No. 22-204

IN THE
Supreme Court of the United States

MELISSA ELAINE KLEIN AND AARON WAYNE KLEIN,
Petitioners,

v.

OREGON BUREAU OF LABOR AND INDUSTRIES,
Respondent.

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

BRIEF OF *AMICUS CURIAE* ALABAMA CENTER FOR LAW AND LIBERTY IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Alabama Center for Law and Liberty ("ACLL") is a nonprofit public-interest firm based in Birmingham, Alabama, dedicated to the defense of limited government, free markets, and strong families. Believing that religious liberty and free speech is a cornerstones of limited government and individual liberties, ACLL believes that the First Amendment requires a judgment in favor of Petitioners in the present case.

SUMMARY OF THE ARGUMENT

Scholars and Justices of this Court have debated extensively whether the Free Exercise Clause protects one's right to a religious exemption from neutral and generally applicable laws. In *Fulton v. City of Philadelphia*, Justices Barrett and Kavanaugh found the historical record as to this issue largely silent but the textual argument compelling. Thus, ACLL takes a more nuanced approach to the debate here, arguing that the relevant question is whether the founding

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[1] Pursuant to Rule 37.2, all parties were given ten days' notice of intent to file this brief and have consented to its filing. Pursuant to Rule 37.6, 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 *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

generation would have understood the words "free exercise of religion" to protect the Kleins' conduct. This analysis, in turn, focuses on what the word "religion" encompassed. To answer this question, ACLL examines the confessions and creeds that were common in 1791 in America and finds that all of them required Christians to obey God's moral law. Since that law, at least as it was understood by the Christian Americans of 1791, requires the Kleins to abstain from endorsing same-sex marriage, their conduct is protected by the First Amendment.

If the Free Exercise Clause alone is not enough to answer the inquiry, then basic Free Speech principles should answer it. The history and basic principles of Free Speech overwhelmingly compel the conclusion that the government may not force people to praise a message with which they disagree. Artistic expression in creating a custom wedding cake is a form of such speech. Therefore, the Free Speech Clause protects the Kleins' conduct.

ARGUMENT

I. The Founding Generation Would Have Understood the Word "Religion" in 1791 to Cover Obeying God's Moral Commandments as Understood by the Various Christian Sects of America

The First and Fourteenth Amendments to the Constitution prohibit the government from

"prohibiting the free exercise" of religion. U.S. Const. amends. I, XIV. Scholars have thoroughly debated whether the original meaning of the Free Exercise Clause granted accommodations from valid and neutral laws of general applicability or not. *Compare* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1989) (arguing that, generally, it does), *with* Phillip Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992) (arguing that it does not). This Court has been on both sides of that issue during its history. *Compare Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (subjecting laws that infringe on free exercise to the compelling-interest test) *with Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (holding that a religious belief does not excuse an individual of complying with a valid and neutral law of general applicability).

Last year, in *Fulton v. City of Philadelphia*, the Justices of this Court were asked to overrule *Smith*. A majority declined to do so, finding that *Smith* was sufficient to resolve the case at hand. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876-77 (2021). Justices Alito, Thomas, and Gorsuch argued thoroughly that the Free Exercise Clause generally excuses religious exercise from complying with neutral and generally applicable laws except when the public peace and safety are threatened. *Id.* at 1901 (Alito, J., concurring in judgment). Justices Barrett and Kavanaugh found the textual and structural

arguments compelling that the Free Exercise Clause had to be more than simply a nondiscrimination provision. *Id.* at 1882 (Barrett, J., concurring). However, they also found "the historical record more silent than supportive *on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws* in at least some circumstances." *Id.* (emphasis added).

As to this matter, ACLL respectfully submits that the historical analysis in *Fulton* may have been focused on the wrong question. Instead of surveying history to answer the specific question that Justice Barrett flagged, ACLL respectfully submits that history should be consulted to answer another question: what did that generation consider "religion" to be? Since that is what is in the Constitution, that needs to be the focus of the inquiry. If the Kleins' conduct would have fallen within what a reasonable person in 1791 would have considered to be the "free exercise of religion," then Respondent's case collapses.

While providing a comprehensive explanation of all that was considered "religion" in 1791 may be too exhaustive for this brief,[2] ACLL believes it can provide one helpful source to consider: the creeds and confessions of the major religions in America in 1791.

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[2] *Cf. Fulton*, 142 S. Ct. at 1895 (Alito., J., concurring) (noting that there might be difficulty denoting the "outer bounds" of the term but arguing that the exercise in that case was clearly religious).

This certainly does not set a ceiling on what "free exercise of religion" protects, but it does provide a floor. For instance, we can debate today whether freedom of the press applies to the internet, but no reasonable person from 1791 would have questioned whether it applied to printing presses. We can debate whether the Second Amendment applies to AR-15's and the like, but no reasonable person would have questioned whether it applied to muskets. So in the same way, if ACLL can demonstrate that the Kleins are seeking to exercise their religion here in accordance with well-established religious beliefs from 1791, then there should be absolutely no question as to whether the words, as interpreted according by their original meaning, protect the Kleins' right to decline to design a custom cake for a same-sex wedding.

To be clear, ACLL is not asking this Court to decide what the theologically correct position is on whether the Kleins should bake the cake or not. "Courts are not arbiters of scriptural interpretation." *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981). Rather, this exercise is more *sociological* than *theological* in nature, asking only what "intelligent and informed people of the time … display[ed] how the text of the Constitution was originally understood." Antonin Scalia, *A Matter of Interpretation* 38 (new ed. 2018). If the people of America in 1791 would have been acquainted with the tenants of the major faiths in the Country and knew that a near uniformity among them providing that conduct like the Kleins was religious

exercise, then the Free Exercise Clause protects their conduct.

A. Examining the Creeds and Confessions That Were Common in 1791

It is beyond reasonable dispute that the dominant religion in America in 1791 was Christianity. The Christian population of that era was overwhelmingly (but not exclusively) Protestant. As such, when people in 1791 thought about the word "religion," they were probably thinking, at least, about what all of these Protestant confessions and doctrines had in common. Thus, while reproducing all of the confessions of the churches that had a major presence in America in 1791 would be too tedious, ACLL will examine the confessions of those churches to determine whether they said anything about whether their religion required them to obey God's moral commands. If so, then the exercise of religion would have included carrying out those commands.

1. The Confessions of the Established Churches

As Justice Thomas has observed, at least six of the states had established religions at the time the Bill of Rights was ratified. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring in judgment) (citing McConnell, *supra*, at 1437). The four New England states all had Congregationalist establishments. McConnell, *supra*, at 1437.

Maryland, South Carolina, and Georgia did as well, and those establishments tended to be more like the Church of England. *See id.*; 3 John Eidsmoe, *Historical and Theological Foundations of Law* 1253, 1259, and 1327-28 (2011). Thus, at the very least, representatives from New England and the three Southern colonies listed above would not have likely voted for the new Constitution unless they believed that it protected the tenants of those faiths. Thus, ACLL will begin its examination with the confessions of those two denominations.

a. Congregationalism

The Westminster Confession of Faith, written 1646 during the English Civil War, "became the dominant confession of Reformed Christianity." *The Westminster Confession of Faith: Introduction* 181, in *Creeds, Confessions, & Catechisms* (Chad Van Dixhoorn ed. Crossway 2022) (hereinafter "Van Dixhoorn"). This confession became the prototype for the Congregationalist, Baptist, and Methodist confessions that followed later. *Id.*

The leading Congregationalist confession was called *The Savoy Declaration*. Written in Savoy, England, in 1658, this Declaration was meant to reflect what the Congregationalist faith believed. Chapter 19, entitled, "Of the Law of God," reflected what they believed God required of them when it came

to His law. *Savoy Declaration*, ch. 19. (1658).[3] This Chapter held that "God gave to Adam a law of universal obedience" that bound "him and all his posterity to personal, entire, and perpetual obedience." *Id*. at para. 1. This law was eventually given by God to Moses in the Ten Commandments. *Id.* at para. 2. The "sundry judicial laws" continued in their "general equity" to be "still of moral use." *Id.* para. 3. Even in the New Testament era, the *Savoy Declaration* held that "[t]he moral law doth for ever bind all … to the obedience thereof … neither doth Christ in the gospel any way dissolve, but much strengthen this obligation." *Id.* para. 5. Despite the fact that the Congregationalists believed they were saved by grace instead of works of the law, the precepts of the moral law were still a "rule of life, informing them of the will of God, and their duty, it directs and binds them to walk accordingly." *Id.* para. 6. Thus, the Congregationalists very much believed they were obligated to obey God's moral law.

b. Anglicanism and Episcopalianism

When the Church of England broke away from the Church of Rome, it initially drafted 42 articles of religion for the new church, but it eventually settled on 39. *The Thirty-Nine Articles of Religion: Introduction* 113 in Van Dixhoorn, *supra*. In

[3] *Available at* http://apostles-creed.org/wp-content/uploads/2014/07/the-savoy-declaration-of-faith-and-order-1658.pdf.

attempting to wrestle with the question of whether the Old Testament Law was binding on a New Testament Christian, the Articles of Religion took a position similar to the *Savoy Declaration*:

> Although the Law given from God by Moses, as touching Ceremonies and Rites, do not bind Christian men, nor the Civil precepts thereof ought of necessity to be received in any commonwealth; yet notwithstanding, no Christian man whatsoever is free from the obedience of the Commandments which are called Moral.

The Thirty-Nine Articles of Religion art. VII (1571).

After the American Revolution, those who had adhered to the Church of England in this Country wanted to keep the faith without having to answer to the English government. Thus, in 1789, the Episcopalian Church was formed in Philadelphia "to unify all Episcopalians in the United States into a single national church." *History of the Episcopal Church*, The Episcopal Church, https://www.episcopalchurch.org/who-we-are/history-episcopal-church/american-church (last visited Oct. 6, 2022). In 1801, the Episcopal Church also adopted 39 Articles of Religion. Article 7 of the Episcopal Confession was identical in all material respects to

Article 7 of the Anglican Confession. *See Articles of Religion*, art. VII (1801).[4]

Thus, just as the Congregationalists of New England believed they were bound by their religion to keep the moral commandments of God, so did the Anglicans/Episcopalians of the South.

2. Churches with a Non-established but Substantial Presence in America

There were many other churches in America that had a substantial enough presence to make a difference but not enough to receive the status of government-established. Those churches included the Presbyterians, Baptists, and Quakers. As Professor McConnell has noted, these evangelical denominations, especially Baptists and Presbyterians, led the charge for religious freedom in America against the Anglican and Congregationalist establishments. McConnell, *supra*, at 1437.

a. Presbyterianism

As discussed above under the Congregationalist model, *The Westminster Confession of Faith* was written in 1646 in the midst of the English Civil War and became the standard for Reformed Christianity. In particular, it became the standard confession for

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[4] *Available at* https://www.episcopalchurch.org/about-us/articles-of-religion.

the Presbyterian Church. In 1788, American Presbyterians adopted it as their own with minor exceptions. *The Westminster Confession of Faith: Introduction* 182 in Van Dixhoorn, *supra*. But as to what the Confession said about the Law of God, the confession was identical in all material respects to *The Savoy Declaration*, discussed above. *See The Westminster Confession of Faith* ch. XIX (1644) in Van Dixhoorn, *supra*, at 212-14.

b. Baptists

The earliest Baptist Confession was written in 1644, but the Second London Baptist Confession (which is commonly called "The London Baptist Confession") was written in 1677 and formally adopted in 1689. *The London Baptist Confession: Introduction* 237, in Van Dixhoorn, *supra*. This confession was based on *The Westminster Confession of Faith* and *The Savoy Declaration* with adjustments being made for the particulars of the Baptist faith. Chapter 19, "Of the Law of God," is material to *The Savory Declaration* and *The Westminster Confession of Faith* in all material respects. *The London Baptist Confession* Ch. 19 (1689), in Van Dixhoorn, *supra*, at 268-70.

c. Quakers

As the Court knows, William Penn was a Quaker and was originally granted a charter that covered Pennsylvania, New Jersey, and Delaware. 3 Eidsmoe,

supra, at 1330-40. Penn, of course, chose to use his power not to enforce the Quaker faith upon nonadherents but rather as a haven for religious freedom. *See id.* at 1332-36. Nevertheless, Quakers had a substantial presence, at least in Pennsylvania and New Jersey, *id.* at 1330, 1339, but were also elsewhere throughout the colonies.

The official confession of the Quakers was the 1675 *Confession of the Society of Friends*. According to the Eighth Proposition of this confession, freedom in Christ was not the freedom to sin "but to be free from actual sinning and transgressing the law of God[.]" *The Confession of the Society of Friends* prop. XIII (1675).[5] Though this confession is not as clear as the others on the parts of the Law that are still binding, it does reflect the proposition that Christians are religiously obligated to obey the Law of God.

3. Other Churches with a Notable Presence in America

There were other churches in America that may not have had as strong of a presence in America in 1791 as the aforementioned but should still be noted, since the Founding Generation would have undoubtedly been aware of their existence and probably would have been aware of their tenants.

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[5] *Available at* https://biblehub.com/library/schaff/the_creeds_of_the_evangelical_protestant_churches/the_confession_of_the_society.htm

Shortly before the First Amendment was ratified, the Methodist Episcopal Church was small but on the rise in America. In 1784, this church, under the leadership of John Wesley, adopted the *Twenty-Five Articles of Religion*. Article VI resembled the Article VII of the Anglican *Thirty-Nine Articles of Religion* in all material respects. *See The Articles of Religion in the Methodist Church* art. VI (2016).[6]

Lutherans had enough presence in America where Professor McConnell gives them credit with Baptists and Presbyterians for being part of the evangelical force that drove the First Amendment. McConnell, *supra*, at 1439. Because the focus of *The Augsburg Confession of 1530* was focused so heavily on defending the doctrine of justification by faith alone, this confession did not discuss obedience to the moral law as much as the others, but it did affirm that "it is necessary to do the good works commanded by God, because of God's will." *The Augsburg Confession of 1530* art. VI (1530), in Van Dixhoorn, *supra*, at 37.

But Lutheranism had a huge impact on all Protestant sects by Luther's three uses of the Law: civil (which is instructive for civil governments), ceremonial (or theological, our tutor to lead us to Christ), and moral (or didactic, which "is sometimes called the *rule* by which we govern our lives."). 3 Eidsmoe, *supra*, at 980-81. The idea that the moral

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[6] *Available at* https://www.umc.org/en/content/articles-of-religion.

law is still binding on Christians even if the ceremonial and civil laws are not is a theme reflected in every confession examined herein.

The Dutch Reformed Church was also active in America, and it was originally the official church of New York. 3 Eidsmoe, *supra*, at 1342. The confession of this church was called *The Canons of Dort*. These canons held that assurance of salvation in Christ was no excuse for failing to obey God's commandments. *The Canons of Dort: The Fifth Main Point of Doctrine* art. XIII, in Van Dixhoorn, *supra*, at 172.

Finally, Catholicism had a presence in America at the time of the First Amendment's ratification. While Catholics came in larger numbers in the Nineteenth Century, they had a presence here before that. Despite its many points of theological difference with Protestantism, Catholicism agreed that Christians were morally bound to obey God's laws, especially as found in the Ten Commandments. *See generally Catechism of the Catholic Church* Part III, § 2 (1993).[7]

B. Analysis and Conclusion

Thus, every single Christian sect in America in 1791 held that Christianity required its adherents to obey God's moral law and commandments. As the Bible teaches and as Christians of all sects believed

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[7] *Available at* https://www.vatican.va/archive/ENG0015/_INDEX.HTM.

for thousands of years, God created marriage between a man and a woman in the beginning. *See Genesis* 2:18-24. When the Law came later, God explicitly prohibited adultery. *Exodus* 20:14. He also taught that sexual relationships between two people of the same sex were immoral, even calling it an abomination. *Leviticus* 18:22. When Jesus came, he drew on *Genesis* to teach that God created sex for a man and a woman in marriage. *See Matthew* 19:3-9. The Apostle Paul likewise condemned heterosexual and homosexual activity outside of one man and one-woman marriage. *Romans* 1:24-28.

As Justice Alito has correctly observed, no serious argument can be made that same-sex marriage is deeply rooted in this Nation's history and tradition, since no country in the world legalized it until 2000. *United States v. Windsor*, 570 U.S. 744 (2013) (Alito, J., dissenting). Thus, if we examined the historical record for evidence of what the founding generation thought of the clash between gay rights and religious freedom, we would not find much, since that issue had not yet arisen. However, what we would find is overwhelming evidence that Christians were bound to obey God's moral law. Since that law, at least as understood by the Christians of the founding generation, required them to abstain from sexual activities that God declared immoral, they would have had no problem concluding that the Kleins' decision to abstain from using their artistic talents to celebrate a same-sex wedding was undoubtedly protected religious exercise.

II. The Free Speech Clause Protects the Kleins' Conduct

A. Constitutionally protected speech includes wedding cake communications

"Congress shall make no law...abridging freedom of speech." U.S. Const., amend. I. The United States Supreme Court has repeatedly confirmed that the protected "speech" under the First Amendment extends beyond mere spoken words and, based on judicial precedent set by this Court, custom wedding cakes should fall under the First Amendment's protection of speech.

The Court has previously held many forms of speech as constitutionally protected under the First Amendment including: verbage on a shirt in *Cohen v. Cal.*, 403 U.S. 15, 18 (1971); compelling a payment of union subsidies in *United States v. United Foods*, 533 U.S. 405, 411 (2001) and *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2484 (2018); and covering a state motto on a license plate in *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Further,"[s]ymbolism[, such as saluting a flag,] is a . . . way of communicating ideas," and compelling such communication "transcends constitutional limitations on the[state's] power." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 & 642 (1943). Additionally, "pictures, films, paintings, drawings, and engravings, both oral utterance and the

printed word have First Amendment protection." *Kaplan v. California*, 413 U.S. 115, 119-120 (1973).

Most recently the Supreme Court held in *Masterpiece Cakeshop* that, under the First Amendment, "the religious and philosophical objections to gay marriage are protected views." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018). For new mediums of communication that have yet to be specifically addressed, such as custom wedding cakes, "the basic principles of freedom of speech . . . do not vary." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)). Upon consideration, the nature of the speech at issue is to be taken as a whole, not in part. *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 796 (1988). Based on this Court's judicial precedent, which has held that words on a shirt, paying union subsidies, covering a state license plate, paintings, drawings, and saluting a flag all classify as "speech," it follows that the definition of speech would also include a custom wedding cake that "as a whole" would convey a celebration of gay marriage; the State compelling such communication should be held as unconstitutional.

B. The government lacks authority here to impede upon free speech

1. History of the First Amendment and its importance

"The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J. concurring). The First Amendment exists to restrain the government from infringing upon an individual's right to freedom of speech. This Court has admitted that "the benefits of [the First Amendment's] restrictions on the Government outweigh the costs." *United States v. Stevens*, 559 U.S. 460, 461 (2010). Speech "is essential to our democratic form of government," *see*, *e.g., Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964), "and it furthers the search for truth," *see*, *e.g., Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). Additionally, religion played a factor in the composition of the First Amendment. "[I]n Anglo-American history, . . . government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022) (quoting *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, 760 (1995)).

Since the ratification of the Bill of Rights, the Supreme Court has held that the government cannot "regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) (quoting *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993)). The government cannot determine whether one individual's speech is worthy of protection while the other is not. "The First Amendment protects [both] 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*, 430 U.S. at 715.

2. Freedom of speech includes freedom from government compelled speech

In addition to the First Amendment's freedom of speech restricting the State from restricting certain speech, it also restricts the State from compelling speech. "When speech is compelled . . . individuals are coerced into betraying their convictions." *Janus*, 138 S. Ct. at 2464. This Court has "held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Id.* at 2463 (quoting *Wooley*, 430 U.S. at 714). "[A] law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence. *Id.* at 2464 (quoting *Barnette*, 319 U.S. at 633). Forcing an individual to convey a

message they do not want to convey is an abuse of the constitutional power of the State.

"[F]reedom of speech prohibits the government from telling people what they must say" through any form of speech - other than the narrow list of exceptions the Supreme Court has permitted. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). Certain speech that an individual chooses to refrain from based on their moral reservations, cannot then be compelled by the government. An individual cannot be forced into a form of speech when they exercise their freedom under the First Amendment to resort to silence - to not saying anything at all.

Moral reservations are also not left up to judgment by the State. "[E]sthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *Brown,* 564 U.S. at 790 (quoting *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000)). Speech cannot be sacrificed for efficiency. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018) ("*NIFLA*") (quoting *Riley*, 487 U.S. at 795). Public opinion does not determine how someone chooses to exercise their First Amendment right to free speech, but their *own* moral judgment guides that choice which is not to be restricted by the government.

3. Freedom of Speech has narrow exceptions which do not apply here

The government's limited authority over controlling speech does not extend to the case here. "[T]he First Amendment's free speech guarantee does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *Stevens*, 559 U.S. at 460-461. Freedom of speech extends to all speech, excluding the few narrow exceptions of unprotected speech. Several unprotected categories of speech have been accepted by the Court, and those categories of speech are "well-defined and narrowly limited classes." *Id.* at 468-469 (2010) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942)). Historically, unprotected categories of speech have often been found by the Court to have "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Stevens*, 559 U.S. at 470 (using *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992) (quoting *Chaplinsky,* 315 U.S. at 572). These constitutional restrictions on speech include "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct;" none of which would apply to a custom wedding cake creation. *Id.* at 460.

The Court has on at least two occasions declined to create another exception to the free speech doctrine, and they made it clear that it would take something "'intrinsically related' to the underlying abuse" to allow for another exception. *Id.* at 471 (citing *New*

York v. Ferber, 458 U.S. 747, 761 (1982) which held that a New York statute prohibiting the distribution of child pornography was constitutionally valid). The Court declined an exception for violent video games because the California law "abridge[d] the First Amendment rights of young people." *Brown,* 564 U.S. at 805. The Court also refused to decide whether depictions of animal cruelty would be constitutional, but held the statute banning them to be overly broad for purposes of the First Amendment. *Stevens*, 559 U.S. at 482.

"[T]he government's ability to permissibly restrict expressive conduct is very limited." *United States v. Grace*, 461 U.S. 171, 177 (1983). The Court stated that "[o]ur decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Stevens*, 559 U.S. at 472. The exceptions to the First Amendment are explicitly stated as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct - and it is important that the government does not grow in its authority to limit speech through setting a new precedent that conveying a message, such as a wedding cake design, may be limited by the State.

C. The State cannot regulate what does not exist

Finally, the government cannot regulate speech that does not exist. This assumption parallels the rule

from the *NFIB v. Sebelius* case where this Court stated that "an individual mandate forc[ing] individuals into commerce precisely because they elected to refrain from commercial activity. . . . is a law [that] cannot be sustained under a clause authorizing Congress to '"regulate Commerce."' *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 558 (2012). Similarly, here the State would be forcing someone to violate their own religious beliefs and morals to create and convey a message through a custom wedding cake; thus taking away their ability to remain silent and refrain from conveying any message at all.

"Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley,* 487 U.S. at 795. The state cannot make someone exercise their freedom of speech in a specific way. There are other means of obtaining a custom wedding cake without the baker taking part in unwanted speech, and without making the baker agree to convey a message against their moral beliefs. *See NIFLA*, 138 S. Ct. at 2376.

D. Conclusion

The issue here is not a prohibition of speech, but rather the State compelling an individual to convey a certain message on a wedding cake for a homosexual couple when the message goes against the moral and religious beliefs of the baker. This Court has held on numerous occasions that the freedom of speech under

the First Amendment protects the right to say nothing at all.

"By compelling individuals to speak a particular message, such notices 'alte[r] the content of [their] speech.'" *NIFLA,* 138 S. Ct. at 2371 (quoting *Riley,* 487 U.S. at 795). The ability to be spiritually diverse exists through the application of Constitutional rights, therefore, the differing opinions and moral beliefs are meant to exist in our society. *Barnette*, 319 U.S. at 641-642. If the Court compels a baker to conform to the messages they convey to the popular opinion, then both the diversity of thought in this country and the freedom of speech under the First Amendment will cease to exist.

CONCLUSION

This Court should grant certiorari and hold that the Free Exercise Clause and Free Speech Clause protect the Kleins' conduct.

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