IN THE COURT OF APPEALS OF THE STATE OF OREGON

MELISSA ELAINE KLEIN, dba Sweetcakes by Melissa; and **AARON WAYNE KLEIN**, dba Sweetcakes by Melissa, and, in the alternative, individually as an aider and abettor under ORS 659A.406, Petitioners, v. **OREGON BUREAU OF LABOR AND INDUSTRIES**, Respondent.	Agency Nos. 44-14, 45-14 CA A159899

PETITIONERS' OPENING BRIEF AND COMBINED EXCERPT OF RECORD AND APPENDIX

Petition For Review Of A Final Order Of The Oregon Bureau Of Labor And Industries

Petition includes constitutional challenges to the application of ORS 659A.403 and ORS 659A.409

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STATEMENT OF THE CASE

I. NATURE OF THE ACTION AND RELIEF SOUGHT

This is a petition for review of a Final Order of the Oregon Bureau of Labor and Industries ("BOLI") finding that Petitioners Melissa Klein and Aaron Klein, d/b/a Sweetcakes by Melissa (collectively, "the Kleins"), violated ORS 659A.409 and enjoining future violations that Aaron Klein violated ORS 659A.403 and assessing damages. The Kleins ask the Court to vacate the Final Order. Alternatively, the Kleins ask the Court to vacate and remand the damages award and injunction.

II. NATURE OF THE ORDER

The Final Order concluded Aaron Klein violated ORS 659A.403 for declining, based on his sincerely held religious beliefs, to create a custom-designed cake for a ceremony celebrating the union of two women ("Complainants").[1] The Final Order awarded Complainants $135,000 for alleged emotional suffering attributable to the Kleins. It also concludes the Kleins violated ORS 659A.409 for statements that allegedly conveyed a future

[1] The events giving rise to this case occurred before same-sex marriage became legal in Oregon in May 2014. Throughout this brief, the terms "union" and "marriage" are used interchangeably.

intent to refuse similar requests and enjoins the Kleins from making such statements.

III. BASIS OF APPELLATE JURISDICTION

This Court has jurisdiction pursuant to ORS 19.205 and ORS 183.482.

IV. EFFECTIVE DATE FOR APPELLATE PURPOSES

The Final Order is dated July 2, 2015. The petition for review, served and filed on July 17, 2015, is timely.

V. JURISDICTIONAL BASIS AND NATURE OF AGENCY ACTION

BOLI's jurisdiction over this contested case proceeding was founded upon ORS 659A.800 *et seq*.

VI. QUESTIONS PRESENTED ON APPEAL

A. ORS 659A.403

BOLI determined the Kleins' religiously motivated decision not to create a custom-designed cake for a ceremony celebrating a union between two women violated ORS 659A.403's prohibition on sexual orientation-based discrimination.

1. Did BOLI err in interpreting ORS 659A.403 to prohibit refusals to provide goods or services to facilitate same-sex weddings?
2. Does BOLI's application of ORS 659A.403 violate the guarantees against compelled speech encompassed within the Speech Clauses of

either the United States or Oregon constitutions? US Const, amend I; Or Const, Art I, § 8.

3. Does BOLI's application of ORS 659A.403 violate the right to freely exercise religion protected by the United States Constitution's Free Exercise Clause? US Const, amend I.
4. Should the Court exempt the Kleins from ORS 659A.403 as permitted by the Oregon Constitution's Worship and Conscience Clauses? Or Const, Art I, §§ 2-3.

B. Due Process

BOLI determined its Commissioner could adjudicate this case notwithstanding public statements, made before development of the factual record or presentation of legal argument, to the effect that the Kleins had violated Oregon law and should not be exempted from its enforcement.

5. Did the Commissioner's failure to recuse violate the Kleins' Due Process right to an impartial administrative tribunal?

C. Damages

BOLI awarded $135,000 to Complainants to remedy alleged emotional suffering attributable to the Kleins.

6. Does substantial evidence and reason support the damages award?

D. Violation of ORS 659A.409

BOLI determined the Kleins violated ORS 659A.409 by making statements that allegedly conveyed a future intent to engage in unlawful discrimination and enjoined such statements in the future.

7. Is BOLI's determination that the Kleins' statements conveyed a future intent to unlawfully discriminate supported by substantial evidence and reason?
8. If so, should the Court vacate the injunction to ensure consistency with the Speech Clauses of the United States and Oregon constitutions? US Const, amend I; Or Const, Art I, § 8.

VII. SUMMARY OF ARGUMENT

This case addresses a BOLI Final Order misinterpreting Oregon's public accommodations law, ORS 659A.403, which requires businesses to sell their goods and services to all persons, regardless of protected characteristics like sexual orientation. BOLI's misapplication of Oregon law violates both the Oregon and United States constitutions. It unlawfully compels two law-abiding Oregon citizens, the Kleins, to devote their time and talents to create art destined for use in expressive events conveying messages that contradict their deeply and sincerely held religious beliefs. Properly applied, ORS 659A.403 would not produce any constitutional violations. But whether analyzed as a

constitutional or statutory matter, the Final Order is unlawful. It must be vacated.

BOLI insists this case is simply about "a business's refusal to serve someone because of their sexual orientation" and not about "a wedding cake or a marriage." Op 32.[2] But four paragraphs later, BOLI admits that the case is, in fact, about "more than the denial of [a] product." Op 33.

Indeed it is. It is about the state forcing business owners to publicly facilitate ceremonies, rituals, and other expressive events with which they have fundamental and often, as in this case, religious disagreements. BOLI says the Kleins' refusal to create custom-designed cakes for same-sex weddings tells Complainants that "there are places [they] cannot go, things [they] cannot . . . be," and that they "lac[k] an identity worthy of being recognized." Op 33. The Kleins, however, have no power over where Complainants go, what they can be, or whether their identities are worthy of recognition. BOLI, of course, *does* have those powers over the Kleins and others like them. And its Final Order sends a clear message that their identity as religious people is not worthy of state recognition and that they cannot operate a business in Oregon unless they facilitate same-sex weddings. In BOLI's view, that is just how

[2] The Final Order is cited as "Op."

"people in a free society should choose to treat each other." Op 32. Perhaps. But BOLI's charge is to fairly and impartially enforce the law, not to use it to bring about its vision of a free society, compelling people to engage in speech that violates their consciences in the name of "rehabilitat[ing]" religious dissenters. *See* Op 53.

In this case, BOLI misinterpreted ORS 659A.403, mistakenly concluding that declining to facilitate same-sex *weddings* is legally the same as refusing to sell goods or services to gay *people*. Op 78. According to BOLI, refusing to facilitate same-sex weddings is unlawful discrimination "on account of" sexual orientation because same-sex weddings exclusively celebrate unions between gay people. Op 78. They are thus "inextricably linked to . . . sexual orientation." *Id*.

In effect, the Final Order interprets Oregon law to require businesses to service expressive events (*e.g.*, same-sex weddings) in which the participants are predominantly within a protected class (*e.g.*, gay people). The participants in many expressive events, however, are exclusively or at least predominantly within a class protected by ORS 659A.403—for example, "marital status," "religion," and "sex." Pairing these protected classes with their *expressive events* exposes the flaw in BOLI's interpretation of ORS 659A.403:

1. Married people predominantly participate in weddings.

2. Wiccans predominantly participate in Wiccan rituals.
3. Men predominantly participate in fraternity initiations.
4. Women predominantly participate in abortions.

On BOLI's logic, these expressive events are "inextricably linked" to marital status, religion, and sex, respectively, such that refusing to facilitate them is legally equivalent to refusing to sell goods and services "on account of" the protected status of the people participating in them. It would be shocking, however, to discover that Oregon law requires (1) caterers who reject the institution of marriage to facilitate weddings by selling food; (2) atheist bakers to facilitate Wiccan rituals by selling bread, (3) feminist photographers to facilitate fraternity initiations by taking pictures, or (4) pro-life videographers to facilitate abortions by filming them. Yet that is how the Final Order interprets and applies ORS 659A.403 with respect to Christian bakers and same-sex weddings.

In any event, interpreting and applying ORS 659.403 to require businesses whose goods and services are expressive, like custom bakeries, to facilitate expressive events like same-sex weddings violates the Speech and Religion Clauses of the constitutions of Oregon and the United States. The Court could, of course, avoid reaching these constitutional issues simply by rejecting BOLI's extension of ORS 659A.403 to cover expressive events. But if

the Court reaches the issue, the Final Order cannot withstand constitutional scrutiny.

First, it conflicts with the Speech Clauses of the constitutions of Oregon and the United States. Those clauses protect people and businesses from state compulsions to speak or to carry, contribute to, or associate with others' expression. BOLI's application of the law will often, as here, violate those guarantees. Like sculptures, custom-designed cakes are inherently expressive, artistic works. And weddings are expressive events, conveying "important messages about the couple, their beliefs, and their relationship to each other and to their community." *Kaahumanu v Hawaii*, 682 F3d 789, 799 (9th Cir 2012). State action that forces the creation of art or that requires artists to carry, contribute to, or associate with others' expression is unconstitutional.

Second, BOLI's interpretation of the law will often conflict with the constitutions' Religion Clauses, which guarantee freedom from state interference with the exercise of religion. Here, the Final Order violates the hybrid-rights doctrine, burdening the Kleins' free speech rights along with their religious exercise. It also unlawfully targets religious exercise, expanding Oregon's public accommodations law in a way that applies uniquely to people with religious beliefs about marriage. Under Supreme Court precedent, even the state's interest in preventing sexual orientation-based discrimination cannot

justify such serious burdens on the Kleins' constitutionally protected religious freedom. The constitutional violations are all the more acute here because the Oregon Constitution expressly authorizes *exemptions* for people like the Kleins from ORS 659A.403 to avoid religious hardship.

BOLI's Final Order also suffers from three additional defects. First, it is the product of a biased adjudication that violated the Kleins' Due Process right to an impartial tribunal. Having publicly commented on the facts and probable legal outcome of the case before hearing it, Due Process required BOLI's Commissioner to recuse himself. Second, the Final Order's $135,000 damages award lacks substantial evidence and reason: it failed to account for mitigating evidence and Complainants' discovery abuses, lacks internal consistency, and bears no relationship to awards in comparable cases. Finally, the Final Order incorrectly concludes that the Kleins violated ORS 659A.409, which makes it unlawful for public accommodations to convey a future intent to engage in unlawful discrimination. But the Kleins have only described the facts of this case, stated their view of the law, and vowed to vindicate that view through litigation. Their statements do not threaten *future* violations of the law and are constitutionally protected.

One of America's founding principles is that state action "compel[ling] a man to furnish contributions of money for the propagation of opinions which he

disbelieves and abhors" is "tyrannical." Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779). It is at least as tyrannical to compel people to use their time and talent to speak, or to carry, contribute to, or affiliate with others' expressions to which they do not ascribe and to which their religion forbids them from adhering. It is irrelevant that today's case involves politically favored ceremonies like same-sex weddings. Tomorrow's case may involve expressive events that are less politically palatable—celebrations of male exclusivity, white exclusivity, Wiccan practices, or abortions. The law cannot and does not turn on the nature of the expressive event.

Oregonians have not empowered BOLI to determine how people in a free society should treat each other, compelling speech and running roughshod over sincere religious beliefs as it brings about its vision of the good society. They have not empowered BOLI to enjoin people from constitutionally protected speech. And they have not authorized BOLI to conduct adjudications that do not comport with Due Process and that produce irrational damages awards. Nor could they have. The Final Order must be vacated.

VIII. STATEMENT OF FACTS

A. The Kleins Operate Sweet Cakes In Accordance With Their Religious Beliefs.

Until 2013, Sweet Cakes was a bakery in Gresham, Oregon owned and operated by the Kleins. ER.373. The Kleins' religion requires them to live out

their faith in every aspect of their lives, including their work. ER.365-66, 373-74. As a testament to their commitment to operating Sweet Cakes in accordance with their Christian faith, the Kleins had their church pastor pray over the store and dedicate its work to Jesus Christ and decorated the storefront with Christian imagery like crosses. ER.373; Doc 179, p.270.

The Kleins' faith teaches that God instituted marriage as the sacred and sexual union of one man and one woman. ER.365-67, 373-76. The Kleins' beliefs about marriage are grounded in the Bible, that, through marriage, one man and one woman become united physically, emotionally, mentally, and spiritually. *See id.* For the Kleins, the union between a man and a woman in marriage mirrors the union between Jesus Christ and his church on earth. *See id.* The Kleins do not believe that other types of interpersonal unions are marriages, and they believe it is sinful to celebrate them as such. *Id*.

For the most part, the Kleins' faith did not affect their relationship with customers. As they testified, the Kleins would not turn people away on account of membership in a protected class. ER.368, 376; ER.275. But they also noted that on rare occasions their faith might require them to decline to custom-design cakes for certain *events*—for example, divorce parties. ER.368, 376.

Because of their religious views about marriage, custom-designed wedding cakes were central to the Kleins' religiously focused operation of

Sweet Cakes. The Kleins created these cakes, in part, because they wanted to facilitate celebrations of sacred unions between one man and one woman. ER.367, 375.

B. Rachel Cryer Visits Sweet Cakes.

In January 2013, Complainant Rachel Cryer was shopping for a custom-designed cake to celebrate her union with Complainant Laurel Bowman. *See* Op 5.[3] In 2010, she had purchased a cake for her mother's wedding from Sweet Cakes. *Id.* Because she liked that cake, Cryer returned to Sweet Cakes to discuss purchasing a custom-designed cake for her own wedding. *Id.*

On January 17, 2013, Cryer and her mother, Cheryl McPherson, went to the Sweet Cakes store and met with Aaron Klein. *Id.* Laurel Bowman was not present. *Id*. Cryer told Klein that she wanted to purchase a cake to celebrate her wedding, and Klein inquired as to the names of the bride and groom. *Id.* Cryer stated that the cake would facilitate the celebration of a union of two women. *Id.* Klein then apologized and said that, because of their religious beliefs, he and his wife could not create a custom-designed cake for that purpose. *Id.*; ER.369. Cryer and McPherson left the store. Op 6.

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[3] Names used are as they were at the time of the events giving rise to this case.

Shortly after leaving, McPherson returned to confront Klein about his religious beliefs. *Id.* Klein listened while McPherson told him how her religious view of marriage had changed and that she understood the Bible to be silent about same-sex relationships. *Id.*; ER.369. After she finished, Klein expressed disagreement and quoted a Bible verse in support of his position. Op 6; ER.369. As BOLI found, Klein quoted the Book of Leviticus: "You shall not lie with a male as one lies with a female; it is an abomination." Op 6. McPherson ended the conversation, returned to her car, and told Cryer that Klein had called her "an abomination." *Id.*; ER.369. BOLI determined that this was a misreporting of events. *See* Op 3 n.2; *id*. at 6; ER.160 & n.48.

Shortly after this incident, Cryer and Bowman purchased a cake from another bakery for $250. Op 11-12. The Kleins would have charged $600 for a similar-style cake. Op 12. Cryer and Bowman also received a free wedding cake from Duff Goldman, the host of the popular television show *Ace of Cakes*. *Id.* at 15, 17.

C. Cryer And Bowman File Verified Administrative Complaints, And BOLI Issues Formal Charges And Adjudicates The Contested Case.

1. Cryer And Bowman File Verified Complaints But Disclaim Any Desire To Prosecute The Case Or Recover Damages.

Complainants filed verified complaints with BOLI on August 8 and November 7, 2013. Doc 167, pp.339-45; Doc 168, pp.332-35. Complainants, however, later stated publicly that they "did not sue this bakery" and that they "had no input in how much [BOLI] asked for or how much was awarded." ER.6. They also stated publicly that they "didn't have a choice in how this [case] was prosecuted," that they "never asked for a penny from anybody," and that they "[didn't] want anything." App.511-512.[4]

Nevertheless, BOLI initiated an investigation, and on June 4, 2014, issued two substantially identical Formal Charges, one related to each Complainant. Docs 122, 132. After two rounds of amendments, the Formal Charges alleged that the Kleins had violated ORS 659A.403 and ORS 659A.409. ER.245-60. The Formal Charges also alleged that Aaron Klein had violated ORS 659A.406 by aiding and abetting Melissa Klein's alleged

[4] Nigel Jaquiss, *Bittersweet Cake*, Willamette Week (July 2015), http://www.wweek.com/portland/article-25119-bittersweet-cake.html.

violations of ORS 659A.403 and ORS 659A.409. ER.249-50, 257-58. The Formal Charges sought to recover $75,000 for each Complainant for "emotional, mental, and physical suffering." ER.259, 251.

2. The ALJ Denies Motions To Disqualify The Commissioner And For Discovery And Grants Summary Judgment Against The Kleins.

The case was assigned to a BOLI Administrative Law Judge ("ALJ"). As the case unfolded, the ALJ ruled against the Kleins on motions for disqualification, discovery, and summary judgment.

Shortly after BOLI filed formal charges, the Kleins moved to disqualify BOLI's Commissioner from deciding the case based on comments he made about it even before BOLI had filed formal charges. ER.395-410. In a social media post specifically referencing the Kleins, the Commissioner said that "religious beliefs" do not "mean that [people] can disobey laws already in place" and that there is "one set of rules for everybody." Op 53. In that post, the Commissioner linked to an interview in which he announced that the Kleins "likely" violated the law because "regardless of one's religious belief, if you open up a store, and you open it up to the public to sell goods, you cannot discriminate in Oregon." *Id.* at 53; ER.412 (with link to embedded video App.499-500).

In a different interview about the Kleins, he stated that "folks" in Oregon do not have a "right to discriminate," that those who use their "beliefs" to justify discrimination need to be "rehabilitate[d]." Op 53; ER.416. The ALJ denied the Kleins' motion, primarily on the ground that prejudgment of legal issues—as opposed to factual issues—is not grounds for disqualification in Oregon. Op 48-56.

The Kleins also made several requests for discovery. Docs 34, 37, 59, 103, 104. The ALJ granted some of these requests. Nevertheless, without justification, BOLI withheld responsive materials it intended to use as evidence at the damages hearing. ER.179-84. Among other things the materials BOLI withheld showed that some of the expenses Complainants sought to recover were for trips planned months before the incident at Sweet Cakes. Doc 157, p.481; Doc 203, pp.143-45. Discovery also revealed that Complainants had failed to produce or undertake reasonable efforts to locate discoverable material and had deleted discoverable material. *See* ER.2-6 (discoverable material the Kleins independently located); ER.204-07; ER.423-29, Tr.108:12-114:20 (testimony regarding deleting emails); Doc 143, p.530 (acknowledging deleting emails). The ALJ, however, failed to punish these abuses.

The ALJ denied the Kleins' requests to depose any BOLI witnesses other than Complainants. Op 63-64, 109. The ALJ limited discovery despite

Complainants' attribution of 178 distinct injuries to the Kleins' conduct, an "exhaustive list of harms" standing "well apart from" and not "even remotely close" to any other case in BOLI's history. Op 108-09.

During these proceedings, the undisputed evidence established that custom-designed wedding cakes are works of art. Sweet Cakes customers want the Kleins to create an expression of "who they are" to display as a centerpiece at their wedding. *See* ER.373-74; ER.459, Tr.752:14-20. Each Sweet Cakes custom-designed wedding cake was the product of a long process that began with a consultation with the couple. ER.366-67, 374-76. Melissa Klein believed that it was important to become acquainted with each couple, so that she could pour her "heart and soul" into each personalized cake. ER.376. Following the consultation, Melissa Klein would sketch a series of personalized designs for the couple. ER.374-76. The design process alone could take hours, if not a full day. ER.450, Tr.598:2-8; ER.460, Tr.755:6-20. The design that best reflected the couple's preferences, styles, and wedding themes would be the blueprint for the finished cake, created through a multistep creative process of molding, cutting and shaping. ER.374-75, 366-67.

BOLI's own witness—a baker who sold Complainants one of their wedding cakes—testified that she considers herself to be "an artist" and that her wedding cakes are "artistic expression[s]" that she "share[s]" with "the public

and the community." ER.446, Tr.594:1-10; ER.451-52, Tr.599:23-600:11. She called Complainants' cake an "artistic creatio[n]," and recounted how it made her "proud that [it would] be part of [the] celebration." ER.446-47, Tr.594:17-595:7. Moreover, the celebrity baker who also created a cake for Complainants describes himself as an "edible art" maker, employing multiple "artists" in the creation of each cake. *See* Op 15, 17; App.497.

On January 29, 2015, the ALJ ruled on the parties' cross-motions for summary judgment. Op 66, 105-06. The ALJ concluded that Aaron Klein had violated ORS 659A.403 and that though Melissa Klein had not, she was jointly and severally liable as his business partner. Op 105-06. The ALJ rejected the Kleins' constitutional speech- and religion-based defenses. Op 80, 85-106.

The ALJ also determined that the Kleins had not violated ORS 659A.409. Op 81-83. BOLI's case on that charge rested entirely on two statements the Kleins had made after the Complainants filed their verified complaints. *Id*. In one, Aaron Klein recounted in an interview the events that transpired at Sweet Cakes on January 17, 2013, explaining that he had told Cryer and McPherson that "we don't do same-sex marriage, same-sex wedding cakes." Op 82. In another, Aaron Klein explained that once Washington state had legalized same-sex marriage, he and his wife could "see it is going to become an issue" in Oregon and determined that their religion required them to

"stand firm." *Id*. The ALJ determined that these were non-actionable statements about the past, stating that adopting BOLI's position to the contrary would "require[e] drawing an inference of future intent from the Kleins[']statements of religious belief that [it was] not willing to draw." Op 82-83.[5]

3. The ALJ Conducts A Hearing And Awards Damages.

In March 2015, the ALJ held a hearing on damages. To contest damages, the Kleins also introduced evidence, most of it undisputed, to rebut Complainants' allegations of emotional suffering. For example, the Kleins showed, without dispute, that during the relevant time period, Complainants were enduring a custody battle regarding their foster children. Op 4. And they elicited testimony from Aaron Cryer, Complainant's brother, tending to show the case was about political change desired by Complainants and a gay-rights advocacy group rather than remedying alleged emotional suffering. ER.455-56, Tr.637:21-638:19 ("[T]he whole reason of pursuing this case is . . . to change . . . these behaviors."); ER.457, Tr.645:20-22.

On April 24, 2015, the ALJ issued a Proposed Final Order ("PFO"). Doc 16. In the PFO, the ALJ determined significant testimony supporting damages

[5] The ALJ dismissed the ORS 659A.406 charges against Aaron Klein, since he could not aid or abet violations Melissa Klein never committed. Op 80.

lacked credibility. ER.161-63, 177. The ALJ also concluded "there is no basis in law for awarding damages to Complainants for their emotional suffering caused by media and social media attention related to this case." ER.176.

Despite those findings, the ALJ awarded $135,000 to Complainants. The award was based principally on testimony from McPherson, who the Kleins were not allowed to depose, and Complainants. Doc 16, pp.1742-43, 1770-73. From the testimony, the ALJ concluded that the Kleins' denial of service *and* McPherson's misreporting that Aaron Klein had called them "abomination[s]" caused complainants to feel "shame," "stres[s]," "anxiety," "frustration," "exhaustion," "sorrow," and "anger," and experienced some discord within their family and unspecified sleep-related problems. *Id*. at 1750-54; *id*. at 1751 ("Because of [allegedly being called 'an abomination,' Bowman] felt shame."); *id.* at 1754 (The retelling of allegedly being called "an abomination" made Cryer feel like "a mistake" that "had no right to love or be loved" or "go to heaven.").

The ALJ awarded one Complainant her full prayer for relief, $75,000, and reduced the other Complainant's prayer by $15,000 to $60,000 because she had not been present at Sweet Cakes and because her testimony lacked credibility in certain respects. Op 41; ER.259, 251. The award covered alleged

emotional suffering during the twenty-six-month period from the service denial in January 2013 to the hearing in March 2015.

The PFO made no mention of Complainants' discovery abuses or the rebuttal evidence introduced to contest Complainants' alleged emotional suffering.

4. BOLI Issues A Final Order.

On July 2, 2015, BOLI, acting through its Commissioner, issued a Final Order. The Final Order adopted the ALJ's conclusions that the Kleins were liable for violating ORS 659A.403 but not ORS 659A.406. Op 22, 105-06. It also affirmed the ALJ's $135,000 damages award, adopting most of the ALJ's reasoning in the PFO, including the ALJ's credibility determinations and legal conclusion that damages attributable to media exposure are not cognizable. Op 40-42. BOLI, however, reversed the ALJ's determination that the Kleins had not violated ORS 659A.409, concluding that the Kleins' statements in the media did, in fact, convey a future intent to unlawfully discriminate. Op 22-28. In addition to the statements the ALJ analyzed, the Final Order concluded that a note left on Sweet Cakes' door when it closed in September 2013 stating that "[t]his fight is not over," vowing to "continue to stand strong," taken together with Aaron's separate statements, conveyed a future intent to unlawfully discriminate. Op 17-18, 26-27. BOLI rejected the Kleins' constitutional speech-

and religion-based defenses and enjoined the Kleins from violating ORS 659A.409 in the future. Op 28-32, 42-43.

This petition for review followed.

FIRST ASSIGNMENT OF ERROR: BOLI ERRED IN APPLYING ORS 659A.403 TO THE KLEINS' CONDUCT

I. Assignment And Preservation Of Error

BOLI erred in concluding the Kleins violated ORS 659A.403, including by rejecting their federal and state constitutional speech- and religion-based defenses. Op 22, 32, 72-80 (incorporating Doc 56, pp.1428-38), 85-105 (incorporating Doc 56, pp.1396-1421). The Kleins preserved this assignment in their answers, ER.219-24, 232-37, opposition to summary judgment on liability, ER.286-306, motion for summary judgment on liability, ER.328-56, motion for reconsideration of summary judgment, ER.265-70, and exceptions to the PFO. ER.135-42, 156.

II. Standard Of Review

This Court reviews BOLI's "legal conclusions for errors of law," under ORS 183.482(8)(a), and "factual determinations for substantial evidence," under ORS 183.482(8)(c). *Broadway Cab LLC v Emp't Dep't*, 358 Or 431, 438, 364 P3d 338 (2015). The Court gives no deference to BOLI's interpretation of nondelegative statutory terms. *Blachana, LLC v BOLI*, 354 Or 676, 687, 318

P3d 735 (2014). Orders infected by legal errors must be set aside, modified, or remanded for disposition under the correct legal standard. ORS 183.482(8)(a)(A)-(B). Orders infected by a lack of substantial evidence must be set aside or remanded. ORS 183.482(8)(c); ORS 183.417(8).

Courts reviewing Free Speech issues under the federal First Amendment must independently examine the whole record without deference to the opinion below on any issue, including factual findings. *Hurley v Irish-Am Gay, Lesbian & Bisexual Grp of Bos*, 515 US 557, 567 (1995).

III. Argument

A. The Kleins Did Not Violate ORS 659A.403.

In Oregon, it is an "unlawful practice" to "deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation" to any person "on account of race, color, religion, sex, sexual orientation, national origin, marital status or age." ORS 659A.403. The Kleins did not violate this statute. They did not decline service to Complainants "on account of" their being gay. Rather, they declined to facilitate the celebration of a union that conveys messages about marriage to which they do not ascribe and that contravene their religious beliefs. ER.365-69, 373-77. The statute is silent about such denials.

BOLI erred in reaching a contrary conclusion, concluding, without analysis, that same-sex "marriage ceremon[ies]" are so "inextricably linked to a person's sexual orientation" such that "refusal to provide a wedding cake . . . because it was for [a] same-sex wedding was synonymous with refusing to provide a cake because of . . . sexual orientation." Op 78. In other words, the celebration of a union of two gay people is so linked with the status of being gay, that to discriminate against the *celebration*—an event distinct from the union—is to discriminate "on account of" the status.

BOLI's broad equation of celebrations (weddings) of gay conduct (marriage) with gay status rewrites and expands Oregon's public accommodations law. It lacks foundation in any Oregon statute, any Oregon court decision, any federal statute, or any United States Supreme Court decision. Indeed, it fails the test for equating conduct with status the Supreme Court set forth in *Bray v Alexandria Women's Health Clinic*, 506 US 263 (1993). There, the Court observed that "[s]ome activities may be such an irrational object of disfavor" that if they "happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed." *Id.* at 270. Applying that test, the Court rejected an argument that discrimination against abortion was discrimination on account of sex. Though abortion is exclusive to women, the Court said "[w]hatever one

thinks of [it], it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class." *Id.*

The same is true here. Whatever one thinks of same-sex weddings, there are respectable reasons for not wanting to facilitate them. Indeed, the Supreme Court has held that even with respect to same-sex *marriage*—a thing quite distinct from same-sex *weddings* and a liberty protected by the Constitution—there are "decent and honorable religious or philosophical" reasons for opposing it. *Obergefell v Hodges*, 135 S Ct 2584, 2602 (2015).

BOLI ignores *Bray* and attempts to ground its equivalence in dictum from *Lawrence v Texas*, asserting that laws criminalizing "homosexual conduct" amount to "an invitation to subject homosexual persons to discrimination." 539 US 558, 575 (2003). *Lawrence*, however, equated with gay status only conduct predominantly affiliated with gay people that is also a "liberty protected by the Constitution." *Id.* at 567. The equivalence worked in *Lawrence* because the Court held that "sexual" and "intimate conduct with another person"—"the most private human conduct" taking place "in the most private of places, the home"—is a liberty protected by the Constitution. *Id.* at 567, 577-78. Indeed, gay sexual conduct is so "closely correlated" with being

gay that it "defines" the "class" of people who are gay. *Id.* at 583 (O'Connor, J., concurring in judgment).

Lawrence's dictum does not support BOLI. This case is not about gay sexual conduct. As BOLI concedes, it is not even "about . . . marriage." Op 32. It is about *celebrations* of same-sex unions. Participating in a same-sex wedding bears no resemblance to the sexual conduct the Court equated with status in *Lawrence*. Weddings are not private sexual conduct between consenting adults. They are celebrations involving friends and family. Unlike marriage, *Obergefell*, 135 S Ct at 2604-05, weddings are not within the liberty protected by the Constitution. Indeed, BOLI's equation implies that wedding ceremonies—like sexual conduct—are so inextricably intertwined with gay identity that they "define" gay people as a "class." *Lawrence*, 539 US at 583 (O'Connor, J., concurring in judgment); *see also Bray*, 506 US at 270 ("A tax on wearing yarmulkes is a tax on Jews."). That cannot be true. Until relatively recently, marriage itself—to say nothing of weddings—found inconsistent support in the gay community. *See* George Chauncey, *Why Marriage?* 108-09 (2004) ("Not until the 1990s did [gay] marriage become a widespread goal."); *id*. (noting the "long contentious gay and lesbian debate" over "the *desirability* . . . of pursuing marriage rights").

BOLI also misplaces reliance on *Christian Legal Society v Martinez*, which noted that the Court had in *Lawrence* "declined to distinguish" between gay sexual conduct and gay status. 561 US 661, 689 (2010). *CLS* does not expand on *Lawrence*'s equivalence. At most, *CLS* instructs that states may incorporate that equivalence into their laws. *CLS* does not compel such incorporation, let alone expansion of the equivalence beyond sexual conduct to other conduct like weddings. *Id*.[6]

The consequences of BOLI's legally spurious equation are sufficiently serious that they should be imposed on Oregon's citizens, if at all, by a deliberative legislature and governor. If it is sexual orientation-based discrimination to refuse to sell goods or services to facilitate same-sex weddings, then it is likewise marital status-based discrimination to do so for any wedding, gay or straight. It is likewise sex-based discrimination to refuse to photograph fraternity initiations or abortion procedures, and religion-based discrimination to refuse to paint pictures for Catholic or Wiccan rituals. All of these ceremonies and events are, on BOLI's logic, "inextricably linked" to protected statuses. It would be shocking to discover that Oregon law contains a

[6] BOLI also relies on *Elane Photography, LLC v Willock*, 309 P3d 53 (NM 2013). That decision does not bind this Court and is based on the same misapplications of *Lawrence* and *CLS* as the Final Order.

mandate, for example, requiring businesses to be wedding vendors or Catholic artists to paint pictures to facilitate Wiccan rituals. But that is what BOLI's reasoning would require.

A recent case from Colorado, *Craig v Masterpiece Cakeshop, Inc*, 2015 WL 4760453 (Colo Ct App, Aug 13, 2015), demonstrates the pitfalls of BOLI's interpretation of ORS 659A.403. In *Craig*, a Colorado court used BOLI-like reasoning to hold that a law similar to ORS 659A.403 forbids refusals to decorate cakes for same-sex weddings. *Id*. at *7. Simultaneously, the court said that the same law's prohibition on religion-based discrimination did not forbid refusals to decorate cakes with Bible passages disapproving of gay sexual conduct. *Id*. at *7 n.8. The court allowed the latter discrimination on the theory that it was premised on the cakes' "offensive nature" rather than the customers' "creed." *Id*.

There is no basis, however, in law or logic for forcing some bakers to associate with expressive events (same-sex weddings) while exempting others from associating with expressive messages (Bible passages). Weddings, no less than Bible passages, "convey important messages." *Kaahumanu*, 682 F3d at 799. And there is no warrant to compel associations with some messages but not others based on an assessment of offensiveness. To avoid this jurisprudential quagmire *and* protect Oregonians' liberty to not associate with

offensive messages, the Court must reject BOLI's interpretation of ORS 659A.403.

Rejecting BOLI's interpretation will also avoid unnecessarily confronting serious constitutional questions. As explained below, the Final Order violates the Speech and Religion Clauses of the Oregon and United States constitutions. The Court, however, need not reach those issues if it interprets ORS 659A.403 so as to leave Oregonians free not to associate with expressive events. *Salem Coll & Acad, Inc v Emp't Div*, 298 Or 471, 481, 695 P2d 25 (1985) ("Statutes should be interpreted . . . consistent with constitutional standards before attributing a policy of doubtful constitutionality to the political policymakers, unless their expressed intentions leave no room for doubt."); *Clark v Martinez*, 543 US 371, 380-81 (2005) ("[A] a court must" reject statutory constructions that "raise . . . constitutional problems.").

There is little to be said for BOLI's interpretation of ORS 659A.403. It lacks support in statute or precedent, equates being gay with a celebration rejected by many gay people, and forces people to convey messages against their will and religious beliefs—all while, at a minimum, raising serious constitutional questions. This Court must reject it and vacate the Final Order.

B. The Final Order Violates The Free Speech Clause Of The United States Constitution.

1. Custom-Designed Wedding Cakes Are Fully Protected Speech.

The First Amendment prohibits laws abridging the "freedom of speech." BOLI has not argued that custom-designed cakes are not artwork fully protected by the First Amendment. *See* Op 102-05; ER.317-19. Nor could it have. The First Amendment unquestionably shields artwork from government control. *Hurley*, 515 US at 569; *White v City of Sparks*, 500 F3d 953, 956 (9th Cir 2007); *ETW Corp v Jireh Pub, Inc*, 332 F3d 915, 924 (6th Cir 2003); *Bery v NYC*, 97 F3d 689, 696 (2d Cir 1996); *Piarowski v Ill Comm Coll Dist 515*, 759 F2d 625, 627-28 (7th Cir 1985). It does not matter whether the art sends "clear" or even "obvious" messages. The message conveyed by Jackson Pollock's paint splatters, for example, is anything but clear or obvious, but the First Amendment "unquestionably" protects them. *Hurley*, 515 US at 569; *id*. at 575 (expressive works need not express "a particular point of view"). In fact, many works of protected expression simply convey the creator's "sense of form, topic, and perspective." *White*, 500 F3d at 956.

All that is needed for protection is that the work be "an artist's self-expression." *Id.* It does not matter that a work of art may be a collaboration between artist and patron. *Hurley*, 515 US at 570 (The First Amendment does

not "require a speaker to generate, as an original matter, each item featured in the communication." (citing *Miami Herald Publ'g Co v Tornillo*, 418 US 241, 258 (1974))). Indeed, it does not matter if the "the customer has [the] ultimate control over which design she wants," so long as the artist "applies his creative talents as well." *Anderson v City of Hermosa Beach*, 621 F3d 1051, 1062 (9th Cir 2010). It does not matter that the art may be sold commercially. *Riley v Nat'l Fed'n of the Blind*, 487 US 781, 801 (1988); *White*, 500 F3d at 956. And contrary to BOLI's implication, Op 105, the process of creating art is just as protected as the art itself. *E.g.*, *Anderson*, 621 F3d at 1060, 1062 ("The tattoo *itself*, the *process* of tattooing, and even the *business* of tattooing are not expressive conduct but purely expressive activity fully protected by the First Amendment." (citing *Minneapolis Star & Tribune Co v Minn Comm'r of Revenue*, 460 US 575, 582 (1983))).

Self-expression is undoubtedly afoot in creating custom-designed cakes, bringing them within the scope of the First Amendment's protections. Just as tattoos are like protected pen-and-ink drawings, custom-designed wedding cakes are like protected sculpture. *Buehrle v City of Key West*, 813 F3d 973, 976 (11th Cir 2015). Though sculpture is typically created from clay or metal and wedding cakes from food, speech "does not lose First Amendment

protection based on the kind of surface it is applied to." *E.g.*, *Anderson*, 621 F3d at 1061; *Bery*, 97 F3d at 695.

The record in this case confirms that custom-designed wedding cakes are First Amendment-protected art. The Kleins' customers do not merely want food; they want art. They want the cake to be centerpiece display at their wedding as an expression of "who they are." *See* ER.373-74; ER.459, Tr.752:14-20. At Sweet Cakes, the creative process starts with a patron consultation. Melissa Klein acquaints herself with each couple and pours her "heart and soul" into creating personalized cakes for them. ER.376. Following the consultation, she sketches several different cake designs. The sketch that best captures the couple's personalities and the wedding's themes becomes—through a multistep creative process of molding, cutting, and shaping—the cake featured at the celebration. *See* ER.374-76. The design process alone can take hours or even a full day. ER.450, Tr.598:2-8; ER.460, Tr.755:6-20.

For the Kleins, this process is not only artistic, but also religious. The Kleins believe that weddings celebrate a sacred and joyous union of one man and one woman in a spiritual bond called marriage, a bond that mirrors that between Jesus Christ and his church. ER.373-76. They create wedding cakes, in part, because they believe in that spiritual union. *Id.* The wedding cakes the Kleins sell are the product of their creativity and prayerful reflection. *Id.*

The record is replete with additional evidence supporting the artistry and self-expression inherent in custom cake-making. A baker who created a cake for Complainants' ceremony testified that she considers herself as "an artist" and that her wedding cakes are "artistic expression[s]" that she wants to "share" with "the public and the community." ER.446, Tr.594:1-10; ER.451-52, Tr.599:23-600:11. She called the cake she made for Complainants' wedding an "artistic creatio[n]," and recounted how it made her "proud that [it would] be part of [the] celebration." ER.446-47, Tr.594:17-595:7. The celebrity baker who also created a cake for Complainants' wedding says he makes "edible art" and employs other "artists" in that process. App.497. The upshot of all of this is that wedding cakes are artistic expression fully protected by the First Amendment.

2. The Final Order Violates The Right Not To Speak At All.

The First Amendment protects the right not to speak at all, such that the state can no more compel the artist to create than it can prohibit her from creating. As the Supreme Court has held, deciding "what not to say" is an "important manifestation" of "free speech." *Hurley*, 515 US at 573 (internal quotation marks omitted). Thus, the right "to refrain from speaking" is inherent in the First Amendment's "right to speak," protecting "'individual freedom of mind.'" *Wooley v Maynard*, 430 US 705, 714 (1977) (quoting *W Va State Bd of Educ v Barnette*, 319 US 624, 637 (1943)). The "principle that each person

should decide" for themselves "the ideas and beliefs deserving of expression, consideration, and adherence" lies at "the heart of the First Amendment." *Turner Broadcasting Sys, Inc v FCC*, 512 US 622, 641 (1994).

The First Amendment's protection against compelled speech is broad. It extends to non-verbal expression. *Barnette*, 319 US at 628, 632-34 (state cannot compel people to salute the flag). It extends to expressions that the government believes are benign or beneficial. *See, e.g.*, *Ortiz v State*, 749 P2d 80, 82 (NM 1988) (prohibiting state compulsion of non-ideological messages). It is "enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression." *Hurley*, 515 US at 574. And it cannot be overcome even by the government's undeniably compelling interests in law enforcement or national security. *Wooley*, 430 US at 716-17; *Barnette*, 319 US at 640-41.

In concluding that the First Amendment does not prohibit compelling the Kleins to create custom-designed wedding cakes, BOLI fundamentally misunderstood the right against compelled speech, believing it to protect only from compulsions to "speak the government's message." Op 104.

An unbroken line of Supreme Court cases—*Barnette*, *Wooley*, *Turner*, and *Hurley*—belie BOLI's conclusion. The First Amendment protects the "to refrain from speaking." *Wooley*, 430 US at 714. It does not matter that the state may not have a coherent message it wishes to coerce from the artist. The state

cannot compel Jackson Pollock to splatter paint any more than it can compel him to splatter it this or that way. *See Cressman v Thompson*, 798 F3d 938, 961-62 (10th Cir 2015) ("[T]he First Amendment protection accorded to [compelled] pure speech is not tethered to whether it conveys any particular message."); *Redgrave v Bos Symphony Orchestra, Inc*, 855 F2d 888, 905 (1st Cir 1988) ("Protection for free expression in the arts should be particularly strong when asserted against a state effort to *compel* expression.").

Simply put, compelling creation invades "the sphere of intellect and spirit" just as much as compelling an artist to create a specific picture. *Barnette*, 319 US at 642. And as the Supreme Court has held, "the purpose of the First Amendment to our Constitution" is to protect that sphere "from *all* official control." *Id.* (emphasis added). By ordering the Kleins to engage in expression rather than remain silent, the Final Order violates the First Amendment.

3. The Final Order Violates The Right Not To Host Or Accommodate Others' Messages.

The First Amendment also prohibits the state from forcing speakers to host or accommodate another speaker's message. *Hurley*, 515 US at 566. Indeed, "the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees." *Walker v Tex Div, Sons of Confederate Veterans, Inc*, 135 S Ct 2239, 2253 (2015). This protection ensures that one speaker's message is not affected by the speech of

another. *Hurley*, at 572-73; *Tornillo*, 418 US at 256; *Pac Gas & Elec Co v PUC of Cal*, 475 US 1, 16-18 (1986) (plurality).

BOLI erred in concluding that its Final Order does not force the Kleins to host or accommodate another speaker's message, misapplying *Hurley*, *Tornillo*, and *Pacific Gas & Electric*. BOLI concluded that *Hurley* does not apply because "[w]hatever message" customized wedding cakes convey is "expressed only to . . . the persons . . . invited to [a] wedding ceremony," and "not to the public at large." Op 105. And BOLI sought to distinguish *Tornillo* and *Pacific Gas & Electric* on the ground that its Final Order does not compel the Kleins "to publish or distribute anything expressing a view." *Id.* at 104-05. Those cases, however, are not merely about speech in public settings or publishing or distributing text. *Cf. Boy Scouts of Am v Dale*, 530 US 640, 648 (2000) (noting that the First Amendment protects expression "whether it be public or private"). The "compelled-speech violation" in those cases "resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld v Forum for Academic & Institutional Rights*, 547 US 47, 63 (2006) [hereinafter "*FAIR*"] (discussing *Hurley*, *Tornillo*, and *Pacific Gas & Electric*). The same violation has occurred here.

Hurley squarely controls. In *Hurley*, the Court held that the Constitution precludes applying public accommodations laws so as to "essentially requir[e]"

speakers "to alter the expressive content" of their art. *Hurley*, 515 US at 572-73. *Hurley* involved a group's effort to compel its inclusion in a parade. Observing that both the parade organizers' selection of units and each unit's participation were "expressive," the Court determined that public accommodations laws cannot be applied to favor one expressive message over another, at least absent a showing that one speaker has "the capacity to silence the voice of competing speakers." *Id.* at 572-73, 577-79 (internal quotation marks omitted). Such an application of "[s]tate power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573.

Here, the Final Order contravenes *Hurley* by favoring the expression of same-sex weddings over that of the Kleins. In *Hurley*, Massachusetts violated the Constitution by trying to force an expressive component—a unit of people—into an expressive event—a parade. Here, BOLI seeks to do the same thing, forcing an expressive component—a custom-designed cake—into an expressive event—a same-sex wedding. The complaining speaker is different, but the constitutional violation is the same.[7]

[7] Potential disclaimers are irrelevant where, as here, each element of an expressive act "is understood to contribute something to a common theme

The constitutional violation occurs even when a cake's design lacks images, symbols, or words that clearly promote or celebrate same-sex relationships or marriage. Where and how a piece of art is presented can affect its meaning just as much as what it looks like. *See, e.g.*, Note, *Before That Artist Came Along, It Was Just a Bridge*, 11 Cornell J L & Pub Pol'y 203, 211-13 (2001); *cf. Hurley* 515 US at 572 (noting that "every participating unit" in a parade "affects the message conveyed" by the parade as a whole). Personalized, custom wedding cakes are no exception. They derive their meaning not just from their constituent elements—shape, color, size, ingredients, and decoration—but also from the context of the wedding celebration in which they are featured. Wedding ceremonies are the compilation of multiple expressive components—the vows, the officiator, the venue, the cake—uniquely chosen to express "important messages about the couple, their beliefs, and their relationship to each other and to the community." *Kaahumanu*, 682 F3d at 799. As BOLI's witness testified, wedding cakes are a central component in creating

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. . . disclaimers would be quite curious." *Hurley*, 515 US at 576. And where potential disclaimers have justified rejecting First Amendment challenges, the activities involved were "not inherently expressive." *FAIR*, 547 US at 64-65 (citing *PruneYard Shopping Ctr v Robbins*, 447 US 74, 100 (1980)).

and expressing a wedding's messages. ER.446-47, Tr.594:1-595:7. The Constitution protects the Kleins' message from being appropriated against their will by expressive events like weddings.

As in *Hurley*, the Kleins "disclaim any intent to exclude homosexuals as such" and there is no evidence that they have ever denied service to customers because of sexual orientation. *Hurley*, 515 US at 572; ER.275; ER.376-77. Accordingly, as in *Hurley*, this case is not about "any dispute" regarding the availability of goods and services to gay people. *Hurley*, 515 US at 572. Rather, it is about the state's authority to commandeer the message of one set of speakers—people like the Kleins—to further the message of another set of speakers—people participating in same-sex weddings. BOLI's application of ORS 659A.403 has "the effect of declaring the [Kleins'] speech itself to be the public accommodation," granting people celebrating same-sex weddings "the right to participate in [that] speech." *Id.* at 573. Such "peculiar" applications of public accommodations laws violate the First Amendment. *Id*. at 572.

4. The Final Order Violates The Right Against Compelled Association With Others' Expression.

The Final Order violates the freedom of expressive association. *Dale*, 530 US at 644. The freedom of expressive association protects groups that join together to pursue "a wide variety of political, social, economic, educational, religious, [or] cultural ends" from state action that "significantly affect[s]" their

"ability to advocate" their viewpoints. *Id.* at 647-48, 650. A law raises freedom of expressive association concerns when, like ORS 659A.403, it "impose[s] penalties . . . based on membership in a disfavored group." *FAIR*, 547 US at 69. Under *Dale*, the First Amendment prohibits public accommodations laws like ORS 659A.403 from "materially interfer[ing] with the ideas that the organization [seeks] to express." *Dale*, 530 US at 657. In evaluating freedom of expressive association claims, courts must "give deference to an association's assertion regarding" both "the nature of its expression" and its "view of what would impair its expression." *Id*. at 653. Applications of public accommodations laws that interfere with the freedom of expressive association do not survive strict scrutiny. *Id*. at 657-59.

Both elements of the freedom of expressive association are satisfied here. Sweet Cakes was an entity engaged in expression. *See supra* pages 30-47. The record shows that Sweet Cakes used its creations to express a message about the sacredness of the union between man and woman in marriage. ER.373-76, 365-66. And *Dale* establishes forcing Sweet Cakes to provide cakes for same-sex weddings significantly alters—indeed, obliterates—its message. In *Dale*, the Court held that a gay man's mere "presence in the Boy Scouts would, at the very least," unconstitutionally "force [it] to send a message . . . that [it] accepts homosexual conduct as a legitimate form of behavior." *Dale*, 530 US at 653. In

the same vein, the presence of Sweet Cakes' products at same-sex weddings unlawfully compels a message that Sweet Cakes accepts same-sex marriages as celebration-worthy events.

The constitutional violation in this case is even sharper than in *Dale*. The The state's action more directly and substantially affects Sweet Cakes' message and the state's interest is more attenuated. Forcing entities that do not believe same-sex marriages are celebration-worthy events to facilitate celebrations of those unions (this case) places a far more serious burden on expression than merely forcing groups opposed to gay sexual conduct to simply accept gay members into their ranks—irrespective of their conduct (*Dale*). At the same time, the state's interest in protecting citizens from denials of goods and services because of who they are (*Dale*) is far stronger than protecting them from such denials based on what they propose to do with them (this case).

This same violation of the freedom of expressive association would occur, for example, if the state forced a florist that used its arrangements to convey messages of sexual equality to provide arrangements for Catholic Masses, which are conducted exclusively by men. *Dale* would not permit the florist to shun customers merely because they are Catholic; such sales place minimal burdens on the florist's sexual-equality message and directly further the state's interest in ensuring equal access to florist services. But those

considerations' relative weight reverses for arrangements used at Masses. Those sales directly undermine the florist's message, while furthering only the state's attenuated interest in ensuring the presence of flower arrangements at religious ceremonies.

In sum, *Dale* resolves this case in favor of the Kleins. The state may not apply its public accommodations law in "peculiar way[s]," as it has here, to force people who have joined together to express certain beliefs to associate with people hosting expressive events that convey messages contrary to those beliefs. *Dale*, 530 US at 658-59. Doing so violates the First Amendment.

5. The Final Order Violates The Right Against Compelled Contributions To Support Others' Speech.

The First Amendment prohibits state action that compels people to "contribute" to "expressive activities [that] conflict with [their] 'freedom of belief.'" *United States v United Foods*, 533 US 405, 413 (2001).

In *United Foods*, the Supreme Court addressed a law requiring mushroom producers to contribute funds to further a message promoting non-branded mushrooms. 533 US at 411. Even applying intermediate scrutiny for commercial speech, the Court concluded that the First Amendment prohibited compelling contributions from objecting producers. *Id.* at 410. It did not matter that the producer could disclaim the message. *Id*. at 411-12. And it was

sufficient to violate the Constitution that the contribution was coerced. *Id.* at 413.

Here, BOLI's Final Order violates the right against compelled contributions to speech by requiring the Kleins to devote their time, resources, and artistic talent to create custom-designed wedding cakes that promote the messages same-sex weddings express. Wedding cakes contribute significantly that message, ER.431-54, Tr.579-602, though even a minimal contribution would suffice. *See United Foods*, 533 US at 423 (Breyer, J., dissenting) (characterizing the forced contribution as "trivial"). Just as the mushroom producer's financial contributions would have facilitated promotional speech in *United Foods*, the Kleins' custom-designed wedding cakes would facilitate the expressive messages of same-sex weddings, *Kaahumanu*, 682 F3d at 799.

United Foods is not distinguishable because it involved financial contributions. Every facet of *United Foods* addressed First Amendment concerns far less important than those involved here. *United Foods* involved commercial speech. *United Foods*, 533 US at 409-10. This case involves religious speech, which lies at the core of the First Amendment. *Capitol Square Rev & Advisory Bd v Pinette*, 515 US 753, 760 (1995). *United Foods* involved a government effort to commandeer an advertising budget. This case involves a government effort to commandeer the time, effort, and artistic vision of two

ordinary citizens. *United Foods* involved contributions to speech that the public could not readily trace to the complaining contributor. Here, the Kleins' contribution to same-sex weddings is readily traceable to them. And *United Foods* involved "trivial" speech about the quality of non-branded mushrooms that, unlike the speech here, was "incapable of 'engendering any crisis of conscience.'" *United Foods*, 533 US at 423 (Breyer, J., dissenting) (quoting *Glickman v Wileman Bros & Elliott, Inc*, 521 US 457, 472 (1997)).

BOLI's Final Order compels the Kleins to contribute their time, resources, and artistic talent to the expression of same-sex weddings. Binding Supreme Court precedent precludes this application of the state's public accommodations law.

6. The Final Order Violates The Right Against Compelled Expressive Conduct.

Custom-designed wedding cakes, like other works of art, are pure speech. *See supra* pages 30-33. But the Final Order violates the First Amendment, even if custom-designed cakes are considered as mere expressive conduct.

The First Amendment protects from government interference expressive conduct that conveys a message to a reasonable observer. *See Texas v Johnson*, 491 US 397, 406 (1989); *Spence v Washington*, 418 US 405, 409-11 (1974) (per curiam); *Holloman ex Rel Holloman v Harland*, 370 F3d 1252, 1270 (11th

Cir 2004) (conduct must send "some sort of message" but not necessarily a "specific message" to receive constitutional protection (emphasis omitted)).

Compulsions of expressive conduct are analyzed like compelled speech. It is true that restrictions on expressive conduct are lawful if narrowly tailored to further a substantial government interest. *United States v O'Brien*, 391 US 367, 377 (1968). But *O'Brien* is "inapplicable" when laws "directly and immediately affect[t]" First Amendment rights, like those implicated here against being compelled to speak at all or to carry, contribute to, or affiliate with somebody else's speech. *Dale*, 530 US at 659. As other courts have recognized, compelling expressive conduct violates the Constitution no less than compelled speech. *Cressman*, 798 F3d at 950-51, 963-64 (applying *Wooley* to a claim of compelled expressive conduct); *id.* at 967 (McHugh, J., concurring) (noting that "the Supreme Court" has not "recognized any lesser intrusion caused by compelled" expressive conduct "that would justify lesser restraint than on compelled pure speech"). Indeed, the Supreme Court has held that the compelled expressive conduct of a "flag salute involve[s] a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate." *Wooley*, 430 US at 715.

Even if the Court concludes that creating custom-designed cakes is not pure speech, it is at least expressive conduct. Custom-designed wedding cakes

are "sufficiently imbued with elements of communication" so that they send a message to a reasonable observer. *Spence*, 418 US at 409; *Kaahumanu*, 682 F3d at 799. Thus, the Final Order fails as a compulsion of expressive conduct for the same reasons it fails as a regulation of pure speech. Indeed, it fails even under *O'Brien*, since the admittedly weighty interests underlying state public accommodations laws cannot overcome the right against being forced to accommodate or associate with objected-to expression. *Dale*, 530 US at 658-59 (citing *Hurley*, 515 US at 580).

C. The Final Order Violates The Free Speech Clause Of The Oregon Constitution.

Article I, Section 8 of the Oregon Constitution provides that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever." This clause grants even "broader" protection for expression than the federal Constitution. *State v Henry*, 302 Or 510, 515, 732 P2d 9 (1987). It covers "any expression of opinion, including verbal and *nonverbal* expressions contained in films, pictures, paintings, *sculpture and the like*." *Id.* (emphases added); *State v Ciancanelli*, 339 Or 282, 311, 121 P3d 613 (2005) ("Article I, [S]ection 8 . . . broadly" prohibits "*any laws* directed at restraining verbal or nonverbal expression of ideas of *any kind*." (emphases added)). The Court has said that the clause protects "nonverbal 'artistic' forms of expression" that "convey

something about the communicator's world view." *Ciancanelli*, 339 Or at 293; *see also State v Robertson*, 293 Or 402, 649 P2d 569 (1982).

Oregon courts do not appear to have addressed the Oregon Constitution's application to compelled speech. *See* Op 101. But since BOLI's Final Order violates the federal Constitution's Speech Clause, it also violates the Oregon Constitution's broader counterpart *a fortiori*.

D. The Final Order Violates The Free Exercise Clause Of The United States Constitution.

The Free Exercise Clause protects against laws "prohibiting the free exercise [of religion]." US Const, amend I. BOLI has not argued that application of ORS 659A.403 to the Kleins' conduct in this case burdens their exercise of religion. *See* ER.313-14. Thus, the only questions are whether strict scrutiny applies and, if so, whether the Final Order's application of ORS 659A.403 is narrowly tailored to advance a compelling government interest. *Church of Lukumi Babalu Aye v City of Hialeah*, 508 US 520, 546 (1993).[8]

The Final Order violates the Free Exercise Clause. It is subject to strict scrutiny both because it infringes on the Kleins' hybrid rights and because it

[8] In any event, assessing $135,000 in penalties for refusing to engage in conduct that violates their religious beliefs places a substantial burden on the Kleins' exercise of religion. *See Sherbert v Verner*, 374 US 398, 404 (1963); *Holt v Hobbs*, 135 S Ct 853, 862 (2015).

targets religious practice for disfavored treatment. *See Emp't Div v Smith*, 494 US 872, 881-82 (1990) (hybrid rights); *Lukumi*, 508 US at 546 (targeting). And binding Supreme Court precedent dictates that public accommodations laws like ORS 659A.403 do not satisfy strict scrutiny when they burden First Amendment rights. *See Dale*, 530 US at 659; *Lukumi*, 508 US at 546.

1. The Final Order Burdens Hybrid Rights.

Hybrid rights are implicated when the application of a law burdens both the free exercise of religion and another constitutional right. Laws that implicate hybrid rights are unconstitutional unless they satisfy strict scrutiny. *See Smith*, 494 US at 881-82.

This is a hybrid-rights case. BOLI's Final Order burdens both the Kleins' exercise of their religion as well as their rights to free speech and free association. Indeed, cases involving compelled expression are quintessential hybrid-rights case. *Id.* at 882 (citing *Wooley* and *Barnette* as examples of hybrid-rights cases).

BOLI failed to recognize this as a hybrid-rights case based on its conclusion that litigants in such cases must establish that their Free Exercise claim and the other constitutional claim are "independently viable." Op 96 (citing *Elane Photography*, 309 P3d at 75-76). That is not the test. If it were, the hybrid-rights doctrine would be an empty vessel, as litigants with independently

viable constitutional arguments would never need to invoke it. *Axson-Flynn v Johnson*, 356 F3d 1277, 1296-97 (10th Cir 2004). Supreme Court precedent is not so easily nullified.

Contrary to BOLI's conclusion, hybrid-rights claims require a litigant only to make a "colorable" argument that the law being applied infringes a constitutional right protected by a clause other than the Free Exercise Clause. *Id.* at 1295-96; *see also Thomas v Anchorage Equal Rights Comm'n*, 165 F3d 692, 705-06 (9th Cir 1999), *vacated on other grounds* 220 F3d 1134 (9th Cir 2000) (en banc). A claim is colorable when there is a "fair probability or a likelihood, but not a certitude, of success on the merits." *Axson-Flynn*, 356 F3d at 1295. Thus, a hybrid-rights case exists where, as here, the application of a law raises difficult constitutional questions under another provision of the Constitution.

As shown above, *supra* pages 30-46, BOLI's Final Order violates the First Amendment's Speech Clause several times over. At the very least, it raises serious questions under the Free Speech Clause. Accordingly, clear Supreme Court precedent dictates that the Court evaluate the compatibility of the Final Order with the Free Exercise Clause using strict scrutiny.

2. The Final Order Targets Religious Conduct For Disfavored Treatment.

Strict scrutiny also applies to the Final Order because it targets religion for disparate treatment. *Lukumi*, 508 US at 546 (Applications of laws that uniquely burden religious practice "must undergo the most rigorous of scrutiny.").

Without a single sentence of analysis, BOLI wrongly concluded that its application of ORS 659A.403 was neutral and generally applicable and therefore did not target religious conduct. Op 96. The lack of support is unsurprising since BOLI has applied ORS 659A.403 in a way that targets religious practice. Its Final Order compels people who object to same-sex marriage to provide goods and services to facilitate celebrations of those unions. As the Supreme Court has recognized, such objections are often grounded on "decent and honorable religious or philosophical premises." *Obergefell*, 135 S Ct at 2602. BOLI accomplished this result through a novel expansion of ORS 659A.403 that if not foreclosed outright, *see supra* pages 23-29, is certainly not compelled. It follows that BOLI's expansion was, at best, discretionary and done *for the specific purpose* of forcing business owners with moral reservations about same-sex marriage to either violate their consciences or go out of business. That is impermissible targeting. *Lukumi*, 508 US at 532, 546.

Further, BOLI has given no indication it would apply its novel interpretation of ORS 659A.403 beyond situations like those here that are intimately linked with religion. There is no suggestion, for example, that BOLI would apply ORS 659A.403 to compel feminist photographers to take pictures of Catholic Masses or all-male fraternity initiation ceremonies (religion and sex-based discrimination), Israeli delicatessen owners to cater parties celebrating Iran's Revolution Day holiday (national origin-based discrimination), or pacifist graphic designers to create posters for Black Panthers' rallies (race-based discrimination). If BOLI is not willing to bind itself to those outcomes, then its Final Order is simply a contortion of ORS 659A.403 to empower it to compel people with religious beliefs about same-sex marriage to facilitate same-sex weddings. Such "selective, discretionary application" of an ordinance against people with religious beliefs violates *Lukumi*'s neutrality principle, and strict scrutiny applies. *Tenafly Eruv Ass'n v Borough of Tenafly*, 309 F3d 144, 168 (3d Cir 2002).

3. The Final Order Fails Strict Scrutiny.

BOLI's Final Order cannot withstand strict scrutiny either as an infringement of hybrid rights or an impermissible targeting of religious practice. Under the hybrid-rights analysis, BOLI must put forth evidence that exempting Oregon businesses from an obligation to provide goods and services to same-

sex weddings "will unduly interfere with fulfillment of" its interest in deterring sexual orientation-based discrimination. *United States v Lee*, 455 US 252, 259 (1982); *see also Gonzales v O Centro Espirita Beneficente Uniao do Vegetal*, 546 US 418, 437 (2006); *Wisconsin v Yoder*, 406 US 205 (1972); *Sherbert v Verner*, 374 US 398 (1963). Under the targeting analysis, laws may not be "underinclusive to a substantial extent" with respect to the state's asserted interest such that "it is only conduct motivated by religious conviction that bears the weight" of BOLI's application of ORS 659A.403. *Lukumi*, 508 US at 547.

There is no evidence in the record that allowing businesses to decline to provide goods and services to same-sex weddings will undermine its ability to pursue its interest in deterring sexual orientation-based discrimination. That ends the matter. *O Centro*, 546 US at 437. In any event, the Supreme Court has held that states cannot impose a "serious burden" on other constitutional rights even to prevent indisputable sexual-orientation based discrimination. *See Dale*, 530 US at 658-59. The state's interest here is even more attenuated than in *Dale*. There, the Boy Scouts excluded people from its ranks simply because of their sexual orientation, directly implicating the state's interest in protecting gay people from discrimination in public accommodations. By contrast, the Kleins are willing to sell their goods to gay people and object only to facilitating

celebrations that violate their religious beliefs. No court has ever held that the state has a compelling interest in ensuring that people hosting wedding celebrations have access to their vendors of choice, particularly when adequate substitutes are readily available. *Cf. Yoder*, 406 US at 234 (state must not only show compelling interest in public education generally but specifically in compelling Amish children to attend one more year of public schooling)

Additionally, applying laws like ORS659A.403 to "targe[t] religious conduct" and "advanc[e] legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Lukumi*, 508 US at 546. That is because, such applications cannot "be regarded as protecting an interest 'of the highest order'" when they leave "appreciable damage to that supposedly vital interest unprohibited." *Id.* at 547.

The Final Order is not one of the rare cases that survives strict scrutiny. BOLI's novel interpretation of ORS 659A.403 reveals that it is seeking to stamp out dissent to a new social orthodoxy that embraces same-sex weddings rather than seeking to deter all invidious discrimination in business transactions. Were it otherwise, BOLI would extend its equivalence between conduct and status to other characteristics protected by ORS 659A.403. Failing that, however, the Final Order applies ORS 659A.403 in a way that fails strict scrutiny under *Lukumi*, 508 US at 547.

E. The Final Order Should Have Exempted The Kleins From ORS 659A.403, As Permitted By The Oregon Constitution's Worship And Conscience Clauses.

The Oregon Constitution's Worship and Conscience Clauses "secure" the "Natural right[] to worship Almighty God according to the dictates" of one's own "conscienc[e]" and prohibit all laws that "in any case whatever control the free exercise[] and enjoyment of [religious] opinions or interfere with the rights of conscience." Or Const, Art I, §§ 2-3. The scope of the Clauses is similar to that of the federal Free Exercise Clause. *State v Hickman*, 358 Or 1, 15, 358 P3d 987 (2015). While the Oregon Supreme Court has never determined whether the Clauses protect hybrid rights, it has said that applications of laws targeting religious beliefs must satisfy exacting scrutiny. *Id.* The Clauses also empower courts to create exemptions to generally applicable and neutral laws that must survive only rational basis review to be constitutional. *See id.* at 16 (noting that courts must consider whether to "grant 'an individual claim to exemption on religious grounds'" when applying generally applicable and neutral laws (quoting *Cooper v Eugene Sch Dist*, 301 Or 358, 368-69, 723 P2d 298 (1986))).

For the reasons explained above, BOLI has applied ORS 659A.403 in a way that targets religious practice and that cannot survive exacting scrutiny. *Supra* pages 50-53.

In any event, the Court should use its authority to exempt the Kleins and others with sincere religious objections to same-sex marriage from being forced to facilitate same-sex weddings. BOLI rejected the Kleins' plea for an exemption on the ground that there "is no requirement under the Oregon Constitution for such an exemption." Op 91. That is a red herring. The question is whether a judicially created exemption would further the goals of Oregon's Worship and Conscience Clauses without unduly interfering with the goals of Oregon's validly enacted laws. *See Hickman*, 358 Or at 16.

In this case, the answer is yes. Oregon's broadly-worded Worship and Conscience Clauses reflect respect and tolerance for people of different beliefs. *See State v Van Brumwell*, 350 Or 93, 108 n.16, 249 P3d 965 (2011). The principles animating the state's constitutional protections for worship and conscience counsel strongly in favor of an exemption for people whose faith forbids them from celebrating same-sex marriages. Here the sincerity of the Kleins' religious beliefs and the magnitude of the burden the Final Order places on those beliefs are undisputed. ER.313-14. An exemption in this context impairs the state's ability to deter discrimination minimally, if at all, while providing much needed space in commercial society for the many people who have "decent and honorable religious or philosophical" objections to same-sex

marriage, reassuring people that their Constitution protects their livelihoods, irrespective of their faith. *Obergefell*, 135 S Ct at 2602.

SECOND ASSIGNMENT OF ERROR: THE COMMISSIONER'S FAILURE TO RECUSE VIOLATED THE KLEINS' DUE PROCESS RIGHTS

I. Assignment And Preservation Of Error

BOLI erred by failing to disqualify the Commissioner from adjudicating this case. Op 48-56 (incorporating ER.383-92). The Kleins preserved this assignment in their motion to disqualify, ER.398-409, and exceptions to the PFO, ER.131-32, 155.

II. Standard Of Review

The standard of review is the same standard as the First Assignment of Error.

III. Argument

BOLI's Commissioner, the ultimate decisionmaker in this case, violated the Kleins' Due Process rights by failing to recuse himself despite numerous public comments revealing his intent to rule against them. All parties agree that the Kleins have a "procedural due process" right to "a decision maker free of actual bias." Op 49. Indeed, it is beyond dispute that Due Process is denied where the adjudicator "has prejudged, or reasonably appears to have prejudged, an issue." *Kenneally v Lungren*, 967 F2d 329, 333 (9th Cir 1992). That is true

even in administrative adjudications like this one. *Withrow v Larkin*, 421 US 35, 46 (1975).

Here, several pre-hearing public comments demonstrate the Commissioner's actual bias against the Kleins. For example, in a Facebook post that specifically referenced this case, the Commissioner wrote that "religious beliefs" do not "mean that [people] can disobey laws already in place." Op 50-53. In an interview about the Kleins, he stated that there is "one set of rules for everybody," *i.e.*, no exceptions. *Id.* In a televised interview, the Commissioner opined that the Kleins "likely" violated the law because "regardless of one's religious belief, if you open up a store, and you open it up to the public to sell goods, you cannot discriminate in Oregon." ER.412. The Commissioner also said that "folks" in Oregon do not have a "right to discriminate" and stated that those who use their "beliefs" to justify discrimination need to be "rehabilitate[d]." Op 53; ER.416.

This Court addressed the standard for disqualification in administrative adjudications in *Samuel v Board of Chiropractic Examiners*, 77 Or App 53, 712 P2d 132 (1985). At issue there was a determination by the Oregon Board of Chiropractic Examiners that vasectomies constituted major rather than minor surgery. Before the Board made that determination, one of its members opined publicly that vasectomies were major surgery. This Court rejected an argument

that the member's expression of a "preconceived point of view concerning an issue of law" required disqualification. *Id.* at 60 (citing *FTC v Cement Inst*, 333 US 683 (1948)).

BOLI's conclusion that Due Process did not require the Commissioner's recusal rests on a misapplication of *Samuel*. *See* Op 53-54. In contrast to the adjudicator in *Samuel*, the Commissioner did far more than announce a preconceived view of the law. His statements that the Kleins had "disobey[ed]" Oregon law and needed to be "rehabilitate[d]," for example, reflect determinations about the merits of the Kleins' constitutional defenses. And his statements about the need for "one set of rules" and the need for businesses to sell their goods and services to everybody "regardless of [their] religious belief" demonstrate determinations not to exercise his authority under the Worship and Conscience Clauses of the Oregon Constitution to exempt the Kleins from ORS 659A.403. *See Hickman*, 358 Or at 15-16 (expressly allowing for exemptions).

In any event, *Samuel* did not state the correct test for disqualification in this context. In most administrative adjudications, disqualification is required when "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Cinderella Career & Finishing Schs, Inc v FTC*, 425 F2d 583, 591 (DC Cir 1970); *see also Stivers v Pierce*, 71 F3d 732, 741, 747 (9th Cir 1995)

(applying *Cinderella*). *Cement Institute* required a different test because the allegedly disqualifying statements at issue were made in reports and testimony required by Congress. 333 US at 701-02. Allowing such statements to disqualify adjudicators would frustrate congressional purposes. *Id.* Such concerns were absent in *Samuel* and they are absent here. *See also Knutson Towboat Co v Bd of Maritime Pilots*, 131 Or App 364, 377, 885 P2d 746 (1994), *rev den* 321 Or 94 (1995) (bias shown where decisionmakers made up their minds about facts before hearing).

The Commissioner's statements satisfy the correct standard for disqualification set forth in *Cinderella* and *Knutson Towboat*. They reveal that before the Kleins had any opportunity to create a factual record or argue their view of the law, the Commissioner had already decided that the Kleins had denied service to the Complainants, that the denial violated ORS 659A.403, that it was not protected by either the Oregon or United States constitutions, and that no exemption should be granted. Due Process entitles the Kleins to a hearing before somebody who waits to hear the facts and arguments before reaching those conclusions.

THIRD ASSIGNMENT OF ERROR: THE DAMAGES AWARD IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE OR REASON

I. Assignment And Preservation Of Error

BOLI erred by awarding damages not supported by substantial evidence or reason. Op 32-41. The Kleins preserved this assignment at the damages hearing, ER.418-19, Tr.20-21; Doc 228, pp.804:3-832:5, and in their exceptions to the PFO, ER.132-35, 143-46, 150-55.

II. Standard Of Review

The standard of review is the same standard as the First Assignment of Error.

III. Argument

BOLI's award of $135,000 in damages is unsupported by substantial evidence and reason. *City of Roseburg v Roseburg City Firefighters*, 292 Or 266, 271-72, 639 P2d 90 (1981) (holding that final orders must be supported by substantial evidence and reason); *Springfield Educ Ass'n v Sch Dist*, 290 Or. 217, 226-28, 621 P2d 547 (1980) (same). The award ignores BOLI's own credibility determinations, mitigating causation evidence, and Complainants' discovery abuses; it is internally contradictory; and it bears no relation to awards in allegedly comparable cases. In other words, in several respects, the damages award lacks evidentiary support and fails to exhibit a "rational

connection between the facts and the legal conclusions it draws from them." *Ross v Springfield Sch Dist No 19*, 294 Or 357, 370, 657 P2d 188 (1982). Accordingly, it must be vacated and remanded.

For each Complainant, BOLI sought $75,000 to remedy mental and emotional suffering the Kleins' conduct allegedly caused. ER.259, 251. The Final Order determined that the Kleins' denial of service *and* McPherson's misreporting that Aaron Klein had called them "abomination[s]" caused complainants to feel "shame," "stres[s]," "anxiety," "frustration," "exhaustion," "sorrow," and "anger," and experience some discord within their family and unspecified sleep-related problems. Op 30-40; *id*. at 35 (The misreporting of the abomination statement made Cryer feel like "a mistake" that "had no right to love or be loved" or "go to heaven."); *id*. at 38 ("Because of [the misreported abomination statement, Bowman] felt shame.").

Like the ALJ, the Final Order determined that "emotional harm resulting from media attention [did] not adequately support an award of damages." Op 40. Nevertheless, the Final Order awarded damages for suffering that allegedly lasted twenty-six months, from the encounter at Sweet Cakes on January 17, 2013, "throughout the period of media attention," until the ALJ's damages hearing in March 2015. *Id*. BOLI awarded $75,000 to one Complainant and $60,000 to the other explaining the difference was because the latter had not

been "present at the denial" and had "in some respects" given "exaggerated" testimony "about the extent and severity of her emotional suffering." Op 41.

A. The Damages Award Lacks Substantial Evidence And Reason Because It Fails To Account For BOLI's Own Credibility Determinations, Material Evidence, And Complainants' Discovery Abuses.

BOLI's damages award is inconsistent with its credibility determinations. BOLI awarded damages to Complainants for harm attributable to being called "abomination[s]." Op 35, 38. But the Final Order contains no finding that the Kleins called Complainants by that name. Its only findings are (i) Aaron Klein explained his religious opposition to same-sex weddings *to McPherson*, *after the denial occurred*, by quoting a Bible verse stating that "it is an abomination" for a man to "lie with a male as one lies with a female" and (ii) McPherson subsequently misreported the conversation to Cryer, telling her that Klein "had called her 'an abomination.'" Op 3 n.2; *id*. at 6; ER.160 & n.48. It is error for BOLI to hold the Kleins liable for harms attributable to a statement it found the Kleins did not make to McPherson, let alone to one of the Complainants. *Petro v Dep't of Human Res*, 32 Or App 17, 23-24, 573 P2d 1250 (1978) (remanding order that deviates from credibility determination).

The Final Order further does not account for evidence, often undisputed, that tended to discredit Complainants' damages case. For example, it was undisputed that during the relevant time period, Complainants were enduring a

bitter custody battle regarding their foster children. Op 4. The Kleins also introduced evidence that the entire case was not about remedying emotional suffering, rather it was about Complainants and a gay-rights advocacy group's desire for political change. ER.455-56, Tr.637:21-638:19 ("[T]he whole reason of pursuing this case is . . . to change . . . these behaviors."); ER.457. An order based on substantial reason would either have accounted for this evidence, explained why it was not material, or dismissed it as incredible or overcome by other evidence. The Final Order, however, does none of these things. *PUC v Emp't Dep't*, 267 Or App 68, 69, 340 P3d 136 (2014) (remanding due to lack of substantial evidence); *In re ARG Enterprises*, 19 BOLI 116, 139-41 (1999) (awarding reduced damages due to other sources of mental distress not caused by respondent).

The Final Order also fails to account for Complainants' discovery abuses that stymied the Kleins' efforts to discover the true extent of their alleged emotional harm. For example, Complainants violated the ALJ's discovery order by failing to produce or undertake reasonable efforts to search for discoverable material and by deleting discoverable material notwithstanding a reasonable anticipation of litigation. ER.2-6 (discoverable material the Kleins independently located); ER.204-07; ER.423-29, Tr.108:12-114:20 (testimony regarding deleting emails); Doc 143, p.530 (acknowledging deleting emails).

An order based on substantial reason would have either accounted for these discovery abuses or explained why they did not prejudice the Kleins. The Final Order, however, is silent about Complainants' gamesmanship. *See Ross*, 294 Or at 370.

B. The Damages Award Lacks Substantial Evidence and Substantial Reason Because It Is Internally Contradictory.

First, the Final Order determined that Complainants cannot recover for harm attributable to media exposure, yet awarded damages for harm lasting over twenty-six months, "throughout the period of media attention." Op 40; *see also* ER.167, 175-76. That is a contradiction, unless there is substantial evidence of harm in the weeks, months, *and years* following the service denial attributable to anything other than media exposure. But both the PFO and Final Order note a near total lack of any such evidence. Op 37-40 & nn.17, 19; ER.175-76. The award covering twenty-six months is thus not supported by substantial evidence.

Second, the Formal Charges sought $150,000 in *total* damages based on alleged emotional suffering stemming from the denial of service *and* subsequent media exposure. The Final Order's determination that Complainants cannot recover for media-related harms at least implies that their damages awards should be reduced from their prayers for relief. But the Final Order neither reflects such reductions nor justifies their absence. *See* Op 32-41.

These internal contradictions require vacatur and remand. *Furnish v Montavilla Lumber Co*, 124 Or App 622, 625, 863 P2d 524, 526 (1993); *see also Cole/Dinsmore v DMV*, 336 Or 565, 584, 87 P3d 1120 (2004).

C. The Damages Award Lacks Substantial Reason Because It Is Out Of Line With Comparable Cases.

BOLI cites four precedents in determining that the "award is consistent with [its] prior orders." Op 41 & n.20. In each of those cases, however, the Complainants suffered *ongoing* harassment. Here, all claimed emotional suffering relates to a single, discrete incident. In all but one of the cases, the emotional suffering was so severe that it required medical treatment. *See id*. The record here reflects no such treatment. Two of the cases are particularly instructive. In one, a complainant was awarded $50,000 after being repeatedly assaulted and threatened with a firearm. *In re Maltby Biocontrol, Inc*, 33 BOLI 121, 133-34, 159 (2014). In another, a complainant who had been punched in the head and sexually harassed was awarded $50,000. *In re Charles Edward Minor*, 31 BOLI 88, 104-05 (2010). Both awards in this case are much larger, even though there was no physical contact, let alone a physical attack or assault with a deadly weapon. In short, BOLI has failed to offer any substantial reason that connects the harms alleged in this case to the damages award. Vacatur and remand are required. *See In re Montgomery Ward & Co*, 42 Or App 159, 163, 600 P2d 452 (1979).

FOURTH ASSIGNMENT OF ERROR: BOLI ERRED IN APPLYING ORS 659A.409 TO THE KLEINS

I. Assignment And Preservation Of Error

BOLI erred in concluding the Kleins violated ORS 659A.409, including rejecting their state and federal constitutional speech-and religion-based defenses. Op 23-32. The Kleins preserved this assignment in their answers, ER.221-24, 234-37, opposition to summary judgment on liability, ER.293-98, 301-08, and motion for summary judgment on liability, ER.330-361. They prevailed on this issue before the ALJ. Op 81-83 (incorporating Doc 56, pp.1425-1427).

II. Standard Of Review

The standard of review is the same standard as the First Assignment of Error.

III. Argument

BOLI erroneously determined that the Kleins violated ORS 659A.409, which makes it unlawful to make any communication to the effect that a public accommodation will deny its services to any person on account of, among other things, sexual orientation. To "further eliminate the effect" of the Kleins' alleged violation, BOLI enjoined future violations of ORS 659A.409. Op 42.

BOLI's incorrect determination is based on statements that relate only to providing goods and services to facilitate same-sex weddings, which are not—

and cannot be—prohibited by ORS 659A.403. Op 27; *supra* pages 23-56. Therefore, statements regarding such refusals are also not—and cannot be—prohibited by ORS 659A.409.

In any event, BOLI concedes that a statement of future intent to unlawfully discriminate is an indispensable element of an ORS 659A.409 violation. Op 82. As the ALJ correctly determined, the Kleins' allegedly actionable statements do not convey any such intent. Op 82-83. They simply describe the facts of this case, their view of the law, and their intent to vindicate that view.

The first statement is from an interview in which Aaron Klein told the host "[w]e don't do same-sex marriage, same-sex wedding cakes." Op 24-25, 27. But it is clear from context that Klein was not describing Sweet Cakes' future or even current stance, but rather the events that gave rise to this case: "Well, as far as how it unfolded . . . She kind of giggled and informed me it was two brides. At that point, . . . I said 'I'm very sorry, I feel like you may have wasted your time. You know we don't do same-sex marriage, same-sex wedding cakes.'" Op 24.

The second statement comes from the same interview in which Klein told the host that when Washington legalized same-sex marriage—long before the events of this case—he and his wife could "see this becoming an issue" for

them and expressed to each other an intent to "stand firm." Op 25-27. This simply describes a private conversation between spouses. Its public retelling described how this case arose and is not a statement about the Kleins' future intent.

Finally, BOLI cites a note the Kleins posted on Sweet Cakes' door after going out of business stating that "[t]his fight is not over" vowing to "continue to stand strong." Op 24. Those words only declare the Kleins' intent to vindicate their view of the law.

Remarkably, BOLI supported its conclusion by analogizing to cases involving statements far more explicit and egregious than those involved here. One addressed a voicemail asking transgendered persons "not to come back" to a bar. Op 27 n.11 (citing *In re Blachana LLC*, 32 BOLI 220 (2013)). The other involved a sign that said "NO . . . NI***RS." *Id.* (citing *In re The Pub*, 6 BOLI 270 (1987) (omissions added)). These are the very same cases the ALJ used to show that the Kleins' statements *did not* violate ORS 659A.409.

BOLI's conclusion that the Kleins violated ORS 659A.409 is erroneous. Even if the Kleins' statements discussed unlawful discrimination—and they do not—they do not convey any future discriminatory intent. The injunction BOLI issued to "remedy" these non-existent violations must be vacated and judgment entered for the Kleins.

In any event, the injunction must be vacated to ensure consistency with the Speech Clauses of the Oregon and United States constitutions. BOLI may enjoin people from threatening to discriminate on the basis of sexual orientation. *See FAIR*, 547 US at 62 (noting that Congress may require employers to "take down a sign reading 'White Applicants Only'"). But BOLI's injunction is premised on statements that are within the core of the First Amendment right "to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v Alabama*, 310 US 88, 101-02 (1940). The Kleins are entitled to speak about this case, their view of the law, and their intent to vindicate that view, even if their comments lead some to seek out other bakers. The injunction therefore restricts more speech than necessary to achieve any legitimate objectives and threatens a "chilling effect" that could result in self-censorship of protected speech. *Wash State Grange v Wash State Republican Party*, 552 US 442, 449 & n.6 (2008); *Virginia v Hicks*, 539 US 113, 118-19 (2003); *see also Grayned v City of Rockford*, 408 US 104, 114 (1972) ("A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct."). It must be invalidated.

CONCLUSION

BOLI's Final Order must be vacated. The Kleins did not violate ORS 659A.403 or ORS 659A.409. In any event, applying ORS 659A.403 to the conduct at issue here would violate the Speech and Religion Clauses of the constitutions of both Oregon and the United States. At a minimum, the Final Order must be vacated and remanded and the injunction entered to remedy violations of ORS 659A.409 must be reformed. BOLI violated the Kleins' Due Process rights, rendered a damages award unsupported by substantial reason, and issued an overbroad injunction that chills protected First Amendment expression.

DATED this 25th day of April, 2016.

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CERTIFICATE OF COMPLIANCE

On April 12, 2016, the Court issued an Order Granting Extended Brief. The Court's Order extended the word limit for Petitioners' opening brief to 15,000 words and the page limit for the combined excerpt of record and appendix to 700 pages.

I hereby certify that this brief complies with the Court's April 12, 2016 Order. The word count of this brief as described in ORAP 5.05(2)(a) is 14,921 words. The page count of the combined excerpt of record and appendix is 527 pages.

DATED this 25th day of April, 2016.

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CERTIFICATE OF FILING AND SERVICE

I certify that on April 25, 2016, I directed Appellants' OPENING BRIEF AND COMBINED EXCERPT OF RECORD AND APPENDIX to be electronically filed with the Appellate Court Administrator, Appellate Records Section.

I further certify that on April 25, 2016, I directed a true copy of the Appellants' OPENING BRIEF AND COMBINED EXCERPT OF RECORD AND APPENDIX to be served on the following parties at the addresses set forth below:

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Attorney for Respondent

Service was made by eFiling.

DATED this 25th day of April, 2016.

/s/ TYLER SMITH
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IN THE COURT OF APPEALS OF THE STATE OF OREGON

MELISSA ELAINE KLEIN, dba Sweetcakes by Melissa; and **AARON WAYNE KLEIN**, dba Sweetcakes by Melissa, and, in the alternative, individually as an aider and abettor under ORS 659A.406, Petitioners, v. **OREGON BUREAU OF LABOR AND INDUSTRIES**, Respondent.	Agency Nos. 44-14, 45-14 CA A159899

PETITIONERS' COMBINED EXCERPT OF RECORD AND APPENDIX

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INDEX

EXCERPT OF RECORD

APPENDIX

EXCERPT OF RECORD

EXHIBIT A

BEFORE THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON

In the Matter of: Oregon Bureau of Labor and Industries on behalf of RACHEL CRYER Complainants v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 44-14 AFFIDAVIT OF ANNA HARMON IN SUPPORT OF REQUEST FOR STAY
In the Matter of: Oregon Bureau of Labor and Industries on Behalf of LAUREL BOWMAN CRYER, Complainant, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 45-14 AFFIDAVIT OF ANNA HARMON IN SUPPORT OF REQUEST FOR STAY

I, Anna Harmon, being duly sworn, or affirm as follows:

1.

My name is Anna Harmon. I am one of the attorneys representing Respondents in this case. I am over 18 years of age, and I have personal knowledge of the facts stated in this

TYLER SMITH & ASSOCIATES, P.C.
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declaration.

2.

Exhibit 1 is a true and accurate copy of a screenshot I took from Facebook dated July 10, 2015 from the Boycott Sweet Cakes by Melissa Facebook page, with my personal information redacted.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

DATED this 10 day of July, 2015.

Anna Harmon

STATE OF OREGON)
) ss.
County of Clackamas)

SUBSCRIBED AND SWORN TO before me this 10th day of July, 2015.

OFFICIAL SEAL
FAYDRA ROSS
NOTARY PUBLIC - OREGON
COMMISSION NO. 920831
MY COMMISSION EXPIRES OCTOBER 02, 2017

Notary Public for Oregon
My commission expires: Oct 2, 2017

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant St. STE 212, Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

808 people like this

Invite friends to like this Page

JT

Boycott SCBM for breaking an Oregon State law by discriminating against a couple based on sexual orientation.

'08

ER-4

Carl Jacobs Who is Allen Bloom and why should I care about his opinion?
Like · Reply · April 28 at 8:55pm

02676

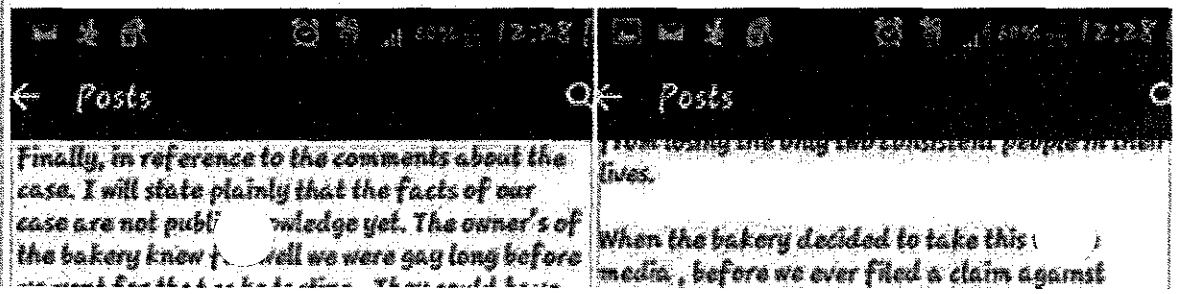
Boycott Sweet Cakes by Melissa, Gresham, OR added 2 new photos.
April 28 ·

BREAKING

We have received statements for both Laurel Bowman and Rachel Cryer from both a related and the most reliable source. Rachel's will appear as screenshots.

From Laurel Bowman:

"Words arent enough, and emotions are paramount. This was indeed a victory for our community. But it was a great sacrifice for myself, my wife, and our family. There arent many people, if any, who can understand what we have been through. The heartache, humiliation, gut wrenching torture of not being able to talk because we need to do the right thing and protect our children. Those that have been around and seen us, understand slightly. They have seen the utter pain my family is in. But the public. ..... they dont understand they are the main reason we are hurting. The judgement without knowing, condemnation, and hateful disheartening messages, these all feel to be too much to bear at times. But alas, I must keep my head high, my face must hide my pain, my anger... because what really matters, everything I do, is for these two little girls. I need them to know their mothers love them unconditionally, and sacrificed ourselves for not only them, but our community as a whole."



3x1.1

60% 12:28 PM

← Posts

Finally, in reference to the comments about the case. I will state plainly that the facts of our case are not public knowledge yet. The owner's of the bakery knew full well we were gay long before we went for that cake tasting. They could have told us they weren't going to serve us on 3 different occasions when we spoke about cake tasting. They didn't because they wanted all this publicity to happen. They set us up so they can make themselves famous among their right wing conservative peers and so they could make money off of their speaking engagements, their pending documentary, their exclusive interview coming 4/27/15, and all of the people who have already donated way more than the $135, 000 fine to them already. We have not. We have been silent, done no interviews, given no statements, and seeked no spotlight for ourselves. What we have done is our best to protect our 2 disabled children from the media, the death threats, and from losing the only two consistent people in their lives.

When the bakery decided to take this to the media , before we ever filed a claim against them, they posted our home address, email, and phone number on Facebook. At that time we were foster parents, and the state almost took them from us because their location was compromised.

Write a comment...

Boycott Sweet Cakes by Meli
Gresham, OR
April 28 ·

Like · Comment · Share

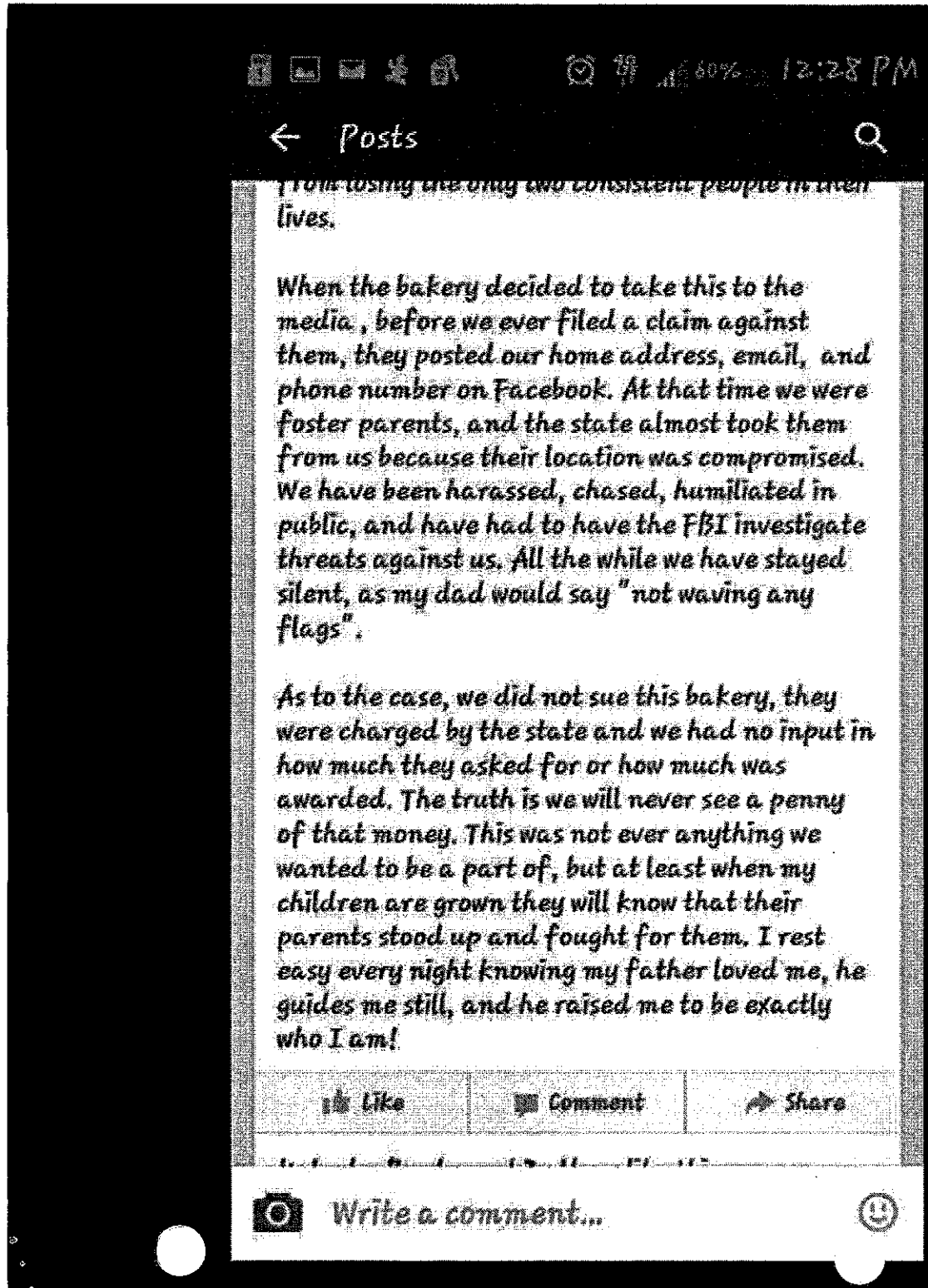
7 people like this.

Sponsored

Pay with Visa Checkout
williams-sonoma.com/visacheckout
at Williams-Sonoma, get $10 off $100+ next sonoma.com purchase. Ltd Time. Terms.

02075

Ex. , p.2



Posts

from losing the only two consistent people in their lives.

When the bakery decided to take this to the media , before we ever filed a claim against them, they posted our home address, email, and phone number on Facebook. At that time we were foster parents, and the state almost took them from us because their location was compromised. We have been harassed, chased, humiliated in public, and have had to have the FBI investigate threats against us. All the while we have stayed silent, as my dad would say "not waving any flags".

As to the case, we did not sue this bakery, they were charged by the state and we had no input in how much they asked for or how much was awarded. The truth is we will never see a penny of that money. This was not ever anything we wanted to be a part of, but at least when my children are grown they will know that their parents stood up and fought for them. I rest easy every night knowing my father loved me, he guides me still, and he raised me to be exactly who I am!

Like Comment Share

Write a comment...

Boycott Sweet Cakes by Meli
Gresham, OR
April 28 -

Like · Comment · Share

10 people like this.

Write a comment...

Sponsored

Spice up your summer
sweeps.visacheckout.com
You could win $5000 Williams-Sonoma. No
18+USRes. Ends 8/31/15. Rules:

Ex. 2.3

EXCERPT OF RECORD

EXHIBIT B

BRAD AVAKIAN
COMMISSIONER

CHRISTIE HAMMOND
DEPUTY COMMISSIONER

BUREAU OF LABOR AND INDUSTRIES

BEFORE THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES OF THE STATE OF OREGON

In the Matter of: **MELISSA ELAINE KLEIN, dba SWEETCAKES BY MELISSA,** **and** **AARON WAYNE KLEIN, dba SWEETCAKES BY MELISSA, and, in the alternative, individually as an aider and abettor under ORS 659A.406,** Respondents.	Case Nos. **44-14 & 45-14** FINDINGS OF FACT ULTIMATE FINDINGS OF FACT CONCLUSIONS OF LAW OPINION ORDER

SYNOPSIS

The Agency's Formal Charges alleged that Respondents refused to make a wedding cake for two Complainants based on their sexual orientation and that Respondents published and displayed a communication to that effect, in violation of ORS 659A.403 and ORS 659A.409. In addition, the Formal Charges alleged that Aaron Klein aided and abetted Melissa Klein in the commission of those violations. In this Final Order, the Commissioner concludes that: (1) A. Klein, acting on behalf of Sweetcakes by Melissa, refused to make a wedding cake for Complainants based on their sexual orientation, thereby violating ORS 659A.403; (2) M. Klein did not violate ORS 659A.403; and (3) A. Klein did not aid and abet M. Klein in violation of ORS 659A.406. The Commissioner reversed the ALJ's ruling on summary judgment motions that neither A. nor M. Klein violated ORS 659A.409 and held that both A. and M. Klein violated ORS 659A.409. The Commissioner held that, as partners, A. Klein and M. Klein are jointly and severally liable for all violations. The Commissioner awarded Complainants $75,000 and $60,000, respectively, in damages for emotional and mental suffering resulting from the denial of service.

ITEM 9

02073

NOTE: The procedural history of this case is extensive and includes the ALJ's lengthy ruling on Respondents' motion and the Agency's cross-motion for summary judgment. For ease of reading, all procedural facts, pre-hearing motions, and rulings on those motions are included as an Appendix to this Final Order. The Appendix immediately follows the "Order" section of this Final Order that bears the Commissioner's signature.

IMPORTANT: The Judicial Review Notice that customarily follows the "Order" section of Commissioner's Final Orders may be found on the last page of this Final Order.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held at the Office of Administrative Hearings, located at 7995 S. W. Mohawk Street, Entrance B, Tualatin, Oregon. The evidentiary part of the hearing was conducted on March 10-13, and 17, 2015, and closing arguments were made on March 18, 2015.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by BOLI's chief prosecutor, Jenn Gaddis, and Cristin Casey, administrative prosecutor, both employees of the Agency. Paul Thompson, Complainants' attorney, was present throughout the hearing. Complainants Rachel Bowman-Cryer and Laurel Bowman-Cryer were both present throughout the hearing. Respondents Melissa Klein and Aaron Wayne Klein were both present throughout the hearing and were represented by Herbert Grey, Tyler Smith, and Anna Harmon, attorneys at law.

The Agency called the following witnesses: Rachel Bowman-Cryer, Laurel Bowman-Cryer, Cheryl McPherson, Aaron Cryer, Jessica Ponaman, Candice Ericksen, Laura Widener, Aaron Klein, and Melissa Klein.

Respondent called the following witnesses: Aaron Klein, Melissa Klein, and Rachel Bowman-Cryer.

At hearing, the forum received into evidence:

a) Administrative exhibits X1 through X95.

b) Agency exhibits A1 through A12, A23 (pp. 1-4), A25, and A27 through A29 were received. Exhibit A30 was offered but not received.

c) Respondents' exhibits R2 (selected "posts" on pp. 3 and 9), R2 through R5, R6 (pp. 1-2), R7 through R12, R13 (pp. 7-18), R15, R16, R18 through R24, R26, R27, R28 (pp. 1-3, part of p. 4, pp. 14-28), R29, R30, R32, R33 (pp. 5-8), and R34 through R41 were received. Exhibits R1, R14, and R17 were offered but not received.

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact,[1] Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – THE MERITS[2]

1) LBC and RBC are both homosexual females. They met in 2004 while they attended the same college and considered themselves a "couple" for the 11 years preceding the hearing. They lived together in Texas until 2009, when they moved to

[1] The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

[2] Except for Finding of Fact #43 – The Merits, the findings of fact relevant to the forum's determination of whether Respondents violated ORS 659A.403, ORS 659A.406, and ORS 659A.409 are set out in the forum's ruling on Respondents' Renewed Motion for Summary Judgment and the Agency's Cross-Motion for Summary Judgment. *See* Finding of Fact #28 – Procedural, *supra*. They are duplicated in these Findings of Fact – The Merits only to the extent necessary to provide context to Complainants' claim for damages.

Portland, Oregon, and have lived together continuously since moving to Portland. (Testimony of LBC, RBC, McPherson)

2) LBC first asked RBC to marry her soon after they met and was turned down. LBC continued to propose on a regular basis until October 2012, when RBC finally agreed to marry her. (Testimony of RBC, LBC)

3) Before October 2012, RBC did not want to get married because of her personal experience of failed marriages that "tended to do more damage than good." (Testimony of RBC, LBC, McPherson)

4) In November 2011, Complainants became foster parents for "E" and "A,"[3] two disabled children with very high special needs, after the death of their mother, LBC's best friend. At the time, Complainants were already the children's godparents. When they became the children's foster parents, Complainants decided that they wanted to adopt the children. Subsequently, Complainants became involved in a bitter and emotional custody battle for the children with the children's great-grandparents that continued until sometime after December 2013, when Complainants' December 2013 adoption application was formally approved by the state of Oregon.[4] (Testimony of LBC, RBC, McPherson)

5) In October 2012, RBC decided that she and LBC should get married in order to give their foster children "permanency and commitment" by showing them how much she and LBC loved one another and were committed to one another. RBC told LBC that she wanted to get married, which made LBC "extremely happy." After her long-standing matrimonial reticence, RBC then became excited to get married and to

[3] The forum uses the children's first name initials instead of their full names to protect their privacy.

[4] Although it is undisputed that Complainants eventually adopted the children, there is no evidence as to what date the adoptions were finalized.

start planning the wedding, wanting a wedding that was as "big and grand" as they could afford. (Testimony of RBC, LBC)

6) Sometime between October 2012 and January 17, 2013, RBC and Cheryl McPherson ("CM"), RBC's mother, attended a Portland bridal show. MK had a booth at the show to advertise wedding cakes made by Sweetcakes by Melissa ("Sweetcakes"). Two years earlier, Sweetcakes had designed, created, and decorated a wedding cake for CM and RBC that RBC really liked. At the show, RBC and CM visited Sweetcakes's booth and told MK they would like to order a cake from her. After the show, RBC made an appointment via email for a cake tasting at Sweetcakes. (Testimony of RBC, CM, MK; Ex. R16)

7) Complainants were both excited about the cake tasting at Sweetcakes because the cake Respondents had made for CM's wedding had been so good and RBC wanted to order a cake like CM's cake. (Testimony of RBC, A. Cryer)

9) On January 17, 2013, RBC and CM visited Sweetcakes's bakery shop in Gresham, Oregon for their cake tasting appointment, intending to order a cake for RBC's wedding to LBC. (Respondents' Admission; Affidavit of AK; Testimony of RBC, CM, AK)

9) In January 2013, AK and MK were alternately caring for their infant twins at their home. At the time of the tasting, MK was at home and AK conducted the tasting. During the tasting, AK asked for the names of the bride and groom, and RBC told him there would be two brides and their names were "Rachel and Laurel." At that point, AK stated that he was sorry, but that Sweetcakes did not make wedding cakes for same-sex ceremonies because of AK's and MK's religious convictions. In response, RBC began crying. She felt that she had humiliated her mother and was anxious whether CM was ashamed of her, in that CM had believed that being a homosexual was

wrong until only a few years earlier. CM then took RBC by the arm and walked her out of Sweetcakes to their car. On the way out to their car and in the car, RBC became hysterical and kept telling CM "I'm sorry" because she felt that she had humiliated CM. (Respondents' Admission; Affidavit of AK; Testimony of RBC, CM)

10) In the car, CM hugged RBC and assured her they would find someone to make a wedding cake. CM drove a short distance, then returned to Sweetcakes and re-entered Sweetcakes by herself to talk to AK. During their subsequent conversation, CM told AK that she used to think like him, but her "truth had changed" as a result of having "two gay children." AK quoted Leviticus 18:22 to CM, saying "You shall not lie with a male as one lies with a female; it is an abomination." CM then left Sweetcakes and returned to the car. While CM was in Sweetcakes, RBC remained sitting in the car, "holding [her] head in her hands, just bawling." (Affidavit of AK; Testimony of RBC, CM)

11) When CM returned to the car, she told RBC that AK had told her that "her children were an abomination unto God." (Testimony of RBC; CM)

12) When CM told RBC that AK had called her "an abomination," this made RBC cry even more. RBC was raised as a Southern Baptist. The denial of service in this manner made her feel as if God made a mistake when he made her, that she wasn't supposed to be, and that she wasn't supposed to love or be loved, have a family, or go to heaven. (Testimony of RBC)

13) CM and RBC then drove home. RBC was crying when they arrived home and immediately went upstairs to her bedroom, followed by LBC and CM, where she lay in her bed, crying.[5] In the bedroom, LBC asked CM what had happened, and CM told

---

[5] RBC credibly testified as follows:

> "I was beyond upset. I just wanted everybody to leave me alone. I couldn't face looking at my mom, and I didn't even know if I still wanted to go through with getting married anymore. So I just told everybody to leave me alone as much as possible, and I went to my room."

her that AK had told them that Sweetcakes did "not do same-sex weddings" and that AK had told CM that "your children are an abomination." LBC was "flabbergasted" at AK's statement about same-sex weddings. This upset her and made her very angry. (Testimony of RBC, LBC, CM)

14) LBC, who was raised as a Catholic, recognized Klein's statement as a reference from Leviticus. She was "shocked" to hear that AK had referred to her as an "abomination," and thought CM may have heard wrong. She took the denial of service in this manner to mean "...this is a creature not created by God, not created with a soul; they are unworthy of holy love; they are not worthy of life." She immediately thought that this never would have happened if she had not asked RBC to marry her and felt shame because of it. She also worried that this might negatively impact CM's acceptance of RBC's sexual orientation. (Testimony of LBC)

15) LBC, who had always viewed herself as RBC's protector, got into bed with RBC and tried to soothe her. RBC became even more upset and pushed RBC away. In response, LBC lost her temper and started yelling that she "could not believe this had happened" and that she could "fix" things if RBC would just let her. After LBC left the room, RBC continued crying and spent much of that evening in bed. (Testimony of RBC, LBC, CM)

16) Back downstairs, E, the older of Complainants' foster daughters was extremely agitated from events at school that day. LBC tried to calm her, but she refused to be calmed, repeatedly calling out for RBC, with whom she had a special bond. Eventually, E cried herself to sleep. LBC's inability to calm E was very frustrating to her. She felt overwhelmed because she didn't know how to handle the situation. That night, LBC was very upset, cried a lot, and was hurt and angry. (Testimony LBC, A. Cryer)

17) After CM returned home on January 17, 2013, she telephoned "Lauren" at the West End Ballroom ("WEB"), the venue where Complainants planned to have their commitment ceremony, and told Lauren that Sweetcakes had refused them cake service for their wedding. CM also posted a review on Sweetcakes Facebook wedding page and on another wedding website with a message stating: "If you're a gay couple and having a commitment ceremony or wedding, don't go to this place because they discriminate against gay people." (Testimony of CM; Ex. R22)

18) At 8:22 p.m. on January 17, 2013, Lauren from WEB emailed RBC and LBC to say she had heard from CM and wanted to know the details of the refusal at Sweetcakes. (Testimony of LBC; Ex. R32)

19) At 9:10 p.m. on January 17, 2013, RBC sent a return email to Lauren at WEB in which she stated:

> "Hi Lauren,
>
> "I am sorry to have to bring this to your attention. I want to assure you that we would have gone with Sweet Cakes reguardless (sic) of your recommendation, because we purchased my mother's wedding cake from them and were very happy with the cake. My girlfriend and I purchased my mother's cake as a wedding gift for her. At that time Melissa said nothing about not wanting to work for us because we were gay.
>
> "I even spoke with them at the Portland Wedding Show and made an appointment then for 1pm today. When we showed up for the appointment it was with Melissa's husband. I did not catch his name because the appointment did not last long enough for me to ask. He took us in the office and asked what the bride and groom names were. When we told him that our names were Rachel and Laurel, he quickly said that they don't do gay weddings because they are Christians and don't believe same-sex marriage is right. My mother asked why they had no problem taking my money when I purchased her cake. She told them that we are a christian family as well and that she used to believe like he believed until God blessed her with two gay children.
>
> "I was stunned and crying. This is twice in this wedding process that we have faced this kind of bigotry. It saddens me because we moved from Texas so that my brother and I could be more accepted in the community.

> "We wanted to inform you of all of this because you have a right to know so that other same-sex couples don't have to go through this in the future. It surprisingly that both the West End Ballroom and the caterers we chose, Premier Catering, reccommend (sic) Sweet Cakes and yet neither mentioned to us that they don't do gay weddings. I figure that this must be because no one ever speaks up to let you know. I didn't want to let this pass without saying something.
>
> "My fiancé and I have been together for 10 years. We are adopting our two foster children and wanted to get married as a sign of our commitment to each other and the family that we are creating. It saddens me that my children will grow up in a world where people are an abomination because they love each other. It is my responsibility to set an example for them that you should speak up when you see injustice because that is how we make progress.
>
> "Thank you for your fast response to both my mother and I. I realize that you are not responsible for their poor behavior, and thank you for your understanding. If there is anymore info that I can provide for you please let me know.
>
> "Sincerely,
> Rachel Cryer & Laurel Bowman"

(Testimony of LBC; Ex. R32)

20) Later that same evening, LBC filled out an "Oregon Department of Justice ("DOJ") Consumer Complaint Form," using her smart phone to access DOJ's website. In hard copy,[6] the complaint was two pages long. On the first page, she provided her name, address, phone number and email address, Sweetcakes's name, address, and phone number. On the first page, immediately above the space where LBC wrote her name, the following text was printed:

> "By submitting this complaint, I understand a) this complaint will become part of DOJ's permanent records and is subject to Oregon's Public Records Law; b) this complaint may be released to the business or person about whom I am complaining; c) this complaint may be referred to another governmental agency. By submitting this complaint, I authorize any party to release to the DOJ any information and documentation relative to this complaint."

[6] The record lacks substantial evidence to establish what the digital format for the complaint form looked like, but Ex. R3 is a hard copy of the complaint that Respondents received. The forum relies on that copy in describing the contents and format of the complaint.

This public records disclaimer was not visible on LBC's smart phone view of DOJ's form. On the second page, LBC described the details of her complaint as follows:

> "In november of 2011 my fiance and I purchased a wedding cake from this establishment for her mother's wedding. We spent 250. When we decided to get married ourselves chose to back and purchase a second cake. Today, January 17, 2013, we went for our cake tasting. When asked for a grooms name my soon to be mother in law informed them of my name. The owner then proceeded to say we were abominations unto the lord and refused to make another cake for us despite having already paid 250 once and having done business in the past. We were then informed that our money was not equal, my fiancé reduced to tears. This is absolutely unacceptable."

(Testimony of LBC; Exhibit R3)

21) Aaron Cryer, RBC's brother, also lived with Complainants at this time. Later on the evening of January 17, 2013, he arrived home from school and work and he and Complainants had a 30 minute conversation about what happened at Sweetcakes that day. (Testimony of A. Cryer)

22) On January 18, 2013, RBC felt depressed and questioned whether there was something inherently wrong with the sexual orientation she was born with and if she and LBC deserved to be married like a heterosexual couple. She spent most of her day in her room, trying to sleep. (Testimony of RBC)

23) In the days following January 17, 2013, RBC had difficulty controlling her emotions and cried a lot, and Complainants argued because of RBC's inability to control her emotions. They had not argued previously since moving to Oregon. RBC also became more introverted and distant in her family relationships. She and A. Cryer, have always been very close, and their connection was not as close "for a little bit" after January 17, 2013. RBC questioned whether she had the ability to be a good mother because of the difficulty she was having in controlling her emotions. A week later, RBC still felt "very sad and stressed," felt concerned about still having to plan her wedding, and felt less exuberant about the wedding. Previous to that time, she had been "very

friendly and happy" in her communications with Candice Ericksen, A and E's great aunt, about her wedding. After January 17, 2013, although RBC relied on CM to contact potential wedding vendors, she experienced anxiety over possible rejection because her wedding was a same-sex wedding. (Testimony of RBC, LBC, CM, A. Cryer, Ericksen)

24) In the days following January 17, 2013, LBC experienced extreme anger, outrage, embarrassment, exhaustion, frustration, intense sorrow, and shame as a reaction to AK's refusal to provide a cake. She felt sorrow because she couldn't console E, she could not protect RBC, and because RBC was no longer sure she wanted be married. Her excitement about getting married was also lessened because she was not sure she could protect RBC if any similar incidents occurred. (Testimony of RBC, LBC, Ericksen)

25) After January 17, 2013, CM assumed the responsibility for contacting the vendors who would be needed for Complainants' ceremony. Shortly thereafter, she arranged for a cake tasting at Pastry Girl ("PG"), another local bakery. While making the appointment, CM asked Laura Widener, PG's owner/baker, if she was okay with providing a cake for a same-sex wedding ceremony. Widener assured her that this was not a problem. (Testimony of RBC, CM, Widener; Ex. R4)

26) On January 21, 2013, CM and RBC went to PG and met with Widener. While at PG, CM and RBC were both anxious, and CM did most of the talking, while RBC tried not to cry until they started talking about the design of the cake. At that point, RBC became more animated and was able to explain the design she wanted on the cake. By the end of the meeting, the design they settled on was a cake with three tiers that had a peacock's body on top and the peacock's tail feathers trailing down over tiers to the cake plate. When completed, the peacock and its feathers were hand-created

and hand-painted by Widener. Widener charged Complainants $250 for the cake. (Testimony of Widener, RBC, CM)

27) Respondents would have charged $600 for making and delivering the same cake. (Testimony of AK)

28) On January 28, 2013, DOJ mailed a copy of LBC's Consumer Complaint to Respondents, along with a cover letter. In pertinent part, DOJ's cover letter stated:

> "We have received the enclosed consumer complaint about your business. We understand that there are often two sides to a problem, and we would appreciate your prompt review of this matter.
>
> "We do not represent the complainant. We do, however, review all complaints to determine whether grounds exist to warrant action by us. Your response to the allegations in the complaint would help us to make that determination.
>
> "In the interest of efficiency, we prefer that you respond directly to the complainant and e-mail copy of the response to our office. Please include the file number shown above on the subject line of your e-mail. Alternatively, you may respond to us by regular mail."

On January 29, AK posted a copy of the first page of LBC's DOJ complaint on his Facebook page, prefaced by his comment "[t]his is what happens when you tell gay people you won't do their 'wedding cake.'" At that time, AK only had 17 "friends" on his Facebook page. (Testimony of LBC, AK; Exs. R3, A4)

29) On the same day that AK posted LBC's DOJ complaint, LBC received an email telling her of the posting and that she should look at it. LBC did so, then called Paul Thompson, Complainants' attorney in this proceeding. Later that day, the posting was removed. (Testimony of LBC, AK)

30) On February 1, 2013, LBC went to the emergency room of a local hospital at approximately 8:00 p.m. because of an injury to her shoulder that she had suffered three weeks earlier when lifting one of her foster children above her head when they

were playing. While in the hospital, she became aware that AK's refusal to make their wedding cake was on the news. This made her very upset and she cried when she was examined by a doctor, telling the doctor that she had an "unpleasant interaction with a business owner, and now this information is on the news." (Testimony of LBC; Exs. A6, R7)

31) On February 1, 2013, RBC became aware that the media was aware of AK's refusal to make a wedding cake for Complainants when she received a telephone call from Lars Larson, an American conservative talk radio show host based in Portland, Oregon, who told her that he had spoken with AK and wanted to see what RBC "had to say about the pending case." RBC refused to talk with Larson and called LBC, who was at the hospital having her shoulder examined. (Testimony of RBC, LBC)

32) As soon as they became aware that LBC's DOJ complaint had become public knowledge through the media, both Complainants greatly feared that E and A would be taken away from them by the state of Oregon's foster care system.[7] Earlier,

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[7] The level of Complainants' concern over their foster parent status was vividly illustrated in RBC's and LBC's testimony on direct examination by the Agency:

R. Bowman-Cryer

Q: "So how did you react? How did you react to hearing about your case, I guess, or your situation in the news?"

A: "My first concern was that nobody could know that we had these children and that whatever we did had to be to protect them. We did not want their names in the media. We did not want any information about them or our foster parent status or the status of their case to be public knowledge to anyone."

L. Bowman-Cryer

Q: "Was the fear from that initial media release ever lessened for you?"

A: "No, ma'am. That fear was paramount to everything."

Q: "When you say paramount, was it greater for you than the actual refusal of service?"

A: "At that point in time, yes, ma'am."

Q: "Did you still feel emotional effects from the refusal of service?"

A: "Absolutely, yes, ma'am. My children were still suffering. My wife was still suffering, and that was tearing me apart."

they had been instructed that it was their responsibility to make sure that the girls' information was protected and that the state would "have to readdress placement" of the girls with Complainants if any information was released concerning the girls. (Testimony of RBC, LBC)

33) Based on the media or potential media exposure about the case after February 1, 2013, LBC's headaches increased. She felt intimidated and became fearful. (Testimony of LBC; Ex. A12)

34) At some point after February 1, 2013, one of RBC's Facebook "friends" saw an article about the case in her local Florida paper and posted it on Facebook, adding in her comments that RBC and LBC had children. RBC immediately responded, writing: "Jessica – I know you were trying to defend us, but you released information about our kids. The public doesn't know we have kids; that is the whole point of being silent. Please remove your comment immediately." RBC's "friend" responded and said she removed her comment as soon as she read RBC's response. (Testimony of RBC; Ex. A26)

35) On February 8, 2013, Paul Thompson sent a letter regarding Complainants and their situation to the following media sources: KGW, KOIN, The Oregonian, OPB, KATU, KPTV, the Lars Larson Radio Show, The Wall Street Journal, Willamette Week, and Reuters. The letter read as follows:

> "Members of the Media:
>
> "I would like to begin by thanking each of you for your interest in this story. As you know, I represent the lesbian couple who were denied a wedding cake by Sweet Cakes by Melissa. I ask that their names not be printed in regards to this statement, as they would appreciate privacy in this matter.
>
> "The Press Release reads:

"We are grateful for the outpouring of support we have received from friends, family, members of the LGBT community, and our allies. We are especially thankful that LGBT-supportive companies have graciously offered their services to make our special day perfect.

"At this time, the support of the community and other well-wishers is all we require. We ask that individuals and companies that want to provide support, direct their donations in our name to Pride Northwest, our pride organization in Portland, Oregon. They have accepted our request to direct donations and gifts to further awareness of issues affecting the LGBT community, including marriage equality and families. Interested parties can contact Cory L. Murphy of Pride Northwest with any questions. * * *

"We have decided to accept the gracious offer from Mr. Duff Goldman of Charm City Cakes and the TV show 'Ace of Cakes.' At the time Mr. Goldman made his offer we had already contracted with and paid for another local bakery, Pastrygirl, to make our wedding cake. It is extremely important to us to honor that contract. With that in mind we have humbly asked Mr. Goldman and Charm City Cakes to prepare a Bride's cake for us in place of the traditional Groom's cake. We are grateful to both bakeries for being a part of making our wedding date incredibly special.

"While we are humbled by the support and mindful of people's interest, this matter has placed us in the media spotlight against our wishes. In order to maintain our privacy, we will not be granting interviews and are asking everyone to respect our privacy at this time.

"Please direct any media inquiries to our attorney, Paul Thompson[.]"

(Exs. A7, R28)

36) On February 9, 2013, there was an organized protest outside Respondents' bakery that was reported by KATU.com. The protest was organized by a person or persons who started a Facebook page called "BoycottSweetCakesByMelissaGRESHAM" ("Boycott") on February 6, 2013, and posted a photo from KATU.com that shows "protesters gathered Saturday outside a Gresham bakery that's at the center of a wedding cake controversy." Complainants were not involved in the protest or subsequent boycott. However, on February 10, 2013, both Complainants made comments on Boycott's Facebook page in which they indirectly

identified themselves as the persons who sought the wedding cake and thanked people for their support. (Exs. R9, R13)

37) On February 8, 2013, Herbert Grey, Respondents' lead counsel in this case, sent a letter to DOJ that responded to LBC's January 17, 2013, consumer complaint. In the letter, Grey identified himself as representing Respondents concerning the complaint filed by "Laurel Bowman" and addressed the issues raised in the complaint. Grey also cc'd a copy of his letter to LBC. (Ex. R10)

38) On February 12, 2013, DOJ emailed a copy of LBC's DOJ consumer complaint to a number of media sources, along with a note stating:

> "Hey everyone,
>
> "Please pardon the mob email. But it seems the most efficient and fair thing to do. Attached is the initial Sweet Cakes complaint as well as the newly received response from the bakery owners' lawyer. The other new development is that the complainants have informed the DOJ and BOLI that they plan on filing a complaint with BOLI. That has yet to happen as early this afternoon. But we're told it's the plan. At that point, the DOJ's involvement in the saga will end."

On February 13, 2013, this email was forwarded to Herb Grey, Respondents' attorney, by Tony King, the executive producer of the Lars Larson Show. (Ex. R15)

39) After LBC's DOJ complaint was publicized in the media, Complainants both had negative confrontations from relatives who learned about their complaint against Respondents through the media. In January 2013, LBC had just begun to re-establish a relationship with an aunt who had physically and emotionally abused her as a child and also owned all of the family property. Shortly after LBC's complaint became public, the aunt insisted through social media that LBC drop the complaint. She also called LBC and told her she was not welcome on family property and she would shoot LBC "in the face" if LBC ever set foot on the family's property in Ireland or the United States. This threat "devastated" LBC, as it meant she could not visit her mother or

grandmother, both of whom lived on family property. RBC's sister, who believed that homosexuals should not be allowed to get married, wrote a Facebook message to the Kleins to tell them that she supported them. This was a "crushing blow" to RBC, and it hurt her and made her very angry at her sister. (Testimony of LBC, RBC, CM; Ex. A16)

40) On June 27, 2013, Complainants had a commitment ceremony at the West End Ballroom, a venue located at 1220 S.W. Taylor in downtown Portland. On the day of the ceremony, the words "ROMANCE BY CANDLELIGHT – STARRING RACHEL AND LAUREL – JUNE 27, 2013" were posted on a large billboard on the street-facing wall of the WEB. Only invited guests were allowed to attend the ceremony. Just prior to the ceremony, Duff Goldman's free cake was delivered by an incognito motorcyclist. At the ceremony, Complainants and their guests celebrated with their cakes from Pastry Girl and Goldman. After the ceremony, Complainants considered themselves to be married even though they could not be legally married in the state of Oregon at that time. (Testimony of RBC, LBC, Widener; Exs. R18, R19)

41) On August 8, 2013, RBC filed a verified complaint with BOLI alleged that Sweetcakes by Melissa had discriminated against her by refusing to make her a wedding cake because of her sexual orientation. (Testimony of RBC; Ex. A27)

42) On August 14, 2013, BOLI's Communications Director issued a press release related to RBC's complaint. The first paragraph read: "Portland, OR – A same-sex couple has filed an anti-discrimination complaint with the Oregon Bureau of Labor and Industries (BOLI) against a Gresham bakery, Sweet Cakes by Melissa, for allegedly refusing service based on sexual orientation." (Ex. R20)

43) During the CBN video interview described in Finding of Fact #12 in the ALJ's Summary Judgment Ruling, CBN broadcast a picture of a handwritten note taped on the inside of a front window at Sweetcakes' bakery in Gresham. The note read:

> "Closed but still in business. You can reach me by email or facebook. www.sweetcakesweb.com or Sweetcakes by Melissa facebook page. New phone number will be provide on my website and facebook. This fight is not over. We will continue to stand strong. Your religious freedom is becoming not free anymore. This is ridiculous that we cannot practice our faith. The LORD is good and we will continue to serve HIM with all our heart. [heart symbol]"

(Ex. 1-I, Respondents' Motion for Summary Judgment)

44) On November 7, 2013, LBC filed a verified complaint with BOLI alleging that Sweetcakes by Melissa had discriminated against her by refusing to make her a wedding cake because of her sexual orientation. (Testimony of LBC; Ex. A28)

45) On January 17, 2014, BOLI's Communications Director issued a press release that began and ended with the following statements:

> "**BOLI finds substantial evidence of unlawful discrimination in bakery civil rights complaint**
> *Sweet Cakes complaint will now move into conciliation to determine whether settlement can be reached*
>
> "Portland, OR – A Gresham bakery violated the civil rights of a same-sex couple when it denied service based on sexual orientation, a Bureau of Labor and Industries (BOLI) investigation has found.
>
> "The couple filed the complaint against Sweetcakes by Melissa under the Oregon Equality Act of 2007, a law that protects the rights of gays, lesbians, bisexual and transgender Oregonians in employment, housing and public places.
>
> "* * * * *
>
> "Copies of the complaint are available upon request. * * *"

(Ex. R24)

46) Complainants were legally married by signing a "legal document of marriage" in 2014, a few days after Oregon's ban on same-sex marriage was struck down in federal court. (Testimony of RBC)

47) From February 1, 2013, until the time of the hearing, many people have made "hate-filled" comments through social media and in the comments sections of

55) LBC was a very bitter and angry witness who had a strong tendency to exaggerate and over-dramatize events. On cross examination, she argued repeatedly with Respondents' counsel and had to be counseled by the ALJ to answer the questions asked of her instead of editorializing about the denial of service and how it affected her. Her testimony was inconsistent in several respects with more credible evidence. First, she testified that she had a "major blowout" and "really bad fight" with A. Cryer between January 17 and January 21, 2013. In contrast, A. Cryer testified, when asked if he fought with LBC, "I wouldn't say we fought." He also testified that this case did not affect his relationship with LBC. Second, she testified that her blood pressure spiked in the hospital to 210/165 on February 1, 2013, when she learned that her DOJ complaint had hit the media, requiring the immediate attention of a doctor and four nurses. Her treating doctor's report notes that she was upset and crying about her situation hitting the news, but there is no mention of a blood pressure spike. Third, she testified that the media were standing outside her and RBC's apartment on February 1, 2013, when she talked to RBC from the hospital. RBC, who was at the apartment at that time, testified that the media were not outside their apartment at that time. Fourth, LBC testified that RBC stayed in bed the rest of the day after she returned from the cake tasting at Sweetcakes. In contrast, A. Cryer testified that he, LBC, and RBC had a 30 minute conversation that evening. Like RBC, the forum has only credited her testimony about media exposure when she testified about specific incidents. The forum has only credited LBC's testimony when it was either (a) undisputed, or (b) disputed but corroborated by other credible testimony. (Testimony of LBC)

CONCLUSIONS OF LAW

1) At all times material herein, Respondents AK and MK owned and operated a bakery in Gresham, Oregon as a partnership under the assumed business name of Sweetcakes by Melissa.

2) At all times material herein, Sweetcakes by Melissa was a "place of public accommodation" as defined in ORS 659A.400.

3) At all times material herein, AK and MK were individuals and "person[s]" under ORS 659A.010(9), ORS 659A.403, ORS 659A.406, and ORS 659A.409.

4) At all times material herein, Complainants' sexual orientation was homosexual.

5) AK denied the full and equal accommodations, advantages, facilities and privileges of Sweetcakes by Melissa to Complainants based on their sexual orientation, thereby violating ORS 659A.403.

6) AK did not violate ORS 659A.406.

7) AK and MK violated ORS 659A.409.

8) Complainants suffered emotional and mental suffering as a result of AK's violation of ORS 659A.403.

9) As partners, AK and MK are jointly and severally liable for AK's violation of ORS 659A.403 and their joint violations of ORS 659A.409

10) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful practices found. ORS 659A.800 to ORS 659A.865.

11) Pursuant to ORS 659A.850 and ORS 659A.855, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to issue an appropriate cease and desist order. The sum of money awarded

and on the radio on February 13, 2014, that allegedly communicated an intent to discriminate based on sexual orientation. The full text of the relevant part of the CBN broadcast is reprinted below:

> **A. Klein**: 'I didn't want to be a part of her marriage, which I think is wrong.'
>
> **M. Klein**: 'I am who I am and I want to live my life the way I want to live my life and, you know, I choose to serve God.'
>
> **A. Klein**: 'It's one of those things where you never want to see something you've put so much work into go belly up, but on the other hand, um, I have faith in the Lord and he's taken care of us up to this point and I'm sure he will in the future.' (***September 2, 2013, CBN interview***)

The Agency's cross-motion for summary judgment also singles out the text on a handwritten sign that was shown taped to the inside of Sweetcakes' front window during the CBN broadcast:

> "Closed but still in business. You can reach me by email or facebook. www.sweetcakesweb.com or Sweetcakes by Melissa facebook page. New phone number will be provided on my website and facebook. This fight is not over. We will continue to stand strong. Your religious freedom is becoming not free anymore. This is ridiculous that we cannot practice our faith. The LORD is good and we will continue to serve HIM with all our heart. [heart symbol]"

The full text of the relevant part of the Perkins' broadcast is reprinted below:

> **Perkins**: '* * * Tell us how this unfolded and your reaction to that.'
>
> **Klein**: 'Well, as far as how it unfolded, it was just, you know, business as usual. We had a bride come in. She wanted to try some wedding cake. Return customer. Came in, sat down. I simply asked the bride and groom's first name and date of the wedding. She kind of giggled and informed me it was two brides. At that point, I apologized. I said "I'm very sorry, I feel like you may have wasted your time. You know we don't do same-sex marriage, same-sex wedding cakes." And she got upset, noticeably, and I understand that. Got up, walked out, and you know, that was, I figured the end of it.'
>
> **Perkins**: 'Aaron, let me stop you for a moment. Had you and your wife, had you talked about this before; is this something that you had discussed? Did you think, you know, this might occur and had you thought through how you might respond or did this kind of catch you off guard?'

> **Klein**: 'You know, it was something I had a feeling was going to become an issue and I discussed it with my wife when the state of Washington, which is right across the river from us, legalized same-sex marriage and we watched Masterpiece Bakery going through the same issue that we ended up going through. But, you know, it was one of those situations where we said "well I can see it is going to become an issue but we have to stand firm. It's our belief and we have a right to it, you know." I could totally understand the backlash from the gay and lesbian community. I could see that; what I don't understand is the government sponsorship of religious persecution. That is something that just kind of boggles my mind as to how a government that is under the jurisdiction of the Constitution can decide, you know, that these people's rights overtake these people's rights or even opinion, that this person's opinion is more valid than this person's; it kind of blows my mind.' ***(February 13, 2014, Perkins' interview)***

The Agency's cross-motion for summary judgment singles out the statements made on those two occasions as proof that Respondents violated ORS 659A.409, along with the note posted on Sweetcakes' front door.

> "ORS 659A.409 provides, in pertinent part:
>
> '* * * it is an unlawful practice for any person acting on behalf of any place of public accommodation as defined in ORS 659A.400 to publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of * * * sexual orientation * * *.'

In their motion for summary judgment, Respondents argue that "ORS 659A.409 by its terms requires a statement of *future intention* that is entirely absent in this instance." Respondents further argue that:

> "A review of the videotape record of the CBN broadcast * * * clearly shows that Aaron Klein spoke only of the reason why he and his wife declined to participate in complainants' ceremony. The same is true of the Perkins radio broadcast. * * * A statement of future intention in either media event is conspicuously absent."

In contrast, the Agency argues that the Klein's statements are a prospective communication:

> "Reviewed in context, Respondents communicated quite clearly that same-sex couples would not be provided wedding cake services at their bakery. These are not descriptions of past events as alleged by Respondents. Respondents stated their position in these communications and notify the public that they 'don't do same sex weddings,' they 'stand firm,' are 'still in business' and will 'continue to stay strong.'"

As stated earlier, the Agency asserts that the three incidents described above – the two interviews and the note -- show Respondents' prospective intent to discriminate. Although the Agency did not include the text or specifically allege the existence of the note in its Formal Charges and the Perkins' interview occurred after the Agency had completed its initial investigation of the complaint and issued its Substantial Evidence Determination, this does not preclude the Agency from pursuing those incidents at hearing. The Agency's investigation may continue past its substantial evidence determination and charges may include evidence not discovered by the investigator. *See In the Matter of Sears, Roebuck and Company,* 18 BOLI 47, 78 (1999). The only limitation is that the charges be "reasonably related" to the allegations of the initial complaint. *Id.* The allegations and theories of the specific charges define those to be adjudicated through the hearing, whether or not those allegations and theories are consistent with or even based on those in the administrative determination. *See In the Matter of Jake's Truck Stop,* 7 BOLI 199, 211 (1988). Also, the only limitation on charges is that the complainant must have had standing to raise the issues and those issues must encompass discrimination only like or reasonably related to the allegations in the complaint. *See In the Matter of Sapp's Realty, Inc.*, 4 BOLI 93, 94 (1981).

In the present case, both the note and Perkins interview are not only "reasonably related' but, directly related to the allegations and theories of both the original complaint and charges. Whether corroborating evidence or included as a fact underlying a

specific charge, they may be considered as evidence to determine whether a violation of ORS 659A.409 occurred.

Whatever Respondents' intentions may have been or may still be with regard to providing wedding cake services for same-sex weddings, the Commissioner finds that AK's above-quoted statements, evaluated both for text and context, are properly construed as the recounting of past events that led to the present Charges being filed. In addition, they also constitute notice that discrimination will be made in the future by refusing such services. In the Perkins' interview, AK stated "...We don't do same-sex marriage, same-sex wedding cakes...." He continued that in discussing Washington's same-sex marriage law with MK, "we can see this becoming an issue and we have to stand firm." The note similarly said "...This fight is not over. We will continue to stand strong...." On their face, these statements are not constrained to a singular incident or time. They reference past, present and future conduct. AK did not say only that he would not do complainants' specific marriage and cake but, that respondents "don't do" same-sex marriage and cakes. Respondents' joint statement that they will "continue" to stand strong relates to their denial of service and is prospective in nature. The statements, therefore, indicate Respondents' clear intent to discriminate in the future just as they had done with Complainants.

The Commissioner concludes that, through the communications described above, AK and MK both violated ORS 659A.409.[11] However, the Commissioner awards

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[11] *See In the Matter of Blachana, LLC,* 32 BOLI 220 (2013), *appeal pending* (Respondent found to have violated ORS 659A.409 when member of the LLC left a telephone message with the organizer of a group of transgender individuals who had visited the LLC's nightclub regularly on Friday nights during the previous 18 months asking "not to come back on Friday nights."); *In the Matter of The Pub,* 6 BOLI 270, 282-83 (1987)(Respondent found to have violated ORS 659.037, the predecessor of ORS 659A.409, by posting a on front door of pub, immediately under another sign that said "VIVA APARTHEID," a sign that said "NO SHOES, SHIRTS, SERVICE, NIGGERS," and a sign inside the pub, with chain and spikes attached at each end, that read "Discrimination. Webster – to use good judgment" on the front and

no damages to Complainants based on Respondents' unlawful practice because there is no evidence in the record that Complainants experienced any mental, emotional, or physical suffering because of it.

In their Answers to the Formal Charges, Respondents raised the affirmative defenses that ORS 659A.409 is unconstitutional on its face and as applied. Their defense is set out with particularity in Finding of Fact #7 – Procedural. The forum did not address these defenses in the ALJ's Summary Judgment ruling because the ALJ concluded that Respondents did not violate ORS 659A.409. The Commissioner now addresses them without duplicating the extensive analysis in the ALJ's Summary Judgment ruling.

Oregon Constitution -- Article I, Sections 2 and 3

Article I, Sections 2 and 3 of the Oregon Constitution provide:

> "Section 2. Freedom of worship. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.
>
> "Section 3. Freedom of religious opinion. No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions, or interfere with the rights of conscience."

ORS 659A.409, like ORS 659A.403, is a law that is part of a general regulatory scheme, expressly neutral toward religion as such and neutral among religions. Accordingly, it is constitutional on its face. *Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 903 P2d 351 (1995). It is also constitutional as applied in this case because Respondents' statements announcing their clear intent to discriminate in future, just as they had done with Complainants, was not a religious practice but was conduct motivated by their

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"Authentic South African Apartheid Nigger 'Black' Handcuffs Directions Drive Through Wrists and Bend Over Tips" on the back).

religious beliefs. *Id.* at 153. Furthermore, the Oregon Supreme Court has held, in the context of Article I, section 8, that engagement in constitutionally protected expression while engaging in otherwise punishable conduct does not insulate the unlawful conduct from the usual consequences that accompany it. *See, e.g., Hoffman and Wright Logging Co. v. Wade,* 317 Or 445, 452, 857 P2d 101 (1993)("a person's reason for engaging in punishable conduct does not transform conduct into expression under Article I, section 8 [and] speech accompanying punishable conduct does not transform conduct into expression[.]); *State v. Plowman,* 314 Or 157, 165, 838 P2d 558 (1992) ("One may hate members of a specified group all one wishes, but still be punished constitutionally if one acts together with another to cause physical injury to a person because of that person's perceived membership in the hated group"). The same should hold true with regard to the protections afforded by Article I, sections 2 and 3.[12]

United States Constitution – First Amendment: Unlawfully Infringing on Respondents' right of conscience *and* ***right to free exercise of religion***

The Commissioner finds ORS 659A.409 constitutional, both facially and as applied, based on the same reasoning set out in the Summary Judgment ruling with respect to the constitutionality of ORS 659A.403.

Oregon Constitution – Section 8: freedom of speech

Article I, Section 8 of the Oregon Constitution provides:

> **"Section 8. Freedom of speech and press.** No laws shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

[12] This reasoning also applies to the ALJ's analysis of the constitutionality of ORS 659A.403 in the summary judgment ruling.

In *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), the Oregon Supreme Court established a basic framework, with three categories, for determining whether a law violates Article I, Section 8. ORS 659A.409 falls within *Robertson's* second category because it is "directed in terms against the pursuit of a forbidden effect" and "the proscribed means [of causing that effect] include speech or writing." *Id.* at 417-18.[13] Oregon courts examine a statute in the second category for "overbreadth' to determine if 'the terms of [the] law exceed constitutional boundaries, purporting to reach conduct protected by guarantees such as * * * [A]rticle I, section 8. * * * If a statute is overbroad, the court then must determine whether it can be interpreted to avoid such overbreadth." *State v. Babson,* 355 Or 383, 391, 326 P3d 559, 566 (2014).

Respondents assert that ORS 659A.409 prohibits Respondents from "express[ing] their own position" and that ORS 659A.409 amounts to "a speech code." To the contrary, the language of ORS 659A.409 focuses on the discriminatory effect that accompanies certain speech "published, circulated, issued or displayed" **on behalf** of a place of public accommodation. It does not cover expressions of personal opinion, political commentary, or other privileged communications unrelated to the business of a place of public accommodation, and its breadth is narrowly tailored to address the effects of the speech at issue. As such, it is facially constitutional under Article I, Section 8.[14]

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[13] In its cross-motion for summary judgment, the Agency concedes that ORS 659A.409 "falls within the second *Robertson* category of laws."

[14] *See also State v. Sutherland*, 329 Or 359, 365, 987 P2d 501, 504 (1999)(for a statute to be facially unconstitutional, it must be unconstitutional in all circumstances, *i.e.*, there can be no reasonably likely circumstances in which application of the statute would pass constitutional muster).

A statute that falls within *Robertson* category two is not subject to an as-applied challenge. *See Leppanen v. Lane Transit Dist.*, 181 Or App 136, 142-43, 45 P3d 501, 504-05 (2002), citing *City of Eugene v. Lee*, 177 Or App 492, 497, 34 P3d 690 (2001).

U.S. Constitution – First Amendment: Unlawfully infringing on Respondents' right to free speech

In pertinent part, the First Amendment to the U.S. Constitution provides "Congress shall make no law * * * abridging the freedom of speech * * *." This applies to the State of Oregon under the Fourteenth Amendment. In his Summary Judgment ruling, the ALJ conducted a "compelled speech" analysis to Respondents' defense that baking a wedding cake for Complainants was "speech" that violated the First Amendment. In contrast, the speech that violated ORS 659A.409 – the CBN interview, the "note" on Sweetcakes's door, and the Perkins' interview – was voluntary on Respondents' part.

ORS 659A.409 is an integral part the anti-discrimination public accommodation laws in ORS chapter 659A. The forum first interpreted this statute nearly 30 years ago, when it was numbered as ORS 659.037, in a case in which the Respondent owned a bar and posted a sign on the front door stating "NO, SHOES, SHIRTS, SERVICE, NIGGERS." *In the Matter of The Pub,* 6 BOLI 270, 278 (1987). In her Final Order, the Commissioner held that this statute, then numbered as ORS 659.037, "does not generally operate to deny [a] Respondent his constitutional guarantees of free speech." Subsequently, in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995), the U. S. Supreme Court held that "modern public accommodations laws are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general

matter, violate the First or Fourteenth Amendments."[15] In conclusion, ORS 659A.409 is constitutional on its face. It is also constitutional as applied because the Commissioner only applies it to Respondents' language that indicate Respondents' clear intent to discriminate in future just as they had done with Complainants.

Damages

This case is not about a wedding cake or a marriage. It is about a business's refusal to serve someone because of their sexual orientation. Under Oregon law, that is illegal.

Free enterprise provides great opportunity for entrepreneurs to take an idea, create a business and achieve whatever success they can. It is a system open to all but, to participate fairly, businesses must follow the laws that apply to each of them equally. A business that disregards the law erodes the free marketplace for both law abiding businesses and patrons alike.

Respondents' claim they are not denying service because of Complainants' sexual orientation but rather because they do not wish to participate in their same sex wedding ceremony. The forum has already found there to be no distinction between the two. Further, to allow Respondents, a for profit business, to deny any services to people because of their protected class, would be tantamount to allowing legal separation of people based on their sexual orientation from at least some portion of the public marketplace. This would clearly be contrary to Oregon law as well as any standard by which people in a free society should choose to treat each other.

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[15] *Cf. Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984)("[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections")

Within Oregon's public accommodations law is the basic principle of human decency that every person, regardless of their sexual orientation, has the freedom to fully participate in society. The ability to enter public places, to shop, to dine, to move about unfettered by bigotry.

When Respondents denied RBC and LBC a wedding cake, their act was more than the denial of the product. It was, and is, a denial of RBC's and LBC's freedom to participate equally. It is the epitome of being told there are places you cannot go, things you cannot do...or be. Respondent's conduct was a clear and direct statement that RBC and LBC lacked an identity worthy of being recognized.

The denial of these basic freedoms to which all are entitled devalues the human condition of the individual, and in doing so, devalues the humanity of us all.

This was clearly reflected in RBC's and LBC's testimony. In addition to other emotional responses, RBC described that being raised a Christian in the Southern Baptist Church, Respondent's denial of service made her feel as if God made a mistake when he made her, that she wasn't supposed to be, and that she wasn't supposed to love or be loved, have a family, or go to heaven. LBC, who was raised Catholic, interpreted the denial to represent that she was not a creature created by god, not created with a soul and unworthy of holy love and life. She felt anger, intense sorrow and shame. These are the reasonable and very real responses to not being allowed to participate in society like everyone else. The personal harm in being subjected to such separation is felt deeply and severely, as the evidence in this case indicated.

The Formal Charges seek damages for emotional, mental and physical suffering in the amount of "at least $75,000" for each Complainant. In addition to any emotional suffering experienced by Complainants as a direct result of Sweetcakes' refusal to bake

them a cake ("denial of service"), the Agency also seeks damages for suffering caused to Complainants by media publicity and social media responses to this case.

In order, the forum considers the extent of Complainants' emotional suffering and the cause of that suffering; and the appropriate amount of damages. Any damages awarded do not constitute a fine or civil penalty, which the Commissioner has no authority to impose in a case such as this. Instead, any damages fairly compensate RBC and LBC for the harm they suffered and which was proven at hearing. This is an important distinction as this order does not punish respondents for their illegal conduct but, rather makes whole those subjected to the harm their conduct caused.

1. Extent and Cause of Complainants' Emotional Suffering

A. R. Bowman-Cryer

a. Emotional suffering from the denial of service

Prior to the cake tasting, LBC had been asking RBC to marry her for nine years. Until October 2012, RBC did not want to be married because of her personal experience of failed marriages. At that time, RBC decided that they should get married to give their foster children a sense of "permanency and commitment." After her long-standing matrimonial reticence, RBC became excited to get married and to start planning the wedding,[16] wanting a wedding that was as "big and grand" as they could afford. Obtaining a cake from Sweetcakes like the one purchased for CM's wedding two years earlier was part of that grand scheme, and both Complainants were excited about the cake tasting at Sweetcakes because of how much they liked the cake Respondents had made for CM's wedding.

[16] The forum acknowledges that Complainants' "wedding" on June 27, 2013, was only a commitment ceremony, not a legal "marriage." *See* footnote 58, *infra*.

RBC's emotional suffering began at the January 17, 2013, cake tasting when AK told RBC and CM that Sweetcakes did not make wedding cakes for same-sex ceremonies. In response, RBC began to cry. She felt that she had humiliated her mother and was concerned that CM, who had believed that homosexuality was wrong until only a few years earlier, was ashamed of her. Walking out to the car and in the car, RBC became hysterical and kept apologizing to CM. When CM returned to the car after talking with AK, RBC was still "bawling" in the car. When CM told her that AK had called her "an abomination," this made RBC cry even more. RBC, who was brought up as a Southern Baptist, interpreted AK's use of the word "abomination" her mean that God made a mistake when he made her, that she wasn't supposed to exist, and that she had no right to love or be loved, have a family, or go to heaven. She continued to cry all the way home and after she arrived at home, where she immediately went upstairs to her bedroom and lay in her bed, crying.

On January 18, 2013, RBC felt depressed and questioned whether there was something inherently wrong with the sexual orientation she was born with and if she and LBC deserved to be married like a heterosexual couple. She spent most of that day in her room, trying to sleep.

In the days following January 17, 2013, RBC had difficulty controlling her emotions and cried a lot, and Complainants argued with each other because of RBC's inability to control her emotions. They had not argued previously since moving to Oregon. In addition, RBC also became more introverted and distant in her family relationships. She and A. Cryer have always been very close, and their connection was not as close "for a little bit" after January 17, 2013. A week later, RBC still felt "very sad and stressed," felt concerned about still having to plan her wedding, and felt less exuberant about the wedding. On January 21, 2013, she experienced anxiety during

her cake tasting at Pastry Girl because of AK's January 17, 2013, refusal and her fear of subsequent refusals. After January 17, 2013, although RBC relied on CM to contact potential wedding vendors, RBC still experienced some anxiety over possible rejection because her wedding was a same-sex wedding. During this same period of time, A. Cryer credibly analogized RBC's demeanor as similar to that of a dog who had been abused.

b. Emotional suffering from publicity about the case

On February 1, 2013, RBC became aware that the media was aware of AK's refusal to make a wedding cake for Complainants when she received a telephone call from Lars Larson, an American conservative talk radio show host based in Portland, Oregon, who told her that he had spoken with AK and wanted to see what RBC "had to say about the pending case." This upset RBC, and she became greatly concerned that E and A would be taken away from them by the foster care system because they had been told that the girls' information had to be protected and that the state would "have to readdress placement" of the girls with Complainants if any information was released concerning the girls. This concern continued until their adoption became final sometime after December 2013.

From February 1, 2013, until the time of the hearing, many people have made "hate-filled" comments through social media and in the comments sections of various websites that were supportive of Respondents and critical of or threatening to Complainants. These comments and the media attention caused RBC stress, anger, pain, frustration, suffering, torture, shame, humiliation, degradation, fear that she would be harassed at home because the DOJ complaint with Complainants' home address had been posted on Facebook, and the feeling that her reputation was being destroyed. The publicity from the case and accompanying threats on social media from third parties

made RBC "scared" for the lives of A, E, LBC, and herself. In addition, RBC was also upset by a confrontation with her sister who learned about the DOJ complaint through the media and posted a comment in support of Respondents on Respondents' Facebook.

Without giving any specific examples, RBC credibly testified that, in a general sense,[17] the denial of service has caused her continued emotional suffering up to the time of hearing.

B. L. Bowman-Cryer

a. Emotional suffering from the denial of service

LBC had been asking RBC to marry her for nine years before RBC finally accepted in October 2012. RBC's acceptance in October 2012 of LBC's marriage proposal made LBC "extremely happy." Both Complainants were excited about the cake tasting at Sweetcakes because of how much they liked the cake Respondents had made for CM's earlier wedding. However, LBC, unlike RBC, did not go to the cake tasting.

When CM and RBC arrived home on January 17, 2013, after their cake tasting at Sweetcakes, CM told LBC that AK had told them that Sweetcakes did "not do same-sex

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[17] The following is RBC's only testimony about her emotional suffering due to the denial of service after the case began to be publicized. It occurred during the Agency's redirect examination:

Q: "You testified earlier about the media attention being sort of a secondary layer of stress, and I believe that that term you used during Mr. Smith's cross examination of you. During my examination of you, you testified at length as to the emotional harm that you suffered directly from the refusal of service alone. Do you still feel that harm from the refusal itself -- the January 17, 2013 refusal?"

"* * * * *

A. "Yes, I still experience that."

Q. "Was the primary harm, the harm that resulted from the refusal of service itself, persistent throughout the times where you experienced media attention?"

"* * * * *

A. "Yes, the harm was still present during the media attention."

weddings" and that AK had told CM that "your children are an abomination." LBC was "flabbergasted" and she became very upset and very angry. LBC, who was raised as a Roman Catholic, recognized AK's statement as a reference from Leviticus. She was "shocked" to hear that AK had referred to her as an "abomination." Based on her religious background, she understood the term "abomination" to mean "this is a creature not created by God, not created with a soul. They are unworthy of holy love. They are not worthy of life." Her immediate thought was that this never would have happened, had she had not asked RBC to marry her. Because of that, she felt shame. Like RBC, she also worried about how it would affect CM's relatively recent acceptance of RBC's sexual orientation.

LBC views herself as RBC's protector. After RBC climbed into bed, crying, LBC got into bed with RBC and tried to soothe her. RBC became even more upset and pushed RBC away. In response, LBC lost her temper because she could not "fix" things.

When LBC went back downstairs, E, the older of Complainants' foster daughters was extremely agitated from events at school that day. LBC tried to calm her, but she refused to be calmed, repeatedly calling out for RBC, with whom she had a special bond. Eventually, E cried herself to sleep. LBC's inability to calm E was very frustrating to her. That night, LBC was very upset, cried a lot, and was hurt and angry. Later that same evening, she filed her DOJ complaint.

In the days immediately following January 17, 2013, LBC experienced anger, outrage, embarrassment, exhaustion, frustration, sorrow, and shame as a reaction to AK's denial of service. She felt sorrow because she couldn't console E, she could not protect RBC, and because RBC was no longer sure she wanted to be married. Her

excitement about getting married was also lessened because she was not sure she could protect RBC if any similar incidents occurred.

b. Emotional suffering from publicity about the case

On February 1, 2013, LBC went to the emergency room of a local hospital because of pain from a shoulder injury that she had suffered three weeks earlier and her concern that she might have a broken shoulder. While in the hospital, she heard that AK's refusal to make their wedding cake was on the news. This made her very upset and she was crying when she was examined by a doctor. Based on the media, potential media exposure, and social media attention related to her DOJ complaint after February 1, 2013, LBC's headaches increased. She also felt intimidated and became fearful.

After LBC's DOJ complaint was publicized in the media, LBC also had an "devastating" confrontation with her aunt who had learned about her DOJ complaint against Respondents through the media and threatened to shoot LBC in the face if she ever set foot on LBC's family's property again.[18]

After February 1, 2013, LBC, like RBC, was also greatly concerned that their foster children would be taken away from them because of media exposure.

LBC testified that she still feels emotional effects from the denial of service because E, A, and RBC "were" still suffering and that "was" tearing me apart.[19]

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[18] LBC's intense and visceral display of emotions while testifying about her aunt's behavior made it clear that her aunt's behavior caused her extreme upset.

[19] *See* footnote 7, *supra*. LBC testified in the past tense.

2. Emotional suffering damages based on media and social media attention

In its closing argument, the Agency asked the forum to award Complainants $75,000 each in emotional suffering damages stemming directly from the denial of service, In addition, the Agency asked the forum to award damages to Complainants for emotional suffering they experienced as a result of the media and social media attention generated by the case from January 29, 2013, the date AK posted LBC's DOJ complaint on his Facebook page, up to the date of hearing. The Agency's theory of liability is that since Respondents brought the case to the media's attention and kept it there by repeatedly appearing in public to make statements deriding Complainants, it was foreseeable that this attention would negatively impact Complainants, making Respondents liable for any resultant emotional suffering experienced by Complainants. The Agency also argues that Respondents are liable for negative third party social media directed at Complainants because it was a foreseeable consequence of the media attention.

The Commissioner concludes that complainants' emotional harm related to the denial of service continued throughout the period of media attention and that the facts related solely to emotional harm resulting from media attention do not adequately support an award of damages. No further analysis regarding the media attention as a causative factor is, therefore, necessary.

3. Amount of Damages

There is ample evidence in the record of specific, identifiable types of emotional suffering both Complainants experienced because of the denial of service.

In determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the

vulnerability of the aggrieved persons. The actual amount depends on the facts presented by each aggrieved person. An aggrieved person's testimony, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of C. C. Slaughters, Ltd.,* 26 BOLI 186, 196 (2005). In public accommodation cases, "the duration of the discrimination does not determine either the degree or duration of the effects of discrimination." *In the Matter of Westwind Group of Oregon, Inc.,* 17 BOLI 46, 53 (1998).

In this case, the ALJ proposed that $75,000 and $60,000, are appropriate awards to compensate Complainants RBC and LBC, respectively, for the emotional suffering they experienced from Respondents' denial of service. The proposal for LBC is less because she was not present at the denial and the ALJ found her testimony about the extent and severity of her emotional suffering to be exaggerated in some respects. In this particular case, the demeanor of the witnesses was critical in determining both the sincerity and extent of the harm that was felt by RBC and LBC. As such, the Commissioner defers to the ALJ's perception of the witnesses and evidence presented at hearing and adopts the noneconomic award as proposed, finding also that this noneconomic award is consistent with the forum's prior orders.[20]

[20] See, *In the Matter of Andrew W. Engel, DMD*, 32 BOLI 94 (2012) (Complainant, a Christian, subjected to harassment based on her religious belief including the job requirement of attending Scientology trainings suffered anxiety, stress, insomnia, gastrointestinal problems and weight loss requiring medical treatment awarded $350,000); *In the Matter of From The Wilderness, Inc.,*30 BOLI 227 (2009) (Complainant subjected to verbal and physical sexual harassment for two months before being fired and then retaliated against after termination suffered panic attacks requiring medical treatment awarded $125,000); *In the Matter of Maltby Biocontrol, Inc.,* 33 BOLI 121 (2014) (Complainants subjected to racially hostile environment including assault, threats with a firearm, racial epithets and retaliation for reports to police suffered fear, sleeplessness and physical injuries requiring medical treatment awarded $50,000 and $100,000 each); *In the Matter of Charles Edward Minor,* 31 BOLI 88 (2010) (Complainant subjected to verbal and physical sexual harassment including respondent striking her in the head with his fist suffered anxiety, reclusiveness and fear awarded $50,000).

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(4), and to eliminate the effects of the violation of ORS 659A.403 by **Respondent Aaron Klein,** and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondents Aaron Klein and Melissa Klein** to deliver to the Administrative Prosecution Unit of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in trust for **Complainants Rachel Bowman-Cryer** and **Laurel Bowman-Cryer** in the amount of:

1) ONE HUNDRED THIRTY FIVE THOUSAND DOLLARS ($135,000), representing compensatory damages for emotional, mental and physical suffering, to be apportioned as follows:

Rachel Bowman-Cryer: $75,000

Laurel. Bowman-Cryer: $60,000

plus,

2) Interest at the legal rate on the sum of $135,000 from the date of issuance of the Final Order until Respondents comply with the requirements of the Order herein.

B. NOW, THEREFORE, as authorized by ORS 659A.850(4), and to further eliminate the effect of the violation of ORS 659A.403 by **Respondent Aaron Klein,** the Commissioner of the Bureau of Labor and Industries hereby orders **Respondents Aaron Klein and Melissa Klein** to cease and desist from denying the full and equal accommodations, advantages, facilities and privileges of Sweetcakes by Melissa to any person based on that person's sexual orientation.

C. NOW, THEREFORE, as authorized by ORS 659A.850(4), and to further eliminate the effect of the violations of ORS 659A.409 by **Respondents Aaron Klein and Melissa Klein,** the Commissioner of the Bureau of Labor and Industries hereby

orders **Respondents Aaron Klein and Melissa Klein** to cease and desist from publishing, circulating, issuing or displaying, or causing to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of a place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of sexual orientation.

DATED this 2 day of July, 2015.

Brad Avakian, Commissioner
Bureau of Labor and Industries

Issued ON: July 2, 2015

APPENDIX

FINDINGS OF FACT – PROCEDURAL

1) On August 8, 2013, R. Bowman-Cryer ("RBC") filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging that Aaron Klein and Melissa Klein, dba Sweetcakes by Melissa, refused to make her a wedding cake based on her sexual orientation and published and displayed a communication to that effect, in violation of ORS 659A.403 and ORS 659A.409. RBC's complaint was subsequently amended to name both Kleins as aiders and abettors under ORS 659A.406. (Ex. A-27)

2) On November 7, 2013, L. Bowman-Cryer ("LBC") filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging that Aaron Klein ("AK") and Melissa Klein ("MK"), dba Sweetcakes by Melissa, refused to make her a wedding cake based on her sexual orientation and published and displayed a communication to that effect, in violation of ORS 659A.403 and ORS 659A.409. LBC's complaint was subsequently amended to name AK and MK as aiders and abettors under ORS 659A.406. (Ex. A-28)

3) On January 15, 2014, after investigating RBC's and LBC's complaints, the CRD issued a Notice of Substantial Evidence Determination in each case in which the CRD found substantial evidence of unlawful discrimination in public accommodation against Respondents in violation of ORS 659A.403, ORS 659A.406, and ORS 659A.409 (Ex. A29)

4) On June 4, 2014, the Agency issued two sets of Formal Charges, one alleging unlawful discrimination against RBC (case no. 44-14) and the other alleging unlawful discrimination against LBC (case no. 45-14) that alleged the following:

(a) At all times material, Sweetcakes by Melissa ("Sweetcakes") was an assumed business name of Respondent MK doing business in Gresham, Oregon, that offered goods and services to the public, including wedding cakes;

(b) At all times material, AK was registered with the Oregon Sec. of State Business Registry as the authorized representative of MK, dba Sweetcakes by Melissa;

(c) On January 17, 2013, RBC and her mother went to Sweetcakes for a cake tasting related to RBC's wedding ceremony to LBC;

(d) AK conducted the tasting and asked for the names of a bride and groom. RBC said there would be two brides for her ceremony and gave her name and LBC's name. AK told RBC that Sweetcakes did not do "same-sex couples" because it "goes against our religion";

(e) Complainants were injured by Respondents' refusal to provide them with a wedding cake;

(f) MK discriminated against Complainants based on their sexual orientation, in violation of ORS 659A.403(3) and ORS 659.409;

(g) AK aided or abetted MK as the owner of Sweetcakes in MK's violation of ORS 659A.403(3) and ORS 659.409; thereby violating ORS 659A.406;

(h) Complainants are each entitled to damages for emotional, mental, and physical suffering in the amount of "at least $75,000" and out-of-pocket expenses "to be proven at hearing."

(i) Respondents published or issued a communication, notice that its accommodation, advantages would be refused, withheld from or denied to, or that discrimination would be made against, a person on account of his or her sexual orientation, in violation of ORS 659A.409.

On the same day, BOLI's Contested Case Coordinator issued Notices of Hearing in both cases stating the time and place of the hearing as August 5, 2014, beginning at 9:00 a.m., at BOLI's Portland, Oregon office. (Exs. X2, X4)

4) On June 6, 2014, Respondents filed a motion to postpone the hearing because Respondent's attorney Herbert Grey had "pre-paid non-refundable vacation plans" during the time scheduled for hearing. The forum granted Respondents' motion. (Ex. X5)

5) On June 18, 2014, Respondents, through attorneys Grey, Tyler Smith, and Anna Adams, filed an "Election to Remove to Circuit Court (ORS 659A.870(4)(b))" and "Alternative Motion to Disqualify BOLI Commissioner Brad Avakian" from deciding issues in these cases. Respondents requested oral argument on both issues. On June 25, 2014, the Agency filed objections to Respondents' motions. On June 26, 2014, the ALJ denied Respondents' request for oral argument. (Exs. X8, X11)

6) On June 19, 2014, the ALJ held a prehearing conference and rescheduled the hearing to start on October 6, 2014. The ALJ also consolidated the cases for hearing. (Ex. X7)

7) On June 24, 2014, Respondents timely filed an answer and response to both sets of Formal Charges. Respondent admitted that AK had declined RBC's request to design and provide a cake for Complainants' same-sex ceremony but denied that any unlawful discrimination occurred. Respondents raised numerous affirmative defenses, including:

- The Formal Charges fail to state ultimate facts sufficient to constitute a claim.

- Because the Oregon Constitution did not provide for or recognize same-sex unions in January 2013 and the state of Oregon did not issue marriage licenses to same-sex couples at that time, BOLI lacks "any legitimate authority to compel Respondents to engage in creative expression or otherwise participate in same-sex ceremonies not recognized by the state of Oregon contrary to their fundamental rights, consciences and convictions."

- BOLI is estopped from compelling Respondents to engage in free expression or otherwise participate in same-sex ceremonies not recognized by the state of Oregon contrary to their fundamental rights, consciences and convictions.

- The statutes underlying the Formal Charges are unconstitutional as applied to Respondents to the extent they do not protect the fundamental rights of Respondents and persons similarly situated arising under the First and Fourteenth Amendments to the United States Constitution, as applied to the state of Oregon under the Fourteenth Amendment, in one or more of the following particulars, by unlawfully: (a) infringing on Respondents' right of conscience; (b) infringing on Respondents' right to free exercise of religion; (c) infringing on Respondents' right to free speech; (d) compelling Respondents to engage in expression of a message they do not want to express; (e) denying Respondents' right to due process; and (f) denying Respondents the equal protection of the laws.

- The statutes underlying the Formal Charges, as applied, violate Respondents fundamental rights arising under the Oregon Constitution in one or more of the following particulars, by unlawfully: (a) violating Respondents' freedom of worship and conscience under Article I, §2; (b) violating Respondents' freedom of religious opinion under Article I, §3; (c) violating Respondents' freedom of speech under Article I, §8; (d) compelling Respondents to engage in expression of a message they did not want to express; (e) violating Respondents' privileges and immunities under Article I, §20; and (f) violating Article XV, §3.

- The statutes underlying the Formal Charges are facially unconstitutional in that they violate Respondents' fundamental rights arising under the Oregon Constitution to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated.

Respondents also raised four Counterclaims, including:

- Respondents are entitled to costs and attorney fees if they are determined to be the prevailing party.

- The State of Oregon, acting by and through BOLI, has knowingly and selectively acted under color of state law to deprive Respondents of their fundamental constitutional and statutory rights in the basis of religion without taking similar action against county clerks and other state of Oregon officials similarly denying same-sex couples goods and services related to same-sex unions, disparately impacting Respondents, causing economic damages to Respondents in an amount not less than $100,000. BOLI has knowingly and selectively acted under color of state law to deprive Respondents of their fundamental constitutional and statutory rights in the basis of religion without taking similar action against county

clerks and other state of Oregon officials similarly denying same-sex couples goods and services related to same-sex unions, disparately impacting Respondents and causing economic damages to Respondents in an amount not less than $100,000.

- During the period from February 5, 2013 to the present, BOLI's Commissioner published, circulated, issued, displayed, or cause to be published, circulated, issued, displayed, communications on Facebook and in print media to the effect that its accommodations, advantages, facilities, services or privileges would be refused, withheld from or denied to, or that discrimination would be made against Respondents and other persons similarly situated on the basis of religion in violation of ORS 659A.409.

- Under 42 USC § 1983, BOLI is liable to Respondents for depriving Respondents of their rights and protections guaranteed by the United States Constitution "under color of any statute, ordinance, regulation, custom or usage of any State."

(Ex. X10)

8) On July 2, 2014, the ALJ issued an interim order ruling on Respondents' June 18, 2014, motions. That order is reprinted below in pertinent part.[21]

"Respondents' Putative Election to Circuit Court

"Respondents assert that they have a 'unqualified right to have these matters removed to the circuit court of either Clackamas, Marion or Multnomah Counties pursuant to ORS 659A.870(4)(b).' ORS 659A.870(4)(b) provides, in pertinent part:

> '(b) A respondent or complainant named in a complaint filed under ORS 659A.820 or 659A.825 alleging an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law may elect to have the matter heard in circuit court under ORS 659A.885. The election must be made in writing and received by the commissioner within 20 days after service of formal charges under ORS 659A.845. If the respondent or the complainant makes the election, the commissioner shall pursue the matter in court on behalf of the complainant at no cost to the complainant.'

"To establish jurisdiction, the Agency's Formal Charges each allege: (1) both cases originated as verified complaints filed by Complainants Rachel Cryer and Laurel Bowman-Cryer; (2) both Complainants were authorized to file their complaints under the provisions of ORS 659A.820; and (3) that the Agency

[21] Footnotes from this interim order and other interim orders quoted at length in the Proposed Findings of Fact – Procedural that are not critical to an understanding of the order have been deleted. The deletions are indicated by a "^" symbol.

issued a Notice of Substantial Evidence Determination in both cases. Respondents deny that they engaged in discrimination based on sexual orientation or any other grounds set forth in ORS chapter 659A but do not dispute these jurisdictional allegations. Accordingly, the forum concludes that respondents were named in a complaint filed under ORS 659A.820. Under ORS 659A.870(4)(b), if the Formal Charges allege an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law, Respondents are entitled to elect to have the matter heard in circuit court under ORS 659A.885, subject to the requirement that such election must be made in writing within 20 days of service of the Formal Charges.

"ORS 659A.145 is titled '**Discrimination against individual with disability in real property transactions prohibited; advertising discriminatory preference prohibited; allowance for reasonable modification; assisting discriminatory practices prohibited.**' As indicated by its title, the provisions of ORS 659A.145 are exclusively limited to real property transactions involving people with disabilities. ORS 659A.421 is titled '**Discrimination in selling, renting or leasing real property prohibited**' and prohibits discrimination in real property transactions based on the race, color, religion, sex, sexual orientation, national origin, marital status, familial status or source of income of any person.

"In contrast, these cases allege violations of ORS 659A.403(3), ORS 659A.406, and ORS 659A.409. All three of these statutes appear in a section of ORS chapter 659A titled '**ACCESS TO PUBLIC ACCOMMODATIONS**' that includes ORS 659A.400 to ORS 659A.415. Neither of the Formal Charges contains any allegations related to discrimination under federal housing law or discrimination based on real property transactions. Rather, the Formal Charges both identify Respondent Melissa Klein's business as a 'place of public accommodation' and allege that Respondent Melissa Klein's business, as a public accommodation, discriminated against Complainants based on their sexual orientation.

"Since the Formal Charges do not allege an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law, they are not subject to the provisions of ORS 659A.870(4)(b) and Respondents have no statutory right to elect to have the matter heard in circuit court.

"MOTION TO DISQUALIFY BOLI COMMISSIONER AVAKIAN BASED ON AVAKIAN'S ACTUAL BIAS

"Respondents ask that Commissioner Avakian be disqualified from deciding the issues presented in the Formal Charges because he has 'publicly demonstrated actual bias against Respondents and others similarly situated, both as a candidate for re-election and as Commissioner.' Based on that alleged actual bias, Respondents contend that the Commissioner's fulfillment of his statutory role by deciding and issuing a Final Order in these cases will deprive

Respondents of due process and other constitutional rights. Respondents concede that BOLI administrative rules OAR 839-050-000 *et seq* contain no provision related to the disqualification of a BOLI Commissioner deciding and issuing a Final Order. However, both Respondents and the Agency acknowledge that procedural due process requires a decision maker free of actual bias^ and that Respondents have the burden of showing that bias. *See Teledyne Wah Chang v. Energy Facility Siting Council,* 298 Or 240, 262 (1985), *citing Boughan v. Board of Engineering Examiners,* 46 Or App 287, 611 P.2d 670, *rev den* 289 Or 588 (1980).

"To show the Commissioner's actual bias and demonstrate that he has already pre-judged this case, Respondents submitted exhibits containing numerous copies of statements made by Commissioner Avakian to the media, in e-mails sent to Respondents' attorney Herb Grey, or on Facebook posts during the Commissioner's candidacy for re-election and as Commissioner. Summarized, those exhibits include the following statements:

"E-Mails sent to Respondents' attorney Herb Grey by 'Avakian for Labor Commissioner'

- "February 16, 2013, in which the Commissioner identified himself as 'Oregon's chief civil rights enforcer,' and (1) noting his effort to convince the Veterans Affairs Department to grant a waiver to retired Air Force Lt. Col. Linda Campbell and her spouse, Nancy Campbell, making them the 'first same-sex couple to receive equal military burial rights' and endorsing the 'Oregonians United for Marriage * * * campaign to bring full marriage equality to Oregon.'
- "April 4, 2013, again noting the Commissioner's efforts on behalf of Linda Campbell, and quoting the comments made by Campbell on the steps of the U.S. Supreme Court a week earlier during the debate on marriage equality.
- "December 10, 2013, in which Commissioner Avakian urged Grey to co-sign his letter to House Speaker Jon Boehner to bring the Employment Non-Discrimination Act up for a vote.
- "December 19, 2013, in which Commissioner Avakian notes his 'progressive' priorities and states '[t]hat's why I defend public education, take on unlawful discrimination, and stand up for equal rights for every last Oregonian.'
- "January 10, 2014, in which Commissioner Avakian stated '[a]t the Bureau of Labor and Industries, it's my job to protect rights of Oregonians in the workplace * * * and protect everyone's civil rights in housing and public accommodations.'
- "March 4, 2014, in which Commissioner Avakian stated: 'I believe in an Oregon where everyone has the opportunity to get married, raise a family and get ahead. Gay or straight, male or female, white, black, or brown -- everyone deserves an equal shot at making it in Oregon. That's why I will continue to fight for marriage equality, a woman's right to choose, better wages, and robust non-discrimination laws that protect gays and lesbians.'
- "March 12, 2014, in which Commissioner Avakian noted that no one filed to run against him as Labor Commissioner and stated, among other things: 'We built a

coalition of civil rights champions, business leaders, educators, working families and labor leaders, and many, many more. Just think – it wasn't very long ago that right-wing activists were calling for my head because of our strong support for civil rights and equality laws in Oregon.'

- "May 19, 2014, in which Commissioner Avakian stated: 'A few minutes ago, we received word that all Oregonians, including same-sex couples, will now have the freedom to marry the person they love. As many had hoped, our federal court ruled Oregon's ban on same-sex marriage unconstitutional under the United States Constitution. This is an important moment in our state's history. The ruling also reflects what so many others have felt all along -- that Oregonians always eventually open their hearts to equality and freedom. The victory is a testament to the strength and energy of so many who dedicated themselves to making our laws match our highest ideals. Thank you. The win comes after news earlier this month that the Oregon Family Council has abandoned its campaign for a ballot measure to allow corporations to discriminate against loving same-sex couples. As a result, Oregon's law will continue to say that no corporation can deny service, housing or employment based on sexual orientation or gender identity. And as always, I will continue to hold those responsible that violate the rights of Oregonians and enthusiastically support those that go the extra mile for fairness. Here's to two significant victories that expand freedom for Oregonians – and the incredible efforts by friends and neighbors that made today possible. It's been a remarkable journey.'

"Independent Media

- "August 14, 2013, Oregonian article written by Maxine Bernstein entitled 'Lesbian couple refused wedding cake files state discrimination complaint' that contains quotes by Complainant Cryer, Respondent Melissa Klein, and Commissioner Avakian. Commissioner Avakian was quoted as follows:

  - 'We are committed to a fair and thorough investigation to determine whether there is substantial evidence of unlawful discrimination,' said Labor Commissioner Brad Avakian.
  - 'Everybody's entitled to their own beliefs, but that doesn't mean that folks have the right to discriminate,' Avakian said, speaking generally.
  - 'The goal is never to shut down a business. The goal is to rehabilitate,' Avakian said. 'For those who do violate the law, we want them to learn from that experience and have a good, successful business in Oregon.'

"Facebook Posts on Commissioner Avakian's Facebook Page

- "April 26, 2012: 'Today, Basic Rights Oregon honored me with the 2012 Equality Advocate Award. I appreciate this recognition, but I am far more appreciative of all the efforts and accomplishments that BRO has made for Oregon's LGBT community. Thank you for including me in the incredible work that you do.'

- "February 15, 2013, with the same text included in February 16, 2013, e-mail to Herb Grey.
- "February 5, 2013, with a link to 'Ace of Cakes offers free wedding cake for Ore. gay couple www.kgw.com:' 'Everyone has a right to their religious beliefs, but that doesn't mean they can disobey laws already in place. Having one set of rules for everybody assures that people are treated fairly as they go about their daily lives. The Oregon Department of Justice is looking into a complaint that a Gresham bakery refused to make a wedding cake for a same-sex marriage. It started when a mother and daughter showed up at Sweet Cakes by Melissa looking for a wedding cake.'
- "March 13, 2013: 'Tomorrow morning, I'll be testifying before the U.S. Senate about Oregon Lt. Col. Linda Campbell; she made history when she was the first person to ever get approval to bury her same-sex spouse in a national cemetery...'
- "March 22, 2013, with a link to 'Speakers announced for marriage equality rally in D.C.-Breaking News-Wisconsin Gazette – Lesbian www.wisconsingazette.com:' 'Thrilled to see Lt. Col. Linda Campbell among the headliners for next week's rally in front of the U.S. Supreme Court. LIKE this status if you support marriage equality for all loving, caring couples.'
- "March 26, 2013: 'Our country is on a journey of understanding. As more and more people talk to gay and lesbian friends and family about why marriage matters, they're coming to realize that this is not a political issue. This is about love, commitment and family. I'll be joining Oregon United for Marriage for a rally at the Mark O. Hatfield Courthouse in downtown Portland at 5pm. Join us!'
- "June 8, 2013: 'Proud to support Sen. Jeff Merkley's fight for the Non-Discrimination Act in Congress. All Americans deserve a fair shot at a good job and the opportunity for a better life. – at Q Center.'
- "June 26, 2013: 'Huge day for equality across America! In a few minutes, I'm heading to a celebration rally with Oregon United for Marriage at Terry Schrunk Plaza in downtown Portland – see you there?'
- "March 27, 2013: Link to Commissioner Avakian speaking 'on the importance of people gathering in front of the Hatfield Courthouse on the day the Supreme Court heard arguments on Prop. 8.' and statement 'I just got off the phone with Lt. Col. Linda Campbell, who said that the crowd in front of the Supreme Court was awesome and absolutely electric.'
- "May 9, 2013, with a link to 'Victory! Discrimination measure Withdrawn – Oregon United for Marriage:' 'Really great news. It's also a tribute to the fact that Oregonians are fundamentally fair and have little stomach for such a needlessly divisive fight.'
- "March 12, 2014, shared link: 'Conservative Christian group's call for Labor Commissioner Brad Avakian's ouster falls flat. www.oregonlive.com. Oregon Labor Commissioner Brad Avakian, despite criticism of his enforcement action against a Gresham bakery that refused to serve a lesbian wedding, wound up with no opponent in this year's election.'
- "May 19, 2014: 'Today's victory is a testament to the strength and energy of so many who dedicated themselves to making our laws match our highest ideals. If

you've talk to your neighbors, collected signatures, or attended a marriage rally, you've played an important role in Oregon's story. Thank you -- and congratulations!'

"Summarized, these exhibits fall into two categories: (1) the Commissioner's e-mails and Facebook posts generally opposing discrimination against gays and lesbians and advocating the legality of same-sex marriage in Oregon and not addressed to these cases; and (2) remarks specific to the present cases. The vast majority of exhibits fall into the first category. Only two exhibits fall into the second category -- the Commissioner's February 5, 2013, Facebook post and the August 14, 2013, Oregonian article.

"ORS chapter 659A contains Oregon's anti-discrimination laws related to employment, public accommodations, and real property transactions and delegates the enforcement of those laws to BOLI's Commissioner. The Legislature's purpose in adopting the provisions of ORS chapter 659A is set out in ORS 659A.003. In pertinent part, ORS 659A.003 provides that:

> 'The purpose of this chapter is * * * to ensure the human dignity of all people within this state and protect their health, safety and morals from the consequences of intergroup hostility, tensions and practices of unlawful discrimination of any kind based on race, color, religion, sex, sexual orientation, national origin, marital status, age, disability or familial status.'

"ORS 651.030(1) provides that '[t]he Bureau of Labor and Industries shall be under the control of the Commissioner of the Bureau of Labor and Industries * * *.' As such, BOLI's Commissioner has the duty to see that the stated purpose of ORS chapter 659A is carried out. In addition to enforcing the various statutes contained in that chapter through the administrative process created by the Legislature,[22] the Commissioner's duties include, among other things, initiating programs of 'public education calculated to eliminate attitudes upon which practices of unlawful discrimination because of * * * sexual orientation * * * are based.'^ In short, the Commissioner has been instructed by the Legislature itself to raise public awareness about practices that the Legislature has declared to be unlawful discrimination in ORS chapter 659A. The forum finds that all of the Commissioner's remarks contained in the first category – remarks *generally* opposing discrimination against gays and lesbians and advocating the legality of same-sex marriage in Oregon – fall within the scope of this particular job duty. As more articulately stated by the Agency in its objections, '[n]one of this material is inconsistent with the exercise of the commissioner's statutory obligations as an elected official.'

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[22] *See* footnote 21.

"The forum next examines the two exhibits that fall within the second category that contain remarks specific to the present cases – the Commissioner's February 5, 2013, Facebook post and the August 14, 2013, Oregonian article. The Commissioner's February 5, 2013, Facebook post contains the following content, consisting of a link to 'Ace of Cakes offers free wedding cake for Ore. gay couple www.kgw.com' and the following remark by the Commissioner that Respondents contend shows actual bias:

> 'Everyone has a right to their religious beliefs, but that doesn't mean they can disobey laws already in place. Having one set of rules for everybody assures that people are treated fairly as they go about their daily lives. The Oregon Department of Justice is looking into a complaint that a Gresham bakery refused to make a wedding cake for a same-sex marriage. It started when a mother and daughter showed up at Sweet Cakes by Melissa looking for a wedding cake.'

"The Oregonian article, printed six days after the two Complainants filed their complaints with BOLI's CRD, contains two remarks attributed to the Commissioner that Respondents contend demonstrate his actual bias against Respondents. Those remarks are:

- '"Everyone is entitled to their own beliefs, but that doesn't mean that folks have the right to discriminate," Avakian said, speaking generally.'
- '"The goal is never to shut down a business. The goal is to rehabilitate," Avakian said. "For those who do violate the law, we want them to learn from that experience and have a good, successful business in Oregon."'

"In *Samuel v. Board of Chiropractic Examiners*, 77 Or App 53, 712 P2d 132 (1985), Samuel, a chiropractor, had his chiropractor's license suspended and his right to perform minor surgery permanently revoked by the Board of Chiropractic Examiners after he performed a vasectomy on a patient. The issue before the Board was whether Samuels had exceeded the scope of his license by performing 'major' surgery, whereas chiropractors are only allowed to perform 'minor' surgery. In their decision, the Oregon Court of Appeals, after determining that a vasectomy was 'major' surgery, considered whether the Board's decision should be overturned based on the alleged bias of two members of the Board, Bolin and Camerer, who participated in the disciplinary hearing and resulting decision to suspend Samuels. Prior to Samuels's hearing, Bolin opined that a vasectomy was not minor surgery. The Court, citing *Trade Comm'n v. Cement Institute,* 333 U.S. 683 (1948), held that Bolin's expression of opinion, which the Court characterized as 'a preconceived point of view concerning an issue of law' -- was 'not an independent basis for disqualification' of Bolin. Camerer, in contrast, met with four chiropractors at a restaurant, brought the Board's file on Samuels, and allowed the other chiropractors to examine it. Prior to the Board's suspension decision, Samuels sought censure against Camerer and sued Camerer for disclosing the contents of the file. The Court held:

> 'As a defendant in the lawsuit which arose out of the very matter pending before the Board, Camerer may have harbored some animosity towards [Samuels]. The possibility of personal animosity and the appearance of a substantial basis for bias is sufficient that, under the circumstances, he should have disqualified himself.'

"To show that the Commissioner has prejudged the cases before the Forum, Respondents quote the Commissioner's two 'second category' statements as follows: 'Respondents are "disobey[ing] laws" and need to be "rehabilitated."' However, this 'quote' combines selected portions of remarks made at two different times and misquotes the latter. Respondents seek to create an inference of bias that cannot reasonably be drawn from Respondents' exhibits as a whole. The Forum finds that the accurately quoted 'second category' remarks, while made in the context of Respondents' alleged discriminatory actions and the Complainants' complaints, are remarks reflecting the Commissioner's attitude generally about enforcing Oregon's anti-discrimination laws and, at most, show 'a preconceived point of view concerning an issue of law' that, under *Samuels*, is not a basis for disqualification due to bias.

"RESPONDENTS' ADDITIONAL ARGUMENTS

"In addition to their 'actual bias' argument, Respondents contend that the Commissioner should be disqualified for two other reasons: (1) The Commissioner's participation as a decision maker in these cases would violate the policy expressed in ORS 244.010 regarding ethical standards for public officials because of his conflict of interest; and (2) His participation as a decision maker in these cases would violate Oregon Rules of Professional Conduct (ORPC) 3.6 related to lawyers making public statements about matters in litigation[23] and Oregon's Code of Judicial Ethics.^

"Ethical Standards for Public Officials – ORS chapter 244 & Conflict of Interest

"Respondents contend that the Commissioner's actual bias and conflict of interest demonstrate a partiality towards these cases that requires the Commissioner to disqualify himself from this case. As noted earlier, Respondents have not demonstrated actual bias on the Commissioner's part. Respondents assert that, under ORS chapter 244, 'the state of Oregon and its respective agencies, including BOLI, cannot ethically sit in judgment of Respondents for conduct of which it may be legally culpable,' and cite the

[23] Commissioner Avakian is an attorney and a member of the Oregon State Bar.

following 'multiple conflicts of interest on the part of the Commissioner and BOLI as grounds for disqualification:

> '(1) [T]he Oregon Constitution and ORS 659A.003, *et seq,* not to mention the U.S. Constitution, require BOLI to respect and protect Respondents' constitutionally-protected religion, conscience and speech rights to an even greater degree than it does complainants' statutory rights; and
>
> '(2) [T]he State of Oregon, including BOLI itself, has potential legal liability as a place of public accommodation under ORS 659A.400(1)(b) and (c) because, at the time of the original defense and the filing of complaints by complainants, the state of Oregon itself refused to recognize same sex marriage relationships, just as Respondents have chosen not to participate in complainants' same-sex ceremony.'

"'Conflict of interest'" is defined under ORS chapter 244 in ORS 244.020:

> '(1) "Actual conflict of interest" means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (12) of this section.
>
> '* * * * *
>
> '(12) "Potential conflict of interest" means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated[.]'

"Respondents identify no conflict of interest by the Commissioner based on a pecuniary benefit or detriment that fits within these definitions. As noted by the Agency in its response, the Oregon Government Ethics Commission, not the Administrative Law Judge, is responsible for determining the Commissioner's ethical obligations under ORS chapter 244. ORS 244.250 *et seq.*

"ORPC & Canons of Judicial Ethics

"The Administrative Law Judge does not have the authority to enforce the ORPC or Code of Judicial Ethics. However, I note that Respondents have not shown that any of Commissioner Avakian's remarks contained in Respondents' exhibits 'will have a substantial likelihood of materially prejudicing' this contested case proceeding. *ORPC 3.6.* The Code of Judicial Ethics does not apply to the

Commissioner because he is not 'an officer of a judicial system performing judicial functions.'[24]

"**Conclusion**

"Respondents' motion to disqualify Commissioner Avakian from deciding the issues presented in the Formal Charges and issuing a Final Order is **DENIED**."

(Ex. X12)

9) On August 13, 2014, the ALJ issued an interim order that reset the hearing to begin on October 6, 2013, noting that the Agency and Respondents had both stated in an earlier prehearing conference it might take up to a week to complete the hearing. The same day, the ALJ issued an interim order requiring case summaries and setting a filing deadline of September 22, 2014. (Ex. X14)

10) On August 25, 2014, Respondents moved to postpone the hearing based on Respondents' prescheduled plans to be out of town on October 6, 2014. The Agency did not object and the ALJ reset the hearing to begin on October 7, 2014. (Ex. X17, X18)

11) On September 4, 2014, Respondents filed motions to depose Complainants and Cheryl McPherson and for a discovery order related to the Agency's objections to Respondents' informal discovery request for admissions, interrogatory responses, and documents. The Agency filed timely objections to both motions. (Exs. X20 through X24)

12) On September 11, 2014, the Agency moved for a discovery order for the production of four types of documents. (Ex. X25)

13) On September 15, 2014, Respondents filed a motion for summary judgment "on each or all of the claims asserted against them." (Ex. X26)

14) On September 16, 2014, the Agency moved for a Protective Order regarding Complainants' medical records both informally requested by Respondents and in Respondents' motion for a discovery order. The Agency attached five pages of medical records related to LBC and asked that the forum conduct an *in camera* inspection "to determine what, if any, of the information contained within these records is relevant or calculated to lead to the discovery of admissible evidence and must be turned over to Respondents." After conducting an *in camera* review, the ALJ made

[24] *See* ORS 1.210 – "Judicial officer defined. A judicial officer is a person authorized to act as a judge in a court of justice." BOLI does not operate a "court of justice," but is an administrative agency whose contested case proceedings are regulated by the Administrative Procedures Act, ORS 183.411 to ORS 183.470.

minor redactions unrelated to LBC's medical diagnosis and released the records to Respondents, accompanied by a Protective Order. (Exs. X27, X44)

15) The ALJ held a prehearing conference on September 18, 2014. After the conference, the ALJ issued an interim order summarizing his oral rulings, including his decision to postpone the hearing to give him time to rule on Respondents' motion for summary judgment before the hearing began. (Ex. X32)

16) On September 24, 2014, the Agency filed Amended Formal Charges in both cases. (Ex. X38)

17) On September 25, 2014, the ALJ issued an interim order ruling on Respondents' motion for a discovery order for documents, interrogatory responses, and admissions. In pertinent part, the ruling read:

> "As an initial matter, the Agency argues that Complainants are not subject to discovery rules under OAR 839-050-0020 because they are not 'parties' and therefore are not 'participants' under OAR 839-050-0200(1). In numerous prior cases with the forum * * * a respondent has been allowed to request a discovery order to obtain documents and information from a complainant through the Agency that are discoverable under OAR 839-050-0020(7). *See In the Matter of Toltec*, 8 BOLI at 152 (noting that although the complainant was not a party, complainant still was 'a compellable witness' and the Agency was ordered to produce evidence over which it had power or authority). *See also In the Matter of Columbia Components, Inc.*, 32 BOLI 257, 259-61 (2013)(requiring complainant to verify that the interrogatory responses were true, and that complainant respond to a specific interrogatory request to which the Agency had objected); *In the Matter of Dr. Andrew Engel, DMD, PC,* 32 BOLI 94, 100 (2012) (requiring the Agency to produce any documents responsive to respondents' requests that appeared reasonably likely to produce information generally relevant to the case, including complainant's tax returns for relevant years).
>
> **A. "Interrogatories**
>
> "Respondents requested an order requiring the Agency to fully respond to four separate interrogatories. To the extent this order requires Complainants, through the Agency, to respond to the interrogatories, Complainants must sign them under oath as required by OAR 839-050-0200(6).
>
> ***"Interrogatory No. 7***
>
> "Respondents requested that the Agency explain in detail the nature of the physical harm Complainants allege in the Formal Charges ('Charges'). The Agency responded that both Complainants experienced 'varying physical manifestations of stress' and that '[a]ny further medical information will be provided pursuant to a protective order.' I agree that Respondents are entitled to

know more specifically what physical damages have been allegedly sustained. I order the Agency to have Complainants, through the Agency, respond to this interrogatory.

"Interrogatory No. 8

"Respondents requested an explanation 'in detail [of] the nature of the mental harm Complainants alleged resulted from the events alleged in the Complaint.' The Agency objected on the grounds that the request was redundant and vague, as it was unclear how the interrogatory differed from the interrogatory asking for information as to emotional harm allegedly suffered by Complainants. In its response to the motion, the Agency 'stipulates' that 'emotional, mental' suffering is any suffering not attributed to physical suffering, and that information was provided in response to Interrogatory No. 6. Based on the Agency's stipulation that 'emotional [and] mental' suffering are the same, the response to this Interrogatory appears to be sufficient and, therefore, I DENY Respondents' request for additional information in response to this interrogatory.

'Interrogatory No. 11

"This interrogatory also relates to damages. With this interrogatory, Respondents requested an explanation as to the actions taken by Complainants to remove their public social media profiles after a complaint was filed with the Department of Justice on January 18, 2013. The Agency objected on the basis of relevancy. Respondents assert that this request is relevant because '[m]uch, if not all of the damage Complainants have alleged to this point revolve around the media attention they received as a result of Complainant Laurel Bowman-Cryer's filing a Complaint with the Department of Justice.' Respondents further assert that Complainants have told Respondents they had to travel out of town because of attention and publicity. Respondents claim that the removal of social media profiles is relevant to the assessment of damages or mitigation of damages. In its response to the motion, the Agency reiterates its objection on the basis of relevance, but does not directly address the arguments made in Respondents' motion as to damages allegedly caused by publicity and media attention. On September 22, 2014, the Agency timely filed a statement addressing this issue. In pertinent part, the Agency stated:

> "Respondents caused substantial harm to Complainants, in part, through their intentional posting of the Department of Justice complaint on their social media website, which included Complainants' home address. This affected Complainants by exposing them to unwanted and, sometimes, unnerving contact from the public. * * * Complainants have had little to no contact with media, except through their attorney Mr. Paul Thompson. * * * The agency's position is that Complainants' damages were a direct result of Respondents intentionally posting the DOJ complaint on the Internet."

Based on the information and representations before me, I am unable to determine at this time if Interrogatory No. 11 is 'reasonably likely to produce information that is generally relevant to the case.' Therefore, the Agency is not required to respond to this interrogatory. If Respondents establish the relevance of this interrogatory in their depositions of Complainants, Respondents may renew their motion for a discovery order regarding this interrogatory.

"Interrogatory No. 12

"Respondents have requested an explanation 'in detail [of] any involvement or communication Complainants had with any group involved in boycotting Respondents' business.' The Agency objected on the basis of relevance, over breadth, and because the requested information is outside the possession or control of the agency. As to relevancy, I view this request as similar to Interrogatory No. 11. Based on the information and representations before me, I am unable to determine at this time if Interrogatory No. 12 is reasonably likely to produce information that is generally relevant to the case. Therefore, the Agency is not required to respond to this interrogatory. If Respondents establish the relevance of this interrogatory in their depositions of Complainants, Respondents may renew their motion for a discovery order regarding this interrogatory.

"B. Production of Documents

"* * * * *

'Request No. 2

"Respondents requested a copy of records 'in the Agency's possession' as to the state policy in January of 2013 for issuing marriage licenses to same sex couples. The Agency objected on the basis of relevance and also states that such documents are not within the possession or control of the Agency. Respondents claim such documents are relevant to show whether the "Agency is aware" that same sex marriage was not recognized in Oregon at the time of the acts in question in this case. I deny Respondents' motion because (1) the Agency's awareness of the status of same sex marriage in Oregon is not likely to lead to relevant evidence^; (2) the same sex marriage laws in Oregon are a matter of public record; and (3) the Agency has indicated it has no such documents in its possession.

'Request No. 7

"This request seeks medical records for any medical visits relating to Complainants' request for emotional, mental or physical damages. Respondents' motion is GRANTED. * * *

Request No. 9

"Each of these requests for production seeks documentation and photographs of the actual wedding cake served at Complainants' wedding ceremony. The Agency objected to these requests on the basis of relevancy. The fact that a cake was purchased from another cake baker is likely relevant and, thus, I grant this motion only as to a receipt or invoice for showing the purchase of the cake and one photograph of the cake. Any other requested information is overly broad. Furthermore, for the reasons set forth below regarding Request for Production No. 10, the Agency need not produce photographs of Complainants, their families, and the actual wedding ceremony.

Request No. 10

"In this request, Respondents have asked for photos, videos, or audio recordings of Complainants' wedding ceremony. The Agency has objected on the grounds that the requested documents are irrelevant. The Agency further explains that Complainants are wary of turning over these materials to Respondents because Respondents previously posted Complainants' home address on a social media site. Unless the Agency is intending to offer photos, videos or audio recordings as evidence at the hearing, then I agree with the Agency's objections and DENY the motion as to these documents. If the Agency intends to offer them as evidence at hearing, then the Agency must turn them over to Respondents.

Request No. 11

"Request No. 11 seeks communications made by Complainants to the media or on social media sites 'relating to Respondents and the events leading to the filing of Formal Charges against Respondents.' I find that this request is reasonably likely to produce information that is generally relevant to the case. * * * Respondents' request is GRANTED.

Request No. 12

"Request No. 12 seeks '[a]ny social media posts, blog posts, emails, text messages, or other record or communication showing Complainant's involvement with a boycott of Respondents or their business.' Based on the information and representations currently before me, I am unable to determine at this time if this request is reasonably likely to produce information that is generally relevant to the case. Therefore, Respondents' request is DENIED. If Respondents establish the relevance of this request in their depositions of

Complainants, Respondents may renew their motion for a discovery order regarding this request.

'Request No. 16

"Request No. 16 seeks the "names and addresses of any person, media outlet, or other entity with whom Complainants or Cheryl McPherson spoke regarding the events leading to this Complaint or the Complaint filed with the Department of Justice." I find that Respondents' request, with respect to Complainants, is reasonably likely to produce information that is generally relevant to the case, and is GRANTED. Respondents' request with regard to Cheryl McPherson is DENIED.

'Request No. 17

"Request No. 17 seeks the production of '[a]ny receipt, invoice, contract, or other writing memorializing the purchase of the cake by Complainants from Respondent for Cheryl McPherson's wedding.' I find that Respondents' request is not reasonably likely to produce information that is generally relevant to the case. Respondents' request is DENIED.

'Request No. 18

"Request No. 18 seeks the production of '[a]ny photos, videos, or other record of the cake Complainants purchased from Respondent for Cheryl McPherson's wedding.' I find that Respondents' request is not reasonably likely to produce information that is generally relevant to the case. Respondents' request is DENIED.

'Request No. 22

"Request No. 22 seeks '[a]ll posting by Complainants or Cheryl McPherson to any social media website, including but not limited to Facebook, Twitter, LinkedIn, MySpace, Instagram, and SnapChat from January 2013 to the present.' I find that this request, with respect to Complainants, is reasonably likely to produce information that is generally relevant to the case. * * * However, Complainants are only required to provide postings that contain comments about the facts of this case, comments about Respondents, or comments that relate to their alleged damages. Respondents' request with regard to Cheryl McPherson is DENIED.

"Request No. 23

"Request No. 23 seeks '[a]ny recording or documents showing that Complainants ever removed any public social media profiles or caused to be hidden from public view.' Based on the information and representations currently before me, I am unable to determine at this time if this request is reasonably likely to produce information that is generally relevant to the case. Therefore, Respondents' request is DENIED. If Respondents establish the relevance of this request in their depositions of Complainants, Respondents may renew their motion for a discovery order regarding this request.

B. "Requests for Admissions

"* * * * *

"Request No. 4

"Respondents ask the Agency to admit that the State of Oregon did not recognize same sex marriage on or about January 17 and 18, 2013. The Agency objected on the basis of relevancy. For the reasons set forth above in regards to *Request for Production No. 2*, Respondents' request is DENIED.

"Requests Nos. 7 & 8

"Respondents ask the Agency to admit that Complainants Laurel Bowman-Cryer and Rachel Cryer 'did not at any time on or after January 17, 2013, delete or remove her public Facebook profile.' The Agency objects on the basis of relevance. Based on the information and representations currently before me, I am unable to determine at this time if this request is reasonably likely to produce information that is generally relevant to the case. Therefore, Respondents' request is DENIED. If Respondents establish the relevance of this request in their depositions of Complainants, Respondents may renew their motion for a discovery order regarding this request.

"Request No. 9

"Respondents ask the Agency to admit that Complainants were not issued a marriage license between January 17, 2013, and May 18, 2014. The Agency objects for the same reasons it objected to *Request for Production No. 2*, which sought similar information. This request is DENIED for the same reasons set out in my denial to *Request for Production No. 2*.

(Ex. X41)

18) On September 25, 2014, the ALJ issued an interim order ruling on Respondents' motion for a discovery order for depositions. In pertinent part, the ruling read:

> **"Complainants Laurel Bowman-Cryer and Rachel Cryer**
>
> "I agree with the Agency that, given the availability of other discovery methods, the forum typically does not allow for depositions, as well as the fact that the Agency typically produces an investigative file with detailed notes of interviews of witnesses. However, this case poses two unique circumstances. First, based on the information I have received to date from Respondents and the Agency, I have been unable to determine whether or not information and documents sought in response to Interrogatories Nos. 11 and 12 and Requests for Production Nos. 12 and 23 are reasonably likely to produce information that is generally relevant to the case. If so, it may result in the production of evidence that bears a significant relationship to Complainants' alleged damages. Respondents should be able to ascertain this in a deposition and, as stated in my interim order related to those Interrogatories and Requests for the Production, may renew their request for a discovery order if they can show that testimony given during the depositions shows those requests are reasonably likely to produce information is generally relevant to the case. I also note that there appears to be a unique damages claim for reimbursement of expenses for out-of-town trips to Seattle, Tacoma (two trips), and Lincoln City, with expenses for lodging, gas, and food at a number of establishments. As Respondents point out in their motion, they 'would use all of their 25 interrogatories just trying to determine exactly how one or two of these alleged expenses was at all related to Respondents' alleged unlawful conduct.' I am persuaded by Respondents that they have sought informal discovery on the issue of damages through other methods and do not have adequate information as to damages.
>
> "In this unusual set of circumstances, I find that Respondents should be permitted to briefly depose Complainants, with the scope of the depositions limited to Complainants' claim for damages. Unless unexpected circumstances arise that require an ALJ's intervention, the depositions should take no longer than 90 minutes per Complainant. After the scheduled September 29, 2014, prehearing conference in this matter, the forum will issue a subsequent order stating a deadline for when the depositions should be completed. The Agency and Complainants' counsel are instructed to cooperate with Respondents so that the depositions can be conducted by that deadline. Respondents are responsible for any court reporter costs associated with the deposition, and Respondents and the Agency must each pay for their own copy of transcripts if transcripts are prepared.

"**Cheryl McPherson**

"Respondents argue that they are entitled to depose Cheryl McPherson, a material witness in this case, because they:

> "strongly dispute some of the factual claims made by the complainants, Respondents need to know whether Cheryl McPherson will validate complainant's (sic) testimony under oath before the hearing. * * * In this case, multiple parties to the same conversations recall substantially different events, and subtle differences in retelling will substantially affect a credibility determination that Administrative Law Judge must make. Without being able to compare such testimony prior to hearing, the Respondents are substantially prejudiced."

"I do not find that Respondents have demonstrated the need to depose witness Cheryl McPherson. I note that Respondents are typically provided with notes from investigative interviews of witnesses. Neither the Agency nor Respondents have provided information as to whether that occurred in this case. However, unless Respondents did not receive the usual investigative notes of the Agency's interview with Cheryl McPherson or no such notes exist because McPherson was never interviewed, I deny Respondents' request to take her deposition."

(Ex. X42)

19) On September 25, 2014, the ALJ issued a discovery order requiring Respondents to produce documents in three of the four categories sought by the Agency in its September 11, 2014, motion. (Ex. X43)

20) On September 29, 2014, the ALJ held a prehearing conference. During the conference, mutually acceptable new hearing dates, discovery status and a possible alternative to depositions, and filing deadlines were discussed and the ALJ made several rulings, summarized in a September 30, 2014 interim order that stated:

> "(1) Subject to the availability of Respondents and Complainants, the hearing is reset to begin at 9:00 a.m. on Tuesday, March 10, 2015, at the Tualatin Office of Administrative Hearings. If the hearing is not concluded by late afternoon on Friday, March 13, the hearing will reconvene at 9:00 a.m. on Tuesday, March 17, 2015, at the same location. The Agency and Respondents' counsel will let me know this week of the availability of Respondents and Complainants on those dates.
>
> "(2) Respondents have until October 2, 2014, to file answers to the Amended Formal Charges.

"(3) The Discovery ordered in my rulings on the Agency's and Respondents' motions for Discovery Orders must be mailed or hand-delivered no later than October 14, 2014. This does not include Complainants' depositions.

"(4) My order requiring Complainants to submit to depositions by Respondents is 'on hold' for the present.

"(5) As a potential means for avoiding the necessity of depositions, Respondents proposed that they be allowed to serve 30 additional interrogatories to the Agency for Complainants' responses. The Agency objected to 30 but agreed to 25. I agreed and ruled that Respondents could serve 25 additional interrogatories to the Agency for Complainants' response, with the responses due 14 days after the date of service. At the Agency's request, I also ruled that, should they elect to do so, the Agency may also serve up to 25 interrogatories to Respondents' counsel for Respondents' response, noting that the Agency is also entitled to do that under the rules since they have issued no prior interrogatories.

"(6) Case Summaries must be filed no later than February 24, 2015.

"(7) We also discussed the most efficient means of procedure regarding Respondents' motion for summary judgment and the Agency's pending response, considering the fact that the Agency has filed Amended Formal Charges since Respondents filed a motion for summary judgment. Respondents' counsel stated their intention in filing the motion was to resolve both cases in their entirety, if possible. After discussion, I ruled that the Agency did not need to respond to Respondents' pending motion for summary judgment and I will not rule on that motion. Rather, Respondents will file another motion for summary judgment that will incorporate the matters raised in the Amended Formal Charges so that all outstanding issues can be addressed in my ruling on Respondents' motion. It was mutually agreed that Respondents could have until October 24, 2014, to file an amended motion for summary judgment and that the Agency would have until November 21, 2014, to file its written response. Accordingly, I order that Respondents must file their amended motion for summary judgment no later than October 24, 2014, and the Agency must file its response no later than November 21, 2014. Respondents' counsel asked if oral argument would be allowed on the motion and I ruled that it would not.

"(8) The Agency stipulated that it is not seeking reimbursement for the out-of-pocket expenses listed in response to Respondents' Interrogatory #16. In response to my question, the Agency stated that it is not willing to stipulate that those trips are not relevant to the issue of damages."

(Ex. X50)

21) On October 2, 2014, Respondents filed Answers to the Agency's Amended Formal Charges. (Ex. X51)

22) On October 24, 2014, Respondents re-filed their motions for summary judgment. (Ex. X53)

23) On November 21, 2014, the Agency filed a response to Respondents' motion for summary judgment and a cross-motion for partial summary judgment "on the same issues moved upon by Respondents." (Ex. X54)

24) On December 8, 2014, the Agency filed a second motion for a discovery order. On December 15, 2014, Respondents filed a response stating that they had "now provided the Agency with all responsive documents * * * not subject to the attorney-client privilege." On December 18, 2014, the Agency withdrew its motion for a discovery order, stating that Respondents had satisfied the Agency's request for production. (Ex. X57)

25) On December 19, 2014, Respondents filed a response to the Agency's cross-motion for summary judgment. (Ex. X61)

26) On January 15, 2015, the Agency moved for a Protective Order regarding "additional medical documentation from Complainants that is subject to discovery." The Agency attached 13 pages of medical records, dated September 30, 2014, through January 20, 2015, related to LBC and asked that the forum conduct an *in camera* inspection "to determine what, if any, of the information contained within these records is relevant or calculated to lead to the discovery of admissible evidence and must be turned over to Respondents." Before ruling, the ALJ instructed the Agency to tell the forum whether the Agency contended "that Bowman-Cryer continued to experience "emotional, mental, and physical suffering" caused by Respondents' alleged unlawful actions during the period of time covered by these records. (Ex. X64)

27) On January 15, 2014, Respondents renewed their motion to depose Complainants, based on part on Complainant's alleged inadequate responses to Respondents second set of interrogatories. On January 22, 2014, the Agency objected to Respondents' motion. On January 29, 2014, the ALJ issued an interim order instructing Respondents to provide a copy of the interrogatories and the Agency's responses before the ALJ ruled on Respondents' motion. (Exs. X62, X63, X66)

28) On January 29, 2015, the ALJ issued an interim order ruling on Respondents' re-filed motion for summary judgment and the Agency's cross-motion for summary judgment. The interim order is reprinted verbatim below, pursuant to OAR 839-050-0150(4)(b):

"Introduction

"Respondents operate a bakery under the name of Sweetcakes by Melissa.[25] These cases arise from Respondents' refusal to provide a wedding cake for Complainants Rachel Cryer ('Cryer') and Laurel Bowman-Cryer ('Bowman-Cryer') after Respondents Aaron Klein ('A. Klein') and Melissa Klein ('M. Klein') learned that the wedding would be a same-sex wedding.

"As an initial matter, the forum notes Respondents' request for oral argument with regard to their motion. Respondents' request for oral argument is **DENIED.**

"Procedural History

"On June 4, 2014, the Civil Rights Division of the Oregon Bureau of Labor and Industries ('Agency') issued two sets of Formal Charges alleging that M. Klein violated ORS 659A.403(3) by refusing to provide Complainants a wedding cake for their same-sex wedding based on their sexual orientation and that A. Klein aided and abetted M. Klein, thereby violating ORS 659A.406. The Charges further alleged that M. Klein and A. Klein, who was acting on behalf of M. Klein, 'published, circulated, issued or displayed or caused to be published, circulated, issued or displayed, a communication, notice, advertisement or sign to the effect that its accommodations, advantages, facilities, services or privileges would be refused, withheld from or denied to, or that discrimination would be made against, a person on account of his or her sexual orientation,' causing M. Klein to violate ORS 659A.409 and A. Klein to violate ORS 659A.406 by aiding and abetting M. Klein in her violation of ORS 659A.409. The Agency sought $75,000 in damages for 'emotional, mental, and physical suffering' for each Complainant, plus 'out of pocket expenses to be proven at hearing.' On June 19, 2014, the ALJ consolidated the two cases for hearing.

"Respondents, through joint counsel Herbert Grey, Tyler Smith, and Anna Adams (now Anna Harmon), timely filed Answers to both sets of Formal Charges, raising numerous affirmative defenses and four counterclaims.

"On September 15, 2014, Respondents filed a motion for summary judgment with respect to both sets of Charges, based primarily on legal argument supporting the constitutional affirmative defenses raised in their Answers. On September 16, 2014, the Agency moved for an extension of time to respond to Respondents' motion until September 26, 2014. On September 17, 2014, the

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[25] At the time of the alleged discrimination, Sweetcakes by Melissa was an inactive assumed business name. On February 1, 2013, Sweetcakes by Melissa was re-registered as an assumed business name with the Oregon Secretary of State Business Registry, with M. Klein listed as the registrant and A. Klein listed as the authorized representative.

ALJ granted the Agency's motion. On September 17, 2014, the ALJ held a prehearing conference in which it became apparent that he had ruled on the Agency's motion before Respondents had seen the motion. Accordingly, the ALJ gave Respondents an opportunity to file objections. On September 18, 2014, Respondents filed objections to Agency's motion for extension. On September 22, 2014, the ALJ issued an interim order that sustained his September 17, 2014, order.

"On September 24, 2014, the Agency amended both sets of Charges to allege that M. Klein and A. Klein both violated ORS 659A.403(3) and that A. Klein, 'in the alternative,' aided and abetted M. Klein in her violation of ORS 659A.403(3), thereby violating ORS 659A.406. Additionally, the Agency alleged that, 'in the alternative,' A. Klein aided and abetted M. Klein's violation of ORS 659A.409.[26]

"On September 29, 2014, the ALJ held a prehearing conference. During the conference, the participants discussed the most efficient means of proceeding regarding Respondents' motion for summary judgment and the Agency's pending response, considering the fact that the Agency had filed Amended Formal Charges ('Charges') since Respondents filed their motion for summary judgment. After discussion, it was agreed that, instead of the Agency filing a response to Respondents' original motion, it would be more efficient for Respondents to file an amended motion for summary judgment that would incorporate the matters raised in the Charges so that all outstanding issues could be addressed in the ALJ's ruling on Respondents' motion. It was mutually agreed that Respondents could have until October 24, 2014, to file an amended motion for summary judgment and that the Agency would have until November 21, 2014, to file its response.

"On October 2, 2014, Respondents filed Amended Answers ('Answers') to the Charges. On October 24, 2014, Respondents timely filed an amended motion for summary judgment. On November 21, 2014, the Agency timely filed a response and cross motion asking that Respondents' motion be denied in its entirety and that the Agency be granted partial summary judgment as to the issues on which Respondents sought summary judgment. On November 25, 2014, the forum granted Respondents' unopposed motion for an extension of time until December 19, 2014, to respond to the Agency's cross motion. Respondents filed a response on December 19, 2014.

"**Summary Judgment Standard**

"A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. *OAR 839-050-0150(4)(B).*

[26] The Agency's amended Charges did not allege that A. Klein violated ORS 659A.409.

The standard for determining if a genuine issue of material fact exists and the evidentiary burden on the participants is as follows:

> '* * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].' ORCP 47C.

The 'record' considered by the forum consists of: (1) the amended Formal Charges and Respondents' amended Answers to those Charges; (2) Respondents' motion, with attached exhibits; (3) the Agency's response and cross-motion to Respondents' motion, with an attached exhibit; and (4) Respondents' response to the Agency's motion.

"Analysis

A. Facts of the Case

"The undisputed material facts of this case relevant to show whether Respondents violated ORS chapter 659A as alleged in the Charges are set out below.

Findings of Fact

1) "Complainants Cryer and Bowman-Cryer are both female persons.[27] (Formal Charges)

2) "In January 2013, Sweetcakes by Melissa ('Sweetcakes') was a business owned and operated as an unregistered assumed business name by Respondents M. Klein and A. Klein. At all material times, Sweetcakes was a place or service that offered custom designed wedding cakes for sale to the public. (Respondents' Admission; Affidavits of A. Klein, M. Klein)

3) "Before and throughout the operation of Sweetcakes, Respondents M. Klein and A. Klein have been jointly committed to live their lives and operate their business according to their Christian religious convictions. Based on specific passages from the Bible, they have a sincerely held belief that that God 'uniquely and purposefully designed the institution of marriage exclusively as the union of one man and one woman' and that 'the Bible forbids us from

[27] The Charges do not identify either Complainant as a female, but the forum infers from their names and the Agency's reference to each Complainant as "her" that Complainants are both female.

proclaiming messages or participating in activities contrary to Biblical principles, including celebrations or ceremonies for uniting same-sex couples.' (Affidavits of A. Klein, M. Klein)

4) "In the operation of Sweetcakes, A. Klein bakes the cakes, cuts the layers, adds filling, and applies a base layer of frosting. M. Klein then does the design and decorating. A. Klein delivers the cake to the wedding or reception site in a vehicle that has 'Sweet Cakes by Melissa' written in large pink letters on the side and assembles the cake as necessary. A. Klein also sets up the cake and finalizes any remaining decorations after final assembly and placement. In that capacity, he often interacts with the couple or other family members and often places cards showing that Sweetcakes created the cake. (Affidavits of A. Klein, M. Klein)

5) "In or around November 2010, Respondents designed, created, and decorated a wedding cake for Cryer's mother, Cheryl McPherson, for which Cryer paid. (Affidavit of M. Klein)

6) "On January 17, 2013, Cryer and McPherson visited Sweetcakes for a previously scheduled cake tasting appointment, intending to order a cake for Cryer's wedding ceremony to Bowman-Cryer. (Respondents' Admission; Affidavit of A. Klein)

7) "A. Klein conducted the cake tasting at Sweetcakes' bakery shop located in Gresham, Oregon. M. Klein was not present during the tasting. During the tasting, A. Klein asked for the names of the bride and groom, and Cryer told him there would be two brides and their names were 'Rachel and Laurel.' (Respondents' Admission; Affidavit of A. Klein)

8) "A. Klein told Cryer that Sweetcakes did not make wedding cakes for same-sex ceremonies because of A. and M. Klein's religious convictions. In response, Cryer and McPherson walked out of Sweetcakes. (Respondents' Admission; Affidavit of A. Klein)

9) "Before driving off, McPherson re-entered Sweetcakes by herself to talk to A. Klein. During their subsequent conversation, McPherson told A. Klein that she used to think like him, but her 'truth had changed' as a result of having 'two gay children.' A. Klein quoted Leviticus 18:22 to McPherson, saying 'You shall not lie with a male as one lies with a female; it is an abomination.' McPherson then left Sweetcakes. (Affidavit of A. Klein)

10) "On February 1, 2013, Sweetcakes by Melissa was registered as an assumed business name with the Oregon Secretary of State, with the 'Registrant/Owner' listed as Melissa Elaine Klein and the 'Authorized Representative' listed as Aaron Wayne Klein. (Exhibit A1, p. 2, Agency

Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment)

11) "On August 8, 2013, both Complainants filed verified written complaints with BOLI's Civil Rights Division ('CRD') alleging unlawful discrimination by Respondents on the basis of sexual orientation. After investigation, the CRD issued a Notice of Substantial Evidence Determination on January 15, 2014, in both cases, and sent copies to Respondents. (Respondents' Admission)

12) "At some time prior to September 2, 2013, A. Klein and M. Klein took part in a video interview with Christian Broadcast Network (CBN) in which A. Klein explained the reasons for declining to provide a wedding cake for Complainants. On September 2, 2013, CBN broadcast a one minute, five seconds long presentation about Complainants' complaints. The broadcast begins and ends with a CBN announcer describing the complaints filed by Cryer and Bowman-Cryer against Respondents while pictures of the bakery are broadcast. A. and M. Klein appear midway in the broadcast, standing together outdoors, and make the following statements:[28] [29]

A. Klein: 'I didn't want to be a part of her marriage, which I think is wrong.'

M. Klein: 'I am who I am and I want to live my life the way I want to live my life and, you know, I choose to serve God.'[30]

A. Klein: 'It's one of those things where you never want to see something you've put so much work into go belly up, but on the other hand, um, I have faith in the Lord and he's taken care of us up to this point and I'm sure he will in the future.'

(Exhibit 1-I, Respondents' Motion for Summary Judgment)

13) "In September 2013, M. and A. Klein closed their bakery shop in Gresham and moved their business to their home, where they continued to offer custom designed wedding cakes for sale to the public. (Affidavits of A. Klein, M. Klein)

14) "On February 13, 2014, A. Klein was interviewed live on a radio show by Tony Perkins called 'Washington Watch.' Perkins's show lasted approximately 15

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[28] There is nothing in the video to show whether these statements were made in response to a question or if it was part of a longer interview.

[29] This transcript was made by the ALJ from a DVD provided to the forum by Respondents. The DVD includes the September 2, 2013, CBN video, and an mp4 recording of a February 13, 2014, interview with Tony Perkins.

[30] M. Klein's statement is only included to provide context, as the Agency did not allege that her statement was a violation of Oregon law.

minutes. In pertinent part, the interview included the following exchange that occurred, starting at four minutes, 30 seconds into the interview and ending at six minutes, twenty-two seconds into the interview:[31]

> **Perkins**: '* * * Tell us how this unfolded and your reaction to that.'
>
> **Klein**: 'Well, as far as how it unfolded, it was just, you know, business as usual. We had a bride come in. She wanted to try some wedding cake. Return customer. Came in, sat down. I simply asked the bride and groom's first name and date of the wedding. She kind of giggled and informed me it was two brides. At that point, I apologized. I said "I'm very sorry, I feel like you may have wasted your time. You know we don't do same-sex marriage, same-sex wedding cakes." And she got upset, noticeably, and I understand that. Got up, walked out, and you know, that was, I figured the end of it.'
>
> **Perkins**: 'Aaron, let me stop you for a moment. Had you and your wife, had you talked about this before; is this something that you had discussed? Did you think, you know, this might occur and had you thought through how you might respond or did this kind of catch you off guard?'
>
> **Klein**: 'You know, it was something I had a feeling was going to become an issue and I discussed it with my wife when the state of Washington, which is right across the river from us, legalized same-sex marriage and we watched Masterpiece Bakery going through the same issue that we ended up going through. But, you know, it was one of those situations where we said "well I can see it is going to become an issue but we have to stand firm. It's our belief and we have a right to it, you know." I could totally understand the backlash from the gay and lesbian community. I could see that; what I don't understand is the government sponsorship of religious persecution. That is something that just kind of boggles my mind as to how a government that is under the jurisdiction of the Constitution can decide, you know, that these people's rights overtake these people's rights or even opinion, that this person's opinion is more valid than this person's; it kind of blows my mind.'
>
> (Exhibit 1-I, Respondents' Motion for Summary Judgment)

"**B. Analysis of Complainants' Claims on the Merits**

"The forum first analyzes whether Respondents' actions violated the applicable public accommodation statutes. If so, the forum moves on to a determination of whether Respondents have established one or more of their affirmative defenses that rely on the Oregon and U. S. Constitution. *See Tanner v. OHSU,* 157 Or App 502, 513 (1998), *rev den* 329 Or 528, citing *Planned*

[31] *See* footnote 29.

Parenthood Assn. v. Dept. of Human Resources, 297 Or 562, 564, 687 P2d 785 (1984); *Young v. Alongi,* 123 Or App 74, 77–78, 858 P2d 1339 (1993). *See also Meltebeke v. Bureau of Labor and Industries,* 322 Or 132, 138-39 (1995)(before considering constitutional issues, court must first consider pertinent subconstitutional issues).

"In its Charges, the Agency alleged that Respondents operated Sweetcakes, a place of public accommodation under ORS 659A.400, and violated ORS 659A.403, 659A.406, and 659A.409 by refusing to provide Complainants a wedding cake based on their sexual orientation, by aiding and abetting that refusal, and by communicating their intent to discriminate based on sexual orientation.

"Although Respondents' affirmative defenses apply to the forum's ultimate disposition of each alleged statutory violation, the forum is able to draw several legal conclusions from the undisputed material facts relevant to the Agency's allegations that are unaffected by those affirmative defenses.

"First, at all times material, A. Klein and M. Klein owned and operated Sweetcakes as a partnership. ORS 67.055 provides, in pertinent part:

> '(1) Except as otherwise provided in subsection (3) of this section, the association of two or more persons to carry on as co-owners a business for profit creates a partnership, whether or not the persons intend to create a partnership.
>
> '* * * * *
>
> '(d) It is a rebuttable presumption that a person who receives a share of the profits of a business is a partner in the business * * *.'

In affidavits dated October 23, 2014, signed by M. Klein and A. Klein and submitted in support of Respondent's motion for summary judgment, they both aver: 'Together we have operated Sweetcakes by Melissa as a business since we opened in 2007. * * * Until recent months, we both worked actively in the business, primarily derived our family income from the operation of the business, and jointly shared the profits of the business.' The Agency does not dispute the factual accuracy of these statements. Accordingly, the forum concludes that M. Klein and A. Klein were joint owners of Sweetcakes and operated it as a partnership and unregistered assumed business name in January 2013, and as a registered assumed business name since February 1, 2013. As such, they are jointly and severally liable for any violations of ORS chapter 659A related to Sweetcakes.

"Second, ORS 659A.403, 659A.406, and 659A.409 all require that discrimination must be made by a 'person' acting on behalf of a 'place of public accommodation.' 'Person' includes '[o]ne or more individuals.' ORS

659A.001(9)(a). The undisputed facts establish that A. Klein and M. Klein are 'individual[s]' and 'person[s].' A 'place of public accommodation' is defined in ORS 659A.400 as '(a) Any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise.' The undisputed facts show that, at all material times, Sweetcakes was a place or service offering goods and services – wedding cakes and the design of those cakes – to the public. Accordingly, the forum concludes that Sweetcakes, at all material times, was a 'place of public accommodation.'

"Third, as germane to this case, ORS 659A.403 and 659A.406 prohibit any 'distinction, discrimination or restriction' based on Complainants' 'sexual orientation.' This requires the forum to determine Complainants' actual or perceived sexual orientation. As used in ORS chapter 659A, 'sexual orientation' is defined as 'an individual's actual or perceived heterosexuality, homosexuality, bisexuality, or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's assigned sex at birth.' OAR 839-005-0003(16). The forum infers[32] that Complainants' sexual orientation is homosexual and that A. Klein perceived they were homosexual from four undisputed facts: (a) Complainants were planning to have a same-sex marriage; (b) A. Klein told Cryer and McPherson that Respondents do not make wedding cakes for same-sex ceremonies; (c) McPherson told A. Klein that she had 'two gay children'; and (d) In response to McPherson's statement, A. Klein quoted a reference from Leviticus related to male homosexual behavior.

"Fourth, A. Klein's verbal statements made in the CBN and Tony Perkins interviews that were publicly broadcast constitute a 'communication' that was 'published' under ORS 659A.409.

"C. Failure to State Ultimate Facts Sufficient to Constitute a Claim

"Before determining the merits of the Agency's ORS 659A.403(3) allegations, the forum first evaluates Respondents' pleading – 'fail[ure] to state ultimate facts sufficient to constitute a claim' -- that Respondents categorize as their first 'affirmative defense.' As a procedural matter, the forum views this defense as a straightforward denial of the allegations in the pleadings rather than as an affirmative defense.[33] As argued by Respondents in their motion for

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[32] Evidence includes inferences. There may be more than one inference to be drawn from the basic fact found; it is the forum's task to decide which inference to draw. *See, e.g., In the Matter of Income Property Management, 31 BOLI 18, 39 (2010).*

[33] In general, an affirmative defense is a defense setting up new matter that provides a defense against the Agency's case, assuming all the facts in the complaint to be true. *See, e.g. Pacificorp v. Union Pacific Railroad,* 118 Or App 712, 717, 848 P2d 1249 (1993). A few examples of affirmative defenses previously recognized by this forum include statute of limitations, claim and issue preclusion, bona fide occupational requirement, undue hardship, laches, and unclean hands. Some other affirmative defenses recognized

summary judgment, this defense goes to two issues. First, whether Bowman-Cryer's absence when A. Klein made his alleged discriminatory statement on January 13, 2013, deprives her of a cause of action under ORS 659A.403 and 659A.406. Second, whether Respondents' refusal to provide a wedding cake for Complainants was on account of their sexual orientation.

"Bowman-Cryer's absence on January 13, 2013 does not deprive her of standing

"It is undisputed is the fact that Complainants sought a wedding cake from Sweetcakes based on Cryer's previous experience in purchasing a wedding cake from Sweetcakes for McPherson's wedding. It is also undisputed that Bowman-Cryer was not present at Sweetcakes on January 13, 2013, when A. Klein told Cryer and McPherson that Sweetcakes would not make a wedding cake for a same-sex wedding.

"Respondents argue as follows:

> 'Additionally, if as it appears on the face of the pleadings, one or more of the complainants were not actually potential customers requesting a wedding cake issue, and they were also not the ones denied services, and their claims must fail as a matter of law. In particular, the record is Laurel Bowman-Cryer was not present for the cake tasting and was never denied services. Therefore, either Rachel Cryer or Cheryl McPherson was the only person who was denied services according to Complainants['] own record. Claims made by anyone else must fail.'

The forum rejects this argument, as it relies on the false premise that a person cannot be discriminated against unless they are physically present to witness an alleged act of discrimination perpetrated against them. In this case, the 'full and equal accommodation' sought by both Complainants was a wedding cake to celebrate their same-sex wedding, an occasion in which they would be joint celebrants. The forum takes judicial notice that a wedding cake has long been considered a customary and important tradition in weddings in the United States. Respondents themselves acknowledge the special significance of wedding cakes in their affidavits, in which A. Klein and M. Klein each aver:

> 'The process of designing, creating and decorating a cake for a wedding goes far beyond the basics of baking a cake and putting frosting on it. Our customary practice involves meeting with customers to determine who

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by Oregon courts include discharge in bankruptcy, duress, fraud, payment, release, statute of frauds, unconstitutionality, and waiver. *ORCP 19B.* In contrast, a defense that admits or denies facts constituting elements of the Agency's prima facie case that are alleged in the Agency's charging document is not an affirmative defense.

> they are, what their personalities are, how they are planning a wedding, finding out what their wishes and expectations concerning size, number of layers, colors, style and other decorative detail, which often includes looking at a variety of design alternatives before conceiving, sketching, and custom crafting a variety of decorating suggestions and ultimately finalizing the design. Our clients expect, and we intend, that each cake will be uniquely crafted to be a statement of each customer's personality, physical tastes, theme and desires, as well as their palate so it is a special part of their holy union.'

Because the wedding cake was intended to equally benefit both Cryer and Bowman-Cryer, the forum finds that Bowman-Cryer has the same cause of action against Respondents under ORS 659A.403 and .406 as Cryer. *Macedonia Church v. Lancaster Hotel Ltd.*, 498 F. Supp 2d 494 (2007), though not binding on this forum, illustrates this point. In *Macedonia*, a group of individuals associated with Macedonia Church, a predominantly African-American congregation, alleged that they were denied accommodations because of their race. Defendants moved to dismiss the complaint as to all but four plaintiffs on the grounds that the only plaintiffs who had standing to pursue the complaint were the four who actually visited defendants' facility. As stated by the court, 'the defendants' argument appears to assume that unless each plaintiff had a first-hand contact with the defendants, he or she could not [have] suffered any "personal and individual" injury.' The court denied defendants' motion, holding:

> 'Whether there was first-hand contact between the individual plaintiffs and the defendants is not material to the question of whether the individual plaintiffs suffered a personal and individual injury. Each of the Non-organizer Plaintiffs alleges that he or she was denied accommodations on the basis of race or color. The fact that the defendants informed the plaintiffs that their refusal to provide them with accommodations by communicating with the Organizers instead of with each of the Non-organizer plaintiffs does not alter the fact that those plaintiffs were denied accommodations. Nor is it material that the plaintiffs were unaware of the discrimination until sometime after it occurred.'

"Nexus between Complainants' sexual orientation and Respondents' refusal to provide a wedding cake for their same-sex wedding

"Respondents argue that there is no evidence of any connection between Complainants' sexual orientation and Respondents' alleged discriminatory action. Respondents' argument is two-pronged. First, Respondents argue that their prior sale of a wedding cake to Cryer for her mother's wedding proves Respondents' lack of animus towards Complainant's sexual orientation. Second, Respondents

attempt to isolate Complainants' sexual orientation from their proposed[34] wedding, arguing that their decision was not on account of Complainants' sexual orientation, but on Respondents' objection to participation in the event for which the cake would be prepared.

"Respondents' first argument fails for the reason that there is no evidence in the record that A. Klein, the person who refused to make a cake for Complainants while acting on Sweetcakes' behalf, had any knowledge of Complainants' sexual orientation in November 2010 when Cryer purchased a cake for her mother's wedding. Even if A. Klein was aware of Cryer's sexual orientation in November 2010, not discriminating on one occasion does not inevitably lead to the conclusion that A. Klein did not discriminate on a subsequent occasion.

"Respondents rely on *Tanner v. OHSU* to support their second argument. In *Tanner,* OHSU, in accordance with State Employees' Benefits Board (SEBB) eligibility criteria, permitted employees to purchase insurance coverage for 'family members.' Under the SEBB criteria, unmarried domestic partners of employees were not 'family members' who were entitled to insurance coverage. Plaintiffs, three lesbian nursing professionals with domestic partners, applied for insurance coverage and were denied on the ground that the domestic partners did not meet the SEBB eligibility criteria. Plaintiffs sued, alleging disparate impact sex discrimination in violation of *then* ORS 659.030(1)(b) in that OHSU's policy had the effect of discriminating against homosexual couples because, unlike heterosexual couples, they could not marry and become eligible for insurance benefits. Significant to this case, the court stated that plaintiffs were a member of a protected class under ORS 659.030 and that they made out a disparate impact claim because 'OHSU's practice of denying insurance benefits to unmarried domestic partners, while facially neutral as to homosexual couples, effectively screens out 100 percent of them from obtaining full coverage for both partners. That is because, under Oregon law, homosexual couples may not marry.' *Id.* at 516. The court then held that OHSU did not violate *then* ORS 659.030(1)(b) because plaintiffs did not prove that OHSU engaged 'in a subterfuge to evade the purposes of this chapter' under *then* ORS 659.028. *Id.* at 517-19. The language that Respondents quote to support their argument is not the holding of the case, but merely a bridge between the court's evaluation of plaintiffs' case based on different treatment and disparate impact theories. Accordingly, *Tanner* does not assist Respondents. Also significant to this case, plaintiffs alleged a violation of Article I, section 20, of the Oregon Constitution. The court found that plaintiffs, as homosexual couples, were members of a 'true class,' and also members of a 'suspect class' based on their sexual orientation. *Id.* at 524.

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[34] The forum uses the term "proposed" because there is no evidence in the record to show whether Complainants were actually ever married. [NOTE: At hearing, evidence was presented that Complainant's were legally married in 2014, a few days after Oregon's ban on same-sex marriage was struck down in federal court. *See* Proposed Finding of Fact #47 -- The Merits, *infra*.

"Respondents' attempt to divorce their refusal to provide a cake for Complainants' same-sex wedding from Complainants' sexual orientation is neither novel nor supported by case law. As the Agency argues in support of its cross-motion, '[t]here is simply no reason to distinguish between services for a wedding ceremony between two persons of the same sex and the sexual orientation of that couple. The conduct, a marriage ceremony, is inextricably linked to a person's sexual orientation.'

"The U. S. Supreme Court has rejected similar attempts to distinguish between a protected status and conduct closely correlated with that status. In *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez,* 561 U.S. 661, 130 S. Ct. 2971 (2010), students at Hastings College of the Law formed a chapter of the Christian Legal Society ('CLS') and sought formal recognition from the school. The CLS required its members to affirm their belief in the divinity of Jesus Christ and to refrain from 'unrepentant homosexual conduct.' *Id.* at 2980. Hastings refused to recognize the organization on the ground that it violated Hastings' nondiscrimination policy, which prohibited exclusion based on religion or sexual orientation. The CLS argued that 'it does not exclude individuals because of sexual orientation, but rather "on the basis of a conjunction of conduct and the belief that the conduct is not wrong."' *Id.* at 2990. The Court rejected this argument, stating:

> 'Our decisions have declined to distinguish between status and conduct in this context. See *Lawrence v. Texas,* 539 U.S. 558, 575, 123 S Ct 2472, 156 L.Ed.2d 508 (2003) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination." (emphasis added)); *id.,* at 583, 123 S.Ct. 2472 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."); cf. *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 270, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").'

In conclusion, the forum holds that when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation. *See Elane Photography, LLC v. Willock,* 309 P3d 53, 62 (2013), *cert den* 134 S. Ct. 1787 (2014). Applied to this case, the forum finds that Respondents' refusal to provide a wedding cake for Complainants because it was for their same-sex wedding was synonymous with refusing to provide a cake because of Complainants' sexual orientation.

"**D. Respondent A. Klein violated 659A.403**

With regard to its ORS 659A.403 claims, the Agency alleges the following in paragraph III.12 in both sets of Charges:

'12. Respondents discriminated against Complainant because of her sexual orientation.

a. Melissa Elaine Klein denied full and equal accommodations, advantages, facilities and privileges of her business to [Complainant] based on her sexual orientation, in violation of ORS 659A.403(3).

b. Respondent Aaron Wayne Klein, dba Sweetcakes by Melissa denied full and equal accommodations, advantages, facilities and privileges of her [sic] **business to [Complainant] based on her sexual orientation, in violation of ORS 659A.403(3).**

c. **In the alternative,** Respondent Aaron Wayne Klein aided or abetted Melissa Elaine Klein in violating ORS 659A.403(3), in violation of ORS 659A.406.'

(emphasis bolded by Agency in its Amended Formal Charges to show amendments to original Formal Charges)

ORS 659A.403 provides, in pertinent part:

> '(1) Except as provided in subsection (2) of this section, all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older.
>
> '(2) Subsection (1) of this section does not prohibit:
>
> > "(a) The enforcement of laws governing the consumption of alcoholic beverages by minors and the frequenting by minors of places of public accommodation where alcoholic beverages are served; or
> >
> > "(b) The offering of special rates or services to persons 50 years of age or older.
>
> '(3) It is an unlawful practice for any person to deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation in violation of this section.'

"The prima facie elements of the Agency's 659A.403 case are: 1) Complainants were a homosexual couple and were perceived as such by A. Klein and M. Klein; 2) Sweetcakes was a place of public accommodation; 3a) A. Klein, a person acting on behalf of Sweetcakes, denied full and equal accommodations to Complainants; 3b) M. Klein, a person acting on behalf of Sweetcakes, denied full and equal accommodations to Complainants; and 4) the denials were on account of Complainants' sexual orientation. Elements 1, 2, 3a are established by undisputed facts. Element 4 is established in the preceding section's discussion of 'Nexus.' Accordingly, the forum concludes that A. Klein violated ORS 659A.403 and that the Agency is entitled to summary judgment on the merits as to Cryer's and Bowman-Cryer's 659A.403 claims against A. Klein. Since there is no evidence that M. Klein took any action to deny the full and equal accommodations, advantages, facilities and privileges of Sweetcakes to Complainants, the forum concludes that M. Klein did not violate ORS 659A.403. However, M. Klein, as a joint owner of Sweetcakes with A. Klein, is jointly and severally liable for any damages awarded to Complainants stemming from A. Klein's violation.

"E. ORS 659A.406 -- Aiding and Abetting a Violation of ORS 659A.403(3)

"The Agency seeks to hold A. Klein liable as an aider and abettor under ORS 659A.406 for M. Klein's alleged violation of ORS 659A.403(3). Respondents assert that A. Klein cannot be held liable as an aider and abettor under ORS 659A.406 because he is a co-owner of Sweetcakes and, as a matter of law, cannot aid and abet himself. The Agency argues to the contrary, based on the 'plain text' of the statute.

"ORS 659A.406 provides, in pertinent part:

> "Except as otherwise authorized by ORS 659A.403, it is an unlawful practice for any person to aid or abet any place of public accommodation, as defined in ORS 659A.400, or any employee or person acting on behalf of the place of public accommodation to make any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older."

In the previous section, the forum concluded that M. Klein did not violate ORS 659A.403(3) as alleged in paragraph III.12.a and that A. Klein, the joint owner of Sweetcakes, violated ORS 659A.403(3) as alleged in paragraph II.12.b. Since M. Klein did not violate ORS 659A.403, A. Klein cannot be held liable to have aided and abetted her violation.[35]

[35] As pointed out in the previous section, there is a difference between committing a violation and being liable for the consequences of that violation. In this case, M. Klein's liability stems from her partnership status, not from any violation that she committed.

"F. Notice that Discrimination will be made in Place of Public Accommodation – ORS 659A.409

"In section IV of its Charges,[36] the Agency alleges: (a) Respondent M. Klein 'published, issued * * * a communication, notice * * * that its accommodation, advantages * * * would be refused, withheld from or denied to, or that discrimination would be made against, a person on account of his or her sexual orientation, in violation of ORS 659A.409'; (b) Respondent A. Klein, 'dba Sweetcakes by Melissa, denied full and equal accommodations, advantages, facilities and privileges of her business to [Complainant] based on her sexual orientation, in violation of ORS 659A.403(3)'; and (c) In the alternative, Respondent A. Klein 'aided or abetted M. Klein in violating ORS 659A.409, in violation of ORS 659A.406.'

"In its Charges, the Agency alleges in paragraphs II.8 & 9 that A. Klein made statements that were broadcast on television on September 2, 2013, and on the radio on February 13, 2014, that communicate an intent to discriminate based on sexual orientation. The full text of the relevant part of those broadcasts is set out in Findings of Fact ##12 and 14, *supra*. The Agency's cross-motion for summary judgment singles out the statements made on those two occasions as proof that Respondents violated ORS 659A.409.[37]

"ORS 659A.409 provides, in pertinent part:

> '* * * it is an unlawful practice for any person acting on behalf of any place of public accommodation as defined in ORS 659A.400 to publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of * * * sexual orientation * * *.'

The alleged unlawful statements made by A. Klein were:

> 'I didn't want to be a part of her marriage, which I think is wrong.' (*September 2, 2013 CBN interview*)

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[36] Section IV is prefaced by the caption "UNLAWFUL PRACTICE: DISCRIMINATION BY PUBLICATION, CIRCULATION, ISSUANCE, OR DISPLAY OF A COMMUNICATION, NOTICE, ADVERTISEMENT, OR SIGN OF A DENIAL OF ACCOMMODATIONS, ADVANTAGES, FACILITIES, SERVICES OR PRIVILEGES BY A PLACE OF PUBLIC ACCOMMODATION BASED ON SEXUAL ORIENTATION."

[37] The Agency's cross-motion also discusses the sign on Sweetcakes' door after it closed for business, but since the Agency did not allege the existence or contents of the sign as a violation, the forum does not consider it.

> 'I said "I'm very sorry, I feel like you may have wasted your time. You know we don't do same-sex marriage, same-sex wedding cakes." * * * You know, it was something I had a feeling was going to become an issue and I discussed it with my wife when the state of Washington, which is right across the river from us, legalized same-sex marriage and we watched Masterpiece Bakery going through the same issue that we ended up going through. But, you know, it was one of those situations where we said "well I can see it is going to become an issue but we have to stand firm. It's our belief and we have a right to it, you know.'" (*February 13, 2014, Tony Perkins interview*)

In their motion for summary judgment, Respondents argue that 'ORS 659A.409 by its terms requires a statement of *future intention* that is entirely absent in this instance.' Respondents further argue that:

> 'A review of the videotape record of the CBN broadcast * * * clearly shows that Aaron Klein spoke only of the reason why he and his wife declined to participate in complainants' ceremony. The same is true of the Perkins radio broadcast. * * * A statement of future intention in either media event is conspicuously absent.'

The Agency does not dispute the correctness of Respondents' argument that ORS 659A.409 is directed towards communications relating a prospective intent to discriminate, but argues that A. Klein's statements are a prospective communication:

> 'Reviewed in context, Respondents communicated quite clearly that same-sex couples would not be provided wedding cake services at their bakery. These are not descriptions of past events as alleged by Respondents. Respondents stated their position in these communications and notify the public that they "don't do same sex weddings," they "stand firm," are "still in business" and will "continue to stay strong."'

Whatever Respondents' post-January 2013 intentions may have been or may still be with regard to providing wedding cake services for same-sex weddings, the forum finds that A. Klein's above-quoted statements, evaluated both for text and context, are properly construed as the recounting of past events that led to the present Charges being filed. In other words, these statements described what occurred on January 17, 2013, and thoughts and discussions the Kleins had before January 2013, not what the Kleins intended to do in the future.[38] To arrive at the conclusion sought by the Agency requires drawing an inference of future

[38] In contrast, had A. Klein told Perkins "I said 'I'm very sorry * * * You know we don't do same-sex marriage, same-sex wedding cakes' *and we take the same stand today*," the forum's ruling would be different, assuming the Agency had plead a violation of ORS 659A.409 by A. Klein.

intent from the Kleins's statements of religious belief that the forum is not willing to draw. Accordingly, the forum concludes that A. Klein's communication did not violate ORS 659A.409.[39]

"In addition, the forum notes that M. Klein cannot be held to have violated ORS 659A.409 because she made no communication. Therefore, the forum finds that A. Klein did not aid or abet M. Klein to commit a violation of that statute and Respondents are entitled to summary judgment on this issue.

"G. Respondents' Counterclaims

"Before addressing Respondents' affirmative defenses, the forum addresses Respondents' counterclaims. First, Respondents allege that BOLI, through its actions in prosecuting this case, has 'knowingly and selectively acted under color of state law to deprive Respondents of their fundamental constitutional and statutory rights on the basis of religion' in violation of ORS 659A.403 and 'deprive[d] the Respondents of fundamental rights and protections guaranteed by the First and Fourteenth amendments to the United States Constitution,' thereby generating liability under 42 USC § 1983. Second, Respondents allege that the BOLI's Commissioner violated ORS 659A.409 by publishing, circulating, issuing, or displaying communications on Facebook and in print media 'to the effect that its accommodations, advantages, facilities, services or privileges would be refused, withheld from or denied to, or the discrimination would be made against Respondents and other persons similarly situated on the basis of religion in violation of ORS 659A.409.' Respondents seek damages in the amount of $100,000 for economic damages, $100,000 for non-economic damages, court costs, and reasonable attorney fees.

"The authority of state agencies is limited to that granted to them by the legislature. *See SAIF Corp. v. Shipley,* 326 Or 557, 561, 955 P2d 244 (1998) ('an agency has only those powers that the legislature grants and cannot exercise authority that it does not have'). ORS 659A.850(4) gives the Commissioner the authority to award compensatory damages to complainants as an element of a cease and desist order within a contested case proceeding. There is no corresponding statute that authorizes the Commissioner to award the damages sought by Respondents in their counterclaims. With regard to attorney

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[39] *Compare In the Matter of Blachana, LLC,* 32 BOLI 220 (2013), *appeal pending* (Respondent found to have violated ORS 659A.409 when member of the LLC left a telephone message with the organizer of a group of transgender individuals who had visited the LLC's nightclub regularly on Friday nights during the previous 18 months asking "not to come back on Friday nights."); *In the Matter of The Pub,* 6 BOLI 270, 282-83 (1987)(Respondent found to have violated ORS 659.037, the predecessor of ORS 659A.409, by posting a on front door of pub, immediately under another sign that said "VIVA APARTHEID," a sign that said "NO SHOES, SHIRTS, SERVICE, NIGGERS," and a sign inside the pub, with chain and spikes attached at each end, that read "Discrimination. Webster – to use good judgment" on the front and "Authentic South African Apartheid Nigger 'Black' Handcuffs Directions Drive Through Wrists and Bend Over Tips" on the back).

fees or court costs, the legislature has only granted authority to the Commissioner to award these in contested case proceedings to interveners in a real property case brought under ORS 659A.145 or ORS 659A.421.[40]

"In conclusion, the forum lacks jurisdiction to adjudicate Respondents' counterclaims and may neither grant nor deny them. The only relief available to Respondents through this forum is dismissal of any Charges not proven by the Agency under ORS 659A.850(3).[41]

"H. Respondents' Affirmative Defenses

"Respondents' affirmative defenses include estoppel and the unconstitutionality of ORS 659A.403, .406, and .409, both facially and as applied. As an initial matter, the forum notes that the Oregon Court of Appeals has held that an Agency has the authority to decide the constitutionality of statutes. *See Eppler v. Board of Tax Service Examiners,* 189 Or App 216, 75 P3d 900 (2003), citing *Cooper v. Eugene Sch. Dist. No. 4J,* 301 Or. 358, 362-65, 723 P.2d 298 (1986) and *Nutbrown v. Munn,* 311 Or. 328, 346, 811 P.2d 131 (1991). In BOLI contested cases, the Commissioner has delegated to the ALJ the authority to rule on motions for summary judgment, with the decision 'set forth in the Proposed Order' and subject to ratification by the Commissioner in the Final Order. OAR 839-050-0150(4). Accordingly, the ALJ has the initial authority to rule on the constitutional issues raised by Respondents in their motion for summary judgment.[42]

"Estoppel

"In their answers, Respondents phrase their estoppel defense as follows:

"The state of Oregon, including the Bureau of Labor and Industries[,] is estopped from compelling Respondents to engage in creative expression or otherwise participate in same-sex ceremonies not recognized by the state of Oregon contrary to their fundamental rights, consciences and convictions."

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[40] *See* ORS 659A.850(1)(b)(B).

[41] *See, e.g., Wallace v. PERB,* 245 Or App 16, 30, 263 P3d 1010 (2011) (when plaintiff sought compensatory damages in an APA contested case proceeding based on alleged financial loss after PERS placed a limit on how often he could transfer funds he had invested in the Oregon Savings Growth Plan, the court held that, since it had no authority under ORS 183.486(1)(b) to award compensatory damages to plaintiff, plaintiff was also unable to recover those damages in the contested case proceeding).

[42] *Eppler, Cooper,* and *Nutbrown* impliedly overruled the forum's holding in the case of *In the Matter of Doyle's Shoes,* 1 BOLI 295 (1980), a Final Order issued before the *Eppler, Cooper,* and *Nutbrown* decisions in which the forum held that it was beyond the Commissioner's discretion to determine the constitutionality of legislative enactments. The forum now explicitly overrules that holding.

Estoppel is a legal doctrine whereby one party is foreclosed from proceeding against another when one party has made 'a false representation, (1) of which the other party was ignorant, (2) made with the knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it.' *State ex rel. State Offices for Services to Children and Families v. Dennis*, 173 Or App 604, 611, 25 P3d 341 (2001), *citing Keppinger v. Hanson Crushing, Inc.*, 161 Or App 424, 428, 983 P.2d 1084 (1999). In order to establish estoppel against a state agency, a party must have relied on the agency's representations and the party's reliance must have been reasonable. *Id., citing Dept. of Transportation v. Hewett Professional Group,* 321 Or 118, 126, 895 P2d 755 (1995).[43]

"Here, Respondents do not identify any false representation made by BOLI or any other state agency upon which Respondents relied in refusing to provide a wedding cake to Complainants. Although it is undisputed that the Oregon Constitution did not recognize same-sex marriages in January 2013, the affidavits of A. Klein and M. Klein establish that the refusal was because of Respondents' religious convictions stemming from Biblical authority, not on their reliance on Oregon's Constitutional provision rejecting same-sex marriage or their attempt to enforce that provision.[44]

"In conclusion, Respondents present no facts, articulate no legal theory, and cite no case law to support their argument that BOLI should be estopped from litigating this case based on the doctrine of estoppel. The Agency is entitled to summary judgment on this issue.

"Respondents' Constitutional Defenses – Introduction

"Due to the number and complexity of Respondents' constitutional defenses, the forum summarizes them, as plead in Respondents' answers, before analyzing them. They include the following:

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[43] *See also In the Matter of Sunnyside Inn,* 11 BOLI 151, 162 (1993) (Equitable estoppel may exist when one party (1) has made a false representation; (2) the false representation is made with knowledge of the facts; (3) the other party is ignorant of the truth; (4) the false representation is made with the intention that it should be relied upon by the other party; and (5) the other party is induced to act upon it to that party's detriment); *In the Matter of Portland Electric & Plumbing Company,* 4 BOLI 82, 98-99 (1983) (estoppel only protects those who materially change their position in reliance on another's acts or representations).

[44] In A. Klein's affidavit, he states that, after Cryer told him "something to the effect 'Well, there are two brides, and their names are Rachel and Laurel,'" he "indicated we did not create wedding cakes for same-sex ceremonies because of our religious convictions, and they left the shop." In the same paragraph, he states "I believed that I was acting within the bounds of the Oregon Constitution and the laws of the State of Oregon which, at that time, explicitly defined marriage as the union of one man and prohibited recognition of any other type of union as marriage."

- "The statutes underlying the Charges are unconstitutional as applied in that they violate Respondents' fundamental rights arising under the Oregon Constitution by: (a) unlawfully violating Respondents' freedom of worship and conscience under Article I, §2; (b) unlawfully violating Respondents' freedom of religious opinion under Article I, §3; (c) unlawfully violating Respondents' freedom of speech under Article I, §8; (d) unlawfully compelling Respondents to engage expression of a message they did not want to express; (e) unlawfully violating Respondents' privileges and immunities under Article I, §20; and (f) violating Article XV, §5a.

- "The statutes underlying the Charges are facially unconstitutional under the Oregon Constitution in that they violate Respondents' fundamental rights arising under the Oregon Constitution to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated.

- "The statutes underlying the Charges are unconstitutional as applied to Respondents to the extent they do not protect the fundamental rights of Respondents and persons similarly situated arising under the First and Fourteenth Amendments to the United States Constitution, as applied to the State of Oregon under the Fourteenth Amendment, by: (a) unlawfully infringing on Respondents' right of conscience, right to free exercise of religion, and right to free speech; (b) unlawfully compelling Respondents to engage expression of a message they did not want to express; and (c) unlawfully denying Respondents' right to due process and equal protection of the laws.

- "The statutes underlying the Charges are facially unconstitutional to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated arising under the First and Fourteenth Amendments to the United States Constitution, as applied to the State of Oregon under the Fourteenth Amendment.

When both state and federal constitutional claims are raised, Oregon courts first evaluate the state claim. *Sterling v. Cupp,* 290 Or 611, 614, 625 P2d 123 (1981). The forum does likewise. For continuity's sake, the forum follows the analysis of each state claim with an analysis of the parallel federal claim. The forum only addresses the constitutionality of ORS 659A.403, since the forum has already concluded, on a subconstitutional level, that Respondents did not violate ORS 659A.406 and 659A.409.

"Oregon Constitution

"Article I, Sections 2 and 3: Freedom of worship and conscience; Freedom of religious opinion

"The forum addresses these interrelated defenses together. Article I, Sections 2 and 3 of the Oregon Constitution provide:

> '**Section 2. Freedom of worship**. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.'
>
> '**Section 3. Freedom of religious opinion.** No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions, or interfere with the rights of conscience.'

Respondents, who are Christians, have a sincerely held belief that the Bible 'forbids us from proclaiming messages or participating in activities contrary to Biblical principles, including celebrations or ceremonies for uniting same-sex couples.' They argue that Article I, sections 2 and 3 gave them the unfettered right to refuse to provide a cake for Complainants' same-sex wedding ceremony because doing so would have compelled them to act contrary to their sincerely held religious beliefs.

"The forum first analyzes a series of Oregon Supreme Court cases interpreting Article I, sections 2 and 3, then applies them to ORS 659A.403. Beginning with *City of Portland v. Thornton,* 174 Or 508, 149 P2d 972 (1944), the Oregon Supreme Court applied U.S. Supreme Court precedents under the First Amendment to the U.S. Constitution when interpreting Article I, Sections 2 and 3 of the Oregon Constitution. In *Salem College & Academy, Inc. v. Emp. Div.,* 298 Or 471, 486-87, 695 P2d 25 (1985), an inter-denominational Christian school argued that the state's requirement that it pay unemployment tax violated Article I, sections 2 and 3. The court held that 'the state had not infringed upon the school's right to religious freedom when all similarly situated employers in the state were subject to [unemployment tax].' Significant to this case, the *Salem* court interpreted Article I, sections 2 and 3 in light of the text and historical context in which they arose, without reference to U.S. Supreme Court decisions and without reference to its own prior decisions that had relied on federal First Amendment precedent. *Id.* at 484.

"In 1986, in the next case involving the application of Article I, sections 2-7, the Oregon Supreme Court made explicit what was implicit in *Salem* College. In *Cooper* v. *Eugene Sch. Dist. No. 4J*, 301 Or. 358, 369-70, 723 P2d 298, 306-07 (1986), the court stated:

> 'This court sometimes has treated these guarantees and the First Amendment's ban on laws prohibiting the free exercise of religion (footnote omitted) as "identical in meaning," *City of Portland v. Thornton,* 174 Or. 508, 512, 149 P.2d 972 (1942); but identity of 'meaning' or even of text does not imply that the state's laws will not be tested against the state's own constitutional guarantees before reaching the federal constraints imposed by the Fourtenth [sic] Amendment, or that verbal formulas developed by the United States Supreme Court in applying the federal text also govern application of the state's comparable clauses.' (footnote omitted).

Since *Cooper*, the Oregon Supreme Court has decided a trio of cases interpreting Article I, sections 2 and 3 that are relevant to the present case.

"In *Smith v. Employment Div., Dept. of Human Resources,* 301 Or 209, 721 P2d 445 (1986), *vacated on other grounds sub nom., Employment Div. v. Smith,* 485 US 660 (1988), a drug counselor was fired for misconduct based on his ingestion of peyote, a sacrament in the Native American Church, during a Native American Church service and denied unemployment benefits. Smith claimed that the denial of unemployment benefits placed 'a burden on his freedom to worship according to the dictates of his conscience' under the Oregon Constitution, Article I, sections 2 and 3. Citing *Salem College*, the court held that there was no violation of Article I, sections 2 and 3 because the statute and rule defining misconduct were 'completely neutral toward religious motivations for misconduct' and '[claimant] was denied benefits through the operation of a statute that is neutral both on its face and as applied.' *Id.* at 215-16.

"In *Employment Div., Department of Human Resources v. Rogue Valley Youth for Christ,* 307 Or 490, 498-99, 770 P2d 588 (1989), the court rejected a religious organization's claim that payment of unemployment tax would violate its rights under Article I, sections 2 and 3. Relying on *United States v. Lee,* 455 U.S. 252, 256–57, 102 S.Ct. 1051, 1054–55, 71 L.Ed.2d 127, 132 (1982), the court stated:

> 'When governmental action is challenged as a violation of the Free Exercise Clause of the First Amendment it must first be shown that the governmental action imposes a burden on the party's religion. Assuming that imposing unemployment payroll taxes on all religious organizations will burden at least some of those groups, (although not necessarily their freedom of belief or worship), that assumption "is only the beginning, however, and not the end of the inquiry. Not all burdens on religious liberty are unconstitutional. * * * The state may justify a limitation on religion by showing that it is essential to accomplish an overriding governmental interest." In the present case the State of Oregon has two governmental interests which, when taken together, are sufficiently important to support the burden on religion represented by unemployment payroll taxes.

> 'There are few governmental tasks as important as providing for the economic security of its citizens. A strong unemployment compensation system plays a significant role in providing this security. * * * [A]ny state's unemployment tax must, as a practical matter, comply with FUTA's (Federal Unemployment Tax Act) requirements or the state's employers would face a double tax. Such a double tax would, in turn, create a very undesirable business climate in the state. This, combined with Oregon's constitutional interest in treating all religious organizations equally, creates an overriding state interest in applying the unemployment payroll taxes to all religious organizations. Our construction of the coverage of Oregon's unemployment compensation taxation scheme does not offend the First Amendment's Free Exercise Clause or Article I, section 3 of the Oregon Constitution.' (internal citations and footnotes omitted)

Rogue Valley, at 498-99.

"In *Meltebeke v. Bureau of Labor and Industries,* 322 Or 132, 903 P2d 351 (1995), the court considered a constitutional challenge to BOLI's rule that 'verbal or physical conduct of a religious nature' in the workplace was unlawful if it had 'the purpose or effect of unreasonably interfering with the subject's work performance or creating an intimidating, hostile or offensive working environment.' *Id.* at 139. As Respondents note, the court introduced its discussion of Article I, sections 2 and 3, with this sweeping statement:

> 'These provisions are obviously worded more broadly than the federal First Amendment, and are remarkable in the inclusiveness and adamancy with which rights of conscience are to be protected from governmental interference.'

Id. at 146. The court then launched into a brief history of governmental intolerance towards religion enforced by criminal laws in England before summarizing its *Salem College* decision and concluding:

> 'A general scheme prohibiting religious discrimination in employment, including religious harassment, does not conflict with any of the underpinnings of the Oregon constitutional guarantees of religious freedom identified in *Salem College:* It does not infringe on the right of an employer independently to develop or to practice his or her own religious opinions or exercise his or her rights of conscience, short of the employer's imposing them on employees holding other forms of belief or nonbelief; it does not discourage the multiplicity of religious sects; and it applies equally to all employers and thereby does not choose among religions or beliefs.
>
> 'The law prohibiting religious discrimination, including religious harassment, honors the constitutional commitment to religious pluralism

> by ensuring that employees can earn a living regardless of *their* religious beliefs. The statutory prohibition against religious discrimination in employment and, in particular, the BOLI rule at issue, when properly applied, will promote the '[n]atural right' of employees to 'be secure in' their 'worship [of] Almighty God according to the dictates of their own consciences,' Or. Const. Art. I, § 2, and will not be a law controlling religious rights of conscience or their free exercise.'

Meltebeke at 148-49. The court then moved on to a review of *Smith*, stating that *Smith* stood for the principle that '[a] law that is neutral toward religion or nonreligion as such, that is neutral among religions, and that is part of a general regulatory scheme having no purpose to control or interfere with rights of conscience or with religious opinions does not violate the guarantees of religious freedom in Article I, sections 2 and 3.' *Meltebeke* at 149. The court held as follows:

> 'We conclude that, under established principles of state constitutional law concerning freedom of religion, discussed above, BOLI's rule is constitutional on its face. The law prohibiting employment discrimination, including the regulatory prohibition against religious harassment, is a law that is part of a general regulatory scheme, expressly neutral toward religion as such and neutral among religions. Indeed, its purpose is to support the values protected by Article I, sections 2 and 3, not to impede them.'

Id. at 150-51.

"Next, the *Meltebeke* court analyzed whether the BOLI rule, *as applied*, violated Article I, sections 2 and 3. Following *Smith*, the court stated:

> 'Because sections 2 and 3 of Article I are expressly designed to prevent government-created homogeneity of religion, the government may not constitutionally impose sanctions on an employer for engaging in a **religious practice** without knowledge that the practice has a harmful effect on the employees intended to be protected. If the rule were otherwise, fear of unwarranted government punishment would stifle or make insecure the employer's enjoyment and exercise of religion, seriously eroding the very values that the constitution expressly exempts from government control.' (emphasis added)

Id. at 153. Based on facts set out in BOLI's Final Order, the court found that the employer's complained-of conduct constituted a 'religious practice,' that the employer did not know his conduct created an intimidating, hostile, or offensive

working environment,[45] and that the employer had established an affirmative defense under Article I, sections 2 and 3 because BOLI's rule did not require that the employer 'knew in fact that his actions in exercise of his religious practice had an effect forbidden by the rule.'[46] *Id.* In contrast, here Respondents' affidavits establish that their refusal to make a wedding cake for Complainants was not a religious practice, but *conduct* motivated by their religious beliefs.[47] Accordingly, *Meltebeke* does not aid Respondents.

"The general principle that emerges from these cases is that a law that is part of a general regulatory scheme, expressly neutral and neutral among religions, is constitutional under Article I, sections 2 and 3. ORS 659A.403 is such a law. Additionally, there is also "an overriding governmental interest" present, explicitly expressed by Oregon's legislature in ORS 659A.003 in the following words:

> 'The purpose of this chapter is * * * to ensure the human dignity of all people within this state and protect their health, safety and morals from the consequences of intergroup hostility, tensions and practices of unlawful discrimination of any kind based on * * * sexual orientation * * *.'

"Respondents further contend that 'the statutes underlying the Charges are facially unconstitutional under the Oregon Constitution in that they violate Respondents' fundamental rights arising under the Oregon Constitution to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated.' There is no requirement under the Oregon Constitution for such an exemption.[48] The exclusions and

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[45] *See In the Matter of James Meltebeke,* 10 BOLI 102, 105-07 (1992) (BOLI Commissioner's Findings of Fact included detailed findings that employer believed he was commanded to preach his beliefs to others under "any and all circumstances" or "he would be lost").

[46] In a footnote, the court distinguished "a religious practice" from "conduct that may be motivated by one's religious beliefs" in stating: "Conduct that may be motivated by one's religious beliefs is not the same as conduct that constitutes a religious practice. The knowledge standard is considered here only in relation to the latter category. In this case, no distinction between those categories is called into play, because a fair reading of BOLI's revised final order is that BOLI found that all of Employer's religious activity respecting Complainant is part of Employer's religious practice." *Meltebeke* at 153, fn. 19.

[47] *Cf. State v. Beagley,* 257 Or App 220, 226, 305 P3d 147 (2013) ("First, we conclude that, regardless of where the line between religious practice and religiously motivated conduct is drawn, there are some behaviors that fall clearly to one side or the other. A Catholic taking communion at mass is clearly and unambiguously engaging in a religious practice; on the other side of the line, allowing a child to die for lack of life-saving medical care is clearly and unambiguously—and, as a matter of law—conduct that may be motivated by one's religious beliefs.")

[48] The legislature did choose to enact certain exemptions to civil rights laws. Actions by bona fide churches or other religious institutions regarding housing and use of facilities are not unlawful practices if based on a bona fide religious belief about sexual orientation. Actions by bona fide churches or other religious institutions regarding employment are not unlawful practices if based on a bona fide religious belief about sexual orientation if the actions fall under one of three specific circumstances. Preference for

prohibitions in ORS 659A.400(2) and 659A.403(2) do not lead to the conclusion that the law is not neutral. Respondents' reliance on *Hobby Lobby*[49] fails because *Hobby Lobby* was not decided on constitutional grounds, but decided under the Religious Freedom Restoration Act ("RFRA") of 1993 and because the RFRA does not apply to the states. *City of Boerne v. Flores,* 521 US 507 (1997).

"Based on the above, the forum finds ORS 659A.403 to be constitutional with respect to Article I, sections 2 and 3 of the Oregon Constitution. With respect to whether ORS 659A.403 is constitutional 'as applied,' *Meltebeke* does not aid Respondents for the reason that Respondents' refusal to make a wedding cake for Complainants was not a 'religious practice,' but conduct motivated by their 'religious beliefs.' *Meltebeke* at 153.

"United States Constitution

"First Amendment: Unlawfully infringing on Respondents' right of conscience and right to free exercise of religion

"Respondents contend that the First Amendment to the U.S. Constitution, as applied to the State of Oregon under the Fourteenth Amendment, prohibits BOLI from enforcing the provisions of ORS 659A.403 against Respondents because that statute, on its face and as applied, unlawfully infringes on Respondents' right of conscience and right to free exercise of religion. In pertinent part, the First Amendment provides: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.'

"Respondents argue that the forum should apply the 'strict scrutiny' test set out by the U.S. Supreme Court in *Sherbert v. Verneer,* 374 US 398 (1963), claiming that *Sherbert* and the U.S. Supreme Court's subsequent decisions in *Wisconsin v. Yoder,* 406 US 205 (1972), *Thomas v. Review Board,* 450 US 707 (1981), *Pacific Gas and Elec. Co. v. Public Utilities Commissioner.,* 475 US 1 (1986), *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 US 520 (1993), *Hosanna-Tabor Ev. Lutheran Church & School v. EEOC,* 132 SCt 694 (2012), *Gonzalez v. O Centro,* 546 US 418 (2006), *Brown v. Entertainment Merchants Assn.,* 131 SCt 2729 (2011), and *Wooley v. Maynard,* 430 US 705 (1977) compel the application of that test.

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employment applicants of a particular religion is not an unlawful practice by a bona fide church or other religious institution if it passes a three part test. The housing, use of facilities and employment exemptions do not apply to commercial or business activities of the church or institution. *See* ORS 659A.006. The existence of this statute, last amended in 2007, does not support Respondents' argument that the public accommodation statutes are unconstitutional because they do not contain such exemptions. Rather, it supports the Agency. If the legislature intended such exemptions be applied to the public accommodation statutes it would have enacted them.

[49] *Burwell v. Hobby Lobby,* 573 US ___, 134 SCt 2751 (June 30, 2014).

"The forum begins its analysis by noting that *Wooley, Pacific Gas, Hosanna-Tabor, Gonzalez,* and *Brown* are inapplicable to Respondents' free exercise claim for the following reasons:

- *"Wooley* and *Pacific Gas* involved religion but were decided exclusively upon free speech grounds.
- *"Hosanna-Tabor* was an employment discrimination suit brought by the EEOC on behalf of a minister challenging the church's decision to fire her as an ADA violation in which the court held only that 'the ministerial exception bars such a suit.' *Hosanna-Tabor* at 710.
- *"Gonzalez,* like *Hobby Lobby*, is inapplicable to this case because it was decided under the RFRA and because the RFRA does not apply to the states.
- *"Brown* was a free speech case that did not involve a free exercise claim.

"In *Sherbert*, a Seventh Day Adventist ('appellant') was denied unemployment benefits because she refused to work on Saturdays based on her religious beliefs. She appealed on the grounds that South Carolina's law violated the free exercise clause of the First Amendment. The court held that the law was constitutionally invalid because it imposed a burden on appellant's free exercise of her religion and there was no 'compelling state interest enforced in the eligibility provisions of the South Carolina statute [that] justifies the substantial infringement of appellant's First Amendment rights.' *Id.* at 404, 406-07.

"In *Wisconsin,* the Supreme Court held that the state of Wisconsin could not compel Amish students to attend school beyond the eighth grade when that requirement conflicted with Amish religious beliefs, stating:

> "[I]n order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."

"Relying on *Sherbert* and *Wisconsin*, the *Thomas* court reversed the denial of unemployment benefits to a Jehovah's Witnesses who quit his job because his job duties changed from working with sheet metal to manufacturing turrets for tanks, a war-related task that he opposed based on his religious beliefs. In upholding appellant's claim, the court stated:

> 'The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious

> liberty by showing that it is the least restrictive means of achieving some compelling state interest.'

Thomas, at 718.

"In 1990, the *Smith* case, upon which both the Agency and Respondents rely, came before the court on appeal from the Oregon Supreme Court. The Oregon Supreme Court held that the state's denial of unemployment benefits based on the prohibition of sacramental peyote use was valid under the Oregon Constitution but invalid under the free exercise clause in the First Amendment of the U. S. Constitution based on *Sherbert* and *Thomas*. The U.S. Supreme Court characterized the issue before it as follows:

> "This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use."

Smith at 874. Smith argued that 'prohibiting the free exercise [of religion]' includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires).' *Id.* at 878. The court rejected Smith's argument, holding that the State of Oregon, 'consistent with the free exercise clause,' could deny Smith unemployment benefits when Smith's dismissal resulted from the use of peyote, a use that was constitutionally prohibited under Oregon law. *Id.* at 890. The court specifically declined to apply *Sherbert's* 'compelling interest' test, stating:

> 'Although, as noted earlier, we have sometimes used the *Sherbert* test to analyze free exercise challenges to * * * laws, we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling - permitting him, by virtue of his beliefs, "to become a law unto himself," - contradicts both constitutional tradition and common sense.' (internal citations omitted)

Id. at 884-85. The court concluded that the 'right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."' *Id.* at 879, citing *United*

States v. Lee, 455 U.S. 252, at 263, n. 3. Related to one of Respondents' arguments here, the court also discussed the concept of 'hybrid' cases and concluded that *Smith* was not a 'hybrid' case.[50]

"In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 US 520 (1993), the Church of the Lukumi Babalu Aye, Inc. ('church') and its congregants practiced the Santeria religion, a religion that employed animal sacrifice as one of its principal forms of devotion. During that devotion, animals are killed by cutting their carotid arteries, then cooked and eaten following Santeria rituals. After the church leased land in Hialeah and announced plans to establish a house of worship and other facilities there, the city council held an emergency public session and passed a resolution which noted city residents' 'concern' over religious practices inconsistent with public morals, peace, or safety, and adopted three substantive ordinances addressing the issue of religious animal sacrifice.

Using the *Smith* test, the Supreme Court found that the ordinances were neither neutral[51] nor of general applicability[52] and held that 'a law burdening religious

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[50] With respect to "hybrid claims," the *Smith* court stated: "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell v. Connecticut,* 310 U.S., at 304-307, 60 S.Ct., at 903-905 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick,* 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944) (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), to direct the education of their children, see *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school). Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. *Wooley v. Maynard,* 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (invalidating compulsory flag salute statute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. *Cf. Roberts v. United States Jaycees,* 468 U.S. 609, 622, 104 S.Ct. 3244, 3251-52, 82 L.Ed.2d 462 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed.") (footnotes omitted)

[51] The court examined the history behind the ordinances before concluding:

> "In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These

practice that is not neutral or not of general application' can only survive if there is a 'compelling' governmental interest and the law is 'narrowly tailored in pursuit of those interests.' *Id.* at 546-47.

"Respondents argue that the *Smith* 'neutrality' test should not be applied here for two reasons. First, this is a 'hybrid' case in which the law 'substantially burden[s] multiple rights combining religion and speech' that the *Smith* court distinguished from cases that only involve free exercise claims. This argument fails because neither Respondents' free exercise nor free speech claims are independently viable[53] and the two claims together are not greater than the sum of their parts.[54] Second, Respondents argue that ORS 659A.403 is neither 'neutral' nor of 'general applicability.' Applying the *Smith* test, the forum finds that ORS 659A.403 is a 'valid and neutral law of general applicability.' As such, it is constitutional under the First Amendment's free exercise clause, both facially and as applied.

"Oregon Constitution

"Article I, Section 8: freedom of speech

"Article I, Section 8 of the Oregon Constitution provides:

> '**Section 8. Freedom of speech and press.** No laws shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.'

ORS 659A.403 provides, in pertinent part:

> '(1) Except as provided in subsection (2) of this section, all persons within the jurisdiction of this state are entitled to the full and equal

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ordinances are not neutral, and the court below committed clear error in failing to reach this conclusion." *Lukumi* at 542.

[52] In concluding that Hialeah's ordinances were not of "general applicability," the court found that the ordinances "were drafted with care to forbid few killings but those occasioned by religious sacrifice," that they did not prohibit and approved many kinds of "animal deaths or kills for nonreligious reason," that the city's purported concern for public health resulting from improper disposal of animal carcasses only addressed religious sacrifice and not disposal by restaurants or hunters, that more rigorous standards of inspection were imposed on animals killed for religious sacrifice and eaten than animals killed by hunters or fishermen, and that small commercial slaughterhouses were not subject to similar requirements related to the city's "professed desire to prevent cruelty to animals and preserve the public health." *Id.* at 543-45.

[53] *See* discussion in "free speech" section, *infra*.

[54] *See Elane Photography, LLC v. Willock,* 309 P3d 53 (2013), *cert. den.* ___ US ___ , 134 SCt 1787 (2014).

> accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of * * * sexual orientation * * *.
>
> '* * * * *
>
> '(3) It is an unlawful practice for any person to deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation in violation of this section.'

The issues considered by the forum are:

> (1) Is ORS 659A.403 facially unconstitutional?
>
> (2) If ORS 659A.403 is facially constitutional, is it unconstitutional by requiring Respondents to participate in 'compelled speech' by making and providing a wedding cake for Complainants?

"*State v. Robertson*, 293 Or 402, 649 P.2d 569 (1982), is the seminal Oregon case in this area. *Robertson* involved an Article I, Section 8 challenge to ORS 163.275, a statute defining the crime of coercion, in which 'speech [was] a statutory element in the definition of the offense.' *Id.* at 415. In *Robertson*, the Oregon Supreme Court established a basic framework, comprised of three categories, for determining whether a law violates Article I, section 8. That framework was most recently described in *State v. Babson*, 355 Or 383, 391, 326 P3d 559, 566 (2014).

> 'Under the first category, the court begins by determining whether a law is "written in terms directed to the substance of any 'opinion' or any 'subject' of communication." If it is, then the law is unconstitutional, unless the scope of the restraint is "wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." If the law survives that inquiry, then the court determines whether the law focuses on forbidden effects and "the proscribed means [of causing those effects] include speech or writing," or whether it is "directed only against causing the forbidden effects." If the law focuses on forbidden effects, and the proscribed means of causing those effects include expression, then the law is analyzed under the second *Robertson* category. Under that category, the court determines whether the law is overbroad, and, if so, whether it is capable of being narrowed. If, on the other hand, the law focuses only on forbidden effects, then the law is in the third *Robertson* category, and an individual can challenge the law as applied to that individual's circumstances.' (internal citations omitted)

"Robertson Category One

"In analyzing a law under *Robertson's* first category, Oregon courts have looked to the text of the law to see whether it expressly regulates expression. *Babson* at 395. In *Babson*, the issue was the constitutionality of a guideline adopted by the Legislation Administration Committee ('LAC') that prohibited all overnight use of the capitol steps, including protests like defendants' vigil. Defendants and the LAC agreed that a person could violate the guideline without engaging in expressive activities, if, for example, a person used the steps as a shortcut while crossing the capitol grounds after 11:00 p.m. when there were no hearings or floor sessions taking place. *Id.* at 396-97. The court held that the guideline was not unconstitutional under *Robertson's* first category because it was not 'written in terms directed to the substance of any "opinion" or any "subject" of communication.' *Id.* ORS 659A.403, like the LAC guideline in *Babson*, is not "written in terms directed to the substance of any 'opinion' or any "subject" of communication." Rather, it is a law focused on proscribing the pursuit or accomplishment of a forbidden result – in this case, discrimination by places of public accommodations against individuals belonging to specifically enumerated protected classes. As such, it is not susceptible to a *Robertson* category one facial challenge.

"Respondents argue that ORS 659A.403 expressly regulates expression because the word 'deny' in section (3) shows that, when properly interpreted, 'the statute prohibits *communication* that services are being denied for a prohibited reason, which implicates both speech and opinion.' (emphasis in original). Under Respondents' expansive interpretation, all laws implicating any form of communication whatsoever would be facially unconstitutional under Article I, Section 8. This is not what the court held in *Robertson* and *Babson*.[55]

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[55] *See State v. Robertson,* 293 Or 402, 416-417, 649 P.2d 569 (1982) ("As stated above, article I, section 8, prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences. * * * It means that laws must focus on proscribing the pursuit or accomplishment of forbidden results rather than on the suppression of speech or writing either as an end in itself or as a means to some other legislative end.") *See also State v. Garcias*, 296 Or 688, 697, 679 P.2d 1354, 1359 (1984) (menacing statute held constitutional under *Robertson* category one analysis even though it prohibited threatening words because "[t]he fact that the harm may be brought about by use of words, even by words unaccompanied by a physical act, does not alter the focus of the statute, which remains directed against attempts to cause an identified harm, rather than prohibiting the use of words as such"); *State v. Moyle,* 299 Or 691, 701, 705 P2d 740 (1985)(statute criminalizing telephonic or written threats held constitutional under *Robertson* category one analysis because "the effect that it proscribes, causing fear of injury to persons or property, merely mirrors a prohibition of words themselves"); *City of Eugene v. Miller,* 318 Or 480, 489, 871 P2d 454 (1994)(defendant, who sold joke books on the city sidewalk, was convicted of violating an ordinance prohibiting vendors from selling merchandise on city sidewalks; ordinance held valid under first category of *Robertson* because it banned the sale of all expressive material on the sidewalk and therefore was content neutral); *State v. Illig-Renn,* 341 Or 228, 237, 142 P3d 62 (2006)("[t]he fact that persons seek to convey a message by their conduct, that words accompany their conduct, or that the very reason for their conduct is expressive, does not transform prohibited conduct into protected expression or assembly").

"Based on the above, the forum concludes that ORS 659A.403 is not subject to a *Robertson* category one Article I, Section 8 facial challenge.

"Robertson Category Two

"A law falls under the second category of *Robertson* if it is 'directed in terms against the pursuit of a forbidden effect' and 'the proscribed means [of causing that effect] include speech or writing.' *Babson* at 397, quoting *Robertson* at 417-18. Oregon courts examine a statute in the second category for 'overbreadth' to determine if 'the terms of [the] law exceed constitutional boundaries, purporting to reach conduct protected by guarantees such as * * * [A]rticle I, section 8. * * * If a statute is overbroad, the court then must determine whether it can be interpreted to avoid such overbreadth.' *Id.* at 397-98, quoting *Robertson* at 410, 412.

"In *State v. Illig Renn,* 341 Or 228 (2006), the defendant challenged as overbroad a statute that made it a crime to '[r]efuse[ ] to obey a lawful order by [a] peace officer' if the person knew that the person giving the order was a peace officer. In addressing the state's argument that the statute was not subject to an overbreadth challenge because it did not 'expressly' restrict expression, the court stated that a statute is subject to a facial challenge under the first or second category of *Robertson* if it 'expressly or obviously proscribes expression,' leaving statutes with '[m]arginal and unforeseen applications to speech and expression' to as-applied challenges under the third category.[56] *Illig–Renn,* at 234. The court went on to state that facial challenges generally would not be permitted 'if the statute's application to protected speech [was] not traceable to the statute's express terms.' *Id.* at 236. Based on that interpretation of Article I, section 8, the court concluded that the defendant could challenge the statute that prohibited interfering with a peace officer only as applied, under the third category of *Robertson,* and not on its face, under the other two categories. *Id.* at 237.

"Respondents' argument resembles defendants' argument in *Babson*, which the court characterized in the following words:

> 'Defendants instead argue that, even if the [law] targets some harm—rather than targeting expression—the [law] has an "obvious and foreseeable" application to speech, and it is overbroad. That is, defendants argue that the text of the statute does not have to refer to expression or include expression as an element to fall under category two, as long as it has an obvious application to expression.'

Babson at 398. The *Babson* court rejected this argument, stating:

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[56] The court referred to this type of statute as a "speech-neutral" statute, one that "doe[s] not by its terms forbid particular forms of expression." *Illig-Renn* at 233-34.

> 'We agree with the state that the statement in *Robertson* on which defendants rely does not extend Article I, section 8, overbreadth analysis to every law that the legislature enacts. When expression is a proscribed means of causing the harm prohibited in a statute, it is apparent that the law will restrict expression in some way because expression is an element of the law. For that type of law, the legislature must narrow the law to eliminate apparent applications to *protected* expression. *See Robertson,* 293 Or. at 417–18, 649 P2d 569 (noting that when a law focused on harmful effects includes expression as a proscribed means of causing those effects, the court must determine whether the law "appears to reach *privileged* communication" (emphasis added)). However, if expression is not a proscribed means of causing harm, and is not described in the terms of the statute, the possible or plausible application of the statute to protected expression is less apparent. That is, in the former situation, every time the statute is enforced, expression will be implicated, leading to the possibility that the law will be considered overbroad; in the latter situation, the statute may never be enforced in a way that implicates expression, even if it is possible, or even apparent, that it *could* be applied to reach protected expression. When a law does not expressly or obviously refer to expression, the legislature is not required to consider all apparent applications of that law to protected expression and narrow the law to eliminate them. The court's statement in *Robertson,* on which defendants rely, does not extend the second category overbreadth analysis to statutes that do not, by their terms, expressly or obviously refer to protected expression.'

Id. at 400. The *Babson* court went on to explain that 'obviously,' as used in the last sentence of the above-quoted statement, did not 'extend Article I, section 8, scrutiny [under the first two *Robertson* categories] to any statute that could have an apparent application to speech; rather, the [*Robertson*] court used the word 'obviously' to make it clear that creative wording that does not refer directly to expression, but which could *only* be applied to expression, would be scrutinized under the first two categories of *Robertson.*' *Id.* at 403. The *Babson* court concluded its *Robertson* category two analysis by stating:

> 'Similarly, here, although the guideline does not directly refer to speech, the guideline does have apparent applications to speech, as defendants contend. A restriction on use of the capitol steps will prevent people like defendants from protesting or otherwise engaging in expressive activities on the capitol steps overnight. That fact alone, however, does not subject the guideline to Article I, section 8, scrutiny under the second category of *Robertson.* The guideline is not simply a mirror of a prohibition on words. The guideline also bars skateboarding, sitting, sleeping, walking, storing equipment, and all other possible uses of the capitol steps during certain hours. Thus, because the guideline does not expressly refer to expression as a means of causing some harm, and it does not "obviously" prohibit

expression within the meaning of *Moyle,* it is not subject to an overbreadth challenge under the second category of *Robertson.'*

Babson at 403-04. This case, like *Babson* and *Illig-Renn*, does not involve a statute that 'obviously' prohibits expression. Rather, it is a 'speech-neutral' statute as described in *Illig-Renn*.[57] Furthermore, the legislature's use of the challenged word 'deny' in ORS 659A.403 is contextually similar to the challenged word 'refuse' in *Illig-Renn*, as both terms prohibit specific actions that may involve expression without specifying a particular form of expression. In conclusion, the forum finds that ORS 659A.403 is not subject to Article I, section 8 overbreadth scrutiny as set out in *Robertson*, category two.

"Robertson Category Three Does Not Apply to Respondents' claim of 'compelled speech.'

"Respondents contend that their Article I, section 8, rights were violated by the Agency's application of ORS 659A.403 because that application, in requiring them to provide a wedding cake to Complainants, 'unlawfully compel[s] Respondents to engage in expression of a message they did not want to express.' The *Robertson* framework was developed in a series of cases involving prohibited speech, and there are no Oregon cases that have come to the forum's attention in which compelled speech was the issue. However, the U.S. Supreme Court has addressed that issue in a line of cases involving the First Amendment and compelled speech. In the absence of Oregon case law, the forum turns to those decisions for guidance.

"As a preliminary matter, the forum addresses Respondents' argument, made in their response to the Agency's cross-motions for summary judgment, that the 'forbidden effect' involved in a *Robertson* category three analysis of the constitutionality of ORS 659A.403 is 'Respondents' choice not to be involved in Complainants' same-sex ceremony, which is alleged to be a denial of services based on sexual orientation.' Respondents argue that their 'choice not to be involved' cannot be a 'forbidden effect' because Article XV, section 5a of the Oregon Constitution expressly prohibited legal recognition of same-sex marriages in January 2013,[58] making it 'clear [that] opposition to same-sex marriage is not a 'forbidden effect.'" Respondents misread *Babson*, *Robertson*, and the statute. The 'forbidden effect' under ORS 659A.403 is not its impact on

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[57] *Cf. State v. Babson*, 355 Or 383, 405, 326 P3d 559, 566 (2014), quoting *Miller* at 489-90 (*Robertson* category two analysis did not apply because contested ordinance "was directed at a harm – street and sidewalk congestion – that the city legitimately could seek to prevent, and did not, 'by [its] terms, purport to proscribe speech or writing as a means to avoid a forbidden effect.'")

[58] In January 2013, Article XV, section 5a, of the Oregon Constitution provided: "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage."

Respondents, but Respondents' denial of services to Complainants based on their sexual orientation. Respondents were not asked to issue a marriage license, perform a wedding ceremony, or in any way legally recognize Complainants' planned same-sex wedding in contravention of Article XV, Section 5a. Furthermore, there is no evidence in the record, as submitted for summary judgment, that they communicated to Respondents where they intended to be married, that they intended to be married in the state of Oregon, or, for that matter, that Complainants were ever married.[59]

"The right to refrain from speaking was established in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943), in which the U. S. Supreme Court held that the State of West Virginia could not constitutionally require students to salute the American flag and recite the Pledge of Allegiance. The Court held that a state could not require 'affirmation of a belief and an attitude of mind,' noting that 'the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.' *Id.* at 633-34.

"In *Miami Herald Publishing Company v. Tornillo,* 418 U.S. 241 (1974), the Court considered whether a Florida statute that required newspapers that 'assailed' the 'personal character or official record' of any political candidate to give that candidate the 'right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges,' and to print the reply 'in as conspicuous a place and in the same kind of type as the charges which prompted the reply.' *Id.* at 243. The Court found the statute was unconstitutional because it deprived the newspaper and its editors of the fundamental right to decide what to print or omit. *Id. at 258.*

"In 1977, the Court was asked to decide whether the State of New Hampshire could constitutionally enforce criminal sanctions against persons who covered the motto 'Live Free or Die' on their passenger vehicle license plates because that motto was repugnant to their moral and religious beliefs. *Wooley v. Maynard,* 430 U.S. 705 (1977). In its discussion of the nature of compelled speech, the Court noted that New Hampshire's statute 'in effect requires that appellees used their private property as a "mobile billboard" for the State's ideological message or suffer a penalty' and that driving an automobile was a 'virtual necessity for most Americans.' *Id.* at 715. The Court found New Hampshire's statute unconstitutional, holding as follows:

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[59] The forum takes judicial notice that a law granting full marriage rights for same-sex couples in the state of Washington, which is immediately adjacent to the State of Oregon and only separated from the City of Portland by the Columbia River, took effect on December 6, 2012. *See* Revised Code of Washington 26.04.010. A. Klein was aware of that on January 17, 2013, as shown by his statement during the Perkins interview, quoted in Finding of Fact #14.

> 'We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.'

Id. at 713.

"In 1986, the Court was asked to decide whether a regulated public utility company that had traditionally distributed a company newsletter in its quarterly billing statements was required to enclose newsletters published by TURN, a group expressing views opposite to the utility, in the same billing statements. *Pacific Gas & Electric Co. v. Public Utilities Commission of California* ("PUC"), 475 U.S. 1 (1986). The Court held that the PUC's requirement unconstitutionally compelled Pacific Gas to accommodate TURN's speech by requiring it to disseminate messages hostile to Pacific's own interests. *Id.* at 20-21.

"*Hurley v. Irish-American GLIB,* 515 U.S. 557 (1995), presented the question of whether private citizens in Massachusetts who organized a St. Patrick's Day parade were required to include GLIB, a group 'celebrat[ing] its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants,' thereby imparting a message that the organizers did not wish to convey among the marchers. *Id.* at 570. The requirement was based on a provision of Massachusetts' public accommodation law that included a prohibition on discrimination on the basis of sexual orientation. The Court found that a parade is a form of expression, stating that a 'parade' indicates 'marchers who are making some sort of collective point, not just to each other but to bystanders along the way. Indeed, a parade's dependence on watchers is so extreme that nowadays, as with Bishop Berkeley's celebrated tree, "if a parade or demonstration receives no media coverage, it may as well not have happened."' *Id.* at 568. The Court also determined that:

> '[GLIB]'s participation as a unit in the parade was equally expressive. GLIB was formed for the very purpose of marching in it, as the trial court found, in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade. The organization distributed a fact sheet describing the members' intentions, and the record otherwise corroborates the expressive nature of GLIB's participation. In 1993, members of GLIB marched behind a shamrock-strewn banner with the simple inscription "Irish American Gay, Lesbian and Bisexual Group of Boston." GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own.' (internal citations omitted)

Id. at 570. The Court further determined that '[s]ince every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade'[60] and held the state's application of the statute unconstitutional because 'this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.' *Id.* at 573.

"In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* ('FAIR'), 547 U.S. 47 (2006), a group of law school associations objected to the application of the Solomon Amendment, which required campuses receiving federal funds to provide equal access to military recruiters. The Court held that there was no First Amendment violation, distinguishing *Hurley*, *Tornillo*, and *Pacific Gas* because in those cases 'the complaining speaker's own message was affected by the speech it was forced to accommodate' or 'interfere[d] with a speaker's desired message.' *Id.* at 63-64. The Court noted that '[c]ompelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.' *Id.* at 62. Of additional significance to this case, the Court stated:

> 'Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies. We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy.'

Id. at 65.

"*Wooley* and *Barnette* do not support Respondents because Respondents are under no compulsion to publicly 'speak the government's message'[61] in an affirmative manner that demonstrates their support for same-sex marriage. Unlike the laws at issue in *Wooley* and *Barnette*, ORS 659A.403 does not require Respondents to recite or display any message. It only mandates that if Respondents operate a business as a place of public accommodation, they cannot discriminate against potential clients based on their sexual orientation. *Elane Photography* at 64.

"*Tornillo* and *Pacific Gas* are distinctly different from this case. In both cases, the government commandeered a speaker's means of reaching its

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[60] *Hurley v. Irish-American GLIB*, 515 U.S. 557, 572-73 (1995).

[61] *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006).

audience and required the speaker to disseminate an opposing point of view. Here, the state has not compelled Respondents to publish or distribute anything expressing a view.

"*Hurley* is distinguishable because Respondents' provision of a wedding cake for Complainants was not for a public event, but for a private event. Whatever message the cake conveyed was expressed only to Complainants and the persons they invited to their wedding ceremony, not to the public at large. In addition, the forum notes that, whether or not making a wedding cake may be expressive, the operation of Respondents' bakery, including Respondents' decision not to offer services to a protected class of persons, is not. *Elane Photography* at 68.

"Finally, *Rumsfeld* does not aid Respondents because it rejected the law schools' arguments that they were forced to speak the government's message and that they were required to host the recruiters' speech in a way that violated compelled speech principles. *Rumsfeld* at 64-65.

"For the reasons stated above, the forum concludes that the application of ORS 659A.403 to Respondents so as to require them to provide a wedding cake for Complainants does not constitute compelled speech that violates Article I, section 8 of the Oregon Constitution.

"United States Constitution

"First Amendment: Unlawfully infringing on Respondents' right to free speech.

"Respondents contend that the First Amendment to the U. S. Constitution, as applied to the State of Oregon under the Fourteenth Amendment, prohibits BOLI from enforcing the provisions of ORS 659A.403 against Respondents because that statute unlawfully infringes on Respondents' free speech rights. In pertinent part, the First Amendment provides: 'Congress shall make no law * * * abridging the freedom of speech * * *.'

"Based on the discussion in the previous section, the forum concludes that the requirement in ORS 659A.403 that Respondents bake a wedding cake for Complainants is not 'compelled speech' that violates the free speech clause of the First Amendment to the U. S. Constitution.

"CONCLUSION

"Respondents' motion for summary judgment is **GRANTED** with respect to the Agency's allegations in the Amended Formal Charges that Respondent M. Klein violated ORS 659A.403 by denying full and equal accommodations, advantages, facilities and privileges to Complainants Rachel Cryer and Laurel Bowman-Cryer.

"Respondents' motion for summary judgment is **GRANTED** with respect to the Agency's allegations in the Amended Formal Charges that Respondent A. Klein violated ORS 659A.406.

"Respondents' motion for summary judgment is **GRANTED** with respect to the Agency's allegations in the Amended Formal Charges that Respondents violated ORS 659A.409.

"The Agency's cross-motion for summary judgment is **GRANTED** with respect to the Agency's allegations in the Amended Formal Charges that Respondent A. Klein violated ORS 659A.403 by denying the full and equal accommodations, advantages, facilities and privileges of a place of public accommodation to Complainants Rachel Cryer and Laurel Bowman-Cryer based on their sexual orientation.

"The Agency's cross-motion for summary judgment is **GRANTED** with respect to the Agency's allegations in the Formal Charges that Respondents A. Klein and M. Klein are jointly and severally liable for A. Klein's violation of ORS 659A.403.

"The Agency's cross-motion for summary judgment is **GRANTED** with respect to Respondents' affirmative defenses.

"The Forum has **NO JURISDICTION** to adjudicate the counterclaims raised by Respondents in paragraphs ##31-42 in Respondents' Amended Answers.

"**Case Status**

"The hearing will convene as currently scheduled. The scope of the evidentiary portion of the hearing will be limited to the damages, if any, suffered by Complainants as a result of A. Klein's ORS 659A.403 violation.

IT IS SO ORDERED"

The ALJ's rulings on Respondents' motion for summary judgment and the Agency's cross-motion for summary judgment are **AFFIRMED**, except for the ruling on Respondents' violation of ORS 659A.409, which is **REVERSED** for reasons set out in the Opinion section of this Final Order and as noted in the Conclusions of Law in this Final Order. (Ex. X65)

29) On February 4, 2015, the ALJ granted the Agency's second motion for a protective order. (Ex. X65)

30) On February 5, 2015, the ALJ granted Respondents' renewed motion to depose Complainants. The ALJ's interim order read as follows:

"**Introduction**

"On January 15, 2015, Respondents filed a renewed motion to depose Complainants. On January 22, 2015, the Agency timely filed objections. Respondents' motion is based on part on their assertion that (1) the 25 additional interrogatories they were allowed to serve on the Agency pursuant to my September 29, 2014, interim order that allowed Respondents to serve additional interrogatories as a potential means of eliminating the need for a deposition, (2) coupled with the Agency's responses to Respondents' prior interrogatories and the Agency's answers to the 25 additional interrogatories, (3) are inadequate to address Complainants' damages, leaving Respondents substantially prejudiced as a result.

"On January 22, 2015, the Agency filed objections, arguing that Respondents' have not clearly articulated how they will be substantially prejudiced in the absence of depositions, that Complainants should not be subjected to depositions 'due to Respondents' inability to adequately craft their interrogatories,' and that Respondents' 'discovery tactics are an abuse of process.'

"**Discussion**

"On October 14, 2014, the Agency complied with the forum's September 25, 2014, discovery order requiring the Agency to answer Respondents' August 5, 2014, interrogatory seeking a detailed explanation of Complainants' emotional, physical and mental suffering caused by Respondents' actions. The Agency's interrogatory response listed a total of 88 discrete types of harm suffered by Complainant Cryer and 90 discrete types of harm suffered by Complainant Bowman-Cryer. In support of their motion, Respondents argue that:

> '[The listed symptoms], some of which are inconsistent with each other, raise more questions than they answer. Respondents attempted to address some of these nearly 200 symptoms in their 25 interrogatories, but were unable to even begin to address the questions raised by this exhaustive list of symptoms, much less get clear answers from Complainants.'

Among its objections to Respondents' motion for depositions, the Agency asserts that 'many of the listed symptoms are interrelated to one another and would hardly require Respondents to explore them individually.' The Agency further notes that Respondents will have an adequate opportunity to 'cross-examine Complainants on all symptoms at hearing.'

"To more clearly illustrate the points raised by Respondents and the Agency, the types of harm alleged by each Complainant are reprinted below in their entirety. As will be seen, they permeate all aspects of Complainants' lives.

Complainant Rachel Cryer

'[88 symptoms listed]

Complainant Laurel Bowman-Cryer

'[90 symptoms listed]

OAR 839-050-0200(3) governs depositions in this forum. It provides:

> 'Depositions are strongly disfavored and will be allowed only when the requesting participant demonstrates that other methods of discovery are so inadequate that the participant will be substantially prejudiced by the denial of the motion to depose a particular witness.'

"Since OAR 839-050-0200(3) was adopted, the forum has been extremely reluctant to grant depositions, and has uniformly denied respondents' requests for depositions when respondents have not first sought informal discovery through interrogatories. *See, e.g., In the Matter of Oak Harbor Freight Lines, Inc.,* 33 BOLI 1 (2014), *In the Matter of Columbia Components, Inc.,* 32 BOLI 257 (2013), *In the Matter of Blachana, LLC,* 32 BOLI 220 (2013), *In the Matter of From the Wilderness, Inc.,* 30 BOLI 227 (2009). The only occasion when the forum has allowed a deposition to take place was in the *Columbia Components* case, under the following circumstances:

> 'During the hearing it became clear that Complainant possessed documents either requested by Respondent and/or set out in the [ALJ's] discovery order that Complainant did not provide until Respondent was able to ascertain existence of those documents during Complainant's testimony * * * [and] that Complainant had been less than forthcoming with regard to the existence of those documents.'

"In this case, Respondents have satisfied the forum's requirement of seeking discovery by means of informal request before requesting a deposition. Before initially requesting a deposition, Respondents made informal document discovery requests, requested admissions, and served 25 interrogatories on the Agency, all before Respondents received the Agency's interrogatory answer setting out the alleged 178 types of harm suffered by Complainants as a result of Respondents' actions.

"On September 25, 2014, the forum granted Respondents' motion to depose Complainants, with the scope of the depositions limited to 'Complainants'

claim for damages.' That ruling was predicated on my conclusion that Respondents '[had] sought informal discovery on the issue of damages through other methods and do not have adequate information on damages.'

"At a prehearing conference held on September 29, 2014, discovery was discussed at length. As noted earlier, it was agreed that Respondents would be allowed to serve 25 additional interrogatories on the Agency as a potential means of eliminating the need for a deposition. On October 14, 2014, the Agency sent Respondents its interrogatory response listing the 178 types of alleged harm. In the absence of depositions, that left 25 interrogatories for Respondents to explore those 178 listed harms. On December 31, 2014, Respondents served the interrogatories that were allowed in my September 29, 2014, ruling. The Agency timely responded on January 13, 2015.

"Since Respondents filed their motion on January 15, 2015, the Agency was granted summary judgment as to Respondents' alleged ORS 659A.403 violation. In the interim order granting summary judgment, I ruled that the only evidentiary issue at hearing will be the amount of damages, if any, to which Complainants are entitled. The amount of damages sought on Complainants' behalf is 'at least $75,000' for each Complainant. In addition, it appears from the Agency's February 3, 2015, filing in response to the forum's inquiry regarding a Protective Order sought by the Agency that the Agency may intend to present evidence at hearing that Complainants are entitled to damages for mental and emotional suffering up to the present day, more than two years after the date of discrimination.

"I have reviewed prior BOLI Final Orders in which damages were awarded for emotional and mental suffering and find that this case stands well apart from all its predecessors in the exhaustive list of harms alleged by Complainants for which the Agency seeks damages. No other case comes even remotely close. In defending themselves, Respondents have a right to inquire into each type of harm alleged by Complainants to determine the extent of the harm and whether Complainants' physical, mental, and emotional suffering was caused, at least in part, if not in whole, by events and circumstances that were unrelated to Aaron Klein's ORS 659A.403 violation. Based on the sheer number and variety of types of alleged harm, there is no practical way Respondents can accomplish an effective inquiry using interrogatories. I find that Respondents will be substantially prejudiced if they are not allowed to depose Complainants.

"Based on the above, Respondents' motion to depose Complainants is **GRANTED,** with the following limitations:

'1. Respondents are allowed a maximum of three hours, not counting breaks, to question each Complainant.

'2. The Agency may choose where the depositions are to be conducted and is instructed to cooperate in making Complainants available for deposition as soon as practical, given that the hearing is scheduled to begin next month. If the Agency and Respondents cannot agree on a date, they are instructed to contact me and I will choose a date. I do not intend to postpone this hearing again because of a discovery issue.

'3. Respondents are responsible for any costs associated with conducting the deposition. Respondents and Agency must each pay for their own copy of the transcript if a transcript is prepared.

'4. Respondents and the Agency are ordered to notify me at least seven days in advance of the date and time for the depositions so that I can be available if necessary. As of today, the only dates I will be unavailable between now and March 1 are the afternoon of February 11 and all day February 16.

5. The scope of Respondents' questioning is limited to damages. Respondents may not engage in a fishing expedition by inquiring into matters totally irrelevant to the issue of physical, emotional, and mental suffering.'"

(Ex. X72)

31) On February 11, 2015, "in view of the national attention and attendant publicity these cases have already received and the likelihood that Complainants will be questioned about the protected health information in the records produced under the protective order," the ALJ issued a protective order regarding Complainants' depositions. The order prohibited the deposition transcripts or notes made of the deposition testimony from being made available to "non-qualified" persons or from being used "for any other purpose than the preparation for litigation of [the] proceeding." (Ex. X74)

32) On February 17, 2015, Respondents filed a motion for reconsideration of the ALJ's ruling on summary judgment. The ALJ denied Respondents' motion. (Exs. X73, X75, X79)

33) On February 23, 2015, the Agency issued Second Amended Formal Charges in both cases. Respondents filed answers on February 27, 2015. (Exs. X78, X82)

34) Respondents and Agency timely submitted case summaries. (Exs. X76, 77)

35) On February 26, 2015, Respondents filed a motion for discovery sanctions that was opposed by the Agency. On March 5, 2015, the ALJ ruled on Respondents' motion as follows:

> "On February 26, 2015, Respondents filed a motion requesting discovery sanctions related to the Agency's failure to provide discovery subject to my Discovery Order dated September 25, 2014, until February 24, 2015. The Agency filed a response on February 27, 2015, and Respondents supplemented their motion on March 3, 2015.
>
> "The discovery in question relates to my September 25, 2014, Order requiring that the Agency provide Respondents with:
>
> > 'all posting by Complainants to any social media website, including but not limited to Facebook, Twitter, LinkedIn, MySpace, Instagram, and SnapChat from January 2013 to the present that contain comments about the facts of this case, comments about Respondents, or comments that relate to their alleged damages.'
>
> "Specifically, Respondents allege that on February 24, 2015, less than three hours before the Agency filed its case summary, the Agency turned over 109 pages of documents ('subject documents') to Respondents that were subject to my discovery order. Respondents further allege that the 109 pages were included in the Agency's case summary. The Agency does not dispute these allegations, acknowledges it received the subject documents from Complainants in August 2014, and attempts to explain the reason for its late disclosure in its response. After reviewing the subject documents, I conclude that they contain Complainants' social media conversations that fall within the scope of my September 25, 2014, Discovery Order.
>
> "Respondents allege that the Agency's untimely disclosure of these documents establishes bad faith on the part of the Agency and/or Complainants, particularly since the disclosure occurred after Respondents completed their depositions of Complainants, and that Respondents are irreparably prejudiced as a result. Respondents ask that the forum sanction the Agency in a number of different ways.
>
> "In my September 25, 2014, Discovery Order, I ruled as follows:
>
> > 'After the scheduled September 29, 2014, prehearing conference in this matter, the forum will issue a subsequent order stating the Agency's deadline for complying with the terms of this order. The Agency has a continuing obligation, through the close of the hearing, to provide Respondents' counsel with any newly discovered material that responds to the responses and production ordered in this interim order. The

> Agency's failure to comply with this order may result in the sanction described in OAR 839-050-0200(11).'

In the interim order I issued on September 30, 2014, that summarized the September 29, 2014, prehearing conference, I ordered that "[t]he Discovery ordered in my rulings on * * * Respondents' motions for Discovery Orders must be mailed or hand-delivered no later than October 14, 2014." That was not done.

"As a prelude to my ruling, I note that the forum has no authority to impose the vast majority of sanctions sought by Respondents. The forum's authority in this matter is not derived from the ORCP, but from provisions in the Oregon APA, the Oregon Attorney General's Administrative Rules (OAR 137-003-0000 to -0092), and the forum's own rules, OAR 839-050-000 *et seq*. The ALJ's authority to impose sanctions for violations of discovery orders is set out in OAR 839-050-0020(11):^

> 'The administrative law judge may refuse to admit evidence that has not been disclosed in response to a discovery order or subpoena, unless the participant that failed to provide discovery shows good cause for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10)[62]. If the administrative law judge admits evidence that was not disclosed as ordered or subpoenaed, the administrative law judge may grant a continuance to allow an opportunity for the other participant(s) to respond."

In brief, the Agency frankly admits that it 'cannot determine why the [subject records] were not produced [earlier] in discovery, but they were in a location unlikely to be accessed' and characterizes its 'oversight' as an 'inadvertent error.' The Agency also notes, in a supporting declaration by * * * the Agency's Chief Prosecutor, that '[i]t appears that on or about October 3, 2014, in anticipation of discovery, the subject documents were partially redacted. I have no other recollection as to why they were not provided in discovery.'

"OAR 839-050-0020(16) provides:

> '"Good cause" means, unless otherwise specifically stated, that a participant failed to perform a required act due to an excusable mistake or a circumstance over which the participant had no control. "Good cause" does not include a lack of knowledge of the law, including these rules.'

For the reasons stated below, the forum concludes that the Agency's failure to provide the subject records by October 14, 2014, as ordered by the forum, does

[62] This statutory reference in the current rule is in error. The APA was amended in 2007 and the "full and fair inquiry" requirement was moved to ORS 183.417(8).

not meet the 'good cause' standard. Participants in all cases are responsible for keeping track of documents that constitute potential evidence, particularly documents subject to an existing discovery order. In this case, the subject records were accessed by BOLI's Administrative Prosecutions Unit on October 3, 2014, eight days after a discovery order was issued requiring the production of those records, and only 11 days before their production was due pursuant to the forum's September 30, 2014, order. The Agency's 'oversight' or storage of the documents in a place where they were 'unlikely to be accessed' does not constitute 'an excusable mistake or a circumstance over which the [Agency] had no control.'

"Ordinarily, the forum's sanction for failing to provide documents pursuant to a discovery order would be to prohibit the introduction of the documents as evidence.^ However, Respondents assert that some of the subject records will potentially assist Respondents' defense and explain why in their motion. Based on Respondents' assertion, it appears that a blanket prohibition on the introduction of the subject records may prejudice Respondents and prevent a 'full and fair inquiry' by the forum. The forum's order is crafted with this in mind.

"ORDER

"1. Sanctions: (a) The Agency may not offer or otherwise utilize any of the subject documents as evidence until such time as Respondents have offered the subject documents into evidence or otherwise utilized them during the hearing while eliciting testimony in support of their case; (b) Respondents, should they elect to do so, may offer or utilize the subject documents in support of their case.

"2. Discovery Order

"To the extent these records have not already been provided, the forum hereby issues a discovery order requiring the Agency to provide responsive documents to items ##1, 5-6, 8, 13-15, and 21 listed on pages 9 and 10 of Respondents' Motion for Discovery Sanctions, with the caveat that the Agency is not required to produce statements made to Ms. Gaddis or Ms. Casey, the Agency's administrative prosecutors in this case, in any response to item #5. The Agency's responsibility to produce any such records begins as soon as this order is issued and continues until the hearing is concluded. The forum will apply OAR 839-050-0020(11) if an issue arises regarding an alleged failure by the Agency to produce such records in a timely manner.

"3. Respondents' request that the forum dismiss the Agency's Second Amended Formal Charges is **DENIED**.

"4. Respondents may amend their Case Summary witness list and exhibit list. * * *"

"**5.** Respondents' request to 'reopen discovery to allow for depositions of Complainants and other BOLI witnesses with knowledge of these matters' is **DENIED**.

"**6.** Respondents' request that the cases be dismissed or that the Agency's claim for damages of Complainants' behalf be dismissed is **DENIED**.

"**7.** Respondents' request for costs is **DENIED**.

"**8.** Respondents' request for any other sanctions not specifically discussed in this interim order is **DENIED**."

(Exs. X81, X83, X86, X87)

36) The general public was allowed to attend the hearing. Because of this and potential security issues, the ALJ issued guidelines prior to the hearing that, among other things: prohibited the public from bringing backpacks, briefcases, satchels, carrying cases any type, or handbags into the building in which the hearing was held; prohibited the use of audio recorders and cameras, including cell phone cameras and recorders; and required cell phones to be turned off during the hearing. (Ex. X85; Statement of ALJ)

37) At the start of the hearing, the ALJ orally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. (Statement of ALJ)

38) During the hearing, the Agency offered Exhibits A24 and A26. Respondents objected to their admission and the ALJ reserved ruling on their admissibility for the Proposed Order. Respondents objected on the basis of relevancy. Exhibits A24 and A26 are received because they are relevant to show the impact that the media exposure spawned by this case had on Complainants. (Exs. A24, A26)

39) During the hearing, the ALJ stated he would consider LBC's testimony about the "handfasting cord" used in LBC's and RBC's commitment[63] ceremony as an offer of proof and rule on its admissibility in the Proposed Order. That testimony is admitted because it is not evidence that was required to be disclosed by the ALJ's discovery orders and it is relevant to show the extent of Complainants' commitment to their relationship. (Testimony of LBC; Statement of ALJ)

[63] The forum uses the term "commitment" because the handfasting cord was used in Complainants' June 27, 2013, ceremony at the West End Ballroom, when same-sex marriage was not yet permitted in the state of Oregon.

40) On March 16, after the Agency had concluded its case-in-chief, Respondents filed a motion for an order to Dismiss or Reopen Discovery and Keep Record Open. Respondents argued that this was necessary in order:

> "to allow Respondents a full and fair opportunity to reopen discovery concerning possible undisclosed collusion among Complainants, Basic Rights Oregon and/or the Agency in light of the testimony of Agency witness Aaron Cryer elicited at the hearing on Friday, March 13, 2015."

The ALJ allowed Respondents and the Agency to present oral argument on Respondents' motion when the hearing re-convened on March 17, 2015, then denied Respondents' motion. (Ex. X94; Statement of ALJ)

41) Respondents called AK, MK, and RBC as witnesses in support of their case in chief. At the conclusion of RBC's testimony on March 17, 2015, Respondents' counsel Grey made the following statement:

> "That's all of the witnesses that we have to present at this time. However, for purposes of the record I'd like to make it clear that Respondents did not intend to rest their case in chief for the reasons we discussed in connection with the motion that we presented this morning, which the forum denied. So simply for purposes of the record, we are not planning on closing our case in chief."

(Statement of Grey)

42) On May 28, 2015, Respondents filed a motion to Reopen the Contested Case Record. The Agency filed a response on June 2, then supplemented its response on June 5, 2015. On June 22, 2015, the ALJ issued an interim order that denied Respondents' motion. The ALJ's ruling is reprinted in its entirety below:

> "Pursuant to OAR 839-050-0410, Respondents filed a motion to reopen the contested case record on May 29, 2015.
>
> "OAR 839-050-0410 provides:
>
> > 'On the administrative law judge's own motion or on the motion of a participant, the administrative law judge will reopen the record when the administrative law judge determines additional evidence is necessary to fully and fairly adjudicate the case. A participant requesting that the record be reopened to offer additional evidence must show good cause for not having provided the evidence before the record closed.'
>
> "Good cause" means:
>
> > '[U]nless otherwise specifically stated, that a participant failed to perform a required act due to an excusable mistake or a circumstance over which

the participant had no control. "Good cause" does not include a lack of knowledge of the law, including these rules.' OAR 839-050-0020(16).

Respondents' motion, like their earlier motion to Disqualify BOLI Commissioner Brad Avakian, is predicated on their argument that Commissioner Avakian's alleged bias 'has effectively precluded Respondents from receiving due process in this case.'

"In support of their motion, Respondents attached documentation of the following: (1) emails beginning April 11, 2014, and ending January 31, 2015, primarily containing conversations between Charlie Burr, BOLI's Communications Director and Strategy Works NW, LLC, Basic Rights of Oregon ('BRO'), and Senator Jeff Merkley's office, that were forwarded to Respondents' counsel by email by on May 20, 2015, by Kelsey Harkness, a reporter for the Daily Signal, pursuant to a public records request made by Harkness (the 'Harkness records'); (2) testimony of both Rachel and Laurel Bowman-Cryer from their February 17, 2015, depositions; and (3) selected hearing testimony of Aaron Cryer, brother of Complainant Rachel Bowman-Cryer. Respondents contend that the above shows 'hitherto undisclosed collusion between complainants, BOLI and Basic Rights Oregon * * * sufficient to taint the integrity of the proceedings and deny Respondents fundamental due process or a fair hearing" and 'unfairly prejudice Respondents[']' rights herein.

"Specifically, Respondents ask that the record be reopened so that they can:

"(1) Depose Aaron Cryer;

"(2) Request, obtain and review additional documents from BOLI, BRO, and others and to issue interrogatories through *subpoena duces tecum* upon non-participants including but not limited to Commissioner Brad Avakian, the Commissioner's assistant Jesse Bontecou, Charlie Burr, Jeanna Frazzini, Amy Ruiz, Diane Goodwin, Emily McLain, Joe LeBlanc and Maura Roche, all of whom are identified in the emails provided to Respondents by Harkness;

"(3) Depose Avakian, Bontecou, Burr, Frazzini, Ruiz, Goodwin, McLain, LeBlanc and Roche; and

"(4) Depending on the information obtained, renew their motion to disqualify the Commissioner "and other BOLI personnel shown to have been involved in this political agenda from any role in deciding the case."

On June 2, 2015, the Agency timely filed a response to Respondents' motion, then supplemented it with an amended response on June 5, 2015.

"Discussion

"Under OAR 839-050-0410, Respondents have the burden of showing 'good cause' within the meaning of OAR 839-050-0020(16) for reopening the contested case record. To show good cause, Respondents must demonstrate an excusable mistake or a circumstance over which Respondents had no control. The excusable mistake or circumstances over Respondents had no control means 'there must be a superseding or intervening event which prevents timely compliance.' *In the Matter of Ashlanders Senior Foster Care, Inc.,* 14 BOLI 54, 61-62 (1996), *citing In the Matter of City of Umatilla,* 9 BOLI 91 (1990), *affirmed without opinion, City of Umatilla v. Bureau of Labor and Industries,* 110 151, 821 P2d 1134 (1991). The mistaken act or failure to act is excusable if a party mistakenly acts or fails to act due to being misled by facts or circumstances that would mislead a reasonable person under similar circumstances. *Ashlanders, citing In the Matter of 60 Minute Tune,* 9 BOLI 191 (1991), *affirmed without opinion, Nida v. Bureau of Labor and Industries,* 119 Or App 174, 822 P2d 974 (1993). The forum examines the three different types of supporting documentation provided by Respondents against these standards.

A. The Harkness Records

"The emails provided to Respondents by Harkness are dated April 11, 2014, to January 31, 2015, well before the hearing began. Respondents do not assert that BOLI did not cooperate promptly in providing these documents to Harkness when she made her public records request. Respondents' June 18, 2014, motion to disqualify Commissioner Avakian due to bias makes it apparent that Respondents considered the Commissioner's alleged bias to be a relevant issue at least nine months before the hearing began. Despite this, there is no evidence in the record that Respondents made a discovery request or public records request for the records that were provided to Harkness. This is a circumstance that was under Respondents' control, and Respondents provide no explanation for their own failure to make a pre-hearing request for these records that they now claim are relevant and probative of the Commissioner's bias. In addition, Respondents have failed to show a superseding or intervening event that prevented them obtaining the Harkness Records before the hearing or that they were misled by facts or circumstances that would mislead a reasonable person under similar circumstances. Accordingly, the forum concludes that Respondents have not shown good cause for their failure to pursue the Harkness records before the hearing and offer them as evidence at hearing.[64]

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[64] There are no Commissioner's Final Orders interpreting "good cause" in the context of a motion to reopen a contested case proceeding. Besides *Ashlanders, City of Umatilla,* and *60 Minute Tune*, there have been numerous Final Orders interpreting the definition of "good cause" in OAR 839-050-0020(16) in other contexts. None of them support Respondents' claim that their supporting documentation shows "good cause." ***Cf.*** *In the Matter of From the Wilderness, Inc.,* 30 BOLI 227, 240 (2009)(when respondents sought a postponement so they could complete discovery and respondents' previous motion for a postponement had been granted to give respondents' newly

retained attorney time to prepare for the hearing, respondents delayed three months after the forum granted the first postponement before seeking discovery, the agency was not responsible for respondent's delay, and respondents' need for an another postponement could have been obviated if respondents had timely sought discovery, the forum denied respondents' motion, finding that respondents had not shown "good cause"); *In the Matter of Logan International, Ltd.,* 26 BOLI 254, 257-58 (2005)(the ALJ denied respondent's motion to reset the hearing based on the agency's alleged failure to provide complete discovery, stating that respondent had not established "good cause" because it had not shown that the agency had withheld discoverable information nor that respondent was entitled to a deposition of the complainant); *In the Matter of Orion Driftboat and Watercraft Company, LLC,* 26 BOLI 137, 139 (2005)(when respondents moved for a postponement 12 days before the hearing date based on respondents' need to be represented by an attorney and current inability to afford an attorney, because the agency had refused to accept respondents' settlement offers, and because respondents needed more time to file a discovery order, the agency objected on the basis that it had lined up its witnesses and was prepared to proceed, and because respondents had agreed three months earlier to the date set for hearing and the forum denied respondents' motion because respondents had not shown good cause); *In the Matter of Adesina Adeniji,* 25 BOLI 162, 164-65 (2004)(respondent's failure to comply with discovery order because he believed the case would settle and because he had provided some of the documents subject to discovery order exhibits with his answer was not "good cause" and the ALJ sustained the agency's objection to respondent's attempted reliance at hearing on exhibits subject to discovery order that were not provided before hearing); *In the Matter of Barbara Coleman,* 19 BOLI 230, 238-39 (2000)(respondent's attorney's assertion that respondent's medical condition of depression made it difficult for her to gather information did not present good cause for postponement of the hearing when "nothing filed with this forum * * * comes close to establishing that respondent is legally incompetent, and respondent has made no such claim. As the forum stated in [an earlier] order, respondent spoke lucidly and logically during the * * * teleconference, stated that she was able to work at her business several hours each day, and was able to recall details of events that occurred many months ago"); *In the Matter of Sabas Gonzalez,* 19 BOLI 1, 5-6 (1999)(respondent's motion for postponement, based in part on a scheduling conflict of respondent's counsel, was denied based on respondent's failure to show good cause when there was no evidence that the matter on respondent's counsel's schedule that conflicted with the hearing had been set before the notice of hearing issued in this case and respondent's counsel knew of the possible conflict for weeks before filing the motion and did not respond to the attempts the agency made at that time to resolve the conflict); *In the Matter of Troy R. Johnson,* 17 BOLI 285, 287-88 (1999)(respondent's motion to postpone the hearing was denied based on respondent's failure to show good cause when respondent based his motion on assertions that he had not received the notice of hearing until one week before a scheduled hearing date and did not have time to prepare for the hearing, but his delay in receiving the notice of hearing was due to his failure to notify the forum of his change of address; he was out of town on a hunting trip; and he was amazed the case had been set for hearing); *In the Matter of Jewel Schmidt,* 15 BOLI 236, 237 (1997)(when respondent requested a postponement of the hearing because she had an adult care home and could not find a relief person for the date of hearing or successive days, and the agency opposed the request because it was ready to proceed and had subpoenaed witnesses, the ALJ denied the request because respondent had not shown good cause for a postponement, noting that there were over 30 days between the date the notice of hearing was issued and the date of the scheduled hearing, and this should have been ample time to find a relief person for the expected one-day hearing). ***Compare*** *In the Matter of Computer Products Unlimited, Inc.,* 31 BOLI 209, 212-13 (2011) (respondent's motion for postponement granted based on emergency medical treatment required by the wife of respondent's authorized representative that could not be put off); *In the Matter of Spud Cellar Deli, Inc.,* 31 BOLI 106, 111 (2010)(forum granted the agency's motion for a hearing postponement based on the fact that respondent's counsel had been traveling out of state due to a death in her family and was unable to adequately prepare for hearing); *In the Matter of Northwestern Title Loans LLC,* 30 BOLI 1, 3, (2008)(forum granted respondent's motion for postponement based on unavailability of respondent's key witness on the date set for hearing); *In the Matter of Captain Hooks, LLP,* 27 BOLI 211, 213 (2006)(respondent's motion for postponement granted based on respondent's documented emergency medical condition); *In the Matter of SQDL Co.,* 22 BOLI 223, 227-28 (2001)(when respondent retained substitute counsel after its original counsel was suspended from the practice of law and substitute counsel filed a motion for postponement five days before the hearing based on the complexity of the case and his corresponding need for more time to prepare for the hearing, the ALJ concluded that respondent had shown good cause and granted the motion); *In the Matter of Ann L. Swanger,* 19 BOLI 42, 44 (1999)(respondent's motion for postponement, based on the fact that respondent would be having major dental surgery the day before the hearing was set to commence, making it extremely difficult for her to attend or communicate at the hearing, was granted).

B. Complainants' Deposition Testimony

"Respondents allege that Aaron Cryer's testimony and the Harkness records show that Complainants' deposition testimony is not credible regarding their alleged 'collusion' with BOLI 'in using this case against Respondents for a political agenda rather than a good faith claim for recovery of damages to Complainants.' This is merely a repeat of Respondents' March 16, 2015, argument made in their *Motion to Dismiss or Reopen Discovery and Keep Record Open* that the ALJ denied at hearing. The deposition testimony given by Complainants that Respondents now argue justifies reopening the case was given on February 17, 2015, almost a month before the hearing commenced. In their depositions, Complainants were asked questions and gave answers regarding Jeanna Frazzini, Amy Ruiz, BRO, and their involvement with Frazzini, Ruiz, and BRO, as reflected in the attachments to Exhibit X94. Despite that deposition testimony, there is no evidence that Respondents attempted to follow up on the collusion that Respondents now alleges existed between these individuals, Complainants, BRO, and BOLI. Further, Respondents could have questioned Complainants about Cryer's testimony in their case-in-chief, but did not do so. These opportunities were both circumstances that were under Respondents' control. Likewise, Respondents have not shown a superseding or intervening event that prevented them from pursuing further discovery before the hearing based on Complainants' deposition testimony or that they were misled by facts or circumstances that would mislead a reasonable person under similar circumstances. Accordingly, Respondents have not established good cause to support their argument that Complainants' deposition testimony, coupled with Aaron Cryer's hearing testimony and the Harkness records, constitute grounds for reopening the contested case record to pursue the additional discovery that Respondents seek in this motion.

C. Aaron Cryer's Testimony

"Respondents' proffered characterization of Cryer's quoted testimony as '*directly* implicat[ing] BOLI and Complainants in using this case against Respondents for a political agenda rather than a good faith claim for recovery of damages to Complainants' is simply inaccurate. As noted above, Respondents were aware of communications between Complainants, BRO, BOLI, Frazzini, and Ruiz before the hearing, but elected not to pursue the defense they now assert by requesting additional discovery or by calling Complainants as witnesses in their case in chief to explore the alleged political agenda. This was a choice made by Respondents' legal team, not a circumstance beyond Respondents' control, and Respondents have not shown any superseding or intervening event that prevented them seeking additional discovery or that they were misled by facts or circumstances that would mislead a reasonable person

under similar circumstances. Accordingly, Cryer's testimony that Respondents rely on is not good cause within the meaning of OAR 839-050-0410 and OAR 839-050-0020(16).

D. The Additional Evidence Sought by Respondents is Unnecessary to Fully and Fairly Adjudicate This Case

"Notwithstanding the lack of 'good cause,' the forum also concludes that additional evidence on the issues raised in Respondent's motion is unnecessary to fully and fairly adjudicate this case, as the forum has fully and carefully considered and ruled on these matters, which are incorporated herein and made a part hereof by this reference. *See* Ex. X12 (ALJ's July 2, 2014, Interim Order entitled *Ruling on Respondents' Election to Remove Cases to Circuit Court and Alternative Motion to Disqualify BOLI Commissioner Brad Avakian*).[65]

"Furthermore, since these prior rulings the Oregon Court of Appeals issued an opinion in *Columbia Riverkeeper* v. Clatsop County, 267 Or App 578, 341 P3d 790 (2014) that supports those rulings. Respondents' earlier motions sought to disqualify Commissioner Avakian due to 'actual bias.' In *Columbia,* Huhtala, a Clatsop County Commissioner, ran for election on the platform of not allowing a LNG business to be established in Astoria, then voted to deny in a land use decision that denied a pipeline company's application to build an LNG pipeline originating in Astoria. Prior to his election, Huhtala had made many public statements opposing construction of an LNG pipeline. In reversing the Land Use Board of Appeals' (LUBA) decision that Huhtala's bias had deprived the pipeline company of an impartial tribunal, the court stated:

> 'All told, no single case in Oregon establishes what is necessary for a party to prove actual bias by an elected official in quasi-judicial land-use proceedings such as this one. Generally, we can glean the following. The bar for disqualification is high; no published case has concluded that disqualification was required in quasi-judicial land-use proceedings. An elected local official's 'intense involvement in the affairs of the community' or 'political predisposition' is not grounds for disqualification. Involvement with other governmental organizations that may have an interest in the decision does not require disqualification. An elected local official is not expected to have no appearance of having views on matters of community

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[65] *Cf. In the Matter of Mountain Forestry, Inc.*, 29 BOLI 11, 48-50 (2007), *affirmed without opinion, Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009)(when respondents moved to reopen the record to admit a federal audit that purportedly showed the prevalence of records discrepancies throughout the firefighting industry and that the Oregon Department of Forestry did not have specific training requirements prior to 2003, and that purportedly negated certain inferences drawn from witness testimony, the forum found that, notwithstanding respondents' failure to submit an affidavit showing they had no knowledge of the audit prior to its release in March 2006, the audit did not contain any information relevant to the issues in the case or that mitigated respondents' violations and therefore the additional evidence was not necessary to fully and fairly adjudicate the case).

> interest when a decision on the matter is to be made by an adjudicatory procedure.
>
> 'In addition to those general observations, there are three salient principles from the case law that define and drive our analysis in this case. *First,* the scope of the "matter" and "question at issue" is narrowly limited to the specific decision that is before the tribunal. *Second,* because of the nature of elected local officials making decisions in quasi-judicial proceedings, the bias must be actual, not merely apparent. And *third,* the substantive standard for actual bias is that the decision maker has so prejudged the particular matter as to be incapable of determining its merits on the basis of the evidence and arguments presented.'

Columbia Riverkeeper at 602-03.

"Under this standard, none of the "evidence" that Respondents have proffered previously or in support of their Motion to Reopen the Contested Case Record is probative to show "actual bias" on Commissioner Avakian's part. Therefore, notwithstanding the lack of "good cause" shown for not providing the proffered "evidence" before the record closed, the Motion is denied on the merits.

E. Conclusion

"Respondents' motion to Reopen the Contested Case Record is **DENIED**."

43) On April 24, 2015, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency and Respondents both timely filed exceptions.

44) Respondents' exceptions are **DENIED** in their entirety as lacking merit. The Agency's exceptions as to the alleged violations of ORS 659A.409 are **GRANTED**. Otherwise, the Agency's exceptions are **DENIED**.

JUDICIAL REVIEW NOTICE

Pursuant to ORS 183.482, you are entitled to judicial review of this Final Order. To obtain judicial review, you must file a Petition for Judicial Review with the Court of Appeals in Salem, Oregon, within **sixty (60)** days of the service of this Order.

If you file a Petition for Judicial Review, *YOU MUST ALSO SERVE A COPY OF THE PETITION ON the* **BUREAU OF LABOR AND INDUSTRIES** *and* ***THE DEPARTMENT OF JUSTICE - APPELLATE DIVISION***

AT THE FOLLOWING ADDRESSES:

BUREAU OF LABOR AND INDUSTRIES
CONTESTED CASE COORDINATOR
1045 STATE OFFICE BUILDING
800 NE OREGON STREET
PORTLAND, OREGON 97232-2180

DEPARTMENT OF JUSTICE
APPELLATE DIVISION
1162 COURT STREET NE
SALEM, OREGON 97301-4096

If you file a Petition for Judicial Review and if you wish to stay the enforcement of this final order pending judicial review, **you must file a request with the Bureau of Labor and Industries**, at the address above. Your request must contain the information described in ORS 183.482(3) and OAR 137-003-0090 to OAR 137-003-0092.

CERTIFIED TO BE A TRUE AND CORRECT COPY OF THE ORIGINAL AND OF A WHOLE THEREOF.

Diane M. Brickner

FO-CRD/*Sweetcakes, ##44-14 & 45-14.doc*

BEFORE THE COMMISSIONER
OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I SERVED A COPY OF THE ATTACHED

FINAL ORDER

In the Matter of

MELISSA ELAINE KLEIN, DBA SWEETCAKES BY MELISSA, AND AARON WAYNE KLEIN, INDIVIDUALLY

Case #44-14 & 45-14

BY HAND DELIVERING OR PLACING IT IN INTERNAL STATE MAIL SERVICES TO EACH PERSON AT THE ADDRESS LISTED BELOW:

Jenn Gaddis, Chief Prosecutor Bureau of Labor and Industries 1045 State Office Building 800 NE Oregon Street Portland, OR 97232	Amy Klare, Civil Rights Division Administrator Bureau of Labor and Industries 1045 State Office Building 800 NE Oregon Street Portland, OR 97232	Johanna Riemenschneider Sr. Assistant Attorney General Oregon Department of Justice 1162 Court St NE Salem, OR 97301-4096 via Regular Mail

AND BY PREPARING AND PLACING IT IN THE OUTGOING BUREAU OF LABOR AND INDUSTRIES MAIL TO EACH PERSON OR ENTITY AT THE ADDRESSES LISTED BELOW:

Rachel Bowman-Cryer via Regular Mail	Paul Thompson, Attorney at Law Thompson Law, LLC 1207 SW 6th Ave. Portland, OR 97204 via Regular Mail	Aaron Wayne Klein via Regular Mail
Laurel Bowman-Cryer via Regular Mail-	Herbert Grey Attorney at Law 4800 SW Griffith Dr, #320 Beaverton, OR 97005 via Regular Mail	Melissa Elaine Klein via Regular Mail
	Tyler D Smith and Anna Harmon, Attorneys at Law 181 N. Grant Street, Suite 212 Canby OR 97013 via Regular Mail	

On Thursday, July 2, 2015

Diane M. Anicker

Diane M. Anicker, Contested Case Coordinator, Bureau of Labor and Industries

EXCERPT OF RECORD

EXHIBIT C

BEFORE THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON

In the Matter of: Oregon Bureau of Labor and Industries on behalf of RACHEL CRYER, Complainant, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 44-14 RESPONDENTS' EXCEPTIONS TO PROPOSED FINAL ORDER
In the Matter of: Oregon Bureau of Labor and Industries on behalf of LAUREL BOWMAN CRYER, Complainant, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 45-14 RESPONDENTS' EXCEPTIONS TO PROPOSED FINAL ORDER

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Attorney At Law
4800 SW Griffith Drive, Suite 320
Beaverton, OR 97005-8716
(503) 641-4908

ITEM 13

01923

Pursuant to OAR 839-050-0380, Respondents MELISSA KLEIN and AARON KLEIN dba SWEET CAKES BY MELISSA file the following exceptions to ALJ Alan McCullough's April 24, 2015 Proposed Final Order (hereinafter PFO). Respondents further rely upon and incorporate their prior briefing on summary judgment and their multiple motions to disqualify the Commissioner for bias and discovery motions.

EXCEPTIONS: SYNOPSIS

Respondents concur in the summary of the dates and location of the contested case hearing and description of the representation of the participants and the witnesses who testified (PFO, pp. 1-2).

Respondents concur in the description of evidence offered and received, except Agency Exhibits A24, A26 and A30 were submitted under an offer of proof. Ex. A30 was properly not received, and Respondents now except to post-hearing admission of Exhibits A24 and A26 (*See* PFO, p. 75, ¶ 38) as "relevant to show the impact that the media exposure spawned by this case had on Complainants" when the ALJ properly found no legal basis for awarding Complainants' emotional distress damages on the basis of media and social media exposure. PFO, p. 108.

SPECIFIC EXCEPTIONS: PROPOSED FINDINGS OF FACT – PROCEDURAL

Respondents except to the Proposed Findings of Fact – Procedural as follows:

Respondents except to the language in the PFO, p. 3, ¶ 1 that "RBC's complaint was subsequently amended to name both Kleins as aiders and abettors under ORS 659A.406 (Ex. A-27)" and the comparable language in the PFO, p. 3, ¶ 2 that "LBC's complaint was subsequently amended to name AK and MK as aiders and abettors under ORS 659A.406 (Ex. A-28)" because

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the record demonstrates Aaron Klein alone was named as an aider and abettor in the various iterations of the Formal Charges. *See* Exs. X2a, X4a, X38, X78.

Respondents further except to interim orders denying Respondents' motion to disqualify Commissioner Brad Avakian (Ex. X8) on grounds of documented bias in the record (Ex. X12; Exs. R2, pp. 3, 9; R24; R34 recited in PFO, pp. 8-16), as well as denial of Respondents' motion to keep the record open and reopen discovery to explore BOLI witness Aaron Cryer's testimony of collusion (Ex. X94 recited in PFO, p. 76), all of which have denied Respondents due process and resulted an unredeemable unfair hearing process in violation of ORS 183.482(7).

Respondents further except to interim orders limiting and/or denying Respondents' multiple discovery motions (Exs. X41, X42, X66, X72) and multiple discovery sanctions motions (Exs. X83, X86, X91). PFO, pp. 16-27.

Finally, Respondents except to prehearing decisions on summary judgment and denial of Respondents' motion for reconsideration on summary judgment (X26, X37, X65, X75, X80). PFO, pp. 27-75. The arguments concerning each follow below.

BIAS: Respondents have been denied a fair hearing and due process by wrongful denial of their motion to disqualify Commissioner Brad Avakian for documented bias and denial of the opportunity to obtain and present additional evidence of bias adduced at hearing in violation of ORS 183.482(7).

Respondents have been denied due process under ORS 183.482(7) based on: a) denial of their multiple motions to disqualify the Commissioner on grounds of bias in the face of undisputed evidence of bias, as noted above; and (b) failure to grant Respondents' motion to keep the record open to allow them to inquire into hitherto undisclosed evidence from a BOLI witness at hearing describing collusion between BOLI, Basic Rights Oregon and/or complainants

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in the bringing and handling of these cases. *See* Respondents' Motion to Reopen Contested Case Record dated May 29, 2015.

The ALJ erred in denying Respondents' June 18, 2014 motion to disqualify BOLI Commissioner Brad Avakian (Ex. X8, referenced in PFO, p. 5, ¶ 5 and PFO, p. 7 ¶ 8), and quoting Ex. X12 at length (PFO, pp. 8-16). The exhibits in the record make painfully clear the nature and the extent of the Commissioner's public advocacy, including about the instant case, adopting positions adverse to that of Respondents herein. *See* Ex. X8, X94; Exs. R2, pp. 3, 9; R24, R34. Moreover, as set forth in Respondents' contemporaneous Motion to Reopen Contested Case Record, substantial evidence exists to demonstrate probable collusion between Complainants, advocacy organizations active in their opposition to Respondents in this case, and a variety of BOLI personnel, including likely the Commissioner himself.

The nature and extent of the unfair prejudice is even more egregious considering BOLI's exercise of executive, legislative and judicial power in violation of the Oregon Constitution. *Infra*, pp. 19-22.

DISCOVERY/DISCOVERY SANCTIONS. Respondents have been denied a fair hearing and due process by wrongful denial of their motions to obtain discovery and enforce discovery violations in violation of ORS 183.482(7).

The ALJ erred in denying Respondents' discovery motions (*See* PFO, pp. 16 ¶¶ 11, 12; pp. 17-18 ¶17; pp. 23-24 ¶18; pp. 24-26 ¶¶19, 20) in one or more of the following particulars:

1. In Ex. X21, Interrogatory No. 8, Respondents requested an order requiring the Agency to provide a detailed explanation of the nature of the mental harm Complainant and the Agency alleged. The ALJ determined, based on the Agency's stipulation, that "emotional and mental suffering are the same" and therefore denied Respondents' request for an Order based on

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the fact that Complainants had already provided a response to Respondents' interrogatory regarding emotional harm. Ex. X41. The ALJ erred insofar as the proposed award amount includes an award for "*emotional and mental physical* suffering", particularly since there is no corroborated evidence of *physical* suffering. *See* PFO, p. 110 ¶1(emphasis added).

2. In Ex. X21, Requests No. 17 and 18, Respondents requested any receipt, invoice, contract or other writing memorializing the purchase of a wedding cake by Complainants for CM's wedding as well as photos, videos, or other records of that cake. The ALJ denied the request stating that it was not likely to produce information generally relevant to the case. Ex. X41. The ALJ erred to the extent that the Complainants testified at trial regarding the importance of the cake Respondents made for CM's wedding (Tr. 30, 32-33, 65), and the ALJ included reference to that testimony in the Proposed Final Order. *See* PFO, p. 78 ¶ 6-7; 97.

3. In Ex. X21, Request No. 10, Respondents requested an order requiring the Agency and Complainants to provide any photos, videos, or audio recording of the Complainants' wedding ceremony. The ALJ denied the motion stating that the requested items were irrelevant. Ex. X41. However, during the hearing Complainants went into great detail about the "big grand wedding" they wanted as well as a particular "handfasting" ceremony at the event. Tr. 28, 103, 271-272, 333-334, 526. The ALJ referenced this testimony in the Proposed Final Order as a basis for damages. *See* PFO, pp. 77-78 ¶5; p. 75 ¶39; p. 90 ¶40.

4. In Ex. X21, Requests for Admission 4 and 9, Respondents asked the ALJ to order the Agency to admit or deny that same-sex marriage was not recognized by the State of Oregon on January 17, 2013 and to admit or deny that Complainants were not issued a marriage license by the state of Oregon between January 17, 2013 and May 18, 2014. The ALJ denied

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Respondents' request stating that the Agency's awareness of the Oregon law regarding same-sex marriage is irrelevant. Ex. X41. Nevertheless, the ALJ included in his findings on the merits in the PFO that "Complainants considered themselves to be married even though they could not be legally married in the state of Oregon at the time." *See* PFO, pp. 90 ¶40; 97, fn 53.

The ALJ erred in limiting the depositions of complainants RBC and LBC (*See* Exs. X42, X62, X66, X72) and not allowing Respondents to depose witness CM (*See* Exs. X20, X42; PFO, pp. 70-71 ¶ 30). In particular, Respondents moved to depose CM (Ex. X20) on the basis that "multiple parties to the same conversations recall substantially different events, and subtle difference in retelling will substantially affect a credibility determination that the ALJ must make." The ALJ denied Respondents' request for deposition. Ex. X42. The ALJ erred in that Interim Order because CM proved herself to be incredible at the hearing, and even the ALJ found that she "exaggerated" and only credited part of her testimony. PFO, p. 93. Respondents were substantially prejudiced by not having had the opportunity to question CM before the hearing.

The ALJ erred at PFO, pp. 71-75, ¶ 35 and Ex. X91 in denying Respondents February 26, 2015 Motion for Discovery Sanctions (Ex. X83), as supplemented by motion dated March 3, 2015 (Ex. X86) insofar as the ALJ denied Respondents' requests without *any* meaningful sanction for Complainants' or BOLI's misconduct:

1. That the ALJ dismiss the Agency's Second Amended Formal Charges;

2. That the ALJ reopen discovery to allow for depositions of Complainants and other BOLI witnesses with knowledge of the matters in the withheld documents;

3. That the cases be dismissed;

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4. That the Agency's request for damages for dismissed;

5. That the Agency or Complainants be required to pay Respondents' costs for filing the Motion for Sanctions.

The ALJ erred in orally denying Respondents' Motion to Dismiss or Reopen Discovery and Keep Record Open (Ex. X94; Tr. 673) in light of BOLI witness Aaron Cryer's March 13, 2015 testimony about "possible undisclosed collusion among Complainants, Basic Rights Oregon and/or the Agency" (PFO, p. 76, ¶ 40). *See also* Tr. 637-638, 643; Respondents' contemporaneous Motion to Reopen Contested Case Record dated May 29, 2015.

SUMMARY JUDGMENT: Denial of Respondents' motions for summary judgment (and reconsiderations thereof) and wrongful granting of BOLI's motions for summary judgment is based upon factual errors or ignoring undisputed evidence contrary to ORS 183.482(8)(c), and it is based on application of clearly erroneous conclusions of law in violation of ORS 183.482(8)(b).

The ALJ erred at PFO pp. 66-67 in denying Respondents' original Motion for Summary Judgment (Ex. X26), Re-Filed Motion for Summary Judgment (Ex. X53) and granting the Agency's Cross-Motion for Summary Judgment (Ex. X54) in one or more of the following particulars described in its order dated January 29, 2015 (Ex. X65): a) the summary judgment rulings are based on factual errors, ignoring undisputed evidence and findings later disproved by uncontroverted evidence adduced at hearing that actually confirmed Respondents' position throughout the record, and thus cannot be based upon substantial evidence; and b) they are based on clearly erroneous conclusions of law. Additionally, the ALJ compounded his error by denying Respondents' Motion for Reconsideration on Summary Judgment (*See* Exs. X73, X75), which, when evaluated in hindsight with the benefit of evidence later developed at hearing, now

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confirms summary judgment against Respondents was improvidently granted for the very reasons previously set forth in Respondents' Motion for Reconsideration. Ex. X73.

Put simply, the ALJ's interim orders and PFO reflect a fundamental lack of background in constitutional law, rejecting controlling precedent on specious grounds and relying instead on inapposite authority. Specifically, the PFO (and the interim orders it incorporates, Exs. X65 and X75) wrongly: a) rejects *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 US 557 (1995) for an public event/private event distinction that doesn't exist (PFO, p. 65); b) wrongly rejects *Burwell v. Hobby Lobby*, 573 US ___ (June 30, 2014) and *Burwell v. Conestoga Wood Specialties*, 573 US ___(June 30, 2014)) on the fallacious grounds the federal Religious Freedom Restoration Act (RFRA), 42 USC §2000bb *et seq.* is a sub-constitutional statute when it actually restores former U.S. Supreme Court strict scrutiny analysis under *Sherbert v. Verner*, 374 US 398 (1963)(PFO, p. 52); and c) wrongly relies on *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 US 47 (2006) and authorities cited therein to reject Respondents' compelled speech arguments when it is an equal access case rather than a compelled speech case. PFO, pp. 65-66. *See also* Exs. X53, pp. 13, 17-18, 26-27, 37-38; X61, p. 26; X73, pp. 7-9.

a) **The undisputed evidence at hearing demonstrates that Respondents were aware of Complainants' sexual orientation at the time they previously provided services to them in 2012 and did not deny services on the basis of sexual orientation**.

There can be no question that an erroneous prehearing ruling on summary judgment on the issue of liability that is contrary to all of the undisputed evidence in the record predetermines an improper and unfair award of damages in favor of complainants and warrants reversal. The ALJ erroneously ruled as follows:

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> Respondents' first argument fails for the reason that there is no evidence in the record that A. Klein, the person who refused to make a cake for Complainants while acting on Sweetcakes' behalf, had any knowledge of Complainants' sexual orientation in November 2010 when Cryer purchased a cake for her mother's wedding. Even if A. Klein was aware of Cryer's sexual orientation in November 2010, not discriminating on one occasion does not inevitably lead to the conclusion that A. Klein did not discriminate on a subsequent occasion.

PFO, pp. 37-38, incorporating Ex. X65, p. 14. *See also* Ex. X75, 3.

In this instance, the undisputed evidence – ignored or avoided by the ALJ- is that Respondents were in fact aware of complainants' sexual orientation in 2012 and served them anyway. *See* Respondents' Motion for Reconsideration (Ex. X73), pp. 2-3 and attached AK Supp. Decl., ¶ 1. In fact, the record is undisputed that Respondents "do, have, and would design cakes for any person irrespective of that person's sexual orientation as long as the design requested does not require us to promote, encourage, support, or participate in an event or activity which violates our religious beliefs and practices." Ex. X73, AK Decl., ¶ 7. Complainants, Cheryl McPherson and both Respondents all testified the Kleins knew of complainants' sexual orientation in 2012 and served them anyway. Tr. 30-33, 294, 756-757. It is undisputed that complainants were the purchasers of the cake for Cheryl McPherson's wedding. Ex. X73, p. 2. Tr. 33, 334-335, 756-757.

The ALJ on summary judgment not only wrongly rejected that undisputed evidence, reinforced by witness testimony at hearing, but also misapplied his erroneous findings to reach the erroneous legal conclusion a prior denial or prior service was not relevant to determining the ultimate fact of whether sexual orientation discrimination occurred on January 17, 2013. PFO, pp. 37-39. *See also* Exs. X65, p. 14; X75, p. 3. While the prior services are not per se proof of *lack* of discriminatory intent, neither are they proof *as a matter of law* of the *existence* of

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discriminatory intent against Respondents, especially in the face of *uncontradicted evidence to the contrary.*

Additionally, the ALJ wrongly ruled that complainants' ceremony was "inextricably linked" to their sexual orientation, rendering Respondents' refusal to make a cake synonymous with sexual orientation discrimination, relying in part on *Elane Photography v. Willock*, 309 P3d 53 (2013). PFO, p. 39, incorporating Ex. X65, pp. 15-16. As long as the ALJ considered legal authority from other states besides Oregon, it bears noting that the appeal of an administrative decision in Kentucky resulted in the opposite conclusion to that reached in *Elane*. *See Hands On Originals v. Urban County Human Rights Commission*, Fayette Circuit Court Case No. 14-CI-04474 (April 27, 2015).

b) **Undisputed evidence at hearing from requires reversal of the ALJ's summary judgment ruling that Respondents' design and creation of a cake compelled their participation in complainants' same-sex ceremony**.

Similarly, the undisputed evidence at hearing refutes the ALJ's summary judgment decision and demonstrates design and creation of a cake would have impermissibly compelled Respondents' participation in complainants' ceremony against their sincerely-held convictions.

At hearing BOLI witness Laura Widener confirmed what Respondents had been saying all along: designing and creating a wedding cake is an integral part of a wedding process that requires their active participation in the ceremony itself. She testified, in relevant part:

1. The bride's dress and the cake are the two most important elements of a wedding ceremony that people come to see (Tr. 594-595);

2. She felt "proud to be a part of the celebration", and her cake was a part as well (Tr. 594-595);

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3. The cake is "artistic expression" for the public to see (Tr. 594), her "artwork enhanced the celebration", and she "felt bonded with Complainants because of her ability to create something for them" (Tr. 588).

Such testimony is consistent with the declarations of Aaron Klein and Melissa Klein on summary judgment (*See* Ex. X53), as well as Melissa Klein's testimony at hearing. Tr. 755. The testimony of Laura Widener and Melissa Klein is also the only evidence in the hearing record concerning Respondents' defense based on compelled speech. *See* Ex. X82, pp. 5-7, ¶¶ 22, 24, 26, 29 .

Moreover, after making factual findings contrary to the record, the ALJ further made a number of erroneous conclusions of law. He wrongly tried to distinguish between religious practices protected by both Oregon and U.S. Constitutions and "conduct motivated by their religious beliefs." PFO, p. 51. Ex. X65, p. 31, fn 23. *See also* Ex. X73, pp. 4-5.

The ALJ was wrong to reject the holding of *Meltebeke v. BOLI*, 322 Or 132 (1995), which prohibits the state from imposing a civil penalty against a person for acting in accordance with his religious practices unless the state proves that his conduct would cause an effect forbidden by law. PFO, p. 51, quoting Ex. X65, p. 31. *See also* Ex. X73, p. 4; Ex. X75. As noted in Respondents' Motion for Reconsideration, Aaron Klein stated explicitly in his declaration that he "did not know and [he] never imagined that the practice of abstaining from participating in events which are prohibited by his religion could possibly be a violation of Oregon Law. Ex. X53, Decl. of A. Klein ¶ 8. Ex. X73, p. 4. He also said "I believed that I was acting within the bounds of the Oregon Constitution and the laws of the state of Oregon which, at that time, explicitly defined marriage as the union of one man and one woman and prohibited recognition

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of any other type of union as marriage." *Id.* BOLI cannot controvert, and the ALJ may not hold otherwise, that Article XV, §5a was the controlling law in Oregon on January 17, 2013, and Aaron Klein was entitled to rely upon that. *See also* PFO, p. 62 incorporating Ex. X65, p. 24 (acknowledging "the Oregon Constitution did not recognize same sex marriage in January 2013...")

The ALJ committed an additional error of law in relying on *State v. Beagley*, 257 Or App 220 (2013) as authority for a distinction between "religious practice" and "conduct motivated by religious belief." PFO, p. 51 incorporating Ex. X65, p. 31, fn 23. *See also* Ex. X73, pp. 4-5. Under *State v. Beagley*, 257 Or App at 226, the factual record must establish "clearly and unambiguously" that the Kleins' choice not to provide services was not a religious practice when the undisputed facts show it was:

> We practice our religious faith through our business and make no distinction when we are working and when we are not...the Bible forbids us from proclaiming messages or participating in activities contrary to Biblical principles, including celebrations or ceremonies for uniting same-sex couples."

Ex. X53, A. Klein Decl. ¶ 2, quoted in Ex. X73, pp. 5-6. The ALJ, BOLI prosecutors and complainants may disagree with that position, but they have presented nothing other than their opinions to controvert it. Accordingly, summary judgment is wrong as a matter of law.

Even putting aside the Oregon Court of Appeals' confusion over this distinction (*State v. Beagley*, 257 Or App at 226), it is not the province of the ALJ or the Commissioner to determine what is Respondents' religious practice; they have no jurisdiction to decide those questions, and the ALJ was wrong as a matter of law to rule otherwise. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S.Ct. 694, 705. *Corporation of Presiding Bishops v. Amos*, 482

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US 327, 336 (1987). PFO, p. 53 incorporating Ex. X65, p. 33. *See also* Ex. X73, p. 6. At a minimum, whether Respondents' action was a religious practice or conduct motivated by religious belief is a question of fact that bars summary judgment.

c) **Undisputed evidence at hearing requires reversal of the ALJ's summary judgment ruling against Respondents in that design and creation of a cake is artistic expression entitled to protection under the United States and Oregon Constitutions, and Respondents cannot be compelled to produce such artistic expression against their sincerely-held beliefs.**

As noted above, the undisputed evidence on summary judgment and through witness testimony presented by both BOLI and Respondents at hearing refutes the ALJ's summary judgment decision and conclusively establishes that design and creation of a cake is artistic expression entitled to protection under the United States and Oregon Constitutions, whereby Respondents could not be compelled to produce such artistic expression against their sincerely-held beliefs. Beyond the factual error, the ALJ made decisions that were clearly erroneous as a matter of law and render summary judgment against Respondents improper.

Once the factual record establishes that design and creation of a cake is artistic expression, such expression is presumptively entitled to constitutional protection. Once again, the ALJ's decision rejecting constitutional protection of expression because "ORS 659A.403 does not require Respondents to recite or display any message" (*See* PFO, pp. 65-66 incorporating Ex. X 65, p. 49; *See also* Ex. X73, pp. 7-9) is clearly erroneous, warranting reversal on summary judgment- especially since the ALJ's ruling, and the faulty reasoning upon which it is based, have already been rejected by the U.S. Supreme Court in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 US 557 (1995). The Supreme Court could not have been more clear:

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> While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech *for no better reason than promoting an approved message or discouraging a disfavored one*, however enlightened either purpose may strike the government.

Hurley, 515 US at 579. Ex. X73, p. 9 (emphasis added).

The ALJ incorrectly ruled that "*whether or not making a wedding cake may be expressive*, the operation of Respondents' bakery, including Respondents' decision not to offer services to a protected class of persons, is not." PFO, p. 65. *See also* Ex. X65, p. 49; *Supra*, pp. 10-11. Not only is that a flawed reading of *Hurley*, but it is contrary to the undisputed evidence in the record. The Supreme Court in *Hurley* even addressed the ALJ's false distinction:

> ...although the state courts spoke of the parade as a place of public accommodation, once the expressive character of both the parade and the marching LGBT contingent is understood, it becomes apparent that *the state courts' application of the statute had the effect of declaring the sponsor's speech itself to be the public accommodation.*

Hurley, 515 US at 573 (emphasis added). The U.S. Supreme Court did not conflate the place with the expression, and neither can ALJ McCullough.

Inexplicably, the ALJ also ruled *Hurley* was not controlling authority on the issue of compelled speech because Complainants' wedding was a private event rather than a public parade. PFO, p. 65. Ex. X65, p. 49. Ex. X75. If designing and creating a cake is artistic expression (*Supra*, pp. 10-11), then such expression is constitutionally protected from government coercion whether it is displayed to one person or millions of people. To find otherwise would be to argue privately-commissioned art or music cannot be protected expression if intended solely for the private enjoyment of the patron.

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d) Evidence allowed at hearing over Respondents' objection regarding the "handfasting cord" was improperly allowed unless the ALJ's summary judgment ruling disregarding Oregon Constitution, Article XV §5a as relevant state policy prohibiting validity or recognition of same sex marriage was improvidently granted.

Finally, the ALJ further erred in admitting LBC's testimony (Tr. 333) regarding the "'handfasting cord' used in LBC's and RBC's commitment ceremony" as "*relevant* to show the extent of Complainants' commitment to their relationship." PFO, p. 75, ¶ 39. Tr. 333, 526. How the ALJ can expressly acknowledge Respondents' argument "same-sex marriage was not yet permitted in the state of Oregon" (PFO p. 75, fn 44) *after rejecting such evidence as irrelevant in Respondents' motion for summary judgment* (PFO, pp. 62, 90. *See also* Exs. X26; X53; X65, p. 24; Ex. X75), then allow evidence of Complainants' commitment to each other, defies understanding. The desires and motivations of Complainants concerning their relationship and marriage, or their interest in a cake from Sweet Cakes by Melissa (PFO, pp. 96-97, ¶ 1(A)(a); 100, ¶ 1(B)(a)) are in fact irrelevant when the declared constitutional policy of the state of Oregon on January 17, 2013 was that marriage was valid and recognized only between one man and one woman under Oregon Constitution, Article XV § 5a.

In other words, the ALJ was wrong about the "irrelevance" of official state policy as expressed in Oregon Constitution, Article XV §5a on summary judgment, and he was wrong about the relevance of the "handfasting cord."

SPECIFIC EXCEPTIONS: PROPOSED FINDINGS OF FACT – MERITS

Respondents except to the Proposed Findings of Fact – Merits as follows:

It is not evident the ALJ gave sufficient– or any- weight to the impact of Complainants' involvement "in a bitter and emotional custody battle for the [foster] children with the children's

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great-grandparents that continued until sometime after December 2013" (PFO, p. 77, ¶ 4) in his determination of damages. Respondents cannot be responsible for emotional distress arising from Complainants' unrelated family conflict, and in fact damages should be reduced to exclude such emotional distress as it appears in the record.

The ALJ also erred in his finding about the interactions of Respondent MK, RBC and CP at the Portland Bridal Show "[*s*]*ometime* between October 2012 and January 17, 2013" (PFO, p. 78, ¶ 6) when the undisputed record shows the bridal show interactions occurred on January 13, 2013, four days before the cake tasting that led to this litigation. Exs. R 22; Tr. 295.

The ALJ's correct and undisputed finding "Two years earlier, Sweetcakes had designed, created, and decorated a wedding cake for CM and RBC that RBC really liked" (PFO, p.78, ¶6) is inconsistent with its improper rejection of the same evidence proferred by Respondents on summary judgment as irrelevant to show proof of *lack* of discrimination based on sexual orientation. PFO, pp. 37-38; Ex. X65, p. 14. It is further inconsistent with undisputed facts in the record showing the earlier wedding cake was *for* CM and was *ordered and paid for by* RBC and LBC. Ex. X65, p. 5; X73, p. 2. Tr. 33, 334-335, 756-757. *See also* PFO pp. 31, ¶ 5; 78, ¶ 7; 81, ¶ 19). Evidence of prior dealings between the parties are in fact probative of a lack of discrimination and should be considered as material facts.

The ALJ further erred in determining "the forum need not resolve the contradiction between AK's affidavit and CM's testimony" (PFO p. 79, fn 48) because that contradiction is a material error in evaluating CM's lack of credibility as a witness, and because *CM*'s later *mischaracterization* of AK's statement to RBC in the car and to LBC at home later on January

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17, 2013 was relied upon by the ALJ in awarding damages to RBC. PFO, pp. 79-80, ¶¶ 10, 13; *See also* PFO, p. 93, ¶ 51.

The ALJ erred when it "credited RBC's testimony about her emotional suffering in its entirety" (PFO, p. 94, ¶ 53) when the record shows many reasons why that is unreasonable. The ALJ made no effort to reconcile evidence that RBC "spent much of that evening in bed" while Complainants' oldest foster daughter was "banging her head on the floor" for reasons unrelated to the case. *See* PFO, pp. 80-81, ¶¶ 15-16; Tr. 481. *See also* PFO p. 101 ("...the older of Complainants' foster daughters was extremely agitated from events at school that day"). It is incomprehensible that a parent would not respond to a child under such circumstances, and testimony suggesting otherwise is suspect at best. Such evidence also contradicts evidence that RBC may not have "spent much of that evening in bed" because of talking with her brother Aaron Cryer (PFO, p. 83, ¶ 21) and perhaps being the author of the email identified as Ex. R32 (Tr. 436-437, 489-490). In short, the ALJ should have perceived greater issues with RBC's inability to tell the truth than he apparently did.

Additionally, the ALJ failed to note or consider RBC's role in concealing the existence of Ex. R32: an email dated January 17, 2013 apparently willfully concealed by Complainants until March 6, 2015, four days prior to hearing. *See* Ex. X86. After Complainants claimed during depositions and discovery all their emails except Ex. R5 had been deleted (Tr. 108-109, 121), Ex. R32 for the first time disclosed another prior incident of apparent denial of services. PFO, pp. 81-82, ¶ 19 ("This is *twice* in this wedding process that we have faced this kind of bigotry"). Tr. 117-119. The ALJ erroneously denied Respondents' Motion for Sanctions for that willful concealment dated March 17, 2015 (Ex. X91) and further failed to consider the other previously-

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undisclosed denial of services to make an appropriate reduction in its award of damages, thereby erroneously attributing liability for damages from the other incident to Respondents. *See* PFO, p. 97 reciting "RBC's emotional suffering *began* at the January 17, 2013 cake tasting..." (emphasis added).

Similarly, the ALJ was more than charitable in minimizing LBC's credibility issues in the face of multiple examples of inconsistencies. PFO, pp. 94-95, ¶ 54. He failed to mention LBC's attempts to justify inconsistencies in her testimony on the record by saying she was testifying "metaphorically." Tr. 480, 505. As noted below (*Infra*, p. 25), she presented no expert or other corroborating evidence to support her entitlement to damages – fatal as a matter of law to her damages claim where the record justifies the ALJ himself calling her credibility into question.

In the same way, ALJ McCullough erred in finding "This public records disclaimer was not visible on LBC's smartphone view of DOJ's form" (PFO p. 83, ¶ 20) when the ALJ himself noted the evidence he relied on contained that public records disclaimer:

> *The record lacks substantial evidence to establish what the digital format for the complaint form looked like*, but Ex. R3 is a hard copy of the complaint that Respondents received. *The forum relies on that copy in describing the contents and format of the complaint.*"

PFO, p. 82, fn 50 (emphasis added).

The ALJ erred in failing to recite or consider uncontradicted evidence by BOLI witness Aaron Cryer that he and his sister RBC were "not as close 'for a little bit' after January 17, 2013" (PFO, p. 84, ¶ 23) because of a disagreement about how best to use the case for political advantage. Tr. 637-638, 643. *See also* Respondents' Motion to Reopen Contested Case Record dated May 29, 2015.

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The ALJ erred in failing to recite or consider at PFO p. 85, ¶ 26 uncontradicted evidence by BOLI witness Laura Widener and Respondent MK that the design and creation of a wedding cake is "artistic expression" protected by the First Amendment and required "participation" in the wedding itself, which undisputed evidence was contrary to the ALJ's ruling on that issue on summary judgment. *Supra*, pp. 10-11. Ex. X65, pp. 44-49.

SPECIFIC EXCEPTIONS: PROPOSED CONCLUSIONS OF LAW

As noted above (*Supra*, pp. 8-10), the determination that AK denied Complainants the full and equal accommodations, advantages, facilities and privileges based on their sexual orientation in violation of ORS 659A.403 is clearly erroneous and not based on substantial evidence. PFO, p. 95, ¶ 5. Respondents have consistently argued their decision was based on not designing and creating a cake requiring their participation in a same-sex commitment ceremony rather than Complainants' sexual orientation. *Supra*, pp. 8-9. Moreover, as noted herein, Respondents had served Complainants previously without regard to their sexual orientation, even though they knew from their conduct and demeanor they were lesbians. *Id.*

The ruling that Complainants suffered emotional and mental suffering as a result of AK's alleged violation of ORS 659A.403 is clearly erroneous and not based on substantial evidence. PFO, p. 95, ¶ 8. Moreover, this legal conclusion is erroneous in failing to account for the impact of another documented instance of denied services willfully concealed by Complainants until shortly before hearing, the impact of family conflicts and other factors contributing to any perceived emotional distress. *Supra*, pp. 17-18.

Additionally, the PFO finding against Respondents is clearly erroneous because the Commissioner and the Agency lack jurisdiction to determine alleged violations and impose legal

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or equitable sanctions against Respondents because the legislative grant of authority violates the Oregon Constitution, Article III § 1 and Article VII § 1. PFO, p. 96, ¶¶ 10-11. Accordingly, the Commissioner of BOLI lacks jurisdiction over the persons and the subject matter of this dispute and lacks constitutional authority to eliminate the effects of any alleged unlawful practice herein under ORS 659A.800-659A.865.

It is well settled in Oregon that an objection to the jurisdiction of the court may be taken at any time, either before or after judgment. *Salitan v. Dashney*, 219 Or 553,559 (1959). The Oregon Constitution makes clear that all judicial authority is to be exercised by courts, and that there shall be maintained a separation of executive, legislative and judicial functions. Oregon Constitution, Articles VII ¶ 1, III ¶ 1. Accordingly, any legislative grant of judicial authority to BOLI violates the Oregon Constitution and is thereby insufficient to confer jurisdiction on the ALJ or the Commissioner to adjudicate the matters before it in this case.

"The judicial power of the state shall be vested in one supreme court such other courts as may from time to time be created by law." Oregon Constitution, Article VII ¶ 1. Moreover:

> The powers of the Government shall be divided into three separate departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

Oregon Constitution, Article III ¶ 1. Accordingly, any legislative authorization to confer authority upon BOLI as an executive agency to engage in judicial action under ORS Chapter 659A or otherwise – or for that matter, to engage in delegated legislative rulemaking action- is unconstitutional and void.

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The Oregon Supreme Court has noted "judicial power" was defined as ""the authority vested in the judges." *Smothers v. Gresham Transfer Inc*, 332 Or 83, 92 (2001)(quoting John Bouvier, *A Law Dictionary, Adapted to the laws and Constitution of the United States of America, and of the Several States of the American Union with References to the Civil and Other Systems of Foreign Law*, p. 553 (1839). "...the judges, clerk or prothonotory, counsellors (sic) and ministerial officers, are said to constitute the court. According to Lord Coke, a court is a place where justice is judicially administered,..." *Id* at 246-247. Similarly, a "court" has been defined as "an organ of the government, belonging to the judicial department, whose function is the application of the laws to controversies brought before it and the public administration of justice." Black's Law Dictionary, p. 284 (1910).

The Oregon Constitution also requires judges to be elected:

> The judges of the supreme and other courts shall be elected by the legal voters of the state or of their respective districts for a term of six years, and shall receive such compensation as may be provided by law, which compensation shall not be diminished during the term for which they are elected.

Oregon Constitution, Article VII ¶ 1. It further bears noting that in Oregon all judges are required to "be bound by Oath or Affirmation, to support this Constitution..." Oregon Constitution, Article VI ¶ 1, Cl. 3. No such oath or affirmation appears in the record herein.

Initially, Respondents raised concerns over the absence of impartiality of the BOLI administrative process in their motion to disqualify the Commissioner from any role in deciding the case or to remove the case to circuit court, which is allowed in some circumstances. Ex. X8. The ALJ denied Respondents' motion to remove because ORS 659A.145 did not authorize such removal in matters involved cases of public accommodation. Ex. X12. However, neither the ALJ

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nor the Commissioner has constitutional authority to render any judicial decision in this case or any other.

For the same reasons, the Commissioner of BOLI lacks constitutional authority under the facts and circumstances of this case to issue an appropriate cease and desist order, nor is the sum of money awarded to Complainants and order to cease and desist violating ORS 659A.403 an appropriate exercise of constitutional authority. PFO, p. 96, ¶ 11. The wisdom of the prohibitions in the Oregon Constitution intended to prevent miscarriages of justice is starkly evidence in the record of this case. *Supra*, pp. 3-4. Respondents' Motion to Reopen Contested Case Record dated May 29, 2015.

SPECIFIC EXCEPTIONS: PROPOSED OPINION REGARDING DAMAGES

The damages awarded under ORS 659A.850 herein are not based on substantial evidence (in the form of expert or other corroborating evidence), but rather on an apparent "default" or presumptive award in the combined amount of $135,000 of the $150,000 sought in the Amended Formal Charges rather than starting at zero, as the law requires. In other words, it is clearly erroneous for the ALJ to start his analysis as if Respondents were presumptively entitled to $75,000 each and reduce the award from there due to credibility or other issues, instead of starting at zero and requiring substantial evidence to prove damages directly caused by denial of services.

Neither is there any clear standard delineating what is necessary to compensate Complainants for the effects of the alleged denial of services, nor justification for the ALJ's award of $135,000 in mental distress damages, rendering the award an abuse of discretion. Mental distress damages must be limited to the direct result of the unlawful practice. *Baker*

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Truck Corral, 8 BOLI 118 (1989). *HR Satterfield*, 22 BOLI 198, 211 (2001). *See also* Tr. 811. The ALJ must also consider whether other factors in a complainant's life, unrelated to the alleged unlawful practice, which may have contributed to the mental distress claims. *ARG Enterprises, Inc.*, 19 BOLI 116, 139-140 (2000). *See also* Tr. 811-812.

More specifically, Respondents except to the damages award when the ALJ failed to reduce the amount of damages account for mental distress attributable to another previously-undisclosed instance of denial of services (*See* PFO, pp. 96-97, ¶ 1(A)(a); Ex. R32) or family conflicts (PFO, p. 77, ¶ 4). *See also PGE*, 7 BOLI 253, 271 (1988)(stress due to attitudes of others toward the pending complaint are not compensable unless others are agents of respondents). Even worse, the ALJ purported to disallow mental distress attributed to media and social media (PFO, p. 108), yet still awarded $75,000 for RBC and $60,000 for LBC. PFO, p. 109. Put another way, the ALJ awarded almost the full prayer of damages without apparently considering or eliminating the impact of damages from other causes unrelated to the alleged denial of cake services (*See* Tr. 831-832), which constitutes material error and an erroneous application of ORS659A.850 and the other authorities cited above.

This failure is particularly evident upon closer inspection of the record concerning the impact of media and social media. First, the incorrect finding that Complainants suffered emotional distress due to the media and social media attention up to the time of the hearing (PFO, pp. 99-100, 102) is irrelevant and legally inconsistent with the correct finding that there is no legal basis under Oregon law for awarding damages for emotional distress allegedly caused by media and social media attention (PFO, p. 107).

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Moreover, compounding that error, the record show that, from the time Agency brought Formal Charges throughout the presentation of evidence at hearing, all parties had accepted at face value the Agency's allegation in Formal Charges seeking *a total of* $75,000 in mental, emotional, and physical damages for each complainant. There was never a distinction drawn regarding damages from the cake refusal or damages from media exposure until closing argument when BOLI prosecutor Jenn Gaddis –for the first time- asked the ALJ for an award of $75,000 for each Complainant for the cake refusal *and some additional unspecified amount for damages from media exposure*. Tr. 792, 802. In contrast, the Agency had previously justified its $75,000 prayer for each complainant as follows:

> Respondents caused substantial harm to Complainants, in part, through their intentional posting of the Department of Justice complaint on their social media website, which included Complainants' home address. This affected Complainants by exposing them to unwanted and, sometimes unnerving contact from the public. *** *The agency's position is that some of Complainants' damages were a direct result of Respondents intentionally posting the DOJ complaint on the internet."*

See Ex. X36 (emphasis added).

Thus, the ALJ's award of $75,000 to RBC (and probably the $60,000 awarded to LBC as well) without question includes an amount that the Agency has been asserting since the beginning of this case *already included* compensation for media damages. Because the ALJ correctly determined that Complainants are not entitled to damages for media exposure (PFO, p. 108), the damages awards for each complainant must be reduced.

Similarly, Respondents except to the ALJ"s award based in part for "physical suffering" (*See* PFO p. 110 ¶1) when neither the record nor the findings of fact show any evidence of

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physical suffering, which the Agency itself stated during discovery was separate and distinct from emotional and mental suffering. *See* PFO, p. 18 ll. 15-16.

Respondents further except to considering the desires and motivations of Complainants concerning their relationship and marriage, or their interest in a cake from Sweet Cakes by Melissa. PFO, p. 96-97, ¶ 1(A)(a); p. 100, ¶ 1(B)(a). Those matters are patently irrelevant when the declared constitutional policy of the state of Oregon on January 17, 2013 was that marriage was valid and recognized only between one man and one woman under Oregon Constitution, Article XV § 5a. *Supra*, pp. 15. *See also* Exs. X26, X53.

In addition to the foregoing, Complainant LBC is not entitled as a matter of law to *any* award of mental distress damages where the ALJ properly determined- albeit in overly charitable terms- she was not a credible witness (PFO, pp. 94-95), and there was no expert or other corroborating evidence to support her entitlement to an award of such damages. *See CC Slaughters*, 26 BOLI 186, 196 (2005)(an aggrieved person's testimony may be sufficient to support a claim for mental distress damages *if that person's testimony is believed*).

As noted above, there is no justification for finding RBC's "emotional suffering *began* at the January 17, 2013 cake tasting" when there is no obvious consideration of RBC concealing evidence of another denial of services until shortly before the hearing (PFO, pp. 96-97, ¶ 1(A)(a); *see also* Ex. R32), and there is no apparent consideration of the uncontradicted evidence of a bitter custody battle ongoing during the same time period. PFO, pp. 77, ¶ 4. Finally, the finding of emotional distress due to alleged denial of services is not based on substantial evidence where there is uncontradicted evidence in the record of collusion for political purposes involving BOLI,

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Basic Rights Oregon, Complainants and Aaron Cryer. Ex. X94; Tr. 637-638, 643. Respondents' Motion to Reopen Contested Case Record dated May 29, 2015 , pp. 2-4.

Respondents further except to language in the proposed order "*Without giving any specific examples*, RBC credibly testified that, *in a general sense*, the cake refusal has caused her continued emotional suffering up to the time of hearing. Other than that, *she did not testify as to any specific suffering she experienced after February 1 that was directly attributable to the cake refusal.*" PFO, pp. 99-100 (emphasis added). The quoted portion *on its face* demonstrates a lack of substantial evidence and is inconsistent with the correct finding that follows: "Rather, her descriptions of the particular types of suffering she experienced after February 1 were all in response to questions about how she felt as a result of identifiable media or social media exposures." PFO, p. 100.

Similar defects concerning LBC's testimony of "emotional effects of the cake refusal" are equally objectionable. PFO, p. 102 ("Other than that, *she did not testify as to any specific suffering she experienced after February 1 that was directly attributable to the cake refusal*" (emphasis added). The quoted portion *on its face* demonstrates a lack of substantial evidence and is inconsistent with the correct finding that follows: "Rather, her descriptions of the particular types of suffering she experienced after February 1 were all in response to questions about how she felt as a result of identifiable media or social media exposures." PFO, p. 102.

Finally, the findings concerning CM's false statement attributed to AK "that your children are an abomination" (PFO, p. 97), and LBC's reactions to it, are not a result of the denial of cake services and are therefore irrelevant in their entirety, especially since they are inconsistent with the earlier finding that AK made no such statement to CM. PFO, p. 31, ¶ 9; *See*

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also PFO, p. 79, ¶¶ 10, 12, 13; Ex. X65. Even worse, it was error for the ALJ to attribute legal responsibility to AK and MK for that false statement by CM, an intervening cause which could not conceivably result in damage to Complainants, who weren't even present to hear it.

SPECIFIC EXCEPTIONS: PROPOSED ORDER

Respondents except to the award itself and amount of damages and to issuance of the cease and desist order for the reasons set forth in exceptions to Proposed Conclusions of Law set forth above (*Supra*, pp. 19-22) and Proposed Opinion (*Supra*, pp. 22-26) concerning damages.

CONCLUSION

As a threshold matter, BOLI lacks jurisdiction to decide this case under the Oregon Constitution, and the ALJ has further consistently rejected evidence of documented bias on the part of Commissioner Brad Avakian or afforded Respondents the opportunity to explore and document such bias more fully, even when BOLI's own witness testified to it.

As if that was not enough evidence of injustice to Respondents, the factual record demonstrates conclusively that Complainants herein materially falsified or exaggerated their testimony and willfully concealed evidence of another instance of denial of services close in time until four days before the hearing began, which the ALJ did not count against them or sanction them on his way to awarding almost all of the damages they sought. They did not present expert or other corroborating evidence to justify their alleged emotional distress, all the while falsely blaming Respondents for 100% of their alleged damages when other factors – and their own conduct- was in fact at least partially responsible. To the very end, BOLI prosecutors persisted in arguing Complainants could recover for media/social media injury despite Respondents'

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strenuous objections and exhibits demonstrating that Complainants, their supporters and even BOLI were responsible for most of that media and social media attention.

Moreover, the ALJ goes to great lengths to describe testimony of Complainants' alleged suffering he later claims to disregard or discount (especially concerning the impact of media and social media) while conspicuously omitting uncontradicted evidence detrimental to Complainants' legal position or favorable to Respondents. In other words, he has poisoned the record with long summaries of evidence from Complainants he claims are irrelevant and failed to note probative evidence supportive of Respondents' position.

Finally, the PFO perpetuates the ALJ's improvidently-granted summary judgment ruling against Respondents in the face of clear adverse controlling legal authority and subsequent uncontradicted evidence at hearing from BOLI's own witness confirming Respondents' claim that designing and creating wedding cakes is "artistic expression" that compels their participation in a wedding ceremony which, in this case, is contrary to their constitutionally-protected values. In short, the record herein is replete with factual errors and clear errors of law.

For these reasons, the Proposed Final Order cannot be sustained under ORS 183.482(7) and (8), and it must be remanded and rewritten to enter a Final Order in favor of Respondents.

DATED this 29th day of May, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing RESPONDENTS' EXCEPTIONS TO PROPOSED FINAL ORDER on the following via the indicated method(s) of service on the 29th day of May, 2015:

Karen Knight, Contested Case Coordinator
Amy Klare, Administrator, Civil Rights Division
BUREAU OF LABOR & INDUSTRIES
800 NE Oregon Street, Room 1045
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Jennifer Gaddis, Chief Prosecutor
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MAILING certified full, true and correct copies thereof in a sealed, first class postage-prepaid envelope, addressed to the attorney(s) shown above at their last known office address(es), and deposited with the U.S. Postal Service at Portland/Beaverton, Oregon, on the date set forth below.

_____ **EMAILING** certified full, true and correct copies thereof to the attorney(s) shown above at their last known email address(es) on the date set forth below.

KNIGHT, KLARE GADDIS, CASEY

HAND DELIVERING certified full, true and correct copies thereof to the attorney(s) shown above at their last known office address(es), on the date set forth below.

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EXCERPT OF RECORD

EXHIBIT D

wrong until only a few years earlier. CM then took RBC by the arm and walked her out of Sweetcakes to their car. On the way out to their car and in the car, RBC became hysterical and kept telling CM "I'm sorry" because she felt that she had humiliated CM. (Respondents' Admission; Affidavit of AK; Testimony of RBC, CM)

10) In the car, CM hugged RBC and assured her they would find someone to make a wedding cake. CM drove a short distance, then returned to Sweetcakes and re-entered Sweetcakes by herself to talk to AK. During their subsequent conversation, CM told AK that she used to think like him, but her "truth had changed" as a result of having "two gay children." AK quoted Leviticus 18:22 to CM, saying "You shall not lie with a male as one lies with a female; it is an abomination."[48] CM then left Sweetcakes and returned to the car. While CM was in Sweetcakes, RBC remained sitting in the car, "holding [her] head in her hands, just bawling." (Affidavit of AK; Testimony of RBC, CM)

11) When CM returned to the car, she told RBC that AK had told her that "her children were an abomination unto God." (Testimony of RBC; CM)

12) When CM told RBC that AK had called her "an abomination," this made RBC cry even more. RBC was raised as a Southern Baptist. From past experience, the word "abomination" made her feel that God made a mistake when he made her, that she wasn't supposed to exist, and that she had no right to love or be loved, have a family, or go to heaven. (Testimony of RBC)

13) CM and RBC then drove home. RBC was crying when they arrived home and immediately went upstairs to her bedroom, followed by LBC and CM, where she lay

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[48] *See* Finding of Fact #9 in the forum's January 29, 2015, interim order ruling on Respondents' motion for summary judgment and the Agency's cross-motion for summary judgment, in which the forum concluded that AK had quoted Leviticus based on an undisputed statement in AK's affidavit. In contrast, at hearing, CM testified that AK did not quote a Bible verse, but simply stated that her children were an "abomination." Because the forum previously determined the text of AK's statement in its January 29 interim order, the forum need not resolve the contradiction between AK's affidavit and CM's testimony.

49) Except for Paul Thompson's February 8, 2013, press release, Complainants have never solicited media attention nor been interviewed by the media with regard to this case. (Testimony of RBC, LBC)

50) Candice Ericksen, Laura Widener, Melissa Klein, Jessica Ponaman, and Aaron Cryer were credible witnesses and the forum has credited their testimony in its entirety. (Testimony of Ericksen, Widener, M. Klein, RBC, Ponaman)

51) For the most part, CM's testimony was credible, even though her answers frequently strayed from the subject of the questions. However, the forum did not believe her earlier statements to Ponaman that RBC was "throwing up" because she was so nervous and that "for days [RBC] couldn't get out of bed" because RBC did not testify to those facts and because RBC spent 30 minutes talking with LBC and A. Cryer the night of January 17, 2013, and went to a cake tasting at Pastry Girl on January 21, 2013. Due to these exaggerations, the forum has only credited CM's testimony when it was either (a) undisputed, or (b) disputed but corroborated by other credible testimony. (Testimony of CM)

52) AK was a credible witness except for his testimony that he did not realize that LBC's name and address were on the DOJ complaint that he posted on his Facebook page. LBC's name, address, and phone number are conspicuously printed on the complaint immediately above Sweetcakes's name, address, and phone number, and the forum finds it extremely unlikely that AK would have posted the complaint without reading it, particularly since he posted a comment immediately above it that read: "This is what happens when you tell gay people you won't do their 'wedding' cake." Apart from that testimony, the forum has credited AK's testimony in its entirety. (Testimony of AK)

53) RBC was an extremely emotional witness who was in tears or close to tears during most of her testimony. Despite her emotional state, she answered questions directly in a forthright manner. She did not try to minimize the effect of media exposure on her emotional state as compared to how the cake denial affected her. The forum has credited RBC's testimony about her emotional suffering in its entirety. However, the forum has only credited her testimony about media exposure when she testified about specific incidents. (Testimony of RBC)

54) LBC was a very bitter and angry witness who had a strong tendency to exaggerate and over-dramatize events. On cross examination, she argued repeatedly with Respondents' counsel and had to be counseled by the ALJ to answer the questions asked of her instead of editorializing about the cake refusal and how it affected her. Her testimony was inconsistent in several respects with more credible evidence. First, she testified that she had a "major blowout" and "really bad fight" with A. Cryer between January 17 and January 21, 2013. In contrast, A. Cryer testified, when asked if he fought with LBC, "I wouldn't say we fought." He also testified that this case did not affect his relationship with LBC. Second, she testified that her blood pressure spiked in the hospital to 210/165 on February 1, 2013, when she learned that her DOJ complaint had hit the media, requiring the immediate attention of a doctor and four nurses. Her treating doctor's report notes that she was upset and crying about her situation hitting the news, but there is no mention of a blood pressure spike. Third, she testified that the media were standing outside her and RBC's apartment on February 1, 2013, when she talked to RBC from the hospital. RBC, who was at the apartment at that time, testified that the media were not outside their apartment at that time. Fourth, LBC testified that RBC stayed in bed the rest of the day after she returned from the cake tasting at Sweetcakes. In contrast, A. Cryer testified that he, LBC, and RBC had a 30 minute

conversation that evening. Like RBC, the forum has only credited her testimony about media exposure when she testified about specific incidents. The forum has only credited LBC's testimony when it was either (a) undisputed, or (b) disputed but corroborated by other credible testimony. (Testimony of LBC)

PROPOSED CONCLUSIONS OF LAW

1) At all times material herein, Respondents AK and MK owned and operated a bakery in Gresham, Oregon as a partnership under the assumed business name of Sweetcakes by Melissa.

2) At all times material herein, Sweetcakes by Melissa was a "place of public accommodation" as defined in ORS 659A.400.

3) At all times material herein, AK and MK were individuals and "person[s]" under ORS 659A.010(9), ORS 659A.403, ORS 659A.406, and ORS 659A.409.

4) At all times material herein, Complainants' sexual orientation was homosexual.

5) AK denied the full and equal accommodations, advantages, facilities and privileges of Sweetcakes by Melissa to Complainants based on their sexual orientation, thereby violating ORS 659A.403.

6) AK did not aid or abet MK in violations of ORS 659A.403 or ORS 659A.409 and did not thereby violate ORS 659A.406.

7) MK did not violate ORS 659A.403, ORS 659A.406, or ORS 659A.409.

8) Complainants suffered emotional and mental suffering as a result of AK's violation of ORS 659A.403.

9) AK and MK, as partners, are jointly and severally liable for A. Klein's violation of ORS 659A.403.

10) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful practices found. ORS 659A.800 to ORS 659A.865.

11) Pursuant to ORS 659A.850 and ORS 659A.855, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to issue an appropriate cease and desist order. The sum of money awarded to Complainants and order to cease and desist violating ORS 659A.403 is an appropriate exercise of that authority.

PROPOSED OPINION

INTRODUCTION

The Formal Charges seek damages for emotional, mental and physical suffering in the amount of "at least $75,000" for each Complainant. In addition to any emotional suffering experienced by Complainants as a direct result of Sweetcakes' refusal to bake them a cake ("cake refusal"), the Agency also seeks damages for suffering caused to Complainants by media publicity and social media responses to this case.

In order, the forum considers: (1) the amount and extent of Complainants' emotional suffering and the cause of that suffering; (2) whether the law provides a remedy for the suffering they experienced as a result of media and social media attention; and (3) the appropriate amount of damages.

1. Amount, Extent, and Cause of Complainants' Emotional Suffering

A. R. Bowman-Cryer

a. Emotional suffering from the cake refusal

Prior to the cake tasting, LBC had been asking RBC to marry her for nine years. Until October 2012, RBC did not want to be married because of her personal

experience of failed marriages. At that time, RBC decided that they should get married to give their foster children a sense of "permanency and commitment." After her long-standing matrimonial reticence, RBC became excited to get married and to start planning the wedding,[53] wanting a wedding that was as "big and grand" as they could afford. Obtaining a cake from Sweetcakes like the one purchased for CM's wedding two years earlier was part of that grand scheme, and both Complainants were excited about the cake tasting at Sweetcakes because of how much they liked the cake Respondents had made for CM's wedding.

RBC's emotional suffering began at the January 17, 2013, cake tasting when AK told RBC and CM that Sweetcakes did not make wedding cakes for same-sex ceremonies. In response, RBC began to cry. She felt that she had humiliated her mother and was concerned that CM, who had believed that homosexuality was wrong until only a few years earlier, was ashamed of her. Walking out to the car and in the car, RBC became hysterical and kept apologizing to CM. When CM returned to the car after talking with AK, RBC was still "bawling" in the car. When CM told her that AK had called her "an abomination," this made RBC cry even more. RBC, who was brought up as a Southern Baptist, interpreted AK's use of the word "abomination" her mean that God made a mistake when he made her, that she wasn't supposed to exist, and that she had no right to love or be loved, have a family, or go to heaven. She continued to cry all the way home and after she arrived at home, where she immediately went upstairs to her bedroom and lay in her bed, crying.

On January 18, 2013, RBC felt depressed and questioned whether there was something inherently wrong with the sexual orientation she was born with and if she and

[53] The forum again acknowledges that Complainants' "wedding" on June 27, 2013, was only a commitment ceremony, not a legal "marriage." *See* footnote 39.

LBC deserved to be married like a heterosexual couple. She spent most of that day in her room, trying to sleep.

In the days following January 17, 2013, RBC had difficulty controlling her emotions and cried a lot, and Complainants argued with each other because of RBC's inability to control her emotions. They had not argued previously since moving to Oregon. In addition, RBC also became more introverted and distant in her family relationships. She and A. Cryer have always been very close, and their connection was not as close "for a little bit" after January 17, 2013. A week later, RBC still felt "very sad and stressed," felt concerned about still having to plan her wedding, and felt less exuberant about the wedding. On January 21, 2013, she experienced anxiety during her cake tasting at Pastry Girl because of AK's January 17, 2013, refusal and her fear of subsequent refusals. After January 17, 2013, although RBC relied on CM to contact potential wedding vendors, RBC still experienced some anxiety over possible rejection because her wedding was a same-sex wedding. During this same period of time, A. Cryer credibly analogized RBC's demeanor as similar to that of a dog who had been abused.

b. Emotional suffering from publicity about the case

On February 1, 2013, RBC became aware that the media was aware of AK's refusal to make a wedding cake for Complainants when she received a telephone call from Lars Larson, an American conservative talk radio show host based in Portland, Oregon, who told her that he had spoken with AK and wanted to see what RBC "had to say about the pending case." This upset RBC, and she became greatly concerned that E and A would be taken away from them by the foster care system because they had been told that the girls' information had to be protected and that the state would "have to readdress placement" of the girls with Complainants if any information was released

concerning the girls. This concern continued until their adoption became final sometime after December 2013.

From February 1, 2013, until the time of the hearing, many people have made "hate-filled" comments through social media and in the comments sections of various websites that were supportive of Respondents and critical of or threatening to Complainants. These comments and the media attention caused RBC stress, anger, pain, frustration, suffering, torture, shame, humiliation, degradation, fear that she would be harassed at home because the DOJ complaint with Complainants' home address had been posted on Facebook, and the feeling that her reputation was being destroyed. The publicity from the case and accompanying threats on social media from third parties made RBC "scared" for the lives of A, E, LBC, and herself. In addition, RBC was also upset by a confrontation with her sister who learned about the DOJ complaint through the media and posted a comment in support of Respondents on Respondents' Facebook.

Without giving any specific examples, RBC credibly testified that, in a general sense,[54] the cake refusal has caused her continued emotional suffering up to the time of hearing. Other than that, she did not testify as to any specific suffering she

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[54] The following is RBC's only testimony about her emotional suffering due to the cake refusal after the case began to be publicized. It occurred during the Agency's redirect examination:

Q: "You testified earlier about the media attention being sort of a secondary layer of stress, and I believe that that term you used during Mr. Smith's cross examination of you. During my examination of you, you testified at length as to the emotional harm that you suffered directly from the refusal of service alone. Do you still feel that harm from the refusal itself -- the January 17, 2013 refusal?"

"* * * * *

A. "Yes, I still experience that."

Q. "Was the primary harm, the harm that resulted from the refusal of service itself, persistent throughout the times where you experienced media attention?"

"* * * * *

A. "Yes, the harm was still present during the media attention."

experienced after February 1 that was directly attributable to the cake refusal. Rather, her descriptions of the particular types of suffering she experienced after February 1 were all in response to questions about how she felt as a result of identifiable media or social media exposures.

B. L. Bowman-Cryer

a. Emotional suffering from the cake refusal

LBC had been asking RBC to marry her for nine years before RBC finally accepted in October 2012. RBC's acceptance in October 2012 of LBC's marriage proposal made LBC "extremely happy." Both Complainants were excited about the cake tasting at Sweetcakes because of how much they liked the cake Respondents had made for CM's earlier wedding. However, LBC, unlike RBC, did not go to the cake tasting.

When CM and RBC arrived home on January 17, 2013, after their cake tasting at Sweetcakes, CM told LBC that AK had told them that Sweetcakes did "not do same-sex weddings" and that AK had told CM that "your children are an abomination." LBC was "flabbergasted" and she became very upset and very angry. LBC, who was raised as a Roman Catholic, recognized AK's statement as a reference from Leviticus. She was "shocked" to hear that AK had referred to her as an "abomination." Based on her religious background, she understood the term "abomination" to mean "this is a creature not created by God, not created with a soul. They are unworthy of holy love. They are not worthy of life." Her immediate thought was that this never would have happened, had she had not asked RBC to marry her. Because of that, she felt shame. Like RBC, she also worried about how it would affect CM's relatively recent acceptance of RBC's sexual orientation.

LBC views herself as RBC's protector. After RBC climbed into bed, crying, LBC got into bed with RBC and tried to soothe her. RBC became even more upset and pushed RBC away. In response, LBC lost her temper because she could not "fix" things.

When LBC went back downstairs, E, the older of Complainants' foster daughters was extremely agitated from events at school that day. LBC tried to calm her, but she refused to be calmed, repeatedly calling out for RBC, with whom she had a special bond. Eventually, E cried herself to sleep. LBC's inability to calm E was very frustrating to her. That night, LBC was very upset, cried a lot, and was hurt and angry. Later that same evening, she filed her DOJ complaint.

In the days immediately following January 17, 2013, LBC experienced anger, outrage, embarrassment, exhaustion, frustration, sorrow, and shame as a reaction to AK's refusal to provide a cake. She felt sorrow because she couldn't console E, she could not protect RBC, and because RBC was no longer sure she wanted to be married. Her excitement about getting married was also lessened because she was not sure she could protect RBC if any similar incidents occurred.

b. Emotional suffering from publicity about the case

On February 1, 2013, LBC went to the emergency room of a local hospital because of pain from a shoulder injury that she had suffered three weeks earlier and her concern that she might have a broken shoulder. While in the hospital, she heard that AK's refusal to make their wedding cake was on the news. This made her very upset and she was crying when she was examined by a doctor. Based on the media, potential media exposure, and social media attention related to her DOJ complaint after February 1, 2013, LBC's headaches increased. She also felt intimidated and became fearful.

After LBC's DOJ complaint was publicized in the media, LBC also had an "devastating" confrontation with her aunt who had learned about her DOJ complaint against Respondents through the media and threatened to shoot LBC in the face if she ever set foot on LBC's family's property again.[55]

After February 1, 2013, LBC, like RBC, was also greatly concerned that their foster children would be taken away from them because of media exposure.

LBC testified that she still feels emotional effects from the cake refusal because E, A, and RBC "were" still suffering and that "was" tearing me apart.[56] Other than that, she did not testify as to any particular suffering she experienced after February 1 that was directly attributable to the cake refusal. Rather, her descriptions of the particular types of suffering she experienced after February 1 were all in response to questions about how she felt as a result of identifiable media or social media exposures.

2. Emotional suffering damages based on media and social media attention

In its closing argument, the Agency asked the forum to award Complainants $75,000 each in emotional suffering damages stemming directly from the cake refusal, In addition, the Agency asked the forum to award damages to Complainants for emotional suffering they experienced as a result of the media and social media attention generated by the case from January 29, 2013, the date AK posted LBC's DOJ complaint on his Facebook page, up to the date of hearing. The Agency's theory of liability is that since Respondents brought the case to the media's attention and kept it there by repeatedly appearing in public to make statements deriding Complainants, it

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[55] LBC's intense and visceral display of emotions while testifying about her aunt's behavior made it clear that her aunt's behavior caused her extreme upset.

[56] *See* footnote 51, *supra*. LBC testified in the past tense.

was foreseeable that this attention would negatively impact Complainants, making Respondents liable for any resultant emotional suffering experienced by Complainants. The Agency also argues that Respondents are liable for negative third party social media directed at Complainants because it was a foreseeable consequence of the media attention. Accordingly, the forum examines the evidence to determine the extent, if any, of Respondents' responsibility for the attention, then whether existing law supports this theory of liability

Respondents' responsibility for the attention

Respondents' January 17, 2013, cake refusal was first brought to the attention of a third party on January 17, when LBC filed a consumer complaint with DOJ. Although LBC did not see DOJ's disclaimer on her smart phone view of DOJ's form, her complaint was a public record under Oregon law, as noted on the hard copy and cover letter that DOJ mailed to AK on January 28. On January 29, AK posted a copy of the first page of the complaint on his personal Facebook account, prefaced with his comment "[t]his is what happens when you tell gay people you won't do their 'wedding cake.'" That page had LBC's name, address, phone number, and email and Sweetcakes' address and phone number printed on it. On January 29, LBC received an email telling her about AK's posting. LBC did so, and called Paul Thompson, Complainants' attorney. Later that day, AK's posting was removed, apparently through Thompson's efforts.

On February 1, RBC received a telephone call from Lars Larson, a talk radio show host based in Portland who told her that he had spoken with AK and wanted to see what RBC "had to say about the pending case." However, there is no evidence in the record to show how Larson acquired that awareness or what, if anything, that AK told him.

There is no evidence in the record about any publicity that occurred between February 1 and February 8, except for: (1) a February 4 comment by LBC on her Facebook page stating "I did NOT go 2 news, or conduct interviews despite what articles Elude to. No comment, talk 2 my lawyer Paul Thompson" and (2) LBC's statement that she overheard news about the cake refusal being broadcast on television while she was in the hospital on February 1.

From February 1, 2013, until the time of the hearing, many people have made "hate-filled" comments through social media and in the comments sections of various websites that were supportive of Respondents and critical of or threatening to Complainants.

On February 8, 2013, Paul Thompson sent a letter regarding Complainants and their situation, without disclosing their names, to KGW, KOIN, The Oregonian, OPB, KATU, KPTV, the Lars Larson Radio Show, The Wall Street Journal, Willamette Week, and Reuters. Four days later, DOJ emailed a copy of LBC's complaint to a number of media sources, including the executive producer of the Lars Larson Show. As noted earlier, that complaint contained LBC's address, phone number, and email address.

On February 9, 2013, there was a protest outside Respondents' bakery that was reported by KATU.com, organized by a person or persons who started a Facebook page called "BoycottSweetCakesByMelissaGRESHAM" ("Boycott") a few days earlier. KATU.com posted a photo captioned as "protesters gathered Saturday outside a Gresham bakery that's at the center of a wedding cake controversy." Complainants were not involved in the protest or subsequent boycott. However, on February 10, 2013, both Complainants made comments on Boycott's Facebook page in which they indirectly identified themselves as the persons who sought the wedding cake and thanked people for their support.

The fact that Complainants had foster children was first exposed to the public on an undetermined date by one of RBC's Facebook "friends" who saw an article about the case in her local Florida paper and posted it on Facebook, adding in her comments that Complainants had children.

After February 8, the case took on a life of its own in the media, generating media articles, comments to those articles, and social media "tweets" and Facebook comments from people throughout the United States that continued after Complainants filed their BOLI complaints.

On August 14, 2013, BOLI itself issued a press release publicizing the fact that "[a] same-sex couple has filed an anti-discrimination complaint with the Oregon Bureau of Labor and Industries (BOLI) against a Gresham bakery, Sweet Cakes by Melissa, for allegedly refusing service based on sexual orientation." On January 17, 2014, BOLI issued a second stating that a BOLI investigation has found that "[a] Gresham bakery violated the civil rights of a same-sex couple when it denied service based on sexual orientation * * * "The couple filed the complaint against Sweetcakes by Melissa under the Oregon Equality Act of 2007[.]"

After February 1, 2013, despite general testimony by Complainants about Respondents' extensive public comments concerning the case, the record contains limited evidence of any events involving Respondents in the media or social media that publicized the cake refusal. First, AK's and MK's September 2, 2013, CBN appearance. Second, AK's February 13, 2014, radio interview with Tony Perkins. Third, an article in the "Blade" that RBC read that referred to an interview with AK in which AK had said "that he did not want to support something that he considered a bad decision."[57] There

[57] There is no other evidence to show what kind of media the "Blade" is, the context of the article, the date AK was interviewed, or the date the article was published.

is no evidence that either Complainant watched the CBN broadcast or heard the Perkins' interview. LBC testified that she watched some interviews "where Mr. Klein admitted to calling us abominations and admitted he would no longer nor would he serve any gay couple" but there was no evidence of when she watched the interviews or in what media the interviews appeared. There is also no evidence that Respondents ever solicited attention from the media or contacted any of the persons who sent negative "tweets" or Facebook comments to Complainants. On the other hand, the media and social media firestorm that followed the cake refusal may not have been lit, but was certainly torched, by DOJ's release of LBC's complaint to the media, Paul Thompson's press release, the Boycott Sweetcakes website and protests, and BOLI's own press releases.

As the case was being widely publicized, AK testified that he allowed himself to be interviewed by different media sources, but he also credibly testified that he did not seek out any interviews and there is no evidence that he mentioned Complainants' names in any of his interviews.

Based on the above, the forum concludes that Respondents' responsibility for the media and social media attention that caused Complainants to experience emotional suffering was limited to that attributable to AK's January 29, 2013, post of LBC's DOJ complaint. Assuming, arguendo, that this responsibility was enough to trigger potential liability, the forum next examines analogous common law tort cases to determine if the law allows recovery for emotional suffering damages stemming from the media and social media attention such as that directed at Complainants.

Emotional Suffering Damages Related to Media and Social Media Attention Not Recoverable

In a 1986 case involving unwanted publicity, the Oregon Supreme Court set forth the following test to be used in deciding whether truthful publication of a fact about a private individual that the individual reasonably prefers to keep private gives rise to common-law tort liability for damages for mental or emotional distress. *Anderson v. Fisher Broad. Companies, Inc.*, 300 Or. 452, 712 P.2d 803, 804 (1986).

> "To summarize, we conclude that in Oregon the truthful presentation of facts concerning a person, even facts that a reasonable person would wish to keep private and that are not 'newsworthy,' does not give rise to common-law tort liability for damages for mental or emotional distress, unless the manner or purpose of defendant's conduct is wrongful in some respect apart from causing the plaintiff's hurt feelings. For instance, a defendant might incur liability for purposely inflicting emotional distress by publishing private information in a socially intolerable way, *cf. Hall v. The May Dept. Stores, supra;* or the publicized information might be wrongfully obtained by conversion, bribery, false pretenses, or trespassory intrusion, *see McLain v. Boise Cascade Corp., supra,* or published by a photographer who has been paid for what the subject reasonably expects to be the exclusive use of a picture; or when a defendant disregards a duty of confidentiality or other statutory duty, *see Humphers v. First Interstate Bank, supra,* or exploits a distinctive economic value of an individual's identity or image beyond that of other similar persons for purposes of associating it with a commercial product or service, although this court has not decided all such issues. And, of course, the distressing report or presentation of a person's private affairs might not be truthful, *see Tollefson v. Price, supra; Hinish v. Meier & Frank, supra."*

Id. at 469.

In subsequent decisions, the Oregon Court of Appeals has consistently held that a person cannot recover for negligent infliction of emotional distress if the person is not also physically injured, threatened with physical injury, or physically impacted by the tortious conduct "unless the defendant's conduct infringes on some legally protected

interest apart from causing the claimed distress."[58] The term "legally protected interest" refers to "an independent basis of liability separate from the general duty to avoid foreseeable risk of harm."[59] In this case, the Agency has identified no untruthful statements made by Respondents, has not shown that the manner or purpose of Respondents' conduct with respect to the media or social media was wrongful in some respect apart from causing the Complainants' hurt feelings, and has not identified an "an independent basis of liability separate from the general duty to avoid foreseeable risk of harm." Accordingly, the forum concludes that there is no basis in law for awarding damages to Complainants for their emotional suffering caused by media and social media attention related to this case.

3. Amount of Damages

There is ample evidence in the record of specific, identifiable types of emotional suffering both Complainants experienced between the date of the cake refusal and the date that LBC's DOJ complaint was first publicized in the media. After that, both Complainants testified that they continued to suffer because of the cake refusal, but did not identify that suffering with any particularity. In contrast, both Complainants testified in great detail about the specific suffering they experienced due to media and social media attention after the cases were publicized. However, as stated above, Complainants are not entitled to damages for any emotional suffering related to media and social media attention from the cake refusal.

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[58] *See e.g., Phillips v. Lincoln County School District,* 161 Or.App. 429, 433, 984 P.2d 947 (1999); *Lockett v. Hill*, 182 Or. App. 377, 380, 51 P.3d 5, 6-7 (2002); *Rustvold v. Taylor*, 171 Or. App. 128, 134-36, 14 P.3d 675, 679-80 (2000).

[59] *Phillips* at 432-33.

In determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the aggrieved persons. The actual amount depends on the facts presented by each aggrieved person. An aggrieved person's testimony, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of C. C. Slaughters, Ltd.*, 26 BOLI 186, 196 (2005). In public accommodation cases, "the duration of the discrimination does not determine either the degree or duration of the effects of discrimination." *In the Matter of Westwind Group of Oregon, Inc.*, 17 BOLI 46, 53 (1998).

In this case, the forum concludes that $75,000 and $60,000, are appropriate awards to compensate Complainants RBC and LBC, respectively, for the emotional suffering they experienced from Respondents' cake refusal. LBC is awarded the lesser amount because she was not present at the cake refusal and the forum found her testimony about the extent and severity of her emotional suffering to be exaggerated in some respects.

PROPOSED ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate the effects of the violation of ORS 659A.403 by **Respondent Aaron Klein,** and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondents Aaron Klein and Melissa Klein** to deliver to the Administrative Prosecution Unit of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check

EXCERPT OF RECORD

EXHIBIT E

BEFORE THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES OF THE STATE OF OREGON

In the Matter of:	Case Nos. **44-14 & 45-14**
MELISSA ELAINE KLEIN, dba SWEETCAKES BY MELISSA, **and** **AARON WAYNE KLEIN, dba SWEETCAKES BY MELISSA, and, in the alternative, individually as an aider and abettor under ORS 659A.406,** Respondents.	**INTERIM ORDER – RULING ON RESPONDENTS' MOTION FOR DISCOVERY SANCTIONS and FOR ORAL ARGUMENT ON THE MOTION**

RESPONDENTS' MOTION FOR ORAL ARGUMENT

Respondents' motion for oral argument on its motion is **DENIED**.

RULING ON RESPONDENTS' MOTION FOR DISCOVERY SANCTIONS

On February 26, 2015, Respondents filed a motion requesting discovery sanctions related to the Agency's failure to provide discovery subject to my Discovery Order dated September 25, 2014, until February 24, 2015. The Agency filed a response on February 27, 2015, and Respondents supplemented their motion on March 3, 2015.

The discovery in question relates to my September 25, 2014, Order requiring that the Agency provide Respondents with:

> "all posting by Complainants to any social media website, including but not limited to Facebook, Twitter, LinkedIn, MySpace, Instagram, and SnapChat from January 2013 to the present that contain comments about the facts of this case, comments about Respondents, or comments that relate to their alleged damages."

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EXHIBIT
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Specifically, Respondents allege that on February 24, 2015, less than three hours before the Agency filed its case summary, the Agency turned over 109 pages of documents ("subject documents") to Respondents that were subject to my discovery order. Respondents further allege that the 109 pages were included in the Agency's case summary. The Agency does not dispute these allegations, acknowledges it received the subject documents from Complainants in August 2014, and attempts to explain the reason for its late disclosure in its response. After reviewing the subject documents, I conclude that they contain Complainants' social media conversations that fall within the scope of my September 25, 2014, Discovery Order.

Respondents allege that the Agency's untimely disclosure of these documents establishes bad faith on the part of the Agency and/or Complainants, particularly since the disclosure occurred after Respondents completed their depositions of Complainants, and that Respondents are irreparably prejudiced as a result. Respondents ask that the forum sanction the Agency in a number of different ways.

In my September 25, 2014, Discovery Order, I ruled as follows:

> "After the scheduled September 29, 2014, prehearing conference in this matter, the forum will issue a subsequent order stating the Agency's deadline for complying with the terms of this order. The Agency has a continuing obligation, through the close of the hearing, to provide Respondents' counsel with any newly discovered material that responds to the responses and production ordered in this interim order. The Agency's failure to comply with this order may result in the sanction described in OAR 839-050-0200(11)."

In the interim order I issued on September 30, 2014, that summarized the September 29, 2014, prehearing conference, I ordered that "[t]he Discovery ordered in my rulings on * * * Respondents' motions for Discovery Orders must be mailed or hand-delivered no later than October 14, 2014." That was not done.

As a prelude to my ruling, I note that the forum has no authority to impose the vast majority of sanctions sought by Respondents. The forum's authority in this matter

is not derived from the ORCP, but from provisions in the Oregon APA, the Oregon Attorney General's Administrative Rules (OAR 137-003-0000 to -0092), and the forum's own rules, OAR 839-050-000 *et seq*. The ALJ's authority to impose sanctions for violations of discovery orders is set out in OAR 839-050-0020(11):[1]

> "The administrative law judge may refuse to admit evidence that has not been disclosed in response to a discovery order or subpoena, unless the participant that failed to provide discovery shows good cause for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10)[2]. If the administrative law judge admits evidence that was not disclosed as ordered or subpoenaed, the administrative law judge may grant a continuance to allow an opportunity for the other participant(s) to respond."

In brief, the Agency frankly admits that it "cannot determine why the [subject records] were not produced [earlier] in discovery, but they were in a location unlikely to be accessed" and characterizes its "oversight" as an "inadvertent error." The Agency also notes, in a supporting declaration by Jennifer Gaddis, the Agency's Chief Prosecutor, that "[i]t appears that on or about October 3, 2014, in anticipation of discovery, the subject documents were partially redacted. I have no other recollection as to why they were not provided in discovery."

OAR 839-050-0020(16) provides:

> "'Good cause' means, unless otherwise specifically stated, that a participant failed to perform a required act due to an excusable mistake or a circumstance over which the participant had no control. 'Good cause' does not include a lack of knowledge of the law, including these rules."

For the reasons stated below, the forum concludes that the Agency's failure to provide the subject records by October 14, 2014, as ordered by the forum, does not meet the

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[1] OAR 137-003-0025(9) contains similar language.

[2] This statutory reference in the current rule is in error. The APA was amended in 2007 and the "full and fair inquiry" requirement was moved to ORS 183.417(8).

"good cause" standard. Participants in all cases are responsible for keeping track of documents that constitute potential evidence, particularly documents subject to an existing discovery order. In this case, the subject records were accessed by BOLI's Administrative Prosecutions Unit on October 3, 2014, eight days after a discovery order was issued requiring the production of those records, and only 11 days before their production was due pursuant to the forum's September 30, 2014, order. The Agency's "oversight" or storage of the documents in a place where they were "unlikely to be accessed" does not constitute "an excusable mistake or a circumstance over which the [Agency] had no control."

Ordinarily, the forum's sanction for failing to provide documents pursuant to a discovery order would be to prohibit the introduction of the documents as evidence.[3] However, Respondents assert that some of the subject records will potentially assist Respondents' defense and explain why in their motion. Based on Respondents' assertion, it appears that a blanket prohibition on the introduction of the subject records may prejudice Respondents and prevent a "full and fair inquiry" by the forum. The forum's order is crafted with this in mind.

ORDER

1. **Sanctions:** (a) The Agency may not offer or otherwise utilize any of the subject documents as evidence until such time as Respondents have offered the subject documents into evidence or otherwise utilized them during the hearing while eliciting testimony in support of their case; (b) Respondents, should they elect to do so, may offer or utilize the subject documents in support of their case.

[3] In the cases cited by the Agency in its response to Respondents' motion, the objection over documents not produced in response to a discovery order first arose at hearing, differentiating it from this case.

2. Discovery Order

To the extent these records have not already been provided, the forum hereby issues a discovery order requiring the Agency to provide responsive documents to items ##1, 5-6, 8, 13-15, and 21 listed on pages 9 and 10 of Respondents' Motion for Discovery Sanctions, with the caveat that the Agency is not required to produce statements made to Ms. Gaddis or Ms. Casey, the Agency's administrative prosecutors in this case, in any response to item #5. The Agency's responsibility to produce any such records begins as soon as this order is issued and continues until the hearing is concluded. The forum will apply OAR 839-050-0020(11) if an issue arises regarding an alleged failure by the Agency to produce such records in a timely manner.

3. Respondents' request that the forum dismiss the Agency's Second Amended Formal Charges is **DENIED**.

4. Respondents may amend their Case Summary witness list and exhibit list. I note that OAR 839-050-0210(3) gives both participants the right to submit an "addendum" once the participant has timely filed a Case Summary.

5. Respondents' request to "reopen discovery to allow for depositions of Complainants and other BOLI witnesses with knowledge of these matters" is **DENIED**.

6. Respondents' request that the cases be dismissed or that the Agency's claim for damages of Complainants' behalf be dismissed is **DENIED**.

7. Respondents' request for costs is **DENIED**.

8. Respondents' request for any other sanctions not specifically discussed in this interim order is **DENIED**.

IT IS SO ORDERED

Entered at Eugene, Oregon, with copies mailed and e-mailed to:

Jenn Gaddis, Chief Prosecutor, BOLI/APU, 1045 State Office Building, 800 NE Oregon Street, Portland, OR 97232-2180

Cristin Casey, Administrative Prosecutor, BOLI/APU, 1045 State Office Building, 800 NE Oregon Street, Portland, OR 97232-2180

Herbert G. Grey, Attorney at Law, 4800 SW Griffith Drive, Suite 320, Beaverton, OR 97005-8716

Tyler D. Smith and Anna Harmon, Attorneys at Law, 181 N. Grant Street, Suite 212, Canby, OR 97013

Paul Thompson, Attorney at Law, 310 SW 4th Ave., Suite 803, Portland, OR 97204

Johanna Riemenschneider, Sr. Asst. Attorney General, Department of Justice,

Kari Furnanz, ALJ, BOLI

Dated: March 5, 2015

Alan McCullough, Administrative Law Judge
Bureau of Labor and Industries

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EXCERPT OF RECORD

EXHIBIT F

BEFORE THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON

In the Matter of: Oregon Bureau of Labor And Industries on behalf of RACHEL BOWMAN-CRYER and LAUREL BOWMAN-CRYER, Complainants, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually and as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 44-14 & 45-14 RESPONDENTS' SUPPLEMENTAL MOTION IN SUPPORT OF DISCOVERY SANCTIONS AGAINST THE AGENCY AND/OR COMPLAINANTS **ORAL ARGUMENT REQUESTED**

On February 26, 2015, Respondents filed a Motion for Discovery Sanctions against the Agency and/or Complainants for violating the ALJ's September 25, 2014 Order and failing to turn over 109 pages of social media conversations by Complainants and other BOLI witnesses directly related to this case, as well as a lists of symptoms completed by each Complainant. Since that time, there have been two more significant developments: (1) a review of the 109 pages of additional discovery furnished February 24, 2015 in preparation for trial reveals that the Complainants and Agency personnel have committed under oath to a version of Complainants damages arising from the "trip expenses" that is directly contradicted by portions of the belated social media records produced February 24, 2015; and (2) the Agency on March 2, 2015 emailed the Forum and all

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counsel with the actual symptoms lists, which do not match the symptom lists previously produced in discovery.

While it remains to be seen whether Agency personnel are complicit with Complainants' presentation of false testimony, this much is clear: (a) Laurel Bowman-Cryer was not part of the February 17-20, 2013 trip to Seattle as earlier represented, and the purpose for the trips has been misrepresented; and (b) some of the charges were not incurred on a trip to Seattle at all, but appear to have been local transactions prior to the dates of the Seattle trip. It further appears Agency personnel have produced different versions of the "symptoms list" for each Complainant, and it was not possible to discern the inconsistencies until the real lists were belatedly produced March 2, 2015.

These developments warrant the immediate intervention of the ALJ in stopping the presentation of evidence known now – if not before – to be false rather than simply allowing cross-examination to take its course at hearing. Proceeding to hearing under these circumstances has far-reaching consequences. First, Respondents still do not fully know the nature and extent of the false evidence or whether additional discovery is being wrongfully withheld. Second, counsel for the Agency and Complainants are now on notice that some of the evidence they intend to present at hearing is false in apparent violation of RPC 3.3.

THE AGENCY'S INITIAL RESPONSE TO MOTION FOR SANCTIONS

The Agency's Initial Response to the Motion for Sanctions fails to adequately address all of the issues raised in Respondent's earlier motion, and its justification for its actions falls short as well. The Agency acknowledged its failure to turn over the documents until February 23, 2015 but says that its failure was a regrettable error not subject to sanction. In BOLI prosecutor Jenn Gaddis' Declaration in support of the Agency's Response, she stated that the Agency received the

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109 pages of social media posts from Complainants in August of 2014 but set the documents aside in a separate file (along with Laurel Bowman-Cryer's medical records) because the Agency objected to their relevance at the time. Ms. Gaddis also stated that the documents were reviewed and redacted on October 3, 2014 in preparation for production subject to the ALJ's Order; however, the documents were never Bates stamped or sent to Respondents. No explanation is offered why the medical records apparently kept in the same "separate file" were submitted for *in camera* inspection, September 16, 2014, but the 109 pages of social media records stored with them were overlooked until February 23, 2015.

This much is unmistakably clear: the Agency has now admitted it reviewed the 109 pages of documents it withheld at least twice – once in August 2014 to determine they were "irrelevant" and once in October 2014 to redact them. As will become evident below, the Agency certainly read the statements in the documents facially showing their inconsistencies with Complainants' claims about traveling out of the state, yet the Agency and Complainants continued to claim, under oath, that these trips were taken "out of fear for [Complainants'] safety." Respondents had no way of knowing about these inconsistencies until Febuary 24, 2014 at 11:00 AM when the Agency first provided the Complainants' statements to Respondents six hours before Respondents' Case Summary was due (and well after Respondents' deposition of Complainants).

FALSE EVIDENCE OF THE TRIP EXPENSES FOR DAMAGES

Purpose for the Trip; Laurel Bowman-Cryer Didn't Go. Now that Respondents have had a chance to begin reviewing these 109 pages of documents in preparation for trial, glaring inconsistencies in Complainants and the Agency's statements in discovery – some of them under oath – are starkly evident. In their first set of interrogatories to the Agency, Respondents asked the Agency to "list and explain in detail any out of town trips Complainants allege they took

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because of the events alleged in the Complaint." Respondents asked the Agency to include each expense Complainants incurred as a result of these trips. The Agency responded on August 19, 2014 by listing four separate out of town trips and corresponding expenses. These trips to Seattle, Tacoma, and Lincoln City allegedly took place February 17-20, 2013, February 23-25, 2013, March 15-17, 2013, and August 21-25, 2013. Complainants and BOLI investigator Jessica Ponaman all signed this Response to Interrogatories under oath, and Prosecutor Cristin Casey signed it. Ex. 1. On August 28, 2014, the Agency produced bank records showing expenses Complainants allege to have incurred during the trips.

On January 13, 2015, the Agency answered Interrogatory No. 3 in Respondents' Second Set of Interrogatories by stating that "Complainant Rachel Cryer had to borrow money from her mother during the middle of February 2013, when she and Complainant Laurel Bowman-Cryer traveled to Seattle. Complainants traveled to Seattle out of fear for their safety and to remove themselves from the public spotlight." Ex. 2. Complainants both signed this statement under oath. In her February 17, 2015 deposition, Complainant Rachel Bowman-Cryer testified under oath that she, Laurel Bowman-Cryer and their two daughters made a trip to Seattle on February 17-20, 2014. Ex. 3.

The 109 pages of documents the Agency failed to produce earlier now tell a different story. On February 2, 2013, Michelle Purcell (the Complainants' childrens' biological aunt who lives in Seattle and a BOLI witness listed on the Agency's Amended Case Summary filed March 2, 2015) stated to Laurel Bowman-Cryer, "I hope this doesnt [sic] mean that you aren [sic] coming up at the end of the month to celebrate your birthday..." Ex. 4. Laurel Bowman-Cryer responded that same day, "nope we are coming, get uswed [sic] to it, your [sic] screwed and SHHH im [sic] going to drink like a baby pirate again...arg matey." Ex. 4. Michelle Purcell responded "I am glad that

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you will still be coming you will need a break by them and we have then alcohol for it…" [sic]. Ex. 4. On February 14, 2013, Laurel Bowman-Cryer again told Michelle Purcell "im [sic] so exciyed [sic] for next weekend gomna get the hell outa town and go see u!" Ex. 5. Michelle Purcell responded "I know me to [sic]! I cant [sic] wait." Ex. 5. Clearly, Complainants' February 23-25, 2013 trip to Seattle was not made "out of fear for their safety and to remove themselves from the public spotlight" as they claimed under oath; they had already planned this trip prior to February 2, 2013.

In addition, on the afternoon of February 17, 2013 – when Complainants were ostensibly en route to or in Seattle – Laurel Bowman-Cryer and Michelle Purcell had a conversation about an argument between Rachel Bowman-Cryer, Aaron Cryer (Rachel's brother), April Thrasher (Rachel's sister), and Cheryl Cryer (Rachel's mother). During that conversation, Michelle Purcell asked Laurel, "They are still in Seattle, aren't they?" Ex. 6. Laurel didn't answer that question directly, but Michelle later asked "What else did you do while you you [sic] where [sic] by yourself with the kids…" Laurel Bowman-Cryer's response: "Im [sic] still bysmelf, [sic] they just left today." Ex. 6. Both Complainants have represented under oath at least three times during discovery that they together with their children took a trip to Seattle from February 17, 2013 through February 20, 2013. In her deposition, Rachel Bowman-Cryer explained that a dinner which took place in Seattle on February 18, 2013 included only herself, her mother, her brother, and a family friend. Ex. 3. With the benefit of the belated production of these additional social media messages (after the depositions), it is now clear that neither Laurel Bowman-Cryer nor their children were at this dinner Complainants previously listed as part of their damages during the February 17-20, 2013 trip. Ex. 3.

Some of the Trip Expenses Were Not Incurred on the Trip. Although the Agency has

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stipulated that it will not seek out of pocket expenses for Complainants' out of town trips, its stated intent is to include those trips as evidence of Complainants' damages. Ex. 7. Nevertheless, until the September 29, 2014 hearing, the Agency pursued Complainants' out of pocket trip expenses. Upon closer inspection of the bank records the Agency provided to Complainants, it is now clear that Agency personnel knew or should have known by September 29, 2014 that at least a portion of those expenses Complainants and the Agency claimed are completely unrelated.

For example, Complainants claimed a charge for $60 to Los Dos Compadres in Seattle, Washington. Ex. 1 p. 5. A search for Los Dos Compadres in Seattle, Washington returns no results; however, there is a Los Dos Compadres in Washougal, Washington. Complainants' bank statements show that Complainants actually ate at Los Dos Compadres in Washougal, Washington on February 14, 2013. Ex. 8. While the charge posted on February 19, 2013, the purchase was made on February 14, 2013, before the date of the alleged trip. See Decl. of Anna Harmon ¶ 12. Put simply, Complainants and the Agency sought to claim out of pocket expenses for this dinner as part of a February 17-20, 2013 trip knowing that the claim was false.

THE SYMPTOMS LIST

Additional false evidence came to light on March 2, 2015 when, in apparent response to Respondents' Motion for Sanctions, Chief Prosecutor Jennifer Gaddis emailed the ALJ and all counsel the "symptoms list" completed by both Complainants, which previously had been "retyped" into the Agency's Response to Forum's Discovery Order. As noted in a responsive email by Respondents' counsel to the ALJ and all counsel on March 2, 2015, the lists were inconsistent in the following respects:

a) Three things are marked on Laurel Bowman-Cryer's list that did not make it onto the symptoms list BOLI retyped ("Colitis Attack", "Difficulty relating to subsequent

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employers," and "inability to accept criticism and suspicion of authority in the employment context");

b) Two hand-written corrections Laurel Bowman-Cryer made were not made on BOLI's retyped list (crossed out "mentally" re: mentally raped and wrote "emotionally" next to it, crossed out "husband" and wrote "wife" re: not wanting husband to touch her);

c) Laurel Bowman-Cryer said in deposition that "inability to find work" shouldn't have been on the list BOLI made for her and that it should have been on Rachel Bowman-Cryer's symptoms list instead (Dep. 84-85), but Laurel Bowman-Cryer marked "inability to find work" on her list; and

d) Two things are marked on [Rachel] Bowman-Cryer's list that did not make it onto the symptoms list BOLI retyped ("Difficulty relating to subsequent employers," "future job opportunities damaged").

The Agency's response that "The Agency did not include all the symptoms listed on Complainants' forms because, after discussion with the complainants, the Agency did not wish to seek emotional distress damages for those excluded symptoms" (Ex. 9) is unconvincing because Complainant Laurel Bowman-Cryer explicitly testified to the following in deposition:

"Q What happened to the list of the potential symptoms that BOLI gave to you?

A I don't know.

MS. RIEMENSCHNEIDER: Objection. Vague.

THE WITNESS: I'm not a lawyer, I'm not a paralegal, I'm not a legal aide. I don't know what happens once I hand it over.

BY MR. SMITH:

Q When you looked at it and checked the boxes you gave it back to them?

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A In good faith, yes.

Q Have you seen that list since then?

A No. Not until now.

Q You've seen it now?

A Yes. That's the list.

Q Where did you check the boxes at if that's the list?

A It's obviously been retyped.

Q Okay. So your understanding is the same as mine, that this is not the list you actually saw in the office and checked the boxes on?

A It has been reworded and retyped. It is the list.

Q Okay. It has the same contents but not the same physical piece of paper?

A Yes."

Ex. 10.

APPROPRIATE SANCTIONS

The Agency's own evidence further amplifies the nature and severity of the concerns raised in Respondents' Motion for Sanctions and emphasizes even more the need for the forum to take corrective action in the interests of integrity to avoid gross injustice on the eve of hearing. It appears that Agency personnel, including the prosecutors, have either misrepresented the evidence or taken no effective action to evaluate properly the truthfulness of information received from Complainants. Nor has the Agency acted properly to turn over all exculpatory evidence to the Respondents in a timely manner and to stop pursuing unfounded claims. The behavior of the Agency and Complainants in this case is appalling and verges on unethical.

The integrity of this contested case proceeding has been compromised to the point of being

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unredeemable. Proceeding to hearing under these circumstances necessarily involves opposing counsel's knowing presentation of false evidence to support a potential damages award that cannot possibly be based on substantial evidence or credible testimony. The interests of justice and due process require the ALJ to take immediate and effective action to order one or more of the following: (a) exclude all evidence of Complainants' damages and enter an interim order awarding Complainants no damages; (b) the Agency and/or the Complainants should be required to pay the costs and fees associated with the taking of Complainants' depositions, as well as the fees and costs related to this motion; (c) if the case is not dismissed, the Agency's Second Amended Formal Charges should be stricken, and respondents should be granted leave to amend their Case Summary witness list and exhibit list in light of this voluminous new evidence; and/or (d) if the case is not dismissed, the ALJ should order the Agency to immediately turn over all responsive documents to Respondents and reopen discovery to allow for depositions of Complainants and other BOLI witness with knowledge of these matters. Fundamental fairness and due process demands nothing less.

DATED this 27 day of March, 2015.

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Of Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3 day of March, 2015, I caused a true copies of RESPONDENTS' SUPPLEMENTAL MOTION FOR DISCOVERY SANCTIONS AGAINST THE AGENCY AND/OR COMPLAINANTS, DECLARATION OF ANNA HARMON, and EXHIBITS 1-10 to be served upon the following named parties or their attorney by first class mail as indicated below and addressed to the following:

Karen Knight
Contested Case Coordinator
800 NE Oregon Street, Room 1045
Portland, OR 97232-2180

Jennifer Gaddis
Cristin Casey
800 NE Oregon Street, Room 1045
Portland, OR 97232-2180

Amy Klare
Administrator, Civil Rights Division
800 NE Oregon Street, Room 1045
Portland, OR 97232-2180

Paul A. Thompson
310 SW Fourth Avenue, Suite 803
Portland, OR 97204

Johanna M. Riemenschneider
DOJ GC Business Activities
1162 Court Street NE
Salem, OR 97301

Mailing was completed by first class mail and email.

DATED this 3 day of March, 2015.

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Of Attorneys for Respondents

BEFORE THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON

In the Matter of: Oregon Bureau of Labor And Industries on behalf of RACHEL BOWMAN-CRYER and LAUREL BOWMAN-CRYER, Complainants, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually and as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 44-14 & 45-14 DECLARATION OF ANNA HARMON IN SUPPORT OF RESPONDENTS' SUPPLEMENTAL EVIDENCE IN SUPPORT OF DISCOVERY SANCTIONS

1.

My name is Anna Harmon. I am one of the attorneys representing Respondents in this case. I am over 18 years of age, and I have personal knowledge of the facts stated in this declaration.

2.

Exhibit 1 is a true and accurate copy of the Agency's Response to Respondents' Interrogatories for Oregon Bureau of Labor and Industries.

3.

Exhibit 2 is a true and accurate copy of the Agency's Response to Respondents' Second Set of Interrogatories for Oregon Bureau of Labor and Industries.

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4.

Exhibit 3 is a true and accurate copy of pages 21-22 of the deposition of Complainant Rachel Bowman-Cryer. **CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER.**

5.

Exhibit 4 is a true and accurate copy of the Agency's exhibits bates stamped 000366-67 provided on February 24, 2015.

6.

Exhibit 5 is a true and accurate copy of the Agency's exhibit bates stamped 000378 provided on February 24, 2015.

7.

Exhibit 6 is a true and accurate copy of the Agency's exhibits bates stamped 000379-000385 provided on February 24, 2015.

8.

Exhibit 7 is a true and accurate copy of the ALJ's Order noting the Agency's stipulation to the forum regarding its seeking damages for out of pocket trip expenses.

9.

Exhibit 8 is a true and accurate copy of the bank statement the Agency provided Respondents on August 28, 2014 bates stamped 000269.

10.

Exhibit 9 is a true and accurate copy of the email I received from BOLI Prosecutor Jenn Gaddis on March 2, 2015.

11.

Exhibit 10 is a true and accurate copy of pages 74-75 of the deposition of Complainant

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Laurel Bowman-Cryer. **CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER.**

12.

In Exhibit 8, Complainants' bank statement reads "CheckCard 0214 Los Dos Compadres 1." A column to the right lists the "date posted" as 2/19. I have personally verified with Bank of America personnel that the four digits listed (0214) are the transaction date.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

DATED this 17 day of March, 2015.

Anna Harmon

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EXCERPT OF RECORD

EXHIBIT G

BEFORE THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON

In the Matter of: Oregon Bureau of Labor And Industries on behalf of RACHEL BOWMAN-CRYER and LAUREL BOWMAN-CRYER, Complainants, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually and as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 44-14 & 45-14 RESPONDENTS' MOTION FOR DISCOVERY SANCTIONS AGAINST THE AGENCY AND/OR COMPLAINANTS **ORAL ARGUMENT REQUESTED**

BACKGROUND

On September 4, 2014, Respondents requested that the ALJ order the Agency to produce, "any social media posts, blog posts, or any other public or private communication by Complainants or Cheryl McPherson relating to Respondents and the events leading to this Complaint or the Complaint filed with the Department of Justice" and "all postings by Complainants or Cheryl McPherson to any social media website, including but not limited to Facebook, Twitter, LinkedIn, MySpace, Instagram, and SnapChat from January 2013 to the present." The ALJ granted Respondents' requests ordering Complainants to produce responsive documents with respect to Complainants only.

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On October 14, 2014, the Agency provided Respondents with its response to the ALJ's discovery order. This response included 15 pages showing posts and interactions on Complainant Laurel Bowman-Cryer's Twitter account. No other social media evidence was provided. The Agency followed up on February 13, 2015 and February 17, 2015 with additional responsive documents showing Facebook activity by Complainant Laurel Bowman-Cryer. The Agency did not provide any responsive documents showing any social media interaction by Complainant Rachel Bowman-Cryer until February 24, 2015 at 11:01 AM when Chief Prosecutor Jennifer Gaddis sent the following email to Respondents' counsel:

> Good Morning,
>
> I recently came across some discovery that I do not have a record of going out to you. It consists of social media posts. I sincerely apologize for this oversight. I will place hard copies in the mail today.
>
> Thank you,
>
> Jenn Gaddis
> Chief Prosecutor
> Administrative Prosecution Unit
> Bureau of Labor and Industries

(Exhibit 1). Attached to that email was a document 109 pages in length dating back to as early as January 17, 2013, the date of the alleged unlawful conduct. The document shows over one hundred pages of Complainants' social media conversations with family members, friends, and other people, and directly addresses the facts alleged in the Formal Charges.

Less than three hours after turning over these documents, Respondents received another email from the Agency with the Agency's Case Summary attached. Ten of the Agency's twenty-six exhibits are excerpts from the 109-page document the Agency provided to Respondents just hours before.

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Ms. Gaddis' email suggests that the Agency has had these documents for some time and has failed to turn them over to Respondents. Indeed, the documents themselves contain conversations which took place on January 17, 2013. Ms. Gaddis' insinuation is puzzling, however, because the bates numbering on the withheld documents suggests that the documents were stamped recently. To clarify, the Agency's investigative file begins at bates number 000001 and goes through 000276. The discovery the Agency provided on October 14, 2014, in response to the ALJ's discovery order was marked 000293-000317. The discovery the Agency provided on February 13, 2015 was marked 000332-000338. The discovery the Agency provided on February 17, 2015 was marked 000337-000340. The 109-page document the Agency provided on February 24, 2015 begins at 000341 and goes through 000449. Although the Agency implies that it had the documents in its possession and has no record of providing them to Respondents, it appears from the bates stamps that the Agency may have just received the documents from Complainants. On the other hand, the Agency included the documents as a major part of its case summary, suggesting that the Agency has had these documents for at least enough time to include them in its case strategy without providing them to Respondents. Respondents have no way of knowing whether Complainants failed to turn over the documents to the Agency or whether the Agency had the documents and withheld them. The Agency and Complainants should be required to document for the ALJ under oath what happened and when.

Either way, the Agency's failure to produce responsive documents until February 24, 2015 (the very day that the parties' case summaries were due) has irreparably prejudiced Respondents' case. All summary judgment motions have been briefed and decided. The hearing is two weeks away and will not be and should not be postponed. Respondents have already conducted, at their own expense, depositions of the Complainants on the issue of damages over the objections of the

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Agency. The documents the Agency withheld would have been a crucial part of those depositions as they contain multiple conversations between the Complainants and potential witnesses. The parties' witness lists and exhibit lists have been completed and filed. There is no fair opportunity before the hearing for Respondents to conduct another round of depositions of Complainants using the additional documents the Agency and/or the Complainants withheld, especially since the full magnitude of the misconduct may still not be known. *Infra*, pp. 9-13. There is no fair opportunity for Respondents to add the additional documents to their exhibit list, as that list was due and had to be filed on the very day the Agency provided the withheld documents.

In the ALJ's discovery order dated September 25, 2014, the ALJ stated that the Agency's failure to comply with the order "may result in the sanction described in OAR 839-050-0200(11)." OAR 839-050-0200(11) allows the ALJ to refuse to admit evidence withheld in the face of a discovery order. In this case, such a sanction is insufficient to address the prejudice caused by the Agency and/or the Complainants' actions- unless the sanction excludes all evidence of damages by or on behalf of Complainants. The document withheld by the Agency contains evidence which is helpful to Respondents' case, at least some of which Respondents would not want excluded. Thus, if the ALJ issued the sanction in OAR 839-050-0200(11) against the Agency, the Agency would *benefit* from its wrongdoing - unless the sanction excludes all evidence of damages by or on behalf of Complainants. A more comprehensive sanction is warranted and necessary. *Infra*, pp. 7-8. ORCP 46 provides additional sanctions which would be available to Respondents in a circuit court under similar circumstances, including dismissal, payment of expenses, and stricken pleadings.

MOTION TO DISMISS OR EXCLUDE ALL DAMAGES EVIDENCE

Because the Agency's actions have irreparably prejudiced Respondents' case, and the

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limited sanction specified in the ALJ's discovery order is patently insufficient to repair the damage done, this case should be dismissed with prejudice in its entirety. The Agency has resisted Respondent's' requests for discovery at every step of this process. When Respondents asked the Agency to explain in detail the nature of the physical harm Complainants alleged, the Agency provided nothing more than a five word vague reference to stress. Respondents were forced to seek an order requiring the Agency to be more specific about the nature of the damages they claim justifies an award of at least $150,000. Respondents requested a deposition of Complainants and Cheryl McPherson, whose false statement of the facts has been repeatedly relied on by the Complainants in this case. The Agency opposed a deposition and agreed to answer additional interrogatories instead. When Respondents renewed their request for deposition due to the inadequacy of the interrogatories, the Agency again opposed a deposition. The Agency objected to many of Respondents' requests for production of documents as irrelevant, including a request for names and addresses of any person with whom the Complainants spoke about the case, a request for Complainants' communications relating to the alleged unlawful event, and Complainants' social media postings relating to the alleged unlawful event. Again, Respondents were forced to move for an order compelling these clearly relevant documents.

Even in the face of an order, however, it has now become clear that the Agency has no intention of providing Respondents with the documents necessary to fairly defend their case. Complainant Laurel Bowman-Cryer's testimony at deposition showed that she actually did very little, if anything, to comply with the ALJ's order:

Q: Did you search for social media and text documents yourself at all?

A: Yes.

Q: And what did you do to search for those?

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A: I pulled up my Facebook messages between myself and my Aunt Terri.

Q: Is there more that you did on those?

A: Not really, no.

Q: Did you turn over the social media messages between yourself and your Aunt Terri?

A: Yes.

(Exhibit 2).

Q: Did you have any text messages relating to the facts of this case?

A: Most likely.

Q: Did you search for those?

A: I did not.

Q: Did someone?

A: I would assume Rachel did.

(Exhibit 3).

Complainant Rachel Bowman-Cryer also showed in her deposition that she did not perform any comprehensive search for records:

Q: So I believe you had said you searched your email, your Facebook and your Twitter accounts. Do you have any other social media, anything that you would have searched?

A: Nothing that I searched.

Q: Did you search anyone else's accounts?

A: Laurel's

Q: You searched Laurel's. What accounts of Laurel's did you search?

A: Her Facebook account and her Twitter account.

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Q: Did you search her emails?

A: No.

(Exhibit 4).

To compound this complete lack of effort to comply with the ALJ's order, now the Agency and/or Complainants have sandbagged Respondents by withholding crucial evidence until the last possible moment, thus allowing Respondents to proceed through deposition and trial preparation without more than one hundred pages of statements made by the Complainants from the beginning that directly relate to the damages the Agency has alleged. The Agency and the Complainants knew the contents of the discovery order and knew that these documents existed and were subject to the ALJ's order. If the Complainants failed to provide the documents until this late date, they have intentionally prejudiced Respondents' case and should not be allowed to proceed.

To allow such a blatant disregard for the orders of the forum would be a gross violation of due process and Respondents' right to a fair trial comparable to a criminal prosecutor failing to turn over *Brady* exculpatory evidence in a criminal proceeding. If the Complainants did timely provide the documents and the Agency withheld them, whether knowingly or negligently, the Agency's action is inexcusable. The Agency had a continuing duty to comply with the ALJ's order, and its failure to provide over one hundred pages of the Complainants' statements and reactions directly addressing the alleged unlawful events until this late date has irreparably prejudiced Respondents.

Alternatively, the forum should enter an order excluding presentation of any and all evidence of damages by or on behalf of Complainants and enter a finding awarding Complainants no monetary damages. As noted above (*Supra*, p. 4), such a sanction would be the only way to apply OAR 839-050-0200(11) in a manner consistent with due process and the forum's prior order.

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See also OAR 137-003-0569(1).

MOTION FOR FEES AND COSTS

In addition to dismissing the case and/or excluding all evidence of damages, the ALJ should cause the Complainants and/or the Agency to be liable for the costs and fees associated with the depositions completed, any other depositions ordered by the ALJ and this Motion for Sanctions. The information contained in the documents withheld would have been crucial to Respondents' deposition of Complainants as the documents contain a record of multiple conversations between Complainants and other potential witnesses as well as conversations between Complainants and the group organizing and perpetuating the public boycott of Respondents' business. Respondents should have had the opportunity to address these statements in deposition. Now there is no fair and just opportunity for another deposition without substantial prejudice to Respondents on the eve of hearing, especially if the scope of nonproduction by the Complainants and/or the Agency is yet to be fully determined. *Infra*, pp. 9-13. This hearing has already been postponed twice, and Respondents should not have to endure further protracted proceedings.

There is no way to right the wrong done when the ALJ has previously declined to allow further postponements due to discovery problems, and ordering another round of depositions without assuring discovery is <u>in fact</u> complete is an inadequate remedy at best. The Agency and/or the Complainants must be required to pay the costs associated with any and all depositions, the attorney fees for preparation and appearance at deposition, the cost of court reporting, and the attorney fees for this Motion. (Exhibit 5). Respondents can provide further documentation of its attorney fees as necessary.

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MOTION TO STRIKE

If the ALJ determines that the case should proceed in spite of the Complainants' and/or the Agency's actions, the Agency's Second Amended Formal Charges should also be stricken. The Agency filed Second Amended Formal Charges on February 23, 2015, the day before case summaries were due. The next morning, the Agency sent Respondents over one hundred pages of documents it had withheld. Less than three hours later, the Agency filed its case summary showing that more than one-third of its exhibits came out of the 109 page document the Agency or Complainants withheld. The Agency has taken full advantage of its unilateral ability to amend the Formal Charges at any time by cryptically adding references to the definitions of "sex" and "sexual orientation" for no clear reason the very day before case summaries are due and *before* handing over the more than one hundred pages of statements by the Complainants. The Agency's overt actions to prejudice the process and Respondents' rights has put the Respondents at a decided disadvantage from the beginning, and the Agency's and/or Complainants' deliberate withholding of documents and continued resistance at every possible opportunity casts serious doubt on the constitutionality and fundamental fairness of this proceeding.

MOTION FOR DISCOVERY ORDER

If the ALJ does not dismiss the proceedings entirely or exclude all evidence of Complainants' damages as requested above (and in light of the following recently discovered facts), Respondents move the ALJ for a discovery order requiring the Agency to turn over responsive documents to the below-listed requests. The Agency provided the following responses (in italics) to Respondents' Informal Requests for Discovery:

1. The Bureau of Labor and Industry's (hereinafter "the Agency") entire investigative file relating to the case No. 44-14 and 45-15.

The investigative files for both cases were mailed to Mr. Herbert Grey on July 24, 2014. Mr. Grey was asked to notify the agency if he had any problems with the mailed discs. The agency

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is unaware of any issues with the discovery, at this time.

5. Any written or otherwise recorded statements made by Complainants to the Agency.
All written or recorded statements made by the Complainants to the Agency have been provided to Respondents in the discovery sent on July 24, 2014. Should any future written or recorded statements come into the Agency's possession, they will be provided to Respondents in a timely manner.

6. Any statements in the Agency's possession which were made by Complainants to the Department of Justice.
All statements in the Agency's possession which were made by Complainants to the Department of Justice were provided to Respondents in the previously sent discovery.

8. Any record or documents showing that Complainants missed work or lost pay for any amount of time and for which Complainants seek damages in this action.
The Agency is working with Complainants in order to comply with this request. Any information will be provided as soon as possible.

13. Any and all receipts, invoices, or other records of expense for any "out of pocket expenses" Complainants intend to pursue as damages.
The Agency is working with Complainants in order to comply with this request. Any information will be provided as soon as possible.

14. Any social media post, blog post, email, text message, or other record or communication relating to any emotional, mental, or physical damage Complainants allege.
The Agency is working with Complainants in order to comply with this request. Any information will be provided as soon as possible.

15. Any social media post, blog post, email, text message, or other record or communication relating to travel or other expenses Complainants allege they incurred because of the events leading to this Complaint or the Complaint filed with the Department of Justice.
The Agency is working with Complainants in order to comply with this request. Any information will be provided as soon as possible.

21. All message received by Complainants on social media, by mail, email, text message, or any other means which Complainants intend to present as evidence of emotional or mental distress caused by Respondent's alleged actions.
This material contained in the previously provided discovery. Any further discovery that may come in on this issue will be provided in a timely manner.

Because the Agency did not object to these requests but instead stated that it was working

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with Complainants to provide the responsive documents, Respondents did not seek a discovery order. In deposition, however, it became apparent that the Agency had not actually worked with Complainants to provide responsive documents. For example, the Agency stated it was working with Complainants to provide records of any missed work or lost pay (*See* Request 8 above). In deposition, however, Laurel Bowman-Cryer stated the following:

> Q: Did you at any time search for records or documents showing that you missed any work or lost any pay?
>
> A: No, I did not.
>
> Q: Did anyone?
>
> A: It's not my knowledge.
>
> (Exhibit 6).

The ALJ ordered the Agency to comply with Respondents' request number nine; however, at the deposition, Laurel Bowman-Cryer stated that she did not search for any records relating to that request and that she did not know whether anyone else had searched for the records. (Exhibit 6). Further, in requests 14, 15, and 21, the Agency stated that it was working with Complainants to provide responsive text messages; however, Complainant Laurel Bowman-Cryer stated that she did not search for any such documents:

> Q: Did you have text messages relating to the facts of this case?
>
> A: Most likely.
>
> Q: Did you search for those?
>
> A: I did not.
>
> Q: Did someone?
>
> A: I would assume Rachel did.

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(Exhibit 3).

Q: What else did you do to response to the requests in this document?

A: provided verbal answers.

Q: Did you hand over any papers?

A: Just my Facebook messages.

Q: Did you forward any emails?

A: Not to my knowledge. I could be wrong.

Q: Did you hand over any paper documents?

A: No.

Q: Did you print anything out?

A: I did not.

Q: Did you, let's see, give passwords to any of your accounts to anyone to look through it for themselves?

A: I did not need to. My wife knows all of my passwords.

Q: Was there anything else that you did to respond to these other than what you've already explained?

A: No.

(Exhibit 2).

Finally, Mr. Smith asked, "Did anyone advise you, other than your own attorney, about the ramifications of not turning over or searching for the documents we've asked for?" Complainant Laurel Bowman-Cryer answered "No." (Exhibit 7).

Respondents became aware at the deposition of at least two documents that the Agency is still withholding. Complainant Laurel Bowman-Cryer explained that she provided a handwritten list of symptoms to BOLI and that BOLI provided her with a list of symptoms to which she added

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handwritten notes and checkmarks. (Exhibit 8). Respondents also believe similar lists were provided by and between Rachel Bowman-Cryer and the Agency. These documents would fall into the category of communications made from Complainants to BOLI and would, no doubt, be part of the investigative file. BOLI stated in its responses to Respondents' requests 1 and 5 that it would continue to provide additional documents which fell within the scope of those requests as they were received by the Agency. As of the time of this filing, Respondents have not received any of the aforementioned documents.

It appears from Ms. Bowman-Cryer's answers that the Agency has not been forthright with Respondents regarding its efforts to comply with discovery requests. We have no reason to believe that the Agency has actually fully complied with Respondents requests as it said it would do. For this reason, Respondents request an Order requiring the Agency to turn over all responsive documents to the above-listed requests 5, 6, 8, 13, 14, and 21. With the hearing just two weeks away, this order should require compliance within 24 hours of the order. Further, Respondents should be allowed to amend their Case Summary following the Agency's production.

CONCLUSION

This case should be dismissed due to the Agency's and/or the Complainants bad faith. In addition to or in the alternative, the ALJ should order one or more of the following: (a) exclude all evidence of Complainants' damages and enter an interim order awarding no damages; (b) the Agency and/or the Complainants should be required to pay the costs and fees associated with the taking of Complainants' depositions, as well as the fees and costs related to this motion; (c) if the case is not dismissed, the Agency's Second Amended Formal Charges should be stricken, and respondents should be granted leave to amend their Case Summary witness list and exhibit list in light of this voluminous new evidence; and (d) finally, the ALJ should order the Agency to

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immediately turn over all responsive documents to Respondents. Fundamental fairness and due process demands nothing less.

DATED this 26 day of February, 2015.

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Of Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26 day of February, 2015, I caused a true copies of RESPONDENTS' MOTION FOR DISCOVERY SANCTIONS AGAINST THE AGENCY AND/OR COMPLAINANTS, DECLARATION OF ANNA HARMON, and EXHIBITS 1-8 to be served upon the following named parties or their attorney by first class mail as indicated below and addressed to the following:

Karen Knight
Contested Case Coordinator
800 NE Oregon Street, Room 1045
Portland, OR 97232-2180

Jennifer Gaddis
Cristin Casey
800 NE Oregon Street, Room 1045
Portland, OR 97232-2180

Paul A. Thompson
310 SW Fourth Avenue, Suite 803
Portland, OR 97204

Johanna M. Riemenschneider
DOJ GC Business Activities
1162 Court Street NE
Salem, OR 97301

Mailing was completed by first class mail and email.

DATED this 26 day of February, 2015.

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Of Attorneys for Respondents

EXCERPT OF RECORD

EXHIBIT H

BEFORE THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON

In the Matter of: Oregon Bureau of Labor and Industries on behalf of LAUREL BOWMAN CRYER, Complainant, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 44-15 RESPONDENTS' ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS TO SECOND AMENDED FORMAL CHARGES

Respondents MELISSA ELAINE KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, for answer to the Amended Formal Charges on file herein, admit, deny and allege the following:

I. JURISDICTION

Admit that as of February 1, 2013 "Sweetcakes by Melissa" was registered as an assumed business name of MELISSA ELAINE KLEIN, who is the registrant and person involved in the daily operation of Sweetcakes by Melissa. Respondents further admit that "Sweet Cakes by Melissa" was the previous dba of MELISSA ELAIN KLEIN as alleged. Respondents further

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admit MELISSA ELAINE KLEIN was a "person" within the meaning of ORS 659A.001(9) and is a "respondent" herein.

Admit that AARON WAYNE KLEIN was registered as the authorized representative of Sweetcakes by Melissa as of February 1, 2013 and was involved in the daily operation of Sweetcakes by Melissa. Respondents further admit AARON WAYNE KLEIN was a "person" within the meaning of ORS 659A.001(9) and is a "respondent" herein.

Admit that at all times material herein, Respondent MELISSA ELAINE KLEIN operated the business at 44 NE Division Street, Gresham, OR 97030 which was a place of public accommodation within the meaning of ORS 659A.400.

Admit that on November 7, 2013, Laurel Bowman-Cryer filed a verified complaint with the Oregon Bureau of Labor & Industries alleging unlawful discrimination on the basis of sexual orientation, and further admit that the Agency issued and served Notice of Substantial Evidence dated January 15, 2014 on Respondents. Respondents deny that they engaged in discrimination based on sexual orientation or any other grounds set forth in ORS Chapter 659A.

II. UNLAWFUL PRACTICES

1. Admit the allegations of paragraph 1.
2. Admit the allegations of paragraph 2.
3. Admit in paragraph 3 that at the date and place alleged Complainant Rachel Cryer expressed interest in ordering a cake in connection with a same-sex wedding ceremony involving Complainant and Rachel Cryer, even though Article XV, §5a of the Oregon Constitution at that time did not authorize validity or recognition of

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marriage between same-sex couples in Oregon as alleged in paragraph 21 below. Respondents further admit Cheryl McPherson was also present on the date alleged.

4. Admit the allegations of paragraph 4.

5. Admit in paragraph 5 that Respondent AARON KLEIN declined the request to design and decorate a cake for complainants' same-sex ceremony with words substantially similar to "We don't do cakes for same-sex weddings", and further admit that Ms. Cryer and Ms. McPherson left Respondents' place of business, but otherwise deny the allegations of paragraph 5.

6. Admit in paragraph 6 that Ms. McPherson returned to the business and spoke with Respondent AARON KLEIN, but denies the remaining allegations of paragraph 6.

7. Admit in paragraph 7 that Respondent AARON KLEIN had participated in a televised interview that was *rebroadcast* on Christian Broadcasting Network on the date alleged, but denies the remaining allegations of paragraph 7.

8. Admit in paragraph 8 that Respondent AARON KLEIN participated in a radio interview with Tony Perkins on the date alleged, but denies the remaining allegations of paragraph 7.

9. Deny the allegations of paragraph 9.

III. UNLAWFUL PRACTICE: DISCRIMINATION BY PLACE OF PUBLIC ACCOMMODATION BASED ON SEXUAL ORIENTATION

10. Admit MELISSA ELAINE KLEIN's place of business was a place of public accommodation within the meaning of ORS 659A.400(1).

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11. Admit in paragraph 11 that complainant is a "person", but deny that the provisions alleged entitle complainant to the relief sought.

12. Deny the allegations of paragraph 12.

IV. UNLAWFUL PRACTICE: DISCRIMINATION BY PUBLICATION, CIRCULATION, ISSUANCE, OR DISPLAY OF A COMMUNICATION, NOTICE, ADVERTISEMENT, OR SIGN OF A DENIAL OF ACCOMMODATIONS, ADVANTAGES, FACILITIES, SERVICES OR PRIVILEGES BY A PLACE OF PUBLIC ACCOMMODATION BASED ON SEXUAL ORIENTATION

13. Deny the allegations of paragraph 13.

14. Deny the allegations of paragraph 14.

V. DAMAGES

15. Deny the allegations of paragraph 15.

ADDITIONAL ALLEGATIONS

16. At all times material herein, the state of Oregon, its executive departments (including the Bureau of Labor and Industries) and its political subdivisions were acting under color of state law.

17. At all times material herein, the state of Oregon, its executive, legislative or judicial departments (including the Bureau of Labor and Industries) and its political subdivisions were public bodies which owned or maintained places open to the public as defined in ORS 174.109 and which were places of public accommodation within the meaning of ORS 659A.400(1)(b) and 174.109. In particular, the Bureau of Labor and Industries has been granted judicial enforcement jurisdiction over the protection of civil rights, including those set forth in ORS Chapter 659A, for all Oregon citizens.

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For a further separate ANSWER AND FIRST AFFIRMATIVE DEFENSE to Claims III and IV (Failure to State a Claim for Public Accommodation Discrimination or Publication and Circulation), Respondents allege the Second Amended Formal Charges should be dismissed in their entirety for failure to state ultimate facts sufficient to constitute a claim in that:

18. Respondents did not engage in discrimination based on sexual orientation or any other grounds set forth in ORS Chapter 659A, including without limitation ORS 659A.403, 659A.406 and 659A.409; and

19. All claims or allegations in the Second Amended Formal Charges relating to aiding and abetting by any Respondent lack factual or legal foundation.

For a further separate ANSWER AND SECOND AFFIRMATIVE DEFENSE to Claims III and IV (Illegality), Respondents allege:

20. Re-allege and incorporate by reference the allegations of paragraphs 16 and 17.

21. Before and throughout the time of the initial events and the filing of the complaints, the Oregon Constitution specifically provided that it is the policy of Oregon and its political subdivisions that only a marriage between one man and one woman shall be valid or legally recognized as a marriage. Article XV, §5a (enacted by voters in 2004).

22. Inasmuch as the Oregon Constitution did not authorize validity or legal recognition of same-sex unions at the time of the alleged events, and the state of Oregon by policy and practice did not issue marriage licenses to same-sex couples at the time of the events alleged in the Second Amended Formal Charges, no executive, legislative or

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judicial department of the state of Oregon nor any of its political subdivisions has any legitimate authority to compel Respondents to engage in creative expression or otherwise participate in same-sex ceremonies not recognized by the state of Oregon contrary to their fundamental rights, consciences and convictions.

For a further separate ANSWER AND THIRD AFFIRMATIVE DEFENSE to Claims III and IV (Estoppel), Respondents allege:

23. Re-allege and incorporate by reference herein the allegations of paragraphs 16, 17, 21 and 22 above.

24. The state of Oregon, including the Bureau of Labor and Industries is estopped from compelling Respondents to engage in creative expression or otherwise participate in same-sex ceremonies not recognized by the state of Oregon contrary to their fundamental rights, consciences and convictions.

For a further separate ANSWER AND FOURTH AFFIRMATIVE DEFENSE to Claims III and IV (Public Accommodation Discrimination or Publication and Circulation Unconstitutional under First and Fourteenth Amendments, U.S. Constitution), Respondents allege:

25. Re-allege and incorporate by reference herein the allegations of paragraphs 16, 17, 21 and 22 above.

26. The statutes underlying the Second Amended Formal Charges herein in ORS 659A.003, *et seq*, are unconstitutional as applied to Respondents to the extent they do not protect the fundamental rights of Respondents and persons similarly situated arising under the First and Fourteenth Amendments to the United States Constitution,

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as applied to the state of Oregon under the Fourteenth Amendment, in one or more of the following particulars:

a) In unlawfully infringing on Respondents' right of conscience;

b) In unlawfully infringing on Respondents' right to free exercise of religion;

c) In unlawfully infringing on Respondents' right to free speech;

d) In unlawfully compelling Respondents to engage in expression of a message they do not want to express;

e) In unlawfully denying Respondents' right to due process; and

f) In unlawfully denying Respondents the equal protection of the laws.

27. The statutes underlying the Second Amended Formal Charges herein in ORS 659A.003, *et seq*, are facially unconstitutional to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated arising under the First and Fourteenth Amendments to the United States Constitution, as applied to the state of Oregon under the Fourteenth Amendment, in one or more of the ways alleged in paragraph 26.

For a further separate ANSWER AND FIFTH AFFIRMATIVE DEFENSE to Claims III and IV (Public Accommodation Discrimination or Publication and Circulation Unconstitutional under Article I, §§ 2, 3, 8, 20 and Article XV, §5a of the Oregon Constitution), Respondents allege:

28. Re-allege and incorporate by reference herein the allegations of paragraphs 16, 17, 21, 22 and 26-27 above.

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29. The statutes underlying the Second Amended Formal Charges against Respondents, as-applied, violate Respondents' fundamental rights arising under the Oregon Constitution in one or more of the following particulars:

a) In unlawfully violating Respondents' freedom of worship and conscience under Article I, §2;

b) In unlawfully violating Respondents' freedom of religious opinion under Article I, §3;

c) In unlawfully violating Respondents' freedom of speech under Article I, §8;

d) In unlawfully compelling Respondents to engage in expression of a message they did not want to express;

e) In unlawfully violating Respondents' privileges and immunities under Article I, §20; and

f) In violating Article XV, §5a of the Oregon Constitution.

30. The statutes underlying the Second Amended Formal Charges against Respondents are facially unconstitutional in that they violate Respondents' fundamental rights arising under the Oregon Constitution to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated in one or more of the ways set forth in paragraph 29.

For a further separate ANSWER AND FIRST COUNTERCLAIM (Attorney Fees), Respondents allege:

31. Re-allege and incorporate by reference herein the allegations of paragraphs 16, 17, 21, 22, 26-27 and 29-30 above.

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32. If Respondents are determined to be the prevailing party herein, they are entitled to recover their court costs and reasonable attorney fees pursuant to ORS 659A.885(9), *Armatta v. Kitzhaber*, 327 Or 250 (1998), *Deras v. Myers*, 272 Or 47 (1975) and 42 USC § 1988 in an amount to be determined by the court.

For a further separate ANSWER AND SECOND COUNTERCLAIM (Violation of ORS 659A.403), Respondents allege:

33. Re-allege and incorporate by reference the allegations of paragraphs 16, 17, 21, 22, 26-27 29-30 and 32above.

34. Respondents are members of a class based on religion protected in ORS 659A.003, *et seq*. in all places of public accommodation.

35. On or about August 23, 2013, November 21, 2013, and June 4, 2014 Respondents gave written notice of their constitutional and statutory claims and defenses in their responses to the initial complaints and other pleadings filed herein with the Bureau of Labor and Industries.

36. The state of Oregon, acting by and through its Bureau of Labor and Industries, has knowingly and selectively acted under color of state law to deprive Respondents of their fundamental constitutional and statutory rights on the basis of religion without taking similar action against county clerks and other state of Oregon officials similarly denying same-sex couples goods and services relating to same-sex unions, disparately impacting Respondents and causing economic damages to Respondents in an amount not less than $100,000.

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37. The Bureau of Labor and Industries has knowingly and selectively acted under color of state law to deprive Respondents of their fundamental constitutional and statutory rights without taking similar action against county clerks and other state of Oregon officials similarly denying same-sex couples goods and services relating to same-sex unions, disparately impacting Respondents and causing non-economic damages to Respondents in an amount not less than $100,000.

For a further separate ANSWER AND THIRD COUNTERCLAIM (Violation of ORS 659A.409), Respondents allege:

38. Re-allege and incorporate by reference the allegations of paragraphs 16, 17, 21, 22, 26-27, 29-30, 31 and 34-37 above.

39. During the period from February 5, 2013 to the present, the Commissioner of the Bureau of Labor and Industries published, circulated, issued, displayed, or caused to be published, circulated, issued, displayed, communications on Facebook and in print media to the effect that its accommodations, advantages, facilities, services or privileges would be refused, withheld from or denied to, or that discrimination would be made against Respondents and other persons similarly situated on the basis of religion in violation of ORS 659A.409.

For a further separate ANSWER AND FOURTH COUNTERCLAIM (Deprivation of Civil Rights under First and Fourteenth Amendments, U.S. Constitution), Respondents allege:

40. Re-allege and incorporate by reference herein the allegations of paragraphs 16, 17, 21, 22, 26-27, 29-30, 31 and 34-39 above.

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41. 42 USC § 1983 provides that persons acting "under color of any statute, ordinance, regulation, custom or usage of any State" who deprives any U.S. citizen of his/her rights and protections guaranteed by the United States Constitution "shall be liable to the party injured."

42. As alleged herein, ORS 659A.003 *et seq*, as applied and enforced herein, deprives the Respondents of fundamental rights and protections guaranteed by the First and Fourteenth Amendments to the United States Constitution, whereby ORS 659A.003 *et seq*, as applied and enforced herein,.

WHEREFORE, Respondents pray that the Second Amended Formal Charges be dismissed, that complainants recover nothing, for judgment in their favor in the amount of $200,000, and that Respondents be awarded their costs and disbursements, including reasonable attorney fees pursuant to ORS 659A.885(9), *Armatta v. Kitzhaber*, 327 Or 250 (1998), *Deras v. Myers*, 272 Or 47 (1975) and 42 USC § 1988.

DATED this 27th day of February, 2015.

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Of Attorneys for Respondents

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CERTIFICATE OF SERVICE

I hereby certify I served the foregoing RESPONDENTS' ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS TO SECOND AMENDED FORMAL CHARGES on the following via the indicated method(s) of service on the 27th day of February, 2015:

Karen Knight
Contested Case Coordinator
800 NE Oregon Street, Room 1045
Portland, OR 97232-2180

Jennifer Gaddis
Cristin Casey
800 NE Oregon Street, Room 1045
Portland, OR 97232-2180

Amy Klare
Administrator, Civil Rights Division
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Johanna M. Riemenschneider
DOJ GC Business Activities
1162 Court Street NE
Salem, OR 97301

Paul A. Thompson
310 SW Fourth Avenue, Suite 803
Portland, OR 97204

✓ **MAILING** certified full, true and correct copies thereof in a sealed, first class postage-prepaid envelope, addressed to the attorney(s) shown above at their last known office address(es), and deposited with the U.S. Postal Service at Portland/Beaverton, Oregon, on the date set forth below.

_____ **EMAILING** certified full, true and correct copies thereof to the attorney(s) shown above at their last known email address(es) on the date set forth below.

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1 ____ **HAND DELIVERING** certified full, true and correct copies thereof to the
2 attorney(s) shown above at their last known office address(es), on the date set
3 forth below.
4
5
6
7 Herbert G. Grey, OSB #810250
8 Of Attorneys for Respondents

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BEFORE THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON

In the Matter of: Oregon Bureau of Labor and Industries on behalf of RACHEL CRYER, Complainant, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 44-14 RESPONDENTS' ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS TO SECOND AMENDED FORMAL CHARGES

I HEREBY CERTIFY THAT THE FOREGOING IS A COMPLETE AND EXACT COPY OF THE ORIGINAL THEREOF.

Attorney for Respondents

Respondents MELISSA ELAINE KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, for answer to the Formal Charges on file herein, admit, deny and allege the following:

I. JURISDICTION

Admit that as of February 1, 2013 "Sweetcakes by Melissa" was registered as an assumed business name of MELISSA ELAINE KLEIN, who is the registrant and person involved in the daily operation of Sweetcakes by Melissa. Respondents further admit that "Sweet Cakes by Melissa" was the previous dba of MELISSA ELAIN KLEIN as alleged. Respondents further

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admit MELISSA ELAINE KLEIN was a "person" within the meaning of ORS 659A.001(9) and is a "respondent" herein.

Admit that AARON WAYNE KLEIN was registered as the authorized representative of Sweetcakes by Melissa as of February 1, 2013 and was involved in the daily operation of Sweetcakes by Melissa. Respondents further admit AARON WAYNE KLEIN was a "person" within the meaning of ORS 659A.001(9) and is a "respondent" herein.

Admit that at all times material herein, Respondent MELISSA ELAINE KLEIN operated the business at 44 NE Division Street, Gresham, OR 97030 which was a place of public accommodation within the meaning of ORS 659A.400.

Admit that on August 8, 2013, Rachel Cryer filed a verified complaint with the Oregon Bureau of Labor & Industries alleging unlawful discrimination on the basis of sexual orientation, and further admit that the Agency issued and served Notices of Substantial Evidence dated January 15, 2014 on Respondents. Respondents deny that they engaged in discrimination based on sexual orientation or any other grounds set forth in ORS Chapter 659A.

II. UNLAWFUL PRACTICES

1. Admit the allegations of paragraph 1.
2. Admit the allegations of paragraph 2.
3. Admit in paragraph 3 that at the date and place alleged Complainant expressed interest in ordering a cake in connection with a same-sex wedding ceremony involving Complainant and Laurel Bowman-Cryer, even though Article XV, §5a of the Oregon Constitution at that time did not authorize validity or recognition of

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marriage between same-sex couples in Oregon as alleged in paragraph 21 below. Respondents further admit Cheryl McPherson was also present on the date alleged.

4. Admit the allegations of paragraph 4.

5. Admit in paragraph 5 that Respondent AARON KLEIN declined the request to design and decorate a cake for complainants' same-sex ceremony with words substantially similar to "We don't do same-sex weddings", and further admit that Ms. Cryer and Ms. McPherson left Respondents' place of business, but otherwise deny the allegations of paragraph 5.

6. Admit in paragraph 6 that Ms. McPherson returned to the business and spoke with Respondent AARON KLEIN, but denies the remaining allegations of paragraph 6.

7. Admit in paragraph 7 that Respondent AARON KLEIN had participated in a televised interview that was rebroadcast on Christian Broadcasting Network on the date alleged, but denies the remaining allegations of paragraph 7.

8. Admit in paragraph 8 that Respondent AARON KLEIN participated in a radio interview with Tony Perkins on the date alleged, but denies the remaining allegations of paragraph 8.

9. Deny the allegations of paragraph 9.

III. UNLAWFUL PRACTICE: DISCRIMINATION BY PLACE OF PUBLIC ACCOMMODATION BASED ON SEXUAL ORIENTATION

10. Admit MELISSA ELAINE KLEIN's place of business was a place of public accommodation within the meaning of ORS 659A.400(1).

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11. Admit in paragraph 11 that complainant is a "person", but deny that the provisions alleged entitle complainant to the relief sought.

12. Deny the allegations of paragraph 12.

IV. UNLAWFUL PRACTICE: DISCRIMINATION BY PUBLICATION, CIRCULATION, ISSUANCE, OR DISPLAY OF A COMMUNICATION, NOTICE, ADVERTISEMENT, OR SIGN OF A DENIAL OF ACCOMMODATIONS, ADVANTAGES, FACILITIES, SERVICES OR PRIVILEGES BY A PLACE OF PUBLIC ACCOMMODATION BASED ON SEXUAL ORIENTATION

13. Deny the allegations of paragraph 13.

14. Deny the allegations of paragraph 14.

V. DAMAGES

15. Deny the allegations of paragraph 15.

ADDITIONAL ALLEGATIONS

16. At all times material herein, the state of Oregon, its executive departments (including the Bureau of Labor and Industries) and its political subdivisions were acting under color of state law.

17. At all times material herein, the state of Oregon, its executive, legislative or judicial departments (including the Bureau of Labor and Industries) and its political subdivisions were public bodies which owned or maintained places open to the public as defined in ORS 174.109 and which were places of public accommodation within the meaning of ORS 659A.400(1)(b) and 174.109. In particular, the Bureau of Labor and Industries has been granted quasi-judicial enforcement jurisdiction over the

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protection of civil rights, including those set forth in ORS Chapter 659A, for all Oregon citizens.

For a further separate ANSWER AND FIRST AFFIRMATIVE DEFENSE to Claims III and IV (Failure to State a Claim for Public Accommodation Discrimination or Publication and Circulation), Respondents allege the Second Amended Formal Charges should be dismissed in their entirety for failure to state ultimate facts sufficient to constitute a claim in that:

18. Respondents did not engage in discrimination based on sexual orientation or any other grounds set forth in ORS Chapter 659A, including without limitation ORS 659A.403, 659A.406 and 659A.409; and

19. All claims or allegations in the Second Amended Formal Charges relating to aiding and abetting by any Respondent lack factual or legal foundation.

For a further separate ANSWER AND SECOND AFFIRMATIVE DEFENSE to Claims III and IV (Illegality), Respondents allege:

20. Re-allege and incorporate by reference the allegations of paragraphs 16 and 17.

21. Before and throughout the time of the initial events and the filing of the complaints, the Oregon Constitution specifically provided that it is the policy of Oregon and its political subdivisions that only a marriage between one man and one woman shall be valid or legally recognized as a marriage. Article XV, §5a (enacted by voters in 2004).

22. Inasmuch as the Oregon Constitution did not authorize the validity or legal recognition of same-sex unions at the time of the alleged events, and the state of

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Oregon by policy and practice did not issue marriage licenses to same-sex couples at the time of the events alleged in the Second Amended Formal Charges, no executive, legislative or judicial department of the state of Oregon nor any of its political subdivisions has any legitimate authority to compel Respondents to engage in creative expression or otherwise participate in same-sex ceremonies not recognized by the state of Oregon contrary to their fundamental rights, consciences and convictions.

For a further separate ANSWER AND THIRD AFFIRMATIVE DEFENSE to Claims III and IV (Estoppel), Respondents allege:

23. Re-allege and incorporate by reference herein the allegations of paragraphs 16, 17, 21 and 22 above.

24. The state of Oregon, including the Bureau of Labor and Industries is estopped from compelling Respondents to engage in creative expression or otherwise participate in same-sex ceremonies not recognized by the state of Oregon contrary to their fundamental rights, consciences and convictions.

For a further separate ANSWER AND FOURTH AFFIRMATIVE DEFENSE to Claims III and IV (Public Accommodation Discrimination or Publication and Circulation Unconstitutional under First and Fourteenth Amendments, U.S. Constitution), Respondents allege:

25. Re-allege and incorporate by reference herein the allegations of paragraphs 16, 17, 21 and 22 above.

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26. The statutes underlying the Second Amended Formal Charges herein in ORS 659A.003, *et seq*, are unconstitutional as applied to Respondents to the extent they do not protect the fundamental rights of Respondents and persons similarly situated arising under the First and Fourteenth Amendments to the United States Constitution, as applied to the state of Oregon under the Fourteenth Amendment, in one or more of the following particulars:

a) In unlawfully infringing on Respondents' right of conscience;

b) In unlawfully infringing on Respondents' right to free exercise of religion;

c) In unlawfully infringing on Respondents' right to free speech;

d) In unlawfully compelling Respondents to engage in expression of a message they do not want to express;

e) In unlawfully denying Respondents' right to due process; and

f) In unlawfully denying Respondents the equal protection of the laws.

27. The statutes underlying the Second Amended Formal Charges herein in ORS 659A.003, *et seq*, are facially unconstitutional to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated arising under the First and Fourteenth Amendments to the United States Constitution, as applied to the state of Oregon under the Fourteenth Amendment, in one or more of the ways alleged in paragraph 26.

For a further separate ANSWER AND FIFTH AFFIRMATIVE DEFENSE to Claims III and IV (Public Accommodation Discrimination or Publication and Circulation

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Unconstitutional under Article I, §§ 2, 3, 8, 20 and Article XV, §5a of the Oregon Constitution), Respondents allege:

28. Re-allege and incorporate by reference herein the allegations of paragraphs 16, 17, 21, 22 and 26-27 above.

29. The statutes underlying the Second Amended Formal Charges against Respondents are unconstitutional as applied in that they violate Respondents' fundamental rights arising under the Oregon Constitution in one or more of the following particulars:

a) In unlawfully violating Respondents' freedom of worship and conscience under Article I, §2;

b) In unlawfully violating Respondents' freedom of religious opinion under Article I, §3;

c) In unlawfully violating Respondents' freedom of speech under Article I, §8;

d) In unlawfully compelling Respondents to engage in expression of a message they did not want to express;

e) In unlawfully violating Respondents' privileges and immunities under Article I, §20; and

f) In violating Article XV, §5a of the Oregon Constitution.

30. The statutes underlying the Second Amended Formal Charges against Respondents are facially unconstitutional in that they violate Respondents' fundamental rights arising under the Oregon Constitution to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated in one or more of the ways set forth in paragraph 29.

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For a further separate ANSWER AND FIRST COUNTERCLAIM (Attorney Fees), Respondents allege:

31. Re-allege and incorporate by reference herein the allegations of paragraphs 16, 17, 21, 22, 26-27 and 29-30 above.

32. If Respondents are determined to be the prevailing party herein, they are entitled to recover their court costs and reasonable attorney fees pursuant to ORS 659A.885(9), *Armatta v. Kitzhaber*, 327 Or 250 (1998), *Deras v. Myers*, 272 Or 47 (1975) and 42 USC § 1988 in an amount to be determined by the court.

For a further separate ANSWER AND SECOND COUNTERCLAIM (Violation of ORS 659A.403), Respondents allege:

33. Re-allege and incorporate by reference the allegations of paragraphs 16, 17, 21, 22, 26-27, 29-30 and 32 above.

34. Respondents are members of a class based on religion protected in ORS 659A.003, *et seq.* in all places of public accommodation.

35. On or about August 23, 2013, November 21, 2013, and June 4, 2014 Respondents gave written notice of their constitutional and statutory claims and defenses in their responses to the initial complaints and other pleadings filed herein with the Bureau of Labor and Industries.

36. The state of Oregon, acting by and through its Bureau of Labor and Industries, has knowingly and selectively acted under color of state law to deprive Respondents of their fundamental constitutional and statutory rights on the basis of religion without taking similar action against county clerks and other state of Oregon officials

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similarly denying same-sex couples goods and services relating to same-sex unions, disparately impacting Respondents and causing economic damages to Respondents in an amount not less than $100,000.

37. The Bureau of Labor and Industries has knowingly and selectively acted under color of state law to deprive Respondents of their fundamental constitutional and statutory rights without taking similar action against county clerks and other state of Oregon officials similarly denying same-sex couples goods and services relating to same-sex unions, disparately impacting Respondents and causing non-economic damages to Respondents in an amount not less than $100,000.

For a further separate ANSWER AND THIRD COUNTERCLAIM (Violation of ORS 659A.409), Respondents allege:

38. Re-allege and incorporate by reference the allegations of paragraphs 16, 17, 21, 22, 26-27, 29-30, 31 and 34-37 above.

39. During the period from February 5, 2013 to the present, the Commissioner of the Bureau of Labor and Industries published, circulated, issued, displayed, or caused to be published, circulated, issued, displayed, communications on Facebook and in print media to the effect that its accommodations, advantages, facilities, services or privileges would be refused, withheld from or denied to, or that discrimination would be made against Respondents and other persons similarly situated on the basis of religion in violation of ORS 659A.409.

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For a further separate ANSWER AND FOURTH COUNTERCLAIM (Deprivation of Civil Rights under First and Fourteenth Amendments, U.S. Constitution), Respondents allege:

40. Re-allege and incorporate by reference herein the allegations of paragraphs 16, 17, 21, 22, 26-27, 29-30, 31 and 34-39 above.

41. 42 USC § 1983 provides that persons acting "under color of any statute, ordinance, regulation, custom or usage of any State" who deprives any U.S. citizen of his/her rights and protections guaranteed by the United States Constitution "shall be liable to the party injured."

42. As alleged herein, ORS 659A.003 *et seq*, as applied and enforced herein, deprives the Respondents of fundamental rights and protections guaranteed by the First and Fourteenth Amendments to the United States Constitution, whereby ORS 659A.003 *et seq*, as applied and enforced herein,.

WHEREFORE, Respondents pray that the Second Amended Formal Charges be dismissed, that complainants recover nothing, for judgment in their favor in the amount of $200,000, and that Respondents be awarded their costs and disbursements, including reasonable

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attorney fees pursuant to ORS 659A.885(9), *Armatta v. Kitzhaber*, 327 Or 250 (1998), *Deras v. Myers*, 272 Or 47 (1975) and 42 USC § 1988.

DATED this 27th day of February, 2015.

Herbert G. Grey, OSB #810250
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anna@ruralbusinessattorneys.com

Of Attorneys for Respondents

HERBERT G. GREY
Attorney At Law
4800 SW Griffith Drive, Suite 320
Beaverton, OR 97005-8716
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CERTIFICATE OF SERVICE

I hereby certify I served the foregoing RESPONDENTS' ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS TO SECOND AMENDED FORMAL CHARGES on the following via the indicated method(s) of service on the 27th day of February, 2015:

Karen Knight
Contested Case Coordinator
800 NE Oregon Street, Room 1045
Portland, OR 97232-2180

Jennifer Gaddis
Cristin Casey
800 NE Oregon Street, Room 1045
Portland, OR 97232-2180

Amy Klare
Administrator, Civil Rights Division
800 NE Oregon Street, Room 1045
Portland, OR 97232-2180

Johanna M. Riemenschneider
DOJ GC Business Activities
1162 Court Street NE
Salem, OR 97301

Paul A. Thompson
310 SW Fourth Avenue, Suite 803
Portland, OR 97204

X **MAILING** certified full, true and correct copies thereof in a sealed, first class postage-prepaid envelope, addressed to the attorney(s) shown above at their last known office address(es), and deposited with the U.S. Postal Service at Portland/Beaverton, Oregon, on the date set forth below.

____ **EMAILING** certified full, true and correct copies thereof to the attorney(s) shown above at their last known email address(es) on the date set forth below.

HERBERT G. GREY
Attorney At Law
4800 SW Griffith Drive, Suite 320
Beaverton, OR 97005-8716
(503) 641-4908

1 ____ **HAND DELIVERING** certified full, true and correct copies thereof to the
2 attorney(s) shown above at their last known office address(es), on the date set
3 forth below.
4
5
6
7 Herbert G. Grey, OSB #810250
8 Of Attorneys for Respondents

HERBERT G. GREY
Attorney At Law
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EXCERPT OF RECORD

EXHIBIT I

BEFORE THE COMMISSIONER
OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON

In the Matter of:	
Oregon Bureau of Labor and Industries on behalf of Rachel Cryer, Complainant	Case No. 44-14
v.	
Melissa Elaine Klein, dba Sweetcakes by Melissa,	**SECOND AMENDED** FORMAL CHARGES
and Aaron Wayne Klein, dba Sweetcakes by Melissa	
and, in the alternative, Aaron Wayne Klein, individually as an Aider or Abettor under ORS 659A.406,	
Respondent(s)	

The Civil Rights Division of the Oregon Bureau of Labor and Industries ("the Agency") alleges the following Formal Charges against Respondent Melissa Elaine Klein, dba Sweetcakes by Melissa, and Respondent Aaron Wayne Klein that will be heard at a time and place set forth in the Notice of Hearing.

I. JURISDICTION

Sweetcakes by Melissa is registered with the Oregon Secretary of State Business Registry as an assumed business name of Melissa Elaine Klein.[1] Respondent Melissa Elaine Klein is registered with the Oregon Secretary of State

[1] "Sweetcakes by Melissa" was registered with the Oregon Secretary of State on Feb 1, 2013. "Sweet Cakes by Melissa" was the previous dba of Melissa Elaine Klein, registered on May 18, 2007 and failing to renew in 2009.

Business Registry as the Registrant for Sweetcakes by Melissa and is involved with the daily operation of Sweetcakes by Melissa. Respondent Melissa Elaine Klein was at all material times a "person" within the meaning of ORS 659A.001(9), was subject to all applicable provisions of ORS chapter 659A and is a "respondent" within the meaning of ORS 659A.001(10).

Respondent Aaron Wayne Klein was at all material times the authorized representative of Melissa Elaine Klein and was involved with the daily operation of the business. Respondent Aaron Wayne Klein is registered with the Oregon Secretary of State Business Registry as the Authorized Representative of Melissa Elaine Klein, dba Sweetcakes by Melissa. Respondent Aaron Wayne Klein was at all material times a "person" within the meaning of ORS 659A.001(9), was subject to all applicable provisions of ORS chapter 659A and is a "respondent" within the meaning of ORS 659A.001(10).

At material times, Respondent Melissa Elaine Klein operated her business at 44 NE Division St, Gresham, OR 97030, and it was a place of public accommodation within the meaning of ORS 659A.400.

On August 8, 2013, Rachel Cryer, filed a verified complaint (Case Number STPASO130808-11097) and is authorized to file this complaint pursuant to ORS 659A.820, alleging unlawful discrimination on the basis of sexual orientation. The Agency found substantial evidence of said practices on the part of Respondents and issued a Notice of Substantial Evidence Determination on January 15, 2014, sending a copy to Respondents.

II. UNLAWFUL PRACTICES

1. Respondent designs and manufactures baked goods, including wedding cakes.

2. At all material times, Melissa Elaine Klein's business was a place offering goods and services to the public.
3. On or about January 17, 2013 Complainant and her mother, Cheryl McPherson, went to Respondent's place of business for a previously scheduled cake tasting appointment. Complainant was interested in purchasing a cake for her wedding ceremony to Laurel Bowman-Cryer.
4. Respondent Aaron Klein conducted the cake tasting. During the tasting, Respondent Aaron Klein asked for the names of the bride and groom. Complainant explained that there would be two brides for her ceremony, and provided her own name and that of Laurel Bowman-Cryer.
5. Respondent refused to provide services to Complainant, stating "we don't do same-sex couples." He further explained "I'm sorry but we don't do same-sex weddings because it goes against our religion." Complainant and Ms. McPherson then left Respondents' place of business.
6. Shortly thereafter, Ms. McPherson returned to the business and spoke with Respondent Aaron Klein. Ms. McPherson told Respondent Aaron Klein that she was once "like him;" she told him that she "was raised in a Southern Baptist home...God [had] blessed [her] with two gay children and [her] truth now had changed." Respondent Aaron Klein responded, "Your children are an abomination of God."
7. On or about September 2, 2013, Respondent Aaron Klein participated in a televised interview that aired on the Christian Broadcasting Network. In

reference to his refusal to provide Complainant with goods or services, Respondent Aaron Klein stated "I didn't want to be a part of her marriage, which I think is wrong."

8. On or about February 13, 2014, Respondent Aaron Klein participated in a radio interview with Tony Perkins. In reference to his refusal to provide Complainant with goods or services, Respondent Aaron Klein stated "We don't do same-sex marriage, same-sex wedding cakes..." He went on to explain that he and Respondent Melissa Klein had previously discussed whether they would provide cake service to same-sex couples when the state of Washington legalized same-sex marriage and agreed they would decline to do so.

9. Rachel Cryer was injured by the actions of Respondent(s).

III. UNLAWFUL PRACTICE: DISCRIMINATION BY PLACE OF PUBLIC ACCOMMODATION BASED ON SEXUAL ORIENTATION

The Agency re-alleges the previous paragraphs and further alleges:

10. At all material times, Melissa Elaine Klein's business was a place of public accommodation within the meaning of ORS 659A.400(1).

11. At all material times, Rachel Cryer was a "person" entitled to the full and equal accommodations, advantages, facilities and privileges of Respondent Melissa Elaine Klein's business, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age. ORS 659A.001(9); ORS 659A.403(1); OAR 839-005-0003(14), **(15), and (16)**.

12. Respondents discriminated against Complainant because of her sexual orientation.

a. Melissa Elaine Klein denied full and equal accommodations, advantages, facilities and privileges of her business to Rachel Cryer based on her sexual orientation, in violation of ORS 659A.403(3).

b. Respondent Aaron Wayne Klein, dba Sweetcakes by Melissa denied full and equal accommodations, advantages, facilities and privileges of her business to Rachel Cryer based on her sexual orientation, in violation of ORS 659A.403(3).

c. In the alternative, Respondent Aaron Wayne Klein aided or abetted Melissa Elaine Klein in violating ORS 659A.403(3), in violation of ORS 659A.406.

IV. UNLAWFUL PRACTICE: DISCRIMINATION BY PUBLICATION, CIRCULATION, ISSUANCE, OR DISPLAY OF A COMMUNICATION, NOTICE, ADVERTISEMENT, OR SIGN OF A DENIAL OF ACCOMMODATIONS, ADVANTAGES, FACILITIES, SERVICES OR PRIVILEGES BY A PLACE OF PUBLIC ACCOMMODATION BASED ON SEXUAL ORIENTATION

The Agency re-alleges the previous paragraphs and further alleges:

13. Respondents published, circulated, issued or displayed, or caused to be published, circulated, issued or displayed, a communication, notice, advertisement or sign to the effect that its accommodations, advantages, facilities, services or privileges would be refused, withheld from or denied to, or that discrimination would be made against, a person on account of his or her sexual orientation.

a. Melissa Elaine Klein published, circulated, issued or displayed, or caused to be published, circulated, issued or displayed, a communication, notice, advertisement or sign to the effect that its accommodations, advantages, facilities, services or privileges would be refused, withheld from or denied to, or that discrimination would be made against, a person on account of his or her sexual orientation, in violation of ORS 659A.409.

b. Respondent Aaron Wayne Klein, dba Sweetcakes by Melissa denied full and equal accommodations, advantages, facilities and privileges of her business to Rachel Cryer based on her sexual orientation, in violation of ORS 659A.403(3).

c. In the alternative, Respondent Aaron Wayne Klein aided or abetted Melissa Elaine Klein in violating ORS 659A.409, in violation of ORS 659A.406.

14. Respondent Melissa Elaine Klein and Respondent Aaron Wayne Klein, individually, are jointly and severally liable for the effects and consequences of the violation of ORS 659A.403(3) and 659A.409 as detailed in the aforementioned paragraphs, and any damages resulted therefrom, under ORS 659A.406.

V. DAMAGES

The Agency re-alleges the previous paragraphs and further alleges:

15. Complainant claims damages as to the effects of the multiple unlawful practices charged against Respondents, pursuant to ORS 659A.850(4)(a) to be proven at hearing as follows:

a. Damages for emotional, mental, and physical suffering in the amount of at least $75,000.

b. Out of pocket expenses to be proven at hearing.

WHEREFORE, at the conclusion of the hearing of the within matter, the Commissioner of the Oregon Bureau of Labor and Industries will cause to be issued Findings of Fact and Conclusions of Law. An Order will be entered dismissing the charges if the Respondent is found not to have engaged in or committed any unlawful practice. Alternatively, an appropriate Cease and Desist Order will be entered against the Respondents if the Respondents are found to have engaged in or committed any unlawful practices as alleged herein, ordering that they immediately stop all such unlawful practices. Such an Order may include such other relief as is appropriate to eliminate the effects of the unlawful practices found both as to Complainant and as to others similarly situated.

Dated this Monday, February 23, 2015.

Amy Klare, Administrator
Civil Rights Division

Certified to be a true and correct copy of the original and of the whole thereof.

Karen Knight
Contested Case Coordinator

BEFORE THE COMMISSIONER
OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON

In the Matter of: Oregon Bureau of Labor and Industries on behalf of Laurel Bowman-Cryer, Complainant v. Melissa Elaine Klein, dba Sweetcakes by Melissa, and Aaron Wayne Klein, dba Sweetcakes by Melissa and, in the alternative, Aaron Wayne Klein, individually as an Aider or Abettor under ORS 659A.406, Respondent(s)	Case No. 45-14 **SECOND AMENDED** FORMAL CHARGES

The Civil Rights Division of the Oregon Bureau of Labor and Industries ("the Agency") alleges the following Formal Charges against Respondent Melissa Elaine Klein, dba Sweetcakes by Melissa and Respondent Aaron Wayne Klein that will be heard at a time and place set forth in the Notice of Hearing.

I. JURISDICTION

Sweetcakes by Melissa is registered with the Oregon Secretary of State Business Registry as an assumed business name of Melissa Elaine Klein.[1] Respondent Melissa Elaine Klein is registered with the Oregon Secretary of State

[1] "Sweetcakes by Melissa" was registered with the Oregon Secretary of State on Feb 1, 2013. "Sweet Cakes by Melissa" was the previous dba of Melissa Elaine Klein, registered on May 18, 2007 and failing to renew in 2009.

Business Registry as the Registrant for Sweetcakes by Melissa and is involved with the daily operation of Sweetcakes by Melissa. Respondent Melissa Elaine Klein was at all material times a "person" within the meaning of ORS 659A.001(9), was subject to all applicable provisions of ORS chapter 659A and is a "respondent" within the meaning of ORS 659A.001(10).

Respondent Aaron Wayne Klein was at all material times the authorized representative of Melissa Elaine Klein and was involved with the daily operation of the business. Respondent Aaron Wayne Klein is registered with the Oregon Secretary of State Business Registry as the Authorized Representative of Melissa Elaine Klein, dba Sweetcakes by Melissa. Respondent Aaron Wayne Klein was at all material times a "person" within the meaning of ORS 659A.001(9), was subject to all applicable provisions of ORS chapter 659A and is a "respondent" within the meaning of ORS 659A.001(10).

At material times, Respondent Melissa Elaine Klein operated her business at 44 NE Division St, Gresham, OR 97030, and it was a place of public accommodation within the meaning of ORS 659A.400.

On August 8, 2013, Laurel Bowman-Cryer, filed a verified complaint (Case Number STPASO131107-11409) and is authorized to file this complaint pursuant to ORS 659A.820, alleging unlawful discrimination on the basis of sexual orientation. The Agency found substantial evidence of said practices on the part of Respondents and issued a Notice of Substantial Evidence Determination on January 15, 2014, sending a copy to Respondents.

II. UNLAWFUL PRACTICES

1. Respondent designs and manufactures baked goods, including wedding cakes.
2. At all material times, Melissa Elaine Klein's business was a place offering goods and services to the public.
3. On or about January 17, 2013 Complainant's fiancé, Rachel Cryer, and her fiancé's mother, Cheryl McPherson, went to Respondent's place of business for a previously scheduled cake tasting appointment. Ms. Cryer was interested in purchasing a cake for her wedding ceremony to Complainant.
4. Respondent Aaron Klein conducted the cake tasting. During the tasting, Respondent Aaron Klein asked for the names of the bride and groom. Ms. Cryer explained that there would be two brides for her ceremony, and provided her own name and that of Complainant Laurel Bowman-Cryer.
5. Respondent refused to provide services to Ms. Cryer and Complainant, stating "we don't do same-sex couples." He further explained "I'm sorry but we don't do same-sex weddings because it goes against our religion." Ms. Cryer and Ms. McPherson then left Respondents' place of business.
6. Shortly thereafter, Ms. McPherson returned to the business and spoke with Respondent Aaron Klein. Ms. McPherson told Respondent Aaron Klein that she was once "like him;" she told him that she "was raised in a Southern Baptist home...God [had] blessed [her] with two gay children and [her] truth now had changed." Respondent Aaron Klein responded, "Your children are an abomination of God."

7. On or about September 2, 2013, Respondent Aaron Klein participated in a televised interview that aired on the Christian Broadcasting Network. In reference to his refusal to provide Complainant and Ms. Cryer with goods or services, Respondent Aaron Klein stated "I didn't want to be a part of her marriage, which I think is wrong."

8. On or about February 13, 2014, Respondent Aaron Klein participated in a radio interview with Tony Perkins. In reference to his refusal to provide Complainant with goods or services, Respondent Aaron Klein stated "We don't do same-sex marriage, same-sex wedding cakes..." He went on to explain that he and Respondent Melissa Klein had previously discussed whether they would provide cake service to same-sex couples when the state of Washington legalized same-sex marriage and agreed they would decline to do so.

9. Laurel Bowman-Cryer was injured by the actions of Respondent(s).

III. UNLAWFUL PRACTICE: DISCRIMINATION BY PLACE OF PUBLIC ACCOMMODATION BASED ON SEXUAL ORIENTATION

The Agency re-alleges the previous paragraphs and further alleges:

10. At all material times, Melissa Elaine Klein's business was a place of public accommodation within the meaning of ORS 659A.400(1).

11. At all material times, Laurel Bowman-Cryer was a "person" entitled to the full and equal accommodations, advantages, facilities and privileges of Respondent Melissa Elaine Klein's business, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national

origin, marital status or age. ORS 659A.001(9); ORS 659A.403(1); OAR 839-005-0003(14), **(15), and (16)**.

12. Respondents discriminated against Complainant because of her sexual orientation.

    a. Melissa Elaine Klein denied full and equal accommodations, advantages, facilities and privileges of her business to Laurel Bowman-Cryer based on her sexual orientation, in violation of ORS 659A.403(3).

    b. Respondent Aaron Wayne Klein, dba Sweetcakes by Melissa, denied full and equal accommodations, advantages, facilities and privileges of her business to Laurel Bowman-Cryer based on her sexual orientation, in violation of ORS 659A.403(3).

    c. In the alternative, Respondent Aaron Wayne Klein aided or abetted Melissa Elaine Klein in violating ORS 659A.403(3), in violation of ORS 659A.406.

IV. UNLAWFUL PRACTICE: DISCRIMINATION BY PUBLICATION, CIRCULATION, ISSUANCE, OR DISPLAY OF A COMMUNICATION, NOTICE, ADVERTISEMENT, OR SIGN OF A DENIAL OF ACCOMMODATIONS, ADVANTAGES, FACILITIES, SERVICES OR PRIVILEGES BY A PLACE OF PUBLIC ACCOMMODATION BASED ON SEXUAL ORIENTATION

The Agency re-alleges the previous paragraphs and further alleges:

13. Respondents published, circulated, issued or displayed, or caused to be published, circulated, issued or displayed, a communication, notice, advertisement or sign to the effect that its accommodations, advantages, facilities, services or privileges would be refused, withheld from or denied to,

or that discrimination would be made against, a person on account of his or her sexual orientation.

a. Melissa Elaine Klein published, circulated, issued or displayed, or caused to be published, circulated, issued or displayed, a communication, notice, advertisement or sign to the effect that its accommodations, advantages, facilities, services or privileges would be refused, withheld from or denied to, or that discrimination would be made against, a person on account of his or her sexual orientation, in violation of ORS 659A.409.

b. Respondent Aaron Wayne Klein, dba Sweetcakes by Melissa, denied full and equal accommodations, advantages, facilities and privileges of her business to Laurel Bowman-Cryer based on her sexual orientation, in violation of ORS 659A.403(3).

c. In the alternative, Respondent Aaron Wayne Klein aided or abetted Melissa Elaine Klein in violating ORS 659A.409, in violation of ORS 659A.406.

14. Respondent Melissa Elaine Klein and Respondent Aaron Wayne Klein, individually, are jointly and severally liable for the effects and consequences of the violation of ORS 659A.403(3) and 659A.409 as detailed in the aforementioned paragraphs, and any damages resulted therefrom, under ORS 659A.406.

V. DAMAGES

The Agency re-alleges the previous paragraphs and further alleges:

15. Complainant claims damages as to the effects of the multiple unlawful practices charged against Respondents, pursuant to ORS 659A.850(4)(a) to be proven at hearing as follows:

a. Damages for emotional, mental, and physical suffering in the amount of at least $75,000.

b. Out of pocket expenses to be proven at hearing.

WHEREFORE, at the conclusion of the hearing of the within matter, the Commissioner of the Oregon Bureau of Labor and Industries will cause to be issued Findings of Fact and Conclusions of Law. An Order will be entered dismissing the charges if the Respondent is found not to have engaged in or committed any unlawful practice. Alternatively, an appropriate Cease and Desist Order will be entered against the Respondents if the Respondents are found to have engaged in or committed any unlawful practices as alleged herein, ordering that they immediately stop all such unlawful practices. Such an Order may include such other relief as is appropriate to eliminate the effects of the unlawful practices found both as to Complainant and as to others similarly situated.

Dated this Monday, February 23, 2015.

Amy Klare, Administrator
Civil Rights Division

Certified to be a true and correct copy of the original and of the whole thereof.

Karen Knight
Contested Case Coordinator

EXCERPT OF RECORD

EXHIBIT J

BEFORE THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON

In the Matter of: Oregon Bureau of Labor And Industries on behalf of RACHEL CRYER, Complainant, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 44-14 & 45-14 RESPONDENTS' MOTION FOR RECONSIDERATION

Respondents request that the ALJ reconsider the following determinations made in the January 29, 2015 Interim Order Ruling on Respondents' Re-filed Motion for Summary Judgment and Agency's Cross-Motion for Summary Judgment ("Order") on the basis that the ALJ's determinations were based on incorrect facts. Although this Request for Reconsideration is limited to three narrow points, Respondents' Request should not be construed in any way that would waive Respondents' right to appeal any other part of the Order.

1. Mr. Klein was aware of Complainant's sexual orientation in November 2010.

In an Order dated January 29, 2015, ALJ Alan McCullough rejected Respondents' argument that "[Respondents'] prior sale of a wedding cake to Cryer for her mother's wedding proves Respondents' lack of animus towards Complainant's sexual orientation" by stating the

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TYLER SMITH & ASSOCIATES,
181 N. Grant St. STE 212, Canby, Oreg
503-266-5590; Fax 503-212-63

following:

> Respondents' first argument fails for the reason that there is no evidence in the record that A. Klein, the person who refused to make a cake for Complainants while acting on Sweetcakes' behalf, had any knowledge of Complainants' sexual orientation in November 2010 when Cryer purchased a cake for her mother's wedding. Even if A. Klein was aware of Cryer's sexual orientation in November 2012, not discriminating on one occasion does not inevitably lead to the conclusion that A. Klein did not discriminate on a subsequent occasion.
>
> Order, p. 14.

First, although Mr. Klein did not explicitly state on the record that he knew the Complainants' sexual orientation in 2010, he included in his original Declaration a statement that Respondents "do, have, and would, design cakes for any person irrespective of that person's sexual orientation as long as the design requested does not require us to promote, encourage, support, or participate in an event or activity which violates our religious beliefs and practices." Decl. of Aaron Klein ¶ 7. He also stated that Ms. Cryer had previously requested and paid for a cake which Respondents made without hesitation. Decl. of Aaron Klein ¶ 7.

These are facts that preclude the ALJ's ruling. Mr. Klein was indeed aware of Ms. Cryer's sexual orientation when he served the Complainants in November 2010. Mr. Klein has attached here a Supplemental Declaration stating that he was in the shop on the date the Complainants came in together to order a wedding cake for Ms. Cryer's mother in 2010. Suppl. Decl. of Aaron Klein ¶ 1. He has stated that when they entered the shop, he took them to the cake tasting room, and he immediately knew they were a lesbian couple. Suppl. Decl. of Aaron Klein ¶ 1. Mr. Klein stated that he specifically remembers that they were holding hands and showing other signs of affection such as resting a hand on the others' leg and sitting very close to each other. Suppl. Decl. of Aaron Klein ¶ 1. As usual, Mr. Klein asked the Complainants the date of the wedding and the name of the bride and groom. Complainants responded that the cake was not for them but for Ms. Cryer's

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mother who was not present but would be arriving shortly. Suppl. Decl. of Aaron Klein ¶ 1. The ALJ's basis for rejecting Respondents' argument is wrong as a matter of fact. This court cannot skip over important questions of disputed fact.

The ALJ reinforced his rejection of Respondents' argument by clarifying that "Even if Mr. Klein was aware of Cryer's sexual orientation in November 2010, not discriminating on one occasion does not inevitably lead to the conclusion that A. Klein did not discriminate on a subsequent occasion." Order, p. 14. This statement suggests that no facts which Respondents could possibly present would have any impact on the ALJ's ruling. The facts Respondent has presented are not random and unrelated instances. Respondents have not only shown that they have and would continue to serve anyone of any sexual orientation, but they have now shown specifically that they actually did serve Complainants even with knowledge of Complainants' sexual orientation. Is this court suggesting that facts do not matter? To further demonstrate the distinction between discrimination on the basis of sexual orientation and declining to participate in an event, Respondents assert that if a heterosexual person had requested a cake to celebrate a same-sex wedding, Respondents would have also declined to fill that order. Suppl. Decl. of Aaron Klein ¶ 2. The sexual orientation of the person requesting the cake has no bearing on whether Respondents would design the cake. Suppl. Decl. of Aaron Klein ¶ 2. Instead, Respondents consider whether the event for which they will be designing and creating the cake would cause them to violate their religious convictions and whether they are compelled to abstain. The ALJ's ruling has the practical effect of holding that no one could refuse service to a same-sex couple for any reason without violating ORS 659A.403. This cannot be. The reason why Respondents refused to participate is a question of fact which must be determined at trial. As Respondents pointed out in their Motion, the Agency has not presented *any* facts beyond its bald assertions that

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Respondents discriminated. For this reason, the ALJ should have granted Respondents' Motion for Summary Judgment on this issue. However, to the extent that the ALJ does not grant summary judgment in Respondents' favor where the Agency has not presented a *prima facie* case, there are disputed facts which must be determined at trial, and summary judgment is not appropriate. The ALJ's rejection of Respondents' argument is not supported by the facts of this case, and the ALJ should reconsider.

2. Abstaining from participating in a same-sex marriage is a religious practice protected by the Oregon and Federal Constitutions.

Respondents argued that under *Meltebeke v. Bureau of Labor and Industries*, 322 OR 132 (1995), the state cannot impose a civil penalty against a person for acting in accordance with his religious practice unless the state proves that that person knew that his conduct would cause an effect forbidden by law. Respondent Aaron Klein stated explicitly in his Declaration that he "did not know and [he] never imagined that the practice of abstaining from participating in events which are prohibited by [his] religion could possibly be a violation of Oregon law." Decl. of Aaron Klein ¶ 8. He further stated, "I believed that I was acting within the bounds of the Oregon Constitution and the laws of the State of Oregon which, at that time, explicitly defined marriage as the union of one man and one woman and prohibited recognition of any other type of union as marriage." Decl. of Aaron Klein ¶ 8.

The ALJ denied Respondents' request for relief under the free exercise clauses of the Oregon and Federal Constitutions as interpreted by *Meltebeke* because "Respondents' affidavits establish that their refusal to make a wedding cake for Complainants was not a religious practice, but conduct motivated by their religious beliefs." Order, p. 31. The ALJ therefore held that "*Meltebeke* does not aid Respondents." The ALJ cited *State v. Beagley*, 257 Or App 220 (2013)

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as support for his determination, apparently holding that the Kleins' actions were so obviously not a religious practice that no analysis was needed. The ALJ's holding does not comport with the facts of this case or the standard in *State v. Beagley*.

Beagley was a criminal negligence case in which parents were convicted for failing to provide medical treatment to their child and allowing him to die. *Beagley*, 257 Or App at 226. The parents asserted a defense under *Meltebeke* and the Oregon Constitution that their actions were a religious practice and therefore were protected. *Id.* The Court expressed its confusion over the difference between "religious practice" and "conduct motivated by religious belief" by stating:

> We find it difficult to understand this distinction between religious conduct and religious practice. Perhaps it draws a line between conduct that is directly mandated by a religion and would not be performed except for that mandate – for example praying, making the sign of the cross, wearing prescribed clothing (a yarmulke) – and ordinary conduct that a person might engage in for reasons unrelated to religion but, in some circumstances, might engage in as the result of religious teaching – for example, abstaining from alcohol, "turning the other cheek," giving to charity, slaughtering chickens. Perhaps, under *Meltebeke*, the former are religious practices and the latter are conduct that "may be motivated by one's religious beliefs." That formulation, however, is not completely satisfactory. The practice of abstaining from alcohol, for example, is *both* directly mandated by some religions, and it is also frequently observed by nonadherents for nonreligious reasons.
>
> *Id.*

Even in light of the obvious confusion, the Court held that "allowing a child to die for lack of life-saving medical care is clearly and unambiguously – and as a matter of law – conduct 'that may be motivated by religious beliefs'" and not a religious practice. *Id.* Therefore, in order for the ALJ to have determined that the Klein's action here was not a religious practice, the facts must "clearly and unambiguously" show as much. The facts here do not fit that standard.

Respondent Aaron Klein stated in his Declaration in Support of Respondents' Re-filed Motion for Summary Judgment that: "We practice our religious faith through our business and

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make no distinction between when we are working and when we are not" and "the Bible forbids us from proclaiming messages or participating in activities contrary to Biblical principles, including celebrations or ceremonies for uniting same-sex couples." Decl. of Aaron Klein. ¶ 2. Mr. Klein quoted a particular passage which he believes mandates that he not participate in a same-sex wedding ceremony. (I Timothy 5:22 "Do not be hasty in the laying on of hands, nor take part in the sins of others; keep yourself pure."). Decl. of Aaron Klein ¶ 2. The Court of Appeals in *Beagley* wrestled with the distinction between a religious practice and conduct motivated by a religious belief and reasoned that abstention from an activity could fit within either category depending on the circumstances. Using the Court's own example, the practice of abstaining from alcohol is mandated by some religions but there are, of course, some non-religious teetotalers. *Beagley*, 257 Or App at 226. Here, Respondents have presented abundant facts that their decision to abstain from designing and creating a work of art celebrating a same-sex union was made in conformity with a religious mandate that they not take part in what they believe the Bible calls sin. The ALJ really should not be taking part at all in determining whether Respondents' actions were a "religious practice" or conduct that may be motivated by a religious belief because it is not the jurisdiction of the court to determine the tenets of a religious faith or what may or may not be mandated. *See e.g. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,* 132 S. Ct. 694, 705 (2012); *Corporation of Presiding Bishops v. Amos*, 483 US 327, 336 (1987) ("It is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission."). Nevertheless, to the extent that the ALJ does

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engage in determining whether Respondents' action was a religious practice or conduct motivated by religious belief, this is a question of fact which must be determined at trial.

The ALJ's determination that Respondent's actions were not a religious practice does not comport with the facts of the case and cannot support summary judgment. The ALJ should reconsider his determination that *Meltebeke* does not apply because there are facts in dispute that support an alternative holding under *Meltebeke*. In the alternative, the ALJ should explain the reasoning behind his determination that Respondents' actions were clearly and unambiguously conduct motivated by religious belief and not a religious practice. That is, the ALJ should explain why, in light of Respondents' explicit testimony calling their actions religious practice, the ALJ determined that Respondent's actions were clearly and unambiguously not a religious practice.

3. The ALJ's ruling on *Hurley*'s applicability is legally wrong and must be reconsidered.

The ALJ wrongly concluded in his Order that:

> *Hurley* is distinguishable because Respondents' provision of a wedding cake for Complainants was not for a public event, but for a private event. Whatever message the cake conveyed was expressed only to Complainants and the persons they invited to their wedding ceremony, not to the public at large. In addition, the forum notes that whether or not making a wedding cake may be expressive, the operation of Respondents' bakery, including Respondents' decision not to offer services to a protected class of persons, is not.
>
> Order, p. 49.

The ALJ's holding here demonstrates a fundamental misunderstanding of the law. In *Hurley*, the issue before the court was whether a parade was "lacking the element of expression for purposes of the First Amendment." *Hurley v. Irish-American Gay*, 515 US 557, 567 (1995). In making that determination, the court considered the fact that the parade was a public event as one factor in its determination that the parade was indeed an expressive association protected by the First Amendment. The ALJ here has wrongly concluded from this analysis that only public

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events are given Constitutional protection. This is patently wrong. The Court did not hold that speech is more or less protected when it is public or private. Such a holding would be ludicrous. The state could no more force a soloist to sing a certain song at a small private wedding ceremony than it could force that soloist to sing a certain song at an open-air public event. The public versus private distinction drawn in *Hurley* was merely a fact relied upon by the court to determine whether the parade in question was expressive.

In this case, the expressive conduct is the design and creation of a wedding cake. As Respondents have stated and as the ALJ has noted, such an undertaking involves individual creativity, original sketches and drawings made to each customer's personal specifications, and the sculpting of cake and icing into a unique work of art. Decl. of Aaron Klein ¶¶ 3-6; Order, p. 12. The Supreme Court has held already that art and sculptures are unquestionably expressive. *See* Resp. Re-filed Mot. for Summ. J. pp. 24-26. For First Amendment purposes, there is no difference between sculpting clay and sculpting sugar. Respondents' work is expressive. Because the expressive nature of creating a wedding cake is clear, the ALJ need not delve into the public or private nature of the event where the cake is displayed. Respondents' art is protected whether it is displayed to one person or one million people because it is, by its nature, expressive.

Further, the ALJ's conclusion that the expressive nature of designing and creating a wedding cake is irrelevant to *Hurley*'s application is simply wrong. The ALJ wrongly applied the expressive association test to Respondents' "operation of a bakery" and not to the actual work that Respondents do in that bakery which the Agency contends Respondents should be forced to perform. In *Hurley*, the court addressed this exact fallacy when it stated that "although the state courts spoke of the parade as a place of public accommodation, once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the

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state courts' application of the statute had the effect of declaring the sponsors' **speech itself to be the public accommodation.**" *Hurley*, 515 US at 573 (emphasis added). Here, just like the state in *Hurley*, the Agency is calling the operation of Respondents' operation of a business the public accommodation when in reality, the thing Complainants sought from Respondents business and the thing the Agency is demanding Respondents produce is a work of art – a custom designed and created wedding cake that is unquestionably expressive. In this case, by demanding that Respondents create and design a custom cake for Complainants, the Agency has made the "speech itself to be the public accommodation." Such compulsion by the government of a person to engage in expression is prohibited. The Supreme Court could not have been more clear: "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.* at 579.

The ALJ failed to make any factual finding that Respondents' design and creation of a custom wedding cake was expressive or nonexpressive although such a finding is required by *Hurley*. Respondents have provided ample evidence that their work is as artistic as a painting or any other sculpture and therefore subject to Constitutional protection. The ALJ should reconsider his ruling dismissing the outstanding question of fact regarding the expressive nature of Respondents' work. To the extent that the Agency argued that Respondents' designing and creating a wedding cake is not expressive, there is a genuine dispute of material fact which must be decided at trial.

DATED this 16 day of February, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing MOTION FOR RECONSIDERATION and SUPPLEMENTAL DECLARATION OF AARON KLEIN on the following via hand delivery on February 17, 2015:

Rebekah Taylor-Failor
Contested Case Coordinator
800 NE Oregon Street, Room 1045
Portland, OR 97232-2180

Jennifer Gaddis
Cristin Casey
Administrative Prosecutors
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EXCERPT OF RECORD

EXHIBIT K

BEFORE THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON

In the Matter of: Oregon Bureau of Labor and Industries on behalf of RACHEL CRYER, Complainant, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 44-14 SUPPLEMENTAL DECLARATION OF RESPONDENT AARON KLEIN IN SUPPORT OF RESPONDENTS' MOTION FOR RECONSIDERATION
In the Matter of: Oregon Bureau of Labor and Industries on behalf of LAUREL BOWMAN CRYER, Complainant, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually as an Aider and Abettor under ORS	Case No. 44-15 SUPPLEMENTAL DECLARATION OF RESPONDENT AARON KLEIN IN SUPPORT OF RESPONDENTS' MOTION FOR RECONSIDERATION

HERBERT G. GREY
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659A.406,)
Respondents.)

I, AARON KLEIN, hereby declare as follows:

I am one of the Respondents, and I am married to Respondent Melissa Klein. I am over 18 years of age, and I have personal knowledge of the facts stated in this declaration.

1.

I was aware of Ms. Cryer's sexual orientation when I served the Complainants in November 2010. I was in the shop on the date the Complainants came in together to order a wedding cake for Ms. Cryer's mother. When they entered the shop, I took them to the cake tasting room, and I immediately knew they were a lesbian couple. I remember noticing that they were holding hands and showing other signs of affection such as resting a hand on one another's legs and sitting very close to each other. As I always do, I asked the Complainants the date of the wedding and the name of the bride and groom. Complainants responded that the cake was not for them but for Ms. Cryer's mother who was not present but would be arriving shortly.

2.

The sexual orientation of the customer requesting a cake has no bearing on whether I would agree to make a cake. Even if a heterosexual person had requested a cake for a same-sex wedding, I would have declined to fill that order because my religion demands that I abstain from participating in events which celebrate what I believe the Bible classifies as sin.

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I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

DATED this 11th day of February, 2014.

Aaron Klein

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EXCERPT OF RECORD

EXHIBIT L

United States Constitution

First Amendment: Unlawfully infringing on Respondents' right to free speech.

Respondents contend that the First Amendment to the U. S. Constitution, as applied to the State of Oregon under the Fourteenth Amendment, prohibits BOLI from enforcing the provisions of ORS 659A.403 against Respondents because that statute unlawfully infringes on Respondents' free speech rights. In pertinent part, the First Amendment provides: "Congress shall make no law * * * abridging the freedom of speech * * *."

Based on the discussion in the previous section, the forum concludes that the requirement in ORS 659A.403 that Respondents bake a wedding cake for Complainants is not "compelled speech" that violates the free speech clause of the First Amendment to the U. S. Constitution.

CONCLUSION

Respondents' motion for summary judgment is **GRANTED** with respect to the Agency's allegations in the Amended Formal Charges that Respondent M. Klein violated ORS 659A.403 by denying full and equal accommodations, advantages, facilities and privileges to Complainants Rachel Cryer and Laurel Bowman-Cryer.

Respondents' motion for summary judgment is **GRANTED** with respect to the Agency's allegations in the Amended Formal Charges that Respondent A. Klein violated ORS 659A.406.

Respondents' motion for summary judgment is **GRANTED** with respect to the Agency's allegations in the Amended Formal Charges that Respondents violated ORS 659A.409.

The Agency's cross-motion for summary judgment is **GRANTED** with respect to the Agency's allegations in the Amended Formal Charges that Respondent A. Klein

violated ORS 659A.403 by denying the full and equal accommodations, advantages, facilities and privileges of a place of public accommodation to Complainants Rachel Cryer and Laurel Bowman-Cryer based on their sexual orientation.

The Agency's cross-motion for summary judgment is **GRANTED** with respect to the Agency's allegations in the Formal Charges that Respondents A. Klein and M. Klein are jointly and severally liable for A. Klein's violation of ORS 659A.403.

The Agency's cross-motion for summary judgment is **GRANTED** with respect to Respondents' affirmative defenses.

The Forum has **NO JURISDICTION** to adjudicate the counterclaims raised by Respondents in paragraphs ##31-42 in Respondents' Amended Answers.

Case Status

The hearing will convene as currently scheduled. The scope of the evidentiary portion of the hearing will be limited to the damages, if any, suffered by Complainants as a result of A. Klein's ORS 659A.403 violation.

IT IS SO ORDERED

Entered at Eugene, Oregon, with copies mailed and emailed to:

Jennifer Gaddis, Chief Prosecutor, BOLI/APU, 1045 State Office Building, 800 NE Oregon Street, Portland, OR 97232-2180

Cristin Casey, Administrative Prosecutor, BOLI/APU, 1045 State Office Building, 800 NE Oregon Street, Portland, OR 97232-2180

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Paul Thompson, Attorney at Law, 310 SW 4th Ave., Suite 803, Portland, OR 97204

Kari Furnanz, ALJ, BOLI

Dated: January 29, 2015

Alan McCullough, Administrative Law Judge
Bureau of Labor and Industries

Summary Judgment/Sweetcakes, ##44-14 & 45-14

EXCERPT OF RECORD

EXHIBIT M

BEFORE THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON

In the Matter of: Oregon Bureau of Labor and Industries on behalf of RACHEL CRYER, Complainant, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 44-14 RESPONDENTS' RESPONSE TO AGENCY CROSS-MOTIONS FOR SUMMARY JUDGMENT Oral Argument Requested

I HEREBY CERTIFY THAT THE FOREGOING IS A COMPLETE AND EXACT COPY OF THE ORIGINAL THEREOF.

Attorney for RESP.

In the Matter of: Oregon Bureau of Labor and Industries on behalf of LAUREL BOWMAN CRYER, Complainant, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 44-15 RESPONDENTS' RESPONSE TO AGENCY CROSS-MOTIONS FOR SUMMARY JUDGMENT Oral Argument Requested

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In response to Respondents' Motions for Summary Judgment, the Agency has now asserted cross-motions for partial summary judgment "in favor of the Agency on the same issues moved upon by Respondents." Agency Response, p. 2. Periodically thereafter, the Agency's cross-motion asserts requests for partial summary judgment in section headings without actually identifying the grounds upon which such requests are based. Agency Response, pp. 10, 24, 27, 30, 33. That lack of specificity alone justifies denial of the Agency's cross-motions.

However, even if the Agency had actually articulated a legitimate basis for its cross-motions in conformity with ORCP 46 and OAR 839-050-0150(4), its brief further suffers from several fundamental flaws:

1. It falsely and illogically, without legal authority, equates "same-sex marriage" with "sexual orientation" when the record shows the state of Oregon itself distinguishes the two as a matter of policy;
2. Its analysis throughout elevates sexual orientation above all other rights, expressly refusing to acknowledge competing constitutional rights or the rights of Respondents as members of another protected class based on religion, even in the face of Supreme Court precedent to the contrary; and
3. It attempts to erect a false dichotomy between speech and expressive conduct to avoid controlling Supreme Court precedent and claims "Respondents remain free to state their views" (Agency Response, p. 16), even though multiple Formal Charges against Respondents under ORS 659A.409 arise directly from Respondents' speech. Amended Formal Charges, ¶¶ 7, 8, 13.

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SUMMARY OF ARGUMENT

To prevail on its claim under ORS 659A.403, the Agency must prove that Respondents denied Complainants services on the basis of Complainants' sexual orientation. Respondents have presented facts that their denial of services was based on their opposition to participation in a particular event which violates their religious beliefs, not on the Complainants' sexual orientation. The Agency did not present additional or controverting evidence to establish a prima facie case. The Agency argued only that the facts Respondents presented were of no consequence. Therefore, there is no genuine issue as to any material fact on the issue of causation. For these reasons and the reasons that follow, Respondents are entitled to judgment as a matter of law on paragraphs 10, 11 and 12 of the Amended Formal Charges. Because all other claims rise or fall with ORS 659A.403, the Forum need not go further as its determination on ORS 659A.403 resolves all issues in the case. *See* Section 1, pp. 5-7.

Because the Agency cannot present a prima facie case of discrimination on the basis of sexual orientation under ORS 659A.403, Respondents are entitled to summary judgment on paragraph 12(c) of the Amended Formal Charges for aiding and abetting under ORS 659A.406. Section 6, pp. 25-26.

Because the Agency cannot present a prima facie case of discrimination on the basis of sexual orientation under ORS 659A.403, Respondents are entitled to summary judgment on paragraph 13 of the Amended Formal Charges for publication, circulation, issuance or display under ORS 659A.409. Section 4, 5 and 7, pp. 12-20, 21-26, 26-27.

In addition to the foregoing, the Agency loses because: (a) it did not controvert Respondents' evidence concerning their legitimate basis for denying services to Complainants on

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this occasion in reliance on their speech, religious and conscience rights under the U.S. and Oregon Constitutions; and (b) the Agency ignores or misstates controlling precedent that requires accommodation of Respondents' fundamental rights. ORS 659A.403, 659A.406 and 659A.409 are unconstitutional, facially and/or as-applied to Respondents. See Sections 2-5 and 7, pp. 8-26, 26-27.

FACTUAL BACKGROUND

With the exception of one disputed material fact "Respondent Aaron Klein told McPherson that her children are an abomination of God" (*See* Agency Response, p. 3; Respondents' Motion for Summary Judgment, Ex. 2, p. 6), the Agency's response apparently acknowledges there are no disputes of material fact involved in the subject motions. Accordingly, the Forum must determine whether either moving party is entitled to judgment as a matter of law. ORCP 47. OAR 839-050-0150(4).

It should also be noted the Agency does not address or controvert the following arguments in Respondents' Motion for Summary Judgment, each of which must therefore be determined in Respondents' favor:

a) The Agency completely overlooks, and does not controvert, Respondents' status as members of a protected class under ORS 659A.403 (Respondents' Motion, pp. 14) and in fact denies Respondents have <u>any</u> rights to protect (Agency Response, pp. 8, 31);

b) The Agency made no argument in opposition to Respondents' viewpoint discrimination arguments under ORS 659A.409 (Respondents' Motion, p. 32; *Infra*, pp. 26-27); and

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c) The Agency made no argument in opposition to Respondents' argument that state agencies, including BOLI, are estopped from denying they are places of public accommodation under ORS 659A.400. Respondents' Motion, pp. 14, 15-18. The Agency similarly made no response concerning the impact of the Oregon Constitution, Article XV, §5a. If it now tries to argue that "same-sex marriage = sexual orientation" (Agency Response, p. 6), the Agency must then acknowledge the state of Oregon discriminated against Complainants and others in places of public accommodation in denying them marriage licenses until mid-2014 (Respondents' Motion, pp. 17-20).

ARGUMENT

1. **The Agency Conflates Same-Sex Marriage and Sexual Orientation in a Vain Attempt to Avoid its Burden of Proof Concerning Denial of Services Based on Sexual Orientation.**

In responding to Respondents' Motion (pp. 9-10) about objecting to participation in a same-sex ceremony as an "event", the Agency asserts:

> "Only same-sex couples engage in same-sex weddings. The primary difference between a same-sex wedding and a heterosexual wedding is the sexual orientation of the couple getting married."

Agency Response, p. 6. In addition to the statement being indefensible legally, factually and logically, refusal to participate in a same-sex ceremony is not tantamount to a denial of services based on sexual orientation and cannot establish a prima facie case against Respondents.

First of all, the primary difference between a same-sex wedding and an opposite-sex wedding is not the sexual orientation of the couple getting married. Agency Response, p. 6. The primary difference is that at the time of the alleged denial of services, same-sex marriage was not

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legally recognized in the state of Oregon under Article XV, §5a of the Oregon Constitution. Respondents' Motion, pp. 15, 17-19. In fact, the state of Oregon itself refused as a matter of constitutional policy to recognize same-sex marriages in January 2013, even though ORS 659A.403 included sexual orientation as a protected class starting in 2007. Respondents' Motion, pp. 17-19. Oregon state agencies, including BOLI, were and are places of public accommodation under ORS 659A.400 (Respondents' Motion, pp. 14, 18). Until May of 2014, county clerks, acting as agents of the state, were openly denying marriage licenses to same-sex couples because Oregon's Constitution limited marriage to the union of one man and one woman. Thus, it is evident the state of Oregon itself distinguished between same-sex marriage and sexual orientation. If BOLI now wants to take the contrary view and hold itself to the same standard it seeks to apply to Respondents, it must confess the state of Oregon engaged in *official* discrimination based on sexual orientation resulting in legal liability to Complainants and others. Respondents' Motion, pp. 18-19.

On a more basic level, the Agency cannot baldly assert that Respondents' desire not to participate in a same-sex wedding by designing a custom cake is *per se* discrimination on the basis of sexual orientation without more. Respondents have provided ample evidence proving that their basis for denying services was not Complainants' sexual orientation at all but was instead Respondents' religious objection to using their artistic abilities to design and create a cake which would celebrate an event which is patently opposed to Respondents sincerely held religious beliefs. Respondents' Motion, Exs. 2 and 3. So far that record is unopposed except by inference. Respondents have testified that they regularly served gay and lesbian customers, and the record shows that they happily served Complainants themselves in the past without any

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differentiation on the basis of sexual orientation. *Id.* Such evidence, which the Agency dismisses as irrelevant (Agency Response, p. 9), confirms that sexual orientation was not the reason for the denial to participate in this ceremony.

Under the Agency's analysis, no evidence of causation is necessary at all. Any denial of services related to a same-sex wedding would automatically be deemed a denial of services based on sexual orientation. Disagreement over price would not be allowed. Disagreement over design or colors would not be allowed. Disagreement about a specific message on the cake would not be allowed. Clearly, the Agency's legal reasoning is wrong and must be rejected.

In order to establish a prima facie case under ORS 659A.403, the Agency must prove that Respondents denied services to Complainants because of Complainants' sexual orientation. Because the Agency has failed to present evidence to controvert Respondents' evidence, there are no facts in controversy here. The Agency did not controvert Respondents' argument, its own argument is internally inconsistent and unsupported legally, and the issue must be resolved in favor of Respondents. Because the Agency must lose on this basis, it cannot prove a prima facie case under ORS 659A.403, its claims under ORS 659A.406 and 659A.409 similarly fall, and this case must be resolved in its entirety in favor of Respondents as a matter of law.

2. **The Agency Ignores Controlling Authority Affirming Respondents' Religious Rights to Object to Participation in Complainants' Same-Sex Ceremony**.

The fundamental problem at the root of the Agency's action is explicitly stated in its Response to Respondents' Motion:

> Respondents advocate for the *unsupported* position that they may unlawfully discriminate against members of a protected class based on their religious beliefs...Contrary to Respondents' position, *neither statute nor case law allows a religious exception* for their unlawful conduct in this case.

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> Respondents' religious practices and beliefs *are not relevant* for a factual determination of unlawful conduct in this case as Respondents do not argue that baking wedding cakes is a tenet of their religion rather than a commercial enterprise. Part of Respondents' misunderstanding of the legal issues addressed in this matter seems to be rooted in the assertion that the act of providing a good or service in a place of public accommodation, in this case, baking a cake at their bakery, is equivalent to *participating* [emphasis in original]in a wedding ceremony. The acts are entirely separate.

Agency Response, pp. 7-8, 8-9 (emphasis added). At least the Agency now openly acknowledges what Respondents have complained about throughout these proceedings: there is no statute in ORS Chapter 659A allowing a religious exemption for Respondents and others similarly situated, and the Agency believes their "religious practices and beliefs *are not relevant*."

Respondents' religious practices and beliefs actually are "relevant" under constitutional analysis (and ORS 659A.403) and are not dependent, as the Agency's analysis is, on "statute []or case law." Respondents' Motion, pp. 11, 32-35. Respondents will revisit these authorities further in the religious rights analysis below. *Infra*, pp. 20-25. Second, the Agency mistakenly argues all that is involved is "baking a cake" without regard to the extensive factual record of what goods and services Respondents actually provide – a record the Agency has conceded by failing to offer controverting evidence. *See* Respondents' Motion, Ex. 2, pp. 3-5; Ex. 3, pp. 3-5. The Agency dismisses Respondents and their religious convictions (also protected under ORS 659A.403) as "not relevant" while failing to respond to or controvert Respondents' complete record of how their faith comes to bear in designing, baking, decorating and delivering a wedding cake. *Id. See also* Agency Response, pp. 14, 26. It is precisely this blindness toward Respondents' rights, or any attempt to balance the rights of competing protected classes, that has led to this dispute and these motions.

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Finally, the Agency subjectively characterizes Respondents' legitimate exercise of their protected rights as "unlawful" (Agency Response, pp. 7-8, 8-9), which only begs the ultimate question. In point of fact, Respondents rely on a long line of authority affording protection of conscience against government coercion dating back hundreds of years, and it is the Agency that is attempting to make new law unlawfully abridging these rights. *Infra*, pp. 20-25.

3. **The Agency Misstates Controlling Supreme Court Authority, which Actually Supports Respondents' Free Speech Analysis under the First Amendment.**

Once again, the Agency denies that Respondents have any speech rights at issue here because the Public Accommodations Law "regulates conduct, not speech." Agency Response, p. 11. It is even more astounding the Agency says "The fact that *a baker may find* designing and decorating a cake to be [sic] form of expression is *irrelevant*." Agency Response, p. 14 (emphasis added). In so doing, the Agency chooses to impose its own official governmental orthodoxy on Respondents and others in open defiance of Respondents' constitutional speech rights, misrepresents the law, and attempts to create false distinctions between expressive conduct and speech where none truly exist.

It is beside the point to argue that "ORS Chapter 659A does not regulate the manner in which Respondents design, bake or decorate cakes" (Agency Response, p. 10) because the gravamen of the Agency's argument is that thoughts, speech and religious convictions may be held *but not expressed*. The critical point is actually that the Agency interprets ORS Chapter 659A to mean that Respondents have *no* choice in whether to design, bake, decorate or deliver cakes for everyone who comes in the door, especially if sexual orientation is allegedly involved. Despite the Agency's view, the design, creation, baking and delivery of wedding cakes remains

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artistic expression worthy of constitutional protection from government coercion. Respondents' Motion, pp. 24-25.

In its zeal to denigrate Respondents' speech rights, the Agency falsely claims that "the issue in *Hurley* [*v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 US 557 (1995)] was not the public accommodations law, but rather its application in an unusual situation." Agency Response, p. 11. While the Supreme Court in *Hurley* certainly acknowledged a state legislature's authority to enact a public accommodations law, it also found that such laws remain subject to constitutional limitations. Respondents' Motion, pp. 16-17, 28.

As the Agency's response notes (p. 12), the parade in *Hurley* was "an expressive event", just as a same-sex ceremony is an "expressive event" or Respondents' designing and creating a custom cake for a particular event is expressive conduct. The Agency's attempt to distinguish *Hurley* on the grounds that Respondents were engaged in a for-profit business fails. *Compare*: Agency Response, pp. 12-14; Respondents' Motion, pp. 24, 28. *See also* Respondents' Motion, pp. 34-35 citing *Hobby Lobby* and *Conestoga Wood Specialties* affirming First Amendment religion and speech rights. *Infra*, p. 24.

The Agency's reliance on *Pruneyard Shopping Center v. Robins*, 447 US 74 (1980) is similarly misplaced. Agency Response, p. 13. Free speech and petition rights by *third parties* at a *private* mall are different from the instant situation, where a government agency not only seeks to coerce Respondents to ply their trade contrary to their convictions, but also seeks to restrict them from expressing their own convictions under ORS 659A.409 when the Agency and Complainants are not similarly restricted. *See* Agency Response, p. 16; Amended Formal

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Charges, ¶¶ 7, 8, 13. Respondents' Motion, pp. 39-41. That is impermissible viewpoint discrimination. *Infra*, p. 27.

When it comes to the issue of compelled speech, the Agency says Respondents "do not allege specifically the message that they are compelled to convey" in blatant disregard of the record. *See* Respondents' Motion, pp. 39-41. Respondents cannot be compelled to express support for same-sex marriage contrary to their convictions any more than BOLI may compel anyone to listen to a religious message with which they disagree (given that reli gion is a protected class under ORS 659A.403) or to compel the media about what, when or how it reports news.

The compelled speech cases the Agency relies upon actually support Respondents' position. Agency Response, p. 15. All of the cases the Agency relies upon in support of its "for-profit" and compelled speech arguments were discussed in *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 US 47 (2006). Agency Response, pp. 14-16. Respondents' Motion, pp. 24, 27-28. In fact, *Rumsfeld* and cases cited therein actually support Respondents and are distinguishable (for the purposes the Agency relies on them) for the following reasons:

a) *Rumsfeld* did not infringe speech because the law schools were still free to express their disapproval of military policy and recruitment (*Rumsfeld*, 547 US at 60);

b) *Rumsfeld* did not abridge expressive conduct and compel speaking a governmental message in the form of either "direct expression" or "facilitated expression" because FAIR's opposition to the Solomon Amendment's requirements required speech in addition to conduct to explain their position (*Rumsfeld*, 547 US at 61-62, 64), the law schools were not required to communicate agreement with the government's position

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or policy (*Rumsfeld*, 547 US at 61-62), and there was no requirement on the delivery or content of scheduling emails or flyers (*Rumsfeld*, 547 US at 61-62);

c) *Rumsfeld* is distinguishable because it required simple access as a condition to receipt of U.S. government funds; no government funds are implicated in this case or most public accommodation cases (*Rumsfeld*, 547 US at 59-60); and

d) Perhaps most significantly, the central issue in *Rumsfeld* was military recruitment, where the Supreme Court opined that "judicial deference is at its apogee when Congress legislates under its authority to raise and support armies" (*Rumsfeld*, 547 US at 58). In other words, *Rumsfeld* is a special case that is *sui generis* and is not persuasive beyond its factual context.

Unlike the speech freedom enjoyed by the coalition of law schools in *Rumsfeld*, it is untrue that "Respondents remain free to state their views." Agency Response, p. 16. As noted elsewhere, Respondents face formal charges for speaking publicly based on ORS 659A.409. *Supra*, p. 10. *Infra*, pp. 15, 26.

4. **The Agency is not Entitled to Summary Judgment as a Matter of Law on Speech Provisions of the Oregon Constitution**.

The Agency correctly recites the analysis from *State v. Robertson* 293 Or 402 (1982), but comes to the wrong conclusion because it applies the analysis incorrectly. *See* Agency Response, pp. 16-24. For all the reasons stated in Respondents' own motion (pp. 29-32) and herein, ORS 659A.409 is facially unconstitutional under the first category of the *Robertson* test. ORS 659A.403 and 659A.406 should similarly fall under that same analysis, but even if the Forum is not persuaded in that regard, those statutes also fall to an "as applied" challenge under the second

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or third categories for at least one significant reason: opposition to same-sex marriage could not be a forbidden effect under *Robertson* and its progeny if the state of Oregon's opposition to it was enshrined in the Oregon Constitution at the time of the events giving rise to this case.

As noted in Respondents' own motion (pp. 29-32), the Oregon Constitution expressly and broadly protects speech from governmental restrictions in Article I §8:

> No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

See Answer to Amended Formal Charges, ¶¶ 28-29.

The Oregon Supreme Court has held that "The text of Article 1, section 8, is broader [than the First Amendment of the Federal Constitution] and covers any expression of opinion...." as well as speech. *State v. Henry*, 302 Or 510, 515 (1987). *City of Portland v. Tidyman*, 306 Or 174, 178-180 (1988). Oregon's constitutional protection of speech extends even to protecting nude dancing. *State v. Ciancanelli*, 339 Or 282 (2009). The constitutionality of laws under Article I, § 8 of the Oregon Constitution is evaluated under the following analysis unique to the Oregon Constitution (popularly known as the "*Robertson* test"), recently reaffirmed in *State v. Babson*, 355 Or 383 (2014):

> **Under the first category**, the court begins by determining whether a law is "written in terms directed to the substance of any 'opinion' or any 'subject' of communication." *Robertson*, 293 Or at 412. If it is, then the law is unconstitutional, unless the scope of the restraint is "wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Id.* If the law survives that inquiry, then the court determines whether the law focuses on forbidden effects and "the proscribed means [of causing those effects] include speech or writing," or whether it is "directed only against causing the forbidden effects." *Id.* at 417-18. **If the law focuses on forbidden effects, and the proscribed means of causing those effects include expression, then the law is analyzed under the second *Robertson* category. Under that category, the court determines whether the law is overbroad, and, if so, whether it is capable of being narrowed.** *Id.* If, on the other hand, **the**

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> **law focuses only on forbidden effects, then the law is in the third *Robertson* category, and an individual can challenge the law as applied to that individual's circumstances.** *Id.* at 417.

State v. Babson, 355 Or at 391 (emphasis added). *See also State v. Robertson* 293 Or 402, (1982).

Laws in the first category are unconstitutional on their face if directed at the "substance of any opinion or subject of communication" unless the scope of the restraint is within one of the historical exceptions existing in 1859 (which, as noted below, undeniably did not include protection of sexual orientation). *City of Eugene v. Miller*, 318 Or 480, 495 (1994). If the laws focus on forbidden effects, they fall in the second category and are analyzed for overbreadth to the extent they improperly prohibit or regulate protected speech, looking to see if the "actual focus of the enactment is an effect or harm that may be proscribed, rather than on the substance of the communication." *State v. Stoneman*, 323 Or 536, 543 (1996). The third category addresses application of the law that is not speech-neutral, usually in a regulatory context. *City of Portland v. Lincoln*, 183 Or App 36, 43 (2002).

With respect to the first category, the Oregon Supreme Court has said:

> Article I, section 8, for instance, forbids lawmakers to pass any law "restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever," beyond providing a remedy for any person injured by the "abuse" of this right. *This forecloses the enactment of any law written in terms directed to the substance of any "opinion" or any "subject" of communication, unless the scope of the restraint is wholly confined within some historical exception* that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach. Examples are perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants.

State v. Robertson 293 Or at 412. (emphasis added)

The Oregon Supreme Court in *State v. Ciancanelli*, 339 Or 282 (2009) explained in great detail that the "historical exception" is not proven simply by a showing that some law existed at

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the time when the federal Bill of Rights was adopted or even when the Oregon Constitution was adopted. In addition to both of those things, the statute must be of the kind that Article 1, §8 was *demonstrably not intended to reach*; i.e., there must be some showing that the historical example not only was well-established before the Oregon Constitution was adopted, but also that it continued to be enforced *in Oregon* well after 1859. *State v. Ciancanelli*, 339 Or at 322. "The party opposing the claim of constitutional protection has the burden of demonstrating that the restriction on expression falls within a historical exception." *State v. Henry*, 302 Or at 521.

ORS 659A.409. Respondents have argued, and the Agency concedes, that on its face ORS 659A.409 restricts Respondents' right to speak. Respondents' Motion, p. 31. Agency Response, pp. 20, 22. Moreover, the Agency is not entitled to summary judgment under ORS 659A.409. Agency Response, pp. 33-34. As noted above (*Supra*, pp. 2-3), the Forum should categorically reject the Agency's argument that speech rights are not infringed herein and "Respondents remain free to state their views" (Agency Response, p. 16) for a very simple reason: the record shows it is patently untrue given that some of the Amended Formal Charges are explicitly based on alleged violations of that statute. Amended Formal Charges, ¶¶ 7, 8, 13.

That aside, there can be no doubt that ORS 659A.409 is directed squarely at prohibiting certain content of speech without regard for the forbidden effect it seeks to prohibit. "There is a distinction between making speech the crime itself, or an element of the crime, and using speech to prove the crime." *State v. Plowman*, 314 Or 157, 167 (1992).

> [A]rticle 1, Section 8 prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences.

Robertson, 293 Or at 416.

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In *State v. Spencer*, 289 Or 225 (1980), the court invalidated a statute that prohibited obscene language in a public place if such language was intended to cause "public inconvenience, annoyance, or alarm" because it "expressly made the gravamen of the offense that *the offender communicates* rather than that he subjects the victim to some defined injury." *State v. Spencer*, 289 Or at 229 (emphasis added). Nothing in that statute required that the speaker actually cause public inconvenience, annoyance, or alarm, and in fact a person could violate the statute by saying something obscene in a public place without causing any actual harm at all. The court, therefore, reasoned that the statute was not directed at the forbidden effect but rather at the speech itself.

That construction was reinforced in *State v. Moyle*, 299 Or 691, 697-98 (1985) when the Court reaffirmed its decision in *Spencer*:

> We held the disorderly conduct statute to be unconstitutional because the statute made the use of certain kinds of words illegal, if spoken with a specific intent, regardless of whether the words had the intended effect upon the hearer. That statute was held to be directed towards speech itself, not toward the prevention of a specified harm.

The Court also noted another case in which a statute violated Article 1, Section 8 for the same reason: "In *State v. Blair*, we noted that one of several problems with that provision was that the gravamen of the offense was that the offender communicated, rather than that he subjected the victim to a defined injury." *Id.* at 698. Like the statutes in *Spencer* and *Blair*, ORS 659A.409 makes the gravamen of the offense the expression of speech or opinion itself without any requirement that denial or services actually occur, or that the speech actually reach any person. Like the unconstitutional statute in *Spencer*, ORS 659A.409 makes it unlawful to use certain words "regardless of whether the words [have] the intended effect upon the hearer." *Id.*

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Moreover, ORS 659A.409 fails the historical exceptions analysis. The Agency cites sources from 1893, 1891, and 1876 (Agency Response, pp. 20-21, fn 3), but none of those cases or sources satisfies the Agency's burden that prior to or after 1859 there was any well-established rule requiring either non-discrimination on the basis of sexual orientation or compelling the owner of a place of public accommodation to participate in an event which violated his beliefs.

To the extent the Agency must acknowledge that ORS 659A.409 direct limits speech or opinion and has not presented facts necessary to bring the public accommodations law at issue within an historical exception, its defense of the facial validity of ORS 659A.409 fails as a matter of law, and it is not entitled to summary judgment.

ORS 659A.403 and 659A.406 Facial Challenge. These statutes similarly have constitutional infirmities that cannot be ignored. Inexplicably, the Agency contends that ORS 659A.403 and 659A.406 are not directed at expression or communication. *See* Agency Response, pp. 18-20. A plain reading of the statutes shows the opposite. ORS 659A.403 makes it "an unlawful practice for any person to **deny** full and equal accommodations...." ORS 659A.406 makes it an "unlawful practice for any person to aid and abet" a violation of ORS 659A.403. If ORS 659A.403 falls, ORS 659A.406 cannot survive either.

The word "deny" is not defined in the statute itself, but its dictionary definition is "to say that something is not true; to refuse to accept or admit (something); to refuse to give (something) to someone; to prevent someone from having or receiving (something)." *See* Merriam-Webster.com. Merriam-Webster, n.d. Web. 17 Dec. 2014. http://www.merriam-webster.com/dictionary/deny . Ordinarily, a denial must be made verbally or in writing although,

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as the Agency speculates, a store owner hypothetically could "silently refuse to take a customer's order on the basis of his race or simply provide services that are qualitatively different based on the person's protected status" while still denying services for purposes of ORS 659A.403. Agency Response, p. 19. At its heart, the statute prohibits *communication* that services are being denied for a prohibited reason, which implicates both speech and opinion. The Agency cannot seriously contend ORS 659A.403 and 659A.406 pass constitutional scrutiny merely because it may be possible to violate them without actually speaking.

As noted above (*Supra*, p. 13), "The text of Article 1, section 8, is broader [than the First Amendment of the Federal Constitution] and covers any expression of opinion...." *State v. Henry*, 302 Or at 515. "The phrase, 'expression of opinion'...appears to refer to expression that, in some way, appraises or judges an object, person, action, or idea. *But the concept is not in terms limited to opinion that is communicated by means of words*." *Ciancanelli*, 339 Or at 293. (emphasis added).

In the statutes at issue, the denial of services is only unlawful when a person somehow communicates that he is denying full and equal accommodations based on a specific prohibited reason, namely race, color, religion, sex, sexual orientation, national origin, marital status, or age. ORS 659A.403. That is, denial of services is not *per se* unlawful (e.g., a person could deny services to a person with brown eyes without violating the public accommodations laws because "eye color" is not a protected class under ORS 659A.403). These statutes are subject to *Robertson*'s first category because they are clearly directed at restricting the expression – in word or deed – of certain opinions in connection with the denial of services.

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As explained above, the gravamen of the Agency's argument is that Respondents' beliefs may be held but not expressed; that is, Respondents may believe whatever they choose, but they may not allow those beliefs to guide their business practices. The Agency's reliance on *State v. Plowman*, 314 Or 157 (1992) (Agency Response, p. 16) is misplaced because *Plowman* is clearly distinguishable. In *State v. Plowman*, the court considered whether an intimidation statute making it a crime for two or more people, acting together, to cause injury to another because of their perception that the victim belongs to a particular group. *State v. Plowman*, 314 Or at 165-166. Agreement of multiple people to take affirmative *offensive* action to cause harm to another is a far cry from Respondents politely declining to provide services to Complainants. The statutes here fail constitutional scrutiny because they target expression of opinion itself.

Nor are ORS 659A.403 and 659A.406 saved by the historical exception analysis for all the reasons stated above. *Supra*, pp. 14-15, 17.

ORS 659A.403 and 659A.406 As-Applied Challenge. Even if the Forum is not persuaded about the facial invalidity of these statutes, it is evident as a matter of law that they cannot survive an as-applied challenge under *Robertson*'s second or third categories. Fundamentally, this analysis depends upon proof of "forbidden effects" that may affect speech or opinion. *Supra*, p. 13, quoting *State v. Babson*, 355 Or at 391 and *State v. Robertson* 293 Or 402.

The "forbidden effect" at issue herein is Respondents' choice not to be involved in Complainants' same-sex ceremony, which is alleged to be a denial of services based on sexual orientation. Amended Formal Charges, ¶¶ 5, 6, 12. However, Respondents' choice not to participate cannot be a "forbidden effect" if Article XV §5a of the Oregon Constitution expressly prohibited recognition of same-sex marriages at the time. *Supra*, pp. 4-5. If the Agency wants to

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defend these statutes based on forbidden effects, the Oregon Constitution makes clear opposition to same-sex marriage is not a "forbidden effect."

Additionally, the *Robertson* analysis requires consideration whether the statutes may be overbroad or can be narrowed to avoid constitutional infirmity. As noted here (p. 3) and in Respondents motion (p. 32), ORS 659A.403 purports to protect both religion and sexual orientation, but makes no room for balancing those rights when they conflict, as they do here. Without a suitable religious exemption for business owners like Respondents or some other stated means of balancing the interests of the parties, the statutes must be amended by the Legislature before they can be used as a sword against Respondents and their fundamental protected rights of speech and opinion.

The Agency cannot overcome both facial challenges and as-applied challenges to these statutes, which must be declared unconstitutional. The Agency's motion fails as a matter of law, and Respondents' motion should be granted.

5. <u>The Agency is not Entitled to Summary Judgment as a Matter of Law on Religion & Conscience Provisions of the U.S. or Oregon Constitutions</u>.

The Agency cannot infringe- let alone disregard- either First Amendment free exercise rights nor Respondents' religion and conscience rights under Article I §§ 2 and 3. *Supra*, pp. 5-7. Respondents' Motion, pp. 27-35. The Agency argues as if it believes such rights are a recent development hitherto unrecognized when in fact they have a long and well-established place in our nation's jurisprudence. Agency Response, pp. 24-30. That these rights appear in the First Amendment to the U.S. Constitution (adopted in 1791) and in Article I of the Oregon

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Constitution (adopted in 1859) should be sufficient proof in itself, but that is by no means the only proof.

As noted in Respondents' Motion (p. 27), Justice Jackson famously articulated in *Minersville School District v. Gobitis*, 310 U.S. 586, 642 (1940), and later quoted in the well-known Pledge of Allegiance case, *West Virginia v. Barnette*, 319 U.S. 624, 642 (1943):

> If there is any fixed star in our constitutional constellation, it is that *no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.* If there are any circumstances which permit an exception, they do not now occur to us. (emphasis added)

Three years later, Justice Jackson went on to say:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia v. Barnette, 319 U.S. at 638.

These principles, which remain good law, are in fact based on a long tradition of vindicating individual rights and protecting conscience from government coercion dating back to the colonial period in America. Charles Chauncy wrote in "Civil Magistrates Must Be Just, Ruling in the Fear of God" (1747):

> As rulers would be just, they must take all proper care *to preserve entire* the civil rights of a people. And the ways in which they should express this care are such as these…They should also express this care, by seasonably and faithfully placing a proper guard against the designs of those, who would rule in a despotic manner, to the subversion of the rights naturally or legally vested in the people…Justice in rules should therefore put them upon leaving every member of the community, without respect of persons, freely to choose his own religion, *and profess and practice it* according to that external form, which he

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> apprehends will be most acceptable to his maker: Provided, his religion is such as may consist with the public safety:...

Dreisbach & Hall, *The Sacred Rights of Conscience* 186, 187 (Liberty Fund, 2009)(emphasis added).

Thomas Jefferson and James Madison both had a hand in the drafting and adoption of "A Bill for Establishing Religious Freedom in Virginia" in 1779 and 1786:

> Section 1. Well aware that the opinions and belief of men depend not upon their own will, but follow involuntarily the evidence proposed to their minds; that Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness,...

Dreisbach & Hall, *The Sacred Rights of Conscience* 250 (Liberty Fund, 2009).

George Washington's Farewell Address in 1796 further confirms the critical role of religious liberty and conscience in our nation's history:

> Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labor to subvert the great Pillars of human happiness, these firmest props of the duties of Men and citizens....Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice? And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.
>
> 'Tis substantially true, that *virtue or morality is a necessary spring of popular government. The rule indeed extends with more or less force to every species of free Government.*

Dreisbach & Hall, *The Sacred Rights of Conscience* 468 (Liberty Fund, 2009)(emphasis added).

Some years later, Alexis deTocqueville in *Democracy in America* (1835) observed:

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> Religion in America takes no direct part in the government of society, but it must nevertheless be regarded as the foremost of the political institutions of that country; *for if it does not impart a taste for freedom, it facilitates the use of free institutions*... The Americans combine the notions of Christianity and liberty so intimately in their minds, that it is impossible to make them conceive the one without the other;...

Dreisbach & Hall, *The Sacred Rights of Conscience* 616 (Liberty Fund, 2009) (emphasis added).

As noted in Respondents' motion, they rely on Scriptural foundations for the exercise of their faith in their business, as well as other legal authorities. Respondents' Motion, p. 4. Ex. 2, pp. 2-3. Ex. 3, pp. 2-3. In contrast, the Agency disdains as "irrelevant" Respondents' beliefs, as well as their consideration that "designing and decorating a cake to be [sic] form of expression." Agency Response, pp. 7-8, 8-9, 14.

Moreover, the level of scrutiny to be applied is at least intermediate scrutiny, and good cause exists to apply strict scrutiny where multiple "hybrid" rights are at issue. Respondents' Motion, pp. 12, 22-23. The Agency simply avers-without citation of authority- that Respondents have *no* rights, let alone multiple hybrid rights, so strict scrutiny cannot apply. Agency Response, p. 31. Respondents' rights are not so easily dismissed, especially when the Supreme Court evaluates hybrid rights by a strict scrutiny standard. *Employment Division v. Smith*, 494 US 872, 881-882 (1990).

Public accommodation laws like ORS Chapter 659A cannot be justified merely as neutral laws of general applicability under *Smith.* Agency Response, pp. 28-31. Respondents' Motion, pp. 14-15. First, they are not being applied in a content-neutral manner herein when they coerce action contrary to fundamental speech, religion and conscience rights. Respondents' Motion, p. 14. Moreover, they cannot be generally applied when exceptions to general laws based on exercise of religious beliefs and conscience are numerous and of long duration, including:

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a) Conscientious objections to military service, even for non-religious objectors (50 USC App. § 456(j); *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 390 U.S. 333 (1970));

b) Religious objections to compulsory public education laws (*Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 US 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972));

c) Religious exemptions to Prohibition in the Volstead Act (1919) for sacramental use of wine in communion observances (http://www.legisworks.org/congress/66/publaw-66.pdf (November 14, 2014));

d) Religious objections to saying the Pledge of Allegiance, even in a time of war (*West Virginia v. Barnette*, 319 US 624 (1943); and

e) Exceptions from HHS mandates under the Affordable Care Act requiring employer health coverage for abortifacients for closely-held for-profit companies (*Burwell v. Hobby Lobby*, 573 US ___ (June 30, 2014); *Burwell v. Conestoga Wood Specialties*, 573 US ___(June 30, 2014))(cited in Respondents' Motion, pp. 34-35).

See also Respondents' Motion, pp. 14-15 regarding the impact of the Oregon Constitution, Article XV, §5a.

The Forum should not be beguiled by the Agency's attempt to discount the persuasiveness of the *Hobby Lobby* and *Conestoga Wood Specialties* cases simply because they were decided under the Religious Freedom Restoration Act (RFRA), 42 USC §2000bb *et seq.* Agency Response, p. 27. In reality, RFRA restored pre-*Smith* strict scrutiny jurisprudence the Agency wrongly claims has been superseded. *Gonzales v. O Centro Espirita*, 546 U.S. 418, 424

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(2006). Agency Response, p. 27. Respondents' Motion, pp. 12-13. That RFRA is limited in its application to the federal government does not undermine the continuing vitality of the federal jurisprudence that existed before *Smith* when federal rights are at stake. *See City of Boerne v. Flores*, 521 US 507 (1997).

Just as these statutes fail federal constitutional analysis for failing to protect religion and conscience, they also fall under Article I §§ 2 and 3 for the same reasons articulated in connection with the *Robertson* analysis of speech and opinion above. *Supra*, pp. 13-20. As before, ORS 659A.409 is a direct prohibition on expression that cannot be defended against religious objections any more than speech or opinion objections. Moreover, as noted in Respondents' motion (p. 30), when a person engages in a religious practice, the state may not restrict that person's activity unless it first demonstrates that the person is consciously aware that the conduct has an effect forbidden by the law that is being enforced. *Meltebeke v. BOLI*, 322 Or 132, 152 (1995). Respondents have made clear their understanding that same-sex marriage was prohibited by the Oregon Constitution, and that they felt they were entitled to object to participation in Complainants' ceremony accordingly. Respondents' Motion, Ex. 2, p 6. Either facially or as-applied, all three statutes must fail as a matter of law for violating Respondents' protected religion and conscience rights.

6. **Aaron Klein is not Subject to Aider and Abettor Liability under ORS 659A.406.**

The Agency is not entitled to summary judgment as a matter of law under ORS 659A.406 because it rejects the authorities cited in Respondents' Motion (pp. 36-39) without offering any evidence or authority of its own to justify its position. Agency Response, pp. 31-33.The Agency's Response simply argues that "The Agency *may, as a matter of law*, find an owner of a

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business has committed the unlawful practice of aiding and abetting a place of public accommodation in violation of ORS 659A.406." Agency Response, p. 33 (emphasis added). Put simply, the Agency's position expressed herein appears to be no more than that it can simply do what it wants.

7. **The Agency is not Entitled to Summary Judgment as a Matter of Law under ORS 659A.409.**

In addition to the authorities relied on above (*Supra*, pp. 15*ff*), there are other constitutional infirmities precluding summary judgment in favor of the Agency: (1) the statute is overbroad; and (2) it codifies viewpoint discrimination. Respondents' Motion, p, 32.

The Agency's argument attempts to justify ORS 659A.409 by alleging "the statute, *by its express terms*, does not punish purely personal comments; it only restricts comments made on behalf of a business." Agency Response, p. 23 (emphasis added). Note that the statute does not distinguish between personal and business comments, as the Agency argues, so it is the Agency itself that is reading something in that isn't there. Nor is it evident how to apply such a distinction in the case of expressions of opinion by self-employed business owners like the Kleins. No evidence is proferred to establish that Aaron Klein's statements were anything other than his personal opinion.

In addition, the Agency argues that ORS 659A.409 properly regulates Respondents' speech because "these are not descriptions of past events as alleged by Respondents." Agency Response, p. 34. As Respondents noted, they were speaking in the context of looking back at their dealings with Complainants and the ensuing BOLI proceedings. Respondents' Motion, pp. 29-32, 39-41. If the Agency chooses to interpret closed signs on the door and statements of

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"standing firm" in the face of BOLI enforcement as statements of future intention that violate the statute, that reinforces Respondents' argument of its unconstitutionality as an overbroad prior restraint. Moreover, if that construction is not apparent so people can distinguish between what is lawful and unlawful conduct, it may constitute a due process violation as well.

Finally, the statute is overbroad in other respects. Note what the Agency does not say about the statute in its argument: it does not deny or controvert the record that Complainants- and even the Commissioner- have spoken publicly about the subject incident while seeking to punish Respondents for doing the same, which is viewpoint discrimination unconstitutional in every forum, including nonpublic forums. Respondents' Motion, pp. 32.

CONCLUSION

The Agency's cross-motions do not comply with ORCP 46 and OAR 839-050-0150(4). They do not dispute or controvert many of Respondents' arguments in support of their own motion for summary judgment, most notably that Respondents too are members of a protected class. They are rife with false presumptions unsupported by law or fact, they summarily dismiss as "irrelevant" the existence or validity of any rights other than those based on sexual orientation, and they selectively characterize speech, expressive events and expressive conduct as they choose in an effort to diminish Respondents' speech rights, even when some of its own formal charges against Respondents are facially based on speech.

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Not only should the Agency's motions be denied, but Respondents are entitled to entry of partial or full summary judgment in their favor.

DATED this 19th day of December, 2014.

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Of Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing RESPONDENTS' RESPONSE TO AGENCY'S CROSS-MOTIONS FOR SUMMARY JUDGMENT on the following via the indicated method(s) of service on the 19th day of December, 2014:

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✓ **EMAILING** certified full, true and correct copies thereof to the attorney(s) shown above at their last known email address(es) on the date set forth below.

✓ **HAND DELIVERING** certified full, true and correct copies thereof to the attorney(s) shown above at their last known office address(es), on the date set forth below.

I hereby certify that I served the foregoing RESPONDENTS' RESPONSE TO AGENCY'S CROSS-MOTIONS FOR SUMMARY JUDGMENT on the following via the indicated method(s) of service on the 19th day of December, 2014:

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✓ **EMAILING** certified full, true and correct copies thereof to the attorney(s) shown above at their last known email address(es) on the date set forth below.

✓ **MAILING** certified full, true and correct copies thereof in a sealed, first class postage-prepaid envelope, addressed to the attorney(s) shown above at their last known office address(es), and deposited with the U.S. Postal Service at Portland/Beaverton, Oregon, on the date set forth below.

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EXCERPT OF RECORD

EXHIBIT N

statutory prohibition against discrimination in places of public accommodation allows two exceptions:

> "(a) The enforcement of laws governing the consumption of alcoholic beverages by minors and the frequenting by minors of places of public accommodation where alcoholic beverages are served; or
> (b) The offering of special rates or services to persons 50 years of age or older."

ORS 659A.403(2).

Contrary to Respondents' position, neither statute nor case law allows a religious exception for their unlawful conduct in this case.

Respondents further claim that "merely telling a customer 'no' on one occasion, without evidence of more, is not unlawful discrimination per se." Respondents' Motion at 9, lines 1-2. In this case, Respondents eliminated any confusion as to the nature the refusal of service. Respondent Aaron Klein did not just say "no" without explanation. He said "We don't do same-sex weddings." Respondents have not wavered in their position on refusing wedding cake services to same-sex couples in subsequent interviews.

Respondents claim that "it is undisputed that their religious beliefs were the real reason Respondents chose not to *participate in* Complainants' same-sex ceremony..." (*Emphasis added,* Respondents' Motion at 9, lines 16-17). Respondents' religious practices and beliefs are not relevant for a factual determination of unlawful conduct in this case as Respondents do not argue that baking wedding cakes is a tenet of their religion rather than a commercial enterprise. Part of Respondents' misunderstanding of the legal issues addressed in this matter seems to be rooted in the assertion that the act of providing a good or service in a place of public accommodation, in this case, baking a

cake at their bakery, is equivalent to *participating in* a wedding ceremony. The acts are entirely separate.

Respondents also assert that Complainant Laurel Bowman-Cryer was not present for the tasting and therefore was not denied service. Respondents concede in their motion, however, that their basis for denying service was the fact that Complainants were attempting to order a cake for *their* same-sex ceremony. Complainant Rachel Cryer told Respondent Aaron Klein that there would be two brides at the ceremony and that their names were Rachel and Laurel. Because the very basis of Respondents' discrimination was rooted in the fact that Complainants jointly sought a service for their ceremony, Respondents' argument is befuddling. There is no legal requirement that she be present for the refusal, simply that she be refused and suffer a harm from it. ORS 659A.403.

Respondents argue that because they previously sold a wedding cake to Complainant Rachel Cryer, that it was clear they did not discriminate in this instance. Whether Respondents previously discriminated against Complainants is irrelevant as to whether they discriminated against Complainants in this instance. ORS 659A.403(3) prohibits the denial of "*full and equal* accommodations, advantages, facilities and privileges of any place of public accommodation." (Emphasis added). The fact that Respondents may provide other services to Complainants, but not a wedding cake, does not minimize or erase the violation in refusing the wedding cake services that are offered to heterosexual couples.

Therefore, Respondents' argument that they are entitled to summary judgment on the grounds that "[t]here are no material facts alleged to prove Respondents denied services to complainants on the basis of their sexual orientation" should fail in its

entirety. The Agency is entitled to a finding that Respondents refused services to Complainants based on their sexual orientation.

II. RESPONDENTS' MOTION FOR SUMMARY JUDGMENT FAILS TO ESTABLISH A DEFENSE BASED ON FREEDOM OF SPEECH PROTECTIONS UNDER THE U.S. CONSTITUTION AND THE AGENCY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THIS ISSUE.

Respondents allege as a defense to the Formal Charges that the Oregon Public Accommodations Law (ORS 659A.400 to ORS 659A.417) violates Respondents' First Amendment right to freedom of speech. Respondents' Motion at 23-32. The First Amendment to the U.S. Constitution provides that Congress shall make no law abridging the freedom of speech. Oregon is also bound by the First Amendment pursuant to the 14th Amendment to the U.S. Constitution. Respondents allege the Public Accommodations Law violates the First Amendment because it compels Respondents to engage in the State's speech and suppresses Respondents' freedom of expression in the form of wedding cake services. Respondents' Motion at 24-28. Both arguments fail as a matter of law.

A. The Oregon Public Accommodations Law does not Restrict Respondents' Freedom to Express their Views.

Respondents argue that wedding cake design and production is protected as symbolic, expressive speech and the Oregon Public Accommodations Law unconstitutionally restricts that expression. Respondents' Motion at 24-25. It does not. ORS Chapter 659A does not regulate the manner in which Respondents design, bake or decorate cakes. Because Respondents' business was open to the public, Oregon law requires Respondents to offer its services to the public, including Complainants,

without restrictions based on protected class. This is a law that regulates conduct, not speech.

The purpose of public accommodations laws historically has been to require businesses to treat customers alike. Even when the business owner would personally prefer not to serve a particular customer, he or she cannot be turned away. *See Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 US 557, 571 (1995). In *Hurley*, the Supreme Court noted that modern public accommodations laws are well within a state legislature's power to enact and do not generally violate the First or Fourteenth Amendments. *Hurley*, 515 US at 572. In reviewing the Massachusetts statute at issue in that case, the Court noted that statute was not unusual for a public accommodations law:

> Since it does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.

Hurley, 515 US at 572.[1] Thus, the issue in *Hurley* was not the public accommodations law, but rather its application in an unusual situation. In other words, the public accommodations statute was not facially invalid, but unconstitutional as applied to the specific set of facts presented.

More specifically, in *Hurley*, the South Boston Allied War Veterans Council, an unincorporated association of individuals elected from various veterans groups, was

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[1] The Massachusetts law reviewed in *Hurley* was similar to Oregon's Public Accommodations Law in that it prohibited discrimination on the basis of "'race, color, religious creed, national origin, sex, sexual orientation ..., '"deafness, blindness or any physical or mental disability or ancestry in "'the admission of any person to, or treatment in any place of public accommodation, resort or amusement.'" Hurley, 515 US at 572. Interestingly, it appears that, in *Hurley*, the Massachusetts courts ruled that the parade "sponsors' speech itself" was "the public accommodation." *See id.* at 573.

authorized by the city of Boston to organize and conduct the St. Patrick's Day-Evacuation Day Parade. The Council refused a place in the event to an organization formed for the purpose of marching in the parade in order to express its members' pride in their Irish heritage as openly gay, lesbian, and bisexual individuals. *Hurley*, 515 US at 560-61. The gay and lesbian organization sued, and Massachusetts courts determined that the Council had violated the state's public accommodations act by excluding the organization and therefore required the Council to allow the organization to participate in the parade.

The Supreme Court determined that "the requirement to admit a parade contingent expressing a message not of the private organizers' own choosing violate[d] the First Amendment." *Id.* at 566. The Supreme Court based its decision in large part, however, on its view that a parade is, in and of itself, an expressive event, comprised of "marchers who are making some sort of collective point, not just to each other but to bystanders along the way." *Id.* at 568. In other words, "the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole." *Id.* at 577. The selection of the contingents to make a parade thus is entitled to protection, since "every participating unit affects the message conveyed by the private organizers." *Id.* at 573.

Such concerns are not present here. As noted in *Hurley*, the application of a public accommodation law to a for-profit public accommodation does not implicate free speech protections. If a wedding cake is a form of expression, the expression would be that of the customers who order and purchase a specific cake to later display at their event, and not the particular viewpoint of the baker. It is commonly understood that wedding cakes, like wedding flowers, disc jockey services, catering and photography,

are services obtained by paying customers. The customer may not share the tastes or views of a chef, florist, baker, DJ, or photographer when selecting these services. Certainly, a customer's choices place no limit on the service provider's freedom to express their views about anything, including views that are different from their customers, including views opposed to same-sex marriage. See *Elane Photography,* 309 P3d at 65-66.

In most situations, there is no potential confusion between the views of a business owner and the views of the members of the public who access the business or its services. This is true even when the statute under review regulates speech. In *Pruneyard Shopping Center v. Robins*, 447 US 74 (1980), the owners of a shopping mall raised First and Fourteenth Amendment claims when the California constitution required access by the public to express free speech and petition rights at the shopping mall. The Supreme Court found no free speech violation because 1) the mall is a business establishment open to the public; therefore the views expressed by members of the public will not likely be identified with those of the owner, 2) no specific message was dictated by the State to be displayed at the mall, and 3) the mall owners can expressly disavow any connection with messages expressed by the public by posting signs that disclaim any sponsorship of the message and the persons are communicating their own messages. *Pruneyard*, 447 US at 87-88.

In the few instances in which the Supreme Court has held that a statute or regulation has unlawfully restricted a business's freedom of expression, the source of those regulations was not the public accommodations laws, but rather statutes directly targeting the content and location of speech. For example, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the statute at issue required any newspaper that

assailed a political candidate's character to print, upon request by the candidate, the candidate's reply. The law requires publication of specific editorial content and the Court found it to be a violation of press freedoms by imposing editorial control. *Id.* at 258. In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 US 1 (1986), the law at issue required a utility to include third party messages in the utility's bill inserts. The Court found a violation of free speech protections because the utility was required to publish third party communications as part of its own communications with customers. *Id.* at 9-13. These laws not only required a business to speak, but regulated the content of that speech.

Here, the Oregon Public Accommodations Law does not require Respondents to communicate a message on behalf of anyone. It merely prohibits Respondents from refusing to serve customers on the basis of a protected class. Even if this conduct were consider symbolic speech, there is no basis for concluding that, under this law, that the views expressed by customers of a wedding cake business that is open to the public could be identified with those of the owner.

The fact that a baker may find designing and decorating a cake to be form of expression is irrelevant. As noted above, Respondents' operated a commercial business in which wedding cakes are a service available to members of the public for purchase. At issue in this case is the Respondents' conduct in refusing to serve customers seeking a wedding cake on the basis of sexual orientation. That conduct is not symbolic speech such as the burning of a flag or wearing a black armband. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 US 47, 66 (2006). To the extent the design and baking activity may entail expression, it is a commercial activity for which there is no First Amendment protection from anti-discrimination laws.

EXCERPT OF RECORD

EXHIBIT O

BEFORE THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON

In the Matter of: Oregon Bureau of Labor and Industries on behalf of RACHEL CRYER, Complainant, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 44-14 RESPONDENTS' RE-FILED MOTIONS FOR SUMMARY JUDGMENT Oral Argument Requested
In the Matter of: Oregon Bureau of Labor and Industries on behalf of LAUREL BOWMAN CRYER, Complainant, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 44-15 RESPONDENTS' RE-FILED MOTIONS FOR SUMMARY JUDGMENT Oral Argument Requested

ITEM 68

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Pursuant to OAR 839-050-0150(4), Respondents AARON KLEIN, MELISSA KLEIN and SWEET CAKES BY MELISSA move for summary judgment on the grounds that there is no genuine issue of material fact, and Respondents are entitled to judgment as a matter of law as follows:

1. Respondents are entitled to summary judgment on all claims because the undisputed facts demonstrate that neither complainant was denied services on account of their sexual orientation;
2. Respondents are entitled to summary judgment on all claims because ORS 659A.403, 659A.406 and 659A.409 cannot survive strict scrutiny analysis necessary to abridge Respondents' constitutionally-protected speech, religion and conscience rights under the U.S. and Oregon Constitutions in that: (a) the statutes are neither neutral laws nor generally applicable; (b) BOLI cannot demonstrate a compelling governmental interest where it is undisputed that at the time of the alleged events, the official policy of the state of Oregon expressed in Article XV §5a was that marriage was limited to one man/one woman relationships, which BOLI as a state agency is estopped from controverting; and (c) the statutes are not narrowly tailored to achieve any compelling government interest because they do not employ the least restrictive means;
3. Respondents are entitled to summary judgment on all claims because ORS 659A.403, 659A.406 and 659A.409 unconstitutionally limit their rights to freedom of speech and their freedom not to engage in government-compelled speech protected under the U.S. and Oregon Constitutions;

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4. Respondents are entitled to summary judgment on all claims because ORS 659A.403, 659A.406 and 659A.409 unconstitutionally limit their right to freedom of religion and conscience protected under the U.S. and Oregon Constitution, as well as their status as members of a protected class based on religion within the meaning of ORS 659A.006;
5. Respondents are entitled to summary judgment on BOLI's Second Claim because controlling law dictates that a business owner cannot "aid and abet" himself/herself as a matter of law; and
6. Respondents are entitled to summary judgment on BOLI's Third Claim because the CBN and Perkins inter views did not involve speech or conduct subject to ORS 659A.409, and the statute cannot constitutionally limit such protected expression in any event.

Respondents rely on OAR 839-050-0150(4), the pleadings on file herein, the attached exhibits and the following memorandum of points and authorities.

FACTUAL BACKGROUND

The record reflects the amended formal charges herein are based on three events. The first two claims assert denial of services during a "cake tasting" on or about January 17, 2013 when Aaron Klein verbally declined to create and decorate a cake for complainants' same sex ceremony and allegedly aided and abetted himself. Amended Formal Charges, ¶¶ 3-5, 12(b). Answer to Amended Formal Charges, ¶ 5. Ex. 2, p. 6. The third claim is based on a second event, a televised interview by Aaron Klein rebroadcast on CBN on or about September 2, 2013. Amended Formal Charges, ¶¶ 7, 13. Answer to Amended Formal Charges, ¶ 7. Ex. 2, p. 8. The

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third claim also asserts Aaron Klein's participation in a radio interview with Tony Perkins on February 13, 2014. Amended Formal Charges, ¶¶ 8, 13. Answer to Amended Formal Charges, ¶ 8. Ex. 2, p. 8. As will be evident below, it is uncontroverted Respondent Melissa Klein was not present for any of these events and played no direct role in them.

At the time of these events, Respondents were husband and wife operating Sweet Cakes by Melissa as an unregistered assumed business name. Amended Formal Charges I, pp.1-2, ¶12(a) and (b). Answer to Amended Formal Charges I, pp. 2-3. Ex. 1-A. Following the alleged denial of services and the filing of an initial complaint, Aaron Klein registered Sweet Cakes by Melissa as an assumed business name with the Oregon Corporation Division and listed himself as an authorized representative (Amended Formal Charges I, p.1 fn 1; Answer to Amended Formal Charges I, p.2; Ex. 1-B), which changed nothing about Sweet Cakes' business organization. It is undisputed that Respondents' shop was a place of public accommodation. Amended Formal Charges, ¶ 9. Answer to Amended Formal Charges, ¶ 10.

By profession, Aaron and Melissa Klein were and now are committed Christians who believe that they should live out their faith in the way they conduct their business and all other areas of their lives in accordance with their religious principles, guided by the Bible. Ex. 2, pp. 2-3. Ex. 3, pp. 2-3. In particular, they believe that the Bible prohibits them from participating in activities they understand to be contrary to biblical principles, including marriage ceremonies involving same sex couples. Ex. 2, p. 3. Ex. 3, p. 3. For the same reasons, Respondents have not created, and would not create, cakes for a variety of other events, including celebration of divorce, any message with profanity or coarse language or a message advocating harm or ill will to another. Ex. 2, p. 5. Ex. 3, p. 5. It is undisputed Respondents had provided services for

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complainants previously, including creating a wedding cake for Cheryl McPherson paid for by Complainant Rachel Cryer in November 2010. Exs. 1-F, p. 2; 1-G, pp. 2-3; 2, p. 5; 3, pp. 5-6. he record is undisputed that on January 17, 2013 complainant Rachel Cryer and her mother, witness Cheryl McPherson, arrived at Respondents' shop for a cake tasting. Amended Formal Charges ¶ 3; Answer to Amended Formal Charges ¶ 3; Ex. 1-F, p. 2; Ex. 1-G, p. 3; Ex. 2, p. 6. All agree complainant Laurel Bowman-Cryer was not present. *Id. See also* Ex. 1-H, p. 2. At that time, Aaron Klein appeared to conduct the tasting ([Amended] Formal Charges ¶ 4; Answer [to Amended Formal Charges] ¶ 4), although he did not know the names or identities of the prospective customers in advance. Ex. 2, p. 6. Melissa Klein was not present. Ex. 3, p. 6. When Aaron Klein asked for the names of the bride and groom, all agree he was told "There are two brides, and their names are Rachel and Laurel." Amended Formal Charges ¶ 4; Answer to Amended Formal Charges ¶ 4. Exs. 1-F, p. 4; 1-G, p. 3; 2, p. 6 At that time, Aaron Klein advised Rachel Cryer and Cheryl McPherson that they did not create wedding cakes for, or choose to participate in, same sex ceremonies based on their religious beliefs. Amended Formal Charges ¶ 5; Answer to Amended Formal Charges ¶ 5. Exs. 1-F, p. 4; 1-G, p, 3; 2, p. 6. Rachel Cryer and Cheryl McPherson then left the shop. *Id.*

The record is further undisputed that although complainant Rachel Cryer was present for the initial discussion, she was not present during an ensuing conversation a few minutes later when Cheryl McPherson returned to talk with Aaron Klein. Amended Formal Charges ¶ 6; Answer to Amended Formal Charges ¶ 6. Exs. 1-F, p. 4; 1-G, p. 3; 2, p. 6. In that ensuing conversation, Cheryl McPherson by herself confronted Mr. Klein, starting a debate with him in which she indicated that she used to have a religious faith like his, but that her truth had changed,

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including in relevant part that the Bible did not address homosexuality (Ex.2, p. 6). Aaron Klein simply responded by quoting Leviticus 18:22 ("You shall not lie with a male as one lies with a female; it is an abomination"). Ex. 2, p. 6. The conversation concluded at that point, and Cheryl McPherson left the Sweet Cakes premises. Exs. 1-G, p. 3; 2, p. 6.

The record confirms that on or about January 18, 2013 Laurel Bowman filed a complaint with the Oregon Department of Justice alleging sexual orientation discrimination, in which she concealed the fact she was not present to observe the alleged denial of services:

> Today, January 17, 2013 *we* went for our cake tasting. When asked for the grooms name my soon to be mother in law informed them of my name.

Ex. 1-C, p. 2 (emphasis added). Notice of Substantial Determination ¶ 15, p. 3. Through counsel, Respondents filed a response to the complaint with the Oregon Department of Justice on or about February 8, 2013 denying the allegations and advising that Laurel Bowman was not present and lacked personal knowledge. Ex. 1-D. Shortly thereafter, Ms. Bowman withdrew her complaint, and DOJ closed the file. Ex. 1-E. Subsequently, Rachel Cryer filed a complaint with BOLI on or about August 8, 2013 asserting the two events in question. Amended Formal Charges ¶ I, p.2. Thereafter, on or about November 7, 2013, Laurel Bowman filed an identical complaint with BOLI based on the same events. *Id.* Respondents filed their responses to the complaints on or about August 23, 2013 and November 22, 2013, respectively.

Following an investigation and conciliation process, BOLI issued formal charges against Respondents on or about June 4, 2014 based solely on allegations of sexual orientation discrimination. Respondents timely filed their answer, affirmative defenses and counterclaims in response to formal charges in both cases on or about June 24, 2014. Subsequent to the filing of

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Respondents' summary judgment motions in these cases on September 15, 2014, BOLI prosecutors filed Amended Formal Charges dated September 23, 2014 adding allegations based on the Tony Perkins radio interview of February 13, 2014 and changing the aiding and abetting allegations in an apparent attempt to circumvent the pending summary judgment motions. Compare: Amended Formal Charges, ¶12(c); Formal Charges, ¶11(b). Respondents timely filed their answer, affirmative defenses and counterclaims to the Amended Formal Charges in both cases on or about October 2, 2014.

Based on the filing of the Amended Formal Charges, scheduling issues with a timely response to Respondents' summary judgment motions on the part of Department of Justice counsel, outstanding discovery matters and other factors, the ALJ formally postponed the previous hearing date to March 10, 2015 and directed counsel to re-file and re-brief the pending summary judgment motions on or before October 24, 2014 without ruling on them to cover new allegations in the Amended Formal Charges. Interim Order dated September 29, 2014, p. 2, ¶ 7.

SUMMARY JUDGMENT STANDARD

Under OAR 839-050-150(4), Respondents are entitled to summary judgment in whole or in part when there is no genuine issue as to any material fact, and the participant is entitled to judgment as a matter of law. Accordingly, any failure by BOLI to present material facts demonstrating actual discrimination on account of sexual orientation to controvert Respondents' undisputed facts means BOLI cannot prove a prima facie case, whereby Respondents must prevail as a matter of law. When a motion for summary judgment is made and supported as provided in the rules an adverse party may not rest upon the mere allegations or denials of that party's pleading, but must by affidavits, declarations or other admissible evidence set forth

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specific facts showing that there is a genuine issue as to any material fact for trial. If the adverse party does not so respond, the court shall grant the motion if appropriate. ORCP 47.

Additionally, as described below the undisputed facts demonstrate that Respondents were acting based upon their religious practices as members of a protected class based on religion under both the U.S. and Oregon Constitutions, as well as members of a protected class under the same statutes BOLI relies upon in ORS Chapter 659A. Those uncontested facts entitle Respondents to prevail on their defenses and counterclaims as a matter of law.

ARGUMENT

I. There are no material facts alleged to prove Respondents denied services to complainants on the basis of their sexual orientation.

The amended formal charges allege discrimination in providing services to complainants based on their sexual orientation, which Respondents have denied. Amended Formal Charges, ¶¶12(a) and (b). Answer to Amended Formal Charges, ¶12. Exs. 2, p. 5; 3, p. 5. Complainants and Respondents all acknowledge that Respondents acted on their religious beliefs. To overcome summary judgment BOLI must present a witness or *actual material* evidence to controvert Respondents' evidence on that point and otherwise put that material fact in dispute.

ORS 659A.403 requires proof of: (a) denial of services; (b) in a place of public accommodation; (c) on account of; (d) a person's status as a member of a protected class, including sexual orientation. *See also* ORS 659A.006(1). Other than conjecture or speculation, there is *no material factual evidence* that Respondents chose not to participate in Complainants' ceremony on account of their sexual orientation, and indeed the record is undisputed concerning the real reason. Instead, BOLI seeks to impute a non-existent strict liability legal standard into

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the statute. Merely telling a customer "No" on one occasion, without *evidence* of more, is not unlawful discrimination *per se*.

At the outset, it is instructive to note that in the landmark case *Tanner v. OHSU*, 157 Or App 502, *rev. den.* 329 Or 528 (1998), the Oregon Court of Appeals rejected the argument in an employment context that denial of domestic partner benefits to public employees was discrimination based on sexual orientation under ORS 659.030, finding instead it was based on marital status:

> OHSU's denial of benefits to plaintiffs ostensibly was based on the fact that plaintiffs were unmarried. As OHSU contends- and as plaintiffs concede- its practice of denying benefits to domestic partners was based on a definition of eligible family members that applied both to unmarried heterosexual couples and unmarried homosexual couples. Ostensibly, therefore, OHSU did not discriminate "because of" sexual orientation; it discriminated "because of" marital status, *without regard to sexual orientation.*

Tanner v. OHSU, 157 Or App at 515-516 (emphasis added).

In these cases, it is undisputed that their religious beliefs were the real reason Respondents chose not to participate in Complainants' same sex ceremony by designing, creating, decorating and delivering a cake. Both sides of the dispute have alleged that same fact. Amended Formal Charges ¶ 5; Answer to Amended Formal Charges ¶ 5. Exs. 1-F, p. 4; 2, p. 6. It is further undisputed that Respondents had previously provided goods and services to complainants and their family members, including creating and decorating a wedding cake for Cheryl McPherson- ordered and paid for by complainant Rachel Cryer. Notice of Substantial Determination, p. 2, ¶ 10. Exs. 1-C, p. 2; 1-D, p. 2; 1-F, p. 2; 1-G, p. 2; 2, p. 5. Even if a "straight" person wanted Sweet Cakes to design, decorate and deliver a cake celebrating a same-sex wedding, Respondents would decline to provide it because it is participation in the *event* they

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object to. Exs. 2, p. 5; 3, p. 5. Respondents object to being compelled to express support for something that violates their religious convictions. In the face of uncontradicted evidence Respondents served complainants except on this one occasion, and would serve them again for any other event, BOLI's unsupported assertion that Respondents acted *on account of* complainants' sexual orientation must fail in its entirety.

Additionally, if as it appears on the face of the pleadings, one or more of the complainants were not actually the potential customers requesting the wedding cake at issue, then they were also not the ones denied services, and their claims must fail as a matter of law. In particular, the record is clear Laurel Bowman-Cryer was not present for the cake tasting and was never denied services. Therefore, either Rachel Cryer or Cheryl McPherson was the only person who was or could have been denied services according to Complainants own record. Claims made by anyone else must fail.

2. ORS 659A.403, 659A.406 and 659A.409 are unconstitutional because they infringe on free speech and religious liberty but they cannot survive strict scrutiny analysis under the U.S. Constitution.

It should be noted at the outset that principles of statutory construction require statutes to be construed, if possible, in such a manner as to avoid constitutional questions or unconstitutional results unless such a construction is plainly contrary to the intent of the Legislature. *Fair Housing Council of San Fernando Valley v. Roommate.com*, 666 F.3d 1216, 1222 (9th Cir. 2012). *See also Salem College & Academy, Inc. v. Employment Div.*, 298 Or 471, 481(1985)(statutes should be interpreted and administered to be consistent with constitutional standards before attributing a policy of doubtful constitutionality to the political policymakers, unless their expressed intentions leave no room for doubt); *Planned Parenthood Assn v. Dept. of*

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Human Res., 297 Or 562, 687 P2d 785 (1984); *Osborne v. Ohio*, 495 US 103, 115 n.12, 119-121(1990). In the present case that requires the ALJ to construe statutes in such a way as to avoid a constitutional problem, which necessarily requires consideration of Respondents' constitutional rights herein and forbids imposing a governmental message on Respondents which is contrary to their protected beliefs.

Under any appropriate analysis here, the statutes upon which BOLI bases its three legal claims must survive the strict scrutiny standard that applies where infringement of speech and religious liberties are at issue. As noted below, ORS 659A.403, ORS 659A.406, and ORS 659A.409 on their face make no exemption for religious practices, rights of conscience or other well-established constitutional protections such as compelled speech. In fact, the record shows BOLI refuses to acknowledge these protected rights and blindly applies these statutes to punish rather than protect Respondents for practicing their religious faith at their place of business, punish them for refusing to express a message of support for Complainants event by participating, and punish them for explaining in a TV or radio interview why they refused to participate in Complainants' event. That blindness is fatal to BOLI's claims herein.

Moreover, BOLI prosecutors have hitherto resisted Respondents' motion to compel production of evidence of any consideration of Respondents' constitutional rights. Their resistance to producing evidence relevant to this inquiry reflects either ignorance to well-established constitutional law, deliberate indifference to Respondents' rights or bad faith in responding to Respondents' legitimate discovery requests. *See* Ex. 4 (BOLI Response to Respondents' Interrogatories # 17, p. 8). At present, the record confirms Respondents' contention BOLI has not made such an effort.

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The strict scrutiny standard dates back to the early 1960s and remains vibrant to this day. *Sherbert v. Verner*, 374 US 398, 406-410 (1963)(government action imposing a substantial burden on individual rights must be struck down unless it is the least restrictive means of achieving a compelling governmental interest). *See also Wisconsin v. Yoder*, 406 US 205 (1972); *Thomas v. Review Board*, 450 US 707 (1981); *Pacific Gas and Elec. Co. v Public Utilities Comm.*, 475 U.S. 1 (1986)(applying strict scrutiny review in the context of a compelled speech claim); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (applying strict scrutiny in the context of a free exercise claim); *Wooley v. Maynard*, 430 U.S. 705 (1977).

This strict scrutiny test is "the most demanding test known to constitutional law" (*City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)), and it applies to content-based regulation of expression. *Brown v. Entertainment Merchants Assn.*, 131 S.Ct. 2729, 2733-2734 (2011). In order to survive strict scrutiny under this historical analysis, BOLI must demonstrate that the law furthers a "compelling state interest" and is "narrowly tailored" to that interest. *Brown v. Entertainment Merchants Assn.*, 131 S.Ct. at 2738. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. at 533. Narrow tailoring requires that BOLI employ "the least restrictive means" for achieving its compelling interest, *Thomas*, 450 U.S. at 718, which BOLI has so far declined to consider herein.

Strict scrutiny was the standard that prevailed for both state and federal claims until 1990, when the U.S. Supreme Court limited the federal constitutional protection in some cases, stating that "the right of free exercise [under the United States Constitution] does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the

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grounds that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).

BOLI may also claim that *Employment Division v. Smith,* 494 US 872, dictates a lesser standard of review, but such an assertion would be wrong in this case. *Smith* left intact the strict scrutiny standard in at least 4 types of cases: (a) if the law was not neutral; (b) if the law was not generally applicable; (c) if the law required some form of individualized assessment; or (d) if the law substantially burdened multiple rights combining religion and speech, known as "hybrid rights. *Smith*, 494 U.S. at 881-882. If a law that burdens individual liberties is not neutral or of general applicability, the law must be justified by a compelling government interest, *Lukumi*, 508 U.S. at 531, *and* "must undergo the most rigorous of scrutiny." *Id.* at 546. This standard has been applied in the aftermath of *Smith* concerning the rights of entities as well as individuals. *Hosanna-Tabor Ev. Lutheran Church & School v. EEOC*, 132 S.Ct. 694 (2012). *Gonzales v. O Centro*, 546 US 418 (2006). *Lukumi*, 508 US 520 (1993).

Congress responded to *Smith* by passing the religious Freedom Restoration Act (RFRA), 42 USC §2000bb *et seq*, which restored pre-*Smith* jurisprudence. Even though RFRA does not apply directly to state or local governments (*See City of Boerne v. Flores*, 521 U.S. 507), the principles upon which RFRA is based remain viable, as subsequent decisions cited above demonstrate. *Supra*, pp. 10-12.

The upshot is that under any of these analyses, BOLI's claims rest on statutes that must survive strict scrutiny and properly account for Respondents' protected interests. As will be demonstrated below, even under intermediate scrutiny, the answer will be the same. *Infra*, pp. 24-25. The statutes upon which BOLI relies are indefensible, and BOLI's claims fail.

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a. Oregon's Anti-discrimination Law is Not Neutral.

It is easy to see that the application of ORS 659A.003 *et seq* is not neutral in these cases because the statutes substantially burden Respondents' well-established constitutional rights in a number of ways. *See* §§ 3, 4 and 6 below. Respondents, and those similarly situated cannot simply refrain from acting because under ORS 659A.003 *et seq* they are being *compelled* to take actions and make statements that violate their religious beliefs, contradict their personal opinions, and violate their personal conscience. As noted below, BOLI seeks to *compel* Respondents' participation in an event that the government of Oregon itself wouldn't participate in, and had defined as invalid at the time, and BOLI seeks to do so by crushing Respondents' constitutionally-protected speech, religion and conscience rights. The law is directed at stopping religious practices because, with no exception for Respondents and those similarly situated, the government has elevated sexual orientation protections over religious liberty protections. The conflict is easily apparent in that Complainants and Respondents *all* assert their status as members of protected classes under ORS 659A.006, whose rights have inevitably collided herein. Religion is not treated neutrally under the statutes. Yet BOLI, unless this ALJ gives a limiting and restricting definition, has completely abrogated Respondents constitutional rights in favor of Complainants' newly created statutory protections.

b. Oregon's Anti-discrimination Law is Not Generally Applicable.

It is equally evident that ORS 659A.003 *et seq* is not generally applicable. ORS 659A.006(3)-(5) sets forth multiple exemptions from the law for "a bona fide church or other religious institution." ORS 659A.400(2) excludes a variety of public facilities as well as "[a]n institution, bona fide club or place of accommodation that is in its nature distinctly private." ORS

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569A.403 exempts laws governing the consumption of alcoholic beverages and "senior discounts" for persons over the age of 50. Perhaps most conspicuously, the state of Oregon in 2013 was itself exempted from issuing marriage licenses to same-sex couples by its own official policy pursuant to Article XV, §5a. When the Oregon Constitution decreed one man and one woman marriage to be the law of Oregon in 2004, it expressly exempted BOLI and everyone else (including Respondents) from coerced participation in providing same sex couples access to wedding cakes. *Infra*, pp. 15-17, 19. In fact, BOLI is estopped from asserting a contrary position concerning the time in question. Accordingly, the public accommodation statutes are not neutral laws of general applicability and must be struck down unless they satisfy the additional requirements of strict scrutiny.

c. The State of Oregon Does Not have a Compelling Government Interest which Supersedes Respondents' Speech, Religious, and Conscience Rights.

Inasmuch as the statutes at issue herein are neither neutral nor generally applicable, the inquiry necessarily turns to the issue of whether there is a compelling government interest. In this instance, the public accommodation statutes cannot satisfy these additional elements of strict scrutiny because: (a) BOLI cannot establish a compelling government interest that supersedes Respondents' speech, religion and conscience rights; and (b) BOLI's attempt to impose liability on Respondents is not narrowly tailored nor the least restrictive means of accomplishing any alleged government interest it may rely upon.

A compelling interest is an interest of "the highest order," *Lukumi*, 508 U.S. at 546, and is implicated only by "the gravest abuses, endangering paramount interests." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). In 2011, the Supreme Court described a compelling interest as a "high

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degree of necessity," noting that "[t]he State must specifically identify an 'actual problem' in need of solving, and the curtailment of [the asserted right] must be actually necessary to the solution." *Brown v. Entertainment Merchants Ass'n,* 131 S. Ct. at 2738, 2741 (citations omitted). The "[m]ere speculation of harm does not constitute a compelling state interest." *Consol. Edison Co. v. Pub. Serv. Comm'n,* 447 U.S. 530, 543 (1980). Moreover, the strict scrutiny standard requires a particularized focus, not just the general assertion of a compelling state interest. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006).

It is important at the outset to understand BOLI has the legal obligation herein to articulate and justify what a relevant compelling interest is, as well as justify the particular means to achieve it. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (discussing cases showing that strict scrutiny analysis demands a particularized focus on the parties and circumstances). The relevant government interest herein *cannot be* a general interest in prohibiting discrimination because that position has already been rejected by the Supreme Court in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995)). It should also be noted that neither the United States Supreme Court, nor the Supreme Court of Oregon, has ever established sexual orientation as a historically protected suspect classification.

Under *Hurley*, public accommodation laws, which are designed to ensure that protected persons "desiring to make use of public accommodations . . . will not be turned away merely on the proprietor's exercise of personal preference," do not serve a compelling interest when "applied to expressive activity." 515 U.S. at 578. For their "object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to

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alter it with messages of their own." *Id.* Thus, their only function is "to allow exactly what the general rule of speaker's autonomy forbids," *id.*, which is the deprivation of personal "autonomy to control one's own speech" and make "choices of content that in someone's eyes are misguided, or even hurtful," *id.* at 574.

Stated differently, public accommodation laws do not serve a compelling interest when applied to expressive activity because their sole purpose is to override the general ban on compelled speech. *See id.* at 579 (explaining that non-commercial speech restrictions may not "be used to produce thoughts and statements acceptable to some groups" as the First Amendment "has no more certain antithesis"); *Dale*, 530 U.S. 657 (noting that public accommodation laws do not serve a "compelling interest" when they "materially interfere with the ideas" a person or group wishes "to express"). Because this purpose is categorically invalid under the First Amendment, it is not legitimate, let alone "compelling."

The particular interest properly at stake here is whether the *government* has a legitimate interest in forcing Aaron and Melissa Klein personally to design, create, decorate and deliver a wedding cake and participate in a same-sex wedding ceremony, which the state of Oregon did not even recognize in 2013. *See Attorney Gen. v. Desilets*, 418 Mass. 316, 325-26, 636 N.E.2d 233, 238 (1994) ("The general objective of eliminating discrimination . . . cannot alone provide a compelling State interest that justifies the application of that section in disregard of the defendants' right to free exercise of their religion. The analysis must be more focused.")

Additionally, as noted above, the statutes at issue cannot be justified by a compelling governmental interest because that theory is barred by the Oregon Constitution. Article XV, §5a of the Oregon Constitution provides:

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> Section 5a Policy regarding marriage. It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage. [Created through initiative petition filed March 2, 2004, and adopted by the people Nov. 2, 2004][Note: Added as unnumbered section to the Constitution but not to any Article therein by initiative petition (Measure No. 36, 2004) adopted by the people Nov. 2, 2004.]

See Answer to Amended Formal Charges, ¶¶ 20-21.

In January 2013, at the time of the events alleged in the Formal Charges, Article XV, §5a was in effect and had been upheld as constitutional. *Martinez v. Kulongoski*, 220 Or App 142, 164, *rev.den.* 345 Or 115(2008). A subsequent decision to the contrary in 2014 does not change the Oregon Constitution as it existed in 2013. *See Geiger v. Kitzhaber*, 994 F. Supp.2d 1128 (2014). On its face, Article XV, §5a conclusively governs the state of Oregon, its political subdivisions and state agencies, including BOLI. At the time, Article XV §5a and the *Martinez* decision could not be contravened by inferior state statutes or BOLI regulatory fiat.

BOLI, as a place open to and providing services to the general public, is itself a place of public accommodation. ORS 659A.400(1)(b) and (c). If the state of Oregon could not assert a governmental interest contrary to the Oregon Constitution, BOLI has no authority to recognize or participate in- nor to require anyone to recognize or participate in- "marriage" ceremonies other than those authorized in the Oregon Constitution arising under such a conclusive policy. That is particularly true when other provisions of the Oregon Constitution also protect Respondents' rights, estopping BOLI from imposing liability herein. *See* §§ 3, 4 and 6 below; Answer to Amended Formal Charges, ¶¶ 22, 24.

ORS 659A.403, 659A.406 and 659A.409 effectively attempt, without legal authority, to impose liability on Respondents for abiding by th e Oregon (and U.S.) Constitution, and it

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ironically attempts to do so when the state of Oregon itself- whose agencies themselves provide services as places of public accommodation- would similarly have refused services to complainants by declining to issue marriage licenses or otherwise participate in their same-sex ceremony. *See* Answer to Amended Formal Charges, ¶ 22. BOLI cannot rely on unconstitutional statutes and rejected government interest theories to force Aaron and Melissa Klein to participate actively in and endorse the very marriage ceremonies the state at the same time declined to recognize or license.

In these cases, there is no dispute that Respondents acted on the basis of their religious beliefs because they stated as much. Amended Formal Charges, ¶ 5; Answer to Amended Formal Charges, ¶¶ 5, 24, 26, 29. *See also* Exs. 1-F, p. 4; 1-G, p. 3; 2, p. 6. Even if there were disputed issues of material fact – which are conspicuously lacking- it is axiomatic inferior state statutes are subordinate to the Oregon Constitution, especially where the Oregon Constitution in this instance coincided with the religious beliefs of Respondents at the time the alleged events herein took place. *See Li v. State of Oregon*, 338 Or 376 (2005). At the time (and in 2013), Measure 36 as enshrined in the Oregon Constitution was a "presently enforceable" provision of the Oregon Constitution. *Id* at 390. Governmental officials have "a duty to follow the Constitution regardless of whether a court has ruled on the constitutionality of a particular issue. *Li v. State*, 338 Or 376, 383 (2005).

Therefore, the ALJ must interpret the statute in a way that will not create constitutional problems or violate Respondents' constitutional rights. To the extent BOLI improperly seeks to impose legal liability under a 2007 statutory scheme that is undeniably subordinate to the marriage provisions of the Oregon Constitution, and the undisputed facts confirm Respondents'

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choice not to participate based on their religious beliefs, the ALJ must find BOLI's claims and the statutes they are based on unconstitutional as a matter of law.

d. Oregon's Anti-discrimination Law is Not Narrow Tailored to Achieve the State's Interest.

Finally, the statutory scheme completely fails the narrow tailoring test. There is no attempt, either by statute or by BOLI practice, to enforce the nondiscrimination laws in a manner which acknowledges the validity of, or balances, constitutional protections. The bludgeon applied here is that everyone must be compelled to think, act or express a governmental message at the point of BOLI's spear. Further proving that the government has made zero attempt to narrowly tailor this law, is BOLI's response to Respondents' discovery request asking for all less restrictive alternatives considered by the state. BOLI prosecutors responded that such an inquiry was misleading and argumentative and refused to answer. *See* Ex. 4 (BOLI Response to Respondents' Interrogatories #17, p. 8, attached as Exhibit 1 to Respondents' Motion to Compel Discovery on file herein). Apparently BOLI prosecutors have not even understood to date that they are trampling on the constitutional rights of respondents in their zeal to apply these comparatively new statutes. Attempting to eliminate "discrimination" by discriminating against another protected group is not narrow tailoring.

BOLI's interest in ensuring that people may obtain artistically designed wedding cakes celebrating same-sex marriages can be served by more tailored means than compelling the Kleins to engage in such expression. In fact, BOLI could plainly serve its interests "through means that would not violate [the Klein's] First Amendment rights." *Pac. Gas & Elec. Co. v. Pub. Utilities Comm of Cal.*, 475 U.S. 1, 19 (1986). But, so far, it has not even made such an

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attempt. *Cf. id.* (concluding that a law forcing a utility company to facilitate third party speech flunked the narrow tailoring test because there was "no substantially relevant correlation between the governmental interest asserted and the State's effort to compel appellant" to engage in unwanted expression (quotation omitted)).

Perhaps the most ready alternatives would be for the State to engage in counter-speech favoring the celebration of same-sex unions, as well as the acknowledgment and reward of bakeries that are willing to design and create cakes to celebrate these events. It could readily do so through educational programs, advertising schemes, a business ranking system, community awards scheme, or through any number of other means. The U.S. Supreme Court has recognized that all of these alternatives are more narrowly tailored to advance the government's interests than restricting the essential right to free speech. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507-08 (1996) (plurality op.) (finding a statute not sufficiently tailored, in the commercial speech context, because the state could engage in "educational campaigns," "financial incentives[,] or counter-speech, rather than speech restrictions, to advance its interests") (citing *Linmark Assocs. Inc. v. Willingboro Twp.*, 431 U.S. 85, 97 (1977).

Because all of these options are "less restrictive of speech" than forcing Respondents to engage in creative expression, "the State must use [these] alternative[s] instead." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 582 (2001); *see also Brown v. Entertainment Merchants*, 131 S. Ct. at 2738 (explaining that strict scrutiny requires "the curtailment of free speech [to] be actually necessary to the solution"). "It is no response" for Appellees to claim that these options "require[] a consumer to take action, or may be inconvenient, or may not go perfectly every

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time." *Playboy*, 529 U.S. at 824. Courts, under the strict scrutiny standard, may "not assume a plausible, less restrictive alternative would be ineffective." *Id.*

Significantly, Respondents herein only decline to design and create cakes specifically to celebrate same-sex weddings. They do not seek an exemption from the Anti-Discrimination Act as a whole. BOLI is simply unable to "articulate why accommodating such a limited request fundamentally frustrates its goals." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1144 (10th Cir. 2013), *aff'd by Hobby Lobby*, 134 S. Ct. at 2780 (concluding that the government's arguments failed because they did not show that it lacked "other means of achieving its desired goal without imposing" on the plaintiffs' rights). In fact, "there is no hint that the [g]overnment even considered these or any other alternatives." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). But a fundamental principle of our law is that "regulating speech must be a last—not first—resort." *Id.*

e. Oregon's Anti-discrimination Law Fails Even Under Intermediate Scrutiny Because it is Not Content Neutral and Does Not Serve a Substantial Governmental Interest.

The public accommodation statutes, as applied to Aaron and Melissa Klein in this case, fail strict scrutiny under the First Amendment for all the reasons stated herein, and summary judgment should be granted in favor of Respondents. However, even if the ALJ is not convinced the strict scrutiny standard of review applies, the same answer obtains under intermediate scrutiny. The Supreme Court has recognized two lines of cases applying intermediate scrutiny rather than strict scrutiny: (1) cases involving expressive conduct; and (2) time, place and manner restrictions, which apply to pure speech or expressive conduct. The first is subject to the test articulated in *U.S. v. O'Brien*, 391 US 367, 376-377 (1968) involving a combination of

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"speech" and "nonspeech" elements in the same course of conduct, in which the government must demonstrate (a) the regulation furthers an important or substantial government interest; (b) the government interest is unrelated to suppression of expression; and (3) the restrictions are no greater than is essential to furthering the government interest. *Id.* The second arises in cases such as *Ward v. Rock Against Racism*, 491 US 781, 791 (1989), where time, place and manner regulations are allowed if the regulation: (a) is content neutral; (b) serves a significant government interest; (c) is narrowly tailored (i.e., "the means chosen are not substantially broader than necessary to achieve the government's interest"); and (4) leaves open ample alternative channels of communication. *Id.* at 791, 800. In both situations, the regulation at issue must still be content-neutral. *See also Gathright v. City of Portland,* 439 F3d 573 (9th Cir. 2006); *Rohman v. City of Portland*, 909 F.Supp. 767 (USDC-Or, 1995).

There can be no doubt that ORS 659A.403, 659A.406 and 659A.409 all fail even the intermediate scrutiny test because they are not content-neutral, they are not based on a valid governmental interest (*Supra*, pp. 16-20) and they are blanket prohibitions on expression rather than being narrowly tailored or imposing reasonable time, place and manner restrictions. As with strict scrutiny, the statutes are unconstitutional under controlling Supreme Court and Ninth Circuit precedent.

3. Respondents are entitled to summary judgment on all claims because ORS 659A.403, 659A.406 and 659A.409 unconstitutionally limit their rights of free speech and against compelled speech protected under the U.S. and Oregon Constitutions.

Respondents herein have not only the right to express their own views, but also are protected from being compelled to express views they disagree with, under the U.S. and Oregon

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Constitutions. *See* Answer to Amended Formal Charges, ¶¶ 22, 24, 29. The critical fact to remember is that BOLI is a *government entity* which seeks to crush Respondents' speech rights and compel their *private* expression of a *government* message. BOLI has no more authority to compel Respondents' participation or expression than it does to tell members of the news media what to report, how to report and when to report. The statutes in question here not only compel Respondents to express views that Respondents disagree with, but also prohibit them from speaking their opposition to those views. Aaron and Melissa Klein are forced by this law to express approval for the actions of Complainants by helping them convey their message, and at the same time Aaron and Melissa are threatened with a violation of the law if they express their own position. *See* Amended Formal Charges, ¶¶ 12-14.

a. Designing and Creating a Wedding Cake is Expression subject to First Amendment Protection.

First Amendment protection against abridging freedom of speech extends beyond spoken or written words. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006); *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. at 569 (saluting or not saluting a flag; wearing an armband; displaying a red flag, parading in uniform while displaying a swastika, music, and art all held to be speech protected by First Amendment). In fact, "the Constitution looks beyond written or spoken words as mediums of expression." *Id.* at 569. Last, but certainly not least, the First Amendment protects freedom of thought. *Wooley v. Maynard*, 430 US 705, 714 (1977).

The design, creation and decoration of custom wedding cakes, as symbolic speech, is inherently expressive and entitled to full First Amendment protection. *See Kaplan v. California,*

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413 US 115, 119 (1973)("As with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution."); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060-61 (9th Cir. 2010); *Cressman v. Thompson*, 719 F.3d 1139, 1141 (10th Cir. 2013); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (recognizing that First Amendment protections have been specifically afforded to a variety of mediums of expression, including music, pictures, films, art, entertainment, paintings, drawings, engravings, prints, sculptures, and speech that "is carried in a form that is sold for profit") (citations omitted); *Bery v. City of New York*, 97 F.3d 689, 696 (2nd Cir. 1996) ("[P]aintings, photographs, prints and sculptures...always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection.").

The Ninth Circuit has made clear there is no distinction between an expressive product and the creation of that end product:

> *Neither the Supreme Court nor our court has ever drawn a distinction between the process of creating a form of pure speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection* afforded. Although writing and painting can be reduced to their constituent acts, and thus described as conduct, *we have not attempted to disconnect the end product from the act of creation*...In other words, we have never seriously questioned that the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection.

Anderson v. City of Hermosa Beach, 621 F.3d at 1061-62 (emphasis added).

Other jurisdictions similarly find no distinction between "creating, distributing or consuming" speech (*Brown v. Entertainment Merchants Assn.*, 131 S.Ct. at 2734 n.1), just as "there is no fixed First Amendment line between the act of creating speech and the speech

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itself." *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012)(quoting *Citizens United v. FEC*, 558 US 310, 336 (2010)).]

As described above, wedding cakes are inherently expressive artistic creations that constitute speech, just like a host of other mediums of expression recognized by courts, and specifically by the United States Supreme Court. Melissa Klein custom designs the wedding cakes to specifically tell a story and speak for and about the individuals getting married. *See* Exs. 2, pp. 3-4; 3, pp. 3-5. Melissa talks with each client to ascertain his or her ideas, personality, likes, and dislikes to create the cake the client envisions. Ex. 2 pp 3-5. She then personally sketches multiple designs for each client until her sketches finally reflect the wedding's mood and theme as well as the individuality of the client. *Id.* Much like a sculptor, Melissa draws, molds, cuts, and forms material into a skillful design which becomes a tangible representation of the personalities of two people who are becoming one. *Id.* Melissa's clients pay hundreds of dollars for her designs. *Id.* at 5. Her creations are not "one size fits all" cakes. *Id.* In fact, they are not "just cakes." If Melissa's clients simply wanted cake to feed a crowd, certainly they could find such a thing for a lower price at Walmart or Costco. But Melissa's clients do not just want cake. They want art. They want an expression of "who they are" to display as a centerpiece at their wedding. Moreover, many of Melissa's clients have hired her especially *because* of her artistic talent. Melissa has designed and created a cake for clients as far away as Ashland, Oregon. *Id.* These clients saw Melissa's artwork and so desired her particular artistic skills that the 400 mile distance was no barrier. In this way, Melissa's work is tantamount to an artist commissioned to paint a portrait or create a sculpture. This expression and the entire process of its creation is speech explicitly protected by the First Amendment.

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b. ORS 659A.403 and 659A.406 Violate the Compelled Speech Doctrine by Forcing Respondents to Engage in Conduct which is Inherently Expressive.

The Supreme Court has long held that the government may not compel the speech of private actors. See *United States v. United Foods, Inc.*, 533 U.S. 405, 413-15 (2001); *Wooley v. Maynard*, 430 U.S. at 714-15; *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). "In order to compel the exercise or suppression of speech, the governmental measure must punish, or threaten to punish, protected speech by governmental action that is 'regulatory, proscriptive, or compulsory in nature.'" *Phelan v. Laramie County Comm. College Board of Trustees,* 235 F.3d 1243, 1247 (10th Cir. 2000)(quoting *Laird v. Tatum*, 408 U.S. 1, 11 (1972)). The First Amendment similarly protects speech from government *compulsion*, and that is particularly true if it expresses an unpopular point of view, even involving nondiscrimination:

> As the United States Supreme Court explained long ago, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)(Jehovah's Witnesses could not be compelled to say the Pledge of Allegiance in public schools). The protection against compelled speech extends even further:

> "Our compelled-speech cases are not limited to the situation in which an individual must personally speak *the Government's* message. We have also in a number of instances limited *the government's* ability to force one speaker to host or accommodate another speaker's message." (emphasis added)

Rumsfeld, 547 U.S. at 63, citing *Hurley*, 515 U.S. at 559 (1995)(forcing parade organizer to include LGBT group's message, which organizer opposed, violated First Amendment); *Pacific Gas and Elec. Co. v. Pub. Utilities Comm. of California*, 475 U.S. at 9 (plurality opinion holding

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that compelling plaintiff to include oppositional private speech of third-party in plaintiff's monthly newsletter violated First Amendment); *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241, 258 (1974) (right-of-reply statute violates editors' right to determine the content of their newspapers in violation of First Amendment).

It is incontrovertible that First Amendment rights under the U.S. Constitution take precedence over state nondiscrimination statutes. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 US 557, the Supreme Court ruled that the state courts' application of the Massachusetts public accommodations law to require private citizens who organize a parade to include among the marchers a group imparting a message that the organizers do not wish to convey violated the First Amendment. *Id* at 559. In so ruling, the Court held:

> Disapproval of a private speaker's statement does not legitimize use of *the Commonwealth's* power to compel the speaker to alter the message by including one more acceptable to others.

Id at 581 (emphasis added). The Supreme Court continued:

> Since all speech inherently involves choices of what to say and what to leave unsaid," Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal., 475 U.S. 1, 11, 106 S.Ct. 903, 909, 89 L.Ed.2d 1 (1986) (plurality opinion) (emphasis in original), one important manifestation of the principle of free speech is that one who chooses to speak may also decide "what not to say," id., at 16, 106 S.Ct., at 912. Although *the State* may at times "prescribe what shall be orthodox in commercial advertising" by requiring the dissemination of "purely factual and uncontroversial information," Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651, 105 S.Ct. 2265, 2281, 85 L.Ed.2d 652 (1985); see Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 386-387, 93 S.Ct. 2553, 2559-2560, 37 L.Ed.2d 669 (1973), *outside that context it may not compel affirmance of a belief with which the speaker disagrees, see Barnette*, 319 U.S., at 642, 63 S.Ct., at 1187.

Hurley, at p. 573 (emphasis added).

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Again, compelled speech failed in in the foregoing cases –as it does here- under a strict scrutiny standard, but it also fails under an intermediate scrutiny analysis. *Supra*, pp. 22-23.

c. ORS 659A.409 Violates Oregon's Constitution by Explicitly Prohibiting Content-based Speech.

In the same way, the Oregon Constitution expressly and broadly protects speech from governmental restrictions in Article I §8:

> No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

See Answer to Amended Formal Charges, ¶¶ 28-29.

Article I §8 protections exceed even those under the First Amendment. *City of Portland v. Tidyman*, 306 Or 174, 178-180 (1988). Oregon's constitutional protection of speech extends even to protecting nude dancing. *State v. Ciancanelli*, 339 Or 282 (2005). The constitutionality of laws under Article I, § 8 of the Oregon Constitution is evaluated under the following analysis unique to the Oregon Constitution, recently reaffirmed in *State v. Babson*, ___ Or ___ (2014):

> **Under the first category**, the court begins by determining whether a law is "written in terms directed to the substance of any 'opinion' or any 'subject' of communication." *Robertson*, 293 Or at 412. If it is, then the law is unconstitutional, unless the scope of the restraint is "wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Id.* If the law survives that inquiry, then the court determines whether the law focuses on forbidden effects and "the proscribed means [of causing those effects] include speech or writing," or whether it is "directed only against causing the forbidden effects." *Id.* at 417-18. **If the law focuses on forbidden effects, and the proscribed means of causing those effects include expression, then the law is analyzed under the second *Robertson* category. Under that category, the court determines whether the law is overbroad, and, if so, whether it is capable of being narrowed.** *Id.* If, on the other hand, **the law focuses only on forbidden effects, then the law is in the third *Robertson* category, and an individual can challenge the law as applied to that individual's circumstances.** *Id.* at 417.

State v. Babson, ___ Or ___(Slip opinion, pp. 9-10, May 15, 2014)(emphasis added). *See also* *State v. Robertson* 293 Or 402, (1982).

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Laws in the first category are unconstitutional on their face unless the scope of the restraint is within one of the historical exceptions existing in 1859 (which undeniably did not include protection of sexual orientation). *City of Eugene v. Miller*, 318 Or 480, 495 (1994). Laws in the second category are analyzed for overbreadth to the extent they improperly prohibit or regulate protected speech, looking to see if the "actual focus of the enactment is an effect or harm that may be proscribed, rather than on the substance of the communication." *State v. Stoneman*, 323 Or 536, 543 (1996). The third category addresses application of the law that is not speech-neutral, usually in a regulatory context. *City of Portland v. Lincoln*, 183 Or App 36, 43 (2002).

With respect to the first category, the Oregon Supreme Court has said:

> Article I, section 8, for instance, forbids lawmakers to pass any law "restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever," beyond providing a remedy for any person injured by the "abuse" of this right. *This forecloses the enactment of any law written in terms directed to the substance of any "opinion" or any "subject" of communication, unless the scope of the restraint is wholly confined within some historical exception* that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach. Examples are perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants. 293 Or. at 412. (emphasis added)

The Oregon Supreme Court has held, for example, that an employer's lack of knowledge that repeated proselytizing of an employee was resulting in the employee feeling distressed and harassed *prevents* the employer from being liable for the content of speech under ORS 659A.030. *Meltebeke v. BOLI,* 322 Or 132 (1995). When a person engages in a religious practice, the state may not restrict that person's activity unless it first demonstrates that the person is consciously aware that the conduct has an effect forbidden by the law that is being enforced. *Meltebeke v. BOLI,* 322 Or at 152. BOLI has made no such effort to meet its constitutional requirement, and it cannot on the facts alleged.

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Since ORS 659A.403, 659A.406 and 659A.409 seek to compel speech, expression and participation relating to sexual orientation, a concept that was not protected in 1859, the statutes are facially unconstitutional. The law literally prohibits Respondents, or those similarly situation from stating a particular message (*i.e.*, that they won't provide services). However, even if sustained under the first category, the statutes cannot be sustained under the second class of laws regulating speech in that there is no valid government interest. *Supra*, pp. 14-17. The statute would have to be directed a proscribing a particular kind of harm rather than shutting off a particular topic of speech, but here the law is specifically directed a banning a particular viewpoint with respect to the categories listed. BOLI has made no effort to show that the law has been narrowly tailored, so unless the ALJ narrowly interprets the statutes, it is unconstitutional under *Robertson*'s second category. Under that category, the court determines if the law is overbroad, and, if so, whether it is capable of being narrowed. *State v. Babson*, ___ Or ___ (Slip opinion, pp. 9-10, May 15, 2014). *See also State v. Robertson*, 293 Or 402.

With respect to the third *Robertson* category, Oregon's nondiscrimination statues in ORS Chapter 659A must be evaluated as follows:

> If the enactment does not restrain or restrict speech historically intended to be excepted from Article I, section 8, a third inquiry is necessary. "That question is whether the focus of the enactment, as written, is on an identifiable, actual effect or harm that may be proscribed, rather than on the communication itself." *In re Fadeley*, 310 Or. at 576, 802 P.2d 31 (Unis, J., concurring in part, dissenting in part); *see Moyle*, 299 Or. at 697, 705 P.2d 740; see also *Oregon State Police Assn. v. State of Oregon*, 308 Or. 531, 541, 783 P.2d 7 (1989) (Linde, J., concurring) ("law must specify expressly or by clear inference what 'serious and imminent' effects it is designed to prevent"), *cert. den.* 498 U.S. 810, 111 S.Ct. 44, If the answer to the third inquiry is that the enactment proscribes expression or the use of words, rather than harm, it violates Article I, section 8, unless there is a claim that infringement on otherwise constitutionally protected speech is justified under the "incompatibility exception" to Article I, section 8.

Meltebeke v. BOLI, 322 Or at 155-156 (Unis, concurring). Moreover:

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> Our cases under Article I, section 8, preclude using *apprehension of unproven effects* as a *cover for suppression of undesired expression*, because they require regulation to address the effects rather than the expression as such."

State v. Moyle, 299 Or. 691, 695, 705 P.2d 740 (1985)(emphasis added).

Under *Meltebeke*'s application of the third step of the *Robertson* analysis, if a prohibition directed at the effects of expression "proscribes expression or the use of words, rather than harm, it violates Article I, section 8." *Meltebeke*, 322 OR at 155-156.

In effect, BOLI impermissibly uses ORS 659A.403 and 659A.409 as speech codes which, when challenged, have been routinely struck down in the federal courts as prior restraints on speech. Prior restraints bear "a heavy presumption against [their] constitutional validity." *Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir. 1994), quoting *Vance v. Universal Amusement Co.*, 445 US 308, 317 (1980). Similarly, if the government allows only speech from a particular point of view on a particular question, that is deemed viewpoint discrimination that is also usually unconstitutional. *See Rosenberger v. University of Virginia*, 515 US 819 (1995).

4. <u>Respondents are entitled to summary judgment on all claims because ORS 659A.403, 659A.406 and 659A.409 unconstitutionally limit their rights of religion and conscience protected under the U.S. and Oregon Constitutions.</u>

In this instance, there is no dispute that Respondents acted on the basis of their religious beliefs because they stated as much, which Rachel Cryer and Cheryl McPherson readily acknowledge. Amended Formal Charges, ¶ 5; Answer to Amended Formal, ¶¶ 5, 25, 28, 33. Exs. 1-F, p. 4; 1-G, p. 3; 2, p. 6. It is equally evident their religious beliefs are worthy of protection. The First Amendment (as applied to the states under the Fourteenth Amendment, §1) famously provides "Congress shall make no law respecting an establishment of religion, or prohibiting the

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free exercise thereof; or abridging the freedom of speech..." Similarly, the Oregon Constitution protects worship and religious opinion as follows:

> Section 2. Freedom of worship. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.-
>
> Section 3. Freedom of religious opinion. No law shall in any case whatever control the free exercise, and enjoyment of religious [sic] opinions, or interfere with the rights of conscience.-

As with speech, the Oregon Constitution is more expansive in protecting religion and conscience than even the First Amendment because Article I, §§ 2 and 3

> are obviously worded more broadly than the federal First Amendment, and they are remarkable in *the inclusiveness and adamancy* with which rights of conscience are to be protected from government interference.

Meltebeke, 322 OR at 146 (emphasis added).

Additionally, the statutes in ORS 659A.006, *et seq* facially purport to confer the same level of protection on Respondents as members of a protected class (religion) that BOLI seeks to enforce on behalf of complainants. Respondents' Answer asserts their religious rights both as a defense and as an affirmative right to relief. Answer to Amended Formal Charges, ¶¶ 5, 25, 28, 33. The public accommodation statutes, as applied to Aaron and Melissa Klein, violate their right to the free exercise of religion and conscience under the First Amendment and the Oregon Constitution unless their protected status is recognized and applied.

In effect, BOLI herein is violating the rights of one protected class (religion) in a misguided attempt to protect the rights of another protected class (sexual orientation), even though religion enjoys constitutional protection under the U.S. and Oregon Constitutions. BOLI's position depends upon the remarkable –and indefensible- proposition that selectively-

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enforced state statutory rights trump protections afforded Respondents under the U.S. and Oregon Constitutions – a position already rejected by the U.S. Supreme Court in *Hurley*. *Supra*, pp. 16-17.

Under the First Amendment:

> "The principle that government, in pursuit of legitimate interests, cannot *in a selective manner impose burdens only on conduct motivated by religious belief* is essential to the protection of the rights guaranteed by the Free Exercise Clause."

Lukumi, 508 U.S. at 543 (emphasis added).

The Free Exercise Clause is implicated "if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. A substantial burden on free exercise exists where the State pressures a person to violate his or her religious convictions by conditioning a benefit or right on faith-violating conduct. *Sherbert v. Verner*, 374 U.S. at 404; *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. at 717-18. By forcing Respondents "to choose between following the precepts of his religion and forfeiting [the right to make wedding cakes and remain in business], on the one hand, and abandoning one of the precepts of his religion in order to [maintain that right], on the other hand," this application of the public accommodation law would impose a substantial "burden upon the free exercise of religion." *See Sherbert*, 374 U.S. at 404; *see also Thomas*, 450 U.S. at 717-18 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.").

That these religious and conscience rights continue to enjoy great protection and vitality for individuals and businesses cannot be doubted after the Supreme Court's recent decisions in *Burwell v. Hobby Lobby*, 573 US ___ (June 30, 2014) and *Burwell v. Conestoga Wood*

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Specialties, 573 US ___ (June 30, 2014). Those cases reaffirm the principle that the rights of Christian business owners do not reside solely in their places of worship, but extend to the marketplace, reaffirming the jurisprudence under the Religious Freedom Restoration Act, 42 USC §2000bb *et seq*:

> Since the HHS contraceptive mandate imposes a substantial burden on the exercise of religion, we must move on and decide whether HHS has shown that the mandate both "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 USC §2000bb–1(b). HHS asserts that the contraceptive mandate serves a variety of important interests, but many of these are couched in very broad terms, such as promoting "public health" and "gender equality." Brief for HHS in No. 13–354, at 46, 49. *RFRA, however, contemplates a "more focused" inquiry: It "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.*" O'Centro, 546 U. S., at 430–431 (quoting §2000bb–1(b)). This requires us to "loo[k] beyond broadly formulated interests" and to "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants"—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases. O Centro, supra, at 431.

Burwell v. Hobby Lobby, 573 US ___ (slip opinion, p. 39)(emphasis added). The Court determined that the Affordable Care Act failed on all these requirements for protecting religious and conscience rights of closely-held Christian business owners, just as the nondiscrimination statutes BOLI seeks to impose on the Kleins do. The Ninth Circuit has ruled similarly. *Stormans v. Selecky*, 586 F3d 1109, 1120 (9th Cir. 2009)(a family-owned for-profit company need not be religious to assert the free exercise rights of its owners). *EEOC v. Townley Eng. & Mfg.*, 859 F2d 610, 620 n.15 (9th Cir. 1988)(same).

The same is true under the Oregon Constitution, which protects both freedom of worship and conscience, albeit to a greater degree. Article I, §§ 2 and 3. *Meltebeke*, 322 Or at 146. Since Article 1, § 3 protects acts of conscience equally to acts based on religious beliefs, protection of

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speech motivated by conscience should receive the same degree of protection. ORS 659A.403 and 409 are unconstitutional on their face, and as applied to Respondents, unless an exemption for religious and compelled speech is carved out from the statutes' express terms.

5. Respondents are entitled to summary judgment on the second claim because a person cannot aid and abet himself, especially as a business owner.

Respondents are entitled to summary judgment on BOLI's Second Claim for the same reasons outlined above because the Second Claim necessarily is dependent upon BOLI prevailing on the First Claim (*i.e.*, if the principal is not liable in the first instance, neither is an aider or abettor). Additionally, the law is clear that no person can aid and abet themselves, especially if they are a co-owner.

The Amended Formal Charges allege that Aaron Klein aided and abetted denial of services by Aaron acting on behalf of the business. Amended Formal Charges, ¶¶ 12(c), 13(c). Respondents have denied the allegations and challenged their legal and factual foundation. Answer to Amended Formal Charges, ¶¶ 12, 13, 19. There is a disputed fact there, but the outcome of that fact is immaterial. The law does not recognize the ability to aid and abet oneself. It defies the law, let alone common sense, for BOLI to argue that Respondent Aaron Klein aided and abetted someone else (including himself via his business) in choosing not to participate in complainants' ceremony, and in any event ORS 659A.406 cannot serve as a free-standing basis for liability.

In the related area of employment discrimination claims under ORS 659A.030, there are a plethora of controlling authorities confirming one cannot aid and abet oneself. A supervisor

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cannot aid and abet themselves in carrying out an unlawful employment practice, nor can they be held separately liable for damages:

> "From the standpoint of statutory construction... aiding and abetting liability makes little sense against an employee alleged to be an active participant in the asserted harm... additionally, as a pragmatic matter, I note that liability against [defendant supervisor] under 659.030 makes little sense given the limited relief available under the statute. Section 659.121(1) provides the exclusive relief for violations of 659.030."

Sniadoski v. Unimart of Portland, 1993 WL at 2 (D-Or, October 29, 1993).

Sniadoski's limitation of liability for supervisors who functionally "aided themselves" in perpetrating the complained of conduct has been held to have survived 2007 amendments to ORS 659A. *Gaither v. John Q. Hammons Hotels Management*, Civ. No. 09-CV-629-MO, 6, 2009 U.S. Dist. LEXIS 130491 (D.Or. Sept. 3, 2009); see also *Reid v. Evergreen Aviation Ground Logistics Enterprise Inc.*, Civ. No. 07-1641-AC, 2009 WL 136019, 26 (D. Or. Jan 20, 2009) (Defendant supervisor not liable for aiding and abetting termination of plaintiff due to his substantial involvement in the complained of activity).

In *Peter's v. Betaseed, Inc.* the court relied upon *Gaither* and *Sniadoski* in holding that a supervisor that was also the executive authority of the company could not be liable for aiding and abetting the company. To find otherwise "would be to suggest that it is possible to aid and abet *oneself*." *Peters v. Betaseed, Inc.*, Civ. No. 6:11-CV-06308-AA, 2012 WL 5503617, 7 (D. Or. Nov. 9, 2012)(emphasis added). "Because [the supervisor] took action to terminate the plaintiff within his role as president of [the employer]" the court found that the employee's claim against the supervisor "for aiding and abetting under § 659A.030(1)(g) makes little sense under the plain meaning of the statute." *Id. Gaither* and *Sniadoski* were drawn on again in *White v. Amedisys Holding, LLC,* resulting in a finding of supervisor liability when the court determined that the

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supervisor exercised no "executive authority" on behalf of the employer. *White v. Amedisys Holding, LLC,* Civ. No. 3:12-CV-01773-ST, 2012 WL 7037317, 4 (D. Or. Dec. 18, 2012). In either instance the supervisor's liability for aiding and abetting the employer was clearly derivative and necessarily distinct from that of the employer and as such did not serve as a standalone basis for liability.

Betaseed, Gaither and *Sniadosky* all stand for the "irrefutable point… that a person cannot aid and abet [themselves]." *White v. Amedisys Holding, LLC,* 2012 WL at 5. This basic premise echoes through seemingly every federal case to consider this matter and must be applied in the current instance. See generally *Reid v. Evergreen Aviation Ground Logistics Enterprise Inc.,* Civ. No. 07-1641-AC, 2009 WL 136019, 26 (D. Or. Jan 20, 2009); *Demont v. Starbucks Corporation*, Civ. No. 10-CV-644-ST, 2010 WL 5173304, 3 (D. Or. Dec. 15, 2010); *Peters v. Betaseed, Inc.*, Civ. No. 6:11-CV-06308-AA, 2012 WL 5503617, 7 (D. Or. Nov. 9, 2012); *White v. Amedisys Holding, LLC,* Civ. No. 3:12-CV-01773-ST, 2012 WL 7037317, 3 (D. Or. Dec. 18, 2012). Liability for aiding and abetting another simply cannot attach unless the actor accused of aiding and abetting the employer engages in some independent activity that somehow supports or assists the complained of conduct. Likewise, a distinction between the actor and the employer must exist. When, as in this case, the actor is accused of being the legal equivalent of the employer, liability cannot attach. *Id*; see also *Peters v. Betaseed, Inc.*, 2012 WL at 7. To allow otherwise would "would be to suggest that it is possible to aid and abet oneself." *Peters v. Betaseed, Inc.*, 2012 WL at 7.

In this instance, it is not disputed that Aaron Klein was a principal in an unregistered business operated by himself and his wife, Melissa Klein, under an assumed business name.

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Exs.1-A; 2, p.2. All agree he was the person who is alleged to have denied services to complainants in the first instance. Formal Charges, ¶ 4-5. Answer, ¶ 4-5. He is also the only one alleged to have appeared on the CBN broadcast or the Perkins interview, which are the subjects of BOLI's third claim. Amended Formal Charges, ¶¶ 7, 8. Answer to Amended Formal Charges, ¶¶ 7, 8. As a matter of law, he cannot aid and abet himself or the business, and BOLI's Second Claim fails as a matter of law.

6. <u>The CBN and Perkins interviews did not violate ORS 659A.409, and even if they did, ORS 659A.409 unconstitutionally limits protected speech under the U.S. and Oregon Constitutions</u>.

ORS 659A.409 by its express terms is directed at statements of *future intention*, and the undisputed material facts show that neither respondent made such statements of *future intention* as alleged. *See* Formal Charges ¶¶ 7, 8. Answer to Amended Formal Charges ¶¶ 7, 8. Ex. 2, p. 8. Moreover, even if they had, ORS 659A.409 cannot alter their right to make such statements on a matter of public interest as protected speech under the U.S. and Oregon Constitutions, as noted above. *Supra*, pp. 16-28. Finally, if "communicating" or "causing to be communicated" is the *sina qua non* of liability under ORS 659A.409, public statements by the news media, Cheryl McPherson, complainants and even BOLI Commissioner Brad Avakian himself have all violated the statute to the same degree as Respondent Aaron Klein is alleged to have done. Exs. 1-F, p. 4; 1-G, p. 3. *See also* Respondents' Motion to Disqualify BOLI Commissioner dated June 18, 2014, Exs. R7, p. 3; R9; R10, R11; R12; R13; R14; R15, pp. 1, 2, 5-9.

ORS 659A.409 by its terms requires a statement of *future intention* that is entirely absent in this instance:

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> ...it is an unlawful practice for any person acting on behalf of any place of public accommodation...to publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation *will be* refused, withheld from or denied, or that any discrimination will be made against, any person *on account of* race, color, religion, sex, sexual orientation, national origin, marital status or age...(emphasis added).

The express language of the statute, as well as the allegations of the parties, are instructive and help demonstrate why Respondents' legal position is the correct one. BOLI prosecutors actually alter the statutory language in the Formal Charges in an attempt to mask its clear statutory construction that it applies prospectively, averring that "its accommodations, advantages, facilities, services or privileges *would be* refused..." Amended Formal Charges, ¶ 13; *compare* ORS 659A.406. Respondents deny appearing on CBN, which was a rebroadcast done without Respondents' knowledge of an earlier interview at a different venue. Ex. 2, p. 8. Answer to Amended Formal Charges, ¶¶ 7, 12, 13. However, that is not the only reason Respondents should prevail on the Third Claim.

A review of the videotape record of the CBN broadcast (*See* Ex. 1-I) clearly shows that Aaron Klein spoke only of the reason why he and his wife declined to participate in complainants' ceremony. The same is true of the Perkins radio broadcast. Ex. 1-I. Any statement of future intention in either media event is conspicuously absent. Moreover, since Respondents had nothing to say about CBN's rebroadcast of the original interview, they cannot have "caused to be published, circulated, issued or displayed any communication..." *See* ORS 659A.409; Ex. 2, p. 8. Finally, to the extent Respondents did not act or speak "on account of" complainants' sexual orientation in the first instance, BOLI cannot make a prima facie case under ORS

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659A.409. Respondents are entitled to judgment in their favor on the Third Claim on those grounds alone.

However, even if there was evidence that Aaron Klein had made any statement of future intention that arguably violated ORS 659A.409, the statute unconstitutionally restricts expression entitled to protection under both the Oregon and U.S. Constitutions. It bears noting that public statements made by Aaron or Melissa Klein were always made in response to media requests, and further that complainants, their family and even the Commissioner have also publicly commented on the events underlying this legal dispute. *Supra*, p. 32. Statements made in relation to, or response to, allegations in a judicial proceeding are privileged and cannot be the basis of tort liability. *See* Restatement (Second) of Torts §594, comment k (1977) and *Israel v. Portland News Pub. Co.,* 152 Or 225, 232–233 (1936) as applied in tort and defamation law.

Because there is no evidence Aaron Klein's statements in the CBN rebroadcast or the Perkins radio interview violated ORS 659A.409, and because ORS 659A.409 cannot limit or punish protected expression, the Kleins are entitled to summary judgment on BOLI's Third Claim as a matter of law.

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CONCLUSION

The undisputed facts establish that Respondents are entitled to judgment as a matter of law on each or all of the claims asserted against them, and in fact those undisputed facts entitle Respondents to recovery as a matter of law.

DATED this 24th day of October, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing RESPONDENTS' RE-FILED MOTIONS FOR SUMMARY JUDGMENT on the following via the indicated method(s) of service on the 24th day of October, 2014:

Rebekah Taylor-Failor
Contested Case Coordinator
800 NE Oregon Street, Room 1045
Portland, OR 97232-2180

Jennifer Gaddis
Casey Cristin
800 NE Oregon Street, Room 1045
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Amy Klare
Administrator, Civil Rights Division
800 NE Oregon Street, Room 1045
Portland, OR 97232-2180

Paul A. Thompson
310 SW Fourth Avenue, Suite 803
Portland, OR 97204

_____ **MAILING** certified full, true and correct copies thereof in a sealed, first class postage-prepaid envelope, addressed to the attorney(s) shown above at their last known office address(es), and deposited with the U.S. Postal Service at Portland/Beaverton, Oregon, on the date set forth below.

_____ **EMAILING** certified full, true and correct copies thereof to the attorney(s) shown above at their last known email address(es) on the date set forth below.

K **HAND DELIVERING** certified full, true and correct copies thereof to the attorney(s) shown above at their last known office address(es), on the date set forth below.

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BEFORE THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON

In the Matter of: Oregon Bureau of Labor and Industries on behalf of RACHEL CRYER, Complainant, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 44-14 DECLARATION OF RESPONDENT AARON KLEIN
In the Matter of: Oregon Bureau of Labor and Industries on behalf of LAUREL BOWMAN CRYER, Complainant, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 44-15 DECLARATION OF RESPONDENT AARON KLEIN

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I, AARON KLEIN, hereby declare as follows:

I am one of the Respondents, and I am married to Respondent Melissa Klein. I am over 18 years of age, and I have personal knowledge of the facts stated in this declaration.

1.

Together we have operated Sweet Cakes by Melissa as an assumed business since we opened in 2007. For most of its history, Sweet Cakes by Melissa has been an unregistered business entity, but on or about February 1, 2013 (after the January 17, 2013 cake tasting event at issue here) I registered Sweet Cakes by Melissa as an assumed business name with the Oregon Corporation Division. Until recent months, we both worked actively in the business, primarily derived our family income from the operation of the business, and jointly shared the profits of the business.

2.

Before and throughout our operation of Sweet Cakes, we have been jointly committed to live our lives and operate our business according to our Christian religious convictions. At the time we opened Sweet Cakes by Melissa, we gathered with our pastor and church at our shop and dedicated our business and craft to God. We practice our religious faith through our business and make no distinction between when we are working and when we are not. Based on the principles espoused in the Bible, we try to give glory to the Lord in all that we do. We believe each person is created in the image of God to reflect His glory according to Genesis 1:26-28. We believe each person is created male and female for the purpose of propagating the human race according to God's design. *Id.* We believe that God uniquely and purposefully designed the institution of marriage exclusively as the union of one man and one woman. Genesis 2:24

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("Therefore a man shall leave his father and his mother and hold fast to his wife, and they shall become one flesh."); Mark 10:6-8 ("But from the beginning of creation, God made them male and female. Therefore a man shall leave his father and mother and hold fast to his wife, and the two shall become one flesh. So they are no longer two but one flesh."). We believe we are called as disciples of Jesus Christ to live out our faith on a daily basis in all areas of our lives. Colossians 3: 17; 24 ("And whatever you do, in word or deed, do everything in the name of the Lord Jesus, giving thanks to God the Father through him.... Whatever you do, work heartily, as for the Lord and not for men, knowing that from the Lord you will receive the inheritance as your reward. You are serving the Lord Christ."); Romans 12:1-2: ("I appeal to you therefore, brothers, by the mercies of God, to present your bodies as a living sacrifice, holy and acceptable to God, which is your spiritual worship. Do not be conformed to this world, but be transformed by the renewal of your mind, that by testing you may discern what is the will of God, what is good and acceptable and perfect.") In particular, the Bible forbids us from proclaiming messages or participating in activities contrary to Biblical principles, including celebrations or ceremonies for uniting same-sex couples. I Timothy 5:22 (Do not be hasty in the laying on of hands, nor take part in the sins of others; keep yourself pure.")

3.

The process of designing, creating and decorating a cake for a wedding goes far beyond the basics of baking a cake and putting frosting on it. Our customary practice involves meeting with customers to determine who they are, what their personalities are, how they are planning their wedding, finding out what their wishes and expectations concerning size, number of layers, colors, style and other decorative detail, which often includes looking at a variety of design

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alternatives before conceiving, sketching, and custom crafting a variety of decorating suggestions and ultimately finalizing the design. Our clients expect, and we intend, that each cake will be uniquely crafted to be a statement of each customer's personality, physical tastes, theme and desires, as well as their palate so it is a special part of their holy union.

4.

This entire design and decoration process is, for us not only a labor of love, but an expression of our Christian faith. The process typically begins with a customer's request to set up a tasting, which can be conducted by one of us. After obtaining the names of the bride and groom and the wedding date, it is customary to show each customer a book of our previous designs as inspiration, but almost no one picks one of those designs. Melissa often draws various designs on sheets of paper to help start the process of directing the design, and once that is finalized, the parties sign a contract and collect a deposit. However, it is also not uncommon for people to change their design after the contract is signed, which is finalized about 10 days prior to the wedding date and secured by final payment.

5.

I am the one who usually bakes the cakes, cuts the layers, adds filling and applies the "crumb coat" (a base layer of frosting). Melissa does most or all of the design and crafting of the decorations since she is an artist and typically is the one who conceives of and understands what the customer wants. As she decorates, it is customary for Melissa to listen to Christian music and to pray specifically for the couple being married. I am the one who delivers the cake to the wedding or reception site in our vehicle that has "Sweet Cakes by Melissa" written in large pink letters on the side and assembles it as necessary, and I am responsible for setting up the cake and

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finalizing any remaining decorations after final assembly and placement. In that capacity, I often interact with the couple or other family members, and I often place cards showing we are the creators of the cake so the guests, caterers and others know who created the cake. I have delivered and set up wedding cakes as far away as Ashland, Oregon.

6.

For all these reasons, we have not created, nor chosen to create, cakes with messages honoring or celebrating ceremonies uniting same-sex couples under any legal framework, nor have we or will we create cakes for a variety of other events, including a celebration of divorce, any message including profanity or coarse language, or any message that advocates harm or ill will toward any person. In our view, if designing and creating a wedding cake was a simple process requiring no artistic talent or personal attention, people would simply choose to buy sheet cakes from Costco or other retailers for their weddings or other events.

7.

We do, have, and would, design cakes for any person irrespective of that person's sexual orientation as long as the design requested does not require us to promote, encourage, support, or participate in an event or activity which violates our religious beliefs and practices. It is important to note that we have previously designed a cake for and provided services to Rachel Cryer and Laurel Bowman-Cryer on multiple occasions before January 17, 2013. In particular, we were asked to and did design, create and decorate a wedding cake for Rachel Cryer's mother Cheryl McPherson at the time of her marriage to her husband, which the Notice of Substantial Evidence Determination says occurred in or about November, 2010 (Notice of Substantial Evidence Determination, p. 2, ¶10). Rachel Cryer paid for that cake.

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8.

On January 17, 2013 I came to the shop to conduct a tasting by appointment, although I did not know whom I was meeting that day. I now know I met with Rachel Cryer and her mother Cheryl McPherson that day, and I began to follow our customary practice of asking for the names of the bride and groom and the wedding date. Rachel Cryer told me something to the effect "Well, there are two brides, and their names are Rachel and Laurel." At that point, I indicated we did not create wedding cakes for same-sex ceremonies because of our religious convictions, and they left the shop. A few minutes later, Cheryl McPherson came back without Rachel Cryer and said something like, "I used to think like you do, but now my truth has changed because of having two gay children." She also stated her opinion that the Bible does not speak to or condemn homosexuality, and I responded by quoting a passage from the Bible, particularly Leviticus 18:22, which says "You shall not lie with a male as one lies with a female; it is an abomination." I made no statement or judgment about her children or anyone else being an abomination, but was merely quoting the Scripture verse in response to her statement, which I believed to be inaccurate. At that point she left the shop. Laurel Bowman was not there on that day and never asked us to design a cake for her wedding. At the time I told Rachel Cryer that we do not design cakes for same-sex weddings, I did not know, and I never imagined, that the practice of abstaining from participating in events which are prohibited by my religion could possibly be a violation of Oregon law. I believed that I was acting within the bounds of the Oregon Constitution and the laws of the State of Oregon which, at that time, explicitly defined marriage as the union of one man and one woman and prohibited recognition of any other type of union as marriage.

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9.

Since the filing of the complaints, there has periodically been a great deal of media attention about our choice not to participate in complainants' wedding ceremony, none of which we solicited. In fact, during much of the time, we have been subjected to media requests because of an orchestrated internet campaign to "Boycott Sweet Cakes" that included personal attacks, threats to our children, vandalism to our "Sweet Cakes by Melissa" vehicle and unrelenting phone campaigns threatening our vendors and referral sources if they did not sever their business relationships with us. The details of those actions against us and those we were doing business with will be documented separately in other documents included in the hearing record, but they include support from Laurel Bowman-Cryer on the "Boycott Sweet Cakes" Facebook page as recently as August 12, 2014. For now, it is sufficient to say that the financial consequences of the boycott campaign resulted in us closing our shop and moving our business to our home in September of 2013.

10.

Finally, I did not appear on CBN on or about September 2, 2013 as alleged in the Notice of Substantial Evidence Determination, p. 4, ¶19. Rather, what was broadcast at that time was a tape of an earlier video interview in which I explained the reasons for our decision in this case. As the video (and even the Notice of Substantial Evidence Determination, p. 4, ¶19) shows, I made no statements of any future intention concerning our participation (or lack of participation) in same-sex ceremonies, and neither Melissa nor I were consulted nor approved the re-broadcast of the earlier interview. Similarly, when Tony Perkins' staff requested my participation in the radio interview on or about February 13, 2014 (alleged in Amended Formal Charges, ¶ 8) I

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shared information about the impact of the controversy on our lives to date and again explained the reasons we stand by our faith. As the amended formal charges recite, and the radio program recording makes clear, I mentioned a *past private* conversation with my wife about standing by our religious beliefs if confronted with participation (or lack of participation) in same-sex ceremonies due to *Washington* legalizing same-sex marriage. We have made no public pronouncement of such intention, and even if we had, our right to do so is constitutionally protected. I also want to make clear that at no time have we been paid or compensated in any way for our participation in any media interviews.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

DATED this 23rd day of October, 2014.

Aaron Klein, Respondent

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BEFORE THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON

In the Matter of: Oregon Bureau of Labor and Industries on behalf of RACHEL CRYER, Complainant, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 44-14 DECLARATION OF RESPONDENT MELISSA KLEIN
In the Matter of: Oregon Bureau of Labor and Industries on behalf of LAUREL BOWMAN CRYER, Complainant, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 44-15 DECLARATION OF RESPONDENT MELISSA KLEIN

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EXHIBIT 3
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I, MELISSA KLEIN, hereby declare as follows:

I am one of the Respondents, and I am married to Respondent Aaron Klein. I am over 18 years of age, and I have personal knowledge of the facts stated in this declaration.

1.

Together we have operated Sweet Cakes by Melissa as an assumed business since we opened in 2007. For most of its history, Sweet Cakes by Melissa has been an unregistered business entity, but on or about February 1, 2013 (after the January 17, 2013 cake tasting event at issue here) my husband, Aaron Klein, registered Sweet Cakes by Melissa as an assumed business name with the Oregon Corporation Division. Until recent months, we both worked actively in the business, primarily derived our family income from the operation of the business, and jointly shared the profits of the business;

2.

Before and throughout our operation of Sweet Cakes, we have been jointly committed to live our lives and operate our business according to our Christian religious convictions. At the time we opened Sweet Cakes by Melissa, we gathered with our pastor and church at our shop and dedicated our business and craft to God. We practice our religious faith through our business and make no distinction between when we are working and when we are not. Based on the principles espoused in the Bible, we try to give glory to the Lord in all that we do. We believe each person is created in the image of God to reflect His glory according to Genesis 1:26-28. We believe each person is created male and female for the purpose of propagating the human race according to God's design. *Id.* We believe that God uniquely and purposefully designed the institution of marriage exclusively as the union of one man and one woman. Genesis 2:24

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("Therefore a man shall leave his father and his mother and hold fast to his wife, and they shall become one flesh."); Mark 10:6-8 ("But from the beginning of creation, God made them male and female. Therefore a man shall leave his father and mother and hold fast to his wife, and the two shall become one flesh. So they are no longer two but one flesh."). We believe we are called as disciples of Jesus Christ to live out our faith on a daily basis in all areas of our lives. Colossians 3: 17; 24 ("And whatever you do, in word or deed, do everything in the name of the Lord Jesus, giving thanks to God the Father through him.... Whatever you do, work heartily, as for the Lord and not for men, knowing that from the Lord you will receive the inheritance as your reward. You are serving the Lord Christ."); Romans 12:1-2: ("I appeal to you therefore, brothers, by the mercies of God, to present your bodies as a living sacrifice, holy and acceptable to God, which is your spiritual worship. Do not be conformed to this world, but be transformed by the renewal of your mind, that by testing you may discern what is the will of God, what is good and acceptable and perfect.") In particular, the Bible forbids us from proclaiming messages or participating in activities contrary to Biblical principles, including celebrations or ceremonies for uniting same-sex couples. I Timothy 5:22 (Do not be hasty in the laying on of hands, nor take part in the sins of others; keep yourself pure.")

3.

The process of designing, creating and decorating a cake for a wedding goes far beyond the basics of baking a cake and putting frosting on it. Our customary practice involves meeting with customers to determine who they are, what their personalities are, how they are planning their wedding, finding out what their wishes and expectations concerning size, number of layers, colors, style and other decorative detail, which often includes looking at a variety of design

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alternatives before conceiving, sketching, and custom crafting a variety of decorating suggestions and ultimately finalizing the design. Our clients expect, and we intend, that each cake will be uniquely crafted to be a statement of each customer's personality, physical tastes, theme and desires, as well as their palate so it is a special part of their holy union.

4.

This entire design and decoration process is, for us not only a labor of love, but an expression of our Christian faith. The process typically begins with a customer's request to set up a tasting, which can be conducted by one of us. After obtaining the names of the bride and groom and the wedding date, it is customary to show each customer a book of our previous designs as inspiration, but almost no one picks one of those designs. I often personally sketch various designs on sheets of paper to help start the process of directing the design. I routinely draw multiple custom designs for each client until we together come to exactly the design they envision. Once that is finalized, the parties sign a contract and I collect a deposit. However, it is also not uncommon for people to change their design after the contract is signed, which is finalized about 10 days prior to the wedding date and secured by final payment.

5.

Aaron does most of the baking and preparation work. I do most or all of the design and crafting of the decorations because I am an artist, and I am the one who typically conceives of and understands what the customer wants. This business is my passion. As an artist, I love meeting people, learning their story, and designing a custom piece that will be suit their day perfectly. I spend individual time and effort on each wedding cake I design and craft. No two cakes are alike, and I almost never make a cake without creating a unique element of style and

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customization for my customers. I have created cakes for a client as far away as Ashland, Oregon. That particular couple saw my designs and paid extra just to have me design and create their cake, even though it would be an additional cost to deliver the cake so far away. As I decorate, it is customary for me to listen to Christian music and to pray specifically for the couple being married as I believe marriage is a special and unique relationship created and blessed by God.

6.

I put my heart and soul into every unique cake I create. In my view, if designing and creating a wedding cake were a simple process requiring no artistic talent or personal attention, people would simply choose to buy sheet cakes from Costco or other retailers for their weddings or other events. When a client comes to my shop, they are paying me to use my artistic talent and skill to design something special and unique. For all these reasons, we have not created, nor chosen to create, cakes with messages honoring or celebrating ceremonies uniting same-sex couples under any legal framework, nor have we or will we create cakes for a variety of other events, including a celebration of divorce, any message including profanity or coarse language, or any message that advocates harm or ill will toward any person.

7.

We do, have, and would, design cakes for any person irrespective of that person's sexual orientation as long as the design requested does not require us to promote, encourage, support, or participate in an event or activity which violates our religious beliefs and practices. It is important to note that we have previously designed a cake for and provided services to Rachel Cryer and Laurel Bowman-Cryer on multiple occasions before January 17, 2013. In particular,

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we were asked to and did design, create and decorate a wedding cake for Rachel Cryer's mother Cheryl McPherson at the time of her marriage to her husband, which the Notice of Substantial Evidence Determination says occurred in or about November, 2010 (Notice of Substantial Evidence Determination, p. 2, ¶10). Rachel Cryer paid for that cake.

8.

On January 17, 2013, I was not in the shop, and my husband Aaron met Rachel Cryer and her mother Cheryl McPherson. I was not present for any of the events that took place that day.

9.

Since the filing of the complaints, there has periodically been a great deal of media attention about our choice not to participate in complainants' wedding ceremony, none of which we solicited. In fact, during much of the time, we have been subjected to media requests because of an orchestrated internet campaign to "Boycott Sweet Cakes" that included personal attacks, threats to our children, vandalism to our "Sweet Cakes by Melissa" vehicle and unrelenting phone campaigns threatening our vendors and referral sources if they did not sever their business relationships with us. The details of those actions against us and those we were doing business with will be documented separately in other documents included in the hearing record, but they include support from Laurel Bowman-Cryer on the "Boycott Sweet Cakes" Facebook page as recently as August 12, 2014. For now, it is sufficient to say the financial consequences of the boycott campaign resulted in closing our shop and moving our business to our home in September of 2013.

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Finally, I did not appear on CBN on or about September 2, 2013 as alleged in the Notice of Substantial Evidence Determination, p. 4, ¶19. Rather, what was broadcast at that time was a tape of an earlier video interview in which my husband Aaron explained the reasons for our decision in this case. As the video (and even the Notice of Substantial Evidence Determination, p. 4, ¶19) shows, I made no statements of any future intention concerning our participation (or lack of participation) in same-sex ceremonies, and neither Aaron nor I were consulted nor approved the re-broadcast of the earlier interview. Similarly, I did not participate in the Tony Perkins radio interview on or about February 13, 2014 (alleged in Amended Formal Charges, ¶ 8) in which my husband again explained the reasons we stand by our faith. As the amended formal charges recite, and the radio program recording makes clear, my husband mentioned a *past private* conversation with me about standing by our religious beliefs if confronted with participation (or lack of participation) in same-sex ceremonies due to *Washington* legalizing same-sex marriage. We have made no public pronouncement of such intention, and even if we had, our right to do so is constitutionally protected. I also want to make clear that at no time have we been paid or compensated in any way for our participation in any media interviews.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

DATED this 23 day of October, 2014.

Melissa Klein, Respondent

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17. *List and explain each of the alternatives the State of Oregon considered which was less restrictive than ORS 659A.403, ORS 659A.406, and ORS 659A.409 in abridging free speech and free exercise rights.*

The Agency objects on the basis that the interrogatory is misleading and argumentative.

Submitted By: _____ Date: August 19, 2014
Cristin Casey
Administrative Prosecutor
Oregon Bureau of Labor and Industries

I have read the Agency's Response to Respondents' Interrogatories for Oregon Bureau of Labor and Industries and, to the extent that answers required my input, I find the responses to be true and accurate.

_____ Dates: August 19, 2014
Rachel ~~Cryer~~ Bowman-Cryer RBC

I have read the Agency's Response to Respondents' Interrogatories for Oregon Bureau of Labor and Industries and, to the extent that answers required my input, I find the responses to be true and accurate.

_____ Dates: August 19, 2014
Laurel Bowman-Cryer

I have read the Agency's Response to Respondents' Interrogatories for Oregon Bureau of Labor and Industries and, to the extent that answers required my input, I find the responses to be true and accurate.

_____ Dates: August 19, 2014
Jessica Ponaman, CRD Investigator

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EXHIBIT P

BEFORE THE COMMISSIONER
OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON

In the Matter of:	Case Nos. **44-14 & 45-14**
MELISSA ELAINE KLEIN, dba SWEETCAKES BY MELISSA, and AARON WAYNE KLEIN, individually,	**INTERIM ORDER – RULING ON RESPONDENTS' ELECTION TO REMOVE CASES TO CIRCUIT COURT and ALTERNATIVE MOTION TO DISQUALIFY BOLI COMMISSIONER BRAD AVAKIAN**
Respondents.	

Introduction

These cases are based on complaints filed with BOLI's Civil Rights Division ("CRD") on August 8, 2013, and Formal Charges issued by the CRD on June 4, 2014, that accompanied the forum's Notice of Hearing. On June 18, 2014, Respondents filed a document entitled "Respondents' Election to Remove to Circuit Court (ORS 659A.870(4)(b)) and Alternative Motion to Disqualify BOLI Commissioner Brad Avakian." Respondents requested oral argument on both motions, which I denied in an interim order dated June 26, 2014. On June 25, 2014, the Agency timely filed written objections to Respondents' putative election and motion.

Respondents' Putative Election to Circuit Court

Respondents assert that they have a "unqualified right to have these matters removed to the circuit court of either Clackamas, Marion or Multnomah Counties pursuant to ORS 659A.870(4)(b)." ORS 659A.870(4)(b) provides, in pertinent part:

> "(b) A respondent or complainant named in a complaint filed under ORS 659A.820 or 659A.825 alleging an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law may elect to have the matter heard in circuit court under ORS 659A.885. The election must be made in writing and received by the commissioner within 20 days after service of formal charges under ORS 659A.845. If the respondent or the complainant makes the

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election, the commissioner shall pursue the matter in court on behalf of the complainant at no cost to the complainant."

To establish jurisdiction, the Agency's Formal Charges each allege: (1) both cases originated as verified complaints filed by Complainants Rachel Cryer and Laurel Bowman-Cryer; (2) both Complainants were authorized to file their complaints under the provisions of ORS 659A.820; and (3) that the Agency issued a Notice of Substantial Evidence Determination in both cases. Respondents deny that they engaged in discrimination based on sexual orientation or any other grounds set forth in ORS chapter 659A but do not dispute these jurisdictional allegations. Accordingly, the forum concludes that respondents were named in a complaint filed under ORS 659A.820. Under ORS 659A.870(4)(b), if the Formal Charges allege an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law, Respondents are entitled to elect to have the matter heard in circuit court under ORS 659A.885, subject to the requirement that such election must be made in writing within 20 days of service of the Formal Charges.

ORS 659A.145 is titled "**Discrimination against individual with disability in real property transactions prohibited; advertising discriminatory preference prohibited; allowance for reasonable modification; assisting discriminatory practices prohibited.**" As indicated by its title, the provisions of ORS 659A.145 are exclusively limited to real property transactions involving people with disabilities. ORS 659A.421 is titled "**Discrimination in selling, renting or leasing real property prohibited**" and prohibits discrimination in real property transactions based on the race, color, religion, sex, sexual orientation, national origin, marital status, familial status or source of income of any person.

In contrast, these cases allege violations of ORS 659A.403(3), ORS 659A.406, and ORS 659A.409. All three of these statutes appear in a section of ORS chapter

659A titled "**ACCESS TO PUBLIC ACCOMMODATIONS**" that includes ORS 659A.400 to ORS 659A.415. Neither of the Formal Charges contains any allegations related to discrimination under federal housing law or discrimination based on real property transactions. Rather, the Formal Charges both identify Respondent Melissa Klein's business as a "place of public accommodation" and allege that Respondent Melissa Klein's business, as a public accommodation, discriminated against Complainants based on their sexual orientation.

Since the Formal Charges do not allege an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law, they are not subject to the provisions of ORS 659A.870(4)(b) and Respondents have no statutory right to elect to have the matter heard in circuit court.

MOTION TO DISQUALIFY BOLI COMMISSIONER AVAKIAN BASED ON AVAKIAN'S ACTUAL BIAS

Respondents ask that Commissioner Avakian be disqualified from deciding the issues presented in the Formal Charges because he has "publicly demonstrated actual bias against Respondents and others similarly situated, both as a candidate for re-election and as Commissioner." Based on that alleged actual bias, Respondents contend that the Commissioner's fulfillment of his statutory role by deciding and issuing a Final Order in these cases will deprive Respondents of due process and other constitutional rights. Respondents concede that BOLI administrative rules OAR 839-050-000 *et seq* contain no provision related to the disqualification of a BOLI Commissioner deciding and issuing a Final Order. However, both Respondents and the Agency acknowledge that procedural due process requires a decision maker free of

actual bias[1] and that Respondents have the burden of showing that bias. *See Teledyne Wah Chang v. Energy Facility Siting Council,* 298 Or 240, 262 (1985), *citing Boughan v. Board of Engineering Examiners,* 46 Or App 287, 611 P.2d 670, *rev den* 289 Or 588 (1980).

To show the Commissioner's actual bias and demonstrate that he has already pre-judged this case, Respondents submitted exhibits containing numerous copies of statements made by Commissioner Avakian to the media, in e-mails sent to Respondents' attorney Herb Grey, or on Facebook posts during the Commissioner's candidacy for re-election and as Commissioner. Summarized, those exhibits include the following statements:

E-Mails sent to Respondents' attorney Herb Grey by "Avakian for Labor Commissioner"

- February 16, 2013, in which the Commissioner identified himself as "Oregon's chief civil rights enforcer," and (1) noting his effort to convince the Veterans Affairs Department to grant a waiver to retired Air Force Lt. Col. Linda Campbell and her spouse, Nancy Campbell, making them the "first same-sex couple to receive equal military burial rights" and endorsing the "Oregonians United for Marriage * * * campaign to bring full marriage equality to Oregon."
- April 4, 2013, again noting the Commissioner's efforts on behalf of Linda Campbell, and quoting the comments made by Campbell on the steps of the U.S. Supreme Court a week earlier hearing during the debate on marriage equality.
- December 10, 2013, in which Commissioner Avakian urged Grey to co-sign his letter to House Speaker John Boehner to bring the Employment Non-Discrimination Act up for a vote.
- December 19, 2013, in which Commissioner Avakian notes his "progressive" priorities and states "[t]hat's why I defend public education, take on unlawful discrimination, and stand up for equal rights for every last Oregonian."
- January 10, 2014, in which Commissioner Avakian stated "[a]t the Bureau of Labor and Industries, it's my job to protect rights of Oregonians in the workplace * * * and protect everyone's civil rights in housing and public accommodations."

[1] *Cf. In the Matter of Blachana, LLC,* 32 BOLI 211 (2012), in which the Commissioner filed the complaint under ORS 659A.825(1)(b), then delegated the ultimate decision-making authority in the case to the Deputy Commissioner, who signed and issued the Final Order.

- March 4, 2014, in which Commissioner Avakian stated: "I believe in an Oregon where everyone has the opportunity to get married, raise a family and get ahead. Gay or straight, male or female, white, black, or brown -- everyone deserves an equal shot at making it in Oregon. That's why I will continue to fight for marriage equality, a woman's right to choose, better wages, and robust non-discrimination laws that protect gays and lesbians."
- March 12, 2014, in which Commissioner Avakian noted that no one filed to run against him as Labor Commissioner and stated, among other things: "We built a coalition of civil rights champions, business leaders, educators, working families and labor leaders, and many, many more. Just think – it wasn't very long ago that right-wing activists were calling for my head because of our strong support for civil rights and equality laws in Oregon."
- May 19, 2014, in which Commissioner Avakian stated: "A few minutes ago, we received word that all Oregonians, including same-sex couples, will now have the freedom to marry the person they love. As many had hoped, our federal court ruled Oregon's ban on same-sex marriage unconstitutional under the United States Constitution. This is an important moment in our state's history. The ruling also reflects what so many others have felt all along -- that Oregonians always eventually open their hearts to equality and freedom. The victory is a testament to the strength and energy of so many who dedicated themselves to making our laws match our highest ideals. Thank you. The win comes after news earlier this month that the Oregon Family Council has abandoned its campaign for a ballot measure to allow corporations to discriminate against loving same-sex couples. As a result, Oregon's law will continue to say that no corporation can deny service, housing or employment based on sexual orientation or gender identity. And as always, I will continue to hold those responsible that violate the rights of Oregonians and enthusiastically support those that go the extra mile for fairness. Here's to two significant victories that expand freedom for Oregonians – and the incredible efforts by friends and neighbors that made today possible. It's been a remarkable journey."

Independent Media

- August 14, 2013, Oregonian article written by Maxine Bernstein entitled "Lesbian couple refused wedding cake files state discrimination complaint" that contains quotes by Complainant Cryer, Respondent Melissa Klein, and Commissioner Avakian. Commissioner Avakian was quoted as follows:

  - "We are committed to a fair and thorough investigation to determine whether there is substantial evidence of unlawful discrimination," said Labor Commissioner Brad Avakian.
  - "Everyone is entitled to their own beliefs, but that doesn't mean that folks have the right to discriminate," Avakian said, speaking generally.
  - "Everybody's entitled to their own beliefs, but that doesn't mean that folks have the right to discriminate," Avakian said, speaking generally.

- "The goal is never to shut down a business. The goal is to rehabilitate," Avakian said. "For those who do violate the law, we want them to learn from that experience and have a good, successful business in Oregon."

Facebook Posts on Commissioner Avakian's Facebook Page

- April 26, 2012: "Today, Basic Rights Oregon honored me with the 2012 Equality Advocate Award. I appreciate this recognition, but I am far more appreciative of all the efforts and accomplishments that BRO has made for Oregon's LGBT community. Thank you for including me in the incredible work that you do."
- February 15, 2013, with the same text included in February 16, 2013, e-mail to Herb Grey.
- February 5, 2013, with a link to "Ace of Cakes offers free wedding cake for Ore. gay couple www.kgw.com:" "Everyone has a right to their religious beliefs, but that doesn't mean they can disobey laws already in place. Having one set of rules for everybody assures that people are treated fairly as they go about their daily lives. The Oregon Department of Justice is looking into a complaint that a Gresham bakery refused to make a wedding cake for a same-sex marriage. It started when a mother and daughter showed up at Sweet Cakes by Melissa looking for a wedding cake."
- March 13, 2013: "Tomorrow morning, I'll be testifying before the U.S. Senate about Oregon Lt. Col. Linda Campbell; she made history when she was the first person to ever get approval to bury her same-sex spouse in a national cemetery..."
- March 22, 2013, with a link to "Speakers announced for marriage equality rally in D.C.-Breaking News-Wisconsin Gazette – Lesbian www.wisconsingazette.com:" "Thrilled to see Lt. Col. Linda Campbell among the headliners for next week's rally in front of the U.S. Supreme Court. LIKE this status if you support marriage equality for all loving, caring couples."
- March 26, 2013: "Our country is on a journey of understanding. As more and more people talk to gay and lesbian friends and family about why marriage matters, they're coming to realize that this is not a political issue. This is about love, commitment and family. I'll be joining Oregon United for Marriage for a rally at the Mark O. Hatfield Courthouse in downtown Portland at 5pm. Join us!"
- June 8, 2013: "Proud to support Sen. Jeff Merkley's fight for the Non-Discrimination Act in Congress. All Americans deserve a fair shot at a good job and the opportunity for a better life. – at Q Center."
- June 26, 2013: "Huge day for equality across America! In a few minutes, I'm heading to a celebration rally with Oregon United for Marriage at Terry Schrunk Plaza in downtown Portland – see you there?"
- March 27, 2013: Link to Commissioner Avakian speaking "on the importance of people gathering in front of the Hatfield Courthouse on the day the Supreme Court heard arguments on Prop. 8." and statement "I just got off the phone with Lt. Col. Linda Campbell, who said that the crowd in front of the Supreme Court was awesome and absolutely electric."

- May 9, 2013, with a link to "Victory! Discrimination measure Withdrawn – Oregon United for Marriage:" "Really great news. It's also a tribute to the fact that Oregonians are fundamentally fair and have little stomach for such a needlessly divisive fight."
- March 12, 2014, shared link: "Conservative Christian group's call for Labor Commissioner Brad Avakian's ouster falls flat. www.oregonlive.com. Oregon Labor Commissioner Brad Avakian, despite criticism of his enforcement action against a Gresham bakery that refused to serve a lesbian wedding, wound up with no opponent in this year's election."
- May 19, 2014: "Today's victory is a testament to the strength and energy of so many who dedicated themselves to making our laws match our highest ideals. If you've talk to your neighbors, collected signatures, or attended a marriage rally, you've played an important role in Oregon's story. Thank you -- and congratulations!"

Summarized, these exhibits fall into two categories: (1) the Commissioner's e-mails and Facebook posts generally opposing discrimination against gays and lesbians and advocating the legality of same-sex marriage in Oregon and not addressed to these cases; and (2) remarks specific to the present cases. The vast majority of exhibits fall into the first category. Only two exhibits fall into the second category -- the Commissioner's February 5, 2013, Facebook post and the August 14, 2013, Oregonian article.

ORS chapter 659A contains Oregon's anti-discrimination laws related to employment, public accommodations, and real property transactions and delegates the enforcement of those laws to BOLI's Commissioner. The Legislature's purpose in adopting the provisions of ORS chapter 659A is set out in ORS 659A.003. In pertinent part, ORS 659A.003 provides that:

> "The purpose of this chapter is * * * to ensure the human dignity of all people within this state and protect their health, safety and morals from the consequences of intergroup hostility, tensions and practices of unlawful discrimination of any kind based on race, color, religion, sex, sexual orientation, national origin, marital status, age, disability or familial status."

ORS 651.030(1) provides that "[t]he Bureau of Labor and Industries shall be under the control of the Commissioner of the Bureau of Labor and Industries * * *." As such,

BOLI's Commissioner has the duty to see that the stated purpose of ORS chapter 659A is carried out. In addition to enforcing the various statutes contained in that chapter through the administrative process created by the Legislature,[2] the Commissioner's duties include, among other things, initiating programs of "public education calculated to eliminate attitudes upon which practices of unlawful discrimination because of * * * sexual orientation * * * are based."[3] In short, the Commissioner has been instructed by the Legislature itself to raise public awareness about practices that the Legislature has declared to be unlawful discrimination in ORS chapter 659A. The forum finds that all of the Commissioner's remarks contained in the first category – remarks *generally* opposing discrimination against gays and lesbians and advocating the legality of same-sex marriage in Oregon – fall within the scope of this particular job duty. As more articulately stated by the Agency in its objections, "[n]one of this material is inconsistent with the exercise of the commissioner's statutory obligations as an elected official."

The forum next examines the two exhibits that fall within the second category that contain remarks specific to the present cases – the Commissioner's February 5, 2013, Facebook post and the August 14, 2013, Oregonian article. The Commissioner's February 5, 2013, Facebook post contains the following content, consisting of a link to "Ace of Cakes offers free wedding cake for Ore. gay couple www.kgw.com" and the following remark by the Commissioner that Respondents contend shows actual bias:

> "Everyone has a right to their religious beliefs, but that doesn't mean they can disobey laws already in place. Having one set of rules for everybody assures that people are treated fairly as they go about their daily lives. The Oregon Department of Justice is looking into a complaint that a Gresham bakery refused to make a wedding cake for a same-sex marriage. It started when a mother and daughter showed up at Sweet Cakes by Melissa looking for a wedding cake."

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[2] *See* ORS 659A.800 to ORS 659A.865.
[3] *See* ORS 659A.003(1)

The Oregonian article, printed six days after the two Complainants filed their complaints with BOLI's CRD, contains three remarks attributed to the Commissioner that Respondents contend demonstrate his actual bias against Respondents. Those remarks are:

- "'Everyone is entitled to their own beliefs, but that doesn't mean that folks have the right to discriminate,'" Avakian said, speaking generally."
- "'Everybody's entitled to their own beliefs, but that doesn't mean that folks have the right to discriminate,' Avakian said, speaking generally."
- "'The goal is never to shut down a business. The goal is to rehabilitate,' Avakian said. 'For those who do violate the law, we want them to learn from that experience and have a good, successful business in Oregon.'"

In *Samuel v. Board of Chiropractic Examiners*, 77 Or App 53, 712 P2d 132 (1985), Samuels, a chiropractor, had his chiropractor's license suspended and his right to perform minor surgery permanently revoked by the Board of Chiropractic Examiners after he performed a vasectomy on a patient. The issue before the Board was whether Samuels had exceeded the scope of his license by performing "major" surgery, whereas chiropractors are only allowed to perform "minor" surgery. In their decision, the Oregon Court of Appeals, after determining that a vasectomy was "major" surgery, considered whether the Board's decision should be overturned based on the alleged bias of two members of the Board, Bolin and Camerer, who participated in the disciplinary hearing and resulting decision to suspend Samuels. Prior to Samuels's hearing, Bolin opined that a vasectomy was not minor surgery. The Court, citing *Trade Comm'n v. Cement Institute,* 333 U.S. 683 (1948), held that Bolin's expression of opinion, which the Court characterized as "a preconceived point of view concerning an issue of law" -- was "not an independent basis for disqualification" of Bolin. Camerer, in contrast, met with four chiropractors at a restaurant, brought the Board's file on Samuels, and allowed the

other chiropractors to examine it. Prior to the Board's suspension decision, Samuels sought censure against Camerer and sued Camerer for disclosing the contents of the file. The Court held:

> "As a defendant in the lawsuit which arose out of the very matter pending before the Board, Camerer may have harbored some animosity towards [Samuels]. The possibility of personal animosity and the appearance of a substantial basis for bias is sufficient that, under the circumstances, he should have disqualified himself."

To show that the Commissioner has prejudged the cases before the Forum, Respondents quote the Commissioner's two "second category" statements as follows: "Respondents are 'disobey[ing] laws' and need to be 'rehabilitated.'" However, this "quote" combines selected portions of remarks made at two different times and misquotes the latter. Respondents seek to create an inference of bias that cannot reasonably be drawn from Respondents' exhibits as a whole. The Forum finds that the accurately quoted "second category" remarks, while made in the context of Respondents' alleged discriminatory actions and the Complainants' complaints, are remarks reflecting the Commissioner's attitude generally about enforcing Oregon's anti-discrimination laws and, at most, show "a preconceived point of view concerning an issue of law" that, under *Samuels*, is not a basis for disqualification due to bias.

RESPONDENTS' ADDITIONAL ARGUMENTS

In addition to their "actual bias" argument, Respondents contend that the Commissioner should be disqualified for two other reasons: (1) The Commissioner's participation as a decision maker in these cases would violate the policy expressed in ORS 244.010 regarding ethical standards for public officials because of his conflict of interest; and (2) His participation as a decision maker in these cases would violate

Oregon Rules of Professional Conduct (ORPC) 3.6 related to lawyers making public statements about matters in litigation[4] and Oregon's Code of Judicial Ethics.[5]

Ethical Standards for Public Officials – ORS chapter 244 & Conflict of Interest

Respondents contend that the Commissioner's actual bias and conflict of interest demonstrate a partiality towards these cases that requires the Commissioner to disqualify himself from this case. As noted earlier, Respondents have not demonstrated actual bias on the Commissioner's part. Respondents assert that, under ORS chapter 244, "the state of Oregon and its respective agencies, including BOLI, cannot ethically sit in judgment of Respondents for conduct of which it may be legally culpable," and cite the following "multiple conflicts of interest on the part of the Commissioner and BOLI as grounds for disqualification:

> "(1) [T]he Oregon Constitution and ORS 659A.003, *et seq,* not to mention the U.S. Constitution, require BOLI to respect and protect Respondents' constitutionally-protected religion, conscience and speech rights to an even greater degree than it does complainants' statutory rights; and
>
> "(2) [T]he State of Oregon, including BOLI itself, has potential legal liability as a place of public accommodation under ORS 659A.400(1)(b) and (c) because, at the time of the original defense and the filing of complaints by complainants, the state of Oregon itself refused to recognize same sex marriage relationships, just as Respondents have chosen not to participate in complainants' same-sex ceremony."

"Conflict of interest" is defined under ORS chapter 244 in ORS 244.020:

> "(1) 'Actual conflict of interest' means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (12) of this section.

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[4] Commissioner Avakian is an attorney and a member of the Oregon State Bar.

[5] In their motion, Respondents refer to the "Canons of Judicial Ethics," whereas the correct name in Oregon is the "Code of Judicial Ethics."

"* * * * *

"(12) 'Potential conflict of interest' means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated[.]"

Respondents identify no conflict of interest by the Commissioner based on a pecuniary benefit or detriment that fits within these definitions. As noted by the Agency in its response, the Oregon Government Ethics Commission, not the Administrative Law Judge, is responsible for determining the Commissioner's ethical obligations under ORS chapter 244. ORS 244.250 *et seq.*

ORPC & Canons of Judicial Ethics

The Administrative Law Judge does not have the authority to enforce the ORPC or Code of Judicial Ethics. However, I note that Respondents have not shown that any of Commissioner Avakian's remarks contained in Respondents' exhibits "will have a substantial likelihood of materially prejudicing" this contested case proceeding. *ORPC 3.6.* The Code of Judicial Ethics does not apply to the Commissioner because he is not "an officer of a judicial system performing judicial functions."[6]

Conclusion

Respondents' motion to disqualify Commissioner Avakian from deciding the issues presented in the Formal Charges and issuing a Final Order is **DENIED**.

[6] *See* ORS 1.210 – "Judicial officer defined. A judicial officer is a person authorized to act as a judge in a court of justice." BOLI does not operate a "court of justice," but is an administrative agency whose contested case proceedings are regulated by the Administrative Procedures Act, ORS 183.411 to ORS 183.470.

IT IS SO ORDERED

Entered at Eugene, Oregon, with copies mailed and e-mailed to:

Jenn Gaddis, Chief Prosecutor, BOLI/APU, 1045 State Office Building, 800 NE Oregon Street, Portland, OR 97232-2180

Herbert G. Grey, Attorney at Law, 4800 SW Griffith Drive, Suite 320, Beaverton, OR 97005-8716

Tyler D. Smith and Anna Adams, Attorneys at Law, 181 N. Grant Street, Suite 212, Canby, OR 97013

Paul Thompson, Attorney at Law, 310 SW 4th Ave., Suite 803, Portland, OR 97204

Dated: July 2, 2014

Alan McCullough, Administrative Law Judge
Bureau of Labor and Industries

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EXCERPT OF RECORD

EXHIBIT Q

BEFORE THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON

In the Matter of: Oregon Bureau of Labor And Industries on behalf of RACHEL CRYER, Complainant, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 44-14 RESPONDENTS' ELECTION TO REMOVE TO CIRCUIT COURT (ORS 659A.870(4)(b)) AND ALTERNATIVE MOTION TO DISQUALIFY BOLI COMMISSIONER BRAD AVAKIAN Oral Argument Requested
In the Matter of: Oregon Bureau of Labor and Industries on behalf of LAUREL BOWMAN CRYER, Complainant, v. MELISSA KLEIN, dba SWEET CAKES BY MELISSA, and AARON WAYNE KLEIN, individually as an Aider and Abettor under ORS 659A.406, Respondents.	Case No. 44-15 RESPONDENTS' ELECTION TO REMOVE TO CIRCUIT COURT (ORS 659A.870(4)(b)) AND ALTERNATIVE MOTION TO DISQUALIFY BOLI COMMISSIONER BRAD AVAKIAN Oral Argument Requested

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1.

Respondents AARON KLEIN and MELISSA KLEIN, individually and dba SWEET CAKES BY MELISSA, hereby elect to remove the above-captioned matters to the circuit court of Clackamas, Marion or Multnomah Counties pursuant to ORS 659A.870(4)(b).

2.

In the alternative, Respondents move to disqualify Commissioner Brad Avakian from any role in hearing or adjudicating any matters arising from Complainants' complaints herein on the grounds and for the reason that the Commissioner has demonstrated actual bias or prejudice against Respondents and other persons similarly situated on issues relating to matters of sexual orientation in that he has made public statements demonstrating such bias or prejudice and cannot be relied upon to render a fair and impartial decision based on a preponderance of evidence standard within the meaning of ORS 183.650(3). Moreover, the Commissioner and BOLI have conflicts of interest that similarly render them unable to impartially adjudicate these matters. This motion is made in good faith and not for purposes of delay.

Respondents rely on ORS 244.010 et seq, OAR 839-050-0160 and the following memorandum and attached exhibits.

FACTUAL AND LEGAL BACKGROUND

The events which gave rise to these complaints occurred on or about January 17, 2013. Formal Charges, p. 3. On or about January 18, 2013 complainant Laurel Bowman-Cryer filed a complaint with the Oregon Department of Justice, which was withdrawn shortly thereafter. Exs. R3 and R4. The complainants herein filed their complaints with BOLI on or about August 8,

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2013. Formal Charges, p. 2. The Commissioner is responsible for issuing final orders in all contested case proceedings within BOLI jurisdiction. ORS 659A.850(4). OAR 839-050-0420.

Before and during the time of the initial events and the filing of the complaints, the Oregon Constitution specifically provided that only a marriage between one man and one woman shall be valid or legally recognized as a marriage. Article XV, §5a (enacted by voters in 2004). Similarly, the Oregon Constitution protects freedom of worship, conscience and speech. Article I, §§ 2, 3 and 8. "Sexual orientation" was added to ORS 659A.003 and related statutes under which these complaints are brought in 2007. "Religion", in addition to its federal and state constitutional protections, was also included as a protected class in ORS 659A.003, *et seq,* long before that. Respondents have consistently and vigorously denied they have engaged in sexual orientation discrimination or violated public accommodation law in the first instance. Beyond that, their defenses herein all rely upon their constitutionally-protected religion, conscience and speech rights under the Oregon and U.S. Constitutions, as well as their statutory rights as members of a protected class based on religion.

MEMORANDUM OF POINTS AND AUTHORITIES

1. **Respondents have the unqualified right to have these matters removed to the circuit court of either Clackamas, Marion or Multnomah Counties pursuant to ORS 659A.870(4)(b).**

While ORS 659A.870(4)(b) says a respondent or complainant "may elect to have the matter heard in circuit court under ORS 659A.885", its clear language further requires that "If the respondent or the complainant makes the election, the commissioner shall pursue the matter

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in court on behalf of the complainant at no cost to the complainant." The clear intent is that removal to circuit court is mandatory rather than permissive once requested.

Removal of this action to circuit court is appropriate and necessary in order to assure an impartial tribunal that can deliver due process. Given the Commissioner's public statements demonstrating bias and other reasons recited in §§ 2 and 3 of this memorandum, an impartial tribunal capable of affording Respondents due process and preservation of their constitutionally-protected rights is not possible under the Commissioner's jurisdiction.

In this instance, Respondents believe the appropriate circuit court venue for removal is Clackamas County, where they reside and now conduct their business after closing their shop in Gresham after filing of the pending complaints.

2. **Commissioner Brad Avakian has publicly demonstrated actual bias against Respondents and others similarly situated, both as a candidate for re-election and as Commissioner**.

In the event removal to circuit court is not recognized and granted as a matter of right, the record makes clear Labor Commissioner Avakian should be disqualified from deciding the issues in these cases, even though he has statutory authority to issue final agency orders under ORS 659A.850(4) and OAR 839-050-0420.

Public officials in Oregon are held to an extremely high ethical standard under policy standards promulgated by the Oregon Legislature, including the following:

> **ORS 244.010 Policy**. (1)The Legislative Assembly declares that service as a public official is a public trust and that, as one safeguard for that trust, the people require all public officials to comply with the applicable provisions of this chapter.
> ***

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(5) The Legislative Assembly recognizes that public officials should put loyalty to the highest ethical standards above loyalty to government, persons, political party or private enterprise.

(6) The Legislative Assembly recognizes that public officials should not make private promises that are binding upon the duties of a public official, because a public official has no private word that can be binding on public duty.

These standards are binding upon public officials and candidates for public office. ORS 244.020(4), (14). Additionally, state agencies are given authority to adopt rules or policies interpreting the provisions of these statutes, ORS 244.165(1), which BOLI has not done. BOLI administrative rules only authorize disqualification of an administrative law judge – but not the Commissioner- under OAR 839-050-0160.

However, that does not mean there is no lawful basis for disqualification where, as here, the Commissioner is the final authority authorized to issue final agency orders (*See* ORS 659A.850(4) and OAR 839-050-0420), and there is a record demonstrating actual bias or prejudice against a party to the proceedings. *See Becklin v. Board of Examiners for Engineering*, 195 Or App 186, 207-208 (2004). *Gallant v. Board of Medical Examiners*, 159 Or App 175, 188 (1999). Given the wealth of documentation available, Respondents willingly accept the burden of demonstrating actual bias or prejudice sufficient to disqualify the Commissioner. *See Boughan v. Board of Engineering Examiners*, 46 Or App 287, 292-293 (1980)(reversed and remanded because board member had personal knowledge regarding project at issue in licensing hearing); *Gregg v. Oregon Racing Commission*, 30 Or App 19 (1979).

For obvious reasons, due process "demands impartiality on the part of those who function in judicial or quasi-judicial capacities." *Schweiker v. McClure*, 456 US 188, 195 (1982). "Bias" has been defined as "prejudice or prejudgment of facts to such an extent that an official is

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incapable of rendering a fair judgment." 41 Op. Atty. Gen. 492-493 (1981). *See also* OAR 839-050-0160. "Good cause" for disqualification under OAR 471-060-0005(2)(b) includes personal bias, personal knowledge of disputed facts, conflict of interest or any other interest that could be substantially affected by the outcome of the hearing. BOLI's mandate from the Oregon Legislature refers to encouraging "use in good faith of the [adequate administrative] machinery by all parties...and to discourage unilateral action *that makes moot the outcome* of final administrative or judicial determination of the merits of the complaint." ORS 659A.003(3)(emphasis added). As noted below, and as the attached exhibits demonstrate, Commissioner Avakian has openly expressed his personal bias and manifested a conflict of interest on the issues before him that will inevitably prejudice Respondents' constitutional rights and fall short of the statutory mandate herein.

The importance of impartiality- and avoiding the appearance of impropriety- is evident in the ethical standards of lawyers and judges inasmuch as Commissioner Avakian is a member of the Oregon State Bar (Ex. R1) and is called upon to issue quasi-judicial final agency orders in contested cases such as this one. RPC 3.6 relates to lawyers making public statements about matters in litigation:

> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

See also In re Lasswell, 296 Or 121 (1983)(limiting public comment of district attorney involved in criminal prosecution as prejudicial to the administration of justice).

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Similarly, the Canons of Judicial Ethics apply to "Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions is a judge for purposes of this Code. All judges shall comply with this Code except as provided otherwise in this rule." JR 5-101. Other pertinent portions of the Code include:

a) A judge shall observe high standards of conduct so that the integrity, impartiality and independence of the judiciary are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system (JR1-101(A));

b) A judge shall promptly disclose to the parties any communication not otherwise prohibited by this rule that will or reasonably may influence the outcome of any adversary proceeding (JR 2-102(D);

c) A judge shall not, while a proceeding is pending any court within the judge's jurisdiction, make any public comment that might reasonably be expected to affect the outcome or impair the fairness of the proceeding (JR 2-103);

d) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality reasonably may be questioned, including but not limited to instances when (1) the judge has a bias or prejudice concerning a party or has personal knowledge of disputed evidentiary facts concerning the proceeding (JR 2-106);

e) A judge shall not be swayed by partisan interests, public clamor or fear of criticism (JR 2-108);

f) A judge shall not knowingly ...(3) lend the judge's name in support of an action, by any person or group, to promote or influence the passage or defeat of laws or

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regulations at any level of government if in doing [the] above, the judge: (A) creates a reasonable doubt about the judge's impartiality toward persons, organizations, or factual issues that would likely come before the court on which the judge serves, including but not limited to, circumstances that require the judge;s disqualification under JR 2-106 (JR 4-101); and

g) With respect to any election or appointment for judicial public office, a judicial candidate shall not knowingly: ...(B) Make pledges or promises of conduct in office that could inhibit or compromise the faithful, impartial and diligent performance of the duties of the office; ...(D) Personally solicit campaign contributions in money or in kind [with an exception for campaign committees to promote the judicial candidate's election] (JR 4-102). *See In re Fadeley*, 310 Or 548 (1991), wherein the Oregon Supreme Court censured one of its own justices for personally soliciting campaign funds while sitting as a member of the court.

These standards apply to public officials, as well as candidates for public office, for an obvious reason: to assure litigants and the public of due process in a fair and impartial tribunal rather than a "star chamber", the court of public opinion or according to the dictates of political contributors. Even if they are not directly controlling, litigants appearing before the Commissioner and BOLI are entitled to at least comparable protections to avoid making a mockery of due process. Unfortunately, the record demonstrates the Commissioner cannot meet that high standard and should be disqualified from taking any part in the decision of this case.

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Both as a candidate for re-election (Exs. R2, R15) and in his capacity as Commissioner, Commissioner Avakian has been outspoken specifically concerning this case and LGBT issues in general, making clear that "discrimination" is a one-way ratchet in favor of certain preferred protected classes (e.g., complainants' alleged sexual orientation) and opposed to disfavored protected classes like religion, which includes Respondents:

a) In January 2013, shortly after the underlying event became public, the Commissioner was reported to say, "Everyone is entitled to their own beliefs, but that doesn't mean that folks have the right to discriminate…The goal is never to shut down a business. *The goal is to rehabilitate*." (Ex. R7, p. 3)(emphasis added);

b) In February of 2013, the Commissioner posted to his Facebook profile a link to an article reporting on the facts that led to this Complaint. The Commissioner added the following statement to the link: "Everyone has a right to their religious beliefs, but *that doesn't mean they can disobey laws* that are already in place." (Ex. R15, p. 9);

c) In February 2013, the Commissioner was reported to have intervened with Senator Jeff Merkley and other federal authorities on behalf of a same-sex military spouse seeking the right to be buried in Willamette National Cemetery (Ex. R15, pp. 6-8);

d) In December 2013, in the course of his re-election campaign, the Commissioner sent an email to supporters encouraging support for a federal Employment Non-Discrimination Act in Congress (Ex. R15, p. 5);

e) Another campaign email from the Commissioner on December 19, 2013 says he "take[s] on unlawful discrimination, and stand[s] up for *equal rights for every last*

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Oregonian" (Ex. R9)- with the apparent exception of Respondents, who face religious discrimination from his own agency;

f) A campaign email from the Commissioner on January 10, 2014 claims to "protect *everyone's* civil rights in housing and public accommodations" (Ex. 10), again even as Respondents face enforcement action from his agency for having a different view;

g) A campaign email from the Commissioner on February 25, 2014 speaks of "protecting workers from discrimination" (Ex. R11), even though Respondents too face discrimination against their religious, conscience and speech rights from his agency;

h) On March 4, 2014 the Commissioner issued a campaign email proclaiming the support of "civil rights champions Basic Rights Oregon, Mother PAC, NARAL and Planned Parenthood" in support of "marriage equality" in Oregon (Ex. R12);

i) On March 12, 2014 a campaign email from Commissioner Avakian reported he had no opposition in his campaign for re-election, saying "it wasn't very long ago that *right-wing activists* were calling for my head because of our strong support for civil rights and equality laws in Oregon…I'll be working hard to support progressive ballot measures and *defeat ones that undo protections against discrimination*" (Ex. R13);

j) On May 9, 2014, the Commissioner posted a link on his Facebook profile showing a photo referencing Initiative Petition #52 (Protect Religious Freedom Initiative) stating "Victory! Discrimination measure WITHDRAWN!" Along with the picture, the Commissioner added his own comments as follows: "Really great news. It's also

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a tribute to the fact that Oregonians are fundamentally fair and have little stomach for such *a needlessly divisive fight*." (R15, p. 2);

k) On May 19, 2014, the Commissioner posted on Facebook and issued a campaign email celebrating an Oregon federal court decision that day "that all Oregonians, including same-sex couples, will now have the freedom to marry the person they love…And as always, *I will continue to hold those responsible that violate the rights of Oregonians* and enthusiastically support those that go the extra mile for fairness" (Exs. R14, R15, p. 1)(emphasis added); and

l) The commissioner's Facebook posts dating back to February 5, 2013 confirm his position on this case and his bias against those like Respondents who disagree on conscience grounds with his stated commitment to eradicating discrimination (Ex. R15, p. 9).

It is evident that the Commissioner has openly manifested and publicly demonstrated his bias against Respondents and their sincerely-held convictions, effectively prejudging the case before the presentation of any evidence. He has already declared his opinion on the outcome of this case. As early as February 5, 2013, the Commissioner publicly opined that Respondents had "disobey[ed] laws." Ex. R15, p. 9. The Commissioner made this legal determination on Respondent's actions while the case was still being investigated by the Department of Justice and before any complaint was filed with BOLI. The legislative purpose of ORS 659A is, in part, "to encourage the use in good faith of the machinery by all parties to a complaint of unlawful discrimination and to discourage unilateral action that makes moot the outcome of final

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administrative or judicial determination on the merits of the complaint." ORS 659A.003(3). The Commissioner, the final decision-maker at BOLI, made public his final determination on the facts of this case before one word of testimony has been heard, compromising his agency's very legislative purpose under ORS Chapter 659A. As long as the Commissioner has any decision-making authority in this case, there is no way BOLI will respect Respondents' due process and other constitutional rights or render a decision based on substantial evidence rather than the bias of the Commissioner and those subject to his direction.

3. **Commissioner Brad Avakian and BOLI have conflicts of interest that preclude them from impartially adjudicating these complaints.**

There are multiple apparent conflicts of interest on the part of the Commissioner and BOLI herein: (1) the Oregon Constitution and ORS 659A.003, *et seq.*, not to mention the U.S. Constitution, require BOLI to respect and protect Respondents' constitutionally-protected religion, conscience and speech rights to an even greater degree than it does complainants' statutory rights; and (2) the state of Oregon, including BOLI itself, has potential legal liability as a place of public accommodation under ORS 659A.400(1)(b) and (c)) because, at the time of the original events and the filing of complaints by complainants, the state of Oregon itself refused to recognize same sex marriage relationships, just as Respondents have chosen not to participate in complainants' same sex ceremony. In other words, the state of Oregon and its respective agencies, including BOLI, cannot ethically sit in judgment of Respondents for conduct of which it may be legally culpable.

It is settled law that state nondiscrimination laws must defer to constitutionally-protected rights. *See Hurley v. Irish-American Gay, Lesbia & Bisexual Group*, 515 US 557 (1995). In light

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of that, one might ask why the Commissioner, who professes to protect all Oregonians (Exs. R9, R10), doesn't demonstrate the same zeal to respect-or at least not attack- the Respondents' religious, conscience and speech rights, protected by the U.S. and Oregon constitutions, as well as ORS 659A.003 *et seq*. Instead, the Commissioner says Respondents are "disobey[ing] laws" and need to be "rehabilitated." Exs. R7, p. 3, and R15, p. 9. These statements, taken together with the Commissioner's statements that a ballot measure to protect religious liberty in public accommodations is a "needlessly divisive fight", are not only legally wrong, but shows clearly that when religious freedom faces off with sexual orientation, Commissioner Avakian has already picked the winner. *See* Ex. R15, pp. 2, 9.

It is even more ironic- not to mention unfair- that BOLI's formal charges herein threaten sanctions against Respondent Aaron Klein for making public statements (in response to an interview request) about the case when the Commissioner himself has done just that, both about this case in particular and related issues, and both in his capacity as Commissioner and as a candidate for re-election. Formal Charges, p. 4. Exs. R5-R15. The Commissioner has attempted to use the power of his office to silence the Respondents in this case simply because they have convictions and a message different from his own.

Secondly, it is clear the state of Oregon, including BOLI and the Commissioner, has a conflict of interest when it simultaneously prohibited sexual orientation discrimination by *statute* while *constitutionally* declining to recognize same-sex marriage. As noted above, Respondents deny engaging in sexual orientation discrimination because they declined to use their artistic talents to celebrate a same sex union, and they at least had the Oregon Constitution on their side.

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In contrast, BOLI seeks to impose liability on Respondents for abiding by the Oregon Constitution as it existed in 2013 while declining to hold itself to the same standard in the area of its own public accommodations law.

The clerk's office of each county is a place of public accommodation subject to ORS 659A.403. *See* ORS 659A.400(1)(b)("A public accommodation...means...Any place that is open to the public *and owned or maintained by a public body*, as defined in ORS 174.109, regardless of whether that place is commercial in nature."); *See also* ORS 174.109 ("[A]s used in the statutes of this state 'public body' means state government bodies, local government bodies and special government bodies."). There is no question that before May 19, 2014, same sex couples (including complainants) would have been declined a marriage license in any county in Oregon. If in 2013, the state of Oregon did not recognize or participate in same sex marriage relationships, it cannot justly impose liability on Respondents for being unwilling to devote their artistic talents to a same sex ceremony. The state of Oregon does not get to say, "Do as I say and not as I do" when its agencies are places of public accommodation subject to the same statutes it desires to enforce against Respondents. Beyond hypocrisy, it is difficult to envision how the BOLI Commissioner can sit in judgment of Respondents when his agency may face legal liability to those whose interests he claims to be protecting.

CONCLUSION

Respondents are entitled as a matter of right to remove this matter to the circuit court, just as complainants would be free to do. However, even if they could not do so as a matter of right, the Commissioner should be disqualified from having any role in the decision or disposition of

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the pending complaints due to demonstrated bias against Respondents and his own agency's conflict of interest. Due process and the protection of Respondents' constitutionally-protected rights demand nothing less.

DATED this 18th day of June, 2014.

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Of Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing RESPONDENTS' ELECTION TO REMOVE TO CIRCUIT COURT (ORS 659A.870(4)(b)) AND ALTERNATIVE MOTION TO DISQUALIFY BOLI COMMISSIONER BRAD AVAKIAN on the following via the indicated method(s) of service on June 18, 2014:

Rebekah Taylor-Failor, Contested Case Coordinator
800 NE Oregon Street, Room 1045
Portland, OR 97232-2180

Jennifer Gaddis, Chief Prosecutor
800 NE Oregon Street, Room 1045
Portland, OR 97232-2180

Amy Klare, Administrator, Civil Rights Division
800 NE Oregon Street, Room 1045
Portland, OR 97232-2180

Paul A. Thompson
310 SW Fourth Avenue, Suite 803
Portland, OR 97204

Of Attorneys for Complainants

____ **MAILING** certified full, true and correct copies thereof in a sealed, first class postage-prepaid envelope, addressed to the attorney(s) shown above at their last known office address(es), and deposited with the U.S. Postal Service at Portland/Beaverton, Oregon, on the date set forth below.

____ **EMAILING** certified full, true and correct copies thereof to the attorney(s) shown above at their last known email address(es) on the date set forth below.

x **HAND DELIVERING** certified full, true and correct copies thereof to the attorney(s) shown above at their last known office address(es), in person or by messenger on the date set forth below.

Herbert G. Grey, OSB #810250
Of Attorneys for Respondents

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EXCERPT OF RECORD

EXHIBIT R

www.lol.com

The Agency now has a one-stop-shop for final orders and digests

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Brad Avakian shared a link.
February 12

It's so wonderful to see that the Senate ap[illegible] authorization of the Violence Against Women Act, but I'm disappointed that 22 Senators dissented. It's very sobering to be reminded that issues like protecting women from violence still require constant advocacy to receive adequate funding.

Senate Approves VAWA Re-authorization, on to House — MSNBC
tv.msnbc.com

Among the 22 opponents were Sens. Marco Rubio and Rand Paul, the two GOP speakers expected to deliver rebuttals to President Obama's State of the Union speech Tuesday.

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Brad Avakian
February 4

Had a fantastic day in Salem meeting with Senators, Representatives and advocates as the 2013 legislative session gets underway. I'm looking forward to an exciting and productive year in Oregon policy-making.

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Brad Avakian
February 3

Just back from OSU where friend Jock Mills and I rooted on my #9 ranked OSU wrestling team as they took care of tough Cal State Bakersfield 35-7. Go Beavs!!

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Brad Avakian
January 23

I'm looking forward to emceeing tonight's Chocolate for Choice event. It's a great way to celebrate the 40th Anniversary of Roe v. Wade and support the critical work of protecting Oregonians' reproductive rights.

Chat (Off)

It's been one of the great honors of my life meeting and working with Lt. Col. Linda Campbell and Nancy Lynchild. My hope is that this decision will bring Linda peace and help pave the way for other loving, caring couples to enjoy the benefits and respect they deserve. A huge thanks to my friend Jeff Merkley, who was as relentless and effective of a partner as always.

In a first, VA approves request by Oregon woman to bury same-sex spouse in national cemetery
blog.oregonlive.com

The Oregonian's exclusive story of the first such waiver of federal military burial policy centers on retired Air Force Lt. Col. Linda Campbell of Eugene and her spouse, Nancy

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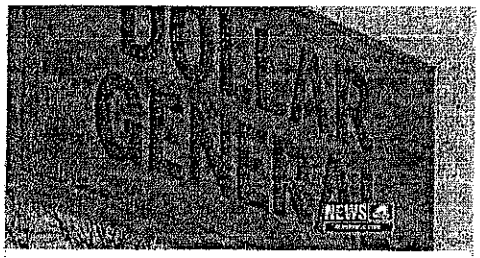
Brad Avakian shared a link.
February 5

Everyone has a right to their religious beliefs, but that doesn't mean they can disobey laws that are already in place. Having one set of rules for everybody ensures that people are treated fairly as they go about their daily lives.



'Ace of Cakes' offers free wedding cake for Ore. gay couple
www.kgw.com

The Oregon Department of Justice is looking into a complaint that a Gresham bakery refused to make a wedding cake for a same sex marriage.
 It started when a mother and daughter showed up at Sweet Cakes by Melissa looking for a wedding cake.

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Brad Avakian shared a link.
February 2

I'm excited about this program and its potential to provide opportunity and hands-on training for returning veterans. That's good for Oregon's workforce and communities around the state.

Forest Grove student volunteer program to serve as statewide model for helping U.S. veterans
www.oregonlive.com

The student volunteer program with Forest Grove Fire and Rescue received approval from the U.S. Department of Veterans Affairs on Monday, Jan. 28.

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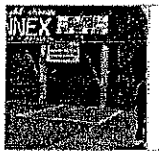
Brad Avakian shared a link.
January 29

Today, I announced that I officially filed a Commissioner's Complaint under the Oregon Equality Act against the Twilight Room Annex, formerly The P Club. For more information, here's the story on Oregonlive.



Labor Commissioner Brad Avakian files formal charges against P Club for discrimination against trans
www.oregonlive.com

The bureau of labor and industries tried to reach a settlement with the club, now known as The

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EXHIBIT R2
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00288

EXCERPT OF RECORD

EXHIBIT S

OREGONLIVE
The Oregonian

Lesbian couple refused wedding cake files state discrimination complaint

Melissa Klein, co-owner of Sweet Cakes by Melissa in Gresham, with a customer earlier this year. *(Everton Bailey Jr./The Oregonian)*

Print

By Maxine Bernstein | mbernstein@oregonian.com
on August 14, 2013 at 5:30 AM, updated January 20, 2014 at 10:01 AM

A same-sex couple who requested a cake for their wedding in January but were refused service by a Gresham bakery have filed a complaint with the state, alleging Sweet Cakes by Melissa discriminated against them based on their sexual orientation.

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00141

Oregon's Bureau of Labor and Industries' civil rights division will investigate to determine if the business violated the Oregon Equality Act of 2007, which protects the rights of gays, lesbians, bisexual and transgender people in employment, housing and public accommodations.

It's the 10th complaint to the state in the last five years involving allegations of discrimination in a public place based on sexual orientation or gender identity, according to the bureau.

Rachel N. Cryer, 30, said she had gone to the Gresham bakery on Jan. 17 for a scheduled appointment to order a wedding cake. She met with the owner, Aaron Klein.

Klein asked for the date of the wedding and names of the bride and groom, Cryer said.

"I told him, 'There are two brides and our names are Rachel and Laurel,' " according to her complaint.

Klein responded that his business does not provide its services for same-sex weddings, she said.

"Respondent cited a religious belief for its refusal to make cakes for same-sex couples planning to marry," the complaint says.

Klein earlier this year told The Oregonian that he and his wife, Melissa, turn down requests to bake cakes for same-sex marriages because that goes against their Christian faith and cited their freedom of religious opinion. He has denied disparaging the couple.

Melissa Klein said the complaint was delivered to the bakery Tuesday. She said she and her husband had expected it because the same-sex couple had initially made an inquiry to the state attorney general's office.

"It's definitely not discrimination at all. We don't have anything against lesbians or homosexuals," she said. "It has to do with our morals and beliefs. It's so frustrating because we went through all of this in January, when it all came out."

The complaint will be assigned to an investigator. If substantial evidence of discrimination is found, the inquiry could lead to a settlement or to prosecution before an administrative law judge. A proposed order would be made to the labor commissioner, who serves as the final arbiter and decides if violations are warranted.

"We are committed to a fair and thorough investigation to determine whether there's substantial evidence of unlawful discrimination," said Labor Commissioner Brad Avakian. He advocated for the 2007 law when he was a state senator.

In the other nine discrimination complaints based on sexual orientation, four were unsubstantiated, three resulted in a negotiated settlement before a finding, one was

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privately settled and withdrawn, and one is pending -- a Portland case involving a bar called the P Club.

The law provides an exemption for religious organizations and parochial schools, but does not allow private business owners to discriminate based on sexual orientation, just as they cannot legally deny service based on race, age, veteran status, disability or religion.

"Everybody is entitled to their own beliefs, but that doesn't mean that folks have the right to discriminate," Avakian said, speaking generally.

An administrative law judge could assess civil penalties.

"The goal is never to shut down a business. The goal is to rehabilitate," Avakian said. "For those who do violate the law, we want them to learn from that experience and have a good, successful business in Oregon."

The bureau's civil rights division conducts about 2,200 investigations a year on all types of discrimination, Avakian said.

This summer, the bureau expects a ruling on the P Club complaint: Transgender customers complained that the North Portland bar told them not to return. In that case, Avakian himself filed the complaint against the club, accusing it of refusing service to patrons based on their gender identity. A deputy commissioner will serve as arbiter in that case.

The labor bureau previously obtained negotiated settlements in the past on allegations by lesbian partners that they were denied a hotel room in Sutherlin, that a Eugene market and gas station subjected a gay man to homophobic jokes and that a Umatilla County event facility would not host a lesbian couple's wedding.

The bureau provides training to businesses to help them avoid potential violations of the relatively new law.

"I think you're going to see numbers (of complaints) increase with additional training and awareness," Avakian said.

-- Maxine Bernstein

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EXHIBIT T

So since we are here to talk about damages, the important thing to remember is that, in light of what I've just talked about, the central remaining issue is what, if any, legally cognizable damages did the Complainants suffer as a result of not being able to order a cake on January 17, 2013?

And the second question, which is as every bit as important as the first, is what, if any, of those legally cognizable damages were caused by Aaron and Melissa Klein, as opposed to other factors?

As the forum hears evidence about all of this damages evidence, the forum's authority is not unlimited. The standard for damages I just found in ORS 659A.850(4), which authorizes the forum to allow damages, quote, "reasonably calculated to eliminate the effects of the unlawful practice." In other words, the focus of the conversation during this hearing must be on the effects of the Complainants being denied a cake.

I'm sure I don't need to tell the forum that damages must be proved and shouldn't be presumed. And the forum has absolutely no obligation to award any damages, let alone the amounts that are being sought against the Kleins.

In fact, if you look historically at other BOLI decisions, there aren't any that even justify anything close to the amounts that are being sought here today.

Now, as you listen to the evidence, you will hear

a lot of evidence about various things that were going on in the Complainants' lives, things that they were stressed about. And as you listen to that testimony, what you should ask yourself is: Does that evidence show that it was the result of not getting a cake on January 17, 2013, or something else? What does the evidence show in terms of what was going on in the rest of their lives at the time and what stresses may come from that?

You see, we believe that the evidence will show that what the Complainants are really complaining about is the impact of all the media attention that came from a variety of sources and not from the denial of the cake. The evidence will further indicate that there were other things going on in their lives that involved family conflicts and other things that have absolutely nothing to do with Aaron and Melissa Klein.

As the forum listens to the evidence on damages, it's important to ask: Is there going to be any evidence that the Complainants sought any kind of professional help for anything that they attribute to being denied a cake on January 17, 2013, for? And the record will reflect -- and I'm sure you will find at the end -- that such evidence is not being presented because it doesn't exist. And it won't be presented here because the evidence from the Complainants themselves and presented on their behalf will show that nothing that happened on January 17th, 2013, in their minds actually motivated them to seek any kind of professional assistance.

A. As a foster parent, you are charged with the responsibility of protecting not just the children but their privileged information.

Q. Okay.

A. Also, we just -- when you are a foster parent, you are always on edge. You never know if today is going to be the day that they come take them away, and so that was just -- all my concern at that time was just don't let anybody in the media know. Don't -- please, don't let them post their information because they could just take the girls right away from us.

Q. Had you had any conversations with anybody from -- I'm presuming it's Department of Human Services who handles the foster care system here in Oregon -- correct me if I am wrong -- but had you had any conversations with anybody from that agency that made you believe there was a chance that your children could be taken away?

A. Are you asking about prior to it being in the media or after it being in the media?

Q. After it being in the media. My apologies.

A. Yes, we had conversations with our social workers, our certifier, and our Developmental Disabled Services coordinator.

Q. And what did they say? Was this a legitimate concern of yours?

A. Yes. They said that it was our responsibility to make sure that the girls' information was protected no matter what,

and that should anything come out that released any of the girls' information, that they would have to readdress placement.

Q. Readdress placement with you and Laurel?

A. (Nods head.)

Q. Okay. Had you had a conversation similar to that prior to January 17th, 2013?

A. No.

Q. Okay. Between January 17th, 2013, and when the facts of this case entered the media -- during that period of time, had you had a conversation with these caseworkers about the kids and concerns about their placement?

A. No.

Q. Okay.

A. Or -- I'm sorry. I just want to clarify that a little bit, if I could.

Q. Okay.

A. Not any concerns about their placement that had anything to do relative with this case.

Q. Okay. Had there been concerns -- any concerns about placement prior to this case? Not related to this case, were there concerns about placement?

A. Yes.

Q. And what were those?

A. We were in a battle with the children's great-grandparents, who did not believe that the children should

be placed with us because we are homosexuals.

Q. Okay. Was it a legal battle or some other sort of battle? What do you mean by "battle"?

A. It was a legal battle but also a process battle through DHS.

Q. Okay. Did that cause you greater concern once the facts of this case hit the media?

A. Yes. You have very little control over what the media says or does. It's very difficult for someone to tell you you are responsible for making sure that they don't print this when you have no control over what they print.

Q. Did you personally have any interviews with the media at any time from January 17th, 2013, through today?

A. No.

Q. Okay. Do you recall seeing interviews with Aaron and Melissa Klein in the media?

A. Yes.

Q. Do you feel that information presented by Aaron and Melissa Klein to the media has been accurate?

A. No.

Q. And what's the basis for that opinion?

A. I feel like they made it seem as if we targeted and attacked them and ran them out of business, which I don't see to be true in any part of that statement.

Q. Did you boycott -- engage in any boycott behaviors

you, you will see a number of documents marked R-1 through 39. Do you see that binder?

A. This one here?

Q. Yes, that one.

A. And I'm sorry. What was the exhibit again?

Q. Just -- can you see where they are labeled R-1 through R-38? So I'll be flipping to those in a minute here.

A. (Nods head.)

Q. Okay. Let me ask you to turn to a document marked R-5. Do you see that document?

A. Yes.

Q. Now, in that document -- do you have that yet? Okay.

In that document you say you think you deleted some e-mails you sent to Melissa; is that correct?

A. Yes.

Q. Okay. And you did not turn those e-mails over in the course of this case?

MS. CASEY: Objection. She just said she deleted them.

BY MR. SMITH:

Q. Did you turn --

ALJ: Hang on a second. So are you asking if she turned over the deleted e-mails?

MR. SMITH: Yes, Your Honor. This e-mail was sent apparently either September 6th, 2013, or September 5th, 2013,

and it says she deleted some e-mails.

ALJ: So your question, then, is whether she turned over the deleted e-mails to you in discovery?

MR. SMITH: Right.

ALJ: Okay. And what was your objection?

MS. CASEY: Well, that she just testified that she had deleted them. Asking if she submitted deleted documents doesn't make any sense to me.

ALJ: It may not make any sense. But the question is clear to me. You can go ahead and answer.

THE WITNESS: I'm sorry --

ALJ: Did you understand the question?

BY MR. SMITH:

Q. Did you turn over these -- whatever e-mails you say you deleted -- in the course of this case to us?

A. No.

Q. When did you delete those e-mails?

A. I don't recall the exact date.

Q. It says on here that you deleted them after the incident.

A. Yes, it would have been after the incident.

Q. And you filed the Department of Justice complaint on January 17th -- or let me withdraw that question.

Ms. Laurel Bowman-Cryer filed the Department of Justice complaint on January 17th, 2013, correct?

MS. CASEY: Objection. That date is not accurate.

ALJ: What's the exhibit number? Or is there an exhibit?

MS. CASEY: A-1.

ALJ: Do you want to ask your question again with the date that's shown on A-1? That appears to be -- there is a line on the top that says "Date of complaint submission."

BY MR. SMITH:

Q. Let me ask you to turn to page R-3, the second page, if you can, Ms. Bowman-Cryer. And doesn't it -- on the fourth line down doesn't it say, "Today, January 17th, 2013, we went for the cake-testing"?

ALJ: I'm sorry. You are on R-3?

MR. SMITH: Page 3, R-3.

ALJ: Oh, I'm sorry. That's the document -- let's go off the record really quickly.

(OFF THE RECORD: 2:13 p.m. to 2:13 p.m.)

ALJ: Okay. I'm there.

THE WITNESS: I'm sorry. Can you --

BY MR. SMITH:

Q. Do you recognize Exhibit R-3?

A. Yes.

Q. And what is it?

A. It seems to be notice from the Department of Justice that they received a complaint.

Q. And the second page there, R-3, page 2 of 3, do you recognize that document?

A. Page 2 of 3?

Q. Yes.

A. Yes.

Q. What is that one?

A. It seems to be the Oregon Department of Justice Consumer Complaint Form.

Q. And whose information is on that form?

A. Laurel's name and our joint address and phone numbers and Laurie's e-mail address.

Q. Now, do you recognize that particular document?

A. Yes.

Q. And what is it?

A. The Oregon Department of Justice Consumer Complaint Form.

Q. Is that the one that Laurel filed?

A. That's not my specific knowledge. I believe it says it is.

Q. Okay. Let's cut to the chase on this. Isn't it true that Laurel filed this late at night on January 17th, and it showed up as being registered on January 18th, the next morning?

MS. CASEY: Objection. That's -- lack of foundation. That's outside of her knowledge as to when it was filed or when it showed up.

ALJ: Sustained.

BY MR. SMITH:

Q. Okay. Who wrote -- let's turn to R-3, page 3. The document has already been admitted. Do you know who wrote --

ALJ: Excuse me just a second. I don't seem to have -- I've got page 2, but I don't seem to have page 3.

MS. CASEY: It's the same as Agency Exhibit A-1 page 2 of 2, if that helps for clarification.

ALJ: Yes. I just want to make sure I have got the original here in the record.

(OFF THE RECORD: 2:16 p.m. to 2:17 p.m.)

ALJ: Sorry to interrupt.

BY MR. SMITH:

Q. Okay. We have Exhibit R-3, page 3 of 3. Do you have that?

A. Yes, I do.

Q. Do you know who wrote that page?

A. Laurel.

Q. And in it she wrote, "Today, January 17th," did she not?

A. Yes, that's what it says.

Q. And that's the complaint that she submitted to the Oregon Department of Justice, correct?

MS. CASEY: Objection. Lack of foundation.

BY MR. SMITH:

Q. Do you know if that's the complaint she submitted to the Oregon Department of Justice?

A. That's what I have been told.

Q. Your testimony here today is that you are not sure if that was -- that complaint was filed with the Department of Justice?

MS. CASEY: Objection. I don't believe that is what she testified to.

ALJ: Well, I think she can answer whether or not that's her testimony.

THE WITNESS: Can you repeat the question for me?

BY MR. SMITH:

Q. Is this the complaint filed -- to your knowledge is this the complaint that was filed with the Oregon Department of Justice?

A. To the best of my knowledge, yes.

Q. And you knew at that time that it was being filed with the Oregon Department of Justice, didn't you?

MS. CASEY: Objection. She's already testified that she did not have that knowledge.

ALJ: It's cross-exam. Go ahead and answer.

THE WITNESS: Can you repeat the question for me?

BY MR. SMITH:

Q. The same day that Laurel filed the complaint, you knew she filed the complaint with the Department of Justice, didn't

you?

A. I don't recall if I knew it was the Department of Justice on that particular day or at a later point.

Q. Okay. In your deposition I asked you the question:

"QUESTION: Did she tell you what she ultimately did that day?"

Your answer was:

"ANSWER: She told me that she had written a complaint to the Department of Justice."

And I asked you:

"QUESTION: Okay. So she knew she had filed a complaint with the Department of Justice?"

And you answered:

"ANSWER: She knew she had written a complaint."

Isn't that true?

A. That is true, but the "that day" response pertains to specifically that she told me she filed a complaint at that time, not that she told me that day that she filed a complaint. Because I don't recall specifically whether it was that evening or the next morning. I don't recall.

Q. Now, when you went in for the cake-tasting, was that January 17th, 2013?

A. I'm sorry. Did you ask me if that was January 17th?

Q. Was that January 17th, 2013?

A. Yes.

EXCERPT OF RECORD

EXHIBIT U

Widener.

LAURA MARIE WIDENER

was called as a witness in behalf of the Agency and, being first given the oath by the Administrative Law Judge, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. CASEY:

Q. Ms. Widener, do you know Rachel Bowman-Cryer?

A. Yes.

Q. And do you know Laurel Bowman-Cryer?

A. Yes.

Q. How do you know them?

A. They ordered a wedding cake from me.

Q. And do you own Pastrygirl?

A. Yes.

Q. And that's a bakery?

A. Yes.

Q. You do wedding cakes; is that correct?

A. Yes.

Q. If I could direct your attention to the booklet up in front of you, Respondents' Exhibit R-4. There will be numbers in the bottom right-hand corner --

A. This one right here?

MR. GREY: The small one.

MS. CASEY: Yes, the small one.

BY MS. CASEY:

Q. So on the bottom right-hand corner, it will say "R-4." It's a five-page -- five pages of the exhibit.

ALJ: Let us know when you found it.

THE WITNESS: Yes. Got it.

BY MS. CASEY:

Q. You are there?

A. I am.

Q. Do you recognize this document?

A. I do.

Q. And just looking at page 1 of 5, what is this?

A. This is my special order form that I fill out.

Q. And fill out for what?

A. For customers who are ordering. This particular form is usually for weddings.

Q. Is it your handwriting on this form?

A. Yes, it is.

Q. What was the date that Rachel and Laurel came in for a tasting?

A. Rachel and Cheryl came in for a tasting on January 21st, 2013.

Q. All right. But it was for Rachel and Laurel's cake?

A. It is for Rachel and Laurel's cake, yes.

Q. But it was just Cheryl and Rachel at the tasting?

A. Correct.

Q. Was this the first time you had met Rachel Bowman-Cryer?

A. Yes.

Q. Do you recall when you first met Laurel?

A. Not exactly. I know I met her before the wedding, but I don't -- I can't recall the date on that.

Q. Do you remember who called you to set up the cake-tasting?

A. Cheryl did.

Q. Do you remember if she asked you if you were okay with providing a cake for a same-sex wedding ceremony?

A. Yeah. It was the second question she asked me.

Q. It's your handwriting on this document; is that correct?

A. That's correct.

Q. Was all of the information on this event order written on January 21st of 2013?

A. No.

Q. Okay. What information was written on the 21st that you recall?

A. The date and time, the location, the cake flavors.

Q. I just want to interrupt you. The event date and time?

A. Yes, the event date and time. Sorry. All this up at the very top. The contact name, the tasting date, phone

numbers, and, you know, contact information. The event date and time of ceremony and delivery, the location, how many people were expected for the wedding, the sizes of the cakes, the flavors of the cakes, and the fillings and the frosting. Also the cost was -- the price of the cake and the delivery was also included on that date.

Q. Was the price of the cake discounted in any way?

A. No, no.

Q. What about the notations down in the bottom left-hand corner under "Special Instructions"?

A. The peacock theme was there from the very beginning. I -- the other information -- I know for a fact that the Duff information here was added later. Usually I -- I do now add dates to when I add extra information onto a current form. This particular -- at this particular time, I did not do that.

Q. Okay.

A. But looking at my handwriting, it's possible I added all this other stuff as we progressed towards the wedding date.

Q. Okay. And then what about on the bottom right-hand corner, the "Pricing" section? Was all of that on the day of the tasting, or was some of it added at a later date?

A. The total and the deposit and then the total due -- it went to that point, and then the final payment of $150 was made by card on March 15th.

Q. Okay. What did you think when Cheryl McPherson asked

you if you were okay baking a wedding cake for a same-sex ceremony?

A. I didn't find it an odd question, but I'm always taken aback when people ask me.

Q. Why is that?

A. Because I don't see why there is a problem with it.

Q. Okay.

A. But I know there are people out there who fear having a problem with it, and then there are people who do have a problem. And when people ask me a question -- and it's not the only time it's ever been asked of me -- I -- I just think, okay, I'm sad that they have to ask me, and I'm usually, like, "Of course, I'll do your cake." So -- and I usually try to put them at ease.

Q. Is that what you did when you spoke with Cheryl McPherson in this case?

A. Yes.

Q. Okay. So Cheryl and Rachel come in for the tasting on the 21st?

A. Mm-hmm.

Q. What do you remember about that tasting?

A. I remember it was very -- there was anxiety. And there was --

Q. Anxiety? Was it your anxiety or their anxiety?

A. Their anxiety because of what they went through to get

to me.

Q. Okay.

A. And so I felt that there was -- a lot of my job at that tasting was to alleviate their fears, to bring them to a happier, calmer place. Because I was going to take care of them, and I couldn't -- and I couldn't undo whatever damage had been done to them already, but what I could do was I could make it better. And that's -- I felt that was a part of my job at that time, besides also giving them a tasting and talking about their design and doing all the other things that are required in a cake-tasting and a consultation. But I also had to alleviate some anxiety.

Q. What, if any, observations did you make regarding Rachel Bowman-Cryer's demeanor during this tasting?

A. She was very, very low-key. She was very -- she was constantly on the verge of tears, and she did very little talking. Cheryl did most of the talking. And it was clear to me this was a person -- I almost felt that she had been abused emotionally, that she was beaten down and didn't know how to get back up again. And I felt really sad for her.

Q. About how long was the tasting?

A. My tasting is usually about an hour.

Q. And would your descriptions of her demeanor -- would that be consistent throughout the hour-long tasting?

A. For the most part, until we started talking about the

design of the cake, and then there was a little bit more animation. She clearly had an idea of what she wanted, which was -- is great to hear from someone who is ordering a cake from me. And so there was more vocal -- vocalization from her part.

Q. Just when you got to the design part; is that correct?

A. Yeah.

Q. Would you say that she was excited during this tasting?

A. No.

Q. Was this the only time that you met with Rachel Bowman-Cryer?

A. No.

Q. And when did you meet her next -- or under what circumstances did you meet with her next?

A. When Duff proclaimed on national television that he was going to make their cake for free.

Q. Okay.

A. I contacted them and said, "Okay. I think we need to talk about the logistics of what's going to happen now." And we did meet again.

Q. Okay. Did you meet in person?

A. Yes.

Q. Do you remember about when this second meeting happened?

A. It was -- I think it was in February, honestly. It

was right after -- and I don't have a date on it, but it was right after -- immediately after Duff made that proclamation. So...

Q. So February 2013?

A. Yes.

Q. And was Laurel present at that time?

A. No.

Q. Was it just Rachel?

A. And Cheryl.

Q. And Cheryl. Okay. What, if any, observations did you make about Rachel's demeanor at that meeting?

A. There was a great deal of -- how do I put this -- surprise, incredulousness -- is that the word? It was really hard for her to comprehend everything that was happening because of her cake, and she still hadn't -- clearly, she still hadn't, you know, wrapped her brain around all the media and -- just this snowball effect. So it was very -- it was overwhelming, and she was still processing it. So it was all brand-new to her. She seemed excited but at the same time anxious and unsure.

Q. Was it excited about the cake or about the wedding? Do you recall?

A. Well, it's really exciting when a celebrity comes up to you and says, "I'm going to do something for you," and that's something to stop and kind of go, "Okay. I need to think about

this, and how do I respond to this in a real manner, as opposed to an instant" -- it was clear to me that they hadn't instantly responded. It wasn't like this -- they had to stop, sit back, and talk about it, and then I'm glad they did because then they had a chance to meet with me and we could go over our logistics of the cake.

Q. And you still made their wedding cake for their ceremony, correct?

A. I did.

Q. If you can flip to page 5 of Exhibit R-4.

A. Yes.

Q. Is that a picture of the cake that you made for their wedding?

A. It is.

Q. Did you have any other meetings with Rachel or Laurel prior to the wedding?

A. Not that I recall, no, I don't think I did.

Q. Did you see them at the wedding?

A. I did.

Q. And was that when you dropped off the cake?

A. It was -- I'm trying to remember if I actually saw them. I did see Rachel when I dropped off the cake, and then I saw both Rachel and Laurel at the actual ceremony.

Q. Okay. So were you a guest at the wedding?

A. I was.

Q. Prior to the tasting on January 21st, 2013, had you met Rachel or Laurel?

A. No.

Q. Okay. So you weren't a pre-existing friend?

A. Correct.

Q. Why were you a guest at their wedding?

A. I think they felt very bonded to me because of my ability -- because of my willingness to do their cake, my ability to be able to create something for them to their desire. During this strong emotional time for them that linked me to this whole process, I believe that they felt a sense of need to bring me and include me in the wedding as -- and I felt, for me, it was nice. It was kind of a closure for me, too. It was nice to be invited. I enjoyed the wedding. It was -- it was lovely to be there.

MS. CASEY: No further questions, thank you.

CROSS-EXAMINATION

BY MS. HARMON:

Q. All right. Ms. Widener, you told us that you met with Rachel and Laurel again in February, right?

A. It was not Laurel; it was Rachel and Cheryl.

Q. I'm sorry. Rachel and Cheryl in February.

A. Mm-hmm.

Q. Would that have been the beginning of February?

A. I don't recall exactly. I could Google when Duff made that announcement, and we can pretty much assume it was two days -- one to two days after that.

Q. Okay. You actually talked to the media yourself about the cake; is that right?

A. The media? Yes.

Q. And you talked -- did you talk with a magazine called "PQ Monthly"?

A. I did.

Q. If you will turn to Exhibit R-12 in your binder there.

A. Yes.

Q. Do you recognize Exhibit R-12, starting at page 2 and going through page 5? Are you on R-12? It looks like you are looking at something different from me.

A. I'm on R-13. I'm sorry. Okay. There we go.

Q. If you could just take a look at page 2 through 5 and let me know if you are familiar with that.

MS. CASEY: Objection, Your Honor. It's outside the scope of direct examination.

ALJ: Do you want to respond to that?

MS. HARMON: Yes, Your Honor. They talked about Duff Goldman -- I'm sorry -- she spoke on direct about Duff Goldman going to the media and kind of how Complainants were processing the media, and we have heard a lot of testimony regarding how the media affected this case, and this would

certainly be relevant to the questions that have been brought up about the media. And I think it's within the scope about the questions about media that were raised on direct and Ms. Widener's personal interaction with the media, as well.

MS. CASEY: Not a lot of testimony about the media from this particular witness.

ALJ: Overruled. Go ahead.

MS. HARMON: Okay.

BY MS. HARMON:

Q. Do you recognize this exhibit?

A. Well, I recognize the photo of one of my cakes. I recognize the information regarding it. I don't necessarily recognize the text itself; although, the text is very familiar to me.

Q. So when you say the text is "familiar to me," the quotation marks you see on page 4, about, like, maybe halfway down, are those -- is that your quote?

A. Yes, mm-hmm.

Q. All right. So you then -- you did -- let's talk about, actually, the -- let's go back to page 2 -- I'm sorry -- page 3 of 5.

A. Mm-hmm.

Q. At the top there, there is a date that says February 8th, 2013. Does that sound like the right date?

A. That does, yes.

Q. Did you do an interview with "PQ Monthly"?
A. Yes. It was over the phone.
Q. And did you ask Rachel and Laurel if it was okay if you went public with the --
MS. CASEY: Objection.
THE WITNESS: (Nods head.)
BY MS. HARMON:
Q. You did? And they said it was okay?
A. Yes.
MS. HARMON: Your Honor, Respondents would offer Respondents R-12 pages 2 through 5 at this time. I think we already received R-12, page 1.
ALJ: You are right. R-12 is already in.
MS. CASEY: No objection.
ALJ: All right. Received. It's in its entirety now.
(EXHIBIT R-12, pages 2 through 5, was offered and received into evidence.)
BY MS. HARMON:
Q. And you also posted a status about the cake on Facebook, right?
A. I did.
Q. You posted one on February 8th?
A. Yes, I guess --
Q. You put this article on your Pastrygirl Facebook page?

A. We shared a link, yes.

Q. So you were kind of publicizing the fact that you were doing the cake and you were involved in it?

A. Yeah, trying to squash -- there was a lot of hype about Duff offering to produce their cake for free, and part of my desire was to inform the local community that a local bakery was already doing the cake.

And there was a lot of cry about that, too. It was, like, "Why is this -- why aren't they going to someone here in the community to do their cake?" Because they didn't know because I was keeping quiet about it until I got their permission to say, "Yeah, I am doing it."

Q. Okay. And they were okay with you putting that on your Facebook page?

A. Yes.

Q. And your Facebook page is publicly viewable; is that right?

A. Yes.

Q. So anybody -- you don't have to be a specific friend of yours or anything like that to look at your Facebook page?

A. That's correct. It's a business page.

Q. Anybody in the universe could get on and look at it?

A. Yeah.

Q. All right. And you also posted a photo of the actual cake you made on your Facebook page, too, right?

A. Mm-hmm, I did.

Q. That would be -- a picture of that would be in Exhibit R-12 -- I'm sorry -- R-4, page 5, if you want to flip over to that.

A. Yes.

Q. Is this the picture that you posted on Facebook?

A. It's either -- it was probably that one. There was another shot that I took of a different angle, as well.

Q. Okay.

A. But this is probably the one I...

Q. Okay. And you posted that photo the day after their wedding ceremony?

A. Probably, yeah.

Q. And were they okay with you posting that, as well?

A. I -- I would assume that they were. I didn't ask them specifically about that. But with all the permission that I had about talking about the cake, it became clear to me that I could. It was my -- it was my cake and that I could...

Q. Did that become clear to you from your own observations or from the Complainants?

A. From my own observations.

Q. About -- where did you draw those observations from?

A. Just their -- their demeanor towards me, the fact that they really loved the cake. There was no information that was shared with me about, "Please don't publicize anything else

about this cake or about our wedding." They just -- to me, it's about -- at this point it was about my artistic expression and being able to share that.

Q. About "being able to share that" -- can you explain that? What do you mean about your artistic expression and how to share that?

A. Cakes are an artistic expression for me. And, as an artist, you want to be able to share that with the public and the community. And this was one of my artistic creations, and I wanted to share it with the public.

Q. So on that note, let's go back to Exhibit R-12, page 4 out of 5. And I'm going to read to you -- about halfway down the page -- it's part of the quote that you referenced earlier.

A. Mm-hmm.

Q. I'll just wait a second until everybody is on the same page.

So you were just telling us a second ago that cakes are an artistic expression for you, and you like the public to know what you are doing and what you are expressing, and on that line you said -- am I quoting correctly -- in this article you said, "It's all about the love and commitment these two people share. They want to declare that commitment in the company of their friends and family, and I'm proud that my cake will be a part of that celebration"; is that right?

A. Yeah.

Q. So you felt that your cake was part of the celebration?

A. Oh, yeah.

Q. It was a big part of the celebration?

A. Any cake is. It's either -- when someone is designing their wedding, it's dress and then cake. So, yeah, it's a big part in any wedding celebration.

Q. All right. I'm going to jump back to what we were talking about -- your post on Facebook. So you posted a photo of the cake on Facebook, and then you also posted kind of a commentary -- sort of your own commentary about it; is that right?

A. I usually will say something about the cake, yes.

Q. Okay. And this commentary was specifically about the -- kind of more of the facts of this case, letting everybody know that this -- who they were and what your cake was for and that, you know, it wasn't just a picture of a cake; it was kind of an explanation. Is that right?

A. Yeah, I'm sure it was.

Q. Okay. And, again, that was on your Facebook page, which was publicly viewable by anyone?

A. Yeah.

Q. And the Complainants were okay with that being up there?

A. Yes.

Q. Now, you mentioned on -- in your testimony a moment ago that you didn't give any discount for the cake that you made; is that right?

A. That's correct.

Q. Let's turn to Exhibit R-4. If we could all flip over to Exhibit R-4, page 1 -- I believe it is -- that was your intake sheet?

A. Yes.

Q. Are you there?

A. Mm-hmm. Sorry. Yes, I am.

Q. It looks like you charged a total price of $200 for the cake; is that correct?

A. That's correct.

Q. And does that price come from a per-serving cost?

A. Yes.

Q. Is it $4 per serving?

A. Yes. And at that time, that's what I was charging.

Q. So they had -- if you look above at the top there, it has "Number of People," and then in the blank it says "50 people."

A. Mm-hmm.

Q. Is that where we got the 200?

A. Yes.

Q. 50 times 4 is 200?

A. Yes.

Q. I'm just making it very clear. It probably sounds silly. Okay. So $200 was the base price of the cake?

A. Yes.

Q. You didn't charge them for any additional decoration fees or anything like that?

A. I didn't.

Q. Do you generally charge people just the base price for a cake, no matter what the decorations are?

A. I did at the time.

Q. There was no other --

A. No. I was pretty simple at the time.

Q. So if we look back at Exhibit R-4, page 5, that is a pretty distinctive looking cake. It looks like you spent a lot of time on that.

A. I did.

Q. Is that peacock fondant?

A. Yes.

Q. So you hand-created that peacock?

A. I did.

Q. And did you hand-paint those feathers?

A. I did.

Q. And that's not something you would normally charge anybody else anything extra for?

A. At the time, no.

Q. Wow.

A. Yeah, I do now.

Q. Rightfully so. Did it take you a long time to make all of those things?

A. It did.

Q. Yeah? How long do you think it took you?

A. You want hours?

Q. Sure.

A. Probably close to ten hours.

Q. All right. The last line of questioning here. You mentioned during your direct testimony about Rachel's demeanor during your first encounter.

A. Mm-hmm.

Q. You were able to talk with Rachel during your tasting, right?

A. I was.

Q. So was she crying the whole time? You said she was on the verge of tears. Was she crying the entire time?

A. She wasn't crying the entire time. She was crying and then not crying, and then -- it was -- the entire hour it was -- there was a box of Kleenex on the table.

Q. Off and on?

A. Yes.

Q. And when she started talking about the design, she sort of started getting into it again?

A. A little more animated, but it was -- it was through

the tears, yeah.

Q. And they appeared to be happy with the design of your cake?

A. Yeah, I think they -- she was excited about the possibility. She wasn't familiar with me. She had familiarity with Sweet Cakes and was excited about what they could do. I was a brand-new client -- or vendor. And so...

Q. Okay.

A. She wasn't familiar with my work, and I think, with that, there's always some trepidation.

Q. Sure. Just nervousness that maybe you are not going to do what she wants or --

A. Yeah, I'm sure, yeah.

Q. Okay. So you told us earlier that she started explaining the peacock design, and it was exciting for you to hear an idea that she wanted.

A. Mm-hmm.

Q. Did this sound like something that she had been thinking about for a while?

A. Yeah, it sounded like something she had been thinking about. I don't know about for a while, but it was certainly an idea that she had, yeah.

Q. And she definitely had the specifics, as she was telling you what she wanted?

A. Yes. But we also talked back and forth. So we came

to -- when she would give me an idea -- we collaborated. So the give and take and the back and forth -- like, this is what she was thinking of; I could put it in a design -- like, I sketched out a design, and we went back and forth, and I said, "Do you want this? Do you want it to look like this? Do you want the tail to swoop this way? Do you want the jewels to do this? Do you want the flowers to look like this?"

Q. So we are not talking about she came with a picture to you; she kind of gave you words, and then you turned that into some kind of art?

A. Exactly, yes.

MS. HARMON: Okay. No further questions for this witness, Your Honor.

ALJ: Redirect?

REDIRECT EXAMINATION

BY MS. CASEY:

Q. Do you regularly post pictures of cakes that you make on your Facebook page?

A. Yes.

Q. Why is that?

A. Because people are very visual consumers, and when they can see the quality of product, they are more likely to give me a call to find out if I can do a cake for them. It's -- it's part of doing business. It's part of showing what I can do

and what I have done, and that opens up a conversation for potential clients.

Q. At any point in time, from your first meeting with Rachel and Cheryl through, I guess, today, did Rachel or Laurel give you permission to talk -- to give out their personal information to the media?

A. They did not.

Q. Okay.

A. They told me specifically not to.

Q. Do you recall specifically that conversation that you had with them?

A. I don't recall the date. I remember very well that -- that the privacy was extremely important to them.

Q. Okay.

A. They were very concerned about their family.

Q. Okay.

A. And they -- it was important that -- that all the stuff that was going around this, that was happening around this did not affect their family life.

Q. Okay.

A. And I respect that, and anything and everything that had to do with the cake was about me and about Pastrygirl producing the cake for them. But their personal --

Q. You mean your media contact had to do with the cake --

A. Yes.

Q. -- and not the Complainants specifically?

A. Exactly.

MS. CASEY: Nothing further.

ALJ: I have one question. I don't know -- are you going to be introducing or offering any evidence at all about who this fellow "Duff" is, other than --

MS. CASEY: We do not have him as a witness.

ALJ: Good enough. I just have a quick question, then. If you look at R-12 page 4, it describes -- it says, "Celebrity Baker Duff Goldman, star of Food Network's 'Ace of Cakes,' has a team, Charm City Cakes in Baltimore and Los Angeles."

THE WITNESS: Mm-hmm.

ALJ: Do you know if this is an accurate description of who Duff is?

THE WITNESS: Uhm...

ALJ: I don't know if you do or not, but I'm just trying to figure out for my own self the significance.

THE WITNESS: I know Duff Goldman as a celebrity baker from the Food Network "Ace of Cakes." That's where I first heard of him was on the Food Network Channel, and his elaborate cakes -- everything from just beautiful tiered cakes to sculpted motorcycles and things like that -- I mean, he does, like, insane cakes.

ALJ: So he has a regular show, then?

A. I'm sorry. I didn't hear you again.
Q. How to best use this case.
A. How to best use this case?
Q. Yes.
A. I don't ever -- you are using the word "fight." And I don't like that word because we never really fought. We had disagreements at times, and that might have been one of them, but it was never, like, a fight.
Q. So it didn't affect your relationship?
A. No.
Q. Okay.
A. Laurie is like my sister. I would do anything for her, and that will never change, no matter what.
Q. Okay. Now, did you have a disagreement with Laurel and Rachel about whether they should pursue filing a claim with BOLI?
A. I -- a disagreement about whether or not they should? Are you referring to -- what exactly are you referring to?
Q. Whether they should file a complaint with the Bureau of Labor and Industries.
A. There was a point in time where BOLI was unsure on whether or not we should pursue the case right now or wait, just because of marriage equality in Oregon becoming a thing, and we were looking at the scope as a bigger whole. Because the whole reason of pursuing this case is to -- is to change these --

these behaviors, I guess you would say. So with this case we want to make a statement and set an example for the rest of Oregon and the rest of the country that these things are not okay.

I mean, there might have been conversations about whether or not -- about BOLI and related to pursuing the case, but then, again, I -- it was two years ago, and you are asking me to recall things that are super detailed, and I don't really remember.

Q. Okay. So you had specific discussions with Laurel and Rachel about pursuing this case for the purpose of publicity or pursuing change in Oregon?

A. Not for publicity because publicity has nothing to do with it. We all could care less about who knows about this, and, as a publicity stunt, it's not anything like that. It's about something wrong was done. The actions of that wrongdoing need to have consequences, and those consequences are going to set precedents for every other case that is just like this that's going on in the country right now.

Q. Okay. So in that vein kind of, let's talk about the publicity around this case.

MS. GADDIS: I will object to that, Your Honor. That's outside the scope. A line of questioning about publicity is outside the scope of direct.

ALJ: Hang on a second, please.

Q. Maybe gay rights organizations or something of that nature.

A. I mean, there was a Facebook group that was formed in support. Duff from, I think it's -- I can't remember -- Duff's Wedding Cakes or something like that -- reached out and --

Q. Do you recall -- I'm sorry. I didn't mean to cut you off.

A. And that's pretty much the extent of what I know.

Q. Do you recall Basic Rights Oregon reaching out to Laurel and Rachel?

A. Basic Rights Oregon? Yes, I do.

Q. Okay.

A. Can I --

Q. You talked --

A. Can I clarify something real quick?

Q. What are you wishing to clarify?

A. BOLI and Basic Rights Oregon. I think I kind of put the two together.

Q. Okay. Sure. Go ahead.

A. So Basic Rights Oregon was the organization that me and Laurel and the rest of the family had a conversation about, about pursuing this case, if I remember correctly.

Q. Okay. Thank you. I was pretty confused. So thank you for that clarification.

A. Yeah. Sorry about that.

EXCERPT OF RECORD

EXHIBIT V

wedding, and I'd really want to know everything about their wedding -- the details -- you know, the dress, the decorations, everything. Because when it came time to design the cake, I wanted to kind of have a full scope of what their wedding looked like so that way their cake could match perfectly with their day.

Q. And when you talk about the cake matching the other elements of the wedding, what does -- can you be more specific about what that means to you?

A. Can you say that again? I'm sorry.

Q. In other words, why is it important for you to know about dress and flowers and the other stuff that you described in terms of the design of a wedding cake?

A. Well, for me personally it's, you know, I -- I just -- I want to know everything. You know, their cake is their -- it's their centerpiece. It's -- you know, it's where the bride and groom stand in front of their guests and usually do the traditional, you know, feeding each other their cake. You know, it's just -- it's just really important to me. I -- I just want everything to, like, come together and just be perfect for them.

Q. So once you have all that information about the wedding, how is that reflected in the design of a wedding cake?

A. Well, the way that I do it is, like, I sit down with them, and I kind of have them give me ideas. We kind of bounce back off each other, and, you know, they tell me what they like.

ALJ: All right. So are you going to be asking more questions about R-1?

MR. GREY: I don't believe so.

ALJ: All right.

BY MR. GREY:

Q. Earlier in the hearing, you were present for the testimony of Laura Widener; is that correct?

A. Mm-hmm.

Q. You have to answer out loud.

A. Yes, sorry.

Q. Okay. And she described the process that she goes through in terms of creating a cake and designing a cake and so on; is that right?

A. Absolutely.

Q. Do you agree basically with the process that she described?

A. Oh, absolutely.

Q. And is that similar to the process that you went through?

A. Yeah.

Q. And it's your testimony that sometimes you make drawings if the cake is more complicated, and sometimes you don't if it's simpler?

A. Mm-hmm.

Q. Is that a fair summary of your --

EXCERPT OF RECORD

EXHIBIT W

You can let those other folks back in now.

(Audience returns to the room.)

MR. GREY: As I begin the Kleins' closing, you will recall I started with a very simple question about what this case is really about, and that is: How did a very simple, respectful conversation on January 17th of 2013 turn into such a high-profile case? And you will recall that I laid out that there were really two very different views of the case and the people who are part of the case.

I quoted from Martin Luther, who says, "A shoemaker is not a Christian because he puts crosses on shoes but because he makes really good shoes." And then I contrasted that with what I call the NIKE philosophy, "Just do it." And I raised the question about whether or not the subject at hand is really "just a cake," quote, unquote, or whether there is some significance to it far beyond that.

And, really, the difference between the parties in their approach to this case and the evidence before the forum is whether or not creative talents and energies and abilities can be exercised and protected, as the law allows, or whether they can be compelled in some fashion.

And you will recall that when Laura Widener, from Pastrygirl, testified, she went into significant detail about the process whereby she creates cakes. And it was remarkably consistent with the evidence that's been presented to the forum

by Melissa Klein and others. Now, what that tells us is that creating a cake -- to use Laura Widener's expression -- is artistic expression that's entitled to protection, and what we have is both sides basically presenting testimony to the forum that shows agreement on that fundamental point. I would just say, with all due respect to the forum, it shows that summary judgment on that point was improvidently granted a couple of months ago.

So another answer to the question that I posed about how this conversation turned into what it did was really offered by the Agency's own witness, Aaron Cryer, when he testified last Friday, the 13th of March. And what he testified to, as the forum will recall, is that this was -- this case was part of an orchestrated effort by the Complainants, by him, Basic Rights Oregon, and perhaps other people at the Agency about, quote, "how best to use this case," closed quote, to advance the LGBT agenda in Oregon, including overturning Oregon's constitutional Defense of Marriage Act, which is set forth in Article XV, Section 5a.

And it's important for the forum to keep in focus that at the time the events of this case started, Article XV, Section 5a, was, in fact, the law of the state of Oregon, and, in fact, it was declared to be the official policy of the state of Oregon.

So there are a number of things, which I'll point

out, in other parts of the testimony that really come into sharp relief when we evaluate them against the testimony presented by Aaron Cryer. And what that all adds up to fundamentally, in terms of the decision before the forum, is the evidence itself shows that the Complainants and the Agency agree with the Kleins, that it's always been about the event; it's never been about the Complainants' sexual orientation.

And there was testimony about the prior instance of the Complainants' buying a cake for Cheryl McPherson back in November of 2010, and you'll recall that that was brought up back at the summary judgment stage, and the forum -- unwisely, I believe -- decided at that point in time that that was not -- that was not pertinent to the issues at hand, and yet what we see is in the testimony that was presented here, the Complainants ordered that cake; the Complainants paid for that cake. And even if that doesn't rule out categorically that the prior incident of -- instance of non-discrimination -- that doesn't necessarily rule out some alleged discrimination here, but it certainly is indicative and supports what the Kleins have said all along, and that is it's about the event for which the cake is intended, not about who's asking for it. And that is probative of the damages and the evidence before the forum.

So as we look at all of that, the BOLI prosecutors have laid out what they say was really kind of a designed action plan on the part of the Kleins to turn this into a -- something

more than a simple denial of a cake. In reality, what the evidence shows is that the Kleins had no such intention and that there was, in fact, a design, but it was coming from the Complainants and the people supporting them. So, in that respect, much of the evidence that's been presented to you actually supports the Kleins' version of what happened rather than the presentation by the BOLI prosecutors.

I'd like to spend a few moments talking about the standards for damages, and I'll reiterate a little bit of what I said in opening -- and I'm not trying to insult the forum's intelligence because you understand these things -- but just to make clear, when it comes to awarding damages, the forum's authority is not unlimited and there are standards to guide it.

First of all, the statutory standard is that the damages have to be reasonably calculated to eliminate the effects of the unlawful practice. So what does that mean? Well, that doesn't mean any and all effects for any evidence that's presented to you. It means some sort of reasonable calculation, and it has to be tied to the effects that can really be traceable to the event itself.

And it's the Agency's responsibility to carry their burden of proof to present evidence of cognizable damages. You are not in a position where you can presume that. And, in fact, there is no obligation to award any damages if you determine that you haven't been presented with credible evidence

of the damages.

And I would reiterate some cases that address these kinds of questions. The amount that is to be awarded depends upon proof from each claimant. That's Barrett Business Services, 22 BOLI 77 from 2007.

"An aggrieved person's testimony may be sufficient to support a claim for mental distress damages, but with this caveat: If that person's testimony is believed." And that's the C.C. Slaughters case, 26 BOLI 186, (2005). And I will come back to that.

The forum is to consider the type of conduct in its duration, its frequency, and its severity -- referring to the Blachana decision, 32 BOLI 220 from (2013). And in that respect, what we are really talking about is what happened, how often did it happen, over what period of time did it happen. I would submit that many of the cases that Ms. Gaddis referenced in her closing are, in fact, instances where there was a protracted course of events, not a single event.

The forum must limit its award for mental distress to the direct result of the unlawful practice. And that comes from the Baker Truck Corral case, 8 BOLI 118, and H.R. Satterfield, 22 BOLI 198.

The forum must also consider whether there are other factors in Complainants' life that are unrelated to the unlawful practice that may have contributed to the mental

distress damages. And that's ARG Enterprises, 19 BOLI 116.

Now, Ms. Gaddis made reference to the fact that the Kleins accept the Complainants as they find them. Well, that's fine, but much of what they talked about are factors that were unknown to the Kleins and for which the Agency even acknowledges the Kleins bear no responsibility.

Mental distress damages are not recognized for the stress inherent in the litigation process, and if anything has come through in the record, this process has been hard on everybody involved. There's lots of evidence of that. And that comes from the Katari case, 16 BOLI 149 from 1997, and the Oregon Supreme Court's decision in School District v. Nilsen, 271 Or 461.

And the final thing I'll say on that is that damages cannot be awarded for stress due to the attitudes of others toward the pending complaint. Those are not compensable. And the reason they are not compensable is they have to be tied to the Respondents in some fashion, and that comes from the PGE case, 7 BOLI 253. In other words, damages for the reactions of family members and their attitudes, sort of the factors that are unique to each particular family, are not -- are not cognizable.

Now, the forum has heard a lot of evidence and a lot of testimony in this case, but what's really clear is that there are several exhibits which really have an outsized sort of impact on everything and help to define how the evidence, as a

whole, should be viewed.

And one of them is the Department of Justice Complaint, Exhibit R-3. I believe it's marked as A-1 in the Agency exhibits. And what's interesting about Exhibit R-3 -- and I'll talk about this a little bit more -- is the evidence that was presented about how it was created and what happened with it.

For one thing, it is clear that it was done either late the night of the cake-tasting or early the next day. We know that it was prepared by Laurel Bowman-Cryer. We know that she created the narrative that is on page 3 of Exhibit R-3. And we know it contains not only her address and telephone number and e-mail address, but it also includes that information for Sweet Cakes by Melissa but without an e-mail address.

And the reason that R-3 is so significant in this case is it represents the first statement to anyone -- other than the parties and the participants in this proceeding -- about what happened on January 17th. And it didn't come from the Kleins.

The other thing that is really significant here is Exhibit R-32, and I'll talk more about this a little bit later, but there are several key things about Exhibit R-32 that should frame the forum's evaluation of this evidence.

First of all, we know from looking at page 2 of Exhibit R-32 that it was generated on January 17, 2013, at

8:22 p.m. And we know also from looking at page 2 that that e-mail was not provided to Complainants' counsel until March 6, 2015, at 10:33 a.m. And it was subsequently provided to the BOLI prosecutors that same day, and it was delivered to Respondents' counsel on March 6, 2015, at 2:57 p.m.

Now, aside from the fact that the evidence was withheld until way after discovery was completed, way after summary judgment had been argued, after case summaries had been submitted, and witness and exhibit lists had been submitted, what's really telling about Exhibit R-32 was found on page 4, and it's repeated again on page 5. And this reflects what the author thought and believed on January 17, 2013, and it says, "This is twice in this wedding process that we have faced this kind of bigotry."

Now, what that makes clear is that there was another instance before January 17 that the author considered to be a denial of service that was bigotry before they ever came to the Kleins. And this is information that was withheld not only from the Kleins and their lawyers, it was apparently withheld from the BOLI prosecutors; it was apparently withheld even from the Complainants' own lawyer. And it clearly shows that there was something else going on that was on the radar screen at that time that impacts the whole question of what damages proceeded from what. And I will come back to talking about that in a few moments.

The other sort of key exhibits that I'll sort of lump together as a package relates to Exhibit A-5, which is what the Respondents have referred to as the "fake post." And Exhibits R-37 and R-39 through 41 were presented to the forum to show, in fact, that A-5 was a fake, and, in fact, it would be the Kleins' contention that it was known to be a fake at the time that it was presented to the forum.

So what evidence is there to support any kind of legally cognizable damages that relate back to January 17 of 2013? Again, it's the Agency's burden to prove the damages and to show the causation. And if you'll recall back to opening statement, I encouraged the forum at that time to consider whether or not the forum was hearing a consistent story throughout these proceedings, not only from the Complainants but also from their supporting witnesses. And if you reflect on the evidence that's been presented to you, it's pretty clear that, in fact, there has not been a consistent story told by the Complainants throughout, and even their own stories don't match with the witnesses' that they presented in their case.

So let's talk a little bit about a summary of the damages that the Complainants have talked about. Rachel Bowman-Cryer talked about being upset at being denied a cake, its impact on her relationship with her mother, family conflicts that existed before this event and which continued after, a history -- a long history of discrimination against homosexuals

in the United States -- mental distress from media and social media, having to leave town to escape media, the impact on the relationship with children during the fostering and adoption process.

What did Laurel Bowman-Cryer talk about? She described being mad at being denied the cake; a lot of mental distress from media and social media; physical injuries, which until this morning, were thought to be attributable to January 17, 2013; the impact on Rachel Bowman-Cryer, which she personalized to herself; having to leave town to escape media attention; and the impact on the relationship with the kids during the fostering and adoption process.

So before getting into the weeds, I'd like to just look at what the evidence shows was the timeline of what events happened in close proximity to one another.

So we know that the cake-tasting occurred on January 17th of 2013. There are a number of exhibits that confirm that, and all the testimony confirms that. We know that that same day Exhibit R-32, which was the January 17th e-mail that I just referenced, was sent to Lauren at The West End Ballroom saying, "This is twice in this wedding process that we have faced this kind of bigotry." That happened the day of the event.

And we know from the evidence that either late that day or early the following day that the Department of

Justice Complaint was filed. And we know that Cheryl McPherson -- from not only the exhibits but also from her own testimony -- posted on several websites and posted reviews. So that all took place within a 24-hour period of time, the day of the tasting.

So let's skip forward a few -- a couple of weeks. On January 1, 2013, a whole bunch of things happened. The Mac! Mac & Cheesery Facebook post happened, which is Exhibit R-6. And the evidence shows it was "Liked" by both Complainants and by Cheryl McPherson.

That same day Laurel Bowman-Cryer seeks medical treatment.

On February 4, we know from Exhibit R-8 that the "Huffington Post" Facebook posts begin talking about the case. And we know somewhere around that time, based on Exhibit R-8, that Duff Goldman of "Ace of Cakes" offered a free cake to the Complainants.

On February 6, according to Exhibit R-9 the Boycott Sweet Cakes Facebook posts begin.

We know from Exhibit R-10 that the Kleins responded to the Oregon Department of Justice complaint on February 8th, which happened to be the same day that Mr. Thompson put out a press release, which is marked as Exhibit R-11 and Agency Exhibit A-7. And we know that that day in Exhibit R-12, Cheryl McPherson made some posts regarding a

"PQ Monthly" Facebook post.

We know from Exhibit R-9 that the Boycott Sweet Cakes protest outside the shop began on February 9.

And we know that on February 12th, from Exhibit R-15, that the Department of Justice notified the media -- not the parties -- the media -- that they were closing their file because the case was being referred elsewhere.

We know from Exhibit R-16, which is also Exhibit A-8, that on February 15th, Rachel Bowman-Cryer filed her Public Accommodation Discrimination Questionnaire.

And we know from Exhibit R-17 that the following day the Commissioner of Labor and Industries, Brad Avakian, began making public statements.

So if you look from January -- or from February 1 to February 16, there are a whole bunch of public events that are taking place, almost none of which are attributable to the Kleins.

And what was the evidence about what happened immediately thereafter? Well, if you look at Exhibit 33, page 5, that's when it was alleged that the Complainants took a trip to Seattle because they had to get away. Now, I'll talk about the conflicting evidence about that trip in a moment. But what's clear is most of what I just recited is attention that was generated in the media -- not by the Kleins -- by other people, either the Complainants themselves, members of their

family, or people who were supporting them.

So, then, let's fast-forward a few months. On August 8 of 2013 -- and I don't remember exactly which Agency exhibit this was -- but Rachel Bowman-Cryer's formal complaint was filed.

We know from Exhibit R-34 that somewhere about a week later BOLI put out a press release, which is Exhibit R-20, and we know that the Commissioner made statements to the media, which are in Exhibit R-34.

So during that week period of time, there is the filing of the complaint, a BOLI press release, and public statements about the case from the Commissioner -- again, none of which is attributable to the Complainants -- or to the Kleins.

And then we fast-forward to January 15th of 2014, when BOLI issued its notices of substantial evidence determination, and two days later put out a press release, which is Exhibit R-24. Now, it goes without saying that the Kleins are not responsible for either one of those.

And the last time period I'd like to highlight in terms of events that happened close together is that we know on May 19th of 2014, Judge Michael McShane issued the Geiger v. Kitzhaber decision, which at that point ruled Article XV, Section 5a, of the Oregon Constitution unconstitutional.

Four days later, from Exhibit R-19, we know that

the Complainants got married. And on June 4, 2014, we know the Formal Charges were filed in this case. So, again, what that shows is that there were things happening that generated attention and resulted in Formal Charges in a close period of time, none of which is attributable to the Kleins.

So just to look at that progression, what we can tell is that the things that Complainants were talking about where they felt they needed to take some action or that there had been some sort of media attention which they attributed to the Kleins actually is attributable to everybody except the Kleins, and that's before we even get to the questions about whether the trips were necessary, whether they were preplanned, or any of that.

And I think in evaluating the damages, again, it's important to cut through all of the testimony about the tears and the anger and all of that that you heard at length to see what the Complainants said at different times in what, I would argue, are unguarded moments.

For example, in her testimony Rachel Bowman-Cryer said, "Melissa Klein should have just told us at the bridal show that they wouldn't do the cake." Now, is she suggesting that somehow or another having a conversation at the Oregon Convention Center instead of in their shop in Gresham would have made this okay and this case would have never happened? We don't know. She never explained that. But she said that's what

she wished would have happened, that she'd just heard it at a different time.

You'll also recall testimony from Laurel Bowman-Cryer where she vehemently denied that they are suing the Kleins. Well, if that's the case, why are we talking about damages? I don't understand that testimony in light of these proceedings.

Again, referring to what Rachel Bowman-Cryer said in her testimony, quote, "Being denied is just a small part of a much larger picture," closed quote. That came from the witness stand right there. And after we heard her brother, Aaron Klein [sic], testify, I think that cast that statement in a much different light.

And we also know that Laurel Bowman-Cryer testified she wanted the Department of Justice complaint to be public because she didn't want other homosexual couples to be denied service by Sweet Cakes. So clearly her intention at the time that she did it was to make sure that it was out there. And, again, we can see that even in her investigative summary that she provided to the Agency, which is Exhibit R-23.

So let me address for a moment the infamous "abomination" statement. First of all, it's important to keep in mind that neither of the Complainants were present and heard it. Secondly, we know that the only two people who were present at the time it was supposedly uttered were Aaron Klein and

Cheryl McPherson. And you know what, the evidence shows that there's not even agreement that that's what was said. Cheryl McPherson says one thing. Aaron Klein says all he did was quote a scripture verse; he never, ever, ever called Cheryl McPherson's children an "abomination." And, in fact, if the forum will review the briefing on summary judgment and its decision on summary judgment, you determined at that point in time, correctly, that Aaron Klein never said that.

And, again, I'd like to go back to Exhibit R-32. It is really telling that the Complainants tried to conceal evidence of Exhibit R-32. Now, let's talk for a moment about what happened with Exhibit 32. Because the testimony on this was pretty interesting.

We were told during the presentation of testimony by the Complainants that Rachel Bowman-Cryer was so torn up by the denial of services that she went to bed and she cried for days. And yet, if you listen to the testimony of Laurel Bowman-Cryer, she denied that she wrote the e-mail to Lauren at The West End Theater -- or The West End Ballroom on January 17th. So what we are left to conclude is either Laurel Bowman-Cryer wasn't in bed or -- either Rachel Bowman-Cryer was not in bed that day, as testified to, or Laurel Bowman-Cryer was not being truthful at the time she said she didn't write it or we are forced to conclude that somehow or another that e-mail was generated spontaneously.

Now, it's up to the forum to determine how to consider that sort of evidence. But this is just by looking at the Complainants' own evidence. And the reason why it's significant that they tried to conceal the existence of Exhibit R-32 is they tried to say in their testimony that they were satisfied with the response from a caterer that there was a scheduling conflict. But that is not what they thought on January 17th of 2013 because they said, "This is twice in this wedding process we have faced this kind of bigotry." So what that shows is the Complainants themselves were trying to conceal evidence from the forum and from all of the lawyers and the other participants in this proceeding.

They didn't want to acknowledge that there's some other incident previously undisclosed that may actually be part of what they are complaining about and trying to attribute to the Kleins alone.

And we also need to keep in mind that it's undisputed that Laurel Bowman-Cryer wasn't present at the bridal show. So she has -- wasn't part of a conversation with Melissa Klein that day, had nothing to do with Aaron Klein on January 17th, and even when she filed R-3 with the Oregon Department of Justice, here's part of the narrative which she said that she wrote: "Today, January 17, 2013, we went for our cake-tasting."

Now, we know from all the evidence that she didn't go for the cake-tasting. So was she speaking metaphorically

when she said, "We went to the cake-tasting?" Is that what happened here? She also said, trying to explain that when it came up in cross-examination, "Well, I said 'we' because," quote, "I was there in spirit in the room." Now, that may or may not be true. It may or may not be metaphorical. But that doesn't explain a statement in a public record that she filed with the Oregon Department of Justice.

Let's talk for a moment about the history of family conflict for Rachel Bowman-Cryer. Now, that's -- it's unfortunate that there is family conflict. That's something that's a part of life, but it's something that we all wish we didn't have to deal with. But a lot of what she talked about was before January 17, 2013, and family members' disapproval of her homosexuality and her decision to leave Texas -- well, that's not compensable. After the date of the cake-tasting on January 17, 2013, there was testimony about the disapproval of some of those other family members about whether to pursue this case and its potential impact on the Kleins. Again, that's not compensable.

Let's talk about all of the media and social media coverage. Now, as I've already outlined, a lot of what happened in the early stages is attributable to either the Complainants or their family members or their supporters. So what the record shows is that the Complainants sowed the wind, and now they are complaining about reaping the whirlwind. If they are bleeding

from media wounds, those wounds are self-inflicted -- at least a lot of them. That's what the law calls "avoidable consequences." Again, that's not compensable.

And don't forget that the media and social media took on a life of its own, which also impacted the Kleins. So, again, going back to the whole design thing and that the Kleins were looking for an opportunity to make this into a big deal -- well, they testified yesterday to the impacts on them, which pretty clearly shows they are not going to willingly set something off that they know is going to cause problems for them.

It's clear from all of the evidence before the forum that the Complainants were the first ones to go public. Even their own representatives and the Agency then put out press releases, and the only evidence we have in the early stages of this is Aaron Klein in exhibit -- I believe it was A-4 -- posting the DOJ complaint on his Facebook page, which at that time, according to his testimony, had 17 friends. And the testimony further was -- and this is undisputed -- it was only up for a matter of hours before Facebook shut down his site and made him take it off.

Now, is it really a bad deal that he put a DOJ complaint on his Facebook page? Well, first of all, we know from looking at Exhibit R-3 that it says right on it it's a public record. And he posted it as it was. Who put all that

information in there? Well, it wasn't him. And there were a lot of explanations from Laurel Bowman-Cryer about how all that information got in there, most of which doesn't really make sense.

So proceeding on from her use of "we," based on she was there in spirit in the room, she made several different statements about how she prepared the DOJ complaint. Initially she said she filled in the narrative, which is on page 3, and I believe a date, and a $250 amount. Then she said the rest of it auto-filled. Then she said she clicked on something that supposedly auto-filled.

Now, you have to ask yourself, is it reasonable to assume under either of those scenarios that it would have auto-filled the personal information for Sweet Cakes by Melissa and their business address and telephone number? That story doesn't even make sense.

We also know that the same day that that happened, the day of the tasting, by her own admission Cheryl McPherson was posting on websites. And then there was testimony by Rachel Bowman-Cryer that the whole reason that Paul Thompson put out the press release -- which is, I believe, R-11 -- was to make sure there was accurate information out there. Well, up to that point what was the information that was out there? The DOJ complaint, for one thing. So is she saying, well, that wasn't accurate? I'm not sure.

So if you take all of this, then you say, "What does the evidence actually show?" -- not what people infer, not what people think -- but "What does the evidence show about who started all this media stuff and who perpetuated it?"

So -- and I would also say that to the extent that the Agency would argue that media coverage is compensable, then anybody who reported on this case, posted on this case, made comments about this case, or said anything in public would also be liable to the Complainants. That can't be the law; it can't be the grounds for a finding by this forum.

So let's talk about causation a little bit. Again, this is the Agency's burden to carry. It's not up to the Kleins to disprove causation; it's up to the Agency to prove it.

So, again, what is it that the Complainants themselves said in some of their statements? Rachel Bowman-Cryer says her fear for her safety was because of a, quote, "long history of homosexual persecution in the United States." Not denial of services, not being denied a cake, a long history of homosexual persecution in the United States.

We have Exhibit R-32, which I won't belabor any more, but it's pretty clear what it says is there was another event -- which the Complainants now try to minimize -- which at that point in time they considered to be an instance of being denied services, just like they are complaining about the

Kleins. Have they brought any action against whoever did that? No. In the face of their own testimony about the existence of that other event, which they tried to keep quiet until four days before the hearing started, how much of what they claim is attributable to the Kleins may, in fact, be attributable to something else that they didn't want to disclose until four days before hearing.

What's critical there is not what they say now, looking back on that time. What's critical is what they themselves expressed they believed back on January 17th of 2013, combined with the fact they tried to hide the ball from everybody.

Let's talk about the trip expenses. Now, initially when this case started, they were trying to collect economic damages for those trip expenses, and ultimately that was withdrawn. Well, why it was withdrawn kind of became clear as this proceeding developed. Initially, they said it was to get away from the media. That's in Exhibit R-33, pages 5 to 8. And both of them testified under oath in their depositions and to some degree here that they took those trips to get away from the media.

However, what came out in the evidence is that Laurel Bowman-Cryer did not go on trip No. 1 on February 17th to Seattle. And Rachel Bowman-Cryer in her testimony said, suggesting otherwise was, quote, "mistaken." Well, then Rachel

Bowman-Cryer told us that the trips required planning in advance before DHS would allow them to take the children out of state. And there's even evidence to indicate that the trip was planned certainly by early February.

Then Rachel Bowman-Cryer says, "You know, now that I look back on it, one of the trips was for Aaron Cryer to audition and had nothing to do with this." And then in R-38, one of the discovery exhibits, talks about the date of another one of the Seattle trips, Rachel Bowman-Cryer says she was mistaken about the date. So when we look at the trip expenses, the story doesn't hold together.

You have heard a lot of evidence about other stressors in their lives. Was it attributable to not getting a cake on January 17th? No. Was it attributable to the media coverage which they started? No. Again, looking at their own evidence, Exhibit R-30, page 3, Laurel Bowman-Cryer said -- metaphorically perhaps -- the day after the cake-tasting they were moving on. That is indicative of how severe this was.

We know from the evidence that they got a cheaper cake, and they actually got a free cake from Duff Goldman. There was testimony presented about them receiving a cake for $200 from Pastrygirl and Laura Widener. So they paid $200 for that. And the Kleins testified, based on the information on Exhibit R-4, they would have charged more than $600 for that cake.

The other stressors in the record that I haven't really talked a lot about is during the time all of this was happening, the Complainants were trying to foster and adopt two kids with special needs. There was testimony about conflict from birth grandparents over that adoption. And we know from the records that were presented that there were other physical injuries that were going on at the same time. We know there was family conflict that existed before and continued after. We know that neither of them sought any kind of professional treatment. So they don't get to claim damages because a lot of the damages they complain about are things that they caused, and that means that those are not compensable; they are not the Kleins' responsibility.

Again, it's important to keep in mind the only public statements made early on in this whole process was Aaron Klein posting a public record for a few hours on his Facebook page with 17 friends. There is no explanation offered and no evidence before you of how things took off from there, other than the evidence presented by the Complainants themselves and the Agency, showing that they contributed to a media frenzy.

In the last few minutes, I'm not going to really belabor a lot of the evidence about the credibility of the Complainants. You can, under the law, award mental distress damages based on their testimony without a whole lot else, but only if the evidence that you are presented shows that they are

credible. And there's all kinds of things that I have already covered which show that the Complainants in this case are not credible.

So, in wrapping up, ORS 659A.850 authorizes you to award damages to eliminate the effects of the denial of services but not to eliminate the effects of long-standing family conflicts, to eliminate the effects of media and social media attention that the Complainants and their supporters initiated and perpetuated, to eliminate the effects of media and social media that even came from the Agency and the Commissioner. We know, from a damages standpoint, that the Complainants received a cheaper cake and got a freebie besides with publicity attending that.

At most, we know that some of the damages that Laurel Bowman-Cryer attributes to the Kleins are because somebody else -- not him -- said what supposedly he said, a lot of which he denies. We know that Rachel Bowman-Cryer says that being denied services was just a small part of a bigger overall picture. And we know Aaron Klein -- or Aaron Cryer testifying about serious consideration of this case being all about a bigger agenda, and the forum can look back at his testimony and see for itself.

So without any credible evidence or consistent evidence or evidence that holds up over time from the Complainants and other people supporting them, without any

evidence of compensable damages that is reasonably related to denial of a cake on January 17th of 2013, the Agency has failed to meet its burden; damages are not awardable here; and the forum should make no award of damages to the Complainants. Thank you.

ALJ: Thank you, Mr. Grey.

So it's 10:15. Let's take that 30-minute break, and you can come back and have your 15 minutes.

MS. GADDIS: Thank you, Your Honor.

ALJ: We are off the record.

(BRIEF RECESS: 10:16 a.m. to 10:48 a.m.)

ALJ: Okay, let's go back on the record. Ms. Gaddis, you have got 15 minutes for rebuttal.

MS. GADDIS: Just so you know, I will be alluding to medical records. I will not be talking specifics. So I don't think we need folks to leave the room. I just wanted you to be aware, in case you were more comfortable in their leaving.

ALJ: Alluding to them is fine, as long as you are not discussing the specific facts represented in those records.

Okay. Go.

MS. GADDIS: Addressing the medical records first, we would urge the forum to give them the weight they deserve. We offered and presented evidence on them. We also took testimony that we think is fairly obvious. Laurel Bowman-Cryer addressed inconsistencies during her -- perceived

APPENDIX

EXHIBIT X

FILED July 17, 2015 11:52 AM
Appellate Court Records

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

MELISSA ELAINE KLEIN, dba SWEETCAKES BY MELISSA,

And

AARON WAYNE KLEIN, dba SWEETCAKES BY MELISSA, and, in the alternative, individually as an aider and abettor under ORS 659A.406,

Petitioner,

v.

BUREAU OF LABOR AND INDUSTRIES OF THE STATE OF OREGON,

Respondent.

Bureau of Labor and Industries of the State of Oregon

Agency Case Nos. 44-14 & 45-14

CA

PETITION FOR JUDICIAL REVIEW

Petitioners seek judicial review of the final order of the Bureau of Labor and Industries in consolidated cases, case numbers 44-14 & 45-14 dated July 2, 2015. The Final Order was mailed to Petitioners' attorneys on July 2, 2015. Petitioners hereby state that this petition challenges the constitutionality of ORS 659A.403, ORS 659A.406, ORS 659A.409, ORS 659A.800, ORS 659A.850, and ORS 183.425.

//

Petitioner(s)	Respondent(s)
MELISSA ELAINE KLEIN, dba SWEETCAKES BY MELISSA,	BUREAU OF LABOR AND INDUSTRIES OF THE STATE OF OREGON
And	
AARON WAYNE KLEIN, dba SWEETCAKES BY MELISSA, and, in The alternative, individually as an aider and abettor under ORS 659A.406.	

The name, bar number, address, telephone number, and e-mail address of the attorney(s) for each party represented by an attorney is:

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The name, address, and telephone number of each self-represented party is:

None.

A. The nature of the order for which review is sought is a consolidated Final Order from Brad Avakian, Commissioner of the Bureau of Labor and Industries titled "FINDINGS OF FACT, ULTIMATE FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION, ORDER". A copy of this Final Order is attached.

B. Petitioner was a party to the administrative proceeding which resulted in the order for which review is sought.

C. Petitioner is not willing to stipulate that the agency record may be shortened unless such shorting is reasonable and Petitioner is given notice of the parts of the record being shortened.

DATED this 17th day of July, 2015.

/s/ Tyler Smith
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CERTIFICATE OF SERVICE

I certify that on the 17th day of July, 2015, I caused a true copy of the PETITION FOR JUDICIAL REVIEW to be served on the following parties at the addresses set forth below:

State Agency and Address of those Served:

Bureau of Labor and Industries
Contested Case Coordinator
1045 State Office Building
800 NE Oregon Street
Portland, Or 97232

Attorney General of the State of Oregon
Office of the Solicitor General
400 Justice Building
1162 Court Street NE
Salem, OR 97301

Department of Justice
1162 Court Street NE
Salem, Oregon 97301-4096

Service was made by eFiling, and sent by certified U.S. Mail.

DATED this 17th day of July, 2015.

/s/ Tyler Smith

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Attorneys for Petitioners

CERTIFICATE OF FILING

I certify that on the 17th day of July, 2015, I filed the original of the PETITION FOR JUDICIAL REVIEW with the Appellate Court Administrator by eFiling:

Appellate Court Administrator
Supreme Court Building
Appellate Court Records Section
1163 State Street
Salem, OR 97301-2563

DATED this 17th day of July, 2015.

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APPENDIX

EXHIBIT Y

CHARM CITY CAKES

A LITTLE ABOUT US

Chef Duff Goldman founded Charm City Cakes in 2002, when demand for his extraordinary cake creations required him to fling off the oppression of his day job and follow his dream of being his own boss. Duff's success came quickly due to his fearless attitude, unsinkable positive mentality, and passion for pushing the envelope. As the business grew, he brought together a team of exceptionally talented artists and talent that broadened Charm City Cakes' portfolio and grew into one big happy cakemaking family.

Our mission is to create the world's most exquisite cakes. Our inspiration comes from everywhere: art, fashion, fabric, furniture, architecture, landscapes, science, music, and history. Most of all, our inspiration comes from each one of our incredible clients. Every cake we create is custom made from concept to consumption and is a completely original piece of edible art. If you can imagine it, we can create it.



Mary Smith

Artist/Director of Class Programming

MARY SMITH

X

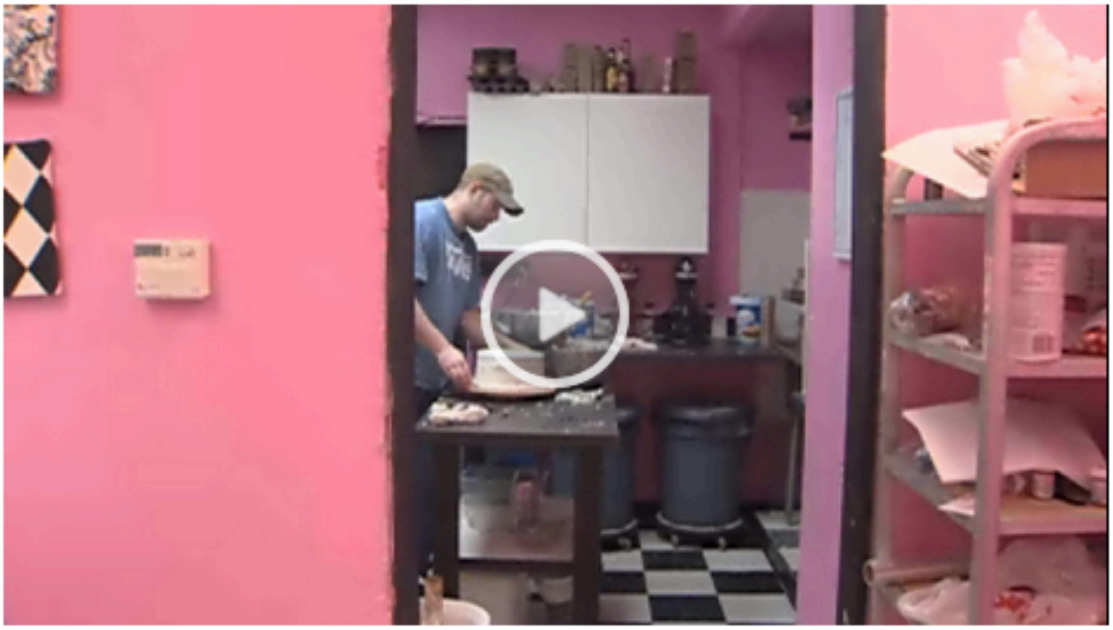
Artist/Director of Class Programming

Born on a hot summer's day in Albany, NY, Mary has been creating ruckus, mayhem and small brush fires since 1979. After Duff discovered Mary in 2005, she grew into an expert cake designer and decorator for CCC. Mary maintains a twitter account, @marydesmith, where she posts about her cats, bands, and general cakery. If she weren't an artist at CCC, her dream job would be either a Broadway choreographer, or merch girl for a touring band. An avid trivia buff, Mary can name every US president in chronological order, and she is also an air saxophonist of the highest caliber.

APPENDIX

EXHIBIT Z

Free wedding cake offer for Ore. gay couple



by Mike Benner & Erica Heartquist, KGW Staff

Posted on February 5, 2013 at 5:47 AM
Updated Tuesday, Feb 5 at 7:00 PM

GRESHAM, Ore -- The Oregon Department of Justice is looking into a complaint that a Gresham bakery refused to make a wedding cake for a same-sex marriage.

Related:

- Gresham bakery denies discrimination
- Gresham same-sex cake order stirs debate

Meantime, celebrity baker **Duff Goldman** has offered to make the couple a free cake.

The lesbian couple's story got national attention and the well-known Baltimore baker with the TV show, "Ace of Cakes" offered to make them a cake for free, then even ship it at no charge, according to a **report in the Huffington Post** Monday.

The incident began on Jan. 17 when a mother and daughter showed up at Sweet Cakes by Melissa looking for the perfect wedding cake.

"My first question is what's the wedding date," said owner Aaron Klein. "My next question is bride and groom's name ... the girl giggled a little bit and said it's two brides."

Klein apologized to the women and told them he and his wife do not make cakes for same-sex marriages. Klein said the women were disgusted and walked out.

"I believe that marriage is a religious institution ordained by God," said Klein. "A man should leave his mother and father and cling to his wife ... that to me is the beginning of marriage."

At the advice of their attorney, the women are not speaking to the media, but they have plenty of support.

Numerous people have blasted the Kleins on the Internet. What Klein wants to make clear is that he and his wife do not hate homosexuals.

"They can buy my stuff," said Klein. "I'll sell them stuff ... I'll talk to them, it's fine."

What is not fine, according to Klein, is a marriage between people of the same sex. He will always stand by that conviction.

"I'd rather have my kids see their dad stand up for what he believes in then to see him bow down because one person complained."

ORS 659A.403 is the law in question. In short, it prohibits discrimination in places of public accommodation. Klein and his wife have two weeks to respond to the Oregon Department of Justice's inquiry into what happened.

"People who open up their store to the public have to follow the law because it applies legally to everybody," said Comm. Brad Avakian with the Oregon Bureau of Labor & Industries.

APPENDIX

EXHIBIT AA

Bittersweet Cake

A Gresham bakery refused to sell this lesbian couple a wedding cake. Now, Rachel and Laurel Bowman-Cryer break their silence.

By NIGEL JAQUISS

Updated July 21, 2015

Published July 21, 2015

Rachel Cryer loved Sweet Cakes by Melissa.

She had discovered the Gresham bakery online in 2011 when she went looking for a wedding cake to celebrate her mother's remarriage. The $250 raspberry fantasy cake baked by the store's namesake co-owner, Melissa Klein, was, as Cryer put it, "to die for."

Cryer was in a lesbian relationship with her longtime partner, Laurel Bowman, and she says Klein was aware of that fact. Nonetheless, as Cryer would later recall, Klein encouraged Cryer and Bowman to return to her bakery if they ever decided to get married. Sweet Cakes by Melissa, they recall Klein telling them, would be happy to bake their wedding cake.

In November 2012, Cryer and Bowman decided to hold a civil commitment ceremony, and they took Melissa Klein up on her offer.

What happened next set off a national debate about same-sex marriage, civil rights and discrimination based on sexual orientation.

When Cryer and her mother arrived at the bakery in January 2013, Aaron Klein, Melissa's husband and the bakery's co-owner, refused to sell Cryer a wedding cake because she and her partner were lesbian.

Earlier this month, the Oregon Bureau of Labor and Industries (BOLI), the state's civil rights watchdog, concluded that the Kleins' actions were discriminatory and violated Oregon law. State Labor Commissioner Brad Avakian ordered the Kleins to pay $135,000 in damages because of emotional and physical suffering they caused Bowman and Cryer by denying them service.

It seems as if everyone has had their turn weighing in on the debate. Gay rights groups protested outside Sweet Cakes and have used Rachel and Laurel Bowman-Cryer (as they are now known) as symbols to promote the cause of same-sex marriage.

The Kleins closed their bakery in the face of boycotts and became darlings of conservative media, with more than $400,000 raised on their behalf from donors, according to fundraising websites. After the July 2 final order, *The Oregonian* called BOLI officials "cake crusaders," and conservative magazine *The Weekly Standard* labeled the fine "excessive" and its logic "specious."

The only people involved who had not granted an interview to the news media about the controversy were Laurel and Rachel Bowman-Cryer.

Until now.

After the state's ruling, Rachel, 32, and Laurel, 31, sat down with *WW* for their first news media interview. Their story includes cameo appearances by Portland singer Storm Large and conservative radio host Lars Larson.

It also includes accounts of the humiliation the couple experienced, neighbors who turned their backs and strangers who heaped abuse on them after Aaron Klein posted their names, address and phone number on his Facebook page.

The vilification the two endured, however, paled in comparison to the threat that their entanglement with the Kleins might cause them to lose the foster daughters they were in the process of adopting.

The couple may never see the money the state awarded them, but they say their decision to challenge the Kleins was never about money.

Their story begins when they met in 2002 at Del Mar College in Corpus Christi, Texas, where they were part of the school's speech and debate team.

LOOKING BACK: Rachel Bowman-Cryer (left) and Laurel Bowman-Cryer, in their first news media interview, talk about how they first blamed themselves after the refusal of Sweet Cakes by Melissa co-owner Aaron Klein in January 2013 to sell them a wedding cake because they were lesbians. "I can't stop Rachel from crying. I can't take this back," Laurel recalls feeling. "This is all my fault. If I hadn't asked Rachel to marry me, we wouldn't have been in this situation. Because we wouldn't be looking for a cake."

IMAGE: V. Kapoor

Rachel Bowman-Cryer: When we were in college, Laurel and I were both on the forensics team, and we traveled to New York for a competition. She took everybody up to the roof of our hotel, the Hotel 17 in Manhattan, and proposed to me in front of everybody.

Laurel Bowman-Cryer: I just knew that if I spent the rest of my life with somebody, it was going to be her.

Rachel: We were really young. I'd said yes, but then as soon as we walked out and we were away from people, I was like, "You know I really didn't mean yes, right?"

I hadn't really seen a marriage in my life that had worked. My mom had been in and out of marriages that all failed, and I just always felt like it did more harm than good. I felt like our relationship was so great, why ruin it with marriage?

Laurel: When Rachel and I first met, I didn't understand the politics behind LGBT, and I didn't understand that you couldn't just marry a person that you loved.

After college, Laurel worked in construction and Rachel performed as a musician and poet. They wanted to move somewhere else, and considered Portland.

Rachel: When my dad was alive, we used to watch this show on TV called *Rock Star*, and there was a contestant on the show, Storm Large. She was our favorite contestant. She always talked about Portland like it was this utopia. So when my dad passed, I wanted to go someplace where we could be more accepted, and Portland just seemed like that place.

In Texas, we definitely faced discrimination—general discrimination and specific acts like people throwing bottles at us when we were walking down the street, screaming, "You dyke!"

Laurel: Having the hospital ban me from seeing her.

Rachel: After my father passed away, I became sick with typhus. I went to the hospital, and they admitted me, and while I was in the hospital, they wouldn't allow Laurel to come and see me.

Laurel: Because we were gay.

Rachel: And then the doctors suggested that I would not be able to heal around her, and I should separate myself from her.

Laurel: From the gay lifestyle.

The couple moved to Portland in 2009, and soon members of Rachel's family followed.

Rachel: My mother and my brother moved out here after we moved. We told them this was going to be more accepting for my brother, who's also gay and at the time was in high school and was having problems with being bullied in Texas.

Mom met a man, and they decided to get married. I did all of their wedding planning. Part of that was finding a place to purchase a cake for their wedding. I found Sweet Cakes by Melissa online, set up an appointment, and the three of us—my mom, Laurel and I—went to a cake-tasting and eventually purchased a cake from them.

It was beautiful, it tasted fabulous. It was the most impressive thing about my mom's wedding.

Rachel and Laurel say Melissa Klein knew they were a lesbian couple, but nonetheless invited them back to her bakery.

Laurel: Actually [Melissa Klein] said, "Have you thought about getting married?" and Rachel said, "Oh no, I'm never getting married." And we just made the joke about it, and she said, "Well, if you decide to, come back." And that was the last thing we really said about it.

(Melissa Klein, through her attorney, disputes the claim that she invited Rachel and Laurel back as customers for their own wedding: "There was never any discussion of my designing a cake for Rachel and Laurel's future wedding. I simply did not say what they claim I said.")

A close friend of Laurel's died in 2011, leaving two small children, both of whom have special needs. That fall, Rachel and Laurel became the children's foster parents and soon decided to adopt them. The decision prompted Rachel in 2012 to reconsider her view on marriage.

Rachel: I never wanted to have children, but when the children were placed with us, we had the option to help these kids that I already loved so much. And they needed us so much, and they'd been through so much, I felt like they needed the stability of knowing that we were committed both to each other and to them.

Laurel had repeatedly asked me, it was sort of like a joke every year. She would go, "Oh, we're going to get married this year?"

I came home from work one night, and Laurel was in bed, and I just kind of got in the bed and I said, "Hey, I think we need to do that thing that you've been talking about."

She jumps up out of the bed and starts jumping around the room. She's so excited, and she's like, "We're going to Mount St. Helens! I'm so excited!"

And I was like, "No, that was not exactly the thing we talked about."

Laurel: I thought we were going to go see the volcano.

Rachel: When I came out to my mom, she mourned for a long time that she would never be able to plan a wedding with me, see me get married and have kids. So it was very bonding for us to plan our wedding together, and we really bonded over that cake. So when Laurel and I told my mother we were going to get married, the first thing we all said was, "I know where we're going for the cake."

Same-sex marriage was illegal in Oregon at the time—the ban wasn't struck down until May 19, 2014. Rachel and Laurel instead chose a civil commitment ceremony.

Laurel: Rachel and her mother went to a bridal expo and had run into Melissa.

Rachel: When we saw her at the bridal expo, I already knew that I was going to go to her for our cake. So I just walked up to her: "Hey, do you remember? You made my mother's wedding cake. I know we talked about how we would never get married, but Laurel and I finally decided that we're going to get married, and we don't want anybody else to make our cake except you." Melissa didn't seem put off by it at all.

Laurel: They came home just so happy. I've never seen Rachel and her mom that exuberant.

Rachel and Laurel made an appointment to meet with Melissa Klein for a tasting at Sweet Cakes by Melissa on Jan. 17, 2013. (Klein says she saw Rachel and her mother at the bridal show but did not remember them.) Laurel couldn't go to the cake-tasting appointment, so Rachel and her mother went.

Rachel: We get there and see Mr. Klein behind the counter. We had never met him before and never had any interaction with him. We were a little put off that it was him and not her, just because we had such a rapport with Melissa.

The first thing he says is, "To get started, we need to get the bride and groom's name." And I just kind of giggled a little, and I think maybe she didn't tell him and he didn't know. I was like, "Oh, it's two brides." And he put his clipboard down and he just said, "Well, I'm sorry, but we don't do same-sex weddings here."

I kind of laughed and said, "Are you kidding?" I really thought he was joking with me, like just trying to give me a jab or something, and he was like, "No, we don't do same-sex weddings." And I just sat there kind of stunned.

My mom immediately stood up and grabbed her purse and started kind of going at him with, "Why didn't you tell us this before?" And, "If you had told us this before we bought our cake from you previously, we would have never purchased from you."

She just kind of looked at me and said: "Get up, Rachel, let's go. We will find someone who will make you a cake." And we got up and walked out. I was crying already. I was just in tears as I'm just sitting there stunned.

I was just humiliated that this happened in front of my mom, whom I spent all these years trying to convince that we deserved equal accommodation, and we deserve rights, and we deserve to be able to get married. I was crying and she was trying to console me and say, "Don't worry, we will find somebody that will make you a beautiful cake."

We pulled out of the parking lot, and we got to the light, and as we're sitting there, she looks over at me and she's like: "I can't do it, Rachel. I have to go back."

My mom went back inside and she told him, "You know I used to believe just like you believe, but then God blessed me with not one but two gay children and it changed my truth."

He supposedly quoted Leviticus to her, and in her mind what she heard from that was, "My children are an abomination." My mom being the God-fearing Southern Baptist Christian that she is, it was a very hurtful and hateful thing to hear someone say about your children.

The passage Aaron Klein quoted was Leviticus 18:22: "Thou shalt not lie with mankind, as with womankind: it is abomination."

Laurel: They got home and Rachel immediately went up the stairs, and I could tell something was wrong. Rachel was just in a ball crying, and her mom told me what happened. I just got angry. I decided I was going to write a review. I was going to warn other gay people: "Don't go to this establishment." So I pulled out my little phone with this tiny little screen and I typed in something to Google. I thought I was leaving a comment for the Better Business Bureau, and I didn't think much of it. It turned out to be an Oregon Department of Justice complaint. I didn't know you could do something like that on a phone. I just thought it was a comment.

Rachel: I didn't even know about that happening.

Laurel: I didn't tell her. I thought I was just leaving a comment.

Laurel's filing went to the state DOJ's office that handles consumer complaints. On Jan. 28, 2013, the DOJ forwarded a copy of the complaint to the Kleins.

Rachel: We didn't know anything about the complaint until I received a phone call at home from Lars Larson, and he was calling me to see if I had any comment. He had Mr. Klein on his radio show.

Laurel: I don't know how he got our phone numbers.

Rachel: He said, "I had Mr. Klein on the show today and wanted to know if you had any comment about your complaint against them?" And I was immediately dumbfounded. I was like, "I don't know what you're talking about."

Laurel: When Lars Larson called, I said, "I think we need a lawyer." We called the Oregon [State] Bar looking for help.

Aaron Klein had posted a copy of Laurel's complaint on his Facebook page. The complaint included Rachel and Laurel's home address and phone number. Rachel and Laurel received hundreds of angry and threatening messages in response to Klein's post, including death threats. Klein later testified he was unaware that the women's personal information was on the complaint when he posted it. The BOLI decision found his denial was not credible.

Laurel: Our neighbors had dropped off notes on our doorstep saying they don't agree with what we are doing to this good, decent Christian family.

Rachel: You couldn't possibly feel less safe in that situation.

Laurel: Your own neighbors are against you, and they've known you for years.

Rachel: At the same time, I find out from people on the Internet sending me messages that our address and phone number were published on Mr. Klein's Facebook page.

Laurel: Even our email addresses—everything.

Rachel: And to know that there's this other element that somebody actually wanted to kill us. They didn't know where to find us, but when he put our information out there, suddenly this person knew how to find us.

Laurel: We had the FBI at our house at one point.

Rachel and Laurel left their home with the children to stay with Rachel's mother in Washington. They feared the publicity about their case would hurt their efforts to adopt their foster children.

Laurel: We just thought: "Let's lay low. We're going to protect our daughters, and eventually this is going to blow over. It's gotta blow over."

Rachel: But it didn't blow over. They just kept talking about it.

Laurel: The detractors, the Kleins' supporters, the Kleins themselves—they kept saying that we were going to sue them, that we were targeting them. We are sitting at home going, "We haven't done anything to you, just leave us alone."

After a few weeks, the state DOJ dropped the consumer complaint. The couple held their commitment ceremony in June 2013, and the state soon affirmed their right to adopt the children. On Aug. 8, 2013, after Aaron Klein denied them service, Rachel filed a formal complaint with the BOLI.

Rachel: We talked about it. We went back and forth. We talked to our family and our friends. We just ultimately came to the decision that it wasn't just going to go away and that we needed to...

Laurel: Defend ourselves and stop being bullied.

Rachel: And show our children that you're going to face a lot of adversity in life, but you have to stand up for yourself and you have to stand up for what you believe in.

It is our desire that nobody in Oregon ever has to go through what we went through.

Laurel: Or the country.

FROSTED: Aaron and Melissa Klein (far left) told the Family Research Council Values Voter Summit in Washington, D.C., in September 2014 they closed their bakery after they faced boycotts following Aaron Klein's refusal to serve Rachel Cryer. "[My wife] has a God-given talent to create a work of art to celebrate a union between two people," Klein said. "And to use that in a manner, that would be in the face of what the Bible says it should be, I just couldn't in good conscience agree to do it."

IMAGE: Ron Walters/Light Productions

It took nearly two years of BOLI hearings, testimony and deliberations before the state issued its final order against the Kleins.

Rachel: We didn't have a choice in how this was prosecuted. We didn't have a choice in the fine. If we had been given the option, we probably would have said: "Just apologize. Just say you're sorry and go away."

Laurel: Why would they not tell us in one of the emails, before ever allowing us to come into the shop and be humiliated like that?

Rachel: That was initially the thing we were kind of taken aback by: "You had opportunities to tell us. Why not?"

Laurel: People don't realize that we never wanted this to happen—that we're not asking for anything. We've never asked for a penny from anybody.

The Kleins have been out there begging for money to pay the fine. And they still continue to ask for money, and say that they're not going to pay the fine because they don't want the money to go to us.

Rachel: The money doesn't have anything to do with anything as far as we're concerned.

People might feel more sympathy for us if somebody hit me rather than just denying me a cake. But the hurt, whether it's physical or emotional, is the same. We are treated like second-class citizens. That's whether you want to deny me something or walk up and hit me just because I was born gay.

People say, "Oh, it's just a cake, it's just a wedding." That's the part that they're not seeing, that this was not just a wedding to us. It was more than that.

For us, the marriage and the wedding in particular was about bringing together our families—being able to bring together these families, to commit to raising these kids, the children, together as one family.

APPENDIX

EXHIBIT BB

Relevant Oregon Statutory and Constitutional Provisions

Oregon Constitution, Article I, Section 2. Freedom of worship.

- All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.

Oregon Constitution, Article I, Section 3. Freedom of religious opinion.

- No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions, or interfere with the rights of conscience.

Oregon Constitution, Article I, Section 8. Freedom of speech and press.

- No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

ORS 659A.403 Discrimination in place of public accommodation prohibited. [Operative until December 31, 2015]

- (1) Except as provided in subsection (2) of this section, all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older.

- (2) Subsection (1) of this section does not prohibit:
    - (a) The enforcement of laws governing the consumption of alcoholic beverages by minors and the frequenting by minors of places of public accommodation where alcoholic beverages are served; or
    - (b) The offering of special rates or services to persons 50 years of age or older.

- (3) It is an unlawful practice for any person to deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation in violation of this section.

ORS 659A.403 Discrimination in place of public accommodation prohibited.

- (1) Except as provided in subsection (2) of this section, all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is of age, as described in this section, or older.

- (2) Subsection (1) of this section does not prohibit:
    - (a) The enforcement of laws governing the consumption of alcoholic beverages by minors and the frequenting by minors of places of public accommodation where alcoholic beverages are served;
    - (b) The enforcement of laws governing the use of marijuana items, as defined in section 5, chapter 1, Oregon Laws 2015, by persons under 21 years of age and the frequenting by persons under 21 years of age of places of public accommodation where marijuana items are sold; or
    - (c) The offering of special rates or services to persons 50 years of age or older.

- (3) It is an unlawful practice for any person to deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation in violation of this section.

ORS 659A.409 Notice that discrimination will be made in place of public accommodation prohibited; age exceptions. [Operative until December 31, 2015]

- Except as provided by laws governing the consumption of alcoholic beverages by minors and the frequenting by minors of places of public accommodation where alcoholic beverages are served, and except for special rates or services offered to persons 50 years of age or older, it is an unlawful practice for any person acting on behalf of any place of public accommodation as defined in ORS 659A.400 to publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older.

ORS 659A.409 Notice that discrimination will be made in place of public accommodation prohibited; age exceptions.

- Except as provided by laws governing the consumption of alcoholic beverages by minors, the use of marijuana items, as defined in section 5, chapter 1, Oregon Laws 2015, by persons under 21 years of age, the frequenting by minors of places of public accommodation where alcoholic beverages are served and the frequenting by persons under 21 years of age of places of public accommodation where marijuana items are sold, and except for special rates or services offered to persons 50 years of age or older, it is an unlawful practice for any person acting on behalf of any place of public accommodation as defined in ORS 659A.400 to publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is of age, as described in this section, or older.

ORS 659A.406 Aiding or abetting certain discrimination prohibited.

- Except as otherwise authorized by ORS 659A.403, it is an unlawful practice for any person to aid or abet any place of public accommodation, as defined in ORS 659A.400, or any employee or person acting on behalf of the place of public accommodation to make any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older.

ORS 659A.805 Rules for Carrying Out ORS Chapter 659A.

- (1) In accordance with any applicable provision of ORS chapter 183, the Commissioner of the Bureau of Labor and Industries may adopt reasonable rules:
    - (a) Establishing what acts and communications constitute a notice, sign or advertisement that public accommodation or real property will be refused, withheld from, or denied to any person or that the person will be unlawfully discriminated against because of race, color, religion, sex, sexual orientation, national origin, marital status, disability or:
        - (A) With respect to public accommodation, age.

        - (B) With respect to real property transactions, familial status or source of income.
    - (b) Establishing what inquiries in connection with employment and prospective employment express a limitation, specification or unlawful discrimination as to race, color, religion, sex, sexual orientation, national origin, marital status, age or disability.
    - (c) Establishing what inquiries in connection with employment and prospective employment soliciting information as to race, color, religion, sex, sexual orientation, national origin, marital status, age or disability are based on bona fide occupational qualifications.
    - (d) For internal operation and practice and procedure before the commissioner under this chapter.
    - (e) Covering any other matter required to carry out the purposes of this chapter.

- (2) In adopting rules under this section the commissioner shall consider the following factors, among others:
    - (a) The relevance of information requested to job performance in connection with which it is requested.
    - (b) Available reasonable alternative ways of obtaining requested information without soliciting responses as to race, color, religion, sex, sexual orientation, national origin, marital status, age, disability, source of income or, with respect to real property transactions, familial status.
    - (c) Whether a statement or inquiry soliciting information as to race, color, religion, sex, sexual orientation, national origin, marital status, age, disability, source of income or, with respect to real property transactions, familial status, communicates an idea independent of an intention to limit, specify or unlawfully discriminate as to race, color, religion, sex, sexual orientation, national origin, marital status, age, disability, source of income or, with respect to real property transactions, familial status.
    - (d) Whether the independent idea communicated is relevant to a legitimate objective of the kind of transaction that it contemplates.
    - (e) The ease with which the independent idea relating to a legitimate objective of the kind of transaction contemplated could be communicated without connoting an intention to unlawfully discriminate as to race, color, religion, sex, sexual orientation, national origin, marital status, age, disability, source of income or, with respect to real property transactions, familial status.

ORS 183.417 Procedure in contested case hearing.

- (1) In a contested case proceeding, the parties may elect to be represented by counsel and to respond and present evidence and argument on all issues properly before the presiding officer in the proceeding.

- (2) Agencies may adopt rules of procedure governing participation in contested case proceedings by persons appearing as limited parties.

- (3)
    - (a) Unless prohibited by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default. Informal settlement may be made in license revocation proceedings by written agreement of the parties and the agency consenting to a suspension, fine or other form of intermediate sanction.
    - (b) Any informal disposition of a contested case, other than an informal disposition by default, must be in writing and signed by the party or parties to the contested case. The agency shall incorporate that disposition into a final order. An order under this paragraph is not subject to ORS 183.470. The agency shall deliver or mail a copy of the order to each party and to the attorney of record if the party is represented. An order that incorporates the informal disposition is a final order in a contested case, but is not subject to judicial review. A party may petition the agency to set aside a final order that incorporates the informal disposition on the ground that the informal disposition was obtained by fraud or duress.

- (4) An order adverse to a party may be issued upon default only if a prima facie case is made on the record. The record on a default order includes all materials submitted by the party. The record on a default order may be made at the time of issuance of the order. If the record on the default order consists solely of an application and other materials submitted by the party, the agency shall so note in the order.

- (5) At the commencement of a contested case hearing, the officer presiding at the hearing shall explain the issues involved in the hearing and the matters that the parties must either prove or disprove.

- (6) Testimony at a contested case hearing shall be taken upon oath or affirmation of the witness. The officer presiding at the hearing shall administer oaths or affirmations to witnesses.

- (7) The officer presiding at the hearing shall place on the record a statement of the substance of any written or oral ex parte communication on a fact in issue made to the officer during the pendency of the proceeding and notify the parties of the communication and of their right to rebut the communication. If an ex parte communication is made to an administrative law judge assigned from the Office of Administrative Hearings established under ORS 183.605, the administrative law judge must comply with ORS 183.685.

- (8) The officer presiding at the hearing shall ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the presiding officer in the case and the correct application of the law to those facts.

- (9) The record in a contested case shall include:
  - (a) All pleadings, motions and intermediate rulings.
  - (b) Evidence received or considered.
  - (c) Stipulations.
  - (d) A statement of matters officially noticed.
  - (e) Questions and offers of proof, objections and rulings thereon.
  - (f) A statement of any ex parte communication that must be disclosed under subsection (7) of this section and that was made to the officer presiding at the hearing.
  - (g) Proposed findings and exceptions.
  - (h) Any proposed, intermediate or final order prepared by the agency or an administrative law judge.

- (10) A verbatim oral, written or mechanical record shall be made of all motions, rulings and testimony in a contested case proceeding. The record need not be transcribed unless requested for purposes of rehearing or court review. The agency may charge the party requesting transcription the cost of a copy of transcription, unless the party files an appropriate affidavit of indigency. Upon petition, a court having jurisdiction to review under ORS 183.480 may reduce or eliminate the charge upon finding that it is equitable to do so, or that matters of general interest would be determined by review of the order of the agency.

ORS 183.482 Jurisdiction for review of contested cases; procedure; scope of court authority.

- (1) Jurisdiction for judicial review of contested cases is conferred upon the Court of Appeals. Proceedings for review shall be instituted by filing a petition in the Court of Appeals. The petition shall be filed within 60 days only

following the date the order upon which the petition is based is served unless otherwise provided by statute. If a petition for rehearing has been filed, then the petition for review shall be filed within 60 days only following the date the order denying the petition for rehearing is served. If the agency does not otherwise act, a petition for rehearing or reconsideration shall be deemed denied the 60th day following the date the petition was filed, and in such cases, petition for judicial review shall be filed within 60 days only following such date. Date of service shall be the date on which the agency delivered or mailed its order in accordance with ORS 183.470.

- (2) The petition shall state the nature of the order the petitioner desires reviewed, and shall state whether the petitioner was a party to the administrative proceeding, was denied status as a party or is seeking judicial review as a person adversely affected or aggrieved by the agency order. In the latter case, the petitioner shall, by supporting affidavit, state the facts showing how the petitioner is adversely affected or aggrieved by the agency order. Before deciding the issues raised by the petition for review, the Court of Appeals shall decide, from facts set forth in the affidavit, whether or not the petitioner is entitled to petition as an adversely affected or an aggrieved person. Copies of the petition shall be served by registered or certified mail upon the agency, and all other parties of record in the agency proceeding.

- (3)
    - (a) The filing of the petition shall not stay enforcement of the agency order, but the agency may do so upon a showing of:
        - (A) Irreparable injury to the petitioner; and
        - (B) A colorable claim of error in the order.
    - (b) When a petitioner makes the showing required by paragraph (a) of this subsection, the agency shall grant the stay unless the agency determines that substantial public harm will result if the order is stayed. If the agency denies the stay, the denial shall be in writing and shall specifically state the substantial public harm that would result from the granting of the stay.
    - (c) When the agency grants a stay, the agency may impose such reasonable conditions as the giving of a bond, irrevocable letter of credit or other undertaking and that the petitioner file all documents necessary to bring the matter to issue before the Court of Appeals within specified reasonable periods of time.
    - (d) Agency denial of a motion for stay is subject to review by the Court of Appeals under such rules as the court may establish.

- (4) Within 30 days after service of the petition, or within such further time as the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review, but, by stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record when deemed desirable. Except as specifically provided in this subsection, the cost of the record shall not be taxed to the petitioner or any intervening party. However, the court may tax such costs and the cost of agency transcription of record to a party filing a frivolous petition for review.

- (5) If, on review of a contested case, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good and substantial reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and order by reason of the additional evidence and shall, within a time to be fixed by the court, file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or orders, or its certificate that the agency elects to stand on its original findings and order, as the case may be.

- (6) At any time subsequent to the filing of the petition for review and prior to the date set for hearing the agency may withdraw its order for purposes of reconsideration. If an agency withdraws an order for purposes of reconsideration, the agency shall, within such time as the court may allow, affirm, modify or reverse its order. If the petitioner is dissatisfied with the agency action after withdrawal for purposes of reconsideration, the petitioner may refile the petition for review and the review shall proceed upon the revised order. An amended petition for review shall not be required if the agency, on reconsideration, affirms the order or modifies the order with only minor changes. If an agency withdraws an order for purposes of reconsideration and modifies or reverses the order in favor of the petitioner, the court shall allow the petitioner costs, but not attorney fees, to be paid from funds available to the agency.

- (7) Review of a contested case shall be confined to the record, and the court shall not substitute its judgment for that of the agency as to any issue of fact or agency discretion. In the case of disputed allegations of irregularities in

procedure before the agency not shown in the record which, if proved, would warrant reversal or remand, the Court of Appeals may refer the allegations to a master appointed by the court to take evidence and make findings of fact upon them. The court shall remand the order for further agency action if the court finds that either the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure, including a failure by the presiding officer to comply with the requirements of ORS 183.417 (8).

- (8)
    - (a) The court may affirm, reverse or remand the order. If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, the court shall:
        - (A) Set aside or modify the order; or
        - (B) Remand the case to the agency for further action under a correct interpretation of the provision of law.
    - (b) The court shall remand the order to the agency if the court finds the agency's exercise of discretion to be:
        - (A) Outside the range of discretion delegated to the agency by law;
        - (B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or
        - (C) Otherwise in violation of a constitutional or statutory provision.
    - (c) The court shall set aside or remand the order if the court finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.

ORS 19.205 Appealable judgments and orders.

- (1) Unless otherwise provided by law, a limited judgment, general judgment or supplemental judgment, as those terms are defined by ORS 18.005, may be appealed as provided in this chapter. A judgment corrected under ORCP 71 may be appealed only as provided in ORS 18.107 and 18.112.

- (2) An order in an action that affects a substantial right, and that effectively determines the action so as to prevent a judgment in the action, may be appealed in the same manner as provided in this chapter for judgments.

- (3) An order that is made in the action after a general judgment is entered and that affects a substantial right, including an order granting a new trial, may be appealed in the same manner as provided in this chapter for judgments.

- (4) No appeal to the Court of Appeals shall be taken or allowed in any action for the recovery of money or damages only unless it appears from the pleadings that the amount in controversy exceeds $ 250.

- (5) An appeal may be taken from the circuit court in any special statutory proceeding under the same conditions, in the same manner and with like effect as from a judgment or order entered in an action, unless appeal is expressly prohibited by the law authorizing the special statutory proceeding.

- (6) Nothing in ORS chapter 18 affects the authority of an appellate court to dismiss an appeal or to remand a proceeding to the trial court under ORS 19.270 (4) based on the appellate court's determination that the appeal has not been taken from an appealable judgment or order.