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 a Writ of Certiorari
to the Court of Appeals of Oregon

## Brief *Amicus Curiae* of Public Advocate of the United States, Conservative Legal Defense and Education Fund, One Nation Under God Foundation, and Restoring Liberty Action Committee in Support of Petitioners


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## INTEREST OF THE *AMICI CURIAE* [1]

Public Advocate of the United States is a nonprofit educational, legal, and religious organization, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code. Conservative Legal Defense and Education Fund and One Nation Under God Foundation are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). Restoring Liberty Action Committee is an educational organization. These entities seek, *inter alia*, to participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

## STATEMENT OF FACTS

Petitioners Melissa and Aaron Klein, husband and wife, own a small bakery known as "Sweetcakes by Melissa" (hereinafter "Sweetcakes") located in Gresham, Oregon. Operating according to the owners' sincerely held religious conviction not to facilitate or participate in a same-sex wedding, Sweetcakes has

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than this *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

been shuttered as the direct result of an order of an Oregon administrative agency.

On January 17, 2013, Rachel Bowman-Cryer ("RBC")[2] asked the Petitioners' bakery to prepare a wedding cake for her same-sex wedding to Laurel Bowman-Cryer ("LBC"). She was told by Aaron Klein that Sweetcakes did not make wedding cakes for same-sex ceremonies because of the bakery owners' religious convictions. Klein v. Or. Bureau of Labor & Indus., 289 Ore. App. 507, 410 P.3d 1051, 1056-57 (2017) (hereinafter "Klein"). RBC obtained a cake from another baker at a lower price.[3]

No lawsuit was ever filed by either RBC or LBC against Sweetcakes seeking injunctive relief or money damages. Rather, a complaint was filed first with the Oregon Department of Justice and thereafter with the Oregon Bureau of Labor and Industries ("BOLI")

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[2] Individuals are referred herein by the same initials used in the administrative decision below.

[3] The record does not indicate that either complainant incurred any special damages whatsoever. Indeed, complainants enjoyed an economic benefit in their cake purchase, having obtained a cake from another baker for $250 for which Respondents would have charged $600. 34 BOLI at 109.

alleging discrimination based on sexual orientation.[4] Klein at 1058.

Under the Oregon procedure, complaints are received and charges are filed by the BOLI. The "chief prosecutor" and the "administrative prosecutor" of the Kleins are employees of BOLI. Cases are heard by an Administrative Law Judge ("ALJ") designated by the BOLI Commissioner. And the final decisions are issued by the BOLI Commissioner. *See* In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI Final Order of Commissioner at 102-103 (issued July 3, 2015). Thereafter, a petition for judicial review may be filed in the Oregon Court of Appeals. Klein at 1056.

BOLI issued formal charges against the Kleins for violation of ORS 659A.403, for refusing service "on account of" sexual orientation. BOLI's Commissioner Brad Avakian was asked to recuse for having made prejudicial statements about the Kleins, but he refused. The ALJ denied the Kleins' motion to disqualify the Commissioner, in part because the Oregon Code of Judicial Ethics did not apply, as the Commissioner adjudicating the case was "not 'an officer of a judicial system performing judicial functions.'" 34 BOLI at 143.

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[4] Under Oregon procedures, for complainants have no responsibility to engage counsel or in any manner pursue the litigation other than by providing testimony, and the litigation costs are funded by the taxpayers of Oregon. Nevertheless, complainants' attorney was present throughout the hearing. 34 BOLI at 103.

The finding that the Kleins violated the Oregon statute was apparently decided by the ALJ on cross-motions for summary judgment, without a hearing.[5] Klein at 1058-59. After six days of testimony and argument on damages, the ALJ issued a proposed final order, imposing a fine of $135,000[6] — $75,000 for "suffering" by RBC, and $60,000 for "suffering" by LBC.[7] The damages award was ordered to be paid to complainants. The BOLI, through its Commissioner,[8] then issued a final order affirming the findings and damages award. Klein at 1060.

The BOLI Final Order and Appendices in this case extend to over 100 pages. 34 BOLI at 102-207. The Findings of Fact include the following acknowledgment of the Kleins' motivation in declining service:

> Respondents ... have been jointly committed to live their lives and operate their business according to their Christian religious convictions. Based on specific passages from

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[5] An effort to have the case removed to circuit court was denied by the ALJ. 34 BOLI at 134-35.

[6] No jury trial on the matter of a damage award is permitted under the Oregon statute.

[7] The Oregon court's opinion repeatedly uses the words "feel, " "feeling," and "felt" to support the damage award. Klein at 1057, 1058, 1081, 1082, 1084, 1086. The award was in part for "damages for suffering caused to Complainants by media publicity and social media responses to this case." 34 BOLI at 124.

[8] https://www.oregon.gov/boli/pages/about_boli.aspx.

> the Bible, they have a **sincerely held belief** that God "uniquely and purposefully designed the institution of marriage exclusively as the union of one man and one woman" and that "the **Bible forbids** us from proclaiming messages or participating in activities contrary to Biblical principles, including celebrations or ceremonies for uniting same-sex couples." [Findings of Fact #3, 34 BOLI at 156 (emphasis added).]

However, that finding of fact was disregarded by both the ALJ and the Commissioner in their decision that the Kleins were motivated by prejudice against the two complainants. Rather, the ALJ and Commissioner characterized the Kleins' sincerely held, Bible-based **religious convictions** as having adversely affected Respondents' "ability to enter public places, to shop, to dine, to move about unfettered by **bigotry**." 34 BOLI at 124 (emphasis added).

The specific charge identified in the Synopsis of the Final Order was that "Respondents refused to make a wedding cake for two Complainants based on their sexual orientation," and for that the Kleins were assessed a damage award in the amount of $135,000. The BOLI Final Order denies that the money award was a fine designed to punish the Kleins.

> Any damages awarded do not constitute a fine or civil penalty, which the Commissioner has no authority to impose in a case such as this. Instead, any damages fairly compensate RBC and

> LBC for the harm they suffered and which was proven at hearing. This is an important distinction as this order does not punish respondents for their illegal conduct but, rather makes whole those subjected to the harm their conduct caused. [34 BOLI at 125.]

The BOLI's Final Order also "orders **Respondents Aaron Klein and Melissa Klein** to cease and desist from denying the full and equal accommodations, advantages, facilities and privileges of Sweetcakes by Melissa to any person based on that person's sexual orientation." And finally, it orders Respondents to refrain from publishing any notice to the effect that "any discrimination will be made against, any person on account of sexual orientation." 34 BOLI at 130.

The Kleins filed a petition for judicial review with the Court of Appeals of Oregon, which affirmed the portions of the BOLI decision addressed by the Petition for Certiorari.[9] Klein at 1087. A petition for review was filed with the Supreme Court of Oregon, which was denied without published opinion. Klein v. Or. Bureau of Labor & Indus., 2018 Ore. LEXIS 505, 363 Ore. 224 (2018). A petition seeking certiorari from this Court followed.

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[9] The Court of Appeals reversed the Commissioner's decision on a claim that the Kleins violated ORS 659A.409, which is not relevant to the petition here.

## SUMMARY OF ARGUMENT

It would be a mistake to view this case apart from its historical setting. It is not simply about the protection of artistic expression. Rather, it is an attempt by Oregon to regulate the operation of a small business in ways that many Bible-believing Christians simply cannot obey. It takes the Law of Public Accommodation and expands it in ways that are completely untethered to its long history in common law. It seeks to punish and shutter businesses which, based on what were found to be sincerely held religious beliefs, cannot provide services and goods which would require them to facilitate and participate in a same-sex marriage. Here, a same-sex couple easily was able to obtain their wedding cake from another source at a lower price. Nevertheless, the State of Oregon, after denying any type of jury trial, administratively imposed a crushing $135,000 penalty and a cease-and-desist order which caused the business to close its doors. The decision below deprives Petitioners of their livelihood because they would not bend their knee to the new "morality" of the secular state of Oregon. This type of law can only be viewed as extreme interventionism in a business — a long step along the road to Fascism.

From start to finish, Aaron and Melissa Klein maintained that they declined to make a wedding cake for a same-sex couple "on account of" their religious conviction that same-sex marriage was an abomination condemned by God. Initially, the same-sex couple and mother attempted to persuade the Kleins to change their minds. When persuasion did not work, the

couple filed a complaint with the Oregon Bureau of Labor and Industry ("BOLI") whereupon its Commissioner transformed a religious dispute into an administrative proceeding charging the Kleins with having refused to bake a cake for the same-sex couple "on account of" their "sexual orientation" in violation of the Oregon Public Accommodations Act.

Even though the Kleins continued to maintain that their decision was based solely upon their religious profession and belief, in the absence of any evidence to the contrary, BOLI found against them. On review before the Oregon Court of Appeals, BOLI was affirmed on the ground that the "Kleins refused to make a wedding cake ... **precisely and expressly** *because of* the relationship between sexual orientation and the [wedding]," contrary to an earlier court finding of fact that the Kleins had said that they never make wedding cakes for same-sex couples because of their religious convictions. Klein v. Oregon Bureau of Labor and Industries, 289 Ore. App. 507, 410 P.3d 1051, 1063 (2017) (emphasis added).

Compounding this error, the court affirmed a damage award in the amount of $135,000, on the ground that its underlying "nexus" was the Kleins' use of "abomination" to describe their reason for declining to bake the same-sex wedding cake. The court below claims that this damage award — rooted as it is in BOLI's condemnation of the Kleins' religious convictions — is only an "incidental" effect of Oregon's "generally applicable" public accommodations law, and for that reason, is immune from attack as violation of the Free Exercise Clause. This overlooks the fact that

the "object" of the damage award is to condemn the Kleins' religious profession and belief that same-sex marriage is an abomination and, thus, violates the Free Exercise guarantee under Employment Div. v. Smith.

The existential threat faced now by Sweetcakes Bakery by Melissa is being repeated with increasing frequency by those twenty or so states which have public accommodation laws which operate to morally and religiously subjugate Christians and others who resist homosexual marriage to the demands of the LGBT Agenda. This is a threat to the Freedom of Religion of a great swath of the nation which this Court should not ignore.

## ARGUMENT

### I. THE OREGON PUBLIC ACCOMMODATIONS STATUTE ASSERTS CONTROL OVER PRIVATE BEHAVIOR, GIVING SPECIAL RIGHTS TO POLITICALLY POWERFUL CLASSES.

Petitioners were found to have violated Oregon's so-called "public accommodations" statute, ORS 659A.403, which governs the conduct of businesses that fall in the definition of "places of public accommodation" as defined in ORS 659A.400:

> A place of public accommodation ... means: (a) [a]ny place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods,

> services, lodgings, amusements, transportation or otherwise.

By its terms, the statute is not limited to businesses of a particular size or type. Moreover, it is not even limited to businesses, but could apply to any individual who, or organization of any sort which, offers anything for sale or rental. Written as it is, it could be said to apply to a church, a one-day yard sale, a child's lemonade stand, a lawyer, or a person renting a room in his house.

The classes of individuals protected against "discrimination or restriction" are not limited to "race, color, religion, sex [or] national origin," but also includes "sexual orientation." The last two protected categories are marital status or age. The statute prohibits favoring persons who belong to a restricted class, such as offering rooms at shelters only to women. Discounts to persons 50 years of age or older are permitted, but no other business discounts based on age are permitted, such as offering lower prices to children for admission to an amusement park or a movie. Of course, it is highly unlikely that the statute would be enforced to its fullest extent, since its enforcement is subject to the Commissioner's unfettered discretion.

In truth, the notion of declaring all businesses (and all individuals) to be places of public accommodation has become in vogue in certain states, enacted, *inter alia*, to cater to the politically powerful or politically favored, but it has no common law or even federal antecedent. Such laws place government bureaucrats

in operational charge of businesses, imposing the state's morality on every business owner, while still (nominally) allowing private ownership of the "means of production." Thus, it is best understood as extreme interventionism — a step on the road to Fascism. Consider how the Oregon Public Accommodation law accords with the description of Fascism offered by scholar Sheldon Richmond, editor of *The Freeman*.

> As an economic system, fascism is SOCIALISM with a capitalist veneer....
>
> Where socialism sought totalitarian control of a society's economic processes through direct state operation of the means of production, fascism sought that control indirectly, through **domination of nominally private owners**. Where socialism nationalized property explicitly, fascism did so implicitly, by **requiring owners to use their property in the "national interest"** — that is, as the autocratic authority conceived it.... [Sheldon Richman, "Fascism," The Library of Economics and Liberty (emphasis added).]

In its essence, the Oregon law confiscates from individuals and businesses the right to determine with whom they will do business and on what terms. They smack of the type of control that Benito Mussolini described in his 1928 autobiography:

> The citizen in the Fascist State is no longer a selfish individual who has **the anti-social right of rebelling against any law of the Collectivity**. The Fascist State with its

> corporative conception puts men and their possibilities into productive work and **interprets for them the duties they have to fulfill**. [B. Mussolini, My Autobiography (1928) cited in Sheldon Richman, *supra* (emphasis added)]

The only federal case cited by the Commissioner to support his decision that the First Amendment did not protect the Kleins was Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995). *See* 34 BOLI at 123. In Hurley, Justice Souter asserted that modern public accommodation laws have a "venerable history" (*id*. at 571), stretching back to the common law rule requiring an innkeeper to serve all travelers that come his way unless he had "good reason" not to. *See* III W. Blackstone, Commentaries on the Laws of England, Ch. 9, Sec. 6 (1768). But none of those laws went beyond "a public calling, such as an innkeeper or public carrier." Indeed, only those few professions were "obliged to serve without discrimination all who sought service, whereas proprietors or purely private enterprises were under no such obligation, the latter enjoying an absolute power to serve whom they pleased." John E.H. Sherry, The Laws of Innkeepers at 45 (Cornell Univ. Press: 1993) (citation omitted).

However, once public accommodation laws seek to control businesses outside those few "public callings," and once they expand to force complicity with biblically banned practices, they cease to be part of that "venerable history." The Commissioner relied on a sentence in Hurley that such laws "as a general

matter" do not violate the First Amendment, but that carefully qualified *dicta* does not resolve the issue discussed here, and Hurley certainly did not address or rule on a frontal challenge to state laws such as that involved here.

Even Title II of the 1964 Civil Rights Act is narrowly limited in its application generally to hotels, restaurants, movie theaters, and stadiums (42 U.S.C. § 2000a(b)) and its grounds for discrimination were strictly limited to "race, color, religion, or national origin" (42 U.S.C. § 2000a(a)).[10]

Nonetheless, and curiously, frontal challenges to modern anti-discrimination laws, including public accommodation laws, asserting their violation of constitutional protections have not been initiated. Lawyers routinely seek to win cases on narrow grounds, choosing not to defend business as such, but only those businesses whose work they believe constitutes "artistic expression."[11] However the constitutional threat from state public accommodation laws has not gone entirely unnoticed by academics. For example, George Mason Law Professor David

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[10] Every effort in Congress to broaden the "protected classes" to include "sexual orientation" has thus far failed.

[11] *See, e.g.*, Oral Argument (Dec. 5, 2017) in Masterpiece Cakeshop v. Colorado Civil Rights Commission where counsel for Masterpiece Cakeshop declined to defend hair stylists, makeup artists, tailors, chefs, and architects from compelled participation in same sex weddings (*id.* at 4-25), and the Solicitor General's defense of only a "relatively narrow category" of protected speech (*id.* at 27).

Bernstein has captured the essence of the threat to our liberties:

> **Intolerant activists are determined to impose their moralistic views on all Americans, regardless of the consequences for civil liberties**. These zealots are politically well organized and are a dominant force in one of the two major political parties. They have already achieved many legislative victories, especially at the local level, where they wield disproportionate power. Courts have often acquiesced to their agenda, even when it conflicts directly with constitutional provisions protecting civil liberties. Until the power of these militants is checked, the First Amendment's protection of freedom of speech and freedom of religion will be in constant danger.
>
> To many civil libertarians, the preceding paragraph reads like a description of the Christian right. But it also describes left-wing egalitarian activists, many of whom are associated with the "civil rights" establishment. **Their agenda of elevating antidiscrimination concerns above all others poses an acute threat to civil liberties**. [David E. Bernstein, You Can't Say That: The Growing Threat to Civil Liberties from Antidiscrimination Laws (Cato Institute: 2003) at 1 (emphasis added).]

The Petition challenges the Oregon public accommodation law's application and scope, and would

provide this Court with an opportunity to re-examine the First Amendment bounds of such state laws.

## II. THE DAMAGE AWARD VIOLATES THE FREE EXERCISE GUARANTEE UNDER EMPLOYMENT DIV. V. SMITH.

As Petitioners point out, "[t]he Oregon Court of Appeals rejected [their] free exercise claim on the basis of *Employment Division, Department of Human Resources of Oregon v. Smith*" because Oregon's Public Accommodation Act was deemed to be "'a generally applicable and otherwise valid provision,'" having only an "'incidental effect'" on the Free Exercise guarantee. Pet. at 30. According to the Oregon Court, the Kleins "made no showing that the state targeted them for enforcement because of their religious beliefs." Klein at 1057. This is not true. There is a mountain of evidence, adduced in support of a damage award, proving that the "object" of the enforcement proceeding was to discredit and undermine the Kleins' religious belief and profession that same-sex marriage was an "abomination." This is a matter that the state is not "free to regulate" under the Free Exercise guarantee as understood in Smith. Smith at 876-79.

As attested by Aaron Klein, Sweetcakes "served all customers regardless of sexual orientation." Pet. at 5. However, with respect to wedding cakes, both Kleins were intimately involved with their customers in both the design and preparation of the cake, and in the presentation of the cake at the wedding celebration. Pet. at 3-4. Both complainants knew this to be the Sweetcakes policy and procedure, having purchased a

wedding cake two years earlier from the Kleins to celebrate one of the complainant's mother's wedding to a man. Klein at 1057. One complainant and her mother, after attending a bridal show in Portland, made an appointment with Sweetcakes for a cake-tasting. *Id.* Upon learning that the wedding cake was to be designed and presented at a ceremony for "two brides," Aaron Klein "stated that he was sorry, but that Sweetcakes did not make wedding cakes for same-sex ceremonies because of his and Melissa's religious convictions." *Id.* Whereupon, the complainant and her mother left the premises, only for the mother to come back to the bakery "to talk with Aaron." *Id.* at 1058.

Without either complainant present, one's mother "told Aaron that she had previously shared his thinking about homosexuality, but that her 'truth had changed' as a result of having 'two gay children.'" *Id.* Aaron Klein replied, quoting Leviticus 18:22: "'You shall not lie with a male as one lies with a female; it is an abomination.'" *Id.* Upon returning to her car, the mother blurted out "that Aaron had called her 'an abomination,'" further upsetting her daughter who "later said that '[i]t made me feel like they were saying God made a mistake when he made me.'" *Id.* Upon their arrival home, the mother and daughter related the encounter to the daughter's intended "bride" who, "hav[ing] been raised Catholic, recognized the 'abomination' reference from Leviticus and felt shame and anger." *Id.* at 1058. In this state of mind and emotion, the daughter's bride-to-be "filled out an online complaint form with the Oregon Department of Justice (DOJ), describing the denial of service at Sweetcakes." *Id.*

From this point, BOLI took what theretofore had been a private dispute over religious belief and profession, and transformed it into a State administrative enforcement action designed to punish the Kleins for denying services "on account of" the "sexual orientation" of two women who had pledged to marry one another. *See* Klein at 1060-64. Instead of reciting the actual reason that the Kleins refused to create a wedding cake for the two women — namely, that to honor their request would violate the Biblical norm as expressed in Leviticus — the court of appeals put into Petitioners' mouths words that neither of the Kleins actually said:

> The Kleins refused to make a wedding cake for the complainants **precisely and expressly** *because of* the relationship between sexual orientation and the conduct at issue (a wedding). [*Id.* at 1063 (emphasis added).]

As the court below had acknowledged in its opening statement of facts, from the beginning, Aaron Klein said that they "did not make wedding cakes for same-sex ceremonies because of his and Melissa's **religious convictions**" — not on account of the complainants' sexual orientation. *See id.* at 1057. Significantly, the court of appeals found the damage awards of $75,000 and $60,000 to be justified on account of the Leviticus "abomination" reference:

> BOLI's final order ... reflects a **focus** on the effect of the word "**abomination**" on the complainants, including their recognition of that biblical reference and their associations

> with the reference. For instance, the order states that Rachel, who was brought up as a Southern Baptist, "interpreted [Aaron's] use of the word '**abomination**' [to] mean that God made a mistake when he made her, that she wasn't supposed to exist, and that she had no right to love or be loved[.]" Similarly, the order states that Laurel recognized the statement as a reference from Leviticus and, based on her religious background, "understood the term '**abomination**' to mean 'this is a creature not created by God, not created with a soul. They are unworthy of holy love. They are not worthy of life.'" [*Id.* at 1083 (emphasis added).]

To be sure, the court reverted back to its previous narrative on liability, attributing to Aaron Klein a misleading statement that he did not make — "that Aaron used the term 'abomination' in the course of explaining why he was denying service to the complainants **on account of their sexual orientation**." *Id.* at 1083 (emphasis added). The truth is that Aaron Klein never linked the word "abomination" with "sexual orientation" to explain why he and Melissa declined to make the requested wedding cake. Instead, he used the term "abomination" to explain his own motive — that "same-sex" marriage is not only a sin, but also a sin singled out as one that God intensely hates. Stubbornly, the court of appeals insisted that the "**nexus** that underlies BOLI's damages award" is Aaron Klein's use of the term "abomination" to

describe the sin of same-sex marriage. *Id.* at 1083 (emphasis added).

In essence, then, the Kleins were put on trial for their religious belief and profession that same-sex marriage is an abomination. According to Employment Div. v. Smith, a law — such as the Oregon Public Accommodations Act — is one of general applicability which complies with the Free Exercise guarantee, **only if** its effect on the religious belief and practice is "**incidental**." Smith at 878 (emphasis added). But where the "object" of the law prohibits one's exercise of religious profession and belief, it violates the Free Exercise guarantee, unless it "prohibit[s] conduct that the State is **free to regulate**." *Id.* at 879 (emphasis added). By "targeting" the Kleins' belief and profession of the Leviticus teaching against homosexual behavior in support of its award for damages, BOLI breached the jurisdictional wall of separation of Church and State. *See id.* at 876-79.

## III. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE AN IMPORTANT FEDERAL QUESTION NOT PREVIOUSLY DECIDED.

The threat to the Christian cakemaker in this case is part of a nationwide political, LGBT-led, relentless and well-funded campaign to use government power to coerce individuals and businesses to facilitate, participate in, and celebrate same-sex marriage. And it is part of an effort to destroy the livelihood of those individuals and businesses who stand against the

secular tide. And not only are the Kleins unable to make a living in their chosen profession, they are rendered unable to generate financing which that they could contribute to churches and causes and candidates to push back against the political and cultural LGBT juggernaut.

Although the Hurley case mentioned a State's power to protect a group that "is the target of discrimination" (Hurley at 572), another question entirely arises when the group that had been discriminated against becomes the aggressor. As John Stossel, a supporter of same-sex marriage, has described it:

> Look, I'm for gay marriage, but I think this movement has moved from tolerance to totalitarianism. The totalitarianism of the left....
>
> No baker should get to stop two people from getting married to anybody they want. They shouldn't ... be forced to bake the cake.... This is not about religious rights, this is about individual freedom. You shouldn't have to prove you've got this religion. [John Stossel: Gay Marriage "Movement Has Moved From Tolerance To Totalitarianism" (Apr. 2, 2015).]

There are many indications that the LGBT forces are not oppressed, but politically and economically powerful, and in the ascendancy:

> The LGBT Victory Fund released numbers on the Rainbow Wave of candidates in the

> November election. Of 432 LGBT candidates who made it on to the Nov. 6 ballot, 244 won on election night. [Victory: LGBT Victory Fund releases Rainbow Wave numbers, *dallasvoice* (Nov. 19, 2018).]

And, thus far, LGBT forces often have prevailed in their campaign to manipulate various state "public accommodation" and "human rights" laws to force individuals and businesses that oppose same-sex marriage to provide goods and services for those ceremonies.

- On August 22, 2013, even before this Court's Obergefell decision, the Supreme Court of New Mexico ruled that a New Mexico human rights law required a wedding photography company (Elane Photography, LLC) to provide services for a same-sex wedding. On April 7, 2014, this Court denied review of the case.[12]

- In 2017, a state court ruled in favor of a wedding photographer (Amy Lawson) in Madison, Wisconsin, and determined that Wisconsin's public accommodations law did not apply to her refusal to photograph same-sex weddings — but only because the photographer did not have a physical storefront.[13]

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[12] Elane Photography, LLC v. Willock, 134 S.Ct. 1787 (2014).

[13] *See* S. Zaimov, "Christian Photographer Can't Be Forced to Work Gay Weddings, Wis. Court Rules," The Christian Post (Aug. 25, 2017).

- Masterpiece Cakeshop v. Colorado Civil Rights Commission, 138 S.Ct. 1710 (2018), appears to have been decided not based on the free exercise clause, but rather on the overt hostility that the Colorado Commission showed toward the cake baker and the Commission's demonstrated viewpoint discrimination, evidenced by its unwillingness to enforce the same law against bakers who refused to bake anti-same-sex marriage cakes. *Id.* at 1729-32. As the case was simply remanded without further guidance, the state of Colorado is continuing its aggression against the cakeshop.[14]

- After its decision in Masterpiece Cakeshop, on June 25, 2018, this Court remanded to Washington state a case concerning a florist (Arlene's Flowers) who declined to provide floral arrangements for a same-sex wedding because of her "relationship with Jesus Christ."[15] The Washington Supreme Court had ruled against the florist, rejecting her free speech and free exercise rights.

- Other similar enforcement actions are now working their way through the legal system, including Brush & Nib Studio v. City of

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[14] Some of these *amici* filed an *amicus* brief in the Masterpiece Cakeshop case when it was before the Colorado Supreme Court (Oct. 23, 2015), and another *amicus* brief in this Court on the merits (Sept. 7, 2017).

[15] Arlene's Flowers v. Washington (No. 17-108) (June 25, 2018).

Phoenix,[16] and Lexington-Fayette Urban County Human Rights Commission v. Hands On Originals.[17]

Is this the future for Christian-based businesses in America — operating underground as if they were black marketers, forced to hide from governments that were designed to secure their God-given rights? Christians are instructed that when civil authorities demand they abandon their faith, that, as Peter explained: "We ought to obey God rather than men." Acts 5:29. If Christians cannot in good conscience conform their behavior to the dictates of laws which criminalize biblical beliefs and professions, are Christians to be denied the ability to open and operate a business?

Indeed, the coercive approach of those who highly value sexual license extends even beyond same-sex marriage. On June 29, 2016, in a similar type of case, but one involving abortifacients, this (then eight justice) Court denied a petition of certiorari to review the case of a Christian pharmacist (Stormans) who was ordered by Washington State officials to carry abortifacients.[18] A dissent filed by Justice Alito, joined by Chief Justice Roberts and Justice Thomas from the

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[16] *See* https://www.adflegal.org/detailspages/case-details/ brush-nib-studio-v.-city-of-phoenix.

[17] *See* http://www.adfmedia.org/News/PRDetail/9254.

[18] Some of these *amici* filed an *amicus* brief in support of the petition for certiorari in Stormans v. Wiesman, No. 15-682.

denial of certiorari in Stormans v. Weisman, began with these words — "This case is an ominous sign." — and continued[19]:

> There are strong **reasons to doubt** whether the regulations were adopted for—or that they actually serve — **any legitimate purpose**. And there is much evidence that the impetus for the adoption of the regulations was **hostility** to pharmacists whose **religious beliefs** regarding abortion and contraception are out of step with prevailing opinion in the State. Yet the Ninth Circuit held that the regulations do not violate the First Amendment.... If this is a sign of how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern. [*Id.*]

The circumstances presented in this case undermine the same principles.

## CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be granted.

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[19] *See* https://www.supremecourt.gov/opinions/15pdf/15-862_2c8f.pdf (June 26, 2016).

Respectfully submitted,

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