IN THE COURT OF APPEALS OF THE STATE OF OREGON

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

PETITIONERS' REPLY BRIEF

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

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

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AUB	Brief of Amicus Curiae Americans United for Separation of Church and State
BOLI	Oregon Bureau of Labor & Industries
Complainants	Rachel Cryer ("Cryer") & Laurel Bowman ("Bowman")
ER	Excerpt of Record (filed with Opening Brief)
Kleins	Melissa Klein and Aaron Klein
McPherson	Cheryl McPherson, Cryer's mother
OB	Opening Brief
Op	Final Order of Oregon Bureau of Labor & Industries (order under review)
Sweet Cakes	Sweetcakes by Melissa

STATEMENT OF THE CASE

I. SUMMARY OF ARGUMENT

This case is, first and foremost, about whether Oregon has commandeered individuals' liberty to compel them—upon pain of crippling financial penalties—to facilitate the multitude of events in which "persons" protected by ORS 659A.403 might participate. Such events might be weddings, as here, or religious rituals, sex-segregated club initiations, or abortions. So the Court must determine: Has Oregon, for example, compelled Catholics to sculpt totems for Wiccan rituals? Feminists to photograph fraternity initiations? Pro-life filmmakers to video abortions? It has not, and that ends the case.

In addition to being correct, limiting ORS 659A.403's application to its text—"persons," not events—eliminates any need to resolve multiple constitutional questions that otherwise arise. What is art, and can the state compel its creation or affiliation with others' expression? Can the state coerce people to contribute their time, talent, and resources to others' expression? Can the state compel an expressive group to associate with others' discordant messages? What is "expressive conduct" and can the state compel it? What are hybrid rights? When is a law's application over religious, but not secular, objections unlawful targeting of religious practice?

BOLI gives the wrong answers to each question. Its errors are readily traceable to an insistence on applying ORS 659A.403 beyond its terms, distortions of the record, and repeated misapplications of precedents.

BOLI's statutory interpretation finds no support in any authoritative legal source: text, context, legislative history, or precedent. Persons are not events. And Oregon's legislature did not contemplate, let alone intend, the far-reaching, sometimes unconstitutional, consequences of concluding otherwise.

BOLI's constitutional interpretation fares no better.

The constitutions' Speech Clauses generally prohibit compulsion of pure speech. Because art is pure speech, BOLI tries to argue custom-designed wedding cakes are not art. Precedent says otherwise. So BOLI speculates that Complainants may have wanted nothing more than an off-the-shelf "sheet cake." AB 22. The record says otherwise: The Kleins created custom-designed wedding cakes (art). That is what Complainants wanted. That is what BOLI punished the Kleins for not creating. That is unconstitutional.

BOLI's other pure speech-related arguments also miss the mark. The Supreme Court has foreclosed its argument that it can compel speakers to accommodate others' expression so long as the risk of misattribution is low. Compelled physical contributions to expression are at least as constitutionally off-limits as their financial counterparts. And small, for-profit businesses

possess broad expressive associational rights that protect them from compelled association with incongruent expression.

The constitutions' Speech Clauses also generally prohibit compulsion of expressive conduct. BOLI says it can compel people to create wedding cakes because they do not convey particularized messages to reasonable observers. That is contrary to precedent, the record, and common sense. Wedding cakes' inherent purpose—as BOLI's own expert witness testified—is expression.

BOLI's Final Order also runs afoul of the constitutions' Religion Clauses. The federal Constitution generally prohibits interference with hybrid rights, *e.g.*, Free Exercise rights asserted in conjunction with "colorable" claims based on other constitutional provisions. BOLI says such rights do not exist. The Supreme Court disagrees. In addition, the constitutions prohibit targeting religious exercise for disfavored treatment. BOLI says it has not done this. But BOLI has applied its interpretation of ORS 659A.403 to compel facilitation of events notwithstanding *religious* objections, while failing to commit to compelling such facilitation notwithstanding *secular* objections. BOLI's refusal to grant the Kleins an individualized exemption from ORS 659A.403, as permitted by Oregon's Constitution, only highlights its impermissible targeting.

BOLI also fails to rehabilitate the Final Order's three additional defects: its violation of Due Process, its unsupported damages award, and its erroneous ORS 659A.409 liability conclusion.

On Due Process, BOLI misapplies precedent and abstracts from context, ignoring that the Commissioner impermissibly made statements about *this specific case* that *prejudged* the Kleins' liability.

On damages, BOLI manipulates the standard of review to distract from its failure to account for mitigating evidence, inconsistent legal determinations, and a reliance on materially distinguishable cases for guidance.

Finally, on ORS 659A.409, BOLI contends that statements admittedly made "in the context of discussing the past," AB 62, conveyed a future intent to discriminate. BOLI thus stretches the statute beyond the breaking point. And BOLI has no material response to the injunction's constitutional defects, premised, as it is, upon constitutionally protected speech.

The Final Order must be vacated.

II. REPLY TO QUESTIONS PRESENTED ON APPEAL

BOLI "rejects" the Kleins' "questions presented," but identifies no basis for doing so. AB 1. The Kleins correctly stated the questions presented. OB 2-4.

III. REPLY TO STATEMENT OF FACTS

BOLI says the Kleins' statement of facts was "argumentative" and "inconsistent with" its "factual findings." AB 1. Yet BOLI fails to identify any argumentative or inconsistent statements. And BOLI cannot complain about the Kleins' recitation of *undisputed* record evidence. *Michelet v Morgan*, 11 Or App 79, 501 P2d 984 (1972).

BOLI also asserts that the Kleins relied "on information" not "made a part of the record." AB 1 (citing OB 14). Any extra-record material merely corroborates record evidence; no argument depends upon it.

BOLI contends (or implies) its factual findings are binding. AB 5, 9-10, 18, 59-60. That ignores that review of the Kleins' assignments of error is for both substantial evidence and reason. OB 2-4, 22-23, 56, 60, 66; *City of Roseburg v Roseburg City Firefighters*, 292 Or 266, 271-72, 639 P2d 90 (1981); ORS 183.482(8)(c).

FIRST ASSIGNMENT OF ERROR: BOLI ERRED IN APPLYING ORS 659A.403

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

BOLI converts ORS 659A.403's antidiscrimination protections into compulsions to facilitate events without textual warrant, and in spite of unconstitutional consequences.

BOLI misidentifies the question presented. The record is clear that Sweet Cakes sold custom-designed wedding cakes, to gay and straight customers alike, *for use in opposite-sex weddings.* Op 70 (Sweet Cakes sold a wedding cake to Cryer for mother's wedding); ER.275, 368, 376. Thus, the question is not, as BOLI contends, whether ORS 659A.403 compels a business to offer that service to both same- and opposite-sex couples. AB 12, 17. It is whether the law

compels that business to offer a *new service*: wedding cakes *for use in same-sex weddings*. That question answers itself: No.

ORS 659A.403's text supports that answer. The statute protects "persons"—dictating *with whom* businesses must deal. But its text, context, and history are silent as to conduct—allowing private resolution of questions about how customers use businesses' products.

BOLI seeks to span the divide between unregulated conduct and protected persons through the expedient of equation. It thus contends that not facilitating same-sex weddings *is* not serving gay "persons" because the former are "engaged in exclusively or predominantly" by the latter. AB 14. Applied consistently, this formula would compel facilitation of all activities "engaged in exclusively or predominantly" by "persons" protected by ORS 659A.403—of which there are many. OB 6-7, 27-28. And BOLI cannot identify text, context, or history indicating that Oregon's legislature contemplated such outcomes. *See Halperin v Pitts*, 352 Or 482, 495, 287 P3d 1069 (2012) (remedial statutes must be applied consistent with their text).

BOLI says the Oregon Family Fairness Act ("OFFA"), which extended state marriage "rights, benefits, and responsibilities" to same-sex couples, informs ORS 659A.403's meaning. AB 13 (citing Or Laws 2007, ch 99). But BOLI does not contend the OFFA extended to same-sex couples any

preexisting right of opposite-sex couples to compel businesses to facilitate their weddings. The OFFA says nothing about ORS 659A.403. *See* OB 6-7, 23.

BOLI (citing nothing) asserts that distinguishing between persons and closely correlated ceremonies is unprincipled. AB 16-17. It is not. The law may, for example, refrain from compelling facilitation of Wiccan ceremonies, even while requiring service of Wiccans qua Wiccans. The law may do so out of respect for potential objections to such facilitation or because of the constitutional questions compulsion would trigger. OB 29.[1]

BOLI misplaces reliance on *Lawrence v Texas*—and cases relying on it—contending it held that status-conduct distinctions to be "generally inappropriate when" the two are "closely correlated." AB 15 n.3. It did not. *Lawrence* firmly ground its equivalence between gay status and gay *sexual conduct* in the latter being intimate, private, indispensable to autonomy, and an irrational subject of government regulation. 539 US 558, 562, 567, 577-78 (2003). BOLI makes no effort to show that any of those qualities characterize *weddings*, same-sex or otherwise. Nor could it. OB 26.

Indeed, Supreme Court precedent is against BOLI. OB 25-26. Beyond sexual conduct, the Court has merged status and closely correlated conduct only

[1] By contrast, BOLI ignores the unprincipled results inherent in its interpretation. OB 28-29.

where the latter is an "irrational object of disfavor." *Bray v Alexandria Women's Health Clinic*, 506 US 263, 270 (1993). And BOLI does not—and cannot—dispute that "decent and honorable" reasons exist for opposing even same-sex *marriage*. *Obergefell v Hodges*, 135 S Ct 2584, 2602 (2015).

BOLI also concocts a new rationale for its Final Order: that the Kleins declined to design a wedding cake *because of* Complainants' sexual orientation, irrespective of its facilitation of a same-sex wedding. AB 19. This blinks reality—and BOLI's own factual findings: The Kleins' motivation was their religious beliefs about same-sex *weddings*. *See* Op 5, 44, 69-70; AB 30.[2]

II. The Final Order Violates The Federal Speech Clause.

A. Courts Review Fact Findings In Speech Clause Cases De Novo.

BOLI says *Hurley v Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 US 557 (1995), does not require state courts to review factual findings underpinning federal speech-related determinations de novo. AB 9-10. BOLI ignores that de novo review is "a constitutional duty" and "a requirement of federal constitutional law." *Hurley*, 515 US at 567.

[2] BOLI now contends that the Kleins engaged in sex-based discrimination. AB 17 n.4. BOLI neither charged nor made required findings in support of that liability theory. ER.245-260; Op 22, 42-43; ORS 659A.845(1).

B. The Final Order Unconstitutionally Compels Pure Speech.

BOLI contends that custom-designed wedding cakes are not pure speech. Not so. They are art, the creation of which BOLI concedes it cannot compel. AB 24, 30.[3]

BOLI ignores the test for identifying art: whether the item reflects "self-expression," "creative talents," or a personal "sense of form, topic, and perspective." *White v City of Sparks*, 500 F3d 953, 956 (9th Cir 2007); *Anderson v City of Hermosa Beach*, 621 F3d 1051, 1062 (9th Cir 2010); OB 30-31. BOLI does not dispute that sculpture is fully protected, that a sculpture could be of a wedding cake, or that the medium of art (plaster or dough) is irrelevant to the First Amendment. *Bery v NYC*, 97 F3d 689, 696 (2d Cir 1996); *Anderson*, 621 F3d at 1060-61.[4]

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[3] BOLI does not—and could not—contend the Final Order satisfies strict scrutiny. *Pac Gas & Elec Co v PUC of Cal*, 475 US 1, 19 (1986) (plurality). Doing so would, at a minimum, require showing that its application of ORS 659A.403 is so narrowly tailored as to be the least restrictive means of achieving an articulated, compelling government interest. *United States v Playboy Entm't Grp*, 529 US 803, 813 (2000). And even that might be insufficient, since dignity-protecting laws do not overcome the "general rule" that "expression prevails, even where no less restrictive alternative exits." *Id.*; *see also* OB 51-52.

[4] It does not help BOLI that the Kleins' art results from conduct. AB 21-23. All art does. And BOLI does not contend art's creation receives less constitutional protection than art itself. AB 24. Nor could it. *Anderson*, 621 F3d at 1061-62.

Having bypassed the proper analysis, BOLI falls short in contending that custom-designed wedding cakes are not art—an argument it did not raise in its own proceedings. BOLI says such cakes are not art because they can "be presented or decorated in any number of ways, only some of which convey any message," let alone a particularized one. AB 22-23, 25, 27. But *Hurley* stands in the way: Jackson Pollock's canvases are pure speech, though he can "present or decorate" them "in any number of ways," many of which may not convey an articulable message. 515 US at 569. BOLI repeatedly identifies "written inscriptions" as somehow important. AB 21, 27. But they are not. *Hurley*, 515 US at 569. And even if wedding cakes convey couples' messages, AB 29 n.7, 31, they are their creator-artists' speech too. *Riley v Nat'l Fed'n of the Blind*, 487 US 781, 801 (1988); OB 31.

BOLI further ignores the irrelevance of the artistic medium, contending that custom-designed wedding cakes are merely food "to be eaten," perhaps like fish. AB 24. The notion that custom-designed wedding cakes are principally food is without support. They are receptions' "backdrop" and "the focal point of hundreds of pictures." Buddy Valastro, *Secrets from the Cake Boss*, Huffington Post (Oct 11, 2011). BOLI's Final Order specifically notes wedding cakes' "customary" and "tradition[al]" expressive role. Op 75. Its expert witness explained they are not food, but "artistic creations," expressive of married couples' identity, beliefs, and relationship. ER.446-47, Tr.594:1-595:7; ER.451-

52, Tr.599:23-600:11. And Complainants discuss their own wedding cakes—one a peacock, one a fairy based on a tattoo—in aesthetic and expressive, rather than culinary, terms. *See* Doc. 224 at 356:6-8; *Anderson*, 621 F3d at 1062 (tattoos are art); *Mastrovincenzo v NYC*, 435 F3d 78, 95-96 (2d Cir 2006) (graffiti hats are art because of their "predominantly expressive purpose").

Without support from precedent, BOLI distorts the record, speculating that Complainants may have wanted nothing more than an off-the-shelf "sheet cake." AB 22, 23, 28. Even assuming hypothetical sheet cakes are not art, BOLI cites nothing to support its speculation, including no evidence the Kleins even offered to sell "off-the-shelf" wedding cakes.

Indeed, the *uncontested* record establishes that BOLI punished the Kleins for declining to sell what their business created and what Complainants wanted—a *custom-designed wedding cake*. According to BOLI:

- "At all material times," Sweet Cakes "offered custom designed wedding cakes for sale to the public." Op 69.
- In 2010, the Kleins "designed, created, and decorated a wedding cake for [McPherson]." *Id.* at 5.
- "[Cryer] wanted" a "cake like [McPherson's]." *Id.*
- Days after visiting Sweet Cakes, Cryer ordered a three-tiered cake with "hand-created" peacock feathers "trailing down over tiers to the cake plate." *Id.* at 11-12.

On this record, BOLI's speculation that the Kleins might have declined to sell "a simple sheet cake" is untenable. *Norden v State*, 329 Or 641, 643, 996 P2d 958 (2000) (agency confined to "developed" evidence).[5]

The record is also clear that *every* wedding cake the Kleins make is art—the "predominantly" expressive product of their "self-expression" and "creative talents." *Supra* pp.9, 11; OB 32. From a First Amendment perspective, there is no difference between the Kleins' custom-designed wedding cakes and those of BOLI's own expert witness, which are—according to the undisputed record—"artistic expression[s]" and "artistic creations" of an "artist." *Supra* p.10-11.

On this record, the Final Order unconstitutionally compels art.[6]

C. The Final Order Unconstitutionally Compels Speakers To Accommodate Others' Expression.

Even if BOLI could force the Kleins to create art—and it cannot—*Hurley* prevents it from compelling the Kleins to use their art to accommodate the

[5] Neither ORS 659A.403 nor Due Process countenance BOLI's attempt to impose liability on the Kleins for declining to sell a product there is no evidence they offered or that Complainants even wanted.

[6] The state may *forbid* speech that effectively threatens exclusionary conduct. *Rumsfeld v Forum for Academic & Institutional Rights*, 547 US 47, 62 (2006) ["*FAIR*"]. But BOLI is wrong, AB 21-22, that it can *compel* speech under the guise of regulating such conduct. *Hurley*, 515 US at 572-73.

expression inherent in Complainants' wedding.[7] The Kleins, no less than any wedded couple, have a constitutional right to speak unimpeded by others' expression. And *Hurley* would forbid compelling Complainants to display the Kleins' art at their wedding—doing so would deprive them of fundamental message "autonomy." 515 US at 573. The reverse—compelling the Kleins' art to accommodate the expression inherent in Complainants' wedding—is no less a deprivation. OB 36-39.

In response, BOLI correctly abandons the Final Order's assertion that *Hurley* does not apply to speech that occurs beyond the public square. *See* Op 105; OB 35-36 (refuting argument).

BOLI's replacement arguments fare no better. BOLI asserts (without citation) that wedding attendees are "unlikely" to "even know" who custom-created the cake. AB 31. *Hurley*, however, rejects the notion that the government can forcibly comingle speech, casually assuming that listeners will later correctly disentangle it. 515 US at 575-80. *Hurley* is premised upon listeners interpreting accommodated speech as resulting from coerced speakers' determinations that its "message is worthy of presentation." *Id.* at 575. Indeed,

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[7] BOLI does not dispute that weddings are inherently expressive. *See Kaahumanu v Hawaii*, 682 F3d 789, 799 (9th Cir 2012). Nor does BOLI dispute that location affects art's message. OB 38.

the risk of "compromised" message autonomy is unacceptably high where, as here, *see* ER.446-47, disclaimers "would be quite curious" and the coerced speech is "intimately connected" with the accommodated message. *Id*. at 576. [8]

In any event, anonymity is a BOLI fantasy, in general and on this record. A cake's purchaser always knows the artist, as would the marrying couple and any guests interested enough to ask. And this record cannot support an anonymity conclusion: In the course of providing "full and equal service" (as BOLI defines it), the Kleins deliver wedding cakes in a truck emblazoned with their company's name, and sometimes assemble them on-site. Op 22, 70.

Finally, BOLI's reliance on the Kleins' voluntary cake creation, AB 32, also runs into *Hurley*. AB 32. That speech is voluntary does not empower the state to compel it to accommodate others' messages. 515 US at 573.[9]

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[8] *FAIR* is not to the contrary because plaintiffs there were "not speaking." 547 US at 64. Thus, *FAIR* presumed only that listeners can discern non-speakers' compelled toleration of others' speech, not that they accurately disentangle two speakers' different messages. *Id.* at 64-65.

[9] AU says parades-of-horribles could arise from protecting "artists" against compelled speech. AUB 1-2, 21. But AU does not argue the state can compel undisputed artists—*e.g.*, Jackson Pollock—to splatter paint. The only question, then, is whether courts can identify art. They can and do. *Supra* pp.9-11. AU further does not address strict scrutiny's role in forestalling its feared horribles. And AU fails to explain why those horribles have not beset commercial markets that are certainly covered by *Hurley*'s rule—*e.g.*, speechwriting—which are characterized by professional speakers paid to accommodate others' expression. In fact, AU does not even cite *Hurley*.

D. The Final Order Unconstitutionally Compels Material Contributions To Others' Expression.

BOLI has unconstitutionally compelled the Kleins to "contribute" to "expressive activities [that] conflict with [their] 'freedom of belief.'" *See* OB 42-44 (quoting *United States v United Foods*, 533 US 405, 413 (2001)).

BOLI says this argument is "a rehash" of arguments "concerning compelled speech." AB 36. Unlike those arguments, this one succeeds even if the Kleins' art is not pure speech. *United Foods*, 533 US at 413; OB 43-44.

Further, BOLI does not explain why the First Amendment applies differently to financial contributions to speech, as in *United Foods*, than to physical contributions, as here. AB 36-37. It does not. Coerced physical contributions are far more constitutionally problematic than the "trivial" corporate financial contributions of mushroom producers in *United Foods*. OB 43-44. And BOLI is as wrong under *United Foods* as under *Hurley* that *voluntary* actions can be the basis for otherwise unconstitutional coercion.

E. The Final Order Unconstitutionally Interferes With An Expressive Association's Message.

BOLI's two responses to the Kleins' argument that the Final Order violates their right against compelled association with others' speech both fail.

First BOLI (citing nothing) argues that small for-profit businesses like Sweet Cakes do not have expressive associational rights. AB 35. That is contrary to *Roberts v United States Jaycees*, in which the Court considered the

expressive associational rights of a "business." 468 US 609, 616 (1984). It is also inconsistent with *Boy Scouts of America v Dale*, which reiterates that groups formed for "a wide variety" of ends, including "economic" and "religious" purposes, have expressive associational rights. 530 US 640, 647-48 (2000). Sweet Cakes, a small family-operated venture organized for religious and economic ends, fits the mold. OB 40-41. Nor is there any basis for denying the right to small, for-profit businesses. OB 41-42.

Second, BOLI mischaracterizes the right, contending it is violated only by forcing expressive associations to accept "associates." AB 35. The right, however, is broader, protecting the "ideas" groups seek "to express" through their association from "materia[l]" state "interfer[ence]." *Dale*, 530 US at 657. Forcing Sweet Cakes to associate with same-sex weddings' messages—not with Complainants, *see* AUB 29—unconstitutionally interferes with its associational message that marriage is an opposite-sex institution. OB 40-41.

F. The Final Order Unconstitutionally Compels Expressive Conduct.

BOLI devotes most of its argument to contending the Final Order does not violate the First Amendment's protection against compelled "expressive conduct." AB 25-30. This is a distraction, because the Final Order unconstitutionally compels pure speech. Regardless, BOLI is wrong.

BOLI says "expressive conduct" must convey particularized messages to reasonable observers. But a "particularized" message has not been part of the expressive conduct inquiry since *Hurley*. *Holloman v Harland*, 370 F3d 1252, 1270 (11th Cir 2004). Conduct must convey nothing more than "some sort of message" to receive First Amendment protection. *Id.*

In any event, the Final Order compels the creation of products that convey particularized messages.

BOLI mischaracterizes the question presented. It is not whether the Kleins' wedding cakes successfully communicate *their* hoped-for messages. AB 25-29 & n.7. It is whether custom-designed wedding cakes convey any message to their observers. *See Cressman v Thompson*, 798 F3d 938, 957-58 (10th Cir 2015). They do.

Custom-designed wedding cakes convey particularized messages. The *undisputed* record demonstrates that, at a minimum, they convey messages about a couples' identity and relationship. ER.374-76; ER.459, Tr.752:14-20. BOLI's witness speaks to this. *Supra* p.10-11. So does BOLI. AB 29 n.7. BOLI is wrong, AB 28, that such cakes are like legislative voting, which "symbolizes nothing." *Nev Comm'n of Ethics v Carrigan*, 564 US 117, 126 (2011).[10]

[10] *FAIR* is not to the contrary. AB 26-27. Treating military recruiters identically to other recruiters is "expressive" only if accompanied by

The contention that reasonable custom-designed wedding cake viewers do not perceive their expression, AB 28-29, is fanciful. Indeed, it is contradicted by BOLI's own, presumably reasonable, witness. ER.446-47, Tr.594:1-595:7; *see also Kaahumanu*, 682 F3d at 799. The message of wedding cakes is "overwhelmingly apparent." *Texas v Johnson*, 491 US 397, 406 (1989).

BOLI's assertion that custom-designed wedding cakes lose their expressive character because they are products of commercial transactions, AB 28-29, is a diversion. The cakes are expressive. Their audience perceives them to be so. And if compelled to create them, the Kleins have no feasible means to disassociate themselves from their expression. That is all the Supreme Court requires. *Supra* pp.13-14.

Finally, BOLI asserts that compelling expressive conduct need satisfy only intermediate scrutiny. AB 33. Not so. It must overcome strict scrutiny because it "directly and immediately" affects the First Amendment right to remain silent. *Dale*, 530 US at 659. BOLI addresses neither *Dale* nor its progeny, which resolve the strict scrutiny question in the Kleins' favor. OB 46.

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explanatory statements. *FAIR*, 547 US at 65-66. But custom-designed wedding cakes express messages without extrinsic explanation.

III. The Final Order Violates Oregon's Free Speech Clause.

BOLI argues that the Kleins forfeited their free speech-defenses under the Oregon Constitution by offering "no independent analysis." AB 37-38. BOLI confuses the brevity of the Kleins' arguments for lack of analysis. First, the Oregon Constitution's "broader" speech protections mean that the Kleins should win close federal constitutional questions under the Oregon Constitution. OB 46-47. Second, explicit inclusion of "sculpture and the like" within "pure speech" resolves that issue in favor of the Kleins should there be any doubt about it as a federal matter. OB 47 (quoting *State v Henry*, 302 Or 510, 515, 732 P2d 9 (1987)).

IV. The Final Order Violates The Federal Free Exercise Clause.

A. Strict Scrutiny Applies Under The Hybrid Rights Doctrine.

BOLI erroneously contends that strict scrutiny does not apply because this is not a hybrid-rights case.

BOLI principally contends that hybrid rights do not exist. AB 40-42. But the Supreme Court has twice disagreed. *Employment Div v Smith*, 494 US 872, 881-82 (1990); *City of Boerne v Flores*, 521 US 507, 513-14 (1997). And the Supreme Court has *never* overruled cases decided under hybrid-rights. *See, e.g.*, *Axson-Flynn v Johnson*, 356 F3d 1277, 1295 (10th Cir 2004).

Alternatively, BOLI advocates confining hybrid-rights to Free Exercise Clause cases involving an *independently viable* claim under another

constitutional provision. AB 41-42. But as BOLI admits, this Court has demurred from doing so because it would nullify the doctrine. *Id.* (citing *Church at 295 S 18th Street v Employment Dep't*, 175 Or App 114, 127-28, 28 P3d 1185 (2001)). That demurer was well-justified, as the Court cannot nullify Supreme Court doctrine. *Rodriguez de Quijas v Shearson/Am Express, Inc*, 490 US 477, 484 (1989).

To avoid nullifying Supreme Court precedent, the Court should apply the doctrine in Free Exercise Clause cases involving a "colorable" claim under another constitutional provision. *Thomas v Anchorage Equal Rights Comm'n*, 165 F3d 692, 705-06 (9th Cir 1999), *vacated on other grounds* 220 F3d 1134 (9th Cir 2000) (en banc); *see also Axson-Flynn*, 356 F3d at 1295. As this Court has noted, *Thomas*'s rule could narrow the universe of cases in which *Smith* allows states to avoid religious accommodations. *Church*, 175 Or App at 127. But the choice between a doctrine that nullifies Supreme Court doctrine and one that is consistent with it is no choice at all.

B. Strict Scrutiny Applies Under The Targeting Doctrine.

BOLI says strict scrutiny does not apply because there is no evidence it has violated the Constitution's bar on targeting religion. AB 38-40 (discussing *Church of Lukumi Babalu Aye v City of Hialeah*, 508 US 520 (1993)).

BOLI, however, ignores *Tenafly Eruv Ass'n v Borough of Tenafly*, which held that evidence of "selective application" of a law triggers *Lukumi* strict

scrutiny. 309 F3d 144, 166-68 (3d Cir 2002). Such evidence exists here: BOLI does not dispute that it was under no statutory obligation to interpret ORS 659A.403 to compel people with "decent and honorable religious" objections to same-sex marriage, *Obergefell*, 135 S Ct at 2602, to facilitate their celebration. And it conspicuously will not say it will apply its overbroad interpretation of ORS 659A.403 in analogous situations involving secular objections. *See, e.g.*, OB 51. That refusal is sufficient evidence of "selective" application of the law to trigger strict scrutiny. *Tenafly*, 309 F3d at 168.

* * *

The Kleins prevail under strict scrutiny. BOLI does not dispute the Final Order substantially burdens the Kleins' religious exercise or contend it survives strict scrutiny. OB 47, 51-53.[11]

V. Exempting The Kleins From BOLI's Overbroad Interpretation Of ORS 659A.403 Promotes The Values Of Oregon's Religion Clauses.

The Kleins should be exempted "on religious grounds" from BOLI's interpretation of ORS 659A.403. *Hickman*, 358 Or at 16.

BOLI errs in denigrating *Hickman*'s discussion of individualized exemptions under Oregon's Constitution as dicta. AB 42. The case could not

[11] BOLI notes, without explanation, that the Final Order distinguished between "conduct motivated" by religious belief and "religious practice." Nothing turns on that illusory distinction. *Lukumi*, 508 US at 524; *State v Hickman*, 358 Or 1, 14 n.5, 358 P3d 987 (2015) .

have been resolved in the government's favor unless the Court rejected the defendant's plea for an individualized exemption. *Hickman*, 358 Or at 15-16.

BOLI says that *Hickman*-exemptions might generate (unidentified) "constitutional problems." Not so, as "the government may (and sometimes must) accommodate religious practices." *Corp of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v Amos*, 483 US 327, 334 (1987).

The remaining question is whether the Kleins should be exempted from BOLI's overbroad interpretation of ORS 659A.403. BOLI does not respond to the Kleins' well-developed arguments that an exemption would further the Free Exercise values of Oregon's Constitution. OB 55-56.

SECOND ASSIGNMENT OF ERROR: BOLI VIOLATED THE KLEINS' DUE PROCESS RIGHTS

BOLI contends that Due Process did not require the Commissioner's recusal because his statements only announced a preconceived view of the law, allowable under *Samuel v Board of Chiropractic Examiners*, 77 Or App 53, 60, 712 P2d 132 (1985). AB 44-48. *Samuel*, however, is not on point. *Samuel* involved a doctor-adjudicator's expression of a medical opinion with legal implications. 77 Or App at 60. Here, the Commissioner proclaimed that "religious beliefs" do not permit "disobey[ing] laws that are already in place" and that such "beliefs" do not create a "right to discriminate." Op 53. These were not even accurate restatements of *Smith* or Oregon law. *Supra* pp.19-20,

22. They were, however, categorical pre-adjudications of the Kleins' hybrid rights and targeting defenses, as well as pre-adjudications of the Kleins' petition for individualized exemptions under Oregon's Constitution.

Samuel is also inapposite here because the Commissioner made his statements in the context of *this case*, in one instance *after* complaints were pending before his agency. AB 47-48; ER.412, 416. BOLI ignores the absence of that critical detail in *Samuel*. *See* 77 Or App at 60.

Finally, *Samuel* is not the correct test for disqualifying administrative adjudicators. OB 58-59; *Williams v Pennsylvania*, 136 S Ct 1899, 1905 (2016).

THIRD ASSIGNMENT OF ERROR: NEITHER SUBSTANTIAL EVIDENCE NOR REASON SUPPORTS BOLI'S DAMAGES AWARD

BOLI's award is riddled with unreasonable conclusions. BOLI first veers off track by awarding Cryer damages for being called an "abomination," despite finding that this never happened. OB 62. BOLI nevertheless says that Aaron Klein should have foreseen that McPherson would cause harm by misreporting his quotation of a Bible verse to others. AB 50. But Oregon law requires facts—not bare assertions—to support such a foreseeability inference. *Piazza v Kellim*, 360 Or 58, 74-78, __ P3d __ (2016).[12]

[12] BOLI repeatedly misplaces reliance on *King v Greyhound Lines, Inc*, 61 Or App 197, 656 P2d 349 (1982). AB 17, 50. There, the Court held that

BOLI is also incorrect that its justifications for the damages award are beyond judicial scrutiny for reasonableness. AB 51. Substantial reason must support the entire Final Order, including its damages award. *Roseburg*, 292 Or at 271. BOLI's award lacks substantial reason because it fails to account for *undisputed* evidence that undermines damages or for Complainants' *undisputed* abuses in neglecting to search for, deleting, and withholding discoverable material, impeding the Kleins' defense. OB 63-64.[13] BOLI says this is an impermissible argument that it "could have reached a different result." AB 51. But the objection is more fundamental: BOLI's failure even to supply *reasons* for disregarding these aspects of the record deprives its award of substantial reason. OB 63-64.

BOLI also fails to identify *substantial* evidence Complainants suffered cognizable harm "throughout" the twenty-six-month "period of media attention." Op 40; *see also* ER.167, 175-76. For Cryer, BOLI cites only her "general sense" of harm during this period, unsupported by "specific examples." AB 53. If such gauzy, self-serving statements suffice, the

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gratuitously subjecting customers to racial slurs violates ORS 659A.403. That is far afield from an overtly Christian business owner responding with Bible quotations to someone who engaged him regarding his religious beliefs. Op 6; ER.369.

[13] BOLI's discussion of *its* discovery abuses, AB 51-52, is beside the point. The Kleins' argument is based on *Complainants*' discovery abuses.

"substantial evidence" standard is misnamed. For Bowman, BOLI cites only her statement that she felt continued "emotional effects" based a belief that Cryer and her children were "suffering." AB 53 (citing Op 39). BOLI cannot explain how a reasonable factfinder could approve substantial liability on the basis of beliefs about others' unsubstantiated harm.

BOLI also fails to explain an internal contradiction underlying its award. BOLI does not deny that it sought $75,000 for each Complainant's harm stemming from the service denial *and* subsequent media exposure. Nor does it deny its award reflects no deduction for non-compensable media exposure-related harms. *See* Op 40. BOLI denies the contradiction by pointing to its closing argument's characterization of its $150,000 prayer as relating solely to the service denial. But shifting the theory of a case after evidence has closed is an unjustifiable bait-and-switch. OB 64-65.

Finally, BOLI fails to explain how cases upon which it concededly relied to determine damages support its award. BOLI has awarded far less to others, despite the presence of aggravating factors absent here: weekly service denials, physical symptoms like weight fluctuations, or repeated assaults—including with a firearm and punches to the head. OB 65; *In re Blachana*, 32 BOLI 220 (2013). BOLI has awarded far more too, but only in cases involving factors absent here, like ongoing harassment requiring medical treatment. OB 65. This is an unlawful jurisprudence of whim, not reason.

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

Statements conveying a future intent to unlawfully discriminate violate ORS 659A.409. But BOLI is wrong that the Kleins ever made such a statement.

BOLI says its conclusion that the Kleins' statements conveyed an unlawful intent to discriminate is an uncontested factual determination, "binding" on the Court. AB 59-60. But the question presented is legal: does the law subject the Kleins to liability for statements about which there is no dispute as to content, context, or timing. In any event, the Kleins unambiguously assigned error to BOLI's future-intent determination, noting its lack of "substantial evidence" and "substantial reason." OB 4, 22-23, 66. Thus, even as a factual matter, BOLI's determination is "binding" only insofar as it could garner assent from reasonable persons. ORS 183.482(8)(c).

Through any prism, BOLI's conclusion is erroneous. OB 66-69. BOLI expands future intent beyond the breaking point, making every present-tense statement—even if recounting the past (e.g., "I said, 'we don't do that'")—a future-intent statement unless accompanied by a stockbroker's disclaimer ("past performance does not indicate future results"). That is not the law.

The Final Order's comparator cases reveal how far afield BOLI traveled to reach its result: a bar owner who told people "not to come back," Op 83 n.39, and one who hung a sign reading "NO . . . NI***RS." *Id*. BOLI now abandons

these comparator cases (without identifying replacements), demonstrating it has slipped its tether and set sail into uncharted waters.

And there is good reason those waters are—and should remain—uncharted: They are set off-limits by the state and federal constitutions.

The Kleins do not dispute BOLI's only constitutional argument—that the First Amendment does not prevent enjoining people from threatening unlawful discrimination. *See FAIR*, 547 US at 62. But that is beside the point. The First Amendment does not reach such statements because they are "incidental" to legitimate conduct regulations, *id.*, akin to offers to engage in unlawful conduct, *cf. United States v Williams*, 553 US 285, 297-99 (2008).

Currently, the Kleins are enjoined from simply vowing to "stand strong," against charges of illegal conduct. Op 24. Yet the Kleins have merely spoken on matters of public concern—facts about high-profile litigation, interpretations of the law, and vows of vindication. Enjoining such statements, which are not akin to offers of illegal conduct, does not give force to legitimate conduct regulation. The constitutions protect the Kleins' right to make the statements BOLI has enjoined "without previous restraint or fear of subsequent punishment," *Thornhill v Alabama*, 310 US 88, 101-02 (1940), that is, without fear of contempt orders potentially immune from collateral attack. *Walker v City of Birmingham*, 388 US 307, 320-21 (1967).

BOLI ultimately cannot dispute that its injunction restricts far more speech than necessary to "remedy" any possible ORS 659A.409 violation. The injunction thus unconstitutionally chills protected speech. OB 69.

CONCLUSION

BOLI's Final Order must be vacated.

DATED this 8th day of September, 2016.

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CERTIFICATE OF COMPLIANCE

On September 1, 2016, the Court issued an Order Granting Extended Brief. The Court's Order extended the word limit for Petitioners' reply brief to 6,000 words. I hereby certify that this brief complies with the Court's September 1, 2016 Order. The word count of this brief as described in ORAP 5.05(2)(a) is 5,969 words.

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CERTIFICATE OF FILING AND SERVICE

I certify that on September 8, 2016, I directed Petitioners' REPLY BRIEF to be electronically filed with the Appellate Court Administrator, Appellate Records Section.

I further certify that on September 8, 2016, I directed a true copy of the Petitioners' REPLY BRIEF to be served on the following parties at the addresses set forth below:

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