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 No. 4414, 4514 CA A159899

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

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

Continued…

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional & Statutory Provisions

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

INTRODUCTION

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S Ct 1719, 201 L Ed 2d 35 (2018), the United States Supreme Court issued a narrow opinion that reversed the Commission's decision because the record showed clear hostility by the Commission toward the religious beliefs of Phillips, the bakery owner. The Court subsequently granted petitioner's petition for *certiorari* in this case, vacated the judgment, and remanded for reconsideration in light of *Masterpiece.* On remand, this court should affirm its prior decision and reject petitioners' argument that BOLI failed to act with neutrality. Unlike the record in *Masterpiece*, this record does not show any hostility to petitioners' religious beliefs.

In their brief, petitioners recast two of their previous arguments—that the BOLI Commissioner made comments that showed bias against them and that the damages award is not supported by substantial evidence or substantial reason—as free exercise arguments under *Masterpiece*. This court has already determined that the Commissioner's comments were appropriate and that the damages award was supported by substantial evidence and was consistent with other awards issued by BOLI. This court should reject petitioners' attempts to relitigate those issues in the guise of a free exercise claim.

Petitioners also raise new arguments that BOLI exhibited hostility towards religion during the contested case proceeding and in the final order. Specifically, petitions assert that statements by BOLI's prosecutor, BOLI's reference to Aaron Klein's use of the word "abomination" in assessing the amount of damages, and BOLI's conclusion that petitioners violated ORS 659A.409, show that BOLI was hostile toward their religious beliefs.

None of those arguments have merit. First, the interrogatory response that petitioners assert was a disparaging statement by BOLI in fact reflected only the complainants' views. The record is clear that BOLI did not characterize petitioners' beliefs as an "excuse" for discrimination. Second, the record shows the complainants were injured by the manner in which Aaron Klein denied services, which included his reference to a Bible verse using the word "abomination." BOLI did not show hostility toward petitioners' religion by calculating damages based on complainants' injuries. Third, although this court ultimately concluded that petitioners had not violated ORS 659A.409, that ruling did not call into question BOLI's good faith in pursuing that violation in the first place. Petitioners' speculation that BOLI was motivated by religious hostility is wholly unsupported. This court should reject petitioners' arguments and reaffirm its previously issued decision.

A. *Masterpiece* is a narrow decision that reversed based on the overt hostility of the decision maker.

In *Masterpiece*, Phillips, the bakery owner, declined to bake a cake for the wedding of a same-sex couple "because of his religious opposition to same-sex marriages." 138 S Ct at 1723. The Colorado Civil Rights Commission concluded that Phillips had discriminated against the couple in violation of Colorado's anti-discrimination law. *Id*. In the United States Supreme Court, Phillips raised First Amendment claims similar to the ones raised in this case. Rather than reaching the merits of Phillips' free speech or free exercise claims concerning the validity of Colorado's antidiscrimination law, the Supreme Court concluded that the Commission had failed to treat Phillips' religious objections with neutrality, as required by the Free Exercise Clause, and reversed.

In reaching that conclusion, the Court relied on statements by Commission members during the administrative hearing that disparaged Phillips' religion and on other cases decided by the Colorado Civil Rights Division that upheld the refusal of other bakers to create cakes that conveyed disapproval of same-sex marriage.

The Court emphasized two comments by commission members at public hearings. In the first comment, a commission member "suggested that Phillips can believe 'what he wants to believe' but cannot act on his religious

beliefs 'if he decides to do business in this state.'" *Id*. at 1729. The same commissioner made a similar comment a short while later. The Court acknowledged that those comments, standing alone, were "susceptible of different interpretations," explaining that the comments could indicate that a business could not refuse services based on sexual orientation or could indicate that the commissioner was inappropriately dismissive of "Phillips' free exercise rights and the dilemma he faced." *Id*.

Another comment by a commission member, however, indicated that the latter interpretation was likely the correct one. In that comment, a commissioner expressed overt hostility to Phillips' religious beliefs:

> Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.

Id. at 1729. The Court viewed that comment as disparaging Phillips' beliefs by describing his beliefs as despicable and merely rhetorical. *Id*. In light of those comments, the Court could not "avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case." *Id*. at 1730.

The other "indication of [the Commission's] hostility" was "the difference in treatment between Phillips' case and the cases of other bakers who

objected to a requested cake on the basis of conscience and prevailed before the Commission." *Id.* at 1730. In the other cases, bakers had refused, on the basis of conscience, "to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text," but the Colorado Civil Rights Division had "found that the baker acted lawfully in refusing service." *Id.* The Court concluded that "the Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections." *Id.*

Based on the comments and the other bakery cases, the Court held that it must—on the facts presented—"draw the inference that Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires." *Masterpiece*, 138 S Ct at 1731.

B. *Masterpiece* did not lower the standard of proof for claims of hostility to religious beliefs.

An order from the United States Supreme Court that grants *certiorari*, vacates the judgment, and remands for further consideration ("GVR") is not an adjudication on the merits. When the Court remands for reconsideration in light of an intervening Supreme Court decision, a GVR order indicates "only that the intervening decision has changed the legal context in a way that, the Court believes, requires the lower court to determine whether its previous decision remains good law." *Waddill v. Anchor Hocking, Inc.*, 190 Or App 172, 176, 78 P3d 570 (2003).

Petitioners assert that *Masterpiece* sets a low bar for a finding of religious hostility and assert that the evidence of hostility need not be overt. They claim that "[t]he cumulative effect of small 'indication[s] of hostility' and statements 'susceptible of different interpretations' may reveal unconstitutional bias that would not be evident if each detail were examined in isolation." (Pet Br 4 (quoting *Masterpiece*, 138 S Ct at 1729-30)). *Masterpiece*, however, did not employ that standard, and the Court did not hold that small indications of hostility or ambiguous statements would be sufficient to show hostility toward religion. Rather, the hostility toward Phillips' beliefs was readily apparent in the Commission member's comment that disparaged those beliefs as both despicable and merely rhetorical. In light of that comment, the Court viewed the previous ambiguous statements as also hostile. Then, in addition to those hostile comments, the Commission also treated the similarly situated bakers who objected to messages opposed to same-sex marriage differently than Phillips. In light of the comments and the disparate treatment, the Commission failed to give Phillips' objections "the neutral and respectful consideration" they deserved under the First Amendment. That was so because "the Commission's treatment of his case ha[d] some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated [Phillips'] objection." *Masterpiece*, 138 S Ct at 1729. Ultimately, the court stated that it "must draw the inference that Phillips' religious objection was not

considered with the neutrality that the Free Exercise Clause requires." *Id*. at 1731.

As explained below, the record in this case does not demonstrate any elements of a clear and impermissible hostility toward petitioner's religious beliefs. To the extent that petitioners suggest that *Masterpiece* sets a low bar for evaluating their claims, they are wrong. It is petitioners' burden to show that BOLI acted without neutrality, and this court should presume that BOLI did so, absent clear evidence to the contrary. *See Milwaukie Co. of Jehovah's Witnesses v. Mullen*, 214 Or 281, 294, 330 P2d 5 (1958) ("This court has long and consistently held that there is a presumption that public officers perform their duties regularly and in accordance with the law; that the burden is upon him who claims to the contrary.").

C. The record does not show that BOLI treated petitioners' religious objections with hostility.

The record in this case is very different than the one in *Masterpiece*. Although petitioners attempt to recast comments by Commissioner Avakian as disparaging their religious beliefs and prejudging their legal arguments, this court has already held that those comments were general statements of the law that did not reflect any bias by the Commissioner. Petitioners also make a new claim that one of BOLI's prosecutors called their religion an "excuse" for discrimination. But the statement that petitioners complain about—which was

contained in an interrogatory response—was a reflection of the complainants' views, not BOLI's. That fact is apparent from the interrogatory and from petitioners' own discussion of that interrogatory during the contested case proceeding.

Nor does the record support petitioners' claim that the damages award shows hostility to their religion. Petitioners' arguments about damages are similar to the substantial evidence and substantial reason argument already rejected by this court. In short, the record explains the factual basis of the damages award—the emotional and psychological distress suffered by the complainants—and provides no support for petitioners' speculative argument that the actual reason for the award was hostility towards petitioners' religious beliefs. Additionally, this court has already concluded that the damages award does not conflict with damages awards in other BOLI cases. Accordingly, there was no disparate treatment based on petitioners' religion.

Lastly, petitioners assert that BOLI's conclusion that petitioners expressed a prospective intent to discriminate shows hostility toward their religion. Although this court reversed BOLI's conclusion as lacking substantial evidence, that reversal does not suggest any hostility on BOLI's part.

1. BOLI did not disparage petitioners' religion.

On remand, petitioners assert that Commissioner Avakian and a BOLI prosecutor made comments that showed animosity toward petitioner's religious

beliefs, similar to the improper comments made by the Colorado Civil Rights Commission in *Masterpiece*. Petitioners are wrong.

a. Commissioner Avakian's statements were general descriptions of public accommodations law.

As to Commissioner Avakian, petitioners point to two statements as showing hostility to their religious beliefs. First, in a 2013 Facebook post, Commissioner Avakian stated, "Everyone has a right to their religious beliefs, but that doesn't mean they can disobey laws already in place. Having one set of rules for everybody assures that people are treated fairly as they go about their daily lives." Second, Avakian commented to *The Oregonian*, in general terms, "Everybody is entitled to their own beliefs but that doesn't mean that folks have the right to discriminate." *Klein v. BOLI*, 289 Or App 507, 553, 410 P3d 1051 (2017). This court has already determined that those comments reflected the Commissioner's view of the law and did not demonstrate any bias by the Commission against petitioners. *Id*. at 553-54. For those same reasons, Commissioner Avakian's comments do not show any hostility toward the Kliens' religious beliefs.

In its opinion, this court observed that petitioners had "selectively quoted" statements by Commissioner Avakian to create an impression that the Commissioner "was commenting specifically on their conduct." *Id*. at 554. This court found that, when viewed in context, none of his statements—

including the two highlighted in petitioners' brief on remand and quoted above—described the particular facts of the case or suggested that he had "fixed views as to any defenses or interpretations of the law that might be advanced in the context of a contested proceeding." *Id*. at 553. Rather, the Commissioner's statements reflected his "general views of law and policy regarding public accommodations laws," and they fell "short of the kinds of statements that reflect prejudgment of the facts or an impermissibly closed-minded view of law or policy so as to indicate that he, as a decision maker, cannot be impartial." *Id*. To the extent the Commissioner made specific reference to petitioners' case, he emphasized BOLI's commitment to "a fair and thorough investigation." *Id*. at 554-55.

Contrary to petitioners' assertion, the Commissioner's comments do not suggest any intolerance for public expressions of religious belief, in general, or for the petitioners' specific beliefs. Rather, the comments merely reflect the law on public accommodations. As the Court reiterated in *Masterpiece*, although "religious and philosophical objections [to gay marriage] are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." 138 S Ct at 1727 (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 US 557, 572, 115 S Ct 2338, 132

L Ed 2d 487 (1995); *Newman v. Piggie Park Enters., Inc.*, 390 US 400, 402, 402 n 5, 88 S Ct 964, 19 L Ed 2d 1263 (1968) (*per curiam*)). Commissioner Avakian's statements are entirely consistent with the Court's description of the "general rule" in public accommodation law.

Petitioners also assert that Commissioner Avakian's comments show that he prejudged "the Kleins' arguments that their art is protected speech and that they are entitled to a religious exemption" under the Oregon Constitution. (Pet Br 8). But, again, this court already concluded that the comments did not suggest that he had "fixed views as to any defenses or interpretations of the law" and did not reflect "an impermissibly closed-minded view of law or policy." *Klein*, 289 Or App at 553. Nothing in those comments—which occurred before the contested case—imply that Commissioner Avakian would not consider petitioners' argument for religious exemption under Oregon law.[1]

In short, Commissioner Avakian's comments did not express any hostility toward religion, did not suggest that religion has no place in public life, and did not prejudge petitioners' free exercise claims.

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[1] As this court explained in its opinion, petitioners asserted that they should be given a religious exemption, but failed to present "a focused argument for why the Oregon Constitution requires an exemption in this case." 289 Or App at 549.

b. The interrogatory response quoted by petitioners was not a statement by BOLI.

Petitioners also assert that one of BOLI's prosecutors disparaged petitioners' religious beliefs as merely an "excuse" during the contest case proceedings. (Pet Br 9). That assertion is not supported by the record. BOLI *did not state* that petitioners "have continually used their religion as an excuse for not serving Complainants." That phrase appears in an answer to an interrogatory from petitioners asking BOLI to explain "what 'alienation toward religion' means *as used by Complainants* in the list of symptoms provided on October 14, 2014." (Pet SER 2 (emphasis added)). The ALJ specifically ordered "the *complainants*, through the Agency, to respond to" petitioners' interrogatories. (BOLI SER 57 (emphasis added); *see also* BOLI SER 57 (observing that complainants were witnesses, not parties to proceeding)).

In response, BOLI consulted the complainants and described what the complainants' meant by that phrase:

> Complainants are both practicing Christians. Respondents have continually used their religion as an excuse for not serving Complainants, which has caused Complainants to question their religious views, which has alienated Complainants toward their religion.

(Pet SER 2 (response to Interrogatory No. 7)). The complainants affirmed that "to the extent that answers required my input, I swear that my responses are true and accurate." (Pet SER 6).

At the contested case hearing, petitioners' counsel cross-examined the complainants about what they meant by the phrase "alienation toward religion," as used in the interrogatory and elsewhere in the record. (Tr 204, 466, 502). In his questions, petitioners' counsel emphasized that the interrogatory response was a statement of the complainants' position, which complainants' had reviewed and signed. (Tr 204, 502). Petitioners' counsel specifically asked Laurel if the response to the interrogatory question stated her position, and she said "yes." (Tr 502).

It is apparent—from both the text of the interrogatory and from petitioners' treatment of the interrogatory at the contested case hearing—that the answer was an expression of complainants' views, not BOLI's. Accordingly, that interrogatory answer provides no support for petitioners' argument that BOLI exhibited hostility toward their religious beliefs.

2. The record shows that the damages award is based on the emotional distress suffered by the complainants, not on hostility toward petitioners' religious beliefs.

Petitioners also repackage their previous arguments that the damages award lacked substantial evidence and substantial reason as a free exercise claim under *Masterpiece*. But nothing in the record suggests that BOLI awarded damages because the agency was hostile to petitioners' religion or failed to treat their religious beliefs with neutrality. Rather, and as this court has already concluded, the amount of damages to Rachel and Laurel was a

factual question and the evidence in the record supported the ALJ's calculation of those damages, which BOLI adopted. The amount of damages is also consistent with damages for emotional distress awarded in other cases, again, based on the facts showing the magnitude of the complainants' injury.

As this court explained in its decision, Rachel and Laurel wanted to purchase a cake for their wedding from petitioners. Rachel scheduled an appointment for a cake tasting with Melissa Klein, who had previously created a wedding cake for her mother, Cheryl McPherson. *Klein*, 289 Or App at 511-12. Aaron Klein conducted the cake tasting, which Rachel and her mother attended. At the beginning of the tasting, Aaron informed Rachel that he would not bake a cake for her wedding because of his religious beliefs. *Id*. at 512.

Rachel felt humiliated and, as they left, became "hysterical." *Id*. at 512. Rachel's mother drove a short distance away, but then returned to the bakery. Rachel remained in the car while her mother went back inside to talk with Aaron. *Id*. at 512. "During their conversation, [Rachel's mother] told Aaron that she had previously shared his thinking about homosexuality, but that her 'truth had changed' as a result of having 'two gay children.'" *Id*. at 512. Aaron explained his refusal to provide services by quoting from the Book of Leviticus, saying, "You shall not lie with a male as one lies with a female; it is an abomination." *Id*. Back in the car, Rachel's mother told her that Aaron had

called her "an abomination," which further upset Rachel. *Id*. Once home, Rachel's mother told Laurel what had happened, and Laurel immediately became upset and angry and felt ashamed. *Id*. at 513.

The ALJ made extensive findings concerning the damages to Rachel and Laurel, and awarded $75,000 and $60,000 respectively. BOLI adopted the ALJ's findings. (BOLI SER 41). In upholding the damages award, this court determined that the award was supported by substantial evidence, which included evidence that the complainants experienced emotional distress based on Aaron's use of the word "abomination." 289 Or App at 560.

a. BOLI's consideration of the manner in which Aaron denied services, including use of the word "abomination," does not show hostility toward religion.

There is nothing improper about BOLI relying on Aaron's words in establishing the extent of the complainants' damages. *See 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."). Under the public accommodations statute, Rachel and Laurel were entitled to an award of "actual damages" suffered as a result of petitioners' violation of the law. ORS 659A.850(4)(a)(B). The damages they suffered depended, in part, on the manner in which petitioners refused services. As

BOLI found, and as the record supports, both Rachel and Laurel were harmed by the denial of services, and their emotional and psychological harms were exacerbated by the use of the word "abomination."

Petitioners also contend that BOLI impermissibly took sides in a religious dispute because it "deemed the Complainants' *religious* sentiments 'reasonable and very real responses' to Aaron's religious speech (or rather to McPherson's mistaken account of that speech)." (Pet Br 13 (citing BOLI Order at 33)). But that selective quotation from the final order does not correctly characterize the record. The order does not endorse the complainants' religious views or disparage petitioners' views. The paragraph in the order that petitioners cite discusses how the denial of services harmed complainants and described their feelings of sorrow, anger, and shame. The complainants' feelings were informed by their own religious histories and experiences. BOLI concluded that the complainants' emotional responses were "the reasonable and very real responses to not being allowed to participate in society like everyone else." (BOLI SER 33).

Read in context, the order does not endorse the complainants' beliefs or punish petitioners'. Rather, the order assesses the factual basis for the complainants' emotional distress, which required BOLI to consider the manner in which Aaron denied services—including his quotation of the Bible—and the complainants' reaction to the denial—including their own religious histories.

By considering that factual context, BOLI did not make an improper comment on either the complainants' or petitioners' religious views.

In sum, the record, BOLI's order, and this court's opinion are clear that Aaron's use of the word "abomination" to explain the denial of services caused emotional distress in the complainants. The record does not support any inference that the damages award was based on hostility by BOLI toward petitioners' religion.

b. BOLI's damages awards in other cases do not show hostility toward petitioners' religion.

This court has already considered and rejected petitioners' argument that the damages award lacks substantial reason because it is inconstant with other damages awards in BOLI cases. After reviewing cases in which BOLI had awarded both greater and lesser damages award—the same cases that petitioners raise again on remand—this court concluded, "given BOLI's detailed factual findings about the effect of the refusal of service on these particular complainants—including anger, depression, questioning their own identity and self-worth, embarrassment, shame, frustration, along with anxiety and reduced excitement about the wedding itself—we cannot say that the order is so far out of line with previous cases that it lacks substantial reason." *Klein*, 289 Or App at 565. Nevertheless, petitioners reassert essentially the same argument, couched in terms of religious hostility.

In this iteration of their damages argument, petitioners assert that the damages award shows that BOLI treated their "religion as analogous to the worst kinds of racism, sexual harassment, and violence," citing the final order at page 40 and note 20. (Pet Br 10). Yet again, that is an incorrect characterization of the record. The passage in the final order that petitioners cite as showing BOLI's disparaging treatment of religion discusses the factual basis for the damages award and explains that the amount of the award was consistent with the damages suffered by the complainants in other cases.[2] (BOLI SER 41). BOLI did not suggest, in any way, that petitioners' religious beliefs were analogous to racism, sexual harassment, or violence. Rather, the emphasis in BOLI's order, which simply adopted the ALJ's findings, was on the harm to the complainants as demonstrated by the particular facts of the case.

Nor do the cases cited in BOLI's order and discussed by this court suggest that BOLI "inflated the award" because of religious bias. (Pet Br 18). As this court explained, "fact matching" is of limited value in reviewing an award of emotional distress damages because each case is unique. *Klein*, 289 Or App at 564. At bottom, petitioners' argument is that the record fails to show that the complainants actually suffered $135,000 in damages from the denial of

[2] As both this court and BOLI noted, BOLI has also awarded substantial damages for religious discrimination claims. *Klein*, 289 Or App at 564 (citing *In the Matter of Andrew W. Engel, DMD*, 32 BOLI 94, 114, 140-41 (2012)).

services and so the award must have been motivated by BOLI's hostility toward their religion. (*See* Pet Br 15, 17 (characterizing petitioner's denial of services as conduct that was "only speech" and that lasted for a short duration)). That argument disregards the substantial evidence in the record that proved the complainants' damages. The argument also disregards that two decision-makers besides BOLI—the ALJ and this court—have concluded that the evidence supports the award. Accordingly, the damages award does not reflect any hostility to petitioners' religion.

3. BOLI's conclusion that petitioners violated ORS 659A.409 does not show hostility toward religion.

Petitioners' final argument is that BOLI showed hostility toward their religion by concluding that they violated ORS 659A.409, which prohibits threatening to commit unlawful discrimination.

Petitioners' argument is not supported by the record. In its final order, BOLI concluded that the evidence showed that petitioners had communicated their intent to discriminate in the future based on two public statements by Aaron Klein and a note placed on the door of the bakery. This court reversed, concluding that the two statements from Aaron recounted past events and could not be construed as a threat of prospective discrimination. *Klein*, 289 Or App at 567. As to the note, this court explained the note was ambiguous, as BOLI conceded, because it could refer to the Kleins' legal fight or to the denial of

services to same-sex couples, and thus determined that the note alone could not support a violation of ORS 659A.409. *Id*.

On remand, petitioners now argue that BOLI's finding under ORS 659A.409, in addition to being factually incorrect, shows that BOLI was hostile toward religion. That is so because, according to petitioners, BOLI's order "suggests that BOLI willfully misconstrued Aaron's unambiguous statements" in effort to prevent the Kleins from making public statements about their religious beliefs. (Pet Br at 19).

That argument finds no support in the record. Although this court disagreed with BOLI's assessment of the evidence and stated that BOLI's interpretation of Aaron's statements during television interviews was not reasonable, that does not suggest that BOLI had any improper intent, much less that BOLI "willfully misconstrued" Aaron's statements in order to suppress petitioners' religious beliefs. To be sure, this court rejected BOLI's factual conclusion that Aaron's statements demonstrated an intent to discriminate and held that the note was insufficient, standing alone, to support BOLI's conclusion. But a reviewing court's conclusion that a factfinder erred in interpreting the record does not suggest bias or improper motive by the factfinder. In short, the absence of substantial evidence does support an inference that BOLI acted out of religious hostility.

Additionally, the order shows that BOLI carefully considered and rejected petitioners' legal arguments that the application of ORS 659A.409 violated the First Amendment. And the order explained that the prohibition in ORS 659A.409 applied only to petitioners' statements that showed a "clear intent to discriminate in the future." (BOLI SER 32). The order provides no basis for this court to infer that BOLI applied ORS 659A.409 out of hostility to petitioners' religion.

D. *Masterpiece* provides no basis to reconsider the merits of this court's prior decision.

Petitioners also ask this court to reconsider and reverse its prior decision even if it rejects their argument that BOLI was hostile towards religion. Petitioners suggest, incorrectly, that *Masterpiece* announced "guiding principles" under the First Amendment that should change this court's previous analysis. (Pet Br 21-22). But *Masterpiece* did not reach the merits of Phillips' free speech and free exercise claims and did not announce any new law on those issues. *Masterpiece*, 138 S Ct at 1732 ("The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.") The portions of the opinion that petitioners cite for the "guiding principles" are

the Court's introductory comments setting out the merits dispute, as framed by the parties, which the Court did not reach.

The correct reading of the Court's GVR order requires this court to consider the narrow issue of whether BOLI was hostile toward petitioners' religion. As explained above, the record shows no hostility. This court should reject petitioners' efforts to expand *Masterpiece*'s narrow holding and revisit the merits of the previous opinion. *See State v. Arlene's Flowers, Inc.*, 441 P3d 1203, 1217 (2019) (rejecting on remand appellant's "attempt to stretch [*Masterpiece*'s] holding beyond recognition and to relitigate issues resolved in our first opinion").

CONCLUSION

This court should reject petitioners' argument that BOLI showed hostility toward their religion and reaffirm its previously issued decision.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on September 12, 2019, I directed the original Respondent's Supplemental Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Tyler D. Smith and Herbert G. Grey, attorneys for petitioners; Julia Elizabeth Markley and Courtney Rian Peck, attorney's for amicus curiae; Stefan Johnson, attorney for amicus curiae; P.K. Runkles-Pearson, Alexander Max Naito, Mathew W. dos Santos, Kelly Kathryn Simon, and Jennifer Middleton, attorneys for amicus curiae; and Clifford Scott Davidson, attorney for amicus curiae, by using the court's electronic filing system.

I further certify that on September 12, 2019, I directed the Respondent's Supplemental Answering Brief to be served upon Adam R. Gustafson, Derek S. Lyons, C. Boyden Gray, Stephanie N. Taaub, and Hiram S. Sasser, III, attorneys for petitioners; and Richard B. Katskee, attorney for amicus curiae, by mailing two copies, with postage prepaid, in an envelope addressed to:

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 4,895 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(3)(b).

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