No. 22-204

IN THE
Supreme Court of the United States

MELISSA ELAINE KLEIN, ET VIR,
Petitioners,
v.

OREGON BUREAU OF LABOR AND INDUSTRIES,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Oregon's public accommodations law, Or. Rev. Stat. § 659A.400–409, prohibits businesses that offer goods or services to the public generally from discriminating against customers on the basis of protected characteristics including race, religion, sex, and sexual orientation.

1. Does the Free Exercise Clause bar Oregon from enforcing its public accommodations law against a business owner who has religious objections to serving a protected class?

2. Does the Free Speech Clause bar Oregon from enforcing its public accommodations law against a business that offers a custom good or service to the public?

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INTRODUCTION

For the second time, petitioners ask this Court to review a decision of the Oregon Court of Appeals applying well-established First Amendment principles to conclude that a bakery open to the public did not have a constitutional right to exclude customers on the basis of the customers' sexual orientation. This court has already allowed review in *303 Creative LLC v. Elenis*, No. 21-476, to address the relationship between free speech rights and a State's public accommodations law. Although there may be questions to resolve concerning the right to free exercise in that context, this case presents a poor vehicle for addressing those questions.

This case is in a worse posture to address the merits of their claims than it was when petitioners sought review in 2018. Following remand from this Court for reconsideration in light of *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Oregon Court of Appeals concluded that the BOLI Commissioner "subtly departed from principles of neutrality" in assessing damages. Pet. App. 38. A new BOLI Commissioner, who had no involvement with prior decision making, issued an amended final order, which addressed the problem identified by the Court of Appeals and issued a reduced damages award. Petitioners have sought review that order in state court. That ongoing state court proceeding clouds this Court's jurisdiction and cautions against review.

Even without that complication, this case poorly presents the questions petitioners ask. This case does

not present the question whether a baker can be compelled to create a cake designed by a customer or reflecting a specific message with which the baker disagrees. The record shows that petitioners denied services to the Bowman-Cryers based on their sexual orientation before discussing the design of any cake. Petitioners seek to sidestep that factual problem by posing broad and abstract questions about whether a custom cake, in general, is protected speech. But under this Court's cases, baking is conduct, not speech, and Oregon may regulate that conduct for purposes unrelated to the suppression of free expression. Whether a particular cake reflecting a specific message could be protected by the First Amendment is not presented on this record, and thus this case does not present a review-worthy question under the Free Speech Clause.

Petitioners also ask this Court to allow their petition to resolve an alleged circuit split regarding the hybrid-rights discussion in *Employment Division v. Smith*, 494 U.S. 872 (1990), or, alternatively, to overturn that case. Petitioners' hybrid-rights argument carries the same vehicle flaws as their free speech argument, and, in any event, does not reflect a true split among the lower courts that warrants review. And petitioners fail to provide any sound reason to overrule *Smith*, which has been relied upon by the lower courts, the States, and private parties for nearly three decades. This Court should deny the petition for certiorari.

STATEMENT OF THE CASE

This case arises out of an administrative determination by respondent Oregon Bureau of Labor and Industries (BOLI), the agency that (among other things) enforces state laws against discrimination in public accommodations. Or. Rev. Stat. § 659A.800. BOLI determined that petitioners had violated those laws by refusing to serve a couple on the basis of their sexual orientation, and it awarded statutorily authorized damages to the couple for the violation.

1. Rachel and Laurel Bowman-Cryer had been in a committed romantic relationship for nearly a decade when they decided to get married.[1] Pet. App. 339–40; Tr. 25. Thus, with the help of Cheryl McPherson, her mother, Rachel started planning the wedding. Eventually, she scheduled an appointment for a cake tasting with Melissa Klein, who had previously created Cheryl's wedding cake and whom the couple had recently seen advertising her services at a bridal show.[2] Pet. App. 7. Rachel wanted the same cake that Melissa had previously made for her mother—a "very simple white cake with purple ribbon accent and purple flowers." Tr. 30, 106.

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[1] Because multiple parties and witnesses share the same last names, this brief uses first names for clarity and readability.

[2] In their statement of the case, petitioners include a picture of a cake as an example of the Kleins' baking. Pet. 6. That picture appears nowhere in the administrative record and should be disregarded by this Court.

Aaron Klein conducted the cake tasting, which Rachel and Cheryl attended. At the beginning of the tasting, before Rachel could even discuss what kind of cake she wanted, Aaron informed her that the bakery would not bake a cake for her wedding because they "do not do cakes for same-sex weddings." Pet. App. 8. There was no mention of design, no discussion as to whether the cake would be picked up or delivered, and no suggestion that Rachel would invite petitioners to attend or participate in the wedding.[3] Rachel immediately felt humiliated and, as they left, she became inconsolable. Tr. 37, 44, 48; Pet. App. 8–9, 341–44.

Rachel's mother drove a short distance away, but then returned to the bakery to talk with Aaron. Pet. App. 8, 53. "During their conversation, [Rachel's mother] told Aaron that she had previously shared his thinking about homosexuality, but that her 'truth had changed' as a result of having 'two gay children.'" Pet. App. 8, 340. Aaron explained his refusal to provide services by quoting from the Book of Leviticus, saying, "'You shall not lie with a male as one lies with a female; it is an abomination.'" Pet. App. 8, 342. Rachel's mother left.

Back in the car, Rachel's mother told her that Aaron had called her "an abomination," causing Rachel to cry even more. Pet. App. 9. Once home, Rachel's mother told Laurel what had happened, and Laurel

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[3] When Rachel had previously purchased a cake for her mother, she did not have it delivered. Tr. 616.

immediately became upset and angry, and, feeling ashamed, she cried. Pet. App. 9, 343–44.

In the days that followed, both Rachel and Laurel experienced emotional distress that affected their relationships with each other and with other family members. Pet. App. 348–49. Rachel felt depressed and questioned whether she "deserve[d] to be able to be married like everyone else," that maybe she did "not deserve the same things that heterosexual people deserve." Tr. 62–63. She no longer wanted to participate in the planning of her wedding because of the constant fear that she would again be refused service based on her sexual orientation. Rachel and her mother both felt compelled to ask vendors upfront if services would be provided without discrimination. Tr. 272–73, 275; Pet. App. 349. Ultimately, Rachel chose a cake design that would not necessarily have distinguished it as a wedding cake, as opposed to celebrating some other occasion: a three-tiered cake with a peacock on top. Pet. App. 350; Ex. R4 at 5.

2. Rachel and Laurel filed complaints with BOLI, alleging that petitioners had refused to bake them a cake on the basis of their sexual orientation. BOLI conducted an investigation and issued formal charges, alleging that petitioners had violated Oregon's public accommodations law, Or. Rev. Stat. § 659A.403(1), (3), which prohibits the denial of "full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of * * * sexual orientation[.]" Pet. App. 9.

Based on some of petitioners' statements to the media, BOLI also alleged that they had communicated an intent to discriminate in the future based on sexual orientation, in violation of Or. Rev. Stat. § 659A.409. Pet. App. 10.

The case was assigned to an independent administrative law judge for adjudication of the allegations. Early in the proceedings, petitioners alleged that the BOLI Commissioner was biased and moved to disqualify him, based on comments he had made to the media. Rec. 708. The ALJ denied the motion, concluded that the comments reflected the Commissioner's general attitude about enforcing Oregon's anti-discrimination statutes and did not show bias or a prejudgment concerning the facts of this case. Pet. App. 410–11. He therefore denied the motion. Pet. App. 414.

BOLI and petitioners filed cross-motions for summary judgment.[4] Pet. App. 431. Petitioners argued that application of Oregon's public accommodations law to their conduct violated their First Amendment rights to free speech and freedom of religion. Based on the undisputed facts, the ALJ disagreed and ruled in BOLI's favor, with two exceptions. Pet. App. 481–89, 498–506. The ALJ found that Melissa Klein had not violated the public accommodations law, and it found that petitioners had not made a statement of

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[4] Petitioners assert that the ALJ prohibited them from presenting evidence on their defenses. Pet. 20. That is incorrect. Petitioners, like BOLI, asserted that the facts relevant to the liability phase of the administrative hearing were undisputed.

future intent to discriminate. Pet. App. 458, 461–63. The ALJ held an evidentiary hearing to determine damages, and, after six days of testimony, issued a proposed order recommending that $75,000 and $60,000 be awarded to Rachel and Laurel respectively based on the emotional distress they suffered as a result of the denial of services. Rec. 1742.

With one exception, the Commissioner adopted the ALJ's ruling in its entirety. Focusing on statements made during two separate interviews, the Commissioner concluded that petitioners had also violated Or. Rev. Stat. § 659A.409's prohibition against conveying a future intent to discriminate. Those statements included Aaron Klein's statement, "We don't do same-sex marriage, same-sex wedding cakes," and a note posted on the business door that stated, "This fight is not over. We will continue to stand strong." Pet. App. 370–71.

3. In the initial appeal, the Court of Appeals reversed the Commissioner's conclusion that petitioners had expressed an intent to discriminate in the future, but otherwise affirmed. Beginning with petitioners' free speech claim, the court conducted a careful analysis of this Court's precedent and concluded that intermediate scrutiny was appropriate. The court recognized that if the petitioners' conduct constituted pure speech then the applicable standard of review would be strict scrutiny. Pet. App. 87. The court also recognized that, conversely, if petitioners' "cake-making retail business involves, at most, both expressive and non-expressive components, and if Oregon's

interest in enforcing [Or. Rev. Stat. §] 659A.403 is unrelated to the content of the expressive components of a wedding cake, then BOLI's order need only survive intermediate scrutiny to comport with the First Amendment." Pet. App. 87–88 (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."), and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994) (applying intermediate scrutiny to a content-neutral regulation that compelled cable operators to carry certain channels)).

The court concluded that, while petitioners' conduct in baking a cake involved some expression, it was not "entitled to the same level of constitutional protection as pure speech or traditional forms of expression" because it was not enough that petitioners subjectively *believed* the cakes to be works of art. Pet. App. 88. Rather, under this Court's decisions in *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011), and *Spence v. Washington*, 418 U.S. 405, 409-10 (1974), "the expressive character of a thing turns 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. Applying this standard, the court readily concluded that petitioners had failed to demonstrate the cakes "are both intended to be *and are* experienced predominantly as expression" as opposed to a commodity made to be eaten. Pet. App. 89 (emphasis in original).

The court next concluded that, under the particular facts of this case, BOLI's order did not compel petitioners to host or accommodate another speaker's message. Pet. App. 90. Because petitioners "refused to provide their wedding-cake service to Rachel and Laurel altogether," it was not a situation where petitioners "were asked to articulate, host, or accommodate a specific message that they found offensive." Pet. App. 91. The court explained that it would be "a different case if BOLI's order had awarded damages against [petitioners] for refusing to decorate a cake with a specific message requested by a customer ('God Bless This Marriage,' for example) that they found offensive or contrary to their beliefs." Pet. App. 91.

The court also concluded that petitioners were not required to "'host' the message that same-sex weddings should be celebrated" on the basis that, unlike in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), the petitioners had "not raised a nonspeculative possibility that anyone attending the wedding [would] impute that message to" them. Pet. App. 91. Rather, the "wedding attendees understand that various commercial vendors involved with the event are there for commercial rather than ideological purposes." Pet. App. 91.

Because the wedding cakes were not "in the nature of fully protected speech or artistic expression," and because petitioners were not forced to host or associate with anyone's particular message, the court applied intermediate scrutiny. Pet. App. 92. The

court first identified the government's compelling interest "in ensuring equal access to publicly available goods and services and in preventing the dignitary harm that results from discriminatory denials of service"—an interest that this Court has consistently acknowledged. Pet. App. 94. The court also recognized that the government's interest "is no less compelling with respect to the provision of services for same-sex weddings; indeed, that interest is particularly acute when the State seeks to prevent the dignitary harms that result from the unequal treatment of same-sex couples who choose to exercise their fundamental right to marry." Pet. App. 94 (citing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) ("The right to marry thus dignifies couples who wish to define themselves by their commitment to each other." (Internal quotation marks omitted)).

Having established that enforcement of the public accommodations law furthers a substantial government interest, the court correctly observed that the government's interest "is in no way related to the suppression of free expression." Pet. App. 94. Instead, the government's concern pertains to "ensuring equal access to products like wedding cakes when a seller chooses to sell them to the general public, not a concern with influencing the expressive choices involved in designing or decorating a cake." Pet. App. 94. Any burden imposed on the petitioners' expression was no greater than essential to further the State's legitimate interests. Rather, to exclude certain groups from the meaning of services would undermine the government's interest in avoiding the

"'evil of unequal treatment, which is the injury to an individual's sense of self-worth and personal integrity.'" Pet. App. 95 (quoting *King v. Greyhound Lines, Inc.*, 656 P.2d 349, 352 (Or. App. 1982)).

The court next rejected petitioners' hybrid-rights claim under the Free Exercise Clause of the First Amendment. Focusing on a particular passage in *Employment Division v. Smith*, 494 U.S. 872 (1990), petitioners argued that, when a law burdens both their free-exercise rights and other constitutional rights, even neutral laws of general applicability are subject to strict scrutiny. Pet. App. 99–100. The court noted that courts and scholars alike have expressed "considerable doubt" about whether there is any cognizable hybrid-rights doctrine. Following the view of the Second, Third, and Sixth Circuits, the court deemed the passage in *Smith* to be *dictum* and declined to follow it. Pet. App. 100–102.

Finally, the court rejected petitioners' claim that the BOLI Commissioner was biased. Like the ALJ, the court observed that petitioners had "selectively quoted" passages to create an impression that the Commissioner "was commenting specifically on their conduct." Pet. App. 110. The court found that, when viewed in context, none of his statements described the particular facts of the case or suggested that he had "fixed views as to any defenses or interpretations of the law that might be advanced in the context of a contested proceeding." Pet. App. 110–11. Rather, the Commissioner's statements reflected his "general views of law and policy regarding public accommoda-

tions laws," and they fell "short of the kinds of statements that reflect prejudgment of the facts or an impermissibly closed-minded view of law or policy so as to indicate that he, as a decision maker, cannot be impartial." Pet. App. 109–10.

4. Petitioners sought review by this Court, which vacated and remanded for reconsideration under *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). On remand, the Court of Appeals reversed the damages award but otherwise affirmed its prior opinion.

The court first addressed petitioners' argument that Oregon's public accommodations statute was not neutral and generally applicable under *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021), because the Oregon Constitution grants state courts the discretion to grant religious exemptions the statute. The court disagreed, concluding that an individual may be able to demonstrate—as a matter of law—that the Oregon Constitution requires a religious exemption from a neutral law of general applicability, but that the courts do not have discretion to provide individualized exemptions. Pet. App. 24–25. Moreover, the court explained that if an exemption were available under the Oregon Constitution, an argument that petitioners did not develop, then the state constitution would provide a remedy without the need to address petitioners' federal question. Pet. App. 26.

Turning to *Masterpiece Cakeshop*, the court discerned three principles to guide its review on remand.

First, the court determined that it must review the entire record of the case, "including each stage of the case." Pet. App. 34–35. Second, the court recognized that, in assessing a religious defense to a neutral, generally applicable law, "the adjudicator must walk a tightwire, acting scrupulously to ensure that the adjudication targets *only* the unlawful conduct, and is not, in any way, the product of the adjudicator's hostility toward the belief itself." Pet. App. 35 (emphasis in original). Third, the court determined that "even 'subtle departures' require some form of corrective action from a reviewing court" because such departures violate the First Amendment. Pet. App. 35 (quoting *Masterpiece Cakeshop*,138 S. Ct. at 1731).

After reviewing the whole record, the court found that the damages portion of the administrative proceeding demonstrated "the type of subtle departure from neutrality" that requires reversal under *Masterpiece Cakeshop*. Pet. App. 35. First, the prosecutor's closing argument suggested "that the Kleins' religious beliefs equate to prejudice," which was a comment similar to the statement in *Masterpiece Cakeshop* that this Court found to be hostile. Pet. App. 36. Second, the court concluded that the "specter of non-neutrality" materialized into an affirmative conclusion that BOLI had departed from principles of neutrality based on the agency's reliance on Aaron Klein's quotation from Leviticus in awarding damages. The court explained that BOLI's conclusion that it did not matter that MacPherson had misquoted Aaron in repeating his statement to Rachel and Laurel

"tends to suggest hostility or dismissiveness." Pet. App. 39. The court summarized its holding as follows: "[T]he prosecutor's closing argument apparently equating the Kleins' religious beliefs with 'prejudice,' together with the agency's reasoning for imposing damages in connection with Aaron's quotation of Leviticus, reflect that the agency acted in a way that passed judgment on the Kleins' religious beliefs[.]" Pet. App. 35.

The court then considered the proper remedy and concluded that the damages portion of the final order must be reversed and remanded; the court affirmed the liability portion, consistently with its first opinion. The court limited the remedy to damages for two reasons. First, the court explained that "the liability issues were resolved on summary determination before the agency on undisputed facts," and so "any non-neutrality on the part of the agency did not affect a fact-finding process." Pet. App. 43. Second, the court explained that it "reviewed all the legal questions concerning liability for legal error," with no deference to BOLI, and that petitioners did not contend that the court failed to be neutral in that review. Pet. App. 43. The court also noted that "BOLI now has a different commissioner, so there is no reason to think that any hostility toward the Kleins' religious beliefs reflected in the prior decision will affect the remedy case on remand." Pet. App. 45.

Petitioners sought review of the Court of Appeals' decision, and the Oregon Supreme Court denied the

petition. Pet. App. 538. Petitioners now seek certiorari of the Court of Appeals' decision.

5. Although it is not properly before this Court, petitioners refer to proceedings that happened after the decision on review. Following the Court of Appeals' ruling, BOLI issued an amended final order addressing the problems the court identified. The amended order disavowed the prosecutor's statement and the previous order's reliance on Aaron's quotation of Leviticus. Pet. App. 167. The order reassessed the amount of damages resulting from the denial of services, which reduced the award to $30,000, an amount consistent with other BOLI cases. Pet. App. 134, 176–79. Petitioners then sought review of the amended order in the Oregon Court of Appeals. On petitioners' motion, the court held their petition for judicial review in abeyance, pending the outcome of their petition for certiorari. Order Holding Case in Abeyance, *Klein v. BOLI,* No. A179239 (Or. Ct. App. Aug. 22, 2022).

REASONS FOR DENYING REVIEW

A. The ongoing state court proceedings in this case cloud this Court's jurisdiction and caution against allowing review.

This case presented a poor vehicle when petitioners first sought review in 2018, and the posture has only worsened following remand from this Court. On remand, the Court of Appeals concluded that the damages phase of the hearing contained indications that BOLI had subtly departed from the neutrality toward religion demanded by the First Amendment

but that the liability phase showed no hostility. Under *Masterpiece Cakeshop*, the court crafted an appropriate remedy by requiring BOLI to reassess damages, which BOLI promptly did in an amended order. The order at issue in this petition, then, has been superseded by a new final order. And petitioners have again sought review in state court of the new order. Pet. App. 132–331. If, as petitioners contend, BOLI continued to exhibit hostility toward their religious beliefs, then the state court proceeding is the appropriate forum for addressing that question. The ongoing state court proceeding clouds this Court's jurisdiction and cautions against review.

This Court has jurisdiction over state-court decisions only if they are "*[f]inal* judgments or decrees rendered by the highest court of a State." 28 U.S.C. § 1257 (emphasis added). The decision at issue here is not final because BOLI has issued an amended final order, and petitioners have sought review in state court. Although petitioners note that the Court of Appeals has stayed review of BOLI's amended final order pending resolution of this petition, they do not address whether this Court has jurisdiction in light of the ongoing state-court proceedings.

To be sure, this Court takes a functional rather than literal approach to finality under § 1257. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477–85 (1975), the Court set forth four circumstances in which a decision is sufficiently final even though proceedings remain pending in state courts. The common denominator in all of those circumstances is that

the state courts have made a final determination about the federal issue in the case, even if other issues remain pending. *Id.* at 477.

Perhaps one of the *Cox* exceptions applies here. In BOLI's view, the state courts have definitively rejected the arguments that petitioners raise here. But it is not clear that petitioners agree. Petitioners may well seek to re-raise free speech or free exercise claims in the Oregon Court of Appeals or in a future petition for review by the Oregon Supreme Court. Their failure to engage with the jurisdictional issue in depth in their petition leaves it unclear what, if anything, they think is final and what remains open for further litigation in the state courts. For those reasons, this case is not an appropriate vehicle to address the questions petitioners pose.

B. The record in this case does not cleanly present petitioners' free speech or free exercise questions.

The record in this case carries the same flaws that prevented this Court from reaching the free speech and free exercise claims in *Masterpiece Cakeshop*. Petitioners' blanket denial of services for the Bowman-Cryer's wedding leaves key factual questions open about the design of the cake and the nature of the Kleins' refusal. Those facts matter, and their absence makes this case a poor vehicle for petitioners' claims.

In *Masterpiece Cakeshop*, the petitioner—a baker who refused to sell a wedding cake to a same-sex cou-

ple because of his religious beliefs—asked this Court to address whether his baking was a form of protected speech. The Court explained that the case presented difficult questions about the "proper reconciliation" of a state's authority to "protect the rights and dignity of gay persons" and "the right of all persons to exercise fundamental freedoms under the First Amendment." *Masterpiece Cakeshop*, 138 S. Ct. at 1723. The record, however, did not present those issues cleanly. The Court explained:

> One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.
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> The same difficulties arise in determining whether a baker has a valid free exercise claim. A baker's refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it are just three ex-

> amples of possibilities that seem all but endless.

Id.

Although petitioners' bakery did not sell "off the shelf" cakes, the record is clear that they refused to bake *any* cake for Rachel and Laurel—regardless of the cake's design or message. Pet. App. 86–87. And at the time petitioners denied service, the record shows that the complainants wanted a "very simple" white cake with a purple ribbon accent—the same as the cake that petitioners baked for Cheryl's wedding. Tr. 30, 106. That makes the record here more like "a refusal to sell any cake at all" than a refusal "to design a special cake with words or images celebrating the marriage," using the examples discussed in *Masterpiece Cakeshop*. The Oregon Court of Appeals was careful to note that it was not "foreclose[ing] the possibility that, on a different factual record, a baker (or chef) could make a showing that a particular cake (or other food) would be objectively experienced predominantly as art—especially when created at the baker's own or chef's own initiative and for her own purposes." Pet. App. 90 n. 9. But in light of petitioners' refusal to make any cake at all, the court correctly recognized that petitioners "must demonstrate that *any* cake that they make through their customary practice constitutes their own speech or art." *Id*. (emphasis in original). Applying this Court's cases, the Oregon Court of Appeals correctly concluded that petitioners' activities were not fully protected speech.

Granting review in this case would, as in *Masterpiece Cakeshop*, likely enmesh this Court in the parties' factual dispute about the nature of the cake Rachel and Laurel wanted to order. Although this record shows that Rachel wanted nothing more than a copy of a cake that petitioners had previously made, petitioners ask this Court to conclude otherwise by emphasizing the design of the two cakes that were served at the wedding—one depicting a peacock and one depicting a tree—and arguing that those designs, though made by other bakers, show why their custom cake-baking should be fully protected speech. Pet. 9–10, 34. Petitioners' emphasis on the design of two cakes that were actually served at the wedding only highlights how the facts of the design matter. Whether Rachel and Laurel would have requested a simple white cake or an elaborate design with a particular message should make a difference to the legal analysis, but petitioners refused them service before they were able to communicate their desire. As a result, petitioners ask this court to define their conduct as fully protected speech without the benefit of knowing what the end product would look like.

The record presents related problems for petitioners' free exercise claims. Petitioners advocate applying heightened scrutiny, either by adopting the hybrid-rights theory mentioned in *Smith* or by overruling *Smith* and returning to the balancing test the Court previously used in unemployment compensation cases. Both of those approaches would require the court to assess the burden Oregon's law places on their free exercise rights. The design of the cake and

the involvement of petitioners in delivery, display, or serving the cake—facts that are not developed on this record—matter when assessing that burden. As in *Masterpiece Cakeshop*, this case does not present a well-defined factual scenario for addressing the free exercise claims. The Court should deny review.

C. Petitioners' free exercise claims do not warrant review.

1. There is no true circuit split to resolve concerning the hybrid-rights discussion in *Smith*.

In ruling that the Free Exercise Clause does not require religious exemptions from neutral laws of general applicability, *Smith* discussed earlier free exercise cases in which the Court had held that "the First Amendment bars application of a neutral, generally applicable law to religiously motivated action." 494 U.S. at 881–82. *Smith* distinguished those cases because they addressed a "hybrid situation," which "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.* For example, *Cantwell v. Connecticut*, 310 U.S. 296 (1940), involved a "licensing system for religious and charitable solicitations" that implicated free speech and free exercise, and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), involved compulsory school-attendance laws that implicated the right of parents to direct the education of their children and free exercise. *Smith*, 494 U.S. at 881. The Court's description of the "hybrid situation" in those cases was not a holding. The opinion makes it clear that

Smith did not "present such a hybrid situation." *Id.* at 882.

Petitioners request that this Court allow review "to resolve a deep and ever-growing split about the precedential value of this Court's hybrid-rights doctrine as articulated in *Smith*," which, in petitioners' view, requires applying strict scrutiny to so-called hybrid claims. Pet. 17. But to the extent that there is a split among the circuit courts concerning what *Smith* meant when the opinion described earlier cases as involving hybrid claims, that doctrinal split has not caused the courts to reach contradictory results. *See Combs v. Homer-Center School Dist.*, 540 F.3d 231, 244–47 (3d Cir. 2008) (summarizing divergent circuit views). The Oregon Court of Appeals, like the Second, Third, and Sixth Circuits, described the discussion of hybrid rights in *Smith* as "dictum" and declined to apply strict scrutiny to a hybrid-rights claim. Pet. App. 100–101. But regardless of how other courts have described the hybrid-rights doctrine, no circuit court has actually applied strict scrutiny under a hybrid-rights theory to overturn a neutral law of general applicability. For that reason, there is no true conflict that merits this Court's attention.

Petitioners assert that the Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits correctly "recognize the possibility of hybrid-rights claims, although the required showings vary." Pet. 25. Notably, none of those circuits has actually applied their formulation of the hybrid-rights exception to invalidate a neutral law of general applicability. For example, the Eighth

Circuits' decision in *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019), recognized the validity of hybrid-rights doctrine and held that a claim could go forward on remand to the district court. But the court also noted that "it is not at all clear that the hybrid-rights doctrine will make any real difference in the end" because the free speech claim was already subject to strict scrutiny. *Id.* at 760; *see also Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004) (remanding for factual development of free speech claim but holding that hybrid rights claim was barred by qualified immunity); *Henderson v. McMurray*, 987 F.3d 997, 1006 (11th Cir. 2021) ("The Hendersons' free-exercise claim is subject to the general rule of *Smith* not because the hybrid-rights doctrine is dicta, but because their claim—as alleged—is not similar to the hybrid free-speech and free-exercise claims the Supreme Court recognized in *Smith*."); *Cornerstone Christian Sch. v. Univ. Interscholastic League*, 563 F.3d 127, 136 n. 8 (5th Cir. 2009) ("[P]laintiffs do not have a colorable claim for a violation of either their free exercise or their due process rights; therefore, we need not consider whether any potential overlap of the asserted rights requires a heightened level of scrutiny."); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 765 (7th Cir. 2003) ("Appellants have identified no constitutionally protected interest upon which the CZO infringes, as they must in order to establish a hybrid rights claim requiring heightened scrutiny."). Despite the conflicting descriptions of the hybrid-rights exception, then, there is no real conflict between the lower courts to resolve.

The absence of any true circuit split is not surprising. As recognized by Justice Souter in his concurrence in *Church of the Lukumi Babalu Aye* and by the Second, Third, and Sixth Circuits, the idea that a free exercise claim gains increased protection by being joined to a second constitutional claim makes little sense. If neither the free exercise claim nor the companion claim is viable, then it is not clear why adding the two claims together should require strict scrutiny. *See Leebaert v. Harrington,* 332 F.3d 134, 144 (2d Cir. 2003) (There is "no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated."); *Kissinger v. Board of Trustees of Ohio State Univ.,* 5 F.3d 177, 180 (6th Cir.1993) (describing hybrid-rights exception as "completely illogical"). If the companion claim is independently viable, then there is no need to address the free exercise claim at all. *Church of the Lukumi Babalu Aye*, 508 U.S. at 567 (Souter, J., concurring). Moreover, "[i]f a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule[.]" *Id*. Aside from the supposed circuit split, which is more about labels than results, petitioners do not explain why the hybrid-rights doctrine presents a review-worthy question.

Petitioners also raise a new claim in their petition and assert, for the first time, that this case is controlled by the "hybrid rights" cases mentioned in *Smith*: *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); and

Follett v. McCormick, 321 U.S. 573 (1944). Each of those cases involved challenges by Jehovah's Witnesses to laws that prohibited or restricted solicitation, including solicitation for religious purposes. *See Smith*, 494 U.S. at 881 (discussing cases). Oregon's public accommodations law is readily distinguished from the laws restricting solicitation, which were a direct limitation on First Amendment rights. And petitioners' conduct here—baking cakes to sell to members of the public—is readily distinguished from the conduct at issue in those cases—distributing religious literature and soliciting support. *Cantwell*, *Murdock*, and *Follett* do not control, and this Court should reject petitioners' attempt to raise those cases for the first time in their petition for certiorari.

Moreover, even if the Court were to apply the level of scrutiny from those cases, as petitioners request, BOLI's order would survive. In *Cantwell*, for example, the Court held that the statute restricting religious solicitation must be "narrowly drawn" to prohibit conduct that "constitute[ed] a clear and present danger to a substantial interest of the State." 310 U.S. at 311. Here, Oregon has a compelling interest in prohibiting discrimination in public accommodations, including discrimination against same-sex couples.

This Court has long recognized that public accommodations laws serve a vital public purpose and are an important, even necessary, area of state regulation. *See Masterpiece Cakeshop*, 138 S. Ct. at 1727 (citing cases); *Roberts v. U.S. Jaycees*, 468 U.S. 609,

624 (1984) (recognizing that public accommodations laws "plainly serv[e] compelling state interests of the highest order"). And this Court has confirmed the importance of protecting same-sex couples from being excluding from social and economic life. *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (recognizing that "gay couples cannot be treated as social outcasts or as inferior in dignity and worth"); *Obergefell*, 135 S. Ct. at 2602 (discussing stigma and injury caused by prohibition on same-sex marriage).

Oregon's public accommodations law—and its application here—is wholly concerned with the equal access of all individuals to businesses that serve the public, regardless of the customer's race, religion, sex, sexual orientation, national origin, marital status, or age. The only way for Oregon to protect equal access to public goods and services is to prohibit discrimination in the provision of those services. The public accommodations law does not compel support for same-sex marriage by requiring equal treatment on the basis of sexual orientation any more than the law compels support for religion by requiring equal treatment for all faiths.

In prohibiting petitioners' conduct, Oregon's public accommodations law is narrowly drawn to serve that interest. On these facts, the public accommodations law requires petitioners to provide to same-sex couples the same service that petitioners would provide to heterosexual couples—a cake for their wedding. In doing so, enforcement of that statute focuses on the noncommunicative aspects of petitioners' conduct and

does not require petitioners to condone or participate in anyone's wedding. Accordingly, the statute and BOLI's order is narrowly drawn to serve the State's interest in stopping sexual-orientation discrimination. There is no less restrictive way to serve that interest. Thus, even if *Cantwell* applied, this Court should deny the petition.

2. There is no sound basis for the Court to consider overruling *Smith*.

As a backup for their hybrid-rights claim, petitioners request that this court reverse *Employment Division v. Smith*. But this case is a poor vehicle for revisiting *Smith*, and, in any event, petitioners have provided no sound basis for doing so.

In *Employment Division v. Smith*, this Court considered whether Oregon had violated the Free Exercise Clause when the State denied unemployment benefits to individuals who had been fired from their jobs for using peyote during a religious ceremony. In ruling for the State, this Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S. at 879 (citation and quotation marks omitted). The majority opinion issued over vigorous objections from a minority of the Court. *Id.* at 891 (O'Connor, J., concurring); *id.* at 907 (Blackmun, J., dissenting).

In the years since it decided *Smith*, this Court has repeatedly rejected calls to revisit or overrule it. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559 (1993) (Souter, J., concurring); *City of Boerne v. Flores*, 521 U.S. 507, 547 (1997) (O'Connor, J. dissenting); *id.* at 565 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting). Just last year, this Court again declined to revisit *Smith*. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021).

Stare decisis "demands special justification" for "any departure" from precedent. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Petitioners cite the criticism in those dissenting opinions as the reason to revisit *Smith*'s rule. Pet. 28. But the minority opinions show that this Court has carefully considered the challenges to the *Smith* rule and rejected them. Moreover, Justice Scalia concurred in *Flores*, rebutting the historical evidence discussed in Justice O'Connor's dissent and addressing criticism of *Smith* in the academic literature. 521 U.S. at 537–44. And in the three decades since *Smith*, the state and federal courts have relied on *Smith*'s standard in evaluating free exercise challenges to state law. Revisiting that standard would have a profound impact on settled law around the country, an impact that petitioners have not justified.

Petitioners highlight the concurring opinions in *Fulton* and *Masterpiece* that highlight some justices' dissatisfaction with *Smith*. Pet. 28–29. The concurrences repeat the early criticisms that *Smith* itself

rejected and that the Court addressed in *Flores*. Arguments that this Court has already considered and rejected do not supply the "special justification," *Rumsey*, 467 U.S. at 212, for overruling precedent. And *Smith* is not a case where subsequent decisions from this court have undermined *Smith*'s "doctrinal underpinnings." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). Whether or not this Court would agree with *Smith*'s reasoning and rule if addressing the issue for the first time, "the principles of *stare decisis* weigh heavily against overruling it now." *Id.* (declining to revisit *Miranda v. Arizona*, 384 U.S. 436 (1966)).

Dismissing decades of case law applying *Smith*, petitioners blithely assert that "[t]here should be no concern about practical consequences if *Smith* is overruled," because strict scrutiny already applies to free exercise claims in some contexts. Pet. 29. But the obvious and intended result of petitioners' argument is to extend the test from *Sherbert v. Verner*, 374 U.S. 398 (1963)—which this Court applied only in the narrow factual context of individual unemployment claims—to every state law, whenever a litigant claims a substantial burden on the exercise of religion. That is a change in the law that would have enormous consequences.

D. Petitioners' free speech claims do not warrant review.

This Court has already allowed review in *303 Creative LLC v. Elenis*, No. 21-476, to address the question "whether applying a public-accommodation law

to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment." Order Granting Petition, February 22, 2022. In petitioners' view, this case "overlaps" with the question presented in *303 Creative* and "compliments" it. Pet. 38.

They are wrong. Petitioners take for granted that their baking and decorating of a cake is "art" and thus entitled to the same First Amendment protections as pure speech. But nothing in this Court's cases suggest that the classification of creative conduct or a created object as "art" is so simple. Stepping outside the context of baking makes this abundantly clear. Painting, for example, is conduct that can lead to the creation of art or that can be purely functional, such as painting a house to protect the siding from the elements. Painting, as a form of conduct, is not always fully protected by the First Amendment because it is not necessarily or inherently expressive. Whether the act of painting is protected depends both on the context in which that conduct occurs and the end product. To continue the house analogy, a homeowner might consult with a painter to pick custom colors for the walls or trim. But that fact alone would not transform house painting into protected speech. Nor is the fact that a "home" carries great symbolic value in American life enough to transform the conduct of painting a house into protected speech by the painter. At the other end of the spectrum, commissioning a painter to create a specific mural on the wall of the house, for example, would involve protected conduct by the painter. But that conduct is protected because the nature of the end product—a spe-

cific picture—fits readily within the commonly understood definition of art, not because the physical act of painting is inherently protected.

Whether custom cake baking should be categorically protected as pure speech—without regard for the end product—is not a review-worthy question. The Court of Appeals correctly determined that cake baking and decorating is, at most, expressive conduct, while recognizing that the analysis may be different if petitioners had refused to bake a cake bearing a specific message with which they disagreed. Pet. App. 91.

The test for expressive conduct requires analyzing whether a person intended to convey a message through the conduct and whether an observer was likely to perceive that message. The Court determines whether conduct is "inherently expressive" by examining "whether '[a]n intent to convey a *particularized* message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence*, 418 U.S. at 410-11) (emphasis added). The person claiming that conduct is expressive bears the burden of "demonstrat[ing] that the First Amendment * * * applies" and must advance more than a mere "'plausible contention' that [the person's] conduct is expressive." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). The Court of Appeals followed that test here. Pet. App. 88–90.

Moreover, if this record did support petitioners' contention that every custom cake they bake is fully protected art, the question whether they could be compelled to speak or be silent by a public accommodations law is already before this court. In short, this case does not present a review worth free speech question on this record, but if it did, the case would be duplicative of *303 Creative*.

Lastly, there is no need for this Court to hold the petition for *303 Creative*. If this Court's opinion in *303 Creative* changes the analysis of public accommodations laws under the First Amendment in a way that would control this case, the Oregon Court of Appeals might find it appropriate to address that change on review of the amended final order that is already before that court. Regardless whether it would do so, however, the possibility reinforces the serious jurisdictional question with this petition.

E. *Masterpiece Cakeshop* does not require summary reversal.

Petitioners ask this Court to summarily reverse the opinion in *Klein II* under *Masterpiece Cakeshop* and order the case dismissed. There is no basis to do so.

First, *Masterpiece Cakeshop* does not require dismissal of an entire proceeding anytime a portion of it exhibits religious hostility. In that case, the Colorado Civil Rights Commission demonstrated hostility to religion in comments at two public meetings. 138 S. Ct. at 1729–30. In previous decisions, the commis-

sion also treated non-religious objections to baking a cake differently than the petitioner's religious objections. *Id.* at 1731–32. The Colorado Court of Appeals did not address either of those issues when it reviewed the commission's decision. Under those circumstances, this Court concluded that the commission's order must be invalidated and reversed the appellate decision that had affirmed. This court, however, did not require the commission to dismiss the proceeding in its entirety. Nor did it hold that dismissal was the necessary remedy whenever the record demonstrates any amount of hostility.

Petitioners also cite footnote one in *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407 (2022), to explain why summary reversal is appropriate. But that footnote merely explains that *Masterpiece Cakeshop* set aside the underlying decisions based on a showing of religious hostility without reaching the other First Amendment issues raised in that case. *Kennedy*, 142 S. Ct. at 2422 n. 1. That footnote does not suggest that the only permissible remedy is dismissal.

Second, petitioners' argument for summary reversal disregards the Court of Appeals' careful analysis. The court reviewed the entire record and found that only the damages portion of the record "evidences the type of subtle departure from neutrality" that this Court identified in *Masterpiece Cakeshop*. Pet. App. 35. Out of the six-day hearing on damages, the court identified a single comment by the prosecutor during closing argument that suggested hostility. Notably, petitioners did not identify that comment in their

briefing on remand; the court raised it on its own review. That comment, when considered in conjunction with the final order's reasoning in imposing damages based on the emotional harm from Aaron Klein's quotation of Leviticus, showed that the damages portion of the proceeding before BOLI did not comport with the strict neutrality toward religion required by the First Amendment. In reaching that conclusion, the court specifically rejected petitioners' argument that other portions of the record showed hostility toward religion—including public statements by the former BOLI commissioner, the amount of damages, and BOLI's imposition of a cease-and-desist order. Pet. App. 35 n. 8.

In seeking summary reversal, petitioners rehash the same arguments about the record that the Court of Appeals has already rejected in its two opinions. Accepting petitioners' position would require this Court to delve into the lengthy record and reverse, without briefing or argument. That is not appropriate. *See Cavazos v. Smith*, 565 U.S. 1, 16 (2011) (Ginsberg, J., dissenting) (summary reversal not appropriate when the "fact-intensive character of the case calls for attentive review of the record").

Significantly, petitioners have not alleged that the Court of Appeals exhibited hostility toward their religious beliefs. Nor have they alleged that the administrative law judge was hostile.[5] They have provided

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[5] Petitioners repeatedly use the phrase "biased record" to describe the basis for BOLI's original decision and its decision on remand. Pet. 4, 16, 19, 21. That phrase appears to be short-

no reason to question the legal conclusions by the court or the ALJ. As the Court of Appeals explained, the parties litigated liability for violation of the public accommodations law on motions for summary determination based on undisputed facts. Accordingly, any "non-neutrality" by BOLI did not "affect a fact-finding process" regarding liability. Pet. App. 43. Additionally, the court explained that it reviewed "all the legal questions concerning liability for legal error" and that there was no suggestion by petitioners that the court itself was hostile in its review of the legal issues. Pet. App. 43.

Third, petitioners' characterization of the record is not accurate. They claim that BOLI stated that petitioners "have continually used their religion as an excuse for not serving Complainants." Pet. 20. BOLI did not describe petitioners' beliefs in that manner; only complainants did. That phrase appears in an answer to an interrogatory from petitioners asking BOLI to explain "what 'alienation toward religion' means *as used by Complainants* in the list of symptoms provided on October 14, 2014." Ex. R-38 at 2–3. The ALJ specifically ordered "the *complainants*, through the Agency, to respond to" petitioners' interrogatories. Pet. App. 417 (emphasis added); *see also* Pet. App. 416 (observing that complainants were witnesses, not parties to proceeding). Petitioners then

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hand for the record containing evidence of bias. To the extent that petitioners suggest that the factfinding by the ALJ was somehow biased, that suggestion is wrong. Petitioners have never asserted that the ALJ was biased.

cross-examined complainants about that statement during the administrative hearing. Tr. 204, 466, 502. It is apparent—from both the text of the interrogatory and from petitioners' treatment of the interrogatory at the hearing—that the answer was an expression of complainants' views, not BOLI's.

The Court of Appeals appropriately remanded for additional proceedings as to the damages portion of the proceeding, the only part in which BOLI exhibited hostility. In doing so, the court noted that BOLI had a new commissioner and correctly concluded that "there is no reason to think that any hostility toward the Kleins' religious beliefs reflected in the prior decision will affect the remedy case on remand." Pet. App. 45. To the extent petitioners believe that the new BOLI commissioner was biased in reassessing the damages award, they are free to raise the issue in the pending state court proceeding.

CONCLUSION

This Court should deny the petition for certiorari.

Respectfully submitted,

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