No. 18-001

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTINA SMITH and SAMANTHA PETERS,

Petitioners,

v.

CLASSIC CAKESHOP, INC., and MARTIN PORTER,

Respondents.

The petition for a writ of certiorari is granted. The parties are directed to brief the following questions:

(1) Does rational basis or strict scrutiny review govern application of a state anti-discrimination law that requires an owner of a place of public accommodation to conduct business in a way that violates his religious beliefs?

and;

(2) Does the creation of a custom wedding cake constitute pure expressive activity such that state compulsion to conduct that activity according to state anti-discrimination law amounts to government compulsion of speech on the basis of content?

SUPREME COURT OF THE STATE OF MONROE

August Term, 2017

Docket No. 0017-CV-0789

CHRISTINA SMITH, and SAMANTHA PETERS,

Petitioners-Appellees,

— v. —

CLASSIC CAKESHOP, INC., and MARTIN PORTER,

Respondents-Appellants.

Before: CHIEF JUDGE ARBERMAN, JUDGE FUENTES, JUDGE HARVEY

Opinion by CHIEF JUDGE ARBERMAN:

Respondents-Appellants appeal an administrative order issued by the Monroe Civil Rights Commission that found them in violation of the Monroe Equal Access Act, Mon. Stat. § 1355(a) (2015). It determined that Respondents' refusal to sell a wedding cake to the Petitioners-Appellees, a same-sex couple, because of Respondents' religious beliefs violated Section 1355(a)'s ban on discriminatory treatment in places of public accommodation on account of sexual orientation.

Respondents concede a violation of Section 1355(a), but argue that the statute is unconstitutional under the First Amendment to the U.S. Constitution because it infringes on the Free Exercise of religion and unlawfully compels them to engage in government speech that is contrary to their religious beliefs. We agree and, for the reasons stated below, we **REVERSE** the decision below and **REMAND** with instructions to review the petition under strict scrutiny with

regard to both the Free Exercise Clause and Free Speech Clause of the First Amendment.

JUDGE HARVEY dissents in a separate opinion.

Factual Background

Smith and Peters (Petitioners) are longtime residents of Monroe. They have been in a same-sex romantic relationship with each other for the past ten years. For most of that time, they were unable to obtain a marriage certificate under Monroe law because the State did not recognize same-sex marriages. In June 2015, however, the U.S. Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) eliminated states' ability to deny same-sex couples the right to marry. In late 2016, Smith and Peters announced their intent to get married and began preparations for a wedding celebration in Monroe.

Smith contacted vendors of wedding services, including venues, catering services, florists, and photographers. She also made a reservation with Classic Cakeshop, Inc. and its owner, Martin Porter, to discuss design and purchase of a wedding cake. Classic is widely regarded as the top cake shop in Monroe, in particular because of Porter's skill and creativity as a cake maker. Classic's cakes and other desserts are in high demand for a variety of special occasions and holidays, including weddings. Each cake is custom-designed and hand-made; Classic does not sell pre-prepared cakes or offer customers a menu of cake designs to choose from. Porter begins his creative process by meeting with the customer to learn about their goals, personalities, personal preferences, and about the nature of their wedding ceremony and celebration. He then creates a paper design sketch, sculpts his ingredients into shape, fashions ornamental and symbolic details, and then decorates the cake with those details through the use of specialized techniques, including hand painting, airbrushing, and sculpting. Since founding Classic, Porter has made known to his customers that he operates Classic according to Christian principles and beliefs. Porter uses his

craft to express and celebrate his faith, and Classic does not make products contrary to his religious principles and beliefs. It has, for instance, previously refused to make cakes that celebrate Halloween, express anti-family themes, contain hateful or vulgar messages, or promote atheism.

Porter met with Smith and Peters at the Classic shop in January 2017. Upon realizing that they were a same-sex couple, he asked them why they were purchasing a wedding cake. Smith responded that the cake was for use in their wedding ceremony, which was planned for later that year. Porter apologized to Smith and Peters, said that he would be unable to sell them a wedding cake, and offered to put them in contact with a different cake shop. He also offered to design desserts other than wedding cakes for their ceremony. Peters asked why Porter was refusing service, and he responded that same-sex marriage was contrary to his religious beliefs. To him, he explained, designing and selling a wedding cake for a same-sex marriage ceremony was tantamount to endorsing same-sex marriage, a violation of his belief that, according to Christianity, marriage is only permissible between opposite-sex couples.

In February 2017, Smith and Peters filed a complaint with the Monroe Civil Rights Commission ("Commission"). They alleged that Porter and Classic's ("Classic")[1] denial of service violated the Monroe Equal Access Act, Mon. Stat. § 1355(a), which states in relevant part:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .

Section 1355(b) exempts "a church, synagogue, mosque, or other place that is principally used for religious purposes." Section 1355(c) exempts places of public accommodation that "restrict admission to one gender if such restriction is essential to their mission."

[1] Respondents do not challenge the Commission's finding that they can be held jointly liable for the violation of Section 1355(a). For simplicity, we will refer to both as "Classic."

After an investigation and hearing, the Commission issued a final decision in favor of Petitioners. It found that Classic's refusal to sell a wedding cake was a violation of Section 1355(a). The Commission rejected Classic's First Amendment challenges, premised on the Free Exercise and Free Speech clauses, to the application of Section 1355(a). It concluded first that Section 1355(a) was both neutral and generally applicable—meaning that strict scrutiny under the Free Exercise Clause was inapplicable—and that the law passed rational basis review. It also found that neither Classic's design nor sale of a custom wedding cake was expressive activity, and that Section 1355(a) was therefore not a content-based restriction of speech subject to strict scrutiny under the Free Speech Clause. While it harbored serious doubts about the expressiveness of designing a wedding cake, the Commission applied the intermediate standard of scrutiny set out in *United States v. O'Brien*, 391 U.S. 367 (1968) for regulation of conduct that contains both speech and non-speech elements and determined that Section 1355(a) passed muster.

Classic requested an exemption from Section 1355(a) on the basis of its religious beliefs, which the Commission refused. It instead entered a cease and desist order requiring Classic to take remedial measures, including elimination of its policy and practice of refusing to sell wedding cakes for same-sex marriage ceremonies and retraining of its staff to ensure compliance with Section 1355(a). Classic timely appealed the Commission's order to the Court of Appeals, which affirmed in a summary opinion. Classic appealed that affirmance, which is now before this Court.

Discussion

Classic does not contest the Commission's finding that it violated Section 1355(a). It instead raises two arguments, which are the sole issues before us: (1) that the Commission's enforcement of Section 1355(a)—requiring Classic to undertake acts in violation of its religious beliefs—is subject to strict scrutiny under the Free Exercise Clause of the First Amendment rather than rational basis review, and (2) that the Commission's enforcement of Section 1355(a) to

regulate Classic's expressive activity constituted content-based compelled speech, which is subject to strict scrutiny under the Free Speech Clause. We review both arguments de novo.

I. First Amendment Free Exercise

The Free Exercise Clause of the First Amendment provides: "Congress shall make no law ... prohibiting the free exercise [of religion]." U.S. Const. Amend I. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993). "The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Lukumi*) (alteration in original). "The government may not compel affirmation of religious belief," "punish the expression of religious doctrines it believes to be false," "or lend its power to one or the other side in controversies over religious authority or dogma." *Employment Div. Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990) (citations omitted).

However, "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *See id.* at 879 (citation and quotations omitted). Even if the law has an "'incidental effect of burdening a particular religious practice'" or belief, it "need not be justified by a compelling governmental interest." *Lukumi*, 508 U.S. at 531; *see also Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 697-98 (10th Cir. 1998). "[A] law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006) (citation omitted). Conversely, a law that

substantially burdens a religious practice and is not generally applicable or is not neutral must satisfy strict scrutiny, *i.e.*, be justified by a compelling government interest narrowly tailored to achieve that interest. *See Smith*, 494 U.S. at 894.

A law is not neutral "if the object of a law is to infringe upon or restrict practices because of their religious motivation," whether that law targets religion on its face or as applied in practice. *Lukumi*, 508 U.S. at 533. A law is not generally applicable when it selectively imposes burdens only on conduct motivated by religious belief. *Id.* at 543.

In *Lukumi*, the Supreme Court found that the relevant law, applicable to all groups who killed, slaughtered, or sacrificed animals "for any type of ritual, regardless of whether or not the flesh or blood of the animals is to be consumed," was neither generally applicable nor neutral. *Id.* at 527. Notwithstanding the fact that the law on its face did not discriminate (it included both secular and religious conduct), the Court found it was not neutral because its purpose was to restrict a specific religious group, Santerías, from ritually killing animals. *Id.* at 542. It also concluded that the law was not generally applicable because it exempted the killing of animals for a variety of different secular activities, including the killing of animals at slaughterhouses, hunting, and extermination of pests, and some religious practices (kosher slaughter). *Id.* at 524, 536-37.

A. General Applicability

Lukumi is controlling here. As Classic argued below, Section 1355(a) is not generally applicable because, by exempting places "principally used for religious purposes," as well as places that restrict admission to one gender if essential to their mission, it does not apply generally to all members of society in the same way. In addition, Section 1355(a) is suspect because it exempts some religious activities, while not exempting all religious activities. *See* Section 1355(b) (exempting "a church, synagogue, mosque, or other place that is principally used for religious purposes"). Such exemptions "are of paramount concern when a law has the incidental effect of

burdening religious practice," which this clearly does. *Lukumi*, 508 U.S. at 542.

Petitioners argue that narrow exceptions like these are common in public accommodation statutes and are aimed at permitting specialized institutions, such as single sex health clubs or schools, the ability to provide services specific to one sex. *See, e.g.*, David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 Colum. J. of Gender & L. 51, 93 n.176 (2011). We disagree: this case is distinct and more like *Lukumi*, in that there are both secular and religious exceptions to Section 1355(a), none of which benefit Classic.

As in *Lukumi*, there is no sincere reason for providing exemptions to Section 1355(a) for some religious groups, but not for Classic. Porter is a religious man who has always conducted his business to honor his God. He does not create cakes that would disparage or run contrary to his religious beliefs. It is for precisely this reason that he does not create custom wedding cakes for same-sex couples—such an act would violate his deeply held Christian faith. A law cannot provide an exemption for some religious reasons and then refuse the same treatment to another party suffering religious hardship without a compelling reason. *See Lukumi*, 508 U.S. at 537 ("[I]n circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of religious hardship without compelling reason.'") (quoting *Smith*, 494 U.S. at 884).

Further, circuit courts have consistently held that heightened scrutiny is required when applying *Smith* to a law that has secular exceptions, but denies specific religious exemptions. *See, e.g., Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360, 366 (3d Cir. 1999) (Alito, J.) ("[W]hen the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny."); *Ward v. Polite*, 667 F.3d 727, 730, 740 (6th Cir. 2012) (where a public university permitted counseling students to refer clients to other counselors for mundane reasons, while

rejecting any request for an exemption founded in religious belief, holding that the "exemption-ridden policy," was "just the kind of state action that must run the gauntlet of strict scrutiny"); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1291, 1299 (10th Cir. 2004). Accordingly, we conclude that Section 1355(a) is not generally applicable and thus should have been subject to strict scrutiny.

B. Neutrality

We also conclude that strict scrutiny under the Free Exercise Clause is required because Section 1355(a) is not neutral. For a law to be "neutral" it must "not target religiously motivated conduct either on its face or as applied in practice." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3rd Cir. 2004) (citations omitted). Exemptions from Section 1355(a) for most religious organizations (*see* Section 1355(b)) evidences the state's awareness that the morality of homosexual marriage is an important religious question for many citizens. Monroe does not, however, afford equal treatment to those holding such beliefs. While certain religious groups enjoy blanket treatment to live according to their religious conscience, the state refused to provide the same exception to Classic. This targeting of religiously motivated conduct for "distinctive" treatment rendered the application of the law non-neutral—some religious objections are respected, while others or not. *See Central Rabbinical Congress of U.S. & Canada v. New York City Dept. of Health & Mental Hygiene*, 763 F.3d 183, 194 (2d Cir. 2014). We hold, therefore, that the law is not neutral as applied in practice, mandating strict scrutiny under the Free Exercise Clause.

C. Substantial Burden

Because Section 1355(a) is neither generally applicable nor neutral, any burden on Classic's ability to exercise its religion justifies strict scrutiny under the Free Exercise Clause; a showing of a "substantial" burden is not necessary. *See Central Rabbinical Congress of U.S. & Canada*, 763 F.3d at 193 (citing *Lukumi*). Although we need not address the issue, the dissent's misguided discussion of "substantial burden" prompts us to explain why, even if Classic were

required to show a substantial burden, it could make that showing.

Forcing Classic to create cakes for same-sex weddings coerces him into dishonoring his God, commandeering Porter's artistic talent to create a custom wedding cake to honor something that his religion teaches him is dishonorable. Classic was left with no option but to close its doors or violate its religious beliefs. In *Sherbert*, the Supreme Court found a substantial burden where a state forced the plaintiff to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Sherbert*, 374 U.S. at 404; *see also Comer*, 137 S. Ct. at 2021-22 (explaining that the government cannot force religious groups or individuals to choose between exercising their faith and pursuing a benefit otherwise available to the public). This is precisely what happened here, meaning that 1355(a) substantially burdened Classic's religious exercise.

II. Speech and Compelled Expression

Classic avers that, by applying Section 1355(a) to compel it to create wedding cakes for same-sex marriage ceremonies, the Commission is coercing Classic to engage in speech that it disagrees with, a violation of the First Amendment's Free Speech Clause. In Classic's view, designing, preparing, and selling a custom-made wedding cake is an artistic expression of speech, an expressive act that communicates a celebratory message about marriage. Where same-sex marriage is involved, it claims, provision of a wedding cake constitutes affirmative endorsement and celebration of such a marriage, and such a message would be totally at odds with Classic's religious beliefs. We thus consider the level of protection granted to the design and sale of a custom-made wedding cake under the First Amendment.

It is well established that the protection of the First Amendment's Free Speech Clause extends beyond the "written or spoken" word—it applies to both expression and expressive conduct. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569

(1995). Artistic expressions, such as music and art, are "unquestionably shielded" by the First Amendment. *Id.*; *see also Kaplan v. California,* 413 U.S. 115, 119-20 (1973) (noting that "First Amendment protection" extends to "pictures, films, paintings, drawings, and engravings"). While most conduct that bears expressive elements is evaluated according to the intermediate-scrutiny standard established in *O'Brien*, some acts are "inherent[ly] expressive[]" (*Hurley*, 515 U.S. at 568) such that they qualify as pure expression, which is entitled to greater constitutional protection. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010) ("[T]he Supreme Court and our court have recognized various forms of entertainment and visual expression as purely expressive activities . . . .") (citations omitted). This is so even where the conduct does not convey a "narrow, succinctly articulable" or "particularized" message. *Hurley*, 515 U.S. at 569 (citations and quotations omitted).

Classic's design and preparation of custom-made wedding cakes falls comfortably within the category of purely expressive conduct.[2] Like a song, sculpture, painting, photograph—or even a video game (*see Brown v. Entertainment Merchs. Ass'n*, 564 U.S. 786, 790 (2011))—the preparation of a custom wedding cake depends largely, if not entirely, on the discretion of the creator, exercised according to that creator's individualized taste and artistic judgment. Indeed, it is precisely because of Porter's artistic skill and judgment that Classic's products are renowned in Monroe; the dissent's claim that custom cake making is more mechanical than artistic is belied by Classic's unchallenged reputation as the top wedding cake maker in the state.

Classic, no less than any other speaker, is entitled under the Free Speech Clause to "the autonomy to choose the content of [its] own message." *Hurley,* 515 U.S. at 572-73. Absent sufficient justification, it cannot be forced to make statements that are contrary to its intended

[2] Business corporations, not less than ordinary people, have a First Amendment right to tailor their speech. *Hurley*, 515 U.S. at 573-74. Petitioners do not contend otherwise.

message and that it "would rather avoid." *Id*. (citations omitted); *see also Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11-12 (1986); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015) ("[T]he First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees.") (citations omitted).

The Ninth Circuit's decision in *Anderson* is instructive. There, the court considered whether a municipal ban on tattoo parlors violated the First Amendment. It rejected application of the *Spence-Johnson* test (*see Spence v. Washington*, 418 U.S. 405 (1974); *Texas v. Johnson*, 491 U.S. 397 (1989)) and held that both a tattoo itself and the process of tattooing were "purely expressive activity rather than conduct expressive of an idea . . . ." *Anderson*, 621 F.3d at 1059, 1061. The *Anderson* court's analysis is persuasive: custom wedding cakes, like tattoos, "are generally composed of words, realistic or abstract images, symbols, or a combination of these," and involve considerable "skill, artistry, care . . . ." *Id*. at 1061. And the process of creating a custom cake, no less than the creation of tattoo, novel, or painting, is "inextricably intertwined with the purely expressive product," and is thus subject to the same "full First Amendment protection." *Id*. at 1062. It is of no moment that tattoos are more akin than cakes to works traditionally protected by the First Amendment. As the *Anderson* court observed, "a form of speech does not lose First Amendment protection based on the kind of surface it is applied to." *Id*. at 1061.

We are not persuaded by the dissent's insistence that the customer's part in the creative process dilutes the expressiveness of Classic's process and output. "As with all collaborative creative processes, both the [artist] and the person receiving the [end product] are engaged in expressive activity." *Anderson*, 621 F.3d at 1062; *see also Buehrle v. City of Key West*, 813 F.3d 973, 976-77 (11th Cir. 2015). The dissent also errs by focusing on the presence of a business transaction. "It is well settled that a Speaker's rights are not lost merely because compensation is

received; a speaker is no less a speaker because he or she is paid to speak." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988) (citation omitted); *see also City of Lakewood v. Plain Dealer Publ'g. Co.*, 486 U.S. 750, 756 n. 5 (1988). Finally, we do not credit the dissent's claims that wedding guests and other observer's will likely not view Classic's preparation of a custom cake for a same-sex wedding as expressive, and that the most likely message to be conveyed, if any, is that Classic is complying with Section 1355(a). "Compelled speech is particularly suspect because it can directly affect listeners as well as speakers. Listeners may have difficulty discerning that the message is the state's, not the speaker's, especially where the 'speaker [is] intimately connected with the communication advanced.'" *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014) (quoting *Hurley*, 515 U.S. at 576) (alteration in original). Creation of a wedding cake for a same-sex couple—crafted with a particularized artistic vision, and creativity borne out of that occasion—would reasonably be seen as saying that Classic does not oppose the union. *See, e.g., Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012) ("The core of the message in a wedding is a celebration of marriage and the uniting of two people in a committed long-term relationship.").

We need not answer the dissent's bleak vision of anti-discrimination law going forward, nor set a precise line by which to sort pure expression from other conduct.[3] For this case, it suffices to conclude that Classic has engaged in pure expression. Nor must we consider the application of *Spence-Johnson* to ascertain whether Classic's conduct is "symbolic speech," which is not applicable where pure expression is present. *See Anderson*, 621 F.3d at 1059.[4]

[3] It seems to us far from likely that our holding will have such widespread application. Given the absence of extensive tailoring, customization, and artistic judgment, most sales of goods of services will not amount to the conduct with expressive elements or purely expressive conduct.

[4] Some courts have questioned the viability and contours of the *Spence-Johnson* test in light of *Hurley*. *See, e.g., Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 160 (3d Cir. 2002); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004).

We do not question the legality of Section 1355(a) as a means of regulating discriminatory conduct in general. *See Hurley*, 515 U.S. at 572. But by conscripting Classic's artistic expressions to serve as a vehicle to spread its preferred message, Monroe has applied Section 1355(a) as a content-based regulation of speech. *See Riley*, 487 U.S. at 795 ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."). Such regulation is subject to strict scrutiny (*see Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994)) because the First Amendment generally prohibits the government from forcing a private person to "utter what is not in his mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). Accordingly, the Commission's application of intermediate scrutiny was reversible error.

Dissent by JUDGE HARVEY:

I do not quarrel with the majority's description of the First Amendment's general contours. It is undoubtedly true that lack of neutrality or targeted applicability of a government regulation with regard to religious belief triggers exacting scrutiny under the Free Exercise Clause. It is also clear that such scrutiny is proper under the Free Speech Clause where government interferes with purely expressive conduct—whether expressed in words or not—on the basis of content. But the majority's application of these standards is deeply flawed. Section 1355(a), and Classic's[1] violation of it, present a clear instance of a generally applicable, neutral anti-discrimination law being enforced to prohibit a private party from engaging in invidious discrimination against a protected class of people. The majority holds otherwise. In doing so, it misunderstands and misinterprets—or simply waives away—long-standing precedent and fails to objectively and correctly weigh the factual record. Its overly broad view of religious exercise and expressive conduct threatens to neuter federal and state anti-discrimination laws, fundamentally rebalancing constitutional rights so as to immunize previously forbidden discrimination under the banner of safeguarding religious freedom. The majority fails to see the wide-reaching effect of its erroneous ruling. I fear that its consequences will be legion, and that they will inordinately burden those vulnerable citizens that have long depended on governments to shield them from invidious discrimination. I would affirm the decision of the Monroe Civil Rights Commission below.

I. First Amendment Free Exercise

"[A] law (or policy) that is neutral and of general applicability need not be justified by a compelling governmental interest even if that law incidentally burdens a particular religious practice or belief." *Swanson v. Guthrie Indep. Sch. Dist*, 135 F.3d 694, 697-98 (10th Cir. 1998). A party's religious beliefs do not excuse it from compliance with an otherwise valid law prohibiting

[1] Like the majority, I refer to Respondents collectively as "Classic."

conduct that the state is free to regulate. *Employment Div. Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990).

Section 1355(a) is neutral, generally applicable, and has an avowed purpose of eradicating certain forms of invidious discrimination in the state. Just because the statute impacts Classic's religious beliefs—no matter how sincere those beliefs are—does not mean it can ignore the law. Public accommodation laws like Section 1355(a) have repeatedly withstood constitutional challenges like those that Classic advances. *See, e.g., Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 279-80 (Alaska 1994) (holding that the Free Exercise Clause does not allow a landlord to discriminate against unmarried couples in violation of public accommodation statute); *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cty. Super. Ct.*, 189 P.3d 959, 967 (2008) ("[T]he First Amendment's right to the free exercise of religion does not exempt defendant physicians here from conforming their conduct to the Act's antidiscrimination requirements even if compliance poses an incidental conflict with defendants' religious beliefs.") (citation omitted).

The majority's belief that *Lukumi* controls the outcome here is misguided. There, the law was specifically created only to restrict religious behavior, and broad secular and religious exceptions were made to all but one religious group. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993). The law was written on its face to be neutral, but in practice it only restricted practitioners of Santería from sacrificing animals in religious ceremonies. *See id*. It had no other purpose and did not restrict secular or other religious activities. This is vastly different from the case at hand, where discrimination is barred in places of public accommodation without reference to a party's religious beliefs.

The majority's analysis of general applicability is also flawed. A law need not apply to every individual and entity to be generally applicable; rather, it is generally applicable so long as it does not regulate only religiously motivated conduct. *See Lukumi.* 508 U.S. at 542-43. Here,

secular and religious conduct are treated the same—the law does not permit people to discriminate, regardless of the reason for the discrimination. The narrow exemptions created for places of worship and same-sex institutions do not prove otherwise. Such exemptions are commonplace in generally applicable statutes. *See, e.g., Elane Photography, LLC v. Willock*, 309 P.3d 53, 75 (N.M. 2013) ("Exemptions for religious organizations are common in a wide variety of laws, and they reflect the attempts of the Legislature to respect free exercise rights by reducing legal burdens on religion.") (citation omitted). There is no "per se rule requiring any … regulation which permits any secular exemption [to] satisfy a strict scrutiny test." *Grace United*, 451 F.3d at 651 (citing *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004)), yet the majority, in effect, creates such a rule. In addition, the existence of an exemption for religious entities belies Classic's broad accusation that the state is hostile towards religion. *See, e.g., Priests for Life v. Dep't of Health & Human Servs.*, 772 F.3d 229, 268 (D.C. Cir. 2014). If anything, the law's exemptions for places of worship demonstrates that Monroe was trying to *minimize* burdens on religious exercise.

The majority's neutrality holding rests on a misinterpretation of precedent. "A law is neutral so long as its object is something other than the infringement or restriction of religious practices." *Grace United*, 451 F.3d at 649-50 (citation omitted). In *Lukumi*, the law was passed for just that purpose, to infringe upon the religious practice of animal sacrifice, and there was no other purpose or any other individuals impacted. *See Lukumi*, 508 U.S. at 537. Section 1355(a), in contrast, was passed to decrease discrimination, with provisions that govern the conduct of secular and religious parties alike. In the majority's view, however, the law's application is non-neutral because of the existence of limited religious exemptions. This reflects a fundamental misunderstanding of the exemption. Classic does not claim that it is a "place that is principally used for religious purposes." Section 1355(b). The reason that Classic cannot avail itself of the exemption is not because the statute is being applied in a non-neutral way, but because it

concededly does not meet the exemption's requirements.

Because Section 1355(a) is generally applicable and neutral, Classic must show that Section 1355(a) imposes a substantial burden on its ability to practice his religion. "An inconsequential or de minimis burden on religious practice does not rise to [the] level" of substantial. *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008); *see also Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004). Although Section 1355(a) "may make it more difficult" for Classic to exercise its religious beliefs, it has "no tendency to coerce [him] into acting contrary to [his] religious beliefs'" and therefore "does not constitute [a] substantial burden[] on the exercise of religion." *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996). Classic could, for instance, post a disclaimer to make it clear that its creation of cakes in no way reflects an opinion about the occasions the cakes are being used for. Further, it is Classic's voluntary decision to operate as a for-profit company that sells custom wedding cakes. By doing so, it, like any other state citizen, is required to abide by the laws of Monroe. "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *United States v. Lee*, 455 U.S. 252, 261 (1982). Because I conclude that Section 1355(a) is a generally applicable, neutral law that does not impose a substantial burden on religious exercise, I would hold that the Commission did not err in subjecting the law to rational basis review.

II. Speech and Compelled Expression

The majority does not dispute that Section 1355(a) is facially neutral. Nor could it; the statute does not target particular conduct or specific viewpoints. It instead enacts a blanket prohibition on discriminatory treatment in places of public accommodation on the basis of several classified protections, including sexual orientation. Monroe Equal Access Act, Mon. Stat. §

1355(a). On its face and as applied, Section 1355(a) does not dictate how Classic must design its products, nor does it prevent it from informing its customers that it does not believe in same-sex marriage. Instead, it simply prevents Classic from refusing to serve customers on the basis of sexual-orientation. Statutes like these "do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 572 (1995) (citations omitted). This is so even where the statute curtails private citizens' desire to act as a means of signaling or vindicating their discriminatory preferences. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 390 (1992) ("Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.").

That should end the matter. Classic's *act* of designing and selling cakes is not inherently expressive, nor is it a means (traditional or otherwise) of expressing a viewpoint. Although Classic may believe that the act of providing wedding cakes evidences and espouses its religious beliefs—the sincerity of which I do not question—belief alone does not imbue a non-expressive act with First Amendment protection. *See Nevada Com'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011) ("[T]he fact that a nonsymbolic act is the product of deeply held personal belief—even if the actor would like it to convey his deeply held personal belief—does not transform action into First Amendment speech.").

The majority purports to sidestep this straightforward conclusion by fundamentally redefining what it means to speak—an unprincipled and unjustified departure from well-established precedent. In its view, conduct is properly characterized as "pure expression" so long as enough "discretion" and "artistic judgment" are involved in carrying that conduct out, regardless of what message, if any, a reasonable observer of the conduct would perceive. This is totally at odds with the traditional standard for distinguishing among pure expression, conduct with

expressive elements, and non-expressive conduct. *See generally Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 60-68 (2006). The majority's abandonment of this standard "trivializes the freedom protected" by the First Amendment and "stretch[es] a number of First Amendment doctrines well beyond the sort of activities these doctrines protect." *Id*. at 62, 70.

"It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989); *see also Blau v. Fort Thomas Public School Dist.*, 401 F.3d 381, 390 (6th Cir. 2005) (the First Amendment does not protect "vague and attenuated notions of expression"). In deciding "whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play," a court must ask whether there is an "'intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citing *Spence*) (alteration in original); *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984) (rejecting suggestion that the burden on the speaker is "limited to 'the advancement of a plausible contention' that their conduct is expressive").

Neither *Hurley* nor *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010) permits the majority to dodge this standard. In *Hurley*, the Supreme Court premised its holding on the inherent expressiveness of parades. *See Hurley*, 515 U.S. at 568-69, 579 (identifying parades as being one of the most "basic," "ancient," and "classic" forms of expression, similar to "a speaker who takes to the street corner to express his views"); *see also Rumsfeld*, 547 U.S. at 63 (observing that the expressiveness of parades was "central" to *Hurley*). Similarly, in *Anderson*, the Ninth Circuit observed that tattooing, like music, is "'one of the oldest forms of human expression,'" and was a "'a venerable means of communication that is both unique and

important.'" *Anderson*, 621 F.3d at 1066 (citations omitted). The creation and sale of custom cakes bears no resemblance to either activity, and there is no evidence before the Court that it has historically been used or understood as a proxy for speech or expression.

The majority also deploys *Hurley* to undermine the *Spence-Johnson* test. I do not read *Hurley* as silently abrogating *Spence-Johnson*. *See Rumsfeld*, 547 U.S. at 66 (relying on *Johnson* to judge the inherent expressiveness of conduct); *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 n.6 (2d Cir. 2004); *see also Cressman v. Thompson*, 798 F.3d 938, 961 (10th Cir. 2015). It is notable that the two opinions the majority uses to cast aspersions on *Spence-Johnson*—*Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3rd Cir. 2002) and *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004)—affirmatively *undermine* Classic's arguments. *See Tenafly*, 309 F.3d at 161-65; *Holloman*, 370 F.3d at 1270.

What remains is the most sensible conclusion: creation and sale of a custom wedding cake, regardless of the skill or discretion involved, is not by itself an expressive act—it does not inherently convey any message, let alone a particular or unified message. A reasonable observer of the baker's creation would simply conclude that there is no message at all—the cake is just a cake. Absent supporting explanation, the observer would have little to no ability to sift through the numerous potential "meanings" of the cake to discern that a particular one was intended. *See Rumsfeld*, 547 U.S. at 66 (observing that a viewer of the conduct would have "no way of knowing" the purpose of the conduct without accompanying explanatory speech). And even if some message were somehow expressed, Classic would not necessarily be associated with it. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980); *Nathanson v. Mass. Comm'n Against Discrimination*, No. 199901657, 2003 WL 22480688, at *6 (Mass. Super. Ct. Sept. 16, 2003).

The essential point, though, is that Classic has not offered *any* evidence to show that others would interpret its creation and sale of a cake as communicating *any* message. Given this failure,

there is no need to entertain its argument that sale of a wedding cake would convey a specific message of support for a same-sex marriage. *See Elane Photography*, 309 P.3d at 68 ("While photography may be expressive, the operation of a photography business is not."); *Gifford v. McCarthy*, 23 N.Y.S.3d 422, 432 (App. Div. 2016). To the extent any meaning attributable to Classic could be wrung out, it is much more likely to be interpreted as reflecting Classic's obligation to comply with the law. *See Rumsfeld*, 547 U.S. at 65; *see also Gifford*, 23 N.Y.S.3d at 432. Porter's sincere *belief* that making a wedding cake communicates an endorsement of that marital union is not enough. *See Carrigan*, 564 U.S. at 127; *see also Cohen v. California*, 403 U.S. 15, 18 (1971) (distinguishing between "a conviction resting solely upon 'speech'" and one arising from "separately identifiable conduct which allegedly was intended . . . to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message"); *Left Field Media LLC v. City of Chicago, Ill.*, 822 F.3d 988, 990 (7th Cir. 2016).

Classic is, of course, free to express its opposition to same-sex marriage in any number of ways. What it cannot do, however, is distort the meaning of expressive activity beyond recognition to dress up its discriminatory preferences in the garb of First Amendment speech. *See Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (rejecting argument that application of anti-discrimination statute would "infringe constitutional rights of expression or association" because "'[i]nvidious private discrimination may be characterized as a form . . . protected by the First Amendment, but it has never been accorded affirmative constitutional protections.'") (citation omitted) (first alteration in original).

* * *

I fear that today's ruling will have profound and wide-reaching consequences. The majority's overly broad reading of the First Amendment strikes a blow to the heart of anti-discrimination laws, underwriting an expansion of conduct that the Constitution has long shielded

against. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Runyon v. McCrary*, 427 U.S. 160 (1976). No longer can members of protected classes be ensured the same access to places of public accommodations as their fellow citizens; their fundamental right to be free of discrimination is instead made subject to the private owner's beliefs. Classic and others like it will deploy the majority's holding to curtail same-sex couples right to enjoy "equal dignity in the eyes of the law." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015). Simply put, today's ruling effects a wholesale revision of longstanding First Amendment jurisprudence and threatens to unravel the core protections that have long stood as a bulwark against invidious discrimination.

For these reasons, I respectfully dissent.