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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 REPLY 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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September 27, 2023

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REPLY ARGUMENT

In its supplemental response brief, BOLI begins by claiming this case is about "refusing to bake a cake," as if the Kleins had simply refused to put a cake in an oven. BOLI.Br.1. Under that view, *303 Creative* was merely about "refusing to upload a website." The U.S. Supreme Court rejected that simplistic framing, however, and this Court must do the same here. This case, like *303 Creative*, is about the government compelling individuals to make admittedly expressive, custom creations.

303 Creative prohibits the government from compelling that expressive content, regardless of whether the government could compel related non-expressive acts like physically baking a cake or registering a sale. After all, it didn't matter in *303 Creative* that the website designer would necessarily take non-expressive acts like registering the website or transacting a sale. And it likewise doesn't matter here that the Kleins would place a cake in the oven.

This Court should reject BOLI's attempt to conflate the expressive and non-expressive, contrary to *303 Creative*'s bright line between the two. What matters is that BOLI seeks to compel creative expression for customized goods. As held by *303 Creative*, the First Amendment bars BOLI from doing so.

I. *303 Creative* Prohibits BOLI from Compelling the Creation of Expressive Content.

In their opening brief, the Kleins explained that *303 Creative* drew a bright line between (1) government-compelled creation of "'expressive'" and "'customized'" content, and (2) government-compelled "'non-expressive'" conduct involving "'ordinary'" "'commercial good[s].'" Op.Br.6–9 (quoting *303 Creative LLC v Elenis*, 143 S Ct 2298, 2308, 2312, 2316 (2023)). The U.S. Supreme Court took great pains to explain that the former is inherently a violation of the First Amendment's guarantee of free speech, while the latter will rarely implicate free speech concerns. *See 303 Creative*, 143 S Ct at 2308, 2312, 2316.

That framework is the one this Court must apply, and it dictates the outcome here. This Court already held that the Kleins' wedding cakes are "highly customized" and inherently require "creative and aesthetic judgment." *Klein v Oregon Bureau of Labor & Industries*, 289 Or App 507, 533, 536–38 (2017). Mirroring the stipulation in *303 Creative*, BOLI's own findings of fact acknowledge that "[a]t all material times, [the Kleins' bakery] was a place or service that offered *custom designed* wedding cakes for sale to the public." Amended Final Order at 57 (emphasis added). BOLI's own expert explained that these cake designers' works are "'artistic expression[s].'" Op.Br.11.

It is undisputed that BOLI is attempting to compel that creative process, which is precisely what *303 Creative* prohibits.[1] BOLI tries to avoid this straightforward and clear application of *303 Creative*, however, by arguing that this Court's constitutional scrutiny must be diluted because the Kleins' expressive design and creation process is followed by the non-expressive acts of physically baking and selling a cake. BOLI.Br.1.

But *303 Creative* prohibits that approach. To be sure, that case involved pure expression (i.e., the text on a website), but it *also* involved separate acts that were undoubtedly non-expressive yet inherent in making the website, like undertaking "website management,"[2] registering the website, and charging money.[3] In fact, Colorado argued that the physical acts of "publishing the Proposed Statement" and of "building websites" both "constitute[d] conduct and not speech."[4] The creative and non-creative elements were tied together in the sense that the website designer would have to undertake both types of acts when compelled to make a website, yet the U.S. Supreme Court separately

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[1] As this Court has held, "the Kleins do not offer such 'standardized' or 'off the shelf' wedding cakes," and thus "any cake that the Kleins made for [the complainants] would have followed the Kleins' customary practice." 289 Or App at 536–37.

[2] Stipulation ¶ 45, Supreme Court Petition Appendix 181, *303 Creative*, https://tinyurl.com/4nyhxhe2.

[3] *303 Creative*, 143 S Ct at 2316.

[4] *303 Creative LLC v Elenis*, 2017 WL 4331065, at *6 n.2 (D. Colo. Sept. 1, 2017).

considered those actions and explained at length that the compelled creation of "customized and tailored" goods with "expressive" content must be analyzed differently than compelling "ordinary, non-expressive" "commercial" actions, with the former type of compulsion violating the First Amendment even if the latter did not. *303 Creative*, 143 S Ct at 2308, 2312, 2316, 2319 n.5, 2320 n.6.

If BOLI were correct, *303 Creative* itself would have come out the other way. To make a website, there are necessarily both creative elements and non-creative acts, and the presence of the latter would somehow allow the government to compel the former.

To be sure, *303 Creative* recognized there will occasionally be cases where compelling commercial action allegedly interferes with expression, and the government may be able to compel those acts if the effect on speech is merely "incidental." *303 Creative*, 143 S. Ct. at 2317–18. Those are the "expressive conduct" cases to which BOLI points. BOLI.Br.9. But that situation arises only when the specific commercial act *itself* is alleged to be expressive, not when there are separate expressive and non-expressive components, as is true here and in *303 Creative*. *See* 143 S. Ct. at 2315, 2317–18; 289 Or App at 537.

In other words, BOLI tries to frame this case as if the Kleins argue that putting a generic cake in the oven is *itself* speech. But the Kleins make no such claim. The Court can—and must under *303 Creative*—separate the expressive

design and creative components from the non-expressive acts like operating the oven and the cash register.[5] Baking a generic cake is not expressive, but designing and creating a custom cake is. Thus, this is best viewed not as an "expressive conduct" case but as a case with compelled expressive creation, separate from non-expressive conduct.

If BOLI were correct, then the necessary involvement of non-expressive physical action would give the government a free hand to control the expressive content. Under BOLI's view, because an author uploading a book online is a non-expressive physical act, the government could dictate that the author write the book in the first instance. Because encoding a film onto a DVD is a non-expressive physical act, the government could dictate that the film itself be produced. And because an artist who mounts a canvas performs a non-expressive physical act, the government could dictate that the artist then paint the canvas. Op.Br.9. Those are all wrong—yet they are the necessary result of BOLI's argument that because physically baking is a non-expressive act, the government can dictate that the Kleins design and create a custom cake, too.

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[5] Moreover, *303 Creative* allowed the compulsion of commercial acts only when there was at most an "incidental" effect on expression. 143 S. Ct at 2317–18. But the creative elements in the Kleins' case are far more than incidental, *see* 289 Or App at 538, so the government could not compel them even if they were inseparable from the physical act of baking.

As the Kleins argued in their opening brief, BOLI's view even means that "a gay cake maker could be forced by the government to design a creative, custom cake for a Westboro Baptist Church ritual." Op.Br.16. BOLI offers no response—because there is none.

303 Creative drew a bright line around the creation of expressive content and marked it as inviolable. BOLI's order transgresses that line.[6]

II. BOLI's Attempt to Distinguish Compelled-Speech Cases Falls Flat.

This Court's 2017 opinion held that *West Virginia State Board of Education v Barnette*, 319 US 624 (1943), and *Wooley v Maynard*, 430 US 705 (1977), did not apply here because those cases involved "a specific message that the individual was required to express." 289 Or App at 530–31. The Kleins' opening brief explained that *303 Creative* rejected that rationale, Op.Br.3–5, and BOLI's response brief does not dispute the point. This Court relied on that erroneous distinction not only when deciding whether the Kleins' expressions fell within the zone that the government can presumptively regulate, but also

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[6] BOLI claims that separating the creative and non-creative elements is a "significant shift in petitioners' argument." BOLI.Br.7. But the Kleins and this Court have recognized there were both creative acts and separate non-creative acts: "the Kleins have shown that their cake-making business includes some arguably expressive elements as well as non-expressive elements." 289 Or App at 526. And the Kleins have made clear that they "object to being compelled to create a custom design, *not to the physical act of baking*." Reply Brief for Petitioners at 12, *Klein v BOLI* (U.S. No. 22-204) (emphasis added). In any event, *303 Creative* itself drew a bright line between the two.

when analyzing intermediate scrutiny. 289 Or App at 530–31, 539, 540. That error, made at the very outset, led the Court erroneously to presume that the government could compel the Kleins' expression.

BOLI nonetheless tries to salvage this Court's decision not to apply compelled-speech cases like *Barnette* by claiming they all "concerned laws that compelled pure speech." BOLI.Br.4. But the challenge in *Barnette* was to "salut[ing]" the flag, which is not pure speech under BOLI's test. 319 US at 627–29. Under BOLI's test, the kids in *Barnette* would be forced to salute, even if they couldn't be forced to say the pledge of allegiance.

BOLI also claims that *Hurley v Irish-American Gay, Lesbian & Bisexual Group*, 515 US 557 (1995), and *Boy Scouts of America v Dale*, 530 US 640 (2000), involved "peculiar applications of public accommodations law" (whatever that means), whereas this case involves "[t]he sale of food to the public." BOLI.Br.5. BOLI's continued attempt to reframe this case as simply about the physical act of conducting a food sale is, as explained above, not only obviously wrong but also contradicted by BOLI's own findings of fact and expert witness, as well as this Court's prior holdings. Op.Br.11; 289 Or App at 536–38.

It is telling that BOLI thinks it can prevail only by recharacterizing nearly every aspect of this case.[7]

III. BOLI's Order Fails Constitutional Scrutiny.

The Kleins' opening brief explained that *303 Creative* did not apply tiers of scrutiny. Op.Br.12. Once the Court concluded the government was trying to compel expression, it was deemed unconstitutional without further inquiry. The same applies here. BOLI does not dispute this interpretation of *303 Creative*.

Even if tiers of scrutiny did apply, BOLI loses because it has no legitimate interest in compelling creation of expressive content. BOLI disputes only whether it was trying to suppress the Kleins' disagreement on same-sex marriage. BOLI.Br.10–11. This Court has already held that BOLI demonstrated unconstitutional hostility towards the Kleins' views on that exact subject. *Klein v. BOLI*, 317 Or App 138, 161–67 (2022).

It is also passing strange for BOLI only now to insist—after prosecuting this case for over a decade—that the Kleins' views about same-sex marriage are irrelevant to BOLI's actions. BOLI proudly announced the opposite when this case began. The only thing that's changed is that the U.S. Supreme Court has

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[7] Similarly, BOLI repeats the false statement that the Kleins "refused to bake any cake for the [complainants] based on their status as a same-sex couple." BOLI.Br.11. As this Court held, the Kleins previously designed and sold a custom wedding cake to the *same* complainants despite knowing they were a same-sex couple. 289 Or App at 511–12.

now held that government compulsion of expressive content for same-sex marriage ceremonies is inherently aimed at stamping out dissenting views.

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 27th day of September 2023.

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CERTIFICATE OF COMPLIANCE

On August 25, 2023, the Court issued an Order granting Petitioners leave to file a supplemental reply brief, not to exceed 2,000 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 1,932 words.

DATED this 27th day of September 2023.

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CERTIFICATE OF FILING AND SERVICE

I certify that on September 27, 2023, I personally submitted this Supplemental Reply 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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