NO. 22-204

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 OF AMICI CURIAE OKLAHOMA AND 16 OTHER STATES IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether, under *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Oregon Court of Appeals should have entered judgment for Petitioners after finding that Respondent had demonstrated anti-religious hostility.

2. Whether, under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), strict scrutiny applies to a free exercise claim that implicates other fundamental rights; and if not, whether this Court should return to its pre-*Smith* jurisprudence.

3. Whether compelling an artist to create custom art for a wedding ceremony violates the Free Speech Clause of the First Amendment.

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INTEREST OF THE AMICI CURIAE[1]

Amici are the States of Oklahoma, Alabama, Alaska, Arizona, Arkansas, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, South Carolina, Tennessee, Texas, Utah, and West Virginia. Amici States have a strong interest in ensuring that their citizens are not compelled to engage in expression or participate in ceremonies that violate their deeply held beliefs. The First Amendment's protections for free expression and religious exercise enable the rich diversity of viewpoints that this Nation has long enjoyed and promoted.

Conversely, States do *not* have a legitimate interest in compelling citizens to engage in state-favored expression. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Amici are well-positioned to explain that States have several alternatives for promoting the availability of customized artistic works at same-sex weddings. For example, States can create online tools publicizing those artists who will create works celebrating same-sex weddings. Compelled private speech and compelled religious participation is thus not a necessary means to this end.

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[1] Amici notified the parties of the intention to file this brief at least ten days in advance, and Amici submit this brief pursuant to Sup. Ct. Rule 37.4.

SUMMARY OF THE ARGUMENT

Our Nation has long protected individual rights in furtherance of "a tolerant citizenry." *Lee v. Weisman*, 505 U.S. 577, 590 (1992). The crucial "mutuality of obligation" inherent to tolerance in a pluralistic society, *id.* at 591, was emphasized in *Obergefell v. Hodges*, 576 U.S. 644 (2015). There, this Court held that the Constitution does not allow States to prohibit same-sex marriage, while simultaneously directing that the free-expression and free-exercise rights of private individuals who disagree with same-sex marriage should be "given proper protection." *Id.* at 679.

This case is about the freedom of artistic expression and religious exercise that should be protected by government rather than threatened by it. As part of our fixed constellation of individual rights, no government—even one with the best of intentions—may commandeer the artistic talents of its citizens by ordering them to create expression with which the government agrees but the artist does not. Even worse here, the expression at issue deals with a topic that this Court recognized divides people of "good faith." *Id.* at 657.

Artistic work, whether viewed as pure speech itself or as conduct that is inherently expressive, has always received full First Amendment protection. Even when artistic works may seemingly lack any aesthetic or communicative value, this Court has determined that those works will be treated as expression entitled to full protection under the First Amendment if the individual

made a serious attempt at creating art. *See e.g., Kois v. Wisconsin*, 408 U.S. 229, 231 (1972) (per curiam)

Creating customized cakes for wedding ceremonies deserves the robust protection afforded to artistic works. That the art is created using an edible medium does not lessen the artistic quality of the cake. Indeed, bakers often spend an extraordinary amount of time designing the wedding cake and carefully constructing and decorating it.

The protection given to artistic endeavors has never been subject to the decreased scrutiny applied to mere conduct with some expressive component. Art—by its nature—is wholly expressive, so the expressive conduct line of cases is inapplicable here.

Requiring the Kleins to participate in a wedding contrary to their religious beliefs would also violate their free exercise rights. The government may not compel participation in religious activities. *Lee v. Weisman*, 505 U.S. 577, 587. But by requiring wedding vendors to play important roles in same-sex weddings, Oregon's public accommodations laws would do just that.

Wedding ceremonies are intrinsically religious events. They are almost always led by clergy members and are often hosted in or near houses of worship. And this Court has recognized the "transcendent importance of marriage" and expressly discussed its connection with "spirituality." *Obergefell*, 576 U.S. at 656, 666. Because of the intertwining of religion with wedding ceremonies, even facially "secular" weddings are viewed as religious by the devout. As such, it is unconstitutional for a government to require participation in a wedding.

ARGUMENT

I. COMMISSIONED WEDDING CAKES ARE ARTISTIC WORKS AND THEREFORE PROTECTED EXPRESSION UNDER THE FIRST AMENDMENT.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox . . . or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642; *accord Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Yet, Oregon seeks to do just that. Through its public accommodation law, Oregon has declared that citizens must create works of artistic expression that violate their sincerely held religious beliefs. Such an outcome would contradict this Court's precedent as well as its caution that "religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018).

A. Artistic Works Receive Full First Amendment Protection and Cannot Be Compelled.

Generally, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department v. Mosley*, 408 U.S. 92, 95 (1972). And as its corollary, the government may not deprive the speaker of the "right to tailor the speech" regarding "expressions of value, opinion, or endorsement." *Hurley v. Irish-Am. Gay, Lesbian &*

Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995). This Court has recognized that artistic expression presumptively falls within the First Amendment's broad protections. *See e.g.*, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-67 (1981). And the creation or sale of art has never been subject to commercial-speech doctrines. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952).

What qualifies as art has been defined broadly. The First Amendment's strong protections apply if the work has "artistic . . . value," *Miller v. California*, 413 U.S. 15, 23 (1973), or "bears some of the earmarks of an attempt" at art, *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972). Going further, even sexually explicit material that "deal[s] with sex in a manner . . . that has literary or scientific or *artistic value* . . . may not be . . . denied the constitutional protection." *Jacobellis v. State of Ohio*, 378 U.S. 184, 191 (1964) (emphasis added). Art is protected even if it is not understandable to viewers. For instance, this Court has described as "unquestionably shielded" nonsensical poetry (Lewis Carroll's Jabberwocky), awkward instrumentals (Arnold Schöenberg's atonal musical compositions), or seemingly incomprehensible paintings (Jackson Pollock's modern art). *Hurley*, 515 U.S. at 569.

This Court has differentiated between what is art and what is not by protecting artistic expression when it has "serious" artistic value, *Miller*, 413 U.S. at 23-37, or "bears some of the earmarks of an attempt at serious art," *Kois*, 408 U.S. at 231. No one who has been involved with a wedding would dispute that wedding cakes are serious business, and art.

B. Commissioned Wedding Cake Designs Are Artistic Works.

Art is the "expression or application of human creative skill and imagination, typically in a visual form such as painting or sculpture, producing works to be appreciated primarily for their beauty or emotional power." NEW OXFORD AM. DICTIONARY 89 (3d ed. 2010). The creation of a customized, unique wedding cake indisputably requires the "application of human creative skill and imagination." Wedding cakes are regarded as "works of art often created specially by cake design artists" and are "as novel and as beautiful as many paintings and sculptures." Hannah Brown, *Having Your Cake and Eating It Too: Intellectual Property Protection for Cake Design*, 56 IDEA: J. FRANKLIN PIERCE CTR. FOR INTELL. PROP. 31, 33-34 (2016).

Indeed, wedding cakes are commissioned and appreciated precisely for their beauty—not for their taste. As one prominent wedding cake baker admitted, "[p]eople assume that the cake is dry, the frosting tasteless and the decorations inedible." Julia Moskin, *Here Comes the Cake (And It Actually Tastes Good)*, N.Y. TIMES (June 11, 2003), https://www.nytimes.com/2003/06/11/dining/here-comes-the-cake-and-it-actually-tastes-good.html. The "symbolic weight" of the cake as the "showpiece" of the wedding "has long surpassed its role as food." *Id.*

Cake art has long been recognized for its beauty but has grown in popularity in recent times with the advent of baking shows such as *Amazing Wedding Cakes*, *Cake Boss*, and *Ace of Cakes*. There are many art institutes and colleges offering training classes and associates degrees in cake decorating. *See Wedding*

Cake Design School: Learn.org (Aug. 24, 2017), https://perma.cc/G8BY-2YMB. This includes the Institute of Culinary Education's 12-week course that trains students in various methods of cake decorating, including advanced sugar-work, hand-sculpting, airbrushing, and hand-painting. *The Art of Cake Decorating*, Institute of Culinary Education (Sept. 5, 2017), https://perma.cc/8WFE-KHED. The fact that these artworks are made through an edible medium does not lessen the quality of the art.

The wedding cake represents the pinnacle of the artform. "As a rule, [the cake] has almost nothing to do with food and everything to do with art—specifically the art of self-expression." Alexander Gilmour, *Too good to eat: the art of the wedding cake*, FINANCIAL TIMES (Aug. 17, 2018), https://www.ft.com/content/0b5f632e-a01f-11e8-85da-eeb7a9ce36e4. It has even been asserted that one's wedding cake ought to be "the ultimate expression of your feelings on the most important day of your life." *Id.* The process of constructing these elaborate masterpieces can at times begin six months to a year before the ceremony with the consultation with the prospective client. American Dream Cakes, *Timeline of a Wedding Cake* (June 27, 2016), https://www.americandreamcakes.com/timeline-of-a-wedding-cake/. Following the consultation, the entire creative process—including extensive design sketches and décor creation—often lasts up until the day of the ceremony. *Id.* This laborious process explains why Melissa Klein would have charged $600 for a custom cake and why other bakeries charge much more. As a centerpiece of the wedding, it is no surprise that great amounts of time, effort, and money is invested in ensuring that the cake looks just right, artistically.

In addition to its history as an artform, the wedding cake also has a rich symbolic history. During Roman times, small fruitcakes would be crumbled over the bride's head to procure good fortune. Carol Wilson, *Wedding Cake: A Slice of History*, 5 GASTRONOMICA 69, 69 (2005). Various forms of "bride-cakes" or "wedding cakes" were used for wedding ceremonies throughout European history. The bright white icing came to symbolize the bride's purity. Abigail Tucker, *The Strange History of the Wedding Cake*, SMITHSONIAN MAGAZINE (July 13, 2009), https://www.smithsonianmag.com/arts-culture/the-strange-history-of-the-wedding-cake-1-63011094/. Its symbolic importance continues to this day. At many weddings, the first task that the married couple performs as husband and wife is cutting the cake. Michelle Anderson, *7 Wedding Cake Traditions and Their Meanings*, The Spruce Eats (Mar. 3, 2019), https://www.thespruceeats.com/wedding-cake-traditions-486933. The couples then feed each other cake as a symbol of their commitment and love for one another. *Id.*

The wedding cake is one of the visual cornerstones for marriage. Unlike other goods, wedding cakes are specifically made and exclusively used for matrimonial celebrations. The association of wedding cakes with marriage ceremonies is so ingrained in the modern psyche that couples will often preserve a piece to eat on their one-year anniversary as a reminder of their spiritual union.

C. Commissioned Art Sold to Others Is Still the Artist's Personal Speech Protected by the First Amendment.

That art is at times created for a profit does not prevent it from "being a form of expression whose liberty is safeguarded by the First Amendment." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952); *see also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee."). It simply cannot be the case that the commissioning strips the art of its expression as related to the creator. To hold otherwise, would require viewing the great works of Leonardo da Vinci and Michelangelo as not embodying their personal expression. Such a view would also have profound (and negative) implications for movies—a visually focused artform that almost always involves profit-seeking. That the buyer seeks to direct or modify that expression does not change the artist's stake in the expression, and further does not mean that the State can compel the expression.

Moreover, the State cannot justify the compulsion of speech here by assuming that an observer will view the cake as an object to be eaten rather than speech or view any expression as reflecting the couple's views and not the baker's. This Court has rejected that line of reasoning. In *Wooley v. Maynard*, 430 U.S. 705 (1977), the Court held that the State could not force a citizen to display a message on his license plate that violated his religious and moral beliefs. *Id.* at 717. Even though it is likely that a neutral observer

would not assume that the citizen was espousing a belief by leaving the motto on his license plate, this Court held that the State could not require the citizen to use his private property as a "mobile billboard" for a certain ideological message. *Id.* at 715. Similarly, in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the compelled salute to the flag could have been justified by arguing that the speech would not have been associated with that of the student. After all, the students were saluting the flag to comply with the law. *Id.* at 642. This Court rejected that argument as compelling the salute "invade[d] the sphere of intellect and spirit" the First Amendment protects from official control. *Id.* Compelled speech is prohibited because it is compelled, regardless of what message observers will take from it.

D. An Expressive-Conduct Analysis Should Not Apply to Visual Art or Content-Based Restrictions; But Even If It Does Apply, Cake Designs Are Protected by the First Amendment.

To determine whether the Kleins' cakes are pieces of artistic expression, the lower court incorrectly extended this Court's "expressive conduct" line of cases set forth in *O'Brien*, *Johnson*, and *Spence* to works of art. The Oregon Court of Appeals cited those cases to determine that the agency's order only needed to pass intermediate scrutiny if the "cake-making retail business involves, at most both expressive and non-expressive components." Pet.App.87. And that court held that "the expressive character of the cake turns 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 89.

The rule governing conduct that possesses some expressive quality does not apply to the creation of art. This Court created the "expressive conduct" test in *United States v. O'Brien*, 391 U.S. 367 (1968). That case demonstrates why art should not subjected to its test. There, the government sought to punish O'Brien for violating a federal law by burning his draft card. *Id.* at 369. He burned the card to express his antiwar beliefs and to influence others to adopt them. *Id.* at 370. While this action was expressive, the non-expressive aspect of the conduct—burning a government form used to raise armies—was not protected by the First Amendment. The Court held that "the incidental restriction on alleged First Amendment freedoms [was] no greater than is essential to the furtherance of that interest." *Id.* at 377. Importantly, had O'Brien burned a *copy* of the draft card, rather than the card itself, the result would have come out in O'Brien's favor.

Spence v. State of Wash., 418 U.S. 405 (1974) and *Texas v. Johnson*, 491 U.S. 397 (1989) further illustrate this Court's approach to analyzing allegedly expressive conduct that violates a law prohibiting that action regardless of any expressive intent. *Spence* involved the hanging of an upside-down American flag with a peace sign taped over both sides—an action which violated Washington law. *Spence*, 418 U.S. at 406. While the Court acknowledged that not all conduct can be labeled speech when the acting person intends to express an idea, the Court nonetheless found that the "activity, combined with the factual context and environment in which it was undertaken, le[d] to the conclusion that [Spence] engaged in a form of protected expression." *Id.* at 410. The Court reached this conclusion by determining that Spence had "[a]n intent to

convey a particularized message" and that "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Id.* at 410-411. Similarly, the Court found that burning an American flag as the "culmination" of a political demonstration implicated the First Amendment. *Johnson*, 491 U.S. at 406.

Art is not subjected to such a context-driven inquiry into whether there is a "narrow, succinctly articulable message." *Hurley*, 515 U.S. at 569. Again, this Court has classified as "unquestionably shielded" by the First Amendment the paintings of Jackson Pollock, music of Arnold Schöenberg, and Jabberwocky verse of Lewis Carroll. *Id.* Art constitutes the entirety of the conduct, and there is no non-expressive element left to be regulated. And *Hurley* makes clear that art does not need to be understood by those that view it. Indeed, the First Amendment even protects art that does not seek to be understood. *See Hurley*, 515 U.S. at 569.

Beyond the fact that art is protected by the First Amendment without undergoing the expressive-conduct test, there is another reason why this test does not apply to the Klein's situation. *O'Brien*, *Spence*, and *Johnson* all dealt with the situation where the government sought to punish conduct that was prohibited regardless of the expression—burning a flag, damaging a government document, and marring a flag. Here, enforcement of the law at issue is "related to the suppression of [the Klein's] free expression" making this case "outside of *O'Brien's* test altogether." *Johnson*, 491 U.S. at 410.

Even if this Court were to decide that commissioned cake designing should be considered conduct

and not art, it would *still* be entitled to full First Amendment protection as expression under *O'Brien*'s expressive-conduct test. Designing and creating a wedding cake conveys messages and themes of at least the same communicative quality as marching in a parade —and therefore should be equally protected by the First Amendment. *See Hurley*, 515 U.S. at 569-70; *cf. Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (treating a purely symbolic act as "closely akin to pure speech . . . entitled to comprehensive protection under the First Amendment"). The overlap between the conduct and speech was complete, leaving no room to apply the state non-discrimination law.

The same is true with designing and creating custom wedding cakes. The commissioned cake is expressive in and of itself. It is therefore fully protected by the First Amendment, regardless of which particular line of precedent applies.

E. The First Amendment Categorically Prohibits Compelled Private Artistic Expression, So Oregon's Compulsion of Speech Is Unconstitutional Even If Strict Scrutiny Applies.

The State cannot compel private artistic expression—period. So here, "it is both unnecessary and incorrect to ask whether the State can show that the statute is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring in the judgment) (internal quotation marks omitted).

Even if strict scrutiny did apply, the government never has a sufficient interest to compel private artistic expression. Private artistic expression inherently espouses ideas that must come from the artist's nuanced work. And "[t]he government may not . . . compel the endorsement of ideas that it approves." *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298, 309 (2012). Moreover, "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Hurley*, 515 U.S. at 576. That concern is only heightened in the context of private artistic expression, which is intimately connected to the artist. Government has no authority to invade that sphere of an artist's personal autonomy and dignity.

Moreover, Oregon's compulsion of speech here is not narrowly tailored to furthering a sufficient state interest. States need not compel artistic expression from private citizens objecting in good faith for States to accomplish the goal of ensuring that same-sex couples have access to artistic expression supporting their same-sex wedding ceremony. A State, for example, could create or facilitate an online listing of artists willing to design and create artistic works for same-sex weddings, and couples could then use this list as a reference to commission nearby artists to create artistic works for same-sex weddings. Resources like this already exist in the private sector. *See e.g.*, *Pridezillas, A Wedding Resource for the LBGT Community* (2013), https://perma.cc/U8U4-WFCH. A State could also create a website where couples post their cake requests and receive bids from interested vendors. Alternatively, a State could even provide the service itself. And the

facts of this case demonstrate that petitioners were easily able to obtain a wedding cake from an alternative baker—even receiving a free second wedding cake from a celebrity baker. Pet.App.154.

F. Public Accommodation Laws Must Be Written and Interpreted in a Manner That Protects Small Businesses and Religious Adherents.

The governmental interest of anti-discrimination broadly defined cannot justify compelling religious citizens to speak in ways that violate their conscience. This Court emphasized the importance of the constitutional protections possessed by the opponents of same-sex marriage. *Obergefell*, 576 U.S. at 679-680. The facts of this case illustrate precisely why the *Obergefell* court was right to be concerned. The Kleins were willing to bake a custom cake for a gay individual, they were willing to sell a gay individual one of their specialty cupcakes, they merely would not design and bake a cake for a same-sex wedding. Pet.App.14. And because they chose to live out their sincerely held religious beliefs, they were initially fined $135,000 and were ultimately forced to close their business and move to a different state.

Public accommodation laws address laudable governmental goals. They were "originally enacted to prevent discrimination in traditional places of public accommodation—like inns and trains" and have "expanded to cover more places." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000). But this government interest—no matter how important—must respect the freedom of expression and the freedom of religion. This Court's decision in *Hurley* demonstrates that

public-accommodation laws must occasionally give way to freedom of expression. There, the Court allowed parade organizers to decline to allow an LGBT advocacy group to march in the parade behind that group's banner. *Hurley*, 515 U.S. at 572. Similarly, in *Dale* this Court held that requiring the Boy Scouts to admit a gay scoutmaster would impermissibly "interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs." *Dale*, 530 U.S. at 654.

Like the Boy Scouts in *Dale* and the parade organizers in *Hurley*, the Kleins seek to exercise control over the messages that their cake designs send. When weighing the State's interest in anti-discrimination with a party's First Amendment rights to free expression and free religious exercise, there is a fundamental difference between ensuring that individuals have access to commodities such as food and shelter and, on the other hand, the ability to compel the creation of custom artwork by a specific artist. Whatever alleged harm may exist in being denied a customized work of art, that harm has always been understood as an acceptable cost under the First Amendment for enjoying the pluralistic society treasured in this Nation.

Put differently, declining to apply public accommodation laws to small business owners that object to lending their artistic expression to ceremonies that violate their deeply held religious beliefs would effectively balance the competing interests involved. There is no realistic fear that same-sex couples will be entirely unable obtain wedding services. After all, following the Klein's refusal, the couple in question received a free wedding cake, whereas the Kleins received a fine, their store was vandalized, and they were ultimately forced to close their business and leave the state.

II. COMPELLING PARTICIPATION IN SAME-SEX WEDDINGS ALSO VIOLATES RELIGIOUS OBJECTORS' RELIGIOUS EXERCISE PROTECTIONS.

Following this Court's decision in *Obergefell*, most of the litigation surrounding same-sex marriage has focused on the issue of free speech. And as stated above, compelling bakers to produce their art in support of a specific ceremony does infringe upon their free speech rights. But focusing solely on free speech elides the equally implicated freedom of religion. The Kleins' objection to designing and creating a cake for a same-sex wedding is ultimately a religious objection. They object to their expression being forced by the State, but their objection is also to being compelled to participate in a ceremony that violates their religious beliefs. Pet. App.471. The First Amendment's protection of religious conscience prevents the government from forcing individuals to actively participate in religious activities to which they object. *Lee*, 505 U.S. at 589. Just as the protection for free speech includes a protection against government-compelled speech, the guarantee of free exercise likewise forbids the government from compelling religious exercise.

A. Religious Compulsion Is Impermissible.

"It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Lee*, 505 U.S. at 587 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984). Indeed, "one of the greatest dangers to the freedom of the individual to worship in his own way lay[s] in the Government's placing its

official stamp of approval upon one particular kind of prayer or one particular form of religious services." *Engel v. Vitale*, 370 U.S. 421, 429 (1962). Religious beliefs are "too precious to be either proscribed or prescribed by the State," and this Court has noted that the religious clauses "exist to protect religion from government interference." *Lee*, 505 U.S. at 589. This protection serves to forbid the government from making compulsory attendance at religious services.

Lee demonstrates this Court's strong aversion towards required attendance at religious services. In *Lee*, a school district allowed "members of the clergy to give invocations and benedictions at middle school and high school graduations." *Id.* at 581. The district took care to ensure that the prayers were inclusive and nonsectarian. *Id*. At the ceremony in dispute, the prayers took up no more than two minutes total of the entire graduation ceremony. *Id.* at 583. Nevertheless, this Court held that this practice violated the Establishment Clause. *Id.* at 593-94.

The dissenting justices did not contend that religious compulsion was okay, constitutionally; rather, they argued that the students in that case were not compelled to participate in the prayers in any meaningful sense. *Id.* at 637 (Scalia, J., dissenting). However, this Court believed that the students participated or gave the appearance of participation *just through the act of standing or sitting silently during the prayers*. *Id.* at 594. Further, even though the students were not required to attend the ceremony or do anything during the prayers, this Court still held that the State "in effect required participation in a religious exercise." *Id.* at 594. As the Court stated, "[i]t is of little comfort to a dissenter then, to be told that for her the act of

standing or remaining in silence signifies mere respect, rather than participation." *Id.* at 593.

If *Lee*'s silence counts as religious compulsion, then what happened here isn't a particularly close call. Oregon seeks to compel the Kleins to actively participate in a wedding ceremony, as artists—a ceremony that is innately or inherently religious. And that participation is not *de minimis*. The participation is not limited to "standing as a group" or maintaining "respectful silence." *Id.* Rather, the State would force the Kleins to create artistic expression for the wedding. And even were this Court to determine that elaborate wedding cakes are not works of art, creating such a key element of the wedding is a degree of participation much greater than anything contemplated in *Lee*. This form of compulsion, for example, goes far beyond the psychological peer pressure to stand during a nonsectarian prayer. Instead, here, petitioners are required to actively participate by the full weight of the law. And echoing the *Lee* court, it would provide little comfort to the Kleins to be told that observers would not view them making a cake as condoning or participating in the ceremony. Through its public accommodation law, Oregon effectively requires participation in religious services that violate one's faith as a prerequisite to opening a small business that provides services to weddings. This is intolerable.

B. Weddings Are Inherently Religious Ceremonies.

Weddings have historically been, and generally still are, religious ceremonies. The Supreme Court's decision in *Obergefell* spoke of the "transcendent importance of marriage" and its significance in "reli-

gious and philosophical texts spanning time, cultures, and faiths," connecting it with "spirituality" and deeming it "intimate to the degree of being sacred." *Obergefell*, 576 U.S. at 656, 657, 666, 667. That decision was based in part on *Turner v. Safley*, which reaffirmed the right to marriage because, among other things, "many religions recognize marriage as having spiritual significance . . . [and] therefore, the commitment of marriage may be an exercise of religious faith." 482 U.S. 78, 96 (1987).

Moreover, clergy almost always lead the ceremonies, which often begin or end in houses of worship. Prayers are offered, solemn vows made, spiritual songs sung and verses from holy literature read. Marriage ceremonies also include "symbolic rites, often sanctified by a religious order." Encyclopedia Britannica, *Marriage rituals*, https://www.britannica.com/topic/marriage/Marriage-rituals. The association between the marriage ceremony and religion stretches back hundreds, if not thousands, of years. Sandra Choron, PLANET WEDDING: A NUPTIALPEDIA 6 (2010). In 1076, for example, the Council of Westminster decreed that all unions had to be blessed by a priest, and by 1563, the Council of Trent required that priest perform the ceremony. *Id.* Jewish weddings required the participation of a religious official by the fourteenth century. *Id.* Some Christian traditions, of course, consider the act of marriage to be a sacrament. *See e.g., Sacrament of Marriage*, Diocese of Superior, https://catholicdos.org/marriage.

And the inextricable intertwining of religion and weddings is not limited to faiths within the Judeo-Christian tradition. Sikh weddings typically incorporate the reading of scriptures and the singing of a marriage

hymn, Muslim weddings often include a reading of the Quran, and Hindu weddings often involve solemn vows and offerings to a deity. Josie Pooler, *Saying 'I do': A look at different religious wedding traditions*, FaithCounts, https://faithcounts.com/saying-i-do-a-look-at-different-religious-wedding-traditions/. The religious underpinnings of wedding ceremonies can even be seen in how nonreligious people "take up a strategic religious identity" in order to obtain a personalized wedding ceremony that is "nonreligious." Dusty Hoesly, *Your Wedding, Your Way: Personalized, Nonreligious Weddings through the Universal Life Church*, *in* ORGANIZED SECULARISM IN THE UNITED STATES, 253 (Ryan T. Cragun et al. eds., 2017). "[E]ven secular Americans still think that a religious presence matters." Samuel G. Freedman, *Couples Personalizing Role of Religion in Wedding Ceremonies*, N.Y. TIMES (June 26, 2015), https://www.nytimes.com/2015/06/27/us/couples-personalizing-role-of-religion-in-wedding-ceremonies.html.

C. Even "Secular" Weddings Are Viewed as Religious.

Although it is possible to conduct a wedding ceremony without a minister and citations to religious texts, a deeply religious person will still in all likelihood view the ceremony as a fundamentally religious exercise. Someone that believes that marriage is a gift from God cannot view a marriage ceremony as bereft of religious underpinnings merely because none of the activities seem overtly or expressly religious. And furthermore, because weddings traditionally are so strongly associated with religion, to say the least, the act of stripping from the ceremony any references to religion is *itself* a statement about religion.

Here, Oregon seeks to require the Kleins to play a central role in these religious celebrations. But this Court has cautioned that "in the hands of the government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce." *Lee*, 505 U.S. at 591-92. Oregon's public accommodation law, which prohibits discrimination on the basis of both religion and sexual orientation, as applied to wedding vendors, would coerce participation in religious ceremonies that those vendors would either prefer to not participate in or are antithetical to their religious beliefs. If the Court does not rule in favor of the Kleins, not only must a Christian baker design a cake for a same-sex wedding, but a Muslim event planner must coordinate a Wiccan ritual, a Jewish wedding photographer must take photos for a wedding involving a Satanic Black Mass, and an atheist feminist vendor must lend her services on behalf of a wedding that includes a sermon on the importance of a wife submitting to her husband.

In sum, if our First Amendment's religion clauses prohibit a graduating high school senior from being compelled to participate in prayers through standing or sitting silently, surely they also protect citizens from being compelled to participate in religious ceremonies in a much more active and artistic manner. Recognizing this truth would enable the protection of a "good faith" belief held by "reasonable and sincere people here and throughout the world" contemplated by this Court in *Obergefell*. 576 U.S. at 657.

CONCLUSION

For the reasons stated, this Court should grant Petitioners the writ of certiorari.

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