IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of 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.	Oregon Bureau of Labor and Industries Nos. 4414, 4514 CA A159899 (Control), A179239

RESPONDENT'S SUPPLEMENTAL BRIEF

Petition for Judicial Review of the Final Order of the Oregon Bureau of Labor and Industries

Continued…

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RESPONDENT'S SUPPLEMENTAL BRIEF

INTRODUCTION

For the third time, petitioners ask this court to hold that their conduct—refusing to bake a cake for a same-sex wedding—is fully protected speech under the First Amendment to the United States Constitution. This court should reject that request for the reasons explained in its original 2017 decision. Although the United States Supreme Court remanded to this court for reconsideration in light of *303 Creative LLC v. Elenis*, ___US___, 143 S Ct 2298, 216 L Ed 2d 1131 (2023), that case did not change the legal principals underlying this court's previous decisions. Most importantly, *303 Creative* does not suggest that the baking of custom cakes is pure speech. *303 Creative* was decided on stipulated facts in which the state conceded that the plaintiffs' website design was fully protected speech. Under those facts, it is not surprising that the First Amendment barred Colorado from compelling the plaintiff to create pure speech in support of same-sex marriage.

Here, this court already held that petitioners' baking is expressive conduct rather than pure speech, because it combines non-expressive and expressive elements. *303 Creative* did not overrule or undermine the First Amendment cases on which this court relied in reaching that conclusion. Nor did *303 Creative* change the analysis for whether a restriction on expressive

conduct survives intermediate scrutiny. Because *303 Creative* did not change the law that applies to the facts of this case, the court should again reject petitioners' arguments and reaffirm that the state can prohibit discriminatory conduct by places of public accommodation even when that prohibition has an incidental effect on speech.

A. *303 Creative* did not address whether conduct, like cake baking, is pure speech.

In *303 Creative*, the plaintiff brought a pre-enforcement challenge seeking an injunction to bar Colorado from applying its public accommodations law to compel her to provide website design services for same-sex weddings. Unlike this case, the Court decided *303 Creative* on stipulated facts. The parties stipulated that all of the plaintiff's graphic and website design services were expressive. 143 S Ct at 2309. They stipulated that the plaintiff's websites and graphics were "original, customized" creations that contribute to the message her business conveys through the websites it creates. *Id*. They stipulated that the wedding websites the plaintiff planned to create would be "expressive in nature" and would express the plaintiff's message "celebrating and promoting her view of marriage. *Id.* And they stipulated that viewers of the wedding websites would know that they were the plaintiff's "original artwork." *Id*. at 2310. Based on those stipulations, the Court concluded that

"the wedding websites [the plaintiff] seeks to create qualify as 'pure speech' under this Court's precedents." *Id*. at 2312.

Throughout its decision, the Court emphasized the importance of the parties' stipulations. In rejecting Colorado's arguments that it sought only to compel nondiscriminatory conduct, the Court noted that, "the State has stipulated that [the plaintiff] does *not* seek to sell an ordinary commercial good but intends to create 'customized and tailored' speech for each couple." *Id*. at 2316 (emphasis in original). In rejecting the dissent's arguments that the majority's holding will permit any business that claims its services are in some way expressive—including restaurants, photographers, and stationers—to discriminate at will, the Court emphasized the narrowness of its holding, which followed directly from the parties' stipulations. The Court acknowledged that "determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions. But this case presents no complication of that kind. The parties have *stipulated* that Ms. Smith seeks to engage in expressive activity. And the Tenth Circuit has recognized her services involve 'pure speech.'" *Id*. at 2319 (citation omitted; emphasis in original).

Because the parties' stipulations dictated that the plaintiff's work product was pure speech, the Court came to the unsurprising conclusion that the First Amendment prohibited Colorado from compelling her to create speech that would send a message she did not wish to utter.

Here, BOLI very much disputes petitioners' assertion that their wedding cakes are pure speech, and this court previously rejected their arguments to the contrary.[1] Nothing in *303 Creative* alters the analysis on the threshold question of whether petitioners' cake baking is pure speech, as they contend, or expressive conduct as this court determined. Because *303 Creative* did not change the law on that issue, this court should affirm its previous decisions.

B. This court properly construed the Court's precedent on compelled speech and public accommodations.

Contrary to petitioners' claim (Supp Br 3–5), this court correctly concluded that *West Virginia State Board of Education v. Barnette*, 319 US 624, 63 S Ct 1178, 87 L Ed 1628 (1943), and *Wooley v. Maynard*, 430 US 705, 97 S Ct 1428, 51 L Ed 2d 752 (1977), did not control. Those cases both concerned laws that compelled pure speech. In *Barnette*, West Virginia law compelled school children to recite the pledge of allegiance. 319 US at 626. In *Wooley*, New Hampshire law compelled drivers to display the state's motto "Live Free or Die." 430 US at 707. This case involves nothing of the sort.

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[1] After the Court remanded for reconsideration in light of *Masterpiece Cakeshop*, petitioner reraised their arguments that cake-baking was protected expression under the First Amendment. (2019 Supp Br at 20–21). This court affirmed its prior decision on that issue without discussion. *Klein v. Oregon Bureau of Labor & Indus.*, 317 Or App 138, 168, 506 P3d 1108 (2022), *rev den*, 369 Or 705 (2022), *cert granted and judgment vac'd*, 143 S Ct 2686 (2023).

Nor did this court err in distinguishing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 US 557, 115 S Ct 2338, 132 L Ed 2d 487 (1995), and *Boy Scouts of America v. Dale*, 530 US 640, 120 S Ct 2446, 147 L Ed 2d 554 (2000). (Supp Br 5–9). *Hurley* held that Massachusetts' public accommodations law could not compel the organizers of a private parade to include an entry from a gay rights organization because doing so would require the parade organizers to host a message they did not wish to express. 515 US at 572–74. *Dale* held that New Jersey's public accommodations law could not compel the acceptance of a gay scout master because doing so would violate the scouts' right of expressive association. 530 US at 656. In contrast to those peculiar applications of public accommodations law, this case concerns the sale of baked goods for a wedding. The sale of food to the public is well within the class of commercial activities that have long been governed by public accommodations law. *See, e.g.*, *Katzenbach v. McClung*, 379 US 294, 85 S Ct 377, 379, 13 L Ed 2d 290 (1964) (upholding application of Civil Rights Act of 1964 to restaurant that refused equal service to Black customers). The parade in *Hurley* and membership in the Boy Scouts in *Dale* were not that type of commercial activity; rather those cases both involved applications of a public accommodations law to compel unwilling speech or association. This court was correct to distinguish *Hurley* and *Dale* as it did.

This court's previous rulings accepted that pure speech is fully protected by the First Amendment, regardless of whether a person sells their speech. In its 2017 decision, this court recognized that "the services of a singer, composer, or painter" could be public accommodations within the scope of Oregon law and that application of the public accommodations law to "require the creation of pure speech or art" would likely be a regulation of content subject to strict scrutiny.[2] *Klein v. Oregon Bureau of Labor & Industries*, 289 Or App 507, 533–34, 410 P3d 1051 (2017). Although this court noted that the Supreme Court had not addressed the issue squarely at the time, *id*., it said nothing that was inconsistent with the later holding in *303 Creative* that a public accommodations law that seeks to compel pure speech violates the First Amendment.

Properly construed, *303 Creative* explains why the government cannot compel pure speech via a public accommodations law. When pure speech is the service sold by a business, speech itself becomes the public accommodation. That fact removes cases involving pure speech—like *Hurley* and *303 Creative*—from the context of ordinary goods and services in which public accommodations laws have long compelled conduct with which the business

[2] Throughout this case, BOLI has not disagreed with that point. (*See* BOLI Response Br at 33 (acknowledging that the state likely could not compel the production of a cake with a particular message).

owner disagrees, such as providing lodging or food to members of a protected class. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 US 241, 250, 85 S Ct 348, 13 L Ed 2d 258 (1964) (lodging)*; Newman v. Piggie Park Enterprises, Inc.*, 390 US 400, 88 S Ct 964, 19 L Ed 2d 1263 (1968) (car-side service at a restaurant).

C. *303 Creative* did not change the analysis for expressive conduct.

As this court recognized, the facts of this case concern an ordinary, commercial good that has an expressive component. *Klein*, 289 Or App at 537–39. Because there are speech and non-speech components of petitioners' conduct, it is properly analyzed as expressive conduct under *United States v. O'Brien*, 391 US 367, 376, 88 S Ct 1673, 20 L Ed 2d 672 (1968).

In an effort to make this case line up with *303 Creative* (instead of *O'Brien*), petitioners now state that "they do not claim that the physical acts of baking a cake or ringing up a sale on a cash register are expressive activities." (Supp Br 8). Rather, they claim to challenge only BOLI's requirement "that they make expressive designs and content that celebrate a message with which they strongly disagree." (Supp Br 8). According to petitioners, then, the expressive component of their cakes is pure speech that can be completely separated from the non-expressive component. (Supp Br 8).

This is a significant shift in petitioners' argument. Previously, petitioners claimed that the entire process of making a wedding cake was fully protected,

akin to the process of creating a tattoo. (Opening Br 31–32 (arguing that "the process of creating art is just as protected as the art itself" and citing *Anderson v City of Hermosa Beach*, 621 F3d 1051, 1060, 1062 (9th Cir 2010)). The argument that the expressive component can be wholly separated from the non-expressive also disregards that a cake is food. Whatever the design, the cake is intended to be eaten.

Regardless, petitioners' concession that baking and selling a cake is conduct, not speech, supports this court's previous decision and further distinguishes this case from *303 Creative*. As this court explained, because petitioners refused to bake a cake for the complainants before knowing what design the complainants wanted, petitioners must show that "*any* cake that they make through their customary practice constitutes their own speech or art." *Klein*, 289 Or App at 539 n 9 (emphasis in original). If the core conduct of baking a cake is not expressive, then petitioners are left to argue that their bare intent to design cakes that celebrate heterosexual marriage is sufficient to prove that any cake they produce is pure speech—regardless of actual design of the cake, regardless of what the customer wants, and regardless of what consumers of the cake perceive.[3] That argument cannot be reconciled with the case law.

[3] On page 11 of their supplemental brief, petitioners include a picture of one of their "typical custom productions." They do not include a

Footnote continued…

As the Court explained in *O'Brien*, "when '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." 391 US at 376. Relatedly, "the fact that a nonsymbolic act is the product of deeply held personal belief—even if the actor would like it to *convey* his deeply held personal belief—does not transform action into First Amendment speech." *Nevada Comm'n on Ethics v. Carrigan*, 564 US 117, 127, 131 S Ct 2343, 2350, 180 L Ed 2d 150 (2011). Under those cases, petitioners cannot divorce the expressive component from their conduct and thereby argue that only their speech is being regulated.

Accepting that argument would completely collapse the longstanding distinction between pure speech and expressive conduct. *303 Creative* did not discuss the test for expressive conduct, much less overrule the decades of precedent that are dependent on the difference between pure speech and expressive conduct. Accordingly, there is no reason for this court to revisit its previous analysis of petitioners' conduct under *O'Brien*.

Petitioners' concession that baking is not expressive also underscores the factual differences between this case and *303 Creative*. Per the stipulations, all

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citation to the record. To the best of BOLI's knowledge, that picture does not appear in the administrative record and thus should be disregarded by this court.

of the plaintiff's services in *303 Creative* were expressive and so Colorado's regulation of her services was a regulation of speech itself. That is not the case here.

D. *303 Creative*'s discussion of Colorado law as applied to the facts of that case do not suggest that BOLI targeted petitioners' expression in its order.

In their brief, petitioners broadly assert that *303 Creative* "made clear" that the application of public accommodations laws to same-sex weddings has the purpose of "suppressing undesired views about same-sex marriage by compelling those speakers to support pro-same-sex-marriage messages." (Supp Br 15). That is a misreading of the decision. To be sure, in *303 Creative* both the Tenth Circuit and the Supreme Court concluded that Colorado's purpose "in seeking to apply its law to [the plaintiff]" was "the coercive elimination of dissenting ideas about marriage." 143 S Ct at 2313 (alterations and quotation marks omitted). That followed from the Court's conclusion that Colorado sought to compel pure speech in support of same-sex marriage. *Id.* The Court was not setting out a legal conclusion for the application of other laws to facts that did not involve pure speech.

Moreover, petitioners disregard this court's acknowledgement that the analysis would be different on different facts. *Klein*, 289 Or App at 539 n 9. Had the record shown that the claimants wished to have a cake that voiced a message with which petitioners disagreed, then that cake might qualify as

protected speech. But those are not our facts. Petitioners refused to bake any cake for the claimants based on their status as a same-sex couple not based on any message the claimants wished to convey. *Klein*, 289 Or App at 539. BOLI's order seeks to remedy that status-based discrimination and the dignitary harm it caused. The order does not co-opt petitioners' voice to speak the state's message.

E. Petitioner has preserved no additional Free Exercise challenges to BOLI's amended order.

To the extent that petitioners seek to challenge BOLI's amended order on the same legal bases as the previous order—that *Employment Division v. Smith*, 494 US 872, 110 S Ct 1595, 108 L Ed 2d 876 (1990), should be overruled and that they prevail under a "hybrid rights" theory—their arguments are preserved, but those arguments provide no basis for revisiting this court's previous rulings on the same arguments. Petitioners have not, however, adequately presented any argument based on their assertion that BOLI's amended order (and its response to their latest petition for certiorari) show continuing animosity toward their religious beliefs.[4] Petitioners make no argument to explain why that it so

[4] BOLI disputes petitioners' characterization of the amended final order and its certiorari response. As to the amended final order, petitioners' unexplained record citations do not demonstrate how BOLI showed animosity or even what statements petitioners find to be objectionable. As to the 2022 certiorari response, petitioners misquote the brief, which did not label petitioners' religious *beliefs* as a "clear and present danger" to the state.

and do not ask this court to address that alleged animosity. If petitioners believed that BOLI exhibited hostility toward their religious beliefs in its amended order, then they were obligated to raise that issue before this court. The assertion that they are "preserving" an argument—despite not actually making one—is insufficient. *See* ORAP 5.45 (setting out preservation requirements); *Briggs v. Lamvik*, 242 Or App 132, 142 n 9, 255 P3d 518 (2011) ("[T]he mere assertion of an unsubstantiated legal proposition [does not] obligate the court to unilaterally validate that proposition.").

CONCLUSION

This court should adhere to its previous decision and affirm BOLI's amended final order.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on September 18, 2023, I directed the original Respondent's Supplemental Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Tyler D. Smith and Herbert G. Grey, attorneys for petitioners; Julia Elizabeth Markley, attorney for amicus curiae; Stefan Johnson, attorney for amicus curiae; Kelly Simon and Jennifer Middleton, attorneys for amicus curiae; and Clifford Scott Davidson, attorney for amicus curiae, by using the court's electronic filing system.

I further certify that on September 18, 2023, I directed the Respondent's Supplemental Brief to be served upon C. Boyden Gray, Stephanie N. Taub, Hiram S. Sasser, III, and R. Trent McCotter, attorneys for petitioners, and Richard B. Katskee, attorney for amicus curiae, by mailing a copy, with postage prepaid, in an envelope addressed to:

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Continued…

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 2,762 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b).

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