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

BRIEF OF *AMICUS CURIAE* THOMAS MORE SOCIETY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STEPHEN M. CRAMPTON
Counsel of Record
CRAMPTON LEGAL SERVICES, PLLC
P.O. Box 4506
Tupelo, MS 38803
(662) 255-9439
smcrampton@hotmail.com
Counsel for Amicus Curiae

THOMAS L. BREJCHA
President
THOMAS MORE SOCIETY
309 West Washington St.
Suite 1250
Chicago, IL 60606
(312) 782-1680
tbrejcha@
thomasmoresociety.org

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Thomas More Society is a not-for-profit, national public interest law firm dedicated to restoring respect in law for life, family, and religious liberty. Based in Chicago, the Thomas More Society defends and fosters support for these causes by providing high quality *pro bono* legal services from local trial courts all the way to this Court. Since its founding in 1997, the Thomas More Society has handled hundreds of cases defending the First Amendment rights of those expressing themselves in public fora as well as ensuring the free expression of religion in the public square.

The Thomas More Society has assisted thousands of clients, including some of the nation's most renowned pro-life and religious leaders: David Bereit and 40 Days for Life; Lila Rose and Live Action; Joe, Ann, and Eric Scheidler and the Pro-

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[1] Counsel for a party did not author this brief in whole or in part, and no such counsel or party made a monetary contribution to fund its preparation or submission. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation and submission of this brief. All parties have received timely notice and have consented to the filing of this brief.

Life Action League; Troy Newman and Operation Rescue; Former Kansas Attorney General Phill Kline; Catholic Bishops; Catholic Charities; Dioceses; Religious Orders; the Notre Dame Protestors ("ND88"); and many more. Given *amicus*' strong interest in the issues presented and its expertise in the First Amendment, *amicus* suggests that this brief may be helpful to the Court.

SUMMARY OF ARGUMENT

The issues presented in this case are of national importance and also address a split in the circuits, as Petitioners explain. *See* Pet. for Cert. at 20-26. Although Petitioners argue for a narrow exception to the expansive reach of the Oregon public accommodations law because they engage in artistic expression, the import of this case is broader than that, reaching almost every business in the state and implicating the rights of many outside the state.

Antidiscrimination laws are mushrooming across the nation, adding new groups claiming special protections almost daily. As a result of the chaotic and unsettled state of the Free Exercise Clause in the wake of *Employment Division v. Smith*, 494 U.S. 872 (1990), application of these antidiscrimination laws often infringe the rights of people of faith.

Because antidiscrimination laws are inherently rooted in morality, they create special problems in the realm of religious freedom. After *Smith*, the courts tend to afford scant protection to litigants raising claims under the Free Exercise Clause.[2] Even when combined with a second right arguably infringed, thereby allowing a claimant to present a "hybrid rights" claim, litigants such as Petitioners here face an uphill climb against a generally applicable law such as Oregon's public accommodations law.

In addition, the weakness of the Free Exercise Clause has created an opening for those motivated by animus against particular religions and people of faith to enact and apply antidiscrimination laws such as Oregon's in a manner designed to punish those who disagree with the new secular orthodoxy generally and same-sex marriage in particular.

This situation in turn threatens the rights of conscience of otherwise law-abiding citizens

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[2] 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; . . ." U.S. Const. amend.1.

everywhere and creates a need for this Court to act in order to clarify the meaning and application of the Free Exercise Clause and to preserve the delicate balance between church and state.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant the Writ to Clarify and Reinvigorate the Free Exercise Clause in light of *Employment Division v. Smith*[3].

The free exercise of religion is expressly protected in the first part of the first section of the First Amendment, adopted by the first Congress. The Declaration of Independence emphatically states that these rights are inalienable, not given by government but by God.

Yet today the free exercise of religion receives less respect and less protection than countless unenumerated rights purportedly found in the "emanations and penumbras" of the text of later amendments adopted by much later Congresses. In

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[3] 494 U.S. 872 (1990).

effect, the Free Exercise Clause has been stripped of its strength and rendered largely impotent.

Simultaneously, but not coincidentally, the citadel of the church faces an unprecedented assault by the forces of a new secular orthodoxy bent on compelling people of faith to conform to the new morality.

Since this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), lower courts have been hopelessly divided and unable or unwilling to protect the free exercise of religion. The *Smith* decision has left the lower courts in chaos and confusion as to the proper analysis of Free Exercise claims, often failing to seriously consider them at all.

This lack of protection, coupled with a growing hostility against religion by the new secular orthodoxy, has led to increased attacks on people of faith using previously unknown tools.

Public accommodation laws were originally narrowly confined to protect hapless travelers from unwelcoming innkeepers, and had no application

elsewhere.[4] Today, they have been interpreted and applied so broadly that no business is safe from a charge of "discrimination" arising from a benign decision not to serve someone, especially if the reason entails religion.

Lower courts now freely disregard claims under the Free Exercise Clause and run roughshod over the consciences and convictions of sincere people of faith, lacking guidance on the meaning and application of that clause.

As a result, we are at risk of succumbing to a new "pall of orthodoxy" unknown to the Founders and anathema to all lovers of freedom.

Something is clearly wrong.

This Court should accept the writ and grant certiorari in order to clarify *Smith* and restore the rights of all Americans to the free exercise of religion.

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[4] *See, e.g.,* B. Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 Harv. L. Rev. 136, 159 (1903).

A. ***The Free Exercise Clause is largely impotent.***

Even before *Smith* had taken root, one law professor opined that "the Free Exercise Clause itself now has little independent substantive content." Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 4. Since then, it has grown even worse. With a few notable exceptions, the only Free Exercise claims that have any chance of succeeding are those wedded to another constitutional right in the guise of a "hybrid" claim.

When this Court first addressed the Free Exercise Clause 140 years ago in *Reynolds v. United States,* 98 U.S. 145 (1878)[5], it observed that to "'intrude . . . into the field of opinion'" was beyond the power of the State; the power of the

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[5] It is ironic that *Reynolds* upheld Congress' authority to prohibit polygamy on grounds that it threatened natural marriage, which the Court said was both "a sacred obligation" and a civil contract upon which "society may be said to be built." 98 U.S. at 165. Polygamy was therefore "subversive of good order." 98 U.S. at 164. Had Mr. Chief Justice Waite expressed those views in a bakery in Oregon today he might have found himself under investigation by the Bureau of Labor and Industries.

government reached outward actions only. *Id.* at 163 (quoting the preamble to the Virginia Bill for Establishing Religious Freedom, 12 Hening's Stat. 84) (hereafter "the Virginia Bill"). The *Smith* Court reiterated this principle, observing that the government "may not punish the expression of religious doctrines it believes to be false . . . or lend its power to one or the other side in controversies over religious authority or dogma . . . ." 494 U.S. 872, 877 (citations omitted).

Of course, there is much more to religion than mere opinion. "[T]he 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts" as well. *Smith*, 494 U.S. at 877; *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, _U.S._, 137 S.Ct. 2012, 2026 (2017) (Gorsuch, J., dissenting) ("After all, that Clause guarantees the free *exercise* of religion, not just the right to inward belief (or status)."). The Clause thus protects at least *some* outward actions.

After *Smith*, however, the lower courts have made short shrift of the Free Exercise Clause in the context of neutral laws of general applicability. Neither, in the vast majority of cases, has a "hybrid rights" claim slowed the assault on religious freedom. *See* Pet. for Cert. at 33-34. The First Circuit noted in 2008 that "[n]o published circuit

court opinion . . . has ever applied strict scrutiny to a case in which plaintiffs argued they had presented a hybrid claim." *Parker v. Hurley*, 514 F.3d 87, 98 (1st Cir. 2008); *see also* Ryan S. Rummage, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 Emory L. J. 1175, 1202 n.60 (2015) ("As of the writing of this Comment, this statement remains true.").

B. The rise of antidiscrimination laws.

The void created by the emasculation of the Free Exercise Clause was quickly filled. Many states and municipalities have enacted new antidiscrimination laws that are at least ostensibly neutral and of general applicability. The proliferation of public accommodation laws is a case in point. The number of states enacting laws broadly protecting sexual orientation and gender identity is increasing rapidly, and there are organizations devoted almost exclusively to expanding such laws as quickly as possible. *See, e.g.*, Movement Advancement Project ("MAP"), a nonprofit organization working "to speed equality and opportunity for all . . . by educating and influencing external change agents, such as policymakers and media, while simultaneously strengthening the organizations and movements advocating for change."

(http://www.lgbtmap.org/our-work-and-mission, last accessed Nov. 21, 2018).[6]

By means of blunt instruments such as these laws, champions of the new morality have now brought the power of the government to bear against one side of the ongoing controversy concerning same-sex marriage, in contravention of the teachings of *Reynolds* and *Smith*. Those cases were careful to note the limits of government authority: "'it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts

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[6] According to their website, at least nineteen (19) states and the District of Columbia now have laws that explicitly prohibit both sexual orientation and gender identity discrimination, while another three (3) states explicitly interpret their laws prohibiting sex discrimination to include sexual orientation or gender identity. (http://www.lgbtmap.org/equality-maps/non_discrimination_laws, last accessed Nov. 21, 2018). In addition, according to the National Center for Transgender Equality as of September 2014 there were over 200 cities and counties that explicitly prohibited gender identity discrimination even if their state did not. (https://transequality.org/sites/default/files/docs/kyr/PublicAccommodations_September2014.pdf, last accessed Nov. 21, 2018).

against peace and good order."" *Reynolds*, 98 U.S. 145, 163 (quoting the Virginia Bill); *see also Hosanna Tabor Lutheran Church v. EEOC*, 565 U.S. 171, 190 (2012) (distinguishing and finding *Smith* inapplicable to internal church decisions because "*Smith* involved government regulation of only outward physical acts").

Under the guise of public accommodation laws, however, beliefs and opinions became fair game. For example, in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), a New Jersey law forbidding discrimination in places of public accommodation was employed against the Boy Scouts in an attempt to force the Scouts to accept homosexual Scout leaders, even though, as one commentator observed, "the Boy Scouts are clearly not a 'place,' the Boy Scouts of America is not an 'accommodation' in the usual sense of the word, and the membership policies of private organizations are not 'public.'" David Bernstein, "Some Strange Consequences of Public Accommodations Laws," The Volokh Conspiracy (May 25, 2010), http://volokh.com/2010/05/25/some-strange-consequences-

of-public-accommodations-laws/ (last accessed Nov. 21, 2018).[7]

C. The antidiscrimination agenda.

It is tempting to view the rise of antidiscrimination laws and their application against people of faith as an accident, something of an unintended consequence. But there is much evidence to the contrary.

Almost twenty years ago, one commentator laid out the history of political correctness, arguing that it is a systematic and intentional effort to tear down the current order. Bill Lind, "The Origins of Political Correctness," Accuracy in Academia (February 5, 2000), https://www.academia.org/the-origins-of-political-correctness/ (last accessed Nov. 22, 2018). Mr. Lind concluded his analysis with a warning: "America today is in the throes of the greatest and direst transformation in its history. **We are becoming an ideological state, a country with an official state ideology**

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[7] The ploy almost succeeded. Dale won at the New Jersey Supreme Court, but this Court reversed in a narrow, 5-4 decision.

enforced by the power of the state." *Id.* (emphasis added).

Mr. Lind is not alone in discerning intent in this forced march toward a new state ideology. Justice Alito's dissent from denial of certiorari in the case of *Stormans, Inc. v. Wiesman*[8], which was joined by Chief Justice Roberts and Justice Thomas, suggests a similar trend. The case involved new regulations in Washington State requiring pharmacists to dispense certain medications, including abortifacients. Plaintiffs were Christians who objected to the requirement on moral and religious grounds. Reversing the trial court's finding in plaintiffs' favor, the Ninth Circuit flatly rejected their Free Exercise claims, applying rational basis review, and denied recovery under plaintiffs' alternative theories as well. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1075-76 (9th Cir. 2015).

Justice Alito began his dissent from denial of certiorari with a heavy tone: "This case is an ominous sign." He then commented on the purported neutrality of the regulations:

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[8]https://www.supremecourt.gov/opinions/15pdf/15-862_2c8f.pdf).

> There are strong reasons to doubt whether the regulations were adopted for—or that they actually serve—any legitimate purpose. And **there is much evidence that the impetus for the adoption of the regulations was hostility to pharmacists whose religious beliefs** regarding abortion and contraception **are out of step with prevailing opinion in the State**.

Id.

Justice Alito ended his introduction with a portentous warning: "If this is a sign of how religious liberty claims will be treated in the years ahead, **those who value religious freedom have cause for great concern**." *Id.* (emphasis added).

One need not look very hard to find hard evidence of intent to bring religious objectors to heel. Consider, for example, Tim Gill, the homosexual tech millionaire who has reportedly "poured an estimated $422 million into various gay

rights causes" and, after *Obergefell v. Hodges*[9], has targeted individuals and businesses that refuse to participate in same-sex wedding ceremonies. *See* B. Payton, "Ultra-Rich Gay Activist On Targeting Christians: It's time to 'Punish the Wicked,'" The Federalist (July 19, 2017), http://thefederalist.com/2017/07/19/ultra-rich-gay-activist-targeting-christians-time-punish-wicked/ (last accessed Nov. 22, 2018). Mr. Gill is quoted as saying with regard to those who oppose same-sex weddings, "**We're going to punish the wicked**." *Id.* (quoting Andy Kroll, "Meet the Megadonor Behind the LGBTQ Movement," The Rolling Stone (June 23, 2017), https://www.rollingstone.com/politics/politics-features/meet-the-megadonor-behind-the-lgbtq-rights-movement-193996/ (last accessed Nov. 22, 2018).

Not surprisingly, this hostility against religion has raised its head in attacks on the Free Exercise Clause itself, too. In a forum in the Yale Law Journal discussing hybrid rights claims after *Smith* one law professor openly questioned why religious

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[9] *Obergefell v. Hodges*, 576 U.S. __, 135 S. Ct. 2584 (2015).

groups should receive special protection at all. Frederick Mark Gedicks, *Three Questions about Hybrid Rights and Religious Groups,* 117 Yale L.J. Pocket Part 192 (2008), http://yalelawjournal.org/forum/three-questions-about-hybrid-rights-and-religious-groups. Professor Gedicks argued that secular minorities are just as vulnerable to abuse as religious minorities, and so should receive equal protection. "It is no answer that the First Amendment protects religious beliefs but not secular beliefs. In a radically pluralistic, multicultural society like the United States, the secular is arguably religious, and the religious is arguably secular."[10]

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[10] Professor Gedicks' observation is particularly insightful. In practice, religious acts now receive less protection than "secular" acts, and religion has become a vice, not a virtue in the eyes of the state.

II. This Court Should Grant the Writ to Address Serious Concerns of Religious Discrimination.

In light of this pattern of concerted effort to eradicate religious dissenters, the prosecution of the Kleins raises serious concerns of religious discrimination. In the end, the recent spate of antidiscrimination laws may themselves be evidence of discrimination against people of faith.

After all, it was not so much the Kleins' *action* that Oregon has punished as it was their *in*action -- that is, their refusal to do the bidding of the complainants, in violation of their convictions. Thus, their principles never did "break out into overt acts" at all, as *Reynolds* and *Smith* require. Moreover, as Petitioners make clear, they were specifically punished, in part at least, because they shared a Bible verse with the complainants. Pet. for Cert. at 6; *see also id.* at 13 (summarizing App. 68-82 and stating that court of appeals upheld damages based on "quoting a bible verse").

This singling out of pure religious speech -- quoting the Bible, no less -- for specific punishment

smacks of "punish[ing] the expression of religious doctrines [the government] believes to be false" -- something the *Smith* Court said the government could not do.[11] In the same vein, compelling the Kleins to create a cake for a wedding ceremony that violates their convictions resembles involuntary servitude more than freedom. The attempt to coerce allegiance to the government's opinion never ends well. As Justice Jackson famously observed in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943): "Compulsory unification of opinion achieves only the unanimity of the graveyard." *Id.* at 641.

A crusade by secular anti-religionists is still a crusade. Regardless whether the government is for or against a particular religion, government involvement with religion "tends to destroy government and to degrade religion," *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

When applied against people of faith, far-reaching antidiscrimination laws such as the

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[11] It also raises suspicions whether this law and others like it are truly content-neutral. The underlying hostility against the Kleins' religion seeps through at every turn.

Oregon public accommodations law raise serious concerns of government involvement with religion. Without adequate guidance from this Court, the lower courts will continue to disrespect the rights of citizens of faith and the Free Exercise Clause will be further eroded.

Religious freedom is the first freedom guaranteed under the First Amendment. It is a cornerstone of our republic. If this Court does not act to restore adequate protections for the free exercise of religion, the very foundations of the republic are placed at risk.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Thomas L. Brejcha
President
Thomas More Society
309 W. Washington
Suite 1250
Chicago, IL 60606
ph: 312-782-1680

Stephen M. Crampton
Crampton Legal Services, PLLC
Counsel of Record
P.O. Box 4506
Tupelo, MS 38803
ph: 662-255-9439
smcrampton@hotmail.com

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