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* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the individual rights of Freedom of Speech and Freedom of Religion. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Janus v. Am. Fed. of State, County, and Mun. Emp.*, 138 S.Ct. 2448 (2018); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018); *Arlene's Flowers v. Washington*, 138 S.Ct. 2671 (2018); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014); and *Knox v. Serv. Employees Int'l Union*, 567 U.S. 298 (2012).

SUMMARY OF ARGUMENT

The record in this case is clear. As the court below noted, the Kleins do not provide "off the shelf" wedding cakes. Instead, each cake they sell is a unique creation depending on the artistic design and execution of the Kleins. As such, creation of a custom wedding cake involves artistic expression protected by the First Amendment. Nonetheless, the Oregon court ruled that Oregon could force the Kleins to speak a particular message about same-sex "marriage" contrary to their sincerely held religious beliefs. This ruling conflicts with the compelled speech doctrine of this

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[1] All parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

Court. Review should be granted to ensure that the Court's promise in *Obergefell* of continuing protection for deeply-held religious beliefs is honored, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015), in the face of attempts by Oregon (and other states) to quash all dissenting voices on the contentious social issue of same-sex "marriage."

This case also presents an opportunity to reexamine this Court's rulings on the constitutional guaranty of free exercise of religion. The decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), eviscerated that guaranty. Of note, the *Smith* decision was immediately rejected by bipartisan action of Congress and by the President. Had the *Smith* decision upheld the exercise of a right against majoritarian action, then such a rejection would be of less relevance. But *Smith* upheld majoritarian interference with an individual right. That Congress and the President would seek to overturn such a decision is noteworthy. Reexamination of *Smith* is warranted as a measure of respect for the considered judgment of the coordinate branches of government that share in the responsibility for the interpretation of protection of the Constitution. Finally, reexamination of that decision is also warranted where the Court's decision was unmoored from the original understanding of Free Exercise.

REASONS FOR GRANTING THE WRIT

I. Review Is Warranted Because the Oregon Decision Introduces Confusion into the Compelled Speech Doctrine.

There can be little doubt that artistic design (whether or not edible) is entitled to First Amendment

protection. *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 231 (1977) ("But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters - to take a nonexhaustive list of labels - is not entitled to full First Amendment protection."). The Free Speech Clause "looks beyond written or spoken words as mediums of expression," *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995), to protect "pictures, films, paintings, drawings, and engravings" as pure speech, *Kaplan v. California*, 413 U.S. 115, 119 (1973). The state may not compel the Kleins to produce art just as it may "never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *See Hurley*, 515 U.S. at 569.

Indeed, the lower federal courts have decided that even the process of *creating* and *applying* a tattoo is itself an expressive activity fully protected by the first amendment. *E.g.*, *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010). Even though the customer has the "ultimate control" over the design of his tattoo, "there is no dispute that the tattooist applies his creative talents as well." *Id.*; *accord Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015); *Coleman v. City of Mesa*, 284 P.3d 863, 870 (Ariz. 2012) (en banc) (holding that tattooing is a protected expressive activity even when tattoo artists use merely "standard designs or patterns"). As the court below noted, the Kleins likewise do not use a "standard design" or sell "off the shelf" cakes. Each cake is a unique creation. This fact puts the compelled speech issue front and center. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1740

(Thomas, J., concurring in part and concurring in the judgment).

That the Kleins' artwork is "sold for profit does not prevent [it] from being a form of expression whose liberty is safeguarded by the First Amendment." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *Buckley v. Valeo*, 424 U.S. 1, 96 (1976); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n. 5 (1988); *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967). The Kleins maintain "an independent First Amendment interest in the speech, even though payment is received." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 794 n.8 (1988); *see also United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 468 (1995). This Court has protected for-profit authorship and publication, *see Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991); *New York Times*, 376 U.S. at 266; *Miami Herald*, 418 U.S. at 258. Thus, the for-profit status of the Kleins' artistic creations should not deprive their art of constitutional protection.

Nor should the Kleins' artwork lose the Constitution's protection merely because it is commissioned. This Court has not lessened protection for speakers merely because they were commissioned to carry another person's intended speech. *See, e.g., Riley*, 487 U.S. at 794 n.8 (professional fundraiser); *New York Times*, 376 U.S. at 266 (paid ad). The art still remains the Kleins' creative expression.

Traditional treatment of art confirms that the artist maintains an expressive interest even when commissioned. The *Sistine Chapel* ceiling expresses not

merely the theology of the Holy See but also the aesthetics of Michelangelo, and the *Last Supper* represents not merely the piety of Ludovico Sforza but also the design of da Vinci. The expression attributed to the artist is not reduced when the commissioner himself is portrayed as the subject. The *Portrait of Henry VIII* is still the painting of Hans Holbein the Younger, and *Las Meninas* represents the mind of Diego Velazquez as much as the Spanish crown that commissioned him.

It is no answer to argue that the Kleins' design aesthetic does not rise to the level of a Michelangelo. This Court has found that the First Amendment protects a great range of expression, from nude dancing (*cf.*, *Masterpiece Cakeshop*, 138 S.Ct. at 1743 (Thomas, J., concurring in part and concurring in the judgment) to what one member of the Court characterized as an "inarticulate grunt" (*Texas v. Johnson*, 491 U.S. 397, 432 (1989) (Rehnquist, C.J., dissenting)

At issue in this case is whether Oregon can compel the Kleins to produce a particular artistic design – one which speaks a message with which they disagree. This Court has consistently rejected such compelled speech. *E.g.*, *Janus* 138 S.Ct. at 2478, *Knox v. Serv. Employees Int'l Union*, 567 U.S. 298, 308-09 (2012); *Keller v. State Bar of Cal.,* 496 U.S. 1, 9–10 (1990); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. at 796–97; *Abood*, 431 U.S. at 234–35.

Review should therefore be granted in this case to reaffirm that just as there is no "abortion" exception to the Free Speech Clause (*see McCullen v. Coakley*, 134 S.Ct. 2518, 2541 (2014) (Scalia, J., concurring in the judgment)), neither is there a "same-sex wedding ceremony" exception.

II. Review Is Warranted Where the Court's Free Exercise Jurisprudence Has Been Rejected by the Coordinate Branches of Government, Which Have a Shared Responsibility for Interpretation of the Constitution.

This Court is not alone in its authority to interpret the Constitution. Members of Congress and the President all take an oath to uphold and defend the Constitution as well. This Court has recognized the role of Congress and the President in interpreting the Constitution, albeit in a limited manner. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015). But the Court should take special notice where Congress seeks to protect individual liberties against majoritarian action. *Cf.*, *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949) (constitutional protections of speech are meant to protect against legislative majorities or dominant political groups).

Shortly after this Court's decision in *Smith*, Congress and the President acted jointly to reinstate protection of free exercise of religion for individuals against legislative majorities or dominant political groups. *See City of Boerne v. Flores*, 521 U.S. 507, 512–15 (1997). The Religious Freedom Restoration Act was passed by voice vote in the House and by a vote of 97-3 in the Senate before being signed into law by President Clinton.

This bipartisan (and nearly unanimous) action of the Congress and the President to reinstate the protection of a liberty against political majorities is noteworthy. The Court, however, rejected this bipartisan effort and refused to reconsider its decision in *Smith*. *City of Boerne*, 521 U.S. at 536. Oddly enough, this

Court defended its decision in *Boerne* by noting "Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches." *Id.* at 535-36. Congress and the President have a role in the interpretation of the Constitution. Respect for the Constitution counsels paying attention to the original understanding of liberties that it sought to protect.

III. Review Is Warranted to Interpret the Free Exercise Clause in Accord with its Original Understanding.

The *Smith* decision effectively reinstated the view espoused in *Reynolds*, that the Free Exercise Clause protects only private belief and perhaps the right to recite the prayers of one's own choosing while behind the closed doors of a house of worship. *Compare Smith*, 494 U.S. at 876-77 *with Reynolds v. United States*, 98 U.S. 145, 164, 166 (1878). But this rewrites the Free Exercise Clause to protect only freedom of belief, something already accomplished by the Free Speech Clause. *See West Virginia Bd. Of Ed. v. Barnett*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). But the founding generation intended the Religion Clause to protect much more than mere private belief; they were intent on protecting freedom to act on that belief. In short, they sought to guaranty the protection of the right to *exercise* one's religion, not just espouse belief in its tenets.

Important clues to the scope of religious liberty the Founders recognized and intended to protect in the First Amendment can be found in the writings of James Madison, the record of the First Congress, the 1787 Constitution, and the actual practices of state governments at the time of the founding.

A. The founders protected the free exercise of religion because they recognized duty to God as superior to duty to government.

The free exercise of religion recognized and protected by the First Amendment reflects the Founders' view that the duty one owes to the Creator is both prior to and higher than any duty owed to government. Because this fundamental right pre-existed the Constitution, the Court should broadly accommodate Free Exercise claims. James Madison articulated the principal religious argument for the right to accommodation of religion in his famous attack on Patrick Henry's general assessment bill, *Memorial and Remonstrance.*

Madison defined religion as "the duty we owe to our Creator." J. Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), ¶ 11 reprinted in Phillip Kurland and Ralph Lerner, eds.5 THE FOUNDERS CONSTITUTION 83 1(987). Because beliefs cannot be compelled, he wrote, the "[r]eligion…of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it, as these may dictate." *Id.* According to Madison, the free exercise of religion is, by its nature, an inalienable right because a person's beliefs "cannot follow the dictates of other men" and because religion involves a "duty towards the Creator." *Id.* He went

on to explain, "This duty [towards the Creator] is precedent both in order of time and in degree of obligation, to the claims of Civil Society" and, therefore, "in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance." *Id.*

The right to free exercise of religion, Madison reasoned, precedes civil society and is superior even to legitimate government. In *City of Boerne v. Flores*, Justice O'Connor pointed out that "Madison did not say that duties to the Creator are precedent only to those laws specifically directed at religion, nor did he strive simply to prevent deliberate acts of persecution or discrimination. The idea that civil obligations are subordinate to religious duty is consonant with the notion that government must accommodate, where possible, those religious practices that conflict with civil law." *City of Boerne*, 521 U.S. at 561 (O'Connor, J., dissenting). The Founders appealed to the higher "Laws of Nature and Nature's God" to justify signing the Declaration of Independence. Decl. of Independence, ¶ 1. Free Exercise claims likewise entail duties to a higher authority. Because the Founders operated on the belief that God was real, the consequence of refusing to exempt Free Exercise claimants from even facially benign laws would have been to unjustly require people of faith to "sin and incur divine wrath." William Penn, *The Great Case for Liberty of Conscience* (1670) in WILLIAM PENN, THE POLITICAL WRITINGS OF WILLIAM PENN, introduction and annotations by Andrew R. Murphy (Indianapolis: Liberty Fund, 2002).

Madison, therefore, did not conceive "of a secular society in which religious expression is tolerated only

when it does not conflict with a generally applicable law," *City of Boerne*, 521 U.S. at 564 (O'Connor, J., dissenting), but rather he believed that citizens have the individual liberty under the Free Exercise Clause to live in accord with their faith. Madison observed that in matters of religion, a man "cannot follow the dictates of other men." *Memorial and Remonstrance*, 5 THE FOUNDERS CONSTITUTION 83.

B. The record of the First Congress supports interpreting the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs.

There is only one discussion in the records of the First Congress addressing the accommodation of religion from generally applicable laws. A special committee had proposed, as part of what eventually became the Second Amendment, a provision declaring "no person religiously scrupulous shall be compelled to bear arms." 1 Annals of Cong. 749 (J. Gales ed. 1834) (Aug. 17, 1789). The discussion that followed indicated that the Founders recognized, as part of their legal landscape, broad accommodation of religion.

Representative Jackson proposed to modify the original proposed exemption to require that those individuals pay for a substitute. 1 Annals of Cong. 750 (J. Gales ed. 1834) (proposal of Rep. Jackson, Aug. 17, 1789). Representative Sherman objected to Jackson's "upon paying an equivalent" modification, however, reminding his colleagues that "those who are religiously scrupulous at bearing arms are equally scrupulous of getting substitutes or paying an equivalent. Many of them would rather die than do either one or

the other." 1 Annals of Cong. 750 (J. Gales ed. 1834) (remark of Rep. Sherman, Aug. 17, 1789).

Moreover, Sherman's additional statement that "[w]e do not live under an arbitrary Government," *id.* implied that even the unconditional accommodation was unnecessary. For him, refusing to accommodate pacifist sects like the Quakers and Moravians from military service—those who were "religiously scrupulous" from bearing arms—would be the very definition of arbitrary government.

Sherman's view that Congress had nothing to do with religion was very common at the time the First Amendment was ratified. But even the position of the representatives who believed the provision was essential to Free Exercise, like Elias Boudinot who hoped the new government would show the world that the United States would not restrict anyone's religious exercise, "strongly suggests that the general idea of free exercise exemptions was part of the legal culture." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1501 (1990). That the Founders recognized and intended to accommodate religious conscience, which may sometimes conflict with federal practice, is further supported by the noticeable parallel between that proposal and the Oath Clause, which ended up in the 1787 Constitution.

C. The Oath Clause also supports an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs.

The 1787 Constitution itself contained an express recognition of accommodating religious exercise. The

Oath Clause contemplated a protection for the free exercise of religion in those situations in which the Founders foresaw a potential conflict between federal practice and individual liberties.

The Oath Clause of Article VI provides:

> The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath *or affirmation*, to support this Constitution.

U.S. Const., Art. VI (emphasis added). Similarly, Article II requires the President "[b]efore he enter on the Execution of his Office, he shall take the following Oath *or Affirmation*:--'I do solemnly swear (*or affirm*)…."

The exception for "affirmations" was an important addition to preserve religious exercise. Oaths were not sworn merely under penalty of secular punishment. The concept of an oath at the time of the founding was explicitly religious. To take an oath, one had to believe in a Supreme Being and some form of afterlife where the Supreme Being would pass judgment and mete out rewards and punishment for conduct during this life. Letter from James Madison to Edmund Pendleton, 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, (John P. Kaminski, *et al.* eds. (Univ. of Virginia Press (2009)) at 125 ("Is not a religious test as far as it is necessary, or would operate, involved in the oath itself?").

The exception to the Oath Clause was for adherents of those religious sects that read the Gospel of Matthew and the Epistle of St. James as prohibiting

Christians from swearing any oaths. In the absence of an exception, then, Quakers and Mennonites would have been barred from state and federal office. Their choice would have been to forego public office or accept the compulsion to take an action prohibited by their religion. The Constitution, however, resolved this concern by providing that public office holders could swear an oath *or* give an affirmation. This religious liberty exception to the oath requirement excited little commentary in the ratification debates. The founding generation was already comfortable with this type of exception and many states had similar provisions in their state constitutions. These provisions did not create a specific, limited accommodation, but instead recognized freedom of conscience in the instances the founding generation expected government compulsion to come into conflict with religious belief.

D. Historical practices at the time of the founding support an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs.

All the early state constitutions sought to guarantee the free exercise of religion. In every state the government had no power to prohibit peaceful religious exercise. Some state constitutions included the pragmatic Jeffersonian provision permitting governmental interference with religiously motivated acts against public peace and good order. But those state constitutions challenge the idea that religiously informed conduct as opposed to mere beliefs is not protected against generally applicable laws. *E.g.*, N.Y. Const. (1777), section 38; Mass. Const. (1780), art. II. Rather, in recognizing exceptions to free exercise even

where the individual's acts were religiously motivated, those provisos tend to confirm that the founding generation understood "free exercise" to mean "freedom of action" and to include conduct as well as belief.

State efforts to ensure religious liberty focused on preventing government compulsion of ordinary citizens to violate their religious beliefs. Thus, some state constitutions contained religious conscience exemptions. The constitution of New Jersey, for example, excused any person from paying religious taxes. Const. of N.J. (1776), art. 18. Delaware, New Hampshire, New York, and Pennsylvania included exemptions from militia service for Quakers in their state constitutions. Stephen M. Kohn, JAILED FOR PEACE, THE HISTORY OF AMERICAN DRAFT LAW VIOLATORS 1658-1985 (Praeger 1987). Statutes containing a similar exemption from militia service for Quakers were enacted in Georgia, Rhode Island, and Virginia. Margaret E. Hirst, THE QUAKERS IN PEACE AND WAR, (Garland 1972) at 331, 396-97. These early protections acknowledged the Quakers' higher duty to their Creator and accepted that Quaker religious belief forbade the use of arms and chose to honor religious liberty even at the expense of additional soldiers.

This protection of religious liberty is most clearly illustrated during the Revolutionary War, where the religious consciences of religiously motivated pacifists were treated with great delicacy. If ever there was a "compelling governmental interest," certainly it was the muster of every able-bodied man to prepare to defend towns from the oncoming British army. Yet George Washington would not compel Quakers to fight. Indeed, when some Quakers were forced to

march into Washington's camp at Valley Forge with muskets strapped to their back, Washington ordered their release. *Id.* at 396.

Washington's commitment to this accommodation of religious conscience was also demonstrated in the orders he issued to towns that were in the path of the British army's march. In January 1777, as the British army advanced on Philadelphia, Washington ordered "that every person able to bear arms (*except such as are Conscientiously scrupulous against in every case*) should give their personal service." George Washington, Letter of January 19, 1777, in JAILED FOR PEACE, *supra* at 10 (emphasis added). The call for every man to "stand ready…against hostile invasion" was not a simple request. The order included the injunction that "every person, who may neglect or refuse to comply with this order, within Thirty days from the date hereof, will be deemed adherents to the King of Great Britain, and treated as common enemies of the American states." Proclamation issued January 25, 1777, in W. B. Allen, GEORGE WASHINGTON, A COLLECTION, (1988) at 85. Again, however, the order expressly excused those "conscientiously scrupulous against bearing arms." *Id.* Even in the face of the most extreme need for militia to resist the British army, Washington's army would not compel Quakers and Mennonites to violate their religious beliefs.

These examples demonstrate that the founding generation understood religious liberty to mean that even generally applicable laws do not permit government to compel a citizen to violate his religious beliefs. The original understanding of the Free Exercise Clause thus forbids the State of Oregon from compelling the Kleins to violate their religious beliefs, and

certiorari is warranted here to reconsider the Court's decision in *Employment Division v. Smith.*

CONCLUSION

The lower courts are well on their way to creating a "same-sex wedding ceremony" exception to this Court's compelled speech jurisprudence. This case presents the opportunity to reject this anomaly in Free Speech jurisprudence. This case also presents this Court with the opportunity to return to an interpretation of the protection of the free exercise of religion that is faithful to the original understanding of the First Amendment.

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