Docket No. 18-321

IN THE SUPREME COURT OF THE UNITED STATES

MAMA MYRA'S BAKERY, INC.,
Petitioner,

-v.-

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

On writ of certiorari to the Supreme Court of Tourovia

BRIEF FOR THE PETITIONER

Team 18
Counsel for Petitioner

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I. Whether § 22.5(b) of Tourovia's Civil Rights Act violates the Free Speech clause of the First Amendment when applied to compel a family-owned bakery to design, create, and provide a custom wedding cake for a same-sex couple in celebration of their marriage.

II. Whether § 22.5(b) of Tourovia's Civil Rights Act violates the Free Exercise clause of the First Amendment when applied to compel a family-owned bakery to engage in conduct that violates its sincerely-held religious objections to same-sex marriage.

JURISDICTIONAL STATEMENT

This case is properly within the subject matter jurisdiction of this Court pursuant to 28 U.S.C. § 1331 (2012). Following the decision of the Supreme Court of Tourovia, affirming judgement for Respondents, Petitioner timely filed for Writ of Certiorari, which was granted on January 31, 2018. (R. at 16). This Court has jurisdiction under 28 U.S.C. § 1254(1) (2012).

STATEMENT OF THE CASE

A. The Proceedings Below

Respondents filed their complaint in the United States District Court for the District of Tourovia. Respondents alleged Petitioners discriminated against them due to their sexual orientation by refusing to sell them a wedding cake, violating Section 22.5(b) of the Tourovia Civil Rights Act. (R. at 3). The district court decided two issues: (1) whether § 22.5(b) applies to Petitioners with respect to their actions with Respondents; and (2) whether there is a distinction between discrimination based on a person's status and based on conduct related to that status. (R. at 3-4). On September 30, 2015, the district court ruled in favor of Respondents in an opinion issued by Judge Fred K. Stevens. (R. at 5). The district court held there was no distinction between discrimination based on a person's status and discrimination based on conduct related to that status, and that Petitioners' refusal to make a wedding cake to celebrate a same-sex marriage constituted discrimination based on sexual orientation. *Id.* The district court found that Petitioners had violated the public accommodations provision of the Act, thus violating Respondents' Equal Protection rights under the Tourovia State Constitution. *Id.*

Petitioners then appealed to the Appellate Division of the Supreme Court of Tourovia, Fourth Department, in a motion to set aside judgement. (R. at 6-7). On appeal, Petitioners claimed the district court's holding violated their First Amendment Constitutional rights to free

speech and to free exercise of religion. (R. at 7). On October 15, 2015, the court ruled in favor of Respondents in an opinion issued by Judge Thomas A. McDermott. (R. at 11). The Court of Appeals held § 22.5(b) did not violate Petitioner's First Amendment right to free speech because it was unlikely the public would view the cake as an expression of Petitioner's beliefs. (R. at 9). The court also held § 22.5(b) did not violate Petitioner's First Amendment free exercise of religion because it was a law of general applicability and there was no religious exemption for places of public accommodation not used solely for religious purposes. (R. at 10). Therefore, the court upheld the constitutionality of § 22.5(b) and found that Respondents' Equal Protection rights were violated. (R. at 11). Following the briefing, the court denied Petitioner's motion at a hearing on October 20, 2015. (R. at 7). Petitioner subsequently appealed to the Supreme Court of Tourovia, which affirmed the lower courts' decisions without issuing an opinion. (R. at 14-15). Petitioner then filed for writ of certiorari, which this Court granted. (R. at 16).

B. The Facts

Petitioner Mama Myra's Bakery is a small, family-run bake shop in Suffolk County, Tourovia. (R. at 2). The owner of the bakery and his family member employees are devout Christians and have been practicing and outwardly expressing their religious faith for over twenty-seven years. *Id.* The bakery employees' beliefs align with those of the Christian faith, including the belief that same-sex marriage violates the teachings of the Bible. (R. at 3).

In August of 2012, Respondents, a same-sex couple, came to Mama Myra's Bakery requesting a custom-made wedding cake to celebrate their marriage. (R. at 2). The couple had been married in Massachusetts, because same-sex marriage was against the law in Tourovia. *Id.* Respondents requested a personalized cake with a sculpted figure of themselves hand-in-hand on the top tier of the cake. *Id.* Given that same-sex marriage violated the Christian beliefs firmly

held by all the bakery's employees, the baker declined to create the wedding cake. *Id.* The baker told Respondents that to create a customized cake celebrating a same-sex marriage would violate his sincerely-held religious beliefs, and offered to make or sell Respondents any other type of baked goods for their party. *Id.* Upon hearing this, Respondents left Mama Myra's Bakery without saying another word. *Id.*

Following their visit to Mama Myra's Bakery, Respondents filed a complaint in the District Court of Tourovia, claiming Petitioner violated § 22.5(b) of the Tourovia Civil Rights Act by not creating a custom wedding cake to celebrate their same-sex marriage. (R. at 3).

SUMMARY OF THE ARGUMENT

The Supreme Court of Tourovia erred in finding for Respondents for the following reasons:

First, § 22.5(b) of Tourovia's Civil Rights Act impermissibly infringes upon Mama Myra's Bakery's freedom of expression protected by the First Amendment and violates the compelled speech doctrine. The Court of Appeals erred in determining that the design and creation of custom wedding cakes does not constitute inherently expressive conduct. A wedding cake is an integral and iconic part of a marriage celebration and consequently conveys an implicit message of celebration and approval. A custom wedding cake necessarily implicates the expression of the cake artist by requiring him to use his artistic talents to reflect personal details about the marrying couple. In this case, Respondents requested that Mama Myra's create a custom cake featuring a sculpture of the same-sex couple holding hands. Because the creation of a wedding cake celebrates marriage, and because the obvious purpose of the requested cake was to celebrate a same-sex marriage, the conduct is expressive beyond a mere "plausible contention." *See Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288 (1984.) The Court of

Appeals erroneously asserted that it is unlikely that the public would view Mama Myra's Bakery's creating a custom-made cake for Respondents as an endorsement of same-sex marriage, given the political controversy surrounding same-sex marriage and the fact that Tourovia did not allow same-sex marriages in 2012. (R. at 2).

To require Mama Myra's to comply with § 22.5(b) would violate the compelled speech doctrine because it would "force one speaker to host or accommodate another speaker's message." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006). Mama Myra's opposes same-sex marriages on religious grounds, and to require the bakery to create a wedding cake for a same-sex couple would require it to endorse a message it finds morally objectionable. A law promoting a legitimate government interest must be narrowly tailored to that interest and will be found unconstitutional if it "broadly stifle[s] fundamental personal liberties." *Wooley v. Maynard*, 430 U.S. 705, 716–17 (1977). In this case, § 22.5(b) is tailored too broadly, leaving places of public accommodations like Mama Myra's vulnerable to impermissible infringement of First Amendment rights. In this case, the weight of Tourovia's interest in preventing discrimination based on sexual orientation is undercut by the fact that Tourovia did not allow same-sex marriages. Therefore, forcing Mama Myra's to endorse a same-sex marriage through the creation of a wedding cake, which constitutes symbolic speech, furthers no legitimate government interest.

Second, § 22.5(b) of Tourovia's Civil Rights Act unconstitutionally restricts the free exercise of religion of Mama Myra's Bakery's owner and employees. The Court of Appeals ignored the precedent set forth in *Smith*, in which this Court explained that laws that create hybrid situations in which there has been an encroachment on the free exercise of religion "in conjunction with other constitutional protections, such as freedom of speech" are automatically

subjected to strict scrutiny. *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990). The Court of Appeals erroneously applied the *Smith* test developed for stand-alone free exercise cases that don't present a hybrid situation. Since the regulation in question burdens Mama Myra's Bakery's freedom of speech and free exercise rights, the hybrid situation strict scrutiny test is appropriate unless this Court determines to break with precedent.

If this Court decides to forego precedent and use the stand-alone free exercise analysis testing constitutionally restrictive statutes, which requires such statutes be neutral and generally applicable to be valid, § 22.5(b) must still be analyzed under strict scrutiny because it is neither neutral nor generally applicable. The statute is not neutral because it implicitly targets the beliefs of devout Christians, a religious minority, and it fails the general applicability requirement by effectively imposing a burden on a religious minority that it does not impose on others; thus, strict scrutiny is required.

The statute fails the strict scrutiny requirement that it further a compelling government interest through narrowly tailored means because § 22.6 of the Tourovia Civil Rights Act includes exceptions that undermine the state interest. Same-sex marriage was not legal in Tourovia at the beginning of this lawsuit, (R. at 2), and the law is not narrowly tailored since it could be more narrowly drafted to protect Mama Myra's Bakery from the burden of affirmatively creating an artistic and expressive product celebrating a religious occasion in violation of their deeply-held religious beliefs without denying protection to same-sex couples and individuals from discrimination on the basis of their sexual orientation.

Accordingly, this Court should reverse the decision of the Supreme Court of Tourovia and find in favor of Mama Myra's Bakery.

ARGUMENT

The Supreme Court of Tourovia erred in finding Section 22.5(b) of the Tourovia Civil Rights Act did not violate Petitioner's First Amendment rights to free speech and free exercise of religion. The Act states, in relevant part:

> 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 First Amendment states, "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. This Court has extended the protection of First Amendment rights to the states. "The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

In this case, enforcement of § 22.5(b) would violate Mama Myra's Bakery's First Amendment right to freedom of speech. Creation of custom-made cakes by a professional baker is inherently expressive symbolic speech. To force Mama Myra's to make cake for Respondents conveying a message contrary to its religious beliefs would constitute impermissible compelled speech.

Additionally, enforcement would violate Mama Myra's Bakery's First Amendment right to free exercise of religion by requiring conduct that violates its deeply held religious beliefs. Section 22.5(b) of Tourovia's Civil Rights Act cannot survive strict scrutiny: the State's interest in protecting same-sex couples' ability to obtain wedding cakes is not compelling in light of its decision not to allow same-sex marriage, and the means employed in advancing that interest are

not narrowly tailored. Evaluating the constitutionality of § 22.5(b) requires a strict scrutiny analysis because the law impinges upon two Constitutional rights and thus gives rise to a hybrid claim. In the alternative, the regulation is neither generally applicable nor neutral because it implicitly targets a religious minority and imposes burdens on that religious minority that it does not place on the rest of the community.

Therefore, this Court should reverse the decision of the Supreme Court of Tourovia and find Section 22.5(b) of the Tourovia Civil Rights Act unconstitutional.

I. § 22.5(B) OF TOUROVIA'S CIVIL RIGHTS ACT VIOLATES THE FREE SPEECH CLAUSE OF THE CONSTITUTION BECAUSE THE CREATION OF A CUSTOM WEDDING CAKE IS SYMBOLIC SPEECH AND FORCED COMPLIANCE WITH § 22.5(B) WOULD FORCE MAMA MYRA'S TO ACCOMMODATE A MESSAGE IS DISAGREES WITH, VIOLATING THE COMPELLED SPEECH DOCTRINE.

Section 22.5(b) of Tourovia's Civil Rights Act violates the Free Speech clause of the First Amendment of the Constitution as applied to the states by the Fourteenth Amendment because it functions to prohibit the free speech of Mama Myra's Bakery employees. U.S. CONST. amends. I, XIV. "The constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression." *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 8 (1986) (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). "By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information." *Id.*

The creation of a custom-made wedding cake by a professional baker is inherently expressive speech that would be seen as an expression of the baker by the public. Additionally, because of the expressive nature of the cake, to compel Mama Myra's to create Respondents' requested cake would violate the compelled speech doctrine because it would force Mama

Myra's to express a message of support for same-sex marriages, with which it strongly disagrees. The government cannot force someone to host another's message unless there is a compelling government interest, which is absent in this instance. For these reasons, enforcing § 22.5(b) would impermissibly violate Mama Myra's Bakery's First Amendment right to free speech.

A. The wedding cake requested of Mama Myra's Bakery by Respondents constituted symbolic speech that would convey a message of celebrating same-sex marriage.

The custom design and creation of a wedding cake constitutes inherently expressive symbolic speech that, in the context of the circumstances surrounding this case, was sufficiently communicative to trigger First Amendment protection. First Amendment protection extends beyond the spoken or written word and applies to some forms of conduct sufficiently communicative to fall within its scope. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). This court has found conduct to be sufficiently expressive as to constitute symbolic speech deserving of First Amendment protections where there exists an "intent to convey a particularized message" and a likelihood that viewers would understand the intended message. *Id.*

In *Johnson*, the court determined that the defendant's flag burning constituted expressive conduct because the national flag serves as a symbol of our nation and the juxtaposition of its destruction with Ronald Reagan's re-nomination for President made the intended political statement overwhelmingly apparent. *Id.* at 405-406. In evaluating the extent to which conduct is communicative, this court has considered both the historical perspective from which it originates and the context in which the conduct occurs. *See Virginia v. Black*, 538 U.S. 343 (2003) (considering the historical use of cross burning by the Klu Klux Klan as a means of communicating a message of intimidation). *See also Spence v. Washington*, 418 U.S. 405 (1974) (political message intended by college student's taping of a peace sign over an American flag evident in light of Cambodian invasion and Kent State incident).

Wedding cakes have long occupied a position of central symbolic importance in the celebration of a marriage. Simon Charsley, *The Wedding Cake*: *History and Meanings*, 99 Folklore 232, 232 (1988). Popular traditions like cutting the cake, feeding the cake, and saving the top tier of the cake for later anniversaries involve the newlywed couple directly interacting with the wedding cake in a ceremonious manner. Michelle Anderson, *7 Wedding Cake Traditions and Their Meanings*, The Spruce, https://www.thespruce.com/wedding-cake-traditions-486933 (last updated Jan. 17, 2018). These traditions attach a celebratory message of symbolic significance to the wedding cake absent from other goods and services. Just as our nation's flag symbolizes national pride, wedding cakes are iconic symbolizations of wedding celebrations. Modern wedding cake designs have become increasingly personalized and reflective of both the artistic ability of the cake artist and the personal tastes of the couple, but a celebratory message remains inherent to any wedding cake no matter the identities of the couple who requests them. The fact that Respondents requested that Mama Myra's Bakery provide a wedding cake including a sculpted figure of the couple hand-in-hand highlights the parties' shared understanding that the requested cake was intended to serve as a celebration, and therefore an approval, of Respondents' same-sex marriage. (R. at 2).

A person seeing the Bakery's cake at a same-sex wedding would not only view it as a symbol of celebration, but as an implicit approval of that celebration by the cake artist. Unlike a premade cake, a custom cake is by definition personally tailored to suit the specifications of the customer. Thus, any custom features present on the cake - like the requested figure of the couple holding hands - would indicate that the cake artist who created the cake understood its purpose and accepted it, or at least did not find that purpose morally objectionable. A person who knew or later learned that Mama Myra's had supplied a custom wedding cake for a same-sex couple

would logically conclude that Mama Myra's supported, or at least did not oppose, same-sex marriage.

The political landscape surrounding same-sex marriage in 2012 attaches another facet of symbolic expression to the wedding cake requested by Respondents. The fact that same-sex marriage was only legal in some states illustrates a nationwide controversy regarding the propriety of same-sex marriage. *Id.* Just as this Court found that the political events surrounding Johnson's burning of the flag in *Johnson* and Spence's taping of a peace sign to the flag in *Spence* provided context that would elevate the speech value of those acts by increasing the likelihood their significance would be understood by viewers, so too should this Court consider the social and political climate surrounding same-sex marriage as increasing the likelihood that the requested cake would be understood as expressing Mama Myra's Baskery's approval of same-sex marriage. The fact that Tourovia did not allow same-sex marriage increases the likelihood that others would view the Bakery's decision to design, create, and sell a wedding cake to a same-sex couple as a political or moral statement in approval of same-sex marriage. *Id.*

For the foregoing reasons, the Court of Appeals erred in determining that Mama Myra's failed to advance more than a mere plausible contention, as required by *Clark*, that the requested wedding cake is expressive. Because a custom wedding cake is inherently expressive, and because it would be perceived by others as an expression of approval of same-sex marriage, it constitutes symbolic speech subject to full protection under the First Amendment.

B. Requiring Mama Myra's to create a custom-made cake for a same-sex wedding celebration to comply with § 22.5(b) of Tourovia's Civil Rights Act constitutes compelled speech by the government of Tourovia.

Requiring Mama Myra's to comply with § 22.5(b) and create a wedding cake for Respondents violates the compelled speech doctrine because it forces Mama Myra's to convey a

message endorsing same-sex marriage, which it opposes on religious grounds. Such compulsion impermissibly infringes upon Mama Myra's First Amendment freedom of expression.

The individual freedom of expression protected by the First Amendment includes both the freedom to express views different from those of the majority and the freedom from forced expression of views one finds morally objectionable. *Wooley*, 430 U.S. at 715. State governments cannot "force one speaker to host or accommodate another speaker's message." *Rumsfeld*, 547 U.S. at 63. "'[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" *Wooley*, 430 U.S. at 716–17 (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

In *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, this Court held that a public order forcing the Pacific Gas & Electric Company to include a third-party newsletter in billing envelopes sent to customers was a violation of petitioner's First Amendment right to free speech. 475 U.S. 1, 20-1 (1986). The Court found that forcing the inclusion of the newsletter "impermissibly require[d] appellant to associate with speech with which appellant may disagree," including political editorials. *Id.* at 15. (Affirming the reasoning in *Miami Herald Pub. Co. v. Tornillo*, which held a Florida statute cannot force a newspaper to publish a political candidate's response to an editorial because "[t]he clear implication has been that any such compulsion to publish that which 'reason' tells them should not be published' is unconstitutional." 418 U.S. 241, 256 (1974)). Respondents argued there was a valid government interest in the public order to support the exchange of multiple viewpoints to customers receiving utility bills from petitioners. 475 U.S at 20. The Court in *Pac. Gas & Elec. Co.* found this interest to not be narrowly tailored, stating, the "State can serve that interest through means that would

not violate appellant's First Amendment rights." *Id.* at 19. Furthermore, the Court was primarily concerned not only that petitioner was being forced to associate with the speech of another, but also the "danger that appellant will be required to alter its own message as a consequence of the government's coercive action." *Id.* at 16. Therefore, the Court found the public order to be compelled speech and a violation of petitioner's right to free speech. *Id.* at 20-1.

In *Rumsfeld*, this Court evaluated whether enforcement of the Solomon Amendment, which allowed the Department of Defense to deny federal funding to any higher education institutions that did not permit equal access to military recruiters, was constitutional. 547 U.S. 47. Respondents argued enforcement of the Amendment constituted compelled speech because it forced the law schools to convey a message supporting the military's policy regarding homosexuals, with which the schools did not agree. *Id.* at 53. The Court found that compelling the law schools to send out scheduling emails for the recruiters was a trivial matter, and "simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die.'" *Id.* at 62. Additionally, the Court recognized that the Solomon Amendment regulated the law schools' conduct, and that any "speech" used to carry out such conduct (like emails), was merely incidental and did not rise to the level of unconstitutional compelled speech. *Id.* Finally, the Court noted the compelled-speech violations in *Tornillo* and *Pac. Gas & Elec. Co* "resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* at 64. However, the Court found in *Rumsfeld* that the law schools' messages were not being infringed in such a way because the schools are not speaking when they host interviews and recruiting events, as this conduct lacks expressive qualities. *Id.* Therefore, the Court held the Solomon Act did not violate the respondent's rights to freedom of speech. *Id.* at 65.

This Court in *W. Virginia State Bd. of Educ. v. Barnette* addressed the question of whether the state government could order students to salute the American flag and recite the pledge of allegiance against the threat of expulsion for non-compliance. 319 U.S. 624 (1943). A group of students claimed the law violated their freedom of speech. *Id.* at 629. To be upheld, a law infringing freedom of speech must function "to prevent grave and immediate danger to interests which the state may lawfully protect." *Id.* at 639. In this case, the Court found the law requiring a flag salute by children clearly did not meet this standard, and "freedoms of speech . . . may not be infringed on such slender grounds." *Id.* Thus the balance of interests weighed in favor of respondent because the compelled salute and pledge required "affirmation of a belief and an attitude of mind" contrary to those held by respondents, constituting compelled speech and a violation of respondent's First Amendment rights. *Id.* at 633.

Similarly, this Court in *Wooley* held the government of New Hampshire's interests in promoting state pride and facilitating vehicle identification did not trump petitioner's desire not to display the state motto on his license plate. 430 U.S. at 717. Petitioner, a Jehovah's Witness, viewed the motto "Live Free or Die" as offensive to his religious beliefs and was covering it up in violation of a state law. *Id.* at 707-8. The Court decided New Hampshire cannot force petitioner to display an ideological message with which he disagrees on his private property absent a compelling governmental interest. *Id.* at 705. Since such an interest was lacking, the Court found the law to be compelled speech in violation of petitioner's First Amendment rights. *Id.* at 717.

This Court in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, similarly held the state government could not force a private group to comply with a public accommodation law by including a LGBT group in a private St. Patrick's Day parade. 515 U.S. 557, 580 (1995).

The Court stated, "[s]ince every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade." *Id.* at 572–73. Not only was the Court concerned with preventing compelled speech, but it also addressed the overly broad application of the statute, noting, "[u]nder this approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech," thus violating petitioner's right to "choose the content of his own message." *Id.* at 573.

Similar to the petitioners in *Pac. Gas & Elec. Co.* and *Tornillo*, forcing Mama Myra's to create a custom cake for Respondents would force them to host a message supporting same-sex marriage, a message they strongly disagree with on religious grounds. (R. at 2). Unlike respondents' emails and recruiting activities in *Rumsfeld*, the creation of the cake does constitute speech and has expressive qualities, as discussed above. Thus, to enforce § 22.5(b) and require Mama Myra's to create the cake would force the bakery to alter its own message, and such compulsion by the government will not be tolerated by this Court.

Petitioner's position can further be distinguished from that of the law schools in *Rumsfeld*. Forcing Mama Myra's to create a wedding cake conveying a message with which it disagrees rises high above the recruiting email found to be inadequate in *Rumsfeld*, and instead is akin to the license plate and flag salute. Creation of the cake, as discussed above, is an artistic expression requiring an investment of time and intimate effort from the baker, which far exceeds the effort needed to send an informational email. Furthermore, though § 22.5(b) mainly functions to regulate conduct, the speech that would be used to carry out the conduct by Mama Myra's is not merely incidental. The speech associated with creating this wedding cake is not "merely incidental" because it is the essence of the cake itself. Absent the message endorsing the

Respondents' wedding, the cake would cease to be a wedding cake at all. Therefore, the speech conveyed through the cake is inherent, rather than incidental, to the cake's existence, further differentiating this case from *Rumsfeld*.

Finally, similar to *Barnette* and *Wooley*, there is no compelling government interest present to override Mama Myra's Bakery's First Amendment right to free speech. Similar to the parade organizers in *Hurley*, the application of this statute is overbroad, and would require Mama Myra's to host any speaker's message on a cake, so long as that customer was part of a statutorily protected class, regardless of how offensive the message may be. § 22.5(b) was enacted to prevent discrimination, a legitimate government interest, however as applicable here that government interest does not outweigh the potential infringements of First Amendment rights, which are held sacred by all United States citizens. Similar to *Barnette*, the balance of interests favors Mama Myra's because to compel the bakery to create the cake would require it to affirm a belief contrary to its own. More specifically, enforcement of § 22.5(b) would have required Mama Myra's to create a cake conveying an endorsement for something illegal at the time in Tourovia. (R. at 2). If the State of Tourovia did not have an interest in recognizing same-sex marriage as legitimate, why should Mama Myra's be forced to do so against its will? In this instance, § 22.5(b) could be more narrowly tailored to provide exceptions for situations such as Mama Myra's, in which a lawful business is forced to forgo its own constitutional rights to accommodate a customer.

Thus, forcing Mama Myra's Bakery to create Respondents' cake would force it to accommodate a message endorsing same-sex marriage, with which it disagrees, without any compelling government interest. This obligation constitutes compelled speech, which this Court

has found time and time again to be an unacceptable violation of the right to free speech protected in the First Amendment.

In conclusion, creation of a custom wedding cake is symbolic speech and forcing Mama Myra's to create the cake would require the bakery to accommodate another speaker's message, violating the compelled speech doctrine. For the foregoing reasons, enforcement of § 22.5(b) would violate Mama Myra's Bakery's constitutionally protected right to free speech.

II. § 22.5(B) OF TOUROVIA'S CIVIL RIGHTS ACT BURDENS THE FREE EXERCISE CLAUSE OF THE CONSTITUTION AND, BECAUSE THE CLAIM INVOLVES A HYBRID SPEECH-RELIGION VIOLATION AND THE STATUTE IS NEITHER GENERALLY APPLICABLE NOR NEUTRAL, IT SHOULD BE SUBJECTED TO A STRICT SCRUTINY ANALYSIS FINDING IT UNCONSTITUTIONAL.

Tourovia's public accommodation statute, § 22.5(b) of the State's Civil Rights Act, violates the Free Exercise clause of the First Amendment of the Constitution as applied to the states by the Fourteenth Amendment because it acts as a law "prohibiting the free exercise" of religion by Mama Myra's owner and employees. U.S. CONST. amends. I, XIV. "The free exercise of religion means . . . the right to believe and profess whatever religious doctrine one desires." *Smith*, 494 U.S. at 877. As set out by this Court in *Smith*, the test to determine if a state statute violates the free exercise of religion first asks if the case in question presents "a hybrid situation" in which there has been an encroachment on the free exercise of religion "in conjunction with other constitutional protections, such as freedom of speech and of the press." Hybrid situations trigger a strict scrutiny that tests whether the questionable statute upholds a "compelling state interest" and whether it is "narrowly tailored to achieve that interest" *Smith*, 494 U.S. at 894. If a case does not present a hybrid situation and the free exercise claim is being considered alone, then "a law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability." *Church of the Lukumi Babalu Aye, Inc. v.*

City of Hialeah, 508 U.S. 520, 521 (1993). If the law is not generally applicable and neutral, then strict scrutiny is triggered. *Id.* Tourovia's public accommodation statute, § 22.5(b) of the state's Civil Rights Act, burdens the free exercise of religion and freedom of speech of the owner and employees of Mama Myra's and should be subjected, in this hybrid situation, to a strict scrutiny analysis testing whether it upholds a compelling state interest and is narrowly tailored to meet that interest. *Smith*, 494 U.S. at 894 The statute is also neither neutral in that it implicitly targets the beliefs of a religious minority nor generally applicable in that it imposes a burden on a particular group, a religious minority, that it does not impose on others. Section 22.5(b) does not survive strict scrutiny because it does not serve a compelling state interest since there are powerful exceptions already provided that harm the interest, same-sex marriage was not legal in Tourovia at the beginning of this lawsuit, and it is not narrowly tailored since it could be more narrowly drafted to protect religious objectors, like the owner of Mama Myra's Bakery, from the burden of affirmatively creating an artistic and expressive product celebrating a religious occasion in violation of their deeply-held religious beliefs. (R. at 2).

A. § 22.6(b) of Tourovia's Civil Rights Act burdens both the free exercise of religion and freedom of speech of Mama Myra's Bakery and, as such, is a hybrid claim automatically subject to strict scrutiny.

Since § 22.5(b) of Tourovia's Civil Rights Act burdens both Mama Myra's freedom of speech in compelling an expression with which the Bakery's owner and employees disagree and its free exercise of religion in that it forces the owner and employees to transgress a tenant of their religious belief, the statute should be subjected to the "hybrid situation" strict scrutiny test derived from earlier free exercise cases and developed in *Smith*. 494 U.S at 882. In situations when a law burdens free exercise "in conjunction with other constitutional protections, such as freedom of speech and of the press," the Court automatically applies strict scrutiny to test

whether the statute in question upholds a "compelling state interest" and whether it is "narrowly tailored to achieve that interest." *Id.* The *Smith* Court created the hybrid situation strict scrutiny test in order to follow the precedent of free exercise cases which came before it, are still valid law, used strict scrutiny, and combined issues of freedom of speech, freedom of the press, and due process with the free exercise of religion and also to distinguish from cases like the situation in *Smith* involving a pure free exercise claim which if validated would permit people, "by virtue of [their] beliefs, 'to become a law unto [themselves].'" *Id.;* Carol M. Kaplan, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith*, 75 N.Y.U. L. Rev. 1045, 1051 (2000).

In *Wooley*, George and Maxine Maynard, who were Jehovah's Witnesses, refused to comply with a New Hampshire statute that required them to exhibit the state motto "Live Free or Die" on their license plates because they found the phrase to be "repugnant to their moral, religious, and political beliefs" and because they believed it was a form of impermissible compelled "symbolic speech." 430 U.S. at 707-13. The court, finding that by requiring the exhibition of the state motto New Hampshire was using the Maynard's car as a "mobile billboard" and that the "First Amendment protects the rights of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable," proceeded automatically to measure the State's "countervailing interest[s]" and found that these interests could be more narrowly tailored to achieve identification of passenger vehicles and promote state pride. *Id.* at 715-16. The court struck down the license plate requirement. *Id.* at 717.

Another case which *Smith* distinguished from itself as a hybrid situation pitted a religious minority against a statute that encroached on both free exercise of religion and freedom of

speech involving a group of schoolchildren who, because of their religious beliefs, refused to comply with the mandatory pledge of allegiance required by West Virginia law. *Barnette,* 319 U.S. at 629; *contra Smith* 494 U.S. at 890 (holding constitutional an Oregon drug statute prohibiting ingestion of peyote even in cases of religious practice by members of the Native American Church who sued on a pure free exercise claim and therefore were not afforded a strict scrutiny analysis of compelling governmental interest and narrowly tailored means). *Barnette* explained that the restriction imposed by the flag-salute statute "invade[d] the sphere of intellect and spirit" and because it mandated expressive speech which burdened faith it could only be justified "to prevent grave and imminent danger to interests which the state may lawfully protect." 319 U.S. at 639, 642. Under this strict scrutiny, the court invalidated the West Virginia law. *Id.* at 642.

Just as *Barnette* and *Wooley* involved hybrid situations in which state statutes compelled speech which burdened deeply-held religious beliefs through the forced exhibition of a phrase on private property in New Hampshire and though the forced, active participation in a pledge of allegiance in West Virginia, so too does § 22.5(b) of Tourovia's Civil Rights Act compel Mama Myra's owner and employees to engage in expressive speech through the act of baking a customized item intended for an event celebrating a ceremony that runs directly contrary to their core religious beliefs and burdens their free exercise. *Id.*; 430 U.S at 715-16; (R. at 2-3). Unlike *Smith*, which involved a "free exercise claim unconnected with any communicative activity" and did not involve an affirmative state-mandated obligation to act a certain way, Mama Myra's Bakery is weighted with the double burden of state-mandated speech in the form of affirmative conduct violating a core religious belief. 494 U.S. at 882. Given the hybrid nature of its situation in which two fundamental constitutional rights are burdened by § 22.5(b), Mama Myra's Bakery

should be afforded a strict scrutiny test to ensure that Tourovia does have a compelling governmental interest and that the means to uphold that state interest are narrowly tailored.

B. § 22.5(b) of Tourovia's Civil Rights Act statute is neither neutral in that it implicitly targets the beliefs of a religious minority nor generally applicable in that it in effect imposes a burden on a religious minority that it does not impose on others and is therefore subject to strict scrutiny analysis.

Tourovia's § 22.5(b) of the state's Civil Rights Act is not neutral nor generally applicable. If the Court decides to apply to this case the pure free exercise test developed in *Smith* to deal with situations in which a free exercise claim is not raised concurrently with another First Amendment issue like freedom of speech, then § 22.5(b) would have to be found to be a neutral law of general application in order to avoid a strict scrutiny analysis testing for a compelling governmental interest justifying burdening protected rights and evaluating if the means to advance that governmental interest are narrowly tailored . *Smith*, 494 U.S. at 881-82. A neutral law is one that does not facially discriminate against a religious practice in its text and, if it does not textually discriminate, was not passed with the intent to covertly and implicitly target and suppress "particular religious beliefs." *Lukumi*, 508 U.S. at 534. General applicability hinges on whether the regulation in question has created a situation in which the "effect of [the] law in its real operation" is to target a religious minority by imposing burdens on a minority that it does not impose on others. *Id.* at 535. "Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531.

The *Lukumi* case involved a governmental statute that, though not explicitly discriminatory because it technically applied to both secular and religious groups and did not textually name a religious practice to be burdened, had the masked intent of targeting a Santeria religious community by creating a system restricting the slaughter of animals for "ritual or

ceremony" and not "for the primary purpose of food consumption." *Id.* at 527. The statute was worded in such a way as to provide exceptions to kosher slaughter and other types of animal killings such as hunting and fishing "no more necessary or humane" than the religiously proscribed animal sacrifices that are central to the Santeria faith. *Id.* at 524, 536. The court in *Lukumi* held that the statute was not neutral because, through recorded comments in the legislative history and carefully crafted statutory language that implicitly did not burden most of the community but greatly burdened Santeria, the government had shown discriminatory intent. *Id.* at 536. The statute was also not generally applicable since it was underinclusive in advancing the state interests of "protecting the public health and preventing cruelty to animals" in that in its application it imposed a prohibition on Santeria worshipers that secular society was unwilling to impose upon itself in order to accomplish the alleged governmental interests. *Id.* at 528, 542-45. The *Lukumi* statute was found to be unconstitutional after being subjected to the strict scrutiny test proper for a regulation burdening free exercise that is neither generally applicable nor neutral. *Id.* at 547.

The Tourovia statute § 22.5(b) of the State Civil Rights Act, like the regulation in *Lukumi* which had the effect "in its real operation" of imposing a heavy burden on a minority religious group that it did not impose on general, secular society and other religious groups, is biased in its application since it will almost only affect conscientious religious objectors to same-sex marriage operating places of public accommodation that provide both religious and secular services. *Id.* at 535. Just as the *Lukumi* statute created powerful exceptions to protect mainstream religious believers at the expense of a less-acceptable religious minority, so too does the Tourovia statute exempt "places solely for religious purposes" in order to protect Churches and other places of worship frequented by a majority of religious believers without protecting establishments like

Mama Myra's Bakery owned by deeply religious citizens who provide both secular and religious services. *Id.* at 524, 536; (R. at 10). Tourovia's interest of protecting same-sex couples from discrimination would be equally served by a modified statute that exempted conscientious religious objectors from having to perform expressive or artistic services for religious occasions, such as a wedding or wedding celebration. The State clearly is already unwilling to advance its interest to its fullest form in protecting same-sex couples from discrimination from all Christians by allowing an exception for Churches and "places solely for religious purposes." (R. at 10). This type of favoritism against a religious minority should be found to be unconstitutional since there is little difference, in terms of justifying biased burdening, between a religious service with hymns and professions of faith on Sundays and the religious service of creating an expressive work commemorating what most in society consider one of the most spiritual of life events, marriage.

As in *Lukumi,* in which the statute was not neutral nor generally applicable, so too in this case the Tourovia statute in its application targets a religious minority and is underinclusive because it is written so as to burden a minority, conscientious religious objectors operating places of dual secular and religious service, without imposing on purely religious places of public accommodation serving the majority of religious believers. 508 U.S. at 542, 545. Tourovia's § 22.5(b) of the state's Civil Rights Act in its current form should be found to be neither neutral nor generally applicable and should be subjected to a strict scrutiny analysis testing for a compelling governmental interest that, importantly, is served by narrowly tailored means.

C. 22.5(b) does not survive strict scrutiny because it does not serve a compelling state interest since there are powerful exceptions already included that undermine the interest, same-sex marriage was not legal in Tourovia at the beginning of this lawsuit, and it is not narrowly tailored since it could be more narrowly drafted to protect religious objectors from the burden of affirmatively creating an artistic and expressive product celebrating a religious occasion in violation of their deeply-held religious beliefs.

The Court should hold § 22.5(b) of Tourovia's Civil Rights Act to be unconstitutional under a strict scrutiny analysis. Strict scrutiny tests whether a statute that burdens a constitutional right like free exercise of religion upholds a "compelling state interest" and whether it is "narrowly tailored to achieve that interest." *Smith*, 494 U.S. at 894. Failure to meet either requirement makes the regulation unconstitutional. *Id.* In cases when a government "restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm . . . of the same sort, the interest given in justification of the restriction is not compelling." *Lukumi*, 508 U.S. at 546-47. A means is not narrowly tailored when there exist "less drastic means for achieving the same basic purpose." *Wooley*, 430 U.S. at 716-17. The *Lukumi* court ruled that the alleged governmental interests of "protecting the public health and preventing cruelty to animals" were not compelling because the statute burdening religious practice of Santeria was underinclusive in allowing for animal killings such as hunting and fishing "no more necessary or humane" than the ritual sacrifice of animals in Santeria. 508 U.S. at 528, 536, 547. In *Wooley*, the court found that the state interest of facilitating "identification of passenger vehicles," was not narrowly served by compelling the state motto on license plates since New Hampshire plates "consist of a specific configuration of letters and numbers," which by itself allowed for easy identification. 430 U.S. at 716.

Just as the interests in *Lukumi* were not compelling because of the exceptions made by the government that made the statute underinclusive of actions equally harmful to those they banned, so too in the present case does the state of Tourovia hamstring its interest in protecting

same-sex couples and individuals from discrimination by providing for exceptions to purely religious places of public accommodation and, at the time of the filing of this suit, by not allowing for legal same-sex marriage in the state. 508 U.S. at 528, 536, 547; (R. at 2, 10) Similarly, like the situation in *Wooley* where a narrower means was easily identified, this case is one in which Tourovia could provide for a less burdensome regulation that exempts, as it exempts purely religious places, religious conscientious objectors to same-sex marriage operating places of public accommodation from having to create expressive and affirmative works commemorating religious occasions like marriages. 430 U.S. at 716; (R. at 2) Because the interest is not compelling and the means could be more narrowly drawn to continue to provide protection to same-sex couples whilst also unburdening Mama Myra's Bakery's right to free exercise of religion, § 22.5(b) should be found unconstitutional under a strict scrutiny analysis.

In conclusion, § 22.5(b) of Tourovia's Civil Rights Act should be held unconstitutional under strict scrutiny because this is a hybrid claim presenting an encroachment of Mama Myra's constitutional rights of free exercise and free speech and because, if this Court decides to forgo hybrid situation strict scrutiny precedent, the law is neither neutral nor generally applicable.

CONCLUSION

For the foregoing reasons, Petitioner Mama Myra's Bakery respectfully requests that this Court reverse the decision of the Supreme Court of Tourovia and find Section 22.5(b) of the Tourovia Civil Rights Act in violation of Mama Myra's First Amendment rights.

Dated: Mar. 4, 2018

Respectfully submitted,

Team #18

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