IN THE COURT OF APPEALS 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, v. **OREGON BUREAU OF LABOR AND INDUSTRIES**, Respondent.	Agency Nos. 44-14, 45-14 CA A159899 (Control) CA A179239

PETITIONERS' SUPPLEMENTAL BRIEF

Petition For Review Of A Final Order
Of The Oregon Bureau Of Labor And Industries

Petition includes constitutional challenges to the application of ORS 659A.403 and ORS 659A.409

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August 28, 2023

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BOLI	Oregon Bureau of Labor & Industries
Complainants	Rachel Cryer & Laurel Bowman
Kleins	Melissa Klein and Aaron Klein

STATEMENT OF THE CASE

In *Klein v Oregon Bureau of Labor & Industries*, 289 Or App 507 (2017), this Court affirmed in part the final order of the Oregon Bureau of Labor and Industries ("BOLI"), which concluded Melissa and Aaron Klein violated Oregon's public accommodations statute, ORS 659A.403, by discriminating "on account of … sexual orientation" when they declined to violate their sincere religious beliefs and free speech rights by designing and creating a custom wedding cake for a same-sex wedding. *Id.* at 523–24. This Court rejected the Kleins' free speech and free exercise arguments, among others, and affirmed BOLI's $135,000 damages award against the Kleins. *Id.* at 565.

On June 17, 2019, the U.S. Supreme Court granted the Kleins' petition for a writ of certiorari, vacated this Court's judgment, and remanded this case "for further consideration in light of *Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Comm'n*," 138 S Ct 1719 (2018). *Klein v Oregon Bureau of Labor & Indus.*, 139 S Ct 2713 (2019).

On remand from the U.S. Supreme Court, this Court again largely rejected the Kleins' free exercise claims but did find that BOLI had demonstrated improper animus towards the Kleins' religion only during the damages phase of the BOLI proceedings. *Klein v Oregon Bureau of Labor &*

Indus., 317 Or App 138 (2022). The Court vacated the damages award and remanded to BOLI, which unilaterally imposed a new damages figure of $30,000. The Kleins appealed that decision, and those proceedings (No. A179239) remained stayed pending disposition of the Kleins' petition for a writ of certiorari at the U.S. Supreme Court, where they re-raised their free speech and free exercise claims.

On June 30, 2023, the U.S. Supreme Court again granted the Kleins' petition, vacated this Court's judgment, and remanded for reconsideration, this time in light of *303 Creative LLC v Elenis*, 143 S Ct 2298 (2023), which held that Colorado's public-accommodation law violated the free speech rights of a web designer who declined on free speech grounds to make wedding websites for same-sex marriages. *See Klein v Oregon Bureau of Labor & Indus.*, No. 22-204, 2023 WL 4278435, at *1 (US June 30, 2023). Upon remand, this Court consolidated the two pending appeals and ordered additional briefing.

ARGUMENT

This Court's 2017 decision is its last word on the Kleins' free speech claims. The Court repeatedly acknowledged the apparent lack of U.S. Supreme Court caselaw at that time about how to analyze a free speech claim in the context of a business that offers creative products. *See* 289 Or App at 525 ("[T]he Supreme Court has grappled with that intersection before, [but] it has not yet decided a case in this particular context, where the public

accommodation at issue is a retail business selling a service, like cake-making, that is asserted to involve artistic expression."); *id.* at 533 ("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."); *id.* at 534 ("The Court has not told us how to apply a requirement of nondiscrimination to an artist.").

With the issuance of *303 Creative*, however, this Court now has the benefit of a U.S. Supreme Court decision addressing those relevant points. As explained below, the opinion in *303 Creative* compels the conclusion that BOLI's order violates the Kleins' free speech rights under the First Amendment.

I. *303 Creative* Held that Compelled Speech Is Unconstitutional Regardless of Whether the Government Mandates a "Specific" Message.

This Court's 2017 opinion began its free speech analysis by holding that the U.S. Supreme Court's compelled-speech decisions in *West Virginia State Board of Education v Barnette*, 319 US 624 (1943) (flag salute), and *Wooley v Maynard*, 430 US 705 (1977) ("Live Free or Die" license plate), were not "helpful here" because in those cases "the government prescribed a specific message that the individual was required to express," 289 Or App at 530–31. This Court found this "specific message" point important because ORS

659A.403 "is a content-neutral regulation that is not directed at expression at all." *Id.* at 531. The 2017 decision repeatedly focused on the importance of this "specific message" point in holding both that (1) the Kleins' expressions fell within the zone that the government can presumptively regulate, and (2) BOLI's order satisfied intermediate scrutiny. *Id.* at 530–31, 539, 540.

With the benefit of *303 Creative*, however, we now know that the weight this Court's 2017 opinion put on the "specific message" point was misplaced. In *303 Creative*, the Colorado statute was—just like ORS 659A.403—content neutral and addressed only the provision of goods and services. 143 S Ct at 2308–09. And that Colorado statute likewise did not demand that anyone speak any "specific message"—i.e., a scripted statement, conveyed position, or act dictated by the government. Rather, a state violates the First Amendment when it forces business owners to "create expressions that defy any of her beliefs." 143 S Ct at 2317; *see also id.* at 2308. It was enough for First Amendment purposes that Colorado was "seek[ing] to compel speech from her that she did not wish to produce" and to make her "utter what is not in her mind about a question of political and religious significance." *Id.* at 2308, 2318 (cleaned up). It did not matter that Colorado had not stated *how* she should make such an utterance.

In *303 Creative*, the U.S. Supreme Court cited *Barnette* and *Wooley*—the same cases this Court held did not apply to such situations—a combined eight

times in support of its holding that compelled speech is compelled speech, regardless of whether the government requires someone to read from a precise script. *Id.* at 2311, 2312, 2313, 2318, 2320, 2321.

The holding in *303 Creative* is precisely what the Kleins argued to this Court: that BOLI was "compel[ling] them to express a message—a celebration of same-sex marriage—with which they disagree." 289 Or App at 530.

This Court's 2017 opinion thus erred at the very first step, leading it to presume this case fell within the category of "generally permissible" government regulations that have only "incidental effects on an individual's expression." *Id.* at 531. With the benefit of *303 Creative*, the Court should hold—as *303 Creative* did—that this case is like *Barnette* and *Wooley*, both of which found the compelled speech in those cases to violate the First Amendment.

II. Like *303 Creative*, the Expression Involved Here Puts This Case Outside the Usual Commercial Context.

After addressing the lack of a compelled "specific message," this Court's 2017 opinion next held that the U.S. Supreme Court's decisions in *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 US 557 (1995), and *Boy Scouts of America v Dale*, 530 US 640 (2000), likewise did not apply here. 289 Or App at 531–32. In this Court's view, those cases were different because they involved "a private parade or membership organization,"

whereas the Kleins' case fell in "the usual commercial context" of a business "open to the public" that "exists for the purpose of engaging in commercial transactions." *Id.* at 531. The Court concluded that this meant the Kleins' creative activities fall within "the ordinary commercial context that the government has wide latitude to regulate," unlike "the case in *Hurley* and *Dale*." *Id.* at 532.

Again, with the benefit of *303 Creative*, we now know this Court's distinction of *Hurley* and *Dale* was erroneous. The U.S. Supreme Court cited *Hurley* and *Dale* a combined *thirty times* in support of its view that compelling the web designer to create a website for same-sex weddings violated the First Amendment, despite the fact that she held open her services to the public and charged money for them—i.e., the bases on which this Court distinguished *Hurley* and *Dale*. *See* 143 S Ct at 2310, 2311, 2312, 2313, 2314, 2315, 2317–18, 2319, 2320, 2321, 2322.

The Court in *303 Creative* made clear that the distinction under the First Amendment is not whether the regulated entity is open to the public or creates art "with an expectation of compensation." *Id.* at 2316. Rather, the distinction is whether the government seeks to compel the creation of "customized and tailored" goods that have "expressive" content, or instead seeks only to compel "ordinary, non-expressive" "commercial good[s]." *Id.* at 2308, 2312, 2316, 2319 n.5, 2320 n.6. And again, it did not matter whether those goods expressed

specific words, but rather that they "communicate[d] *ideas*." *Id.* at 2312 (emphasis added).

There is no dispute here that the Kleins' custom wedding cake designs likewise involve customized content and express "ideas." *Id.* Presaging the "customized" and "expressive" language found in *303 Creative*, this Court already concluded that the Kleins sold "highly customized, creative goods," 289 Or App at 533, 536–38, and "the ultimate effect of BOLI's order is to compel [the Kleins] to engage in a *collaborative* process with a customer and to create a *custom product* that they would not otherwise make," *id.* at 541 (emphases added). "[E]very wedding cake that [the Kleins] create partially reflects their own *creative and aesthetic* judgment" and "would have followed the Kleins' customary practice" of "'creating a unique element of style and customization.'" *Id.* at 533, 536–37 (emphases added).

The undoubtedly expressive and customized nature of those products invokes *303 Creative*, pursuant to which this Court should conclude that BOLI's order compelling the Kleins to make expressive, customized, and tailored creations is subject to the same free speech framework as in *Hurley* and *Dale*, which held the regimes in those cases were invalid under the First Amendment. Just like the "specific message" error above, this Court's misunderstanding of *Hurley*'s and *Dale*'s applicability led the Court to conclude erroneously at the very outset that this case fell within the "context

that the government has wide latitude to regulate," and only then proceeded to consider whether the expressive elements somehow fell within an exception to that presumption. 289 Or App at 532. But under *303 Creative*, compelling the creation of expressive content actually falls squarely within the realm of prohibited government action at the very outset.

To be sure, in *303 Creative*, it was undisputed that the compelled content was "pure speech," a conclusion this Court previously resisted for the Kleins' custom creations. 289 Or App at 538. The specific reasons this Court gave for that conclusion are no longer persuasive post-*303 Creative*, as discussed in the next section. But this raises an important conceptual issue: in their free speech claim, the Kleins challenge BOLI's requirement that they make expressive designs and content that celebrate a message with which they strongly disagree (just as in *303 Creative*), but they do not claim that the physical acts of baking a cake or ringing up a sale on a cash register are expressive activities. The opinion in *303 Creative* went out of its way to distinguish between those two different types of acts, as noted above, and focused only on whether the state was compelling someone to undertake creative acts. If so, that aspect violates the First Amendment, regardless of whether non-creative aspects were *also* being compelled. The presence of non-creative aspects does not compromise or water down the standard for compelling creative speech.

An analogy would be a commissioned painter who makes his own canvases and then paints them based on client suggestions. Even if the government could force him to make canvases for all comers, it could not force him to paint them a certain way, and any order requiring him to do so would still be subject to the Supreme Court's strict compelled-speech framework despite the inextricably linked presence of the non-creative aspect of making the canvases.

Here, there is no doubt that BOLI's order compels the Kleins to undertake creative acts with which they disagree, and thus this case, like *303 Creative*, involves pure speech under the First Amendment.

III. *303 Creative* Rejected This Court's Analysis Regarding the Collaborative Nature and Third Parties' Understanding of Expressive Wedding Content.

Having concluded that *Barnette*, *Wooley*, *Hurley*, and *Dale* did not apply here and that the government presumptively could regulate the Kleins' creative expressions, this Court's 2017 opinion next concluded that the Kleins did not fall outside that presumptive regulation because (1) their "wedding cakes follow a collaborative design process" with their customers, and (2) there was no reason to believe that "other people will necessarily experience *any* wedding cake that the Kleins create predominantly as 'expression' rather than as food." 289 Or App at 537–38.

The U.S. Supreme Court's decision in *303 Creative* speaks to both points. The Court rejected the notion that expression is less entitled to protection simply because it was produced in "close collaboration" with clients or made "with an expectation of compensation." 143 S Ct at 2309, 2316. "[F]or purposes of the First Amendment that changes nothing." *Id.* at 2313. What mattered was that the web designer, like the Kleins here, was being compelled to create admittedly expressive content. It therefore does not matter under the First Amendment that the expressive content "do[es] not reflect only the Kleins' expression," as this Court put it in 2017. 289 Or App at 539.

As to the views of "other people," *id.* at 538, this Court again relied on the point that the Kleins were not required "to articulate, host, or accommodate a *specific message* that they found offensive," *id.* at 539 (emphasis added), as support for the view that wedding attendees would not "impute" any expression "to the Kleins," *id.* at 540. As explained above, the "specific message" argument is irrelevant under *303 Creative* and thus cannot form the basis of this Court's rationale.

Moreover, *303 Creative* explained that "[v]iewers will know … that the websites are [the web designer's] original artwork, for the name of the company she owns and operates by herself will be displayed on every one," albeit not prominently. 143 S Ct at 2308 (cleaned up). This case involves similar facts: not only are the Kleins' cakes distinctive, but the Kleins would leave their

business card beside their custom cakes at weddings, would deliver them in a vehicle emblazoned with the name of their bakery, and would often interact with the couple and other family members. BOLI Final Order 70. Thus, just like in *303 Creative*, to the extent third parties' views matter, they would know the expressive content was at least partially the Kleins' own. BOLI's own expert witness testified not only that she considered herself an "artist" and her wedding cakes are "artistic expression[s]," but also that she "want[s] to be able to share [those expressions] with the public and the community." BOLI Hearing Tr. at 594 (Mar. 13, 2015) (Laura Widener). She recounted how it made her "proud" that her custom cake would "be part of [the] celebration." *Id*. As shown by the images below, the cake she designed for the Complainants (on the left) has obvious creativity and symbolism, just like the Kleins' typical custom productions (on the right):

Nor is it any answer to claim, as this Court did in 2017, that "the Kleins are free to engage in their own speech that disclaims such support" for same-sex marriage. 289 Or App at 540. The web designer in *303 Creative* easily could have added text to a website. But it is blackletter law that "the right to explain compelled speech is present in almost every such case and is inadequate to cure a First Amendment violation." *Nat'l Ass'n of Manufacturers v SEC*, 800 F.3d 518, 556 (D.C. Cir. 2015).

IV. BOLI's Order Fails Both Strict Scrutiny and Intermediate Scrutiny.

Like the opinions in *Barnett*, *Wooley*, and *Hurley*, the opinion in *303 Creative* did not invoke the term or framework of "strict scrutiny." Rather, once the Court concluded that the government was compelling creative expression (i.e., speech), that was the end of the matter, and the government's action was deemed a First Amendment violation. The same should happen here.

But even if levels of scrutiny did apply here, BOLI's order is subject to strict scrutiny because it compels production of expression contrary to the Kleins' strongly held beliefs. BOLI's order fails strict scrutiny because (1) the government has no interest (let alone a compelling one) in forcing the creation of expression, (2) BOLI is targeting the Kleins precisely because of that expression, and (3) there is a dramatic restriction on the Kleins' speech. *See, e.g., Dale*, 530 US at 648 (strict scrutiny in context of mandated expression requires "'compelling state interests, unrelated to the suppression of ideas, that

cannot be achieved through means significantly less restrictive of associational freedoms'"). Even if intermediate scrutiny applied, BOLI's order would still fail for the same reasons.

A. The Government Has No Important or Compelling Interest in Squelching Dissenting Viewpoints by Mandating the Creation of Expressive Content.

This Court previously concluded that Oregon had a "compelling" interest "both in ensuring equal access to publicly available goods and services and in preventing the dignitary harm that results from discriminatory denials of service." 289 Or App at 541–42.

As explained above, that framework is wrong at the outset because the custom and creative products at issue here are not the type of "ordinary, non-expressive" "commercial goods" that the government has a compelling interest in ensuring are accessible. *See* Part II, *supra*. The U.S. Supreme Court in *303 Creative* went to great pains to differentiate those sorts of goods and services, which the government can freely regulate, to the "customized and tailored" and "expressive" goods at issue in that case and also at issue here. 143 S Ct at 2312–16, 2319 n.5, 2320 n.6. The lesson from *303 Creative* is that there is no compelling or important government interest in compelling the production of *those* customized goods. *See id.* "When a state public accommodations law and the Constitution collide, there can be no question which must prevail." *Id.* at 2315.

Moreover, on the issue of ensuring access, it is important to remember that the Complainants in this case almost immediately procured not just a replacement wedding cake but also a second, free cake designed by a celebrity baker, and that was at a time before Oregon even legally recognized same-sex marriage. Or Const, Art XV, § 5a. Such services are undoubtedly even more widely available now. That is just like in *303 Creative*, where there were "numerous companies in the State of Colorado" that would offer the same service. 143 S Ct at 2310.

Meanwhile, just like in *303 Creative*, the Kleins apply their free speech approach even-handedly to "all customers," *id.* at 2317, 2319 n.5, and would decline to make any customized creation that defies their beliefs, regardless of who asked for it, *see* BOLI Final Order 87. In fact, the Kleins previously made a custom wedding cake for one of the Complainants in this very same case, for use in her parent's opposite-sex wedding. 289 Or App at 512. This is further proof that BOLI seeks not to squelch discrimination but opposing viewpoints.

B. BOLI's Order Is Directed at the Kleins' Dissenting Views.

This Court also previously held that "[n]either ORS 659A.403 nor BOLI's order is directed toward the expressive content of the Kleins' business," 289 Or App at 541, but the U.S. Supreme Court's decision in *303 Creative* explained why that approach is wrong. "[T]he coercive elimination of dissenting ideas about marriage constitutes Colorado's very purpose in seeking

to apply its law to Ms. Smith." 143 S Ct at 2313 (cleaned up). Similarly, there is no dispute that the Kleins were targeted because of their refusal to create expressive content for a same-sex wedding ceremony. It is definitionally why BOLI brought this case. By forcing them to make that expressive content, BOLI seeks to coercively eliminate dissenting ideas about same-sex marriage. *See id.*

It therefore is incorrect under *303 Creative* to conclude that BOLI's order compelling the Kleins to create custom expression for same-sex weddings against their strongly held views is "in no way related to the suppression" of those very same views. 289 Or App at 542. The U.S. Supreme Court in *303 Creative* made clear that these cases are about suppressing undesired views about same-sex marriage by compelling those speakers to support pro-same-sex-marriage messages.

And the U.S. Supreme Court also explained that the government has no interest, let alone a compelling or even important interest, in squelching dissenting viewpoints via forced manufacture of expressive content. 143 S Ct at 2315.

C. There Is Far More Than an "Incidental" Restriction on the Kleins' Expression.

This Court also previously held that "any burden imposed on the Kleins' expression is no greater than essential to further the state's interest." 289 Or App at 542. In support, this Court again said that "it is significant that BOLI's

order does not compel the Kleins to express an articulable message with which they disagree." *Id.* As explained above, that "specific message" point is irreconcilable with *303 Creative*, where the web designer likewise was not compelled to express any "specific" message beyond her support for same-sex marriages by using her creativity to design a website. *See* Part I, *supra*.

Moreover, forcing the Kleins to produce expression is far from the least restrictive means available to BOLI. As noted above, cake designers willing to cater to same-sex marriages are plentiful in Oregon. Given this, the only reason BOLI continues targeting the Kleins for refusing to make one cake a decade ago is "to excise certain idea or viewpoints from the public dialogue." *303 Creative*, 143 S Ct at 2313 (cleaned up).

The implications of BOLI's logic confirm its lack of narrow tailoring. If BOLI prevails, "the government may compel anyone who speaks for pay on a given topic to accept all commissions on the same topic—no matter the underlying message—if the topic somehow implicates a customer's statutorily protected trait." *Id*. Or to give a concrete example, BOLI's view means a gay cake maker could be forced by the government to design a creative, custom cake for a Westboro Baptist Church ritual. BOLI may be fine with that, but the First Amendment prohibits it.

V. The Kleins Preserve Their Free Exercise Claims.

The opinion in *303 Creative* did not address free exercise claims, but to avoid any doubt, the Kleins hereby expressly preserve their free exercise claims, including that *Employment Division v. Smith*, 494 U.S. 872 (1990), should be overruled. Even under *Smith*, this Court should have granted relief under the "hybrid rights" theory the Kleins asserted, and this Court also should have required the entire case to be dismissed because of the animosity BOLI has shown to the Kleins' religion throughout these proceedings, from the first step of initiating the case, up to the present day. *See, e.g.*, BOLI's Supreme Court Opp Br at 25 (labeling the Kleins' religious beliefs "a clear and present danger" to Oregon), *available at* https://tinyurl.com/256fk7cw; BOLI Amended Final Order at 2-3, 24, 33 (July 12, 2022).

If this Court does not grant relief on their free speech claims, the Kleins respectfully request that the Court issue a decision and judgment forthwith, so the Kleins can seek prompt review from the Oregon Supreme Court and, if necessary, from the U.S. Supreme Court on all of their free exercise and free speech claims.

The U.S. Supreme Court has now twice vacated this Court's judgments and remanded on First Amendment grounds but has not yet addressed the merits of those claims. This case has been ongoing for over a decade. It is past

time for this dispute to end with a recognition that BOLI's actions violated the Kleins' First Amendment rights.

CONCLUSION

This Court should vacate BOLI's Order, require prompt return of the damages imposed against the Kleins, and direct BOLI to enter final judgment in favor of the Kleins.

DATED this 28th day of August 2023.

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CERTIFICATE OF COMPLIANCE

On August 25, 2023, the Court issued an Order granting Petitioners leave to file a supplemental brief, not to exceed 4,000 words. I hereby certify that this brief complies with the Court's Order. The word count of this brief as described in ORAP 5.05(2)(a) is 3992 words.

DATED this 28th day of August 2023.

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CERTIFICATE OF FILING AND SERVICE

I certify that on August 28, 2023, I personally submitted this Supplemental Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section.

I further certify that on that same date, I directed a true copy of the Supplemental Brief to be served on the following parties at the addresses set forth below:

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