

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' SUPPLEMENTAL 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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GLOSSARY

BOLI	Oregon Bureau of Labor & Industries
BOLI Order	Final Order of Oregon Bureau of Labor & Industries (order under review)
Cheryl	Cheryl McPherson, Rachel Cryer's mother
Commissioner	Brad Avakian, Commissioner of the Oregon Bureau of Labor & Industries
Complainants	Rachel Cryer & Laurel Bowman
ER	Excerpt of Record
Kleins	Melissa Klein and Aaron Klein
Sweet Cakes	Sweetcakes by Melissa

STATEMENT OF THE CASE

I. Remand from the United States Supreme Court

In *Klein v Oregon Bureau of Labor & Industries*, 289 Or App 507 (2017), this Court affirmed in part the Final Order of the Oregon Bureau of Labor and Industries (“BOLI”) in *In re Melissa Elaine Klein*, 34 BOLI 102 (2015). Specifically, this Court affirmed BOLI’s determination that Melissa and Aaron Klein had violated Oregon’s public accommodations statute, ORS 659A.403, by discriminating “on account of ... sexual orientation” when they declined to violate their sincere religious beliefs by designing and creating a custom wedding cake for a same-sex wedding. 289 Or App at 523–24. Further, this Court rejected the Kleins’ arguments that the First Amendment to the United States Constitution and the Free Speech and Conscience Clauses of the Oregon Constitution forbade the application of ORS 659A.403 to penalize the Kleins’ conscientious refusal. *Id.* at 550. Accordingly, this Court affirmed BOLI’s \$135,000 damages award against the Kleins. *Id.* at 565.¹

The Oregon Supreme Court denied the Kleins’ subsequent petition for review. *Klein v Oregon Bureau of Labor & Indus.*, 363 Or 224 (2018).

¹ This Court vacated BOLI’s order that the Kleins “cease and desist” from threatening future discrimination. *Id.* at 568.

The Kleins filed a petition for a writ of certiorari with the United States Supreme Court, arguing that BOLI's order deprives them of constitutionally protected rights to free speech and the free exercise of religion.

On June 17, 2019, the Supreme Court granted the Kleins' petition for certiorari, vacated this Court's decision, and remanded this case "for further consideration in light of *Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Comm'n*," 138 S Ct 1719 (2018). *Klein v Oregon Bureau of Labor & Indus.*, No. 18-547, 2019 WL 2493912, at *1 (U.S. June 17, 2019).

II. *Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Commission*

Masterpiece Cakeshop—decided after this Court rendered its opinion in this case—involved proceedings brought by the Colorado Civil Rights Commission against Jack Phillips, a baker who, like the Kleins, declined on religious grounds to make a wedding cake for a same-sex wedding ceremony. 138 S Ct at 1724. The United States Supreme Court held that Phillips was "entitled to the neutral and respectful consideration of his claims in all the circumstances of the case," free of "hostility toward the sincere religious beliefs that motivated his objection." 138 S Ct at 1729. Because of "indication[s] of hostility" in the Commission's treatment of Phillips, the Supreme Court held that "the rulings of the Commission and of the state court that enforced the Commission's order must be invalidated" as inconsistent with the First Amendment's Free Exercise Clause. *Id.* at 1732.

The Supreme Court concluded that both overt and subtle signs of bias infected the Commission's proceedings against Phillips. During a hearing, one commissioner stated that "Phillips can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state.'" *Id.* at 1729. Another said that "he needs to look at being able to compromise." *Id.* In a separate hearing, another commissioner called Phillips's religious beliefs a "despicable piece[] of rhetoric" and suggested that "religion has been used to justify all kinds of discrimination ..., [including] slavery [and] the holocaust." *Id.* These statements and the other commissioners' failure to object to them, the Court held, "cast doubt on the fairness and impartiality of the Commission's adjudication." *Id.* at 1730.

The Commission's hostility to Phillips's religion was also evident in the agency's inconsistent application of Colorado's anti-discrimination law. In three other cases, the Commission upheld other bakers' refusals to make cakes with religious text and symbolism conveying anti-same-sex-marriage messages. *Id.* at 1730.

In concluding that the Colorado Commission violated the Free Exercise Clause, *Masterpiece Cakeshop* established a strict standard of religious neutrality and respectful tolerance. Persons who assert religious objections are "entitled to a neutral decisionmaker [who will] give full and fair consideration to [their] religious objection[s]." *Id.* at 1732. In considering those objections,

the government “cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.” *Id.* at 1731. And “the requisite religious neutrality ... must be strictly observed.” *Id.* at 1732.

Non-neutral treatment of religious objections need not be overt to run afoul of *Masterpiece Cakeshop*. “The Free Exercise Clause bars even ‘*subtle* departures from neutrality’ on matters of religion.” *Id.* at 1731 (emphasis added) (quoting *Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 US 520, 534 (1993)). Indeed, “government has no role in deciding *or even suggesting* whether the religious ground for [a] conscience-based objection is legitimate or illegitimate.” *Masterpiece Cakeshop*, 138 S Ct at 1731 (emphasis added).

Reviewing governmental action for religious bias is fact-intensive. Even “slight suspicion” of anti-religious animus or distrust should trigger a searching review. *Id.* at 1731 (quoting *Lukumi*, 508 US at 547). The 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. *Id.* at 1729–30.

The Supreme Court’s decision in *Masterpiece Cakeshop* illustrates how this fact-intensive, cumulative analysis works. The Court weighed—in the aggregate—the statements of two commissioners, their fellow commissioners’ failure to object to those statements, *and* the Commission’s disparate treatment

of Phillips relative to similarly situated bakers. Based on the *cumulative* weight of this evidence, the Court determined that the Commission had exhibited unconstitutional bias. *See id.* at 1732 (recapitulating each piece of evidence and concluding that “[f]or these reasons, the order must be set aside”). No overwhelming, unequivocal evidence of bias was needed. It was enough that the Commission’s treatment of Phillips’ case “ha[d] some elements” of hostility toward Phillips’ sincere religious beliefs, and that Phillips’ right to neutral and respectful consideration of his contentions was therefore “compromised.” *Id.* at 1729.

ARGUMENT

Review of BOLI’s decision in light of *Masterpiece Cakeshop* requires the conclusion that the decision violates the Free Exercise Clause. Abandoning the constitutional requirements of neutrality, tolerance, and respect, BOLI’s Commissioner, Brad Avakian, spoke dismissively of the Kleins’ religious objections before their case even came before him. In the administrative proceedings, BOLI’s administrative prosecutor disparaged those objections as a mere “excuse” for discrimination. At the end of those proceedings, the Commissioner not only held the Kleins liable for violating ORS 659A.403, but awarded damages based on Klein’s quotation of his sacred text, the Bible. To justify a disproportionately high damages award of \$135,000, the Commissioner compared the Kleins’ case to completely dissimilar cases of

physical violence, prolonged sexual harassment, and religious coercion. Finally, the Commissioner enjoined the Kleins from speaking about their religious beliefs, despite the lack of any basis for such a gag order.

Viewed together, these facts demonstrate that BOLI's treatment of the Kleins was "neither tolerant nor respectful of [their] religious beliefs," as the Constitution requires. 138 S Ct at 1731.

I. BOLI's Contemporaneous Statements Betray Anti-Religious Hostility.

Commissioner Avakian and BOLI's prosecutor made several remarks about the Kleins' case that, like the Colorado commissioners' "inappropriate and dismissive" comments in *Masterpiece Cakeshop*, evince a "lack of due consideration for [the Christian bakers'] free exercise rights and the dilemma [they] faced." 138 S Ct at 1729.

A. Before the Proceedings, Commissioner Avakian Dismissed the Kleins' Religious Objections Without Due Consideration.

"[C]ontemporaneous statements made by members of the decisionmaking body" are one of the "[f]actors relevant to the assessment of governmental neutrality." 138 S Ct at 1731 (quoting *Lukumi*, 508 US at 540).

In a 2013 Facebook post about the Kleins' case, Avakian wrote, "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." BOLI Order at

53. Avakian echoed this sentiment in an *Oregonian* article: “Everybody’s entitled to their own beliefs, but that doesn’t mean that folks have the right to discriminate.” BOLI Order at 50. Avakian’s statements imply that religious belief has no place in the public square: it is merely a private matter, an ancillary part of one’s life that should be cloistered within the church, mosque, or synagogue.

Masterpiece Cakeshop condemned such indications of intolerance toward public expressions of unpopular religious belief. The Court rebuked the Colorado commissioners for “several points” during a May 30, 2014 meeting at which they “endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado’s business community.” *Masterpiece Cakeshop*, 138 S Ct at 1729; *see supra* at 3 (quoting commissioners’ statements).

Commissioner Avakian communicated the same message—that in the public sphere, religious beliefs must not be exercised when they conflict with the majority view. Commissioner Avakian’s position does not give *any* consideration, much less “due consideration,” to the Kleins’ “free exercise rights and the dilemma [they] faced,” *Masterpiece Cakeshop*, 138 S Ct at 1729.

B. Commissioner Avakian Pre-Judged the Kleins' Free Speech and Religious Exemption Claims.

Commissioner Avakian's statements about the Kleins' religious beliefs—which he uttered *before* BOLI had even completed its investigation or had filed formal charges—show that his anti-religious bias led him to prejudge the Kleins' arguments that their art is protected speech and that they are entitled to a religious exemption. The Oregon Constitution prohibits all laws that “*in any case whatever* control the free exercise[] and enjoyment of [religious] opinions or interfere with the rights of conscience.” Or Const, Art I, § 3 (emphasis added). The Oregon Supreme Court has interpreted this provision to require the State to consider whether to “grant ‘an individual claim to exemption on religious grounds’” when applying generally applicable laws. *State v Hickman*, 358 Or 1, 16 (2015) (en banc) (quoting *Cooper v Eugene School Dist.*, 301 Or 358, 368-69 (1986)).

That requirement is inconsistent with Commissioner Avakian's statements. His insistence on “one set of rules for everybody” and his equation of the Kleins' fidelity to their religious beliefs with “disobey[ing] laws already in place” necessarily denied the possibility of free-speech protection or a religious exemption to the public accommodations statute. The Commissioner thus deprived the Kleins of their right to a truly “neutral decisionmaker” who would “give full and fair consideration to [their] religious objection[s]” in

applying the federal and Oregon Constitutions to the statutory scheme. 138 S Ct at 1732.

Those statements foreshadowed BOLI's dismissive treatment of the Kleins' religious exemption claims in its order. *See* BOLI Order at 28–29 (denying a religious exemption because the Kleins' conduct was not—in the Commissioner's view—"a religious practice"). *Contra* ER.365 (Declaration of Aaron Klein) (explaining that the Kleins "practice [their] religious faith *through* [their] business and make no distinction between when [they] are working and when [they] are not." (emphasis added)); ER.375 (Declaration of Melissa Klein) (stating that their creative work is "not only a labor of love, but an *expression of [their] Christian faith.*" (emphasis added)).

C. During the Proceedings, BOLI Treated the Kleins' Religion as an Insincere Excuse.

Commissioner Avakian's dismissive treatment of the Kleins' sincere religious beliefs was echoed by Cristin Casey, BOLI's Administrative Prosecutor in the case, who asserted that the Kleins "have *continually used* their religion as an *excuse* for not serving Complainants." Supplemental ER.2 (emphases added). Casey's statement that the Kleins' Christian faith is an "excuse"—mere cover for bigotry—violates the requirements of tolerance, respect, and neutrality that are mandated by the Free Exercise Clause. The statement "disparage[s] [the Kleins'] religion ... by characterizing it as merely

rhetorical—something insubstantial and even insincere.” *Masterpiece Cakeshop*, 138 S Ct at 1729. Casey’s statement alone warrants vacating the agency decision in this case on free exercise grounds, because the Kleins were “entitled to the neutral and respectful consideration of [their] claims in *all* the circumstances of the case,” not only in the final adjudication. *Id.* 1729; *see also id.* at 1732 (requiring fair consideration of religious objections “in all of the circumstances in which [a] case [is] *presented*, considered, and decided” (emphasis added)). But Casey’s statement also sheds light on the significance of the other evidence in the case. *See id.* at 1729 (concluding that officials’ initial ambiguous statements were more likely “inappropriate and dismissive” because of later comments).

In *Masterpiece Cakeshop*, the Supreme Court interpreted the Colorado Commission’s failure to object to such comments as further evidence of its lack of impartiality. *Id.* at 1729–30. Commissioner Avakian was aware of Casey’s offensive statement. *See* BOLI Order at 3 (citing BOLI’s response to interrogatories and noting the Commissioner had “fully considered the entire record”). But rather than disavowing the prosecutor’s disparaging characterization of the Kleins’ religion, BOLI sided with the prosecution, treating the Kleins’ religion as analogous to the worst kinds of racism, sexual harassment, and violence. *See* BOLI Order at 41 & n.20 (discussed *infra* at 15–17).

II. BOLI Picked Sides in a Religious Dispute by Awarding Damages for the Quotation of a Bible Verse.

BOLI based its heavy damages award on its assessment of Aaron Klein's quotation from the Bible and of Complainants' "reasonable and very real responses" to an intermediary's garbled account of that quotation. In so doing, BOLI "passe[d] judgment upon" and "presuppose[d] the illegitimacy of [the Kleins'] religious beliefs" about same-sex conduct, in violation of the Free Exercise Clause. *Id.* at 1731.

BOLI's Final Order shows that its damages award represents compensation for the psychic effects of a religious disagreement, not merely for the denial of service at a place of public accommodation. BOLI's Final Order recounts how Rachel Cryer's mother, Cheryl McPherson, returned to the Kleins' bakery alone to confront Aaron about his religious beliefs *after* the tasting appointment at which he apologetically explained that Sweetcakes by Melissa could not create a same-sex wedding cake. BOLI Order at 6. Cheryl, not Aaron, initiated a conversation about religion by directly confronting Aaron about his religious beliefs, against Rachel's wishes. Supplemental ER.9 ("[Cheryl] wanted to tell him what she thought. [Rachel] didn't want her mother to go back into there."). Aaron listened while Cheryl told him how she had used to share his religious belief about marriage, but that her "truth had changed," and that she had come to believe the Bible to be silent about same-sex

relationships. BOLI Order at 6. Only *after* Cheryl asserted that there was no scriptural basis for Aaron’s religious views about same-sex marriage, ER.369, did Aaron disagree with her interpretation of the Bible, quoting Leviticus 18:22: “You shall not lie with a male as with a female; it is an abomination.” BOLI Order at 6. Cheryl then left the bakery and misreported this quotation to Rachel, asserting falsely—as *BOLI found*, ER.160 & n.48—that Aaron “had told her that ‘her children were an abomination unto God.’” BOLI Order at 6.

BOLI made clear that it was the biblical word “abomination”—not Sweet Cakes’ decision not to create the cake—that justified the \$135,000 damages award. BOLI found that “[w]hen [Cheryl] ... told [Rachel] that [Aaron] had called her ‘an abomination,’ this made [Rachel] cry even more.” *Id.* at 6. Noting that Rachel “was raised as a Southern Baptist,” BOLI found that “[t]he 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 be loved, have a family, or go to heaven.” *Id.* (emphasis added); *see also id.* at 33, 35 (repeating these effects of the word “abomination” on Rachel in discussing damages). BOLI similarly noted that Laurel “was raised as a Catholic” and found that “[s]he took denial of service *in this manner* to mean ‘this is a creature not created by God, not created with a soul; they are unworthy of holy love; they are not worthy of life.’” *Id.* at 7 (emphasis added); *see also id.* at 33,

38 (repeating these effects of the word “abomination” on Laurel in discussing damages).

BOLI 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). BOLI Order at 33. On that basis, BOLI awarded \$135,000 in damages. *Id.* at 34, 42. In so doing, BOLI effectively punished the Kleins for expressing a religious belief about same-sex conduct, evincing BOLI’s official disapproval for that expression. *Cf. id.* at 49–52 (listing Commissioner Avakian’s many public statements endorsing gay pride and same-sex marriage). In addition, BOLI’s rationale for the award endorsed the legitimacy of the Complainants’ religious interpretations of what they took to be the Kleins’ beliefs.

This Court agreed that BOLI’s damages award turned on Aaron’s quotation of the Bible and on the Complainants’ “reasonable” reactions to it: “BOLI’s final order ... reflects a focus on the effect of the word ‘abomination’ on the complainants, *including their recognition of that biblical reference.*” *Klein*, 289 Or App at 559 (emphasis added). Aaron’s “use[] [of] the term ‘abomination’ in the course of explaining why he was denying service ... is th[e] nexus that underlies BOLI’s damages award” because “complainants experienced emotional distress based on the use of that term.” *Id.* at 560; *see*

also id. at 559 (“We ... read BOLI’s order to rest on ... [Aaron’s] quoting a biblical verse.”).

By accepting the “reasonable[ness]” of the Complainants’ offended reaction to the Kleins’ opposing religious views, BOLI Order at 33, BOLI expressed impermissible “hostility to [the Kleins’] ... religious viewpoint,” wading into a religious disagreement that BOLI is simply not competent to adjudicate. *See Masterpiece Cakeshop*, 138 S Ct at 1731. BOLI’s ruling on this topic “elevates one view of what is offensive over another and itself sends a signal of official disapproval of [the Kleins’] religious beliefs.” 138 S Ct at 1731. That is impermissible: “government has no role in deciding or even suggesting whether the religious ground for [a] conscience-based objection is legitimate or illegitimate.” *Id.* at 1731. Under the First Amendment, “the religious and philosophical objections to gay marriage are protected views.” *Id.* at 1727.

By awarding damages based on its views about the reasonableness and legitimacy, in light of Complainants’ own religious backgrounds, of Complainants’ reaction to the Kleins’ religious views, BOLI showed that the Kleins’ “religious objection was not considered with the neutrality that the Free Exercise Clause requires.” *Id.* at 1731.

III. The Magnitude of BOLI's Damages Award Reflects Anti-Religious Bias.

BOLI inappropriately justified the \$135,000 damages figure by cursorily benchmarking it against damages awarded by BOLI in four cases that are radically dissimilar to this case. BOLI Order at 41 n.20. Three of the four cases involved physical violence or sexual harassment lasting weeks, months, or years; the fourth case involved religious coercion of an employee by an employer. By contrast, the conduct at the heart of the agency's justification for the damages award—Aaron's quotation from the Bible as part of a conversation that Cheryl initiated—involved only speech: words that lasted a matter of seconds. Quoting a Bible verse is not remotely comparable to violence, sexual harassment, or coercion. Treating Aaron's bare statement as tantamount to such conduct strongly suggests unconstitutional prejudice against religion.

In one case BOLI cites, a white coworker assaulted the complainants with a gun, discharging it several times into the air, and repeatedly called them "Hispanic motherf**kers." *In re Maltby Biocontrol, Inc.*, 33 BOLI 121, 133–35 (2014). One complainant was punched in the face and the other beaten with a wooden bat. *Id.* at 136. Both were fired from their jobs after over four years of verbal and physical abuse. *Id.* at 132, 135, 140–41. Each received \$100,000 in compensation for "fear and sleeplessness" caused by these traumatizing experiences. *Id.* at 121, 159.

In a second case, a male employer put unsolicited pornography in the complainant's locker; stripped to his boxers and exhibited himself to her in the office; defamed her as a sexual blackmailer, methamphetamine abuser, burglar, and vandal; and threatened to ruin her professional reputation. *In re From the Wilderness, Inc.*, 30 BOLI 227, 258–84 (2009). The complainant endured harassment over two full months of employment and for over a year thereafter. *Id.* at 258–75. She received \$125,000 in mental and emotional damages to compensate her for the medically-diagnosed panic attacks that she suffered, for which she saw a counselor. *Id.* at 293.

A third case involved both sexual harassment *and* physical abuse. *In re Charles Edward Minor* concerned a complainant barista whose employer told her that he hired her because of her “juicy boobs,” suggested that she wear more revealing clothing to work, sexually harassed her in other ways, and twice hit her on the head while she was recovering from dental surgery. 31 BOLI 88, 92–93 (2010). This harassment and abuse, occurring over two weeks of employment, caused complainant to experience paranoia and anxiety, for which she sought counseling. *Id.* To compensate for her emotional suffering, BOLI awarded \$50,000—less than the \$75,000 and \$60,000 awarded to Complainants (respectively) in this case. *Id.* at 95–96, 89, 104–05.

The fourth case that BOLI cited involved serious religious coercion. *In re Andrew W. Engel, DMD*, 32 BOLI 94 (2012), concerned a dentist who, over

several days, pressured an unwilling employee to attend a conference affiliated with the dentist's religion, Scientology. *Id.* at 118–19. The employee was forced to quit her job rather than violate her own religious beliefs by attending the conference. *Id.* at 123. This caused medically-diagnosed anxiety and other symptoms for which BOLI awarded her \$325,000. *Id.* at 141.

Engel is an ironic choice of comparator to justify the present damages award: The only party in the Kleins' case that has sought to coerce a person to violate her religious beliefs is BOLI itself, which would require the Kleins to engage in conduct they believe to be sinful. *See* ER.365-67, 373-76. The Kleins themselves did not compel Complainants to take any action at all. The conversation about religion that formed the basis for BOLI's damages award was initiated not by Aaron but by Cheryl, who returned to the store to persuade *him* of "*her* truth." BOLI Order at 6 (emphasis added, quotation mark omitted).

In stark contrast with the preceding four cases, the Kleins' case involved no violence, threats, harassment, or coercion of any kind (excepting BOLI's attempt to punish the Kleins for adhering to their beliefs). And the conduct at issue here lasted minutes—not weeks, months, or years as in the other cases. At the tasting appointment, Aaron simply apologized and informed Rachel that the Kleins were unable to create a wedding cake for her and Laurel. BOLI Order at 5. When Cheryl returned to confront him, Aaron simply responded to her own religious argument with a religious response— a Bible verse. *Id.* at 6.

BOLI nonetheless found that Complainants' emotional suffering upon hearing the word "abomination" warranted damages roughly on par with or even exceeding those awarded to emotionally traumatized victims of extensive physical abuse and sexual harassment. The incongruity strongly suggests that bias inflated the award. Absent anything like the extreme conduct that justified large awards in BOLI's comparator cases, the magnitude of the \$135,000 award indicates that BOLI was "neither tolerant nor respectful of [the Kleins'] religious beliefs." 138 S Ct at 1731.

IV. BOLI's Gag Order Further Demonstrates BOLI's Lack of Tolerance for the Kleins' Religious Viewpoint.

The "cease and desist" order that BOLI imposed on the Kleins (which this Court correctly vacated in its earlier decision, 289 Or at 568²) further demonstrates BOLI's bias against the Kleins' religion. Although BOLI acknowledged that the statements it relied on "are properly construed as the recounting of past events that led to the present Charges being filed," BOLI nevertheless determined that "they also constitute notice that discrimination will be made in the future by refusing such services." BOLI Order at 27. Enjoining

² For the reasons explained in that decision (and noted in this brief), this Court should again vacate the cease and desist order imposed by BOLI, which reflects BOLI's unfounded conclusion that the Kleins had communicated a future intent to discriminate in violation of ORS 659A.409.

such statements effectively barred the Kleins from speaking publicly about their religious beliefs.

As this Court correctly held, BOLI's gag order relied on statements that were "taken out of context." 289 Or App at 568. BOLI wrote that Aaron "did not say only that he would not do complainants' specific marriage and cake but, that respondents 'don't do' same-sex marriage and cakes." BOLI Order at 27. But "BOLI ignores the context in which he made that remark during the interview." 289 Or App at 567. As this Court noted, Aaron was asked a question about "how this unfolded," and he responded by describing "what had happened *on the day of the refusal*." *Id.* The very statement that BOLI relied on was prefixed by the past tense: "*I said*." *Id.* Commissioner Avakian overruled a decision of the ALJ that made this point. BOLI Order at 82–83. This suggests that BOLI willfully misconstrued Aaron's unambiguous statements about past events to justify enjoining Melissa and Aaron from making public statements in the future about their religious beliefs about marriage.

V. As in *Masterpiece Cakeshop*, the Cumulative Evidence of Bias in This Case Requires the Conclusion that the Kleins' Free Exercise Rights Were Violated.

Under *Masterpiece Cakeshop*, "the delicate question of when [a business owner's] free exercise of ... religion must yield to an otherwise valid exercise of state power need[s] to be determined in an adjudication in which religious hostility on the part of the State itself [is not] a factor in the balance the State

sought to reach.” *Masterpiece Cakeshop*, 168 S Ct at 1724. Because that requirement was not met here, BOLI’s judgment “must be invalidated.” *Id.* at 1732.

Any individual component of the facts recited above might warrant this conclusion. But the cumulative evidence of bias is more than adequate to require invalidation in light of *Masterpiece Cakeshop*. In brief: BOLI’s Commissioner and administrative prosecutor disparaged the Kleins’ religious objections both before and during the proceedings at issue. BOLI imposed a punishing damages award that was wildly disproportionate to the conduct said to justify the amount awarded. Worse, BOLI premised the size of the damages penalty on the moral and theological significance of a biblical passage quoted by one of the Kleins. To add insult to injury, BOLI issued a gag order against the Kleins that lacked any basis. Viewed together, these facts demonstrate that the BOLI proceedings compromised the Kleins’ rights to tolerance, neutrality, and respect for their religious beliefs. *See* 138 S Ct at 1731.

As in *Masterpiece Cakeshop*, the evidence shows that the Commissioner “adjudicat[ed] the [Kleins’] religious objection based on a negative normative ‘evaluation of the particular justification’ for [their] objection and the religious grounds for it.” *Id.* By failing to exercise its authority with the tolerance, neutrality, and respect required under *Masterpiece Cakeshop*, BOLI violated the Free Exercise Clause. *See id.*

VI. Even If Anti-Religious Bias Had Been Absent in This Case, the Free Speech and Free Exercise Clauses of the United States and Oregon Constitutions Would Still Require the Invalidation of BOLI's Decision.

The evidence of BOLI's lack of tolerance and neutrality is a sufficient ground for vacating BOLI's judgment. But if this Court does not rule in the Kleins' favor on that ground, the Court should revisit the Kleins' other arguments under the Free Speech and Free Exercise Clauses of the federal and Oregon Constitutions in light of *Masterpiece Cakeshop*. The Kleins here reassert the arguments they raised in their initial briefs before this Court.

Although *Masterpiece Cakeshop* did not determine whether Jack Phillips' art was protected by the Free Speech Clause or whether such artists are entitled to a religious exemption from generally applicable public accommodations laws, the Supreme Court's decision in that case did provide some guiding principles for this Court's analysis of those questions.

First, the Court recognized the impossible situation that religious believers like the Kleins find themselves in when they are compelled to "exercise the right of [their] own personal expression" to support "a message [they] could not express in a way consistent with [their] religious beliefs." *Id.* at 1728.

Second, the Court affirmed that “the religious and philosophical objections to gay marriage are protected views” under the First Amendment. *Id.* at 1727.

Third, the Court insisted that “object[ions] to gay marriage on moral and religious grounds” can be respected without thereby depriving gay persons of their own legal rights. *Id.* “[R]efusal” to participate in a same-sex wedding can “be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth.” *Id.* at 1727.

The Kleins’ beliefs can be respected without any diminishment to the dignity and worth of Complainants and others who live according to different beliefs. The Kleins would happily serve customers of any sexual orientation, as they have served Complainants in the past. BOLI Order at 5. Their religious beliefs prevent them only from using their own expression to celebrate same-sex weddings and other ceremonies that conflict with those beliefs. Respecting the Kleins’ religious views would not cause any “community-wide stigma” to Complainants and others who seek to celebrate same-sex weddings.

Masterpiece Cakeshop, 138 S Ct at 1727. The facts of this case make clear that customers have no difficulty finding bakeries willing to design custom cakes for same-sex weddings in Oregon. BOLI Order at 11. The Kleins’ religious views do not prevent same-sex couples from exercising their right to marry, and there

is no reason why the right to same-sex marriage should compel a violation of the Kleins' constitutional rights.

CONCLUSION

This Court should vacate BOLI's Order and direct BOLI to enter final judgment for Melissa and Aaron Klein.

DATED this 8th day of August, 2019.

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CERTIFICATE OF COMPLIANCE

On June 24, 2019, the Court issued an Order granting Petitioners leave to file a supplemental brief, not to exceed 5,000 words. I hereby certify that this brief complies with the Court's June 24, 2019 Order. The word count of this brief as described in ORAP 5.05(2)(a) is 4,993 words.

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CERTIFICATE OF FILING AND SERVICE

I certify that on August 8, 2019, I directed Petitioners' SUPPLEMENTAL BRIEF to be electronically filed with the Appellate Court Administrator, Appellate Records Section.

I further certify that on August 8, 2019, I directed a true copy of the Petitioners' SUPPLEMENTAL BRIEF to be served on Respondent at the address set forth below:

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