No. 22-_____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners Melissa and Aaron Klein seek review of a decision by the Oregon Court of Appeals, issued on remand from this Court for further consideration in light of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

The questions presented are:

1. Whether, under *Masterpiece*, the Oregon Court of Appeals should have entered judgment for Petitioners after finding that Respondent had demonstrated anti-religious hostility.

2. Whether, under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), strict scrutiny applies to a free exercise claim that implicates other fundamental rights; and if not, whether this Court should return to its pre-*Smith* jurisprudence.

3. Whether compelling an artist to create custom art for a wedding ceremony violates the Free Speech Clause of the First Amendment.

PARTIES TO THE PROCEEDING

Petitioners are Melissa Elaine Klein and her husband Aaron Wayne Klein. Respondent is the Oregon Bureau of Labor and Industries.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings:

- *Klein et al. v. Oregon Bureau of Labor & Industries*, No. 22A73 (U.S.) (granting application extending time to file until Sept. 2, 2022).
- *Klein et al. v. Oregon Bureau of Labor & Industries*, Nos. S069313 & S065744 (Or.) (orders issued denying review May 5, 2022, and June 21, 2018).
- *Klein et al. v. Oregon Bureau of Labor & Industries*, No. A159899 (Or. Ct. App.) (opinions issued Jan. 26, 2022, and Dec. 28, 2017).
- *Klein et al. v. Oregon Bureau of Labor & Industries*, No. 18-547 (U.S.) (remanded June 17, 2019).
- *In re Klein et al.*, Nos. 44-14 & 45-14 (Or. Bureau of Labor & Industries) (orders issued July 12, 2022, and July 2, 2015).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authority

PETITION FOR A WRIT OF CERTIORARI

Melissa and Aaron Klein respectfully petition for a writ of certiorari to review the judgment of the Oregon Court of Appeals.

OPINIONS BELOW

The opinion of the Oregon Court of Appeals (Pet.App.1) is reported at 317 Or. App. 138 (2022). The order of the Oregon Supreme Court denying review of that opinion (Pet.App.538) is reported at 369 Or. 705 (2022) (table).

The previous opinion of the Oregon Court of Appeals (Pet.App.47) is reported at 289 Or. App. 507 (2017). The order of the Oregon Supreme Court denying review of that opinion (Pet.App.540) is reported at 363 Or. 224 (2018) (table). The order of this Court vacating that judgment and remanding for further consideration following *Masterpiece* (Pet.App.46) is reported at 139 S. Ct. 2713 (2019) (mem).

The 2022 order of the Oregon Bureau of Labor and Industries reimposing $30,000 in damages (Pet.App.132) is unreported. The 2015 order of the Oregon Bureau of Labor and Industries (Pet.App.335) is unreported.

JURISDICTION

The Oregon Court of Appeals published its decision on January 26, 2022. Pet.App.1. The Oregon Supreme Court denied review on May 5, 2022. Pet.App.538. On July 26, 2022, Justice Kagan extended the time to file a petition for a writ of

certiorari to September 2, 2022. *See* No. 22A73. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech….

U.S. Const. amend. I.

STATUTORY PROVISION INVOLVED

Oregon's public accommodations statute provides:

> (1) [A]ll persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is of age, as described in this section, or older....
>
> (3) It is an unlawful practice for any person to deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation in violation of this section.

ORS § 659A.403.

INTRODUCTION

The Oregon Bureau of Labor and Industries ("BOLI") drove Petitioners Melissa and Aaron Klein out of the custom wedding-cake business and hit them with 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. Petitioners designed and created only custom cakes—with no off-the-shelf versions—and they did so without regard to the sexual orientation of their customers. In fact, Petitioners previously created a custom cake for the very same Complainants in this case, who commissioned the cake for a family member's opposite-sex wedding.

When Petitioners declined to design, create, and decorate a custom cake for the Complainants' same-sex wedding, however, BOLI concluded that Petitioners violated the Oregon public accommodations law by discriminating on the basis of sexual orientation, ORS § 659A.403, and rejected Petitioners' arguments that the First Amendment protects their rights to free exercise of religion and free speech. BOLI further held that increased damages were appropriate because, in explaining his position, Aaron had quoted the Bible. The Oregon Court of Appeals upheld that award on direct appeal.

Petitioners sought review from this Court, which remanded for further consideration in light of *Masterpiece*. On remand, the Oregon Court of Appeals correctly determined that BOLI failed to act with neutrality toward Petitioners' religion, as evidenced by BOLI accusing Petitioners of being "prejudice[d]" and imposing heightened damages because Aaron had quoted the Bible. Pet.App.36–42, 110. Even though

this hostility permeated BOLI's actions, the Oregon Court of Appeals declined to enter judgment in favor of Petitioners or even vacate the entire proceedings, instead determining that the constitutional violation was manifest only in the *damages* portion of the administrative proceeding. The court thus left intact the underlying finding of liability and remanded the case to the same biased agency to impose damages once again. BOLI then unilaterally reimposed $30,000 in damages, based on the same biased record produced in the prior proceeding.

Petitioners seek review once again from this Court. Certiorari is warranted for three independent reasons. *First*, this Court should reaffirm that dismissal of the government's case is the proper remedy under *Masterpiece* when a government agency acts with anti-religious hostility in an enforcement proceeding, and emphatically reject the notion that it is appropriate to remand such a case to the same agency that already violated the constitutional rights of a party. Indeed, summary reversal would be appropriate here, given this Court's recent affirmation that when "'official expressions of hostility' to religion accompany laws or policies burdening religious exercise," the government action must be "'set aside' … without further inquiry." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 n.1 (2022) (quoting *Masterpiece*, 138 S. Ct. at 1732). Doing so would send a clear message about the proper remedy under *Masterpiece*, conserve this Court's resources, and spare Petitioners the burden of additional litigation after enduring nearly ten years defending their constitutional rights.

Second, this Court should resolve the growing disagreement about the appropriate standard of review for "hybrid-rights" claims, where a free exercise claim implicates other fundamental rights. The Oregon Court of Appeals joined the Second, Third, and Sixth Circuits in rejecting a heightened standard of review in hybrid-rights cases, instead concluding that rational basis applies under *Smith*. But the Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits all hold that *Smith* explicitly preserved an exception for hybrid-rights cases, and strict scrutiny therefore applies. The First and D.C. Circuits also recognize hybrid-rights claims but require an independently viable claim in addition to the free exercise claim, making the hybrid-rights claim irrelevant. Numerous state supreme courts are split on this question, as well.

If the hybrids-right exception preserved by *Smith* proves illusory or unworkable, this Court should return to its pre-*Smith* jurisprudence holding that a substantial government burden on religious exercise must be narrowly tailored to serve a compelling government interest, consistent with other provisions of the First Amendment and fundamental rights. This Court has repeatedly acknowledged that this issue warrants review.

Third, this Court should hold that compelling an artist to design and create custom art for a wedding ceremony violates the Free Speech Clause of the First Amendment, an issue this Court has also acknowledged merits review. This case presents a compelling complement to *303 Creative LLC v. Elenis*, No. 21-476, and should be joined with or at least held pending a decision in that case.

STATEMENT OF THE CASE

I. Background

Petitioners Melissa and Aaron Klein operated a bakery called "Sweetcakes by Melissa" in Gresham, Oregon, until BOLI's punitive and religiously hostile actions put them out of business. All cakes that Petitioners sold were custom-designed, with no off-the-shelf versions. The cakes were ordered for important events like weddings and wakes, and demonstrated significant symbolism and creative design. For example:

Each custom cake was the product of a lengthy process that began with a consultation with each client. Pet.App.241–42. Melissa would then sketch a series of personalized designs. *Id.* The process could take hours, if not a full day, followed by a multistep creative process of molding, cutting, and shaping.

After Melissa prepared and decorated the cake, Aaron would load it into a truck emblazoned with the words "Sweet Cakes by Melissa" in large pink letters and deliver the cake. Pet.App.230. For wedding cakes, he would drive to the location of the wedding ceremony, where he would assemble the cake and add any remaining decorations. *Id.* In performing these services, Aaron "often place[d] cards showing that Sweetcakes created the cake." *Id.*

Petitioners opened and operated Sweetcakes as an expression of their Christian faith, which they understand to teach that God instituted marriage as the union of one man and one woman. [1] For Petitioners, marriage between a man and a woman reflects the union between Jesus Christ and the church. *See* Ephesians 5:31–32. Petitioners created these cakes, in part, because they wanted to celebrate traditional weddings.

Petitioners could not in good conscience design and create products to celebrate events that violate their religious beliefs, including non-traditional marriages and divorces. Pet.App.471. BOLI does not deny the sincerity of Petitioners' religious beliefs. *Id.*

Petitioners served all customers regardless of those customers' sexual orientation. This too was an

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[1] Decl. of Melissa Klein ¶ 2 (Oct. 23, 2015).

expression of Petitioners' faith, which teaches that all persons are made in the image of God and therefore merit dignity. *See* Genesis 1:27. Indeed, two years before the events that gave rise to this case, Petitioners had created a custom wedding cake for Rachel Cryer and Laurel Bowman, the Complainants in this case, to celebrate the opposite-sex marriage of Rachel's mother. Pet.App.7. At that time, Petitioners knew that Rachel and Laurel were a lesbian couple. And Rachel and Laurel had no complaints about the service they received. They liked Petitioners' work so much that they wanted to commission a custom cake from Sweetcakes for their own wedding. *Id.*

In January 2013, when same-sex marriage was still not formally recognized in Oregon, *see* Pet.App.499 n.58, Rachel and her mother went to Sweetcakes for a wedding cake tasting, Pet.App.7. When Aaron asked the names of the bride and groom, Rachel responded that there were two brides. Pet.App.7–8. Aaron apologized and said that, because of their religious beliefs, he and his wife could not create a custom-designed cake for that purpose. Pet.App.8.

Shortly after Rachel and her mother left the store, Rachel's mother returned with the express intent of confronting Aaron about his religious beliefs. She wanted to make it a "teaching moment." *Id.* Aaron listened while Rachel's mother told him how she previously shared his religious belief about marriage, but "[her] truth had changed," and she had come to believe the Bible is silent about same-sex relationships. *Id.* After she finished, Aaron expressed religious disagreement and, quoting a verse from Leviticus, asked why the Bible would say: "You shall

not lie with a male as one lies with a female; it is an abomination." *Id.* Rachel's mother ended the conversation, returned to her car, and inaccurately told Rachel that Aaron had called *Rachel* "an abomination unto God." Pet.App.9. BOLI later determined that Rachel's mother misrepresented Aaron's statements, lacked credibility on this point, and employed "exaggerations" in her testimony. Pet.App.13.

Four days later, Rachel and her mother met with another local baker and commissioned an elaborate, custom three-tiered wedding cake topped with a hand-made, hand-painted peacock figure with tail feathers trailing down the three tiers and onto the cake plate. Pet.App.149.

The baker who designed and created the peacock cake testified that she considers herself an "artist" and her wedding cakes "artistic expression[s]" that she "want[s] to be able to share … with the public and the community." BOLI Hearing Tr. at 594, 599–600 (Testimony of Laura Widener) (Mar. 13, 2015). She recounted how it made her "proud" that her custom cake would "be part of [the] celebration." *Id*. A celebrity baker also donated a second wedding cake. Pet.App.154.

Despite the ease with which they obtained several replacement cakes from willing creators, Laurel and Rachel filed complaints with BOLI, alleging that Petitioners had refused to serve them because of their sexual orientation. Pet.App.9.

II. Initial BOLI Proceedings

BOLI investigated and then issued formal charges against Petitioners, alleging they had violated Oregon's public accommodations law, which prohibits the denial of "full and equal accommodations, advantages, facilities and privileges of any kind" "on account of … sexual orientation." ORS § 659A.403(3), (1). Petitioners raised their free speech and free exercise claims as affirmative defenses in response. *See* Pet.App.10.

BOLI assigned the case to one of its own Administrative Law Judges ("ALJ") who issued a proposed final order granting summary judgment in favor of BOLI on its claim of sexual-orientation discrimination. The proposed final order rejected Petitioners' free speech and free exercise defenses. Pet.App.57.

BOLI sought damages of $75,000 for each Complainant for "emotional, mental, and physical suffering." Pet.App.113. The ALJ proposed an award of $75,000 for Rachel and $60,000 for Laurel. Pet.App.15.

The ALJ transmitted his proposed final order to BOLI Commissioner Brad Avakian, who had sole authority to make final decisions on behalf of BOLI and also oversaw the BOLI-employed ALJ. However, the Commissioner had already expressed his views on the merits of Petitioners' case. Before BOLI even filed charges, he had posted a news story about the matter on Facebook and commented that "[e]veryone has a right to their religious beliefs, but that doesn't mean they can disobey laws already in place." Pet.App.56. The Commissioner stated that his goal is to "rehabilitate" people like Petitioners. Pet.App.110. When the case eventually came before him, the Commissioner ruled accordingly, rejecting Petitioners' constitutional defenses.

The Commissioner concluded that Petitioners had violated Oregon's public accommodations law, ordered Petitioners to stop discriminating on account of sexual orientation, and assessed $135,000 in "compensatory damages for emotional, mental and physical suffering." Pet.App.389.

III. History of Appeals

On appeal, the Oregon Court of Appeals affirmed the award of damages. Petitioners argued that forcing them to design, create, and decorate custom cakes to celebrate same-sex wedding ceremonies violated both the Free Speech Clause and the Free Exercise Clause.

Pet.App.51. The court rejected these constitutional defenses.

Beginning with Petitioners' free speech claim, the court acknowledged that "public accommodations law is awkwardly applied to a person whose 'business' is artistic expression." Pet.App.83. The court conceded that "[i]f BOLI's order can be understood to compel Petitioners to create pure 'expression' that they would not otherwise create, it is possible that the [United States Supreme] Court would regard BOLI's order as a regulation of content, thus subject to strict scrutiny." *Id.*

The Oregon Court of Appeals also acknowledged that this Court "has held that the First Amendment covers various forms of artistic expression." Pet.App.84. Therefore, according to the Oregon court, "the question is whether [Petitioners'] customary practice, and its end product, are in the nature of 'art.'" Pet.App.87.

The Oregon Court of Appeals continued that Petitioners' handiwork bears all the traditional hallmarks of commissioned artistic expression, and that "[Petitioners] imbue each wedding cake with their own aesthetic choices," including Melissa's "own design skills and aesthetic judgments." Pet.App.88–89. Nevertheless, the court concluded that Petitioners' wedding cake designs were not "entitled to the same level of constitutional protection as pure speech or traditional forms of artistic expression." *Id.* The court's decision turned on the premise that BOLI's order need survive only intermediate scrutiny if Petitioners' "cake-making retail business involves, at most, both expressive and non-expressive components," citing this Court's seminal "expressive

conduct" case, *United States v. O'Brien*, 391 U.S. 367 (1968). Pet.App.87.

The Oregon Court of Appeals held that "[f]or First Amendment purposes, the expressive character of a thing must turn not only on how it is subjectively perceived by its maker, but also on how it will be perceived and experienced by others." Pet.App.89. The court concluded that Petitioners had not proven their cakes were invariably "experienced" by others "predominantly as expression," and reasoned that "even when custom-designed for a ceremonial occasion, [they] are still cakes made to be eaten." *Id.*

The Oregon Court of Appeals also rejected Petitioners' arguments that BOLI's order violates the Free Speech Clause by compelling them to host or accommodate celebratory messages about same-sex weddings, and that it violates their freedom of association by compelling them to facilitate such weddings. Pet.App.90–92. The court dismissed these arguments on the ground that "[Petitioners] have not raised a nonspeculative possibility that anyone attending the wedding will impute [the wedding cake's celebratory] message to [Petitioners]." Pet.App.91. The court also suggested that Petitioners could counteract any implicit endorsement of same-sex marriage by "engag[ing] in their own speech that disclaims such support." Pet.App.92.

Because the Oregon Court of Appeals determined that the more deferential standard of intermediate scrutiny applied, it upheld BOLI's order on the ground that any burden imposed on Petitioners' expression was "no greater than essential" to further the State's important interests—first, "ensuring equal access to publicly available goods and services," and second,

"preventing the dignitary harm that results from discriminatory denials of service." Pet.App.94.

Turning to Petitioners' free exercise claim, the Oregon Court of Appeals decided that it was foreclosed by *Smith* because Oregon's public accommodation statute is neutral on its face and BOLI did not impermissibly target religion. The court rejected Petitioners' argument that under the "hybrid-rights" doctrine described in *Smith*, neutral laws of general applicability are subject to strict scrutiny even when they are enforced in ways that simultaneously burden free exercise *and* other fundamental constitutional rights. *See Smith*, 494 U.S. at 881. The court characterized *Smith*'s discussion of hybrid rights as *dictum* and joined other courts that have "declined to follow it." Pet.App.101. The court accordingly applied only rational basis to the claim.

The court thus affirmed BOLI's $135,000 damages award. Pet.App.112–26. The court specifically upheld those damages based on Aaron's "quoting a biblical verse" and on Complainants' own religion-specific interpretation of that verse. Pet.App.118.

Petitioners appealed to the Oregon Supreme Court, which denied review. Pet.App.540.

Petitioners then sought certiorari in this Court, which vacated the Oregon Court of Appeals' decision and remanded the case for further consideration in light of *Masterpiece*. Pet.App.46.

On remand, the Oregon Court of Appeals again rejected Petitioners' claims that ORS § 659A.403 violated their First Amendment rights to free speech

and free exercise, "even though enforcement of the statute burdens Aaron's practice of his faith." Pet.App.5. But the court recognized that "BOLI's handling of the damages portion of the case does not reflect the neutrality toward religion required by the Free Exercise Clause." Pet.App.6.

In particular, the court noted that BOLI's Commissioner and administrative prosecutor equated Petitioners' religious beliefs with "prejudice," Pet.App.35–37, and had awarded heightened damages for Aaron's quotation of the Bible, Pet.App.38–42.

Even though BOLI's Commissioner had proclaimed that the goal is to "rehabilitate" people like Petitioners, Pet.App.110, and BOLI itself had argued that Petitioners "have continually used their religion as an *excuse* for not serving Complainants,"[2] the Oregon Court of Appeals concluded that the anti-religious bias infected only the damages portion of the case and not any other aspect, including whether Petitioners should have been charged in the first place. Pet.App.42–43. The court thus declined to enter judgment for Petitioners or fully vacate the proceedings below, and instead remanded the case to the same biased agency to reassess damages. Pet.App.44–45.

The Oregon Supreme Court once again denied review. Pet.App.538.

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[2] BOLI Response to Respondent's Second Set of Interrog. ¶ 7 (Jan. 13, 2015) (emphasis added).

IV. Subsequent Proceedings

On remand, BOLI relied on the very same biased record to reimpose $30,000 in damages against Petitioners. Pet.App.132–331. Petitioners again appealed to the Oregon Court of Appeals, which has ordered the case held in abeyance "pending the resolution" of this "petition for *writ of certiorari* before the United State[s] Supreme Court." Order Holding Case in Abeyance, *Klein v. BOLI*, No. A179239 (Or. Ct. App. Aug. 22, 2022).

REASONS FOR GRANTING THE PETITION

This Court's review is necessary to reaffirm the proper remedy under *Masterpiece* when administrative enforcement proceedings violate the strict religious neutrality required by the First Amendment. A finding of anti-religious hostility warrants vacating the entire biased proceeding, not trying to artificially isolate the prejudice and remand the case for further proceedings in front of the same biased commission. In fact, summary reversal of the Oregon Court of Appeals would be appropriate, given the clear error and the fact that Petitioners have already spent nearly a decade seeking redress for the violation of their constitutional rights.

This Court should also grant certiorari to resolve a deep and ever-growing split about the precedential value of this Court's hybrid-rights doctrine as articulated in *Smith*. The doctrine applies strict scrutiny in cases, like this one, that implicate both free exercise of religion and another fundamental right, such as free speech. And if the hybrid-rights exception from *Smith* proves illusory or unworkable, this Court should revisit that decision altogether.

Finally, this Court should grant certiorari to resolve the recurring question of whether compelling an artist to create custom art for a wedding ceremony violates the Free Speech Clause of the First Amendment.

This Court has repeatedly signaled the importance of the issues presented in this case. In *Masterpiece*, however, this Court did not answer whether compelled expression that violates sincerely held religious beliefs about marriage violates the Free

Speech Clause and Free Exercise Clause of the First Amendment. This Court also granted certiorari in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021), to reconsider *Smith*, but never reached that question. And *303 Creative* is limited to the free speech issue.

This case is an ideal vehicle to decide these issues. It squarely presents constitutional questions that this Court has signaled are worthy of review, but without the factual uncertainties that beset other cases. Petitioners sold *only* custom cakes—meaning *any* cake they designed and created for a same-sex wedding implicated their free speech and free exercise rights. And standing is clear, given that Petitioners are subject to a damages award assessed by BOLI and upheld by the Oregon Court of Appeals. Moreover, the Oregon Court of Appeals has stayed all proceedings pending the disposition of this petition, ensuring no complications from ongoing state-court proceedings.

If decisions like the Oregon Court of Appeals' are allowed to stand, their coercive application of public accommodation statutes will extend beyond mandatory participation in same-sex wedding ceremonies. Under the same logic, a gay cake designer can be compelled to design, create, and decorate a custom cake for a Westboro Baptist Church ritual. Or an atheist could be compelled to create custom art for a Catholic ceremony. A Christian videographer could be compelled to document a Wiccan ritual. And a Jewish DJ could be compelled to perform for a Nazi rally.

These issues matter, not just to religious business owners, but to the population at large, which benefits from robust protections for free speech and free

exercise, and from the public exchange of ideas that those freedoms promote.

I. Summary Reversal Is Appropriate Under *Masterpiece*.

The Oregon Court of Appeals properly concluded that BOLI demonstrated unconstitutional hostility toward Petitioners' religion when it imposed $135,000 in damages after they declined to design, create, and decorate a custom wedding cake for a same-sex wedding. Yet the court set aside only BOLI's damages award, not BOLI's underlying decision to charge Petitioners in the first place or its finding that they violated Oregon's anti-discrimination statute for public accommodations. The court then remanded the case to the same biased agency, which promptly imposed $30,000 in damages based on the very same biased record. The court's decision to remand was clear error under this Court's precedents and should be reversed summarily.

In *Masterpiece*, this Court held that "indication[s] of hostility" toward religion in government enforcement actions require that "the order must be set aside" or "invalidated." 138 S. Ct. at 1724, 1732. There was no indication that a biased agency's decision could be sliced into biased portions and unbiased portions. Indeed, this Court recently reaffirmed that when "'official expressions of hostility' to religion accompany laws or policies burdening religious exercise," the government action must be "'set aside' … without further inquiry." *Kennedy*, 142 S. Ct. at 2422 n.1 (quoting *Masterpiece*, 138 S. Ct. at 1732).

The rationale is simple: hostility and bias that "infected" "the State's decisions," *Masterpiece*, 138 S. Ct. at 1734 (Kagan, J., concurring), cannot be isolated to one particular part of a single proceeding. The fact that such sentiments only surfaced on occasion is not indicative of their absence elsewhere—it is evidence they lurked below the surface all along. And it is especially illogical to remand a case for a do-over to the very same bureaucratic entity found to have demonstrated religious animus.

Here, BOLI's Commissioner and administrative prosecutor demonstrated hostility throughout the entire administrative proceeding, from equating Petitioners' religious beliefs with "prejudice," Pet.App.35–37, to proclaiming that the goal is to "rehabilitate" people like Petitioners, Pet.App.110. The Commissioner publicly made his disparaging statements about Petitioners before any proceedings began, and BOLI proffered that Petitioners "have continually used their religion as an *excuse* for not serving Complainants." BOLI Response to Respondent's Second Set of Interrog. ¶ 7 (Jan. 13, 2015) (emphasis added).

The ALJ subsequently prohibited Petitioners from presenting evidence in support of their constitutional defenses at a hearing, made his decision under the shadow of anti-religious hostility expressed by the Commissioner, and ultimately made both liability and damages recommendations later adopted by the Commissioner. Pet.App.300–02.

The Oregon Court of Appeals thus correctly concluded that the Commissioner, ALJ, and administrative prosecutor "effectively took a side in an ongoing religious discussion," which "does not

square with the obligation of government to remain strictly neutral toward religion and strictly neutral toward particular religious beliefs," and "directly suggests a governmental preference for one faith perspective over another." Pet.App.41.

But the bias was certainly not limited to the damages portion, and the Oregon Court of Appeals' error on this point only underscores the impropriety and futility of trying to artificially isolate prejudice in administrative proceedings. The court's suggestion that it could partially cure the defect on appeal is likewise wrong. Pet.App.35 n.8. The Commissioner's very decision to bring charges is tainted by his religious animus. ORS § 659A.845. The Commissioner's statements within days of Complainants' initial filing with BOLI reflect that same hostility and his desire to "rehabilitate" people like Petitioners. Pet.App.110.

Moreover, *de novo* review cannot wash away the constitutional violation of being subjected to an unfair process in the first place. There would also be little to deter agencies from violating the constitutional right to a fair hearing before a neutral decisionmaker in the first place. Nor does it make sense to remand the case to the same agency that already demonstrated a lack of religious neutrality. While the Oregon Court of Appeals noted that BOLI has a new Commissioner, many of BOLI's employees remain, as does the cloud overhanging this case, and the same biased record provided the basis for BOLI's unilateral reimposition of $30,000 in damages.

Accordingly, in *Masterpiece*, this Court did not weigh the merits of the case *de novo*, nor remand to the state court or agency to reconsider the case in a

neutral manner—it instead "reversed" the state court judgment without remand, 138 S. Ct. at 1732, and the agency subsequently vacated its decision, thereby ending the case. That remedy applies here. Because BOLI did not act with the requisite neutrality in handling Petitioners' case, the required remedy is dismissal.

This straightforward application of *Masterpiece*'s holding—as re-affirmed in *Kennedy* just this year—would justify summarily reversing the Oregon Court of Appeals. Doing so would allow this Court to correct the lower court's misapprehension of the proper remedy under *Masterpiece*, conserve this Court's resources, and make clear that after Petitioners have "conclusively proven a First Amendment violation and, after almost [ten] years facing unlawful civil charges, [they are] entitled to judgment." *Masterpiece*, 138 S. Ct. at 1740 (Gorsuch, J., concurring).

II. Courts Are Divided on Whether *Smith*'s Exception for "Hybrid-Rights" Claims Is Binding.

Certiorari is also warranted to review the Oregon Court of Appeals' holding regarding "hybrid-rights" claims that implicate both free exercise and another fundamental right. This aspect of *Smith* has led to a deep split and significant confusion among state and lower federal courts. *See, e.g.*, *Parents for Privacy v. Barr*, 949 F.3d 1210, 1236 (9th Cir. 2020) ("The extent to which the hybrid rights exception truly exists, and what standard applies to it, is unclear.").

1. The Oregon Court of Appeals concluded that ORS § 659A.403 is a generally applicable law that does not trigger heightened scrutiny, even though the

free exercise claim in this case unquestionably implicates free speech. The court incorrectly held that rational basis—not strict scrutiny—is the appropriate standard of review.

The court relied on *Smith*, which held that "if prohibiting the exercise of religion … is … merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." 494 U.S. at 878. Religiously neutral, generally applicable laws are thus not subject to the "compelling interest" standard. *Id.* at 885.

But this Court recognized in *Smith* its prior decisions "that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action" in cases that "involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." *Id.* at 881 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Follett v. McCormick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 304–07 (1940); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)). This Court expressly acknowledged and distinguished its application of strict scrutiny in these "hybrid situation[s]." *Id.* at 882. These cases were not implicated by *Smith*, which involved "a free exercise claim unconnected with any communicative activity." *Id.*

The Court reiterated this aspect of *Smith* when it recounted that decision in *City of Boerne v. Flores*, 521 U.S. 507, 513–14 (1997).

Subsequently, some courts continue to recognize the applicability of strict scrutiny to hybrid rights claims, but others—including the Oregon Court of Appeals—have repudiated the hybrid-rights doctrine. This Court should resolve that split.

The Oregon Court of Appeals joined a growing list of courts that have labeled *Smith*'s discussion of hybrid rights "*dictum* and have declined to follow it." Pet.App.101. The court stated that "at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause." Pet.App.102 (quoting *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993)).

The Second, Third, and Sixth Circuits also reject the hybrid-rights doctrine. *See Leebaert v. Harrington*, 332 F.3d 134, 143 (2d Cir. 2003) ("*Smith's* 'language relating to hybrid claims is dicta and not binding on this court.'") (quoting *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001)); *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 247 (3d Cir. 2008) ("Until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta."); *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 240 F.3d 553, 561 (6th Cir. 2001) ("That language was dicta and therefore not binding."), *rev'd on other grounds*, 536 U.S. 150 (2002).

Additional state courts have reached the same conclusion. *See, e.g.*, *Douglas Cnty. v. Anaya*, 694 N.W.2d 601, 606 (Neb. 2005) ("[A]ssertion of a hybrid

rights claim does not implicate a strict scrutiny review[.]").

But the Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits recognize the possibility of hybrid-rights claims, although the required showings vary. The Eight Circuit, for example, has held that plaintiffs alleging a burden on religiously motivated speech "may use their Free Exercise Clause concerns to reinforce their free-speech claim." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 759 (8th Cir. 2019) (cleaned up); *see also Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472–73 (8th Cir. 1991) (holding that other constitutional claims can "breathe[] life back into [a] 'hybrid rights' claim"). The court held that allegations of burdens on both religion and speech "adequately alleged a hybrid-rights claim." *Telescope Media Grp.*, 936 F.3d at 760.

The Tenth Circuit likewise recognizes a "hybrid-rights exception to *Smith* where the plaintiff establishes a 'fair probability, or a likelihood,' of success on the companion claim." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295 (10th Cir. 2004) (quoting *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999)). The Fifth, Seventh, and Eleventh Circuits are similar or analogize to pre-*Smith* cases. *See Cornerstone Christian Schs. v. Univ. Interscholastic League*, 563 F.3d 127, 136 n.8 (5th Cir. 2009) ("Such undue burden may occur where the plaintiff alleges a viable free exercise claim in conjunction with another colorable constitutional claim, giving rise to heightened scrutiny."); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 765 (7th Cir. 2003) (holding that a "hybrid-rights claim entitled to strict scrutiny" requires more than "merely …

combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right") (cleaned up); *Henderson v. McMurray*, 987 F.3d 997, 1006 (11th Cir. 2021) (concluding "[t]he district court was wrong to disregard the hybrid-rights doctrine as dicta" and analogizing to pre-*Smith* cases).

The First and D.C. Circuits also recognize the hybrid-rights doctrine but require that the free exercise claim involve some other independently viable claim, making the hybrid-rights claim irrelevant. *See, e.g.*, *Archdiocese of Wash. v. WMATA*, 897 F.3d 314, 331 (D.C. Cir. 2018); *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 19 (1st Cir. 2004), *aff'g Gary S. v. Manchester Sch. Dist.*, 241 F. Supp. 2d 111, 121 (D.N.H. 2003).[3]

Numerous state courts have applied strict scrutiny to hybrid-rights claims or otherwise recognized their viability. *See, e.g.*, *Shepp v. Shepp*, 906 A.2d 1165, 1173 (Pa. 2006); *City Chapel Evangelical Free Inc. v. City of S. Bend ex rel. Dep't of Redev.*, 744 N.E.2d 443, 454 (Ind. 2001); *People v.*

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[3] In addition, the Fourth Circuit has observed the split in authority over hybrid rights but declined to decide the issue. *Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App'x 348 (4th Cir. 2011). And the Ninth Circuit previously recognized hybrid-rights claims, *see, e.g.*, *San Jose Christian College v. Morgan Hill*, 360 F.3d 1024, 1032–33 (9th Cir. 2004); *Miller*, 176 F.3d at 1207; *Thomas v. Anchorage Equal Rts. Comm'n*, 165 F.3d 692 (9th Cir.), *reh'g granted, opinion withdrawn,* 192 F.3d 1208 (9th Cir. 1999), *and on reh'g,* 220 F.3d 1134 (9th Cir. 2000), but has since asserted there is "no binding Ninth Circuit authority deciding the issue of whether the hybrid rights exception exists and requires strict scrutiny," *Parents for Privacy*, 949 F.3d at 1237.

DeJonge, 501 N.W.2d 127, 134–35 (Mich. 1993); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 182 (Wash. 1992); *Hill-Murray Fed'n of Tchrs. v. Hill-Murray High Sch.*, 487 N.W.2d 857, 862 (Minn. 1992); *State v. DeLaBruere*, 577 A.2d 254, 261 n.8 (Vt. 1990); *see also Swanner v. Anchorage Equal Rts. Comm'n*, 874 P.2d 274, 280 (Alaska 1994).

The present case is controlled by the hybrid-rights cases that *Smith* stated were still good law. As in *Yoder, Follet, Murdock*, *Cantwell*, and *Pierce*, BOLI's application of the Oregon public accommodations statute limits not just Petitioners' ability to live and work in accord with their religious beliefs, but also their freedom to speak or refrain from speaking. Indeed, BOLI punished Petitioners not just because they declined to contribute their art to support a same-sex wedding ritual they opposed on religious grounds, but also because Aaron Klein dared to quote the Bible when explaining those views.

Petitioners present strong free speech claims. But the Oregon Court of Appeals rejected Petitioners' argument solely because the court claimed *Smith*'s discussion of hybrid rights was *dictum*. The Oregon Court of Appeals expressly stated it would await this Court's guidance on the matter, as have many others. *See, e.g.*, *Leebaert*, 332 F.3d at 144 (2d Cir.); *Combs*, 540 F.3d at 247 (3d Cir.); *Kissinger,* 5 F.3d at 180 (6th Cir.). This Court should grant certiorari to resolve the split and reaffirm the hybrid-rights doctrine.

2. If *Smith* does not provide heightened review for hybrid-rights scenarios, then this Court should overrule *Smith* and return to its pre-*Smith* jurisprudence. *See Fulton*, 141 S. Ct. at 1890 (Alito, J., concurring). There is no reason that the Free Exercise

Clause should be subject to a less searching standard of review than other constitutional provisions. *See, e.g.*, *Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring) ("As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination.").

Smith has been controversial since it was decided. Justice O'Connor, joined by three of her colleagues, wrote that its "strained reading of the First Amendment" disregards the Court's "consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct." 494 U.S. at 892 (O'Connor, J., dissenting). In the dissenters' view, *Smith* is "incompatible with our Nation's fundamental commitment to individual liberty." *Id.* at 891.

In the intervening years, Justices have continued to question the soundness of *Smith*'s holding and called for the Court to overrule it. *See, e.g.*, *City of Boerne*, 521 U.S. at 547 (O'Connor, J., dissenting) ("*Stare decisis* concerns should not prevent us from revisiting our holding in *Smith*."); *id.* at 565 (Souter, J., dissenting) (expressing "serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence"); *id.* at 566 (Breyer, J., dissenting) ("I agree with Justice O'Connor that the Court should direct the parties to brief the question whether [*Smith*] was correctly decided."). In *Masterpiece*, Justice Gorsuch—joined by Justice Thomas—noted that "*Smith* remains controversial in many quarters." 138 S. Ct. at 1734.

In *Fulton*, Justices Barrett and Kavanaugh agreed that "the textual and structural arguments

against *Smith* are more compelling. As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination." 141 S. Ct. at 1882 (Barrett, J., concurring); *see also id.* at 1894 (Alito, J., concurring) ("*Smith*, however, paid shockingly little attention to the text of the Free Exercise Clause."). This Court has already once in recent years—*Fulton*—granted certiorari on the question of whether *Smith* should be overruled, recognizing the issue "urgently calls out for review." *Id.* at 1883 (Alito, J., concurring). This Court should do so again.

There should be no concern about practical consequences if *Smith* is overruled. "[E]xperience has disproved the *Smith* majority's fear that retention of the Court's prior free exercise jurisprudence would lead to 'anarchy.'" *Fulton*, 141 S. Ct. at 1888 (Alito, J., concurring). Strict scrutiny has now applied for decades in cases implicating the Free Exercise Clause, without any evidence of workability problems, including in the context of federal laws, regulations, or other actions that substantially burden religious exercise, *see* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 42 U.S.C. § 2000bb *et seq.*; land use regulations that substantially burden religious exercise, *see* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106–274, 42 U.S.C. § 2000cc *et seq.*; non-generally-applicable laws, like those allowing for particularized consideration or individualized exceptions, *see Fulton*, 141 S. Ct. at 1877, or where any secular comparator is treated better, *see Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021); and hybrid rights in certain jurisdictions, *see Smith*, 494 U.S. at 881.

III. Courts Are Divided on Whether Compelling an Artist to Create Custom Art Violates Free Speech.

Review is also warranted on Petitioners' free speech claims. Forcing artists to design, create, and decorate custom products against their strongest beliefs abridges the freedom protected by the Free Speech Clause, as applicable to the states. The Oregon Court of Appeals erred—and deepened growing splits in authorities—by making Petitioners' free speech rights dependent upon whether "other people" would deem the expression worthy of full protection, *see* Part III.A, *infra*, and upon whether the artists collaborated with their customers, *see* Part III.B, *infra*.

A. Courts Disagree About Whether the Protection Afforded Speech Turns on Other People's Opinion of the Speech.

1. The Oregon Court of Appeals acknowledged that "every wedding cake that [Petitioners] create partially reflects their own creative and aesthetic judgment," and that Petitioners "do not offer ... 'standardized' or 'off the shelf' wedding cakes." Pet.App.86. "[T]heir practice for creating wedding cakes includes a collaborative and customized design process that is individual to the customer," the court continued, and relies on Melissa's "own design skills and aesthetic judgments." Pet.App.86–88. And the court concluded that "any cake that [Petitioners] made for [Complainants] Rachel and Laurel would have followed [Petitioners'] customary practice." Pet.App.87.

Despite this, the court found that "[Petitioners] have not demonstrated that their wedding cakes invariably constitute fully protected speech, art, or other expression," and therefore the court declined to "subject BOLI's order to strict scrutiny under the First Amendment." Pet.App.72. The court's rationale was that there had been "no showing that *other people* will necessarily experience any wedding cake that [Petitioners] create predominantly as 'expression' rather than as food." Pet.App.89 (emphasis added).

The Oregon Court of Appeals' subjective, audience-response theory of artistic expression finds no basis in this Court's free speech jurisprudence. Third-party subjective interpretation has never been the test for whether art is fully protected. This Court, for example, did not ask whether "other people" would believe that Jackson Pollock paintings and twelve-tone music are "art" before declaring them to be "unquestionably shielded" expression. *Hurley v Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 569 (1995). To the contrary, "a narrow, succinctly articulable message is not a condition of constitutional protection." *Id.* And premising full protection on third-party subjective interpretation would amount to a heckler's veto.

Only when evaluating "expressive *conduct*"—not art—does this Court consider the "likelihood . . . that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)). But those cases involved purely physical acts like burning a flag, which involves no direct act of communication or lasting artistic product. By contrast, what makes Petitioners' intricately designed

wedding cakes expressive is their meaning as artistic objects, a meaning that the cakes continue to convey long after Petitioners themselves complete their work. Like sand drawings or topiary, Petitioners' cakes are semi-permanent artistic objects. An artist's choice of medium—whether canvas or cake—is irrelevant for the purposes of the First Amendment.

The Oregon Court of Appeals essentially collapsed its protected speech analysis into an expressive-conduct inquiry, importing an audience-comprehension requirement that finds no place in this Court's evaluation of pure expression. Its conflation of the pure-speech and expressive-conduct tests is evident in the court's reliance on *O'Brien* (the draft card burning case) and its progeny. Pet.App.87–89.

2. The Oregon Court of Appeals split from courts that recognize strict scrutiny is appropriate for laws that compel expressive content—such as creating custom wedding invitations—in the context of wedding rituals. *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 895 (Ariz. 2019); *see also Telescope Media Grp.*, 936 F.3d at 758–60 (videography). Moreover, other courts have identified various forms of art as pure expression, without first evaluating the public's perception of the artform. *See, e.g.*, *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1059 (9th Cir. 2010) (tattoos); *Buehrle v. City of Key West*, 813 F.3d 973, 976 (11th Cir. 2015) (same); *Coleman v. City of Mesa*, 230 Ariz. 352, 359 (2012) (same).

The decision of the Oregon Court of Appeals conflicts with these cases, but it finds support in other courts that have denied full First Amendment protection on the basis of judicial inferences about

how the public perceives the art. *See Elane Photography*, 309 P.3d at 68, 69 ("Whatever message Elane Photography's photographs may express, they express that message only to the clients and their loved ones, not to the public.... Observers are unlikely to believe that Elane Photography's photographs reflect the views of either its owners or its employees."); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 287 (Colo. Ct. App. 2015) ("[I]t is unlikely that the public would understand Masterpiece's sale of wedding cakes to same-sex couples as endorsing a celebratory message about same-sex marriage."), *rev'd on other grounds sub nom. Masterpiece*, 138 S. Ct. 1719.

A third category of courts considers public perception to determine whether the expressive purpose predominates in "items with common non-expressive uses that are also sold to customers." *Mastrovincenzo v. City of New York*, 435 F.3d 78, 96 (2d Cir. 2006). These courts have adopted an objective test for doing so. *See id.* ("[C]ourts may gauge the relative importance of the items' expressive character by comparing the prices charged for the decorated goods with the prices charged for similar non-decorated goods. If a vendor charges a substantial premium for the decorated work and/or does not sell the item without decoration, such facts would bolster his claim that the items have a dominant expressive purpose."); *accord People v. Lam*, 995 N.E.2d 128, 129 (N.Y. 2013).

This Court should grant review and resolve this split in authority.

3. The outcome here—and the danger of importing a public perception standard—is especially

clear because the record is replete with evidence that Petitioners' customers and their wedding guests do experience custom wedding cakes predominantly as art, not mere food. *See, e.g.*, Pet.App.242 ("Our clients expect, and we intend, that each cake will be uniquely crafted to be a statement of each customer's personality, physical tastes, theme and desires."). BOLI's own expert witness described herself as an "artist" and her wedding cakes as "artistic expression[s]" that she "want[s] to be able to share … with the public and the community." BOLI Hearing Tr. at 594, 599–600 (Testimony of Laura Widener) (Mar. 13, 2015). Indeed, the Complainants themselves discussed their own wedding cakes—one depicting a three-dimensional peacock, the other showing a fairy tree—in aesthetic and expressive, rather than functional, terms. *See* BOLI Hearing Tr. At 256 (Testimony of Laurel Bowman-Cryer) (Mar. 12, 2015) (describing the design of each cake "*on display* at the wedding," including one that reflected Laurel's Irish heritage "because ... [her] grandmother was going to be watching from Ireland").

Common sense confirms this conclusion: if it were "just a cake," nobody would pay hundreds of dollars for it.

Wedding guests also understand "the inherent symbolism in wedding cakes," which communicate the message that "a wedding has occurred, a marriage has begun, and the couple should be celebrated." *Masterpiece*, 138 S. Ct. at 1743 (Thomas, J., concurring in part and concurring in the judgment); *see id.* ("Although the cake is eventually eaten, that is not its primary purpose. … The cake's purpose is to mark the beginning of a new marriage and to

celebrate the couple."). "[A] wedding cake needs no particular design or written words to communicate th[is] basic message." *Id.* at 1743 n.2.

B. Courts Disagree About Whether the First Amendment Fully Protects Commissioned Art.

1. The opinion below also exacerbates a disagreement among the lower courts about whether commissioned artists forfeit full free speech protection merely by collaborating with their customers.

The Oregon Court of Appeals observed that "to the extent [Petitioners'] cakes are expressive, they do not reflect *only* Petitioners' expression. Rather, they are products of a collaborative process in which Melissa's artistic execution is subservient to a customer's wishes and preferences." Pet.App.89–90 (emphasis added). The court implied that Petitioners' custom wedding cakes would more easily "be understood to fundamentally and inherently embody [Petitioners]' expression, for purposes of the First Amendment," if their art were "created at the baker's … own initiative and for her own purposes," rather than for customers. Pet.App.90 n.9.

This theory would exclude vast swaths of art from the protection of the First Amendment. From Leonardo da Vinci and Michelangelo to modern painters and sculptors, art has always been produced for commercial purposes and often in cooperation with patrons and customers. The ruling below is incompatible with this Court's consistent teaching that speakers do not forfeit First Amendment protection by collaborating with other speakers. *See Hurley*, 515 U.S. at 569 ("[A] private speaker does not

forfeit constitutional protection simply by combining multifarious voices."); *see also Masterpiece*, 138 S. Ct. at 1743 n.3 (Thomas, J., concurring in part and concurring in the judgment) ("Nor does it matter that the couple also communicates through the cake. More than one person can be engaged in protected speech at the same time.").

Many lower courts have followed this Court in holding that art produced in collaboration with a customer is still fully protected by the First Amendment. *See, e.g.*, *Anderson*, 621 F.3d 1051 ("The fact that both the tattooist and the person receiving the tattoo contribute to the creative process … does not make the tattooing process any less expressive activity."); *Buehrle*, 813 F.3d at 977 ("Protected artistic expression frequently encompasses a sequence of acts by different parties, often in relation to the same piece of work.").

But the Oregon Court of Appeals' decision joins a growing number of courts that have deprecated the First Amendment status of artistic expression produced in collaboration with other speakers in a commercial context. *See Elane Photography*, 309 P.3d at 66 ("It may be that Elane Photography expresses its clients' messages in its photographs, but only because it is hired to do so."); *id.* at 68 ("While photography may be expressive, the operation of a photography business is not."); *Craig*, 370 P.3d at 287 ("The fact that an entity charges for its goods and services reduces the likelihood that a reasonable observer will believe that it supports the message expressed in its finished product.").

2. Relatedly, because the Oregon Court of Appeals believed that the speech here was primarily

attributable to the Complainants and not to Petitioners, the court dismissively rejected Petitioners' arguments that they would be compelled to speak against their wishes.

For example, the court first claimed that "Oregon's interest is in no way related to the suppression of free expression." Pet.App.94. But suppression of speech is not BOLI's goal. It wants to *compel* expression against the wishes of the speaker, which this Court recently reaffirmed is even more damaging to First Amendment values than speech restrictions are, and therefore justifies a more searching standard of review. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018).

The Oregon Court of Appeals then stated that compelled-speech cases apply only where "the government prescribed a specific message that the individual was required to express." Pet.App.79. But this Court has not interpreted its precedents so narrowly. *See Hurley*, 515 U.S. at 573–74; *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 17–18 (1986) (plurality op.); *id.* at 22–24 & n.1 (Marshall, J., concurring in the judgment). The Oregon Court of Appeals' claim that Petitioners could counteract any implicit endorsement of same-sex marriage by "engag[ing] in their own speech that disclaims such support" is accordingly a non-starter. Pet.App.92. As Justice Thomas observed in *Masterpiece*, "[t]his reasoning flouts bedrock principles of [this Court's] free-speech jurisprudence" and "would justify any law compelling speech." 138 S. Ct. at 1740; *see Pac. Gas & Elec.*, 475 U.S. at 16 (the government cannot "require speakers to affirm in one breath that which they deny in the next."). The ability "to explain compelled speech

is present in almost every such case and is inadequate to cure a First Amendment violation." *Nat'l Assoc. of Manufacturers v. SEC*, 800 F.3d 518, 556 (D.C. Cir. 2015). Indeed, posting a disclaimer would not remedy the compelled speech injury but only exacerbate it. *See Pac. Gas & Elec.*, 475 U.S. at 16 ("[T]here can be little doubt that [the utility company] will feel compelled to respond to arguments and allegations made [in third-party notices the utility was compelled to mail with its bills]. That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster.").

This Court should grant review and resolve the growing split of authority on First Amendment protections for commissioned art, which directly implicates compelled speech.

IV. This Case Presents an Especially Strong Complement to *303 Creative*.

On February 22, 2022, this Court granted the petition for a writ of certiorari in *303 Creative* to resolve whether applying a public accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment. This case overlaps with, and presents issues that are complementary to, the free speech questions in *303 Creative*. Petitioners here have clear standing to pursue their claims, and the relevant facts of this case are undisputed, presenting a clean vehicle for this Court to consider not only the free speech issue, but also the hybrid-rights and free exercise claims that frequently arise in connection with public accommodation laws. Granting merits review in this case would therefore aid this Court in deciding those important First Amendment questions.

If this Court declines to summarily reverse or grant plenary review in this case, however, the Court should hold this case pending the disposition of *303 Creative*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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