

IN THE
Supreme Court of the United States

MELISSA ELAINE KLEIN AND AARON WAYNE KLEIN,

Petitioners,

v.

OREGON BUREAU OF LABOR AND INDUSTRIES,

Respondent.

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

**APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE A
PETITION FOR A WRIT OF CERTIORARI**

To the Honorable Elena Kagan, Associate Justice and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 21, 22, and 30 of this Court, Petitioners respectfully request a 30-day extension of time, to and including Friday, September 2, 2022, within which to file a Petition for a Writ of Certiorari to the Oregon Court of Appeals in this case. The Oregon Court of Appeals issued its opinion on January 26, 2022, and the Oregon Supreme Court denied review on May 5, 2022. A petition for a writ of certiorari is currently due on or before August 3, 2022. This application is being filed more than ten days before that date.

The opinion of the Oregon Court of Appeals, reported at 317 Or. App. 138 (2022), is attached as Exhibit 1. The Oregon Supreme Court's order denying review, reported at 369 Or. 705 (2022) (table), is attached as Exhibit 2. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1257.

BACKGROUND

Petitioners Melissa and Aaron Klein operated a custom-cake business until Respondent Oregon Bureau of Labor and Industries (“BOLI”) assessed a devastating \$135,000 penalty solely because they could not in good conscience employ their artistic talents to express a message celebrating a same-sex wedding ritual. On remand from this Court in light of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Oregon Court of Appeals held that BOLI had demonstrated hostility towards the Kleins’ religion—yet the Court of Appeals refused to set aside BOLI’s finding of liability and instead remanded solely for BOLI to re-assess damages, which BOLI later set at \$30,000. The Court of Appeals rejected Petitioners’ arguments that applying the Oregon public accommodations law to this scenario violated their free exercise rights, and the court stood by its prior rejection of Petitioners’ free speech arguments. The Oregon Supreme Court subsequently denied review.

REASONS JUSTIFYING AN EXTENSION OF TIME

Good cause exists for extending the time in which Petitioners can file their petition for a writ of certiorari.

First, this case raises numerous complex and cert-worthy legal issues requiring additional time to fully brief. In particular: (1) the decision below violates *Masterpiece Cakeshop* by refusing to set aside and invalidate the entirety of BOLI’s proceedings, despite a finding that BOLI had demonstrated improper hostility towards Petitioners’ religion; (2) this case squarely implicates a growing disagreement in authorities about whether strict scrutiny applies to “hybrid-rights” claims—*i.e.*, where a free exercise claim implicates other fundamental rights—as recognized in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990); (3) if *Smith* does not compel strict scrutiny for such hybrid rights, this case presents an excellent

vehicle for the Court to revisit *Smith* altogether; and (4) this case squarely implicates a growing disagreement about whether compelling artists to create expressive content in the commercial context violates their free speech rights. Counsel for Petitioners need more time to fully present these legal issues in their petition for a writ of certiorari.

Second, this case has an extensive record. The litigation has been ongoing for nearly a decade, having already once been through state administrative proceedings, state appellate proceedings, and a petition for a writ of certiorari to this Court—and now it has gone through the state appellate courts again.

Third, lead counsel for Petitioners is Boyden Gray & Associates PLLC, a small law firm of only five attorneys with multiple ongoing and pressing commitments to other clients over the next several weeks.

PRAYER

For these reasons, Petitioners respectfully request that the Court extend the time to file their petition for a writ of certiorari by 30 days, to and including September 2, 2022.

/s/ R. TRENT MCCOTTER

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