No. 18-547

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

REPLY BRIEF FOR PETITIONERS

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The Oregon Bureau of Labor and Industries ("BOLI") does not dispute that this case raises important constitutional questions that are worthy of this Court's review. Pet. 34–36. Indeed, BOLI concedes—as it must after *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018)—that "there may be questions [for this Court] to resolve concerning the relationship between the rights to free speech and to free exercise and a State's public accommodations laws." Opp. 1. Nevertheless, BOLI urges this Court to wait for another case, because the Kleins did not know precisely what visual imagery the complainants would have commissioned for their custom wedding cake. BOLI's argument for deferring review lacks merit.

1. A custom wedding cake's expressive character does not rise or fall depending on the color of the icing or the precise elements of the design: "a wedding cake needs no particular design or written words to communicate the basic message that a wedding is occurring, a marriage has begun, and the couple should be celebrated." *Masterpiece Cakeshop*, 138 S. Ct. at 1743 n.2 (Thomas, J., concurring in part and concurring in the judgment). The Kleins sold only custom-designed wedding cakes, so any cake the complainants might have commissioned would have required them to employ their artistic skill to communicate a celebratory message about a same-sex wedding ritual that conflicts with the Kleins' religious convictions.

2. Having conceded the worthiness of the free speech and free exercise questions, Opp. 1, BOLI's show of contesting the underlying lower court splits falls flat. As BOLI's own discussion demonstrates, the courts are divided between those that assess works of symbolic art as pure expression and those that relegate them to the test for expressive conduct, whether by name or—as with the Oregon Court of Appeals—in fact.

3. BOLI echoes but does not defend the Court of Appeals' effort to limit the compelled speech doctrine to *government* speech in a *non-commercial* context, and to "specific message[s]" that will be "impute[d]" to the unwilling speaker. Opp. 26, 27. These limitations conflict with relevant decisions of this Court.

4. Even under an expressive conduct analysis, BOLI's order is subject to strict scrutiny, because the State's asserted interest in "preventing . . . dignitary harm" from personal opposition to same-sex marriage is "not ideologically neutral." App. 50; *Wooley v. Maynard*, 430 U.S. 705, 717 (1977). BOLI's reliance on *Obergefell v. Hodges* is misplaced: that decision distinguished between "sincere, personal opposition," which is constitutionally protected, and the enactment of that opposition into "law and public policy," which is not. 135 S. Ct. 2584, 2602 (2015). The State's interest in overcoming dissent so as to prevent "injury to an individual's sense of self-worth and personal integrity" is not equivalent to the State's interest in allowing access to civil marriage and its legal benefits. App. 51. The dignitary interest is "directly related to expression," *Texas v. Johnson*, 491 U.S. 397, 410 (1989), as confirmed by the opinion

affirming BOLI's damages award based on Aaron Klein's quotation of the Bible.

5. This case presents an ideal vehicle to reconsider *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). As four Justices of this Court recently acknowledged, *Smith* "drastically cut back on the protection provided by the Free Exercise Clause." *Kennedy v. Bremerton Sch. Dist.*, No. 18-12 (S. Ct. Jan. 22, 2019) (Alito, J., respecting denial of certiorari). Because *Smith* deprived religious exercise of the strict scrutiny standard that other First Amendment rights enjoy, *Smith* should be reversed as "an 'anomaly' in [this Court's] First Amendment jurisprudence." *Janus v. Am. Fed'n of State, Cty., & Mun. Employees*, 138 S. Ct. 2448, 2483 (2018).

6. If this Court does not overrule *Smith*, the Court should reaffirm *Smith*'s hybrid rights exception. The lower courts' disagreement about the application of this exception is no mere "doctrinal split"; it has "caused the courts to reach contradictory results." *Contra* Opp. 30.

I. This Case Is An Ideal Vehicle, Because The Kleins Sold Only Custom Wedding Cakes.

Unlike *Masterpiece Cakeshop*, this case involves no factual uncertainty of relevance to the First Amendment analysis. *Cf.* 138 S. Ct. at 1723. As the Court of Appeals found, and as BOLI concedes, "petitioners' bakery did not sell 'off the shelf' cakes." Opp. 16. Citing a well-developed record, the court found that "*any* cake that the Kleins made for [complainants] would have followed the Kleins'

customary practice." App. 43 (emphasis added). The court described this practice as follows: Before the Kleins can know what their end product will look like, Melissa must first "use[] her own design skills and aesthetic judgments," by eliciting "her customers' preferences to develop a custom design," showing them "previous designs as inspiration," "draw[ing] various designs on sheets of paper as part of a dialogue with the customer," and "conceiv[ing] and customiz[ing] a variety of decorating suggestions." App. 44 (quotation marks omitted). Any cake produced by this process would have been a custom work of art that expressed a message of celebration for a same-sex wedding.

BOLI makes two mutually inconsistent arguments for deferring review. Neither succeeds.

First, BOLI tries to manufacture a "factual dispute about the nature of the cake Rachel and Laurel wanted to order." Opp. 18. But there is no dispute. The Court of Appeals found, and the parties agree, that "petitioners' bakery did not sell 'off the shelf' cakes." Opp. 16. Thus *any* wedding cake the Kleins could have produced for the complainants would have involved Melissa's "own design skills and aesthetic judgments," as the Court of Appeals found. App. 44. No more "particular message" is needed, Opp. 18, "for the Constitution looks beyond written or spoken words as mediums of expression," and embraces "symbolism [as] a primitive but effective way of communicating ideas." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (alteration omitted).

Second, abandoning its claim of ignorance about "what the end product would look like," Opp. 18,

BOLI asserts that Rachel and Laurel would have commissioned a "very simple white cake with purple ribbon accent and purple flowers." Opp. 3 (quoting Tr. 106). But this description betrays the expressive character of the Kleins' work. Such a design would have, in BOLI's words, "distinguished it as a wedding cake, as opposed to celebrating some other occasion." Opp. 5. A cake like this unavoidably communicates 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).

BOLI implies that a patron's decision to commission a cake with colorful icing rather than white icing—or a peacock design rather than a bow and flowers—determines whether or not the Free Speech guarantee attaches to the resulting work. Opp. 18. The scope of the First Amendment does not depend on the hues of an artist's pigments or the complexity of her design, for the First Amendment protects sophisticated and "unsophisticated expression" alike. *Hurley*, 515 U.S. at 574. All that matters to the First Amendment analysis is whether the work as a whole is "a form of expression." *Id.* at 568. This inquiry does not require a court to make aesthetic judgments about the work's artistic merit or to discern any "particularized message" in its design, *id.* at 569, but only to recognize the "expressive character" of the genre, *id.* at 573; *cf. id.* at 568 ("Parades are thus a form of expression, not just motion."). A custom wedding cake is inherently expressive: "Words or not and whatever the exact design, it celebrates a wedding." *Masterpiece*

Cakeshop, 138 S. Ct. at 1738 (Gorsuch, J., concurring).

II. The Lower Courts Are Divided On First Amendment Protection For Commercial Art.

Lower courts are divided on how to accord First Amendment protection to custom-made works of art that are analytically indistinguishable from the Kleins' wedding cakes. BOLI unpersuasively argues that these splits of authority do not warrant this Court's review.

First, BOLI does not deny that some courts—like the Oregon Court of Appeals—treat art as fully protected speech only if its audience perceives the work "predominantly as 'expression,' " App. 45, while other courts confine that inquiry to expressive conduct, *see* Pet. 20–23.

Second, BOLI does not deny that the courts are divided about the significance of a collaborative, commercial context to the First Amendment analysis for art. *See* Pet. 24–26. Instead of defending the Court of Appeals' assumption that a piece of art is more likely to be protected expression "when created at the baker's own or chef's own initiative," BOLI simply repeats it. Opp. 17–18 (quoting App. 46).

Among the courts that have afforded full First Amendment protection to commissioned art without regard to audience perception is the Ninth Circuit, which held that tattoos as a genre are fully protected speech. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010). BOLI does not dispute that "the tattoo itself [is] an art form, essentially a drawing or painting on skin." Opp. 19. BOLI sees no conflict

between *Anderson* and the decision below, yet BOLI makes no effort to distinguish a tattoo from a wedding cake, which is essentially a sculpture made of flour, sugar, and butter. Opp. 19.

Third, BOLI asserts that the decision below does not conflict with the Second Circuit's test for fully protected art. Opp. 21 (citing *Mastrovincenzo v. City of New York*, 435 F.3d 78 (2d Cir. 2006)). But BOLI does not explain how the "dominant purpose" of custom wedding cakes could be "utilitarian" rather than "expressive" under that test, which looks to "the relative importance of the items' expressive character," as reflected in "the prices charged for the decorated goods" compared to "prices charged for similar non-decorated goods," *id.* at 96,[1] and the artist's stated "motivation for producing and selling their . . . items" as an "act[] of self-expression," *id.* at 97.

In short, BOLI does not reconcile the conflicting lines of pure-speech analysis for art but ignores them, stating categorically that "services for weddings, such as cake baking, flowers, or invitations, should be analyzed as expressive conduct rather than pure speech." Opp. 20. This question warrants Supreme Court review.

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[1] When Rachel and Laurel commissioned a "simple white cake" with purple ribbon and flowers for Rachel's mother's wedding in 2011, they paid the Kleins $250—far more than the cost of an ordinary cake made only, or primarily, to be eaten. Ex. R-3 at 3.

III. The Decision Below Conflicts With This Court's Compelled Speech Precedents.

The Court of Appeals misconstrued this Court's compelled speech doctrine, limiting it to compulsions to speak the *government's* message in *non-commercial* contexts. Pet. 17–20 (citing App. 34–35). BOLI's opposition repeats the errors of the Court of Appeals, Opp. 26, and does not attempt to distinguish, or even cite, this Court's decision in *Pacific Gas & Electric v. Public Utilities Commission*, 475 U.S. 1 (1986), which vacated an order compelling *private* speech in a *commercial* context.

BOLI repeats the Court of Appeals' speculation that no one would impute a wedding cake's celebratory message to the Kleins. Opp. 27 (citing App. 47). But this Court has never required a speaker to prove that the message she is compelled to communicate will be attributed to her. To the contrary, this Court held that compelling "the passive act of carrying the state motto on a license plate" violates the First Amendment, even though there was no risk that the "Live Free or Die" message would be attributed to any individual driver. *Wooley*, 430 U.S. at 715.

And the compelled speech doctrine is not limited to compulsions to communicate a "specific message." Opp. 27. *See Hurley*, 515 U.S. at 569 ("[A] narrow, succinctly articulable message is not a condition of constitutional protection.").

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

Even if the Kleins' custom wedding cakes are evaluated under the rubric of expressive conduct,

BOLI's order must be subject to strict scrutiny, because the State interest that it vindicates is "directly related to expression." *Johnson*, 491 U.S. at 410.

The Court of Appeals held that Oregon had a "substantial government interest" not only in "ensuring equal access to publicly available goods and services," but also in preventing "dignitary harms that result from the unequal treatment of same-sex couples who choose to . . . marry." App. 50.

Like New Hampshire's interest in "promot[ing] appreciation of history, individualism, and state pride," *Wooley*, 430 U.S. at 716, Washington's interest in "preserving the national flag as an unalloyed symbol of our country," *Spence*, 418 U.S. at 412, and Massachusetts' interest in "produc[ing] speakers free of . . . biases," *Hurley*, 515 U.S. at 579, Oregon's interest in protecting "an individual's sense of self-worth and personal integrity," App. 51, is directly related to expression.

BOLI responds that *Obergefell* and *Masterpiece Cakeshop* give the State "a legitimate interest in protecting the dignity of *all* of its citizens, specifically including same-sex couples." Opp. 22.

First of all, *Obergefell* concerned the *State*'s duty to grant same-sex couples equal access to the institution of civil marriage—something *Masterpiece Cakeshop* did not change. The "dignitary" interest identified by the Court of Appeals is altogether different: it concerns not the *State*'s duty to allow same-sex marriage, but the purported duty of *private persons* to dignify same-sex marriage by celebrating it.

More to the point, whatever legitimate interest the State may have in conscripting non-state actors to promote the "self-worth and personal integrity" of same-sex couples, App. 51, that interest is directly related to expression, so it triggers strict scrutiny. *Accord Masterpiece Cakeshop*, 138 S. Ct. at 1746 (Thomas, J., concurring in part and concurring in the judgment).

BOLI's award of $135,000 in damages, which the Court of Appeals upheld based on the psychic damage complainants alleged from Aaron's "quoting a biblical verse," App. 74, confirms that the State's expressive interest carried the day, *see* Pet. 28–30.

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

"In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), the Court drastically cut back on the protection provided by the Free Exercise Clause." *Kennedy v. Bremerton Sch. Dist*, No. 18-12 (S. Ct. Jan. 22, 2019) (Alito, J., respecting denial of certiorari). This case presents an ideal vehicle for revisiting *Smith* and restoring the free exercise of religion guaranteed by the First Amendment.

BOLI concedes that many Justices of this Court have called for *Smith* to be overruled throughout its history. Opp. 27–28. But BOLI takes this history as evidence "that this Court has carefully considered the challenges to the *Smith* rule and rejected them." Opp. 28.

To the contrary, a consistent history of opposition to a precedent undermines one of the key rationales for *stare decisis*: it reduces "reliance on the

decision," in that parties "have been on notice for years regarding this Court's misgivings." *Janus*, 138 S. Ct. at 2484.

A long-running circuit split over the proper application of *Smith* to hybrid rights cases shows that *Smith* lacks "a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced." *Id.* at 2484; *see infra* at 12–13; Pet. 33–34.

The other factors that this Court "take[s] into account in deciding whether to overrule a past decision" all counsel in favor of overruling *Smith*: "the quality of [the precedent's] reasoning, the workability of the rule it established, its consistency with other related decisions, [and] developments since the decision was handed down." *Janus*, 138 S. Ct. at 2478–79. Members of this Court have cogently criticized *Smith* in all of these respects. *See* Pet. 30–31. And the rationale for adhering to precedent is "at its weakest" in the First Amendment context. *Janus*, 138 S. Ct. at 2478.

Like the precedent overruled in *Janus*, *Smith* is "an 'anomaly' in [this Court's] First Amendment jurisprudence," because it "fail[s] to perform the 'exacting scrutiny' applied in other cases involving significant impingements on First Amendment rights," including "cases involving compelled speech and association." *Id.* at 2483. Overruling *Smith* would restore meaningful judicial review to laws that burden the free exercise of religion—bringing "greater coherence to our First Amendment law." *Id.* at 2484.

VI. Lower Courts Are Truly Divided On The Application Of The Hybrid Rights Doctrine.

BOLI cannot deny that the lower courts are divided between those that assign the weight of precedent to *Smith*'s hybrid rights exception and those that do not. Opp. 30. But BOLI claims that this "doctrinal split has not caused the courts to reach contradictory results." *Id.* It says "no circuit has actually applied strict scrutiny under a hybrid-rights theory to overturn a neutral law of general applicability." *Id.* Not so.

The D.C. Circuit applied strict scrutiny to bar enforcement of "a religion-neutral law of general applicability" under a hybrid rights theory. *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461 (D.C. Cir. 1996). The court held that the EEOC's enforcement of Title VII would both burden the religious employer's "right of free exercise and excessively entangle the Government in religion." *Id.* at 467. Thus, the case "present[ed] the kind of 'hybrid situation' referred to in *Smith* that permits us to find a violation of the Free Exercise Clause." *Id.* (The court also held that the EEOC's action violated the Establishment Clause outright, but its hybrid rights ruling is clearly an alternative holding. *Id.*)

Likewise, the Pennsylvania Supreme Court applied strict scrutiny to reverse a judicial order forbidding a Mormon fundamentalist to talk to his daughter about polygamy. *Shepp v. Shepp*, 906 A.2d 1165 (Pa. 2006). Although the order was intended to enforce the State's "neutral law criminalizing polygamy," the case combined "free exercise claims with the fundamental right of parents to raise their

children," and the court held that *Smith* "does not apply to hybrid cases." *Id.* at 1172–73.

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully submitted,

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February 11, 2019