NO. 18-321

IN THE

SUPREME COURT OF THE UNITED STATES

APRIL TERM 2018

MAMA MYRA'S BAKERY, INC.,

Petitioner,

v.

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

Respondent.

On Writ of Certiorari to the
Supreme Court of Tourovia

BRIEF FOR PETITIONER

TEAM 13

Attorneys for Petitioner

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QUESTION PRESENTED

I. I. Under the Free Speech Clause, can a state use a public accommodation law to compel a bakery to use its artistic talents to create a custom wedding cake for a same-sex wedding?

II. Under the Free Exercise Clause, can a state use a public accommodation law to require a bakery to participate in a religious ceremony to which it has a sincerely held religious objection?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Mama Myra's Bakery ("Bakery)" and its employees have been outwardly expressing Christians for over twenty-seven years. R. at 2. The Bakery holds dearly the teachings of Jesus Christ, the Bible, and all things Christian. R. at 3. Hank and Cody Barber ("Barbers") entered the Bakery wanting to purchase a custom-made wedding cake for a celebration of their recent marriage. R. at 2.

The Barbers asked the Bakery to create a custom wedding cake that included a sculpture of the couple holding hands on the top tier of the wedding cake. R. at 2. The Bakery declined the Barber's request to create the wedding cake because doing so would violate the sincerely held religious beliefs that every employee at the Bakery holds. R. at 2. The Bakery had never before created a custom wedding cake for a same-sex couple because all of the employees at the bakery believe that same-sex marriage violates the teachings of their Christian faith. R. at 3.

The Bakery refused to make the wedding cake for the Barbers because their strong faith, not because of the Barbers sexual orientation. R. at 3. While the Bakery did decline to create the custom wedding cake, the Bakery did not wholly refuse to serve the Barbers. R. at 2. The Bakery offered to make and sell any other baked goods for the Barbers. R. at 2. The Barbers became upset because at this offer and immediately left the Bakery without saying anything further. R. at 2.

II. PROCEDURAL HISTORY

The Barbers filed charges of discrimination against the Bakery pursuant to § 22.5(b) of the Tourovia Civil Rights Act which 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 Barbers claimed that the Bakery violated § 22.5(b) of the Act because they did not sell the Barbers the wedding cake they requested because of their sexual orientation. R. at 3. The District Court of Tourovia held that the State of Tourovia met its burden in showing that the Bakery's refusal to create the wedding cake violated the public accommodation provision of the Act. R. at 5. The district court further held that the Barber's Equal Protection Rights under the Tourovia State Constitution were violated when the Bakery refused to create the wedding cake. R. at 5.

The Bakery filed a motion to set aside the judgment of the district court in the Appellate Division of the Supreme Court of Tourovia. R. at 7. On Appeal, the Bakery claimed their rights to free speech and free exercise of religion under the First Amendment were violated because of the district court's ruling on the § 22.5(b) claim brought against the Bakery. R. at 7. However, the Supreme Court of Tourovia held the Act did not violate the Bakery's First Amendment rights to freedom of speech or freedom to freely exercise their religion. R. at 11. The Supreme Court of Tourovia stated that the Bakery's actions would be seen as "mere compliance" with the law and not as imparting religious messages. R. at 9, 11.

SUMMARY OF THE ARGUMENT

This case involves two separate violations of the First Amendment. The Act violates the free speech clause by compelling speech. The Act also violates the free exercise clause by forcing a custom cake baker to forsake his sincerely held religious beliefs.

I.

The Act violates the Free Speech Clause by forcing the Bakery to create a custom wedding cake it does not want to. Tourovia calls his sincerely held religious objections to creating the cake unlawful discrimination. But Tourovia cannot evade the inherent expressive nature of its form of art by subjecting it to public-accommodation laws. There is a fundamental difference between ensuring that the public has, on the one hand, access to the commodities of food and shelter and, on the other hand, the ability to compel the creation of custom artwork by a specific artist. Tourovia cannot punish the Bakery for adhering to its conscience rather than the Tourovia's prevailing orthodoxy. As a result, strict-scrutiny review applies to the Act.

II.

The Act also violates the Free Exercise Clause by burdening the Bakery's sincerely held religious beliefs. Strict scrutiny applies to this law because it is not a neutral law of general applicability. Tourovia has selectively chosen to apply the law to those who support same-sex marriages. Thus, the Act targets activities based upon their religious motives, and it is not generally applicable because it excludes from its grasp secular conduct, which has an equal or greater effect on its asserted interest. Strict scrutiny also applies because the Bakery asserted a hybrid rights claim, which consisted of its rights under the Free Speech and Free Exercise Clause. This Court has stated that a hybrid rights claim invokes heightened scrutiny as well.

III.

Both the free speech analysis and the free exercise analysis trigger strict scrutiny review. Under it, the Act is unconstitutional because it is neither narrowly tailored, nor does it advance a compelling state interest. The government interest is not compelling because Tourovia seeks to avoid the dignitary harm of a member of a protected class not being able to have a custom wedding cake baked for them. Being offended by speech or someone's religious beliefs has never before been enough to constitute a compelling government interest. It should not be under the facts of this case either. Additionally, the Act fails to advance a compelling state interest because there is no evidence that available alternatives would not work.

This Court should reverse the judgment of the Supreme Court of Tourovia and render judgment for Mama Myra's Bakery, finding that § 22.5(b) violates the First Amendment's Free Speech and Free Exercise Clauses.

ARGUMENT AND AUTHORITIES

I. TOUROVIA'S ENFORCEMENT OF THE CIVIL RIGHTS ACT VIOLATES THE BAKERY'S FIRST AMENDMENT RIGHTS.

This application of the Act so as to require the Bakery to design and create custom wedding cakes implicates two separate guarantees of the First Amendment. The Free Speech Clause protects not only the right to speak, but also the right to refrain from speaking. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citing U.S. Const. amend. I). The Free Exercise Clause protects the right to not be coerced into engaging in conduct that is fundamentally at odds with sincerely held religious beliefs. *See Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (citing U.S. Const. amend. I). Although the lines of cases interpreting those Clauses follow different analyses, they reach the same conclusion. Tourovia's application of § 22.5(b) strips the Bakery of its valid First Amendment rights and cannot overcome the strict scrutiny analysis required of such laws. A cake artist cannot be forced to create wedding cakes that celebrate marriages that are expressly against that baker's faith. *See Hurley*, 515 U.S. at 573.

A. Under This Court's Free-Speech Jurisprudence, the Act Is Subject to Strict Scrutiny Review Because It Compels the Bakery to Create Speech That Affirms a Belief It Opposes.

The "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley*, 430 U.S. at 714 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). This Court has emphasized that the First Amendment protects not only the right of a speaker to choose what to say, but also the right of the speaker to decide "what not to say." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 573 (1995) (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986)). As a result, the First Amendment "presume[s] that speakers, not the

government, know best both what they want to say and how to say it." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988). And the government "may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Id.* at 791. The First Amendment protects the Bakery from being compelled to engage in government-sanctioned speech.

Tourovia's enforcement of the Act removes the promised protection of the Free Speech Clause. It compels the Bakery to use its artistic talents to participate in same-sex marriage celebrations. It has a moral and religious opposition from doing so. Through the Act, Tourovia establishes a means by which the government can compel the Bakery and others to adopt a specific opinion and punish those who disagree. This governmental action does not protect discrimination, but "mandates orthodoxy" of thought in violation of the First Amendment. *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012).

The Act triggers strict scrutiny because it effectively compels the Bakery both to create expression and to participate in an expressive event. And the law is presumptively unconstitutional as it intrudes on "the core principle of speaker's autonomy" to make decisions about what messages to communicate and what messages not to communicate. *Hurley*, 515 U.S. at 575.

1. The design and creation of a custom wedding cake is speech protected by the Free Speech Clause.

The Bakery's cakes and design process receive First Amendment protection because they satisfy elements for artistic expression and expressive conduct. The wedding cakes are the means by which the Bakery projects a message. Simply put, the wedding cakes and design process convey a celebratory message for the marriage of the Bakery's customers, which the Bakery holds sacred. Its participation in these wedding confers an acceptance and endorsement

of the union. Understanding this fact, the Bakery's cakes and design process are protected forms of speech regardless of whether this Court identifies them as artistic expression, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 248 (2002), or expressive conduct, *Hurley*, 515 U.S. at 566. This is because the crucial factor in determining speech is identifying the intent of the creator to communicate a message through its art. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 842 (2011).

The inherent message a wedding cake conveys is celebration of marriage. At the wedding reception immediately following a wedding ceremony, the bride, groom, wedding party, and guests celebrate the marriage by sharing the wedding cake. Thus, the wedding cake is an important symbol of the marriage and a key ingredient in celebrating it. These wedding cakes fit into the realm of protected artistic expressions like "pictures, films, paintings, drawings, and engravings." *Kaplan v. California*, 413 U.S. 115, 119 (1973). The wedding cakes produced by the Bakery are artistic expression because they are intended to, and in fact do, allow the Bakery to communicate through the design and display of a custom wedding cake. *See Brown*, 564 U.S. at 790.

a. Custom wedding cakes embody the Bakery's artistic expression to convey a message celebrating its customers' marriages.

The custom wedding cakes are inherently expressive. Speech encompasses a broad spectrum of forms including varying mediums and styles within the realm of art that this Court has associated with "pure speech." *Ashcroft v. Free Speech Coal.*, 535 U.S. at 2325 ("[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

While it is obvious that traditional forms of art such as literature and films should fall under the artistic expression, the world of art is ever evolving and expanding. Our

understanding of expression has expanded "beyond written or spoken words as mediums of expression." *Hurley*, 515 U.S. at 569. Such expression need not be narrowed to a "particularized message" *Id.* (reasoning that to confine expression under formerly restrictive limitations would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll) (citing *Spence v. Washington*, 418 U.S. 405, 411 (1974)). Circuit courts have applied this reasoning in recognizing that tattoos convey artistic expression. *See Buehrle v. City of Key West*, 813 F.3d 973, 976 (11th Cir. 2015); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1057 (9th Cir. 2010). Though this illustrates that this Court has broadened the scope of artistic expression, the question remains as to what constraints have been established to merit whether artistic expression can be attributed to any given creation.

Where the creative process of producing a symbolic form of expression, the process of creating such expression is imbued with the expressiveness of the end product. *Anderson*, 621 F.3d at 1060. That is because the creative process is "inextricably intertwined with the purely expressive product." *Id.* The Bakery's process of designing and baking the cake is so inextricably intertwined with the finished product, the wedding cake, that the process and product are indistinguishably part of its creative expression. The many hours the Bakery devotes to envisioning its work of art, gathering ingredients and supplies needed to express its vision, and baking and decorating the cake itself, are all parts of its creative expression, which is virtually indistinguishable from other forms of protected artistic expression.

Collaboration with a customer does not change the link between the creative process and the end product. Before constructing each cake, the Bakery does take time to meet with and discuss what each couple desires in a wedding cake and attempts to explore each customer's

personality both individually and as a couple. But this crucial step in constructing a wedding cake is so it may create a unique cake for each couple. The creative talents are dependent upon the involvement of the clients. *See Anderson*, 621 F.3d at 1062. From these unique perspectives, the resulting artistic expression comes to life.

The resulting wedding cake conveys a clear and deliberate message, which is required to receive First Amendment protection. The decision in *Brown v. Entertainment Merchants Ass'n* establishes distinct guidelines that allow this Court to determine whether a creation itself possesses artistic expression. 564 U.S. at 791. There, a group representing the video game and software industries challenged a California law which restricted the sale and rental of violent video games. *Id.* at 789. The Court addressed the question of whether video games are artistic expression. *Id.* at 788. While not typically thought of as art, this did not affect the Court's artistic expression analysis considering that the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears. *Id.* at 790. Rather, this Court found video games received First Amendment protection because they intend "to communicate ideas through familiar literary devices and features distinctive to the medium." *Id.* at 788.

The Bakery undoubtedly intends to create artistic expression. It designs custom wedding cakes to communicate a message of celebration. With any celebration, there are accompanying festivities and revelry. A wedding celebration confers not only that there is reason to rejoice, but also an affirmation that the couple should be joined in matrimony. As this Court explained, marriage as a union of "transcendent importance," "sacred to those who live by their religions" and providing "unique fulfillment to those who find meaning in the secular realm." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015). The ceremony itself is comprised

of rituals and symbols with "[t]he core of the message" being "a celebration of marriage and the uniting of two people in a committed long-term relationship." *Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012). A wedding cake is one of the most important symbols of any celebration. Thus, in conveying a message of celebration for its customers, its message of celebration also communicates an acceptance of their union. Therefore, because the Bakery's wedding cakes celebrate the couples' marriages, he engages in protected speech and the First Amendment applies to the government actions that would force him to construct wedding cakes for unions that he had moral and religious objections to.

b. Alternatively, the Bakery's design process is expressive conduct that possesses the expressive qualities attributed to traditional protected forms of speech.

The cake design process is also afforded protection under the First Amendment because the Bakery's process satisfies the elements of expressive conduct. Certain conduct is protected by the First Amendment because it has the expressive qualities which have been historically attributed to protected speech. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (explaining that public burning of the flag was expressive conduct protected by the First Amendment). Conduct is sufficiently expressive to fall within the scope of the First Amendment when the conduct has "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Id.* at 404. But expressive conduct is not limited to only affirmative actions. Conduct seeking to refrain from speaking a message was equally as expressive and thus receives First Amendment protection as well. *Wooley*, 430 U.S. at 717 (finding that citizen had a First Amendment right to not display New Hampshire state motto on license plate).

When analyzing expressive conduct, the primary concern is determining whether the conduct possesses the expressive qualities that are generally attributed to speech. *Spence*, 418 U.S. at 412 (stating that displaying a peace sign over the American flag in protest was sufficiently expressive to invoke free speech protection even though it was not pure speech). This Court has demonstrated that conduct is sufficiently expressive for purposes of free speech protections when the conduct, (1) has an intent to convey a particularized message that was present in its manifestation, and (2), there was a legitimate likelihood that such a message would be understood and that the message is endorsed by its creator. *Johnson*, 491 U.S. at 404 (explaining that public burning of the flag was expressive conduct protected by the First Amendment) (citing *Spence*, 418 U.S. at 409).

The Bakery's efforts in designing its wedding cakes and participating in its customer's wedding provide extensive evidence establishing that a message is inherently conveyed through its artistic creations. The amount of dedication and work that the Bakery expends in attempting to develop a wedding cake both embodies the identities of the couple and the celebratory nature of the event create an understanding that the Bakery is not merely providing a service, but also is celebrating with the individuals being married. It is impossible to separate the Bakery from its creations, as the process of the artist and the artist itself are "inextricably intertwined."

The Bakery's wedding cakes are clearly recognizable. Anyone viewing the wedding cake may appreciate the effort and craftsmanship required to produce it. The painstaking attention to detail, from the decorations down to the trimming, exemplifies the care that is attributed to baking each wedding cake. Each cake is custom designed and made to represent the Bakery and the couple that will be celebrating their marriage. As a result, the Bakery is an active

participant in celebrating and supporting the ceremony. Such intense devotion to creating these inherent forms of artistic expression and the recognition by those who view them establishes that the cake baking process is a form of expressive conduct.

2. Laws compelling speech warrant strict scrutiny review.

Laws that compel speech are reviewed under strict scrutiny because they are presumptively unconstitutional. *Wooley*, 430 U.S. at 705 (holding government cannot compel individual to be a mobile billboard for the state's ideological message by forcing them to have Live Free or Die on LP's); *Barnette*, 319 U.S. at 624 (holding government cannot compel students to salute flag); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 251 (1974) (holding government cannot compel a newspaper to advertise certain messages). The Bakery is being forced to express a specific message—a message of support—that a wedding cake would convey.

This Court provided an example of how the compelled speech doctrine applies in *Hurley*. In that case, an order was challenged that would require private citizens who organized a St. Patrick's Day parade to include a group that wanted to express a message the parade organizers did not want to convey. *Hurley*, 515 U.S. at 559. This Court held that the order was in violation of the First Amendment protections because it was attempting to place a public accommodation requirement ahead of an individual's private and protected speech. *Id.* at 560. This Court further confirmed that "a speaker has the autonomy to choose the content of his own message." *Id.* at 573. *Hurley* confirmed the requirement that "a challenged restriction on speech serve a compelling, or at least important governmental objective." *Id.* at 577. When speech is compelled, strict scrutiny is the proper standard of review.

3. Content-based and viewpoint discriminatory laws implicate strict scrutiny review.

Strict scrutiny also applies to Tourovia's enforcement of the Act because it determines which speakers will be regulated based on the content and viewpoint of their speech. This Court has been consistent in preventing governmental infringements on speech when the statute implemented is not content neutral and discriminates based on the message's viewpoint. *Pac. Gas & Elec. Co.*, 475 U.S. at 10.

A content-based regulation is one where coverage is triggered by what a person says. *Tornillo*, 418 U.S. at 257–58. This Court explained that concept in *Tornillo*, where the state of Florida attempted to force the Miami Herald to provide a right to reply to any criticisms of politicians the newspaper published. *Id.* This "right to reply" statute triggered strict scrutiny because in effect, the statute sought to force the Miami Herald to express contradictory messages only when they chose to publish political criticisms. *Id.* at 241. This implies that the content expressed by the newspaper was the primary purpose for triggering a statutory mandate to present views in opposition.

Tourovia's regulation is content based because its implementation against the Bakery was only triggered after it chose to exercise the right to refuse to participate in a same-sex wedding. Like the matter in *Tornillo*, the Bakery's message of opposing same-sex marriage was the primary trigger that brought forth the Act's speech regulation upon its place of business. Under the Act, had the Bakery refused to participate in their same-sex wedding for any reason besides its opposition to same-sex wedding, the Act would not apply. *See* Colo. Rev. Stat. § 24-34-601(2)(a) (2008) (similar application of Colorado statute). It is only implicated when the denial of service arises from membership in a protected class.

The Act is also a viewpoint based regulation because it selectively enforces its regulations on religious bakeries while withholding enforcement on secular bakeries based on their conformity to the viewpoint of accepting same-sex marriage. Viewpoint-based regulations are determined when the government "adopt[s] a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). This Court has recognized viewpoint discrimination as "censorship in its purest form," which the First Amendment never permits. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 62 (1983).

B. Under This Court's Free-Exercise Jurisprudence, the Act Is Subject to Strict Scrutiny Review Because It Targets Religious Conduct.

Just as the Free Speech Clause protects an individual's right choose what to say, as well as what not to say: the Free Exercise Clause protects the right to perform, or abstain from performing acts for religious reasons. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). Under this separate First Amendment guarantee, the Act is presumptively unconstitutional and strict scrutiny analysis applies.

As Justice Kennedy recently observed:

> In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community.

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring) (citation omitted).

"This Nation is heir to a history and tradition of religious diversity." *County of Allegheny v. ACLU*, 492 U.S. 573, 589 (1989). As a result, Americans exercise their religious beliefs in

various ways. Some "worship God on Sundays or some other chosen day and go about their business without reference to God the rest of the time." *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 624–25 (9th Cir. 1988) (Noonan, J., dissenting). Others, like the owners of the Bakery, take a different approach. They believe that their religion requires far more than a periodic visit to a house of worship. Their personal and professional spheres are inseparable.

This Court's free exercise jurisprudence has always recognized that Americans have the freedom to live their lives in this manner. *See, e.g.*, *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 709 (1981) (allowing free exercise claim brought by Jehovah's Witness who had been discharged from his job because his pacifist "religious beliefs forbade participation in the production of armaments."); *Sherbert v. Verner*, 374 U.S. 398, 399 (1963) (holding that the Free Exercise Clause prohibited government from conditioning eligibility for unemployment benefits upon her willingness to work on the Sabbath in violation of her religious beliefs). But by requiring the Bakery to design and make a cake celebrating a same-sex wedding in direct violation of its firmly held religious convictions, Tourovia presumptively violates the Free Exercise Clause.

When a statute burdens the free exercise of an individual's religion, it must be a statute that is a neutral law of general applicability or be subjected to strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Smith*, 494 U.S. at 878–79. "Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 532. If the law or statute is not neutral or generally applicable, then the state must demonstrate a compelling government interest, and the law must be narrowly tailored to achieve that interest. *Id.* at 531–32. Even if the law is neutral and generally applicable, strict scrutiny can still be triggered if the

religiously motivated conduct in questions implicates some other constitutionally protected right, including freedom of speech. *See Smith*, 494 U.S. at 881.

1. The Act is not neutral in practice because it burdens conduct based on its religious motivations.

This Court has established that, at a bare minimum, a law that burdens the free exercise of religion in any way must be neutral on its face. *Lukumi*, 508 U.S. at 532. This means a law cannot textually discriminate against conduct because it was undertaken due to a religious motivation. *Id.* However, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* at 534. The Free Exercise Clause "forbids subtle departures from neutrality, and covert suppression of particular religious beliefs." *Id.* A law will be subject to strict scrutiny unless it is neutral and generally applicable. *Id.* at 531–32. If a law is infringing on or restricting religious practices or beliefs, the law is not neutral. *Id.* at 533. A law can be facially neutral, but this alone cannot shield government action targeting religious practices or beliefs. *Id.* at 534.

Facial neutrality of a law does not by itself guarantee that a law is actually neutral. *Id.* at 534. A law can be neutral on its face and still not be neutral in application or operation. *See id.* at 535–37. Both the "effect of a law in its real operation" and the interpretation that the state has given the law are strong indicators to determine if a law is truly neutral or not. *Id.* This Court uses a two-step process to determine the neutrality of a law. First, the Court looks to see if the law is facially neutral, and second, the Court asks if the law is neutral in effect. *Id.* at 539. As applied to the Bakery, § 22.5(b) of the Civil Rights Act, while it may be neutral on its face, is not neutral in practice because of the effect it has on the Bakery's chosen religious practices.

By enforcing the Act, the Bakery is being forced to participate in the celebration of a marriage that is expressly against their closely held religious beliefs. R. at 3. The Bakery is being

harmed by the Act because a core religious belief held by all employees of the Bakery has been targeted. The Act is not being applied neutrally because in the real operation and effect in enforcing the Act, the State is attempting to supersede the Bakery's religious practices. The Bakery has never before created a wedding cake for a same sex couple. R. at 3. By holding this practice of religion by the Bakery as a violation of the law, the state is burdening the free exercise of specific religious practices of the Bakery. R. at 2.

The Supreme Court of Tourovia said that the law was neutral, and in doing so, has completely overlooked the free practice of religion that is guaranteed under the First Amendment. Individuals are allowed to "believe and profess whatever religious doctrine one desires." *Smith*, 494 U.S. at 877. Every staff member at the Bakery has chosen to profess their religion in a way that they see same-sex marriage as explicitly against their religion and have all chosen not to endorse it. R. at 3. Forcing the Bakery to make the wedding cake for the Barbers would necessarily force them to violate their closely held religious beliefs in direct violation of the Free Exercise Clause.

The Act is not neutral in its application. By applying the Act to the Bakery, Tourovia is essentially excluding everyone in the baking industry who opposes same-sex marriages because of their religious beliefs from actually practicing that belief. The effect of the Act in its real operation is strong evidence of the true objective of the law. *Lukumi*, 508 U.S. at 536. The government here is dictating that individuals are allowed to have religious protections inside a church, but is essentially throwing those rights to the side when someone steps outside the four walls of the church building. It should not matter where a person is, they should always be able to freely exercise the religion of their choice in the way that fits their own beliefs. The Bakery

has not been allowed to do this. Since the application is not neutral, the proper standard is strict scrutiny. *Id.* at 531–32.

2. The Act is not generally applied because it burdens conduct engaged in because of strictly held religious beliefs.

The Act would not only have to be neutral but would also have to be applied generally. *Lukumi*, 508 U.S. at 534. For the Act to be applied generally, there would have to be some burden on activities that are not purely religious. *Id.* at 542. This Court has stated that the government "cannot in a selective manner impose burdens only on conduct motivated by religious beliefs" because protection of these religious beliefs is "essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* at 543. The religious belief that the Bakery holds, that same-sex marriage is fundamentally wrong, is the only viewpoint being singled out. This application of the Act in this manner is not general.

This Court's decision in *Lukumi* provides an example of a statute that is facially neutral but not neutral in effect. The statute in question in *Lukumi* was held as not neutral in effect because it was meant to suppress a central element of Santeria worship. 508 U.S. at 532. This Court held that since the only conduct that was being subjected to the statute in question was focused on a religious practice of the Santeria that the effect was not neutral. *Id.* at 535–36. Further evidence of a lack of neutrality came from the fact that this Court viewed the statutes as burdening the religious conduct of the group more than was necessary to achieve the intended goal. *Id.* The statute in *Lukumi* was not neutral because it focused on the religious groups conduct and did not impact any nonreligious activities. *Id.* at 543.

The Tourovia Civil Rights Act as it has been applied to the Bakery is operating much like the statute in question in *Lukumi*. By enforcing the Act and holding that the Barber's equal protection rights were violated because the Baker did not want to create them a wedding cake,

the Act is favoring secular views over the religious views of the Bakery. R. at 5. The record reflects that the only views that are being affected by the application of the Act are the religious views held by the bakery. This confirms that the Act is not being generally applied, but instead applied in a way that targets religious views like the Bakery has chosen to follow and believe.

The Bakery did not refuse service to the Barbers, but instead offered to make or sell anything else to the couple that was not in violation of the Bakery's religious practices. R. at 2. By holding the Bakery in violation of the Civil Rights Act because they offered anything to the Barbers besides what was against their religion, the government is applying the Act in a manner that burdens the religious beliefs of the Bakery far too much to be considered as neutral. *See Lukumi*, 508 U.S. at 535–36.

3. The assertion of a valid hybrid rights claim requires the Act be reviewed under strict scrutiny.

There are two constitutional rights in question in this case. First, this Court is being asked to determine if the Bakery's First Amendment right to freedom of speech was violated. R. at 16. Second, this Court is asked to determine if the Bakery's right to free exercise of religion was violated. R. at 16. When a law burdens the free exercise of religion, it must be subjected to strict scrutiny when another constitutional right has also been burdened. *See Smith*, 494 U.S. at 881. More specifically, when a free exercise claim is linked with "communicative activity," like this case presents, strict scrutiny will apply. *Id.*

The "hybrid-rights" theory was first presented in *Smith*. In that case, this Court explored cases that presented situations where free exercise challenges were upheld because of these so called "hybrid rights" claims. *See Smith*, 494 U.S. at 881–82. Justice Scalia, in writing for the majority, explained how these hybrid claims came from a typical free exercise challenge that was coupled with other assertion of constitutional protection like freedom of speech. *Id.* This Court

did not hold Smith as having one of these hybrid rights claims however, stating that Smith's case "[did] not present a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right." *Id.* at 882. Despite the outcome of the case, *Smith* is credited with the emergence of the "hybrid rights" theory.

Since *Smith*, the hybrid rights exception sparked a debate among the circuit courts. This is because the seeming lack of specified boundaries. At least three circuit courts have developed a theory that provides the needed boundaries that has been coined as a "colorable claim" that would satisfy the need for boundaries in these kind hybrid rights claims. *See, e.g., Cornerstone Christian Sch. v. Univ. Interscholastic League*, 563 F.3d 127, 136 n.8 (5th Cir. 2009) (inquiring if the party had a "colorable claim" on a claim accompanying a free exercise claim); *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (explaining a "colorable claim" for the companion claim to a free exercise claim); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295–97 (10th Cir. 2004). This case presents the perfect vehicle for a hybrid rights claim. No circuit court has stood by this theory yet because of the uncertainty present in how to apply this type of claim to any case. This Court can provide clarity by adopting the colorable claim theory. With this case, this Court has the opportunity to provide the boundaries for a hybrid rights claim that circuit courts are asking for with this case. *See Kissinger v. Bd. of Trs. of Ohio State Univ., Coll. of Veterinary Med.*, 5 F.3d 177, 180 (6th Cir. 1993) (dismissing the hybrid rights theory as unworkable until this Court defines a clearer legal standard for evaluating such claims). Since the colorable claim standard "strikes a middle ground between the two extremes of painting hybrid-rights claims too generously and construing them too narrowly," this Court should apply that standard to this case. *See Axson-Flynn*, 356 F.3d at 1296–97.

The Bakery is asserting that the district court's holding regarding § 22.5(b) of the Tourovia Civil Rights Act violates their right to free speech and to free exercise of religion. R. at 7. The Bakery is essentially being forced to throw aside their religious beliefs, in violation of the Free Exercise Clause, to convey a message it prefers not to, in violation of the compelled speech doctrine. The combination of these claims give rise to a proper hybrid rights claim. Further, the colorable claim theory that has developed among the district courts allows this Court to even more certainty in ruling that strict scrutiny is the proper standard in this case. This Court should hold that the hybrid rights claim is valid and subject the Act to strict scrutiny on this basis as well. *See Smith*, 494 U.S. at 881.

C. The Act Fails Strict Scrutiny.

Strict scrutiny analysis is triggered by both the presumptive violation of the Free Speech Clause and by the presumptive violation of the Free Exercise Clause. Either requires the analysis that is almost impossible for the government to win.

For a law to survive strict scrutiny, the law must advance a compelling government interest and must be narrowly tailored to advance that interest. *See Hurley*, 515 U.S. at 577; *Lukumi*, 508 U.S. at 546. Strict scrutiny analysis does not look at big picture application, but instead examines whether the standard is met as applied to the party at interest. *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 430–31 (2006). The Act must have a compelling interest that is narrowly tailored to force a Bakery to communicate a message that is in violation of sincerely held religious beliefs by making them create wedding cakes for same-sex weddings. The State has no such interest in doing so.

1. Tourovia's asserted interest in preventing discrimination does not qualify as a compelling interest in this case.

Under strict scrutiny, the first prong that must be satisfied is that there is a compelling interest in the state action in question. There must be "substantial evidence" supporting the proposed state interest. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 644–45 (1994). The apparent interest Tourovia has is protecting against discrimination against same-sex couples. R. at 3. But the Bakery was not discriminating against the Barbers for any reason. The Bakery offered to make or sell the couple any other baked goods they had. R. at 2. The Barbers were upset when the Bakery refused to make the wedding cake for them, and that is what led to this action. This Court has stated that offending someone is not sufficient to give the state a compelling interest so as to satisfy strict scrutiny. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 18–26 (1971) (holding that protecting the public from being offended by profanity was not a compelling government interest); *Boos v. Barry*, 485 U.S. 312, 322 (1988) (holding that "adverse emotional impact" on others is not enough to qualify as a compelling governmental interest).

The interest here is not a compelling interest because it is not as if the Barbers were not able to get a wedding cake baked for them anywhere. There is no interest of the government to force Mama Myra's to make a wedding cake for the Barbers when it is likely they could have gone to another place. The Bakery has the ability to decided what to sell and who to sell to. The government has no compelling interest in this area and should not interfere with the Bakery's business or religious beliefs like has occurred.

2. The chosen means of achieving Tourovia's asserted interest is not the least restrictive option available.

For a law to pass the second prong of strict scrutiny, it must be "narrowly tailored" to achieve the interest. *Lukumi*, 508 U.S. at 546. Tourovia must establish that the actions taken are

"actually necessary" to address the "actual problem." *Brown*, 564 U.S. at 799. The actual problem Tourovia is trying to address is discrimination against same-sex couples. The state did not do what was actually necessary because there was more than one path the state could have taken in this issue. Tourovia does not have to compel artists like the Bakery to create the kind of expressive messages a wedding cake presents in violation of that artists beliefs. Instead, the state can provide access to information to advertise those willing to design the kind of wedding cake the Barbers are pursuing. There are, without question, many cake artists that are available around the state to create what the Barbers want, and the state can help to facilitate this. What the state cannot do is for the Bakery to contribute, participate, and show support for a message the conflicts with sincerely held religious beliefs.

CONCLUSION

This Court should reverse the judgment of The Supreme Court of Tourovia and render judgment for Petitioner Mama Myra's Bakery.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER