No. _____

In the Supreme Court of the United States

CATHARINE MILLER AND CATHY'S CREATIONS, INC.,
Petitioners,

v.

CIVIL RIGHTS DEPARTMENT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Cathy Miller runs a small bakery in Bakersfield, California, where she designs and creates custom wedding cakes. After she declined to design and create a wedding cake for a same-sex wedding ceremony, the State of California began an 8-year civil prosecution against Miller and her bakery, alleging violations of California's public accommodation laws. Prosecution started after this Court's grant of certiorari in *Masterpiece Cakeshop* and continued through its decisions in that case, *Fulton*, and *303 Creative*.

After a week-long bench trial, the state trial court ruled for Petitioners under the Free Speech Clause. The state appeals court reversed, holding that this Court's precedents were inapplicable, that the white, multitiered cake Miller refused to design "conveyed no particularized message about the nature of marriage," and that the law was generally applicable under the Free Exercise Clause because it did not grant unfettered discretion or exemptions for identical secular conduct. The state supreme court declined review.

The questions presented are:

1. Whether the Free Speech Clause's protection against compelled participation in a ceremony only applies where third parties would view that participation as expressing endorsement of the ceremony.

2. Whether proving a lack of general applicability under the Free Exercise Clause requires showing unfettered discretion or categorical exemptions for identical secular conduct.

3. Whether *Employment Division* v. *Smith* should be overruled.

PARTIES TO THE PROCEEDINGS

Petitioners Catharine Miller and Cathy's Creations, Inc., d/b/a Tastries Bakery, a California corporation, were defendants in the Kern County Superior Court and respondents in the Court of Appeal of the State of California, Fifth Appellate District.

Respondent Civil Rights Department, formerly the Department of Fair Employment and Housing, an agency of the State of California, was the plaintiff in the Kern County Superior Court and appellant in the Court of Appeal of the State of California, Fifth Appellate District.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Cathy's Creations, Inc., represents that it does not have any parent entities and no publicly held company owns any of its stock.

RELATED PROCEEDINGS

The following are directly related proceedings:

- *Civil Rights Department* v. *Cathy's Creations, Inc.*, Supreme Court of California, Case No. S289898 (May 28, 2025).
- *Civil Rights Department* v. *Cathy's Creations, Inc.*, California Court of Appeal, 5th Appellate District, Case No. F086083 (May 5, 2025).
- *Civil Rights Department* v. *Cathy's Creations, Inc.*, California Court of Appeal, 5th Appellate District, Case No. F085800 (Feb. 11, 2025).
- *Department of Fair Employment and Housing* v. *Cathy's Creations, Inc.*, Kern County Superior Court, Case No. BCV-18-102633 (Dec. 27, 2022).
- *Department of Fair Employment and Housing* v. *Superior Court of Kern County*, California Court of Appeal, 5th Appellate District, Case No. F081781 (Mar. 4, 2021).

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INTRODUCTION

Government efforts to force religious people to participate in ceremonies they object to are hardly new to human history. Conflicts between religious conscience and government command are found in ancient texts like the Book of Daniel and Sophocles' *Antigone*. In the Anglo-American world, the Test Acts were carefully crafted to put dissenters to the test by requiring them to take part in Church of England ceremonies in order to go to university, join the professions, or serve in Parliament. Quakers and other dissenters were likewise excluded from privileges and offices because they could not in good conscience participate in oath ceremonies. In response, the Founders specifically designed the Constitution to prevent such tests of conscience in this country.

But California still wants to put Cathy Miller to the test. If she does not agree to design and create cakes for same-sex wedding ceremonies despite her undisputedly sincere religious objections, California says she must give up her cake-design business altogether. Miller must bake the cakes or give up her livelihood.

California's eight-year civil prosecution of Miller violates both the Free Speech Clause and the Free Exercise Clause. The Bill of Rights does not leave "it open to public authorities to compel [Miller] to utter what is not in [her] mind." *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 634 (1943). And because designing and creating one of the most well-known and universal of all wedding symbols involves both Miller's speech and her religion, both Clauses are implicated. Yet the California Court of Appeal held that Miller had no claim under either Clause, asserting that the cake Miller refused to design "conveyed no particularized

message about the nature of marriage" and that California's public accommodations law is generally applicable.

The Court of Appeal's decision deepens two well-established splits of authority among the lower courts. The first is a 3-3 split over whether compelled speech must be viewed as an endorsement by a reasonable observer in order to qualify for First Amendment protection, or whether all compelled speech triggers strict scrutiny. Washington, New Mexico, and California say endorsement is required. The Second Circuit, the Eighth Circuit, and Arizona do not require such an endorsement.

The second split divides the lower courts 7-4 over whether, when determining general applicability under the Free Exercise Clause, courts must consider all secular exemptions to the relevant law. Some courts consider all secular exemptions. Others consider only those exemptions resulting from entirely unfettered discretion or those that are identical to the requested religious exemption.

Without this Court's intervention, these splits will continue to vex lower courts and litigants alike. A litigant's First Amendment rights will vary dramatically by location, even between state and federal courts within California. Failing to resolve the splits will not just needlessly prolong the national battle over accommodations for religious believers when it comes to same-sex wedding ceremonies—it will make those conflicts worse, because it will reward government officials for continuing rather than resolving these conflicts.

Government attempts to compel expression related to ceremonies are of course not new to this Court. In recent years this Court has repeatedly heard cases involving religious objections to participating in same-sex wedding ceremonies. See, *e.g.*, *Masterpiece Cakeshop, Ltd.* v. *Colorado C.R. Comm'n*, 584 U.S. 617 (2018); *303 Creative LLC* v. *Elenis*, 600 U.S. 570 (2023). But this Court's rulings have not yet stopped government attempts to suppress religious objectors. Indeed, this case is Exhibit A for how lower courts continue to manipulate the general applicability standard of *Employment Division* v. *Smith*, 494 U.S. 872 (1990), and thus all the more reason that precedent should be overruled. This case provides an excellent opportunity to put an end to that stubborn resistance to this Court's rulings once and for all.

* * *

The promise of religious pluralism in this country has always been that "every one shall sit in safety under his own vine and fig tree, and there shall be none to make him afraid." George Washington, Letter to the Hebrew Congregation in Newport, Rhode Island (Aug. 18, 1790) in 6 The Papers of George Washington 285, (Dorothy Twohig, ed., 1996). This Court should grant review to allow Miller and millions of other religious Americans to lay equal claim to that promise.

OPINIONS BELOW

The Supreme Court of California's order denying the petition for review (App.1a) is unpublished. The California Court of Appeal's decision, as modified (App.2a), is published at 329 Cal.Rptr.3d 846. The Kern County Superior Court's unpublished statement

of decision (App.112a) is accessible at 2022 WL 18232316.

JURISDICTION

The Supreme Court of California denied the petition for review on May 28, 2025. This Court has jurisdiction pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, U.S. Const. Amend. I, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

California Civil Code § 51 is reproduced at App.268a.

STATEMENT OF THE CASE

A. Miller operates Tastries in accordance with her Christian beliefs.

Cathy Miller is the sole owner and operator of Cathy's Creations, Inc., a small bakery in Bakersfield that does business as Tastries Bakery. App.377a-378a. In addition to selling ready-to-eat baked goods and Christian books and gifts, Miller and her staff also make custom-designed baked goods for special events like birthdays, quinceañeras, and weddings. App.358a, 387a-390a, 403a.

Miller is a member of Valley Baptist Church in Bakersfield. She believes God calls her to honor Him

in all aspects of her life, including how she operates Tastries. App.385a-387a. Because Miller believes that she is the "steward" of "the Lord's business that he put in [her] hands," she also believes she cannot use her business to "participate in something that would hurt him and not abide by his precepts in the Bible." App.398a. Miller and her husband, who helps operate the bakery, believe that they "work for Him." App.385a. Miller's mission statement for Tastries is to "honor God in all that we do." *Ibid.*

After Miller opened her bakery in 2013, she began receiving requests for custom projects that "were not in line with" her faith. App.386a. These requests included "gory" cakes, "marijuana" cakes, "adult" cakes and cookies featuring genitalia, and a cake announcing a divorce that a husband was going to surprise his (then) wife with. *Ibid.*; App.395a-396a. Miller turned these requests down. App.386a-387a, 396a. She then consulted with her pastor to create Tastries' Design Standards, which she uses to communicate her policies to both employees and customers. App.386a-387a, 394a-395a. The Design Standards refer to Miller's mission to create "custom designs that are Creative, Uplifting, Inspirational and Affirming," and that are "lovely, praiseworthy, or of good report." App.276a-277a. Miller's mission is rooted in the Bible. *Ibid.* (quoting Philippians 4:8). The Design Standards state that Tastries "do[es] not accept requests" for baked goods "portraying explicit sexual content," "promoting marijuana or casual drug use," "featuring alcohol products or drunkenness," "depicting gore, witches, spirits, and satanic or demonic content," or "that violate fundamental Christian princip[les]." *Ibid.* The standards also state that "wedding cakes must not contradict God's

sacrament of marriage between a man and a woman." *Ibid.* Miller updates her Design Standards "[e]ach year" to address new types of requests for custom goods that conflict with her faith. App.394a.

Miller also created a four-page Wedding Packet to explain the ceremonial and symbolic history of the wedding cake to her wedding clients while showing them the custom options that Tastries offers. App.278a-280a, 390a-392a. Like many Christians, Miller believes that the Bible ordains marriage as a "sacred" union "between a man and a woman." App.386a-387a. As she explains to all couples who order a custom wedding cake, Miller believes that "[t]he sacrament of marriage was ordained by God and represents the depth of love God has for each of us." App.278a. In the Wedding Packet, Miller includes six different Bible passages about love and marriage, and explains her understanding of the specific role that the wedding cake plays in the new couple's life and in the wedding ceremony:

> Just as you will offer hospitality to friends and family in your new home together, cutting and serving your cake as husband and wife is the first act of hospitality you will perform together. It is a ceremonial representation of the hospitality you will show to others, together as a new family unit.

App.279a. Miller uses the Wedding Packet to encourage the bride and groom to think about the "meaning behind" all aspects of the wedding ceremony, and their wedding cake's role in celebrating that ceremony. App.278a. Miller believes the wedding ceremony expresses that "this is a marriage ordained

by God," and those involved in the wedding "are here to celebrate that" with the couple. App.391a-392a.

B. All of Miller's wedding cakes are custom-designed and custom-created.

All Tastries wedding cakes are custom-designed and custom-made according to Miller's artistic vision. App.392a. "Miller is involved in some aspect of every wedding cake's design and creation." App.134a.

To start, Tastries provides a cake tasting and design consultation for all couples who are interested in ordering a custom wedding cake. App.392a. Each consultation generally takes between 20 and 60 minutes. App.404a. To help couples understand the vision and values informing Miller's creative process in designing each wedding cake, Miller requires that every couple is led through the Wedding Packet. App.278a-280a, 390a-392a.

This design consultation, which Miller herself primarily leads, takes place in the "design center," a special area set apart from the retail section of the bakery. App.281a, 384a. As Tastries employees testified at trial, Tastries' custom cake creation process is "creating by design" and an "art." App.361a. Miller works with customers to "determine not only the flavor and the filling and the outside, the fondant or buttercream," but also the distinct "shapes," colors, and styles of the cakes, which they "mix and match" into custom creations. App.393a. The process includes asking about the colors, themes, and design of the wedding itself, so that the wedding cake will fit each couple's unique celebration. And once Tastries begins to decorate the cakes, the decorators "mix the colors" individually, decorating "just like an artist with a

canvas, but [the] canvas is cake." App.394a. And since this canvas is three-dimensional, in addition to detailed piping and other decorations, the decorators "intrica[tely]" sculpt the cake. App.393a.

Miller's employees describe Tastries' custom cakes as "[e]dible art" and the cake decorators as "cake artists." App.364a. The following are examples of cakes Miller has custom designed:


Tastries
Received in the CA 5th District Court of Appeal


Tastries

App.285a-289a.

Miller also designs her cakes to meet the culinary and dietary needs and settings of her customers' weddings. In the design center, couples sample mini-cupcakes of sixteen different wedding cake flavors and then "16 flavors of fillings and frostings" to select which of over 250 flavor combinations will best fit their wedding. App.384a.

Miller's husband often delivers the custom cakes to the wedding venue in a Tastries-branded vehicle, and he also often arranges the wedding cakes for display at the ceremony. App.378a-380a. During the reception, Tastries employees sometimes "help cut and serve the cake." App.359a-360a; see also App.396a. When helping in this way, both Miller's husband and her employees are dressed in Tastries uniforms. App.359a-360a, 378a-379a.

There are no standardized, off-the-shelf wedding cakes available from Tastries—every wedding cake is custom-made. Miller keeps non-edible examples of possible designs around her store, each of which are original creations. App.283a, 362a, 383a. Cakes are further customized at the design consultation, where Miller discusses with the couple other details of the ceremony, such as the "colors," and "flowers," all of which "come[] into play when [Miller is] designing their cake." App.392a. Indeed, as shown below,

Tastries' refrigerated display cases aren't large enough to hold a wedding cake. App.282a, 383a.

C. Miller declined to make a custom wedding cake.

Mireya and Eileen Rodriguez-Del Rio entered a legal marriage in December 2016, as they wished to "get married before [Donald Trump] goes into presidency because we will be denied that option." App.373a-374a. But they still wanted to "exchange vows in front of" their "extended family and friends from out of town" and "have a reception," all as part of a "traditional" wedding. App.364a, 372a.

To that end, the Rodriguez-Del Rios visited Tastries on August 17, 2017, seeking a wedding cake for a wedding reception ceremony they planned to hold. App.365a-366a, 370a. During the visit, the Rodriguez-Del Rios "walked into the bakery," and explained to an employee "at the counter" that they were "looking for a wedding cake." App.374a. At that time, the Rodriguez-Del Rios pointed to "two displays" (*i.e.*, display cakes) that "helped influence" the design they wanted. App.367a-369a. They discussed with the employee the potential "flavors" and "colors" of the cake and "how many people" needed to be served. App.366a-369a. The Rodriguez-Del Rios "weren't sure" what they wanted at that point. App.374a-375a. The Rodriguez Del-Rios wanted a Tastries employee to "bring the cake to [the] reception," and "cut and serve" the cake for them. App.371a.

The Rodriguez-Del Rios then scheduled a design consultation for "a week or two later." App.369a. As they acknowledged on the initial form they filled out, no "specific design" was guaranteed, as "Tastries Bakery provides custom designs to complement event theme and decor" and "can make variations to the design as it may determine are appropriate." App.300a-302a. They were, however, "going to put a topper" that "included two women," and had "two ordered" but "were still undecided" when they visited Tastries. App.373a, 376a-377a.

The Rodriguez-Del Rios returned for their design consultation with Miller on August 26, 2017. App.370a. A few minutes into the consultation, Miller realized the order "was [for] a same-sex union." App.400a. At that point, the design consultation had just begun—the Rodriguez Del-Rios had not "tr[ied] the [sample]

cupcakes," and had not discussed flavors, fillings, or other details of the design. App.399a-401a. Miller explained that she couldn't "be a part of a same-sex wedding because of [her] deeply held religious convictions, and [she] can't hurt [her] Lord and Savior." App.401a. Miller offered to connect them with a nearby custom wedding cake designer at Gimme Some Sugar, a bakery that had previously "agreed to accept referrals" for similar requests. App.400a-401a, 343a. The Rodriguez-Del Rios refused the referral and left the shop. App.401a.

Within a few hours, both of the Rodriguez-Del Rios and another member of their group all posted on Facebook, stating, among other things, "the owner is a bigot and hates lesbian and gays and refuses service to them. Apparently gay and lesbian money looks different and spends different." App.304a; see also App.303a, App.305a-306a. News reports publicizing the incident followed, resulting in "hate-filled [social media] posts and e-mails," many denouncing Miller's religious beliefs and some including threats of violence against Miller and her shop. App.381a-382a. Miller had to "shut down [the store's] social media" and temporarily "close the store" because of the attention. *Ibid.*

Over the following months, Miller received hundreds of messages calling her "scum," a "hateful c[**]t" "[h]iding behind God," and wishing her dreams filled with "men having hot anal sex on a cross." App.324a. One woman told Miller that "Jesus himself will condemn you to hell" and that "other religions hate Christians, because they are bigoted, sexist and racist." App.323a. Another person told Miller that "[b]igotted [sic] scum like you do not deserve to feel

safe" and that "[b]ricks through the window can serve as excellent reminders that you are not welcome in our modern society." App.321a. Another man repeatedly posted threats, saying "I hope someone violently rapes you. God knows you deserve it." App.322a. The bakery also received many other malicious emails and phone calls that included pornographic images and threats to assault or rape Miller and her young female employees. App.381a-382a, 361a-362a. Miller lost half of her employees due to the ongoing harassment. App.381a-382a. She also lost several corporate contracts. App.402a-403a.

On the evening before the preliminary injunction hearing in this case, one of Miller's employees was violently assaulted behind the bakery by a man who referred to this litigation during the attack. App.347a-348a. Also that night, Miller's laptop was stolen out of her Tastries-branded SUV. *Ibid.*; App.325a-327a.

The Rodriguez-Del Rios held their ceremony on October 7, 2017. App.371a. For their wedding cake, the couple ultimately chose "a three-layer cake" where the top layer was "real" for use in the cake cutting ceremony, while "the other two layers were * * * Styrofoam." App.372a. That cake was made for free by a former Tastries employee. App.349a-352a, 372a. She stated that the cake she made was a "beautiful" cake that she was "proud of." She wanted to post a picture of their wedding cake on Instagram, but the Rodriguez Del-Rios advised her "it's not a good idea" after "speak[ing] to their lawyer." App.349a-350a. The baker said she considered herself a "cake artist," and that the cake she created was "art." App.354a-356a.

D. Proceedings below

On October 18, 2017, the Rodriguez-Del Rios filed a complaint against Petitioners with Respondent Civil Rights Department. App.316a-319a. On October 26, 2017, the Department notified Petitioners that it had opened an investigation. App.307a-315a.

On December 13, 2017, the Department brought a first lawsuit against Petitioners under California's public accommodations law, the Unruh Civil Rights Act, California Civil Code Section 51 (the "Act"), alleging unlawful sexual orientation discrimination. The Department sought a preliminary injunction in the Kern County Superior Court, which the court denied. App.254a-267a. The Department appealed that order, but later abandoned the appeal, App.251a-253a, 244a-245a; the Superior Court entered a judgment terminating the first lawsuit. App.246a-250a.

Petitioners then moved to enforce the Superior Court's judgment, arguing that any further investigation by the Department was collaterally estopped. See App.229a-243a. The Superior Court granted that motion in part, *ibid.*, but the Court of Appeal granted the Department's request to vacate that order. App.154a, 227a.

In so doing, the Court of Appeal determined that the Superior Court's preliminary injunction order was not entitled to "res judicata effect." App.203a-205a. In its view, the Superior Court's determination that "baking a wedding cake constituted expressive conduct" "rested * * * on an accepted factual premise that Miller was asked * * * to use her talents to design and create a custom wedding cake that she had

not yet conceived," but that further investigation might change the First Amendment analysis. App.207a, 211a-212a. The court hypothesized, for example, that the Department's investigation into Tastries might reveal that Miller's cakes were akin to a "*stock* cake selected from a lineup of preexisting designs, bearing no particular indicia of a wedding, suitable for any number of occasions, and made repeatedly for any customer who orders it," the likes of which are routinely sold at "Costco" and "nearly every large grocery store across California." App.218a-219a. The court determined the Department should continue its investigation to determine whether the cake that the Rodriguez-Del Rios sought from Cathy "more closely resembles the order of a grocery store cake or is more akin to the cakes originally designed and created by Phillips, the baker in *Masterpiece*." *Ibid.*

While that appeal was ongoing, the Department filed a second lawsuit—this action—on October 17, 2018, alleging that Petitioners had violated the Act, seeking fines and an order prohibiting Petitioners' conduct. App.121a-122a.

After discovery and summary judgment proceedings, the Superior Court conducted a week-long bench trial in July 2022 that included eight witnesses and 57 exhibits. App.357a, 404a-407a. In December 2022, the Superior Court entered judgment in Petitioners' favor. App.109a-111a.

The Superior Court ruled that there was no intentional discrimination, finding that Miller "serve[d], and employ[ed]" people of all sexual orientations, and that her "*only* intent, her only motivation, was fidelity to her sincere Christian beliefs." App.125a. The court rejected, however,

Petitioners' free exercise arguments, holding that it was bound by the California Supreme Court's decision in *North Coast Women's Care Medical Group, Inc.* v. *San Diego County Superior Court,* 189 P.3d 959 (Cal. 2008), which held—in a single sentence—that "California's Unruh Civil Rights Act * * * is 'a valid and neutral law of general applicability'" for all purposes. App.136a-140a.

The Superior Court next found that the Department's enforcement action violated Petitioners' free speech rights. The Superior Court found that for Petitioners' custom wedding cakes, Miller "is personally involved in some aspect of the design and making of virtually every wedding cake." App.114a. The Superior Court also determined that Petitioners were engaged in "pure and expressive speech * * * entitled to protection under the First Amendment." App.148a.

The Superior Court determined both that Petitioners' custom wedding cakes "are pure speech, designed and intended—genuinely and primarily—as an artistic expression of support for a man and a woman uniting in the 'sacrament' of marriage" and that their cakes "express[] support for the marriage." App.143a (underscore in original). It next found that Tastries' "wedding cake designs range from simple to elaborate, but all are labor-intensive, artistic and require skill to create," and that Petitioners' "participation in the design, creation, delivery and setting up of a wedding cake is expressive conduct, conveying a particular message of support for the marriage that is very likely to be understood by those who view it." App.143a-144a (italics omitted). The Superior Court held that the Department's

enforcement action "seeks to compel Miller and Tastries to express support for same-sex marriage, or be silent," and that "[n]o compelling state interest justifies such a result under strict scrutiny." App.147a-148a.

The Department appealed. After briefing and argument, the California Fifth District Court of Appeal reversed. The Court of Appeal determined that the First Amendment did not protect Petitioners. After conducting an "independent examination" of the record, App.62a, the Court of Appeal held that Petitioners' free speech defense failed because they were not engaged in either pure speech or expressive conduct. App.79a. Specifically, the Court of Appeal determined the cake at issue here was not pure speech because in its view the Rodriguez-Del Rios had requested only a "nondescript, plain white cake with a multi-purpose design" that was not "primarily a self-expressive act of the baker/decorator." App.71a, 79a. The Court of Appeal also rejected Petitioners' argument that they were engaged in expressive conduct, opining that "the cake conveyed no particularized message about the nature of marriage being between one man and one woman, and virtually no one would have understood that message from viewing the cake, even displayed as a centerpiece at a wedding reception." App.75a. In its view, "a viewer is unlikely to understand * * * a message of celebration and endorsement of same-sex marriage." App.76a.

The Court of Appeal also rejected Petitioners' free exercise defense. It held that it was bound by *North Coast*, because the Act "requires business establishments to provide 'full and equal accommodations, advantages, facilities, privileges, or

services' to all persons notwithstanding their sexual orientation." App.81a (quoting *North Coast*). The court rejected Petitioners' arguments that the Act's many exceptions rendered the law not generally applicable, while acknowledging that under the Act courts must consider providing exemptions for conduct that is not "unreasonable, arbitrary or invidious" if "public policy" justifies it. App.89a. Nevertheless, it held that "[n]othing in [Petitioners'] arguments persuades us *North Coast*'s conclusions regarding the [Act]'s general applicability and neutrality have been fatally undermined by *Fulton* or *Tandon*." App.91a-92a. The Court of Appeal held that, even if strict scrutiny applied, "California has a compelling interest in ensuring full and equal access to goods and services irrespective of sexual orientation and there are no less restrictive means for the state to achieve this goal." App.99a (citation omitted).

Petitioners filed a petition for rehearing with the Court of Appeal. On March 5, 2025, the Court of Appeal denied the petition and modified the opinion. App.101a-106a. Petitioners then filed a petition for review with the California Supreme Court. The California Supreme Court denied review on May 28, 2025. App.1a.

REASONS FOR GRANTING THE PETITION

I. The decision below deepens a 3-3 split over whether compelled expressive participation in a ceremony violates the Free Speech Clause.

The lower courts are now split 3-3 over whether governments may, consonant with the Free Speech Clause, force an objector to express herself as part of a

ceremony. Washington, New Mexico, and California hold that the Free Speech Clause does not protect a religious objector's expressive participation in a ceremony unless a third party would understand that participation as an endorsement of the ceremony. By contrast, the Second Circuit, the Eighth Circuit, and the Arizona Supreme Court all hold that compelling an objector to participate in a ceremony by expressing a message triggers strict scrutiny, without tacking on a third-party endorsement test.

A. Three courts hold that the Free Speech Clause offers no protection against compelled expressive participation unless third parties would view that participation as expressing an endorsement of the ceremony.

Three state courts hold that compelled participation in a ceremony does not violate the Free Speech Clause unless the religious objector is perceived as endorsing the ceremony.

In *State* v. *Arlene's Flowers, Inc.*, the Washington Supreme Court held that under the state's public accommodations law, a florist must participate in a same-sex wedding ceremony by designing and creating floral arrangements for the ceremony, despite the florist's sincere religious objections. 441 P.3d 1203, 1210 (Wash. 2019) (en banc), cert. denied, 141 S. Ct. 2884 (2021). The court determined the Free Speech Clause did not prohibit such compelled participation because, in its view, declining to create the requested arrangements "does not inherently express a message" or "endorse" that wedding. *Id.* at 1226. Specifically, the court determined "an outside observer may be left to wonder" whether the objector declined to participate for

religious reasons or otherwise, such as insufficient staff or stock. *Ibid.*

In *Elane Photography, LLC* v. *Willock*, the New Mexico Supreme Court held that a photographer was required to photograph a same-sex wedding ceremony under the state's public accommodations law, despite her sincere religious objections to personally participating in the ceremony in this way. 309 P.3d 53, 59-60 (N.M. 2013), cert. denied, 572 U.S. 1046 (2014). Relying on this Court's decision in *Rumsfeld* v. *FAIR*, 547 U.S. 47 (2006), the court determined that such compulsion did not violate the Free Speech Clause because "[r]easonable observers are unlikely to interpret Elane Photography's photographs as an endorsement of the photographed events." *Elane Photography,* 309 P.3d at 69-70.

California has now joined these states in holding that the First Amendment does not apply because "a viewer is unlikely to understand" that Miller's design, creation, and delivery of the centerpiece for a wedding cake-cutting ceremony would "convey a message of celebration and endorsement of same-sex marriage." App.76a. The court below also held that because the centerpieces Miller creates "are primarily a dessert meant to be eaten," she could be compelled to expressively participate in a wedding ceremony over her religious objections. App.69a-71a.

Oregon would be a fourth state court on this side of the split but for the fact that this Court has twice vacated the Oregon court's decision. In 2017, the Oregon Court of Appeals held that a custom baker who objected to making a cake for a same-sex wedding was not engaged in expressive activity, even though the

baker's design and creation of each cake was "individual to the customer," reflecting "each customer's personality, physical tastes, theme and desires, as well as their palate." *Klein* v. *Oregon Bureau of Lab. & Indus.*, 410 P.3d 1051, 1070 (Or. Ct. App. 2017). The Oregon court held that the Free Speech Clause was not implicated because the baker had made "no showing that other people will necessarily experience" the centerpiece as "predominantly" anything other than "food," nor that anyone would "impute" a wedding cake's "celebratory message" to her. *Id.* at 1071-1072. This Court GVR'd that decision in light of *Masterpiece.* See *Klein* v. *Oregon Bureau of Lab. & Indus.,* 587 U.S. 1060 (2019). On remand, the Oregon court reaffirmed its prior conclusion that "the federal constitution [does not] preclude[ ] the enforcement of the statute" against the baker. *Klein* v. *Oregon Bureau of Lab. & Indus.*, 506 P.3d 1108, 1114 (Or. Ct. App. 2022). This Court GVR'd a second time in light of *303 Creative LLC* v. *Elenis*, 600 U.S. 570 (2023). *Klein* v. *Oregon Bureau of Lab. & Indus.,* 143 S. Ct. 2686, 2687 (2023). Those proceedings are ongoing. *Klein* v. *Oregon Bureau of Lab. & Indus.*, No. A159899 (Or. Ct. App. argued Jan. 30, 2024). So but for this Court's repeated intervention, Oregon would be in this split as well, and it may be back in the split again once the Oregon courts rule a third time.

B. In contrast, three courts hold that religious objectors cannot be compelled to expressively participate in a ceremony, whether or not third parties would perceive an endorsement.

Three other courts do not add an endorsement requirement.

In *Emilee Carpenter, LLC* v. *James*, the Second Circuit held that a wedding photographer plausibly stated a claim that applying New York's public accommodations law to compel her to photograph a same-sex wedding ceremony violated the Free Speech Clause. 107 F.4th 92, 101 (2d Cir. 2024) (citing *303 Creative,* 600 U.S. at 579, 587-588). Judge Nathan explained that on remand the district court should evaluate "whether the vendor creates a medium of expression or communicates an idea through their services." *Id.* at 106. Whether a third party would view Carpenter's participation as an endorsement of the ceremony did not factor into the Second Circuit's analysis at all. *Id.* at 101-107.

Likewise, in *Telescope Media Group* v. *Lucero*, the Eighth Circuit held that the Free Speech Clause did not allow Minnesota to compel religious objectors to participate in a same-sex wedding ceremony by capturing and producing videos of the ceremony. 936 F.3d 740, 747 (8th Cir. 2019). Writing for the court, Judge Stras flatly rejected the argument that participating in the ceremony was "mere conduct" composed of "several actions" like "positioning a camera, setting up microphones, and clicking and dragging files on a computer screen." *Id.* at 752. The court did not require any consideration of whether a third party would understand a message of endorsement from viewing the final video. *Ibid.* To the contrary, the court determined that by forcing participation in the ceremony itself, Minnesota's law impermissibly compelled speech regardless of whether the videographers were required to "convey any specific message." *Id.* at 753.

In *Brush & Nib Studio, LC* v. *City of Phoenix*, the Arizona Supreme Court held that religious objectors

could not be compelled to create custom invitations for same-sex wedding ceremonies. 448 P.3d 890, 895 (Ariz. 2019). The court did not evaluate whether third parties would understand the designers to be endorsing the ceremony. Rather, the artists' "use [of] their original artwork, paintings, hand-drawn images, words, and calligraphy as a means of personal expression" was enough to prevent the government from compelling them to participate in the ceremony. *Id.* at 909.

C. The decision below is wrong on Free Speech.

The decision below conflicts with multiple foundational free speech cases involving ceremonies, including *Barnette* and *303 Creative*. Those cases teach that compelled participation in a ceremony, particularly one with deeply religious significance such as a wedding ceremony, is forbidden by the First Amendment.

For example, *Barnette* established beyond cavil that government may not as part of a "flag salute ceremony" "force citizens to confess by word or act" something they do not believe. 319 U.S. 624, 628 n.4, 642 (1943). In doing so, the Court emphasized that symbols are used by governments throughout history to announce "authority" and encourage "loyalty" to both political and religious ideals. *Id.* at 632. And governments have long attempted to force "individual[s] to communicate by word and sign his acceptance of the political ideas" a given symbol represents. *Id.* at 633. Religious objectors routinely seek protection against participating in symbolic ceremonies ranging from the Pledge of Allegiance to taking oaths and giving affirmations in court, see, *e.g.*, *Bolden-Hardge* v. *Office of Cal. State Controller*, 63 F.4th 1215, 1218-1219 (9th

Cir. 2023) (Jehovah's Witness Free Exercise challenge to state public employee loyalty oath), and protection from such compelled participation goes back to the founding.[1]

Several members of this Court have recognized the inherently symbolic function of a wedding cake, invoking *Barnette* along the way:"Like 'an emblem or flag,' a cake for a same-sex wedding is a symbol that serves as 'a short cut from mind to mind,' signifying approval of a specific 'system, idea, [or] institution.'" *Masterpiece Cakeshop, Ltd.* v. *Colorado C.R. Comm'n*, 584 U.S. 617, 650 (2018) (Gorsuch, J., concurring) (quoting *Barnette*, 319 U.S. at 632); see also *id.* at 659-661 (Thomas, J., concurring) ("[W]edding cakes are so packed with symbolism that it is hard to know where to begin."); *id.* at 656 (citing *Barnette* on symbolism).

303 Creative further held that where a designer creates an "'original, customized' creation" that incorporates "images, words, symbols, and other modes of expression" to "celebrate and promote" the creator's understanding of marriage, the end product is protected speech. 600 U.S. at 587. The Court explained that governments may not use public accommodations laws to impose unconstitutional speech restrictions. *Id.* at 589.

The decision below directly contradicts *303 Creative*. Miller's custom-designed and custom-created wedding cakes are "symbols" that "celebrate and promote" her understanding of marriage. 600 U.S. at 587.

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[1] See U.S. Const. Art. VI (Oath or Affirmation Clause); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 Harv. L. Rev. 1409, 1466-1468 (1990) (describing founding-era state oath exemptions).

That wedding cakes celebrate and promote a wedding can hardly be questioned: "If an average person walked into a room and saw a white, multitiered cake, he would immediately know that he had stumbled upon a wedding." *Masterpiece*, 584 U.S. at 659 (Thomas, J., concurring). Likewise, a person could receive a card with just a picture of a wedding cake on it and understand the card to mean "Congratulations on your wedding."[2] That the court below claimed Miller's cakes don't "express[ ] a message of celebration" or "endorse[ ] [a] marriage," App.76a-77a, shows just how far it has strayed from common sense and this Court's rulings.

Moreover, the California court's restrictive view of compelled speech claims—that they can only be brought if a third party observer would view the plaintiff's speech as an "endorsement" of something he objects to—threatens to revive the "endorsement test offshoot" of the notorious and now-abrogated test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022). Resurrecting *Lemon*-style endorsement in the context of free speech jurisprudence would impose a "modified heckler's veto," forcing courts to consider "perceptions" of protected activity. *Ibid.*

The decision below adds to persistent (and perhaps willful) confusion in the lower courts over whether the Free Speech Clause's protections turn on whether a third party thinks an objector's speech endorses a ceremony or not. Only this Court's intervention can resolve that question.

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[2] See, *e.g.*, Wedding Cake Card, Target, https://perma.cc/56FS-5NV5.

II. The decision below deepens a 7-4 split over whether general applicability under the Free Exercise Clause is undermined only by unfettered discretion or categorical exemptions for identical secular conduct.

The court below held that the Act is "generally applicable" even though it bans Miller's religious exercise while leaving discretion to exempt "reasonable" secular conduct, and the Act also categorically exempts secular conduct that discriminates based on, among other things, age. The court reached this result by concluding that a law could fail general applicability only if it offered entirely unfettered discretion or exempted secular conduct identical to the regulated religious conduct.

That result deepened a now 7-4 split over how to assess whether a law is generally applicable under the Free Exercise Clause. The majority rule evaluates *all* discretion and exemptions allowed by a regulatory scheme to determine if they pose a similar threat to the government's asserted interest as the prohibited religious conduct. The minority rule, which California has now joined, holds that only *unfettered* discretion or exemptions for *identical* secular conduct undermine general applicability. This is a "widespread, entrenched," and growing split. *Dr. A* v. *Hochul*, 142 S. Ct. 2569, 2570 (2022) (Thomas, J., dissenting from denial of certiorari, joined by Alito and Gorsuch, JJ.) (split over whether law is "generally applicable" if it "exempts secular conduct that similarly frustrates the specific interest that the [law] serves").

A. Seven courts hold that a lack of general applicability is shown by any discretion or categorical exemptions undermining the government's interests.

The leading case for the majority rule is the Ninth Circuit's decision in *Fellowship of Christian Athletes* v. *San Jose Unified School District*, 82 F.4th 664 (9th Cir. 2023) (en banc) (*FCA*). There, a school district claimed that a religious student group's requirement that its leaders share its religious beliefs about marriage violated the district's nondiscrimination policy banning religious and sexual orientation discrimination. The nondiscrimination policy was a "broad" policy that also forbade discrimination on the basis of sex, ethnicity, and other criteria. *Id.* at 687. The district admitted that another "Board-adopted equity policy" gave "significant discretion" to school officials in applying the nondiscrimination policy. *Ibid.* The district had also exempted certain other student groups which discriminated "on the basis of sex and ethnicity." *Id.* at 688.

The en banc Ninth Circuit found this scheme violated "bedrock requirements of the Free Exercise Clause" in two ways. *FCA*, 82 F.4th at 686. First, it allowed discretion for "individualized exemptions." *Ibid.* Second, it treated categories of "comparable secular activity more favorably than religious exercise." *Ibid.*

On the discretion exemption, the court rejected the idea that discretion mattered only if it was unfettered. Rather, under *Fulton* v. *City of Philadelphia,* 593 U.S. 522 (2021), the "mere existence of a discretionary mechanism * * * can be sufficient to render a policy not generally applicable" because it allows the

government to favor secular conduct over religious conduct. *FCA,* 82 F.4th at 687-688; accord *Bates* v. *Pakseresht*, — F.4th —, 2025 WL 2079875, at *19 (9th Cir. 2025) (rejecting argument that discretion must be "completely unfettered"). As for the district's categorical sex- and ethnicity-based exemptions, the court held that "[w]hether they are based on gender, race, or faith, each group's exclusionary membership requirements pose an identical risk to the District's stated interest." 82 F.4th at 689. And that similar risk was what undermined general applicability.[3]

The Third, Sixth, and Eleventh Circuits, and the states of Louisiana, Iowa, and Hawaii have likewise refused to cabin general applicability as the court did below.

In *Blackhawk* v. *Pennsylvania*, the Third Circuit agreed that general applicability can be undermined both through "discretionary exemptions" and by "categorical exemptions." 381 F.3d 202, 209-211 (3d Cir. 2004) (Alito, J.). The court rejected defendant's argument that its discretion was permissible because it was objectively tailored to its interests—*i.e.*, not unfettered. *Id.* at 209-210. And the court explained that categorical exemptions arise when a law "burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of [secular] conduct" that "undermines the purposes of the law to at least to the same degree as the covered [religious] conduct." *Id.* at 209.

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[3] Several district courts have also applied this approach to general applicability. See *Fellowship of Christian Athletes* v. *District of Columbia*, 743 F.Supp.3d 73, 88 (D.D.C. 2024) (collecting cases).

In *Monclova Christian Academy* v. *Toledo-Lucas County Health Department*, the Sixth Circuit compared the pandemic-era closing of religious schools not just to also-closed secular schools, but also to still-open "gyms, tanning salons, office buildings, and the Hollywood Casino." 984 F.3d 477, 482 (6th Cir. 2020). The court rejected a "myopic focus solely on the provision that regulates religious conduct," as that would "allow for easy evasion of the Free Exercise guarantee of equal treatment." *Id.* at 481. It further held that this Court "routinely identifies as comparable" secular activities that are "very different" from the prohibited religious conduct at issue but which pose a similar threat to the government's interests. *Ibid.*

In *Midrash Sephardi, Inc.* v. *Town of Surfside*, the Eleventh Circuit similarly held that private clubs were valid comparators to a synagogue seeking to build in a downtown commercial district. 366 F.3d 1214, 1234-1235 (11th Cir. 2004). The court rejected the argument that they were not similar because private club patrons were more likely to spend time and money at the other retail establishments in the downtown commercial zone. *Ibid.*

Louisiana, Iowa, and Hawaii likewise evaluate all secular conduct posing similar risks to the government's interests. See *State* v. *Spell*, 339 So.3d 1125, 1136-1137 (La. 2022) (COVID closure orders not generally applicable when they allowed businesses characterized as "essential" to remain open, but not churches); *Mitchell County* v. *Zimmerman*, 810 N.W.2d 1, 15-16 (Iowa 2012) (road ordinance not generally applicable when it banned traditional Amish carriage wheels because of road damage but allowed school buses to use ice grips and snow studs year-

round); *State* v. *Armitage*, 319 P.3d 1044, 1067 (Haw. 2014) (law banning access to protected island not generally applicable because it incorporated discretionary permit process).[4]

In all, four federal courts of appeals and three states have far more searching tests for general applicability than the court below. The court below nevertheless declined to follow the Ninth Circuit in adopting the majority rule—meaning that in California the scope of federal free exercise rights depends upon whether they are adjudicated in state or federal court.

B. Four courts hold that proving a lack of general applicability requires showing unfettered discretion or exemptions for identical secular conduct.

Four courts—the Second Circuit, Connecticut, the Tenth Circuit, and California—disregard certain categories of secular conduct that undermine the government's interests.

The Second Circuit has held that *Fulton* bars only discretionary exemptions that are "unfettered" and not "objectively defined." *We The Patriots USA, Inc*. v. *Hochul*, 17 F.4th 266, 288-289 (2d Cir. 2021) (quoting *303 Creative* v. *Elenis*, 6 F.4th 1160, 1187 (10th Cir. 2021), rev'd on other grounds, 600 U.S. 570 (2023), and *Stormans, Inc.* v. *Wiesman*, 794 F.3d 1064, 1081-1082 (9th Cir. 2015)). And in *Emilee Carpenter*, the Second

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[4] The First Circuit has left open the question whether all secular exemptions must be considered in determining general applicability. See *Brox* v. *Woods Hole, Martha's Vineyard & Nantucket Steamship Auth.*, 83 F.4th 87, 100 (1st Cir. 2023) (leaving open question whether existing medical exemption had to be compared with requested religious exemption).

Circuit found New York's public accommodations law to be generally applicable despite express exemptions allowed by the same statute for discrimination based on sex and gender identity. 107 F.4th at 111.

Connecticut has followed the Second Circuit's lead. In *Spillane* v. *Lamont*, the Connecticut Supreme Court held that a law's medical exemptions, which vested substantial discretion in medical providers, did not defeat general applicability because its application by government officials was not "entirely discretionary" and was "'framed in objective terms.'" 323 A.3d 1007, 1024-1025 (Conn. 2024) (citing *We The Patriots* litigation).

In *303 Creative*, the Tenth Circuit declined to even consider whether the public accommodations law's case-by-case exemptions for certain kinds of sex discrimination were comparable for purposes of general applicability. 6 F.4th at 1186. Instead, it demanded evidence that Colorado had exempted other instances of *sexual orientation* discrimination. *Ibid.* The Tenth Circuit also refused to consider the law's discretionary exemption, because it was not "*entirely* discretionary." *Id.* at 1188 (italics added).[5]

California follows the same path. *North Coast* held in a single sentence that the Act is neutral and generally applicable under *Smith* because its text calls for

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[5] Although this Court reversed *303 Creative* on free speech grounds, courts continue to rely on the Tenth Circuit's free exercise analysis. See, *e.g.*, *Roman Catholic Diocese of Albany* v. *Vullo*, 42 N.Y.3d 213, 228 (N.Y. 2024) (citing *303 Creative*, 6 F.4th at 1187), granted, vacated, and remanded *sub nom. Roman Catholic Diocese of Albany* v. *Harris*, No. 24-319, 2025 WL 1678991 (U.S. June 16, 2025).

equal services for all. 189 P.3d at 965. *North Coast* ignored the Act's express, categorial exemptions for age discrimination in housing. Cal. Civ. Code §§ 51.2-51.4. It also ignored that the Act does not "confer any right or privilege * * * limited by law"—a carveout that has been used to exempt discriminatory practices at both insurance companies and car rental agencies. Cal. Civ. Code § 51(c); App.45a (acknowledging these exemptions). And *North Coast* never addressed the fact that the Act exempts *all* discrimination which California courts find to be "reasonable," consistent with "public policy," and thus not "arbitrary." *Koire* v. *Metro Car Wash*, 707 P.2d 195, 197-198 (Cal. 1985).

The court below followed *North Coast*, refusing to consider any of the many "lawful distinctions in treatment under the [Act]" because they did not specifically involve "any distinction in treatment based on sexual orientation." App.45a. The lower court said *Fulton* did not apply because the Act "contains no formal system" allowing "unconstrained discretion" to grant exceptions. App.86a-87a, 89a.

C. The decision below is wrong on Free Exercise.

1. *Fulton* held that a law burdening religious exercise is not generally applicable whenever "it invites the government to consider the particular reasons for a person's conduct" through some discretionary mechanism. 593 U.S. at 523. Indeed, *Fulton* relied on *Sherbert,* where a state unemployment benefits law "was not generally applicable because the 'good cause' standard" for receiving benefits "permitted the government to grant exemptions based on the circumstances underlying each application." *Id.* at 534 (citing *Sherbert* v. *Verner*, 374 U.S. 398 (1963)). The problem

wasn't that "good cause" was standardless, but rather that it allowed discretionary value judgments against religious exercise.

Like a "good cause" standard, the Act requires consideration of the "particular reasons" for each business's conduct. *Fulton*, 593 U.S. at 533. "Although [the Act] proscribes any form of arbitrary discrimination, certain types of discrimination have been denominated reasonable and, therefore, not arbitrary." *Koire*, 707 P.2d at 197 (cleaned up). A discriminatory policy may be reasonable "based on the 'nature of the business enterprise and of the facilities provided,'" because there is a "strong public policy" supporting the policy, or because it aligns with a "compelling societal interest." *Id.* at 197-198. Thus, in each case, courts applying the Act must "define the contours of what constitutes unreasonable, arbitrary or invidious discrimination * * * and examine where bona fide public policy may justify" exceptions. App.89a.

Here, Miller's "particular reason[]," *Fulton*, 593 U.S. at 533, for referring the couple who came to her bakery was a central issue at trial. The trial court, after hearing five days of testimony, concluded that Miller's "*only* intent, her only motivation, was fidelity to her sincere Christian beliefs"—and ruled that this was not "arbitrary" discrimination under the Act. App.125a. The Court of Appeals reversed because in its view Miller's desire to follow her religious beliefs was not a "compelling societal interest[]" under the Act. App.19a. That kind of analysis triggers *Fulton*'s discretion rule.

2. Similarly, *Fulton* explained that a law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the

government's asserted interests in a similar way." 593 U.S. at 534; see also *Kennedy,* 597 U.S. at 526; *Tandon* v. *Newsom*, 593 U.S. 61, 62 (2021). Here, the Act exempts certain categories of age discrimination, discrimination permitted by "other laws," and *any* discrimination that isn't "arbitrary." That should have been more than enough to trigger strict scrutiny.

But the court below said a law fails general applicability *only* where the permitted categorical secular exemption is formally *identical* to the requested religious exemption. App.90a-91a. That interpretation would allow "the definition of a particular" regulatory scheme to "always be manipulated" to evade review, reducing First Amendment protections "to a simple semantic exercise." *Carson* v. *Makin*, 596 U.S. 767, 784 (2022). "[T]he government must apply the *same* level of generality across cases"—it may not "adjust[] the dials just right" to "engineer" desired outcomes. *Masterpiece*, 584 U.S. at 652 (Gorsuch, J., concurring). That is why this Court does not just evaluate the terms of a particular prohibition on religious exercise but also other forms of secular underinclusivity—inside and outside the regulatory scheme—that leave the government's interest similarly threatened. See *Fulton*, 593 U.S. at 534. Permitting a government to "divvy up its exemption regimes provision-by-provision would permit governments to subvert free exercise through clever drafting." *Smith* v. *City of Atlantic City*, 138 F.4th 759, 772 (3d Cir. 2025). That would promote exactly the kind of "religious gerrymanders" the Free Exercise Clause is meant to "eliminate." *Carson*, 596 U.S. at 784 (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)); accord *Masterpiece*, 584 U.S. at 645-648 (Gorsuch, J., concur-

ring). Given its "myriad" exemptions for secular business practices, *Tandon*, 593 U.S. at 64, the Act should be subject to strict scrutiny.

D. If *Employment Division* v. *Smith* precludes relief under the Free Exercise Clause, that case should be overruled.

If *Smith* allows California's actions here, the Court should re-examine *Smith*.

This Court has already granted review on whether *Smith* should be reconsidered. See *Fulton*, 593 U.S. at 540-541. But *Fulton* ultimately declined to reach the issue because strict scrutiny applied there even under *Smith*. *Id*. at 541. Yet as five Justices acknowledged in concurring opinions, *Fulton*'s holding did not detract from the ongoing need to reevaluate *Smith*. See *id.* at 543 (Barrett, J., joined by Kavanaugh, J.); *id.* at 545-546 (Alito, J., joined by Thomas, and Gorsuch, JJ.); see also *Kennedy*, 597 U.S. at 525 n.1 (noting no party asked the Court to overrule *Smith*). The persistence of confusion and efforts by lower courts to manipulate the general applicability standard confirm that *Smith* should be overruled.

III. This case is an excellent vehicle to address questions of nationwide importance.

The questions presented by this case are of nationwide importance, not least because the decision below drags out a culture war that ought to have been ended long ago. When this Court decided *Obergefell* v. *Hodges*, it reassured religious Americans with conscientious objections to same-sex marriage that their beliefs were "decent and honorable." 576 U.S. 644, 672 (2015). Likewise, when the California Supreme Court decided the issue of same-sex marriage, it made a

promise: "affording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon * * * religious freedom." *In re Marriage Cases*, 183 P.3d 384, 451 (Cal. 2008).

But years later, this area of the law remains plagued by entrenched conflicts. California filed this lawsuit four months *after* this Court granted certiorari in *Masterpiece*—and in the eight years since, California courts have continued ruling against Miller notwithstanding intervening decisions in *Masterpiece*, *Fulton*, *Tandon*, and *303 Creative*. Similarly, the Colorado courts kept different charges against the *Masterpiece* baker alive until 2024. *Masterpiece Cakeshop, Inc.* v. *Scardina*, 556 P.3d 1238, 1244 (Colo. 2024). Washington courts concluded after GVR that *Masterpiece* "does not affect our original decision" that the florist plaintiff in *Arlene's* should lose. 441 P.3d at 1216. And Oregon continues to pursue claims against the *Klein* baker even though her case has been GVR'd twice. *Klein*, 587 U.S. at 1060; 143 S. Ct. at 2687.

Political realities mean that officials in some states find it impossible to live-and-let-live when it comes to disfavored religious beliefs. And state courts are often reluctant to provide relief, as shown by the California Supreme Court's failure to intervene here. As a result, the only recourse religious objectors have is in the federal courts.

Moreover, if this Court does not resolve this vexed category of cases in a definitive way, it can expect *more* of these cases to come before it from the state courts. That's because litigants are intentionally moving anti-discrimination litigation away from federal courts. See, *e.g.*, Douglas NeJaime, *Before Losing*, Yale L.J. Forum (forthcoming 2025), https://perma.cc/T8CR-

DUBF (advising advocates to avoid federal courts and in particular this Court); Duncan Hosie, *Resistance through Restraint: Liberal Cause Lawyering in an Age of Conservative Judicial Hegemony*, 111 Cornell L. Rev. (forthcoming 2026), https://perma.cc/8NWU-AJH7 ("liberal cause lawyers" should adopt "calculated disengagement from the Supreme Court and federal appeals courts aimed at denying these bodies vehicles to further develop conservative constitutional doctrine").

Furthermore, the narrow view of general applicability presented here applies across California and New York—home to more than 20% of Americans. And it is also the position promoted by the EEOC. See EEOC Br. at 26, *McMahon* v. *World Vision Inc.*, No. 24-cv-3259 (9th Cir. Oct. 28, 2024). Indeed, the EEOC says a religious ministry cannot bring a free exercise defense to Title VII because that law is generally applicable—despite express exemptions for small businesses, private clubs, religious employers, and bona fide occupational qualifications. *Ibid.*; cf. 29 C.F.R. 1604.2(a)(2) (sex a BFOQ when hiring "actor or actress" to enhance "authenticity or genuineness").[6] This Court should resolve these continuing conflicts now.

And finally, the decision below is of nationwide importance because it underscores the continuing need to overrule *Smith*. The court ruled against Miller by manipulating the general applicability analysis. This is not uncommon. See Douglas Laycock & Thomas C.

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[6] The Ninth Circuit did not reach the question, applying the ministerial exception instead. *McMahon* v. *World Vision Inc.*, — .4th —, 2025 WL 2217629, at *3 (9th Cir. Aug. 5, 2025).

Berg, *Protecting Free Exercise Under Smith and After Smith,* 2020-2021 Cato Sup. Ct. Rev. 33, 40 (2021) (Jehovah's Witness seeking Medicaid waiver "died for her faith while lawyers argued about general applicability"). Absent this Court's intervention, *Smith*'s mode of analysis will keep causing problems for litigants and lower courts alike.

This appeal is also an excellent vehicle for resolving all three questions presented. It includes a robust record that reflects a full five-day bench trial after which the Superior Court made detailed findings of fact, minimizing potential factual disputes and leaving nothing for further factual development at a later stage in the case. The California Court of Appeal directly addressed and resolved the first two questions presented, so there are no obstacles to reaching and resolving both. And should this Court determine that it must reconsider *Smith*, this case is an apt vehicle because it involves exactly the kind of religious testing of dissenters that the Founders had learned to abhor.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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