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 Certirorari from the Supreme Court of Tourovia

BRIEF FOR THE RESPONDENT

Team 1

Counsel for Respondent

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QUESTIONS PRESENTED

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

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

JURISDICTIONAL STATEMENT

The Judgement of the Appellate Division, Fourth Department affirming the District Court of Suffolk County was entered on October 15, 2015. (R. at 11). The Supreme Court of Tourovia affirmed, and on January 31, 2018 this Court granted Appellant's timely petition for Writ of Certiorari. (R. at 16). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Factual History

Hank and Cody Barber wanted what every other newlywed couple wants: to bring together their friends and family to celebrate their love. (R. at 2). Unfortunately, the laws of Tourovia denied them the right to "tie the knot" in front of the people who meant the most to them. (R. at 2). Though Tourovia's laws have since evolved to allow same-sex unions, Hank and Cody were forced to travel to a state that would not deny them the right to marry. (R. at 2).

Upon return to Tourovia, the newlyweds desired to host a party to celebrate their new marriage with the family and friends who were unable to attend an out-of-state ceremony. (R. at 2). To this end, the Barbers approached Mama Myra's Bakery to bake their wedding cake, complete with a sculpted figure of the couple hand-in-hand on the top tier of the cake. (R. at 2). The owner of the bakery refused the Barbers order, explaining that same-sex marriage was contrary to their sincerely held religious beliefs, and therefore the bakery would not take part. (R. at 2–3).

Though Mama Myra's Bakery offered to sell the couple other baked goods, Hank and Cody were visibly upset that they were refused a wedding cake based solely on the owner's disapproval of their sexual orientation. (R. at 2). Feeling they had been unfairly discriminated against, the Barber's initiated this action under Tourovia's Civil Rights Act § 22.5(b). (R. at 3).

The relevant language of § 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.

(R. at 3). The parties do not dispute that Mama Myra's Bakery is a "place of business engaged in any sales to the public" and therefore a "place of public accommodation." (R. at 3).

B. Procedural Posture

The District Court of Tourovia held that the State met its burden of showing that Mama Myra's Bakery violated the public accommodation provision of § 22.5(b), infringing upon the Barber's Equal Protections rights under the Tourovia State Constitution. The Appellate Division of the Supreme Court of Tourovia, Fourth Department, upheld § 22.5(b) as constitutional. Further, the court concluded § 22.5(b) did not violate Mama Myra's Bakery First Amendment rights for freedom of speech or freedom to exercise their religion. Mama Myra's Bakery then appealed to the Supreme Court of Tourovia, who affirmed the decisions of both the District Court of Tourovia and the Appellate Division for the Supreme Court of Tourovia, Fourth Department, without further comment. This Court granted Mama Myra's Bakery petition for a Writ of Certiorari on the First Amendment issues.

SUMMARY OF THE ARGUMENT

First, baking a wedding cake is not speech, and therefore the First Amendment is not implicated. Under the *Johnson* test, while Mama Myra's Bakery asserts they would be conveying a message through their wedding cakes, there is not a great likelihood that a member of the public when viewing the cake would understand the message it supposedly conveys. However, if

this court does consider this act sufficiently expressive to constitute speech, then it cannot rise higher than the level of symbolic speech.

The *O'Brien* test, which governs symbolic speech, is satisfied in this case. Tourovia Civil Rights Act § 22.5(b) is within the realm of Tourovia's governmental authority and furthers the significant governmental interest of preventing discrimination between citizens. The Act is not targeted, or otherwise intended to suppress free expression, and is no greater than is essential to guarantee the right for same-sex couples to marry that this Court recognized in *Obergefell*.

Second, the Supreme Court of the State of Tourovia correctly found that Tourovia Civil Rights Act § 22.5(b) was not an unconstitutional infringement on Mama Myra's Bakery's free exercise rights. The Act is neutral, generally applicable, and satisfies the rational basis standard of review. The Act is neutral because the purpose of § 22.5(b) is to prevent discrimination based on sexual orientation, it is not to infringe on or restrict religious practices. Further, the Act is generally applicable as there is no evidence that § 22.5(b) deliberately targets religious conduct. To the contrary, the fact that the act provides an exemption for religious organizations, but provides no equivalent exemption for secular conduct, demonstrates Tourovia's intent to not discriminate against religious conduct. Finally, the anti-discrimination requirements of § 22.5(b) is rationally related to the government's interest in preventing discrimination in public accommodations.

ARGUMENT

Tourovia's Civil Rights Act mirrors Title II of the Civil Rights Act of 1964, which states that "[a]ll persons shall be entitled to the full and equal enjoyment of goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation… without discrimination or segregation on the ground of race, color, religion, or national origin." Pub L.

no. 88-352, 78 Stat. 241 (1964). In addition to the protection given to individuals under Title II, Tourovia elected to increase these protections by passing §22.5(b) of the Tourovia Civil Rights Act, which expands the umbrella of protection to individuals based on, "orientation toward hetero, homo, or bi sexuality, or transgender status, or another individual's perception thereof." (R. at 3).

I. TOUROVIA CIVIL RIGHTS ACT § 22.5(b) DOES NOT VIOLATE MAMA MYRA'S BAKERY'S FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH.

Is baking a cake speech, or is it merely commercial conduct no more special than any other tradesman's craft? This deceptively simple question presents a threshold issue. If baking a cake is speech, then the First Amendment to the U.S. Constitution requires that the State of Tourovia demonstrate a compelling, subordinating, or otherwise strong justification before it may require a bakery to bake a cake it does not wish to. *Wooley v. Maynard,* 430 U.S. 705, 716 (1977). If baking a cake is not speech, Tourovia will merely need to provide a rational basis to justify §22.5(b). *Turner Broad. Sys. v. FCC,* 512 U.S. 622, 640 (1994).

The First Amendment protects not only the right to speak freely, but also the right to "refrain from speaking" at all. *Wooley*, 430 U.S. at 71. While Mama Myra's Bakery argues baking a cake for a same-sex wedding would be "compelled speech" forbidden by the First Amendment, the act of baking a cake fails to satisfy the definition of speech under the *Johnson* test.

A. Baking a cake is neither pure speech nor symbolic speech under the *Johnson* test.

Whether speech is considered "pure speech" or "symbolic speech" determines the amount of protection provided under the First Amendment. *Cressman v. Thompson*, 798 F.3d 938, 952-953 (10th Cir. 2015). An expression that has no purposes or form other than that which

is intended to be communicative is to be thought of by this court as "pure speech." *Id*. Such purely expressive speech will be protected by the First Amendment as a matter of course as part of a fundamental right to self-expression. *Nat'l Endowment for the Arts v. Finley,* 254 U.S. 569, 602-603 (1998).

Conduct that is not purely expressive, may nevertheless be so communicative as to fall under the protection of the First Amendment. Indeed, some actions are as expressive as speech, such that a prohibition of them is akin to a prohibition of speech itself. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-506 (1969). In *Tinker*, the Court ruled that wearing an armband with a political message was "closely akin to ‘pure speech' which, we have repeatedly held, is entitled to comprehensive protection." *Id*. When expression and conduct combine in a manner that may convey a message, courts will refer to such communication as "symbolic speech." *United States v. O'Brien,* 391 U.S. 367, 376 (1968). Because baking a cake in exchange for compensation as part of a bakery’s regular business cannot be a purely expressive act, and is therefore not “pure speech”, the analysis is whether this conduct constitute “symbolic speech”.

This Court established in *Spence v. Washington,* and further clarified in *Texas v. Johnson*, that courts shall employ a two-part test to determine if conduct is so akin to "pure speech" that it is entitled to First Amendment protection as “symbolic speech”. 418 U.S. 405, 410-411 (1974); 491 U.S. 397, 404 (1989).

i. Mama Myra’s Bakery asserts that it intends to convey a message with its wedding cakes.

The first part of the test this Court described in *Johnson* asks if an actor intends his or her action to convey a "particularized" message. 491 U.S. at 404 (holding that burning an American flag to express disapproval of the American government and its policies was symbolic speech). Here, the Petitioner Mama Myra's Bakery asserts that baking a wedding cake for a same-sex

couple would convey a message of approval for such unions. (R. at 2-3). Because "penetrating into the hearts of men and ascertaining the truth" is beyond the purview of courts, absent clear evidence to the contrary we must take a litigant at their word that they truly believe what they profess to believe. *Soon Hing v. Crowly*, 113 U.S. 703, 711 (1885). In this case, the record contains nothing to contradict Mama Myra's Bakery stated intent. Therefore, the first element of the Johnson test is satisfied.

ii. It is unlikely that the public viewing a wedding cake would understand it to convey a particularized message.

The second element of the *Johnson* test requires that circumstances demonstrate the "likelihood was great" that the "message would be understood by those who viewed it". 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 410–11). To succeed on this appeal, Mama Myra's Bakery must demonstrate that attendees at the Barber's marriage ceremony would likely have understood that the bakery selling the couple a wedding cake was meant as an expression of the bakery's support for same-sex marriage.

This Court has considered the test for symbolic speech, first used in *Spence*, in a variety of contexts since 1974 and have been reluctant to hold that the public would infer a particularized message from conduct. For example, this Court recently held that academic institutions could be required to display recruiting materials from the United States Armed Services because the public would not understand the recruiting materials to represent that institution's endorsement of the material contained therein. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). While this Court in *Rumsfeld* did hold that the government could not force an individual to "speak the government's message," or "host or accommodate another speaker's message", it also held that the message conveyed would not be understood by a member of the public, and as such was not entitled to protection.

Other examples include *Clark*, in which this Court found that fellow park goers would not understand the mere act of camping to convey a message about the problem of homelessness. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1998). Also, similar to the present case, this Court found that a movie theatre could not be said to express any message through the movies it elects to show because the audience could not understand a theatre to be "anything more than a commercial purveyor." *Young v. Am. Mini Theatres*, 427 U.S. 50, 78 n.2 (1976). A bakery, like a movie theatre, is nothing more than a commercial purveyor, and a cake no more expressive than recruiting materials or sleeping outside.

As well as this Court's precedence, lower court application of the *Johnson* test is instructive as to how great the likelihood must be that a message will be understood by the public before the conduct becomes "speech". 491 U.S. at 404. The First Circuit held that a man blowing a horn while his town's mayor was speaking as a protest against the Mayor's perceived retributory action against him was not speech because the audience in attendance would have no way of understanding the what message the man intended to convey. *Meany v. Dever*, 326 F.3d 283, 287 (1st Cir. 2003). The same court found that the simple act of riding a bicycle would not be understood to convey any particularized message, when the man rode in a manner that violated state law, as an act of protest of the law. *Damon v. Hukowicz*, 964 F.Supp.2d 120, 149 (1st Cir. 2013). The Second Circuit in New York found that, while wearing a skirt may indeed be an expression of an individual's deeply held cultural values, no passerby unfamiliar with that individual's circumstances would understand that meaning. *Zalewska v. County of Sullivan*, 316 F.3d 314, 319 (2nd Cir. 2003). What has been held to send a particularized message the public would understand is the Ninth Circuit's holding that a medical marijuana "club card" would be

understood by those who viewed it to be a tacit approval of legalization of the drug. *Wilson v. Lynch,* 835 F.3d 1083, 1095 (9th Cir. 2016).

The precedent cited above shows consistently that courts are reluctant to read messages into conduct, even if intended by the actor, when the message is not so clear that the public should be expected to understand it. When a person observes another camping, riding a bicycle, or wearing a skirt, they read no more into that conduct than the conduct itself. In *Young*, the case most analogous to this one, this Court expressly found that a movie theater in the business of showing movies was not expressing any particularized message because showing movies was its business. 427 U.S. at 78. Cakes are Mama Myra's Bakery's business. By this Court's reasoning in *Young*, the likelihood is far from "great" that attendees at the Barber's party would understand the cake to represent the views and beliefs of Mama Myra's Bakery. Therefore, baking a cake fails under the second prong of the *Johnson* test and does not rise to the level of "symbolic speech" protected by the First Amendment.

B. Even if this Court finds that Mama Myra's Bakery cakes are symbolic speech, the appropriate standard of review supports enforcement of § 22.5(b).

The speech in this case is not only symbolic, but it is also incidental. When either pure speech or symbolic speech is incidental, the level of scrutiny applied is lowered from strict scrutiny, normally applied to First Amendment protections, to intermediate scrutiny. *Turner Broad Sys.*, 512 U.S. at 661-662.

Incidental speech is a type of symbolic speech in which the message conveyed is merely a consequence of other more primary motivators for the speech. *See, City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (holding that any communicative element of nude dancing was secondary to the primary goal of tantalizing patrons); *State v. Strong*, 272 P.3d 281 (Wash. App. 2012)

(holding that an otherwise protected threat was not protected when it was merely a secondary element of an extortion scheme); *Am. Ass'n of Disabilities v. Herrera,* 690 F. Supp. 2d 1183 (D.N.M. 2010) (holding that speech secondary to voter-registration activities is nevertheless entitled to protection as incidental speech). As the 9th Circuit stated in *Forti v. City of Menlo Park*, "[i]t is well-established that the First Amendment affords the greatest protection to purposeful speech, while allowing more regulation of incidental speech." 146 F.3d 629, 639 (9th Cir. 1998).

Mama Myra's Bakery's primary purpose in baking wedding cakes is not to express its religious beliefs to the world, but rather to make a profit selling specialty baked goods. While this commercial motivation does not automatically deprive the bakery of its First Amendment protections, it does automatically deprive it the strict scrutiny it may wish for. A cake, if considered speech, cannot be anything more than incidental speech based on the facts of this case.

i. The *O'Brien* test provides the appropriate level of scrutiny for symbolic speech.

In the event a governmental regulation restricts "symbolic speech", the appropriate level of scrutiny was laid out by this Court in *United States v. O'Brien*. *See* 391 U.S. 367 (1968). This Court stated,

> "we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction of alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Id. at 377. Under this test, § 22.5(b) is an appropriate restriction on symbolic speech as applied to Mama Myra's Bakery.

ii. Application of the *O'Brien* test supports enforcement of § 22.5(b).

The first element of the *O'Brien* test is satisfied because § 22.5(b) is well within the bounds of Tourovia's governmental authority. The Commerce Clause grants Congress and state governments concurrent power to regulate commerce. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 282 (1977); *Nat'l Prohibition Cases*, 253 U.S. 350, 387 (1920). Civil rights protections, such as anti-discrimination laws, are a valid exercise of the power to regulate commerce. *Heart of Atlanta Motel v. United States,* 379 U.S. 241, 248 (1964).

The interest of same-sex couples to be free from discrimination that is protected by Tourovia's Civil Rights Act is far from trivial and is sufficient to satisfy the second element of the *O'Brien* test. Three years ago, this Court observed that "[n]o union is more profound than marriage," and that same-sex couples whose "hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions" are entitled to "equal dignity in the eyes of the law." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015). If businesses are permitted to refuse to provide the services necessary to actualize the fundamental right recognized in *Obergefell*, then those rights will be no more than rights on paper and will not become rights in fact. A right without a remedy after all will "remain an empty promise." *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

Tourovia's Civil Rights Act is content-neutral, and as such the interest it furthers cannot be related to suppressing free expression, which satisfies the third element of the *O'Brien* test. Content-neutral speech regulations are those regulations that are "justified without reference to the content of the regulated speech." *Renton v. Playtime Theatres*, 475 U.S. 41, 48 (1986). Content neutrality does not require total blindness to content. For example, a prohibition on adult theatres from certain locations proximate to residences or schools would be treated as content-

neutral. *Id.* at 48. § 22.5(b) is content-neutral because it applies to any discriminatory conduct that is expressive enough to constitute "symbolic speech", regardless of content. Any person of any faith, or no faith at all, would not be permitted to refuse to sell the Barbers a wedding cake solely based on their sexual orientation.

Finally, the fifth element of the *O'Brien* test is satisfied because the incidental restriction of symbolic speech is no greater than is necessary to ensure that same-sex couples may actualize their right to marry, free from discrimination. This Court has been very careful about granting a license to discriminate to individuals who assert their constitutional rights as a reason to do so. The fear would be, of course, that if everyone found a speech, exercise, press, or association right that excused them from the effect of anti-discrimination laws, everyone would be permitted to discriminate. A law without effective mechanisms for enforcement is no more than a symbolic gesture and may be said by some jurists such as the Oliver Wendell Holmes to be no law at all. Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes*, 141 (2000). Whether a law is symbolic or meaningless is not significant to this inquiry, since evidence in the present case shows Tourovia's intent for its Civil Rights Act to have some teeth. (R. at 3). While this Court may again have opportunity to read a narrow exception into § 22.5(b) and other such civil rights legislation, a hole big enough for a commercial baker's standard wedding cake would be wide enough to render the bubble of protection meaningless.

Because all five elements of the *O'Brien* test are satisfied in this case, § 22.5(b) is valid and enforceable.

C. The facts of this case are distinct from cases that have found First Amendment exceptions to anti-discrimination laws.

Advocates of creating a free speech exception to anti-discrimination laws regarding sexual orientation rely on several decisions from this Court. Each of these cases, however, are

distinct from this case on appeal here. In no case has this Court found the conduct at issue to be "symbolic speech," and even if they had, the interests at stake were so distinct from this case that reliance upon them would be inappropriate.

In *Hurley v. Irish American Gay*, a pro-LGBT organization attempted to participate in South Boston's St. Patrick's Day-Evacuation Day Parade. 515 U.S. 557 (1995). The group was denied. *Id* at 560-562. This Court upheld the right of the parade organizers to deny participation on the basis of sexual orientation, then a protected class in Massachusetts. *Id*. They reasoned that, when combined with the highly expressive nature of the parade, the expression of individual participants could be fairly believed to be that of the parade's organizers themselves. *Id* at 573.

While the Court in *Hurley* held that the participants and the organizers of the parade were so closely associated in the mind of the spectators such that the speech of one would be the speech of the other, that is not the case here. Mama Myra's Bakery is providing the Barbers a service, they are not engaged cooperatively with the Barbers in a purely expressive venture, like a parade. This case of a bakery providing a good/service seems to be far more similar to that of *Rumsfeld* and *Young*, because the message of the Barbers is at a clear and visible distance from the bakery. Like the recruiting materials being handed out in *Rumsfeld* could not be attributed to the beliefs of the institution in which they were being distributed, and the films shown in the theater in *Young* could not be attributed to the theater itself, the message created by a wedding cake being served by the Barbers at their wedding could not be attributed to bakery.

Five years after *Hurley* this Court ruled in *Boy Scouts of Am. v. Dale* that New Jersey could not require the Boy Scouts of America to permit homosexual men to serve as scout leaders. 530 U.S. 640 (2000). The BSA argued that employing Mr. Dale, an outspoken advocate for Lesbian, Gay, Bi-sexual, and Trans-sexual (LGBT) rights, would violate their rights against

forced association under the Freedom of Association Clause of the First Amendment. *Id* at 645, 661. This Court found for the BSA, holding that it would undermine the group's official position that "homosexual and leadership in Scouting" would not be compatible as "homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight." *Id* at 651-652. Unlike the BSA, the Barbers are not attempting to become a voice for the bakery or a critical part of its operations. The Barbers merely wish to purchase goods available to the general public. Additionally, the bakery, unlike the BSA, is not engaged in actively communicating an anti-LGBT message. Indeed, to its credit, Mama Myra's Bakery has expressed a general openness to LGBT patronage, such that there is no message that selling a wedding cake to a same-sex couple would undermine.

Also, this Court in *Barnette* held that a law requiring children to salute the American flag was compelled speech and violated the children's rights to free exercise of religion. *W. Va. State Bd. Of Educ. v. Barnette,* 319 U.S. 624 (1943). In that case, the law was requiring the children to do a highly expressive act. Additionally, the law applied not only to public schools, but also to private, parochial and denominational schools, so that the children were forced to either salute the flag, or not attend school as required by state law. *Id.* at 625. In the present case, baking a cake is not highly expressive, and Mama Myra's Bakery faces no such ultimatum.

Because Mama Myra's Bakery is unable to rely on any authority to defeat the proposition that baking a cake is not sufficiently expressive to rise to the level of "symbolic speech", the First Amendment's free speech guarantee affords them no protection. Even if the cake is "symbolic speech" however, the *O'Brien* test indicates that § 22.5(b) is a permissible regulation of that speech.

II. TOUROVIA CIVIL RIGHTS ACT § 22.5(b) DOES NOT VIOLATE MAMA MYRA'S BAKERY'S FIRST AMENDMENT RIGHT TO THE FREE EXERCISE OF RELIGION.

The Supreme Court of the State of Tourovia's decision upholding the validity of Tourovia Civil Rights Act § 22.5(b) should be affirmed for two reasons. First, the law is neutral, generally applicable, and is rationally related to a legitimate government interest. Second, even if the law is held to not be neutral or generally applicable, the law nevertheless satisfies the elevated standard of strict scrutiny.

The Free Exercise Clause of the First Amendment states, "Congress shall make no law…prohibiting the free exercise [of religion]." U.S. Const., Amdt. 1. The First Amendment is incorporated into the Fourteenth Amendment and is therefore binding on the States. *Emp't Div. v. Smith*, 494 U.S. 872, 876 (1990). At a minimum, the protections of the Free Exercise Clause apply if the law at issue discriminates against some or all religious beliefs, or regulates or prohibits conduct because it is undertaken for religious reasons. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 US 520, 532 (1993). However, as Justice Roberts explained in *Cantwell v. Connecticut*, the First Amendment "embraces two concepts - freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." 310 U.S. 296, 303–04 (1940). Because Mama Myra Bakery is a public accommodation, it may not hide behind its First Amendment protections to engage in discrimination.

A. Tourovia Civil Rights Act § 22.5(b) is reviewed under a rational basis standard.

When the State regulates conduct not entitled to elevated Constitutional protections, this Court will review that conduct under the rational basis standard. This Court has determined that a challenge to a government action under the Free Exercise clause will be upheld if the law in

question is neutral, generally applicable, and is rationally related to a legitimate government interest. *See Smith*, 494 U.S. 872 (1990).

i. A rational basis standard is applied to challenges of laws that are neutral and generally applicable.

Prior to *Smith*, a balancing test was applied to the challenge of a government action under the Free Exercise Clause. *Sherbert v. Verner*, 374 U.S. 398 (1963). This balancing test considered whether the challenged government action imposed a substantial burden on the practice of religion, and, if so, whether that burden was justified by a compelling government interest. *Id.* at 406. However, the Supreme Court moved away from the balancing test in *Smith* to a test that asks whether a law that burdens a religious practice is neutral and generally applicable. *Smith*, 494 U.S. at 879–80. If the answer is yes, the law will be upheld so long as the law is rationally related to a legitimate government interest. *Id.* If the law is not neutral or generally applicable, then the law "must be justified by a compelling government interest" and must be narrowly tailored to advance that interest. *Id.*

The purpose of the shift away from a balancing test was to prevent the courts from becoming entangled in religion by requiring them to evaluate religious practices on a case by case basis and determine each practice's significance to a faith. *Id.* at 888 (reasoning that such a balancing test would be incompatible with the religious pluralism that is fundamental to our national identity). This Court recognizes that the United States is made up of "almost every conceivable religious preference." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). To require courts to analyze the practices of each religion, and their relative importance to the faith, would be an overwhelming burden and would make each person a law upon himself. *Smith*, 494 U.S. at 890 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)) (stating when a law is neutral and generally applicable, "to make an individual's obligation to obey such a law contingent upon

the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law upon himself,'—contradicts both constitutional tradition and common sense.").

While Congress reinstated the balancing test by passing the Religious Freedom Restoration Act (RFRA), the Act was held unconstitutional as applied to the states in *City of Boerne v. Flores.* 521 U.S. 507, 536 (1997). Therefore, when analyzing whether a state law unconstitutionally infringes on a citizen's free exercise of religion, *Smith* applies, and a rational basis analysis must be used if the law is neutral and generally applicable. As summarized in *State v. Arlene's Flowers, Inc.,* "[l]aws that burden religion are subject to two different levels of scrutiny under the free exercise clause. Neutral, generally applicable laws burdening religion are subject to rational basis review, while laws that discriminate against some or all religions (or regulate conduct *because* it is undertaken for religious reasons) are subject to strict scrutiny." 187 Wn.2d 804, 839 (2017) (citations omitted). To hold that strict scrutiny must be applied to every regulation of conduct that could possibly burden a religious objector would, as this Court detailed in *Smith*, "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." *Smith,* 494 U.S. at 888.

ii. The hybrid theory does not apply in this case.

A hybrid theory was introduced in *Smith*, which states that when more than one constitutional protection is at issue, the standard of strict scrutiny will be used. *Id*. at 882. In *Smith*, two Native American employees who were fired after testing positive for peyote argued the Oregon criminal prohibitions on peyote use violated the employee's free exercise rights. *Id.* at 878. The employees argued that peyote use was an important aspect of their religious practices. *Id.* This Court applied the rational basis test and distinguished its holding from earlier

cases that applied a strict scrutiny to laws that infringed on free exercise rights. *Id.* at 882. The court explained that the "only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated actions have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." *Id*. Similar to *Smith*, the present case implicates only one constitutional protection, the free exercise of religion. As explained in Section 1 above, there are no free speech grounds implicated in this case, and so it is improper to apply strict scrutiny based on a hybrid theory.

B. Tourovia Civil Rights Act § 22.5(b) is neutral and is generally applicable.

While Mama Myra's Bakery is protected under the First Amendment in espousing its religious beliefs and its opposition to same-sex marriage, this protection does not allow the bakery to avoid compliance with a neutral and generally applicable law. In *Smith*, this Court held that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (internal quotation marks omitted). In this case, Tourovia Civil Rights Act § 22.5(b) is neutral and is generally applicable. Therefore, the law will be upheld if it is rationally related to a legitimate government interest.

The mere fact that § 22.5(b) requires affirmative action on the part of Mama Myra's Bakery, namely providing wedding cakes to couples regardless of their sexual orientation, does not alone make the law not neutral or generally applicable. In *United States v. Lee,* this Court held that an Amish employer could be required to affirmatively pay Social Security taxes, even though he was religiously prohibited from participation in governmental support programs. 455

U.S. 252 (1982). This Court held than a law requiring an affirmative action does not prevent a law from being neutral or generally applicable. *Id.* at 263 n. 3. Therefore, the mere fact that § 22.5(b) requires affirmative action on the part of Mama Myra's Bakery does not invalidate the otherwise neutral and generally applicable law.

i. Tourovia Civil Rights Act § 22.5(b) is neutral.

A law is not neutral "if the object of a law is to infringe upon or restrict practices because of their religious motivation." *Lukumi,* 508 US at 533 (1993). This objective can be determined by looking at the face of the law, as well as whether the law attempts covert discrimination by targeting a religion or certain religious practices.

First, neutrality requires a law not discriminate on its face. *Id.* To be facially neutral, any language in the law that refers to a religious practice must have a discernible secular meaning. *Id.* In the present case, § 22.5(b) is facially neutral because the language of the law does not refer to any religious practices, and the law applies equally to all public accommodations. Mama Myra's Bakery does not dispute that it is a "public accommodation", as defined by the Act. (R. at 3).

Second, the Free Exercise clause also protects against covert suppression of particular religion or certain religious beliefs. *Lukumi,* 508 US at 534. When determining whether a law covertly attempts to discriminate against religion, the question is whether religious practices are being targeted. *See id.* Similar to equal protection cases, the State's objective in enacting a law may be determined from both direct and indirect evidence. *Id.* The present case is distinguishable from the facts in *Lukumi* where the court held the ordinances in question were not neutral because they were enacted "because of", not merely "in spite of" their suppression of a particular religious practice. *Id.* at 540. In *Lukumi*, legislative history, including enactment of numerous exemptions for members of other religions, evidenced a clear intent to target practitioners of the

Santeria faith. *Id.* at 532–42. In the present case, there is no such evidence of targeting Christianity. For example, Christianity was not implicated in the purpose of enacting the law, unlike the Santeria faith was in *Lukumi*. *Id.* at 535. Also, there are no exemptions for some, but not all religions, and there is no expressed intent to discriminate solely against Christianity.

In *State v. Arlene's Flowers Inc.,* a florist who refused to selling wedding flowers to a same-sex couple for their wedding argued that the Washington non-discrimination statute was unfair because it granted exemptions for "religious organizations" but not to her. 187 Wn.2d at 839. Similar to the present facts, Arlene's Flower's Inc. was defined as a public accommodation. *Id.* at 814. The Washington Supreme Court held "blanket exemptions for religious organizations do not evidence an intent to target religion. Instead, they indicate the opposite". *Id.* at 839–40 (citing *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327, 335–38 (1987)). Similarly, in *Elane Photography, LLC v. Willock,* the Supreme Court of New Mexico noted, "[e]xemptions for religious organizations are common in a wide variety of laws, and they reflect the attempts of the Legislature to respect free exercise rights by reducing legal burdens on religion." 309 P.3d 53, 67 (N.M. 2013). Therefore, the fact that § 22.5(b) applies to Mama Myra's Bakery, but does not apply to religious organizations, does not make the law un-neutral.

ii. Tourovia Civil Rights Act § 22.5(b) is generally applicable.

General applicability is intertwined with neutrality and the failure to satisfy one likely means the other has not been satisfied either. *Lukumi,* 508 US at 531 (1993).

First, 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 540. In *Sherbert,* this Court dealt with a worker who lost her job after refusing to work on her Sabbath,

in violation of a state law requiring her to be available for work or lose eligibility for unemployment compensation. *See Sherbert,* 374 U.S. 398 (1963). This Court held that because the rule contained "at least some" secular exceptions, the rule was not generally applicable, and the worker was constitutionally entitled to unemployment compensation. *Id.* There are no exceptions for secular conduct contained in § 22.5(b). Therefore, the present case does not fall under *Sherbert* and does not make § 22.5(b) less than generally applicable.

Similarly, where a law contains a patchwork of exemptions that omit religiously motivated conduct, the omissions provide evidence that the government has "deliberately targeted religious conduct for onerous regulation, or at the very least devalued religion as a ground for exemption." *Lukumi,* 508 U.S. at 544–46. In *Lukumi*, the law prohibiting animal sacrifice was held not generally applicable because it contained multiple exceptions, which included hunting, euthanasia of stray animals, and the infliction of pain or suffering on animals in scientific testing. *Id.* at 544. This patchwork of exemptions demonstrated the intent of the city of Hialeah to place the restrictions solely on the church in *Lukumi*, to prevent them from being able to practice their religion and sacrifice animals. There is no such patchwork of exemptions that evidence an attempt to burden religious conduct in the present case. The sole exemption in § 22.5(b) is for "places solely used for religious purposes". (R. at 10). This exemption demonstrates Tourovia's intent to *not* burden religious conduct.

While Tourovia Civil Rights Act § 22.5(b) does provide an exception for "places solely used for religious purposes", this exception does not prevent § 22.5(b) from being generally applicable. To be generally applicable, a law does not have to apply to every individual and every entity; instead, it is generally applicable as long as it does not regulate only religiously motivated conduct. *Lukumi*, 508 US at 542–43. Exemptions for places solely used for religious

purposes is commonplace throughout state and federal law. It is estimated, based on sampling techniques, that there are about two thousand religious exemptions in state and federal statutes. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 844 (2014). Rather than making § 22.5(b) not generally applicable, this exemption illustrates Tourovia's intent not to infringe on individual and entity free exercise rights under the First Amendment.

Second, a law is not generally applicable if it is applied in a manner that is needlessly prejudicial to religion. *Arlene's Flowers Inc.*, 187 Wn.2d at 841. This would include a law where the government cannot coherently explain what, other than religious motivation, justified the unavailability of an exemption. *Id*. In the present case, there is no evidence that § 22.5(b) has been applied in any manner that is needlessly prejudicial to religion. The application of § 22.5(b) against Mama Myra's Bakery is the only application of the law in the record, and there is no evidence the law was applied solely because of the owner's religious preferences.

C. Tourovia Civil Rights Act § 22.5(b) satisfies rational basis scrutiny.

Because § 22.5(b) is neutral and generally applicable, the law is reviewed under a rational basis standard. *See Smith*, 494 U.S. at 879. A law will be upheld if it is rationally related to a legitimate government interest. *Id*. A law that is neutral and generally applicable "must be reasonable and not arbitrary and it must bear 'a rational relationship to a permissible state objective'". *Lighthouse Inst. For Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 277 (3d Circ. 2007) (quoting *Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974)).

The prevention of discrimination based on sexual orientation is a permissible state objective, and public accommodations statutes are rationally related to that objective. As this Court has stated, public accommodations statutes "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,

and they do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley*, 515 U.S. at 572. Therefore, because § 22.5(b), as a public accommodations statute, is within Tourovia's power to enact, and satisfies rational basis scrutiny.

D. In the alternative, Tourovia Civil Rights Act § 22.5(b) satisfies strict scrutiny in that the law is justified by a compelling government interest and is narrowly tailored to advance that interest.

Even if § 22.5(b) is held to not meet the *Smith* factors, or if the court holds the hybrid theory applies, § 22.5(b) satisfies a strict scrutiny standard. This standard is clearly met in this case as Tourovia is justified in enacting § 22.5(b) by a compelling government interest and the law is narrowly tailored to advance that interest.

As stated in *Lukumi*, "if the object of a law is to infringe upon or restrict practices because of their religious motivation . . . it is invalid unless it is justified by a compelling government interest and is narrowly tailored to advance that interest." 508 U.S. at 533. Marriage is a fundamental right, a right that was recognized to include same-sex couples in *Obergefell v. Hodges*. 135 S. Ct. at 2604–05. This Court held in *Obergefell*, that laws burdening the ability of same-sex couples to marry, "burden the liberty of same-sex couples," and "abridge central precepts of equality." *Id.* at 2604. Preventing discrimination by a public accommodation against same-sex couples pursuing their fundamental right to marry is a compelling government interest. In the striking down of Defense of Marriage Act (DOMA) in New York, this Court recognized a "documented history of discrimination" based on sexual orientation. *U.S. v. Windsor,* 133 S.Ct. 2675, 2683 (2013). The State of Tourovia has a government interest in remedying this discrimination, and in promoting the physical and psychological well-being of its citizens.

As stated above, public accommodations statues do not as a general matter violate the First Amendment. *Hurley,* 515 U.S. at 572. Further, Tourovia Civil Rights Act § 22.5(b) is

narrowly tailored to advance the interests it has to prevent discrimination by a public accommodation. Tourovia has limited application of § 22.5(b) to public accommodations and has exempted "places solely used for religious purposes" to limit the burden placed on religious organizations. (R. at 10). Therefore, even if a strict scrutiny standard were applied to the facts of this case, that standard is met.

CONCLUSION

Tourovia Civil Rights Act § 22.5(b) does not implicate First Amendment free speech protections. Mama Myra's Bakery's act of baking a wedding cake would not be understood by the public to convey a message and is therefore not speech. However, even if baking a cake were considered speech, § 22.5(b) satisfies the intermediate scrutiny standard for symbolic speech. Additionally, Mama Myra's Bakery's free exercise challenge to § 22.5(b) is reviewed under a rational basis standard because the Act is neutral and generally applicable, and that standard is satisfied in this case. Even if the Act is not considered neutral or generally applicable though, or this Court chooses to apply the hybrid theory, the Act satisfies the heightened strict scrutiny standard. Under any standard of review this Court chooses to apply, Tourovia's interest in preventing discrimination on the basis of sexual orientation outweighs Mama Myra's Bakery's individual First Amendment interests. Therefore, we ask this Court to affirm the decision of the Supreme Court of Tourovia.