
In the Supreme Court of the United States

MELISSA ELAINE KLEIN AND AARON WAYNE
KLEIN,

Petitioners,

v.

OREGON BUREAU OF LABOR AND INDUSTRIES,
Respondent.

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

BRIEF OF *AMICI CURIAE* BILLY GRAHAM
EVANGELISTIC ASSOCIATION, SAMARITAN'S
PURSE, NATIONAL ASSOCIATION OF
EVANGELICALS, CONCERNED WOMEN FOR
AMERICA, CONGRESSIONAL PRAYER CAUCUS
FOUNDATION, NATIONAL LEGAL
FOUNDATION, AND PACIFIC JUSTICE
INSTITUTE IN SUPPORT OF THE PETITION FOR
A WRIT OF CERTIORARI

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INTERESTS OF *AMICI CURIAE*¹

The **Billy Graham Evangelistic Association** ("BGEA") was founded by Billy Graham in 1950 and, continuing the lifelong work of Billy Graham, exists to support and extend the evangelistic calling and ministry of Franklin Graham by proclaiming the Gospel of the Lord Jesus Christ to all we can by every effective means available to us and by equipping the church and others to do the same. BGEA ministers to people around the world through a variety of activities including Decision America Tour prayer rallies, evangelistic festivals and celebrations, television and internet evangelism, the Billy Graham Rapid Response Team, the Billy Graham Training Center at the Cove, and the Billy Graham Library. Through its various ministries and in partnership with others, BGEA intends to represent Jesus Christ in the public square; to cultivate prayer, and to proclaim the Gospel. Thus, it is concerned whenever government acts to restrict and inhibit the free expression of the Christian faith those activities represent.

Samaritan's Purse is a nondenominational evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people

¹ Pursuant to Supreme Court Rule 37, all Parties have received timely notice of intent to file this brief and have consented to its filing. No Party or Party's Counsel authored this Brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *Amici Curiae*, their members or their Counsel, contributed money that was intended to fund the preparation or submission of this Brief.

around the world. The organization seeks to follow the command of Jesus to “go and do likewise” in response to the story of the Samaritan who helped a hurting stranger. Samaritan’s Purse operates in over 100 countries providing emergency relief, community development, vocational programs and resources for children, all in the name of Jesus Christ. Samaritan’s Purse’s concern arises when government hostility prevents persons of faith from practicing core aspects of faith such as prayer, discipleship, evangelism, acts of charity for those in need, or other day-to-day activities of those practicing their sincerely held religious beliefs.

The National Association of Evangelicals (“NAE”) is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, social-service providers, colleges, seminaries, religious publishers, and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries. It believes that religious freedom is both a God-given right and a limitation on civil government, all as recognized in the First Amendment, and that marriage is a God-ordained institution that is biblically reserved for the union of one man and one woman.

Concerned Women for America (“CWA”) is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that

strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite.

The **Congressional Prayer Caucus Foundation** (“CPCF”) is an organization established to protect religious freedoms (including those related to America's Judeo-Christian heritage) and to promote prayer (including as it has traditionally been exercised in Congress and other public places). It is independent of, but traces its roots to, the Congressional Prayer Caucus that currently has over 100 representatives and senators associated with it. CPCF has a deep interest in the right of people of faith to speak, freely exercise their religion, and assemble as they see fit, without government coercion and punishment forcing them to endorse different messages that violate their convictions by either speech or association. CPCF reaches across all denominational, socioeconomic, political, racial, and cultural dividing lines. It has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from thirty-three states.

The **National Legal Foundation** (“NLF”) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Oregon, seek to ensure that those

with a religiously based view of marriage continue to be free to express those views without being compelled to express the opposite view by state-enforced association with those holding that opposite view.

The **Pacific Justice Institute** (“PJI”) is a nonprofit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. Such includes those who, as a matter of conscience, hold traditional views of marriage and family. As such, PJI has a strong interest in the development of the law in this area.

SUMMARY OF THE ARGUMENT

The Petition in this case presents issues well worthy of review by this Court. As is obvious from the proliferation of similar cases, these issues demand this Court’s prompt attention.

The central fact of this case is that a marriage ceremony is a communal, expressive event. Thus, this case is principally about what the brides or grooms (and the State) are communicating when they get married. It is about the marriage event, and the message that event publishes to the community. Thus, the question of whether the application of Oregon’s civil rights law violates the vendors’ free speech and free exercise rights is inextricably bound up with another aspect of that law, the consideration of which is required for the resolution of this case: the State is

compelling the vendors to associate with, and facilitate, the message of their customers that the vendors find offensive.

Does a law prohibiting religious discrimination require a Jewish restaurateur to cater a Muslim gala with the announced purpose of fundraising for those fighting for the abolition of the State of Israel? It does not, because the restaurateur objects, not to Muslims per se, but to their message of the gala, a message with which he does not want to associate or facilitate. So it is here. Vendors may be engaged in doing something artistic like arranging flowers or decorating cakes, as are the bakers here. Other vendors may be involved in something menial like providing rental tables and chairs. While those engaged in artistic endeavors will also have their free speech and free exercise rights violated by Oregon laws, all vendors, artistic and non-artistic, including the bakers here, will have their associational rights violated whenever the vendor has a sincere objection to supporting the message being communicated by the recipient of the services. No vendor may be compelled to join that assembly and associate with that message.

The most relevant speech in this case is that proclaimed from the altar by the wedding participants (and the State) that a same-sex marriage is a type of marriage that should be celebrated and approved. Those who disagree with that message, especially if they disagree from a religious perspective like the bakers here, may not constitutionally be compelled to assemble for the purpose of joining or facilitating that message or face being punished for refusing to do so.

ARGUMENT

The bakers in this case do not object to serving homosexuals, including those already in a same-sex relationship. (Pet’r’s App. (hereinafter “App.”) 19.) Rather, they object to associating with and facilitating a same-sex marriage ceremony and the message that ceremony conveys. (App. 16, 193.) Their objection in this instance is based on sincerely held religious convictions that it would be ethically wrong for them to associate with and to help foster such a ceremony and its particular message. That is what is being objected to in this case, and whether their refusal to service an event because it communicates a message objectionable to them can be punished constitutionally is the key consideration that should be addressed and decided by this Court.

I. The Wedding Participants, and the State, are Communicating a Message in the Same-Sex Marriage Ceremony.

By engaging in a marriage ceremony, both the same-sex wedding participants and the State are broadcasting a clear message. That message is not just that marriage, in the abstract, is a good and valued institution. The message is a more particular endorsement: that same-sex couples are entitled to engage in such unions with the State’s full blessing.

As this Court recounted in the various opinions in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), whether same-sex marriage is a legitimate form of marriage is an issue that deeply divides the citizens of this country. A same-sex marriage ceremony is divisive *precisely because* it “makes a statement,” just

as the denial of the right to marry to same-sex couples communicated the message that such marriages were illegitimate. As the majority noted in *Obergefell*, without being able to marry with the sanction of the State, “[a] truthful declaration by same-sex couples of what was in their hearts had to remain unspoken.” *Id.* at 2596. Moreover, same-sex couples were “burdened in their rights to associate.” *Id.* Conversely, permitting same-sex couples to marry allows them to proclaim that their relationship is “sacred,” at least by their own definition, *id.* at 2599, and to associate to the same extent as heterosexual couples.

That the State is also communicating its own message by prohibiting or sanctioning a same-sex marriage ceremony was also emphasized by this Court in *Obergefell*, as well as in *United States v. Windsor*, 133 S. Ct. 2675 (2013). Stated negatively, this Court held that, when the Federal Government only recognized heterosexual marriages, it “impermissibly disparaged those same-sex couples ‘who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.’” *Obergefell*, 135 S. Ct. at 2597 (quoting *Windsor*, 133 S. Ct. at 2689). Stated positively, this Court recognized that, during a marriage ceremony, “just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union.” *Id.* at 2601. “The right to marry [with legal sanction] thus dignifies couples who ‘wish to define themselves by their commitment to each other.’” *Id.* at 2600 (quoting *Windsor*, 133 S. Ct. at 2689). Simply put, this Court recognized that the marriage ceremony is both an individual and a societal statement most

fundamental.

II. The Vendors Have a Sincere Objection to the Message of the Wedding Ceremony.

This Court in *Obergefell* also recognized that many in our country do not agree with these messages that same-sex marriage is either morally permissible or good social policy. This Court noted, “Marriage, in their view, is by its nature a gender differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.” *Id.* at 2594. And, again, the *Obergefell* majority observed, “Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.” *Id.* at 2602.

It is not disputed in this case that the bakers are among those who sincerely believe that same-sex marriage is wrong and that, by facilitating such a ceremony, they would associate with and be announcing their support for it, contrary to their convictions. (App. 9.) See *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981) (holding that a court may not judge the reasonableness of a sincere religious belief). They come to that belief “based on decent and honorable religious or philosophical premises.” *Obergefell*, 135 S. Ct. at 2602. But, unlike this Court, which took pains in *Obergefell* not to disparage such beliefs and in *Masterpiece Cakeshop v. Colo. Civ. Rights. Com’n*, 138 S. Ct. 1719, 1729 (2018), took pains to assure that decision makers did not do so either, the lower tribunals here have both

disparaged and punished the bakers for holding and acting upon their beliefs by refusing to participate in a same-sex marriage ceremony. Whether that is constitutionally permissible is the question presented on these facts, important questions previously identified as such by this Court.

III. The Vendors are Not Discriminating on the Basis of “Sexual Orientation.”

The record is clear in this case that the bakers did not discriminate against the wedding participants because of their sexual orientation. They were quite willing to serve them, despite being aware of their sexual orientation, in a non-marriage context. The bakers had no objection to serving homosexuals, even those already in a same-sex relationship (App. 19), but only to participating in a same-sex marriage ceremony. (App. 16, 193.) Such participation by assisting the ceremony with their services, just like the State’s licensing, would send a message to others of acceptance and approval, “offering symbolic recognition and material benefits to protect and nourish the union.” *Id.* at 2601.

And it does that in a way that is not present in the mere exchange of goods and services disassociated from the ceremonial event. This would be similar to an African-American restaurateur serving Caucasians regularly in his restaurant, but refusing to cater their Ku Klux Klan banquet. In this situation, the restaurateur’s refusal is tied not to the race of the customer, but to the message that will be communicated at the event. It is not a rejection of all Caucasians, but a refusal to become associated with or to facilitate a racist ideology. Indeed, as this Court

pointed out in *Masterpiece Cakeshop*, the Colorado Civil Rights Commission recognized this important distinction in several other contexts. 138 S. Ct. at 1740 (Thomas, J., concurring); *id.* at 1734 (Gorsuch, J., concurring). And the United Kingdom Supreme Court, presented with a very similar case involving bakers refusing to prepare a cake celebrating a same-sex marriage, recently recognized that this refusal was not based on sexual orientation discrimination, but on being unwilling to participate in the message it conveyed.²

The same is true here. The bakers only refused to participate in the message communicated during the same-sex marriage. They did not refuse service on the basis of sexual orientation, but on the basis of the desire (indeed, the ethical imperative in their case) not to become associated with, or to assist in communicating, a message with which they disagreed and that would, in their view, directly indicate their support for that message.

In this respect, the Oregon tribunals acted inconsistently with *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995). There, this Court held that, when parade organizers refused to let LGBT individuals march with them, it was not because they wished “to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner,” expressing an unwanted message at the event. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (summarizing and quoting *Hurley*, 515 U.S. at

² *Lee v. Ashers Baking Co.*, [2018] UKSC 49 (appeal taken from N. Ir.).

574-75). The same is true here: the bakers refused to service the same-sex marriage not because the brides were homosexual, but because of the message the marriage communicated.

IV. Non-discrimination Laws Used in this Way Unconstitutionally Compel Speech and Assembly by Forcing the Vendor to Associate with and Facilitate the Ceremony's Message or Punishing the Refusal to Do So.

Even assuming that it violated the nondiscrimination laws for a black restaurateur to refuse to cater a Ku Klux Klan banquet, the restaurateur would have a valid defense to being punished for his refusal. That is because he would be exercising his own constitutional rights not to associate with or to facilitate racist messages. By requiring such association and facilitation on pain of monetary damages, the State would unconstitutionally compel speech and assembly.

The same is true here for these bakers. See *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321 (2013) (holding that conditioning a grant on compelled speech is unconstitutional). This Court in *Obergefell* took pains to explain that it understood the very situation in which these bakers find themselves and that, by ruling that States could not deny homosexual couples a marriage license, it did not intend to infringe on the First Amendment rights of those who would object for religious or other sincere reasons:

Finally, it must be emphasized that religions,

and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.

135 S. Ct. at 2607.

Like the liberty interest to define one's own identity that this Court found controlling in *Obergefell*, *id.* at 2593, 2599, individuals have a liberty interest, founded both in the First and Fourteenth Amendments, not to be compelled to propagate or advocate a message they find ethically objectionable. "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). The baker here could service the same-sex marriage ceremony "only at the price of evident hypocrisy." *All. for Open Soc'y*, 133 S. Ct. at 2331. Laws "that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 624, 642 (1994). Indeed, "[t]he government may not prohibit the dissemination of ideas that it disfavors, nor compel

the endorsement of ideas that it approves The First Amendment protects ‘the decision of both what to say and what not to say.’” *Knox v. Serv. Employees Int’l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) (quoting *Riley v. Nat’l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988)).

The freedom of assembly, although a freestanding right, is a close cousin of the freedom of speech. Quite commonly, individuals exercise their freedom of speech by gathering in groups. Conversely, by restricting the access of individuals to each other, their rights to free speech can be restricted or eliminated altogether. The two rights, then, often do their essential work in tandem.³ Furthermore, the right of association is also implicated in the outworking of these rights: “The established elements of speech, assembly, association, and petition, ‘though not identical, are inseparable.’” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

The State, through its non-discrimination laws, is trying to force an individual with religious

³ See *NAACP v. Ala.*, 357 U.S. 449, 460 (1958) (“this Court has more than once recognized . . . the close nexus between the freedoms of speech and assembly”); *Thomas v. Collins*, 323 U.S. 516 (1945) (noting that rights of the speaker and audience are “necessarily correlative”); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (“the right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental”); *Whitney v. Cal.*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring in the result) (“without free speech and assembly discussion would be futile”), *majority opinion overruled on other grounds*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

objections to facilitate and support a ceremony with great symbolic significance. Just as the parade organizers objected to associating with those wishing to espouse an unwanted message in *Hurley*, 515 U.S. at 568-81, the bakers here object to being associated with a marriage they consider improper because it implies their consent to, and approval of, the message of the event. The First Amendment freedoms of speech and assembly “deny those in power any legal opportunity to coerce that consent.” *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). No officials may “force citizens to confess by word or act” the “orthodox” position in “religion[] or other matters of opinion.” *Id.* at 642.

CONCLUSION

A Jewish Community Center cannot constitutionally be punished for racial or national origin discrimination for its refusal to rent its hall for a PLO fundraiser. Nor can these bakers properly be compelled to associate with and foster a wedding ceremony they find morally objectionable, or be penalized for refusing to do so. This Court should grant the petition and reverse. The issues raised are both fundamental and far-reaching.

Respectfully submitted,
This 26th day of November 2018,

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