No. 22-204

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Respondent BOLI's brief in opposition raises only makeweight arguments against granting the Petition.

BOLI begins by disingenuously claiming this case is about whether there is "a constitutional right to exclude customers on the basis of the customers' sexual orientation." BIO1. But it is undisputed that Petitioners served all customers regardless of sexual orientation, including the same Complainants in this case, for whom Petitioners had previously made a custom cake for a family member's wedding.

BOLI also ignores that Petitioners made only custom cakes—no off-the-shelf versions—meaning every wedding cake they designed would necessarily implicate First Amendment concerns. Petitioners declined to design a cake here because of what it would symbolize and the message it would necessarily convey, not because of who requested it or what the exact design would be. These cakes are not fungible goods or ready-made creations. Such undisputed facts make this case an especially strong vehicle for addressing the issues left unresolved in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

BOLI also claims this Court's jurisdiction is "clouded" because a portion of the case remains pending at the Oregon Court of Appeals. BIO1. But even BOLI ultimately acknowledges this Court has jurisdiction under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), because the state courts definitively rejected Petitioners' constitutional claims and remanded the case only on damages. BIO17. Moreover, by expressly staying all state proceedings

"pending the resolution" of this Petition, the Oregon Court of Appeals has invited this Court to resolve these important constitutional issues after a decade of litigation.

Finally, rather than meaningfully dispute the existence of the circuit splits Petitioners raise on First Amendment issues, BOLI primarily debates the merits of those claims, demonstrating they are important and worthy of this Court's plenary review.

The Petition should be granted.

I. The Parties Agree This Court Has Jurisdiction.

BOLI asserts that this Court's jurisdiction may be "cloud[ed]" because of "ongoing state court proceeding[s]." BIO1. But the only proceeding is a stayed appeal of the reduced damages figure BOLI perfunctorily imposed on Petitioners—with no new hearing, no new evidence, and no new argument—after the Oregon Court of Appeals rejected the constitutional claims Petitioners present to this Court.

This Court has routinely "treated [a state court] decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Cox Broadcasting*, 420 U.S. at 477. "In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed

justice,' as well as precipitate interference with state litigation." *Id.* at 477–78.

This case satisfies each of these considerations. BOLI concedes "the state courts have definitively rejected the arguments that [P]etitioners raise here," BIO17, which are the same arguments they have raised for years in the state courts and would dispose of the entire case if adopted, *see* Pet.App.19 n.2 ("[T]his case, from the start, has centered on the question of whether the application of the law to the Kleins' conduct is consistent with their rights under the First Amendment….").[1] Indeed, the Oregon Court of Appeals remanded the case for BOLI to reconsider only damages, not Petitioners' First Amendment claims. Nothing will be gained by this Court waiting for further proceedings. BOLI agrees that this alone provides this Court with jurisdiction under *Cox Broadcasting*. BIO17.

Immediate review would also avoid "delayed justice." Petitioners have been litigating these core constitutional challenges for a decade in state court without merits review by this Court. Review would avoid "economic waste" and "interference with state litigation" because the Oregon Court of Appeals has expressly stayed all state court proceedings, with the consent of BOLI itself, "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).

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[1] *See* Pet.App.42–44 (rejecting Question Presented 1); Pet.App.99–102 (rejecting Question Presented 2); Pet.App.86–92 (rejecting Question Presented 3).

The Oregon Court of Appeals clearly agrees that nothing stands in the way of this Court's review of the merits of Petitioners' arguments, the resolution of which could be dispositive of the entire case. The decision to stay state court proceedings also eliminates any comity concerns that granting immediate review would interfere with the state courts.

The Court of Appeals has presented this Court with an invitation to resolve the important constitutional issues presented in the Petition, after so many years of litigation. This Court should accept.

II. Summary Reversal Is Appropriate Under *Masterpiece.*

The Oregon Court of Appeals found repeated instances of bias by BOLI officers against Petitioners' religion, but the court illogically concluded that this bias existed only during the damages phase of the proceedings and effectually rewarded BOLI for hiding its animus until that time. This case is an excellent candidate for summary reversal under *Masterpiece*.

BOLI acknowledges that multiple government officials were found to have exhibited improper bias against Petitioners' religion during the proceedings below, although BOLI disputes that "dismissal" is required whenever the record "demonstrates any amount of hostility." BIO33. But this Court has now twice held that even "indication[s] of hostility" toward religion in government enforcement actions require that "the order must be set aside" or "invalidated." *Masterpiece*, 138 S. Ct. at 1724, 1732; *see Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 n.1 (2022).

The rationale is simple. Biased government actors do not suddenly toggle those views on and off during a case. Bias is not a discrete act that can be isolated and then "cured" by subsequent judicial review, but rather is a continuing mindset that "infect[s]" the entire proceeding. *Masterpiece*, 138 S. Ct. at 1734 (Kagan, J., concurring).

This case proves it. Although the most obvious examples of bias by BOLI's Commissioner (e.g., assessing damages for quoting the Bible) and administrative prosecutor (e.g., equating Petitioners' religious beliefs with prejudice) were in the damages phase, they also demonstrated hostility throughout the entire administrative proceeding, including the decision to charge Petitioners in the first place. *See* Pet.20–21. For example, within days of Complainants' initial filing with BOLI, the Commissioner publicly stated his desire to "rehabilitate" people like Petitioners. Pet.App.110.[2]

BOLI tries to dismiss the Commissioner's desire to "rehabilitate" Petitioners because it was not Petitioner-specific and supposedly reflected only a "general attitude" or "general views." BIO6, 11, 34. Not only does this ignore the context of that statement, *see* Pet.20, but it also suggests that anti-religious hostility is permissible so long as it is general and widespread—the more, the better—unequivocally

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[2] BOLI further argues that deriding Petitioners as "us[ing] their religion as an excuse" for discrimination should be attributed to Complainants, not BOLI. BIO35. But BOLI seeks damages *on behalf of* Complainants for their alleged injuries, and BOLI adopted that language by including it in its own interrogatory responses describing those alleged injuries. BOLI Response to Resp. Second Set of Interrogatories ¶¶1–2, 7 (Jan. 13, 2015).

demonstrating that BOLI is *still* hostile to religion and *anyone* who holds disfavored views, including Petitioners. *See also* n.3, *infra*.

This refutes BOLI's theory that the Court of Appeals could "cure" any bias by reviewing the facts and law *de novo*. BIO34–35. That would not address the Commissioner's tainted decision to bring charges in the first place. *See* ORS § 659A.845. And it does not justify remanding the case to an agency that still demonstrates anti-religious hostility. The only solution is to require dismissal, just as *Masterpiece* and *Kennedy* held.

Finally, summary reversal would not require the Court to "delve into the lengthy record." BIO34. There is only one material fact, and it is undisputed: BOLI officers exhibited unconstitutional bias against Petitioners' religion during their proceeding. And the legal consequence of that fact is also established: BOLI's actions "must be set aside" or "invalidated." 138 S. Ct. at 1724, 1732; *see Kennedy*, 142 S. Ct. at 2422 n.1. The analysis is that simple.

III. The Record Presents an Optimal Vehicle for Resolving Petitioners' First Amendment Claims.

Hoping to avoid the numerous important circuit splits implicated by this case, BOLI insists there are "key factual questions" that render it "a poor vehicle" for Petitioners' First Amendment free exercise and free speech claims. BIO17. In short, BOLI argues that Petitioners declined to make a cake for the Complainants without first knowing exactly what design they wanted, and therefore Petitioners refused service altogether because of Complainants' sexual

orientation rather than because of any *bona fide* First Amendment concerns. BIO17–21.

BOLI tries to recast numerous undisputed facts to conjure a supposed vehicle issue. But in doing so, BOLI unintentionally highlights how strong the factual record is for resolving Petitioners' First Amendment claims.

Complainants Were Repeat Customers. BOLI first says Petitioners allegedly "refused to bake *any* cake for [Complainants] Rachel and Laurel," BIO19 (emphasis in original), so this case implicates the factual dispute in *Masterpiece* about whether there had been "a refusal to sell any cake at all," BIO18 (cleaned up).

That is wrong. Complainants were repeat customers at Petitioners' shop, and Petitioners previously sold them a custom wedding cake for use in Rachel's mother's opposite-sex wedding, which Petitioners freely agreed to design and make despite knowing Complainants were in a same-sex relationship. Pet.App.7. Far from being denied service, Complainants were so pleased with the service they received that they returned for their own wedding cake, which prompted the current litigation.

This prior sale to the very same couple provides direct and undisputed evidence that Petitioners were willing to sell custom cakes regardless of the customers' sexual orientation. BOLI errs by pretending otherwise.

Petitioners Designed Only Custom Cakes, So Every Cake Would Implicate First Amendment Concerns. BOLI next claims Petitioners "refused [Complainants] service before they were able to

communicate their desire[d]" cake design, and therefore it is unclear whether the ultimate cake design would have implicated First Amendment concerns. BIO20.

The Oregon Court of Appeals expressly rejected this argument as unsupported by the record, confirming it is makeweight and meritless. *See* Pet.App.86 (rejecting BOLI's theory that "because the Kleins refused service to Rachel and Laurel before even finding out what kind of cake the couple wanted, there is no basis for assessing the 'artistic' component of whatever cake might have resulted").

The court rejected BOLI's view because Petitioners "do not offer such 'standardized' or 'off the shelf' wedding cakes; they testified that their practice for creating wedding cakes includes a collaborative and customized design process," *id.*, and it was undisputed that "any cake [Petitioners] made for Rachel and Laurel would have followed [that] customary practice," Pet.App.87.

Thus, *any* wedding cake Complainants ordered from Petitioners would necessarily implicate Petitioners' First Amendment concerns about conveying a message of support for same-sex weddings, regardless of precisely what design Complainants wanted. "[A] wedding cake needs no particular design or written words to communicate th[is] basic message." *Masterpiece*, 138 S. Ct. at 1743 n.2 (Thomas, J., concurring in part and concurring in the judgment).

Petitioners' exclusively-custom-made cake business favorably differentiates this case from

Masterpiece, where there was a dispute about whether the baker sold off-the-shelf cakes. 138 S. Ct. at 1723.

Petitioners' Beliefs Are Deeply Held and Bona Fide. Despite BOLI's suggestion that Petitioners acted due to Complainants' sexual orientation rather than legitimate First Amendment concerns, *see* BIO20, it is undisputed that Petitioners' beliefs are deeply held and *bona fide*, Pet.App.471.

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The record presents an ideal vehicle for resolving the questions presented.

IV. BOLI Does Not Dispute that Courts Are Divided on Whether *Smith*'s Exception for "Hybrid-Rights" Claims Is Binding.

The Petition demonstrated there is a deeply entrenched split among federal and state appellate courts on whether *Smith*'s "hybrid-rights" analysis is binding, Pet.22–27, and the court below called out for this Court's guidance on the matter*, see* Pet.App.102.

BOLI does not dispute there is a split on this issue, *see* BIO22, nor could it, given the sheer number of cases on each side, *see* Pet.24–27 (recognizing at least a 12-5 split among state and federal appellate courts). BOLI instead starts by arguing that *Smith*'s discussion of hybrid rights "was not a holding," BIO21–22, and later that hybrid claims should not be subject to strict scrutiny, BIO24. Although those positions are incorrect, *see* Pet.27, the fact that BOLI begins with (and returns to) debating the merits only confirms the propriety of granting review to resolve the split.

BOLI next argues that "no circuit court has actually applied strict scrutiny under a hybrid-rights theory to overturn a neutral law of general applicability," so "there is no true conflict." BIO22. That argument rests on the dubious view that over a dozen lower-court decisions announcing a position on hybrid rights are themselves mere dicta. BOLI also ignores successful as-applied challenges. *See, e.g.*, *Shepp v. Shepp*, 906 A.2d 1165, 1172–74 (Pa. 2006); *People v. DeJonge*, 501 N.W.2d 127, 134–35, 137–144 (Mich. 1993); *see also, e.g.*, *Telescope Media Grp. v. Lucero*, No. CV 16-4094, 2021 WL 2525412, at *1 (D. Minn. Apr. 21, 2021) (entering a stipulated injunction after the Eighth Circuit instructed the district court to consider whether Plaintiffs were entitled to relief on their hybrid-rights claim).

In any event, BOLI's argument is beside the point. Courts are admittedly divided on the test, and that dispute had an outcome-determinative effect here: the Oregon Court of Appeals rejected Petitioners' argument solely because the court claimed *Smith*'s discussion of hybrid rights was *dicta*. Pet.App.101. That is more than sufficient to grant review.

BOLI also argues that Petitioners would lose even under strict scrutiny because Oregon's law "is narrowly drawn" to "protect[] same-sex couples from being exclud[ed] from social and economic life." BIO25–26. But Complainants easily found numerous substitute bakers, including a celebrity baker who donated a second cake, and meanwhile Petitioners were fined $135,000 and forced to close their business under the intense public scorn heaped on them by BOLI's Commissioner. It is BOLI, not Petitioners,

who will stop at nothing to "exclud[e] from social and economic life" those with differing views.[3]

The Court should grant review on the split over *Smith*'s hybrid-rights exception.

V. Alternatively, the Court Should Grant Review on Whether to Return to Its Pre-*Smith* Caselaw.

In response to Petitioners' alternative argument that this Court should return to its pre-*Smith* jurisprudence, Pet.27–29, BOLI argues primarily that the Court should not overrule *Smith*, BIO27–29, but again that goes to the merits. BOLI does not dispute that this Court has already deemed the question worthy of review as recently as *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

BOLI contends that Petitioners "blithely assert" there should be no concern about practical consequences if *Smith* is overruled, BIO29, but Petitioners' argument on this point was well-supported with citations to Justice Alito's *Fulton* concurrence and other authorities, *see* Pet.29.

VI. BOLI Concedes Courts Are Split on Petitioners' Free Speech Claims.

The Petition demonstrated that review is also warranted on Petitioners' free speech claims, which implicate growing splits on whether free speech rights

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[3] By labeling Petitioners' religious beliefs a "'clear and present danger'" to Oregon's interests, BIO25, BOLI continues the very same hostility toward religion present in earlier aspects of this case, further demonstrating that remanding to the agency was improper and that summary reversal is warranted.

can turn on (1) "other people's" opinion of the speech and (2) whether the artists collaborated with their customers. Pet.30–38. BOLI does not address these splits, conceding both their existence and their cert-worthiness. BOLI instead rests on a hypothetical about painting houses. BIO30–31.

But this case isn't about painting a house or the physical act of baking a cake. It is about being compelled to custom-design creatively inspired wedding cakes, which have "inherent symbolism" and 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."). Even BOLI's expert witness described herself as an "artist" and her wedding cakes as "artistic expression[s]." BOLI Hearing Tr. at 594, 599–600.

BOLI cannot cast aside the artistic and symbolic aspects of custom-designing a wedding cake, least of all by simplistically comparing it to "painting a house to protect the siding from the elements." BIO30.

BOLI also briefly insists the Oregon Court of Appeals was correct to look at how "an observer was likely to perceive [a] message." BIO31. That is wrong because this case involves pure speech (again, Petitioners object to being compelled to create a custom design, not to the physical act of baking). *See* Pet.31–32. More importantly, by conceding the split and addressing the merits, BOLI only confirms the cert-worthiness of the issue.

If the opinion below stands, the government could compel anyone to produce creative work with which that person strongly disagrees. BOLI never disputes that the opinion below means "a gay cake designer can be compelled to design, create, and decorate a custom cake for a Westboro Baptist Church ritual." Pet.18.

The Court should grant review of the free speech questions and re-affirm that the First Amendment protects against such government compulsion. At the very least, this Court should grant this case as a complement to *303 Creative*, given that Petitioners have clear Article III standing and present an excellent, fully developed factual record for resolving both the free exercise and free speech claims. Pet.38–39.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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