

**IN THE COURT OF APPEALS OF THE STATE OF OREGON**

MELISSA ELAINE KLEIN, dba  
Sweetcakes by Melissa; and AARON  
WAYNE KLEIN, dba Sweetcakes by  
Melissa, and, in the alternative,  
individually as an aider and abettor under  
ORS 659A.406,

*Petitioners,*

v.

OREGON BUREAU OF LABOR AND  
INDUSTRIES,

*Respondent.*

Oregon Bureau of Labor and  
Industries  
Nos. 4414, 4514

Appellate Court No. A159899

**PETITIONERS' AMENDED  
MOTION— FILE ADDITIONAL  
AUTHORITIES**

Pursuant to ORAP 5.85(1), Petitioners respectfully move for leave to file the attached additional authorities. Counsel for Respondent Oregon Bureau of Labor and Industries has no position regarding the motion.

At oral argument on January 9, 2020, the Court asked about the appropriate remedy should the Court rule for Petitioners. *See, e.g.*, January 9, 2020 Oral Argument Video at 57:03. The attached memorandum provides additional authorities to aid the Court's consideration of that question.

This Court's Rules provide that a party may file a motion for leave to file a memorandum of additional authorities after oral argument. ORAP 5.85. The attached Memorandum of Additional Authorities is warranted in this case because

the authorities it quotes and cites are responsive to questions posed by this Court. The additional authorities show that remand would be inappropriate here.

ORS 183.482(8)(a) gives this Court express authority to “set aside” or “reverse” an agency’s order as an alternative to remand. *See* Suppl. Br. 23.

Interpreting ORS 183.482(8)(a)(A), the Oregon Supreme Court held that when an agency’s “error could not be cured on a remand,” the statute “requires that the board’s order be reversed” without remand. *Megdal v. Oregon State Bd. of Dental Examiners*, 288 Or 293, 321 (1980). This Court has exercised its authority to “set aside” and “reverse” agency orders without remanding on many occasions, as demonstrated by the cases cited in the attached Memorandum.

The Colorado Civil Rights Commission’s final order in the aftermath of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S Ct 1719 (2018), shows that a finding of anti-religious hostility in violation of the Free Exercise Clause compels vacatur without recourse to further proceedings. In that final order, the Commission “withdrew” its “cease-and-desist order” of May 30, 2014, that ordered Jack Phillips to “cease discriminating against Complainants and other same-sex couples by refusing to sell them wedding cakes . . . .” Exhibit A. And the Commission “vacate[d] its May 30, 2018, order” that Jack Phillips “take remedial measures to ensure compliance with” Colorado’s Anti-Discrimination Act. *Id.* The Commission did not initiate any further proceedings against Jack Phillips and Masterpiece Cakeshop on the basis of the operative complaint in that case. The case was over.

The additional authorities cited in the Memorandum are relevant to this Court’s questions about remedy, because BOLI’s errors in this case—no less than the agencies’ errors in *Megdal* and *Masterpiece Cakeshop*—“could not be cured on a remand,” 288 Or at 321, and because “a correct interpretation” of the Free Exercise Clause under *Masterpiece Cakeshop* “compels a particular action.” ORS 183.482(8).

Remand would be futile because the anti-religious hostility that compels vacatur “infected” “the State’s decisions” at every stage in the proceeding, *Masterpiece Cakeshop*, 138 S Ct at 1734 (Kagan, J., concurring). There is no point at which the case could be recommenced outside the pall of anti-religious hostility.

Even the charging documents that initiated this case in 2014 reflect bias in violation of the Free Exercise Clause in several ways.

First, BOLI’s Formal Charges unfairly treat Aaron Klein’s conversation with Cheryl McPherson as part of the denial of service. *See* Amended Formal Charges at 3, ¶ 6 (under “UNLAWFUL PRACTICES”); Suppl. Br. 11–12, Suppl. Reply Br. 8–11; Respondents’ Exceptions to Proposed Final Order 26, Record on Appeal 1898. They seek damages for Aaron’s (misquoted) religious speech in response to McPherson’s account of how her “truth now had changed,” even though McPherson returned to the store for “a teaching moment” that had nothing to do with ordering a cake. Tr. 264, ll. 18–20 (Mar. 11, 2015).

Second, BOLI’s Formal Charges misquote Aaron Klein’s interview with Tony Perkins to support the gag order, omitting the past-tense phrase “I said,” to give the

false impression that Aaron published an intent to deny service in the future. *See* Amended Formal Charges at 4, ¶ 8; *see also id.* ¶ 7; Suppl. Br. 18–19.

Third, BOLI’s Formal Charges seek exorbitant damages of \$75,000 per complainant. Amended Formal Charges at 7, ¶ 15. This amount is far out of line with past mental and emotional distress awards as evaluated according to the factors that BOLI says are decisive: the type, “duration, frequency, and severity” of the conduct and the “type and duration of the mental distress.” ER.44; *see* Supp. Br. 15–18; *cf. In Re Hey Beautiful Enterprises, Ltd. et al.*, No. 41-15 (July 21, 2015) (\$10,000); *In Re Blue Gryphon et al.*, No. 20-15 (Nov. 24, 2015) (\$20,000); *In Re Kara Johnson dba Duck Stop Market*, No. 30-14 (Nov. 6, 2014) (\$60,000, where complainant with diagnosed mental and physical disabilities suffered post-traumatic stress episodes while being shut out of a convenience store on three consecutive days and was then stalked by the store’s owner).

Were this Court to remand, it would be too late for BOLI to amend its Formal Charges in an effort to eliminate this deep-seated bias, because the evidentiary record is now closed. *See* Or Admin Code 839-050-0140(1). And the statute of limitations precludes a new civil action based on the underlying facts of this case. ORS § 659A.875(4).

Moreover, if this Court were to remand the case on the basis of anti-religious hostility in violation of the Free Exercise Clause, BOLI would be required to apply strict scrutiny to the Kleins’ constitutional defenses. *See Masterpiece Cakeshop*, 138 S Ct at 1734 (Gorsuch, J., concurring) (“[W]hen the government fails to act

neutrally toward the free exercise of religion, it tends to run into trouble. Then the government can prevail only if it satisfies strict scrutiny.” (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 US 520, 546 (1993))). There is no way BOLI’s prosecution of the Kleins could survive that demanding standard, for “judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the First Amendment and cannot begin to satisfy strict scrutiny.” *Id.* at 1734.

Because BOLI’s “error could not be cured on a remand,” *Megdal*, 288 Or at 321, the additional authorities are responsive to this Court’s questions.

### CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant leave to file the attached Memorandum of Additional Authorities.

Respectfully submitted,

/s/ Herbert G. Grey

HERBERT G. GREY  
OSB No. 810250  
4800 SW Griffith Dr., Suite 320  
Beaverton, OR 97005  
Telephone: [REDACTED]  
Email: [REDACTED]

*Attorney for Petitioners*

C. BOYDEN GRAY\*  
ADAM R.F. GUSTAFSON\*  
BOYDEN GRAY & ASSOCIATES  
801 17th Street, NW, Suite 350  
Washington, DC 20006  
Telephone: [REDACTED]  
Email: [REDACTED]

*Attorneys for Petitioners*

HIRAM S. SASSER, III\*  
STEPHANIE N. TAUB\*  
FIRST LIBERTY INSTITUTE  
2001 West Plano Pkwy, Suite 1600  
Plano, TX 75075  
Telephone: 972.941.4444  
Email: [REDACTED]

*Attorneys for Petitioners*

\*Admitted pro hac vice

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MEMORANDUM OF  
ADDITIONAL AUTHORITIES

Pursuant to ORAP 5.85, the Petitioners submit this memorandum of additional authorities.

ORS 183.482(8) provides that

The court may affirm, reverse or remand the order. If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, the court shall: (a) Set aside or modify the order; or (b) Remand the case to the agency for further action under a correct interpretation of the provision of law.

In *Megdal v. Oregon State Bd. of Dental Examiners*, the Oregon Supreme Court interpreted this then-new statute to require reversal without remand when an agency's error "could not be cured on remand." 288 Or 293, 321 (1980). There, the Board of Dental Examiners had revoked a license without legal authority, having "erroneously interpreted a provision of law." *Id.* The Oregon Supreme Court

held that “[t]he error could not be cured on a remand. Thus ORS 183.482(8)(a)(A) requires that the board’s order be reversed.” *Id.*

Following *Megdal*, the Oregon Supreme Court and this Court have frequently exercised their statutory authority to reverse an agency’s order without remand.<sup>1</sup>

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, the Supreme Court implied that the Free Exercise violation could not be cured on remand when it held that any adjudication of the baker’s Free Speech claim would have to await a future case: “whatever the outcome of some future controversy involving facts similar to these,” the Colorado Civil Rights Commission’s “order must be set aside.” 138 S Ct 1719, 1724 (2018); *see also id.* at 1732 (“[T]he rulings of the Commission and of the state court that enforced the Commission’s order must be invalidated.”).

In compliance with the Supreme Court’s *Masterpiece Cakeshop* opinion, the Colorado Civil Rights Commission vacated its previous order without initiating further proceedings. *See Exhibit A.*

In the same way, BOLI’s impermissible religious bias “could not be cured on remand,” so ORS 183.482(8)(a)(A) “requires” reversal without remand. *Megdal*, 288 Or at 321.

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<sup>1</sup> *See, e.g., Clackamas Cty. Assessor v. Vill. At Main St. Phase II, LLC*, 352 Or 144, 158, 282 (2012); *Coast Sec. Mortg. Corp. v. Real Estate Agency*, 331 Or 348, 360 (2000); *Liberty Nw. Ins. Corp. v. Lacy*, 241 Or App 233, 238 (2011); *State Exec. Dep’t v. Fed’n of Oregon Parole & Prob. Officers*, 92 Or App 331, 336 (1988); *Brown v. Adult & Family Servs. Div.*, 45 Or App 263, 267 (1980); *Sothras v. Employment Div.*, 48 Or App 69, 77 (1980); *see also Springfield Educ. Ass’n v. Springfield Sch. Dist. No. 19*, 42 Or App 93, 98 (1979) (holding that remand to an agency is inappropriate when “remand would be pointless”), *affirmed in relevant part*, 290 Or 217, 220 (1980) (denying remand that “would needlessly extend this already protracted proceeding,” and exercising authority under ORS 183.482(8) to “set aside or modify the order” without remand).



Respectfully submitted,

/s/ Herbert G. Grey

HERBERT G. GREY  
OSB No. 810250  
4800 SW Griffith Dr., Suite 320  
Beaverton, OR 97005  
Telephone: [REDACTED]  
Email: [REDACTED]

*Attorney for Petitioners*

C. BOYDEN GRAY\*  
ADAM R.F. GUSTAFSON\*  
BOYDEN GRAY & ASSOCIATES  
801 17th Street, NW, Suite 350  
Washington, DC 20006  
Telephone: [REDACTED]  
Email: [REDACTED]

*Attorneys for Petitioners*

HIRAM S. SASSER, III\*  
STEPHANIE N. TAUB\*  
FIRST LIBERTY INSTITUTE  
2001 West Plano Pkwy, Suite 1600  
Plano, TX 75075  
Telephone: 972.941.4444  
Email: [REDACTED]

*Attorneys for Petitioners*

\*Admitted pro hac vice

**EXHIBIT A**

<p>STATE OF COLORADO CIVIL RIGHTS COMMISSION</p> <p>1560 Broadway, Suite 1050 Denver, Colorado 80202</p>	
<p><b>CHARLIE CRAIG AND DAVID MULLINS,</b> Petitioner,</p> <p>v.</p> <p><b>MASTERPIECE CAKESHOP, INC., and any successor entity; AND JACK C. PHILLIPS,</b> Respondent.</p>	
	<p style="text-align: center;"><b>COURT USE ONLY</b></p> <p>Case No. <b>CR 2013-0008</b></p>
<p><b>FINAL AGENCY ORDER ON REMAND</b></p>	

This matter came before the Colorado Civil Rights Commission (“Commission”) at its regularly scheduled monthly meeting on August 24, 2018. The Commission first issued its Final Agency Order in this matter on May 30, 2014. Respondents appealed the Final Agency order to the Colorado Court of Appeals, which appeal resulted in a petition for certiorari to the United States Supreme Court. On June 4, 2018, the United States Supreme Court issued its Opinion, and the Colorado Court of Appeals issued a subsequent Mandate on July 10, 2018.

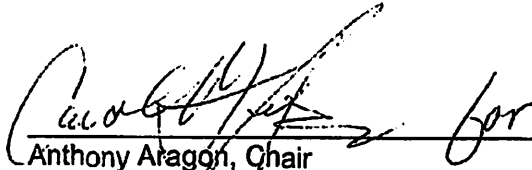
This matter came back before the Commission at its regularly scheduled monthly meeting on September 28, 2018. During the public session portion of the monthly meeting, the Commission considered the Opinion of the United States Supreme Court and the Mandate of the Colorado Court of Appeals.

Based upon the Commission’s review and consideration, it is hereby ORDERED that the Remedy of the Commission’s May 30, 2014, Final Agency Order be amended such that:

1. The Commission’s cease-and-desist order, pursuant to §§ 24-34-306(9) and 24-34-605, C.R.S., to cease discriminating against Complainants and other same-sex couples by refusing to sell them wedding cakes or any product Respondents would sell to heterosexual couples, is hereby withdrawn.

2. The Commission vacates its May 30, 2018, order that Respondents, pursuant to §§ 24-34-306(9) and 24-34-605, C.R.S.:
- a. take remedial measures to ensure compliance with the Public Accommodations section of the Colorado Anti-Discrimination Act, § 24-34-601(2), C.R.S.;
  - b. provide quarterly compliance reports to the Colorado Civil Rights Division for two years; and
  - c. report to the Colorado Civil Rights Division the number of patrons denied service by Mr. Phillips or Masterpiece Cakeshop, Inc., and the reasons the patrons were denied.

Dated this 2<sup>nd</sup> day of ~~September~~ <sup>October</sup> 2018 at Denver, Colorado.

  
\_\_\_\_\_  
Anthony Aragon, Chair  
Colorado Civil Rights Commission  
1560 Broadway, Suite 1050  
Denver, CO 80202

## CERTIFICATE OF FILING AND SERVICE

I certify that on February 4, 2020, I directed Petitioners' Amended Motion—  
File Additional Authorities to be electronically filed with the Appellate Court  
Administrator, Appellate Records Section.

I further certify that on February 4, 2020, I directed a true copy of  
Petitioners' Amended Motion—File Additional Authorities to be served on the  
following parties at the addresses set forth below:

Leigh A. Salmon  
Carson Whitehead  
1162 Court Street NE  
Salem, Oregon 97301-4096

*Attorneys for Respondent*

Service was made by eFiling.

DATED this 4th day of February, 2020.

/s/ Herbert G. Grey

HERBERT G. GREY  
OSB No. 810250  
4800 SW Griffith Dr., Suite 320  
Beaverton, OR 97005  
Telephone: [REDACTED]  
Email: [REDACTED]

*Attorney for Petitioners*

C. BOYDEN GRAY\*  
ADAM R.F. GUSTAFSON\*  
BOYDEN GRAY & ASSOCIATES  
801 17th Street, NW  
Suite 350  
Washington, DC 20006  
Telephone: [REDACTED]  
Email:

[REDACTED]  
*Attorneys for Petitioners*

HIRAM S. SASSER, III\*  
STEPHANIE N. TAUB\*  
FIRST LIBERTY INSTITUTE  
2001 West Plano Pkwy, Suite 1600  
Plano, TX 75075  
Telephone: 972.941.4444  
Email: [REDACTED]

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