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 THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* SUPPORTING PETITIONERS

Jeffrey M. Schwab
Counsel of Record
Daniel R. Suhr
Jeffrey D. Jennings
LIBERTY JUSTICE CENTER
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
312-637-2280
jschwab@libertyjusticecenter.org

Counsel for Amicus Curiae

October 6, 2022

QUESTIONS PRESENTED

The questions presented are:

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

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF THE AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that pursues strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

This case interests Amicus because the freedom of speech is a core value vital to a free society. To that end, Amicus has long represented clients seeking to protect their First Amendment rights. *See, e.g.*, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018). *Janus*, like the current case before this Court, involved the government attempting to compel speech. As the Supreme Court stated in *Janus*, it is "always demeaning" when the government coerces individuals into betraying their convictions and thus, cannot be "casually allowed." *Id.* at 2464.

[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. Counsel for both Petitioners and Respondents have given blanket consent to the filing of amicus briefs. Amicus also informed all parties on September 16, 2022, that it planned to file an amicus brief in this case and thus notice was timely received.

SUMMARY OF ARGUMENT

The Oregon Court of Appeals held that this "Court has never decided a free speech challenge to the application of a public accommodations law to a retail establishment selling highly customized, creative goods and services that arguably are in the nature of art or other expression." Pet. App. 82-83. This lack of guidance led the Oregon Court of Appeals to wrongly hold that intermediate scrutiny applies to artistic speech when it involves creating a wedding cake. Pet. App. 92. But the Oregon Court of Appeals' view of this Court's precedent is too narrow. A careful review of this Court's artistic speech and compelled speech cases shows that strict scrutiny applies when the government compels certain artistic speech. Certiorari should be granted to remedy the confusion among the lower courts as to which standard of review applies.

This Court has held that the First Amendment protects various forms of artistic expression, including visual art, video games, and even nude dancing. Artistic expression involving creating a highly customized wedding cake is no different.

Because forcing a wedding cake artist to create a cake for a wedding that she opposes amounts to compelled speech, strict scrutiny applies. The government may not require an individual to communicate by word or deed one's acceptance of the government's political ideas. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). This Court reaffirmed this principle in *Janus* and *National Institute of Family & Life Advocates v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361 (2018). In *Janus*, this Court held that compelled speech includes compelled

subsidization of speech, holding that agency fees could not be taken from government employees who did not join a public sector union. 138 S. Ct. at 2460. In *NIFLA*, the Court held that a California law that compelled crisis pregnancy centers to inform women how they can obtain state-subsidized abortions "at the same time petitioners try to dissuade women from choosing that option" was content-based compelled speech and therefore subject to strict scrutiny. 138 S. Ct. at 2371.

But the Oregon Court of Appeals misapplied these precedents because it used intermediate scrutiny instead of strict scrutiny to review Oregon's attempt to compel Klein's artistic speech. This ignored the fact that Oregon is attempting to compel Klein's speech to have specific content—"approval of same-sex marriage." *Masterpiece Cakeshop*, 138 S. Ct. at 1746 (Thomas, J., concurring). Accordingly, this Court should clarify that only strict scrutiny applies to such a content-based regulation.

ARGUMENT

Certiorari should be granted to clarify that the First Amendment protects commercial artistic expression from compelled speech.

The Oregon Court of Appeals noted that this Court has "never decided a free speech challenge to the application of a public accommodations law to a retail establishment selling highly customized, creative goods and services that arguably are in the nature of art or other expression." Pet. App. 82-83. Accordingly, the Oregon Court of Appeals found it "difficult" to analogize this case to this Court's other public accommodations cases. *Id.* at 82. But the Oregon

Court of Appeals failed to correctly apply this Court's First Amendment precedent. If it had done so, it would have found that the design, preparation, and crafting of a custom cake at issue in this case constitutes expressive, artistic speech. And it would have found that the application of the Oregon public accommodation law in this case to force Klein to design, prepare, and craft a custom cake for a same-sex wedding constitutes compelled speech requiring strict scrutiny review. Certiorari should be granted for that reason alone.

A. The First Amendment protects commercial artistic expression.

The First Amendment's guarantee of free speech does not just protect words; it also protects a broad sphere of artistic expression. "[P]ictures, films, paintings, drawings, and engravings" have First Amendment protection. *Kaplan v. California*, 413 U.S. 115, 119 (1973). "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." *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981). This is because "'[s]ymbolism is a primitive but effective way of communicating ideas.'" *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1741 (2018) (Thomas, J., concurring) (quoting *Barnette*, 319 U.S. at 632).

Accordingly, in *Southeastern Promotions, Ltd. v. Conrad*, the Court held that the First Amendment protected a play involving "group nudity and simulated sex." 420 U.S. 546, 551 (1975). It noted that "theater usually is the acting out—or singing out—of

the written word, and frequently mixes speech with live action or conduct." *Id.* at 557-58. The Court then stated: "But that is no reason to hold theater subject to a drastically different standard." *Id.* at 558. The Court then held that the normal standard for prior restraints would also apply to a local government's decision to prohibit the play before it occurred. *Id.*

Likewise, in *Barnes v. Glen Theatre, Inc.*, this Court held that "nude dancing" "is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." 501 U.S. 560, 565-66 (1991). The four dissenting justices agreed on that point and noted that "'dancing is an ancient art form and inherently embodies the expression and communication of ideas and emotions.'" *Id.* at 587 (White, J., dissenting). This echoed what the Court had previously said in *Schad* that "nude dancing is not without its First Amendment protections from official regulation." 452 U.S. at 66.

In *National Endowment for the Arts v. Finley*, this Court implicitly acknowledged that works of art such as "homoerotic photographs that several Members of Congress condemned as pornographic" were protected speech. 524 U.S. 569, 574 (1998). As well as "a photograph of a crucifix immersed in urine" called "Piss Christ." *Id.* The Court rejected a facial challenge to a statute requiring government funding of art to consider "general standards of decency and respect," but acknowledged that some applications of that standard might violate the First Amendment. *Id.* at 572, 578.

And in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, this Court explained

that the First Amendment protects the "painting of Jackson Pollock, music of Arnold Schoenberg, [and] Jabberwocky verse of Lewis Carroll." 515 U.S. 557, 572 (1995). The Court then concluded that the same principle protected the right of parade organizers to exclude a float promoting homosexuality. *Id.* at 574.

More recently, in *Brown v. Entertainment Merchants Association*, this Court held that video games are a form of art that the First Amendment protects. 564 US 786, 790 (2011). It reasoned that "[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music)." *Id.* It noted that "[u]nder our Constitution, 'esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.'" *Id.* (quoting *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 818 (2000)). There is thus a long history of this Court protecting various types of artists and art under the First Amendment.

Lower courts also recognize that the First Amendment protects artistic speech. *White v. City of Sparks* protected an artist's business of selling paintings to those who walked by on the sidewalk under free speech principles. 500 F.3d 953, 954 (9th Cir. 2007). The court rejected the argument that the "First Amendment protects the sale of paintings in public fora only if the paintings convey an explicit—or an implicit but obvious—message." *Id.* at 955. It noted that paintings convey the artist's "form, topic, and perspective." *Id.* at 956.

In *Anderson v. City of Hermosa Beach*, the Ninth Circuit held that the "*process* of tattooing, and even the *business* of tattooing are not expressive conduct but purely expressive activity fully protected by the First Amendment." 621 F.3d 1051, 1061 (9th Cir. 2010). It rejected the argument that "the process of tattooing is at most non-verbal conduct expressive of an idea" rather than speech itself." *Id.* at 1059 (cleaned up). It also took "judicial notice of the skill, artistry, and care that modern tattooists have demonstrated." *Id.* at 1061.

Other circuits have also protected paintings under the First Amendment. In *ETW Corp. v. Jireh Publ'g, Inc.*, the Sixth Circuit protected an artist's painting of Tiger Woods. 332 F.3d 915, 938 (6th Cir. 2003). And the Second Circuit held that the First Amendment protected selling paintings on a city sidewalk. *Bery v. City of New York*, 97 F.3d 689, 695-96 (2d Cir. 1996). It reasoned that "[v]isual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection." *Id.* at 695.

B. Designing wedding cakes falls within the sphere of artistic expression that the First Amendment protects.

Under these principles, the design, preparation, and crafting of a custom cake constitutes expressive, artistic speech worthy of broad First Amendment protection. Members of this Court have already reached that conclusion. *Masterpiece Cakeshop*, 138 S. Ct. at 1740 (Thomas, J., concurring). And for good reason.

Wedding cakes communicate that "'a wedding has occurred, a marriage has begun, and the couple should be celebrated.'" *Id.* at 1743 (citation omitted). They are a "tradition" imported from "Victorian England," and they remain so today to the point that "[i]f an average person walked into a room and saw a white, multi-tiered cake, he would immediately know that he had stumbled upon a wedding." *Id.* Thus, wedding cakes are a "well-recognized symbol" today. *Id.* Indeed, they are "'[l]ike 'an emblem or flag'" that "serves as 'a short cut from mind to mind,' signifying approval of a specific 'system, idea, [or] institution.'" *Id.* at 1738 (Gorsuch, J., concurring).

The wedding cake's symbolic nature is not lessened by the fact that it lacks specific words on it, given that the lack of words "do[es] not prevent people from recognizing wedding cakes as wedding cakes." *Masterpiece Cakeshop*, 138 S. Ct. at 1743 n.2 (Thomas, J., concurring). Indeed, "[w]ords or not and whatever the exact design, [a wedding cake] celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding." *Id.* at 1738 (Gorsuch, J., concurring). The cake by itself "clearly communicates a message—certainly more so than nude dancing." *Id.* at 1743 n.2 (Thomas, J., concurring).

Wedding cakes are also part of a larger ceremony that is expressive. "The core of a wedding ceremony's 'particularized message' is easy to discern," namely the "celebration of marriage and the uniting of two people in a committed long-term relationship." *Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012). The fact that most states require a ceremony of some kind to have the state formally recognize the

marriage only amplifies the significance of the wedding ceremony and all its subparts, such as the wedding cake. *See, e.g.*, Va. Code § 20-14.1. The wedding ceremony's significance in most religions is further proof of its expressive nature.

Here the facts of this case involve wedding cakes that are *especially* expressive. The court below acknowledged "that the Kleins do not" create "'standardized' or 'off the shelf' wedding cakes." Pet. App. 86. Instead, the Kleins "intend—and their 'clients expect'—that each cake will be uniquely crafted to be a statement of each customer's personality, physical tastes, theme and desires, as well as their palate." Pet. App. 87. Specifically, Melissa Klein "uses her customers' preferences to develop a custom design, including choices as to 'color,' 'style,' and 'other decorative detail.'" Pet. App. 88. She then "shows customers previous designs 'as inspiration,' and she then draws 'various designs on sheets of paper' as part of a dialogue with the customer." *Id.* She then starts the lengthy process of sculpting ingredients into a wedding cake. Pet. App. 241–42. Thus, as the court below found, the "Kleins' cake-making process is not a simple matter of combining ingredients and following a customer's precise specifications." Pet. App. 92. The court instead found that Melissa Klein "uses her own design skills and aesthetic judgments." Pet. App. 88. The Kleins also do this artistic work to express their Christian faith, which informs their view that only marriages between one man and one woman should be affirmed and celebrated. Pet. App. 54, 82.

Thus, wedding cakes, including the ones that the Kleins create, are expressive, and the First

Amendment protects their design, preparation, and crafting. *Masterpiece Cakeshop*, 138 S. Ct. at 1743-44 (Thomas, J., concurring). Accordingly, forcing the Kleins "to make custom wedding cakes for same-sex marriages requires [them] to, at the very least, acknowledge that same-sex weddings are 'weddings' and suggest that they should be celebrated—the precise message [they] believe[] [their] faith forbids." *Id.* at 1744. This amounts to compelled speech.

It does not matter that the cakes are for commercial sale. Paintings, books, and movies are often for commercial sale but are clearly protected artistic activity under the First Amendment. "[T]his Court has repeatedly rejected the notion that a speaker's profit motive gives the government a freer hand in compelling speech." *Id.* at 1745 (collecting cases).

C. This Court has long held that government-compelled speech is constitutionally suspect.

1. This Court has long disfavored and invalidated laws that compel speech.

This Court has long held that compelled speech "transcends constitutional limitations on [government] power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Barnette*, 319 U.S. at 633.

In *Barnette*, the Court held unconstitutional West Virginia's enforcement of a regulation requiring children in public schools to salute the American flag. *Id*. The Court found that a flag salute constituted a form of utterance and that West Virginia employed a flag as "a symbol of adherence to government as

presently organized." *Id.* at 631–32. The flag salute regulation "requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks." *Id.* at 633. The Court found no compelling justification for requiring students to salute the flag, and therefore held the compelled expression of allegiance to the state unconstitutional. *Id.* at 633–34.

In *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court applied *Barnette* to invalidate a New Hampshire statute that forbade covering up lettering on a license plate, including the state's license plate slogan, "Live Free or Die." *Id.* at 706–07. The Court noted that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714. The Court held that the application of the statute to forbid covering up the slogan was unconstitutional because "the First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable." *Id.* at 715.

In neither *Barnette* nor *Wooley* did the state prohibit private individuals from expressing views counter to state-held orthodoxy—but this Court nonetheless found the compelled speech sufficiently contrary to First Amendment interests as to make them unconstitutional. Martin H. Redish, *Compelled Commercial Speech and the First Amendment*, 94 Notre Dame L. Rev. 1749, 1755–56 (2019).

Compelled speech also can deter a speaker from communicating his or her own views. In *Pacific Gas & Electrical Co. v. Public Utilities Commission*, 475 U.S.

1 (1986), this Court found unconstitutional a California requirement that a gas and electric utilities company apportion space in its billing envelopes four times a year for inserts from an opposing consumer group. This Court found that "because access is awarded only to those who disagree with [Pacific Gas and Electric's] views and who are hostile to [its] interests, [Pacific Gas and Electric] must contend with the fact that whenever it speaks out on a given issue, it may be forced . . . to help disseminate hostile views." *Id.* at 14. This might well lead Pacific Gas to conclude that the safe course is to avoid controversy. *Id.* In other words, by compelling Pacific Gas to include speech with which it disagrees, the government made disseminating Pacific Gas's own speech more expensive.

So too here. If getting in the cake-baking business means having to create same-sex wedding cakes, then some may avoid getting in the business at all and thus forgo all the expression that would entail. Thus, laws like the one at issue here will have the effect of not only "'stamp[ing] out every vestige of dissent'" to same-sex marriage, but will also chill speech favoring opposite-sex marriage. *Masterpiece Cakeshop*, 138 S. Ct. at 1748 (Thomas, J., concurring) (quoting *Obergefell v. Hodges*, 576 U.S. 644, 741 (2015) (Alito, J., dissenting)).

2. This Court has recently affirmed its strong disfavor of government-compelled speech in *Janus* and *NIFLA*.

This Court has recently reaffirmed the First Amendment's strong protection against government-

compelled speech in two cases: *Janus*, 138 S. Ct. at 2486, and *NIFLA*, 138 S. Ct. at 2378.

Janus held that the First Amendment generally bars compelling people to pay money to a private organization that will use it for speech. Specifically, the case involved a challenge to agency fees—fees that state governments forced public employees represented by unions to pay to those unions even if the employee was not a union member. *Janus*, 138 S. Ct. at 2460. This Court held that any requirement for nonmembers to subsidize public-sector unions violated the Free Speech Clause because almost everything that public-sector unions do, including engaging in collective bargaining, constitutes speech on matters of public concern. *Id.* at 2459–60.

Quoting *Barnette*, *Janus* recognized: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 2463 (quoting 319 U.S. at 642). The Court stated that "[c]ompelling individuals to mouth support for views they find objectionable violates [this] cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Id.*

Janus hypothesized that no one would seriously argue that the First Amendment would permit the State of Illinois to require all residents to sign a document expressing support for a particular set of positions on controversial public issues. *Id.* at 2464. Although most of this Court's free speech cases have involved restrictions on what may be said, rather than laws compelling speech, *Janus* said that might be

because such compulsion so plainly violates the Constitution. *Id.* "[M]easures compelling speech are at least as threatening." *Id.*

In addition to undermining the ends of serving our democratic form of government and furthering the search for truth, compelled speech does additional damage: "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Id.* In other words, compelled speech is antithetical to the First Amendment because it undermines one's autonomy to hold and communicate one's opinions and beliefs.

A day before *Janus*, this Court decided *NIFLA*, in which it held that the government cannot require crisis pregnancy centers to inform patients about the availability of low-cost abortions. 138 S. Ct. at 2371–76.

NIFLA found that California's notice requirement was a content-based regulation of speech. By compelling individuals to speak a particular message, such notices altered the content of their speech. *Id.* at 2371. Under the California notice requirement, "licensed clinics [had to] provide a government-drafted script about the availability of state-sponsored services," including abortion—the very practice that the crisis pregnancy centers were devoted to opposing. *Id.* The California law compelled petitioners to inform women how they can obtain state-subsidized abortions "at the same time petitioners try to dissuade women from choosing that option." *Id.* Thus, the Court found that the notice requirement plainly altered the content of petitioners' speech and was therefore a content-based restriction on speech. *Id.*

Normally, content-based restrictions on speech are subject to strict scrutiny, but the Ninth Circuit in *NIFLA* did not apply strict scrutiny because it held that the notice requirement regulated "professional speech." *NIFLA*, however, rejected professional speech as a separate category of speech subject to a different test than other restrictions on speech. *Id.*

NIFLA recognized that in some cases the Court has recognized an exception to the usual rule of strict scrutiny for laws that compel speech. In *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 650–53 (1985), for example, this Court upheld a rule requiring lawyers who advertised their services on a contingency-fee basis to disclose that clients might be required to pay some fees and costs. *Zauderer* stands for the proposition that when a disclosure requirement governs only "commercial advertising" and requires the disclosure of "purely factual and uncontroversial information about the terms under which . . . services will be available," that such requirements should be upheld unless they are "unjustified or unduly burdensome." *NIFLA*, 138 S. Ct. at 2372 (quoting *Zauderer*, 471 U.S. at 651).

But *NIFLA* held that the *Zauderer* exception did not apply in that case because the California notice requirement did not involve purely factual and uncontroversial information about the terms under which services will be available. *NIFLA*, 138 S. Ct. at 2372.

NIFLA also recognized that this Court's previous cases have allowed regulations directed at commerce or conduct, including professional conduct, that imposed incidental burdens on speech. *Id.* at 2373. But the Court held that the California notice

requirement for crisis pregnancy centers did not regulate professional conduct; the requirement regulated speech as speech. *Id.* at 2373–74.

3. Government speech compulsion is always content-based and therefore almost always subject to strict scrutiny.

NIFLA stands for the proposition that compelled speech always involves content-based speech regulation and therefore is almost always subject to strict scrutiny. Although this Court did not specifically undertake the analysis, the Illinois agency-fee system at issue in *Janus* was also a compelled speech requirement that was content-based because nonmember agency-paying public employees were forced to pay funds to the union to be used for a specific message—a pro-union message.

Indeed, compelled speech always involves "content-based" regulation because the government, when it compels speech, compels a specific message, not just an obligation to say whatever the speaker wants. Ashutosh Bhagwat, *Constitutional Rights: Intersections, Synergies, and Conflicts*, 28 Wm. & Mary Bill of Rts. J. 287, 289 (2019); *see also, e.g., Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech."); *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241 (1974) (compelled printing of candidate's reply to criticism interfered with editorial judgment about newspaper content); *Pacific Gas & Elec. Co.,* 475 U.S. at 4 (compelling utilities to apportion space in its billing envelopes for inserts of an opposing public

consumer group unconstitutional); *Hurley,* 515 U.S. at 559 (finding that Massachusetts may not compel private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey).

"Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id*. Thus, compelled speech laws should almost always be subject to strict scrutiny. *Id.*

Here, the Oregon Court of Appeals misapplied these precedents when it reviewed the public accommodations law under intermediate scrutiny instead of strict scrutiny. Pet. App. 93. Indeed, in this case the government seeks to compel *specific* speech: support for same-sex weddings. Oregon "would not be punishing [Klein] if [s]he refused to create any custom wedding cakes; it is punishing h[er] because [s]he refuses to create custom wedding cakes that express approval of same-sex marriage." *Masterpiece Cakeshop*, 138 S. Ct. at 1746 (Thomas, J., concurring). "In cases like this one, [this Court's] precedents demand 'the most exacting scrutiny.'" *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 412 (1989)).

CONCLUSION

The lower court's failure to apply strict scrutiny makes this is an excellent companion case to the

currently pending *303 Creative LLC v. Elenis*, No. 21-476 (U.S. petition for cert. granted Feb. 22, 2022), which involves how strict scrutiny applies to a law that compels artistic speech. The combination of these cases will give lower courts important guidance on how to protect the free speech rights of artists. Such guidance on free speech law is "essential to preventing *Obergefell* from being used to 'stamp out every vestige of dissent' and 'vilify Americans who are unwilling to assent to the new orthodoxy.'" *Masterpiece Cakeshop*, 138 S. Ct. at 1748 (Thomas, J., concurring) (quoting *Obergefell*, 576 U.S. at 741 (Alito, J., dissenting)). Indeed, the majority in *Obergefell* promised "those who oppose same-sex marriage that their rights of conscience will be protected." 576 U.S. at 741 (Alito, J., dissenting). This case presents a perfect opportunity for this Court to make good on that promise. The petitioners' writ for certiorari should be granted.

October 6, 2022

Respectfully submitted,

Jeffrey M. Schwab
Counsel of Record
Daniel R. Suhr
Jeffrey D. Jennings
LIBERTY JUSTICE CENTER
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
312-637-2280
jschwab@libertyjusticecenter.org