No. 18-547

IN THE

Supreme Court of the United States

MELISSA ELAINE KLEIN AND AARON WAYNE KLEIN,
PETITIONERS,

V.

OREGON BUREAU OF LABOR AND INDUSTRIES,
RESPONDENT.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

BRIEF FOR THE CATO INSTITUTE AND COMMITTEE FOR JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the creation and sale of custom wedding cakes constitute artistic expression.
2. Whether Oregon violated the Free Speech and Free Exercise Clauses of the First Amendment by compelling the Kleins to design and create a custom wedding cake to celebrate a same-sex wedding, in violation of their sincerely held religious beliefs.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The **Cato Institute** is a nonpartisan public policy research foundation dedicated to advancing individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

The **Committee for Justice** (CFJ) is a nonprofit, nonpartisan organization dedicated to promoting the rule of law, the Constitution's limits on the power of government, and its guarantees of individual liberty including Americans' First Amendment right to both speak freely and be free from coercion to express views they do not share. CFJ understands that the vitality of the First Amendment is best measured by the protection it affords to people whose sincere beliefs have been marginalized by the government, as is the case for Americans who believe that endorsing same-sex marriage is at odds with their religious faith.

This case concerns *amici* because it implicates the First Amendment's protection against compelled expressive activity, as well as the distinction between public and private actors. Note that Cato is the only organization in the entire country to have filed in support of petitioners in both *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

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[1] Rule 37 statement: All parties lodged blanket consent to the filing of *amicus* briefs. No counsel for any party authored any of this brief; *amici* alone funded its preparation and submission. All parties were given timely notice of *amici*'s intention to file.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the use of state power to coerce individuals into violating their sincerely held religious beliefs. The petitioners here, Melissa and Aaron Klein were forced to close their bakery because they refused to make a custom cake for a same-sex wedding. Oregon is applying the full weight of governmental authority under the mistaken notion that relinquishing First Amendment rights is the cost of doing business. But individuals aren't agents of the state and can't be forced to convey messages with which they disagree.

The facts surrounding this case echo the Court's decision earlier this year in *Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n*, where another baker had to choose between freely expressing his beliefs and operating his business. 138 S. Ct. 1719 (2018). The Kleins owned and operated a cake shop, Sweetcakes by Melissa, until 2013, when this litigation forced them to close it. Cert. Pet. at 3. As practicing Christians, the Kleins ran their shop according to the same values they follow in all other aspects of their lives. *Id.* at 4. Celebration of traditional marriage was central to the spirit and mission of Sweetcakes by Melissa. *Id.*

The controversy that led to this petition began when Rachel Cryer asked Aaron Klein to design a custom cake for her wedding to her same-sex partner, Laurel Bowman. *Id.* at 5. Two years earlier, the Kleins had sold the couple—who they knew were gay—a wedding cake for the marriage of Cryer's mother (to a man). *Id.* Because their faith recognizes marriage as only between a man and a woman, Aaron apologized and politely told Rachel that they could not accommodate her request. *Id.* Rachel and her mother left the

shop, but Rachel's mother returned to confront Aaron about his wife's beliefs. *Id.* After a theological debate in which Aaron quoted Leviticus, Rachel's mother misquoted Aaron, telling Rachel that he had called her an abomination. *Id.* at 5-6. The couple, outraged, filed a complaint with the Bureau of Labor and Industries (BOLI) against the Kleins, alleging discrimination based on their sexual orientation. *Id.* at 7.

Soon after, BOLI filed charges against the Kleins for violating Oregon's public accommodations law. *Id.* An administrative law judge (ALJ) granted summary judgment for BOLI. *Id.* at 8. He awarded Rachel $75,000 for "emotional, mental, and physical suffering." *Id.* Despite his determination that Laurel's testimony lacked credibility, the ALJ awarded her $60,000. *Id.* In all, the judge determined that the Kleins' refusal to abandon their values should cost them $135,000.

The Oregon court of appeals, when reviewing the ALJ's ruling, erroneously claimed that baking a wedding cake is not "entitled to the same level of constitutional protection as pure speech or traditional forms of artistic expression." *Id.* at 10. Further, the court misinterpreted expression itself: "the expressive character of a thing must turn not only on how it is subjectively perceived by its maker, but also on how it will be perceived and experienced by others." *Id.* at 11.

But cake design, like sculpture or painting, is a form of artistic expression protected by the First Amendment. Sculpting with fondant is as creative as sculpting with clay. Painting with buttercream is as expressive as painting with oils. By mandating that the Kleins create a custom cake in celebration of a same-sex wedding, the Oregon court has effectively

undermined this Court's declaration that speech compulsions are just as unconstitutional as speech restrictions. *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (holding that even "the passive act of carrying the state motto on a license plate . . . . 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'") (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

Wooley also provides an important limiting principle to this constitutional protection: Although wedding (and other) vendors who produce and sell expressive works must be free to accept or reject *particular* jobs, this right does not apply to those who do not engage in protected speech. This Court can rule in favor of the Kleins on free speech grounds without blocking the enforcement of antidiscrimination law against caterers, hotels, limousine service operators, and the like.

The Oregon court's decision raises two important questions: one about the definition of expression itself, and another about government control over expression. Those concerns were not fully resolved in *Masterpiece Cakeshop* due to the anti-religious animus of the enforcement agency, but this case presents the Court a clean vehicle for addressing these issues.

The Court has an opportunity here to clarify whether expression such as cake-baking is protected by the First Amendment. It should also define the limits of state-compelled expression when someone is forced to participate in ceremonies that violate their religious beliefs.

ARGUMENT

I. Baking Custom Wedding Cakes Constitutes Artistic Expression That Is Protected by the First Amendment

This Court has long held that the First Amendment's protection of free expression encompasses far more than mere spoken or written word, and in fact covers a broad range of artistic expression and symbolic activities. *See Stromberg v. California*, 283 U.S. 359 (1931) (holding that California's ban on displaying red flags could not be justified as an attempt to prevent anarchist or communist violence); *Tinker v. Des Moines Indep. Cmty. Schl. Dist.*, 393 U.S. 503 (1969) (protecting the right of high school students to wear black armbands to protest the Vietnam War); *Cohen v. California*, 403 U.S. 15 (1971) (overturning a disturbing-the-peace conviction for wearing a jacket with the phrase "Fuck the Draft" inside a courthouse); *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that laws prohibiting desecration of the American flag violate the First Amendment); *Virginia v. Black*, 538 U.S. 343 (2003) (holding that even the racially charged act of burning a cross, without additional evidence of intent to intimidate, constitutes protected symbolic speech).[2]

Art is speech, regardless of whether it actually expresses any important ideas—or even any perceptibly coherent idea at all. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*—which upheld

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[2] Even cases upholding restrictions on symbolic speech, such as *United States v. O'Brien*, 391 U.S. 367 (1968) (burning draft cards) or *Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (nude erotic dancing), have acknowledged the expressive content of the restricted speech and merely outlined relatively narrow contexts in which the state interest can outweigh the First Amendment interest.

the right of parade organizers not to allow a gay-rights group to march because they did not want to endorse its message—even went so far as to say that the paint-splatter art of Jackson Pollock, atonal music of Arnold Schoenberg, and nonsense words of Lewis Carroll's Jabberwocky poem are "unquestionably shielded" by the First Amendment. 515 U.S. 557, 569 (1995).

While not all conduct that may arguably contain expressive content is protected by the First Amendment, *see Rumsfeld v. FAIR*, 547 U.S. 47, 62 (2004) ("Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is."), custom cake-making fits easily within the protection described in *Hurley* and elsewhere.

As the petitioners here argue, cake-baking and design are artistic expression. Cert. Pet. at 12. Numerous schools throughout the world offer classes focused on mastering the delicate techniques necessary to shape cakes into works of art. Some, such as the French Pastry School and the Institute of Culinary Education, offer extensive cake-decorating programs lasting hundreds of hours and teaching everything from specific techniques for sculpting fondant to academic theories of color and design. In the French Pastry School's 16-week professional certification program, for example, students take classes on baking and pastry theory, cake-baking and construction, and advanced decorating techniques, including "elaborate gumpaste work, detailed piping techniques, French buttercream frost-

ing, making rolled fondant from scratch and rolled fondant cake covering, chocolate decorations specifically tailored for cakes, pastillage and pressed sugar accents, pulled and blown sugar flowers and ribbons, mold making methods, airbrushing skills, figurine modeling and 3-D sculpted cakes." *Course Catalogue*, French Pastry School, http://bit.ly/2wjfBQW.

Those who buy wedding cakes are also keenly aware of the artistic work that goes into the process—and are willing to pay for it. In some major cities the price tag can easily turn out to be over a thousand dollars. Sharon Naylor, *Wedding Cake Prices: 20 Ways to Save Big,* Huffington Post, http://bit.ly/2wjy0xg. Customers are willing to pay significant sums not because a wedding cake's ingredients are themselves particularly valuable or unique, but because of the vision, creativity, and artistic skill involved. If the purpose of a wedding cake were simply to feed guests, couples would all buy sheet cakes at the local supermarket. Design and artistry are thus central to the value of a commissioned wedding cake.

Melissa Klein puts a great deal of artistic energy into creating wedding cakes, and each cake involves an individualized process. She does not create mere "off the shelf" wedding cakes. Pet. App. B at 42. Instead, she meets with each engaged couple and spends hours sketching and designing a personalized cake, incorporating "the couple's preferences, styles, and wedding theme" as a "blueprint for the finished cake." Cert. Pet. at 3-4. She forms an artistic vision, fine-tuned for each set of customers, and creates something special just for them, to commemorate their wedding day. To deny that Melissa's sketches, designs, and completed cakes are art is to deny the very nature of expression.

The Oregon Court of Appeals erroneously reasoned that public perception is of primary importance in determining whether conduct is expressive, and that "the Kleins have not raised a nonspeculative possibility that anyone attending the wedding will impute [the wedding cake's celebratory] message to the Kleins." *Id.* at 12. This runs counter to the Court's decision in *Hurley*: "A message need not be narrow, or succinctly articulable" to be considered expression. 515 U.S. at 569. If a message does not even need to be articulable, the public's perception of the message is irrelevant to its expressive nature. The Kleins' art should be defined by the creativity and thoughtfulness that goes into it, not by the public's subjective interpretations.

The Court has a chance here to clarify that expression such as cake-baking is protected under the First Amendment. In the past, it has identified numerous forms of art as speech. *See*, *e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 790–91 (1989) (music without words); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65–66 (1981) (dance); *Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 557–58 (1975) (theater); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502–03 (1952) (movies). Despite the rationales of the Oregon state court, baking wedding cakes—an explicitly artistic activity—fits in far better with those protected art forms than, say, a decision not to allow military recruiters at a law school like in *Rumsfeld v. FAIR*.

II. The Court Must Clarify the Extent to Which States May Compel People to Participate in Ceremonies to Which They Object

In addition to defining what exactly qualifies as expression worthy of First Amendment protection, the second core legal question here is whether the compelled-speech doctrine applies to the refusals of for-hire professionals to engage in artistic expression that they believe would constitute a personal endorsement of same-sex marriage. The lower court case mistakenly said that it does not; *amicus* urges this Court to set the record straight.

More than 70 years ago, in *Barnette*, the Court established that people could not be forced to promote a message they disagree with, even if that message is saluting the flag or saying the Pledge of Allegiance. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." 319 U.S. at 642 (1943). In other words, when the government endorses a principle, even one as fundamental as patriotism, people cannot be compelled to support or convey it. The Court has numerous times reaffirmed that the First Amendment prohibits both compelled speech and speech restrictions: "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *Barnette*, 319 U.S. at 637).

This understanding of "individual freedom of mind" makes considerable sense. Democracy and liberty rely

on citizens' ability to preserve their integrity as speakers, thinkers, and creators—their sense that their expression, including the expression that they "foster," and the expression for which they act as "courier[s]," is consistent with their beliefs. Thus, freedom of conscience is perhaps the most precious liberty in a liberal, democratic society. It forms a foundation on which the dignity of the individual rests.

In the dark days of Soviet repression, Solzhenitsyn implored his fellow citizens to "live not by lies": to refuse to endorse speech they believed false. Aleksandr Solzhenitsyn, *Live Not by Lies*, Wash. Post, Feb. 18, 1974, at A26. An individual must never "write, sign or print in any way a single phrase which in his opinion distorts the truth," never "take into hand nor raise into the air a poster or slogan which he does not completely accept," and never "depict, foster or broadcast a single idea which he can see is false or a distortion of the truth, whether it be in painting, sculpture, photography, technical science or music." *Id.* Solzhenitsyn noted that Soviet domination of conscience extended even to—and some would say especially to—religion. As he put it, "You can pray freely. But just so God alone can hear." Solzhenitsyn, *The Gulag Archipelago* 37 (1973) (quoting Tanya Khodkevich, who received ten years in prison for writing those two sentences).

People whose consciences require them to refuse to distribute certain messages are constitutionally protected. "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and to refrain from speaking at all." *Wooley*, 430 U.S. at 714. In *Wooley*, a family objected to having to display the state motto on

their state-issued license plates and sought the freedom not to display it. *Id.* at 707–08, 715. Surely, no observer would have understood the motto—printed by the government on government-provided and government-mandated license plates—as the driver's own words or sentiments. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015). Yet the Court nonetheless held for the family. *Wooley*, 430 U.S. at 717.

The Court reasoned that a person's "individual freedom of mind" protects the "First Amendment right to avoid becoming the courier" for the communication of speech that they do not wish to communicate. *Id.* at 714, 717. People have the "right to decline to foster . . . concepts" with which they disagree, even when the government is merely requiring them to display a slogan on a state-issued license plate. *Id.* at 714.

Even "the passive act of carrying the state motto on a license plate," *id.* at 715, may not be compelled, because such compulsion "'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'" *Id.* (quoting *Barnette*, 319 U.S. at 642). Forcing drivers to display the motto made them "an instrument for fostering public adherence to an ideological point of view [they] find[] unacceptable." *Id.* This reasoning applies regardless of the slogan's content. *See, e.g.*, *First Covenant Church v. City of Seattle*, 840 P.2d 174, 193 (Wash. 1992) (Utter, J., concurring) (landmarks designation violated church's "freedom to express [itself] through the architecture of its church facilities"); *see also Ortiz v. New Mexico*, 749 P.2d 80, 82 (N.M. 1988) (*Wooley* protects drivers from displaying the non-ideological slogan "Land of Enchantment").

Likewise, in *Hurley*, the Court found that a sponsor of a St. Patrick's Day parade did not have to include a group of gay, lesbian, and bisexual Irish-Americans, disregarding a state public-accommodations law. 515 U.S. 557 (1995). The parade itself was deemed to be "a form of expression," and compelled inclusion of the group would have forced the sponsor to bear a message—that the group's sexual orientation "merits celebration." *Id.* at 568, 574.

If the freedom from being forced to serve as a conduit for objectionable ideas extends to even the sort of passive act at issue in *Wooley*, or simple inclusion in *Hurley*, it must also apply to the compelled creation of expressive art at issue here. Forcing the Kleins to create artistry in celebration of same-sex marriage violates core First Amendment rights even more than allowing a group into a parade, or the imposition of a license plate with a quote hardly anyone could mistake as the driver's own personal opinion.

As discussed in Part I, *supra*, baking cakes—especially for weddings—is an artistic endeavor where individual artists go to painstaking efforts to express both a celebratory feeling and the unique tastes and characteristics of the couple getting married. The Kleins would not only be a conduit of a message in this context; they would be the *creators* of that message.

Simply stated, the government here is mandating, by law, that people produce art that violates their conscience and betrays their faith. This compulsion is just as unconstitutional as would be a ban on the creation of art that expresses unpopular opinions. The Kleins are being forced to participate in ceremonies they disagree with and endorse views they find objectionable—on the dubious reasoning that only those who agree

with the state as to the nature of marriage are entitled to operate small businesses that help celebrate weddings. The fact that the state of Oregon promulgates its policy so to combat discrimination against same-sex couples—a goal *amicus* freely acknowledges is a noble one—is irrelevant, because the government cannot pursue such a goal by violating the First Amendment.

The First Amendment does not allow state governments to compel either the creation or dissemination of speech. Given that making wedding cakes is a form of artistic expression protected as strongly as literal speech, the opinion below is contrary to both the Constitution and this Court's longstanding precedent.

CONCLUSION

The substantive issues that were at play in *Masterpiece Cakeshop* remain unsettled. This case provides an excellent opportunity for the Court to clarify that people's First Amendment rights do not disappear when they open a business. For the foregoing reasons, and those stated by the petitioners, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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