IN THE SUPREME COURT OF THE STATE OF OREGON

MELISSA ELAINE KLEIN, dba Sweetcakes by Melissa; and **AARON WAYNE KLEIN**, dba Sweetcakes by Melissa, and, in the alternative, individually as an aider and abettor under ORS 659A.406, Petitioners Petitioners on Review, v. **OREGON BUREAU OF LABOR AND INDUSTRIES**, Respondent Respondent on Review.	CA A159899 Bureau of Labor and Industries Agency Nos. 44-14, 45-14 Supreme Court No.

PETITION FOR REVIEW OF MELISSA & AARON KLEIN

Petition for Review of the Decision of the Court of Appeals on Remand from the United States Supreme Court

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Petition Includes Constitutional Challenges to the Application of ORS 659A.403

Opinion Filed: January 26, 2022
Author of Opinion: Lagesen, Chief Judge
Before: James, Presiding Judge, Lagesen, Chief Judge, and DeVore, Senior Judge

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PETITIONERS INTEND TO FILE A BRIEF ON THE MERITS

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PETITION FOR REVIEW

Petitioners Aaron and Melissa Klein seek review from this Court after the Court of Appeals issued a decision upon remand from the U.S. Supreme Court in light of *Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Comm'n*, 138 S Ct 1719 (2018). The Court of Appeals also addressed the U.S. Supreme Court's recent decision in *Fulton v Philadelphia*, 141 S Ct 1868 (2021).

The Court of Appeals properly concluded that the Bureau of Labor and Industries (BOLI) had demonstrated improper hostility toward Petitioners' religion when it imposed $135,000 in damages after Petitioners declined to design, create, and decorate a custom wedding cake for a same-sex wedding. Petitioners do not offer standardized or off-the-shelf wedding cakes, but instead design, create, and decorate each cake to order. Yet despite finding BOLI violated the First Amendment's requirement of strict neutrality toward religion, the Court of Appeals set aside only BOLI's damages award, not BOLI's underlying finding that Petitioners violated Oregon's anti-discrimination statute for public accommodations, ORS 659A.403. The Court of Appeals further concluded that ORS 659A.403 is a generally applicable law that does not trigger heightened scrutiny, even though the Oregon Constitution requires courts to decide whether to grant religious exemptions, implicating *Fulton*'s holding that "a formal mechanism for granting exceptions renders a policy not

generally applicable," 141 S Ct at 1879. The Court of Appeals also declined to revisit its prior ruling that Petitioners' custom-designed cakes are entitled to protection under the Free Speech Clauses of the First Amendment and Oregon Constitution.

This Court should address the Court of Appeals' erroneous conclusions regarding the state-law issues of (1) whether Petitioners violated ORS 659A.403, given that they never refused service on account of any customer's sexual orientation; and (2) whether ORS 659A.403 is generally applicable, given the authority in the Oregon Constitution for courts to grant religious exemptions.

This case also presents important federal constitutional issues that are fully preserved for review pursuant to the U.S. Supreme Court's broad remand for reconsideration in light of *Masterpiece*, *see* ER-13 n.2, including:
(1) whether BOLI's confirmed hostility toward Petitioners' religion warrants vacating the entire commission proceedings, not just the damages award;
(2) whether forcing Petitioners to design, create, and decorate a custom product for a wedding ceremony to which they object on sincere religious grounds would violate the First Amendment's Free Speech and Free Exercise Clauses;
(3) whether the "neutral, generally applicable law" test from *Employment Division v Smith*, 494 US 872 (1990), should be overruled; and (4) whether

strict scrutiny applies to free exercise claims that implicate other fundamental rights, like free speech.

STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

The relevant historical and procedural facts in the opinion of the Court of Appeals are correct, except the Court erroneously stated that the Administrative Law Judge in this case was assigned from the Office of Administrative Hearings. ER-7. The ALJ was actually an employee of BOLI. ER-427–29.

QUESTIONS PRESENTED ON REVIEW

The questions presented are:

A. Whether BOLI's confirmed hostility toward Petitioners' religion warrants vacating the entire commission proceedings, not just the damages award.

B. Whether Petitioners violated ORS 659A.403 even though their business served all customers regardless of protected class.

C. Whether compelling Petitioners to design, create, and decorate custom wedding cakes to celebrate marriage rituals that are incompatible with Petitioners' sincerely held religious beliefs violates the Free Speech Clauses of the First Amendment and the Oregon Constitution.

D. Whether compelling Petitioners to design, create, and decorate custom wedding cakes to celebrate marriage rituals that are incompatible with Petitioners' sincerely held religious beliefs violates the Free Exercise Clause of

the First Amendment, either because: (1) the Oregon Constitution authorizes exemptions to ORS 659A.403, rendering it a non-generally-applicable law subject to strict scrutiny in this case, which BOLI cannot satisfy; (2) the "neutral, generally applicable law" test from *Smith* should be overruled; or (3) this is a hybrid-rights case implicating both free exercise and free speech claims, thereby triggering strict scrutiny, which BOLI cannot satisfy.

PROPOSED RULES OF LAW

A. BOLI's hostility toward Petitioners' religion warrants vacating the entire commission proceedings, not just the damages award. That hostility infected the entire proceedings. It is cold comfort that BOLI, the same entity found to have demonstrated religious animus, now gets a do-over on damages.

B. Petitioners did not deny service "on account of ... sexual orientation" in violation of ORS 659A.403. Petitioners serve all customers, regardless of sexual orientation, but decline to design, create, and decorate a custom cake that will be used in a same-sex wedding regardless of who buys the cake. The subsequent use of a wedding cake in a same-sex marriage is not a sufficient proxy for sexual orientation of the customer. As the facts here demonstrate, heterosexual customers routinely purchase cakes for same-sex weddings, and gay customers routinely purchase cakes for opposite-sex weddings. Petitioners previously sold a custom cake and other baked goods—for use in an opposite-sex wedding—to the *same* couple who brought the

current complaint against Petitioners. Furthermore, this case largely stems from misstatements by Complainant Rachel Bowman-Cryer's heterosexual mother, who was assisting with the purchase of a cake for a same-sex wedding.

C. Petitioners' custom wedding cakes are pure expression that is fully protected by the Free Speech Clauses of the First Amendment and the Oregon Constitution. Forcing artists to design, create, and decorate custom products to celebrate marriage rituals abridges the freedom of speech protected by these provisions.

D. Compelling Petitioners to design, create, and decorate custom cakes for ceremonies to which Petitioners have a sincere religious objection violates the Free Exercise Clause of the First Amendment because: (1) the Oregon Constitution authorizes exemptions to ORS 659A.403, rendering it a non-generally-applicable law subject to strict scrutiny in this case, which BOLI cannot satisfy; (2) the "neutral, generally applicable law" test from *Smith* should be overruled; or (3) strict scrutiny applies under the hybrid-rights exception to *Smith* for free exercise claims that simultaneously implicate other fundamental rights like free speech.

REASONS THIS COURT SHOULD ALLOW REVIEW

This Court should review this case because its outcome will determine whether entrepreneurs in Oregon can exercise their freedoms of speech, religion, and conscience, and whether a government agency's hostility toward

religion during a proceeding results in the Pyrrhic victory of remanding the case to that same biased entity for a do-over on damages.

This case satisfies many of this Court's criteria governing discretionary review:

1. It presents several "significant issue[s] of law." ORAP 9.07(1). Among these are "[t]he interpretation of … constitutional provision[s]," namely article I, sections 2, 3, and 8 of the Oregon Constitution, and "[t]he interpretation of a statute," namely Oregon's anti-discrimination statute for public accommodations, ORS 659A.403. ORAP 9.07(1)(a), (b).

If the decision below stands, its effects will extend far beyond same-sex marriage. According to the Court of Appeals, any "public accommodation," broadly defined, is compelled by ORS 659A.403 to contribute its services to promote any conduct so long as there is a "close relationship" between that conduct and a protected status. ER-50. This compulsion remains in force even for entrepreneurs who offer custom-designed products and imbue each product "with their own aesthetic choices," unless those products meet the Court of Appeals' ill-defined and subjective test for what is "inherently 'art.'" ER-65.

On this logic, a gay cake designer can be compelled to design, create, and decorate a custom cake for a Westboro Baptist Church ritual, because there is a "close relationship" between making a cake for a church ritual (the conduct)

and Christians (a protected class). Or an atheist could be compelled to create custom art for a Catholic ceremony.

These legal issues are significant to entrepreneurs who will be compelled to abandon their businesses, as Petitioners did, or to compromise their religious faith and conscience.

And when BOLI prosecutes one of these entrepreneurs and is later proven to have exhibited religious hostility (assuming BOLI does not simply do a better job of hiding its dislike of religion), the only remedy will be that BOLI gets a do-over on damages, with the underlying finding of a violation remaining in force.

2. "[S]imilar issue[s]" will "arise[] often," as creative businesses throughout the State are compelled by the Court of Appeals' interpretation of ORS 659A.403 to participate in rituals that violate their sincerely held religious beliefs. ORAP 9.07(2).

The decision below will also chill creative entrepreneurs throughout the State and enlarge BOLI's power to force unwilling members of the public to participate in celebrations and promote ideologies of all kinds that violate their creeds and consciences.

3. "[M]any people are affected by the decision in the case," and "the consequence of the decision is important to the public," as indicated by the significant press attention this and similar cases have generated. ORAP 9.07(3).

4. The case includes "an issue of state law," as it involves the interpretation of the Oregon Constitution and statutes. ORAP 9.07(4).

5. "[T]he issue is one of first impression for the Supreme Court." ORAP 9.07(5); *see* ER-60 ("It appears that the Supreme Court has never decided a free-speech challenge to the application of a public accommodations law to a retail establishment selling highly customized, creative goods and services that arguably are in the nature of art or other expression.").

6. The legal issues are properly preserved, as reflected in the Court of Appeals' express statement that these issues were preserved. ER-13 n.2. ORAP 9.07(7).

7. "[P]resent case law is inconsistent," ORAP 9.07(9), with regard to the proper interpretation of the phrase "because of … sexual orientation" in ORS 659A.403. *Compare* ER-45, 46, *with Hardie v Legacy Health Sys.*, 167 Or App 425, 435–36 (2000) (establishing a "but for" standard).

8. The errors in the Court of Appeals' decision "result[] in a serious or irreversible injustice" for Petitioners, who have been forced to abandon their business. ORAP 9.07(14). The error also results "in a distortion or misapplication of a legal principle" that cannot be corrected by another branch of government, since it involves misinterpretation of the Oregon and U.S. Constitutions. *Id.*

9. "[T]he issues are well presented in the briefs" of both parties before the Court of Appeals, and petitioners intend to file a brief on the merits before this Court to address the errors in the Court of Appeals' decision. ORAP 9.07(15).

ARGUMENT

I. BOLI's Hostility Toward Petitioners' Religion Warrants Vacating the Entire Administrative Proceedings.

The Court of Appeals correctly found that BOLI had demonstrated unconstitutional hostility toward Petitioners' religion, but the court erroneously concluded that this violation warranted vacatur only of the damages award against Petitioners and not vacatur of the entire BOLI proceedings.

In *Masterpiece*, the U.S. Supreme 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. BOLI's Commissioner and administrative prosecutor demonstrated hostility throughout the entire administrative proceeding, from equating the Klein's religious beliefs with "prejudice," ER-24–25, to proclaiming that the goal is to "rehabilitate" people like Petitioners. ER-81; ER-148. And BOLI proffered that Petitioners "have continually used their religion as an *excuse* for not serving Complainants." ER-240 (emphasis added). Yet the Court of Appeals did not follow *Masterpiece* and invalidate the Commissioner's decision. Instead, the

court affirmed liability and remanded only for a new consideration of damages by the same biased agency. This was error.

The unconstitutional lack of religious neutrality demonstrated by the Commissioner and administrative prosecutor "infected" "the State's decisions" throughout the entire proceeding, not just the damages phase. *Masterpiece*, 138 S Ct at 1734 (Kagan, J., concurring). In addition, the Court of Appeals stated that the ALJ came from the Office of Administrative Hearings, ER-7, ER-25, but that is wrong. The ALJ was a BOLI employee. ER-427–29; Or. Admin. R. § 839-050-0020(1), 839-050-0160(1) (noting ALJs may be agency employees). The Commissioner publicly made his disparaging statements about Petitioners before any proceedings began, and BOLI proffered that individuals like Petitioners may have used their religion as an "excuse" for discrimination. ER-240. The ALJ subsequently prohibited Petitioners from presenting evidence in support of their constitutional defenses, made his decision under the shadow of the religious hostility of the Commissioner, was asked to rule on charges reflecting BOLI's suggestion that Petitioners may have used their religion as an "excuse" for discrimination, and ultimately made both liability and damages recommendations later adopted by the Commissioner. ER-427-29.

The Commissioner, ALJ, and administrative prosecutor were therefore responsible for awarding damages in a non-neutral way that "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." ER-28-29. When the agency acts as prosecutor, judge, and jury, the unconstitutional lack of neutrality should end the case.

The Court of Appeals' suggestion that it could partially cure the defect on appeal is wrong. The Court of Appeals found hostility after "whole record review." ER-24 n 8. The very decision to bring charges was made by the Commissioner and is tainted by his lack of neutrality—indeed, his religious animus. ORS 659A.845. The Commissioner's statements within days of Complainants' initial filing with BOLI reflect that hostility and his desire to "rehabilitate" people like Petitioners. ER-81; ER-148.

A "de novo" review cannot wash away the constitutional violation of being subjected to an unfair process. Otherwise, there would be little to deter agencies from violating the constitutional right to a fair hearing before a neutral decisionmaker. Nor does it make sense to remand the case to the same agency that already demonstrated a lack of religious neutrality. While the Court of Appeals noted that BOLI has a new Commissioner, many of BOLI's employees remain.

Accordingly, in *Masterpiece*, the U.S. Supreme Court did not weigh the merits of the case *de novo*, or remand to the state court or agency to reconsider

the case in a neutral manner—it instead reversed the state court, and the case was dismissed. 138 S Ct at 1732. That remedy applies here. Because the Court of Appeals found that BOLI did not act with the requisite neutrality in handling Petitioners' case, the required remedy is dismissal.

II. Petitioners Served Everyone and Thus Did Not Discriminate Under ORS 659A.403.

This Court can avoid the fraught constitutional questions raised in this case by properly construing ORS 659A.403, which prohibits discrimination "on account of … sexual orientation." On remand, the Court of Appeals adhered to its prior decision that Petitioners had violated ORS 659A.403 by declining to make a custom cake for a same-sex wedding, even though there is no evidence that Petitioners have ever discriminated against *any* customer "on account of" his or her sexual orientation.

The Court of Appeals had previously endorsed—and did not revisit on remand—BOLI's erroneous conclusion that Petitioners' "refusal to provide a wedding cake for Complainants because it was for their same-sex wedding was synonymous with refusing to provide a cake because of Complainants' sexual orientation." ER-45; ER-4. The facts of this case prove how misplaced that analysis is. It is undisputed that Petitioners willingly served Complainants in the past, including when Complainants purchased a wedding cake for the opposite-sex marriage of Rachel Bowman-Cryer's mother. ER-100. Petitioners did so

knowing Complainants were gay. ER-225, ER-227, ER-238. And it is undisputed that Petitioners would have declined to make the cake requested in this case regardless of whether Complainants ordered it, or a heterosexual parent or friend had ordered it. ER-39. Indeed, Bowman-Cryer's own (heterosexual) mother was heavily involved during the attempt to purchase a cake for her daughter's same-sex wedding, demonstrating that Petitioners' objection had nothing to do with who was buying it.

This confirms the reality that heterosexual customers routinely order cakes for gay weddings, and gay customers routinely order cakes for heterosexual weddings. Petitioners decline to make cakes for a narrow and particular use, but Petitioners do not discriminate against any of their customers.

The Court of Appeals created a false equation between protected gay status and unprotected same-sex wedding ceremonies by noting that "on account of" is synonymous with "because of," and then interpreting "because of" to mean "causally connected to." ER-45–46. But the court's use of "causally connected" does not reflect what "on account of" (or "because of") means. The phrase "on account of" has already been interpreted in the context of Oregon's anti-discrimination statutes to require "but for" causation. *See Lacasse v Owen*, 278 Or App 24, 32–33 (2016); *Hardie*, 167 Or App at 435–36. This standard requires a showing that "in the absence of" the protected status,

the complainant "would have been treated differently." *Hardie*, 167 Or App at 435.

The Court of Appeals silently abandoned the longstanding "but-for" causation standard in favor of a much more malleable "causally connected" standard. This Court should correct that mistake.

III. Petitioners' Custom-Designed Wedding Cakes Are Protected by the Free Speech Clauses of the U.S. and Oregon Constitutions.

The Court of Appeals also declined to revisit its earlier ruling on Petitioners' compelled speech claim under the First Amendment and the Oregon Constitution. But this Court should still grant review on that issue, which is fully preserved because the U.S. Supreme Court vacated the entirety of the Court of Appeals' prior judgment for reconsideration in light of *Masterpiece*, including the free speech claims. ER-32; *Masterpiece*, 168 S Ct at 1728; *see* ER-13 n.2 (Court of Appeals recognizing Petitioners preserved arguments regarding "their rights under the First Amendment").

The Court of Appeals' conclusion rested on unfounded speculation that at least some of Petitioners' custom wedding cakes may not rise to the level of protected art. Acknowledging a long line of precedents, the Court of Appeals admitted that "it is plausible that the United States Supreme Court would hold the First Amendment to be implicated by applying a public accommodations law to require the creation of pure speech or art." ER-61. But the Court found

that "the Kleins have not demonstrated that their wedding cakes invariably constitute fully protected speech, art, or other expression," and therefore declined to "subject BOLI's order to strict scrutiny under the First Amendment." ER-53.

The 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." ER-63. Instead, "their practice for creating wedding cakes includes a collaborative and customized design process that is individual to the customer" and relies on Melissa's "own design skills and aesthetic judgments." ER-63, 64. And the court concluded that "any cake that [Petitioners] made for [Complainants] Rachel and Laurel would have followed [Petitioners'] customary practice." ER-64.

The Court of Appeals admitted that Petitioners' "argument that their products entail artistic expression is entitled to be taken seriously." ER-65. Yet the court determined that Petitioners' custom-designed cakes are not "entitled to the same level of constitutional protection as pure speech or traditional forms of artistic expression." *Id.* The court reasoned that these cakes may not be art because there was "no showing that *other people* will necessarily experience any wedding cake that [Petitioners] create predominantly as 'expression' rather than as food." *Id.* (emphasis added).

The Court of Appeals' subjective, audience-response theory of artistic expression finds no basis in First Amendment jurisprudence. Subjective interpretation has never been the test for whether art is fully protected. The Supreme Court did not ask whether "other people" experience Jackson Pollock paintings and twelve-tone music as art before declaring them to be "unquestionably shielded" expression. *See Hurley v Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston, Inc.*, 515 US 557, 571–72 (1995). To support its novel conclusion that "the expressive character of a thing must turn … on how it will be perceived and experienced by others," the Court of Appeals cites only cases dealing with "expressive conduct," not art. ER-65. These cases have no bearing on First Amendment protection for pure expression or art, which does not depend on how the audience interprets it.

In any event, 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.*, ER-219 ("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."); ER-236. BOLI's own expert witness explained that custom wedding cakes are "artistic creations." ER-231, 232, 233, 234. If it were "just a cake," nobody would pay hundreds of dollars for it. And there is no question that the content and design reflect the artistic expression of Petitioners.

By refusing to apply strict scrutiny, the Court of Appeals split from courts that have recognized that strict scrutiny is appropriate for laws that compel expressive content—such as creating custom wedding invitations—in the context of same-sex weddings. *Brush & Nib Studio, LC v City of Phoenix*, 448 P.3d 890, 895 (Ariz. 2019); *see also Telescope Media Group v Lucero*, 936 F.3d 740, 758–60 (8th Cir. 2019) (videography).

Further, the Court of Appeals engaged in sleight of hand by claiming that "Oregon's interest is in no way related to the suppression of free expression." *Id.* BOLI would *compel* expression against the wishes of the speaker, which the U.S. Supreme Court has held is subject to even stronger scrutiny than suppression. *Janus v AFSCME, Council 31*, 138 S Ct 2448, 2464 (2018). This explains why the U.S. Supreme Court—even when applying intermediate scrutiny for commercial speech—has held that the First Amendment prohibits compelling someone to contribute to speech with which he disagrees, even if he could disclaim the message. *United States v United Foods*, 533 US 405, 410-13 (2001).

Even if Petitioners' creations are entitled to free speech protections only as expressive conduct, the Court of Appeals still erred by finding intermediate scrutiny satisfied. ER-69. Because the Court of Appeals misapprehended that Petitioners had engaged in discrimination, *see* Part II, *supra*, the "important or

substantial governmental interest" in preventing discrimination is not satisfied here, ER-69.

Petitioners also prevail under the Oregon Constitution's free speech clause, article I, section 8, which authorizes challenges to laws that are neutral on their face but whose "reach, as applied to defendant, extends to privileged expression." *State v Stoneman*, 323 Or 536, 543 (1996). Section 8 "extends not only to written and spoken communications, but also to verbal and nonverbal expressions in film, photographs, and the like." *Id.* at 541. Accordingly, Petitioners' creative expression is protected even though they used a nontraditional medium.

IV. BOLI Violated Petitioners' Free Exercise Rights.

Compelling Petitioners to design, create, and decorate custom wedding cakes to celebrate marriage rituals that are incompatible with Petitioners' sincerely held religious beliefs violates the Free Exercise Clause of the First Amendment. This conclusion obtains from any of three avenues: (1) contrary to the Court of Appeals' conclusion, the Oregon Constitution authorizes discretionary exemptions to ORS 659A.403, rendering it a non-generally-applicable law subject to strict scrutiny, which BOLI cannot satisfy; (2) the "neutral, generally applicable law" test from *Smith* should be overruled; or (3)

this is a hybrid-rights case implicating both free exercise and free speech claims, thereby triggering strict scrutiny, which BOLI cannot satisfy.[1]

A. The Oregon Constitution Authorizes Discretionary Exemptions to ORS 659A.403, and Therefore Is Not Generally Applicable.

In *Fulton*, the U.S. Supreme Court held: "The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude." 141 S Ct at 1879.

The Court of Appeals agreed that the Oregon Constitution "allow[s] for an individual claim to a religious exemption from the application of a general law," which the courts themselves can "grant." ER-16. But the Court of Appeals appeared to hold that the availability of these exceptions does not render ORS 659A.403 non-generally-applicable because Oregon courts do not have "*discretion*" whether "to grant religious exemptions from generally applicable, neutral statutes." ER-16 (emphasis in original). The Court of Appeals concluded that the availability of exemptions applied only where "*as a matter of law*" the Oregon Constitution "require[s] the grant of a religious exemption to a generally applicable and neutral law." ER-17.

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[1] The Court of Appeals confirmed that these arguments have been properly preserved for review. *See* ER-13 n.2.

The Court of Appeals appears to have drawn the line between exemptions that are discretionary under state law and those that are required under state law. But that is not what *Fulton* held. The U.S. Supreme Court stated that any "formal mechanism for granting exceptions renders a policy not generally applicable," 141 S Ct at 1879, and the Court of Appeals did not dispute that there is such a mechanism in the Oregon Constitution.

Moreover, even if some amount of discretion were required in the exemption process, the Court of Appeals failed to recognize that the type of exemption power in the Oregon Constitution *does involve* discretion. This is no ministerially-applied exception like applying a rule only to people of a certain confirmed age. The religious exemption process in the Oregon Constitution requires courts to determine whether they "should grant" individual religious exemptions, *State v Hickman*, 358 Or 1, 16 (2015), balancing weighty religious concerns, which was precisely the problem *Fulton* identified when it said that an exemption process renders a law non-generally-applicable. This aspect of the Oregon Constitution's exemption regime is demonstrated by the fact that even the Court of Appeals could not explain when exactly an exemption is required. Rather, the Court of Appeals could muster only the vaguest of terms, saying courts must consider "the circumstances present[ed]" and decide whether the Oregon Constitution's "wording, the case law surrounding it, and the historical circumstances that led to its creation" would "require the grant of an individual

religious exemption." ER-17. This clearly "invites the government to decide which reasons for not complying with the policy are worthy of solicitude." 141 S Ct at 1879.

The Court of Appeals therefore erred by finding ORS 659A.403 to be generally applicable. Because the law is not generally applicable, Oregon was required to grant Petitioners an exemption unless BOLI could prove a "compelling reason." *Smith*, 494 US at 884. Oregon has no compelling reason to deny an exemption here (or its decision is not narrowly tailored to that end), especially given the undisputed fact that customers have numerous choices of willing alternative bakeries that will design and create equivalent products. *See* ER-106, 107.

B. *Smith*'s "Neutral, Generally Applicable Law" Test Should Be Overruled.

Petitioners recognize that this Court cannot overrule the U.S. Supreme Court's decision in *Smith* 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 US at 878. But Petitioners nonetheless raise the argument (again) for preservation. The text and structure of the First Amendment are incompatible that decision. And, as Justice O'Connor stated in dissent in *Smith*, the majority's "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." *Id.* at 892.

In the intervening years, Justices have continued to question the soundness of *Smith*'s holding and to call for the Court to overrule it. *See, e.g.*, *City of Boerne v Flores*, 521 US 507, 547 (1997) (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. And most recently, 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.

C. *Smith*'s Hybrid-Rights Exception Requires Strict Scrutiny.

Petitioners are further entitled to relief under the hybrid-rights exception to *Smith*, which explained that the First Amendment can prohibit the application of even neutral, generally applicable laws in cases "involv[ing] 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." 494 US at 881 (citing *Cantwell v Connecticut*, 310 US 296, 304–07 (1940)).

BOLI's application of ORS 659A.403 limits not just Petitioners' ability to live and work according to their religious beliefs, but also their freedom to speak or refrain from speaking. "[I]n the light of the constitutional guarantees" involved, such state action is unlawful "in the absence of a statute narrowly drawn to [avoid] a clear and present danger to a substantial interest of the State." *Cantwell*, 310 US at 311. The Court of Appeals previously labeled *Smith*'s discussion of hybrid rights "dictum," ER-74, but several federal circuit courts persuasively disagree, *see Miller v Reed*, 176 F3d 1202, 1207 (9th Cir. 1999); *Axson-Flynn v Johnson*, 356 F3d 1277, 1295 (10th Cir. 2004). For the same reasons stated above, BOLI cannot satisfy this standard.

CONCLUSION

Petitioners respectfully request that this Court grant review and reverse the decision of the Court of Appeals.

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

I hereby certify that (1) this petition for review complies with the word-count limitation in ORAP 9.05(3)(a) and (2) the word-count of this petition (as described in ORAP 5.05(1)(c)) is 4942 words.

I certify that that the size of the type in this petition is not smaller than 14-point font for both the text of the petition and footnotes as required by ORAP 5.05(3)(b).

DATED this 2nd day of March, 2022.

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CERTIFICATE OF FILING AND SERVICE

I certify that on March 2, 2022, I directed Petitioners' Petition for Review to be filed electronically with the Appellate Court Administrator, Appellate Court Records Section.

I further certify that on March 2, 2022, I directed a true copy of the Petitioners' Corrected Petition for Review to be served on the following parties at the addresses set forth below:

Leigh A. Salmon
Carson Whitehead
1162 Court Street NE
Salem, Oregon 97301-4096

Attorneys for Respondent

Service was made by eFiling.

DATED this 2nd day of March, 2022.

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