

No. 18-112

In The
Supreme Court of the United States

—◆—
INQUIRY CONCERNING A JUDGE
RE: THE HONORABLE VANCE D. DAY,

Petitioner,

v.

THE OREGON COMMISSION ON
JUDICIAL FITNESS AND DISABILITY,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari To
The Supreme Court Of The State Of Oregon**

—◆—
**MOTION FOR LEAVE TO FILE BRIEF
AND BRIEF OF AMICUS CURIAE
FREEDOM OF CONSCIENCE DEFENSE FUND
IN SUPPORT OF PETITIONER**

—◆—
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MOTION FOR LEAVE TO FILE

The Freedom of Conscience Defense Fund (“FCDF”) respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioner. This case raises significant constitutional questions, and FCDF is well suited to explain the broad repercussions of the Oregon Supreme Court’s decision for judges across the country. FCDF timely notified both parties that it intended to submit its *amicus* brief. Counsel for petitioner has consented to the filing of this brief in a letter that has been lodged with the Clerk of this Court. Counsel for respondent did not consent to FCDF’s request.

FCDF is a nonprofit legal organization that protects the religious liberty of people of all faiths. *Amicus* is particularly interested in protecting the conscience rights of individuals and entities who face religious targeting by the government. In this case, the Oregon Supreme Court refused to address petitioner’s First Amendment defenses, which warranted consideration in light of this Court’s precedent. The court below also applied a judicial ethics rule to petitioner that seriously threatens the free exercise and free speech rights of judges nationwide. This Court’s resolution of these issues will set a critical standard for religious liberty in this case and for future litigants.

FCDF thus has a substantial interest in the constitutional interpretation this Court employs in deciding this issue and offers its view in hopes that it “may be of considerable help to the Court.” Sup. Ct. R. 37.1.

Therefore, FCDF respectfully requests that the Court grant leave to file the enclosed *amicus* brief and to consider the brief's arguments in support of petitioner.

Respectfully submitted,

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QUESTION PRESENTED

Whether the First Amendment protects a judge who declined to solemnize same-sex marriages because of his sincerely held religious beliefs.

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INTEREST OF AMICUS¹

The Freedom of Conscience Defense Fund (“FCDF”) is a nonprofit public-interest legal organization that defends the conscience rights and religious freedom of those of all faiths and no faith. FCDF’s mission is to provide trial-level legal services in cases involving religious liberty and free speech issues.

FCDF is concerned that the outcome of this case could affect the free exercise and free speech rights of judges—and public officials more broadly—to live and work according to their sincerely held religious beliefs. Consequently, FCDF files this brief to explain that punishing judges who decline to solemnize same-sex marriages is not only unnecessary, it is unconstitutional.

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STATEMENT

Rule 3.3(B) of the Oregon Code of Judicial Conduct prohibits judges from discriminating across a variety of functions, including solemnizing marriages. As relevant here, the statute provides:

¹ No counsel for any party authored this *amicus* brief in whole or part, nor did any person or entity other than proposed *amicus* or its counsel financially contribute to preparing or submitting this brief. All parties were timely notified of proposed *amicus*’ intent to file this brief. Petitioner has consented to the filing by letter, which has been lodged with the Clerk of this Court. Respondent did not consent; thus, proposed *amicus* have filed a motion seeking leave to file this brief.

A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice * * * against parties, witnesses, lawyers, or others based on attributes including but not limited to, sex, gender identity, race, national origin, ethnicity, religion, sexual orientation, marital status, disability, age, socioeconomic status, or political affiliation and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

Code of Jud. Conduct, Rule 3.3(B).

The Oregon Supreme Court defined “manifesting bias or prejudice” as “taking an action that must be capable of perception.” Pet. App. 106a-107a. “Manifestation of bias or prejudice,” the Oregon Supreme Court stated, “also may be discernable through actions that a judge may take over time, in the performance of his or her judicial duties, that demonstrate a pattern of bias or prejudice.” Pet. App. 108a.

The material facts of this case are undisputed. Since 2011, petitioner Vance D. Day has served as a circuit court judge in Marion County, Oregon. When the governor of Oregon appointed Judge Day to the bench in 2011, same-sex marriage was prohibited under state constitutional and statutory law. Or. Const. art. XV, § 5a; Or. Rev. Stat. § 106.010. In 2014, however, an Oregon federal court struck down the state's constitutional provision banning same-sex marriage. See *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (D. Or. 2014). A year later, this Court decided *Obergefell v. Hodges*,

which granted same-sex couples the constitutional right to marry. 135 S. Ct. 2584 (2015).

Judge Day is a Christian. Consistent with his faith, Judge Day believes that God intended marriage to be a holy union between one man and one woman. Under state law, a judge may voluntarily solemnize marriages. Or. Rev. Stat. § 106.120. Accordingly, Judge Day told his clerks and judicial assistants that he would be available to solemnize opposite-sex marriages. But he also told his staff that he would not officiate same-sex weddings, because doing so would violate his sincerely held religious convictions. He thus instructed his staff not to schedule same-sex weddings on his calendar. Pet. Br. 4. Even so, until he stopped solemnizing marriages in 2014, Judge Day had never refused to officiate a same-sex wedding; in fact, he was never even asked to do so. Pet. Br. 4-5.

That simple instruction to his staff cost Judge Day dearly. It began in August 2014, when Judge Day self-reported to the Oregon Commission on Judicial Fitness and Disability an incident where a probationer under his judicial supervision illegally handled a firearm belonging to Judge Day's son. Pet. Br. 3. Consequently, the Commission launched an extensive investigation into Judge Day's character and fitness. Pet. App. 127a-185a. The investigation went beyond the firearm incident. As part of its inquiry, the Commission learned about Judge Day's position about solemnizing same-sex marriages. For that, and for additional unrelated findings of alleged judicial misconduct, the Commission recommended to the Oregon Supreme Court that

it remove Judge Day from the bench. Pet. App. 184a. The Oregon Supreme Court, which decides judicial disciplinary cases, held that Judge Day violated Rule 3.3(B) for manifesting bias against same-sex couples. Pet. App. 110a. The court noted that Judge Day never actually exhibited bias against a same-sex party in a proceeding, nor did he ever refuse to solemnize a same-sex wedding. Pet. App. 104a-105a, 109a. Instead, the court construed the term “others” to apply to Judge Day’s judicial staff. The court summarized its holding as follows:

Respondent implemented a screening process with his staff, aimed at ensuring that he married only opposite-sex couples, which treated those couples differently from same-sex couples. That screening process demonstrated to respondent’s staff that, in exercising his statutory authority and judicial duty to solemnize marriages, he would not treat all couples fairly. That conduct, in turn, manifested prejudice against same-sex couples, based on their sexual orientation, contrary to Rule 3.3(B).

Pet. App. 110a.

Thus, under the Oregon Supreme Court’s reading of Rule 3.3(B), Judge Day manifested bias and prejudice on the basis of sexual orientation when he informed his staff that he would not officiate same-sex weddings. In defense, Judge Day argued that his choice about solemnizing same-sex weddings was protected under the Free Exercise and Free Speech clauses of the

First Amendment. Pet. Br. 11. In its ruling, however, the Oregon Supreme Court declined to consider Judge Day's constitutional defenses, concluding that they would not affect its final determination of judicial misconduct. Pet. App. 113a. The court suspended Judge Day, without pay, for three years. Pet. App. 126a.



SUMMARY OF ARGUMENT

1. The Oregon Supreme Court's application of Rule 3.3(B) violated Judge Day's rights under the First Amendment's Free Exercise and Free Speech Clauses by punishing him for his sincerely held religious beliefs about same-sex marriage.

2. The Oregon Supreme Court's application of Rule 3.3(B) expressly punished Judge Day for his sincerely held religious beliefs about marriage, thereby violating his free exercise rights. The Free Exercise Clause protects against government actions that target religious conduct. As such, this Court has repeatedly confirmed that laws imposing "special disabilities on the basis of * * * religious status" trigger the strictest scrutiny. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993). Here, Rule 3.3(B) puts Judge Day to a choice: He must either solemnize same-sex marriages and therefore violate his conscience, or refuse and thus face devastating consequences. When the government hangs this Damoclean sword over an individual, it has imposed a penalty on the free

exercise of religion that must undergo the most rigorous scrutiny.

3. The Oregon Supreme Court’s application of Rule 3.3(B) punished Judge Day for his expressive speech about same-sex marriage. “The First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed.” *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (internal citations omitted). The First Amendment also prohibits laws that fundamentally alter speech and force participation in an expressive event. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557 (1995). Here, the court applied Rule 3.3(B) to Judge Day as a content-based “catch-all provision” to punish him for his viewpoint on same-sex marriage. Rule 3.3(B) also puts Judge Day in an impossible dilemma: If he is going to solemnize opposite-sex marriages *voluntarily*, then he is *required* to do the same for same-sex marriages. To be sure, the State has a compelling interest in assuring that judges follow the law and are unbiased. See *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1659 (2015). But “religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.” *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018). This is one such instance.

4. The Oregon Supreme Court’s application of Rule 3.3(B) has created a religious test to satisfy a wildly overinclusive prohibition of judicial bias. Under

this ad hoc test, judges whose religious convictions prevent them from solemnizing a same-sex marriage are effectively disqualified from judicial office. If the government has the power to remove a judge for his sincerely held religious beliefs, then no judge's career is safe.

5. The Oregon Supreme Court's refusal to consider Judge Day's First Amendment defenses raises troubling questions about whether they gave his case "full and fair consideration." *Masterpiece Cakeshop*, 138 S. Ct. at 1732. The court, under thinly veiled hostility, imposed a draconian punishment that will permanently mar Judge Day's otherwise sterling reputation. Imposing such a penalty without adequately considering Judge Day's religious convictions undermines "the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion." *Id.*

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ARGUMENT

I. The Oregon Supreme Court's Erroneous Decision Leaves Unaddressed Serious First Amendment Claims

A. Rule 3.3(B) as applied imposed a penalty on Judge Day's Free Exercise rights

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. This Court has made clear that the

government “cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.” *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018). Thus, a law that imposes a penalty on religious beliefs must be narrowly tailored to achieve a compelling governmental interest. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Such a law “will survive strict scrutiny only in rare cases.” *Id.* This is not one of those cases.

In *Lukumi*, this Court struck down three ordinances banning animal sacrifice, an essential ritual in the Santeria religion. *Id.* at 547. Adherents to Santeria challenged the ordinances under the Free Exercise Clause, alleging that despite their facial neutrality, the ordinances discriminated on the basis of religion. In response, the City claimed that the ordinances furthered a compelling interest in preventing animal cruelty. Applying strict scrutiny, this Court held that the ordinances “devalue[d] religious reasons” for animal slaughter “by judging them to be of lesser import than nonreligious reasons,” thereby “singl[ing] out” religious practice “for discriminatory treatment.” *Id.* at 537–38. Addressing the City’s asserted compelling interest, the Court noted the “effect of [the ordinances] in [their] real operation” did little more than prohibit animal sacrifices carried out at Santeria services. *Id.* at 535. Because the ordinances’ burdens fell exclusively on the Santeria adherents, the Court concluded

that the ordinances imposed a penalty on the free exercise of religion. *See id.* at 546.

The Oregon Supreme Court’s application of Rule 3.3(B) and its refusal to consider Judge Day’s First Amendment defenses penalized his free exercise of religion that cannot survive the “most rigorous” scrutiny. *Lukumi, supra*, at 546. In punishing Judge Day, the court reasoned that suspending him was necessary to prevent judicial actions that could affect perceptions of fairness or prompt an unfavorable view of the judiciary. Pet. App. 109a. To be sure, this Court has made clear that judicial integrity is “a state interest of the highest order.” *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002). Nevertheless, strict scrutiny requires courts to “look[] beyond broadly formulated interests justifying the general applicability of government mandates.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006). Based on both the Oregon Supreme Court’s interpretation of “impartiality” and the record, it is clear that Rule 3.3(B) as applied does not advance a compelling interest, but rather impermissibly imposes “special disabilities on the basis of * * * religious status.” *Lukumi, supra*, at 533.

First, the vagueness of Rule 3.3(B) as applied undermines any compelling interest. According to the Oregon Supreme Court, Rule 3.3(B)’s “fundamental objective” is “ensuring the public’s trust in an impartial and fair judiciary.” Pet. App. 110a. But this vague “impartiality” standard is rife with danger. “We sometimes think, loosely, that ethics is good and

therefore more is better. But ‘more’ is not better if ‘more’ exacts higher costs, measured in terms of vague rules that impose unnecessary disqualifications.” Ronald D. Rotunda, *The Propriety of a Judge’s Failure to Recuse When Being Considered for Another Position*, 19 GEO. J. LEGAL ETHICS 1187, 1195 (2006). Judge Day’s case exemplifies the dangerous result of the Oregon Supreme Court’s sweeping application of an overly broad rule: Any judge who shares Judge Day’s religious convictions about marriage finds his or her career in jeopardy. “Even a compelling interest may be outweighed in some circumstances by another even weightier consideration.” *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2780 (2014). In this case, that consideration was Judge Day’s free exercise rights.

Second, Rule 3.3(B)’s compelling interest as applied to Judge Day falters upon a closer look at the record. Nothing in the record suggests Judge Day threatened the public’s confidence in the judiciary. Pet. Br. 2. Indeed, Judge Day is not even required by law to perform any wedding, *see* Or. Rev. Stat. § 106.120, nor did he ever refuse to solemnize a same-sex marriage. Pet. Br. 4. Nonetheless, the Oregon Supreme Court held that because Judge Day told his staff he would not solemnize same-sex weddings, he manifested prejudice “in a more general way” to the extent his instruction “encompass[ed] an expression of bias.” Pet. App. 109a. A law, however, cannot treat as compelling what it does not even require. By its broad reading of Rule 3.3(B), the court “simply posit[ed] the existence of the disease sought to be cured.” *Turner Broad. Sys., Inc. v. F.C.C.*,

512 U.S. 622, 664 (1994) (internal quotation marks omitted). In the face of the clear infringement of Judge Day’s free exercise of religion, the court below went too far.

Even if Rule 3.3(B) as applied furthers a compelling interest, it is neither narrowly tailored nor the least restrictive means to achieve that interest. “The least-restrictive-means standard is exceptionally demanding,” and it requires the government to “sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y].” *Hobby Lobby, supra*, at 2780. Here, the solution was and still is simple: Allow judges to recuse themselves from solemnizing same-sex marriages and refer the requesting couple to a judge who has no religious objection to same-sex marriage. If that would not be possible, then the Oregon Supreme Court at a minimum could have levied a far less drastic punishment, such as a private censure or an admonishment.

The Oregon Supreme Court circumvented Judge Day’s Free Exercise defense by declining altogether to consider his constitutional challenges (Pet. App. 113a), and its draconian punishment further confirms that its conclusion was anything but religiously neutral. This Court should grant review because Rule 3.3(B) as applied imposes a penalty on Judge Day’s free exercise of religion, one that cannot survive this Court’s “most rigorous” scrutiny. *Lukumi, supra*, at 546.

B. Rule 3.3(B) as applied forces Judge Day to engage in speech and participate in an event that violates his Free Speech rights

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws “abridging the freedom of speech.” U.S. Const. amend. I. Under the Free Speech Clause, the government has “no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 226 (2015) (internal quotation marks omitted). Thus, a content-based law that targets speech because of the topic discussed or the message expressed is presumptively unconstitutional and therefore subject to strict scrutiny. *See, e.g., R.A.V. v. St. Paul, Minn.*, 505 U.S. 377, 395 (1992).

Under Rule 3.3(B), a judge is prohibited from “manifest[ing] bias or prejudice * * * based on attributes including * * * sexual orientation.” The Oregon Supreme Court defined “manifest” as “to show plainly: make palpably evident or certain by showing or displaying.” Pet. App. 106a. In its decision, the court “reiterate[d] that, in prohibiting a judge from manifesting prejudice against court participants or others based on personal attributes, Rule 3.3(B) seeks to prevent judicial actions that impair the fairness of a proceeding or prompt an unfavorable view of the judiciary.” Pet. App. 109a. In this case, the Oregon Supreme Court’s rationale is clearly erroneous.

Rule 3.3(B) as applied impermissibly imposes a “special prohibition[]” on Judge Day for expressing a “disfavored” view. *R.A.V.*, *supra*, at 391. In *R.A.V.*, the City of St. Paul charged a juvenile with violating a city ordinance that prohibited bias-motivated disorderly conduct. *Id.* at 379. The youth had burned a cross on an African American family’s yard, an act expressly banned under the ordinance. *Id.* The Court struck down the ordinance as facially invalid under the First Amendment because it imposed special prohibitions on speakers who express views on certain disfavored subjects, *e.g.*, “race, color, creed, religion or gender,” yet it did not ban displays “containing abusive invective” that were not directed at the prohibited subjects. *Id.* at 391. The Court held that the ordinance was facially invalid because the First Amendment does not permit the government to target speakers who express views on specifically disfavored subjects. *See id.*

Rule 3.3(B) as applied is a content- and speaker-based restriction that strikes at the heart of the Free Speech Clause. Like the ordinance in *R.A.V.*, Rule 3.3(B) is facially unconstitutional: the prohibition on “manifest[ing] * * * prejudice * * * against * * * others” applies to, among other attributes, sexual orientation; yet, Rule 3.3(B) does not expressly prohibit manifestations of bias against persons or parties who do not fall within the categorized attributes. At the same time, it draws a clear distinction between favored and disfavored speech. Indeed, a flaw in the Oregon Supreme Court’s reasoning is apparent in what its reasoning would allow. By the court’s logic, Rule 3.3(B) as

applied does not prohibit a homosexual judge from manifesting bias *in favor* of same-sex marriage; it only applies to judges who *do not* favor same-sex marriage. As this Court noted, “[s]electivity of this sort creates the possibility that [the State] is seeking to handicap the expression of particular ideas.” *R.A.V.*, *supra*, at 394. Because Rule 3.3(B) as applied is a content-based regulation of speech, it must survive strict scrutiny. It cannot.

Rule 3.3(B) neither advances a compelling interest nor is it narrowly tailored to achieve that end. As noted above, the Oregon Supreme Court stated that the provision’s “fundamental objective” was to “ensure the public’s trust in an impartial and fair judiciary.” Pet. App. 110a. While judicial impartiality is a compelling interest, Rule 3.3(B) as applied is fatally flawed. This Court’s decision in *Republican Party of Minn. v. White* is instructive. 536 U.S. 765 (2002). There, the Court struck down a Minnesota judicial ethics rule barring judicial candidates from “announcing” a view on any disputed legal or political issue that might come before a court. *Id.* at 778. Like Rule 3.3(B), the Minnesota rule’s purpose was to promote judicial impartiality. The issue was whether the rule “unnecessarily circumscrib[ed] protected expression.” *Id.* at 775. The Court held that the rule failed strict scrutiny because it was not narrowly tailored, as “it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*.” *Id.* at 776. The Court noted that “impartiality” could be a compelling interest, but to the extent the rule sought to bar “preconception[s]

in favor of or against a particular *legal view*,” *id.* at 777, “avoiding judicial preconceptions on legal issues [was] neither possible nor desirable.” *Id.* at 778.

Here, Rule 3.3(B) as applied demanded of Judge Day what was “neither possible nor desirable.” *Id.* Indeed, the Oregon Supreme Court did not punish Judge Day for his “impartiality” but rather for his “preconception” about same-sex marriage. Under this Court’s holding in *White*, that cannot qualify as a compelling interest. Indeed, the record is crystal clear that Judge Day never said or expressed anything that manifested bias or prejudice to a party during a proceeding. Nevertheless, the court below pressed that a judge could manifest prejudice against others “based on personal attributes in a more *general way* that still could affect perceptions of fairness or prompt an unfavorable view of the judiciary.” Pet. App. 109a (emphasis added). It further explained that manifesting prejudice “may encompass *an expression of bias* against an identifiable group, based on personal characteristics, in the performance of judicial duties.” Pet. App. 110a (emphasis added). That line of reasoning assumes that judges would never have any bias or preconceptions about the law—that is an assumption that this Court has squarely rejected. *See White, supra*, at 778.

Moreover, the overinclusiveness of the Oregon Supreme Court’s interpretation of Rule 3.3(B) shows that its intent was not to prevent judicial bias but to punish Judge Day for his viewpoint on marriage. The First Amendment forbids the government from “regulat[ing] speech in ways that favor some viewpoints or ideas at

the expense of others.” *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) (citation omitted). Based on the record, it is clear that punishing Judge Day under Rule 3.3(B) depended entirely on his viewpoint on same-sex marriage. Pet. App. 173a, 179a. “When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.” *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). Imposing on Judge Day a three-year suspension without pay for expressing *his* viewpoint on same-sex marriage fails to justify any compelling interest.

Even if punishing Judge Day for speaking out on same-sex marriage promotes the compelling interest in judicial impartiality, Rule 3.3(B) as applied is not narrowly tailored to further that end. That is unsurprising—it is woefully overbroad. Indeed, the breadth of such a vague, “catch-all” provision “creates the risk * * * that subjective and idiosyncratic considerations could influence a hearing panel or reviewing court in resolving a charge based only on it.” Rotunda, *supra*, at 1192–94 (footnotes omitted). That is precisely what happened here. Judge Day never exhibited any bias for or against a particular party. Indeed, the only “manifestation of prejudice” the Oregon Supreme Court found was Judge Day directing his staff not to schedule same-sex wedding functions. Pet. App. 110a. That is it. Because a “law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital

interest unprohibited,” *White, supra*, at 780, Rule 3.3(B) as applied fails strict scrutiny.

Rule 3.3(B) also violates Judge Day’s free speech rights because it forces him to join and participate in an event at odds with his sincerely held religious beliefs. In its decision, the Oregon Supreme Court made it clear: If a judge is going to solemnize opposite-sex marriages voluntarily, then he is mandated to solemnize same-sex marriages. Pet. App. 106a. It is, however, a fundamental First Amendment principle that “each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.” *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 213 (2013). Accordingly, just like laws that regulate speech, a law that fundamentally alters expression and interferes with an expressive event triggers heightened scrutiny. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 577–78 (1995).

In *Hurley*, this Court struck down a Massachusetts public accommodations law as applied to a privately organized annual St. Patrick’s Day parade. 515 U.S. at 560–62. The Supreme Judicial Court of Massachusetts held that the organizers’ exclusion of an Irish LGBT group from the parade discriminated on the basis of sexual orientation and thus violated the public accommodations law. *Id.* at 563–64. Having the group march in the parade, the state court declared, would have only an “incidental” effect on the organizers’ First Amendment rights. *Id.* at 563. This Court reversed, holding that the government may not compel an

unwilling expressive group or event to admit speakers at odds with its message. *See id.* at 572–75. The Court acknowledged that the public accommodations law “does not, on its face” target speech, but it nevertheless “essentially requir[es]” the parade organizers “to alter the expressive content of their parade.” *Id.* at 572–73. Thus, where an application of a law alters the “expressive content” of an expressive event, that law must undergo strict scrutiny. *Id.*

Like the public accommodation law in *Hurley*, Rule 3.3(B) as applied “interfer[ed] with [Judge Day’s] speech for no better reason than promoting an approved message [and] discouraging a disfavored one.” *Id.* at 579. While the law in *Hurley* would have forced an expressive group to allow others to participate in an expressive event, here the converse is true to the extent that the government is compelling an unwilling speaker to participate in an event that violates his sincerely held religious beliefs. When Judge Day solemnizes a wedding, he is not merely rubber-stamping the marriage certificate; he is knowingly creating a binding union for a specific couple during a ritual imbued with expression. Indeed, this Court has described marriage as a union of “transcendent importance,” “sacred to those who live by their religions,” and providing “unique fulfillment to those who find meaning in the secular realm.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015). The government may not compel individuals “to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own.” *Hurley, supra*, at 578. The

Oregon Supreme Court punished Judge Day for choosing not to participate in a voluntary expressive event solely because of his religious convictions. Rule 3.3(B) as applied violates the Free Speech Clause.

II. Merely Remanding the Case Would Not Address the Threat to Judges' First Amendment Rights

While remand would require the Oregon Supreme Court to consider Judge Day's First Amendment defenses, it would not address the threat that judges face nationwide for holding sincerely held religious beliefs about same-sex marriage. Despite this Court's holdings in *Obergefell* and *Masterpiece Cakeshop*, judicial ethics rules like Rule 3.3(B) as applied to Judge Day's case would continue to jeopardize the careers of judges with similar religious convictions. Accordingly, we respectfully suggest that, in addition to remanding Judge Day's case, this Court should still address the peril that judicial codes of conduct pose to the free exercise and free speech rights of judges who oppose same-sex marriage because of their sincerely held religious beliefs.

A. Rule 3.3(B) as applied creates a *de facto* “Religious Test” for judicial office that conflicts with the Constitution

The Oregon Supreme Court, in punishing Judge Day for his sincerely held religious beliefs, created a *de facto* religious test for judicial office at odds with our nation’s history of accommodating the constitutionally protected religious exercise of our public officials. *See, e.g.*, U.S. Const. art. VI, cl. 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States”); *id.* (permitting officials to be bound by affirmation instead of oath). Moreover, in *Torcaso v. Watkins*, this Court invalidated on First Amendment grounds a law that barred from public office persons who refused to declare their belief in God. 367 U.S. 488 (1961). Likewise, the Oregon Supreme Court’s erroneous judgment conflicts with other judicial decisions. *See, e.g., Brown v. Polk Cty.*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc) (holding that the First Amendment protects “any religious activities of employees that can be accommodated without undue hardship to the government employer”); *Haring v. Blumenthal*, 471 F. Supp. 1172, 1180 (D.D.C. 1979) (holding that an IRS official may recuse himself from handling applications from pro-abortion groups); *Slater v. Douglas Cty.*, 743 F. Supp. 2d 1188, 1195 (D. Or. 2010) (noting that a same-sex domestic partnership applicant “has no cognizable right” to demand that a specific county employee with religious-based objections process the application); *Myrick v. Warren*, EEOC Charge No. 430-2015-01202 (Mar. 8, 2017) (holding

that a state discriminated against a magistrate judge for not accommodating her wish not to participate in same-sex weddings).

In *Haring v. Blumenthal*, for example, the D.C. Circuit held that an IRS official with “quasi-judicial” authority could disqualify himself from processing tax-exemption applications from pro-abortion and pro-LGBT groups because of religious objections. 471 F. Supp. 1172, 1180 (D.D.C. 1979). The official had sued the IRS after it denied him a promotion in part because of his refusal to handle applications from organizations with objectionable activities. The IRS contended that the official’s personal policy disrupts the agency’s operations and negatively affects the public’s perception of the IRS. The court dismissed that argument, noting that “[i]t is difficult to see how” the official’s refusal to process applications he considers objectionable “could impair taxpayer confidence in the tax system or the impartiality of the IRS.” *Id.* at 1183. In fact, the court observed that “public confidence in our institutions is strengthened when a decision-maker disqualifies himself on account of * * * insuperable bias[] or the appearance of partiality.” *Id.*

Like the IRS official in *Haring*, Judge Day has never once shown that he has or will be biased against a same-sex person in a judicial proceeding. In this case, he simply faced “a conflict between his beliefs and what the law would require him to decide,” and so he “in effect disqualif[ied] himself.” *Id.* As the court of appeals noted, “[i]n a very significant sense, therefore, public policy favors the course of disclosure of bias and

disqualification that this plaintiff has chosen, and that course may not be regarded as impairing the integrity of the [judicial] function.” *Id.* Judge Day was accused and sanctioned for not being impartial; yet in effect, he was the exact opposite.

A proponent of the Constitution’s “No Religious Test” Clause was Charles Carroll, the only Catholic signer of the Declaration of Independence. Kate Mason Rowland, *The Life of Charles Carroll of Carrollton, 1737-1832, With His Correspondence and Public Papers* (New York: G. P. Putnam’s Sons, 1898). Carroll was inspired by Sir Thomas More, Lord Chancellor of England, who refused to endorse the marriage of King Henry VIII and Anne Boleyn because of his fidelity to the Catholic Church’s precepts about marriage. Consequently, Thomas More was convicted of treason and beheaded in 1535. Colin Hoch, *A Man for All Seasons: The Martyrdom of Sir Thomas More*, STEPHEN F. AUSTIN STATE UNIVERSITY (Aug. 2009), <https://goo.gl/Fo4GYy>. More—one of the greatest lawyers in English history—was martyred for his convictions. Mark Zimmerman, *Relics of St. Thomas More invite pols to examination of conscience*, CRUX (Sep. 18, 2016), <https://goo.gl/Ak8QL4>. Is not Judge Day merely standing up for his religious convictions, as did Thomas More? There is a hint of irony that Carroll’s position on the “No Religious Test” Clause was inspired by another heroic judge’s refusal to participate in a wedding.

B. The Oregon Supreme Court erred in refusing to give Judge Day’s religious objections “full and fair consideration”

Judge Day’s sincerely held religious objections to same-sex marriage should have been a central consideration in the Oregon Supreme Court’s application of Rule 3.3(B). Indeed, the court’s refusal to consider Judge Day’s First Amendment defenses would cause and has caused reasonable people—including *amicus*—to question the adjudicators’ bias against Judge Day because of his faith. Accordingly, this Court should grant review to prevent similar injustices by preserving Judge Day’s ability to assert the First Amendment’s protection of his sincerely held religious beliefs.

The dismissiveness of Judge Day’s sincerely held religious beliefs, which were the only reason why he was found to have violated Rule 3.3(B), is extraordinary. It is also troubling in light of this Court’s decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719 (2018). At a minimum, the profound unreasonableness in refusing to consider Judge Day’s religious objections is “inconsistent with the First Amendment’s guarantee that our laws be applied in a manner that is neutral toward religion.” *Id.* at 1732.

In *Masterpiece Cakeshop*, this Court struck down a Colorado Court of Appeals judgment that affirmed the punishment of Jack Phillips, a Christian baker who declined to create a custom wedding cake for a same-sex wedding. The Court noted that the state civil

rights commission's treatment of Phillips had "some elements of a clear and impermissible hostility" to his religious beliefs. *Id.* at 1729. For instance, the Court pointed out that numerous public statements made by commission members expressing hostility to Phillips's religious beliefs compromised the appearance of impartial adjudicators. *Id.* The Court held that the commission should have given "full and fair consideration" of Phillips's sincerely held religious beliefs. *Id.* at 1732. The Court concluded that "[t]he State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed." *Id.* So too, here.

Judge Day's highly disproportionate punishment exemplifies why the Oregon Supreme Court should have given Judge Day a "full and fair consideration" of his sincerely held religious beliefs about same-sex marriage. *Id.* This Court has "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." *Obergefell, supra*, at 2607. Here, however, the record shows that the application of Rule 3.3(B) to Judge Day was "not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Lukumi, supra*, at 538. Most egregiously, the Commission declared, and the Oregon Supreme Court affirmed, that Judge Day's choice to solemnize only opposite-sex marriages was "misconduct," and it demonstrated a "deplorable lack

of understanding of the most basic concepts of impartiality.” Pet. App. 173a. Yet on the other side of these hostile characterizations, the record shows a lifetime of charitable and civic activities and a stellar reputation among his peers in the legal community. Judge Day’s position on solemnizing same-sex marriages was not based on hatred or bias against LGBT persons, but on a moral obligation to follow the dictates of his sincerely held religious beliefs.

To be sure, individuals—including members of the Oregon Supreme Court and the Commission—might find Judge Day’s position on same-sex marriage offensive. But a “bedrock principle underlying the First Amendment” is that “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive.” *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). Likewise, the government may not “penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities.” *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). That is particularly true here, where Judge Day is expressing a “decent and honorable religious” belief held by “reasonable and sincere people” across the country. *Obergefell, supra*, at 2602.

In light of this Court’s decision in *Masterpiece Cakeshop*, the manner in which our courts review cases involving conscientious objections to same-sex marriage is critical. By refusing to consider Judge Day’s constitutional claims, the Oregon Supreme Court undercut this Court’s instruction that courts must give “full and fair consideration” to an individual’s

“religious objection.” *Masterpiece Cakeshop, supra*, at 1732. Accordingly, this Court should grant review not only to vindicate the injustice in Judge Day’s case but also to serve the broader judicial policy of ensuring a fair and impartial judiciary.



CONCLUSION

For these reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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