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,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TOUROVIA

BRIEF FOR PETITIONER

TEAM 19,
Counsel of Record

QUESTIONS PRESENTED

1. Whether Tourovia's Civil Rights Act § 22.5(b) violates the Free Speech Clause of the First Amendment by compelling a bakery to create a custom, artistic wedding cake for a same-sex couple in contravention of its religious beliefs.
2. Whether Tourovia's Civil Rights Act § 22.5(b) violates the Free Exercise Clause of the First Amendment by compelling a bakery to create a custom, artistic wedding cake for a same-sex couple in contravention of its religious beliefs.

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JURISDICTION

Following the Supreme Court of Tourovia's entry of judgment, Petitioner filed its timely petition for a writ of certiorari in this Court. The petition for writ of certiorari was granted on January 31, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Tourovia Civil Rights Act § 22.5(b)

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.

Tourovia Civil Rights Act Definitions

"Place of Public Accommodation" means any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale/retail sales to the public.

"Sexual Orientation" means an individual's orientation toward hetero, homo, or bi sexuality, or transgender status, or another individual's perception thereof.

STATEMENT OF THE CASE

Mama Myra's Bakery ("Mama Myra's" or the "Bakery"), a small, family-owned and operated business, has held itself out to the Suffolk County community as a business founded upon Christian principles and beliefs for twenty-seven years. R-2. Since its foundation, the owner and employees have espoused an ardent faith in Christianity. R-3. It is the very same dedication to and respect for the Bible's traditions and instructions that have shaped the Bakery's business operations. R-2.

Mama Myra's, in addition to offering traditional patisserie goods, provides custom services for its clients. R-2. Those services regularly require the Bakery to employ creative culinary and design skills to meet the client's expectations. R-2. Indeed, clients seeking customized bakery products may request that the Bakery specially design baked goods and craft sculptural ornaments to accompany or accent the order. R-2.

At a meeting in 2012, Hank and Cody Barber approached the bakers at Mama Myra's about a custom order. R-2. Recently married, the Barbers asked the Bakery to prepare a customized wedding cake for a family

party celebrating their nuptials. R-2. In addition to the wedding cake, the Barbers asked Mama Myra's to sculpt a wedding cake ornament with a distinct modification; in place of the traditional bride and groom, the Barbers asked the Bakery to sculpt their likenesses, hand-in-hand, to be placed on the cake's top tier. R-2. While the Bakery offered its services and expertise in creating a variety of baked goods for the Barbers, the Bakery simply could not disobey the Bible's teachings and was, therefore, forced to decline the Barbers' wedding cake request. R-3.

In accordance with its deeply held Christian beliefs, Mama Myra's, along with its owner and employees, believes that same-sex marriage violates Jesus Christ's teachings. R-2. Although the Bakery was prevented from creating a custom wedding cake for the Barbers, Mama Myra's did "offer to make and sell any other baked good to the Barbers" that did not interfere with or contravene Christian doctrines. R-2. Despite the Bakery's offer to work with the Barbers to best accommodate the couple's wishes for their wedding celebration, the Barbers abruptly left the meeting at Mama Myra's. R-2. The next communication from the Barbers came in the form of a sexual orientation discrimination lawsuit filed against the Bakery. R-2. The Barbers alleged that because Mama Myra's could not create a wedding cake for the couple's same-sex wedding celebration, the Bakery violated Tourovia's Civil Rights Act § 22.5(b). R-3.

Since then, Mama Myra's has vigorously defended itself in the judiciary, asserting its rights to free speech and free exercise of religion. R-7. Because of its foundation in a devout Christian faith, the Bakery could not create a wedding cake for a same-sex marriage celebration without committing sacrilege. R-3. The state courts' construction of Tourovia's statute compels the

Bakery to violate its religious convictions and create a distinctive, same-sex wedding cake for the Barbers that would undoubtedly convey a celebratory message about same-sex marriage. R-7.

SUMMARY OF THE ARGUMENT

Tourovia's Civil Rights Act § 22.5(b) commands Mama Myra's to create a custom-made wedding cake for a same-sex couple, in direct contradiction to the Bakery's deeply held religious beliefs about the sanctity of marriage. Tourovia's application of § 22.5(b) to the instant case violates Mama Myra's First Amendment rights to freedom of speech and free exercise of religion.

Section 22.5(b) violates Mama Myra's right to freedom of speech because it compels the Bakery to portray a celebratory message about same-sex marriage. The cake that the Barbers requested is protected free speech activity because the wedding cake is inherently expressive and the process of making the cake is expressive conduct. These are both speech categories that this Court has held are protected under the First Amendment. The requested cake is no different than other forms of artistic expression, like a painting or sculpture. The cake is inherently expressive because it incorporates the baker's design, creativity, and skilled artistry to display a message celebrating the couple's marriage. Additionally, the baker's creative process of crafting the cake is expressive activity because it conveys an unmistakable celebratory message of same-sex marriage.

The statute compels Mama Myra's speech because it forbids the Bakery from refusing to make the Barbers' desired cake; the statute thereby forces the Bakery to send a message against its will. Laws that compel speech,

just like those that prohibit speech, are subject to strict scrutiny review. Tourovia cannot survive this exacting standard because the state's purpose in applying § 22.5(b) to this case is to replace the Bakery's message with that of its customers. This is the precise peril that the First Amendment freedom of speech is meant to protect against.

Section 22.5(b) violates Mama Myra's right to free exercise of religion because it impermissibly contravenes the Bakery's ability to refrain from activity that contradicts its religious beliefs. The law is not neutral or generally applicable because it targets businesses that have religious objections to same-sex marriage. Therefore, the law is again subject to strict scrutiny, which it cannot withstand. Again, Tourovia has no compelling interest in a law that intends to replace Mama Myra's message with that of its customer. Further, even if Tourovia had a compelling interest in enforcing § 22.5(b), it is not narrowly tailored because it allows no exception for First Amendment activity like expression or religious exercise.

Even if this Court finds that § 22.5(b) is neutral and generally applicable, it is still subject to strict scrutiny under the hybrid-rights doctrine. In conjunction with the free exercise claim, Mama Myra's has a colorable free speech claim. The two violations together form the basis of a free exercise hybrid-rights claim, which subjects § 22.5(b) to strict scrutiny. For the reasons articulated above, § 22.5(b) cannot survive this Court's most rigorous standard of scrutiny.

ARGUMENT

The First Amendment, which binds the State of Tourovia through the Fourteenth Amendment, forbids laws "prohibiting the free exercise [of religion], or abridging the freedom of speech." U.S. Const. amend. I. Section 22.5(b), as applied in this case, violates Mama Myra's rights to both free exercise of religion and freedom of speech, and must be struck down.

I. Section 22.5(b) Violates Mama Myra's First Amendment Right To Freedom Of Speech Because It Compels The Bakery To Portray A Celebratory Message Of Same-Sex Marriage.

A. Mama Myra's Custom Cake Is Protected First Amendment Activity.

The freedom of speech clause of the First Amendment protects the ability of people to express their own message and beliefs without interference from the government. The First Amendment undoubtedly protects the written or spoken word, commonly referred to as "pure speech," but it also protects other forms of communication. These protected classes of communications include: (1) purely expressive activities; and (2) expressive conduct. Mama Myra's creation of a custom cake for a same-sex wedding is both a purely expressive activity and expressive conduct, and thus garners First Amendment protection.

1. A Custom Cake Is Purely Expressive Activity.

This Court has recognized that art is inherently expressive, and is protected by the First Amendment in the same way that pure speech is protected. *See e.g.*, *Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (noting that paintings, music, and verse are "unquestionably shielded"

by the First Amendment). These purely expressive activities do not need to satisfy any doctrinal test for qualifying as speech because art forms intrinsically carry their creators' messages. *See id.*

Examples of art as speech include paintings, engravings, instrumental music, live dancing, and motion pictures. *See Kaplan v. California*, 413 U.S. 115, 119–120 (1973) ("[P]aintings, drawings, and engravings . . . have First Amendment protection . . . ."); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music is one of the oldest forms of human expression."); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) ("[M]otion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee."). These communication methods share a common theme with Mama Myra's creation of a cake for a same-sex wedding: they are creative forms of expression; they are art. Mama Myra's creation of a custom wedding cake, as art, is protected by the First Amendment.

The cake that the Barbers requested was no ordinary service order; it would require Mama Myra's bakers to implement the artistic elements of designing, baking, assembling, and decorating the final product. Further, the Barbers requested that Mama Myra's create a miniature sculpture of two men holding hands to adorn the top of the cake. This sculpture alone is protected First Amendment activity. A sculpture is a prototypical artistic medium, much like the Jackson Pollock painting that this Court has held was "unquestionably shielded" by the First Amendment's protection. *Hurley*, 515 U.S. at 569. The sculpted figurines coupled with the custom-made cake form an undeniable artistic creation. Mama Myra's custom wedding cakes are individually tailored to each

customer, and use design, color, and various frosting techniques to craft a creative masterpiece. There is no difference between the "unquestionably shielded" painting and a custom-made wedding cake from an experienced and highly skilled baker. *See id.*

Mama Myra's custom creations are handmade works of art that rely on the baker's artistic talent. As such, the custom cake at issue is purely expressive activity. This is art in its purest form, and is protected by the First Amendment's freedom of speech clause.

2. Creating A Custom Cake Is Expressive Conduct.

Additionally, the creation of a custom wedding cake is protected by the First Amendment because it is expressive conduct under the *O'Brien* test. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968). In *O'Brien*, this Court held that burning a draft card was "symbolic speech," protected by the First Amendment. *Id.* at 376. This Court expounded upon symbolic speech in *Spence v. Washington*, and held that conduct is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments" when "[a]n intent to convey a particularized message [is] present and [when] the likelihood [is] great that the message would be understood by those who viewed it." 418 U.S. 405, 409, 410–11 (1974). Importantly, the *Spence* test does not require the viewer to associate the message with any particular speaker, it simply requires that the message would be understood by those who viewed it. *Spence*, 418 U.S. at 407 (finding that an upside down United States flag superimposed with a peace symbol displayed from a window was expressive conduct, even though the public did not know who was expressing the message).

If Mama Myra's were required to create the requested wedding cake for the Barbers, that process would undoubtedly be expressive conduct as defined in *Spence*. In its creative process, Mama Myra's would intend to produce a cake that conveyed a celebratory message of same-sex marriage. In every custom cake that Mama Myra's produces, the bakers take pride in meeting the customer's expectations and displaying a message that is appropriate for the event. Further, producing the requested cake would certainly be understood by those who viewed it as conveying a celebratory message of same-sex marriage. Wedding cakes are unique and immediately discernable from other cakes. The requested cake had a telltale symbol of same-sex marriage as a central element: the figurines of two men, hand-in-hand, on top of the cake. Wedding cakes traditionally feature such cake toppers that represent the individuals getting married. A cake topper of two men would send the unmistakable message that this cake is celebrating the marriage of two men.

A finding of expressive conduct in this case is consistent with this Court's precedent. This Court has recognized First Amendment protection for saluting the American flag, *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943), wearing a black armband as a form of war-protest, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505–06 (1969), marching in a parade while wearing uniforms with swastikas, *National Socialist Party of America v. Skokie*, 432 U.S. 43, 43–44 (1997), and marching in an Irish heritage parade, *Hurley*, 515 U.S. at 569. In *Hurley*, this Court emphasized that a St. Patrick's Day parade was not simply a means of traveling from point A to point B; the parade's viewers and media coverage gave real meaning

to the parade's message. 515 U.S. at 568. The same is true here. A wedding cake is not simply food to nourish the people who eat the cake; it is meant to be viewed and admired by the couple and wedding guests as a symbol of the couple's union. Couples often save a portion of the cake to eat on their first anniversary—a ceremonious event to remind the couple of their wedding day and allow reflection on the year since past. *See generally*, Carol Wilson, *Wedding Cake: A Slice of History*, GASTRONOMICA, Spring 2005 (explaining that couples, starting in the nineteenth century, often save a slice or a tier of their wedding cake for the christening of their first child).

Therefore, Mama Myra's creative process in designing, assembling, and decorating a custom-made wedding cake is unquestionably expressive conduct under the *O'Brien* test. *See Spence*, 418 U.S. at 409–10; *O'Brien*, 391 U.S. at 376.

B. Section 22.5(b) Unconstitutionally Compels Mama Myra's Protected Speech.

It is a bedrock constitutional principle that a state "may not compel affirmance of a belief with which the speaker disagrees." *Hurley*, 515 U.S. at 573 (citing *Barnette*, 319 U.S. at 642). As this Court instructed in *Barnette*, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. at 642. This Court has consistently held that the First Amendment protects against both governmental restrictions of speech and compelled speech. *See, e.g.*, *Hurley*, 515 U.S. at 573 ("[O]ne important manifestation of the principle of free speech is that one who chooses to

speak may also decide 'what not to say.'" (quoting *Pacific Gas & Elecric Co. v. Public Utilities Comm'n of Cal*, 475 U.S. 1, 16 (1986))).

As this Court has made clear, the compelled speech doctrine is implicated when a law interferes with the speaker's message. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006) (citing *Hurley*, 515 U.S. at 566; *Pacific Gas Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 8–9 (1986) (plurality opinion) (holding that a state law that required a utility company to mail a third-party newsletter in its bill to customers was compelled speech); *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 256 (1974) (holding that a statute that required newspapers to print political candidates' replies to stories about them violates the guarantees of the First Amendment). Just like content-based restrictions on speech, a law that compels speech must be narrowly tailored to serve a compelling state interest. *See Wooley v. Maynard*, 430 U.S. 705, 716 (1977).

Here, *Hurley* instructs the finding that there is no compelling state interest. *See* 515 U.S. at 578. In *Hurley*, Massachusetts applied its public accommodation law to require parade organizers to permit an Irish gay, lesbian, and bisexual pride group ("GLIB") to march under its own banner in a St. Patrick's Day parade. *Id.* at 571. This Court invalidated the law as applied to the parade because the purpose of the law was "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." *Id.* at 578. There was no allegation that the members of GLIB were excluded from participating in the parade, but the law as Massachusetts applied it, had the unconstitutional result of replacing the

parade organizer's message with GLIB's message. *Id.* The same result has occurred in this case.

Mama Myra's does not refuse to serve customers based on their sexual orientation, which is the type of discrimination that typical public accommodation laws are meant to protect against. *See, e.g.*, *Hurley*, 515 U.S. at 571 ("At common law, innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer."). Mama Myra's only declined to make the requested custom cake because the task consisted of expressive activity, which is not covered by the purpose of traditional public accommodation laws. Thus, just as in *Hurley*, Tourovia's application of § 22.5(b) to Mama Myra's custom-made cakes serves to replace Mama Myra's speech with the customers' speech. This state purpose cannot withstand any level of scrutiny. Even if this court were to apply rational basis review, there is no legitimate state interest in replacing one speaker's message with the message of another. *See Hurley*, 515 U.S. at 578 ("[I]n the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids."). At its core, this is precisely what the compelled speech doctrine protects against. *See Barnette*, 319 at 642. Thus, because there is no legitimate state interest in Tourovia's application of § 22.5(b) to Mama Myra's custom-made cakes, there is no justification for the constitutional violation, and § 22.5(b) must be struck down as applied in this case.

Even if there were a sufficient state interest, § 22.5(b) would fail the "fit" prong of any level of scrutiny because it leaves no room for First Amendment activity. The law classifies all of Mama Myra's business activity under the

public accommodation law, while providing no exception for its artistic expression protected by the freedom of speech. For example, the State of Illinois's public accommodation statute explicitly exempts "the exercise of free speech, free expression, free exercise of religion or expression of religiously based views by any individual . . . that is protected by the First Amendment to the United States Constitution" from the statute's reach. 775 ILL. COMP. STAT. § 5/5-102.1(b) (2010). This law balances business's First Amendment rights with traditional public accommodation concerns about discrimination. Mama Myra's meets all of its obligations under traditional public accommodation laws because it will serve the Barbers any standard item in its shop. When a public accommodation law interferes with Mama Myra's right to free speech, the public accommodation law must give way.

Mama Myra's, although a commercial entity, is quite unlike other commercial entities in which this Court has held that the challengers were not sufficiently identifiable as speakers. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). In *PruneYard*, the owners of the shopping mall challenged a state law that required them to permit visitors to solicit signatures on political petitions. *Id.* at 87. This Court held that the owners' First Amendment rights were not implicated because guests of the mall would not identify the messages of solicitors with the owners because malls are open to the public, and visitors often come and go as they please without sanction from the owners. *Id.* Likewise, in *FAIR*, an association of law schools ("FAIR") challenged the Solomon Act, which required the schools to provide military recruiters access on campus in order to receive certain federal funding. 547 U.S. at 51. FAIR challenged the Solomon Act as a free speech violation because the

schools did not want to promote the military's discriminatory policy on homosexuals. *Id.* at 61. This Court found that the Solomon Act did not violate FAIR's free speech rights because viewers were not likely to think that the schools endorsed the military's policy simply because they permitted recruiters on campus, and the Act did not prevent the school from posting its own messages disclaiming its endorsement of the military's discriminatory policy. *Id.* at 62–63. In contrast, Mama Mrya's is not a public gathering place like a mall or university campus, and the messages of its custom-made cakes are immediately identifiable as Mama Myra's speech. Although Tourovia would permit Mama Myra's to post signs disavowing its approval of same-sex marriage, such a sign would not solve the compelled speech violation present in this case. *Cf. Pruneyard*, 447 U.S. at 87. (explaining that the mall owners could display a sign to "disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law").

Section 22.5(b), as applied to Mama Myra's custom-made cakes, violates the Bakery's First Amendment right to the freedom of speech. As there is no justification for replacing Mama Myra's speech with the message of its customers, the law must be struck down as applied in this case.

II. Section 22.5(b) Violates Mama Myra's First Amendment Right To Free Exercise Of Religion Because It Targets Religious Businesses and Implicates A Hybrid-Rights Violation.

A. Section 22.5(b) Is Not A Neutral And Generally Applicable Law Because It Only Affects Businesses That Oppose Same-Sex Marriage Based On Religious Beliefs.

A law that burdens the free exercise of religion is subject to strict scrutiny, unless the law is neutral and generally applicable. *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 901 (1990). "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). A law that imposes burdens on religiously motivated conduct while allowing secular conduct is not generally applicable. *Id.* at 534.

Although on the face of the statute, § 22.5(b) appears neutral because it does not refer to any specific religious practice, "[f]acial neutrality is not determinative." *Id.* In *Lukumi*, this Court analyzed the effects of the City of Hialeah's ordinance banning animal sacrifice and found that it only affected the Santeria religion, which carries out animal sacrifice as part of its religious practice. *Id.* Notwithstanding the ordinance's facially neutral language, in effect, the only conduct that it regulated was the Santeria church's religious animal sacrifices. *Id.* Thus, the Court held that it was not neutral or generally applicable. *Id.* at 534–35. The result is the same here. Although § 22.5(b) appears facially neutral, in practice, it only applies to businesses that have a religious opposition to homosexuality, and in this case, the law is being used

to target a business that has religious objections to same-sex marriage.

The overwhelming objection to same-sex marriage derives from religious groups. *See* PEW RESEARCH CENTER, IN GAY MARRIAGE DEBATE, BOTH SUPPORTERS AND OPPONENTS SEE LEGAL RECOGNITION AS 'INEVITABLE' 1 (2013) (finding that "[o]pposition to gay marriage—and to societal acceptance of homosexuality more generally—is rooted in religious attitudes, such as the belief that engaging in homosexual behavior is a sin"). The objection was not based on an animus toward homosexuality, but rather, a belief in protecting the religious sanctity of marital unions. Thus, in practice, only businesses with sincerely held religious beliefs against same-sex marriage are affected by § 22.5(b) because those without these religious beliefs have no reason to withhold services that celebrated same-sex marriage.

Further, at the time that the Barbers requested their cake from Mama Myra's, same-sex marriage was not yet legal in Tourovia. Section 22.5(b)'s application in this case would have required Mama Myra's to create a custom-made cake celebrating a union that even Tourovia would not sanction. The irony is not lost on Mama Myra's that Tourovia would not issue a marriage license to the Barbers, but instead would compel Mama Myra's to use its artistic resources to send a message contrary to its Christian values.

There is no doubt that § 22.5(b) involves concerns about discrimination toward same-sex couples, much like the ordinance in *Lukumi* involved concerns of animal cruelty "unrelated to religious animosity." *Lukumi*, 508 U.S. at 531. But just as in *Lukumi*, the targeted effects of § 22.5(b) reveal that its goal is to compel businesses to

portray a celebratory message about same-sex marriage, even when that message runs counter to the business's deeply held religious beliefs. *See id.* Free exercise precedent makes clear that neither a state nor court can make value judgments about religious practices. *See Frazee v. Illinois Dept. of Employment Security,* 489 U.S. 829, 834 (1989) (explaining that a challenger need only base his free exercise claim on a "sincerely held religious belief"). Although some may disagree with Mama Myra's religious objection to same-sex marriage, this disapproval is not relevant to the inquiry, just as it was irrelevant in *Lukumi* that some found "the practice of animal sacrifice . . . abhorrent." 508 U.S. at 531. Thus, there are no discernable differences from the application of the animal sacrifice ordinance in *Lukumi*, and § 22.5(b) as applied to Mama Myra's custom-made cakes. Both laws are not neutral and generally applicable, and so strict scrutiny is warranted.

1. Section 22.5(b) Serves No Compelling State Interest.

As explained in section I(B), *supra*, Tourovia's interest in applying § 22.5(b) to Mama Myra's custom-made wedding cakes is simply to replace the Bakery's artistic speech with the Barbers' celebratory message of same-sex marriage. That compelled message is in opposition to Mama Myra's sincerely held religious beliefs about marriage. A state interest that can only be described as an endeavor to violate the Bakery's First Amendment rights cannot survive any level of judicial review, and it is a far cry from a compelling interest. *See Hurley*, 515 U.S. at 578 ("[I]n the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.").

Tourovia has continued to argue that its interest in applying § 22.5(b) to the instant case is to prevent discrimination toward same-sex couples. Provided that § 22.5(b) is not a neutral and generally applicable law, Mama Myra's questions whether Tourovia's true interest is to prevent discrimination. Assuming, *arguendo*, that Tourovia's interest is as they construe it, this Court has found that preventing discrimination toward a minority group is a compelling interest. *See id.* at 571–72.

2. Section 22.5(b) Is Not Narrowly Tailored.

A statute is narrowly tailored when it restricts no more religious activity than necessary to achieve the state's interest. *Lukumi*, 508 U.S. at 538. Section 22.5(b) does not meet this exacting standard because it contains no exception for religious activity. As explained in section I(B), *supra*, Illinois's public accommodation law exempts free exercise of religion from the law's reach. *See* 775 ILL. COMP. STAT. § 5/5-102.1(b) (2010) (exempting, *inter alia*, "free exercise of religion or expression of religiously based views"). This type of exception likely would satisfy the narrow tailoring prong because it allows for First Amendment activity while still protecting customers from discrimination. Because the State of Tourovia provides no such exemption in its public accommodation statute, the state's argument that the statute is narrowly tailored must fail.

Moreover, Section 22.5(b) is unconstitutionally overbroad because it prohibits more activity—protected First Amendment activity—than is necessary to prevent discrimination in public accommodations. Mama Myra's did not refuse service to the Barber's based on their sexual orientation; in fact, the Bakery was willing to create and sell any other item to the couple. Mama

Myra's conduct complied with the purported purpose of the statute, but § 22.5(b)'s expansive restrictions go further than the stated purpose and abridge the Bakery's right to free exercise of religion.

Section 22.5(b) is an even greater infringement on Mama Myra's liberties than the ordinance in *Lukumi* was on the Santeria Church. While the ordinance in *Lukumi* banned the church from partaking in their religious animal sacrifices ceremonies, § 22.5(b) goes even further by requiring an affirmative act. It mandates that Mama Myra's create a custom wedding cake for a same-sex couple. This is akin to the regulation in *Barnette* that required students to salute the American flag. 319 U.S. at 631. This Court struck down that regulation because it compelled the students to communicate against the their will; they could not refuse to participate even though their behavior was "peaceable and orderly." *Id.* For the same reason, this Court should strike down § 22.5(b) because it requires affirmative action in contravention of Mama Myra's religious beliefs.

B. Section 22.5(b) Is Unconstitutional Because It Pairs A Burden On Free Exercise of Religion With A Colorable Free Speech Violation.

If this Court finds that § 22.5(b) is a neutral and generally applicable law, it should still find that the law is unconstitutional under the hybrid-rights doctrine. *See Smith*, 494 U.S. at 881. In *Smith*, this Court held that "the First Amendment bars application of a neutral, generally applicable law to religious motivated action" when the case involves "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and freedom of the press." *Id.* (collecting cases). That is exactly the case here. Mama

Myra's has a hybrid-rights claim for violations of free exercises of religion and freedom of speech.

Although the Courts of Appeals have disagreed on the exact formulation of the hybrid-rights test, they all agree that it does not require the challenger to succeed on the challenge to the companion constitutional challenge. To require success on the merits of the companion challenge would render the hybrid-rights doctrine a nullity because the challenger could have won the case based on the companion right alone. The most stringent version of the test requires that the challenger "assert at least a 'colorable' claim to an independent constitutional right." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 656 (10th Cir. 2006); *see also Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) ("[A] plaintiff does not allege a hybrid-rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right or a claim of an alleged violation of a non-fundamental or non-existent right."). When a challenger makes a colorable hybrid-rights claim, the burden shifts to the government to show that the law passes strict scrutiny. *See, e.g.*, *Smith*, 494 U.S. at 881 (explaining that the Court's past decisions striking down a neutral, generally applicable law involved the free exercise along with another constitutional right); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (challenge based on free exercise and freedom of the press); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (challenge based on free exercise and the right of parents to direct their children's education).

Mama Myra's easily established a colorable claim for a free speech challenge. To be sure, Mama Myra's contends that § 22.5(b) is a complete violation of its free speech

rights. However, at the very least, Mama Myra's has alleged a colorable free speech claim because it is indisputably required to host a message vis-à-vis the creation of a custom wedding cake for a same-sex marriage.

Thus, under the hybrid-rights doctrine, § 22.5(b) is subject to strict scrutiny review. As explained in sections I(B) and II(A), *supra*, there is no compelling interest in replacing Mama Myra's speech with its customers' message, and the statute is not narrowly tailored because it has no exception for free speech or free exercise activities.

Section 22.5(b) improperly prioritizes customers' rights to purchase a custom wedding cake over the Bakery's First Amendment rights. All public accommodation laws involve a policy determination about which rights to favor, but here, the Barbers' right to purchase a custom-made cake is not substantially burdened because there are myriad other options available to them. The couple could purchase a standard cake from Mama Myra's, or they could go to another bakery that does not share Mama Myra's religious beliefs. However, as it stands, § 22.5(b) completely prevents Mama Myra's exercise of their fundamental rights to free speech and free exercise of religion within the shop. When compared to the relatively small burden the Barbers would face in obtaining a different cake, § 22.5(b) cannot justify violating Mama Myra's free exercise and free speech rights.

CONCLUSION

For the foregoing reasons, Mama Myra's Bakery respectfully requests that this Court reverse the Supreme Court of Tourovia.

Respectfully submitted,

Team 19, Counsel for Petitioner