No. 18-321

In the Supreme Court of the United States

OCTOBER TERM, 2017

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 20

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QUESTIONS PRESENTED

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

STATEMENT OF THE CASE

Mama Myra's Bakery ("Mama Myra's" or "the Bakery") is a small, family-owned bakery located in Suffolk County, Tourovia. R. at 2. All employees, including the owner and his family members, are Christians. R. at 2. The employees, through the Bakery, have outwardly expressed their Christianity for over twenty-seven years. R. at 2. Because of their strong Christian beliefs, Mama Myra's employees believe that homosexuality and same-sex marriage are against Biblical teaching, and are therefore sinful and immoral. R. at 2-3. Thus, Mama Myra's has made a conscientious decision to not make wedding cakes for same-sex couples, because "it would violate the sincerely-held religious beliefs held by all Bakery employees." R. at 2. However, the Bakery is willing to make and sell other kinds of baked goods for same-sex weddings and receptions. R. at 2.

Respondents, Hank and Cody Barber ("the Barbers"), are a same-sex couple. R. at 2. Because the state of Tourovia did not recognize same-sex marriage in 2012, the Barbers married in P-Town, Massachusetts, a state that legally recognized same-sex marriage at the time. R. at 2. The Barbers then planned to hold a reception in Tourovia, in order to celebrate their marriage. R. at 2. In August 2012, the Barbers asked Mama Myra's to make a custom-made wedding cake, including a sculpted cake topper of the couple standing hand-in-hand. R. at 2. While Mama Myra's declined to create the custom-made wedding cake, it offered to bake other goods for their

reception. Without saying a word, the Barbers left the Bakery. R. at 2. Several weeks later, the Barbers filed a sexual orientation discrimination complaint under the section 22.5(b) of the Tourovia Civil Rights Act. R. at 3.

The District Court of Tourovia ruled in favor of the State, finding that Mama Myra's violated section 22.5(b) of the Tourovia Civil Rights Act. R. at 5. The District Court based their opinion on Equal Protection grounds, and held that (1) Mama Myra's discriminated against the Barbers because of their sexual orientation, and (2) such discrimination was improper. R. at 5. The Bakery appealed to the Appellate Division of the Supreme Court of Tourovia ("the Appellate Division"). R. at 6. The Appellate Division ruled in favor of Tourovia, holding that section 22.5(b) did not violate the First Amendment on either free speech or freedom of religion grounds. R. at 9, 11. The Bakery appealed to the Supreme Court of Tourovia, which affirmed the Appellate Division's ruling. R. at 15. The Bakery appealed. R. at 16. This Court granted certiorari on January 31, 2018. R. at 16.

SUMMARY OF THE ARGUMENT

First, this Court should hold that Mama Myra's decision not to bake the Barbers' cake was an act of protected expression under the First Amendment. Cake design is a creative endeavor performed by passionate artisans, and it should thus be classified as protected expression regardless of whether any specific cake conveys a particularized message. Alternatively, the specific cake the Barbers requested should be classified as protected expression because they also requested that the cake include a same-sex cake topper, which is an item of symbolic speech that this Court should protect under the First Amendment.

This Court should also hold that the State of Tourovia cannot use section 22.5(b) of the Tourovia Civil Rights Act to compel Mama Myra's to speak the Barbers' message by baking the

expressive cake. This Court has previously held that states may not use public accommodation laws to commandeer the speech of private actors. The State of Tourovia violates Mama Myra's First Amendment right to choose the content of its own message by attempting to force Mama Myra's to bake the Barbers' cake. Further, this Court should not apply the *O'Brien* test to save Tourovia's regulation of Mama Myra's private expression because Mama Myra's actions did not encompass any nonspeech conduct.

Second, Section 22.5(b) of the Tourovia Civil Rights Act violates Mama Myra's right to the Free Exercise of Religion. Under *Employment Division v. Smith*, a Free Exercise claim brought in conjunction with another constitutionally protected right—particularly the freedom of speech—is treated as a "hybrid" claim. Hybrid claims automatically receive strict scrutiny. Because Mama Myra's Free Exercise claim inherently includes a Free Speech claim, making it a hybrid claim, section 22.5(b) must pass strict scrutiny.

Even if this Court determines that Mama Myra's does not advance a hybrid claim, *Smith* still requires section 22.5(b) to pass strict scrutiny. When a law places a burden on a sincerely held religious belief, it receives strict scrutiny if it is not neutral and generally applicable. Both parties in this case agree that Mama Myra's beliefs are sincerely held, and this Court remains hesitant to doubt a claimant's sincerity when both parties concede the issue. When considering if a law places a burden on religious exercise, this Court will not consider whether the belief is reasonable, but whether the law required action that the claimant believed immoral. This protection even applies to perceived complicity in sinful or immoral activity. To determine a law's neutrality and general applicability, the Court will often search for the presence of another exemption that cuts against the purported purpose of the law. Such an exemption implies that the legislature made a suspect

value judgment that treated other reasons as more important than the religious reason at stake, indicating a lack of neutrality and general applicability.

Because Mama Myra's employees sincerely believe that providing a custom-made cake for a same-sex wedding would make it complicit in sin, this Court should hold that section 22.5(b) burdens their free exercise of religion. In addition, section 22.5(b) exempts public accommodations that are "principally used for religious purposes," but not for other public accommodations that hold the same beliefs. Tourovia thus undermines its own alleged purpose of promoting Equal Protection. The state claims that the behavior of one type of party—religious public accommodations—would not threaten the government's purpose while the identical behavior of a different party—less-religious public accommodations—would in fact threaten it. This inconsistency demonstrates the legislature's value judgment in determining which religious beliefs were worth protecting. Therefore, section 22.5(b) must receive strict scrutiny.

The state fails both prongs of strict scrutiny by neither advancing a compelling government interest, nor narrowly tailoring that interest by the least restrictive means. While Tourovia claims section 22.5(b) promotes the interest of advancing Equal Protection, the only interest truly at stake here is preventing insult. This interest falls well short of any compelling interest this Court has previously recognized. Tourovia also fails to narrowly tailor section 22.5(b). Because the law is not neutral and generally applicable, Tourovia cannot legitimately claim the already-granted exemption does not threaten its alleged interest, while an exemption for Mama Myra's—effectively excusing identical behavior—would in fact threaten that interest. Tourovia itself already demonstrates how section 22.5(b) could be more narrowly tailored: granting the religious exemption. Accordingly, section 22.5(b) fails strict scrutiny and this Court should overturn the judgment against Mama Myra's for violating the right to Free Exercise of Religion.

ARGUMENT

I. MAMA MYRA'S REFUSAL TO CREATE THE BARBER'S CAKE IS EXPRESSION THAT IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION. APPLICATION OF THE TOUROVIA CIVIL RIGHTS ACT TO MAMA MYRA'S EXPRESSION VIOLATES ITS FIRST AMENDMENT RIGHT TO CHOOSE THE CONTENT OF ITS OWN SPEECH.

Tourovia brought this suit to compel Mama Myra's—a private speaker—to speak a message that the State feels is appropriate and prudent. The Appellate Division held that Mama Myra's custom cake was conduct rather than protected speech under the First Amendment. R. at 9. The court further held that the First Amendment did not protect the Bakery from having to comply with the Barbers' request to design a custom cake against their religious beliefs. R. at 11. On review, however, this Court should hold that the Barbers' requested cake is the type of expression that the First Amendment protects, because of (1) cake designing's inherent expressivity; or (2) the symbolic speech inherently contained in the requested cake. This Court should further hold that Tourovia may not use section 22.5(b) to compel Mama Myra's speech, because such compulsion would violate its First Amendment right to choose the content of its own speech. Finally, this Court should not apply the test from *United States v. O'Brien*, 391 U.S. 367 (1968), to save Tourovia's constitutionally-impermissible regulation of Mama Myra's speech, because its refusal to bake the Barbers' cake did not entail any nonspeech conduct.

A. Mama Myra's Refusal to Create the Requested Cake is Expression Entitled to Full First Amendment Protection.

The Appellate Division held that Mama Myra's act of designing cakes constituted conduct rather than speech, and was therefore not subject to First Amendment protection. R. at 9. This Court has held that when reviewing a state court's factual findings and legal holdings in matters of First Amendment protection, this Court "must 'make an independent examination of the whole record,' so as to assure [itself] that the judgment does not constitute a forbidden intrusion on the

field of free expression." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (internal citation omitted). This Court should therefore review the entire record of this case to evaluate whether the act of cake design constitutes protected expression, or mere conduct, regardless of whether the question is an issue of fact, law, or both. Because of the inherently expressive nature of cake design, or because the specific cake the Barbers requested was symbolically expressive, this Court should hold that Mama Myra's refusal to act is entitled to full First Amendment protection.

1. Even if cake design does not have a "particularized message," it is an expressive act that should qualify for First Amendment protection.

The Appellate Division relied on the test from *Texas v. Johnson*, 491 U.S. 397 (1989), and *Spence v. Washington*, 418 U.S. 405 (1974), to define "expressive conduct." The rules from those cases ask whether the conduct conveyed a "particularized message"—the type of message that would be commonly understood by most people. *See Johnson*, 491 U.S. at 404; *Spence*, 418 U.S. at 410-11. The particularized message test is helpful where conduct may be completely meaningless or extremely meaningful, depending on the context—the difference between sitting in a chair to rest one's feet and sitting in a chair during the National Anthem to express political disapproval, for instance. There is no need to apply the "particularized message" test in this case, however, because cake design should be considered an inherently expressive act deserving of First Amendment protection.

This Court has held that many expressive acts do not require a showing of a "particularized message" in order to qualify for First Amendment protection. *See Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) ("[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' . . . would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.")

(internal citation omitted). Although cake design is not a traditional artistic medium like oil painting or literature, this Court has not limited this type of inherent First Amendment protection to only acts in traditional artistic mediums. *See id*. at 569 (ruling that parades should qualify for inherent First Amendment protection, just as painting, literature, and music do, because of parades' inherently expressive character). Cake design should qualify for inherent First Amendment protection because it is an expressive and creative endeavor, engaged in by passionate artisans. It is an act which forms part of the "cultural life" of Americans. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602-03 (1998) ("The constitutional protection of artistic works turns not on the political significance that may be attributable to such productions, though they may indeed comment on the political, but simply on their expressive character, which falls within a spectrum of protected 'speech' extending outward from the core of overtly political declarations. Put differently, art is entitled to full protection because our 'cultural life,' just like our native politics, 'rests upon [the] ideal' of governmental viewpoint neutrality") (alteration in original) (internal citations omitted).

Cake design is substantially more expressive than one might initially think. For instance, in 2016, *Cake International* held its annual international cake design competition at the Alexandria Palace in London. Alex Matthews, *Rising to the Occasion: Bakers from Around the World Showcase Their Incredible Skills at the World's Largest Cake Decorating Show—but Albert Einstein is Crowned the Winner!*, Daily Mail (Apr. 18, 2016, 5:36 PM), http://www.dailymail.co.uk/news/article-3544758/Rising-occasion-Bakers-world-showcase-incredible-skills-World-s-Largest-Cake-Decorating-Albert-Einstein-crowned-winner.html. The contestants' cakes demonstrated a range of expressions: there were cakes with literary allusions, cakes with religious symbolism, and cakes with cultural themes. *See id.* Although it might sound

odd to hear of a cake that is exploring cultural themes or making literary allusions, such is the quality of expression now being engaged in by elite cake designers. *See id.*

Another example includes Oregon State University's recently sanctioned cake design competition with ostensibly less ambitious cultural goals—it was affiliated with the 4-H organization, involved Oregon's local County Fairs, and it was open for public entry rather than being an "elite" competition. *See Cake Decorating Contest*, Oregon State University, http://extension.oregonstate.edu/clackamas/sites/default/files/cake_decorating_contest.pdf (last visited Mar. 4, 2018). Even in this contest, a substantial number of the points available were for criteria like "design concept," "texture," "color," "symmetry," "balance," and "harmony." *Id.* The cakes were not evaluated on their "taste." *See id.* In other words, the contestants were evaluated only on the subjective, aesthetic elements of their cake design, rather than if their cake actually succeeded at being a food item. *See id.* While the Oregon State University event was not even a particularly culturally ambitious cake designing contest, it was still settled with approximately the same criteria one would apply in a parlor debate about Picasso's "Blue Period." *See id.* This heavy emphasis on subjective, aesthetic, and creative elements illustrates how artisans are expressive in cake-designing.

These expressive elements distinguish cake design from ordinary conduct, and render the "particularized message" test ineffective for examining whether an act of cake designing is sufficiently expressive to be worthy of First Amendment protection. Cake design should therefore qualify for inherent First Amendment protection as in *Hurley* and *National Endowment for the Arts*.

2. Mama Myra's refusal to act should qualify for First Amendment protection because the requested cake conveyed significant symbolic expression.

Even if this Court rejects the argument that cake design is an inherently expressive act, Mama Myra's refusal to bake the cake for the Barber's same-sex wedding reception should still be entitled to First Amendment protection. The cake the Barbers requested contained symbolic elements—specifically, a same-sex cake topper. R. at 2. The Bakery's refusal to create the Barbers' cake was ultimately the Bakery's refusal to convey the message contained in this kind of symbolic speech.

It is a well-settled principle of First Amendment law that symbolic expressions are a way for speakers to convey messages. *See W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) ("Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind."). This Court has consistently granted First Amendment protection to symbolic expression when a proponent uses a symbol to communicate an idea. *See Spence*, 418 U.S. at 410-11 (putting a peace sign on the American flag to protest the Cambodian invasion); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (wearing black armbands to protest the Vietnam War); *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (African-American refusing to leave a "whites-only" area of the library to protest segregation). Courts have often declined to extend First Amendment protection only after concluding that a given act entailed essentially no expression whatsoever. *Clark v. Cmty. for Creative Nonviolence*, 468 U.S. 288, 296 (1984) (expressive value of sleeping in a park seriously questioned when the Court noted that demonstrators' desire to sleep was more of a logistical necessity of attempting to maintain a "24-hour vigil" in the park than it was an expressive act in itself); *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 438 (9th Cir. 2008) (wearing school uniforms consisting of "nothing more than plain-colored tops and bottoms" does not convey any particular message about the person wearing the clothes).

In this case, the symbolic speech was the cake topper the Barbers wanted Mama Myra's to create for them. The Barbers requested a cake topped with a sculpted figure of two men hand-in-hand. R. at 2. It was this specific cake, with this specific cake topper, that the Bakery politely refused to make. R. at 2. In fact, Mama Myra's offered to create any baked good for the Barbers' reception. R. at 2. This same-sex cake topper contained clear and obvious symbolic significance that would be commonly understood by its audience.

In the United States, the wedding cake topper has been a popular symbol used on wedding cakes since at least the 1950s. *See* Cele Otones & Elizabeth Pleck, *Cinderella Dreams: The Allure of the Lavish Wedding* 124-125 (2003). In the past few decades, demand has risen sharply for wedding cake toppers featuring interracial and same-sex couples. *See* Michael E. Ross, *Cake Toppers Break with Cookie-Cutter Past*, NBC News (June 2, 2015, 7:42 PM), http://www.nbcnews.com/id/7969694/#.Wpb0L-dG3IU. To meet rising demand, artisans from all over the country design same-sex cake toppers and sell them through vendors, such as the online tchotchke shop "Etsy." *See* Search Results for Query Term "Same Sex Cake Topper," Etsy, https://www.etsy.com/ (follow hyperlink; then enter words "Same Sex Cake Topper" in the search bar). Each of the artisans puts his or her own little spin on the concept—some are charming, some are romantic, some are kitschy. *See id.* Yet, the recurrence of the same concept over and over again (of a figurine to be put on top of a wedding cake that features two men or two women standing next to each other) reinforces the idea that the cake topper is a *symbol*—an emblem to communicate an idea, or "a short cut from mind to mind." *See Barnette*, 319 U.S. at 632.

Couples, whether heterosexual or same-sex, seek out cake toppers to connect their love and marriage with American traditions of love and marriage. Same-sex couples also seek out same-sex cake toppers to express and celebrate their own identity. These figurines convey distinct messages.

Mama Myra's refusal to create a wedding cake because it included a same-sex cake topper therefore constitutes the Bakery's refusal to convey symbolic speech on behalf of the Barbers. This type of expressive action should be protected by the First Amendment.

B. Mama Myra's Should Not be Forced to Create an Expressive Cake Because it Would Violate the Bakery's First Amendment Right to Choose the Content of its Own Speech.

The First Amendment stands for the principle that, with limited exceptions, states may not limit or compel the expression of private speakers. U.S. Const. amend. I; *see also Hurley*, 515 U.S. at 573. These First Amendment protections are guaranteed to corporations just as they are to private individuals. *See Hurley*, 515 U.S. at 574. Section 22.5(b) cannot regulate Mama Myra's fundamental First Amendment right to choose whether or not to create an expressive message for the Barbers.

As an initial matter, Mama Myra's did not discriminate against the Barbers because of their homosexuality—the Bakery opened their doors to the Barbers and offered to sell them baked goods for their wedding reception. R. at 2.; *cf. Hurley*, 515 U.S. at 572 (parade organizers made no attempt to dissuade homosexuals from participating in their parade, but instead only resisted the idea of incorporating the homosexual rights group's *message* into their parade). The challenge in this case concerns the application of section 22.5(b) to Mama Myra's decision not to create a specific, expressive cake. Although it is conceded that the Bakery is a place of public accommodation, the application of section 22.5(b) to Mama Myra's single decision whether to create an expressive cake is essentially an attempt to make the Bakery's own private right of expression a "place of public accommodation." *Cf. Hurley*, 515 U.S. at 573 ("[T]he state courts' application of the statute had the effect of declaring the sponsors' *speech itself* to be the public accommodation. Under this approach any contingent of protected individuals with a message

would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own.") (emphasis added).

This Court, however, has consistently held that a private speaker has a right to choose the content of his or her own speech. *See id.* Ultimately, laws that command a private speaker to speak another's message infringe on First Amendment rights. *See id.*; *see also Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 20-21 (1986) (plurality opinion) (utility company cannot be required to convey unwanted messages from interest group in monthly bills); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (deeply religious couple cannot be required to display the unwanted message "Live Free or Die" on their license plate); *Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241, 258 (1974) (newspaper editors cannot be required to convey unwanted messages about political candidates in their newspaper); *Barnette*, 319 U.S. at 642 (schoolchildren cannot be required to express messages of ritualistic loyalty to the American flag). This Court should not alter the rule from this substantial jurisprudence. Tourovia's application of section 22.5(b) to Mama Myra's private right of expression violates its First Amendment right as a speaker to choose the content of its own message.

The Appellate Division held that Mama Myra's compliance with the Barbers' request would be commonly understood as its mere compliance with Tourovian law, not a reflection of the employees' own beliefs. R. at 9. This reasoning tracks this Court's decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006). In that case, this Court determined that law schools were not compelled to speak when federal law required that the schools make their campuses available to the speech of military recruiters. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006) [hereinafter *FAIR*]; *see also PruneYard*

Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) (shopping center owner was not compelled to speak when political demonstrators solicited petition signatures on his property; his property merely acted as the forum where speech occurred). Important factual differences sharply distinguish this case from *FAIR*, however. The Barbers did not ask to use Mama Myra's ovens so that they could make their own custom-made wedding cake. R. at 2. They wanted the Bakery to make the cake for them, and requested the employees to include specific elements—such as the cake topper—in the cake. R. at 2. Analogizing to *FAIR*, the situation in the case at bar would be the equivalent of a federal law requiring law school deans to personally write and deliver a speech on the value of joining the military. This factual change renders the Court's reasoning in *FAIR* inapplicable to this case, because the Barbers asked Mama Myra's to *personally* convey their message. Under the facts in this case, Tourovia is attempting to impermissibly limit Mama Myra's right as a private speaker to choose the content of its own message. Thus, section 22.5(b) of the Tourovia Civil Rights Act violates Mama Myra's fundamental First Amendment rights.

C. This Court Should Not Apply the *O'Brien* Test Because Mama Myra's Refusal to Bake the Cake Does Not Involve Nonspeech Conduct. However, if this Court Applies the Test, the Bakery Should Still Prevail.

This Court's test in *United States v. O'Brien* should not be applied in this case to save Tourovia's regulation of Mama Myra's protected expression. The *O'Brien* test stands for the principle that when an actor engages in a course of conduct that combines both "speech" and "nonspeech" elements, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376. The test is outlined as such:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the

> governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

First, the *O'Brien* test is inapplicable because Mama Myra's refusal to create the Barbers' cake does not entail nonspeech conduct. The Bakery was willing to make and sell any other kind of baked good for the Barbers' wedding reception, other than the specific cake that Mama Myra's found religiously objectionable. R. at 2. The only thing Mama Myra's was unwilling to do was speak—to create the symbolic expression the Barbers requested. The only action section 22.5(b) reaches is Mama Myra's speech.

Second, even if applied, the test is insufficient to save Tourovia's attempted regulation. There is no important or substantial governmental interest making it "essential" to commandeer Mama Myra's private right of expression. *See O'Brien*, 391 U.S. at 377. Mama Myra's does not possess or represent a monopoly on cake design that would make it "essential" for the Bakery to convey the Barbers' message. This case does not present a risk that the Barbers' message will be silenced entirely. *Cf. Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661 (1994) (the "bottleneck monopoly" nature of cable television justified more significant speech regulation of cable providers than would usually be permissible). As noted before, there are plenty of accessible artisans who make same-sex cake toppers. *See* Search Results for Query Term "Same Sex Cake Topper," *supra.* The Barbers could have ordered a same-sex cake topper online for approximately twenty dollars. *See id.*

Although protecting groups from discrimination is recognizably important, this Court has already rejected the contention that commandeering a private speaker's right of expression is

"essential" to further this purpose. *See, e.g.*, *Hurley*, 515 U.S. at 378. As this Court held in *Hurley*, "[w]hen [antidiscrimination] law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids." *Id.* Although the state in *Hurley* had not posited a more concrete purpose justifying their expansive intrusion into private speakers' right of expression, this Court posited a possible justification on the government's behalf:

> It might, of course, have been argued that a broader objective is apparent: that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. Requiring access to a speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. But if this indeed is the point of applying the state law to expressive conduct, it is *a decidedly fatal objective*.

Id. at 578-79 (emphasis added). Even if the *O'Brien* test is applied in this case, the Bakery must prevail because Tourovia's advanced justifications in support of section 22.5(b) are justifications this Court has already held are insufficient to support the type of First Amendment restrictions Tourovia now seeks. Accordingly, this Court should hold that the application of section 22.5(b) to Mama Myra's violates its First Amendment rights.

II. SECTION 22.5(b) OF THE TOUROVIA CIVIL RIGHTS ACT VIOLATES MAMA MYRA'S FIRST AMENDMENT RIGHT TO THE FREE EXERCISE OF RELIGION BECAUSE IT FAILS TO PASS STRICT SCRUTINY UNDER *SMITH*.

The application of section 22.5(b) of the Tourovia Civil Rights Act to Mama Myra's violates its right to freely exercise religion under the First Amendment. The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. This Court has applied the First Amendment to the states under the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). State law presumptively infringes upon the Free Exercise Clause in either one of two ways relevant in this case: when the law (1) denies Free Exercise in conjunction with another fundamental right (known as a "hybrid" claim); and (2) burdens a sincerely held religious belief and is not neutral and generally applicable. *See Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 881-83 (1990). If a law falls into either of these categories, the law must pass the most rigorous scrutiny this Court applies in order to survive. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). First, the state must show that the law serves a compelling government interest. *Id.* Second, the state must show that the law uses the least restrictive means of furthering that government interest. *Id.* Because section 22.5(b) triggers strict scrutiny under *Smith*, and the government falls substantially short of its burden, the law unconstitutionally violates Mama Myra's right to freely exercise religion.

A. Mama Myra's Advances a "Hybrid" Claim, Which Automatically Subjects the Law to Strict Scrutiny Under *Smith*.

Employment Division v. Smith substantially altered the framework courts generally use to analyze Free Exercise claims. *See Smith*, 494 U.S. at 881. This Court in *Smith* explained that "the First Amendment bars application of a neutral, generally applicable law to religiously motivated action . . . [when it involves] not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech." *Id.* In other words,

Smith exempted "hybrid" claims from the "neutral and generally applicable" requirement, making them automatically subject to strict scrutiny. *Id.*

For example, this Court struck down a law punishing Jehovah's Witnesses for engaging in speech tied to their religious beliefs in *Cantwell v. Connecticut*. 310 U.S. at 300-03. In that case, Jehovah's Witnesses attempted to proselytize by walking door-to-door, sharing religious information with residents, and selling materials if the residents expressed interest. *Id.* at 301. The state law in question prohibited only speech-related conduct: "solicit[ation of] money, services, subscriptions, or any valuable thing for any alleged religious, charitable, or philanthropic cause." *Id.* at 301-02. This Court first emphasized the law's infringement on Free Exercise, despite the indisputable Free Speech implications. *Id.* at 303. Under the Free Exercise Clause, this Court held that the government has a responsibility to protect the "freedom to believe and the freedom to act." *Id.* This Court applied strict scrutiny, and ultimately found the law unconstitutional under the Free Exercise Clause. *Id.* at 304-07.

The case at bar presents the opposite side of the same coin. Instead of preventing religious-based speech like the law in *Cantwell*, section 22.5(b) compels speech contrary to Mama Myra's religious beliefs. By requiring Mama Myra's employees to make a product with an unequivocal message condoning same-sex marriage, section 22.5(b) coerces them into violating their religious beliefs. Thus, the law protects neither the "freedom to believe," nor "the freedom to act." *Id.* at 303. Mama Myra's Free Exercise claim inherently binds to its Free Speech claim, making this a "hybrid" claim under *Smith*. Accordingly, this Court should automatically apply strict scrutiny.

B. Even if this Court Finds That Mama Myra's Does Not Advance a "Hybrid" Claim, Section 22.5(b) is Still Subject to Strict Scrutiny Because the Law Burdens a Sincere Religious Belief, and is Not Neutral and Generally Applicable Under *Smith*.

To ensure section 22.5(b) receives strict scrutiny analysis under *Smith*, Mama Myra's demonstrates the three necessary elements: that the (1) Bakery sincerely holds a religious belief, (2) law in question burdens the exercise of the Bakery's religious belief, and (3) law in question is not neutral and generally applicable. *Lukumi*, 508 U.S. at 531. Because all three requirements are met in this case, section 22.5(b) of the Tourovia Civil Rights Act is subject to strict scrutiny.

1. Mama Myra's maintains a sincerely held religious belief that the business may not participate in a same-sex wedding.

Respondents concede that Mama Myra's religious belief is sincerely held, but the issue still warrants brief discussion. While acknowledging that the determination of whether a claim is religious produces a "difficult and delicate task," this Court demands that the answer not "turn upon a judicial perception of the particular belief or practice in question." *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981). In fact, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* This Court ultimately grants significant weight to the testimony of the party professing the belief in making the determination. *See id.* In cases where sincerity is not challenged, the Court refrains from further inquiry into that matter. *See, e.g.*, *Frazee v. Ill. Dept. of Emp't Sec.*, 489 U.S. 829, 833 (1989).

In the present case, the district court found, and both parties agreed, that Mama Myra's maintained a sincerely held religious belief. R. at 2-3. The Bakery employees informed the Barbers that providing a cake for their same-sex wedding reception would violate their sincerely held religious beliefs. R. at 2. Regardless of judicial perception of the belief—or whether the belief appears "acceptable, logical, consistent, or comprehensible,"—Mama Myra's adherence to its beliefs and conviction of its religiosity demonstrate that the belief is both sincerely held and religious. *See Thomas*, 450 U.S. at 714.

2. Section 22.5(b) places a burden on Mama Myra's religious exercise.

Because Mama Myra's holds a sincere belief that same-sex marriage violates Biblical teaching and is thus immoral, compelling the employees to bake the cake for the Barbers' wedding reception would coerce their participation in an act that violates their religion: endorsing same-sex marriage. In other words, section 22.5(b) makes Mama Myra's employees, from their perspective, complicit in immorality.

The burden in this case is analogous to the plaintiffs' burden in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). In that case, two for-profit companies challenged the Affordable Care Act's contraceptive mandate. 134 S. Ct. at 2759. The owners of both companies opposed abortion due to their sincerely-held religious beliefs. *Id.* Thus, the companies objected to providing birth control methods that they considered abortifacients, because of the belief that they would personally be "facilitating abortions." *Id.* This Court held that the law burdened their sincere religious beliefs. *Id.* at 2775.

While this claim was brought under the Religious Freedom Restoration Act, this Court's analysis regarding the plaintiffs' burden is still instructive in this case. In *Hobby Lobby*, the government argued that the proffered burden was too attenuated—that the companies were not in fact providing abortions. *Id.* at 2777. However, this Court held that the judiciary has "no business addressing" whether religious beliefs are reasonable. *Id.* at 2778-79 ("[I]t is not for us to say that their religious beliefs are mistaken or insubstantial."); *see also Smith*, 494 U.S. at 887 ("[C]ourts must not presume to determine . . . the plausibility of a religious claim."). Because the plaintiffs believed "in a way that is sufficient to make [the action] immoral *for them*," that was enough for this Court to decide that the law burdened their religious exercise. *Hobby Lobby*, 134 S. Ct. at 2778 (emphasis added). Simply stated, this Court's jurisprudence mandates that it is not for the judiciary

to decide whether religious line-drawing—the judgment of whether an action makes a person complicit in sin—is valid or not.

This Court's opinion in *Thomas v. Review Board* lends further support. In *Thomas*, a Jehovah's Witness worked at a factory fabricating "sheet steel for a variety of industrial purposes," including steel that was used for making weapons. *Thomas*, 450 U.S. at 710. Thomas's employer subsequently transferred him to a department manufacturing tank turrets. *Id.* Due to his religious beliefs, Thomas objected to making the tank turrets, and lost his job. *Id.* When Thomas sued for unemployment compensation, the lower court objected to where he drew the line between what did and did not violate his religion. *Id.* at 715. Yet, this Court held that even though Thomas drew what might seem like an inconsistent line, "it is not for [this Court] to say that the line he drew was an unreasonable one." *Id.*

Because Mama Myra's employees believe that making a cake for a same-sex wedding reception violates their religion "in a way that is sufficient to make it immoral *for them*," this Court should find that the application of section 22.5(b) violates their Free Exercise rights. *Hobby Lobby*, 134 S. Ct. at 2778 (emphasis added). The case at bar presents a situation that the Free Exercise Clause prohibits: coercing behavior that the claimant's religion forbids them to do. Either Mama Myra's creates a custom-made cake, and sculpts a same-sex cake topper, or they are subject to a civil penalty under section 22.5(b) of the Tourovia Civil Rights Act. Mama Myra's is given a cruel choice between negative legal ramifications and following their religious beliefs. This Court's jurisprudence prohibits such a choice, because it substantially burdens religious exercise.

3. *Section 22.5(b) is not neutral and generally applicable.*

Under *Smith*, a law restricting the Free Exercise of religion is subject to strict scrutiny unless it is neutral and generally applicable. 494 U.S. at 881-83. To determine whether a law is

neutral and generally applicable, this Court and lower courts look to see if the law has any existing exemptions undercutting the purpose of the legislation. *See Lukumi*, 508 U.S. at 535-37 (the secular exemptions to a law prohibiting animal sacrifice included "hunting, slaughter of animals for food, eradication of insects and pests, . . . euthanasia[, and] . . . the use of live rabbits to train greyhounds"); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365-66 (3d Cir. 1999) [hereinafter *FOP*]. The Appellate Division relied on *Lukumi* as demonstrative of the threshold needed to find that a law is not neutral and generally applicable. R. at 10. However, cases with such broad exemptions easily fail this prong, and almost certainly fail strict scrutiny. *See, e.g.*, *Lukumi*, 508 U.S. at 580 (Blackmun, J., concurring) ("[T]he present case is an easy one to decide."). Instead, courts have held that even a *single* relevant exemption to a law is enough to merit a mandatory religious exemption under the Free Exercise Clause. *See FOP*, 170 F.3d at 365. A single exemption is enough to suggest that the legislature made a suspect value judgment. *See id.* at 366.

For example, in *FOP*, two Sunni Muslim police officers requested an exemption from a department policy prohibiting beards. *Id.* at 360. According to the Sunni Muslim faith, men must grow beards if they are physically able. *Id.* at 360-61. While the department allowed those with certain medical conditions to grow a beard, it would not grant an equal exemption to the Sunni Muslim officers. *Id.* The department argued that the medical exemption was important enough to overcome the department's desire for uniformity, but that the religious reason was not. *Id.* Then-Judge Alito criticized the department's distinction, especially because the existing medical exemption and the prospective religious exemption identically undermined the department's interest in uniformity. *See id.* at 366. Essentially, the department made a value judgment between secular and religious reasons. *Id.* The Third Circuit invalidated the policy, holding that "when the

government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny." *Id.* at 366. To justify this outcome, the court stated that government action could not be narrowly tailored. *Id.* Because the medical and religious exemptions produced the same result, the government cannot claim that only one of them would threaten the government interest while the other would not. *Id.* The policy therefore failed strict scrutiny analysis. *Id.* at 367.

Although the Tourovian legislature created an exemption for "public accommodations that are 'principally used for religious purposes,'" the same reasoning applies in this case. R. at 10. Tourovia's actions are problematic for two related reasons. First, Tourovia undermines its own justification. The religious public accommodation exemption necessarily permits discrimination in the public marketplace, directly undermining the state's purpose of promoting Equal Protection. This fact alone makes it difficult to believe that the law is neutral and generally applicable, because the already-granted exemption operates contrary to the express purpose of the law.

Second, the Tourovian legislature passed a value judgment when it exempted "primarily religious" public accommodations, but failed to exempt individuals that hold those same religious beliefs. In other words, the Tourovian legislature made a value judgment that certain religious adherents were worth protecting, but that others were not. To suggest that only select groups have more important First Amendment religious protection than others flagrantly contradicts fundamental constitutional rights. Tourovia's attempt to comport with the Free Exercise Clause falls well short of successfully doing so, accomplishing only hierarchical protection for those the government saw fit to exempt. Thus, section 22.5(b) of the Tourovia Civil Rights Act is not neutral and generally applicable.

C. Section 22.5(b) of the Tourovia Civil Rights Act Fails Strict Scrutiny.

"A law burdening religious practice that is not neutral and not of general application must undergo the *most* rigorous of scrutiny." *Lukumi*, 508 U.S. at 546 (emphasis added). Strict scrutiny requires the government to (1) advance a compelling state interest; and (2) tailor the means of achieving that interest in the least restrictive way possible. Because the government fails both prongs of this analysis, this Court should reverse the lower court's judgment against Mama Myra's.

1. Tourovia does not advance a compelling interest justifying section 22.5(b).

In the Free Exercise Clause context, this Court generally requires a fundamental governmental function, and hesitates to find a compelling interest. *See United States v. Lee*, 455 U.S. 252, 257-58 (1982). For example, this Court found that the government's ability to collect social security taxes—and taxes generally—was a compelling interest. *See id.* Apart from questions of such unquestioned government import, few examples exist where this Court recognized a compelling government interest in the Free Exercise context. In fact, this Court held in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), that "only those interests of the *highest order* and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 U.S. at 215 (emphasis added). Examples where the Court did not find a compelling interest include the education of Amish children, *id.* at 221-22, and general government fiscal concerns, *see Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963).

In this case, the compelling interest is minimal, at best. The generalized interest advanced by the government appears to be Equal Protection and anti-discrimination. R. at 3-5. However, the predominant interest at stake in this case is preventing insult. Nothing in the record indicates that Respondents were unable to purchase or afford a cake from another vendor. Further, the Barbers could have purchased other custom-made baked goods from Mama Myra's. R. at 2. The harm section 22.5(b) addresses here is the insult that the Barbers felt after Mama Myra's denied them a

custom-made cake. R. at 2. While the government may be interested in protecting the emotional wellbeing and dignity of its citizens, this interest does not rise to one of the "highest order." *See Yoder*, 406 U.S. at 215.

However, most striking about Tourovia's position in this case is the state's refusal to recognize same-sex marriage when it brought suit against Mama Myra's. Tourovia claims the interest of Equal Protection, but it only implements selective protection. This inconsistent stance alone undermines any plausible argument that Tourovia advances a compelling government interest. This Court's jurisprudence does not elevate avoiding insult to the level of a compelling government interest in Free Exercise claims. Thus, section 22.5(b) fails strict scrutiny because Tourovia does not proffer a compelling government interest.

2. Even if Tourovia has a compelling interest, section 22.5(b) is not narrowly tailored.

Alternatively, if this Court finds that Tourovia has a compelling interest, Tourovia still fails to demonstrate that it narrowly tailored the law to the least restrictive means. "The least-restrictive-means standard is exceptionally demanding." *Hobby Lobby*, 134 S. Ct. at 2780. The government must show that its interest could not "be achieved by narrower [means] that burdened religion to a far lesser degree." *Lukumi*, 508 U.S. at 546.

Tourovia itself demonstrates one way it could more narrowly tailor section 22.5(b) to protect Free Exercise rights: accommodating religion. The state already grants an exemption for "public accommodations that are 'principally used for religious purposes.'" R. at 10. Tourovia cannot now claim that granting an exemption to Mama Myra's would threaten the government interest in a way that the current exemption would not. Instead, extending this exemption would equally protect the First Amendment rights of the owners and employees of businesses with

sincerely held religious beliefs. Accordingly, section 22.5(b) ultimately fails this Court's strict scrutiny standard, because the law is not narrowly tailored to serve the government's interest.

CONCLUSION

Thus, Petitioner respectfully urges this Court to reverse the Supreme Court of Tourovia's decision.

Respectfully submitted.

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