No. 25-233

In the Supreme Court of the United States

CATHARINE MILLER AND CATHY'S CREATIONS, INC.,

Petitioners,

v.

CIVIL RIGHTS DEPARTMENT,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fifth Appellate District

BRIEF *AMICI CURIAE* OF NATIONAL LEGAL FOUNDATION, ANGLICAN CHURCH IN NORTH AMERICA, CONCERNED WOMEN FOR AMERICA, THE FAMILY FOUNDATION, ILLINOIS FAMILY INSTITUTE, PACIFIC JUSTICE INSTITUTE, INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS, and CONGRESSIONAL PRAYER CAUCUS FOUNDATION *in Support of the Petition for Writ of Certiorari*

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INTERESTS OF *AMICI CURIAE*[1]

The **National Legal Foundation** ("NLF") is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in California, seek to ensure that those with a religiously-based view of marriage continue to be free to express that view without being compelled to express the opposite view by state-enforced association with those holding that opposite view.

The **Anglican Church in North America** ("ACNA") unites more than 100,000 Anglicans in over 1,000 congregations and twenty-eight dioceses across the United States and Canada into a single Church. It is a Province in the Fellowship of Confessing Anglicans, initiated at the request of the Global Anglican Future Conference (GAFCon) and formally recognized by the GAFCon Primates—leaders of Anglican Churches representing 70 percent of active Anglicans globally. The ACNA is determined with God's help to maintain the doctrine, discipline, and worship of Christ as the Anglican Way has received them and to defend the God-given inalienable human right to free exercise of religion.

Concerned Women for America ("CWA") is the largest public policy organization for women in the United States, with approximately half a million

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[1] No counsel for any party authored this Brief in whole or in part. No person or entity other than *Amici*, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this Brief. All Parties received timely notice of this filing.

supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite.

The Family Foundation ("TFF") is a non-partisan, non-profit organization committed to promoting strong family values and defending the sanctity of human life in Virginia through its citizen advocacy and education. TFF serves as the largest pro-family advocacy organization in Virginia, and its interest in this case is derived directly from its members throughout Virginia who seek to advance a culture in which children are valued, religious liberty thrives, and marriage and families flourish.

The **Illinois Family Institute** ("IFI") is a non-profit educational and lobbying organization based in Tinley Park, Illinois, that exists to advance life, faith, family, and religious freedom in public policy and culture from a Christian worldview. A core value of IFI is to uphold religious freedom and conscience rights for all individuals and organizations.

The **Pacific Justice Institute** ("PJI") is a non-profit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions,

particularly in the realm of First Amendment rights. Such includes those who, as a matter of conscience, hold traditional views of marriage and family. As such, PJI has a strong interest in the development of the law in this area.

The **International Conference of Evangelical Chaplain Endorsers** ("ICECE") has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for chaplains and all military personnel.

The **Congressional Prayer Caucus Foundation** ("CPCF") is an organization established to protect religious freedoms (including those related to America's Judeo-Christian heritage) and to promote prayer (including as it has traditionally been exercised in Congress and other public places). It is independent of, but traces its roots to, the Congressional Prayer Caucus. CPCF has a deep interest in the right of people of faith to speak, freely exercise their religion, and assemble as they see fit, without government censorship or coercion. CPCF reaches across all denominational, socioeconomic, political, racial, and cultural dividing lines. It has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders.

SUMMARY OF THE ARGUMENT

The petition presents two issues well worthy of

review by this Court. First, this Court should grant the petition to clarify that the speech primarily at issue in the same-sex vendor cases is that of the marrying couple, speech with which the vendor has religious objections in facilitating and associating. Second, the case presents another opportunity for this Court to reconsider *Employment Division v. Smith*, 494 U.S. 872 (1990).

The central fact of this case is that a marriage ceremony is an event rich with expression, both explicit and implicit. While much of the lower court opinions focuses on Petitioner's expression, properly understood, this case is principally about what the brides (and the State) are communicating when they get married. This case is about the *marriage event*, and the message that *the event* publishes to the community. Thus, the question of whether the application of California's civil rights law violates the vendors' free speech and free exercise rights is inextricably bound up with another aspect of that law, the consideration of which is required for the resolution of this case: the State is compelling the vendors to associate with, and facilitate, the message of their customers that the vendors find offensive.

Does a law prohibiting religious discrimination require a Jewish restauranteur to cater a Muslim gala with the announced purpose of fundraising for Hamas? Or, conversely, does it prohibit a Muslim restaurateur from refusing to host a pro-Israel fundraiser? It does not, because the restauranteurs object, not to Muslims or Jews per se, but to their messages, messages with which they do not want to associate or facilitate.

So it is here. Vendors may be engaged in doing something artistic like arranging flowers or decorating cakes. Other vendors may be involved in something menial like providing rental tables and chairs. While those engaged in artistic endeavors will also have their free speech violated by California laws, all vendors, artistic and non-artistic, including the baker here, will have their speech, religious, and associational rights violated whenever the vendor has a sincere objection to supporting the message being communicated by the recipient of the services. No vendor may properly be compelled to join that assembly and associate with that message.

The most relevant speech in this case is that proclaimed from the altar by the wedding participants (and the State) that a same-sex marriage is a type of marriage that should be celebrated and approved. Those who disagree with that message, especially if they disagree from a religious perspective like the baker here, may not constitutionally be compelled to join or facilitate that message or face being punished for refusing to do so.

This Court addressed objections by vendors to facilitate same-sex marriage in *Masterpiece Cakeshop* and *303 Creative*, but its guidance in those cases has not fully settled the weighty constitutional issues at play here. Various federal and state courts have reached dramatically different results in similar cases. *Amici* urge this Court to use this opportunity to articulate the full scope of First Amendment protections for such situations.

This case also demonstrates that *Smith* continues to create opportunities for lower courts to allow

governments to discriminate against people of religious faith. The petition also should be granted to overrule that decision before it causes any more mischief.

ARGUMENT

I. The Petition Should Be Granted to Clarify the Full Scope of First Amendment Protections for Vendors Who Object to Same-Sex Marriages.

The baker in this case does not object to serving homosexuals, including those already in a same-sex relationship. (Appx. 66a-67a, 125a, 332a-333a.) Rather, she objects to associating with and facilitating a broad range of messages that conflict with the values and moral teachings of her faith, including same-sex marriage ceremonies. (Appx. 276a-277a, 386a-387a.) Her objection is based on sincerely held religious convictions that it would be ethically wrong for her to associate with and to help facilitate such a ceremony and its particular message. Whether her refusal to service and facilitate an event because it communicates a message objectionable to her can be punished constitutionally is the key consideration that has not yet been decided by this Court.

A. The Wedding Participants, and the State, Are Communicating a Message in the Same-Sex Marriage Ceremony.

By engaging in a marriage ceremony, both the same-sex wedding participants and the State are broadcasting a clear message. That message is not just that marriage, in the abstract, is a good and

valued institution. The message is a more particular endorsement: that same-sex couples are entitled to engage in such unions with the State's full blessing.

As this Court recounted in the various opinions in *Obergefell v. Hodges*, 576 U.S. 644 (2015), whether same-sex marriage is a legitimate form of marriage is an issue that deeply divides the citizens of this country. A same-sex marriage ceremony is divisive *precisely because* it "makes a statement," just as the denial of the right to marry to same-sex couples communicated the message that such marriages were illegitimate. As the majority noted in *Obergefell*, without being able to marry with the sanction of the State, "[a] truthful declaration by same-sex couples of what was in their hearts had to remain unspoken." *Id.* at 660. Moreover, same-sex couples were "burdened in their rights to associate." *Id.* Conversely, permitting same-sex couples to marry allows them to proclaim that their relationship is "sacred," at least by their own definition, *id.* at 656-57, and to associate to the same extent as heterosexual married couples.

That the State is also communicating its own message by prohibiting or sanctioning a same-sex marriage ceremony was also emphasized by this Court in *Obergefell*, as well as in *United States v. Windsor*, 570 U.S. 744 (2013). Stated negatively, this Court held that, when the Federal Government only recognized heterosexual marriages, it "impermissibly disparaged those same-sex couples 'who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.'" *Obergefell*, 576 U.S. at 662 (quoting *Windsor*, 570 U.S. at 764). Stated positively, this Court recognized that, during a marriage ceremony, "just as a

couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union." *Id.* at 669. "The right to marry [with legal sanction] thus dignifies couples who 'wish to define themselves by their commitment to each other.'" *Id.* at 667 (quoting *Windsor*, 570 U.S. at 763). Simply put, this Court recognized that the marriage ceremony is both an individual and a societal statement most fundamental.

B. The Vendor Has a Sincere Objection to the Message of the Wedding Ceremony.

This Court in *Obergefell* also recognized that many in our country do not agree with these messages that same-sex marriage is morally permissible and good social policy. This Court noted, "Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." *Id.* at 657. And, again, the *Obergefell* majority observed, "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." *Id.* at 672.

It is not disputed in this case that the baker is among those who sincerely believes that same-sex marriage is wrong and that, by facilitating such a ceremony, she would associate with and be announcing her support for it, contrary to her convictions. (Appx. 386a-387a.) *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981) (holding that a court may not judge the reasonableness of a sincere

religious belief). She comes to that belief "based on decent and honorable religious or philosophical premises." *Obergefell*, 576 U.S. at 672. But, unlike this Court, which took pains in *Obergefell* not to disparage such beliefs and in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617, 666 (2018), to assure that decision makers did not do so either, the lower tribunals here have both disparaged and punished the baker for her holding and acting upon her beliefs by refusing to participate in a same-sex marriage ceremony. Whether that is constitutionally permissible is the question presented on these facts.

C. The Vendor Is Not Discriminating on the Basis of "Sexual Orientation."

The record is clear in this case that the baker did not discriminate against the wedding participants because of their sexual orientation.[2] She was quite willing to serve them in a non-marriage context. The record is also clear that the vendor has denied service to other individuals who seek a cake that conflicts with the principals of her faith (including, for example, a man who sought a cake to "celebrate" his decision to divorce his wife). (Appx. 386a-387a.) The baker had no objection to serving homosexuals, even those already in a same-sex relationship, but refused only to participate in a same-sex marriage ceremony and celebration. (Appx. 399a-401a.) Such participation would, just like the State's licensing of the event, send a message to others of acceptance and approval, "offering symbolic recognition and material benefits to

[2] That this Court reviews the facts to determine what, if any, discrimination is actually present was demonstrated most recently in *United States v. Skrmetti*, 145 S. Ct. 1816 (2025).

protect and nourish the union." *Obergefell*, 576 U.S. at 669.

And it does that in a way that is not present in the mere exchange of goods and services disassociated from the ceremonial event. This situation is similar to an African-American restauranteur serving Caucasians regularly in his restaurant, but refusing to cater their Ku Klux Klan banquet. In this situation, the restauranteur's refusal is tied not to the race of the customer, but to the message that will be communicated at the event. It is not a rejection of all Caucasians, but a refusal to become associated with or to facilitate a racist ideology or event.

As this Court pointed out in *303 Creative,* requiring a vendor to participate in a marriage ceremony against her beliefs would be "dangerous" and lead to a world in which

> Governments could force an unwilling Muslim movie director to make a film with a Zionist message, they could compel an atheist muralist to accept an atheist muralist to accept a commission celebrating Evangelical zeal, and they could require a gay website designer to create websites for a group advocating against same-sex marriage.

303 Creative LLC v. Elenis, 600 U.S. 570, 601 (2023). Of course, such a "dangerous" outcome is both unwise and unconstitutional. "[I]f liberty means anything at all, it means the right to tell people what they don't want to hear." *Id.* at 602.

These principles apply fully here. The baker only refused to participate in the message communicated during the same-sex marriage. She did not refuse service on the basis of sexual orientation, but on the basis of the desire (indeed, the ethical imperative in her case) not to become associated with, or to assist in communicating, a message with which she disagreed. To participate in this way, whether she attended the ceremony in person or via her handiwork, violated her religious scruples.

This is the teaching of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995). There, this Court held that, when parade organizers refused to let LGBT individuals march with them, it was not because they wished "to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner," expressing an unwanted message at the event. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (summarizing and quoting *Hurley*, 515 U.S. at 574-75). The same is true here: the baker refused to service the same-sex marriage not because the brides were homosexual, but because of the message their marriage communicated.

D. Non-discrimination Laws Used in This Way Unconstitutionally Compel Speech and Assembly by Forcing the Vendor to Associate with and Facilitate the Ceremony's Message or Punishing the Refusal to Do So.

Even assuming that it violated the nondiscrimination laws for a black restauranteur to refuse to cater a Ku Klux Klan banquet, the restauranteur would

have a valid defense to being punished for his refusal. That is because he would be exercising his own constitutional rights not to associate with or to facilitate racist messages. By requiring such association and facilitation on pain of monetary damages, the State would unconstitutionally compel speech and assembly.

The same is true here for this baker. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013) (holding that conditioning a grant on compelled speech is unconstitutional). This Court in *Obergefell* took pains to explain that it understood the very situation in which this baker finds herself and that, by ruling that States could not deny homosexual couples a marriage license, it did not intend to infringe on the First Amendment rights of those who would object for religious or other sincere reasons:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.

576 U.S. at 648.

Like the liberty interest to define one's own identity that this Court found controlling in

Obergefell, *id.* at 652, 660, individuals have a liberty interest, founded both in the First and Fourteenth Amendments, not to be compelled to propagate or advocate a message they find ethically objectionable. "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). The baker here could service the same-sex marriage ceremony "only at the price of evident hypocrisy." *All. for Open Soc'y*, 570 U.S. at 219. Laws "that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 624, 642 (1994). Indeed, "[t]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves . . . . The First Amendment protects 'the decision of both what to say and what not to say.'" *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012) (quoting *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988)).

The freedom of assembly, although a freestanding right, is a close cousin of the freedom of speech. Quite commonly, individuals exercise their freedom of speech by gathering in groups. Conversely, by restricting the access of individuals to each other, their rights to free speech can be restricted or eliminated altogether. The two rights, then, often do their essential work in tandem.[3] Furthermore, the right of

[3] *See NAACP v. Ala.*, 357 U.S. 449, 460 (1958) ("this Court has more than once recognized . . . the close nexus between the

association is also implicated in the outworking of these rights: "The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

California, through its non-discrimination laws, is trying to force an individual with religious objections to facilitate and support a ceremony with great symbolic significance. Just as the parade organizers objected to associating with those wishing to espouse an unwanted message in *Hurley*, 515 U.S. at 568-81, the baker here objects to being associated with a marriage she considers improper because it implies her consent to, and approval of, the message of the event. The First Amendment freedoms of speech and assembly "deny those in power any legal opportunity to coerce that consent." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). No officials may "force citizens to confess by word or act" the "orthodox" position in "religion[ ] or other matters of opinion." *Id.* at 642.

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freedoms of speech and assembly"); *Thomas v. Collins*, 323 U.S. 516 (1945) (noting that rights of the speaker and audience are "necessarily correlative"); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) ("the right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental"); *Whitney v. Cal.*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring in the result) ("without free speech and assembly discussion would be futile"), *majority opinion overruled on other grounds*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

II. This Court Should Accept the Petition to Overturn *Smith*.

The rule of *Employment Division v. Smith* has been interpreted ever more narrowly by this Court in recent years. *See, e.g.*, *Mahmoud v. Taylor,* 145 S. Ct. 2332, 2341-42 (2025) (finding *Smith* inapplicable in situations like those of *Wisconsin v. Yoder*, 406 U.S. 205 (1972)); *Fulton v. Phila.*, 593 U.S. 522, 537 (2021) (finding that potential discretion in granting exceptions to religious entities renders a policy non-neutral); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542, 545-46 (1993) (invalidating seemingly neutral city ordinances that the record showed were designed to suppress religious belief). But *Smith* continues to work mischief. This case provides such an example and the opportunity for this Court to renounce *Smith*'s rule.

The California Court of Appeals agreed that California's statute permits "some distinctions in treatment—particularly those that promote the welfare of children and seniors." (Appx. 87a.) However, the California court found that its statute does not violate *Smith*'s neutrality and general applicability requirements because its exceptions are simply an effort "to define the contours of what constitutes unreasonable, arbitrary or invidious discrimination" and not a "formalized system of discretionary, individualized exemptions." (Appx. 89a.) This is simply results-oriented double-talk, but it dramatically demonstrates the malleability of the *Smith* rule.[4]

[4] Of course, the California statute also fails the *Smith* test, as explained in *Fulton*, because of its discretionary exceptions.

Unfortunately, the California Court of Appeals is not an outlier in its willingness to overlook statutes that obviously violated *Smith*'s neutrality guarantee in service of preserving the state's ability to discriminate against people of faith. *See, e.g., Emilie Carpenter, LLC v. James*, 107 F.4th 92, 110 (2d Cir. 2024) (statute that permitted discrimination against anti-LGBTQ speech, but prohibited anti-LGBTQ speech, was "neutral"); *Olympus Spa v. Armstrong,* 138 F.4th 1204, 1219 (9th Cir. 2025) (statute that explicitly exempted private clubs but not public, religious-based clubs was "neutral"). Lower courts have demonstrated that they are more than willing to permit discrimination against religious individuals and entities whose beliefs they or the public disfavor, using the *Smith* rule to do so. This Court should grant the petition to overturn *Smith* and eliminate that very real and continuing concern.

CONCLUSION

A Jewish Community Center cannot constitutionally be punished for racial or national origin discrimination for its refusal to rent its hall for a commemoration of the massacres of October 7. A Palestinian restauranteur cannot be punished for refusing to service a pro-Israel fundraising banquet to support the war in Gaza. Nor can this baker properly be compelled to associate with and foster a wedding ceremony she finds morally objectionable or be penalized for refusing to do so. This Court should grant the petition and reverse. It should also use this case as an opportunity to revisit and overrule *Smith.*

Respectfully submitted,
this 29th day of September 2025,

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