No. 18-547

In the Supreme Court of the United States

MELISSA ELAINE KLEIN, *et vir*,
Petitioners,

v.

OREGON BUREAU OF LABOR AND INDUSTRIES,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Oregon

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR FAITH AND FAMILY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Institute for Faith and Family, as *amicus curiae*, respectfully urges this Court to reverse the decision of the Oregon Court of Appeals.

Institute for Faith and Family (IFF) is a nonprofit, tax-exempt organization based in Raleigh, NC that exists to advance a culture where human life is valued, religious liberty thrives, and marriage and families flourish. *See* https://iffnc.com. IFF has an interest in ensuring that American citizens are free to live and work according to conscience and religious faith.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment has never been confined within the walls of a church, as if it were a wild animal needing to be caged. On the contrary, the Constitution broadly guarantees liberty of religion, conscience, and expression to citizens who participate in public life according to their moral, ethical, and religious convictions.

Amicus curiae urges this Court to grant the Petition for two reasons. First, this Court should clarify that First Amendment protection against compelled expression encompasses the process of creating

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. The parties have consented to the filing of this brief. *Amicus curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

expression. Second, this Court should narrow the reach of *Emp't Div., Ore. Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990) and affirm the strongest possible protection for conscientious objectors.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT THE FIRST AMENDMENT FULLY PROTECTS THE PROCESS OF CREATING EXPRESSION.

This case is "a glaring example of an encroachment on the freedom of speech." Haley Holik, *Note: You Have the Right to Speak by Remaining Silent: Why a State Sanction to Create a Wedding Cake is Compelled Speech*, 28 Regent U.L. Rev. 299, 301 (2015-2016). Oregon compels Petitioners to personally create a message they believe is gravely wrong. The Oregon Court of Appeals admitted that "[i]f BOLI's order can be understood to compel the Kleins to create pure 'expression' that they would not otherwise create," this Court would likely consider it a content-based regulation subject to strict scrutiny. *Klein v. Oregon Bureau of Labor and Industries*, 289 Ore. App. 507, 534 (2017). In a similar case—now vacated and remanded (*Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018))—the Washington Supreme Court criticized a florist's argument for a narrow exception applicable to "businesses, such as newspapers, publicists, speechwriters, photographers, and other artists, that create expression as opposed to gift items, raw products, or prearranged [items]." *State v. Arlene's Flowers,* 389 P.3d 543, 559 (Wash. 2017). The court begrudgingly acknowledged in a footnote that "a

handful of cases protecting various forms of art"[2] appeared to "provide surface support" for her position. *Id.* at 559 n. 13. But the court refused to look beneath that surface and summarily dismissed the argument that custom designs are anything but unprotected conduct. There is a subtle but critical distinction between conduct that *is itself* expressive and the action required to *create* expression. Both implicate the First Amendment, but the analysis differs.

Precedent in multiple jurisdictions, including this Court, confirms that custom visual artwork is protected expression.[3] "It goes without saying that artistic expression lies within . . . First Amendment protection." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (1998) (Souter, J., dissenting). So is the

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[2] *Ward v. Rock Against Racism*, 491 U.S. 781, 790-91 (1989) (music without words); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975) (theater); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010) (tattooing); *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 627-28 (7th Cir. 1985) (stained glass windows on display in an art gallery at a junior college).

[3] *See, e.g., Kaplan v. California*, 413 U.S. 115, 119-120 (1973) (pictures, films, paintings, drawings, engravings); *Anderson v. City of Hermosa Beach*, 621 F.3d at 1060-61 (tattoos); *White v. City of Sparks*, 500 F.3d 953, 955-56 (9th Cir. 2007) (artist's original painting); *Comedy III Productions v. Gary Saderup, Inc.*, 21 P.3d 797, 804 (Cal. 2001) (silk-screened t-shirts); *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) (painting, photography, prints, sculpture); *Mastrovincenzo v. City of New York*, 435 F.3d 78, 82, 97 (2d Cir. 2006) (graffiti-painted clothing); *ETW Corp. v. Jireh Publ'g*, 332 F.3d 915, 924 (6th Cir. 2003) (artist's prints of golfer Tiger Woods); *Univ. of Ala. Bd. of Trs. v. New Life Art*, 683 F.3d 1266, 1276 (11th Cir. 2012) (painting of football scenes with university team uniforms).

personal labor required to create it. First Amendment protection extends to "creating, distributing, or consuming" speech. *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2734 n.1 (2011) (video game restrictions). As the Ninth Circuit explained, "writing words on paper" or "painting a painting" might be "described as conduct," but they are inseparable from the final creative product, and therefore "we have never seriously questioned that the[se] processes…are purely expressive activities entitled to full First Amendment protection." *Anderson v. City of Hermosa Beach*, 621 F.3d at 1061-62. Similarly, a Texas appellate court recognized that "using a camera to create a photography" is like "applying pen to paper" or "brush to canvas"—and in each case "*the process of creating the end product cannot reasonably be separated from the end product for First Amendment purposes*." *Ex parte Thompson*, 442 S.W.3d 325, 337 (Tex. Crim. App. 2014) (emphasis added). The same is true for Petitioners' creation of custom designed wedding cakes. Their creative labors and the final expressive product are inextricably linked.

Oregon's ruling does a grave disservice to both creative artists and their customers. If the artist is repelled by the message he must create, the final product is unlikely to be satisfactory. Coercion produces a counterfeit. That is one reason courts are loathe to order specific performance as a remedy for breach of a contract for personal services—especially where artistic expression is required.[4] The New York

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[4] *See, e.g., Hamblin v. Dinneford*, 2 Edw. Ch. 529, 533-534 (N.Y. 1835) (actor); *Lumley v. Wager*, Ch. App., 42 Eng. Rep. 687 (1852) (singer); *Duff v. Russell*, 14 N.Y.S. 134 (Super. Ct. 1891)

Court of Chancery, declining to compel a singer's performance for an Italian opera, explained how difficult it would be for a judge "to determine *what effect coercion might produce upon the defendant's singing*, especially in the livelier airs; although the fear of imprisonment would unquestionably deepen his seriousness in the graver parts of the drama." *De Rivafinoli v. Corsetti*, 4 Paige Ch. 264, 270 (1833) (emphasis added).

II. THIS COURT SHOULD GRANT CERTIORARI TO NARROW THE REACH OF *SMITH*.

This Court's decision in *Smith* has been widely criticized and debates over the years. *Amicus curiae* urges this Court to at least restrict the ruling so that peaceful conscientious objectors are not swept within its reach. Declining business, particularly where other vendors are readily available, is not tantamount to demanding an exemption from a criminal statute.

Conscience is closely linked to freedom of thought. Respect for individual conscience is deeply rooted in American history. This nation's legal system has traditionally respected conscience, as illustrated by statutory and judicially crafted principles in other contexts. Individuals hold the right to adopt a point of view "and to refuse to foster . . . an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). This Court, acknowledging man's

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(actress/singer); *Okeh Phonograph v. Armstrong*, 63 F.2d 636 (9th Cir. 1933) (jazz player); *Beverly Glen Music v. Warner Communications*, 178 Cal. App. 3d 1142, 1145 (1986) (singer) ("Denying someone his livelihood is a harsh remedy."). *See also* 5A Corbin, Contracts (1964) § 1204.

"duty to a moral power higher than the State," has underscored the urgency of preserving individual conscience. Indeed, "nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process." *United States v. Seeger*, 380 U.S. 163, 170 (1965), quoting Harlan Fiske Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919).

It is hazardous for any government to systematically crush the conscience of its citizens. But that is exactly what this ruling does, breeding a nation of business owners who lack *conscience*—citizens who must set aside conscience, values, and religion simply to remain in business. Courts have long respected conscience rights in other contexts. After abortion became legal, Congress acted swiftly to preserve the conscience rights of professionals who object to participating in abortions. When Senator Church introduced the "Church Amendment" (42 U.S.C. § 300a-7(c)) for that purpose, he explained that: "Nothing is more fundamental to our national birthright than freedom of religion." 119 Cong. Rec. 9595 (1973).

The conscience and integrity of a private business owner is entitled to respect. Oregon compels people of faith to create messages and personally participate in events they consider immoral. Yet many state

constitutions link free exercise to "liberty of conscience."[5] Oregon is one of them:

> All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own *consciences*.
>
> No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions, or interfere with the rights of *conscience*.

Ore. Const. Art. I, §§ 2, 3 (emphasis added). The Oregon court noted the Kleins' reliance on these provisions and their conscience-based objections, but there is no analysis of the role of conscience in American law. *Klein*, 289 Ore. App. at 521 n. 5, 545. Other state courts have shown more respect for conscience. One Minnesota court ruled in favor of a religious deli owner who refused to deliver food to an abortion clinic, explaining that: "Deeply rooted in the

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[5] *See* A.R.S. Const. Art. II, § 12; Ark. Const. Art. 2, § 24; Cal. Const. art. I, § 4; Colo. Const. Art. II, Section 4; Del. Const. art I, § 1; Ga. Const. Art. I, § I, Para. III; Idaho Const. Art. I, § 4; Illinois Const., Art. I, § 3; Ind. Const. Art. 1, §§ 2, 3; Kan. Const. B. of R. § 7; Ky. Const. § 1; ALM Constitution Appx. Pt. 1, Art. II; Me. Const. Art. I, § 3; MCLS Const. Art. I, § 4; Minn. Const. art. 1, § 16; Mo. Const. Art. I, § 5; Ne. Const. Art. I, § 4; Nev. Const. Art. 1, § 4; N.H. Const. Pt. FIRST, Art. 4 and Art. 5; N.J. Const., Art. I, Para. 3; N.M. Const. Art. II, § 11; NY CLS Const Art I, § 3; N.C. Const. art. I, § 13; N.D. Const. Art. I, § 3; Oh. Const. art. I, § 7; Ore. Const. Art. I, §§ 2, 3; Pa. Const. Art. I, § 3; R.I. Const. Art. I, § 3; S.D. Const. Article VI, § 3; Tenn. Const. Art. I, § 3; Tex. Const. Art. I, § 6; Utah Const. Art. I, § 4; Vt. Const. Ch. I, Art. 3; Va. Const. Art. I, § 16; Wash. Const. art. 1, § 11; Wis. Const. Art. I, § 18; Wyo. Const. Art. 1, § 18.

constitutional law of Minnesota is the fundamental right of every citizen to enjoy 'freedom of conscience.'" *Rasmussen v. Glass*, 498 N.W.2d 508, 515 (Minn. Ct. App. 1993).

Liberty of conscience underlies the Establishment Clause and the unique taxpayer standing rules developed in *Flast v. Cohen*, 392 U.S. 83 (1968). The Framers were concerned about the violation of *conscience* "if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1446-1447 (2011), quoting Feldman, *Intellectual Origins of the Establishment Clause*, 77 N. Y. U. L. Rev. 346, 351 (2002). The same is true here: Oregon requires these small business owners to violate their consciences by celebrating an event they believe to be immoral and creating custom artwork for it. This is as much a frontal assault on conscience as the Establishment Clause evil of compelling citizens to support religious beliefs they do not hold.

No American should ever have to choose between allegiance to the state and faithfulness to God as a condition of remaining in business. Conscientious objector claims are "very close to the core of religious liberty." Nora O'Callaghan, *Lessons From Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right*, 39 Creighton L. Rev. 561, 565, 611, 615-616 (2006). Prior to *Smith*, many winning cases involved conscientious objectors—believers seeking freedom from state compulsion to commit an act against conscience. *Girouard v. United States,* 328 U.S. 61 (1946) (military combat); *Sherbert v. Verner*, 374 U.S. 398 (1963)

(Sabbath work); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (flag salute); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (high school education). Many losing cases involve "civil disobedience" claimants seeking to engage in illegal conduct, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor). *Lessons From Pharaoh*, 39 Creighton L. Rev. at 564 (2006). *Smith* repeatedly emphasized the *criminal* conduct at issue. *Smith,* 494 U.S. at 874, 878, 887, 891-892, 897-899, 901-906, 909, 911-912, 916, 921. Unlike the *Smith* plaintiffs, Petitioners do not seek to commit a criminal act, but to peacefully decline business that would require them to violate conscience. Courts should allow the free market to work. As a quick internet search reveals, there are many businesses that expressly cater to same-sex ceremonies. *See, e.g.*, www.lgbtweddings.com (listing vendors in numerous states, including Oregon); www.engaygedweddings.com (same).

America was founded by people who risked their lives to escape religious tyranny and observe their faith free from government intrusion. This Court's decision has broad ramifications for all citizens burdened by legal directives to act against conscience. Considering the high value that courts, legislatures, and state constitutions have historically assigned to conscience and religious liberty, it is incumbent upon this Court to protect the right to live and work according to conscience, and to decline to participate in morally objectionable events or messages. Congress has ranked religious freedom "among the most treasured birthrights of every American." Sen. Rep. No. 103-111, 1st Sess., p. 4 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News, at pp. 1893-1894. This Court

expressed it eloquently in ruling that an alien could not be denied citizenship because of his religious objections to bearing arms:

> The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the *conscience* of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of *conscience* there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

Girouard v. United States, 328 U.S. at 68 (emphasis added).

We dare not sacrifice priceless American freedoms through misguided—or even well-intentioned—government efforts to broaden LGBT rights. People of faith have not forfeited their right to conduct business according to conscience and convictions.

CONCLUSION

This Court should grant the Petition and reverse the decision of the Oregon Court of Appeals.

Respectfully submitted,

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