No. 22-204

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 a Writ of Certiorari to the Oregon Court of Appeals

BRIEF FOR THE MANHATTAN INSTITUTE, COMMITTEE FOR JUSTICE, AND CATO INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether the creation and sale of custom wedding cakes constitute artistic expression.
2. 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, in violation of their sincerely held religious beliefs.

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INTEREST OF *AMICI CURIAE*[1]

The **Manhattan Institute** (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting economic freedom and opposing government speech compulsions. MI recently hired this brief's counsel of record to direct its constitutional studies program, which aims to restore constitutional protections for individual liberty and limited government.

The **Committee for Justice** (CFJ) is a nonprofit organization dedicated to promoting the rule of law and the Constitution's guarantees of individual liberty, including the right to both speak freely and refrain from speaking. CFJ understands that the vitality of the First Amendment is best measured by the protection it affords to people whose beliefs have been marginalized by the government, as is the case for Americans who believe that endorsing same-sex marriage is at odds with their religious faith.

The **Cato Institute** is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and issues the annual *Cato Supreme Court Review*.

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[1] All parties were given timely notice of and consented to the filing of this brief. No counsel for any party authored any of this brief; *amici* alone funded its preparation and submission.

This case concerns *amici* because it implicates the First Amendment's protection against compelled expressive activity. Note that this brief's counsel of record is one of only three lawyers to have filed in support of petitioners in both *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the use of state power to coerce individuals into violating their sincerely held religious beliefs. The petitioners here, Melissa and Aaron Klein, were forced to close their bakery because they refused to make a custom cake for a same-sex wedding. Oregon is applying the full weight of governmental authority under the mistaken notion that relinquishing First Amendment rights is the cost of doing business. But individuals aren't agents of the state and can't be forced to convey messages with which they disagree.

The facts surrounding this case echo the Court's decision in *Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n*, where another baker had to choose between freely expressing his beliefs and operating his business. 138 S. Ct. 1719 (2018). The Kleins owned and operated a cake shop, Sweetcakes by Melissa, until 2013, when this litigation forced them to close it. Cert. Pet. at 3. The Kleins ran their shop according to the same religious values they follow in all other aspects of their lives. Thus they were happy to provide custom cakes to all customers, regardless of sexual orientation, but could not in good conscience express a message celebrating a same-sex marriage. *Id.* at 7.

This case began when Rachel Cryer asked Aaron Klein to design a custom cake for her wedding to Laurel Bowman. Two years earlier, the Kleins had sold the couple—who they knew were gay—a wedding cake for the marriage of Cryer's mother (to a man). *Id.* at 8. Because their faith recognizes marriage as only between a man and a woman, Aaron apologized and politely declined Rachel's request. *Id.* Rachel and her mother left the shop, but Rachel's mother returned to confront Aaron about the couple's beliefs. *Id.* After a theological debate, Rachel's mother misquoted Aaron, telling Rachel that he had called her an abomination. *Id.* at 8–9.

Rachel and Laura found another local baker who happily accepted their cake commission and later testified that she considers herself an "artist" and her wedding cakes "artistic expression." *Id*. at 10. Despite the ease with which the couple obtained replacement cakes (plural), Laurel and Rachel filed a complaint with the Oregon Bureau of Labor and Industries (BOLI), alleging sexual-orientation discrimination.

Soon after, BOLI filed charges against the Kleins for violating Oregon's public accommodations law. *Id.* An administrative law judge (ALJ) rejected the Kleins' free-speech and free-exercise defense and granted summary judgment to BOLI. He awarded Rachel $75,000 and Laurel $60,000 for "emotional, mental, and physical suffering" *Id* at 11.

The Oregon court of appeals erroneously claimed that baking a cake is not "entitled to the same level of constitutional protection as pure speech or traditional forms of artistic expression." *Id.* at 12. The court misinterpreted expression itself, stating that "the expressive character of a thing must turn not only on how it is subjectively perceived by its maker, but also on how

it will be perceived and experienced by others." *Id.* at 13. The court thus affirmed the ALJ's damages award.

After this Court granted the Kleins' cert petition, vacated the Oregon court's order, and remanded for reconsideration in light of *Masterpiece Cakeshop*, the Oregon court of appeals again rejected the Kleins' First Amendment claims. The court found that BOLI had indeed acted with anti-religious animus but that this prejudice somehow only affected the damages portion of the case, such that the same biased agency was able to reimpose "only" $30,000 in damages. *Id.* at 15–16.

Cake design, like sculpture or painting, is a form of artistic expression protected by the First Amendment. Sculpting with fondant is as creative as sculpting with clay. Painting with buttercream is as expressive as painting with oils. By demanding that the Kleins create a custom cake in celebration of a same-sex wedding, the Oregon court has effectively undermined this Court's declaration that speech compulsions are just as unconstitutional as speech restrictions. *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (holding that even "the passive act of carrying the state motto on a license plate . . . . 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'") (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

Wooley also provides an important limiting principle to this constitutional protection: Although wedding (and other) vendors who produce and sell expressive works must be free to accept or reject *particular* jobs, this right does not apply to those who do not engage in protected speech. This Court can rule in favor of the Kleins on free-speech grounds without blocking the

enforcement of antidiscrimination law against caterers, hotels, limousine service operators, and the like.

The Oregon court's reimposed decision raises two important questions: one about the definition of expression itself, and another about government control over expression. Those concerns were not fully resolved in *Masterpiece Cakeshop*, but this case presents the Court a new vehicle for addressing them.

The Court has an opportunity here to clarify that expression like designing a wedding cake is protected by the First Amendment. It should also, in conjunction with *303 Creative LLC v. Elenis*, No. 21-476, define the limits of state-compelled speech when someone is forced to participate in an event that violates their religious beliefs.

ARGUMENT

I. Baking Custom Wedding Cakes Constitutes Artistic Expression That Is Protected by the First Amendment

This Court has long held that the First Amendment's protection of free expression encompasses far more than mere spoken or written word, and in fact covers a broad range of artistic expression and symbolic activities. *See Stromberg v. California*, 283 U.S. 359 (1931) (holding that California's ban on displaying red flags could not be justified as an attempt to prevent anarchist or communist violence); *Tinker v. Des Moines Indep. Cmty. Schl. Dist.*, 393 U.S. 503 (1969) (protecting the right of high school students to wear black armbands to protest the Vietnam War); *Cohen v. California*, 403 U.S. 15 (1971) (overturning a disturbing-the-peace conviction for wearing a jacket with the phrase "Fuck the Draft" inside a courthouse); *Texas v.*

Johnson, 491 U.S. 397 (1989) (holding that laws prohibiting desecration of the American flag violate the First Amendment); *Virginia v. Black*, 538 U.S. 343 (2003) (holding that even the racially charged act of burning a cross, without additional evidence of intent to intimidate, constitutes protected symbolic speech).[2]

Indeed, the Court has identified numerous forms of art as speech. *See*, *e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 790–91 (1989) (music without words); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65–66 (1981) (dance); *Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 557–58 (1975) (theater); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502–03 (1952) (movies). And art is speech regardless of whether it actually expresses any important ideas—or even any perceptibly coherent idea at all. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*—which upheld the right of parade organizers not to allow a gay-rights group to march because they did not want to endorse its message—even went so far as to say that the paint-splatter art of Jackson Pollock, atonal music of Arnold Schoenberg, and nonsense words of Lewis Carroll's Jabberwocky poem are "unquestionably shielded" by the First Amendment. 515 U.S. 557, 569 (1995).

Not all conduct that may arguably contain expressive content is protected by the First Amendment. *See Rumsfeld v. FAIR*, 547 U.S. 47, 62 (2004) ("Compelling a law school that sends scheduling e-mails for other

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[2] Even cases upholding restrictions on symbolic speech, such as *United States v. O'Brien*, 391 U.S. 367 (1968) (burning draft cards) or *Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (nude erotic dancing), have acknowledged the expressive content of the restricted speech and merely outlined relatively narrow contexts in which the state interest can outweigh the First Amendment interest.

recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is."). But custom cake-making fits easily within the protection described in *Hurley* and elsewhere.

As the petitioners here argue, cake-baking and design are artistic expression. Numerous schools throughout the world offer classes focused on mastering the delicate techniques necessary to shape cakes into works of art. Some, such as the French Pastry School and the Institute of Culinary Education, offer extensive cake-decorating programs lasting hundreds of hours and teaching everything from specific techniques for sculpting fondant to academic theories of color and design. In the French Pastry School's 16-week professional certification program, for example, students take classes on baking and pastry theory, cake-baking and construction, and advanced decorating techniques, including "elaborate gumpaste work, detailed piping techniques, French buttercream frosting, making rolled fondant from scratch and rolled fondant cake covering, chocolate decorations specifically tailored for cakes, pastillage and pressed sugar accents, pulled and blown sugar flowers and ribbons, mold making methods, airbrushing skills, figurine modeling and 3-D sculpted cakes." *Course Catalogue*, French Pastry School, http://bit.ly/2wjfBQW.

Those who buy wedding cakes are also keenly aware of the artistic work that goes into the process—and are willing to pay for it. In some major cities, the price tag can easily turn out to be over a thousand dollars. Sharon Naylor, *Wedding Cake Prices: 20 Ways to*

Save Big, Huffington Post, June 12, 2013, http://bit.ly/2wjy0xg. Customers are willing to pay significant sums not because a wedding cake's ingredients are themselves particularly valuable or unique, but because of the vision, creativity, and artistic skill involved. If the purpose of a wedding cake were simply to feed guests, couples would all buy sheet cakes at the local supermarket. Design and artistry are thus central to the value of a commissioned wedding cake.

Melissa Klein puts a great deal of artistic energy into creating wedding cakes, and each cake involves an individualized process. She does not create mere "off the shelf" cakes. Instead, she meets with each couple and spends hours sketching and designing a personalized cake, "followed by a multistep creative process of molding, cutting, and shaping." Cert. Pet. at 6–7. She forms a vision, fine-tuned for each couple, and creates something special just for them. To deny that Melissa's sketches, designs, and completed cakes are art is to deny the very nature of expression.

The Oregon Court of Appeals erroneously reasoned that public perception is of primary importance in determining whether conduct is expressive, and that "the Kleins have not raised a nonspeculative possibility that anyone attending the wedding will impute [the wedding cake's celebratory] message to the Kleins." *Id.* at 12. This runs counter to the Court's decision in *Hurley*: "A message need not be narrow, or succinctly articulable" to be considered expression. 515 U.S. at 569. If a message does not even need to be articulable, the public's perception of the message is irrelevant to its expressive nature. Indeed, an artistic work is no less expressive if the artist never shows it to anyone. The Kleins' art should be defined by the creativity and

thoughtfulness that goes into it, not by the public's subjective interpretations.

The Court has a chance here to clarify that expression such as custom cake-baking is protected under the First Amendment. Despite the rationales of the Oregon state court, creating bespoke wedding cakes is no less a protected art form than any other this Court has squarely ruled upon—and unlike a decision not to grant access to military recruiters at a law school.

II. The Court Must Clarify the Extent to Which States May Compel People to Participate in Ceremonies to Which They Object

In addition to defining what exactly qualifies as expression worthy of First Amendment protection, the second core legal question here is whether the compelled-speech doctrine applies to the refusals of professionals to engage in artistic expression that they believe would be an endorsement of same-sex marriage. The lower court mistakenly said that it does not.

More than 70 years ago, the Court established that people could not be forced to promote a message they disagree with, even if that message is saluting the flag or saying the Pledge of Allegiance. "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." *Barnette*, 319 U.S. at 642. When the government endorses a principle, even one as fundamental as patriotism, people cannot be compelled to support or convey it. The Court has numerous times reaffirmed that the First Amendment prohibits both compelled speech and speech restrictions: "The right to

speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley*, 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 637).

This understanding of "individual freedom of mind" makes considerable sense. Democracy and liberty rely on citizens' ability to preserve their integrity as speakers, thinkers, and creators—that is, the sense that their expression, including the expression that they "foster," and the expression for which they act as "courier[s]," *id.* at 714, is consistent with their beliefs. Thus, freedom of conscience is perhaps the most precious liberty in a liberal, democratic society. It forms a foundation on which the dignity of the individual rests.

In Soviet times, Aleksandr Solzhenitsyn implored his fellow citizens to "live not by lies" by refusing to endorse speech they believed false. Aleksandr Solzhenitsyn, *Live Not by Lies*, Wash. Post, Feb. 18, 1974, at A26. An individual must never "write, sign or print in any way a single phrase which in his opinion distorts the truth," never "take into hand nor raise into the air a poster or slogan which he does not completely accept," and never "depict, foster or broadcast a single idea which he can see is false or a distortion of the truth, whether it be in painting, sculpture, photography, technical science or music." *Id.* Solzhenitsyn noted that Soviet domination of conscience extended even to—and especially to—religion. As he put it, "You can pray freely. But just so God alone can hear." Aleksandr Solzhenitsyn, *The Gulag Archipelago* 37 (1973) (quoting Tanya Khodkevich, who received ten years in prison for writing those two sentences).

People whose consciences require them to refuse to distribute certain messages are constitutionally

protected. In *Wooley*, a family objected to having the state motto on their license plates and sought the freedom not to display it. *Id.* at 707–08, 715. Surely, no observer would have understood the motto—printed by the government on government-provided and government-mandated license plates—as the driver's own words or sentiments. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015). Yet the Court nonetheless held for the family. *Wooley*, 430 U.S. at 717.

The Court reasoned that a person's "individual freedom of mind" protects the "First Amendment right to avoid becoming the courier" for the communication of speech that they do not wish to communicate. *Id.* at 714, 717. People have the "right to decline to foster … concepts" with which they disagree, even when the government is merely requiring them to display a slogan on a state-issued license plate. *Id.* at 714.

Even "the passive act of carrying the state motto on a license plate," *id.* at 715, may not be compelled, because such compulsion "'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'" *Id.* (quoting *Barnette*, 319 U.S. at 642). Forcing drivers to display the motto made them "an instrument for fostering public adherence to an ideological point of view [they] find[] unacceptable." *Id.* This reasoning applies regardless of the slogan's content. *See, e.g.*, *First Covenant Church v. City of Seattle*, 840 P.2d 174, 193 (Wash. 1992) (Utter, J., concurring) (landmarks designation violated church's "freedom to express [itself] through the architecture of its church facilities"); *see also Ortiz v. New Mexico*, 749 P.2d 80, 82

(N.M. 1988) (*Wooley* protects drivers from displaying the slogan "Land of Enchantment").

Likewise, in *Hurley*, the Court found that a sponsor of a St. Patrick's Day parade did not have to include a group of gay, lesbian, and bisexual Irish-Americans, disregarding a state public-accommodations law. 515 U.S. 557 (1995). The parade itself was deemed to be "a form of expression," and compelled inclusion of the group would have forced the sponsor to bear a message—that the group's sexual orientation "merits celebration." *Id.* at 568, 574.

If the freedom from being forced to serve as a conduit for objectionable ideas extends to even the sort of passive act at issue in *Wooley*, and simple inclusion in *Hurley*, it must also apply to the compelled creation of expressive art at issue here. Forcing the Kleins to create artistry in celebration of same-sex marriage violates core First Amendment rights even more than allowing a group into a parade, or the imposition of a license plate with a quote hardly anyone could mistake as the driver's own personal opinion.

As discussed in Part I, *supra*, baking cakes—especially for weddings—is an artistic endeavor where individual artists go to painstaking efforts to express both a celebratory feeling and the unique tastes and characteristics of the couple getting married. The Kleins would not only be a conduit of a message in this context; they would be the *creators* of that message.

Simply stated, the government here is mandating, by law, that people produce art that violates their conscience and betrays their faith. This compulsion is just as unconstitutional as would be a ban on the creation of art that expresses unpopular opinions. The Kleins

are being forced to participate in ceremonies they disagree with and endorse views they find objectionable—on the dubious reasoning that only those who agree with the state as to the nature of marriage are entitled to operate small businesses that help celebrate weddings. The fact that the state of Oregon promulgates its policy so as to combat discrimination against same-sex couples—a goal *amici* freely acknowledge is a noble one—is irrelevant, because the government cannot pursue such a goal by violating the First Amendment.

The First Amendment does not allow the government to compel either the creation or dissemination of speech. Given that making wedding cakes is a form of artistic expression protected as strongly as literal speech, the opinion below is contrary to both the Constitution and this Court's longstanding precedent.

CONCLUSION

The substantive issues that were at play in *Masterpiece Cakeshop* remain unsettled. This case provides an excellent opportunity for the Court to clarify that people's First Amendment rights do not disappear when they use their artistic expression to serve customers. For the foregoing reasons, and those stated by the petitioners, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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