No. _____

In the Supreme Court of the United States

MELISSA ELAINE KLEIN AND AARON WAYNE KLEIN,
Petitioners,

v.

OREGON BUREAU OF LABOR AND INDUSTRIES,
Respondent.

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

PETITION FOR WRITT OF CERTIORARI

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QUESTIONS PRESENTED

Melissa and Aaron Klein owned a bakery, which they operated in accord with their religious convictions. They designed and created custom cakes—only custom cakes. And they did so without regard to the sexual orientation of their customers, including the complainants in this case, who had commissioned a wedding cake from the Kleins for a traditional wedding just two years before setting this litigation in motion. What the Kleins could not do in good conscience was to design and create a custom wedding cake to celebrate a wedding ceremony that contravened their religious belief that marriage is the union of one man and one woman. When the Kleins declined to contribute their art to a same-sex wedding ritual, the Oregon Bureau of Labor and Industries ("BOLI") found that they had violated Oregon's public accommodations law. BOLI ordered the Kleins to pay the complainants $135,000 in damages. Sweetcakes by Melissa went out of business. The Oregon Court of Appeals affirmed BOLI's order, rejecting the Kleins' constitutional defenses. The Oregon Supreme Court denied review.

The questions presented are:

1. Whether Oregon violated the Free Speech and Free Exercise Clauses of the First Amendment by compelling the Kleins to design and create a custom wedding cake to celebrate a same-sex wedding ritual, in violation of their sincerely held religious beliefs.

2. Whether the Court should overrule *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

3. Whether the Court should reaffirm *Smith*'s hybrid rights doctrine, applying strict scrutiny to free exercise claims that implicate other fundamental rights, and resolving the circuit split over the doctrine's precedential status.

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PETITION FOR WRIT OF CERTIORARI

Melissa and Aaron Klein respectfully petition for a writ of certiorari to review the judgment of the Oregon Court of Appeals.

OPINIONS BELOW

The opinion of the Oregon Court of Appeals (App. 3–87) is reported at 289 Or. App. 507. The order of the Oregon Supreme Court denying review (App. 1–2) is unreported. The order of the Oregon Bureau of Labor and Industries (App. 90–290) is unreported.

JURISDICTION

The Oregon Court of Appeals rendered its decision on December 28, 2017, and issued the judgment to be reviewed on July 31, 2018. App. 88. The Oregon Supreme Court denied the Kleins' petition for review on June 21, 2018. App. 1. On September 12, 2018, Chief Justice Roberts granted an extension until October 19, 2018, in which to file the petition for a writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech[.]

U.S. Const. amend. I.

STATUTORY PROVISIONS INVOLVED

Oregon's public accommodations statute provides in pertinent part:

> (1) [A]ll persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is of age, as described in this section, or older. . . .
>
> (3) It is an unlawful practice for any person to deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation in violation of this section.

Ore. Rev. Stat. § 659A.403.

STATEMENT

The State of Oregon drove Melissa and Aaron Klein out of the custom-cake business and hit them with a $135,000 penalty, because the Kleins could not in good conscience employ their artistic talents to express a message celebrating a same-sex wedding ritual. This petition presents the question whether artists in public commerce are protected by the First Amendment when they decline to create expression that would violate their religious beliefs.

The Oregon Bureau of Labor and Industries ("BOLI" or "the Bureau") rejected the Kleins' argument that the First Amendment protects their right to free speech and free exercise of religion. The Oregon Court of Appeals affirmed, and the Oregon Supreme Court denied review.

Certiorari is warranted to clarify the interaction of the First Amendment with state public accommodations laws. Hearing this case would allow the Court to resolve disagreements in the lower courts about the kinds of expression that merit First Amendment protection, and the precedential status of this Court's hybrid rights doctrine, which applies strict scrutiny in the case of free exercise claims that implicate other fundamental rights.

1. Melissa and Aaron Klein operated their bakery—Sweetcakes by Melissa—in Gresham, Oregon, until Oregon put them out of business in 2013. The Kleins sold custom-designed cakes for weddings and other celebratory events.

Each Sweetcakes wedding cake was the product of a lengthy process that began with a consultation with the engaged couple. App. 205. Following the consultation, Melissa would sketch a series of personalized designs for the couple.[1] BOLI Exhibit 3, Declaration of Melissa Klein at 3–5 (Oct. 23, 2014). The design process alone could take hours, if not a full day. Hearing Tr. at 598, 755 (Testimony of Laura Widener, Melissa Klein) (Mar. 13, 2015). The design

[1] Because multiple parties and witnesses share the same last names, this petition uses first names for clarity.

that best reflected the couple's preferences, styles, and wedding theme would be the blueprint for the finished cake, created through a multistep creative process of molding, cutting, and shaping. Declaration of Melissa Klein, *supra*, at 3–4.

After the wedding cake was decorated, Aaron would load it into a truck emblazoned with the words "Sweet Cakes by Melissa" in large pink letters and drive it to the location of the wedding ceremony. There he would set up the cake, assembling it and adding any remaining decorations. App. 193. In performing these services, Aaron "often interact[ed] with the couple or other family members, and often place[d] cards showing that Sweetcakes created the cake." *Id.*; BOLI Exhibit 2, Declaration of Aaron Klein at 4–5 (Oct. 23, 2014).

The Kleins opened and operated Sweetcakes as an expression of their Christian faith. They understand that faith to teach that God instituted marriage as the union of one man and one woman. App. 193. For the Kleins, marriage between a man and a woman reflects the union between Jesus Christ and the church. *See* Ephesians 5:31–32. Because of their religious views about marriage, custom-designed wedding cakes were central to the Kleins' operation of Sweetcakes. The Kleins created these cakes, in part, because they wanted to celebrate weddings between one man and one woman. Declaration of Melissa Klein, *supra*, at 4.

The Kleins do not believe that other types of interpersonal unions are marriages, and they believe it is sinful to celebrate them as such. *Id.* Because their religion forbids complicity with sin, they could not design and create cakes to celebrate events that

violate their religious beliefs. App. 193; Declaration of Melissa Klein, *supra*, at 3. BOLI does not deny the sincerity of the Kleins' religious beliefs. *See* App. 193, 226.

The Kleins served all customers regardless of sexual orientation. Declaration of Aaron Klein, *supra*, at 5. This too was an expression of the Kleins' faith, which teaches that all persons are made in the image of God and are therefore deserving of dignity. *Id.* Indeed, two years before the events that gave rise to this case, the Kleins had sold a wedding cake to Rachel Cryer and Laurel Bowman, the complainants in this case, to celebrate the marriage of Rachel's mother to a man. The Kleins knew that Rachel and Laurel were gay when they took their order. *See* Supplemental Declaration of Aaron Klein at 1 (Feb. 11, 2014); Hearing Tr. at 30–33, 394, 756–57 (Testimony of Cheryl McPherson) (Mar. 12, 2015). And Rachel and Laurel had no complaints about the service they received. They liked the Kleins' work so much that they wanted to commission a custom cake from Sweetcakes for their own wedding. App. 8, 96.

2. Rachel and her mother came to Sweetcakes by Melissa for a wedding cake tasting in January 2013. App. 9. When Aaron asked the names of the bride and groom, Rachel responded that there were two brides. *Id.* Aaron apologized and said that, because of their religious beliefs, he and his wife could not create a custom-designed cake for that purpose. App. 9.

Shortly after Rachel and her mother left the store and started to drive away, Rachel's mother returned alone to confront Aaron about his religious beliefs. Aaron listened while Rachel's mother told

him how she used to share his religious belief about marriage, but her "truth had changed," and she had come to believe the Bible to be silent about same-sex relationships. *Id.*; Declaration of Aaron Klein, *supra*, at 6. After she finished, Aaron expressed religious disagreement and quoted a Bible verse in support of his position. *Id.*; App. 9. As BOLI found, Aaron quoted a verse from the Book of Leviticus: "You shall not lie with a male as one lies with a female; it is an abomination." App. 97. Rachel's mother ended the conversation, returned to her car, and told Rachel (inaccurately) that Aaron had called *her* "an abomination." App. 9. BOLI correctly determined that this was a misreporting of events. *See* App. 97, BOLI Proposed Order at 79 n.48; App. 94 n.2.

Four days later, Rachel and her mother met with another local baker and commissioned an elaborate three-tiered wedding cake topped with a hand-made, hand-painted peacock figure with tail feathers trailing down over the tiers onto the cake plate. App. 105. The design was based on Rachel's explanation of what she wanted the cake to look like. *Id.* The baker who designed and created the peacock cake testified that she considers herself an "artist" and her wedding cakes "artistic expression[s]" that she "want[s] to be able to share . . . with the public and the community." Hearing Tr. at 594, 599–600 (Testimony of Laura Widener) (Mar. 13, 2015). She recounted how it made her "proud" that her custom cake would "be part of [the] celebration." *Id.* at 594.

A celebrity baker donated a second wedding cake—"a Bride's cake . . . in place of the traditional Groom's cake." App. 109. The second cake was decorated with a fairy tree, based on Laurel's tattoo,

to reflect her Irish heritage, because Laurel's "grandmother was going to be watching from Ireland." Hearing Tr. at 356 (Testimony of Laurel Bowman-Cryer) (Mar. 12, 2015).

Laurel and Rachel filed complaints with BOLI, alleging that the Kleins had refused to serve them because of their sexual orientation. App. 10.

3. After conducting an investigation into Laurel and Rachel's complaints, BOLI issued formal charges against the Kleins. App. 11. The Bureau alleged that the Kleins had violated Oregon's public accommodations statute, which prohibits the denial of "full and equal accommodations, advantages, facilities and privileges of any kind" "on account of . . . sexual orientation." Ore. Rev. Stat. § 659A.403(3), (1). BOLI also alleged that the Kleins had unlawfully advertised an intention to discriminate on account of sexual orientation in violation of Ore. Rev. Stat. § 659A.409.

The Kleins pleaded their free speech and free exercise claims as affirmative defenses in their answer to BOLI's charges. *See* App. 223–25.

The case was assigned to a BOLI Administrative Law Judge ("ALJ") who issued a Proposed Final Order granting summary judgment in favor of BOLI on its claim of sexual-orientation discrimination. The Proposed Final Order rejected the Kleins' free speech and free exercise defenses. App. 188, 236–61.

The ALJ ruled for the Kleins on BOLI's claim of discriminatory advertising. App. 214–18. BOLI's charge rested on two statements Aaron had made to the media, describing past events about the case. App. 216.

BOLI sought damages of $75,000 for each complainant for "emotional, mental, and physical suffering." App. 69. On the question of damages, the ALJ heard testimony from the Kleins, the complainants, and the baker who created their peacock wedding cake. The ALJ awarded Rachel the full $75,000; he awarded Laurel $60,000 because he determined Laurel's testimony lacked credibility. App. 71–72.

The ALJ's proposed final order was transmitted to BOLI Commissioner Brad Avakian, an elected official who exercises sole authority to make final decisions on behalf of BOLI. The parties then filed briefs before Avakian. However, Avakian had already expressed his views on the merits of the Kleins' case: before BOLI had even filed charges, Avakian had posted a news story about the matter on Facebook and commented that "Everyone has a right to their religious beliefs, but that doesn't mean they can disobey laws already in place." App. 159. When the case eventually came before him, Avakian ruled accordingly, rejecting the Kleins' state and federal constitutional defenses.

Avakian followed the ALJ's proposed final order in every respect but one. Like the ALJ, BOLI concluded that the Kleins had violated Oregon's public accommodations statute. The Bureau ordered the Kleins to stop discriminating on account of sexual orientation and to pay $135,000 in "compensatory damages for emotional, mental and physical suffering." App. 144. Departing from the ALJ's proposed order, Commissioner Avakian also held that the Kleins had violated the state ban on statements of intent to discriminate and ordered the

Kleins to "cease and desist" from making such statements. App. 144–45.

4. On appeal, the Oregon Court of Appeals issued the order under review here. The court reversed BOLI's "cease and desist" order prohibiting statements of intent to discriminate, because Aaron's statements recounting past events did not indicate an intent to discriminate in the future. The court affirmed the Bureau in every other respect.

The Kleins argued on appeal that by forcing them to design and create custom cakes to celebrate same-sex wedding ceremonies, BOLI's order violates both the Free Speech Clause and the Free Exercise Clause. App. 15–16. The Oregon Court of Appeals rejected these constitutional defenses.

Beginning with the Kleins' free speech claim, the court acknowledged that "public accommodations law is awkwardly applied to a person whose 'business' is artistic expression." App. 39.

The court conceded that "[i]f BOLI's order can be understood to compel the Kleins to create pure 'expression' that they would not otherwise create, it is possible that the [United States Supreme] Court would regard BOLI's order as a regulation of content, thus subject to strict scrutiny." *Id.*

The Oregon Court of Appeals also acknowledged that this Court "has held that the First Amendment covers various forms of artistic expression." App. 40 (enumerating examples). Therefore, according to the Oregon court, "the question is whether [the Kleins'] customary practice, and its end product, are in the nature of 'art.' " App. 39.

At the outset, the Oregon Court of Appeals acknowledged that the Kleins' handiwork bears all the traditional hallmarks of commissioned artistic expression, and that "the Kleins imbue each wedding cake with their own aesthetic choices." App. 45:

> The record reflects that the Kleins' wedding cakes follow a collaborative design process through which Melissa uses her customers' preferences to develop a custom design, including choices as to 'color,' 'style,' and 'other decorative detail.' Melissa shows customers previous designs 'as inspiration,' and she then draws 'various designs on sheets of paper' as part of a dialogue with the customer. From that dialogue, Melissa 'conceives' and customizes 'a variety of decorating suggestions' as she ultimately finalizes the design. Thus, the process does not simply involve the Kleins executing precise instructions from their customers; instead, it is clear that Melissa uses her own design skills and aesthetic judgments.

App. 44.

The court rightly assumed, based on Rachel and Laurel's express intentions, that "any cake that the Kleins made for them would have followed the Kleins' customary practice." App. 43.

Nevertheless, the court concluded that the Kleins' wedding cakes were not "entitled to the same level of constitutional protection as pure speech or traditional forms of artistic expression." App. 44.

The court's decision turned on the premise that BOLI's order need survive only intermediate

scrutiny if the Kleins' "cake-making retail business involves, at most, both expressive and non-expressive components," citing this Court's seminal "expressive conduct" case, *United States v. O'Brien*, 391 U.S. 367 (1968). App. 43. Although the Oregon Court of Appeals acknowledged the "dignitary" aims of BOLI's enforcement of the public accommodations statute, App. 50, it held that the State's "interest . . . is unrelated to the content of the expressive components," App. 43.

To determine whether the "expressive" or "non-expressive" elements of the Kleins' work predominate, the Court of Appeals borrowed from three other "expressive conduct" cases that involved not art but improper flag display, public sleeping, and legislative voting. App. 44–45 (citing *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011)).

Departing from this Court's precedents, which treat even abstract art and music as fully protected expression, the Oregon Court of Appeals held that "[f]or First Amendment purposes, the expressive character of a thing must turn not only on how it is subjectively perceived by its maker, but also on how it will be perceived and experienced by others." App. 45.

Applying this audience-response theory of artistic expression to the Kleins, the Court of Appeals concluded that they had not proven their cakes were invariably "experienced" by others "predominantly as expression." *Id.* The court reasoned that "even when custom-designed for a

ceremonial occasion, [they] are still cakes made to be eaten." *Id.*

The court thought it significant to this analysis that custom cakes are produced through "a collaborative process in which Melissa's artistic execution is subservient to a customer's wishes and preferences." App. 46.

The Oregon Court of Appeals also rejected the Kleins' arguments that BOLI's order violates the Free Speech Clause by compelling them to host or accommodate celebratory messages about same-sex weddings, and that it violates their freedom of association by compelling them to facilitate such weddings. App. 46–48. The court dismissed these arguments on the ground that "the Kleins have not raised a nonspeculative possibility that anyone attending the wedding will impute [the wedding cake's celebratory] message to the Kleins." App. 47. The court also suggested that the Kleins could counteract any implicit endorsement of same-sex marriage by "engag[ing] in their own speech that disclaims such support." App. 47–48.

Because the Oregon Court of Appeals determined that the Kleins' custom wedding cakes are not pure expression, it reviewed BOLI's order under the more deferential intermediate scrutiny standard. The court upheld it on the ground that any burden the order imposed on the Kleins' expression was "no greater than essential" to further the State's important interests. App. 50. The court identified two relevant state interests—first, "ensuring equal access to publicly available goods and services," and second, "preventing the dignitary harm that results from discriminatory denials of service." *Id.*

Turning to the Kleins' free exercise claim, the Oregon Court of Appeals decided that it was foreclosed by *Employment Division v. Smith*, 494 U.S. 872 (1990), after concluding that Oregon's public accommodation statute is neutral on its face and that BOLI did not impermissibly target religion. The court rejected the Kleins' argument that under the hybrid rights doctrine described in *Smith*, even neutral laws of general applicability are subject to strict scrutiny when they are enforced in ways that burden *both* free exercise *and* other fundamental constitutional rights. *See Smith*, 494 U.S. at 881. The court characterized this Court's discussion of hybrid rights in *Smith* as *dictum* and joined the other courts that have "declined to follow it." App. 57.

The court denied the Kleins' request for a religious exemption under the Oregon Constitution, App. 59–61, and rejected their argument that their due process rights were violated by the bias and prejudgment that BOLI Commissioner Avakian exhibited in his public statements about their case and the need for "one set of rules for everybody." App. 61–68.

The court affirmed BOLI's $135,000 damages award. App. 68–82. The Court of Appeals specifically upheld damages based on Aaron's "quoting a biblical verse" and on Complainants' own religion-specific interpretation of a particular word in that verse. App. 74; *see id.* ("BOLI's final order likewise reflects a focus on the effect of the word 'abomination' on the complainants, including their recognition of that biblical reference and their associations with the reference."). The court concluded approvingly that Aaron's quotation from Leviticus to Rachel's mother

"in the course of explaining why he was denying service . . . underlies BOLI's damages award." App. 75.

The Kleins sought review in the Oregon Supreme Court, which denied review. App. 1–2.

REASONS FOR GRANTING THE PETITION

When this Court recognized the rights of same-sex couples to marry, it immediately raised "serious questions about religious liberty." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting); *accord id.* at 2638 (Thomas, J., dissenting). *Obergefell* inevitably requires this Court to decide whether that newly recognized marriage right can be wielded not only as a shield in defense of same-sex unions but also—as in this case—a sword to attack others for adhering to traditional religious beliefs about marriage. As the Chief Justice noted in dissent, "Many good and decent people oppose same-sex marriage as a tenet of faith," and "[h]ard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage." *Id.* He and the Justices who joined his dissent anticipated that such "questions will soon be before this Court." *Id.*

The *Obergefell* majority also anticipated these questions, and insisted that its opinion should not be read to disparage those "who deem same-sex marriage to be wrong . . . based on decent and honorable religious or philosophical premises." *Id.* at 2602. The *Obergefell* majority "emphasize[d]" that "those who adhere to religious doctrines[] may continue to advocate with utmost, sincere conviction

that, by divine precepts, same-sex marriage should not be condoned." *Id.* at 2607.

This Court should grant certiorari to ensure that the constitutionally guaranteed rights to exercise one's religious beliefs and to express those beliefs are not subordinated to a new majoritarian effort to "prescribe what shall be orthodox in . . . matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

This case is an ideal vehicle for this issue: It squarely presents the constitutional questions that the Court did not answer in *Masterpiece Cakeshop*, but without the factual uncertainties that beset that case. The Kleins sold *only* custom wedding cakes; *any* cake they designed and created for a same-sex wedding would have implicated their free speech and free exercise rights.

This Court's review is necessary to resolve disagreement among the courts concerning whether a custom work of art loses its First Amendment protection either because some observers may not understand it as art, or because it is designed for a commercial purpose, in collaboration with the artist's customer.

This Court should also grant certiorari to revisit *Employment Division v. Smith*, after almost two decades of lower court experience applying the deferential rational basis standard of review to laws that burden the free exercise of religion.

If *Smith* remains in force, the Court should resolve confusion among the courts about the precedential value of this Court's hybrid rights

doctrine—which applies strict scrutiny in cases like this one that implicate both free exercise of religion and another fundamental right.

I. This Case Squarely Presents The Constitutional Questions This Court Could Not Resolve In *Masterpiece Cakeshop*.

This Court determined that the legal principles at stake here were worthy of consideration when it granted certiorari in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). But the Court was unable to resolve the core constitutional questions in that case, because of "uncertainties about the record. Specifically, the parties dispute[d] whether [the baker in that case] refused to create a *custom* wedding cake for the individual respondents, or whether he refused to sell them *any* wedding cake (including a premade one)." *Id.* at 1740 (Thomas, J., concurring in part and concurring in the judgment). As Justice Kennedy observed in his opinion for the Court, "these details might make a difference." *Id.* at 1723.

No such uncertainty clouds the present case, because the Kleins did not sell premade wedding cakes. The Oregon Court of Appeals found that "the Kleins do not offer such 'standardized' or 'off the shelf' wedding cakes." App. 42. Instead, for every wedding cake the Kleins produced, "Melissa use[d] her customers' preferences to develop a custom design" employing "her own design skills and aesthetic judgments." App. 44. Thus, the court found, "the Kleins' argument that their products entail artistic expression is entitled to be taken seriously." *Id.* Even so, the court was "not persuaded that the

Kleins' wedding cakes are entitled to the same level of constitutional protection as pure speech or traditional forms of artistic expression." *Id.* This case therefore directly presents the compelled speech question that this Court could not decide in *Masterpiece Cakeshop*.

The factual uncertainties in *Masterpiece Cakeshop* also presented "difficulties . . . in determining whether a baker has a valid free exercise claim." 138 S. Ct. at 1723. Those difficulties are not present in the Kleins' case. Because they sold only custom wedding cakes, there is no possibility that the Kleins "refus[ed] to sell a cake that has been baked for the public generally," *id.*, and the record is clear about the Kleins' process of designing, creating, delivering, and assembling their cakes—a process that the Oregon Court of Appeals held the Kleins must perform on a "full and equal" basis for same-sex weddings. Ore. Rev. Stat. § 659A.403(3).

Thus, this case squarely presents the question whether the Free Exercise Clause protects an artist from being forced to devote her talents to celebrate a wedding ritual to which she conscientiously objects on the basis of "decent and honorable religious . . . premises." *Obergefell*, 135 S. Ct. at 2602.

II. The Decision Below Conflicts With This Court's Compelled Speech Jurisprudence.

This Court recently reaffirmed that speech compulsion is even more damaging to First Amendment values than speech restrictions are, and therefore compelled speech justifies a more searching standard of review. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018) ("Forcing free and

independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." (quoting *Barnette*, 319 U.S. at 633)).

But the Oregon Court of Appeals dismissed as inapposite this Court's landmark compelled speech cases—*Barnette* and *Wooley v. Maynard*, 430 U.S. 705 (1977). App. 34–35. According to the Oregon Court of Appeals, these cases govern only where "the government prescribed a specific message that the individual was required to express." App. 35. The court held that *Barnette* and *Wooley* do not apply to "content neutral regulation that is not directed at expression at all." *Id.*; *accord Elane Photography, LLC v. Willock*, 309 P.3d 53, 64 (N.M. 2013).

This Court has not interpreted its precedents so narrowly. It has applied *Wooley* in cases that involve compelled *non-governmental* speech. *See Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 17–18 (1986) (plurality op.); *id.* at 22–24 & n.1 (Marshall, J., concurring in judgment). And it has certainly not limited *Barnette*, which involved the symbolic act of a compelled flag salute, to cases of "specific message[s] that the individual was required to express." App. 35. Instead, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, this Court cited *Barnette* in particular for the proposition that "the Constitution looks beyond written or spoken words" to "symbolism" as a

protected medium of expression. 515 U.S. 557, 569 (1995).

And rather than insulating "content neutral regulation" from the First Amendment's protection against compelled speech, App. 35, *Hurley* cited *Wooley* and *Barnette* in reversing the Massachusetts courts' application of a facially neutral public accommodations statute much like Oregon's, 515 U.S. at 565, 569, 573, 579.

The Oregon Court of Appeals tried to distinguish *Hurley* on the ground that the public accommodation statute in that case was applied "outside of the usual commercial context." App. 33. This misreads *Hurley*. What the Court found "peculiar" in that case was not the absence of a conventional commercial context but the complainants' effort to hijack the parade organizer's speech—the parade—to convey complainants' own message. 525 U.S. at 573. The Court's result in *Hurley* would have been the same if the parade organizers had been operating a traditional public accommodation rather than a parade when the complainants sought to commandeer their message. *See* 515 U.S. at 580–81. As in *Hurley*, the complainants in the present case did not seek mere access to a publicly available good or service; they sought to force the Kleins to host a message and to celebrate a way of life with which they disagree. In any event, this Court has not hesitated to protect against compelled speech in a commercial context. *See, e.g.*, *Pac. Gas & Elec.*, 475 U.S. at 17–18; *id.* at 22–24 & n.1 (Marshall, J., concurring in the judgment).

The Oregon Court of Appeals suggested that the Kleins could counteract any implicit endorsement of

same-sex marriage by "engag[ing] in their own speech that disclaims such support." App. 47–48. As Justice Thomas observed in *Masterpiece Cakeshop*, "[t]his reasoning flouts bedrock principles of [this Court's] free-speech jurisprudence" and "would justify any law compelling speech." 138 S. Ct. at 1740, 1745 (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974); *Pac. Gas & Elec.*, 475 U.S. at 15 n.11 (The government "cannot 'require speakers to affirm in one breath that which they deny in the next.' ")). Moreover, posting a disclaimer would not remedy the compelled speech injury but only exacerbate it: Creating the need for a disclaimer is itself a form of compelled speech. *See Pac. Gas & Elec.*, 475 U.S. at 16 ("[T]here can be little doubt that [the utility company] will feel compelled to respond to arguments and allegations made [in third-party notices the utility was compelled to mail with its bills]. That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster.").

III. Courts Are Divided About The Test For Determining Whether Commercial Art Is Protected By The First Amendment.

This case reflects disagreements among the lower courts concerning the relevant factors for determining whether a work of commercial art is protected expression.

1. In deciding whether the Kleins' custom wedding cakes are fully protected expression, the Oregon Court of Appeals started from the premise that "the expressive character of a thing must turn not only on how it is subjectively perceived and

experienced by its maker, but also on how it will be perceived and experienced by others." App. 45. To prevail on a free speech claim, according to the court, the Kleins would have to prove "that other people will necessarily experience any wedding cake that the Kleins create predominantly as 'expression' rather than as food." *Id.*

This Court has never looked to audience perceptions to gauge whether a work of art is fully protected expression. The Supreme Court did not ask whether "other people" experience Jackson Pollock paintings and twelve-tone music as art before declaring both to be "unquestionably shielded" expression. *See Hurley*, 515 U.S. at 571–72. To the contrary, "a narrow, succinctly articulable message is not a condition of constitutional protection." *Id.* at 569.

Only when evaluating "expressive *conduct*" does this Court consider the "likelihood . . . that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence*, 418 U.S. at 410–11). Essentially the Oregon Court of Appeals collapsed its protected speech analysis into an expressive conduct inquiry, importing an audience-comprehension requirement that finds no place in this Court's evaluation of pure expression.[2]

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[2] The Oregon Court of Appeals' elision of the pure speech and expressive conduct tests is evident in the court's reliance on *O'Brien* (the draft card burning case) and its progeny. App. 44 (citing *O'Brien*, 391 U.S. 367; *Spence*, 418 U.S. at 409; *Clark v.*

Consistent with this Court's free speech jurisprudence, other courts have objectively identified various forms of art as pure expression, without first evaluating the public's perception of the artform. *See, e.g.*, *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1059 (9th Cir. 2010) (tattoos); *Buehrle v. City of Key West*, 813 F.3d 973, 976 (11th Cir. 2015) (same); *Coleman v. City of Mesa*, 230 Ariz. 352, 359 (2012) (same).

The decision of the Oregon Court of Appeals is in conflict with these cases, but it finds support in other courts that have denied First Amendment protection on the basis of judicial inferences about how the public perceives the art. *See Elane Photography*, 309 P.3d at 68, 69 ("Whatever message Elane Photography's photographs may express, they express that message only to the clients and their loved ones, not to the public. . . . Observers are unlikely to believe that Elane Photography's photograms reflect the views of either its owners or its employees."); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 287 (Colo. Ct. App. 2015) ("[I]t is unlikely that the public would understand Masterpiece's sale of wedding cakes to same-sex couples as endorsing a celebratory message about same-sex marriage."), *rev'd on other grounds sub nom. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719 (2018).

Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984); *Carrigan*, 564 U.S. at 127).

A third category of courts has considered public perception to determine whether the expressive purpose predominates in "items with common non-expressive uses that are also sold to customers." *Mastrovincenzo v. City of New York*, 435 F.3d 78, 96 (2d Cir. 2006). But these courts have adopted an objective test for doing so. *See id.* ("[C]ourts may gauge the relative importance of the items' expressive character by comparing the prices charged for the decorated goods with the prices charged for similar non-decorated goods. If a vendor charges a substantial premium for the decorated work and/or does not sell the item without decoration, such facts would bolster his claim that the items have a dominant expressive purpose."); *accord People v. Lam*, 995 N.E.2d 128, 129 (N.Y. 2013).

In any event, the Oregon Court of Appeals was wrong to conclude that the audience for the Kleins' custom cakes does not appreciate them as art. The primary audience for the Kleins' art is the couple who commissions the cake, pays a price far in excess of its nutritional value, App. 105, and sits for a client consultation so that the artist can design a cake that embodies "each customer's personality, physical tastes, theme and desires." App. 205. Indeed, the complainants discussed their own wedding cakes—one depicting a three-dimensional peacock, the other a fairy tree—in aesthetic and expressive, rather than functional, terms. *See* Hearing Tr. at 356 (Testimony of Laurel Bowman-Cryer) (Mar. 12, 2015) (describing the design of each cake "*on display* at the wedding," including one that reflected Laurel's Irish heritage "because . . . [her] grandmother was going to be watching from Ireland").

Wedding guests also understand "the inherent symbolism in wedding cakes," which communicate the message that "a wedding has occurred, a marriage has begun, and the couple should be celebrated." *Masterpiece Cakeshop*, 138 S. Ct. at 1743 (Thomas, J., concurring in part and concurring in the judgment); *see id.* ("Although the cake is eventually eaten, that is not its primary purpose. The cake's purpose is to mark the beginning of a new marriage and to celebrate the couple."). "[A] wedding cake needs no particular design or written words to communicate th[is] basic message." *Id.* at 1743 n.2.

2. The opinion below also exacerbates a disagreement among the lower courts about whether artists forfeit First Amendment protection by collaborating with their customers.

The Oregon Court of Appeals observed that "to the extent the [Kleins'] cakes are expressive, they do not reflect *only* the Kleins' expression. Rather, they are products of a collaborative process in which Melissa's artistic execution is subservient to a customer's wishes and preferences." App. 45–46 (emphasis added). The Court implied that the Kleins' custom wedding cake could more easily "be understood to fundamentally and inherently embody the Kleins' expression, for purposes of the First Amendment," if their art were "created at the baker's . . . own initiative and for her own purposes." App. 46 n.9.

This theory would exclude vast swaths of art from the protection of the First Amendment, since throughout history art has been produced for commercial purposes, in cooperation with patrons. It is incompatible with this Court's consistent teaching

that speakers do not forfeit First Amendment protection by collaborating with other speakers. *See Hurley*, 515 U.S. at 569 ("[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices." (citing *Tornillo*, 418 U.S. at 258; *New York Times Co. v. Sullivan*, 376 U.S. 254, 265–66 (1964)); *see also Masterpiece Cakeshop*, 138 S. Ct. at 1744 (Thomas, J., concurring in part and concurring in the judgment) ("Nor does it matter that the couple also communicates through the cake. More than one person can be engaged in protected speech at the same time.").

It is also incompatible with this Court's clear holding that "the degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988); *see also Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 801 (1988) ("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.").

Many lower courts have followed this Court in holding that art produced in collaboration with a customer is fully protected by the First Amendment. *See, e.g.*, *Anderson*, 621 F.3d at 1062 ("The fact that both the tattooist and the person receiving the tattoo contribute to the creative process . . . does not make the tattooing process any less expressive activity."); *Buehrle*, 813 F.3d at 977 ("Protected artistic expression frequently encompasses a sequence of acts by different parties, often in relation to the same piece of work.").

These courts have emphasized that the artist's commercial purpose does not dilute her right to First Amendment protection. *See, e.g.*, *Anderson*, 621 F.3d at 1063 ("[T]he business of tattooing qualifies as purely expressive activity rather than conduct with an expressive component, and is therefore entitled to full constitutional protection."); *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996) ("The sale of protected materials is also protected.").

But the Oregon Court of Appeals' decision joins a growing number of courts that have deprecated the First Amendment status of artistic expression that is produced in collaboration with another speaker, in a commercial context. *See Craig*, 370 P.3d at 287 ("The fact that an entity charges for its goods and services reduces the likelihood that a reasonable observer will believe that it supports the message expressed in its finished product."); *Elane Photography*, 309 P.3d at 66 ("It may be that Elane Photography expresses its clients' messages in its photographs, but only because it is hired to do so."); *id.* at 68 ("While photography may be expressive, the operation of a photography business is not."), *quoted in Craig*, 370 P.3d at 287.

IV. The Decision Below Conflicts With This Court's Expressive Conduct Jurisprudence.

As discussed above, the Kleins' custom wedding cakes are pure expression and should not be subjected to the tests that apply to expressive conduct. But even if custom wedding cakes are treated as mere expressive conduct, they are protected by the First Amendment.

The decision below conflicts with this Court's precedent on the application of the expressive conduct test.

Under *O'Brien*'s "relatively lenient" intermediate scrutiny standard, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Johnson*, 491 U.S. at 407 (quoting *O'Brien*, 391 U.S. at 376).

Critically, though, this Court has "limited the applicability" of the *O'Brien* test to those cases in which 'the government interest is unrelated to the suppression of free expression." *Id.* at 407 (quoting *Spence*, 418, U.S. at 414). When the government's interest is "directly related to expression *in the context of activity*," *O'Brien* is "inapplicable," *id.* at 410 (quoting *Spence*, 418 U.S. at 414 n.8), and this Court applies "the most exacting scrutiny," *id.* at 412.

BOLI's order (and the opinion of the Oregon Court of Appeals) are aimed at "expression in the context of activity," so the court erred in applying intermediate scrutiny.

The Oregon Court of Appeals identified two "substantial government interest[s]" that are served by the State's public accommodations law—"ensuring equal access to publicly available goods and services" and "preventing the dignitary harm that results from discriminatory denials of service." App. 50. But it was the second interest—preventing dignitary

harm—that the court identified as "particularly acute" in the context of same-sex marriage. *Id.*

As in *Wooley*, "[t]he State's second claimed interest is not ideologically neutral. The State is seeking to communicate to others an official view," 430 U.S. at 717, namely the dignity it deems proper to same-sex marriage. The State's interest in preventing dignitary harm is "directly related to expression," *Spence*, 418 U.S. at 414 n.8, so *O'Brien*'s intermediate scrutiny standard does not apply. *See Hurley*, 515 U.S. at 574 (applying strict scrutiny to state's use of public accommodations statute to compel parade organizer to communicate challengers' "not wholly articulate . . . view that people of their sexual orientation have as much claim to unqualified social acceptance as heterosexuals"); *id.* at 579 (If "produc[ing] . . . a society free of the corresponding biases . . . is the point of applying the state law to expressive conduct, it is a decidedly fatal objective."); *see also Masterpiece Cakeshop*, 138 S. Ct. 1736 (Thomas, J., concurring in part and concurring in the judgment) ("States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified. 'If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.' " (quoting *Johnson*, 491 U.S. at 414)).

In addition to the Oregon Court of Appeals' explicit identification of an expressive State purpose, BOLI and the court both demonstrated their interest in redressing the effects of the Kleins' religious

speech about the nature of marriage—a concern that is directly related to expression.

BOLI awarded damages of $135,000 to complainants, not to compensate for the inconvenience of having to locate an alternative wedding cake artist, but for the harm attributable to Aaron's quotation of the Bible. Rachel's mother returned to the Kleins' store alone and volunteered that her "truth had changed' as a result of having 'two gay children.' " App. 9. In response, Aaron Klein quoted Leviticus 18:22: "You shall not lie with a male as one lies with a female; it is an abomination." *Id.* When she returned to her car, Rachel's mother misreported to her daughter that Aaron Klein had called Rachel "an abomination." *Id.* BOLI awarded damages for the "shame," "stress[]," "anxiety," "frustration," "exhaustion," "sorrow," and "anger" that complainants alleged as a result of this garbled communication of competing religious views about a subject of public controversy. App. 104, 141.

If the First Amendment protects any speech at all, it protects an invocation of the Bible in a conversation about "my truth" initiated by a third party. Yet the Court of Appeals specifically upheld BOLI's decision to award damages based on Aaron Klein's "quoting a biblical verse" and on Complainants' own religion-specific interpretation (not shared by the Kleins themselves) of a particular word in that verse. App. 74; *see id.* ("BOLI's final order likewise reflects a focus on the effect of the word 'abomination' on the complainants, including their recognition of that biblical reference and their associations with the reference."); App. 133.

The court's treatment of the Kleins' religious speech, and the resulting harm to complainants, shows that it was the expressive purpose of preventing dignitary harm that motivated BOLI's order and the Oregon Court of Appeals' decision to affirm that order. Because Oregon's interest in this case is "directly related to expression," strict scrutiny applies—not the permissive *O'Brien* test. *See Johnson*, 491 U.S. at 410.

This Court should grant certiorari to clarify that the State's asserted interest in compelling an artist's speech to prevent her from "denigrating the dignity of same-sex couples" is "completely foreign to our free-speech jurisprudence," and that such State interests trigger strict scrutiny even under an expressive conduct framework. *Masterpiece Cakeshop*, 138 S. Ct. at 1746 (Thomas, J., concurring in part and concurring in the judgment).

V. This Court Should Reconsider *Employment Division v. Smith*.

The Oregon Court of Appeals rejected the Kleins' free exercise claim on the basis of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which decided (by a 5-4 vote) that "if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." 494 U.S. at 878. This Court should revisit *Smith*.

When *Smith* was decided, Justice O'Connor, joined by three of her colleagues, wrote that its "strained reading of the First Amendment"

disregards the Court's "consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct." *Id.* at 892. In the dissenters' view, *Smith* was "incompatible with our Nation's fundamental commitment to individual liberty." *Id.* at 891. They would have held that "conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause." *Id.* at 893.

In the intervening years, Justices have continued to question the soundness of *Smith*'s holding and to call for the Court to overrule it. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 547 (1997) (O'Connor, J., dissenting) ("*Stare decisis* concerns should not prevent us from revisiting our holding in *Smith*."); *id.* at 565 (Souter, J., dissenting) (expressing "serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence"); *id.* at 566 (Breyer, J., dissenting) ("I agree with Justice O'Connor that the Court should direct the parties to brief the question whether [*Smith*] was correctly decided."). In *Masterpiece Cakeshop*, Justice Gorsuch—joined by Justice Thomas—noted that "*Smith* remains controversial in many quarters." 138 S. Ct. at 1734.

VI. Courts Are Divided About The Standard For Evaluating Hybrid Rights Claims.

As long as *Smith* remains in force, this Court's review is necessary to resolve profound confusion about the standard of review for "hybrid rights" claims in which free exercise and free speech rights are both implicated. This Court has applied strict

scrutiny to such claims, and the Court acknowledged and preserved that precedent in *Employment Division v. Smith*, 494 U.S. 872 (1990). Some courts have continued to apply strict scrutiny to hybrid rights claims, following *Smith*, but others—including the Oregon Court of Appeals—have repudiated the hybrid rights doctrine. This Court should resolve the split.

1. In *Smith*, this Court adopted the general rule that free exercise challenges to neutral, generally applicable laws are not subject to the "compelling interest" standard. 494 U.S. at 885. But the Court recognized its prior decisions "that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action" in cases that "involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." *Id.* at 881 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 304–07 (1940); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. McCormick*, 321 U.S. 573 (1944)). The Court did not repudiate its application of strict scrutiny in these "hybrid situation[s]." *Id.* at 882. These cases were not implicated by *Smith*, which involved "a free exercise claim unconnected with any communicative activity." *Id.* The hybrid rights doctrine remains in force. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 200 (2012) (Alito, J., concurring) ("[T]he constitutional interest in freedom of association may be 'reinforced by Free Exercise Clause concerns.' " (quoting *Smith*, 494 U.S. at 882)).

The present case is controlled by the hybrid rights cases that the *Smith* Court distinguished. As in *Cantwell*, *Murdock*, and *Follet*, BOLI's application of the Oregon public accommodations statute limits not just their ability to live and work in accord with their religious beliefs but also their freedom to speak—or to refrain from speaking. "[I]n the light of the constitutional guarantees" involved, such state action is unlawful, "in the absence of a statute narrowly drawn to [avoid] a clear and present danger to a substantial interest of the State." *Cantwell*, 310 U.S. at 296.

2. In this case, the Oregon Court of Appeals joined a growing list of courts that have labeled *Smith*'s discussion of hybrid rights "*dictum* and have declined to follow it." App. 57 (citing *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 247 (3d Cir. 2008) ("Until the Supreme Court provides direction, we believe the hybrid-rights theory to be *dicta*."); *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 240 F.3d 553, 561 (6th Cir. 2001) ("That language was *dicta* and therefore not binding."), *rev'd on other grounds*, 536 U.S. 150 (2002); *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) ("[T]he language relating to hybrid claims is *dicta* and not binding on this court.").

The Oregon Court of Appeals adopted the Sixth Circuit's wait-and-see approach to the hybrid rights doctrine: "at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter standard than that used in *Smith* to evaluate

generally applicable, exceptionless state regulations under the Free Exercise Clause." App. 58 (quoting *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993).

3. The Oregon Court of Appeals noted its disagreement with two federal appellate courts that have followed this Court's hybrid rights doctrine. *See* App. 57 (citing *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999); *accord Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295 (10th Cir. 2004)). Both courts apply a "colorable claim" approach whereby strict scrutiny applies to the free exercise claim if the additional constitutional claim has a "fair probability or likelihood, but not a certitude, of success on the merits." *Miller*, 176 F.3d at 1207, *quoted in Axson-Flynn*, 356 F.3d at 1295. The Kleins' free speech claim is certainly colorable. As the Oregon Court of Appeals acknowledged, "the Kleins' argument that their products entail artistic expression is entitled to be taken seriously." App. 44. Therefore, under the hybrid rights doctrine, the Kleins' free exercise claim should be subject to strict scrutiny.

If this Court does not overrule *Smith* itself, it should grant certiorari to resolve the circuit split and reaffirm the hybrid rights doctrine.

VII. This Case Presents a Recurring Question of National Importance.

The legal issues raised in this petition are not confined to cake. If decisions like the Oregon Court of Appeals' are allowed to stand, their coercive application of public accommodation statutes will extend beyond mandatory participation in same-sex wedding ceremonies. In addition to their

constitutional defenses, the Kleins argued that they had not violated Oregon's public accommodations statute, because they had not declined to design a cake "on account of . . . sexual orientation," Ore. Rev. Stat. § 659A.403, but rather on account of their unwillingness to participate in the *conduct* of same-sex marriage.

The Oregon Court of Appeals rejected this distinction between conduct and protected status. Under the reasoning of the decision below, any "public accommodation," broadly defined, must contribute its creative services to promote any conduct, so long as there is a "close relationship" between that conduct and a protected status. App. 24. According to the opinion below, this compulsion is in force, even for entrepreneurs who offer custom-designed products and imbue each product "with their own aesthetic choices," unless those works meet an ill-defined and subjective test for what is "inherently 'art.' " App. 45.

States that adopt this reasoning can compel any for-profit speaker to broadcast messages that the state deems deserving of dignity, as long as the conduct to which the speaker objects is related to a statutorily protected class. On this logic, a Christian videographer can be compelled to document a Wiccan ritual, because there is a "close relationship" between Wiccan rituals (the conduct) and practitioners of the Wiccan religion (a protected class). A feminist T-shirt printer can be compelled to design shirts for a fraternity initiation, because there is a close relationship between fraternity initiations and the male sex. A Jewish DJ can be compelled to perform

for a Nazi rally, because there is a close relationship between Nazi rallies and "the Aryan race."

Unless this Court enforces the First Amendment, similar cases will continue to arise, as creative entrepreneurs are compelled, under the guise of public accommodations statutes, to participate in same-sex marriage rituals that violate their sincerely held religious beliefs, or—as the Kleins did—to sacrifice their livelihood.

These issues matter, not just to religious business owners, but to the population at large, which benefits from robust protections for free speech and free exercise, and from the public exchange of ideas that those freedoms promote. If it is allowed to stand, the decision below and others like it will chill expression and enlarge the power of bureaucrats to force unwilling speakers to participate in rituals and to promote ideologies of all kinds that violate their creeds and their consciences.

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully submitted,

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