both man and man holding hands on the top tier of the cake. The Bakery has not refused service to Hank and Cody Barber; they have only declined to create and sculpt a custom wedding cake that would be a celebration of their marriage. R. at 2-3.

The Court should reverse the ruling of the Supreme Court of the State of Tourovia and find that the Tourovia Civil Rights Act §22.5(b) is neither neutral nor generally applicable and fails to meet strict scrutiny standards.

## CONCLUSION

In accordance with the foregoing reasons, this Court should reverse 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 Mama Myra's Bakery.

Dated: February 26, 2018

Respectfully Submitted,

Team 9

Counsel for the Petitioner