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 Writ of Certiorari to the Court of Appeals of Oregon

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR FAITH AND FAMILY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Institute for Faith and Family, as *amicus curiae*, respectfully urges this Court to grant the writ of certiorari and reverse the decision of the Oregon Court of Appeals.

Institute for Faith and Family (IFF) is a nonprofit, tax-exempt organization based in Raleigh, NC that exists to advance a culture where human life is valued, religious liberty thrives, and marriage and families flourish. *See* https://iffnc.com. IFF is interested in ensuring that American citizens are free to live and work according to conscience and religious faith.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment has never been confined within the walls of a church, like a wild animal needing to be caged. On the contrary, the Constitution broadly guarantees liberty of religion, conscience, and expression to citizens who participate in public life according to their moral, ethical, and religious convictions. We dare not sacrifice our priceless American freedoms through misguided—or even well-intentioned—government efforts to broaden LGBT

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. The parties have consented to the filing of this brief. *Amicus curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

rights. People of faith have not forfeited their right to conduct business according to conscience and core convictions.

Amicus curiae urges this Court to grant the Petition for three reasons. First, the religious liberty protections this Court set forth in *Masterpiece Cakeshop* must be reaffirmed and strengthened to combat the rising hostility experienced by Americans who hold traditional views about sexuality and marriage. Second, the Court should clarify that the First Amendment protection against compelled expression encompasses the personal services required to create an expressive product. Third, operating a business according to faith and conscience cannot rightly be characterized as invidious, irrational, or arbitrary discrimination.

ARGUMENT

I. THE RELIGIOUS LIBERTY PROTECTIONS OF *MASTERPIECE CAKESHOP* MUST BE REAFFIRMED AND STRENGTHENED DUE TO THE RISE IN ANTI-RELIGIOUS HOSTILITY EXPERIENCED BY RELIGIOUS AMERICANS ACROSS THE NATION.

There is certainly discrimination lurking behind the scenes in this case—not discrimination perpetrated *by* the Kleins but rather *against* them by the Oregon government. Such government discrimination results in an extraordinarily high human cost, as demonstrated by the torrent of recent

cases where people of faith have faced staggering legal penalties for daring to exercise their religious beliefs in the commercial sphere. *See, e.g., Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2018) (videographers); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019) (wedding invitation designers); *Chelsey Nelson Photography LLC v. Louisville/Jefferson County Metro Gov't,* 479 F. Supp. 3d 543 (W.D. Ky. 2020) (wedding photographer); *Updegrove v. Miyares*, 2022 U.S. App. LEXIS 8819 (4th Cir. 2022) (photographer), held in abeyance pending this Court's decision in *303 Creative LLC v. Elenis*, Docket No. 21-476 (website designer). *Masterpiece Cakeshop* petitioner Jack Phillips faces continuing legal battles even after his victory in this Court. This partial list will only grow without this Court's intervention. See https://adflegal.org/case/scardina-v-masterpiece-cakeshop (lawsuit pending in Colorado state court for refusal to create a gender transition cake).

In this case, the prosecutor's closing argument characterized the Kleins' religious beliefs as "prejudice" and imposed damages for their quotation from the Bible. This is unconscionable in a free society and demands this Court's attention to reaffirm the core constitutional principles protecting freedom of thought, speech, and religion. In *Obergefell*, the majority assured dissenters their First Amendment rights would remain intact (*Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015)). Instead, that case set off a firestorm of threats to the liberty to think, speak, and live according to conscience. Even some LGBT advocates admit that judicial redefinition of marriage

could impose a social view not shared by a majority of citizens by creating "a disquieting new breed—a 'right' to a *word*, *an unprecedented notion having inauspicious potential for regulating speech and thought*." Daniel Dunson, *A Right to a Word? The Interplay of Equal Protection and Freedom of Thought in the Move to Gender-Blind Marriage*, 5 Alb. Govt. L. Rev. 552, 599-600 (2012) (emphasis added). The First Amendment implications are frightening, as this case demonstrates.

A. This Court has required equal treatment for religion in many contexts.

The government may not punish religious doctrine it believes to be false. *United States v. Ballard*, 322 U.S. 78, 86-88 (1944). Oregon punished the Kleins for adhering to their religious faith. This creates an ironic and invidious *inequality* that contrasts with the LGBT movement's "equality" mantra. Such blatant viewpoint discrimination is anathema to the First Amendment and ultimately destroys liberty for everyone. "If Americans are going to preserve their civil liberties . . . they will need to develop thicker skin. . . . A society that undercuts civil liberties in pursuit of the 'equality' offered by a statutory right to be free from all slights will ultimately end up with neither equality nor civil liberties." David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223, 245 (2003).

In other contexts, this Court has recognized and struck down attempts to treat religion less favorably than its secular counterparts or to condition otherwise available benefits on sacrificing fidelity to religious convictions. Examples include *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022) (private school tuition); *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (covid-19 restrictions); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2256 (2020) (private school tuition); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (playground refurbishing funds). "At a minimum," the Free Exercise Clause applies if a law "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) (animal sacrifices).

In *Masterpiece Cakeshop*, this Court advised that future disputes "be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market." *Masterpiece Cakeshop*, 138 S. Ct. at 1732. At the same time, marriage is an institution saturated with religious significance. In the context of providing personal creative services for weddings, how can any court possibly find illegal *discrimination* without itself *discriminating* against religion? Anti-discrimination laws that encompass sexual orientation are inherently hostile to and discriminate against those who hold the religious belief that marriage can only be defined as the union of one man

and one woman. It is one thing to require a business to sell ready-made products off the shelf to anyone who pays the purchase price, but it is quite another to demand that an artist *personally* create a custom-designed product. Hostility is undeniably baked into that "cake" and smacks of prohibited viewpoint discrimination.

B. This Court should reconsider *Smith*, particularly in the context of anti-discrimination laws that encompass sexual orientation or other categories that predictably implicate religion.

Just weeks ago, this Court observed that, in cases where a plaintiff has proven that a government's "official expressions of hostility" to religion "accompany laws or policies burdening free exercise," it has "set aside" such policies "*without further inquiry*." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 n. 1 (2022) (emphasis added), citing *see Masterpiece Cakeshop,* 138 S. Ct. at 1732. That comment underscores the urgent need for this Court to reaffirm its commitment to religious liberty by revisiting *Emp't Div. v. Smith*, 494 U.S. 872 (1990). *Smith* fails to protect religion unless the political branches craft exemptions. *Smith*'s approach is a radical departure from this Court's longstanding Free Exercise jurisprudence and its time-honored role in protecting religious minorities from majoritarian oppression—the very purpose of the Bill of Rights. *Smith* severely restricted religious liberty by limiting

violations to situations where it is clear the government has intentionally targeted religion.

Smith treats generally applicable laws as "presumptively neutral, with religious accommodations a form of special preference." Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1133 (1990). But there is nothing religiously neutral about a policy that so openly and obviously disparages common religious convictions about the nature of marriage. Hostile government targeting of religion is discernible in anti-discrimination laws that protect categories defined by conduct many faith traditions consider immoral. *Lukumi Babalu*, 508 U.S. at 578 (Blackmun, J., concurring). Oregon's policy fails even under that standard, because it indisputably "discriminates against" a specific religious belief.

Smith falls short of protecting conscientious objectors and even religious organizations unless the political branches craft exemptions. Sometimes the political process can efficiently carve out exemptions. But when this Court put its thumb on the scale in the national debate over marriage, it could not lift a finger to relieve the burdens it created. "The majority's decision imposing same-sex marriage cannot . . . create any such accommodations." *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting). This Court *bypassed* the political process by unilaterally redefining marriage but, because of *Smith*, the *entire burden* now falls on the political process to protect religious liberty through legislative exemptions. "[T]he People could have considered the religious

liberty implications" of redefining marriage, but instead this Court "short-circuit[ed] that process, with potentially ruinous consequences for religious liberty." *Id*. at 2639 (Thomas, J., dissenting).

The First Amendment restrains the *legislative branch*—the very entity now charged with protecting religious liberty under *Smith*. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy." *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Accordingly, "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility." *Smith*, 494 U.S. at 902 (O'Connor, concurring). In our nation today, the traditional religious view of marriage—one man, one woman—is often viewed with extreme hostility. Restoring the compelling interest test would ensure the majority does not run roughshod over citizens and organizations that hold this view.

The Kleins were punished for their *speech*—for *religious* speech (one Bible verse), because it offended a customer. No one escapes offense in a free society. This Court has flatly rejected the argument that "[t]he Government has an interest in preventing speech expressing ideas that offend." *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (even hurtful or outrageous speech is protected). Rulings like the one in Oregon virtually ensure the government's ability to freely engage in constitutionally prohibited viewpoint discrimination. Oregon may not agree with the

Kleins' religious beliefs, but the Constitution demands that courts protect their freedom to decide for themselves "the ideas and beliefs deserving of expression, consideration, and adherence. . . . Government action that . . . requires the utterance of a particular message favored by the Government, contravenes this essential right." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 646 (1994).

II. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT THE FIRST AMENDMENT FULLY PROTECTS THE PERSONAL SERVICES NECESSARY TO CREATE EXPRESSIVE PRODUCTS.

The Kleins' design, preparation, and crafting of a custom cake constitutes expressive, artistic speech worthy of broad First Amendment protection**.** This case is "a glaring example of an encroachment on the freedom of speech." Haley Holik, *Note: You Have the Right to Speak by Remaining Silent: Why a State Sanction to Create a Wedding Cake is Compelled Speech*, 28 Regent U.L. Rev. 299, 301 (2015-2016). As a condition of remaining in business, Oregon compels Petitioners to personally create a message they believe is gravely wrong. During the first round of litigation, the Oregon Court of Appeals admitted that "[i]f BOLI's order can be understood to compel the Kleins to create pure 'expression' that they would not otherwise create," this Court would likely consider it a content-based regulation subject to strict scrutiny. *Klein v. Oregon Bureau of Labor and Industries*, 289 Ore. App. 507, 534 (2017). In a similar case, the Washington Supreme Court begrudgingly

acknowledged in a footnote that "a handful of cases protecting various forms of art"[2] appeared to "provide surface support" for the florist's position. *State v. Arlene's Flowers,* 389 P.3d 543, 559 n.13 (Wash. 2017). This was a radical understatement of applicable authority, but the court refused to look beneath that surface and summarily dismissed the argument that custom designs are anything but unprotected conduct. The Washington and Oregon state courts jettisoned the subtle but critical distinction between conduct that *is itself* expressive and the action required to *create* expression. Both fall well within the sphere of the First Amendment.

Precedent in multiple jurisdictions, including this Court, confirms that custom visual artwork is protected expression.[3] "It goes without saying that

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[2] *Ward v. Rock Against Racism*, 491 U.S. 781, 790-91 (1989) (music without words); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975) (theater); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010) (tattooing); *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 627-28 (7th Cir. 1985) (stained glass windows on display in an art gallery at a junior college).

[3] *See, e.g., Kaplan v. California*, 413 U.S. 115, 119-120 (1973) (pictures, films, paintings, drawings, engravings); *Anderson v. City of Hermosa Beach*, 621 F.3d at 1060-61 (tattoos); *White v. City of Sparks*, 500 F.3d 953, 955-56 (9th Cir. 2007) (artist's original painting); *Comedy III Productions v. Gary Saderup, Inc.*, 21 P.3d 797, 804 (Cal. 2001) (silk-screened t-shirts); *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) (painting, photography, prints, sculpture); *Mastrovincenzo v. City of New York*, 435 F.3d 78, 82, 97 (2d Cir. 2006) (graffiti-painted clothing); *ETW Corp. v. Jireh Publ'g*, 332 F.3d 915, 924 (6th Cir. 2003) (artist's prints of golfer Tiger Woods); *Univ. of Ala. Bd. of*

artistic expression lies within . . . First Amendment protection." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (1998) (Souter, J., dissenting).

But First Amendment protection for creative products does not exist in a vacuum. As confirmed by abundant case law, it extends to "creating, distributing, or consuming" speech. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 n. 1 (2011) (video games). Pictures do not paint themselves. Books do not write themselves. Even "using a camera to create a photograph" is like "applying pen to paper" or "brush to canvas"—and in each case "*the process of creating the end product cannot reasonably be separated from the end product for First Amendment purposes*." *Ex parte Thompson*, 442 S.W.3d 325, 337 (Tex. Crim. App. 2014) (emphasis added). As the Ninth Circuit explained, "writing words on paper" or "painting a painting" might be "described as conduct," but they are inseparable from the final creative product, and therefore "we have never seriously questioned that the[se] processes…are purely expressive activities entitled to full First Amendment protection." *Anderson v. City of Hermosa Beach*, 621 F.3d at 1061-62. *See also Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1204 (9th Cir. 2018) (creation of audiovisual recordings is "inextricably intertwined" with the finished recording and therefore "entitled to First Amendment protection as purely expressive activity"). For First Amendment protection to have meaning, the Constitution "must also protect the act

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Trs. v. New Life Art, 683 F.3d 1266, 1276 (11th Cir. 2012) (painting of football scenes with university team uniforms).

of creating that material." *Fields v. City of Phila.*, 862 F.3d 353, 358 (3d Cir. 2017). "The act of *making* an audio or audiovisual recording" is protected "as a corollary of the right to disseminate the resulting recording. *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012).

"[E]ven the purest of pure speech involves physical movements and activities that could be described as conduct." Richard F. Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly Through the Lens of Telescope Media*, 99 Neb. L. Rev. 58, 70 (2020). Recent court decisions have ruled in favor of creative professionals. Like Petitioners' custom cake designs, their creative efforts and the final expressive product are inextricably linked. Producing wedding videos is protected expression. *TMG*, 936 F.3d at 756. The *TMG* plaintiffs did not merely "plant a video camera at the end of the aisle and press record"—they intended "to shoot, assemble, and edit the videos with the goal of expressing their own views about the sanctity of marriage." *Id.* at 751. Designing wedding invitations (*B&N*, 448 P.3d at 910) is also protected expression. The Phoenix Ordinance in *B&N* would have forced plaintiffs "to *personally* write, paint and create artwork celebrating a same-sex wedding . . . to design and create invitations that enable and facilitate the attendance of guests at a same-sex wedding." 448 P.3d at 922. In *Masterpiece Cakeshop*, "[f]orcing Phillips to make custom wedding cakes for same-sex marriages requires him to . . . acknowledge that same-sex weddings are 'weddings' and suggest that they should be celebrated—the precise message

he believes his faith forbids." 138 S. Ct. at 1744 (Thomas, J., concurring in part and in the judgment).

"When the law strikes at free speech it hits human dignity . . . when the law compels a person to say that which he believes to be untrue, the blade cuts deeper because it requires the person to be untrue to himself, perhaps even untrue to God." Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 59. Oregon's ruling does a grave disservice to both creative artists and their customers. If the artist is repelled by the message he must create, the final product is unlikely to be satisfactory. Coercion produces a counterfeit. That is one reason courts are loathe to order specific performance as a remedy for breach of a contract for personal services—especially where artistic expression is required.[4] The New York Court of Chancery, declining to compel a singer's performance for an Italian opera, explained how difficult it would be for a judge "to determine *what effect coercion might produce upon the defendant's singing*, especially in the livelier airs; although the fear of imprisonment would unquestionably deepen his seriousness in the graver parts of the drama." *De Rivafinoli v Corsetti*, 4 Paige Ch. 264, 270 (1833) (emphasis added).

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[4] *See, e.g., Hamblin v. Dinneford*, 2 Edw. Ch. 529, 533-534 (N.Y. 1835) (actor); *Lumley v. Wager*, Ch. App., 42 Eng. Rep. 687 (1852) (singer); *Duff v. Russell*, 14 N.Y.S. 134 (Super. Ct. 1891) (actress/singer); *Okeh Phonograph v. Armstrong*, 63 F.2d 636 (9th Cir. 1933) (jazz player); *Beverly Glen Music v. Warner Communications*, 178 Cal. App. 3d 1142, 1145 (1986) (singer) ("Denying someone his livelihood is a harsh remedy."). *See also* 5A Corbin, Contracts (1964) § 1204.

III. OPERATING A PRIVATE BUSINESS IN ACCORDANCE WITH CONSCIENCE AND RELIGIOUS CONVICTIONS IS NOT THE INVIDIOUS, IRRATIONAL, ARBITRARY DISCRIMINATION THAT MAY BE LAWFULLY PROHIBITED.

The Kleins did not engage in unlawful discrimination by refusing to custom design a wedding cake for a same-sex couple, based on the baker's conscientious objections to the message. Their refusal to create a religiously objectionable message does not constitute invidious, unlawful discrimination—on the contrary, it is constitutionally protected speech. As Justice Alito warned, "those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes" but "if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools." *Obergefell*, 135 S. Ct. at 2642-43 (Alito, J., dissenting). Oregon has unquestionably treated the Kleins as bigots—and *that* could be construed as invidious discrimination.

Action motivated by conscience and/or religious conviction is not arbitrary, irrational, or unreasonable. In a nutshell, it is simply not "discrimination." Public accommodation laws can and must be carefully crafted to prevent discrimination without infringing on the free speech and free exercise rights of small business owners. Anti-discrimination laws are designed to be a protective shield, not a blunt instrument to be wielded as a weapon. Oregon uses its law as a sword to cut people of faith out of the

marketplace and relegate them to second-class citizenship. Anti-discrimination principles should never be applied so expansively as to eviscerate First Amendment rights. Oregon's law extends far beyond the "meal at the inn" promised by common law and encroaches on the Kleins' right to conduct their business free of a mandate to violate conscience.

The Kleins operate a small business that they wish to conduct with integrity, setting company policies consistent with conscience, moral values, and religious faith. Not everyone shares those values. But cutting conscience out of the commercial sphere is a frightening prospect for both customers and business owners. It is hardly "discrimination" to decline to custom design a morally objectionable message.

A. Respect for individual conscience is deeply rooted in American history.

The American legal system has traditionally respected conscience, as illustrated by many statutory and judicially crafted exemptions. This Court, acknowledging man's "duty to a moral power higher than the State," once quoted the profound statement of Harlan Fiske Stone (later Chief Justice) that "both morals and sound policy require that the state should not violate the conscience of the individual." *United States v. Seeger*, 380 U.S. 163, 170 (1965), quoting Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919). Indeed, "nothing short of the self-preservation of the state should warrant its violation," and even then it is questionable "whether the state which preserves its life by a settled policy of

violation of the conscience of the individual will not in fact ultimately lose it by the process." *Id*. It is hazardous for any government to crush the conscience of its citizens. When that happens, it tends to breed a nation of persons who lack *conscience*, forcing religious citizens and even organizations to set aside conscience or face ruinous penalties.

No American should ever have to choose between allegiance to the state and faithfulness to God as a condition of participating in public life. Oregon tramples the conscience and integrity of the Kleins by compelling them to personally create a message about marriage they consider immoral. Yet Oregon's state constitution, like many others,[5] links free exercise to liberty of conscience:

> All men shall be secure in the Natural right, to worship Almighty God

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[5] *See* A.R.S. Const. Art. II, § 12; Ark. Const. Art. 2, § 24; Cal. Const. art. I, § 4; Colo. Const. Art. II, Section 4; Del. Const. art I, § 1; Ga. Const. Art. I, § I, Para. III; Idaho Const. Art. I, § 4; Illinois Const., Art. I, § 3; Ind. Const. Art. 1, §§ 2, 3; Kan. Const. B. of R. § 7; Ky. Const. § 1; ALM Constitution Appx. Pt. 1, Art. II; Me. Const. Art. I, § 3; MCLS Const. Art. I, § 4; Minn. Const. art. 1, § 16; Mo. Const. Art. I, § 5; Ne. Const. Art. I, § 4; Nev. Const. Art. 1, § 4; N.H. Const. Pt. FIRST, Art. 4 and Art. 5; N.J. Const., Art. I, Para. 3; N.M. Const. Art. II, § 11; NY CLS Const Art I, § 3; N.C. Const. art. I, § 13; N.D. Const. Art. I, § 3; Oh. Const. art. I, § 7; Ore. Const. Art. I, §§ 2, 3; Pa. Const. Art. I, § 3; R.I. Const. Art. I, § 3; S.D. Const. Article VI, § 3; Tenn. Const. Art. I, § 3; Tex. Const. Art. I, § 6; Utah Const. Art. I, § 4; Vt. Const. Ch. I, Art. 3; Va. Const. Art. I, § 16; Wash. Const. art. 1, § 11; Wis. Const. Art. I, § 18; Wyo. Const. Art. 1, § 18.

> according to the dictates of their own *consciences*.
>
> No law shall in any case whatever control the free exercise, and enjoyment of religious opinions, or interfere with the rights of *conscience*.

Ore. Const. Art. I, §§ 2, 3 (emphasis added). The Oregon Court of Appeals disregards the role of conscience in American law.

B. Anti-discrimination provisions have expanded to cover more places and protect more groups—complicating the legal analysis and triggering collisions with the First Amendment.

Antidiscrimination policies have ancient roots. These laws initially targeted racial discrimination. James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 Vand. L. Rev. 961, 965 (2011). Primary responsibility shifted to the states after this Court invalidated the Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875). *The Civil Rights Cases*, 109 U.S. 3 (1883). *See Just Shoot Me,* 64 Vand. L. Rev. at 965 n. 7. Later federal attempts succeeded but again highlighted racial equality. The Civil Rights Act of 1964 "was enacted with a spirit of justice and equality in order to remove racial discrimination from certain facilities which are open to the general public." *Miller v. Amusement Enters.,*

Inc., 394 F.2d 342, 352 (5th Cir. 1968); *see* Civil Rights Act of 1964, 42 U.S.C. § 2000a.

But now, anti-discrimination laws have expanded exponentially, covering more places and adding more protected categories. The vast expansion of anti-discrimination laws complicates the legal analysis and increases the potential to encroach on First Amendment rights. Commentators have long observed the "conflict between the statutory rights of individuals against private acts of discrimination and the near universally-recognized right of free exercise of religion." Jack S. Vaitayanonta, Note: *In State Legislatures We Trust? The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 Colum. L. Rev. 886, 887 (2001); *see also* Harlan Loeb and David Rosenberg, *Fundamental Rights in Conflict: The Price of a Maturing Democracy*, 77 N.D. L. Rev. 27, 29 (2001); Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223 (urging resolution in favor of First Amendment liberties).

As anti-discrimination provisions expanded over the years, the potential encroachment on religious liberty escalated. The Massachusetts law at issue in *Hurley* was derived from the common law principle that innkeepers and others in public service could not refuse service without good reason. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 571 (1995). But like many other states today, Massachusetts had broadened the scope to add more categories and places. *Id.* at 571-572. The same trend emerged in *Dale*. The traditional "places"

moved beyond restaurants, lodging, and transportation to commercial entities and even membership associations—increasing tensions with the First Amendment. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000). Such vast expansion of covered categories occurred with little analysis of the difference between race and newly protected classes—or as to how or when the criteria might be legitimately applied. A current District of Columbia statute, e.g., prohibits discrimination based on "race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, or place of residence or business of any individual." D.C. Code § 2-1402.31(a); *see Just Shoot Me*, 64 Vand. L. Rev. 961 at 966; *Dale*, 530 U.S. at 656 n. 2.

It is hardly "arbitrary" discrimination to avoid promoting a cause for reasons of religious conscience. Discrimination is arbitrary where an entire class of persons is excluded based on irrelevant factors. Where widespread refusals deny an entire group access to basic public goods and services—lodging, food, transportation—protective measures are reasonable. This Court rightly upheld the civil rights legislation Congress passed to eradicate America's long history of racial discrimination. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). But as protection expands to more places and people, so does the potential to employ anti-discrimination principles to suppress traditional viewpoints and impose social

change on unwilling participants in violation of their religious liberty.

The clash between anti-discrimination principles and the First Amendment is particularly volatile when morally controversial categories are protected and people of faith are swept within the ambit of the law. Political and judicial power can be deployed to squeeze religious views out of public debate about controversial social issues. Religious voices have shaped views of sexual morality for centuries. These views about right and wrong are deeply personal convictions that influence the way people live their daily lives, both privately and in public. Government has no right to legislate a view of sexual morality and then demand that even religious organizations facilitate it.

The clash between anti-discrimination rights and religious liberty places competing cultural values squarely before the courts. When the D.C. Circuit addressed the question "of imposing official orthodoxy on controversial issues of religious, moral, ethical and philosophical importance, upon an entity whose role is to inquire into such matters" the court concluded that "[t]he First Amendment not only ensures that questions on difficult social topics will be asked, it also *forbids government from dictating the answers*." *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.,* 536 A.2d 1, 24 (D.C. 1987) (emphasis added). Anti-discrimination rights, whether statutory or derived from constitutional principles, may conflict with core religious liberty rights—as they do in this case.

C. Like many successful Free Exercise cases, this case involves *conscientious objectors*—not civil disobedience.

Conscientious objector claims are "very close to the core of religious liberty." Nora O'Callaghan, *Lessons From Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right*, 39 Creighton L. Rev. 561, 615-616 (2006). Religious entrepreneurs should never have to choose between allegiance to the state and faithfulness to God when their beliefs can be accommodated without sacrificing public peace or safety.

Prior to *Smith*, 494 U.S. 872, many winning cases involve conscientious objectors—believers seeking freedom from state compulsion to commit an act against conscience. *Girouard v. United States,* 328 U.S. 61 (1946) (military combat); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Sabbath work); *Barnette*, 319 U.S. 624 (flag salute); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (high school education). Many losing cases involve "civil disobedience" claimants seeking to engage in illegal conduct, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor). *Lessons From Pharaoh*, 39 Creighton L. Rev. at 564. *Smith* repeatedly emphasized the *criminal* conduct at issue. *Smith,* 494 U.S. at 874, 878, 887, 891-892, 897-899, 901-906, 909, 911-912, 916, 921.

Unlike the *Smith* plaintiffs, Petitioners do not seek to commit a criminal act, but to peacefully

decline business under circumstances that would require them to violate conscience. Courts should allow the free market to work. As even a quick internet search reveals, there are many businesses that expressly cater to same-sex ceremonies. *See, e.g.*, www.lgbtweddings.com (listing vendors in numerous states, including Oregon); www.engaygedweddings.com (same).

America was founded by people who risked their lives to escape religious tyranny and observe their faith free from government intrusion. This Court's decision has broad ramifications for others burdened by legal directives to act against conscience. Considering the high value that courts, legislatures, and state constitutions have historically assigned to conscience and religious liberty, it is incumbent upon this Court to protect the right to live, work, and worship according to conscience, and to decline to participate in morally objectionable events or messages. Congress has ranked religious freedom "among the most treasured birthrights of every American." Sen. Rep. No. 103-111, 1st Sess., p. 4 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News, at pp. 1893-1894. As this Court eloquently explained: "The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of *conscience* there is a moral power higher than the State." *Girouard v. United States*, 328 U.S. at 68 (emphasis added).

CONCLUSION

This Court should grant the Petition and reverse the decision of the Oregon Court of Appeals.

Respectfully submitted,

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