No. 22-204

IN THE
Supreme Court of the United States

MELISSA ELAINE KLEIN, *ET VIR.*,
Petitioners,
v.
OREGON BUREAU OF LABOR AND INDUSTRIES,
Respondent.

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

Brief *Amicus Curiae* of America's Future, Inc., Public Advocate of the United States, U.S. Constitutional Rights Legal Defense Fund, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee in Support of Petitioners

RICK BOYER
P.O. Box 10953
Lynchburg, VA 24506

PATRICK MCSWEENEY
3358 John Tree Hill Rd.
Powhatan, VA 23139

JOSEPH W. MILLER
P.O. BOX 83440
Fairbanks, AK 99708

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
Attorneys for *Amici Curiae*

*Counsel of Record

October 7, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE* [1]

America's Future, Inc., Public Advocate of the United States, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Restoring Liberty Action Committee is an educational organization. These entities seek, *inter alia*, to participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Some of these *amici* have filed *amicus* briefs in this and other courts on similar issues, including one filed on November 26, 2018 when this case was previously before this Court.

STATEMENT OF FACTS

Petitioners Melissa and Aaron Klein are the owners of a specialty cake shop in Oregon known as "Sweet Cakes by Melissa." In 2015, the Oregon

---

[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Bureau of Labor & Industries ("BOLI") levied a $135,000 fine against Petitioners for declining to design and create a cake to celebrate a same-sex "wedding." Petition for Certiorari ("Pet. Cert.") at 3.

In 2017, the Oregon Court of Appeals affirmed the BOLI's decision. *Klein v. Or. Bureau of Labor & Indus.*, 289 Ore. App. 507 (Or. Ct. App. 2017). In 2018, the Oregon Supreme Court denied Petitioners' petition for review. *Klein v. Or. Bureau of Labor & Indus.*, 363 Ore. 224 (Or. 2018). Petitioners sought certiorari in this Court. *Klein v. Or. Bureau of Labor & Indus.*, 139 S. Ct. 2713 (2019).

The Klein petition for certiorari was pending when, on June 4, 2018, this Court decided *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n.,* 138 S. Ct. 1719 (2018). At that point, the Court remanded this case "for further consideration in light of" its *Masterpiece Cakeshop* decision. *Klein v. Or. Bureau of Labor & Indus.*, 139 S. Ct. 2713 (2019).

On January 26, 2022, the Oregon Court of Appeals again affirmed the BOLI's decision, remanding the matter to BOLI with instructions only to reconsider the fine. *Klein v. Or. Bureau of Labor & Indus.*, 317 Ore. App. 138 (Ore. Ct. App. Jan. 26, 2022). On May 5, 2022, the Oregon Supreme Court again denied review. *Klein v. Or. Bureau of Lab. & Indus.*, 369 Ore. 705 (May 5, 2022). On remand, the matter was reconsidered by BOLI which simply re-examined the prior record in its case and reduced the fine to $30,000 on July 12, 2022. Pet. Cert at 4.

Seven years into this litigation, Petitioners have now filed their second Petition for Certiorari with this Court, asking this Court to address three questions:

> 1. Whether, under *Masterpiece*, 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. [Pet. Cert. at i (emphasis added).]

STATEMENT

The Klein Petitioners have suffered an egregious constitutional wrong committed by the Oregon BOLI. Petitioners have been sanctioned by the state of Oregon for acting in accordance with their deeply and sincerely held religious belief that they cannot participate in a "same-sex" marriage ceremony. This case requires this Court's most careful attention.

It is undisputed that the Kleins' refusal to serve the "wedding" in question was predicated on their

belief that "same-sex" marriage violates God's design for the institution of marriage. That view is not fabricated or novel or hateful, as may be alleged by some. Rather, it is based on a Biblical understanding of the institution of "marriage" that has endured throughout the world and throughout the generations since man has walked the earth. *See Genesis* 2:24. It is only in recent years that some have demanded that government usurp the authority to define marriage to serve the lifestyle of an increasingly politically powerful minority.

Historically, marriages have been a religious ceremony, and the notion that any government could compel a Christian to participate in an anti-Christian, anti-Biblical, indeed pagan, religious ceremony is on its face an outrage. Even if the ceremony was described as civil rather than religious, the violation of religious liberty would still exist. If a law was being enforced to compel a Muslim or Jew to act in violation of their faith, it would be rejected out of hand. It is only because this enforcement is aimed against Christians that this government abuse has, thus far, been deemed acceptable.

Petitioners ask this Court to grant certiorari to address three questions. While each of these questions is well founded, only the second question addresses the real constitutional offense suffered by the Kleins.

As to the first question, there is no doubt that Oregon has demonstrated anti-religious hostility, but granting review on that issue would accomplish little or nothing, demonstrated by the fact that this Court's

decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) has been followed by unceasing Colorado persecution of Masterpiece Cakeshop owner Jack Phillips.[2] The only lesson that *Masterpiece Cakeshop* taught state regulators was that they would be more careful in shielding their motives as they act against Christian businesses.

As to the third question, the relief that could be obtained is only for "artists" under the Free Speech Clause. This is the very same issue on which certiorari has already been ordered and briefing completed in *303 Creative LLC, et al. v. Elenis*, No. 21-476. There, this Court refused to grant certiorari to consider only the Free Exercise issue when on February 22, 2022, it limited review to: "Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment."

Only Petitioners' second question raises the free exercise claim, but it is raised in terms of whether the Court should employ strict scrutiny under *Employment Division v. Smith*, 494 U.S. 872 (1990), "and if not, whether this Court should return to its pre-*Smith*

---

[2] *See* A. Michels, "Baker back in court after refusing transgender customer," *Fox 31* (Oct. 5, 2022) ("Masterpiece Cakeshop owner Jack Phillips was back in court to appeal a decision from last year that punished him for refusing to bake a birthday cake with colors intended to celebrate a gender transition. Phillips has been in and out of court over the past 10 years defending his decision to turn away customers asking for cakes that send messages he does not believe in.").

jurisprudence." This question gets us closer to the central abuse of the Oregon BOLI, as it raises the free exercise issue. However, it assumes that under *Smith*, balancing was required, but under *Smith*, read correctly, there should be no need for interest balancing at all.

First, Justice Scalia explained that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts [including] assembling with others for a worship service." *Id*. at 877. Under that test, compelling a "same-sex" wedding is an "exercise of religion." Second, Justice Scalia made clear that: "We have never held that an individual's religious beliefs excuse him from compliance with **an otherwise valid law prohibiting conduct that the State is free to regulate**." *Id*. at 878-79 (emphasis added). The Oregon law that punishes those that will not participate in or facilitate a same-sex "marriage" does not meet this test. The Oregon law prohibits "conduct that the State is **[NOT]** free to regulate" under the Free Exercise Clause, making an examination of the Free Exercise Clause central to resolution of this case. It is this issue upon which these *amici* focus this brief, to urge the Court to grant certiorari to review a variant of Petitioner's Question No. 2:

> May Oregon sanction individuals who refuse to participate in or facilitate "same-sex" marriages, which they sincerely and deeply believe to be immoral and in violation of their faith and teachings of the Holy Bible,

consistent with the First Amendment's protection of the Free Exercise of Religion.

SUMMARY OF ARGUMENT

The First Amendment promises Americans that "Congress shall make no law ... prohibiting the free exercise [of religion]." Almost a century and a half ago, this Court recognized that the application of this ban required a clear understanding of the Framers' meaning of "religion." This Court has recognized that meaning was best described by James Madison in his "Memorial and Remonstrance," where he "demonstrated 'that **religion**, or the **duty we owe the Creator**,' was **not within the cognizance of civil government**." *Reynolds v. United States*, 98 U.S. 145, 163 (1878) (emphasis added). Thus, the Free Exercise Clause imposes a jurisdictional barrier on the powers of government.

Oregon Revised Statute 659A.403 defies the jurisdictional limitation of the Free Exercise Clause, as recognized by *Reynolds* and reaffirmed in *Employment Div. v. Smith*. It imposes a civic duty on individuals in an area where their duty is only to God. It requires of citizens the Hobson's choice between violating their conscience, or losing their business and livelihood. It does so through the expedient of so-called "public accommodations" state laws divorced from any textual or historical justification in the common law or the Constitution.

The Court opinions below reveal the importance of this Court granting certiorari to resolve critical

questions of interpretation of the Free Exercise guarantee. Referring to this Court's decision in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719 (2018), the Oregon Court of Appeals noted, "[u]ltimately, though, the Court never addressed the question of the legal correctness of the agency's (and the court's) ruling." *Klein v. Or. Bureau of Labor & Indus.*, 317 Ore. App. 138, 156 (Ore. Ct. App. 2022). The Court realized that *Masterpiece Cakeshop* left the most important questions unanswered: "it is difficult to discern, precisely, the rule of law announced or how to apply it. The Court did not identify an applicable standard of review, and its opinion poses different alternatives." *Id.* at 159.

The rule governing application of the Free Exercise Clause should be similar to the rule recently adopted by this Court for the Second Amendment in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), which eschews interest balancing in favor of a text, history, and tradition approach. Likewise here, no judicial interest balancing should be required or permitted. BOLI has sought to regulate behavior on a matter of religion exceeding the authority of any government.

ARGUMENT

I. THE FREE EXERCISE OF RELIGION CLAUSE IMPOSES A JURISDICTIONAL LIMIT ON GOVERNMENT.

A. The Historical Origin of the Free Exercise Clause.

While the First Amendment protects the "Free Exercise of Religion," it does not attempt to define "religion." In seeking a definition, this Court in *Reynolds v. United States* turned quite properly to James Madison and the 1776 Virginia Declaration of Rights, the lineal ancestor of the First Amendment. Section 16 of the Declaration of Rights (now Article I, Section 16 of the Virginia Constitution) reads, "**religion or the duty which we owe to our Creator**, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the **free exercise of religion**, according to the dictates of **conscience**...."[3]

Virginia led the fight for the Free Exercise of Religion in the time of the Declaration of Independence and the Constitution. Virginia adopted the "world's boldest ... experiment in religious freedom," based on the Madisonian notion which protects "liberty of

---

[3] *See* Constitution of Virginia, Section 16, reprinted in R. Perry and J. Cooper, eds, Sources of Our Liberties (rev. ed.) (American Bar Foundation: 1978) at 312 (emphasis added).

conscience, for all."[4] As the Free Exercise Clause is the lineal descendant of the Virginia Declaration of Rights, Madison's role in developing that Declaration is critical to understanding how the Free Exercise Clause operates as a fixed jurisdictional limit on the powers of government.[5]

The original version of the Declaration of Rights read in part, "all Men should enjoy the fullest **Toleration** in the **Exercise of Religion**, according to the Dictates of Conscience, unpunished and unrestrained by the Magistrate, **unless**, under Colour of Religion, any Man disturb the Peace, the Happiness, or Safety of Society, or of Individuals...." "Virginia Declaration of Rights, First Draft," *Gunston Hall* (May 20-26, 1776) (emphasis added).

Madison objected, and argued for more than "toleration." He proposed, "[a]ll men are equally entitled to the free exercise of religion."[6] "Madison's proposal ... was approved." *Id.* Thus, Section 16 as

---

[4] C. Haynes, "James Madison: Champion of the 'cause of conscience,'" *Washington Times* (Dec. 12, 2016) (emphasis added).

[5] Madison's groundbreaking view of religious liberty nonetheless had roots in English common law. Sir William Blackstone explained that at common law the state properly had jurisdiction only to make the rules governing "civil conduct," not the rules governing "moral conduct," much less "the rule[s] of faith." 1 W. Blackstone, Commentaries on the Laws of England 45 (Facs. Ed., Univ. of Chi: 1765).

[6] *See* Constitutional Debates on Freedom of Religion, p. 31 (J. Patrick & G. Long, eds., Greenwood Press: 1999).

adopted read, in pertinent part, "and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience." Madison's language **eliminated any reference to balancing** the peace, happiness, or safety of the larger society, as determined by any civil magistrate, against the right of Free Exercise — creating a **jurisdictional separation** between the power of government and the citizen's Free Exercise of Religion.

In 1784, Virginia Governor Patrick Henry supported legislation under which state funds would be paid to churches chosen by taxpayers or the state legislature. In opposition, Madison penned his famous "Memorial and Remonstrance Against Religious Assessments":

> Because we hold it for a fundamental and undeniable truth, "that **Religion** or the **duty which we owe to our Creator** and the manner of discharging it, can be directed only by **reason and conviction**, not by **force or violence**.... This right is in its nature an unalienable right.... It is unalienable also, because what is here a right towards men, is a duty towards the Creator.... **This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society**.... We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that

Religion is wholly exempt from its cognizance.[7]

Madison's language became the basis for the Virginia Statute for Religious Freedom, crafted largely by Thomas Jefferson, and passed in 1786. As with Madison's Memorial and Remonstrance, the Statute's language is overtly jurisdictional. The Statute reads in Section I: "Almighty God hath created the mind free. [...T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical.... [O]ur civil rights have no dependance on our religious opinions."[8]

In Section II, the Statute reads, "no man shall be ... enforced, restrained, **molested**, or burthened in his body or goods, nor shall otherwise suffer, **on account of his religious opinions** or belief." *Id*. at 48 (emphasis added).

Just five years later, Virginia and several other states insisted on the inclusion of the First Amendment and the protection of Free Exercise to win their ratification of the Constitution.[9] The clear

---

[7] Madison's Memorial and Remonstrance, reprinted in J. Patrick, ed., Founding the Republic: A Documentary History, 90 (Greenwood Press: 1995) (emphasis added).

[8] Virginia Declaration of Rights, reprinted in N. Cogan, ed., "The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins," 2d ed., 47-48 (Oxford University Press: 2015).

[9] "The Bill of Rights," BillofRightsInstitute.org.

jurisdictional language of the First Amendment — Congress shall make no law — echoes Madison and Jefferson's pioneering work for Free Exercise in Virginia.

Through its 1990 decision in *Employment Div. v. Smith*, this Court repeatedly held that government has no authority under the First Amendment to "regulate religious beliefs [or] the communication of religious beliefs." *Smith* at 882.

As recently as 2012, this Court continued to uphold the jurisdictional divide between a citizen's civil obligations to the state, and his religious obligations to God. Whether the state is free to regulate particular conduct is determined by the original definition of "religion" in the free exercise guarantee itself. This is the lesson from this Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).

In *Hosanna-Tabor,* this Court rejected the EEOC's argument that the Americans with Disabilities Act's prohibition of employer retaliation against employees filing a grievance under the Act was immune from a free exercise challenge because it was a "neutral law of general applicability." *See id.* at 190. The Court held that the internal governance of a church body, including the hiring and firing of ministers, is **outside the jurisdiction** of the government. "[T]he Religion Clauses," Chief Justice Roberts wrote, "ensured that the new Federal Government — unlike the English Crown — would have no role in filling ecclesiastical offices." In support, the Chief Justice cited Madison,

who he credited as "'the leading architect of the religion clauses of the First Amendment.'" *Id.* at 172, 184.

As its chief architect, Madison understood (as did Jefferson) that the First Amendment erected a **jurisdictional barrier** between matters that belonged to church government and matters that belonged to **civil government** of the state, the latter having absolutely **no jurisdiction over duties owed to the Creator** which, by nature, are enforceable only "by reason and conviction."

B. Oregon's "Public Accommodation" Law Defies the Jurisdictional Limit of the Free Exercise Clause.

ORS 659A.403, as interpreted and enforced by the BOLI, has become not a shield against discrimination, but rather a sword to be wielded by militant homosexual activists against the Free Exercise of Religion, including the mere "communication of religious beliefs," which *Smith* teaches is jurisdictionally beyond government's reach.

As noted by Petitioners, even while upholding a verdict and fine against them, the Oregon Court of Appeals admitted that their religious beliefs and the mere act of communicating those beliefs were expressly punished by the BOLI. Petitioner Aaron Klein "quoted Leviticus" and its reference to homosexual conduct as an "abomination." *Klein* at 163. "BOLI adopted the perspective of its prosecutor that it did not really matter what Aaron actually had

said, because of the distress caused by Aaron's use of the word 'abomination'...." *Id.*

The Oregon Court of Appeals even noted, "we do not mean to suggest that the use of a Bible quote immunizes a speaker from liability for emotional distress damages. It is easy to envision circumstances in which, as a factual matter, a speaker might employ biblical references to engage in name-calling and inflict emotional distress." *Id.* at 165.

The Court of Appeals' language is stunning in view of the First Amendment's clear protection of Free Exercise:

> Taking the position that it did not matter factually what [Petitioner] Aaron [Klein] had said tends to suggest hostility or dismissiveness because it is not typical to hold someone liable in damages for something they did not, in fact, say or do. On the contrary, the facts matter when imposing liability for damages, and there is a significant difference, factually, between a person who quotes a topically relevant Bible passage that contains an inflammatory word to respond to a suggestion that they might change their beliefs, and a person who calls another person a name using that same inflammatory word. [*Id.* at 164.]

In other words, according to the Court of Appeals, Petitioners may be punished by the state for quoting a Bible passage to illustrate the basis for their beliefs if

the person being spoken to is offended. The jurisdictional violation by the Court below could scarcely be more blatant — and the offensiveness of ORS 659A.403 to the First Amendment could not be more glaring.

II. OREGON'S ORS 659A.403 IS OUTSIDE THE HISTORY AND TRADITION OF PUBLIC ACCOMMODATION AND ANTIDISCRIMINATION LAWS.

A. Traditionally, "Public Accommodations" Laws Were Limited to Innkeepers and Public Carriers.

Public accommodations laws had their genesis in old English law, and initially had a single application. They applied only to inns, and were designed to protect travelers from being robbed while sleeping alongside the road at night.

Harvard Law Professor William J. Neale wrote a Treatise on "The Law of Innkeepers" in 1906.[10] He described the narrow scope and function of public accommodations laws. Even in application to innkeepers, the law's requirement was to provide a place of safe shelter.[11]

---

[10] W.J. Neale, The Law of Innkeepers and Hotels, sec. 15 (William J Nagel: 1906).

[11] *Id*. at sec. 15, 16. ("The innkeeper supplies all needs of a traveller. The innkeeper supplies all the entertainment which the weary traveller actually needs on his road; which in lowest terms

In America, the innkeeper rule requiring service to all travelers was eventually expanded to include "common carriers" licensed by government, such as railroads.[12] However, with only these narrow exceptions, "proprietors or purely private enterprises were under no such obligation, the latter enjoying an **absolute power to serve whom they pleased**" (emphasis added).[13]

Professor Bruce Wyman also demonstrates the extremely narrow application of historical public accommodations laws. "The **innkeeper is in a common calling** under severe penalty if he do not serve all that apply, while the **ordinary shopkeeper is in a private calling free to refuse to sell** if he is so minded."[14]

Professor John Sherry noted that individuals could choose not to enter the field of innkeeping if they wished to avoid the compulsion to serve all clients. The "duty to serve every person as a member of the public [and at] a reasonable price was imposed only on

---

is food, shelter and protection.... Thus a house which does not supply lodging is not an inn; and this rule excludes from among inns a restaurant or eating house."). *Id.* at sec. 15.

[12] *Id.* at sec. 343, 344.

[13] J.E.H. Sherry, The Laws of Innkeepers at 45 (Cornell Univ. Press: 1993) (citation omitted) (emphasis added).

[14] B. Wyman, "The Law of the Public Callings as a Solution of the Trust Problem," 17 HARV. L. REV. 156, 159 (1904) (emphasis added).

those who chose to operate a business in the narrow field of common callings."[15]

However, a number of states have now vastly expanded the definition of "public accommodations" from a strictly narrow class of common callings to essentially all establishments whatsoever, with no warrant in the common law. Oregon's "public accommodations" statute is almost limitless. ORS 659A.400 defines a "place of public accommodation" as "[a]ny place or service offering to the public accommodations, advantages, facilities or privileges **whether in the nature of goods, services**, lodgings, amusements, transportation **or otherwise**" (emphasis added).

Not only is there no antecedent in the common law for such a limitless interpretation of "public accommodations," but there is also likewise no antecedent in federal law. Even the 1964 Civil Rights Act applies only to three categories of businesses — hotels, restaurants and eating establishments, and places of public entertainment such as movie theaters and sports arenas.[16]

---

[15] Sherry at 38.

[16] "(1) any inn**, hotel, motel**, or other establishment which provides lodging to transient guests ... (2) any **restaurant, cafeteria, lunchroom, lunch counter, soda fountain**, or other facility principally engaged in selling food for consumption on the premises ... (3) any **motion picture house, theater, concert hall, sports arena, stadium** or other place of exhibition or entertainment...." 42 U.S.C. § 2000a(b) (emphasis added).

B. Historically, Nondiscrimination Statutes Are Limited to Immutable Characteristics, not Lifestyle Choices or "Orientations."

Inclusion of "sexual orientation" as a protected class in so-called "public accommodations statutes" is a new phenomenon. As of 1990, only a tiny handful of states had such statutes.[17]

Historically, nondiscrimination statutes have been similar to the 1964 Civil Rights Act, which protects the classes of "race, color, religion or national origin."[18] More recently, sex and age have often been added as protected classes as well. In addition, since 1990,[19] the Americans with Disabilities Act now covers individuals with disabilities as a protected class. 42 U.S.C. § 12101, *et. seq.* But Congress has never provided special status for a person's "orientation" or sexual preference. Indeed, it was this Court's wrongly decided holding in *Bostock v. Clayton County*[20] that triggered unelected federal agencies to redefine the word "sex" in their antidiscrimination protocols to include so-called "sexual orientation" and "gender

---

[17] "State Nondiscrimination Laws: Public Accommodations," Movement Advancement Project.

[18] H.R. Doc. No. 124, 88th Cong. 1st Sess., at 14.

[19] The law was enacted as Pub. L. 101-336 in 1990.

[20] *See Bostock v. Clayton County,* 140 S. Ct. 1731 (2020).

identity."[21] The people's elected representatives in Congress have never taken such action. Indeed, H.R. 5, the so-called "Equality Act," failed to break a Senate filibuster, and no action has been taken on the bill in more than a year.[22]

Despite the lack of support in common law or federal law, ORS 659A.403 prohibits "discrimination" on the basis of "sex, **sexual orientation**...." (emphasis added).

III. STATE "PUBLIC ACCOMMODATIONS" LAWS HAVE BECOME A CLUB USED BY MILITANT HOMOSEXUAL ACTIVISTS.

The proliferation of state "public accommodations" laws has precipitated an explosion of cases where militant homosexual activists — unwilling to be content with patronizing the vast majority of businesses that support their cause — instead target businesses like that of Petitioners — whose sincere religious beliefs were not questioned even by the court that upheld severe fines against them for practicing those sincere beliefs.[23]

---

[21] Dept. of Health and Human Services, "HHS Announces Prohibition on Sex Discrimination Includes Discrimination on the Basis of Sexual Orientation and Gender Identity" (May 10, 2021).

[22] H.R. 5 (117th Congress).

[23] *Klein*, 317 Ore. App. at 161 ("[The BOLI] appears to pass judgment on the Kleins' beliefs, treating the beliefs as the equivalent of mere prejudice....").

Again and again, the right to Free Exercise has been denied to Christians, as they have been targeted under state public accommodations laws, almost exclusively by militant homosexual activists. Business owners in Colorado, Washington, New Mexico, Iowa, New York, Kentucky, and other states have been targeted, and in some cases forced out of business.[24] Again and again, this Court is flooded with cases of Americans forced to defend the liberties enumerated by the Bill of Rights, at the risk of losing their livelihoods for insisting on their Free Exercise of Religion.

In 2014, this Court denied certiorari for a Petitioner in New Mexico who was forced against her religious objections to provide photography for a homosexual wedding.[25] In 2021, this Court denied certiorari to a florist in Washington State who was ordered against her religious objections to provide flowers for a homosexual wedding.[26] The *Masterpiece* decision avoided the Free Exercise issue. The grant of certiorari in *303 Creative* was limited to Free Speech.

---

[24] *See, e.g.*, D. Bohon, "Christian Businesses Targeted Over Refusal to Serve Gay Weddings," *The New American* (Aug. 26, 2013); "NY photographer fights for freedom to create according to her beliefs," *Alliance Defending Freedom* (Jan. 12, 2022); Father M. Hodges, "Christian couple loses business for refusing to participate in gay 'wedding'," *LifeSiteNews* (June 25, 2015).

[25] *See Elane Photography, LLC v. Willock*, 2014 U.S. LEXIS 2453 (2014).

[26] *See Arlene's Flowers, Inc. v. Washington*, 2021 U.S. LEXIS 3574 (2021).

This Court should not continue to disregard Free Exercise challenges to these profoundly unconstitutional statutes.

IV. THE FREE EXERCISE OF RELIGION IS JURISDICTIONAL, NOT REQUIRING "BALANCING."

This Court should grant certiorari and take this opportunity to give the Free Exercise Clause the same level of careful protection it provided the Second Amendment in *Heller*. Instead of a labyrinth of subjective levels of "scrutiny" suggested by Petitioners' Question No. 2 and varying degrees of "government interest," this Court should examine the "text, history, and tradition" of the Free Exercise Clause and seek to grant the Free Exercise of Religion the same protection the Framers did — just as it did the Second Amendment.

In 2008, this Court for the first time addressed the question of whether the Second Amendment protected the rights of individual citizens to bear firearms for self-defense, or whether it protected only a collective right exercised by state militias. This Court made the textually faithful determination that the meaning of the Second Amendment must be determined by examining its text, history, and tradition — not by a balancing of the government's alleged interest against the citizen's enumerated right. For the Court, Justice Scalia wrote:

> The very enumeration of the right takes out of the hands of government--even the Third

> Branch of Government--the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.... The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong headed views. The Second Amendment is no different. **Like the First, it is the very *product* of an interest balancing by the people**. [*District of Columbia v. Heller*, 554 U.S. 570, 634-635 (2008) (emphasis added).]

The textually faithful approach to the Second Amendment taken by this Court in *Heller* should be applied to the Free Exercise Clause as well. Indeed, during oral argument in *Heller*, Chief Justice Roberts pointed out that the First Amendment balancing tests could not possibly be discerned from the Constitution's language, referring to this Court's multifarious interest balancing tiers of review as "baggage."

> [T]hese various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," **none of them appear in the Constitution**.... Isn't it enough to determine **the scope of the existing right that the amendment refers to, look at the various regulations that were available at the**

> **time**, including you can't take the gun to the marketplace and all that, and determine how ... this restriction and the scope of this right looks in relation to those? ... I mean, **these standards** that apply in the First Amendment just kind of developed over the years as sort of **baggage that the First Amendment picked up**. But I don't know why when we are starting afresh [in interpreting the Second Amendment], we would try to articulate a whole standard that would apply in every case? [*See District of Columbia v. Heller*, Docket No. 07-290, Oral Argument Transcript (Mar. 18, 2008), p. 44 (emphasis added).]

In its *Heller* decision, this Court decried "judge-empowering 'interest-balancing inquir[ies]" as a means of constitutional interpretation. *Id.* at 634. The Court laid out the proper paradigm that should be used instead. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller* at 634-635.

In June 2022, this Court decided *N.Y. State Rifle & Pistol Ass'n v. Bruen*. *Bruen* confirmed *Heller's* rejection of "balancing" tests to evaluate enumerated rights.

> *Heller* relied on text and history. It did not invoke any means-end test such as strict or intermediate scrutiny. Moreover, *Heller* and *McDonald* [*v. City of Chicago*, 561 U.S. 742

> (2010)] expressly rejected the application of any "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" [*N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2129 (2022).]

Bruen teaches the necessity of relying on constitutional text and history, instead of the varying and subjective opinions of judges, in evaluating enumerated rights. "But reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate, and more administrable, than asking judges to make difficult empirical judgments about the costs and benefits" of the enumerated right. *Id.* at 2130 (internal quotations omitted).

The *Bruen* Court made clear that while legislatures may balance competing interests in determining the wisdom of legislation, the courts may not "balance" rights secured by enumeration in the Constitution. "[W]hile ... judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here.... It is this balance [the Constitution's text]—struck by the traditions of the American people—that demands our unqualified deference." *Bruen* at 2131.

Either this Court will protect the Free Exercise of Religion or it will allow it to be violated. As Justice Gorsuch put it in his *Masterpiece Cakeshop* concurrence, "Popular religious views are easy enough to defend. **It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom**." *Masterpiece Cakeshop* at 1737 (Gorsuch, J., concurring) (emphasis added).

CONCLUSION

This Court's narrow decision in *Masterpiece Cakeshop* has done nothing to stop the attack on the Free Exercise of Religion by certain states under so-called "public accommodations" laws. This Court's anticipated ruling in *303 Creative* will address only the Free Speech protections as they apply to artists under those laws. These *amici* urge the Court to grant certiorari here to consider the threshold question as to whether the Free Exercise Clause prevents states from sanctioning businesses and individuals through statutes such as ORS 659A.403 when their citizens are unwilling to join in practices which violate their sincerely and deeply held religious beliefs.

Respectfully submitted,

RICK BOYER
INTEGRITY LAW FIRM
P.O. Box 10953
Lynchburg, VA 24506

PATRICK MCSWEENEY
3358 John Tree Hill Rd.
Powhatan, VA 23139

JOSEPH W. MILLER
JOSEPH MILLER LAW OFFICES, LLC
P.O. Box 83440
Fairbanks, AK 99708

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
Attorneys for *Amici Curiae*

**Counsel of Record*
October 7, 2022