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.

Oregon Bureau of Labor and Industries Nos. 4414, 4514

CA A159899

RESPONDENT'S ANSWERING BRIEF

Petition for Judicial Review of the Final Order of the Oregon Bureau of Labor and Industries

Continued...

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RESPONDENT'S ANSWERING BRIEF

STATEMENT OF THE CASE

The Oregon Bureau of Labor and Industries (BOLI), supplies a statement of jurisdiction and rejects respondents' questions presented.[1] BOLI rejects respondents' statement of facts because it is argumentative, because it is inconsistent with BOLI's undisputed factual findings, and because it relies on information that was not made a part of the record before the administrative law judge (ALJ). (*See, e.g.*, App Br 14, quoting information from APP 511-512).

Statement of Jurisdiction

This court has jurisdiction under Oregon's Administrative Procedures Act (APA), ORS 183.482.

Questions Presented

1. Respondents provided wedding cakes for heterosexual weddings but refused to provide a wedding cake for complainants' same-sex wedding. Was that denial of service "on account of" complainants' sexual orientation within the meaning of Oregon's public accommodation statute, ORS 659A.403?

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[1] Aaron and Melissa Klein jointly owned and operated the bakery under an assumed name, Sweetcakes by Melissa ("Sweetcakes"). (SER 69). Pursuant to ORAP 5.15, BOLI refers to the Kleins collectively as "respondents" because they were respondents below. Where it is important to distinguish between the two respondents, BOLI uses full names.

2. Does the application of ORS 659A.403 to respondents' conduct violate their right to free expression under the United States Constitution?

3. Does the application of ORS 659A.403 to respondents' conduct violate their right to free exercise of religion under the Oregon and United States Constitutions?

4. Did statements by the Labor Commissioner that correctly described the law under ORS 659A.403 and promised a fair and thorough investigation of respondents' case show that he was actually biased against respondents?

5. Do substantial evidence and substantial reason support the damages award?

6. Did respondents convey a future intent to discriminate in violation of ORS 659A.409?

Summary of Argument

1. The Commissioner correctly concluded that respondents violated ORS 659A.403 by refusing to provide a cake for complainants' same-sex wedding. That statute bars a business from refusing services or providing different or lesser services on account of sexual orientation. The record shows that respondents are in the business of providing wedding cakes but refused to provide one to complainants upon learning the couples' sexual orientation. That refusal denied complainants the full and equal services that respondents

provide to heterosexual couples and therefore was discrimination on "account of" sexual orientation within the meaning of ORS 659A.403.

2. The application of ORS 659A.403 to respondents' discriminatory conduct does not violate their free-speech rights under the First Amendment. Respondents refused services based on one fact: complainants are gay. That refusal of service was conduct, not protected speech. Moreover, baking and decorating a wedding cake are not pure speech under the First Amendment. Nor are baking and decorating a wedding cake inherently expressive conduct. Here, the final order does not require respondents to engage in any expression, much less endorse a particular point of view or accommodate another's speech. Rather, the final order requires respondents to comply with the public accommodations statute and provide services without discrimination. Although respondents assign error under the Oregon Constitution as well, they develop no independent argument and so this court should summarily reject their state-law claim.

3. The final order does not violate respondents' right to free exercise of religion under the Oregon or United States Constitutions. ORS 659A.403 is a neutral law of general applicability. In enforcing that statute, BOLI targeted respondents' discriminatory conduct; it did not target respondents' religious beliefs or their religious practices. Accordingly, that application of the statute does not infringe on respondents' free-exercise rights. Additionally,

respondents are not entitled to an exception from enforcement under the Oregon Constitution.

4. The Commissioner was not biased against respondents. In public comments to The Oregonian and on Facebook, the Commissioner expressed his understanding of the public accommodations law. To the extent he mentioned respondents' case specifically it was to note that respondents would receive a fair and thorough hearing. Because the record does not show any bias by the Commissioner, respondents' argument fails.

5. BOLI's award of damages for the complainants' emotional distress is supported by substantial evidence and substantial reason. Complainants testified extensively about the emotional suffering caused by the denial of services; the ALJ found that testimony to be credible. That evidence alone is sufficient to support the damages amount. The amount is also consistent with damages BOLI has imposed in other, similar cases. Finally, the fact that BOLI made mistakes during discovery and the fact that BOLI did not award damages based on media exposure do not show that the damages award lacks substantial evidence or substantial reason.

6. The Commissioner correctly concluded that respondents violated ORS 659A.409 by expressing an intent to deny future services based on sexual orientation. In two interviews and in a notice placed on the bakery door, respondents stated that they would continue to refuse to provide their baking

services to same-sex couples. Although respondents' statements also included commentary on their pending case before BOLI, the Commissioner found a violation of the statute based on their expression of a future intent to engage in discriminatory conduct, and not based on respondents' discussion of their case. Because the state can prohibit a business from engaging in speech that threatens to discriminate on the basis of sexual orientation under the First Amendment, the Commissioner did not err.

Statement of Facts

Respondents have not assigned error to BOLI's factual findings; those findings therefore are the facts on judicial review. ORAP 5.45; *Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 134, 903 P2d 351 (1995), *overruled on other grounds*, *State v. Hickman*, 358 Or 1, 358 P3d 987 (2015). For the convenience of the court, BOLI has included a complete copy of the final order in its supplemental excerpt of record. Rather than repeat all the facts described in that order, BOLI provides the following summary.

Complainants LBC and RBC, both lesbians, were in a committed romantic relationship for nearly a decade when they decided to get married. (SER 3-4). Although RBC previously had been hesitant to marry LBC, that changed when the couple became foster parents. RBC wanted, through marriage, to provide her children with a sense of permanency and family structure and to demonstrate her love and commitment to LBC. Thus, with the

help of her mother, McPherson, RBC started planning the wedding. Eventually, she scheduled an appointment for a cake tasting with Melissa Klein, who had previously created McPherson's wedding cake. (SER 4-5).

Aaron Klein conducted the cake tasting, which McPherson and RBC attended. At the beginning of the tasting, Aaron Klein asked for the names of the bride and groom, and RBC replied that there were two brides. Klein immediately said that Sweetcakes did not make wedding cakes for same-sex ceremonies. RBC started crying, and McPherson had to guide her out of the shop and to their car, where she became "hysterical." (SER 5-6). The two started to leave, but McPherson returned to talk with Aaron Klein. She explained to him that she "used to think like him," but that her "truth had changed" as a result of having "two gay children." In response, Klein quoted Leviticus 18:22, saying, "You shall not lie with a male as one lies with a female; it is an abomination." McPherson left. (SER 6).

Back in the car, McPherson told RBC that Klein had called her "an abomination," causing RBC to cry even more. RBC was raised Southern Baptist, and 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." (SER 6).

Once home, McPherson also told LBC what had happened. (SER 6-7). LBC became upset and very angry. She had been raised Catholic and

understood the denial of service, including the reference to Leviticus, 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." LBC felt shame, and became even angrier when she was unable to console RBC. (SER 7). In the days and months that followed, both RBC and LBC experienced emotional distress that affected their relationships with each other and with other family members. (SER 10-11, 37, 39). One witness described "RBC's demeanor as similar to that of a dog who had been abused." (SER 36).

LBC filed a consumer complaint with the Department of Justice (DOJ), which required her to provide her personal contact information. Pursuant to its normal procedures, DOJ provided a copy of the complaint to respondents. The following day, Aaron Klein posted a copy of the first page of the complaint on his Facebook page, which included LBC's personal contact information, stating, "This is what happens when you tell gay people you won't do their 'wedding cake.'" After receiving an email about it, LBC viewed the posting before it was removed later that day. (SER 12).

Eventually, complainants filed complaints with BOLI, alleging that respondents had refused to bake them a cake on the basis of their sexual orientation. BOLI conducted an investigation and issued formal charges, alleging that respondents had violated the Public Accommodations Act in various respects. Before proceeding to a hearing, BOLI and respondents filed

cross-motions for summary judgment. Respondents argued that, because the refusal to provide services was based on their religious beliefs, application of the Public Accommodations Act to their conduct violated their First Amendment rights. The ALJ disagreed and generally ruled in BOLI's favor. (*See* SER 72-105). The ALJ held an evidentiary hearing to determine damages, after which he issued a proposed order recommending that $75,000 and $60,000 be awarded to RBC and LBC respectively. (Rec 1742). The Commissioner affirmed the ALJ's ruling for the most part, concluding that respondents violated ORS 659A.403's prohibition against sexual-orientation discrimination and imposing damages as recommended by the ALJ. The Commissioner modified the ALJ's ruling in one respect, concluding that respondents had also violated ORS 659A.409's prohibition against conveying a future intent to discriminate. This appeal followed.

ANSWER TO FIRST ASSIGNMENT OF ERROR

The Commissioner correctly determined that respondents violated ORS 659A.403 by refusing service to the complainants based on their sexual orientation.

A. Preservation of Error

Respondents preserved their assignment of error.

B. Standard of Review

This court reviews BOLI's legal conclusions for errors of law and for substantial reason. ORS 183.482(8). "[S]ubstantial reason review requires a determination of whether [BOLI's] findings of fact logically lead to its conclusions of law." *Goin v. Employment Dept.*, 203 Or App 758, 763, 126 P3d 734 (2006).

Respondents assert that, because they advance arguments under the First Amendment, this court "must independently examine the whole record without deference" to the agency on any issue, "including factual findings." (App Br 23). Respondents are wrong. To be sure, the United States Supreme Court has held that *federal* courts are obliged to conduct "an independent examination of the record as a whole, without deference to the trial court," when questions of free expression are presented. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 US 557, 567, 115 S Ct 2338, 132 L Ed 2d 487 (1995). But the Supreme Court has never held that *state* courts are *constitutionally* required to conduct *de novo* review or disregard statutorily imposed standards of review. Here, the APA establishes this court's standard of review and states that "the court shall not substitute its judgment for that of the agency as to any issue of fact or agency discretion." ORS 183.482(7).

Even if *de novo* review were required, however, respondents have not independently assigned error to any of BOLI's factual findings. As a result,

those findings are the facts for purposes of judicial review. *Meltebeke*, 322 Or at 134 (so stating). *See also* ORAP 5.45 ("No matter claimed as error will be considered on appeal unless the claim of error * * * is assigned as error in the opening brief[.]").

ARGUMENT

Respondents refused to sell the complainants a wedding cake because it was for a same-sex marriage. Contrary to respondents' arguments, their conduct—even if motivated by their sincerely held belief that marriage should be between a man and a woman—denied the complainants service on the basis of their sexual orientation. And applying Oregon's public accommodations law to respondents in these circumstances did not violate their constitutional rights to free speech or the free exercise of religion.

A. BOLI correctly concluded that respondents violated ORS 659A.403 by denying the complainants service on the basis of their sexual orientation.

Oregon's public accommodations law offers expansive protection against *all* forms of unequal treatment based upon sexual orientation. ORS 659A.403 provides:

> [A]ll 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 * * * sexual orientation * * *.

Relying exclusively on federal case law, respondents argue that their conduct does not fall within the meaning of that statute. But federal case law does not—and cannot—answer the statutory interpretation question posed by this case: whether the refusal to bake a cake for a same-sex wedding constitutes discrimination "on account of" sexual orientation. To the extent that case law from other jurisdictions may be relevant to that question, those authorities support BOLI's conclusion that a refusal to bake a cake for a same-sex wedding—when that same service is provided for heterosexual weddings—constitutes discrimination "on account of" sexual orientation.

1. Under ORS 659A.403, refusing to provide services to a same-sex couple when those services would be provided for a heterosexual couple is discrimination on account of sexual orientation.

To determine the meaning of a statute, this court examines the text, context, and pertinent legislative history. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). As outlined above, the statutory text of ORS 659A.403 entitles all persons to "full *and* equal accommodations, advantages, facilities and privileges of any place of public accommodation, without *any* distinction, discrimination *or* restriction on account of * * * sexual orientation." ORS 659A.403(1) (emphasis added). Based on the plain meaning of those words, it is clear that the legislature intended to prohibit a place of public

accommodation[2] from denying services—or from providing different or lesser services—based on sexual orientation. In other words, if a business provides a service to the public, it cannot refuse that service to anyone or make a distinction regarding the service provided based on the listed classifications, including sexual orientation. Proving a violation of ORS 659A.403, then, involves examining the services offered by a place of public accommodation to determine whether those services are provided "full[y] and equal[ly]" and without any distinction or discrimination.

Respondents do not dispute those basic propositions. Largely ignoring the statute's textual focus on services (*i.e.*, "accommodations, advantages, facilities, and privileges"), respondents instead argue that a same-sex wedding involves conduct that is distinct from the sexual orientation of the participants as a matter of law and so their refusal to provide a cake for a same-sex wedding is permissible. (*See* App Br 23-24). That analysis misses the point. The statutory interpretation question is not whether "sexual orientation" necessarily encompasses same-sex marriage. The question is whether it is discrimination under ORS 659A.403 for a business to offer a particular service—a wedding cake—to the general public but to deny it when the couple seeking the service is same-sex instead of opposite-sex.

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[2] There is no dispute that respondents' bakery was a place of public accommodation under ORS 659A.400(1)(a).

Both statutory context and legislative history provide further support that the legislature did not intend to draw the distinction between sexual orientation and same-sex marriage that respondents advance. The Public Accommodations Act has been part of ORS chapter 659A since the civil rights statutes were reorganized in 2001. Or Laws 2001, ch 621. The general purpose of that 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 [a protected class]." ORS 659A.003. When the legislature added "sexual orientation" to the Public Accommodations Act, it simultaneously adopted the Oregon Family Fairness Act, granting the same rights and benefits of marriage to same-sex couples. *See* Or Laws 2007, ch 99 (Oregon Family Fairness Act); Or Laws 2007, ch 100 (Oregon Equality Act). In making those changes, the legislature recognized that "same-sex couples face numerous obstacles and hardships in attempting to secure rights, benefits and responsibilities for themselves" and their families and that, as a result, legal recognition of same-sex relationships was necessary to "ensur[e] more equal treatment of gays and lesbians." ORS 106.305(3), (6). Respondents' proposed distinction between an individual's sexual orientation and his or her involvement in a same-sex relationship runs directly counter to the express legislative intent to eliminate the many obstacles same-sex couples face.

Moreover, as other courts have explained, it is not always possible—or appropriate—"to distinguish between an individual's status of being homosexual and his or her conduct in openly committing to a person of the same sex." *Elane Photography, LLC v. Willock*, 309 P3d 53, 61 (NM 2013), *cert den*, 134 S Ct 1787 (2014) (rejecting identical argument). Rather, "when the conduct is so closely correlated with the status that it is engaged in exclusively or predominantly by persons who have that particular status," the distinction becomes one without a difference—especially when the aim of the legislature is to eradicate discrimination on the basis of that particular status. *Craig v. Masterpiece Cakeshop, Inc*., 370 P3d 272, 281 (Colo App 2015), *cert den sub nom*, *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm'n*, No 15SC738, 2016 WL 1645027 (Colo April 25, 2016) (holding that bakery's refusal to bake a cake for a same-sex wedding constituted sexual-orientation discrimination). As the court observed in *Craig*, "same-sex marriage constitutes such conduct because it is 'engaged in exclusively or predominantly' by gays, lesbians, and bisexuals." *Id.*

Indeed, every court to address this precise issue has concluded that a refusal to provide equal services for a same-sex wedding is discrimination on the basis of sexual orientation. *See, e.g*., *Elane Photography*, 309 P3d at 61 (wedding photographer's refusal to photograph same-sex ceremony constituted sexual-orientation discrimination); *Gifford v. McCarthy*, 137 AD3d 30, 36-37,

23 NYS3d 422 (App Div 2016) (wedding venue's refusal to host same-sex ceremony constituted sexual-orientation discrimination because the "act of entering into a same-sex marriage is 'conduct that is inextricably tied to sexual orientation'"); *Craig*, 370 P3d 272 at 281 (refusal to bake wedding cake for same-sex ceremony constituted sexual-orientation discrimination); *Barrett v. Fontbonne Acad.*, No NOCV2014-751, 2015 WL 9682042, at *2 (Mass Super Dec. 16, 2015) (unpublished decision) (denying employment to individual on the basis that "he was in a same-sex marriage" constituted sexual-orientation discrimination); *see also In re Fonberg*, 736 F3d 901, 902-03 (9th Cir 2013) (discrimination based on sexual orientation to provide benefits to heterosexual couples but not same-sex couples).[3]

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[3] The United States Supreme Court has also held that such distinctions are generally inappropriate when the targeted conduct is closely correlated with the protected status. *See, e.g.*, *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 US 661, 689, 130 S Ct 2971, 2990, 177 L Ed 2d 838 (2010) ("[The Christian Legal Society] contends 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.' * * * Our decisions have declined to distinguish between status and conduct in this context."); *Lawrence v. Texas*, 539 US 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."); *id.* at 583 (O'Connor, J., concurring in the 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 * * * directed toward gay persons as a class."); *see also Bob Jones Univ. v. United States*, 461 US 574, 605, 103 S Ct 2017, 76 L Ed 2d 157 (1983)

Footnote continued...

More importantly, the inquiry before this court is not what other courts have held in other, unrelated cases—although those cases may very well be persuasive. Rather, the task before this court is to discern and "give effect to the legislative intent behind *the statute*." *Multnomah County Sheriff's Office v. Edwards*, 277 Or App 540, 550, 373 P3d 1099, *rev allowed*, __ Or __ (2016) ("*Edwards*") (emphasis added). In other words, the question before the court is whether, as respondents contend, the legislature intended to *prohibit* discrimination based on sexual orientation, while simultaneously *allowing* a place of public accommodation to refuse equal service based on a same-sex couple's public expression of commitment. As outlined above, both the plain language of the statute and the legislative history behind it evidence a clear intent to prohibit that precise type of unequal treatment. Respondents make no argument to the contrary.

Indeed, there is no principled basis for distinguishing between denying services for a wedding ceremony between two persons of the same sex and denying services based on the sexual orientation of that couple. The primary (if not only) distinction between a heterosexual marriage and a same-sex marriage

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(...continued)
(concluding that prohibiting admission to students married to someone of a different race was a form of racial discrimination, although the ban restricted conduct).

is the sexual orientation of the participants.[4] And here, respondents provided their services to heterosexual couples, but refused to work with a same-sex couple under equivalent circumstances. Under those facts, BOLI correctly concluded that respondents violated ORS 659A.403 by not affording the complainants—a same-sex couple—the same services they would offer a heterosexual couple, namely, a wedding cake. *See Halperin v. Pitts*, 352 Or 482, 495, 287 P3d 1069 (2012) (remedial statutes should be construed liberally to effectuate legislative intent, if that construction is consistent with the text of the statute). *Cf. King v. Greyhound Lines, Inc.*, 61 Or App 197, 656 P2d 349 (1982) (holding that an individual had been denied "full and equal" accommodations because, although he was not denied service, he was subjected to racial slurs in the course of the transaction). To conclude otherwise would

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[4] In that regard, sex and sexual orientation are inextricably intertwined. In essence, respondents refused to bake a cake because of the sex of each spouse. Had the spouses been of opposite sexes, respondents would have baked the cake; because the spouses were of the same sex, respondents refused to bake the cake. *See* ORS 659A.403 (prohibiting discrimination based on sex). Thus, the situation here is akin to the racial discrimination inherent in anti-miscegenation statutes. That discrimination was also historically justified on the proponents' sincerely held religious beliefs, namely, that the Bible forbids the intermarriage of the races. *See, e.g.*, *Bob Jones Univ. v. United States*, 639 F2d 147, 152 (4th Cir 1980), *aff'd*, 461 US 574 (1983) (university's policy of expelling interracial couples were grounded in sincerely held religious beliefs); *Loving v. Virginia*, 388 US 1, 87 S Ct 1817, 18 L Ed 2d 1010 (1967) (noting that the sentencing court quoted scripture as justification for criminal statutes).

undermine the purposes of the statute and defeat the legislative intent behind the 2007 amendments.

Finally, and somewhat relatedly, respondents argue that they did not violate ORS 659A.403 as a matter of law because their denial of services was based on their sincerely held religious beliefs about same-sex marriage, not the complainants' sexual orientation. But regardless of respondents' individual beliefs about the propriety of same-sex marriage, the salient fact for the purposes of ORS 659A.403 is that respondents *would* provide a service for a heterosexual couple, but *would not* provide that same service for a same-sex couple. That is a denial of "full and equal" accommodations and impermissible discrimination based on sexual orientation under ORS 659A.403. The fact that respondents believe same-sex marriage to be morally wrong is immaterial, as there is no statutory defense based on their religious beliefs.

As noted, respondents do not challenge any of BOLI's factual findings. Nor do they argue that BOLI's conclusion that respondents violated ORS 659A.403 lacks substantial evidence. Rather, their argument is that their conduct, as a matter of law, is not prohibited by the statute. Because this court should reject respondents' argument and agree with BOLI's interpretation, it should also conclude that respondents violated the statute as described in the order.

2. Even under respondents' interpretation of the statute, the undisputed facts show that respondents denied services based on complainants' sexual orientation.

Even under respondents' incorrect statutory interpretation, the evidence still shows that respondents, in fact, denied services based on the complainants' sexual orientation. There is no dispute that, immediately upon being informed that the ceremony involved two women, Aaron Klein refused service. (SER 5). Moreover, when McPherson informed Klein that her "truth had changed" as a result of having "two gay children," Klein responded by quoting a Bible verse referring to homosexual behavior as an "abomination." (SER 6). Later, Aaron Klein posted on his Facebook page a copy of the consumer complaint filed against him, with the comment "[t]his is what happens when you tell gay people you won't do their 'wedding cake.'" (SER 12). Thus, even if it *were* possible to separate a person's sexual orientation from the act of marriage itself, those facts strongly indicate that the basis for respondents' denial of service was, in fact, the complainants' sexual orientation. Accordingly, the final order correctly concluded that respondents violated ORS 659A.403, even if the facts are viewed under respondents' faulty distinction between sexual orientation and same-sex marriage.

B. Enforcement of ORS 659A.403 does not violate respondents' freedom of expression under the First Amendment.

The application of ORS 659A.403 to respondents' conduct does not violate the First Amendment, because cake baking and design are not protected speech. Respondents' argument to the contrary rests on the faulty premise that baking a wedding cake is pure speech, such that the Commissioner's final order requires them to engage in expression contrary to their beliefs. As outlined in greater detail below, respondents' arguments fail for several reasons, not the least of which is that respondents' decision to deny services was based on complainants' sexual orientation, not on any particular design or characteristic of the specific cake complainants may have ultimately requested. That refusal of service was conduct, not protected speech. Moreover, selling a cake does not require a baker to endorse or participate in anyone's wedding, and expecting a business to comply with state antidiscrimination statutes by not refusing service to members of a protected class is not governmental compulsion of speech. Respondents' First Amendment argument fails.

1. Respondents' refusal to provide a wedding cake was conduct, not speech.

The First Amendment prohibits laws "'abridging the freedom of speech,' which, 'as a general matter * * * means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Nev. Comm'n on Ethics v. Carrigan*, 564 US 117, 121, 131 S Ct

2343, 180 L Ed 2d 150 (2011) (internal citations omitted). In an as-applied challenge on free speech grounds, "the question is whether the law was applied so that it did, in fact, reach privileged communication." *City of Eugene v. Miller*, 318 Or 480, 490, 871 P2d 454 (1994).

Respondents begin their argument by asserting that cake baking and design constitute inherently expressive conduct that is entitled to full First Amendment protection. But whether cake baking and decorating could, in the abstract, be protected expression is irrelevant, and this court need not address that question. Here, the final order found that respondents violated ORS 659A.403 by refusing to provide a service to same-sex couples that they provided to heterosexual couples. Prohibiting that discriminatory conduct does not implicate the First Amendment at all. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 US 47, 62-65, 126 S Ct 1297, 164 L Ed 2d 156 (2006) ("*FAIR*") ("Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct.").

Additionally, respondents denied service to the complainants without ever discussing the design of the cake or any possible written inscriptions. As soon as Aaron Klein learned that there would be "two brides," he immediately

stated that Sweetcakes did not make wedding cakes for same-sex ceremonies. (ER 12). From all Klein knew at the time he refused service, the complainants could have wanted nothing more than a simple sheet cake with no message or expressive elements at all. Therefore whether the particular design of some *other* cake might convey a particularized message and be protected is not before the court. *See, e.g.*, *Craig*, 370 P3d 272 at 288 (reaching similar conclusion based on similar facts).

The conduct thus reached by the Commissioner's final order consisted of respondents' refusal to sell the complainants a cake—any cake, regardless of design or message—because the complainants were gay and intended to serve the cake at their wedding. The United States Supreme Court has directly rejected the idea that "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," *FAIR*, 547 US at 65; *Giboney v. Empire Storage & Ice Co.*, 336 US 490, 502, 69 S Ct 684, 93 L Ed 834 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."). Whatever message respondents may wish to convey through their baking does not and cannot transform their discriminatory conduct into protected speech. And because the bare refusal to provide services—with no knowledge of any potential design or message—is not

protected speech, the final order's sanction of that refusal does not violate respondents' First Amendment rights.

2. The act of baking and selling a wedding cake is not an "inherently expressive" activity akin to pure speech.

Even if this court were to look beyond respondents' actual conduct in refusing to provide services and consider the act of baking itself, this court should conclude that cake baking and design are not protected speech. Respondents argue that their baking is pure speech because it is an artistic and religious "process" that communicates their views about marriage. (App Br 32). But at most, baking and designing a cake is conduct that can, at times, be accompanied by speech. The actual baking process is chemistry, not expression. The process of combining the proper amounts of leavening, flavoring, and other ingredients are to achieve the desired consistency and taste, and it does not convey any message. Once baked, the cake can then be presented or decorated in any number of ways, only some of which convey any message whatsoever. For example, the same sheet cake could be decorated with colored frosting and then served for a birthday, a wedding, a wake, or for dessert after an ordinary dinner. And while the act of serving cake may be one common element of a wedding, serving cake is the conduct of the hosts not the bakers. The cake itself—even with some level of decoration—conveys no

message. Accordingly, there is nothing about the act of baking and decorating the cake that *necessarily* entails expression.

The cases respondents rely on in claiming that their baking is pure speech are readily distinguishable. For example, in *Anderson v. City of Hermosa Beach*, 621 F3d 1051 (9th Cir 2010), the Ninth Circuit concluded that the business and process of tattooing were fully protected speech because both were inseparably intertwined with the tattoo itself, which was unquestionably pure speech. *See also Buehrle v. City of Key West*, 813 F3d 973 (11th Cir 2015) (act of tattooing protected speech based on status of tattoo as an art form). But a cake itself is not pure speech. That is because, unlike a tattoo, which always involves some form of artistic expression, sometimes a cake is just a cake—a dessert to be eaten with no special meaning attached. Nor is a cake so inseparably intertwined with pure speech that the cake itself or the baking process merit status as pure speech. *See Gaudiya Vaishnava Soc. v. City & County of San Francisco*, 952 F2d 1059, 1066 (9th Cir 1990), *as amended on denial of reh'g* (1991) (sale of expressive items protected as noncommercial speech only "where pure speech and commercial speech are inextricably intertwined").

Although the Supreme Court has recognized that some forms of conduct are symbolic speech worthy of First Amendment protection, *United States v. O'Brien*, 391 US 367, 376, 88 S Ct 1673, 20 L Ed 2d 672 (1968) (holding that

the public burning of draft cards during anti-war protest is expressive conduct), the Court has also recognized that expressive-conduct claims must be carefully circumscribed. Accordingly, the Court has "extended First Amendment protection only to conduct that is *inherently* expressive." *FAIR*, 547 US at 66 (emphasis added). The Court determines whether conduct is "inherently expressive" by examining "whether '[a]n intent to convey a *particularized* message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 US 397, 404, 109 S Ct 2533, 105 L Ed 2d 342 (1989), *quoting Spence v. Washington*, 418 US 405, 410-11, 94 S Ct 2727, 41 L Ed 2d 842 (1974) (emphasis added). The person claiming that conduct is expressive bears the burden of "demonstrat[ing] that the First Amendment * * * applies" and that person must advance more than a mere "'plausible contention' that their conduct is expressive." *Clark v. Community for Creative Non-Violence*, 468 US 288, 294 n 5, 104 S Ct 3065, 82 L Ed 2d 221 (1984).

Respondents fail to satisfy either prong of the test for inherently expressive conduct. First, respondents have not shown how their cakes reflect their intent to communicate a particularized message. Although respondents contend that every wedding cake they bake was meant to celebrate the "sacred and joyous union of one man and one woman in a spiritual bond" (App Br 32), that is not a *particularized* message associated with any given cake. Rather,

that is a general statement about respondents' religious beliefs concerning marriage and how those beliefs inform their conduct. *See Carrigan*, 564 US at 127 (the fact particular conduct "is the product of deeply held personal belief—even if the actor would like it to *convey* his deeply held personal belief—does not transform action into First Amendment speech" (emphasis in original)). Respondents do not explain how any *particular* cake contains such a message and thereby embodies that intent.

Instead, respondents rely on the general proposition that cake baking is inherently creative or artistic, because, in respondents' view, the resulting wedding cake is both an expression of "who [the marrying couple] are" and a celebration of a "union of one man and one woman in a spiritual bond." (App Br 32). But the fact that a cake *can* be used as a medium for expression does not make cake baking and designing itself *inherently* expressive, as a matter of law.[5] Nor does the fact that baking and designing a cake can be accompanied by a subjective intent to celebrate a marriage transform that conduct into pure speech.[6] *See O'Brien*, 391 US at 376-77 ("We cannot accept the view that an

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[5] Respondents note that the bakers who ultimately provided cakes to complainants' wedding stated that they were artists and that their cakes were a form of art. Those factual statements about how those particular bakers viewed their craft do not demonstrate that baking and decorating cake is pure speech as a matter of law.

[6] Fundamentally, respondents confuse the symbolic meaning that an individual can attach to an object with an object itself being inherently

Footnote continued...

apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."); *FAIR*, 547 US at 65 (same).

Additionally, the fact that a couple could request a cake that conveys a particular message does not render the cake-baking process itself inherently expressive conduct. Of course, a cake can be decorated to display a particularized message. But a message displayed on a cake is distinct from the cake itself. Thus a cake may carry a message that is protected speech—writing "Happy Birthday," for example—but that does not mean that the process of baking and decorating the cake is entitled to the same First Amendment protections as the words written on the cake. Those words may be pure speech; the cake and process of baking and decorating it is not. *See Shuttlesworth v. City of Birmingham, Ala*., 394 US 147, 152, 89 S Ct 935, 22 L Ed 2d 162 (1969) (noting distinction between pure speech and conduct accompanied by speech); *City of Dallas v. Stanglin*, 490 US 19, 25, 109 S Ct 1591, 104 L Ed 2d 18 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes * * * but such a kernel is not sufficient to bring the

(...continued)
expressive. For example, an airplane can be used to symbolize freedom or escape. But the creation of the airplane or the airplane as a physical object does not become "inherently expressive" because the airplane can be freighted with symbolic meaning.

activity within the protection of the First Amendment."). And—importantly—respondents denied services to the complainants before knowing anything about them other than their sexual orientation. The services that were denied thus consisted exclusively of the conduct of designing and baking a cake, regardless of whether the cake in question would convey a particularized message.

Respondents also fail the second prong of the test for inherently expressive conduct. The fact that respondents would *like* their cakes to convey a deeply held personal belief does not mean that their conduct is protected. *Carrigan*, 564 US at 126. Rather, there must be a significant likelihood that "the message would be understood by those who viewed it." *Johnson*, 491 US at 404; *Clark*, 468 US at 294. Again, respondents do not explain why a viewer of one of their cakes would perceive any message from Sweetcakes (as a business) or from the Kleins (as individuals). Indeed, it is highly unlikely that a reasonable observer would regard respondents' act of designing and selling a wedding cake as anything *other than* a commercial transaction, without regard to respondents' personal beliefs concerning marriage in general or the appropriateness of the specific marriage in question. Additionally, because Oregon law prohibits all businesses from discriminating against customers based on sexual orientation, it is unlikely that guests would perceive the provision of any services, including a cake, as communicating any message about the particular wedding, whether it is same-sex or heterosexual. Rather, a

guest would likely view a cake as a product of the baker being paid and following Oregon law. *See Craig*, 370 P3d at 286 (reaching similar conclusion regarding a bakery that refused to bake a wedding cake for a gay couple); *Elane Photography*, 309 P3d at 69 (reaching same conclusion in case involving wedding photographer because "[r]easonable observers are unlikely to interpret Elane Photography's photographs as an endorsement of the photographed events").

Moreover, the only way to infer the "celebratory message" that respondents wish to convey regarding heterosexual marriage is through respondents' own commentary about their cakes. In other words, their message—that marriage is a holy union between a man and a woman—is not inherent in the cake itself, but, instead, derives from respondents' separate statements about their cakes.[7] Respondents' motivation for baking and the celebratory message they may hope to convey do not mean that that message

[7] The Kleins assert that the process of designing and baking a cake is a religious process that reflects their personal belief that weddings are a spiritual bond mirroring that of Jesus Christ and his church. (App Br 32). But given that the design of their cakes is intended to "capture[] *the couple's* personalities and the wedding's themes," (App Br 32; emphasis added), it is difficult to imagine how a viewer of the finished cake would understand the *Kleins'* message of a religious union. (App Br 32). For example, a couple could choose to have a wedding with a *Star Wars* theme. The resulting cake—a replica of the Millennium Falcon—would not convey to any viewer the Kleins' personal belief that marriage is a bond "that mirrors" the bond "between Jesus Christ and his church." (App Br 32). Instead, the cake might convey, at most, that the couple getting married are *Star Wars* fans.

inheres in the cake itself, much less that any particular message is likely to be understood by those who view the cake.

In sum, respondents have failed to show that baking and designing a cake is inherently expressive conduct. The purpose of a cake is to be eaten. Although a cake can be used to express a message, baking and designing a cake is not inherently expressive conduct. In the posture of this case, the record shows that Aaron Klein denied services upon learning that complainants were gay, without any regard for a particular message that the cake was to convey, either on behalf of respondents or complainants. And, as outlined above, the fact that respondents' cake-baking is motivated by their religious beliefs does not transform that conduct into protected expression.

3. The final order does not compel respondents to speak or to host another speaker's message.

In addition to the "right to speak freely," the First Amendment also includes the "the right to refrain from speaking at all"—a right that is generally referred to as the "compelled speech doctrine." *Wooley v. Maynard*, 430 US 705, 714, 97 S Ct 1428, 51 L Ed 2d 752 (1977); *Craig*, 370 P3d at 283. Although respondents assert that the order compels them to speak in support of same-sex marriage, they are wrong. The final order does not compel respondents to speak out in favor of same-sex marriage or force respondents to accommodate any speech on behalf of complainants.

The final order commands respondents to cease and desist from denying full and equal accommodations to any person on account of sexual orientation. The final order does not dictate any particular design for a cake, command respondents to express any particular message, or compel any conduct aside from the non-discriminatory provision of services. Because (as outlined above) baking a cake is not inherently expressive and because the final order does not compel any particular speech from respondents, their challenge necessarily fails.

Moreover, as discussed above, it is unlikely that the attendees of a wedding would perceive any message from the baker of a wedding cake (or would even know who had baked the cake). Rather, any message conveyed by the cake would be that of the couple or the person who purchased and served the cake. To be sure, the First Amendment protects an individual from being forced "to host or accommodate another speaker's message." *FAIR*, 547 US at 63; *see, e.g.*, *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 475 US 1, 106 S Ct 903, 89 L Ed 2d 1 (1986) (law requiring utility to include copies of a publication that espoused views contrary to the utility's views with bills sent to customers); *Miami Herald Pub. Co., v. Tornillo*, 418 US 241, 94 S Ct 2831, 41 L Ed 2d 730 (1974) (law compelling newspapers to print responses free of charge from political candidates who had been criticized in editorials). But requiring respondents to comply with Oregon's public

accommodations law does not force them to host any message. Again, the only compelled conduct is the requirement that respondents not discriminate on the basis of sexual orientation in the services they offer. There is no requirement that respondents sell any cakes, let alone wedding cakes or cakes with a particular design. But if respondents choose to create wedding cakes for heterosexual couples, then Oregon law simply requires that they create wedding cakes for same-sex couples in the same manner. Compelling that conduct does not entail compelling any speech.

Unlike this case, the cases on which respondents rely involved a public accommodation that was protected speech. For example, in *Hurley*, the Supreme Court struck down the application of Massachusetts's public accommodation statute which required a parade organizer to include an entry by a gay-rights group. 515 US at 569. In that context, the state violated the First Amendment rights of the parade organizer by compelling it to incorporate a message that it did not wish to send. *Id*. at 574-75. But in arriving at that conclusion, the Court first determined that the content of the parade was subject to full First Amendment protection. *Id*. at 573. With that understanding, the Court then viewed the "public accommodation" provided by the parade organizer as speech itself, and in that context decided that forcing the parade organizer to include a message against its will was impermissible compelled speech. *Id*. at 575.

Here, by contrast, the public accommodation offered by respondents is a service—cake baking—that is not protected speech. Moreover, any message that respondents wish to convey is incidental to the non-expressive aspect of cake baking and design, and any specific message from respondents—as opposed to the message intended by the purchasers of the cake—is unlikely to be perceived by the individuals attending the wedding, as discussed above.

To be sure, there are some potential messages that a customer could request that would likely implicate the compelled-speech doctrine. For example, if a same-sex couple sought a cake with the inscription, "God approves of gay marriage," a bakery may have a constitutional privilege to refuse to create a cake *with that particular message*. But here, respondents refused to provide services without any idea of the design of the cake or any particular message that complainants may have wanted, if any. Accordingly, this court is not presented with the situation in *Hurley* where the state had forced the parade organizer to accommodate particular speech from a gay rights group.

4. Even if this court viewed respondents' baking as expressive conduct, the state has a substantial interest in regulating that conduct to prohibit discrimination.

Laws that regulate expressive conduct are subject to intermediate scrutiny. Under that test, the regulation is valid if it is narrowly tailored to serve a substantial government interest. *O'Brien*, 391 US at 382; *Johnson*, 491

US at 406 ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word."). Here, the state has a substantial interest in prohibiting discrimination based on sexual orientation. *See* ORS 106.305(3), (6) (legislative findings regarding the importance of equal rights for same-sex couples); Governor's Task Force on Equality, *Report to the Governor*, Exhibit B, Senate Committee on Judiciary, SB 2, March 12, 2007 (describing reasons to add "sexual orientation" to protected classifications within public accommodations law). As this court stated in *Tanner v. OHSU*, 157 Or App 502, 524, 971 P2d 435 (1998):

> Sexual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.

ORS 659A.403 serves the state's important interest in reducing the adverse social, economic, and political effects of sexual-orientation discrimination. On these facts, ORS 659A.403 requires respondents to provide a cake for same-sex weddings, just as respondents would for a heterosexual wedding. In doing so, the statute focuses on the non-communicative aspects of respondents' conduct and is thus narrowly tailored to serve the state's interest in stopping sexual-orientation discrimination. Because the order does not compel respondents to engage in any particular speech, as previously discussed, their challenge fails.

5. The final order does not violate respondents' right to expressive association or the right against compelled contributions.

Finally, in addition to arguments outlined above, respondents also make cursory arguments that application of ORS 659A.403 to their conduct violates their right to expressive association and their right against compelled contributions. First, respondents assert that the final order violates their right against compelled association with others' speech, relying on *Boy Scouts of Am. v. Dale*, 530 US 640, 120 S Ct 2446, 147 L Ed 2d 554 (2000). That claim is without merit.

Respondents' bakery is a business; it is not an "expressive association" as that term has been used by the United States Supreme Court. *See id.* at 647 (defining expressive association as a group exercising the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends"). BOLI is unaware of any cases applying the right to expressive association to a for-profit business. But even if respondents' business could be considered an "expressive association," the final order does not force respondents to accept anyone, including complainants, as associates. That doctrine is simply inapplicable to these facts.

Respondents also assert that the final order forces them to "contribute" to expressive activities that conflict with their beliefs, citing *United States v. United Foods, Inc.*, 533 US 405, 413,121 S Ct 2334, 150 L Ed 2d 438 (2001).

Respondents' compelled contribution argument is simply a rehash of their argument concerning compelled speech generally, addressed above. Moreover, *United Foods* concerned a law that required mushroom producers to contribute money to the Mushroom Council, which used the funds for generic mushroom advertising. That forced contribution by a private party to support the government's message violated the First Amendment because it compelled United Foods to pay for a message that it did not want to promote. *Id*. at 413.

Here, respondents refused to provide a service to the complainants based on their sexual orientation—a service that respondents regularly provided to heterosexual couples—and the final order sanctioned them for that conduct. There is no compelled contribution of money as in *United Foods*.

Respondents nevertheless assert that the stark factual differences between *United Foods* and the present case do not matter because "compelling [respondents] to contribute their time, resources, and artistic talent to the expression of same-sex weddings" involves speech that is more important and more protected than the commercial speech at issue in *United Foods*. That argument, however, misses the point. The final order does not compel respondents to make any "contribution"—financial or otherwise—to promote the complainants' speech. Rather the order requires respondents to comply with Oregon's public accommodations law by providing services equally. Stated differently, respondents may bake cakes, or not. But if they *choose* to

offer services to the general public, those services must be afforded to heterosexual couples and same-sex couples equally, without discrimination. *United Foods* simply does not apply.

C. Respondents do not raise an independent challenge under Article I, section 8, of the Oregon Constitution.

Respondents assign error to the final order on the ground that it violates their rights under Article I, section 8, of the Oregon Constitution. Respondents, however, offer no independent analysis under that provision. Instead, they assert that Article I, section 8, provides "broader" protection than the First Amendment, such that, if the First Amendment is violated, Article I, section 8, necessarily is as well.

The mere assertion that Article I, section 8, is "broader" than the First Amendment is insufficient to raise any cognizable challenge under the Oregon Constitution. This court should summarily reject respondents' undeveloped arguments. *See Briggs v. Lamvik*, 242 Or App 132, 142 n 9, 255 P3d 518 (2011) ("[T]he mere assertion of an unsubstantiated legal proposition [does not] obligate the court to unilaterally validate that proposition."); *State v. Montez*, 309 Or 564, 604, 789 P2d 1352 (1990) (refusing to address claim absent "thorough and focused analysis"); *Beall Transport Equipment Co. v. Southern Pacific Transp.*, 186 Or App 696, 700 n 2, 64 P3d 1193, *adh'd to as modified on recons*, 187 Or App 472, 68 P3d 259 (2003) (noting that it is not the

appellate court's "proper function to make or develop a party's argument when that party has not endeavored to do so itself"). In any event, and as explained above, respondents' arguments under the First Amendment are without merit.

D. The final order does not violate respondents' rights to free exercise of religion under the United States and Oregon Constitutions.

The application of ORS 659A.403 to respondents' conduct does not violate their right to free exercise of religion under the United States or Oregon Constitution. First, BOLI did not target respondents' religious beliefs or religious practices for disfavored treatment. Second, this case does not involve "hybrid rights" and, even if it did, the final order is nevertheless constitutionally permissible. Finally, the Oregon Constitution does not require a religious exemption to ORS 659A.403 for respondents' discriminatory conduct.

1. BOLI did not target respondents' religious conduct for disfavored treatment.

Under *Employment Division v. Smith*, "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).'" 494 US 872, 879, 110 S Ct 1595, 108 L Ed 2d 876 (1990) (internal citations omitted). Oregon's public accommodations statute is a neutral law of general applicability; it does not by its terms target any religious practice for disfavored treatment. Under that law,

BOLI is responsible for investigating and prosecuting claims of illegal discrimination. As outlined below, that is precisely what occurred here.

On summary judgment, the ALJ determined that respondents' refusal to bake a cake was "not a 'religious practice,' but conduct motivated by their 'religious beliefs.'" (SER 92). Respondents do not challenge that conclusion on appeal. Instead, they make a cursory argument that that the final order targets their discriminatory conduct for disfavored treatment *because* that conduct is motivated by their religious beliefs. Respondents, however, offer no evidentiary support for their claim that BOLI targeted their religious practices. That is not surprising because no evidence of any intent by BOLI to target respondents' religious practices exists in this record.

Instead, citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 US 520, 113 S Ct 2217, 124 L Ed 2d 472 (1993), respondents assert that BOLI's enforcement *must* have been motivated by a desire to suppress respondents' religious beliefs because BOLI's construction and enforcement of ORS 659A.403 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." (App Br 50; emphasis in original)). Respondents' argument is based on pure speculation and utterly without merit. In *Lukumi*, the Supreme Court looked beyond the text of the ordinance, which was facially neutral, because evidence in the record showed

an intent by the city in adopting the ordinance to specifically target the Santeria religion. *Id*. at 534-35. Here, there is no evidence of any intent (by either BOLI or the legislature) to target respondents' religious beliefs.

2. Respondents' conduct in denying equal accommodations does not implicate "hybrid rights" as that term has been used by the United States Supreme Court.

Respondents also assert that the application of ORS 659A.403 to their conduct is subject to strict scrutiny because their conduct implicates "hybrid rights," *i.e*., both free exercise and free expression. First, respondents' argument fails because their conduct does not implicate hybrid rights as that term has been used by the United States Supreme Court. As discussed extensively above, respondents were ordered to pay emotional distress damages based on their discriminatory conduct, not based on any protected expression. Second, their argument fails because Oregon has not adopted the strict scrutiny test for hybrid-rights claims followed by the Ninth Circuit.

In *Church at 295 S. 18th Street, St. Helens v. Employment Dept.*, 175 Or App 114, 28 P3d 1185 (2001), this court engaged in an extensive discussion of a hybrid rights claim. Respondents do not cite *Church* and, instead, assert that strict scrutiny applies to their claim, citing *Employment Div. v. Smith*. That is simply wrong. As explained in detail by this court in *Church*, the United States Supreme Court in *Smith* "did not say that, in any particular class of cases, a neutral, generally applicable law will be subject to strict scrutiny." *Church*, 175

Or App at 127. Rather, *Smith*, in dictum, "simply noted" that the Court had previously struck down neutral, generally applicable laws when a case "'involved' both the Free Exercise Clause and some other constitutional protection." *Church*, 175 Or App at 127. The lower federal courts have split on what the dictum in *Smith* means, and, in *Church*, this court declined to adopt any of the standards from the federal circuits. *Id*. at 128. As this court noted, it is not apparent why a "hybrid rights" doctrine should exist under United States Supreme Court jurisprudence at all. Because respondents failed to discuss *Church* or offer any argument for why strict scrutiny should apply to a hybrid-rights claim, this court should summarily reject their argument.

In any event, if this court addresses the issue of hybrid rights, it should not follow the Ninth Circuit and apply strict scrutiny. As discussed in *Church*, the United States Supreme Court's discussion of hybrid rights in *Smith* was dictum. Moreover, as *Church* noted, there is no principled reason why adding another constitutional claim should affect the standard of review. That is so for two reasons. First, the "'hybrid' exception" to *Smith* would swallow the rule if "the mere allegation of an additional constitutional claim has the effect of altering the standard articulated in *Smith*." *Church*, 175 Or App at 127. Second, the hybrid-rights exception would be "mere surplusage" if it applies only when the other constitutional claim would be successful. *Id.* at 127-28. In short, based on the reasoning in *Church*, this court should decline to give any

significance to the "hybrid rights" dictum in *Smith*. *See Combs v. Homer-Center School Dist.*, 540 F3d 231, 247 (3d Cir 2008) (declining to recognize "hybrid rights" because "we believe the hybrid-rights theory to be dicta").

3. The Oregon Constitution does not require a religious exemption to ORS 659A.403 for respondents' conduct.

Neither was BOLI required to grant respondents a religious exemption to ORS 659A.403 under Article I, sections 2 and 3, of the Oregon Constitution. Although the Oregon Supreme Court has mentioned that a court *may* consider "an individual claim to exemption on religious grounds" to a neutral, generally applicable law, the court has never stated a test for creating such an exemption, much less actually granted one. The two cases that mention a possible religious exemption, *Cooper v. Eugene School Dist. No. 4J*, 301 Or 358, 723 P2d 298 (1986), and *State v. Hickman*, 358 Or 1, 358 P3d 987 (2015), give no insight into when such an exemption may apply. *Cooper* cited federal cases decided under the First Amendment for the idea that an exemption was possible under the Oregon Constitution, and *Hickman* simply cited *Cooper*. In both cases, the brief references to a religious exemption were dicta. Neither case employed the methodology required by *Priest v. Pearce*, 314 Or 411, 840 P2d 65 (1992), to determine whether the text of the Oregon Constitution compels a religious exemption in some situations. Moreover, under the First Amendment, a religious exemption to a neutral law of general applicability has only been

granted in a narrow set of cases involving unemployment benefits. *See Smith*, 494 US at 883 (so stating). In short, although a religious exemption may, in the abstract, be possible under the free exercise clauses of the Oregon Constitution, respondents have not demonstrated why the Constitution requires an exemption here.[8] *See Montez*, 309 Or at 604 (refusing to address claim absent "thorough and focused analysis").

ANSWER TO SECOND ASSIGNMENT OF ERROR

The Commissioner was not biased against respondents.

A. Preservation of Error

Respondents preserved their assignment of error.

B. Standard of Review

This court reviews the final order's factual findings for substantial evidence. ORS 183.482(7), (8)(c). This court reviews the Commissioner's legal conclusions for errors of law. ORS 183.482(8)(a); *Springfield Education Assn. v. School Dist. No. 19*, 290 Or 217, 227, 621 P2d 547 (1980).

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[8] Moreover, granting an exemption could create its own constitutional problems. Because ORS 659A.403 is a neutral law of general applicability, it makes no distinction on the basis of religious belief or religious practice. Yet, respondents ask that this court carve out a unique exemption from Oregon law based on their religious beliefs. Such an exemption would, itself, impermissibly favor respondents' religion over others, as well as favor religion over nonreligion.

ARGUMENT

The Labor Commissioner was not biased against respondents. The Commissioner's comments to The Oregonian and on Facebook were general statements about Oregon's public accommodations law; to the extent that he commented on respondents' case, his comments noted that they would receive a fair and thorough hearing. Accordingly, respondents' claim fails.

To support their claim that the Commissioner was biased and thereby violated their due process rights, respondents must prove actual bias. *Teledyne Wah Chang Albany v. Energy Fac. Siting Council,* 298 Or 240, 262, 692 P2d 86 (1984). "[T]he 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 v. Clatsop County*, 267 Or App 578, 602, 341 P3d 790 (2014) (addressing actual bias in context of a quasi-judicial land-use decision). Importantly, a "preconceived point of view concerning an issue of law * * * is not an independent basis for disqualification." *Samuel v. Board of Chiropractic Examiners*, 77 Or App 53, 60, 712 P2d 132 (1985), *rev den*, 300 Or 704, and *rev den*, 302 Or 36 (1986).

Respondents assert that the Commissioner demonstrated actual bias by making two public statements concerning Oregon's public accommodations law, the first on Facebook and the second to a reporter for The Oregonian. In

their briefing, however, respondents do not lay out those statements in full, nor do they describe the context in which the Commissioner made those statements. Instead, respondents cobble together select quotations in an attempt to show actual bias. But looking at those statements in full and in context shows that the Commissioner made general comments about Oregon law and his statutory duty to combat illegal discrimination under those laws.

In a Facebook post on February 5, 2013, the Commissioner stated:

> "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."

(ER 412). The post included a link to a news story titled, "'Ace of Cakes' offers free wedding cake for Ore. Gay couple."[9] The post also displayed the following sentences, which appear to be from the article: "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

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[9] Respondents have included various items in their appendix that were not made a part of the administrative record, including two unauthenticated news articles, one of which purports to quote the Commissioner. (App 499-512). Because those articles were not made a part of record, they cannot be considered by this court. In any event, the statement attributed to the Commissioner—"People who open up their store to the public have to follow the law because it applies legally to everybody"—does not show bias for the same reasons discussed above.

wedding cake." (ER 412). At the time of the Facebook post, complainants had yet to file a complaint with BOLI.

The Commissioner's statement that a person's religious beliefs do not permit that person to "disobey laws that are already in place" was a correct description of the holding in *Smith*, 494 US at 879 (and similar cases), which held that neutral laws of general applicability do not run afoul of the Free Exercise Clause even if those laws incidentally burden religious practice. The fact that the Commissioner made that statement in a Facebook post that also included a link to a news article concerning respondents does not mean that the Commissioner had already decided that respondents were, in fact, in violation of the public accommodations law. The Commissioner, as the head of BOLI, is responsible for taking "all steps necessary to eliminate and prevent unlawful practices" and promoting "voluntarily affirmative action by employers, labor organizations, governmental agencies, private organizations and individuals" to eliminate the effects of unlawful discrimination. ORS 659A.800(1). Making public statements about the public accommodations law is part of the Commissioner's official duties. At most, the inclusion of the link shows the Commissioner's legal opinion that religious beliefs about same-sex marriage do not permit discrimination on the basis of sexual orientation. That legal opinion does not show any bias against respondents in particular or any prejudging of

the underlying facts of the complaint, which, as noted, had not been formally filed at the time of the Facebook post.

In an article in The Oregonian dated August 14, 2013—after the complaints against respondents had been filed with BOLI—the Commissioner was quoted as making the following statements:

- "'We are committed to a fair and thorough investigation to determine whether there's substantial evidence of unlawful discrimination,' said Labor Commissioner Brad Avakian." (ER 415).

- "'Everybody is entitled to their own beliefs, but that doesn't mean that folks have the right to discriminate,' Avakian said, speaking generally." (ER 416).

- "'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.'" (ER 416).

As with the Facebook post, the Commissioner's remarks to The Oregonian made no comment about the factual basis of the complaint. Rather, he specifically stated that BOLI was investigating to see *if* there was substantial evidence of unlawful discrimination. None of the Commissioner's statements suggest that he had prejudged whether respondents' alleged conduct had actually occurred or whether that alleged conduct was actually discriminatory. Nor did the Commissioner state that respondents had disobeyed the law and needed to be "rehabilitated," as respondents incorrectly claim. (App Br 58). Rather, the Commissioner made a general statement that the goal of any

enforcement action was for the business to bring its conduct into conformance with the law. Finally, the Commissioner's statement that an individual's right to personal beliefs "doesn't mean that folks have the right to discriminate" is simply an expression of the Commissioner's (correct) understanding of Oregon law. That statement does not show any bias. Because respondents have failed to show that the Commissioner was actually biased, this court should reject their second assignment of error.

ANSWER TO THIRD ASSIGNMENT OF ERROR

The damages award is supported by substantial evidence and substantial reason.

A. Preservation of Error

Respondents preserved their assignment of error.

B. Standard of Review

This court reviews BOLI's damages award for substantial evidence. ORS 183.482(8)(c); *Edwards*, 277 Or App at 562.

ARGUMENT

BOLI properly assessed the amount of damages based on the emotional distress suffered by claimants, as documented in the record. Respondents nevertheless challenge BOLI's damages award on a variety of grounds, including that the award is not supported by substantial evidence, that the award fails to take into account alleged discovery abuses, and that the award is

inconsistent with comparable cases. For the following reasons, respondents' arguments are without merit.

A. The damages award is supported by substantial evidence.

With respect to the first issue—whether the award is supported by substantial evidence—this court considers "whether the evidence in the record would allow a reasonable factfinder to value the emotional distress" as BOLI did. *Edwards*, 277 Or App at 563. The "amount of damages that a complainant is entitled to is an issue of fact," and, a "complainant's testimony, if believed, is sufficient to support a claim for emotional distress damages." *Id*. at 562. Importantly, respondents do not dispute that the complainants endured emotional suffering as a result of the denial of services, nor do they assign error to any of the agency's factual findings or to the ALJ's credibility determinations. Instead, they contend that the damages award was "inconsistent" in several respects and failed to take into account other evidence in the record that, in respondents' view, should have reduced the amount of the damages award.

First, respondents argue that BOLI erred in relying on any emotional distress that resulted from Aaron Klein using the term "abomination"—as used in Leviticus 18:22—when explaining to McPherson why he denied services. Essentially, respondents' argument is that the damages award is unlawful because Aaron Klein did not call RBC an abomination but, instead, stated that

homosexual conduct is an abomination. (App Br 62). That is a distinction without a difference. Moreover, whatever Klein may have meant subjectively, it was reasonably foreseeable that his use of the word "abomination" would be interpreted by the complainants as a statement about them specifically and about gay individuals generally. RBC specifically testified that, based on her religious upbringing, she understood the use of that word as indicating that she "wasn't supposed to exist, and that she had no right to love or be loved." (SER 6, 35). Similarly, LBC testified that, based on the use of the word "abomination," she understood Klein to be calling her "a creature not created by God, not created with a soul," and that she was unworthy of love and life. (SER 7, 38).

In any event, the record shows that Aaron Klein used the term "abomination" to describe homosexual conduct. He did so as an explanation for why he was denying services to a same-sex couple, who plainly engaged in homosexual conduct. The complainants experienced emotional distress based on the use of that term. Accordingly, BOLI did not err in considering the emotional distress resulting from Aaron Klein's use of the word "abomination" in assessing damages. *Cf. King*, 61 Or App at 203 (awarding damages based on clerk's use of racial insults).

Next, respondents assert that the final order fails to account for evidence that "tended to discredit Complainants' damages case." (App Br 62). But that

argument disregards the standard of review. The question is not whether BOLI could have reached a different result on the same evidence; rather, the question is whether a reasonable factfinder could conclude that complainants suffered the damages BOLI awarded based on the evidence before the agency. Here, the ALJ credited RBC's testimony about the damages she suffered from the denial of services and awarded her $75,000; the ALJ viewed LBC as not credible in some respects and awarded her $60,000, both because she exaggerated her testimony at times and because she was not present at the cake tasting. (SER 41). Because that evidence would permit a reasonable factfinder to assess damages as BOLI did, respondents' argument fails. *See Edwards*, 277 Or App at 562 (a complainant's testimony is sufficient to support a claim for emotional distress damages).

Finally, BOLI was not required to reduce the damages award to complainants based on its failure to produce certain discovery. Briefly, as a result of an administrative oversight, BOLI neglected to produce 109 pages of discovery until approximately two weeks before the evidentiary hearing. (SER 111-13). Respondents sought various sanctions, ranging from dismissal of the claim for damages entirely, to an order allowing them to re-depose the complainants. (SER 113-14). Recognizing that the authority to impose discovery sanctions is limited by administrative rule, the ALJ rejected the vast majority of the sanctions respondents sought. Instead, the ALJ prohibited BOLI

from relying on any of the documents (or the information contained therein), while simultaneously *allowing* respondents full use of any of the materials that would support their defense. (SER 112-13). Respondents have not assigned error to that ruling. Accordingly, its propriety is not before this court. ORAP 5.45 ("No matter will be considered on appeal unless the claim * * * is assigned as error in the opening brief[.]").

Instead, respondents attempt to recast their argument as one of substantial evidence. In other words, they contend that the amount of damages awarded is not supported by substantial evidence (or should be reduced) because BOLI did not provide certain documents until two weeks before the evidentiary hearing. There is no authority for the ALJ or the Commissioner to reduce damages awarded to the complainants based on the agency's inadvertent discovery violation. *See also* OAR 839-050-0020(11) (circumscribing authority to impose sanction for discovery violations). Nor should there be. Under ORS 659A.850(4)(a)(B), the purpose of awarding damages is to "eliminate the effects of the unlawful practice" by paying "an award of actual damages suffered by the complainant." As the ALJ determined, it was BOLI's error—not the complainants—that led to the discovery violation, and the violation was appropriately remedied through a carefully crafted evidentiary ruling that respondents do not challenge. (SER 111-14).

B. The damages award is not internally contradictory.

Respondents next argue that the damages award was contradictory because it expressly disclaims any damages based on media exposure but nevertheless awarded $135,000 in total damages. That argument disregards the reasoning in the final order and the request for damages by BOLI. The Second Amended Formal Charges simply requested $75,000 for emotional, mental, and physical suffering. (ER 259). As indicated in the final order, BOLI specified during its closing argument that it sought $75,000 per complainant based solely on the emotional suffering directly resulting from the denial of service. BOLI also asked for damages caused by media exposure as an independent basis for damages. (SER 40). There is no contradiction.

Nor is there any contradiction in BOLI's finding that the complainants' emotional suffering continued from the time of the denial of services until the contested case hearing. The ALJ found credible RBC's testimony that the denial of service caused her emotional distress through the time of the hearing. (SER 37). The ALJ also found credible LBC's testimony that she still felt "emotional effects from the denial of service because [her children] and RBC 'were' still suffering and that 'was' tearing [her] apart." (SER 39). That credible testimony is sufficient to show that complainants suffered emotional distress until the time of the hearing, independent of the media exposure occasioned by the case. *Edwards*, 277 Or App at 562; *see also In the Matter of*

Westwind Group of Oregon, Inc., 17 BOLI 46, 53 (1998) (In public accommodation cases, "the duration of the discrimination does not determine either the degree or duration of the effects of discrimination.").

C. The damages award is consistent with other BOLI cases.

Lastly, and contrary to respondents' contention, the damages award is consistent with that awarded in other BOLI cases. As an initial matter, this court's inquiry, is simply "whether the evidence in the record would allow a reasonable factfinder to value the emotional distress that" the complainants suffered at $75,000 and $60,000, respectively. *Edwards*, 277 Or App at 563. As outlined above, the evidence is more than sufficient in that regard. Even more fundamental, however, is the simple fact that the actual amount awarded necessarily "depends on the facts presented by each complainant." *In the Matter of From the Wilderness*, *Inc.,* 30 BOLI 227, 291-92 (2009) (internal citations omitted). In that regard, no two cases are alike. Nevertheless, the damages award in this case is consistent with that awarded in other, similar cases.

In valuing the complainants' emotional distress, BOLI relied on a number of its own prior decisions as guidance. (*See* SER 41, n 20, *citing In the Matter of Andrew W Engel, DMD*, 32 BOLl 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); *From the Wilderness, Inc*., 30 BOLl 227 (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); and *In the Matter of Maltby Biocontrol, Inc*., 33 BOLl 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)). Those cases demonstrate that, while the amount awarded will vary based on the specific facts presented, the damages awarded in this case are generally consistent with BOLI's historical awards.

Although not referenced in the final order, one additional decision merits brief discussion in light of the similarities between the two cases: *In the Matter of Blachana, LLC*, 32 BOLI 220 (2013), *aff'd sub nom*, *Blachana, LLC v. Oregon Bureau of Labor & Indus*., 273 Or App 806, 359 P3d 574, *opinion adh'd to as modified on recons*, 275 Or App 46, 362 P3d 1210 (2015). In *Blachana*, the owner of a local bar left a voicemail message with the leader of an informal group of transgender individuals, informing them that they were no longer welcome at the establishment. BOLI concluded that, as a result of that communication, the bar and its owner had violated Oregon's Public

Accommodations Act by refusing service to individuals based on their gender identity. BOLI awarded a total of $400,000 in emotional distress damages to 11 members of the group. Each of those members testified about the emotional toll the unlawful denial of services had caused.

For example, one member testified that she had felt "angry, then hurt and offended" by the bar's actions. *In the Matter of Blachana, LLC*, 32 BOLI at 250. She "stopped going out in public dressed as a woman, limited her social life, and lost 15 pounds because of the stress." *Id*. Based on that testimony, BOLI awarded her $35,000 for "the emotional, mental, and physical suffering she experienced as a result" of the unlawful practice. Another complainant testified about how she had "gained 10 pounds, was a little short-tempered and tired at work, and was late to work twice because of her lack of sleep." *Id*. at 251. She testified that she found it "hard to be told you're not welcome somewhere just because of who you are." *Id*. BOLI awarded her $40,000 for her emotional, mental, and physical suffering. Other awards in that case were similar in amount and based on similar evidence. *Id*. at 250-53.

As in *Blachana*, the unlawful conduct in this case was isolated in that it involved a single denial of service. But in public accommodation cases, "the duration of the discrimination does not determine either the degree or duration of the effects of discrimination." *Westwind Group of Oregon*, 17 BOLI at 53. That is because discrimination in public accommodation is "particularly

'insidious and devastating'" in that it "impairs a 'person's basic right to move about freely in society and to be recognized thereby as a part of his or her community.'" *Id*. (internal citations omitted). And, like in *Blachana*, the complainants testified about how respondents' actions left them feeling devalued as humans and grief-stricken over a significant period of time.

For example, RBC testified that respondents' denial of service made her question whether she "deserved" to "be married like everybody else and have a family like everybody else." (Tr 62-63). She questioned whether there was something "inherently wrong with being" gay and whether she deserved "the same things that heterosexual people deserve." (Tr 63). The denial of service also made RBC "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." (SER 35). Indeed, RBC "was in tears or close to tears during most of her testimony." (SER 20). Similarly, LBC testified at length about her emotional distress, including experiencing anger, outrage, embarrassment, exhaustion, frustration, sorrow, and shame. (SER 38; Tr 340-47). Having been raised Catholic, she understood an "abomination" as a "creature not created by God, not created with a soul; they are unworthy of holy love; they are not worthy of life." (Tr 342). Their relationships with each other and with their families were affected, and both testified that, almost two years

later, they were still experiencing emotional pain from the denial of service. (Tr 354, 359-364).

The complainants' testimony in this case shows that they experienced significant emotional distress, and *Blachana* provides important guidance in assigning monetary value to that distress. More importantly, in light of the decisions discussed above, the emotional distress damages awarded in this case are consistent with BOLI's prior case law and supported by substantial evidence.

ANSWER TO FOURTH ASSIGNMENT OF ERROR

BOLI correctly concluded that respondents violated ORS 659A.409.

A. Preservation of Error

Respondents preserved their assignment of error.

B. Standard of Review

This court reviews BOLI's conclusion that respondents violated ORS 659A.409 for substantial evidence. ORS 183.482(8)(c).

ARGUMENT

BOLI properly concluded that respondents violated ORS 659A.409. That statute prohibits a person, who is acting on behalf of a place of public accommodation, from publishing a communication "to the effect that" services "will be refused" (or provided discriminatorily) on account of sexual

orientation.[10] Here, BOLI accepted (for purposes of this case only) respondents' argument that the statute required a prospective intent to refuse services, and found that they had communicated that requisite intent to deny services based on sexual orientation in two interviews and in a notice placed on the bakery door. On appeal, respondents do not argue that the final order lacks substantial evidence to conclude that respondents violated ORS 659A.409.

Instead, respondents argue the *weight* of the evidence; that is, they contend that the evidence itself does not show any future intent by respondents to discriminate and that their statements were simply commentary on their case, which is protected expression. But whether respondents' statements were a communication "to the effect that" services would be denied based on sexual orientation is a question of fact. On judicial review, "the court shall not substitute its judgment for that of the agency as to any issue of fact." ORS 183.482(7). BOLI's finding that respondents' communications expressed a

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[10] ORS 1659A.409 provides that:

> it is an unlawful practice for any person acting on behalf of any place of public accommodation * * * to publish, circulate, issue or display * * * 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.

future intent to discriminate is binding, and respondents' argument disregards the appropriate standard of review.

But even if respondents had argued that the order lacks substantial evidence to conclude that they violated ORS 659A.409, that argument would fail. Under ORS 183.482(8)(c), "[s]ubstantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding." Here, BOLI concluded that respondents made three communications that, taken together, showed a prospective intent to discriminate on the basis of sexual orientation. Those communications were Aaron Klein's statements on CBN television on September 2, 2013, Aaron Klein's statements in a radio interview with Tony Perkins on February 13, 2014, and a notice[11] posted on the door of the bakery by respondents. (SER 24-25). Those statements, taken together, provide substantial evidence to support BOLI's finding.

In his statements to CBN television, Aaron Klein stated that he "didn't want to be a part of [complainants'] marriage, which I think is wrong." He continued, "It's one of those things where you never want to see something

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[11] In the proposed final order, the ALJ did not consider the notice posted on the bakery because BOLI had not described the text of the notice or specifically alleged its existence in the formal charges. BOLI disagreed with the ALJ and explained its reasons for considering the notice. (SER 26). Respondents do not assign error to the final order on that basis.

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 to this point and I'm sure he will in the future." (SER 24).

In his interview with Tony Perkins, Aaron Klein described the initial denial of services, stating:

> 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 am very sorry." I realized they had wasted their time. "*We don't do same-sex marriage, same-sex wedding cakes*."

(SER 24; emphasis added). Later, he continued:

> "Um, you know it was something I-I had a feeling was going to become an issue and I discussed it with my wife. Ah, when the state of Washington, which is right across the river from us, ah, 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 this becoming an issue but we have to stand firm.* It's our belief and we have a right to it, you know."

(SER 25; emphasis added).

Respondents also posted a notice on the door of the bakery that stated:

> 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]

(SER 24; italics added).

Based on that evidence, a reasonable factfinder could conclude that respondents had communicated to the public a prospective intent that they would continue to deny services on the basis of sexual orientation, just as they had done to complainants. Specifically, respondents noted their intent to "stand strong" and "stand firm" in their fight. While those statements could refer to their legal battle, those statements also could refer to the denial of services to same-sex couples—specifically, providing cakes for same-sex weddings generally. From those statements, then, BOLI could reasonably infer a prospective intent to deny services to same-sex couples. That is a communication "to the effect that" services would be denied based on sexual orientation, within the meaning of ORS 659A.409.

Respondents also assert that the order violates their free-speech rights because it enjoins them from making any further statements about their case. Respondents are wrong. Although respondents made the statements just described in the context of discussing the past events that led to this case, the statements also exhibited a future intent to engage in discriminatory conduct. It is that statement of discriminatory intent and not any discussion by respondents

of the facts of their case or their statements about issues of public concern that resulted in the violation.

As respondents acknowledge, the state can require a business to refrain from speech that threatens to discriminate on the basis of sexual orientation under the First Amendment. (App Br 69 (citing *FAIR*, 547 US at 62)). And, as the Commissioner found, respondents' statements were not simply a recounting of past events or commentary on their case, but also included "notice that discrimination will be made in the future by refusing such services." (SER 27). Respondents' statements were not limited by time or circumstance and were a clear indication of prospective intent. Essentially, respondents broadcast a discriminatory business practice with no expiration date. Because, as noted, that factual finding is supported by evidence in the record, BOLI did not violate the First Amendment by enjoining respondents from making such communications—communications that convey a prospective intent to discriminate—in the future. Under the final order, respondents are free to discuss their case, their legal theory, and their religious beliefs. But they cannot do so in a way that communicates to the public an intent to engage in illegal discrimination.

CONCLUSION

This court should affirm BOLI's final order.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on August 16, 2016, I directed the original Respondent's Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Tyler D. Smith, Herbert G. Grey, and Anna Harmon, attorneys for petitioners, by using the electronic filing system.

I further certify that on August 16, 2016 I directed the Respondent's Answering Brief to be served upon Adam R. F. Gustafson, Derek S. Lyons, Kenneth Alan Klukowski, Matthew J. Kacsmaryk, Cleve Weston Doty, and C. Boyden Gray, attorneys for petitioners, by mailing two copies, with postage prepaid, in an envelope addressed to:

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Continued…

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation provided by the order of this court dated August 9, 2016 and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 14,916 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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