

**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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August 8, 2019

## INDEX

STATEMENT OF THE CASE .....	1
I. Remand from the United States Supreme Court .....	1
II. <i>Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Commission</i> .....	2
ARGUMENT .....	5
I. BOLI's Contemporaneous Statements Betray Anti-Religious Hostility. ..	6
A. Before the Proceedings, Commissioner Avakian Dismissed the Kleins' Religious Objections Without Due Consideration. ....	6
B. Commissioner Avakian Pre-Judged the Kleins' Free Speech and Religious Exemption Claims. ....	8
C. During the Proceedings, BOLI Treated the Kleins' Religion as an Insincere Excuse. ....	9
II. BOLI Picked Sides in a Religious Dispute by Awarding Damages for the Quotation of a Bible Verse. ....	11
III. The Magnitude of BOLI's Damages Award Reflects Anti-Religious Bias. .....	15
IV. BOLI's Gag Order Further Demonstrates BOLI's Lack of Tolerance for the Kleins' Religious Viewpoint. ....	18
V. As in <i>Masterpiece Cakeshop</i> , the Cumulative Evidence of Bias in This Case Requires the Conclusion that the Kleins' Free Exercise Rights Were Violated. ....	19
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 Invalidity of BOLI's Decision. .....	21
CONCLUSION.....	23

## TABLE OF AUTHORITIES

### CASES

<i>Church of the Lukumi Babalu Aye, Inc. v City of Hialeah</i> , 508 US 520 (1993) .....	4, 6
<i>Cooper v Eugene School Dist.</i> , 301 Or 358 (1986) .....	8
<i>Klein v Oregon Bureau of Labor &amp; Indus.</i> , No. 18-547, 2019 WL 2493912 (U.S. June 17, 2019) .....	2
<i>Klein v Oregon Bureau of Labor &amp; Indus.</i> , 289 Or App 507 (2017) .....	1, 13, 18
<i>Klein v. Oregon Bureau of Labor &amp; Indus.</i> , 363 Or 224 (2018) .....	1
<i>Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Comm’n</i> , 138 S Ct 1719 (2018) .....	passim
<i>State v Hickman</i> , 358 Or 1 (2015) (en banc) .....	8

### CONSTITUTIONAL PROVISIONS

Or Const, Art I, § 3 .....	8
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### STATUTES

ORS 659A.403 .....	1, 5
ORS 659A.409 .....	18

### ADMINISTRATIVE DECISIONS

<i>In re Andrew W. Engel, DMD</i> , 32 BOLI 94 (2012) .....	16, 17
<i>In Re Charles Edward Minor</i> , 31 BOLI 88 (2010) .....	16
<i>In re From the Wilderness, Inc.</i> , 30 BOLI 227 (2009) .....	16
<i>In re Maltby Biocontrol, Inc.</i> , 33 BOLI 121 (2014) .....	15

## **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.<sup>1</sup>

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

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<sup>1</sup> 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 568<sup>2</sup>) 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

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<sup>2</sup> 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.

/s/ HERBERT G. GREY

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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.

DATED this 8th day of August, 2019.

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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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Service was made by eFiling.

DATED this 8th day of August, 2019.

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## **EXCERPT OF RECORD**

### **TABLE OF CONTENTS**

<i>Agency's Response to Respondents' Second Set of Interrogatories,</i> Exhibit R-38 .....	ER-1
<i>Investigative Interview</i> Exhibit R-22 .....	ER-7



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

In the Matter of:

Case Nos. #44-14 & 45-14

Oregon Bureau of Labor and  
Industries on behalf of Rachel Cryer  
& Laurel Bowman-Cryer,  
Complainants,

Agency's Response to Respondents' Second  
set of Interrogatories for Oregon Bureau of  
Labor and Industries

v.

Melissa Elaine Klein, dba  
Sweetcakes by Melissa,

and Aaron Wayne Klein, individually  
and as an aider and abettor under  
ORS 659A.406

Respondents.

The following is the Agency's Response to Respondents' Interrogatories for  
Oregon Bureau of Labor and Industries.

1. *On pages 2 and 3 of Complainants' discovery provided on October 14, 20-14, Complainant Rachel Cryer listed over 80 physical and mental distress descriptions in alphabetical order. Explain how that list was created and whether the Agency provided a prepared list of potential symptoms to Complainant Rachel Cryer.*

Complainant Rachel Cryer met with the Agency, and her counsel, to discuss her symptoms. Part of that discussion involved the Agency providing a list of non-exhaustive list of potential symptoms. During this meeting, Complainant Rachel Cryer advised the Agency of the symptoms from which she suffered.

2. *On pages 3 and 4 of Complainants' discovery provided on October 14, 2014, Complainant Laurel Bowman-Cryer listed 90 physical and mental distress symptoms in alphabetical order. Explain how that list was created and whether the Agency provided a prepared list of potential symptoms to Complainant Laurel Bowman-Cryer.*

Exhibit R-38  
P1 & L

ITEM 208

00133

Complainant Laurel Bowman-Cryer met with the Agency, and her counsel, to discuss her symptoms. Part of that discussion involved the Agency providing a list of non-exhaustive list of potential symptoms. During this meeting, Complainant Laurel Bowman-Cryer advised the Agency of the symptoms from which she suffered.

3. *Explain stating when, why, and from whom Complainant Rachel Cryer was "forced to borrow money" because of the Respondents' actions on January 17, 2013.*

Answer: Complainant Rachel Cryer had to borrow money from her mother during the middle of February, 2013, when she and Complainant Laurel Bowman-Cryer traveled to Seattle. Complainants traveled to Seattle out of fear for their safety and to remove themselves from the public spotlight. Complainant Rachel Cryer borrowed money from her mother again for a trip that occurred in mid-March 2013.

4. *Explain when and why Complainant Rachel Cryer was "forced to sell [her] possessions" because of Respondents' actions on January 17, 2013.*

Complainant Rachel Cryer placed items into pawn for the times Complainants took trips out of fear for their safety and to remove themselves from the public spotlight in February and March, 2013.

5. *List the possessions Complainant Rachel Cryer sold because of Respondents' actions on January 17, 2013.*

Complainant Rachel Cryer sold a guitar, amplifier and speakers.

6. *Explain how Complainants were ridiculed by Respondents.*

Complainants were ridiculed because of the numerous statements made by Respondents to the media on numerous separate occasions. Respondent Aaron Klein called Complainant Rachel Cryer an "abomination." Respondents have also insinuated that Complainants are involved with a boycott of Respondents' business and have accused Complainants of bullying behavior.

7. *Explain what "alienation toward religion" means as used by Complainants in the list of symptoms provided on October 14, 2014.*

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.

8. *Explain how Respondents' actions on January 17, 2013 caused Complainants "alienation toward religion."*

Exhibit R38  
pg 2 of 6

Complainant Rachel Cryer was raised as a Southern Baptist and remains a member of that congregation. Complainant Laurel Bowman-Cryer was raised Roman Catholic and remains a member of that congregation. Following Respondents' actions on January 17, 2013, Complaints questioned their religious beliefs because of the way religion was being used by Respondents and their supporters to attack Complainants. Complainants stopped attending religious ceremonies because of how they felt their sexual orientation was being used to discriminate against them.

9. *Explain how Respondents' actions on January 17, 2013 caused Complainant Laurel Bowman-Cryer the loss of opportunity to bond with an infant.*

At the time of Respondents' actions on January 17, 2013, Complainants were foster parents to two young girls with special needs. The increased attention to their lives made it more difficult for Complainant Laurel Bowman-Cryer to spend as much time bonding with the girls as she would have liked.

10. *List the names and addresses of Complainant Laurel Bowman-Cryer's employers from 2012 through the present along with the dates Complainant was employed by each.*

Complainant Laurel Bowman-Cryer was a foster parent and the State of Oregon provided supplemental income based on the special needs of her children. Presently, Complainant Laurel Bowman-Cryer is a homemaker.

11. *State and explain in detail when Complainant Laurel Bowman-Cryer applied for jobs and was turned down because of Respondents' actions on January 17, 2013.*

To date, Complainant Laurel Bowman-Cryer has not applied for and been turned down from a job because of Respondents' actions on January 17, 2013.

12. *Explain in detail how Respondents' actions on January 17, 2013 damaged Complainant Laurel Bowman-Cryer's future job opportunities.*

Complainant Laurel Bowman-Cryer has experienced name recognition based on Respondents' actions and fears that this may extend to potential job opportunities after she returns to the workforce.

13. *Explain in detail how Respondents' actions on January 17, 2013 kept Complainant Laurel Bowman-Cryer from finding work.*

Complainant Laurel Bowman-Cryer has experienced name recognition based on Respondents' actions and fears that this may extend to potential job opportunities after she returns to the workforce.

14. *Explain in detail when and why Complainants were pale and sick at home after work.*

Complainants did not keep a diary of the days when the stress resulting from Respondents' actions caused them to be pale and sick, however, these symptoms were the result of Respondents' actions.

15. *State the name of any person who was Complainant Laurel Bowman-Cryer's husband from January 17, 2013 through June 26, 2013.*

Complainant Laurel Bowman-Cryer's spouse is Rachel Cryer.

16. *Explain how Respondents' actions on January 17, 2013 caused Complainant Laurel-Bowman Cryer to not want her husband to touch her.*

The stress resulting from Respondents' actions on January 17, 2013 caused a lack of intimacy between Complainant Laurel Bowman-Cryer and her spouse.

17. *Explain in detail how Respondents' actions on January 17, 2013 caused Complainant Rachel Cryer to distrust former friends and list the names and contact information for each of the friends referenced.*

a. Complainant Rachel Cryer's sister, April Thrasher (205 2<sup>nd</sup> Street, Crandall, TX 75114) does not agree with Rachel's sexual orientation and the fact that Rachel is asserting her rights under Oregon law to be free from discrimination.

b. Suzanne Rexford (address unknown) is a friend of Rachel's who posted things on Facebook concerning this matter without Rachel's consent or permission. Rachel did not feel that she could trust Suzanne afterwards.

c. Xavier Vargas (4110 SE Hawthorne Blvd., #162, Portland, OR 97214) is a wedding photographer that Rachel feared might disseminate unauthorized photos.

Complainant Rachel Cryer was concerned with what was said to friends about this matter because of potential unauthorized dissemination. As a result, she did not discuss much of anything with friends, which led to alienation and distrust.

18. *Explain how Complainant Rachel Cryer suffered from insomnia, loss of sleep, and excessive sleep simultaneously.*

These are separate conditions that did not necessarily happen simultaneously.

19. *Explain in detail the nature of the "pressure" Complainants allege resulted from Respondents' actions on January 17, 2013.*

The public nature of this matter has caused Complainants additional pressure in several ways: Complainants were concerned about how this case might affect their adoption process; Complainants felt pressure from friends and strangers regarding their complaint and how it should be handled; Complainant Laurel

Bowman-Cryer's aunt regularly pressured her regarding the complaint, stating that she should drop the complaint and not further the matter against Respondents; and Complainant Rachel Cryer's sister pressured her regarding the complaint, also stating that she should drop the complaint and not further the matter against Respondents.

20. *Explain the meaning of the word "demeanment" as used in the list of symptoms provided by Complainants on October 14, 2014.*

When Complainants stated they felt demeanment, they mean that they did not feel worthy of equal rights and that they were second-class citizens.

21. *Explain in detail why Respondents' actions on January 17, 2013 caused Complainant Rachel Cryer to distrust men.*

At first, Complainant Rachel Cryer believed that Respondent Melissa Klein was not aware of or supportive of Respondent Aaron Klein's actions on January 17, 2013 based upon Rachel's interactions with Melissa Klein prior to January 17, 2013.

When Complainant Rachel Cryer was younger, she witnessed women in her family in abusive relationships with men and Respondents' actions on January 17, 2013 brought up past trauma. She distrusted any strange men she would see and was "hyper sensitive."

22. *Explain in detail how Respondents' actions on January 17, 2013 affected Complainant Laurel Bowman-Cryer's important personal relationships.*

Respondents' actions on January 17, 2013 caused a multi-generational fight in Laurel's family with different family members taking sides either for or against her participation in this case.

23. *Explain Complainant Laurel Bowman-Cryer's history of high blood pressure.*

Complainant Laurel Bowman-Cryer did not have high blood pressure before Respondents' actions on January 17, 2013, but this is now a symptom she must treat.

24. *Explain what caused Complainant Laurel Bowman-Cryer's "apprehension over possible physical confrontation with Respondent."*

Complainant Laurel Bowman-Cryer was apprehensive because Aaron Klein posted Complainants' personal information online, including their home address. Laurel did not know whether she would ever see Respondent Aaron Klein in public and what his reaction would be.

25. Explain how Complainant Laurel Bowman-Cryer's listed symptom "embarrassment relating to circumstances of discharge to prospective employers" was caused by Respondents' actions on January 17, 2013.

Laurel Bowman-Cryer was afraid that she and Rachel would be removed as foster parents and that their kids would be taken away.

Submitted By: Cristin Casey

Dated: 1-13-15

Cristin Casey

Administrative Prosecutor

Oregon Bureau of Labor and Industries

I have read the Agency's Response to Respondents' Interrogatories for Oregon Bureau of Labor and Industries and, to the extent that answers required my input, I swear that my responses are true and accurate.

Rachel Bowman-Cryer  
Rachel Cryer

Dated: 1-13-15

I have read the Agency's Response to Respondents' Interrogatories for Oregon Bureau of Labor and Industries and, to the extent that answers required my input, I swear that my responses are true and accurate.

Laurel Bowman-Cryer  
Laurel Bowman-Cryer

Dated: 1-13-15

Notary:

State of Oregon, County MULTNOMAH

This was acknowledged

Before me on Jan 13th, 2015

By Rachel Cryer and Laurel Bowman-Cryer

Marie J. Petrasy

Notary Public

Commission Expires 09/30/2018



Exhibit R38

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## INVESTIGATIVE INTERVIEW

Complainant: Rachel Cryer  
 Respondent: Sweet Cakes By Melissa  
 Case Number: STPASO130808-11097

Person Interviewed:

Name: Cheryl McPherson  
 Address: N/A  
 Phone: [REDACTED]

CRD Interviewer:

Name: Jessica Ponaman  
 Date: September 9, 2013  
 Time: 1:50pm-2:30pm  
 Place: Tel.

Position/Relationship: Witness  
 Protected Class: Sexual Orientation  
 Others Present: None  
 Reason for Interview: Witness Interview

INTERVIEW:

- o My name is Jessica Ponaman; I am an investigator with BOLI.
- o Rachel Cryer v. Sweet Cakes by Melissa has been assigned to me for investigation.
- o We are an impartial/neutral organization responsible for investigating the complaint. This means we neither represent the Complainant or Respondent.
- o My job is to see if there is substantial evidence to prove the Complainant's allegations, that Ms. Cryer was denied services based on her sexual orientation in violation of ORS 659A.403(1)
- o In addition, my job is to investigate whether Respondents Aaron Klein and Melissa Klein made or published any communication, notice, advertisement that their services would be denied to any individual based on their sexual orientation in violation of 659A.409.
- o If necessary, there may be follow-up interviews.
- o I will be taking notes, so don't be concerned if you hear pauses and please give me time to make full note of your statement.

EVENT	COMMENTS
Cake tasting and services for the wedding of Rachel's mother.	When: November 2010  Who is present: Respondent Melissa Klein, Complainant Rachel Cryer & Laurel Bowman-Cryer. Respondent Aaron Klein was <i>not</i> present.

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## INVESTIGATIVE INTERVIEW

Page #2

	<p>What happened:</p> <p>They had a wonderful experience, her daughter (CP) had called and set the appointment. CP and Laurie wanted to buy the mother's wedding cake. Melissa had a beautiful room set up for them; all the cakes were laid out, it was very professionally done. They sat down and said the cake was for the mother. They laughed because it was the mother's 6<sup>th</sup> marriage and her husband's fourth. Cheryl said that her daughter and partner were buying the cake and that her mother's husband was picked out by her (online).</p>
	<p>"Everything went smooth as glass." Melissa knew that CP was in a same sex relationship, they talked about how they were together for 8 years (at that time).</p> <p>Nothing out of the ordinary at all, Cheryl says "Melissa was a sweetheart." Cheryl remembers CP saying that if they ever got married, they would use them again. Melissa didn't say anything at all when they made this comment in front of her.</p>
CP Rachel starts to plan her own wedding; venue and caterer recommend Sweet Cakes by Melissa.	<p>When: October 4<sup>th</sup>, 2012 CP Rachel started to look for wedding venues.</p> <p>Who is present: CP Rachel, Cheryl McPherson, Lauren Bowman-Cryer.</p> <p>What happened:</p> <p>Yes, they did. She told them it was fine with us because they were planning on using her anyway.</p> <p>Venue: not sure, doesn't remember talking to venue.</p> <p>Catering: she spoke to John at Premier catering and told him that they were denied services. He had already seen it on the news at that time. He just said "that's not right; we are open to giving services to anyone." She did not ask him to take Respondents off the list, she just told him so that he would be aware and not send another gay couple over there.</p>
Portland Bridal Expo Show	<p>When: January 13, 2013</p> <p>Who is present: Rachel Cryer; Cheryl McPherson; Respondent Melissa Klein.</p> <p>What happened:</p> <p>They walked up to her booth, she was offering a tasting and she reminded Melissa that she had done her own wedding cake. She said we know your cakes, we want to order one for Rachel and Laurie's wedding. She said to email her because she didn't have a book. It was clear it was for a same sex couple.</p>

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## INVESTIGATIVE INTERVIEW

Page #3

	Nothing unusual or out of the ordinary when she said she would contact her for an appointment.
Cake tasting for CP Rachel's wedding.	<p>When: January 17, 2013</p> <p>Who is present: Rachel Cryer and Cheryl McPherson, Aaron Klein</p> <p>What happened:  She was shocked and disappointed that Melissa wasn't there. Mother didn't know he had anything to do with the cake business up until that point. Mother said they're there for the cake tasting. He said Melissa isn't here, he's going to be handling it.</p> <p>The entire place looked different than when they had been in there the first time. There was a couch, a coffee table and chair. She can't remember, there might have been a couple of plates of cake on the coffee table, the entire place looked different. He said who is the bride, and she said "Rachel," "who is the groom?" "it's not a groom, it's a bride and her name is Laurel." He looked down and said "I'm sorry, we don't do same sex weddings." CP replied, "you're kidding me," and he said "I don't want to offend anyone but I'm a Christian." And Cheryl says, "And so am I."</p> <p>Cheryl and CP walked out. Got in the car, CP was crying because she wanted her cake from them. Mother started to drive away and turned the car back around because the mother wanted to tell him what she thought. CP didn't want her mother to go back into there. Cheryl thought she could open his eyes a little bit, she walked back in the door, and he was at the counter. She said "I walked out here and didn't do my due diligence; I used to be just like you and believe in the same things. I was raised in a southern Baptist home... god blessed me with two gay children and my truth now has changed."</p> <p>Respondent Aaron Klein stated "Your children are an abomination of god."</p> <p>Cheryl went home and posted reviews saying "if you're a gay couple and having a commitment ceremony or wedding, don't go to this place because they discriminate against gay people." She posted one on her page (sweet cakes wedding page); and another review on another site but is unable to remember which wedding site. Cheryl believes it might have been wedding wire.</p>
Other relevant information/Damages:	<p>Coming from a red neck town in east Texas, her entire side of the family has totally written them off because she has two gay children. Her two gay children are more productive members of society.</p>

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## INVESTIGATIVE INTERVIEW

Page #4

	<p>They just wanted a wedding cake; they weren't asking Respondents to participate in the wedding. They had no problem making the mother's wedding cake when she had been married 6 other times.</p> <p>Cheryl says CP is visibly stressed from what's going on; as soon as it starts to die down, it pops back into the news. For days CP couldn't get out of bed, she did nothing but cry for days.</p> <p>Her sister won't talk to her; nobody in Texas wants anything to do with Rachel or any of this. She's under the same impression that Laurie's family said the same thing, "Don't call us, we'll call you."</p> <p>Laurie has said that CP has not slept well, she's lost a lot of sleep and she's been "grouchy." Her son had been living with CP at the time and he noticed a change in her personality. Everything about the wedding from that point forward was difficult. She had just started to repair her relationship with her sister and then her sister didn't come, she didn't want anything to do with the wedding.</p> <p>Everything regarding CP's emotional distress she gets second hand, Cheryl believes she's trying to spare her.</p> <p>CP would be throwing up, she would get so nervous. She had to go to the doctor because a medical condition she was previously diagnosed with was exacerbated by stress.</p>
Investigator notes:	I told Cheryl that I would try to move the investigation along as quickly as possible and that CP will be notified once my determination is reviewed and approved by management.
Next Steps:	<ul style="list-style-type: none"> <li>• Interview Respondents</li> <li>• Consider Interviewing other witness to address damages</li> </ul>