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 Oregon Court of Appeals

BRIEF OF ADVANCING AMERICAN FREEDOM AS AMICUS CURIAE SUPPORTING PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including freedom of speech and the free exercise of religious belief. AAF believes that a person's freedom of speech and the free exercise of a person's faith are among the most fundamental of individual rights and must be secured.[1]

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Americans have a long tradition in cultivating religious liberty by embracing exemptions from generally applicable laws. Even stretching back to the colonial period, in the generations leading up to the founding generation that authored the Declaration of Independence, the Articles of Confederation, the Northwest Ordinance, and the Constitution of the United States, the seedbeds of tolerance and respect for religious commitments were being cultivated.

America was being peopled by newcomers from throughout the Atlantic world, and many leaders in colonial governments knew even then that tolerant governments would thrive as immigrants voted with

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[1] All parties received timely notice and have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than *Amicus curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

their feet to settle among people who did not interfere in the liberties of others.

Perhaps the most remarkable acknowledgement of the free exercise of religious liberty were the colonies with established churches allowing nonmembers to decline to pay special taxes dedicated to the support of ministers of the established church. Virginia provided exemptions to French Huguenots in 1700, German Reformed in 1714, and dissenters from the Church of England in 1776. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1467 (1990). See also S. Cobb, The Rise of Religious Liberty in America 98, 492 (1902) and John W. Wayland, Germanna 9 (1957). Massachusetts and Connecticut exempted Baptists and Quakers in 1727. McConnell, 1467.

There could hardly be a starker example of a religious exemption from a law of general applicability than a tax law; that would be something to make neighbors sit up and notice. Although these examples are taken from our own history books, these exemptions are the more astonishing when we consider that the religious freedoms of a modern-day American hang in the balance, not on the number of angels dancing on the head of a pin, but in determining whether a cake is crafted with artistry or is just dessert.

This Court has a duty to safeguard religious freedom because "[a]*ny political constitution develops out of a moral order; and every moral order has been derived from religious beliefs."* Russell Kirk, The Conservative Constitution 174 (1990). Where

decisions from this Court have made the free exercise of religious liberty uncertain among the several circuits, the Court must re-examine its past decisions to bring clarity. "The right to be religious without the right to do religious things would hardly amount to a right at all." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2277 (2020) (Gorsuch, J., concurring).

The Oregon Bureau of Labor and Industries ("BOLI") drove Petitioners Melissa and Aaron Klein ("the bakers") out of the custom wedding-cake business with an assessed $135,000 penalty solely because they could not in good conscience employ their artistic talents to express a message celebrating a same-sex marriage ritual. The bakers had previously made a custom cake for the very same Complainants in this case (a same-sex couple) when they had commissioned a cake for a wedding between a man and a woman.

The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. Here, BOLI has clearly burdened the bakers' religious exercise by putting them in the difficult choice between maintaining a family business free of Government coercion and approving a ceremony involving relationships inconsistent with their religious beliefs.

As this Court observed in *Obergefell v. Hodges*, 576 U.S. ___ (2015), "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are

so fulfilling and so central to their lives and faiths." *Id.*, at ___ (slip op., at 27). The bakers are seeking review from this Court again, after having once before seen their case remanded to the Oregon Court of Appeals for further consideration in light of *Masterpiece Cakeshop, Ltd. v. Colo.Civil Rights Comm'n*, 584 U.S. ___ (2018).

That the bakers are seeking review once more suggests that that the course taken by this Court in 1990 to protect a fundamental Constitutional right very often results in Government-ordered compulsory speech; *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), was a mistake and should be corrected, perhaps by overturning it and returning to the rule in *Sherbert v. Verner*, 374 U.S. 398 (1963): that a law that imposes a substantial burden on the exercise of religion must be narrowly tailored to serve a compelling government interest. The Court should also clarify that exercising Constitutional rights by declining to engage in certain kinds of speech or artistic expression is not invidious discrimination at all.

ARGUMENT

I. *Smith* Often Leads to Compulsory Speech, *Sherbert* Would Restore the *Status Quo Ante*

For the bakers, like many individuals with sincerely held religious beliefs, their faith is lived out in every aspect of their life. Faith is pervasive; it is a central component of daily decisions and interactions.

The First Amendment's Free Exercise Clause recognizes that being a religious person often involves more than "holding beliefs inwardly and secretly," it also includes "act[ing] on those beliefs outwardly and publicly." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2276 (2020) (Gorsuch, J., concurring). The bakers operated their business, "Sweet Cakes By Melissa," as an expression of their Christian faith, which they understand to teach that God instituted marriage on the union of one man and one woman. The bakers could not in good conscience design and create products to celebrate events that violate their religious beliefs. Brief for Petitioners, *Klein v. Makin*, No. 22-204, at 7.

Recognizing that free exercise of religion and the ability to put sincere faith into daily practice were at the core of America's founding and remain central to our nation's character, this Court has repeatedly held that government cannot discriminate against the faithful "solely because of their religious character[.]" *Trinity Lutheran Church of Colombia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017). And just as unpopular speech needs the most protection, some religious beliefs may require more protection from government

regulatory or enforcement agencies for the very reason they run counter to the Zeitgeist: "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 714 (1981). Too often, *Smith* fails to protect the rights of people of faith, as the assertion of a law of "general applicability" steamrolls over faith-based objections.

It is a truism that government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. ___, ___–___ (2018) (slip op., at 16–17). Yet the construction of *Smith* is such that a law of general applicability (so long as it does not target religious practice) can impair the right of association or oftentimes coerce speech. Justice Alito vividly illustrates how *Smith* offers little protection to the bakers or other religious minorities who seek exemption from majoritarian laws of general applicability. "There is no question that *Smith*'s interpretation can have startling consequences. Here are a few examples. Suppose that the Volstead Act, which implemented the Prohibition Amendment, had not contained an exception for sacramental wine. The Act would have been consistent with *Smith* even though it would have prevented the celebration of a Catholic Mass anywhere in the United States. Or suppose that a State, following the example of several European countries, made it unlawful to slaughter an animal that had not first been rendered unconscious. That law would be fine under *Smith* even though it

would outlaw kosher and halal slaughter. Or suppose that a jurisdiction in this country, following the recommendations of medical associations in Europe, banned the circumcision of infants. A San Francisco ballot initiative in 2010 proposed just that. A categorical ban would be allowed by *Smith* even though it would prohibit an ancient and important Jewish and Muslim practice. Or suppose that this Court or some other court enforced a rigid rule prohibiting attorneys from wearing any form of head covering in court. The rule would satisfy *Smith* even though it would prevent Orthodox Jewish men, Sikh men, and many Muslim women from appearing. Many other examples could be added." [footnotes and citations omitted]. *Sharonell Fulton, et al. v. City of Philadelphia, Pennsylvania*, et al. 593 U.S. _____ 1-3 (2021) (Alito, J., concurring, joined by Thomas, J., and Gorsuch, J.).

Pity the poor innocent who is trying to live her life by the light of her conscience but bumps up against a government functionary who is charged with enforcing a statutory provision that comes in direct conflict with a deeply held religious belief. Other parties could be caught in a circular trap, much as the bakers have now come before this Court twice to seek relief, consuming the better part of a decade of their lives in litigation. The bakers sought certiorari in this Court, which vacated the Oregon Court of Appeal's decision and remanded the case for further consideration in light of *Masterpiece*. Pet.App.46. On remand, the Oregon Court of Appeals, standing on *Smith*, again rejected the free speech and free exercise claims of the bakers. Pet.App.5.

Smith simply does not offer clear guidance to government actors to protect faithful objectors if a law of general applicability comes into conflict with people of faith like the bakers. In *Fulton*, this Court found that *Smith* did not apply because the City of Philadelphia had a never-used exemption power, which this Court pointed to in its holding that *Smith* was not applicable because the dormant exemption power rendered the law in dispute not "generally applicable." However, on remand the City could simply eliminate the exemption power and "…the parties will be back where they started. The [government] will claim that it is protected by *Smith*; [citizen] will argue that *Smith* should be overruled; the lower courts, bound by *Smith*, will reject that argument; and [the citizen] will file a new petition in this Court challenging *Smith*. What is the point of going around in this circle?" *Sharonell Fulton, et al. v. City of Philadelphia, Pennsylvania*, et al. 593 U.S. ___ 8-9 (2021) (Alito, J., concurring, joined by Thomas, J., and Gorsuch, J.).

When this Court adopted *Smith* in 1990, complaints were quick to reach the halls of Congress, and on "two separate occasions, Congress, with virtual unanimity, expressed the view that *Smith*'s interpretation is contrary to our society's deep-rooted commitment to religious liberty. In enacting the Religious Freedom Restoration Act of 1993 ("RFRA"), 107 Stat. 1488 (codified at 42 U.S.C. §2000bb et seq.), and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLIUPA"), 114 Stat. 803 (codified at 42 U.S.C. §2000cc *et seq*.), Congress tried to restore *Sherbert v. Verner*, 374 U.S. 398 (1963),

which had prevailed before *Smith* was handed down, but the new Federal laws did not have the same reach as *Sherbe*rt at the State level.

What would replace *Smith* on the question of religious exemptions from generally applicable laws? *Sherbert* should be restored as the controlling decision, which had been in place for nearly four decades when *Smith* was decided. In that 1963 case, Adell Sherbert, a Seventh-day Adventist, refused to work on her Sabbath Day (Saturday) and so was fired. 374 U.S. at 399. Unable to find other employment that did not require Saturday work, she applied for unemployment compensation but was rejected because state law disqualified claimants who "failed, without good cause . . . to accept available suitable work when offered." *Fulton* 399–401, and n. 3 (internal quotation marks omitted). The State Supreme Court held that this denial of benefits did not violate Sherbert's free-exercise right, but this Court reversed… [The Court] concluded that the denial of benefits imposed a substantial burden on Sherbert's free exercise of religion. 374 U.S. at 404. It "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* This Court reasoned that the decision below could be sustained only if it was "justified by a 'compelling state interest.'" *Id.,* at 403, 406.

The test distilled from *Sherbert*—that a law that imposes a substantial burden on the exercise of religion must be narrowly tailored to serve a compelling government interest—was the governing

rule for the next 37 years until *Smith*. Applying that test in *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972), the Court held that a state law requiring all students to remain in school until the age of 16 violated the free-exercise rights of Amish parents whose religion required that children leave school after the eighth grade. The Court acknowledged the State's "admittedly strong interest in compulsory education" but concluded that the State had failed to "show with . . . particularity how [that interest] would be adversely affected by granting an exemption to the Amish." *Id.*, at 236. And in holding that the Amish were entitled to a special exemption, the Court expressly rejected the interpretation of the Free Exercise Clause that was later embraced in *Smith*. "[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability"; *Id.*, at 220 (emphasis added). *Sharonell Fulton, et al. v. City of Philadelphia, Pennsylvania*, et al. 593 U.S. ___ 13 (2021) (Alito, J., concurring, joined by Thomas, J., and Gorsuch, J.).

"*Smith* was wrongly decided. As long as it remains on the books, it threatens a fundamental freedom." *Id.,* 73. *Yoder* explicitly rejected the notion that laws of general applicability could occupy the field of free exercise – holding that there are certain precincts in which the government may not intrude and points the way to restoring the *status quo ante.* Before *Smith*, the prevailing *Sherbert* standard was that a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government

interest. The liberty interests of Americans depend on a renewal of the *Sherbert* standard – the instant case and *303 Creative LLC v. Elenis*, Docket No. 21-476 present this Court with an opportunity to shape a new standard that is protective of Americans' religious freedom.

II. There Is a Crucial Distinction Between Declining a Commission Because of the Nature of the Commission Rather Than Who Requested It

The bakers could have avoided nearly a decade of litigation and the loss of their business had there been clearer guidance to government functionaries on which kind of professions or services that by their very nature present themselves as an admixture of commerce, free speech, freedom of association would present free exercise challenges to the application of *Smith*. There is a wide gulf between someone who provides a service that is at the center of a wider message to the community (a wedding cake here) and someone who may have little involvement with the customer and where First Amendment rights have little or no exposure in the transaction (say, selling someone a set of tires).

> "There is a fundamental difference between invidious discrimination on the basis of who a person is, on one hand, and legitimate selectivity on the basis of what is being requested (i.e., the nature of an event, service, or product). This is the common-sense difference between a restaurant owner who does not serve Muslim customers, versus a

restaurateur who welcomes customers regardless of religion but does not carry halal food options. Cf. *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 703 (2014) ("The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use.")." Amicus Brief of Christian Legal Society and Free Speech Advocates In Support of Petitioners *303 Creative LLC, et al, v. Aubrey Elenis*, et al, Nos. 21-476, 5. ("CLS").

In light of similar cases coming to this Court that have severe impacts on the petitioners, it would be wise to reconsider *Smith*. Justice Scalia, who wrote the *Smith* opinion, doubted the long-term viability of his opinion: "There again, the decision on the point was 5-4, making clear to one and all (and to future litigants, in particular) that this is a highly controverted and thus perhaps changeable portion of our jurisprudence." Scalia, Scalia Speaks, 279 (2017). If this Court chooses not to revisit *Smith*, distinguishing "what" from "who" in commercial transaction is a promising path for safeguarding liberty. Someone who is creative, artistic, skilled in design – like the bakers – offers certain products and services, and not others. Creating a wedding cake is not the same as selling a set of tires. "That such selectivity reflects moral and religious norms is not more relevant for purposes of a state interest in nondiscrimination than if the selectivity reflected aesthetics, profitability projections, or personal quirks." CLS, 10.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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