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 WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARKANSAS, ARIZONA, LOUISIANA, NEBRASKA, NEVADA, OKLAHOMA, SOUTH CAROLINA, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici are the States of Texas, Alabama, Arkansas, Arizona, Louisiana, Nebraska, Nevada, Oklahoma, South Carolina, Utah, and West Virginia.[1] 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). On respondent's view, however, artists may be coerced—as a condition of earning a living through their artistry—to use their expressive talents on contested social and political issues as the government sees fit.

This compulsion of speech is constitutionally forbidden. And for good reason: Government power to order individuals to speak in a manner that violates their conscience is fundamentally at odds with the freedom of expression and tolerance for a diversity of viewpoints that this Nation has long enjoyed and promoted.

Amici are well-positioned to explain that States have a host of 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 is thus not a necessary means to this end.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief, in whole or in part, and no person or entity other than amici contributed monetarily to its preparation or submission. The parties' consents to the filing of this brief have been filed with the Clerk.

SUMMARY OF 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 by this Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The 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 2607.

This case is about the freedom of artistic expression 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 2594. The very purpose of the First Amendment's Free Speech Clause—and among its highest uses—is allowing opposing sides of a debate to express themselves as they see fit. *See, e.g.*, *Roth v. United States*, 354 U.S. 476, 484 (1957). The Constitution provides freedom of expression "in the hope that use of such freedom will ultimately produce a more capable citizenry and . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen v. California*, 403 U.S. 15, 24 (1971).

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 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).

Designing and creating customized art for the centerpiece of a wedding deserves the strong protection afforded to artistic works, regardless of its medium. Creating custom designs and accompanying works celebrating a wedding is artistry—whether it takes the form of a painting on a canvas, a figure carved into ice, or piping and sculpting on a centerpiece wedding cake. Design and creativity go into all those genuine attempts at artistry; the result celebrates the emotional significance of a wedding. All these forms of art deserve the same First Amendment protection.

The protection given to artistic endeavors has never been subject to the decreased scrutiny applied to mere conduct with some expressive component. Respondent relies on precedent that allows preventing someone from *engaging* in such conduct that is partially expressive but partially non-expressive, such as burning a draft card. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). But art—by its nature—is wholly expressive. Moreover, the state law here is "content-based," so it falls outside of *O'Brien* in all events. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010).

Most importantly, though, the government in this case went beyond *preventing* someone from affirmatively engaging in conduct, as did the government in *O'Brien*. Rather, the State here is *compelling* artists to create artistic expression they do not want to create. No precedent supports this, and *O'Brien*'s analysis simply does not apply to a person who refuses to speak. *See, e.g.*,

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 578 (1995) (holding unconstitutional an attempt at compelling expression by applying a public-accommodation law "to expressive activity . . . to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own"). Because art is inherently expressive, the State's compulsory rule violates the First Amendment.

The art at issue in this case involves a particular type of ceremony that has been traditionally tied closely to religion and an issue on which there is a difference of opinion held "in good faith by reasonable and sincere people here and throughout the world." *Obergefell*, 135 S. Ct. at 2594. Additionally, public-accommodation concerns of past eras are not present here; customized pieces of art are not public accommodations (like restaurants and hotels), the artist plainly did not act out of invidious discrimination, and complainants had immediate access to other artists, in any event. If States wish to facilitate the commissioning of artistry for same-sex weddings, they must look to more nuanced and less invasive approaches.

Like other related cases, this one happens to arise in the context of expression regarding same-sex marriage. But the controlling principles here transcend, and will long outlast, the Nation's current dialogue about same-sex marriage. As with any art, Oregon cannot force the Kleins to engage in a particular form of expression—or to refrain from it. The lower court's decision should be reversed.

ARGUMENT

"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 has declared that its officials may do exactly that—compel citizens to create works of artistic expression that violate their consciences. This Court should reject that move and restore the "mutuality of obligation" necessary for a "pluralistic," "tolerant" society, *Weisman*, 505 U.S. at 590-91, as recognized by *Obergefell*, 135 S. Ct. at 2607.

The Kleins have no invidious animus toward the complainants or anyone else. The choice not to design artwork was solely a matter of religious conviction and personal expression with respect to one type of event. Yet because the art at issue here might not necessarily be perceived by others as an expression of belief, the lower court thought it should not be "entitled to the same level of constitutional protection as pure speech or traditional forms of artistic expression." Pet. App. 44-45. This holding uses the wrong First Amendment test and then misapplies it. First, art does not fall under the "expressive conduct" test set out in *Spence v. Washington*, 418 U.S. 405 (1974), and *O'Brien*. Second, content-based restrictions like the one here are removed from that analysis altogether.

The First Amendment has long tolerated, and indeed protected, disagreement in our pluralistic society. Oregon has made no showing—because it cannot—that same-sex couples are unable to obtain artistic works for wedding ceremonies. Broad-based invocation of "antidiscrimination" is thus inappropriate in the specific context here. Any harm from a psychological effect that

someone might claim when another person holds different beliefs cannot override First Amendment protections. Nor could such harm match that suffered by the artists Oregon would compel, on pain of losing their livelihood, to create customized artistic expression that violates their conscience.

The First Amendment protects the right of an artist to not create certain types of art—even if no one understands the message at issue. Oregon's attempt to compel the Kleins to create art must be rejected.

As Artistic Works, Commissioned Wedding Cake Designs Are Protected by the First Amendment's Freedom of Expression and May Not Be Compelled.

The custom-designed cakes celebrating weddings here are artistic expression. They are thus protected under the First Amendment, and government cannot compel their creation. *See, e.g.*, *Wooley*, 430 U.S. at 714 (upholding "the right to refrain from speaking").

A. Because artistic works are inherently expressive, they receive full First Amendment protection and cannot be compelled.

The Court long ago recognized art's inherently expressive nature and developed a tradition of protecting artistic works, even works that some might find offensive. *See, e.g.*, *Kois*, 408 U.S. at 231. Thus, artistic works, with very limited exceptions not present here,[2] presumptively fall within the First Amendment's broad protections. *See, e.g.*, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-67 (1981). Likewise, the creation or sale

[2] Freedom of speech is cabined only by a few "'historic and traditional [exclusions]'—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citations omitted).

of art has never been subject to commercial-speech doctrines.[3] *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952).

This Court's precedents broadly define what qualifies as art. If the work in question has "artistic . . . value"—*Miller v. California*, 413 U.S. 15, 23 (1973)—or even "bears some of the earmarks of an attempt" at art—*Kois*, 408 U.S. at 231—then the First Amendment's strong protections apply. *See also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 246-56 (2002) (invalidating ban on *virtual* child pornography in part because it "prohibit[ed] speech despite its serious literary, artistic, political, or scientific value").[4]

The wide berth of what qualifies as artistic expression can be seen most clearly in the realm of sexually explicit material: "material dealing with sex *in a manner . . . that has* literary or scientific or *artistic value* . . . may not be branded as obscenity and denied constitutional protection." *Jacobellis v. State of Ohio*, 378 U.S. 184, 191 (1964) (emphases added); *see also Kois*, 408 U.S. at 231 ("[W]e believe that [the sexually explicit] poem bears some of the earmarks of an attempt at serious art.").

The First Amendment's protections apply equally to artistic expression that may not be literal speech. *See Ward v. Rock Against Racism*, 491 U.S. 781, 790-91 (1989) (upholding a time-place-manner restriction on

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[3] Even under the commercial-speech doctrine, content-based restrictions on expression are presumptively invalid. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

[4] Child pornography may be prohibited regardless of any claimed artistic value. *New York v. Ferber*, 458 U.S. 747, 756-65 (1982). *Ferber*, however, "presented a special case" involving "'conduct in violation of a valid criminal statute'" tied to a compelling interest. *Stevens*, 559 U.S. at 471.

music, but recognizing that the First Amendment's protections apply to regulations of music). And unlike "symbolic speech," *see, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (flag burning), with artistic expression it is unnecessary to inquire as to the speaker's message or whether it will be understood by viewers. Art in its various forms is "unquestionably shielded" by the First Amendment—even if it is nonsensical poetry (Lewis Carroll's Jabberwocky), awkward instrumentals (Arnold Schönberg's atonal musical compositions), or seemingly incomprehensible paintings (Jackson Pollock's modern art). *Hurley*, 515 U.S. at 569.

There is no reason to fear differentiating between what is art and what is not. This Court has already drawn that line. It is certainly true that not every "expressive" action a person takes qualifies as art, but expression is protected 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 (emphasis added). An objective observer only need recognize the speaker's subjective genuine attempt to create art—and need not appreciate the art's message, beauty, technique, or anything else in order for the creation to be treated as artistic expression protected by the First Amendment.

B. Commissioned cake designs are artistic works.

Art, by its common definition, 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). When the Kleins accept a commission to design and create a custom work, the creation is unques-

tionably an expression of "human creative skill and imagination" made to be appreciated for its beauty and the ideas it represents. It is unsurprising that 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 for Intell. Prop 31, 33-34 (2016). More than just an item of food, cakes are often "the embodiment of a plan or design drawn up by an artist." *Id.* at 55.

Even though cake design has been viewed as art for centuries, cake artists today receive more recognition for their creations than ever before. Cake art has found enormous popularity through reality television shows like *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 sugarwork, hand-sculpting, airbrushing, and hand-painting. *The Art of Cake Decorating*, Institute of Culinary Education (Sept. 5, 2017), https://perma.cc/8WFE-KHED. One college even awards a Bachelor's of Science in Baking and Pastry Arts. Johnson and Wales University in Rhode Island (Aug. 23, 2017), https://perma.cc/5R5D-U8SG.

This art form finds its highest expression in the wedding cake. As it has been for centuries, the wedding cake is rich with symbolism and meaning. Roman weddings culminated with the groom breaking a cake of wheat or barley over the bride's head as a symbol of good fortune.

Carol Wilson, *Wedding Cake: A Slice of History*, 5:2 Gastronomica: The Journal of Critical Food Studies (May 5, 2005), https://perma.cc/H2HL-9PSF. Rather than being a mere "food item" for the wedding, the cake was part of the celebration denoting that a wedding had taken place. The now-traditional white, icing-covered bridal cake first appeared sometime in the seventeenth century. Wilson, *Wedding Cake*, *supra*. Because white icing on a cake symbolized purity and prosperity, a pure white color was highly prized. *Id.*

Cake design changed greatly in the 1800s with the increasing availability of sugar and the inventions of baking powder, baking soda, and temperature-controlled ovens. The first icings were whipped with sugar and eggs and poured over the cake to harden into a smooth, shiny surface that was ideal for decorating. Liz Williams, *The Artistry and History of Cake Decorating*, International Food Information Council Foundation: Food Insight (Oct. 9, 2012), https://perma.cc/244J-85S3. Early decorations were molded from marzipan or other sugar-based pastes and sculpted into intricate and beautiful designs. *Id.*

Today, unlike in the past, it is routinely expected that wedding cakes will uniquely express a couple's personality and match the theme of the couple's wedding: "Ask any summer bride: her wedding cake . . . is the ultimate vehicle for self-expression." Abigail Tucker, *The Strange History of the Wedding Cake*, Smithsonian.com (July 13, 2009), https://perma.cc/5XFV-QNJW. Wedding cakes also afford cake artists a wide opportunity for creative expression. Wilson, *Wedding Cake*, *supra*, ("[C]ake designers continually strive to set new trends."). The design can involve many hours of labor, sculpting, piping, coloring, and structuring, and are often so elaborate that "the happy couple [may not] have the heart to devour the

masterpiece." Tucker, *The Strange History of the Wedding Cake*, *supra*. This helps explain the high prices. Melissa Klein would have charged $600 for the custom cake ordered by complainants. Pet. App. 105. Famous cake artists like Sylvia Weinstock may charge $50,000 or more for one of their wedding cake designs. Caitlin Johnson, *Weinstock's Wedding Cakes for the Wealthy*, CBSNews.com (Feb. 8, 2007), https://perma.cc/5L6Z-4YWW. To save on costs, "elaborate cakes are sometimes crafted out of Styrofoam." Tucker, *The Strange History of the Wedding Cake*, *supra*.

When a cake artist consults with a couple on designing a custom wedding cake, the cake artist will consider a broad palette of color, texture, theme, shape, and décor options. Toba Garrett, Wedding Cake Art and Design 2 (2010). The décor, or design, of the cake is the reason a prospective couple selects a particular cake artist. *Id.* at 7. Every cake artist has a style and body of work in that style—which is why cake artists show portfolios of their work. *Id.*; *see also* Elizabeth Marek, *How To Make It In The Cake Decorating World*, Artisan Cake Company (Mar. 25, 2013), https://perma.cc/9HZ8-PCDF (noting that there is at least one website dedicated to stopping cake photo thieves). After that, the clients will generally pay a consultation fee—from $50-$150—as the "cake artist begins sketching an idea of what the client is looking for." Garrett, *supra*, at 10.

The Oregon court acknowledged that "Melissa uses her own design skills and aesthetic judgments" in creating her cakes. Pet. App. 44. In short, then, she creates art, and the expressions created convey ideas just as surely as the more basic symbols found to be protected speech in other cases. *See, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (acknowl-

edging the implicit message in a black armband); *Stromberg v. California*, 283 U.S. 359, 361, 369 (1931) (recognizing the symbolic value in a "red flag"). Therefore her cake art enjoys the free-speech protections of any other expressive form of communication.[5]

C. An expressive-conduct analysis does not apply to visual art or content-based restrictions, yet commissioned cake designs are protected by the First Amendment even under an expressive-conduct analysis.

The lower court's primary rationale for rejecting the Klein's free-speech claim is that their art is merely conduct that can be regulated under the "expressive conduct" analysis set forth in *O'Brien*, *Johnson*, and *Spence*. *See* Pet. App. 44-45. That test was never fashioned to be applied to a work of art. Like the physical act of moving one's vocal chords to form audible words, the creation of art has never been thought to represent proscribable "conduct." An extension of those expressive-conduct cases to artwork would be inconsistent with the rationale that underlies them. In any event, commissioned cake designs are expression protected by the First Amendment even under *O'Brien*'s expressive-conduct test.

1. The Oregon court held that "[f]or First Amendment purposes, 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." Pet. App. 45 (citing *Spence*, 418 U.S. at

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[5] Impermissible government restrictions on private artistic expression are inherently different from the government ordering its own employees to conduct their official duties so as to effectuate the government's policies. *Cf., e.g.*, *Davis v. Miller*, No. 15A250 (U.S. 2015).

409-10). Contrary to the lower court's reasoning, however, the rule governing mere conduct with some expressive quality does not apply to the creation of art. The expressive-conduct precedent invoked comes from *O'Brien*, which involved the burning of a draft card. 391 U.S. at 376. Although it may not have been art, the act was clearly expressive conduct. The complication was that the First Amendment did not protect the non-expressive element of the conduct—destroying a government form necessary to the effectuation of a constitutional power of Congress (raising armies). Had O'Brien made and burned a *copy* of his completed draft card—the copy itself having no use in the government's program—the result would have been different. But because the government had a substantial interest in O'Brien not destroying the government form at issue, the Court held that he could not justify doing so in the name of free speech.[6]

The result differed when this Court examined the placement of a peace sign on an upside-down American flag. *Spence*, 418 U.S. at 406. *Spence* also rejected "'the

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[6] While *O'Brien* is typically used to justify something less than strict scrutiny with regard to expressive conduct, it also indicated that the regulation at issue cannot burden speech more than is necessary to further the governmental interest at stake. 391 U.S. at 377 (noting that "the incidental restriction on alleged First Amendment freedoms [must be] *no greater than is essential* to the furtherance of that interest" (emphasis added)). The real issue was that the draft card was essentially the government's property and related to an important governmental interest requiring that it not be destroyed. *Id.* at 381. In the present case, however, States could achieve their goal of access to wedding expression services without *any* burden being imposed on speech. *See infra* pp. 19-20. Nevertheless, this type of analysis is unnecessary because compelling any type of speech based on content is unconstitutional.

view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.'" *Id.* at 409 (quoting *O'Brien*, 391 U.S. at 376). But the Court held 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. This Court reached that 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 410-11.

To justifiably limit expressive conduct, context is the key. Burning an American flag outside of the Republican National Convention, as in *Texas v. Johnson*, was protected expression calculated to display a message of displeasure with the renomination of President Reagan. 491 U.S. at 406. As *O'Brien* recognized, it may be necessary on occasion for a court to inquire into whether the expressive conduct has significant non-expressive aspects—where the message and action do not perfectly overlap. That is because *O'Brien* addressed the violation of a law aimed at conduct beyond the expression.

This is not so with works of art. Unlike mere conduct, art is protected whether or not there is a "succinctly articulable message." *See Hurley*, 515 U.S. at 568-69. And when the medium chosen by the artist to convey the expression is visual art—be it a painting, a sculpture, or a cake design—the art constitutes the entirety of the "conduct," and there is no non-expressive element left to be regulated. *See id.* at 567. Thus, free-speech protection for artwork does not depend on assessing the degree of communicativeness of its message—which need not even be '"understood by those who view it'" for protection to

attach. *Johnson*, 491 U.S. at 404; *see Hurley*, 515 U.S. at 569 (citing works of art meaningless to most observers); *see also supra* Part A (noting this Court's categorical First Amendment protection for even attempts at art); Jed Rubenfield, *The First Amendment's Purpose*, 53 Stan. L. Rev. 767, 773 (2001) (recognizing that art "defies the *Spence* test").

Setting aside the fact that art is categorically protected by the First Amendment—without needing to analyze *O'Brien*'s expressive-conduct test—this test does not apply on the facts of this case for an independent reason. Enforcement of the law at issue is "related to the suppression of [the Klein's] free expression," so this case is "outside of *O'Brien*'s test altogether." *Johnson*, 491 U.S. at 410. After all, "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 Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

Nor can Oregon evade the inherently expressive nature of the art at issue here by inapt appeals to public-accommodation laws. There is a fundamental difference between ensuring that individuals have, on the one hand, 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. If the inability to compel an artist to accept a commission is a harm, the harm is merely a dignitary-type harm that has always been understood as an acceptable cost under the First Amendment for enjoying the pluralistic society treasured in this Nation. And any government compulsion attempting to eliminate that sort of harm necessarily works serious First Amendment injury to artists—forcing them to design and create state-preferred expressive works, on pain of losing their means of livelihood.

The "government may not prohibit expression"—including dissent from celebrating certain ceremonies—"simply because it disagrees with its message." *Johnson*, 491 U.S. at 416. The State of Oregon cannot punish the Kleins for refusing to create expression that furthers the State's prevailing orthodoxy.

2. Regardless, even if commissioned cake designing is treated as mere conduct, as opposed to art, it is still expression entitled to full First Amendment protection 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*, 393 U.S. at 505-06 (treating pure symbolic act as "closely akin to pure speech . . . entitled to comprehensive protection under the First Amendment").

The parade in *Hurley*, like art, was expressive in and of itself. 515 U.S. at 569-70. Because expressive conduct was at issue, the parade was treated as speech: parade organizers could not be compelled to include other speech with which they disagreed. *Id.* at 572-73 (preventing organizers from having "to alter the expressive content" of their private conduct). 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 itself is expressive in and of itself. It is therefore fully protected by the First Amendment, regardless of which particular doctrine applies.

D. Commissioned art sold to others is still the artist's personal speech protected by the First Amendment.

Just because an artist sells commissioned expression to others does not negate the fact that the First Amendment protects that artist's expression. *See Joseph Burstyn*, 343 U.S. at 501-02. The buyer may very well want to endorse, adopt, or join in an artist's expression. But the buyer's wishes do not allow the buyer (or the State) to compel an artist's expression. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015) (even if it would be joint speech, one speaker cannot compel speech from another).

The lower court sought to excuse the State's compulsion of speech by assuming that an outside observer would likely think of the cake as something to be eaten rather than speech, Pet. App. 45, or that it is not the Klein's speech but rather just an item of a vendor looking to make money. Pet. App. 47. That reasoning ignores this Court's holdings in *Wooley* and *Barnette*. After all, one could have simply declared that everyone would understand that the "Live Free or Die" message on a license plate wasn't the driver's message—it was only on the car so that the person could use the vehicle. *Wooley*, 430 U.S. at 715. Not only was that position rejected, the Court's holding would have been equally applicable to a license plate on a small-business truck that had the name of the company painted on the side. *Cf.* Pet. App. 193. Similarly, one could blithely announce that students are merely complying with the law when they salute the flag. *Barnette*, 319 U.S. at 642. That argument fails, too.

This Court has recognized that compelled speech is infirm *because* it is compelled. When compelled speech is allowed, it will result in governments seeking to enforce

a preferred orthodoxy. That is why Oregon's authority "to compel a private party to express a view with which the private party disagrees" must be "stringently limit[ed]." *Walker*, 135 S. Ct. at 2253 (citing *Hurley*, 515 U.S. at 573; *Barnette*, 319 U.S. at 642).

E. The First Amendment categorically prohibits compelled private artistic expression, yet Oregon's compulsion of speech is unconstitutional even if strict-scrutiny review applies.

1. Government cannot compel private artistic expression—ever. 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 review did apply, 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. *See supra* Part I.A. 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).

It is unsurprising, then, that this Court has never allowed a government entity to compel art or expressive conduct. A government cannot force a citizen to engage in or endorse expression—whether saluting a flag, *Barnette*, 319 U.S. at 642, or even passively carrying a message on a license plate, *Wooley*, 430 U.S. at 717. And, unlike a cable company hosting someone else's message, for example, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994), the artistic endeavor here is designed and created

directly by the person that the government is seeking to coerce. *Id.* at 641. Also unlike a cable company, there is no concern of creating a bottleneck for people seeking the expression at issue. *Id.* at 652, 656.

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.

2. In all events, Oregon's compulsion of speech here is not narrowly tailored to furthering a sufficient state interest.[7]

States need not compel artistic expression from conscientiously-objecting private citizens 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.[8] Resources like this already exist in the private

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[7] Even conduct subject to *O'Brien*'s expressive-conduct test cannot be curtailed unless the regulation is narrowly tailored—that is, "the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Turner*, 512 U.S. at 662 (quoting *Ward*, 491 U.S. at 799).

[8] A State also could define "public accommodations" like the federal government, so as not to capture businesses that—by their

sector. *E.g.*, Pridezillas, A Wedding Resource for the LBGT Community (2013), https://perma.cc/U8U4-WFCH.

The facts of this very case show that government does not have to compel private artistic expression for same-sex couples to have access to artists for their weddings. After the Kleins declined the request to design a cake for the same-sex wedding at issue here, complainants were able to have an elaborate cake designed by a local baker—and for less than half the price. Pet. App. 105. Additionally, a celebrity baker from the TV show *Ace of Cakes* even donated a second wedding cake to the couple, decorated with a design based on a tattoo of one of the complainants. Pet. App. 109; Pet. Br. 356.

Oregon cannot define its interest as "anti-discrimination," broadly speaking. Not only would such a sweeping definition open the door for government-compelled speech, that interest would not be implicated on the facts of this case. As the record shows, the Kleins sell cakes and baked goods to all customers, regardless of sexual orientation. *See* Pet. Br. 5. The Kleins had even served the complainants at issue in this case before, making a wedding cake for one of their mothers. Pet. App. 194.

The situation here thus parallels the "peculiar way" that the State in *Hurley* interpreted its law—when no individual had been discriminated against because of their sexual orientation, but only because of the message

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nature—selectively choose clients. *See* 42 U.S.C. § 2000a (applying accommodation statute only to establishments such as hotels, restaurants, and stadiums); *see also Amy Lynn Photography Studio, LLC v. City of Madison*, No. 2017-cv-00555 (Dane Cty. Ct. Aug. 11, 2017) (affirming that Wisconsin's analogous anti-discrimination law does not apply in circumstances similar to here).

at stake. 515 U.S. at 572-73 (finding compelled expression unconstitutional where State interpreted its law to make "speech itself" the "public accommodation"). Unfortunately, Oregon is not alone in the way it interprets its law. This Court is familiar with the actions of Colorado, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018),[9] and Washington, *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018) (Mem.). Other States have compelled artistic expression in the name of "anti-discrimination," too. For example:

- New Mexico found that a wedding photographer violated the State's anti-discrimination law when she declined, on the basis of freedom of conscience, a commission to photograph a same-sex commitment ceremony. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013), *cert. denied*, 572 U.S. 1046 (2014). As one Justice of the New Mexico Supreme Court candidly acknowledged, the photographer was "compelled by law to compromise" her beliefs as "the price of citizenship." *Id.* at 79-80 (Bosson, J., specially concurring).

- In Arizona, artists have been forced to design and craft hand-painted wedding invitations for same-sex weddings. *Brush & Nib Studio, LC v. City of*

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[9] The Colorado Civil Rights Commission has since ruled that Jack Phillips—petitioner in *Masterpiece Cakeshop*—violated the law again, this time for not creating a cake that would celebrate a transgender individual's transition from male-to-female. *Scardina v. Masterpiece Cakeshop, Inc.*, Charge No. CP201801130 (Colo. Civ. Rights Comm'n 2018), http://www.adfmedia.org/files/MasterpieceCakeshopProbableCauseDetermination.pdf.

Phoenix, No. CV 2016-052251 (Ariz. Sup. Ct. Maricopa Cty. Sept. 16, 2016).

In contrast, this Court has recognized the "good faith," "decent and honorable" beliefs of those that hold opposing viewpoints on the issue of same-sex marriage. *Obergefell*, 135 S. Ct. at 2594, 2602. The First Amendment rights of those conscientious objectors who refuse to create private artistic expression must be "given proper protection." *Id.* at 2607.

Complainants have suffered no tangible harm, and there is no invidious animus here. Moreover, the State has less-restrictive means available for ensuring that same-sex couples can find artists to create works for their wedding ceremonies. *See supra* pp. 19-20. Oregon simply sought to compel speech—and that is anathema to the First Amendment.

CONCLUSION

The judgment of the Oregon Court of Appeals should be reversed.

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