No. 22-204

In the Supreme Court of the United States

MELISSA ELAINE KLEIN, ET VIR.,
PETITIONERS,

v.

OREGON BUREAU OF LABOR AND INDUSTRIES,
RESPONDENT.

On Petition for Writ of Certiorari to the Oregon Court of Appeals

BRIEF OF *AMICI CURIAE* UNITED STATES SENATORS AND REPRESENTATIVES IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Petitioner Melissa Klein is an artist in cake and icing. Her works require skill and ingenuity; each work goes beyond "food" to become her artistic handiwork. *See* Figs. A-C, Appendix B, at Appx. 2a-3a (pictures of Klein's work and process).

Klein is also one of millions of Americans with religious beliefs who "advocate with utmost, sincere conviction that, by divine precepts," traditional marriages are "central to their lives and faiths." *Obergefell* v. *Hodges*, 576 U.S. 644, 672 (2015). As such, Klein joins other litigants that have asked this Court to make good on its promise: the promise that the First Amendment will afford them "proper protection" as they try to live and work peacefully within "the principles that are so fulfilling and so central to their lives and faiths." *Ibid.*

Melissa and Aaron Klein ran a small bakery in Oregon; they declined a request "to design and create a wedding cake" for a same sex wedding.[2] The Kleins

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel for *amici curiae* certifies that Petitioners and Respondents have filed blanket consents to the filing of amicus briefs, and that counsel of record received timely notice of the intent to file the brief under the Rule. Pursuant to Rule 37.6, counsel for *amici curiae* further certifies that no counsel for a party authored the brief in whole or in part. No person other than the *amici curiae* or their counsel made a monetary contribution to fund the preparation or submission of this brief.

[2] Both *Klein* and *Masterpiece* involve requests to "design and create" a cake with custom decorations, not merely to deliver a particular food. *Klein v. Oregon Bureau of Lab. & Indus.*, 289 Or. App. 507, 536, 410 P.3d 1051, 1070 (2017), *cert. granted, judgment vacated,* 204 L. Ed. 2d 1107, 139 S.Ct. 2713 (2019);

had sold a custom-designed cake to members of the same family for an opposite-sex marriage. But Aaron Klein told a set of potential clients that Aaron and Melissa's religious beliefs prevented them from fulfilling this design request.

The Board of Labor and Industries (BOLI) fined the Kleins $135,000 for violating Oregon's public accommodations law, ORS 659A.403 (2011). The Oregon Court of Appeals recognized that BOLI's proceedings did not comply with the First Amendment because they were biased against the Kleins' religious beliefs. In *Masterpiece*, this Court found that even subtle hints of departure from religious neutrality was a ground for outright dismissal. But, incredibly, the Oregon court merely asked the same BOLI tribunal to reconsider the damages award. To nobody's surprise, BOLI now seeks a $30,000 fine, as if the religious hostility accounted for precisely $105,000 of the prior fine.

This case, then, again raises a fundamental question of Constitutional freedom. Government cannot compel Americans to frame or speak messages against their conscience.

These *amici curiae,* Members of the United States Senate and House of Representatives (listed in Appendix A), believe that whenever legislation tries to compel violations of Americans' constitutional freedoms of speech and religious conscience, government should have to establish a case-specific, compelling

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Craig v. *Masterpiece Cakeshop, Inc.,* 370 P. 3d 272, 276 (Col. App. 2015).

interest or otherwise satisfy strict scrutiny. *Amici* also believe the rule below would trample the rights of all Americans, and place a special burden on those Americans trying to earn a livelihood consistent with their consciences.

Such an outcome troubles *amici,* as Members of Congress who are committed to free speech and religious liberty. Lower courts continue to deny religious Americans the proper protections promised in *Obergefell*. *Amici* may hold various views about same-sex marriage. They are united, however, in their concern about the lower courts' misinterpretation of the First Amendment.

SUMMARY OF ARGUMENT

Petitioner Klein's story illustrates how much some courts are willing to condone or facilitate compelled speech and action, even where it violates the conscience of the speaker, even after this Court's decision in *Masterpiece Cakeshop*.

Notwithstanding the extensive artistry that Mrs. Klein would require, *see* Figs. A-C, Appendix B (showing Klein at work), the court below concluded that it was "speculative" that Petitioners' cakes contained a message understood by the public.

The Oregon Court of Appeals sought to avoid the obvious free speech problems by holding that designing a custom wedding cake is only arguably expressive. It then found that government could compel these artistic designs.

Further, while the Free Exercise Clause should protect the Kleins, the lower court held that *Emp. Division* v. *Smith*, 494 U. S. 872, 882 (1990) foreclosed the Kleins' claim because the Oregon law was

(it said) a neutral, generally applicable law subject to rational basis review.

Your *amici* are concerned by the lower court's use of public accommodation legislation to make the Klein's messages a public good. Legislators are often asked to vote on measures designed to increase access in the marketplace. In *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U. S. 557, 572 (1995), this Court noted a problem when public accommodation laws are applied in a "peculiar" way, where a contingent of individuals could claim a legal right to shape the messages of a public accommodation. The lower court continues to uphold the "peculiar way" rejected in *Hurley*. If upheld, millions would put to a choice between their conscience and their livelihood. This kind of burden on religious exercise that should receive strict scrutiny.

Despite the promises of *Obergefell*, in this area, several lower courts are refusing to even honor the promises of *Masterpiece*.

The Constitution does not allow entrepreneurs, like the Kleins, to be forced from the marketplace. Your *amici* ask the Court to grant certiorari, and either reverse the lower court with instructions to dismiss, or to hear argument on the merits.

ARGUMENT

Government may not compel any speech contrary to the speaker's will. The lower court used a cramped, constricted meaning of "speech" under the First Amendment; as explained below in point I, the resulting rule will compel artists like the Kleins to design celebratory works against their will.

Nor may government coerce in conflict with the speaker's religiously informed conscience, without satisfying strict scrutiny. The lower court tried to avoid grappling with this Free Exercise Clause issue through a too-narrow reading of the framework of *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 882 (1990). In calling the *Smith* framework's "hybrid-rights" discussion "dicta," several lower courts have made *Smith* unworkable. The result puts the Kleins to a choice: their faith or their business. As explained below in Point II, the Oregon Court impermissibly subjected the Kleins' free exercise of religion to a burden, without subjecting that burden to strict scrutiny.

If left uncorrected, these errors will erode the First Amendment rights of all Americans.

The Kleins have been singled out because BOLI does not like their message. But government cannot control the framing of commercial speech. *See Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1151 (2017).

As shown below, the Klein's custom cake designs are speech, and the First Amendment analysis of these facts should be conducted under strict scrutiny.

I. The Klein's artistry is speech; any limitations should be subject to strict scrutiny.

"The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley* v. *Maynard*, 430 U. S. 705, 715 (1977).

Does the creation and design of a custom wedding cake carry ideas or points of view? The Oregon Court of Appeals says, "at most" cake decorators' businesses include "arguably expressive elements," only triggering intermediate scrutiny. *Klein* v. *Oregon Bureau of Lab. & Indus.*, 410 P.3d 1051, 1065 (2017). It concedes that "every wedding cake … partially reflects their own creative and aesthetic judgment." *Id.* at 1069. It then denies that custom wedding cakes communicate "celebratory message[s]," and suggests the Kleins could produce a cake with offsetting messages. *Id*. at 1072.

This misunderstands, at a basic level, the nature of weddings and custom designs. Asking an artist to design a cake to capture the appropriate emotions of a wedding day is more than a request for food. When a wedding cake is requested, a message is requested.

Moreover, the Oregon court misapplies this Court's prior precedents when it finds designing a wedding cake is no more expressive than an email alerting students to an on-campus military recruiter or wearing a school uniform.

Finally, as Oregon admits it would force the Kleins to "engage in a collaborative process" with a customer and "create a custom product that they would not otherwise make," it concludes that design

may be "within the realm of First Amendment protected expression," *id.* at 1073, but only at the level of intermediate scrutiny. *Amici*, as legislators, believe the scheme should be judged (and felled) under strict scrutiny, to protect the free speech rights of all Americans.

A. Artistic design on a custom wedding cake is protected, First Amendment speech.

The Oregon Court of Appeals faced a central question: does a custom designed wedding cake carry meaning; is it speech?

Applying this Court's precedents, artwork has been classified as pure speech by lower courts. "Artist[s] practicing in a visual medium" are creating pure speech protected by the First Amendment. *Buehrle* v. *City of Key W.*, 813 F. 3d 973, 978 (11th Cir. 2015).

Like the Colorado Court of Appeals in *Masterpiece*, however, Oregon suggests there is not even *symbolism* in a decorated cake. It cites *Nevada Comm'n on Ethics* v. *Carrigan*, 564 U.S. 117, 127 (2011) for the proposition that "a nonsymbolic act" does not receive First Amendment speech. *Klein, supra,* at 1071.

But this is intuitively wrong. Cake is at least symbolic. No historian argues that Marie Antoinette's "let them eat cake" was an act without symbolism. Cake carries within itself a message of bounty and plenty.

Consider the explanatory text from "CAKE HOLE," a 2017 group art show, at the MRS. Gallery in Queens, New York:

> **The cake is for celebration, success, remembrance**. The cake is for the day you were born, first and foremost. The cake can also commemorate the day you married your favorite person, the one who will hurt you worse than anyone else in your life (besides your mother … **The round shape of the cake connects to the sun and moon and annual cycles** - ancient people offered them to the gods and spirits who exercised powers at certain times of the year. **The impulse to pile can be traced to … burial monuments, for ceremonial and astronomical purposes, to mark trails**. This need to stack and layer is deep.
>
> **When you eat cake you are communing with celestial beings, you are merging with your ancestors, you are exerting magical manipulations on the cosmos.** When you enter the cake hole, you emerge fresh, new and holy. [3]

This is far from the only art gallery showing cake. Indeed, one art publication asked, "Why Is Cake (Yes, Cake) Suddenly Omnipresent in Contemporary Art?"[4] The editor, Katie White, suggested cake is "one of the favorite artistic symbols of our jaded generation."

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[3] https://www.mrsgallery.com/past-cakehole (last accessed September 27, 2022) (emphasis added).

[4] Katie White, *Why Is Cake (Yes, Cake) Suddenly Omnipresent in Contemporary Art?,* ARTNET News (March 7, 2022), https://news.artnet.com/art-world/a-comprehensive-history-of-cakes-in-art-2061694 (last accessed September 27, 2022).

So, *mere* cake is artistically, symbolically powerful, well beyond "speculation."

But this case goes beyond mere cake. The Kleins were asked to make a *designed, celebratory, wedding* cake. Like tiers of cake, each word adds more proof that the conduct is speech.

Society recognizes the communicative nature of *designed* cakes. Commissioning a cake design is not just a labor-saving device; designers have special artistic and communicative talents. In popular culture, the "Cake Wrecks" blog documents cakes badly or poorly decorated. Like a scary movie, we imagine what if it were our wedding[5], our graduation[6] or our holiday celebration[7] where the cake's message was wrong or offensive. *Cake designs* demand to be interpreted by the viewer.

Even more meaning is implied by the request for a design that celebrates a particular event. A design of celebration at the wrong time or place can result in hurt feelings and damaged relationships. The Kleins might reasonably refuse to send a celebratory cake design to a funeral. A design-event combination almost always suggests a meaning. Would a Democrat-owned cake shop produce designs to celebrate a GOP gathering? In such cases, a design to celebrate a particular event carries a speech message.

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[5] http://www.cakewrecks.com/home/2008/7/10/inspiration-vs-perspiration.html (last accessed September 27, 2022).

[6] http://www.cakewrecks.com/home/2010/6/11/we-learned-good.html (last accessed September 27, 2022).

[7] http://www.cakewrecks.com/home/2008/12/17/seasonal-non-sequiturs.html (last accessed September 27, 2022).

Americans may be divided over whether a same-sex marriage should be celebrated. But this Court has already said such disagreements are not based in animus, but "decent and honorable religious or philosophical premises…." *Obergefell* v. *Hodges*, 576 U.S. 644, 672 (2015). The Oregon court should have protected the Klein's good-faith decisions about involvement in a wedding celebration.

But this situation even more clearly involves speech, for this case concerns a custom, designed, celebratory, *wedding* cake. Wedding cakes are laden with messages about the wedded couple and their ideals. For example, take this description of the 2012 wedding cake of the Duke and Duchess of Cambridge:

> Along the cake's base ran ivy leaves, symbolising marriage, and the bottom three tiers were decorated with piped lace work and daisies, meaning innocence, sweet William - grant me one smile - and lavender.
>
> There were infill features of cascading orange and apple blossom, honeysuckle, acorns with oak leaves - meaning strength and endurance - and bridal rose, which symbolises happiness, and myrtle.
>
> Lily of the valley - representing sweetness and humility - covered the sixth tier which also had an artistic interpretation of the couple's cipher - their initials intertwined below a coronet.
>
> The four flowers of the home nations - English rose, Scottish thistle, Welsh daffodil and Irish

> shamrock - were featured on the penultimate tier ….[8]

In fact, society so expects customized messages in wedding cakes, the tiniest deviation sends its own message. Even at the opposite end of the spectrum from the Duke and Duchess of Cambridge, like a wedding where the new spouses serve cupcakes, it gives a message about the wedded pair.

So, cakes are expressive. *Designed* cakes are more expressive. Designs for a c*elebratory event* carry even more meaning. *Wedding* cakes sit atop this pyramid of meaning, as creations that express hopes and dreams for the couple's rich future; they speak of what is important about the couple, their families, even their nations.

If Oregon tries to compel a design of celebration from an artist, in a medium imbued with emotional, religious, and cultural messages, it must be subject to strict scrutiny under the First Amendment.

B. Kleins' speech is not like the non-expressive conduct in the cases cited by the Oregon Court of Appeals.

The Oregon Court of Appeals claims to have decided that celebratory wedding cake designs are non-expressive because of cases like *Rumsfeld* v. *Acad. & Institutional Rts., Inc.,* 547 U. S. 47 (2006).

It is worth considering just how inapplicable *Rumsfeld* is to this situation.

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[8] http://www.dailymail.co.uk/news/article-1381944/Royal-Wedding-cake-Kate-Middleton-requested-8-tiers-decorated-900-flowers.html (last accessed September 27, 2022).

In *Rumsfeld*, a group of law schools disagreed with Congress's then-exclusion of gays and lesbians from the military. *Id.* at 51. Congress required universities to provide campus access for military recruiters "equal in quality and scope to that provided to other recruiters." *Id.* at 53. Failure to provide the access made an institution ineligible for federal funds. *Id.* at 54. The schools sued, arguing "forced inclusion and equal treatment of military recruiters violated the law schools' First Amendment freedoms of speech and association." *Id.* at 53.

The lower court in *Rumsfeld* identified three constitutional issues; this Court described two as allegations of coerced speech, and the other as an allegation involving expressive conduct. *See id.* at 60–61. First, the schools complained that they were forced to send the government's message because they may have to send factual emails like: "the U. S. Army recruiter will meet interested students in Room 123 at 11 a.m." *Id.* at 62. Second, the schools argued that "by forcing law schools to permit the military on campus to express its message, the Solomon Amendment unconstitutionally requires law schools to host or accommodate the military's speech." *Id.* at 61. Third, the schools complained the exclusion was forcing them to engage in "expressive conduct." *Id.* at 62.

This Court ruled against the schools. *Id.* at 70.

Consider how the Kleins' situation is different from the situation in *Rumsfeld*, at all three points.

1. Where *Rumsfeld* approved incidental, factual emails about a recruiter's presence on campus, the Kleins would be compelled to create designs to celebrate same-sex weddings.

This Court concluded that the factual emails about the military recruiter, incidental to campus visits, were not a compelled government message. "There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse." *Id.* at 62.

Rumsfeld's brevity may hide the depth of its reasoning. The law compelled access, *Id.* at 60, which might result in a school incidentally using truthful words about the conduct. *Id.* at 62. The schools did not claim the words were incorrect or opinionated; they were "compelled statements of [true] fact." *Ibid.* The schools were not forced to say, "we celebrate that military recruiters are here." The school had no duty to bake a cake or hold a party. This "speech" did not changed the schools' message, and was nothing like the compelled pledge of allegiance or recitation of a government motto. *Id.* at 62.

In this case, of course, the government-mandated conduct is not mere access or even selling goods to the public. The Kleins do not exclude gay and lesbian clients; rather, the Kleins say their beliefs prevent their own participation in certain celebrations. This reinforces this Court's point in *Obergefell* v. *Hodges*, 576 U.S. 644, 672, that these disagreements come from honorable differences about the best way to achieve the common good. So, unlike *Rumsfeld*, the government-ordered speech here is more intrusive and about debatable opinion.

In *Rumsfeld*, *supra*, at 62, the compelled disclosure was an incidental statement of fact. Here, the compelled speech is not strictly factual; the wedding cake is idealistic and aesthetic. A wedding cake says more than "a legal wedding is here."

Thus, a design on a celebratory cake is a far cry from the facts in "[t]he U. S. Army recruiter will meet interested students in Room 123 at 11 a.m." *Ibid.* The cake expresses aspirations and ideals, far closer the intent of the pledge (…indivisible, with liberty and justice for all") in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943). The 9th Circuit has said "[w]edding ceremonies convey important messages about the couple, their beliefs, and their relationship to each other and to their community." *Kaahumanu* v. *Hawaii*, 682 F. 3d 789, 799 (9th Cir. 2012).

If these cakes were truly comparable to *Rumsfeld*, as the lower court suggests, Congress could have forced law schools to celebrate military recruiters with food and receptions. *Rumsfeld* does not support imposing celebratory conduct on the Kleins.

2. Recruiting programs, like those in *Rumsfeld,* host competing messages; weddings do not.

On-campus recruiting provides an opportunity for multiple, independent messages. Recruiters do not speak for the school, and they do not speak for each other. On-campus recruiting lowers the cost of these competing messages, so that the student may winnow the choices. Do the student's goals align better with Cravath or Morrison & Foerster? Lambda Legal or the JAG corps? It is an economic tournament, improved by competition.

A wedding is not a competition. Many attend, but they come with a unified message: celebration of the union. The appearance of a rival suitor at "speak now

or forever hold your peace" is not a jaunty addition to the ceremony; it is a matter of shame and embarrassment. Everyone knows it is "their day." It is more like a private parade (as in *Hurley*) than a competition (like *Rumsfeld*); indeed, some cultures do use parades in wedding celebration.

Other cases from this Court that are cited by the Oregon Court of Appeals share the tournament idea. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U. S. 622, 655 (1994), involved a cable system with multiple channels, with multiple programs, and multiple advertisers, often with competing messages; the cacophony of broadcast TV meant viewers would not assume that the cable system conveys ideas or messages endorsed by the cable operators.

Neither the Kleins' business nor a wedding is a tournament involving competing messages.

3. Wedding cakes contain an inherent meaning about the wedding, unlike the presence of any particular recruiter in *Rumsfeld*.

In *Rumsfeld*, the law schools suggested they were being compelled to engage in expressive conduct. *Rumsfeld*, *supra*, at 62. This Court held the conduct compelled was not expressive; the compelled addition did not add a new message. *Id.* at 66. One more competitor is not an endorsement of the new competitor.

But wedding parties do not welcome competing messages.

Custom-designed wedding cakes do carry messages, and those messages could conflict with the wedding celebration. Imagine a receiving line where

people disclaimed any congratulations. The equivalent to a *Rumsfeld* disclaimer would be signs around the cake, disclaiming support for the union. This would change the message of the reception.

Note that the Kleins' cake is not merely the couple's message; by displaying a cake from Sweetcakes by Melissa, observers will expect them to have made an artwork about the couple, showing messages "worthy of presentation and…support…." *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U. S. 557, 560–565 (1995).

All of this goes to underline the public perception of weddings as a place to celebrate the marriage. The wedding is not open for competing messages.

C. Reversal is necessary to protect the First Amendment rights of all Americans.

The most dangerous aspect of the lower court's decision is the idea that public accommodation laws somehow override *Wooley's* promise that "[the First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977).

Where the "conduct" is an act of speech, the highest level of First Amendment protection applies, even to well-intentioned public accommodation laws. In *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U. S. 557, 560–565 (1995), this Court addressed a Massachusetts public accommodation law. In that case, the organizers a parade were to cease and desist their rejection of a separate gay and lesbian contingent. The parade organizers—like the

Kleins—had not "exclude[ed] homosexual[s] as such," *Id.* at 572, but they did not wish to communicate any messages that conflicted with their "traditional and religious and social values." *Id.* at 562.

This Court recognized the danger of a broad public accommodation law which, applied "in a peculiar way," *Id.* at 572, could be read to allow "protected individuals with a message" to override the public accommodation's message. *Ibid.* The venerable history of public accommodation laws does not allow government to break "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Ibid.*

A public accommodation may decide "not to propound a particular point of view," or "what merits celebration" and no matter how "misguided, or even hurtful" that decision may seem to the government, it is a decision "beyond the government's power to control." *Id.* at 574–575. The Kleins should have the right to determine what merits their celebration, as promised in *Hurley*.

The Oregon court allows that the Kleins have First Amendment rights, but assume commerciality erodes these rights. This Court has held otherwise. This Court held in *Expressions Hair Design* that the way a business must frame its prices is a protected form of speech, not incidental conduct. *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1151 (2017). Here, the Oregon law changes how the Kleins must frame their artistic creations and opinions.

Similarly, in *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U. S. 241 (1974), a state law required commercial

newspapers to give a "right of reply." A politician sued after his replies to critical editorials were rejected. *Id.* at 244. "[A]ny compulsion to publish that which 'reason' tells" a private speaker "should not be published is unconstitutional," *Id.* at 256. "Editorial control and judgment" is the speaker's choice, whether it seems "fair or unfair." *Id.* at 259. The Kleins' must have editorial control, too.

A similar holding was made in *Pacific Gas & Elec. Co.* v. *Public Utilities Commission of Cal.*, 475 U. S. 1, 12 (1986). There, a public utility was ordered to include a consumer group's newsletter in billing envelopes, as the utility had previously included its own newsletters in the envelope. *Id.* at 5–6. This Court explained that "[c]ompelled access" "penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set," *Id.* at 9. Corporations and individuals have "the choice to speak." *Id.* at 16.

Americans holding ideas "based on decent and honorable religious or philosophical premises…," *Obergefell* v. *Hodges*, 576 U.S. 644, 672 (2015), should also have the freedom to work for themselves by starting their own business. Artists who are "people of good faith," *ibid.,* should not be prevented from selling their creations to the public. Yet the result of this decision, and other decisions like it, declares certain work off limits to them. This is a dangerous error, blind to human aspirations to live and work consistent with faith. History teems with laws that limited the occupations of certain religious groups. The First Amendment does not allow the Kleins to be forced to carry the wrong message.

II. The Oregon Court misinterpreted this Court's Free Exercise precedent to permit governments to compel speech and action in violation of sincerely held religious beliefs.

The court below did no better in evaluating Petitioner's free exercise claim. To be sure, *Employment Div., Dept. of Human Resources of Ore.* v. *Smith,* 494 U.S. 872 (1990), teaches that rational basis scrutiny applies to some neutral and generally applicable laws that burden religious actions.

But it is erroneous to extend *Smith* to government actions that allowed government to put religious persons to a choice between their religious beliefs and the freedom to operate their own small businesses. Here, Oregon claims to control the marketplace; it cannot force the Kleins to abandon or speak contrary to their religious beliefs as the price of entry. Putting them to that choice is a burden on the Kleins' Free Exercise Clause rights. *Sherbert* v. *Verner,* 374 U.S. 398, (1963); *Employment Div., Dept. of Human Resources of Ore.* v. *Smith, supra*; *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 522 U.S. ___, 137 S. Ct. 2012 (2017); *Fulton* v. *City of Philadelphia*, 593 U.S. ____, 141 S.Ct. 1868, 1882 (2021); *Carson as next friend of O. C.* v. *Makin*, 596 U.S. ____, 142 S.Ct. 1987 (2022).

This is apparent from historical practice as well as this Court's precedents.

A. Longstanding American tradition precludes government coercion of action that violates the actor's religious belief.

The recognition that governments may not coerce actions contrary to religious scruples began during the founding era.

A classic example of this—cited in both Justice Scalia's and Justice Stevens' opinions in *District of Columbia* v. *Heller*—is exemption from laws conscripting military service. 554 U. S. 570, 589—590 (2008); *id.* at 661 (Stevens, J., dissenting). During the founding generation, at least eight of the thirteen original state or colonial legislatures granted exemptions for religious objectors—often Quakers—from military service.[9]

Later, when James Madison was president, Maryland Quakers requested a pardon for defying a state law seeking to coerce them into military service. Madison granted the pardon,[10] thereby illustrating his understanding that, absent a compelling government interest, coercive pressure to violate religious

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[9] *See, e.g.,* 1792 Conn. Pub. Acts 429 (Oct. 11, 1792); Mass. Laws 1763, Ch. 294 (date of passage unknown); Minutes of the Provincial Congress and the Council of Safety in State of New Jersey 82 (Oct. 28, 1775); *An Act to Continue an Act Entitled An Act for Regulating the Militia of the Colony of New York with Some Additions thereto*, 1757 Laws of the Colony of New York 178 [Ch. 1042]; 1770 Laws of North Carolina 787–788 (Dec. 5, 1770); *Militia Act* in 5 Stat. at Large of Pa. 613 (J. Mitchell & H. Flanders Comm'r. 1898) (enacted Mar. 29, 1757).

[10] James Madison, Presidential Pardon, November 20, 1816, in The Gilder Lehrman Institute of American History, *Conscientious Objectors: Madison Pardons Quakers, 1816* at 4.

scruples contradicts our national tradition of religious freedom.

This tradition of avoiding coercion of conduct that violates religious belief is also reflected in the evidence rules of all fifty states, which date to the founding, and which hold that courts cannot force a pastor to break the priest-penitent privilege and testify in court.[11] The first such case, *People* v. *Phillips*, involved stolen goods recovered through a Catholic priest.[12] In an effort to punish the thief, the state sought to force the priest to testify as to who gave him the goods to return, but the priest objected.[13] The New York court sustained the objection because "[i]t is essential to the free exercise of a religion" that the Church "be allowed to do the sacrament of penance."[14]

The case against the Kleins falls within this tradition. Even putting aside that the Kleins' artistry is speech, their messages and actions fall within the Free Exercise Clause, which has long been held applicable to inaction as well as action. *See, e.g., Wisconsin* v. *Yoder,* 406 U.S. 205, 207 (1972*)* (declining to send a child to school). Long-standing tradition precludes coercing conscientious objectorsl; that same tradition counsels strongly against coercing people like the Kleins to participate in celebrations that offend their religious conscience.

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[11] *See* Julie Ann Sippel, Priest-Penitent Privilege Statutes: Dual Protection in the Confessional, 43 CATH. U. L. REV. 1127, 1128 n. 6 (1994) (cataloging state statutes).

[12] N.Y. Ct. Gen. Sess. (1813), as quoted in *Privileged Communications to Clergymen*, 1 CATH. LAW. 198 (1955)).

[13] *Ibid.*

[14] *Ibid*.

B. This Court's Free Exercise decisions also make clear that *Smith* does not apply to government coercion of action that violates religious conscience.

Contrary to this history, the Oregon court, among others, has interpreted *Smith* to endorse coercing an individual in violation of their religious conscience.

The legal issue in *Smith* could be distinguished from the issue presented here and in such cases as *Arlene's Flowers* and *Elene Photography*. *Smith* addressed whether an action motivated by religion—there, using peyote—that violates a neutral and generally applicable law is entitled to the protection of strict scrutiny review. 491 U. S. at 890. *Smith* was limited to a determination that "the Free Exercise Clause did not entitle the church members to a special dispensation from the general criminal laws on account of their religion." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2021 (2017). But *Smith* did not address the situation presented here: an attempt to coerce a message or action that violates religious conscience.

Two terms after *Smith*, however, the Court confronted a case presenting that very issue—*Lee* v. *Weisman*, 505 U. S. 577 (1992), which involved "subtle coercive pressures" to participate in a public school graduation featuring public prayer. *Id.* at 588. Writing for the majority, Justice Kennedy explained that both of "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Id.* at 590. Thus, when a state seeks to subject "freedom of conscience [to] subtle coercive pressure," both religion clauses come into

play. And so, the Court held that the graduation arrangement violated the First Amendment—even though the subtle coercive pressures to attend were neutral and generally applied to all students. *See id.* at 588.

Furthermore, in Free Exercise cases decided by this court since *Smith*—such as *Church of the Lukumi Babalu Aye* v. *City of Hialeah,* 508 U. S. 520 (1993), and *Hosanna-Tabor* v. *EEOC*, 565 U. S. 171 (2012)—the Court has repeatedly recognized that *Smith* does not always foreclose the application of strict scrutiny to free exercise claims. The Court's willingness to cabin *Smith* in those cases suggests that the Court should likewise cabin *Smith* in the situation presented here—government coercion of action that violates the actor's religiously informed conscience.

Finally, this Court's decision in *Trinity Lutheran* v. *Comer,* 137 S. Ct. 2012 (2017), reaffirms the longstanding principle that one cannot be put to the choice between government benefits and religious belief. *Sherbert* v. *Verner*, 374 U. S. 398 (1963), involved a forced choice between unemployment benefits and faith. *McDaniel* v. *Paty,* 435 U.S. 618 (1978), involved a choice between public office and faith. *Trinity Lutheran* involved a choice between a rebate and faith. *Carson as next friend of O. C.* v. *Makin*, 596 U.S. ____, 142 S.Ct. 1987 (2022) involved the choice between school funding and religious conduct. In each case, this Court found it unconstitutional to put religious believers to the choice between faith and public participation. While advertised as 'anti-discrimination' statutes, in practice, "people of good faith" would be excluded from this field of busi-

ness. *Obergefell* v. *Hodges,* 576 U.S. 644, 672 (2015). The promises in *Obergefell* ring hollow if people of good faith can be penalized from creating cakes.

For reasons already explained, the State of Oregon wants to coerce the Kleins into acting or speaking contrary to their religious conscience. *Smith* does not apply to them any more than it would if he objected to going to war or objected to disclosing a penitent's confession. This Court should make clear that *Smith* does not apply to affirmative governmental coercion of action that violates the actor's religiously informed conscience. And if *Smith* does allow compulsion, it should be considered for overruling.

C. *Yoder* provides the proper test for assessing governmental coercion of action that violates the actor's religious beliefs, and that test requires reversal of the lower court.

Government coercions of person to use themselves or their resources in violation of religious beliefs is subject to strict scrutiny. That rule applied to compulsory school attendance in the pre-*Smith* case of *Wisconsin* v. *Yoder* 406 U. S. 205, 221 (1972). And that decision recognized that coercing religious persons to perform acts that violate their religious conscience is a "not only severe, but inescapable" burden on free exercise. *Id.* at 218.

To be sure, *Smith* expressly limits *Yoder* to the extent it suggested that *non-coercive* government action burdening religious exercise is subject to strict scrutiny. *See Smith*, 494 U. S. at 883—890. But *Smith* did

not purport to repudiate *Yoder* in its entirety.[15] Moreover, as already noted, *Smith* dealt with a specific subset of religious burdens—those in which government *prohibits* religious conduct. *Smith* did not address situations of governmental *coercion* of action that violates the actor's conscience.

Under *Yoder,* the Free Exercise Clause requires that strict scrutiny be applied here because the state has employed the force of law to compel messages and acts that—rightly or wrongly—speakers or actors find immoral. As in *Yoder,* such coercion must be and is subject to strict scrutiny. Reversing the Oregon Court of Appeals is necessary to clarify the application of that core principle.

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[15] *See Employment Div., Dept. of Human Resources of Ore.* v. *Smith,* 494 U.S. 872, 881 (1990) (*Yoder* involved "the Free Exercise Clause in conjunction with other constitutional protections….").

CONCLUSION

Government coercion of speech or conduct that violates the religious conscience of the speaker or actor is not only a violation of the First Amendment, it is also un-American and a gross violation of personal liberty. Any such government action must be subject to strict scrutiny. This Court should reverse judgment and grant the relief requested by Petitioners.

Respectfully submitted,

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Attorney for *Amici Curiae* Legislators

October 7, 2022

APPENDIX A - COMPLETE LIST OF *AMICI CURIAE*

I. United States Senators

James Lankford, lead Senate *amicus curiae*

Steve Daines

James M. Inhofe

II. Members of the United States House of Representatives

Vicky Hartzler, lead House *amicus curiae*

Robert Aderholt

Brian Babin

Jeff Duncan

Louie Gohmert

Michael Guest

Andy Harris

Mike Johnson

Doug Lamborn

Mary Miller

Randy Weber

APPENDIX B – PHOTOGRAPHS OF PETITIONERS' ARTISTIC PROCESS AND CREATIONS FROM MASTERPIECECAKES.COM

Fig. A[1]

Fig. B.[2]

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[1] https://a57.foxnews.com/static.foxnews.com/foxnews.com/content/uploads/2022/01/720/405/sweet-cakes-2.jpg?ve=1&tl=1 (last accessed September 26, 2022).

[2] https://sweetcakesbymelissa.com/wp-content/uploads/2021/04/layer-filling-cake.jpg

Appx. 3

Fig. C.[3]

[3] https://sweetcakesbymelissa.com/wp-content/uploads/2018/10/background-img-3.jpg