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
Oregon Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Oregon's public accommodations law, Or. Rev. Stat. § 659A.400–409, prohibits businesses that offer goods or services to the public generally from discriminating against customers on the basis of protected characteristics including race, religion, sex, and sexual orientation.

1. Does the Free Speech Clause bar Oregon from enforcing its public accommodations law against a business that offers a custom good or service to the public?

2. Does the Free Exercise Clause bar Oregon from enforcing its public accommodations law against a business owner who has religious objections to serving a protected class?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.. i

TABLE OF CONTENTS..ii

INTRODUCTION 1

STATEMENT.. 2

REASONS FOR DENYING THE PETITION 13

A. The free speech question presented here has the same vehicle problems that prevented its resolution in *Masterpiece Cakeshop*......................14

B. The lower courts are not divided about the First Amendment standards for free speech claims. 19

C. There is no sound basis for the Court to consider overruling Employment Division v. Smith...........27

D. Although the circuit courts have described *Smith*'s discussion of "hybrid" situations in different terms, there is no true split for this Court to resolve. 29

CONCLUSION.. 34

TABLE OF AUTHORITIES

Cases

Anderson v. City of Hermosa Beach,
621 F.3d 1051 (9th Cir. 2010) 19, 21
Arizona v. Rumsey,
467 U.S. 203 (1984) 28, 29
Axson-Flynn v. Johnson,
356 F.3d 1277 (10th Cir. 2004) 31
Bery v. City of New York,
97 F.3d 689 (2nd Cir. 1996) 21
Brush & Nib Studio, LC v. City of Phoenix,
418 P.3d 426 (Ariz. Ct. App. 2018),
review granted (Nov. 20, 2018) 20
Buehrle v. City of Key West,
813 F.3d 973 (11th Cir. 2015) 19
Cantwell v. Connecticut,
310 U.S. 296 (1940) 29, 32, 33, 34
Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 27, 31, 32
City of Boerne v. Flores,
521 U.S. 507 (1997) 28, 29
Clark v. Community for Creative Non-Violence,
468 U.S. 288 (1984) 20
Cohen v. California,
403 U.S. 15 (1971) 20

Coleman v. City of Mesa,
284 P.3d 863 (Ariz. 2012) 19
Combs v. Homer-Center School Dist.,
540 F.3d 231 (3d Cir. 2008) 30
Employment Division v. Smith,
494 U.S. 872 (1990) .... passim
Follett v. McCormick,
321 U.S. 573 (1944) 32
Giboney v. Empire Storage & Ice Co.,
336 U.S. 490 (1949) 23
Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,
515 U.S. 557 (1995) 9, 10, 26
King v. Greyhound Lines, Inc.,
656 P.2d 349 (Or. App. 1982) 11
Kissinger v. Bd. of Trs. of Ohio State Univ., Coll. of Veterinary Med.,
5 F.3d 177 (6th Cir.1993) 32
Leebaert v. Harrington,
332 F.3d 134 (2d Cir. 2003) 31
Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,
138 S. Ct. 1719 (2018) .... passim
Mastrovincenzo v. City of New York,
435 F.3d 78 (2d Cir. 2006) 21
Miller v. Reed,
176 F.3d 1202 (9th Cir. 1999) 31
Murdock v. Pennsylvania,
319 U.S. 105 (1943) 32

Nevada Commission on Ethics v. Carrigan,
564 U.S. 117 (2011) 9
Obergefell v. Hodges,
135 S. Ct. 2584 (2015)............................... 11, 22, 24, 33
Roberts v. U.S. Jaycees,
468 US 609 (1984) 13, 24, 33
Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,
547 U.S. 47 (2006) 25
Spence v. Washington,
418 U.S. 405 (1974) 9, 20
Texas v. Johnson,
491 U.S. 397 (1989) 20
Turner Broadcasting System, Inc. v. FCC,
512 U.S. 622 (1994) 8
United States v. O'Brien,
391 U.S. 367 (1968) 8, 24
Washington v. Arlene's Flowers, Inc,
389 P.3d 543 (Wash. 2017),
vacated and remanded, 138 S. Ct. 2671 (2018)...... 20
West Virginia Board of Education v. Barnette,
319 U.S. 624 (1943) 26
Wisconsin v. Yoder,
406 U.S. 205 (1972) 29
Wooley v. Maynard,
430 U.S. 705 (1977) 26

Constitutional Provision, Statutes, and Rules

U.S. Const., Amend. I .... passim
Or. Rev. Stat. § 659A.400–409.. i
Or. Rev. Stat. § 659A.403... 8
Or. Rev. Stat. § 659A.403(1), (3)..................................... 5
Or. Rev. Stat. § 659A.409.. 6, 7
Or. Rev. Stat. § 659A.800... 2
Or. Rev. Stat. § 659A.850(4)(a)(B) 24

Other Authorities

Philip A. Hamburger,
A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915 (1992) 29
Michael W. McConnell,
The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990) 29

INTRODUCTION

Petitioners ask this Court to review a decision of the Oregon Court of Appeals applying well-established First Amendment principles to conclude that a bakery open to the public did not have a constitutional right to discriminate against customers on the basis of the customers' sexual orientation. Although there may be questions to resolve concerning the relationship between the rights to free speech and to free exercise and a State's public accommodations laws, this case presents a poor vehicle for addressing those questions.

This case does not present the question whether a baker can be compelled to create a cake designed by a customer or reflecting a specific message with which the baker disagrees. The record shows that petitioners denied services to the Bowman-Cryers based on their sexual orientation before discussing the design of any cake. Petitioners seek to sidestep that factual problem by posing broad and abstract questions about whether a custom cake, in general, is protected speech. But under this Court's cases, baking is conduct, not speech, and Oregon may regulate that conduct for purposes unrelated to the suppression of free expression. Whether a particular cake reflecting a specific message could be protected by the First Amendment is not presented on this record, and thus this case does not present a review-worthy question under the Free Speech Clause.

Petitioners also ask the Court to overturn *Employment Division v. Smith*, or, alternatively, to allow

their petition to "clarify" the hybrid-rights discussion in that case. Petitioners fail to provide any sound reason to overrule *Smith*, which has been relied upon by the lower courts, the States, and private parties for nearly three decades. Petitioners' hybrid-rights argument carries the same vehicle flaws as their free speech argument, and, in any event, does not reflect a true split among the lower courts that warrants review. This Court should deny the petition for certiorari.

STATEMENT

This case arises out of an administrative determination by respondent Oregon Bureau of Labor and Industries (BOLI), the agency that (among other things) enforces state laws against discrimination in public accommodations. Or. Rev. Stat. § 659A.800. BOLI determined that petitioners had violated those laws by refusing to serve a couple on the basis of their sexual orientation, and it awarded statutorily authorized damages to the couple for the violation. Contrary to petitioners' assertion, BOLI did not drive petitioners out of business, nor did it "hit" them with a penalty. Pet. 2. Rather, BOLI enforced a facially neutral and generally applicable law that requires business owners to provide equal services to all customers without regard to protected status, including race, gender, religion, or sexual orientation, thereby furthering the State's significant interest in promoting full access to economic life for all of its citizens. It awarded damages based on the extreme emotional distress the discriminatory conduct caused the two

complainants. That would-be customers may have learned of the discriminatory behavior and chosen to take their business elsewhere is a consequence of petitioners' actions, not BOLI's determination.

1. Rachel and Laurel Bowman-Cryer had been in a committed romantic relationship for nearly a decade when they decided to get married.[1] The couple were in the process of adopting two children with disabilities and special needs, and they wanted to provide their children with a sense of permanency and strong family structure, as well as to demonstrate their love for one another. Pet. App. 95; Tr. 25. Thus, with the help of Cheryl McPherson, her mother, Rachel started planning the wedding. Eventually, she scheduled an appointment for a cake tasting with Melissa Klein, who had previously created Cheryl's wedding cake and whom the couple had recently seen advertising her services at a bridal show. Pet. App. 95-96. Rachel wanted the exact same cake that Melissa had previously made for her mother—a "very simple white cake with purple ribbon accent and purple flowers." Tr. 30, 106. For her mother's wedding, Rachel had arranged the cake and provided the purple flowers. Tr 30, 106.

Aaron Klein conducted the cake tasting, which Rachel and Cheryl attended. At the beginning of the tasting, before Rachel could even discuss what kind of cake she wanted, Aaron informed her that he would

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

not bake a cake for her wedding because of his religious beliefs. Pet. App. 96. There was no mention of design, no discussion as to whether the cake would be picked up or delivered, and no suggestion that Rachel would invite petitioners to attend or participate in the wedding.[2] Rachel immediately felt humiliated and, as they left, she became inconsolable. Tr. 37, 44, 48; Pet. App. 96-98.

Rachel's mother drove a short distance away, but then returned to the bakery. Rachel, who was holding her head in her hands bawling, remained in the car while her mother went back inside to talk with Aaron. Pet. App. 9. "During their conversation, [Rachel's mother] told Aaron that she had previously shared his thinking about homosexuality, but that her 'truth had changed' as a result of having 'two gay children.'" Pet. App. 9, 97. Aaron explained his refusal to provide services by quoting from the Book of Leviticus, saying, "'You shall not lie with a male as one lies with a female; it is an abomination.'" Pet. App. 9, 97. Rachel's mother left.

Back in the car, Rachel's mother told her that Aaron had called her "an abomination," causing Rachel to cry even more. Pet. App. 97. Once home, Rachel's mother told Laurel what had happened, and Laurel immediately became upset and angry, and, feeling ashamed, she cried. Pet. App. 98-99.

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[2] When Rachel had previously purchased a cake for her mother, she did not have it delivered. Tr. 616.

In the days that followed, both Rachel and Laurel experienced emotional distress that affected their relationships with each other and with other family members. Pet. App. 103-104. Rachel felt depressed and questioned whether she "deserve[d] to be able to be married like everyone else," that maybe she did "not deserve the same things that heterosexual people deserve." Tr. 62-63. She no longer wanted to participate in the planning of her wedding because of the constant fear that she would again be refused service based on her sexual orientation. Rachel and her mother both felt compelled to ask vendors upfront if services would be provided without discrimination. Tr. 272-73, 275; Pet. App. 104. Ultimately, Rachel chose a cake design that would not necessarily have distinguished it as a wedding cake, as opposed to celebrating some other occasion: a three-tiered cake with a peacock on top. Pet. App. 105; Ex. R4 at 5.

2. Rachel and Laurel filed complaints with BOLI, alleging that petitioners had refused to bake them a cake on the basis of their sexual orientation. BOLI conducted an investigation and issued formal charges, alleging that petitioners had violated Oregon's public accommodations law, Or. Rev. Stat. § 659A.403(1), (3), which prohibits the denial of "full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of * * * sexual orientation[.]" Pet. App. 11. Based on some of petitioners' statements to the media, BOLI also alleged that they had communicated an intent to discriminate in the future based on sexu-

al orientation, in violation of Or. Rev. Stat. § 659A.409. Pet. App. 11-12.

The case was assigned to an independent administrative law judge for adjudication of the allegations. Early in the proceedings, petitioners alleged that, based on comments he had made to the media, the BOLI Commissioner was biased and moved to disqualify him. Rec. 708. In ruling on that motion, the ALJ observed that petitioners had misquoted the Commissioner and combined statements made at different times to create an appearance of bias. Pet. App. 166. In its entirety, the comment petitioners primarily focused on read:

> Everyone has a right to their religious beliefs, but that doesn't mean they can disobey laws already in place. Having one set of rules for everybody assures that people are treated fairly as they go about their daily lives. The Oregon Department of Justice is looking into a complaint that a Gresham bakery refused to make a wedding cake for a same-sex marriage. It started when a mother and daughter showed up at Sweet Cakes by Melissa looking for a wedding cake.

Pet. App. 159. The ALJ held that the accurately quoted remarks reflected the Commissioner's general attitude about enforcing Oregon's antidiscrimination statutes and, citing state and federal law, did not

constitute a showing of bias or a prejudgment concerning the facts of this case. Pet. App. 166. He therefore denied the motion. Pet. App. 169.

BOLI and petitioners subsequently filed cross-motions for summary judgment. Pet. App. 186. Petitioners argued that application of Oregon's public accommodations law to their conduct violated their First Amendment rights to free speech and freedom of religion. The ALJ disagreed and ruled in BOLI's favor, with two exceptions. Pet. App. 236-44, 253-61. The ALJ found that Melissa Klein had not violated the public accommodations law, and it found that petitioners had not made a statement of future intent to discriminate. Pet. App. 213, 217-18. The ALJ held an evidentiary hearing to determine damages, and, after six days of testimony, issued a proposed order recommending that $75,000 and $60,000 be awarded to Rachel and Laurel respectively based on the emotional distress they suffered as a result of the denial of services. Rec. 1742.

With one exception, the Commissioner adopted the ALJ's ruling in its entirety. Focusing on statements made during two separate interviews, the Commissioner concluded that petitioners had also violated Or. Rev. Stat. § 659A.409's prohibition against conveying a future intent to discriminate. Those statements included Aaron Klein's statement, "We don't do same-sex marriage, same-sex wedding cakes," and a note posted on the business door that stated, "This fight is not over. We will continue to stand strong." Pet. App. 125-26.

3. The Court of Appeals reversed the Commissioner's conclusion that petitioners had expressed an intent to discriminate in the future, but otherwise affirmed. Beginning with petitioners' free speech claim, the court conducted a careful analysis of this Court's precedent and concluded that intermediate scrutiny was appropriate. The court recognized that if the petitioners' conduct constituted pure speech then the applicable standard of review would be strict scrutiny. Pet. App. 43. The court also recognized that, conversely, if petitioners' "cake-making retail business involves, at most, both expressive and non-expressive components, and if Oregon's interest in enforcing [Or. Rev. Stat. §] 659A.403 is unrelated to the content of the expressive components of a wedding cake, then BOLI's order need only survive intermediate scrutiny to comport with the First Amendment." Pet. App. 43-44 (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("[W]hen '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."), and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994) (applying intermediate scrutiny to a content-neutral regulation that compelled cable operators to carry certain channels)).

The court concluded that, while petitioners' conduct in baking a cake involved some expression, it was not "entitled to the same level of constitutional protection as pure speech or traditional forms of ex-

pression" because it was not enough that petitioners subjectively *believed* the cakes to be works of art. Pet. App. 44. Rather, under this Court's decisions in *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011), and *Spence v. Washington*, 418 U.S. 405, 409-10 (1974), "the expressive character of a thing turns not only on how it is subjectively perceived by its maker, but also on how it will be perceived and experienced by others." Pet. App. 44-45. Applying this standard, the court readily concluded that petitioners had failed to demonstrate the cakes "are both intended to be *and are* experienced predominantly as expression" as opposed to a commodity made to be eaten. Pet. App. 45 (emphasis in original).

The court next concluded that, under the particular facts of this case, BOLI's order did not compel petitioners to host or accommodate another speaker's message. Pet. App. 46. The court explained that, in the only "case that involved enforcement of a content-neutral public accommodations law, *Hurley*, the problem was that the speaker's autonomy was affected by the forced intermingling of messages, with consequences for how others would perceive the content of the expression." Pet. App. 46-47 (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 576-77 (1995) (reasoning that parades, unlike cable operators, are not "understood to be so neutrally presented or selectively viewed," and "the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is *perceived by spectators* as part of the whole") (emphasis added)). Here, because peti-

tioners "refused to provide their wedding-cake service to Rachel and Laurel altogether," it was not a situation where petitioners "were asked to articulate, host, or accommodate a specific message that they found offensive." Pet. App. 47. The court explained that it would be "a different case if BOLI's order had awarded damages against [petitioners] for refusing to decorate a cake with a specific message requested by a customer ('God Bless This Marriage,' for example) that they found offensive or contrary to their beliefs." Pet. App. 47.

The court also concluded that petitioners were not required to "'host' the message that same-sex weddings should be celebrated" on the basis that, unlike in *Hurley*, the petitioners had "not raised a non-speculative possibility that anyone attending the wedding [would] impute that message to" them. Pet. App. 47. Rather, the "wedding attendees understand that various commercial vendors involved with the event are there for commercial rather than ideological purposes." Pet. App. 47.

Because the wedding cakes were not "in the nature of fully protected speech or artistic expression," and because petitioners were not forced to host or associate with anyone's particular message, the court applied intermediate scrutiny. Pet. App. 48. The court first identified the government's compelling interest "in ensuring equal access to publicly available goods and services and in preventing the dignitary harm that results from discriminatory denials of service"—an interest that this Court has consistently

acknowledged. Pet. App. 49-50. The court also recognized that the government's interest "is no less compelling with respect to the provision of services for same-sex weddings; indeed, that interest is particularly acute when the State seeks to prevent the dignitary harms that result from the unequal treatment of same-sex couples who choose to exercise their fundamental right to marry." Pet. App. 50 (citing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) ("The right to marry thus dignifies couples who wish to define themselves by their commitment to each other.") (internal quotation marks omitted)).

Having established that enforcement of the public accommodations law furthers a substantial government interest, the court correctly observed that the government's interest "is in no way related to the suppression of free expression." Pet. App. 50. Instead, the government's concern pertains to "ensuring equal access to products like wedding cakes when a seller chooses to sell them to the general public, not a concern with influencing the expressive choices involved in designing or decorating a cake." Pet. App. 50. Any burden imposed on the petitioners' expression was no greater than essential to further the State's legitimate interests. Rather, to exclude certain groups from the meaning of services would undermine the government's interest in avoiding the "'evil of unequal treatment, which is the injury to an individual's sense of self-worth and personal integrity.'" Pet. App. 50-51 (quoting *King v. Greyhound Lines, Inc.*, 656 P.2d 349, 352 (Or. App. 1982)).

The court next rejected petitioners' hybrid-rights claim under the Free Exercise Clause of the First Amendment. Focusing on a particular passage in *Employment Division v. Smith*, 494 U.S. 872 (1990), petitioners argued that, when a law burdens both their free-exercise rights and other constitutional rights, even neutral laws of general applicability are subject to strict scrutiny. Pet. App. 55-56. The court noted that courts and scholars alike have expressed "considerable doubt" about whether there is any cognizable hybrid-rights doctrine. Following the view of the Second, Third, and Sixth Circuits, the court deemed the passage in *Smith* to be *dictum* and declined to follow it. Pet. App. 56-58.

Finally, the court rejected petitioners' claim that the BOLI Commissioner was biased. Like the ALJ, the court observed that petitioners had "selectively quoted" passages to create an impression that the Commissioner "was commenting specifically on their conduct." Pet. App. 66. The court found that, when viewed in context, none of his statements described the particular facts of the case or suggested that he had "fixed views as to any defenses or interpretations of the law that might be advanced in the context of a contested proceeding." Pet. App. 66. Rather, the Commissioner's statements reflected his "general views of law and policy regarding public accommodations laws," and they fell "short of the kinds of statements that reflect prejudgment of the facts or an impermissibly closed-minded view of law or policy so as to indicate that he, as a decision maker, cannot be impartial." Pet. App. 65-66.

REASONS FOR DENYING THE PETITION

This Court has long recognized that public accommodations laws serve a vital public purpose and are an appropriate, even necessary, area of state regulation. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018) (citing cases); *Roberts v. U.S. Jaycees*, 468 US 609, 624 (1984) (recognizing that public accommodations laws "plainly serv[e] compelling state interests of the highest order"). Oregon's public accommodations law—and its application here—is wholly concerned with the equal access of all individuals to businesses that serve the public, regardless of the customer's race, religion, sex, sexual orientation, national origin, marital status, or age. The only way for Oregon to protect equal access to public goods and services is to prohibit discrimination in the provision of those services. The public accommodations law does not compel support for same-sex marriage by requiring equal treatment on the basis of sexual orientation any more than the law compels support for religion by requiring equal treatment for all faiths.

The question whether creating a custom wedding cake is fully protected speech is not worthy of review. Under this Court's cases, baking and designing a cake is not speech. As the Oregon Court of Appeals concluded, the process of creating a custom cake is at most expressive conduct that the State can regulate when, as here, the conduct does not convey a particular message that an observer is likely to perceive and the regulation is unrelated to any expressive

component that may exist. The Court of Appeals correctly applied this Court's free speech jurisprudence when it concluded that BOLI did not violate petitioners' rights.

Nor should this Court allow review to address petitioners' free exercise questions. Nearly three decades ago, *Employment Division v. Smith* established the standard of review for free exercise challenges to neutral laws of general applicability, like Oregon's public accommodations law. Aside from pointing to disputes already resolved in *Smith* and this Court's subsequent cases, petitioners have provided no reason to revisit that well-settled precedent. Petitioners' second free exercise question, concerning "hybrid rights," is not worthy of review either. Although courts have described the legal principles related to hybrid rights differently, there is no split among the circuits in the application of the different formulations. No such court has struck down a neutral law of general applicability under a hybrid-rights doctrine.

Because this case does not present any review-worthy issues under the Free Speech Clause or the Free Exercise Clause, the Court should deny the petition for certiorari.

A. The free speech question presented here has the same vehicle problems that prevented its resolution in *Masterpiece Cakeshop*.

In *Masterpiece Cakeshop*, the petitioner—a baker who refused to sell a wedding cake to a same-

sex couple because of his religious beliefs—asked this Court to address whether his baking was a form of protected speech. The Court explained that the case presented difficult questions about the "proper reconciliation" of a State's authority to "protect the rights and dignity of gay persons" and "the right of all persons to exercise fundamental freedoms under the First Amendment." *Masterpiece Cakeshop*, 138 S. Ct. at 1723. The record, however, did not present those issues cleanly. The Court explained:

> One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.
>
> The same difficulties arise in determining whether a baker has a valid free exercise claim. A baker's refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it are just

> three examples of possibilities that seem all but endless.

Id.

Petitioners assert that this case presents the same difficult questions as *Masterpiece Cakeshop* but not the same difficulties in the record. Pet. 16-17. They are incorrect. Although petitioners' bakery did not sell "off the shelf" cakes, the record is clear that they refused to bake *any* cake for Rachel and Laurel—regardless of the cake's design or message. Pet. App. 42-43. That makes the record here more like "a refusal to sell any cake at all" than a refusal "to design a special cake with words or images celebrating the marriage," using the examples discussed in *Masterpiece Cakeshop*. At best there is a fundamental factual dispute between the parties about that question, a dispute that will—like in *Masterpiece Cakeshop*—complicate this Court's ability to address the free speech question.

Petitioners take it for granted that their baking and decorating of a cake is "art" and thus entitled to full First Amendment protections. But as discussed in more detail below, nothing in this Court's cases suggest that the classification of creative conduct or a created object as "art" is so simple. Stepping outside the context of baking makes this abundantly clear. Painting, for example, is conduct that can lead to the creation of art or that can be purely functional, such as painting a house to protect the siding from the elements. Painting, as a form of con-

duct, is not always fully protected by the First Amendment because it is not necessarily or inherently expressive. Whether the act of painting is protected depends both on the context in which that conduct occurs and the end product. To continue the house analogy, a homeowner might consult with a painter to pick custom colors for the walls or trim. But that fact alone would not transform house painting into protected speech. Nor is the fact that a "home" carries great symbolic value in American life enough to transform the conduct of painting a house into protected speech by the painter. At the other end of the spectrum, commissioning a painter to create a specific mural on the wall of the house, for example, would involve protected conduct by the painter. But that conduct is protected because the nature of the end product—a specific picture—fits readily within the commonly understood definition of art, not because the physical act of painting is inherently protected.

Thus, whether a particular instance of cake-making is protected by the First Amendment is ultimately, at least in part, a factual question about the context of the activity. And to the extent the record resolves that factual question here, it does not do so in petitioners' favor. The Oregon Court of Appeals was mindful of that limitation in reaching its decision. The court was careful to note that it was not "foreclose[ing] the possibility that, on a different factual record, a baker (or chef) could make a showing that a particular cake (or other food) would be objectively experienced predominantly as art—especially when created at the baker's own or chef's own initia-

tive and for her own purposes." Pet. App. 46. In light of petitioners' refusal to make any cake at all, the court correctly recognized that petitioners "must demonstrate that *any* cake that they make through their customary practice constitutes their own speech or art." *Id*. Applying this Court's cases, the Oregon Court of Appeals correctly concluded that petitioners' activities were not fully protected speech.

Granting review in this case would, as in *Masterpiece Cakeshop*, likely enmesh this Court in the parties' factual dispute about the nature of the cake Rachel and Laurel wanted to order. At most, this record shows that Rachel wanted a "very simple white cake with purple ribbon accent" like the one petitioners had made for Rachel's mother, although she was not able to communicate that desire because Aaron Klein denied services completely. But petitioners ask this Court to conclude otherwise by emphasizing the design of the two cakes that were served at the wedding—one depicting a peacock and one depicting a tree—and arguing that those designs, though made by other bakers, show why their custom cake-baking should be fully protected speech. Pet. 6-7, 8, 23. Petitioners' emphasis on the design of two cakes that were actually served at the wedding only highlights how the facts of the design matter. Whether Rachel and Laurel would have requested a simple white cake or an elaborate design with a particular message should make a difference to the legal analysis, but petitioners ask this court to define their conduct as fully protected speech without the benefit of knowing what the end product would look like. If this Court is in-

clined to review the free speech issue presented by petitioners, it should await a case with a clearer record on the nature of the cake at issue.

B. The lower courts are not divided about the First Amendment standards for free speech claims.

1. Contrary to petitioners' assertion, the lower courts are not divided "about the test for determining whether commercial art is protected by the First Amendment." Pet. 20. The "commercial art" cases that petitioners cite all involved city ordinances that barred or restricted tattoo parlors in a way that amounted to a ban on tattooing. In those cases, the courts had little difficulty in concluding that tattooing is pure speech. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-63 (9th Cir. 2010) (the business and process of tattooing were fully protected speech because both were inseparably intertwined with the tattoo itself, which was unquestionably pure speech); *Buehrle v. City of Key West*, 813 F.3d 973, 978 (11th Cir. 2015) (act of tattooing protected speech based on status of tattoo as an art form); *Coleman v. City of Mesa*, 284 P.3d 863, 869-71 (Ariz. 2012) (same result, relying on *Anderson*). The analysis in those cases, as illustrated in *Anderson*, turned on the tattoo itself being an art form, essentially a drawing or painting on skin. The process and business of producing a tattoo were inseparably intertwined with the tattoo itself, and so that conduct was also protected. *Anderson*, 621 F.3d at 1061-63. But as *Anderson* explained, under this Court's cases, conduct that, "'on

its face, does not necessarily convey a message,'" should be analyzed under the expressive-conduct test set out in *Spence*. *Id.* at 1061 (quoting *Cohen v. California*, 403 U.S. 15, 18 (1971)).

The Oregon Court of Appeals and the other courts to address related questions have properly concluded that services for weddings, such as cake baking, flowers, or invitations, should be analyzed as expressive conduct rather than pure speech in the context of public accommodations laws. *See Washington v. Arlene's Flowers, Inc. v*, 389 P.3d 543, 557 (Wash. 2017), *vacated and remanded*, 138 S. Ct. 2671 (2018) (flowers); *Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d 426, 439 (Ariz. Ct. App. 2018), *review granted* (Nov. 20, 2018) (invitations). That test requires analyzing whether a person intended to convey a message through the conduct and whether an observer was likely to perceive that message. The Court determines whether conduct is "inherently expressive" by examining "whether '[a]n intent to convey a *particularized* message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence*, 418 U.S. at 410-11) (emphasis added). The person claiming that conduct is expressive bears the burden of "demonstrat[ing] that the First Amendment * * * applies" and must advance more than a mere "'plausible contention' that [the person's] conduct is expressive." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). The Court of Appeals followed that test here. Pet. App. 44-46.

Petitioners also assert that there is a "third category" of courts that take a different view of whether an activity is fully protected speech or expressive conduct. Pet. 23. But the case petitioners cite, *Mastrovincenzo v. City of New York*, 435 F.3d 78 (2d Cir. 2006), does not conflict with *Anderson* or with the Oregon Court of Appeals' decision in this case. *Mastrovincenzo*, relying on Second Circuit precedent, explained that only "certain items — 'paintings, photographs, prints and sculptures'— automatically trigger First Amendment review because the sale or dissemination of these items 'always communicate[s] some idea or concept' to viewers." *Id*. at 93 (quoting *Bery v. City of New York*, 97 F.3d 689, 696 (2nd Cir. 1996)). Outside of those specific items, a good that might potentially be expressive must be examined on a case-by-case basis to determine whether expression is the dominant purpose. *Id*. at 94-95. The discussion in *Mastrovincenzo* emphasizes the difficulty of parsing what is art and what is not. And the record in that case involved specific goods—painted images and words on clothing—for the court to analyze, unlike here. In that well-defined factual context, the court determined that the specific goods had a predominately expressive purpose and thus were entitled to First Amendment protection. *Id*. at 97. Far from showing why this court should allow review, *Mastrovincenzo* shows precisely why this court should avoid addressing the abstract question petitioners have posed.

The difficulty of dividing conduct from speech is why this court has a long-established test for ex-

pressive conduct. That test, which the Oregon Court of Appeals followed and applied correctly, hinges on whether the message sought to be transmitted by the conduct would be understood by an observer, not merely whether the creator subjectively hoped to transmit a message. In short, there is no division among the lower courts that warrants review concerning the legal test for whether custom cake-making is protected speech under the First Amendment.

2. Petitioners also assert that the Court of Appeals incorrectly applied the test for expressive conduct, because, in their view, BOLI directly targeted their expression. Pet. 27. Again, petitioners do not present a review-worthy question.

Petitioners argue that the public accommodations law is not "ideologically neutral" because it reflects the State's attempt to force Oregonians to accept and respect same-sex marriage. Pet. 28. Petitioners' argument is both ill-conceived and contrary to this Court's opinions in *Obergefell* and *Masterpiece Cakeshop*. The State's interest in affording equal dignity to same-sex couples is not an effort by the state to control expression. And under *Obergefell* and *Masterpiece Cakeshop*, the State plainly has a legitimate interest in protecting the dignity of *all* of its citizens, specifically including same-sex couples. *See Obergefell*, 135 S. Ct. at 2602 ("[L]aws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter."); *Masterpiece Cakeshop*, 138 S. Ct. at 1727

("Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.").

Petitioners also assert that BOLI's damages award, which was based on the emotional and psychological harm to Rachel and Laurel caused by the denial of services, shows that BOLI targeted petitioners' speech. Again, petitioners are wrong and their erroneous claim does not create an issue worthy of review in this court. First, petitioners' argument is a new one. They did not argue to BOLI or to the Oregon Court of Appeals that determining damages based on the manner in which Aaron Klein denied services, which included quoting the Bible, showed that BOLI had targeted the Kleins' expression, instead of their discriminatory conduct. Whether BOLI could rely on Aaron's statements in determining the appropriate amount of damages is a distinct legal question from whether the denial of services itself was protected by the First Amendment.

Second, there is nothing review-worthy about BOLI's use of Aaron Klein's words as one component of calculating the emotional and psychological damages that Rachel and Laurel suffered, even if those words were a quotation from the Bible. A person's words are commonly used to prove facts in legal proceedings. The First Amendment does not prohibit such usage. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct

was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."). Under Oregon law, Rachel and Laurel were entitled to an award of "actual damages" suffered as a result of petitioners' violation of the public accommodations law. Or. Rev. Stat. § 659A.850(4)(a)(B). The damages they suffered depended, in part, on the manner in which petitioners refused services. As BOLI found and as the record supports, both Rachel and Laurel were harmed by the denial of services, and their emotional and psychological harms were exacerbated by the use of the word "abomination." Pet. App. 74. Nothing in the record suggests that BOLI targeted petitioners because of the quotation from the Bible.[3]

In any event, this Court should deny the petition because the Oregon Court of Appeals correctly ruled that BOLI's order survives First Amendment scrutiny, even assuming that petitioners' custom cake-baking can be considered expressive conduct. Applying the test from *O'Brien*, 391 U.S. at 377, the court concluded that Oregon has a compelling interest in ensuring equal access to goods and services for same-sex couples and in preventing the dignitary harm that results from discriminatory denial of services. Pet. App. 50 (citing *Obergefell*, 135 S. Ct. at 2600). That interest is "in no way related to the suppression of free expression." Pet. App. 50 (citing *Rob-*

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[3] In fact, throughout the adjudicative phase of the proceedings, BOLI disputed that Aaron Klein had ever quoted the Bible. Rec. 1068-67, 1301, 1892; Tr. 882.

erts, 468 U.S. at 628). Finally, any burden imposed on petitioners' expressive activities is no "greater than essential to further the state's interest." Pet. App. 51 (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 67 (2006)). That is so because Oregon's compelling interest in ensuring equal access and dignity to same-sex couples would be undermined if businesses were nevertheless free to discriminate against those couples anytime the good or service had some expressive element. Indeed, there is no less restrictive way for Oregon to protect equal access to public goods and services than by prohibiting discrimination in the provision of those services.[4] For that reason, even if strict scrutiny were to apply, BOLI's order would survive.

3. Nor should this Court grant certiorari to review the Court of Appeals' application of the compelled-speech doctrine to the facts of this case. Pet.

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[4] *Amici* characterize the government's interest as that of ensuring that same-sex couples have access to wedding cakes, and that, to further that interest, the State could simply post a listing of businesses willing to serve homosexuals. Brief in Opposition for State of Texas et al. as *Amici Curiae* at 19. Contrary to *amici*'s suggestion, "[t]his case is no more about access to [wedding cakes] than civil rights cases in the 1960s were about access to sandwiches." *Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543, 566 (Wash. 2017), *vacated and remanded*, 138 S. Ct. 2671 (2018). As BOLI's final order correctly concluded, to allow petitioners, as "a for profit business, to deny services to people because of their protected class, would be tantamount to allowing legal separation of people based on their sexual orientation from at least some portion of the public marketplace." Pet. App. 132.

17. Whether BOLI compelled petitioners to speak at all turns on the speech-conduct divide, discussed above, and would require this Court to resolve a factual dispute about the speech content of a hypothetical cake that the petitioners refused to make. In any event, the Court of Appeals' consideration of the compelled-speech issue was entirely consistent with this Court's cases.

Petitioners suggest that Oregon's public accommodations law is indistinguishable from the laws struck down in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard*, 430 U.S. 705 (1977). But the laws in those cases directly regulated speech by compelling individuals to speak the government's message. That is not the case with the public accommodations law, which does not compel any speech and is, instead, concerned with conduct: the equal provision of services to Oregonians. Nor is the application of the public accommodations law here similar to the application that violated the First Amendment in *Hurley*. As the Court of Appeals appropriately noted, the Massachusetts public accommodations law at issue in *Hurley* had been applied to a parade, a situation outside of the commercial context. But more importantly, the Court of Appeals followed *Hurley*'s analysis by considering whether baking a wedding cake for Rachel and Laurel would cause anyone to perceive a message of support from the Kleins personally. Pet. App. 46-48. As the Court of Appeals explained, "because the Kleins refused to provide their wedding-cake service to Rachel and Laurel altogether, this is not a situa-

tion where the Kleins were asked to articulate, host, or accommodate a specific message that they found offensive." Pet. App. 47. And to the extent that a wedding cake provides a generic message of "celebration," the Court of Appeals correctly determined that it was unlikely that any observer would impute that message to petitioners. Pet. App. 47.

C. There is no sound basis for the Court to consider overruling Employment Division v. Smith.

In *Employment Division v. Smith*, this Court considered whether Oregon had violated the Free Exercise Clause when the State denied unemployment benefits to individuals who had been fired from their jobs for using peyote during a religious ceremony. In ruling for the State, this Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S. at 879 (citation and quotation marks omitted). The majority opinion issued over vigorous objections from a minority of the Court. *Id.* at 891 (O'Connor, J., concurring); *id.* at 907 (Blackmun, J., dissenting).

In the years since it decided *Smith*, this Court has repeatedly rejected calls to revisit or overrule it. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, Justice Souter called on the Court to revisit *Smith* in an appropriate case. 508 U.S. 520, 559

(1993) (Souter, J., concurring). Four years later, in *City of Boerne v. Flores*, three justices dissented from the application of *Smith* in that case and called for *Smith* to be reconsidered. 521 U.S. 507, 547 (1997) (O'Connor, J. dissenting); *id*. at 565 (Souter, J., dissenting); *id*. at 566 (Breyer, J., dissenting).

Stare decisis "demands special justification" for "any departure" from precedent. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Petitioners cite the criticism in those dissenting opinions as the reason to revisit *Smith*'s rule. Pet. 30-31. But the minority opinions show that this Court has carefully considered the challenges to the *Smith* rule and rejected them. Moreover, Justice Scalia concurred in *Flores*, rebutting the historical evidence discussed in Justice O'Connor's dissent and addressing criticism of *Smith* in the academic literature. 521 U.S. at 537-44. And in the nearly three decades since *Smith*, the state and federal courts have relied on *Smith*'s standard in evaluating free exercise challenges to state law. Revisiting that standard would have a profound impact on settled law around the country, an impact that petitioners have not justified.

Petitioners highlight Justice Gorsuch's concurring opinion in *Masterpiece Cakeshop*, where he noted that *Smith* "remains controversial in many quarters." 138 S. Ct. at 1734. That statement may be true, but it does not provide a reason for this Court to allow review. Indeed, the two law review articles that Justice Gorsuch cited to show that *Smith* is controversial—Michael W. McConnell, *The Origins and Historical*

Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990), and Philip A. Hamburger, A *Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992)—were both discussed by Justice Scalia in his concurring opinion in *Flores*. 521 U.S. at 537-38. Arguments that this Court has already considered and rejected do not supply the "special justification," *Rumsey*, 467 U.S. at 212, for overruling precedent. Whether or not *Smith* "remains controversial," there is no basis for this Court to grant review.

D. Although the circuit courts have described *Smith*'s discussion of "hybrid" situations in different terms, there is no true split for this Court to resolve.

In the course of ruling that the Free Exercise Clause does not require religious exemptions from neutral laws of general applicability, *Smith* discussed earlier free exercise cases in which the Court had held that "the First Amendment bars application of a neutral, generally applicable law to religiously motivated action." 494 U.S. at 881-82. *Smith* distinguished those cases because they addressed a "hybrid situation," which "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.* For example, *Cantwell v. Connecticut*, 310 U.S. 296 (1940), involved a "licensing system for religious and charitable solicitations" that implicated free speech and free exercise, and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), involved

compulsory school-attendance laws that implicated the right of parents to direct the education of their children and free exercise. *Smith*, 494 U.S. at 881. The Court's description of the "hybrid situation" in those cases was not a holding. The opinion makes it clear that *Smith* did not "present such a hybrid situation." *Id.* at 882.

Petitioners request that this Court allow review to "reaffirm" that strict scrutiny applies to "free exercise claims that implicate other fundamental rights." Pet. ii. But this Court has never reached that conclusion, and petitioners erroneously treat *Smith*'s discussion of hybrid claims as a holding of the case.

To the extent that there is a split among the circuit courts concerning what *Smith* meant when the opinion described earlier cases as involving hybrid claims, that doctrinal split has not caused the courts to reach contradictory results. *See Combs v. Homer-Center School Dist.*, 540 F.3d 231, 244-47 (3d Cir. 2008) (summarizing divergent circuit views). The Oregon Court of Appeals, like the Second, Third, and Sixth Circuits, described the discussion of hybrid rights in *Smith* as "dictum" and declined to apply strict scrutiny to a hybrid-rights claim. Pet. App. 56-57. But regardless of how other courts have described the hybrid-rights doctrine, no circuit has actually applied strict scrutiny under a hybrid-rights theory to overturn a neutral law of general applicability. For that reason, there is no true conflict that merits this Court's attention.

Although petitioners assert that the Ninth Circuit and the Tenth Circuit have adopted the correct approach by holding that strict scrutiny applies to a hybrid-rights claim when the companion claim is "colorable," they do not explain why that is so. Notably, neither of those circuits has actually applied their version of the hybrid-rights exception to invalidate a neutral law of general applicability. For example, in *Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999), the Ninth Circuit concluded that strict scrutiny could apply under the hybrid rights exception, but held in that case that the plaintiff had failed to assert a colorable claim regarding his constitutional right to travel. *Id.* at 1207-08; *see also Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004) (remanding for factual development of free speech claim but holding that hybrid rights claim was barred by qualified immunity). Despite the conflicting descriptions of the hybrid-rights exception, then, there is no real conflict between the lower courts to resolve.

The absence of any true circuit split is not surprising. As recognized by Justice Souter in his concurrence in *Church of the Lukumi Babalu Aye* and by the Second, Third, and Sixth Circuits, the idea that a free exercise claim gains increased protection by being joined to a second constitutional claim makes little sense. If neither the free exercise claim nor the companion claim is viable, then it is not clear why adding the two claims together should require strict scrutiny. *See Leebaert v. Harrington,* 332 F.3d 134, 144 (2d Cir. 2003) (There is "no good reason for the standard of review to vary simply with the number of

constitutional rights that the plaintiff asserts have been violated."); *Kissinger v. Bd. of Trs. of Ohio State Univ., Coll. of Veterinary Med.,* 5 F.3d 177, 180 (6th Cir.1993) (describing hybrid-rights exception as "completely illogical"). If the companion claim is independently viable, then there is no need to address the free exercise claim at all. *Church of the Lukumi Babalu Aye*, 508 U.S. at 567 (Souter, J., concurring). Moreover, "[i]f a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule[.]" *Id*. Aside from the supposed circuit split, which is more about labels than results, petitioners do not explain why the hybrid-rights doctrine presents a review-worthy question.

Petitioners also raise a new claim in their petition and assert, for the first time, that this case is controlled by the "hybrid rights" cases mentioned in *Smith*: *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); and *Follett v. McCormick*, 321 U.S. 573 (1944). Each of those cases involved challenges by Jehovah's Witnesses to laws that prohibited or restricted solicitation, including solicitation for religious purposes. *See Smith*, 494 U.S. at 881 (discussing cases). Oregon's public accommodations law is readily distinguished from the laws restricting solicitation, which were a direct limitation on First Amendment rights. And petitioners' conduct here—cake baking—is readily distinguished from the conduct at issue in those cases—distributing religious literature and soliciting support. *Cantwell*, *Murdock*, and *Follett* do not control,

and this Court should reject petitioners' attempt to raise those cases for the first time in their petition for certiorari.

Moreover, even if the Court were to apply the level of scrutiny from those cases, as petitioners request, BOLI's order would survive. In *Cantwell*, for example, the Court held that the statute restricting religious solicitation must be "narrowly drawn" to prohibit conduct that "constitute[ed] a clear and present danger to a substantial interest of the State." 310 U.S. at 311. Under this Court's cases, Oregon has a compelling interesting in prohibiting discrimination in public accommodations, including discrimination against same-sex couples. *See Roberts*, 468 U.S. at 624 (recognizing that public accommodations laws "plainly serv[e] compelling state interests of the highest order"); *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (recognizing that "gay couples cannot be treated as social outcasts or as inferior in dignity and worth"); *Obergefell*, 135 S. Ct. at 2602 (discussing stigma and injury caused by prohibition on same-sex marriage).

In prohibiting petitioners' conduct, Oregon's public accommodations law is narrowly drawn to serve that interest. On these facts, the public accommodations law requires petitioners to provide to same-sex couples the same service that petitioners would provide to heterosexual couples—a cake for their wedding. In doing so, enforcement of that statute focuses on the noncommunicative aspects of petitioners' conduct and does not require petitioners to condone or participate in anyone's wedding. Accord-

ingly, the statute and BOLI's order is narrowly drawn to serve the State's interest in stopping sexual-orientation discrimination. There is no less restrictive way to serve that interest. Thus, even if *Cantwell* applied, this Court should deny the petition.

CONCLUSION

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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