No. 25-233

In the Supreme Court of the United States

CATHARINE MILLER, ET AL.,

Petitioners

v.

CIVIL RIGHTS DEPARTMENT,

Respondent.

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

BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, IOWA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, NEBRASKA, OHIO, SOUTH CAROLINA, TEXAS, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici are the States of Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana Mississippi, Missouri, Nebraska, Ohio, South Carolina, Texas, and West Virginia.[1] Amici have an interest in ensuring that creative professionals like cake bakers are able to express themselves without being compelled to engage in state-favored expression that violates their deeply held beliefs and religious convictions. Just a few years ago, this Court affirmed that the First Amendment protects artists and other individuals from being coerced into participating in, and expressing endorsement of, same-sex marriages. But Respondent argues that a cake baker, whose custom-cake business is built on her Christian values, was not engaged in sufficiently expressive activity to be protected by the First Amendment. Respondent contends that whether the First Amendment's protections apply to Petitioner depends upon how unique her designs are or whether she used a custom fondant or icing on a cake. This case-by-case, fact-intensive approach is wrong and will have a devastating impact and chilling effect on free speech—especially religiously motivated speech—if not corrected by the Court.

Amici are well-positioned to explain the dangers of this approach and to advocate for alternative standards that adequately protect free speech and religious freedom.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief, in whole or in part, and no person or entity other than amici contributed monetarily to its preparation or submission. On September 17, 2025, counsel of record for all parties received notice of amici's intention to file this brief.

SUMMARY OF ARGUMENT

Just two years ago in *303 Creative LLC v. Elenis*, 600 U.S. 570, 587 (2023), this Court held that the First Amendment forbids States to force creative professionals to "celebrate and promote" same-sex marriages. This was a crucial step for ensuring that the free-expression and free-exercise rights of private individuals who disagree with same-sex marriage are given proper protection.

But this decision and the Court's earlier decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018), left open several outstanding questions regarding what kinds of businesses are protected. As a result, some States have continued to target creative professionals, including bakers, videographers, and photographers, who refuse to participate in same-sex weddings. When these individuals have gone to court, their First Amendment freedoms have been subjected to a complex, fact-intensive inquiry that turns on how clearly they expressed themselves and how much customization they offered clients. This test does not adequately protect First Amendment freedoms and chills creative expression. This petition presents an opportunity for the Court to resolve those open questions and articulate a test more protective of free-speech rights than the approach prevailing in the lower courts.

This case also presents an ideal vehicle for the Court to address the difficultly wrought by *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *Smith* has produced endless wrangling over how many exceptions a law can have and still be considered neutral and generally applicable and consistent with the Free Exercise Clause. *Smith*'s case-by-case, fact-intensive approach ultimately leaves

religious freedom protections uncertain and varying from court to court. The Court should grant the petition to finally overrule *Smith* and restore the robust protections that the Free Exercise Clause guarantees for religious exercise broadly.

ARGUMENT

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox . . . or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *accord Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Just a few years ago, this Court applied those principles to reject Colorado's efforts to compel a website designer to provide websites for same-sex couples to celebrate their weddings. *303 Creative*, 600 U.S. at 579. The Court held that the First Amendment forbade Colorado from forcing that website designer to "celebrate and promote the couple's wedding." *Id.* at 587. It also recognized the important role of public-accommodations laws but explained "that no public accommodations law is immune from the demands of the Constitution," and "[w]hen a state public accommodations law and the Constitution collide, there can be no question which must prevail." *Id.* at 591-92.

The Court explained that, without strong First Amendment protections, "[c]ountless other creative professionals, too, could be forced to choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so." *Id.* at 590. But unfortunately, that is exactly what has happened to Catharine Miller. She has endured years-long litigation brought by the State of California, which has sought to fine her for refusing to bake a

custom cake for a same-sex wedding due to her deeply held religious convictions concerning the sanctity of marriage between a man and a woman. Pet.App.399a–401a.

This situation has arisen because, after *303 Creative*, the door remains open to exactly the type of speech suppression that the Court decried. Specifically, the Court did not address what types of wedding-related products and services are expressive in nature. States have used this opening as an opportunity to test the bounds of *303 Creative* and compel speech over religious objection. In many jurisdictions, whether the First Amendment applies depends on a host of factors that are difficult or impossible to predict in advance—including whether third-party individuals would understand that the wedding cake was expressing approval of the marriage, and whether the cake design was sufficiently customized and expressive. This permits governments to force participation in wedding ceremonies based on ad hoc determinations about the "custom" nature of creative work or the perceived "message" of that participation. And even some of the jurisdictions that have avoided use of these factors still do not utilize an approach that provides cake bakers and other creative professionals with certainty that their expression is protected by the First Amendment.

The Court should grant the petition to resolve this uncertainty. Doing so is particularly important given the highly expressive and emotional role that weddings generally, and same-sex marriages in particular, play. Because the Founders had a "mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints," *Citizens United v. FEC*, 558 U.S. 310, 340 (2010), and an unpredictable

case-by-case approach does not adequately protect these rights.

Regarding the right to free exercise, this Court's decision in *Employment Division v. Smith* has unfortunately led to a similar case-by-case, statute-by-statute approach to determining whether religious exercise is protected. The applicability of strict scrutiny hinges on what kinds of exceptions a statutory scheme contains, whether public officials have administrative discretion, or whether they have made remarks hostile to religious beliefs. As the facts of this case and the circuit split demonstrate, this approach has led to significant uncertainty. This split only highlights what has long been clear—*Employment Division v. Smith* should be overruled.

I. The Lower Courts' Fact-Intensive Compelled-Speech Tests Are Insufficiently Protective of Religious Expression.

In *303 Creative*, this Court took a strong stance in favor of protecting creative professionals against compelled participation in same-sex marriages. But as Petitioners point out, in the wake of *303 Creative*, lower courts have split over what triggers First Amendment protection. Pet.20-25. Three state courts—in Washington, New Mexico, and California—have adopted an "endorsement" test that permits compelled expressive participation unless third parties would view that participation as expressing endorsement of the ceremony. By contrast, three other courts—the Second Circuit, Eighth Circuit, and Arizona Supreme Court—protect against compelled ceremonial participation without requiring such an endorsement showing. Yet ultimately, neither of these approaches is sufficiently protective of religious

expression, leaving religious believers at the mercy of unpredictable tests.

A. The decision below exemplifies the problems with the endorsement-focused approach. The California Court of Appeal held that Miller could be compelled to design and create wedding cakes because "a viewer is unlikely to understand" that her participation would "convey a message of celebration and endorsement of same-sex marriage." *C.R. Dep't v. Cathy's Creations, Inc.*, 109 Cal. App. 5th 204, 259 (Cal. Ct. App. 2025). Miller's artistic work was dismissed despite findings that she is "involved in some aspect of every wedding cake's design and creation," Pet.App.134a, and that her process involves detailed consultations, custom flavor selection from over 250 combinations, and intricate artistic decoration that employees describe as "[e]dible art," Pet.App.7a–11a, 364a. The California Court of Appeal nevertheless concluded that Miller's work was merely a "nondescript, plain white cake with a multi-purpose design" rather than "primarily a self-expressive act." Pet.App.71a, 79a. Subjective characterizations and arbitrary determinations about artistic merit and expressive value, like those made by the lower court here, are the inevitable consequences of the endorsement-focused approach.

Another example is *State v. Arlene's Flowers, Inc.* There, the Washington Supreme Court rejected a florist's argument that the First Amendment prohibited the State from requiring her to participate in a same-sex wedding ceremony by designing and creating floral arrangements to celebrate the marriage. 441 P.3d 1203, 1210 (Wash. 2019) (en banc), *cert. denied* 141 S. Ct. 2884 (2021). The court reasoned that a florist's refusal to create arrangements "does not inherently express a message" of disapproval for the wedding because "an outside

observer may be left to wonder" whether the objection was for religious or other reasons. *Id.* at 1226.

A final example is in *Elane Photography, LLC v. Willock*. There, the New Mexico Supreme Court held that compelled photography was permissible because "[r]easonable observers are unlikely to interpret Elane Photography's photographs as an endorsement of the photographed events." 309 P.3d 53, 69–70 (N.M. 2013).

These decisions misunderstand the nature of compelled speech. This Court has never required that compelled speech be perceived as an endorsement to trigger First Amendment protection. The constitutional violation is instead the compulsion itself, not whether observers would view the expressive conduct as the endorsement of particular views. *See Barnette*, 319 U.S. at 634; *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 893 (2018) (coercing an individual into betraying her convictions "is always demeaning"). The endorsement test is inherently malleable and invites a court to speculate about what hypothetical "reasonable observer[s]" might think—precisely the kind of "modified heckler's veto" that the Court rejected in *Kennedy v. Bremerton School District*, 597 U.S. 507, 534 (2022).

B. A better-reasoned (though still not ideal) approach is the one taken by the Second Circuit, which recognizes that compelling participation in wedding ceremonies may violate the First Amendment regardless of an outside observer's perceptions of endorsement. This approach focuses on "whether the vendor creates a medium of expression or communicates an idea through their services." *Emilee Carpenter, LLC v. James*, 107 F.4th 92, 106 (2d. Cir. 2024); *see id.* at 104 ("The question posed here, then, is whether Carpenter's photography

services are expressive conduct, because, for example, her photographs provide conduits of public discourse or 'communicate ideas.'" (quoting *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 790 (2011))). And it boils down to the question of "which category" the vendor's service "falls into: expressive or not." *Id.* at 104.

Put differently, this approach asks whether the vendor "intended to be communicative" and would be reasonably understood to be communicative. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984). If so, strict scrutiny is triggered. No particular message or endorsement is required. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995). That is an easy call where, as here, the medium of expression is a wedding cake.

C. But even this approach is inadequate because it still requires a case-by-case inquiry into specific artistic processes. *See Carpenter*, 107 F.4th at 106-07 ("This is a nuanced, indeed sometimes 'difficult,' inquiry whose application to public accommodations laws is fact-intensive and varies depending on the context and the nature of the goods and services at issue."). Like the decision below, which required an "independent examination" of the record to characterize Miller's artistic work, Pet.App.62a, courts continue to make subjective determinations about the degree of customization, artistic merit, and expressive value of particular creative works, *see Elane Photography*, 309 P.3d at 69-70; *Arlene's Flowers*, 441 P.3d at 1211-12. These factual inquiries create inconsistent results across jurisdictions purportedly following the same legal standard, as courts inevitably reach different conclusions about similar artistic practices based on how they characterize specific facts. *Compare Elane Photography*, 309 P.3d at 69-70 *with*

Telescope Media Grp. v. Lucero, 936 F.3d 740, 747 (8th Cir. 2019).

The lack of a predictable rule creates uncertainty regarding the protections of the First Amendment, leading to a chilling effect. This case is a perfect example. California has pursued Miller through eight years of litigation despite intervening precedents from this Court in *Masterpiece Cakeshop*, *Fulton*, and *303 Creative*. Oregon likewise continues to pursue similar claims against the bakers in the *Klein* litigation even after two GVRs from this Court. *See generally*, Oral Argument, *Klein v. Or. Bureau of Lab. & Indus.*, No. A159899 (Or. Ct. App. Jan. 30, 2024). These examples have surely chilled others in the exercise of their rights of free expression. That is why the state's authority "to compel a private party to express a view with which the private party disagrees" must be "stringently limit[ed]." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 219 (2015) (citing *Hurley*, 515 U.S. at 573, and *Barnette*, 319 U.S. at 642). Without a more predictable rule from this Court, unclear standards will continue to chill expression.

Fact-intensive cases are also expensive. Whether a small business owner like Miller can assert her First Amendment rights largely depends on her ability to fund lengthy, fact-intensive litigation centering on her artistic process. That requires discovery, expert testimony, and multi-day trials simply to establish that a creative work merits First Amendment protection. This burden falls disproportionally on religious objectors.

By contrast, a more predictable test would allow individuals to resolve these types of cases at the earliest possible stage and without the need for invasive investigations and costly discovery. Once it is clear that First

Amendment protections apply, these cases are simple to resolve. A government cannot compel private artistic expression—ever. So here, "it is both unnecessary and incorrect to ask whether the State can show that the statute is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring in the judgment) (internal quotation marks omitted). Even if strict-scrutiny review did apply, a government never has a sufficient interest to compel private artistic expression. Private artistic expression inherently espouses ideas that must come from the artist's nuanced work. And "[t]he government may not . . . compel the endorsement of ideas that it approves." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 309 (2012). Indeed, this Court has *never* allowed a government entity to compel art or expressive conduct. A government cannot force a citizen to engage in or endorse expression—whether saluting a flag, *Barnette*, 319 U.S. at 642, or even passively carrying a message on a license plate, *Wooley*, 430 U.S. at 717.

In this regard, the Arizona Supreme Court provided the best example when it held that custom wedding invitations were pure speech because they contained the artists' "hand-drawn words, images, and calligraphy, as well as their hand-painted images and original artwork" and therefore it did not matter if the invitations "convey a message" regarding same-sex marriage. *Brush & Nib Studio, LC v. City of Phx.*, 448 P.3d 890, 908, 912 (Ariz. 2019). Likewise, the Eighth Circuit held that Minnesota could not compel videographers to participate in same-sex weddings regardless of whether the videographers were required to convey "any specific message." *Lucero*, 936 F.3d at 753. This was because "the First Amendment

is relevant whenever the government compels speech, regardless of who writes the script." *Id.*

The Court should grant the petition to resolve this split, and to provide clear and predictable rules for artists and States to apply going forward.

II. The Case Presents an Ideal Vehicle for Revisiting *Employment Division v. Smith*.

The Court of Appeal's conclusion that the Free Exercise Clause does not prevent California from compelling Miller to provide custom wedding cakes for same-sex weddings despite her sincerely held religious objections independently warrants this Court's review. Three decades after this Court's decision in *Employment Division v. Smith*, this case demonstrates that there remains significant confusion over whether the application of a law qualifies as neutral and generally applicable. The time has come to reconsider and overturn *Smith*.

In several recent decisions including *Fulton*, *Tandon*, and *Masterpiece Cakeshop*, this Court has narrowed the scope of *Smith* and applied strict scrutiny after concluding that laws were not neutral and generally applicable. In *Masterpiece Cakeshop*, the Court concluded that the free exercise rights of a baker were violated when Colorado displayed animus against his religious beliefs as part of their efforts to compel him to bake a wedding cake for a same-sex marriage. 584 U.S. at 625. In *Fulton v. City of Philadelphia*, the Court concluded that Philadelphia violated the Free Exercise Clause when it attempted to force Catholic Charities to certify adoptions to same-sex couples while allowing for a system of individualized exceptions. 593 U.S. 522, 535 (2021). And in *Tandon v. Newsom*, the Court applied strict scrutiny to California's COVID-19 related closure of churches because the state had exempted "comparable

secular activities." 593 U.S. 61, 63 (2021) (per curiam). Each of these decisions was correctly decided.

But they have led to increasingly thorny questions regarding what kinds of exceptions or exemptions trigger strict scrutiny: How similarly situated must the exempt categories be before strict scrutiny applies? And how much discretion is too much discretion? Answering these questions has required a statute-by-statute or even clause-by-clause analysis to determine whether a law's exceptions are broad enough to trigger strict scrutiny. Alternatively, this Court is regularly asked to apply the so called "hybrid rights" theory that it has never adequately defined and applied. *See Mahmoud v. Taylor*, 145 S. Ct. 2332, 2361 n.14 (2025) (refusing to consider the hybrid rights exception and labelling it as a theory that the Court in *Smith* merely "speculated" about). The result is that laws like the California civil rights statute here are weaponized against religious individuals who cannot with any confidence rely on the protections of the First Amendment.

All of this confusion traces back to *Smith.* As many of the Amici States have previously argued, *Smith* is an "erroneous constitutional decision" in need of being "settled right." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 264 (2022); *see, e.g.,* Brief for the States of Texas et. al. as Amici Curiae in Support of Petitioners, *Fulton v. City of Phila.*, No. 19-123, 2020 WL 3078498, at *13-21 (U.S. June 3, 2020) ("States' *Fulton* Brief"). This case provides an ideal vehicle for doing so.

For one, *Smith* stands on "weak grounds." *Dobbs*, 597 U.S. at 268, 270. In addition to the havoc *Smith* has wrought on free-exercise rights, its "negative protection" from discrimination is a faint shadow of the religious liberty recognized by the Founding generation. *See*

States' *Fulton* Brief, *supra*, at *30. Indeed, *Smith* "can't be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption." *Fulton*, 593 U.S. at 553 (Alito, J., concurring).

"That the free-exercise right included the right to certain religious exemptions is strongly supported by the practice of the Colonies and States." *Id.* at 582. Because religious liberty was so central to the Founding generation, "colonial and state legislatures were willing to grant exemptions" "[w]hen there were important clashes between generally applicable laws and the religious practices of particular groups"—"even when the generally applicable laws served critical state interests." *Id.* For example, religious objectors were exempted from taking legally required oaths before testifying, voting, or even assuming public office, *id.* at 582-83; objectors were "granted exemptions from the requirement that individuals remove their hats in court," *id.* at 584; religious objectors were exempted from mandatory militia service and conscription, because "violence to [objectors'] consciences" was deemed more essential than "the very survival of the new Nation," *id.* at 583-84. These exemptions are "strong evidence of the founding era's understanding of the free-exercise right," *id.* at 585 (citing Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1119 (1990)), and were born out of the Framers' unflagging belief in "the inviolability of conscience," Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 819, 823 (1998). Thus, *Smith*'s "constitutional

analysis was far outside the bounds" on the First Amendment's "text, history, or precedent." *Dobbs*, 597 U.S. at 268, 270.

Furthermore, "[t]his Court's jurisprudence since" *Smith* "has 'eroded' [its] 'underpinnings.'" *Id.* at 350 (Roberts, C.J., concurring) (quoting *United States v. Guadin*, 515 U.S. 506, 521 (1995). In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Court held that "the Free Exercise Clause prevents [government] from interfering with the freedom of religious groups to select their own" ministers. 565 U.S. 171, 184 (2012); *see also Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732 (2020). That carveout is hard to square with *Smith* itself. The employment discrimination statutes at issue in *Hosanna-Tabor* and *Our Lady of Guadalupe* would seem to fit comfortably within *Smith*'s general rule allowing "neutral, generally applicable" laws to burden religious exercise. *Smith*, 494 U.S. at 872. And yet the Court—rightly—determined that the First Amendment required an exception to those laws. *See* States' *Fulton* Brief, *supra*, at *16-17.

Additionally, as this case helps demonstrate, the Court's decisions in *Fulton*, *Tandon*, and *Masterpiece Cakeshop* may have given governments a perverse incentive. These decisions incentivize governments to "rewrite their rules to eliminate discretionary exceptions, Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under Smith and After Smith*, Cato Sup. Ct. Rev. 33, 37 (2021), sometimes "[e]ven if a rule serves no important purpose and has a devastating effect on religious freedom," *Fulton*, 593 U.S. at 545 (Alito, J., concurring); *see id.* at 543 (Barrett, J., concurring) (explaining that, under *Smith*, "a neutral and generally applicable law typically does not violate the Free Exercise Clause—no

matter how severely that law burdens religious exercise"). Thus, *Smith* is the worst of all worlds: It is no longer logically coherent, *and* it still infringes on rights the Constitution obviously protects.

Finally, overruling *Smith* will not "upend substantial reliance interests." *Dobbs*, 597 U.S. at 287. To the contrary, it will vindicate them. As the events in this case and others like it have highlighted, *Smith*'s expectation of solicitude toward religious exercise has proven too optimistic in many jurisdictions. By leaving religious exercise at the mercy of politics, *Smith* has permitted troubling infringements of religious liberty, *see id.*, particularly for those holding beliefs that cut against prevailing secular norms and values, *see* States' *Fulton* Brief, *supra*, at *27-29.

Given *Smith*'s faulty premise, the Court's ongoing pruning of *Smith*'s holding, and the decision's "depart[ure] from a century of this Court's precedents and the common law before that," *stare decisis* does not mandate that the Court prolong *Smith*'s "30-year window." *Edwards v. Vannoy*, 593 U.S. 255, 294 n.7 (2021) (Gorsuch, J., concurring); *see Smith*, 494 U.S. at 891 (O'Connor, J., concurring in the judgment) (recognizing that the majority "dramatically depart[ed] from well-settled First Amendment jurisprudence"). The Court should use this opportunity to set aside *Smith* and reaffirm a standard more consistent with the original public meaning of the Free Exercise Clause. *See* States' *Fulton* Brief, *supra*, at *21. Otherwise, governments will remain free to trample upon Americans' most fundamental rights. Because the Court declined to reach the issue in *Fulton*, it should grant the petition and do so in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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