No. 18-547

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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) files this amicus curiae brief in support of Petitioners Melissa Klein and Aaron Klein. PLF was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. In furtherance of PLF's continuing mission to defend individual liberty, the Foundation has participated in several First Amendment cases before this Court. *See, e.g.*, *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018); *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018); *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017); *Citizens United v. FEC*, 558 U.S. 310 (2013). PLF has also participated in several cases concerning administrative law, including *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and *Sackett v. EPA*, 566 U.S. 120 (2012).

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[1] Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received notice of Amicus Curiae's intent to file this brief at least 10 days before the due date of the brief. Counsel for both parties have lodged blanket consent letters with this Court. Pursuant to Rule 37.6, Amicus Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The petition in this case raises important First Amendment issues. State public accommodation laws are often broader than their federal counterpart. Thus, while not every application of a public accommodation law will infringe on a person's right to free speech, state laws pose unique First Amendment problems given their sweeping "breadth and operation." Pet. App. 17. Although this case deals with cake artistry, the court of appeals noted that the Oregon law could also apply to "a person whose business is writing commissioned music or poetry for weddings, or producing a sculpture or portrait of the couple kissing at an altar." *Id.* at 39. Thus, without this Court's guidance, state agencies will continue to "awkwardly appl[y]" state public accommodations laws to "a person whose 'business' is artistic expression." *Id.*

Agencies enforcing public accommodations law can chill First Amendment activities in ways that evade judicial review. Agencies can use an assortment of tools, such as fines, warning letters, and negative publicity, to coerce individuals to "bend[] to the [agency's] demand without a fight." Ethan W. Blevins, *Life in the Law's Shadow: Due Process in the World of Rule by Threat*, 27 Geo. Mason U. Civ. Rts. L.J. 1, 2 (2016). Such tactics limit the opportunities for plenary review and compound the chilling effect on expressive activity.

To the extent that these important First Amendment issues are litigated, they are decided in the first instance by an administrative law judge

(ALJ) who works for the agency. In recent years, commentators have questioned the independence of federal ALJs who decide issues of national importance. *See* Kent Barnett, *Against Administrative Judges*, 49 U.C. Davis L. Rev. 1643, 1645 (2016) ("*The New York Times* and *The Wall Street Journal* have reported that the [SEC] prevails much more frequently—sometimes 100% of the time in a given year—in its in-house enforcement proceedings than in court."). Their counterparts at the state level enjoy even fewer safeguards to their independence. Thus, this Court's guidance is critical in helping state ALJs decide important First Amendment cases on constitutional principle rather than political pressure or their own policy objective.

Finally, the issues in this case affect the First Amendment rights of all Americans. As the court of appeals observed, there is no "reason in principle why the services of a singer, composer, or painter could not fit the definition of a 'place of public accommodation'" under state law. Pet. App. 39. And there is no reason why a state could not add "political beliefs" to the list of protected classes under its public accommodations law. *See, e.g.*, D.C. Code § 2-1402.31(a) ("political affiliation"); Seattle, Wash., Mun. Code §§ 14.06.020(L), 14.06.030(B) ("political ideology"). A decision from this Court would thus provide guidance far beyond the facts of this case.

ARGUMENT

I.

STATE AGENCIES CAN APPLY STATE PUBLIC ACCOMMODATIONS LAWS IN WAYS THAT RAISE FIRST AMENDMENT PROBLEMS

Many states, as well as the federal government, have public accommodations laws. Although not every application of these laws trigger First Amendment scrutiny, the Free Speech Clause applies with full force when the law has "the effect of declaring . . . speech itself to be the public accommodation." *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 573 (1995). *Cf.* Srikanth Srinivasan, *Incidental Restrictions of Speech and the First Amendment: A Motive-Based Rationalization of the Supreme Court's Jurisprudence*, 12 Const. Comment. 401, 402 (1995) ("[T]he use of a noise ordinance to halt a political rally may seem to warrant First Amendment review, even though the law applies generally to both noisy speeches and noisy jackhammers.").

In *Hurley*, for example, this Court examined a Massachusetts law that prohibited discrimination in places of public accommodation. 515 U.S. at 561. Massachusetts argued that private organizers of a St. Patrick's Day Parade violated the law when they sought to exclude marchers who wanted to carry a banner that read "Irish American Gay, Lesbian and Bisexual Group of Boston." *Id.* at 570. The Supreme Judicial Court of Massachusetts affirmed the trial court's order that the organizers allow the group to "participate in the Parade on the same terms and conditions as other participants." *Id.* at 563. This

Court reversed. *Id.* In a unanimous opinion, the Court acknowledged that the exclusion of the group may have been "misguided" or "even hurtful." *Id.* at 574. Nonetheless, the Court stated that the government is not free to compel speech to promote an approved message or discourage a disfavored one, however enlightened either purpose may strike the government. *Id.* at 579.

In recent years, this Court faced many cases involving the tension between public accommodations laws and the First Amendment. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); *Elane Photography v. Willock*, 572 U.S. 1046 (2014), *cert. denied*. And there will be more to come. *See Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018), *granted, vacated, and remanded*; *Telescope Media Group v. Lindsey*, 271 F. Supp. 3d 1090 (D. Minn. 2017), *appeal filed* Oct. 30, 2017. This is not surprising. This Court has long recognized the ever-expanding reach of public accommodations laws. The *Hurley* Court, for instance, recounted the ways in which the Massachusetts Legislature had expanded state public accommodations law. *See Hurley*, 515 U.S. at 571-72 (noting that the original Massachusetts public accommodations statute had "already expanded upon the common law," and that the state legislature "continued to broaden the scope of legislation").

In *Boy Scouts of America and Manmouth Council v. Dale*, the Court reiterated that the expansion of state public accommodations laws has increased the potential for conflict between those laws and the First Amendment. 530 U.S. 640, 657-59 (2000). Indeed, the

Dale Court noted that New Jersey's definition of a "place of public accommodation" was so "extremely broad" that the state applied the law to a private membership organization without even attempting to tie the term "place" to a physical location. *Id.*

This trend has continued. As the federal government explained in *Masterpiece Cakeshop*, Colorado public accommodations law is broader than its federal counterpart in multiple respects. *See* Br. for the United States as Amicus Curiae Supporting Petitioners, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, (No. 16-111), 2017 WL 4131335, at *12 n.2. As relevant to the First Amendment analysis, the state public accommodations law in *Masterpiece* "applies to more types of businesses than Title II, which does not cover the bakery at issue." *Id.* While federal public accommodations law does not ordinarily govern businesses that commission expression, *see* 42 U.S.C. § 2000a(b)(1)-(2), state public accommodations laws like Colorado's cover every "business offering wholesale or retail sales to the public." Colo. Rev. Stat. § 24-34-601. All told, state laws that "sweep so broadly," Br. of the United States at 22, in expanding beyond common law notions of public accommodations are particularly likely to generate problems under the First Amendment.

This case is one example. *See* Pet. App. 17 ("The text of the [Oregon law] leaves little doubt as to its breadth and operation."). The Oregon Legislature has incrementally expanded the definition of "place of public accommodations." Pet. App. 30. The state legislature first added trailer parks and campgrounds

as places of public accommodation. 1957 Or. Laws ch. 724, § 1. It then expanded the law to places offering food or drink to the public—for consumption on or off the premises. 1961 Or. Laws ch. 247, § 1. Still later, the legislature expanded the definition again to include "any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusement or otherwise," subject to an exception for "any institution, bona fide club or place of accommodation which is in its nature distinctly private." 1973 Or. Laws ch. 714, § 1.

With this expansive definition in mind, the Oregon Court of Appeals saw "no reason in principle why the services of a singer, composer, or painter could not fit the definition of a 'place of public accommodation' under [Oregon law]." Pet. App. 39. Thus, while this case deals with cake artistry, the lower court saw no reason why the Oregon law could not also apply to "a person whose business is writing commissioned music or poetry for weddings, or producing a sculpture or portrait of the couple kissing at an altar." *Id.* Thus, state agencies like the Oregon Bureau of Labor and Industries (BOLI) must, in some instances, "awkwardly appl[y]" state public accommodation laws to "a person whose 'business' is artistic expression." *Id.*

Broad laws pose a problem for the First Amendment because their very existence can "chill the expressive activity of others not before the court." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 129 (1992). Such laws also raise the concern that the legislature "has created an excessively

capacious cloak of administrative and prosecutorial discretion, under which discriminatory enforcement may be hidden." Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 884 (1994).

II.

AGENCIES ENFORCING BROAD PUBLIC ACCOMMODATIONS LAWS CAN DO SO IN WAYS THAT CHILL FIRST AMENDMENT RIGHTS

"Bureaucracy is the ultimate black box of government—the place where exercises of coercive power are the most unfathomable and thus most threatening." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2332 (2001). The regulatory state is ever-expanding, with "hundreds of federal agencies poking into every nook and cranny of daily life." *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

State agencies can also wield significant power in interpreting ambiguous provisions in state laws. The parties in this case, for example, disagreed not just on the merits of Petitioners' First Amendment claim, but also on whether Petitioners' conduct was covered by the Oregon public accommodations statute at all. *See* Pet. App. 25 (examining Petitioners' argument that the Oregon law prohibits discrimination on the basis of status rather than conduct).

The notion that agencies can apply broad laws in ways that threaten individual liberty is neither new nor confined to cases involving the First Amendment. *Sackett* provides an illustrative example. In that case,

the Sacketts attempted to build a house on an empty lot. 566 U.S. at 124. The Environmental Protection Agency issued a compliance order against the Sacketts insisting that the Sacketts were violating the Clean Water Act by discharging into wetlands without a permit. *Id.* The text of the relevant provisions in the Clean Water Act is "hopelessly indeterminate." *Id.* at 133 (Alito, J., concurring). Yet, before this Court's intervention, the Sacketts could not even challenge the EPA's determination in Court, as the lower court held that the order was not subject to judicial review under the Administrative Procedure Act. *Id.* at 125 (majority opinion). Worse, because failure to comply with the order is itself illegal, the Sacketts accrued $75,000 per day in additional liability while they waited for the agency to "drop the hammer" in an enforcement action. *Id.* at 127. "[T]he combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in [*Sackett*] still leaves most property owners with little practical alternative but to dance to the EPA's tune." *Id.* at 132 (Alito, J., concurring).

Agency "arm-twisting" succeeds, and evades judicial scrutiny, because many believe that they cannot afford to resist agency demands. Lars Noah, *Governance by the Backdoor: Administrative Law(lessness) at the FDA*, 93 Neb. L. Rev. 89, 123 (2014). The state agency in this case conducts "about 2,200 investigations a year on all types of discrimination," Pet. App. 67, and assesses damages ranging from $50,000 to $350,000 per complainant. *Id.* at 73. Here, the agency ordered Petitioners to pay damages of $135,000 and ultimately put Petitioners out of business. Pet. for Cert. at 3. To be sure, BOLI

may assess fines that remedy discrimination in places of public accommodations. Yet this Court should be vigilant to guard individual liberty against agencies that place policy objectives over the Constitution's guarantees. Agencies can use fines and other tools to "rehabilitate" businesses, Pet. App. 67, and coerce them to "bend[] to the [agency's] demand without a fight." Blevins, *supra,* at 2; *see also id.* (compiling other methods of agency coercion, including "draft policy statements, negative publicity, warning letters, or direct meetings." (citations omitted)).

Agency coercion presents unique dangers in First Amendment cases. Pressure or threats from government officers impose a chilling effect on free expression. *See Dombrowski v. Pfister*, 380 U.S. 479, 487-88 (1965) (describing the chilling effect). A sweeping statute, like Oregon's public accommodations law, already threatens "to repeatedly chill the exercise of expressive activity by many individuals." *New York v. Ferber*, 458 U.S. 747, 772 (1982). The tools that an agency has at its disposal to coerce individuals in acceding to its demands exacerbate the chilling effect.

III.

ADMINISTRATIVE JUDGES DECIDE IMPORTANT FIRST AMENDMENT ISSUES

This Court should grant review to offer clear guidance to state ALJs who decide sensitive First Amendment issues in the first instance. These judges can face strong political pressure when deciding important constitutional questions, and an authoritative holding from this Court will help ensure

that these difficult cases are resolved on principled First Amendment doctrine rather than pressure from state agencies or the public.

As occurred here, many First Amendment questions in these controversial cases are addressed in the first instance by state ALJs. *See* Pet. App. 92; *see also, e.g.*, *Masterpiece Cakeshop*, 138 S. Ct. at 1726 (a Colorado ALJ was the first decision maker to hear and address Jack Phillips's First Amendment defenses); *Gifford v. McCarthy*, 23 N.Y.S.3d 422, 426-27 (2016) (a New York ALJ addressed First Amendment defenses to a public accommodations claim over the refusal to rent out a wedding venue for a same-sex marriage ceremony). These judges often lack statutory or constitutional safeguards that protect their independence. Where issues arise involving a highly divisive political problem squared against nuanced First Amendment questions, this Court's instruction can help ALJs resolve these disputes in an impartial manner and give the litigants before them a fair shake.

State ALJs often face political pressure. Their counterparts on the federal level have attracted criticism for bias. *See* Barnett, *supra* at 1645 ("*The New York Times* and *The Wall Street Journal* have reported that the [SEC] prevails much more frequently—sometimes 100% of the time in a given year—in its in-house enforcement proceedings than in court."). Yet state ALJs enjoy even fewer safeguards to their independence.

In the federal arena, ALJs enjoy several statutory bulwarks to their independence. For instance, the

Office of Personnel Management decides which candidates an agency can appoint. *Id.* at 1654. The APA requires that federal ALJs be walled off from prosecutorial or investigative functions, and they cannot have *ex parte* contacts with agency officials about ongoing cases. *Id.* at 1655. They also have protection from agency performance reviews, discipline, and removal, and their pay is not set by the agency. *Id.* at 1656.

In the federal administrative system, however, the even greater concern is the comparative lack of safeguards for administrative judges (AJs) adjudicating informal proceedings. *See id.* at 1660-62 (comparing federal ALJs and AJs and concluding that AJs enjoy far fewer safeguards to independence). AJs are not vetted through a neutral body like the Office of Personnel Management, and they do not enjoy protection from agency discipline, performance reviews, or salary pressure. *See id.*

State ALJs are more akin to federal AJs than federal ALJs. States typically have one of three general structures for ALJs: (1) a central panel of ALJs overseen by a chief administrative judge and separate from other state agencies; (2) a central panel of ALJs within nonadjudicative state agencies; and (3) ALJs that each work in respective units within an executive agency. Edwin L. Felter, Jr., *Special Problems of State Administrative Law Judges*, 53 Admin. L. Rev. 403, 404-05 (2001). In the central panel setting, state ALJs are hired and fired by a chief ALJ or director, while in jurisdictions without central panels, state ALJs are typically hired and fired by the respective agency head. *Id.* at 406. The central panel

structure in which ALJs are beholden to a chief ALJ rather than an agency head is the least problematic of the three from the standpoint of impartiality, though independence still depends upon a chief judge or director rather than neutral statutory safeguards. *Id.* at 405, 412, 415. Regardless of which of these three structures a state employs, ALJ independence faces greater threat than in the federal administrative system. *See id.* at 408 ("In too many ALJ organizations, central panel and non-central panel alike, ALJs are subject to the chief's or director's good judgment for the assurance of judicial/decisional independence. Structural assurances, preferably codified into law, better assure judicial/decisional independence.").

Hence, many of the enhanced concerns about the independence of federal AJs apply to state ALJs. State ALJs are often allowed to have ex parte communications with agency officers and heads, *id.* at 410, they suffer disciplinary pressure to issue decisions that fit with agency prerogatives, *id.* at 415, and they are hired, fired, promoted, or demoted by a party appearing before them in litigation. *Id.* at 406; *see also* Edwin L. Jr. Felter, *Accountability in the Administrative Law Judiciary: The Right and the Wrong Kind*, 30 J. Nat'l Ass'n Admin. L. Judiciary 19, 38 (2010) ("State administrative law judges . . . are ordinarily accountable through 'judgmental' performance evaluations, which could result in a firing, demotion, pay raise or promotion."). These factors all exacerbate pressure to issue decisions friendly to agency policy. *See Felter,* 53 Admin. L. Rev. at 415. As Alexander Hamilton noted long ago, "in the general course of human nature, a power over a man's

subsistence amounts to a power over his will." The Federalist Papers No. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Even if an ALJ's analysis of First Amendment issues in the first instance is only a proposed order or recommendation, the ALJ's conclusion is not meaningless. *See* Kent Barnett, *Resolving the ALJ Quandary*, 66 Vand. L. Rev. 797, 826-27 (2013). An ALJ's findings impact subsequent agency findings, and agency findings that conflict with an ALJ's findings often receive more careful scrutiny from a court. *Id.* Even with regard to conclusions of law, a state ALJ's analysis establishes a benchmark that orients the remainder of the proceedings.

The environment in which the ALJ here issued his proposed order exhibits some of the problems facing state ALJ independence in general. In Oregon, agencies like BOLI have authority to rule on constitutional issues. Pet. App. 221. Oregon does have an Office of Administrative Hearings wherein a chief ALJ hires and oversees state ALJs and is obligated to ensure their independence. Or. Rev. Stat. § 183.610 (2017); *see generally* David W. Heynderickx, *Finding Middle Ground: Oregon Experiments with a Central Hearing Panel for Contested Case Proceedings*, 36 Willamette L. Rev. 219 (2000). BOLI, however, does not have to rely on these ALJs. In enforcing antidiscrimination laws, the BOLI commissioner has broad authority in hiring and prescribing the duties of all agency personnel, including ALJs. Or. Rev. Stat. § 651.060(3) (2017). BOLI defines "administrative law judge" as "the commissioner or an individual or a special tribunal designated by the commissioner to

preside over any or all aspects of a contested case." Or. Admin. R. § 839-050-0020(1); *see also id.* § 839-050-0240. A BOLI ALJ assigned by the Commissioner "may or may not be an employee of the Agency,"[2] *id.* § 839-050-0020(1), and employment within the agency cannot be a basis for disqualification. *Id.* § 839-050-0160(1).

The BOLI ALJ has broad authority to conduct hearings, rule on all nondispositive motions, and issue proposed orders on dispositive motions for approval by the Commissioner, as occurred here. *Id.* § 839-050-0240(a), (f), (i), (j); *see* Pet. App. 290. The ALJ is also empowered to hear evidence that would not satisfy admissibility standards in a typical court of law. *See id.* § 839-050-0260(1). Moreover, BOLI regulations expressly allow the ALJ to engage in *ex parte* communications with other agency officers regarding pending matters. *See id.* § 839-050-0310.

The BOLI ALJs do not enjoy any protection from agency discipline, performance review, or salary pressure. Ironically, Oregon law requires ALJs employed through the Office of Administrative Hearings to undergo training, and the chief ALJ has a statutory duty to protect and ensure their independence. *See* Or. Rev. Stat. § 183.610 (2017); *see also id.* § 183.615 (ALJs under the chief ALJ must be impartial and have knowledge of administrative law and procedures). No such statutory protections apply to BOLI ALJs because BOLI is not one of the agencies required to use ALJs from the Office of Administrative

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[2] The BOLI ALJ must be an employee of the agency if the case concerns housing discrimination. *See id.*

Hearings. *Compare id.* Or. Rev. Stat. § 183.625(2) (2017) ("[A]ny agency that is required to use ALJs assigned from the Office of Administrative Hearings to conduct hearings must delegate responsibility for the conduct of the hearing to an ALJ assigned from the Office of Administrative Hearings, and the hearing may not be conducted by the administrator, director, board, commission or other person or body charged with administering the agency."), *with* Or. Admin. R. § 839-050-0020(1) (stating that commissioner may act as an ALJ or may delegate that duty to an agency employee or nonemployee as he sees fit). In this case, ALJ Alan McCullough is an employee of BOLI and therefore is not subject to the statutory protections that apply to ALJs employed by Oregon's Office of Administrative Hearings. *See* George Rede, *Sweet Cakes: 5 things you should know about proposed BOLI order*, The Oregonian, Apr. 27, 2015.[3]

These factors place tremendous pressure on ALJs deciding sensitive First Amendment issues. Without clear and authoritative guidance from this Court, ALJs may well incline toward a less protective approach to the First Amendment in these highly politicized public accommodation cases. In this sense, the concerns about ALJs deciding sensitive First Amendment questions without controlling caselaw to guide them resemble concerns that arise in this Court's prior-restraint jurisprudence regarding unbridled discretion. When officers exercise unbridled discretion in regulating speech through licensing regimes, this Court has held that an unacceptable risk

[3] Available at https://www.oregonlive.com/business/index.ssf/2015/04/sweet_cakes_5_things_you_shoul.html.

of viewpoint discrimination arises. *See, e.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988) (The danger of content and viewpoint discrimination "is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official"). Here ALJs without on-point precedent enjoy broad discretion, and they face tremendous pressure to wield that discretion in a manner adverse to First Amendment interests.

IV.

THIS CASE CONCERNS IMPORTANT ISSUES THAT AFFECT THE FIRST AMENDMENT RIGHTS OF EVERYONE

The issues in this case affect the First Amendment rights of all Americans, regardless of their political views. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). This Court's observation that "much political and religious speech might be perceived as offensive to some" rings with even greater force today. *Morse v. Frederick*, 551 U.S. 393, 409 (2007). *Cf. Minn. Voters Alliance*, 138 S. Ct. at 1883 (invalidating a ban on political apparel within the polling place). Yet if it is the speaker's opinion that gives offense, that consequence is reason for according it constitutional protection. *Hustler Magazine, Inc. v. Falwell*, 485 U.S 46, 55 (1988).

Consider that other jurisdictions have public accommodation laws that expressly cover political

beliefs. *See, e.g.*, D.C. Code § 2-1402.31(a) ("political affiliation"); Seattle, Wash., Mun. Code §§ 14.06.020(L), 14.06.030(B) ("political ideology"). And consider that the court below saw no "reason in principle why the services of a singer, composer, or painter could not fit the definition of a 'place of public accommodation'" under state law. Pet. App. 39. All told, there is no reason why public accommodations law could not compel a singer to perform her services at the inauguration of a political figure whose actions she has denounced, or a speechwriter to craft a speech applauding the virtues of a policy she abhors.[4]

It is no answer to ask the speechwriter or the singer to bring as-applied challenges targeting the examples above. The terms of state public accommodation laws often leave "little doubt as to [their] breadth." Pet. App. 17. The First Amendment allows litigants to raise the rights of third parties who may be unwilling or unlikely to raise a challenge in their own stead. *Schultz v. City of Cumberland*, 228 F.3d 831, 848 (7th Cir. 2000).

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[4] There are other examples in recent years, though they may be better categorized as freedom of association cases. Right before the last presidential election, one New Mexico business claimed that it "will no longer do business with any person that is a registered Republican or supports Donald Trump." Eugene Volokh, *Can businesses refuse to serve—or employ—Trump supporters?*, Wash. Post, (Nov. 25, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/25/can-businesses-refuse-to-serve-or-employ-trump-supporters/?utm_term=.7de2fbd4b262. *See also* Aric Jenkins, *Delta Just Doubled Down on Its Decision to Cut Ties With the NRA*, TIME, (Mar. 2, 2018) http://time.com/5182755/delta-airlines-nra-atlanta-georgia/.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: November 2018.

Respectfully submitted,

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