

NO. 21-476

In the
Supreme Court of the United States

303 CREATIVE LLC; LORIE SMITH,
Petitioners,

v.

AUBREY ELENIS; CHARLES GARCIA; AJAY MENON;
MIGUEL RENE ELIAS; RICHARD LEWIS; KENDRA
ANDERSON; SERGIO CORDOVA; JESSICA POCOCK;
PHIL WEISER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF

PHILIP J. WEISER
Attorney General

ERIC R. OLSON
Solicitor General
Counsel of Record

Office of the Colorado
Attorney General
1300 Broadway, 10th Floor
Denver, Colorado 80203
Eric.Olson@coag.gov
(720) 508-6000

BILLY LEE SEIBER
First Assistant Attorney
General

VINCENT E. MORSCHER
SKIPPERE S. SPEAR
JACK D. PATTEN, III
Senior Assistant Attorneys
General

BIANCA E. MIYATA
Assistant Solicitor General
DANNY RHEINER
Assistant Attorney General

MELODY JOY FIELDS
Assistant Attorney General
Fellow

Counsel for Respondents

INTRODUCTION

The Company relied on *Klein v. Oregon Bureau of Labor & Industries*, 410 P.3d 1051 (Or. Ct. App. 2017) (*Klein I*), which this Court had vacated and remanded, to claim that a circuit split existed requiring this Court’s review. Pet. 13, 32; *Klein v. Or. Bureau of Lab. and Indus.*, 139 S. Ct. 2713 (2019) (*Klein II*).

Last week, the Oregon Court of Appeals issued a new opinion in that case that applied *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), and *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). *Klein v. Or. Bureau of Lab. and Indus.*, 317 Or. App. 138 (2022) (*Klein III*).

Based on undisputed facts relating to liability, the court affirmed the agency’s summary determination that the store’s refusal to serve a same-sex couple violated Oregon law. *Id.* at 155. Because Oregon’s public accommodations law did not allow for individual exceptions, it was neutral and generally applicable under *Fulton*. *Id.* at 152.

The parties disputed the facts relating to damages in a hearing. *Id.* at 144. Applying *Masterpiece*, the court reversed the damage award to the same-sex couple. *Id.* at 166. In the damages closing argument, the agency equated the store owners’ religious beliefs to “prejudice.” *Id.* at 161. The court held this statement—and the failure of the commissioner to disavow it—“departed from principles of neutrality” that *Masterpiece* required. *Id.* at 163. In addition, the court found that the agency awarded damages based on the store owner’s “expression of his views in the context of a religious dialogue” and, in so doing, also “departed from the requirement of strict neutrality.” *Id.* at 164. The

court remanded for additional proceedings and required them to occur “in a manner consistent with *Masterpiece*.” *Id.* at 167–68.

The decision in *Klein III* does not support the Company’s claim that this Court should intervene here to resolve a split in authority.

ARGUMENT

Klein III illustrates four principles weighing against this Court's grant of certiorari here.

First, Klein III shows the importance of a fully developed record to consider the application of *Masterpiece* and *Fulton*. The *Klein III* court relied heavily on the full record of agency proceedings to analyze how Oregon's law was applied in practice. The extensive record allowed the court to determine that the agency had not shown the required neutrality toward religion based on arguments and evidence presented at the hearing. The court did not need to guess about how the law worked or use incomplete statistics about enforcement in other cases, as the Company asks the Court to do here. The lack of factual development in the Company's pre-enforcement challenge to Colorado's law provides a sparse backdrop for addressing these complex constitutional questions compared to the record in *Klein III*.

Second, Klein III confirms that courts apply *Fulton* and *Masterpiece* to ensure regulators do not rely on anti-religious animus. The court scrutinized the Oregon agency's determination as *Masterpiece* requires. It found that the agency had impermissibly passed judgment on the store owners' religious beliefs and therefore reversed the agency's determination of disputed facts. And it made sure that the law was neutral and generally applicable under *Fulton*. The *Klein III* court applied these holdings, evaluated the agency's actions, and required a neutral approach to religion.

Third, Klein III highlights the difference between Colorado and other states. The Colorado Antidiscrimination Act authorizes only a small fine, while the Oregon law places no limit on any damages award. At most, a Colorado business faces a \$500 fine per violation under the Act. Colo. Rev. Stat. § 24-34-602(1)(a). Unlike Oregon, Colorado cannot impose significant monetary penalties.

Fourth, Klein III does not create a new conflict within the courts. The Oregon Court of Appeals applied this Court's precedent to hold that states may enforce neutral and generally applicable laws, so long as they do not demonstrate hostility to religion. Because the *Klein III* court did not employ a new approach to address a First Amendment challenge to an antidiscrimination law, the opinion does not deepen any tension among the courts' decisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP J. WEISER
Attorney General

BILLY LEE SEIBER
First Assistant Attorney
General

ERIC R. OLSON
Solicitor General
Counsel of Record

VINCENT E. MORSCHER
SKIPPERE S. SPEAR
JACK D. PATTEN, III
Senior Assistant Attorneys
General

Office of the Colorado
Attorney General
1300 Broadway
10th Floor
Denver, Colorado 80203
Eric.Olson@coag.gov
(720) 508-6000

BIANCA E. MIYATA
Assistant Solicitor General

DANNY RHEINER
Assistant Attorney General

MELODY JOY FIELDS
Assistant Attorney General
Fellow

Counsel for Respondents

February 4, 2022