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' OPENING BRIEF AND COMBINED EXCERPT OF RECORD AND APPENDIX

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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STATEMENT OF THE CASE

I. NATURE OF THE ACTION AND RELIEF SOUGHT

This is a petition for review of a Final Order of the Oregon Bureau of Labor and Industries ("BOLI") finding that Petitioners Melissa Klein and Aaron Klein, d/b/a Sweetcakes by Melissa (collectively, "the Kleins"), violated ORS 659A.409 and enjoining future violations that Aaron Klein violated ORS 659A.403 and assessing damages. The Kleins ask the Court to vacate the Final Order. Alternatively, the Kleins ask the Court to vacate and remand the damages award and injunction.

II. NATURE OF THE ORDER

The Final Order concluded Aaron Klein violated ORS 659A.403 for declining, based on his sincerely held religious beliefs, to create a custom-designed cake for a ceremony celebrating the union of two women ("Complainants").[1] The Final Order awarded Complainants $135,000 for alleged emotional suffering attributable to the Kleins. It also concludes the Kleins violated ORS 659A.409 for statements that allegedly conveyed a future

[1] The events giving rise to this case occurred before same-sex marriage became legal in Oregon in May 2014. Throughout this brief, the terms "union" and "marriage" are used interchangeably.

intent to refuse similar requests and enjoins the Kleins from making such statements.

III. BASIS OF APPELLATE JURISDICTION

This Court has jurisdiction pursuant to ORS 19.205 and ORS 183.482.

IV. EFFECTIVE DATE FOR APPELLATE PURPOSES

The Final Order is dated July 2, 2015. The petition for review, served and filed on July 17, 2015, is timely.

V. JURISDICTIONAL BASIS AND NATURE OF AGENCY ACTION

BOLI's jurisdiction over this contested case proceeding was founded upon ORS 659A.800 *et seq*.

VI. QUESTIONS PRESENTED ON APPEAL

A. ORS 659A.403

BOLI determined the Kleins' religiously motivated decision not to create a custom-designed cake for a ceremony celebrating a union between two women violated ORS 659A.403's prohibition on sexual orientation-based discrimination.

1. Did BOLI err in interpreting ORS 659A.403 to prohibit refusals to provide goods or services to facilitate same-sex weddings?
2. Does BOLI's application of ORS 659A.403 violate the guarantees against compelled speech encompassed within the Speech Clauses of

either the United States or Oregon constitutions? US Const, amend I; Or Const, Art I, § 8.

3. Does BOLI's application of ORS 659A.403 violate the right to freely exercise religion protected by the United States Constitution's Free Exercise Clause? US Const, amend I.
4. Should the Court exempt the Kleins from ORS 659A.403 as permitted by the Oregon Constitution's Worship and Conscience Clauses? Or Const, Art I, §§ 2-3.

B. Due Process

BOLI determined its Commissioner could adjudicate this case notwithstanding public statements, made before development of the factual record or presentation of legal argument, to the effect that the Kleins had violated Oregon law and should not be exempted from its enforcement.

5. Did the Commissioner's failure to recuse violate the Kleins' Due Process right to an impartial administrative tribunal?

C. Damages

BOLI awarded $135,000 to Complainants to remedy alleged emotional suffering attributable to the Kleins.

6. Does substantial evidence and reason support the damages award?

D. Violation of ORS 659A.409

BOLI determined the Kleins violated ORS 659A.409 by making statements that allegedly conveyed a future intent to engage in unlawful discrimination and enjoined such statements in the future.

7. Is BOLI's determination that the Kleins' statements conveyed a future intent to unlawfully discriminate supported by substantial evidence and reason?
8. If so, should the Court vacate the injunction to ensure consistency with the Speech Clauses of the United States and Oregon constitutions? US Const, amend I; Or Const, Art I, § 8.

VII. SUMMARY OF ARGUMENT

This case addresses a BOLI Final Order misinterpreting Oregon's public accommodations law, ORS 659A.403, which requires businesses to sell their goods and services to all persons, regardless of protected characteristics like sexual orientation. BOLI's misapplication of Oregon law violates both the Oregon and United States constitutions. It unlawfully compels two law-abiding Oregon citizens, the Kleins, to devote their time and talents to create art destined for use in expressive events conveying messages that contradict their deeply and sincerely held religious beliefs. Properly applied, ORS 659A.403 would not produce any constitutional violations. But whether analyzed as a

constitutional or statutory matter, the Final Order is unlawful. It must be vacated.

BOLI insists this case is simply about "a business's refusal to serve someone because of their sexual orientation" and not about "a wedding cake or a marriage." Op 32.[2] But four paragraphs later, BOLI admits that the case is, in fact, about "more than the denial of [a] product." Op 33.

Indeed it is. It is about the state forcing business owners to publicly facilitate ceremonies, rituals, and other expressive events with which they have fundamental and often, as in this case, religious disagreements. BOLI says the Kleins' refusal to create custom-designed cakes for same-sex weddings tells Complainants that "there are places [they] cannot go, things [they] cannot . . . be," and that they "lac[k] an identity worthy of being recognized." Op 33. The Kleins, however, have no power over where Complainants go, what they can be, or whether their identities are worthy of recognition. BOLI, of course, *does* have those powers over the Kleins and others like them. And its Final Order sends a clear message that their identity as religious people is not worthy of state recognition and that they cannot operate a business in Oregon unless they facilitate same-sex weddings. In BOLI's view, that is just how

[2] The Final Order is cited as "Op."

"people in a free society should choose to treat each other." Op 32. Perhaps. But BOLI's charge is to fairly and impartially enforce the law, not to use it to bring about its vision of a free society, compelling people to engage in speech that violates their consciences in the name of "rehabilitat[ing]" religious dissenters. *See* Op 53.

In this case, BOLI misinterpreted ORS 659A.403, mistakenly concluding that declining to facilitate same-sex *weddings* is legally the same as refusing to sell goods or services to gay *people*. Op 78. According to BOLI, refusing to facilitate same-sex weddings is unlawful discrimination "on account of" sexual orientation because same-sex weddings exclusively celebrate unions between gay people. Op 78. They are thus "inextricably linked to . . . sexual orientation." *Id*.

In effect, the Final Order interprets Oregon law to require businesses to service expressive events (*e.g.*, same-sex weddings) in which the participants are predominantly within a protected class (*e.g.*, gay people). The participants in many expressive events, however, are exclusively or at least predominantly within a class protected by ORS 659A.403—for example, "marital status," "religion," and "sex." Pairing these protected classes with their *expressive events* exposes the flaw in BOLI's interpretation of ORS 659A.403:

1. Married people predominantly participate in weddings.

2. Wiccans predominantly participate in Wiccan rituals.
3. Men predominantly participate in fraternity initiations.
4. Women predominantly participate in abortions.

On BOLI's logic, these expressive events are "inextricably linked" to marital status, religion, and sex, respectively, such that refusing to facilitate them is legally equivalent to refusing to sell goods and services "on account of" the protected status of the people participating in them. It would be shocking, however, to discover that Oregon law requires (1) caterers who reject the institution of marriage to facilitate weddings by selling food; (2) atheist bakers to facilitate Wiccan rituals by selling bread, (3) feminist photographers to facilitate fraternity initiations by taking pictures, or (4) pro-life videographers to facilitate abortions by filming them. Yet that is how the Final Order interprets and applies ORS 659A.403 with respect to Christian bakers and same-sex weddings.

In any event, interpreting and applying ORS 659.403 to require businesses whose goods and services are expressive, like custom bakeries, to facilitate expressive events like same-sex weddings violates the Speech and Religion Clauses of the constitutions of Oregon and the United States. The Court could, of course, avoid reaching these constitutional issues simply by rejecting BOLI's extension of ORS 659A.403 to cover expressive events. But if

the Court reaches the issue, the Final Order cannot withstand constitutional scrutiny.

First, it conflicts with the Speech Clauses of the constitutions of Oregon and the United States. Those clauses protect people and businesses from state compulsions to speak or to carry, contribute to, or associate with others' expression. BOLI's application of the law will often, as here, violate those guarantees. Like sculptures, custom-designed cakes are inherently expressive, artistic works. And weddings are expressive events, conveying "important messages about the couple, their beliefs, and their relationship to each other and to their community." *Kaahumanu v Hawaii*, 682 F3d 789, 799 (9th Cir 2012). State action that forces the creation of art or that requires artists to carry, contribute to, or associate with others' expression is unconstitutional.

Second, BOLI's interpretation of the law will often conflict with the constitutions' Religion Clauses, which guarantee freedom from state interference with the exercise of religion. Here, the Final Order violates the hybrid-rights doctrine, burdening the Kleins' free speech rights along with their religious exercise. It also unlawfully targets religious exercise, expanding Oregon's public accommodations law in a way that applies uniquely to people with religious beliefs about marriage. Under Supreme Court precedent, even the state's interest in preventing sexual orientation-based discrimination cannot

justify such serious burdens on the Kleins' constitutionally protected religious freedom. The constitutional violations are all the more acute here because the Oregon Constitution expressly authorizes *exemptions* for people like the Kleins from ORS 659A.403 to avoid religious hardship.

BOLI's Final Order also suffers from three additional defects. First, it is the product of a biased adjudication that violated the Kleins' Due Process right to an impartial tribunal. Having publicly commented on the facts and probable legal outcome of the case before hearing it, Due Process required BOLI's Commissioner to recuse himself. Second, the Final Order's $135,000 damages award lacks substantial evidence and reason: it failed to account for mitigating evidence and Complainants' discovery abuses, lacks internal consistency, and bears no relationship to awards in comparable cases. Finally, the Final Order incorrectly concludes that the Kleins violated ORS 659A.409, which makes it unlawful for public accommodations to convey a future intent to engage in unlawful discrimination. But the Kleins have only described the facts of this case, stated their view of the law, and vowed to vindicate that view through litigation. Their statements do not threaten *future* violations of the law and are constitutionally protected.

One of America's founding principles is that state action "compel[ling] a man to furnish contributions of money for the propagation of opinions which he

disbelieves and abhors" is "tyrannical." Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779). It is at least as tyrannical to compel people to use their time and talent to speak, or to carry, contribute to, or affiliate with others' expressions to which they do not ascribe and to which their religion forbids them from adhering. It is irrelevant that today's case involves politically favored ceremonies like same-sex weddings. Tomorrow's case may involve expressive events that are less politically palatable—celebrations of male exclusivity, white exclusivity, Wiccan practices, or abortions. The law cannot and does not turn on the nature of the expressive event.

Oregonians have not empowered BOLI to determine how people in a free society should treat each other, compelling speech and running roughshod over sincere religious beliefs as it brings about its vision of the good society. They have not empowered BOLI to enjoin people from constitutionally protected speech. And they have not authorized BOLI to conduct adjudications that do not comport with Due Process and that produce irrational damages awards. Nor could they have. The Final Order must be vacated.

VIII. STATEMENT OF FACTS

A. The Kleins Operate Sweet Cakes In Accordance With Their Religious Beliefs.

Until 2013, Sweet Cakes was a bakery in Gresham, Oregon owned and operated by the Kleins. ER.373. The Kleins' religion requires them to live out

their faith in every aspect of their lives, including their work. ER.365-66, 373-74. As a testament to their commitment to operating Sweet Cakes in accordance with their Christian faith, the Kleins had their church pastor pray over the store and dedicate its work to Jesus Christ and decorated the storefront with Christian imagery like crosses. ER.373; Doc 179, p.270.

The Kleins' faith teaches that God instituted marriage as the sacred and sexual union of one man and one woman. ER.365-67, 373-76. The Kleins' beliefs about marriage are grounded in the Bible, that, through marriage, one man and one woman become united physically, emotionally, mentally, and spiritually. *See id.* For the Kleins, the union between a man and a woman in marriage mirrors the union between Jesus Christ and his church on earth. *See id.* The Kleins do not believe that other types of interpersonal unions are marriages, and they believe it is sinful to celebrate them as such. *Id*.

For the most part, the Kleins' faith did not affect their relationship with customers. As they testified, the Kleins would not turn people away on account of membership in a protected class. ER.368, 376; ER.275. But they also noted that on rare occasions their faith might require them to decline to custom-design cakes for certain *events*—for example, divorce parties. ER.368, 376.

Because of their religious views about marriage, custom-designed wedding cakes were central to the Kleins' religiously focused operation of

Sweet Cakes. The Kleins created these cakes, in part, because they wanted to facilitate celebrations of sacred unions between one man and one woman. ER.367, 375.

B. Rachel Cryer Visits Sweet Cakes.

In January 2013, Complainant Rachel Cryer was shopping for a custom-designed cake to celebrate her union with Complainant Laurel Bowman. *See* Op 5.[3] In 2010, she had purchased a cake for her mother's wedding from Sweet Cakes. *Id.* Because she liked that cake, Cryer returned to Sweet Cakes to discuss purchasing a custom-designed cake for her own wedding. *Id.*

On January 17, 2013, Cryer and her mother, Cheryl McPherson, went to the Sweet Cakes store and met with Aaron Klein. *Id.* Laurel Bowman was not present. *Id*. Cryer told Klein that she wanted to purchase a cake to celebrate her wedding, and Klein inquired as to the names of the bride and groom. *Id.* Cryer stated that the cake would facilitate the celebration of a union of two women. *Id.* Klein then apologized and said that, because of their religious beliefs, he and his wife could not create a custom-designed cake for that purpose. *Id.*; ER.369. Cryer and McPherson left the store. Op 6.

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[3] Names used are as they were at the time of the events giving rise to this case.

Shortly after leaving, McPherson returned to confront Klein about his religious beliefs. *Id.* Klein listened while McPherson told him how her religious view of marriage had changed and that she understood the Bible to be silent about same-sex relationships. *Id.*; ER.369. After she finished, Klein expressed disagreement and quoted a Bible verse in support of his position. Op 6; ER.369. As BOLI found, Klein quoted the Book of Leviticus: "You shall not lie with a male as one lies with a female; it is an abomination." Op 6. McPherson ended the conversation, returned to her car, and told Cryer that Klein had called her "an abomination." *Id.*; ER.369. BOLI determined that this was a misreporting of events. *See* Op 3 n.2; *id*. at 6; ER.160 & n.48.

Shortly after this incident, Cryer and Bowman purchased a cake from another bakery for $250. Op 11-12. The Kleins would have charged $600 for a similar-style cake. Op 12. Cryer and Bowman also received a free wedding cake from Duff Goldman, the host of the popular television show *Ace of Cakes*. *Id.* at 15, 17.

C. Cryer And Bowman File Verified Administrative Complaints, And BOLI Issues Formal Charges And Adjudicates The Contested Case.

1. Cryer And Bowman File Verified Complaints But Disclaim Any Desire To Prosecute The Case Or Recover Damages.

Complainants filed verified complaints with BOLI on August 8 and November 7, 2013. Doc 167, pp.339-45; Doc 168, pp.332-35. Complainants, however, later stated publicly that they "did not sue this bakery" and that they "had no input in how much [BOLI] asked for or how much was awarded." ER.6. They also stated publicly that they "didn't have a choice in how this [case] was prosecuted," that they "never asked for a penny from anybody," and that they "[didn't] want anything." App.511-512.[4]

Nevertheless, BOLI initiated an investigation, and on June 4, 2014, issued two substantially identical Formal Charges, one related to each Complainant. Docs 122, 132. After two rounds of amendments, the Formal Charges alleged that the Kleins had violated ORS 659A.403 and ORS 659A.409. ER.245-60. The Formal Charges also alleged that Aaron Klein had violated ORS 659A.406 by aiding and abetting Melissa Klein's alleged

[4] Nigel Jaquiss, *Bittersweet Cake*, Willamette Week (July 2015), http://www.wweek.com/portland/article-25119-bittersweet-cake.html.

violations of ORS 659A.403 and ORS 659A.409. ER.249-50, 257-58. The Formal Charges sought to recover $75,000 for each Complainant for "emotional, mental, and physical suffering." ER.259, 251.

2. The ALJ Denies Motions To Disqualify The Commissioner And For Discovery And Grants Summary Judgment Against The Kleins.

The case was assigned to a BOLI Administrative Law Judge ("ALJ"). As the case unfolded, the ALJ ruled against the Kleins on motions for disqualification, discovery, and summary judgment.

Shortly after BOLI filed formal charges, the Kleins moved to disqualify BOLI's Commissioner from deciding the case based on comments he made about it even before BOLI had filed formal charges. ER.395-410. In a social media post specifically referencing the Kleins, the Commissioner said that "religious beliefs" do not "mean that [people] can disobey laws already in place" and that there is "one set of rules for everybody." Op 53. In that post, the Commissioner linked to an interview in which he announced that the Kleins "likely" violated the law because "regardless of one's religious belief, if you open up a store, and you open it up to the public to sell goods, you cannot discriminate in Oregon." *Id.* at 53; ER.412 (with link to embedded video App.499-500).

In a different interview about the Kleins, he stated that "folks" in Oregon do not have a "right to discriminate," that those who use their "beliefs" to justify discrimination need to be "rehabilitate[d]." Op 53; ER.416. The ALJ denied the Kleins' motion, primarily on the ground that prejudgment of legal issues—as opposed to factual issues—is not grounds for disqualification in Oregon. Op 48-56.

The Kleins also made several requests for discovery. Docs 34, 37, 59, 103, 104. The ALJ granted some of these requests. Nevertheless, without justification, BOLI withheld responsive materials it intended to use as evidence at the damages hearing. ER.179-84. Among other things the materials BOLI withheld showed that some of the expenses Complainants sought to recover were for trips planned months before the incident at Sweet Cakes. Doc 157, p.481; Doc 203, pp.143-45. Discovery also revealed that Complainants had failed to produce or undertake reasonable efforts to locate discoverable material and had deleted discoverable material. *See* ER.2-6 (discoverable material the Kleins independently located); ER.204-07; ER.423-29, Tr.108:12-114:20 (testimony regarding deleting emails); Doc 143, p.530 (acknowledging deleting emails). The ALJ, however, failed to punish these abuses.

The ALJ denied the Kleins' requests to depose any BOLI witnesses other than Complainants. Op 63-64, 109. The ALJ limited discovery despite

Complainants' attribution of 178 distinct injuries to the Kleins' conduct, an "exhaustive list of harms" standing "well apart from" and not "even remotely close" to any other case in BOLI's history. Op 108-09.

During these proceedings, the undisputed evidence established that custom-designed wedding cakes are works of art. Sweet Cakes customers want the Kleins to create an expression of "who they are" to display as a centerpiece at their wedding. *See* ER.373-74; ER.459, Tr.752:14-20. Each Sweet Cakes custom-designed wedding cake was the product of a long process that began with a consultation with the couple. ER.366-67, 374-76. Melissa Klein believed that it was important to become acquainted with each couple, so that she could pour her "heart and soul" into each personalized cake. ER.376. Following the consultation, Melissa Klein would sketch a series of personalized designs for the couple. ER.374-76. The design process alone could take hours, if not a full day. ER.450, Tr.598:2-8; ER.460, Tr.755:6-20. The design that best reflected the couple's preferences, styles, and wedding themes would be the blueprint for the finished cake, created through a multistep creative process of molding, cutting and shaping. ER.374-75, 366-67.

BOLI's own witness—a baker who sold Complainants one of their wedding cakes—testified that she considers herself to be "an artist" and that her wedding cakes are "artistic expression[s]" that she "share[s]" with "the public

and the community." ER.446, Tr.594:1-10; ER.451-52, Tr.599:23-600:11. She called Complainants' cake an "artistic creatio[n]," and recounted how it made her "proud that [it would] be part of [the] celebration." ER.446-47, Tr.594:17-595:7. Moreover, the celebrity baker who also created a cake for Complainants describes himself as an "edible art" maker, employing multiple "artists" in the creation of each cake. *See* Op 15, 17; App.497.

On January 29, 2015, the ALJ ruled on the parties' cross-motions for summary judgment. Op 66, 105-06. The ALJ concluded that Aaron Klein had violated ORS 659A.403 and that though Melissa Klein had not, she was jointly and severally liable as his business partner. Op 105-06. The ALJ rejected the Kleins' constitutional speech- and religion-based defenses. Op 80, 85-106.

The ALJ also determined that the Kleins had not violated ORS 659A.409. Op 81-83. BOLI's case on that charge rested entirely on two statements the Kleins had made after the Complainants filed their verified complaints. *Id*. In one, Aaron Klein recounted in an interview the events that transpired at Sweet Cakes on January 17, 2013, explaining that he had told Cryer and McPherson that "we don't do same-sex marriage, same-sex wedding cakes." Op 82. In another, Aaron Klein explained that once Washington state had legalized same-sex marriage, he and his wife could "see it is going to become an issue" in Oregon and determined that their religion required them to

"stand firm." *Id*. The ALJ determined that these were non-actionable statements about the past, stating that adopting BOLI's position to the contrary would "require[e] drawing an inference of future intent from the Kleins[']statements of religious belief that [it was] not willing to draw." Op 82-83.[5]

3. The ALJ Conducts A Hearing And Awards Damages.

In March 2015, the ALJ held a hearing on damages. To contest damages, the Kleins also introduced evidence, most of it undisputed, to rebut Complainants' allegations of emotional suffering. For example, the Kleins showed, without dispute, that during the relevant time period, Complainants were enduring a custody battle regarding their foster children. Op 4. And they elicited testimony from Aaron Cryer, Complainant's brother, tending to show the case was about political change desired by Complainants and a gay-rights advocacy group rather than remedying alleged emotional suffering. ER.455-56, Tr.637:21-638:19 ("[T]he whole reason of pursuing this case is . . . to change . . . these behaviors."); ER.457, Tr.645:20-22.

On April 24, 2015, the ALJ issued a Proposed Final Order ("PFO"). Doc 16. In the PFO, the ALJ determined significant testimony supporting damages

[5] The ALJ dismissed the ORS 659A.406 charges against Aaron Klein, since he could not aid or abet violations Melissa Klein never committed. Op 80.

lacked credibility. ER.161-63, 177. The ALJ also concluded "there is no basis in law for awarding damages to Complainants for their emotional suffering caused by media and social media attention related to this case." ER.176.

Despite those findings, the ALJ awarded $135,000 to Complainants. The award was based principally on testimony from McPherson, who the Kleins were not allowed to depose, and Complainants. Doc 16, pp.1742-43, 1770-73. From the testimony, the ALJ concluded that the Kleins' denial of service *and* McPherson's misreporting that Aaron Klein had called them "abomination[s]" caused complainants to feel "shame," "stres[s]," "anxiety," "frustration," "exhaustion," "sorrow," and "anger," and experienced some discord within their family and unspecified sleep-related problems. *Id*. at 1750-54; *id*. at 1751 ("Because of [allegedly being called 'an abomination,' Bowman] felt shame."); *id.* at 1754 (The retelling of allegedly being called "an abomination" made Cryer feel like "a mistake" that "had no right to love or be loved" or "go to heaven.").

The ALJ awarded one Complainant her full prayer for relief, $75,000, and reduced the other Complainant's prayer by $15,000 to $60,000 because she had not been present at Sweet Cakes and because her testimony lacked credibility in certain respects. Op 41; ER.259, 251. The award covered alleged

emotional suffering during the twenty-six-month period from the service denial in January 2013 to the hearing in March 2015.

The PFO made no mention of Complainants' discovery abuses or the rebuttal evidence introduced to contest Complainants' alleged emotional suffering.

4. BOLI Issues A Final Order.

On July 2, 2015, BOLI, acting through its Commissioner, issued a Final Order. The Final Order adopted the ALJ's conclusions that the Kleins were liable for violating ORS 659A.403 but not ORS 659A.406. Op 22, 105-06. It also affirmed the ALJ's $135,000 damages award, adopting most of the ALJ's reasoning in the PFO, including the ALJ's credibility determinations and legal conclusion that damages attributable to media exposure are not cognizable. Op 40-42. BOLI, however, reversed the ALJ's determination that the Kleins had not violated ORS 659A.409, concluding that the Kleins' statements in the media did, in fact, convey a future intent to unlawfully discriminate. Op 22-28. In addition to the statements the ALJ analyzed, the Final Order concluded that a note left on Sweet Cakes' door when it closed in September 2013 stating that "[t]his fight is not over," vowing to "continue to stand strong," taken together with Aaron's separate statements, conveyed a future intent to unlawfully discriminate. Op 17-18, 26-27. BOLI rejected the Kleins' constitutional speech-

and religion-based defenses and enjoined the Kleins from violating ORS 659A.409 in the future. Op 28-32, 42-43.

This petition for review followed.

FIRST ASSIGNMENT OF ERROR: BOLI ERRED IN APPLYING ORS 659A.403 TO THE KLEINS' CONDUCT

I. Assignment And Preservation Of Error

BOLI erred in concluding the Kleins violated ORS 659A.403, including by rejecting their federal and state constitutional speech- and religion-based defenses. Op 22, 32, 72-80 (incorporating Doc 56, pp.1428-38), 85-105 (incorporating Doc 56, pp.1396-1421). The Kleins preserved this assignment in their answers, ER.219-24, 232-37, opposition to summary judgment on liability, ER.286-306, motion for summary judgment on liability, ER.328-56, motion for reconsideration of summary judgment, ER.265-70, and exceptions to the PFO. ER.135-42, 156.

II. Standard Of Review

This Court reviews BOLI's "legal conclusions for errors of law," under ORS 183.482(8)(a), and "factual determinations for substantial evidence," under ORS 183.482(8)(c). *Broadway Cab LLC v Emp't Dep't*, 358 Or 431, 438, 364 P3d 338 (2015). The Court gives no deference to BOLI's interpretation of nondelegative statutory terms. *Blachana, LLC v BOLI*, 354 Or 676, 687, 318

P3d 735 (2014). Orders infected by legal errors must be set aside, modified, or remanded for disposition under the correct legal standard. ORS 183.482(8)(a)(A)-(B). Orders infected by a lack of substantial evidence must be set aside or remanded. ORS 183.482(8)(c); ORS 183.417(8).

Courts reviewing Free Speech issues under the federal First Amendment must independently examine the whole record without deference to the opinion below on any issue, including factual findings. *Hurley v Irish-Am Gay, Lesbian & Bisexual Grp of Bos*, 515 US 557, 567 (1995).

III. Argument

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

In Oregon, it is an "unlawful practice" to "deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation" to any person "on account of race, color, religion, sex, sexual orientation, national origin, marital status or age." ORS 659A.403. The Kleins did not violate this statute. They did not decline service to Complainants "on account of" their being gay. Rather, they declined to facilitate the celebration of a union that conveys messages about marriage to which they do not ascribe and that contravene their religious beliefs. ER.365-69, 373-77. The statute is silent about such denials.

BOLI erred in reaching a contrary conclusion, concluding, without analysis, that same-sex "marriage ceremon[ies]" are so "inextricably linked to a person's sexual orientation" such that "refusal to provide a wedding cake . . . because it was for [a] same-sex wedding was synonymous with refusing to provide a cake because of . . . sexual orientation." Op 78. In other words, the celebration of a union of two gay people is so linked with the status of being gay, that to discriminate against the *celebration*—an event distinct from the union—is to discriminate "on account of" the status.

BOLI's broad equation of celebrations (weddings) of gay conduct (marriage) with gay status rewrites and expands Oregon's public accommodations law. It lacks foundation in any Oregon statute, any Oregon court decision, any federal statute, or any United States Supreme Court decision. Indeed, it fails the test for equating conduct with status the Supreme Court set forth in *Bray v Alexandria Women's Health Clinic*, 506 US 263 (1993). There, the Court observed that "[s]ome activities may be such an irrational object of disfavor" that if they "happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed." *Id.* at 270. Applying that test, the Court rejected an argument that discrimination against abortion was discrimination on account of sex. Though abortion is exclusive to women, the Court said "[w]hatever one

thinks of [it], it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class." *Id.*

The same is true here. Whatever one thinks of same-sex weddings, there are respectable reasons for not wanting to facilitate them. Indeed, the Supreme Court has held that even with respect to same-sex *marriage*—a thing quite distinct from same-sex *weddings* and a liberty protected by the Constitution—there are "decent and honorable religious or philosophical" reasons for opposing it. *Obergefell v Hodges*, 135 S Ct 2584, 2602 (2015).

BOLI ignores *Bray* and attempts to ground its equivalence in dictum from *Lawrence v Texas*, asserting that laws criminalizing "homosexual conduct" amount to "an invitation to subject homosexual persons to discrimination." 539 US 558, 575 (2003). *Lawrence*, however, equated with gay status only conduct predominantly affiliated with gay people that is also a "liberty protected by the Constitution." *Id.* at 567. The equivalence worked in *Lawrence* because the Court held that "sexual" and "intimate conduct with another person"—"the most private human conduct" taking place "in the most private of places, the home"—is a liberty protected by the Constitution. *Id.* at 567, 577-78. Indeed, gay sexual conduct is so "closely correlated" with being

gay that it "defines" the "class" of people who are gay. *Id.* at 583 (O'Connor, J., concurring in judgment).

Lawrence's dictum does not support BOLI. This case is not about gay sexual conduct. As BOLI concedes, it is not even "about . . . marriage." Op 32. It is about *celebrations* of same-sex unions. Participating in a same-sex wedding bears no resemblance to the sexual conduct the Court equated with status in *Lawrence*. Weddings are not private sexual conduct between consenting adults. They are celebrations involving friends and family. Unlike marriage, *Obergefell*, 135 S Ct at 2604-05, weddings are not within the liberty protected by the Constitution. Indeed, BOLI's equation implies that wedding ceremonies—like sexual conduct—are so inextricably intertwined with gay identity that they "define" gay people as a "class." *Lawrence*, 539 US at 583 (O'Connor, J., concurring in judgment); *see also Bray*, 506 US at 270 ("A tax on wearing yarmulkes is a tax on Jews."). That cannot be true. Until relatively recently, marriage itself—to say nothing of weddings—found inconsistent support in the gay community. *See* George Chauncey, *Why Marriage?* 108-09 (2004) ("Not until the 1990s did [gay] marriage become a widespread goal."); *id*. (noting the "long contentious gay and lesbian debate" over "the *desirability* . . . of pursuing marriage rights").

BOLI also misplaces reliance on *Christian Legal Society v Martinez*, which noted that the Court had in *Lawrence* "declined to distinguish" between gay sexual conduct and gay status. 561 US 661, 689 (2010). *CLS* does not expand on *Lawrence*'s equivalence. At most, *CLS* instructs that states may incorporate that equivalence into their laws. *CLS* does not compel such incorporation, let alone expansion of the equivalence beyond sexual conduct to other conduct like weddings. *Id*.[6]

The consequences of BOLI's legally spurious equation are sufficiently serious that they should be imposed on Oregon's citizens, if at all, by a deliberative legislature and governor. If it is sexual orientation-based discrimination to refuse to sell goods or services to facilitate same-sex weddings, then it is likewise marital status-based discrimination to do so for any wedding, gay or straight. It is likewise sex-based discrimination to refuse to photograph fraternity initiations or abortion procedures, and religion-based discrimination to refuse to paint pictures for Catholic or Wiccan rituals. All of these ceremonies and events are, on BOLI's logic, "inextricably linked" to protected statuses. It would be shocking to discover that Oregon law contains a

[6] BOLI also relies on *Elane Photography, LLC v Willock*, 309 P3d 53 (NM 2013). That decision does not bind this Court and is based on the same misapplications of *Lawrence* and *CLS* as the Final Order.

mandate, for example, requiring businesses to be wedding vendors or Catholic artists to paint pictures to facilitate Wiccan rituals. But that is what BOLI's reasoning would require.

A recent case from Colorado, *Craig v Masterpiece Cakeshop, Inc*, 2015 WL 4760453 (Colo Ct App, Aug 13, 2015), demonstrates the pitfalls of BOLI's interpretation of ORS 659A.403. In *Craig*, a Colorado court used BOLI-like reasoning to hold that a law similar to ORS 659A.403 forbids refusals to decorate cakes for same-sex weddings. *Id*. at *7. Simultaneously, the court said that the same law's prohibition on religion-based discrimination did not forbid refusals to decorate cakes with Bible passages disapproving of gay sexual conduct. *Id*. at *7 n.8. The court allowed the latter discrimination on the theory that it was premised on the cakes' "offensive nature" rather than the customers' "creed." *Id*.

There is no basis, however, in law or logic for forcing some bakers to associate with expressive events (same-sex weddings) while exempting others from associating with expressive messages (Bible passages). Weddings, no less than Bible passages, "convey important messages." *Kaahumanu*, 682 F3d at 799. And there is no warrant to compel associations with some messages but not others based on an assessment of offensiveness. To avoid this jurisprudential quagmire *and* protect Oregonians' liberty to not associate with

offensive messages, the Court must reject BOLI's interpretation of ORS 659A.403.

Rejecting BOLI's interpretation will also avoid unnecessarily confronting serious constitutional questions. As explained below, the Final Order violates the Speech and Religion Clauses of the Oregon and United States constitutions. The Court, however, need not reach those issues if it interprets ORS 659A.403 so as to leave Oregonians free not to associate with expressive events. *Salem Coll & Acad, Inc v Emp't Div*, 298 Or 471, 481, 695 P2d 25 (1985) ("Statutes should be interpreted . . . consistent with constitutional standards before attributing a policy of doubtful constitutionality to the political policymakers, unless their expressed intentions leave no room for doubt."); *Clark v Martinez*, 543 US 371, 380-81 (2005) ("[A] a court must" reject statutory constructions that "raise . . . constitutional problems.").

There is little to be said for BOLI's interpretation of ORS 659A.403. It lacks support in statute or precedent, equates being gay with a celebration rejected by many gay people, and forces people to convey messages against their will and religious beliefs—all while, at a minimum, raising serious constitutional questions. This Court must reject it and vacate the Final Order.

B. The Final Order Violates The Free Speech Clause Of The United States Constitution.

1. Custom-Designed Wedding Cakes Are Fully Protected Speech.

The First Amendment prohibits laws abridging the "freedom of speech." BOLI has not argued that custom-designed cakes are not artwork fully protected by the First Amendment. *See* Op 102-05; ER.317-19. Nor could it have. The First Amendment unquestionably shields artwork from government control. *Hurley*, 515 US at 569; *White v City of Sparks*, 500 F3d 953, 956 (9th Cir 2007); *ETW Corp v Jireh Pub, Inc*, 332 F3d 915, 924 (6th Cir 2003); *Bery v NYC*, 97 F3d 689, 696 (2d Cir 1996); *Piarowski v Ill Comm Coll Dist 515*, 759 F2d 625, 627-28 (7th Cir 1985). It does not matter whether the art sends "clear" or even "obvious" messages. The message conveyed by Jackson Pollock's paint splatters, for example, is anything but clear or obvious, but the First Amendment "unquestionably" protects them. *Hurley*, 515 US at 569; *id*. at 575 (expressive works need not express "a particular point of view"). In fact, many works of protected expression simply convey the creator's "sense of form, topic, and perspective." *White*, 500 F3d at 956.

All that is needed for protection is that the work be "an artist's self-expression." *Id.* It does not matter that a work of art may be a collaboration between artist and patron. *Hurley*, 515 US at 570 (The First Amendment does

not "require a speaker to generate, as an original matter, each item featured in the communication." (citing *Miami Herald Publ'g Co v Tornillo*, 418 US 241, 258 (1974))). Indeed, it does not matter if the "the customer has [the] ultimate control over which design she wants," so long as the artist "applies his creative talents as well." *Anderson v City of Hermosa Beach*, 621 F3d 1051, 1062 (9th Cir 2010). It does not matter that the art may be sold commercially. *Riley v Nat'l Fed'n of the Blind*, 487 US 781, 801 (1988); *White*, 500 F3d at 956. And contrary to BOLI's implication, Op 105, the process of creating art is just as protected as the art itself. *E.g.*, *Anderson*, 621 F3d at 1060, 1062 ("The tattoo *itself*, the *process* of tattooing, and even the *business* of tattooing are not expressive conduct but purely expressive activity fully protected by the First Amendment." (citing *Minneapolis Star & Tribune Co v Minn Comm'r of Revenue*, 460 US 575, 582 (1983))).

Self-expression is undoubtedly afoot in creating custom-designed cakes, bringing them within the scope of the First Amendment's protections. Just as tattoos are like protected pen-and-ink drawings, custom-designed wedding cakes are like protected sculpture. *Buehrle v City of Key West*, 813 F3d 973, 976 (11th Cir 2015). Though sculpture is typically created from clay or metal and wedding cakes from food, speech "does not lose First Amendment

protection based on the kind of surface it is applied to." *E.g.*, *Anderson*, 621 F3d at 1061; *Bery*, 97 F3d at 695.

The record in this case confirms that custom-designed wedding cakes are First Amendment-protected art. The Kleins' customers do not merely want food; they want art. They want the cake to be centerpiece display at their wedding as an expression of "who they are." *See* ER.373-74; ER.459, Tr.752:14-20. At Sweet Cakes, the creative process starts with a patron consultation. Melissa Klein acquaints herself with each couple and pours her "heart and soul" into creating personalized cakes for them. ER.376. Following the consultation, she sketches several different cake designs. The sketch that best captures the couple's personalities and the wedding's themes becomes—through a multistep creative process of molding, cutting, and shaping—the cake featured at the celebration. *See* ER.374-76. The design process alone can take hours or even a full day. ER.450, Tr.598:2-8; ER.460, Tr.755:6-20.

For the Kleins, this process is not only artistic, but also religious. The Kleins believe that weddings celebrate a sacred and joyous union of one man and one woman in a spiritual bond called marriage, a bond that mirrors that between Jesus Christ and his church. ER.373-76. They create wedding cakes, in part, because they believe in that spiritual union. *Id.* The wedding cakes the Kleins sell are the product of their creativity and prayerful reflection. *Id.*

The record is replete with additional evidence supporting the artistry and self-expression inherent in custom cake-making. A baker who created a cake for Complainants' ceremony testified that she considers herself as "an artist" and that her wedding cakes are "artistic expression[s]" that she wants to "share" with "the public and the community." ER.446, Tr.594:1-10; ER.451-52, Tr.599:23-600:11. She called the cake she made for Complainants' wedding an "artistic creatio[n]," and recounted how it made her "proud that [it would] be part of [the] celebration." ER.446-47, Tr.594:17-595:7. The celebrity baker who also created a cake for Complainants' wedding says he makes "edible art" and employs other "artists" in that process. App.497. The upshot of all of this is that wedding cakes are artistic expression fully protected by the First Amendment.

2. The Final Order Violates The Right Not To Speak At All.

The First Amendment protects the right not to speak at all, such that the state can no more compel the artist to create than it can prohibit her from creating. As the Supreme Court has held, deciding "what not to say" is an "important manifestation" of "free speech." *Hurley*, 515 US at 573 (internal quotation marks omitted). Thus, the right "to refrain from speaking" is inherent in the First Amendment's "right to speak," protecting "'individual freedom of mind.'" *Wooley v Maynard*, 430 US 705, 714 (1977) (quoting *W Va State Bd of Educ v Barnette*, 319 US 624, 637 (1943)). The "principle that each person

should decide" for themselves "the ideas and beliefs deserving of expression, consideration, and adherence" lies at "the heart of the First Amendment." *Turner Broadcasting Sys, Inc v FCC*, 512 US 622, 641 (1994).

The First Amendment's protection against compelled speech is broad. It extends to non-verbal expression. *Barnette*, 319 US at 628, 632-34 (state cannot compel people to salute the flag). It extends to expressions that the government believes are benign or beneficial. *See, e.g.*, *Ortiz v State*, 749 P2d 80, 82 (NM 1988) (prohibiting state compulsion of non-ideological messages). It is "enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression." *Hurley*, 515 US at 574. And it cannot be overcome even by the government's undeniably compelling interests in law enforcement or national security. *Wooley*, 430 US at 716-17; *Barnette*, 319 US at 640-41.

In concluding that the First Amendment does not prohibit compelling the Kleins to create custom-designed wedding cakes, BOLI fundamentally misunderstood the right against compelled speech, believing it to protect only from compulsions to "speak the government's message." Op 104.

An unbroken line of Supreme Court cases—*Barnette*, *Wooley*, *Turner*, and *Hurley*—belie BOLI's conclusion. The First Amendment protects the "to refrain from speaking." *Wooley*, 430 US at 714. It does not matter that the state may not have a coherent message it wishes to coerce from the artist. The state

cannot compel Jackson Pollock to splatter paint any more than it can compel him to splatter it this or that way. *See Cressman v Thompson*, 798 F3d 938, 961-62 (10th Cir 2015) ("[T]he First Amendment protection accorded to [compelled] pure speech is not tethered to whether it conveys any particular message."); *Redgrave v Bos Symphony Orchestra, Inc*, 855 F2d 888, 905 (1st Cir 1988) ("Protection for free expression in the arts should be particularly strong when asserted against a state effort to *compel* expression.").

Simply put, compelling creation invades "the sphere of intellect and spirit" just as much as compelling an artist to create a specific picture. *Barnette*, 319 US at 642. And as the Supreme Court has held, "the purpose of the First Amendment to our Constitution" is to protect that sphere "from *all* official control." *Id.* (emphasis added). By ordering the Kleins to engage in expression rather than remain silent, the Final Order violates the First Amendment.

3. The Final Order Violates The Right Not To Host Or Accommodate Others' Messages.

The First Amendment also prohibits the state from forcing speakers to host or accommodate another speaker's message. *Hurley*, 515 US at 566. Indeed, "the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees." *Walker v Tex Div, Sons of Confederate Veterans, Inc*, 135 S Ct 2239, 2253 (2015). This protection ensures that one speaker's message is not affected by the speech of

another. *Hurley*, at 572-73; *Tornillo*, 418 US at 256; *Pac Gas & Elec Co v PUC of Cal*, 475 US 1, 16-18 (1986) (plurality).

BOLI erred in concluding that its Final Order does not force the Kleins to host or accommodate another speaker's message, misapplying *Hurley*, *Tornillo*, and *Pacific Gas & Electric*. BOLI concluded that *Hurley* does not apply because "[w]hatever message" customized wedding cakes convey is "expressed only to . . . the persons . . . invited to [a] wedding ceremony," and "not to the public at large." Op 105. And BOLI sought to distinguish *Tornillo* and *Pacific Gas & Electric* on the ground that its Final Order does not compel the Kleins "to publish or distribute anything expressing a view." *Id.* at 104-05. Those cases, however, are not merely about speech in public settings or publishing or distributing text. *Cf. Boy Scouts of Am v Dale*, 530 US 640, 648 (2000) (noting that the First Amendment protects expression "whether it be public or private"). The "compelled-speech violation" in those cases "resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld v Forum for Academic & Institutional Rights*, 547 US 47, 63 (2006) [hereinafter "*FAIR*"] (discussing *Hurley*, *Tornillo*, and *Pacific Gas & Electric*). The same violation has occurred here.

Hurley squarely controls. In *Hurley*, the Court held that the Constitution precludes applying public accommodations laws so as to "essentially requir[e]"

speakers "to alter the expressive content" of their art. *Hurley*, 515 US at 572-73. *Hurley* involved a group's effort to compel its inclusion in a parade. Observing that both the parade organizers' selection of units and each unit's participation were "expressive," the Court determined that public accommodations laws cannot be applied to favor one expressive message over another, at least absent a showing that one speaker has "the capacity to silence the voice of competing speakers." *Id.* at 572-73, 577-79 (internal quotation marks omitted). Such an application of "[s]tate power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573.

Here, the Final Order contravenes *Hurley* by favoring the expression of same-sex weddings over that of the Kleins. In *Hurley*, Massachusetts violated the Constitution by trying to force an expressive component—a unit of people—into an expressive event—a parade. Here, BOLI seeks to do the same thing, forcing an expressive component—a custom-designed cake—into an expressive event—a same-sex wedding. The complaining speaker is different, but the constitutional violation is the same.[7]

[7] Potential disclaimers are irrelevant where, as here, each element of an expressive act "is understood to contribute something to a common theme

The constitutional violation occurs even when a cake's design lacks images, symbols, or words that clearly promote or celebrate same-sex relationships or marriage. Where and how a piece of art is presented can affect its meaning just as much as what it looks like. *See, e.g.*, Note, *Before That Artist Came Along, It Was Just a Bridge*, 11 Cornell J L & Pub Pol'y 203, 211-13 (2001); *cf. Hurley* 515 US at 572 (noting that "every participating unit" in a parade "affects the message conveyed" by the parade as a whole). Personalized, custom wedding cakes are no exception. They derive their meaning not just from their constituent elements—shape, color, size, ingredients, and decoration—but also from the context of the wedding celebration in which they are featured. Wedding ceremonies are the compilation of multiple expressive components—the vows, the officiator, the venue, the cake—uniquely chosen to express "important messages about the couple, their beliefs, and their relationship to each other and to the community." *Kaahumanu*, 682 F3d at 799. As BOLI's witness testified, wedding cakes are a central component in creating

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. . . disclaimers would be quite curious." *Hurley*, 515 US at 576. And where potential disclaimers have justified rejecting First Amendment challenges, the activities involved were "not inherently expressive." *FAIR*, 547 US at 64-65 (citing *PruneYard Shopping Ctr v Robbins*, 447 US 74, 100 (1980)).

and expressing a wedding's messages. ER.446-47, Tr.594:1-595:7. The Constitution protects the Kleins' message from being appropriated against their will by expressive events like weddings.

As in *Hurley*, the Kleins "disclaim any intent to exclude homosexuals as such" and there is no evidence that they have ever denied service to customers because of sexual orientation. *Hurley*, 515 US at 572; ER.275; ER.376-77. Accordingly, as in *Hurley*, this case is not about "any dispute" regarding the availability of goods and services to gay people. *Hurley*, 515 US at 572. Rather, it is about the state's authority to commandeer the message of one set of speakers—people like the Kleins—to further the message of another set of speakers—people participating in same-sex weddings. BOLI's application of ORS 659A.403 has "the effect of declaring the [Kleins'] speech itself to be the public accommodation," granting people celebrating same-sex weddings "the right to participate in [that] speech." *Id.* at 573. Such "peculiar" applications of public accommodations laws violate the First Amendment. *Id*. at 572.

4. The Final Order Violates The Right Against Compelled Association With Others' Expression.

The Final Order violates the freedom of expressive association. *Dale*, 530 US at 644. The freedom of expressive association protects groups that join together to pursue "a wide variety of political, social, economic, educational, religious, [or] cultural ends" from state action that "significantly affect[s]" their

"ability to advocate" their viewpoints. *Id.* at 647-48, 650. A law raises freedom of expressive association concerns when, like ORS 659A.403, it "impose[s] penalties . . . based on membership in a disfavored group." *FAIR*, 547 US at 69. Under *Dale*, the First Amendment prohibits public accommodations laws like ORS 659A.403 from "materially interfer[ing] with the ideas that the organization [seeks] to express." *Dale*, 530 US at 657. In evaluating freedom of expressive association claims, courts must "give deference to an association's assertion regarding" both "the nature of its expression" and its "view of what would impair its expression." *Id*. at 653. Applications of public accommodations laws that interfere with the freedom of expressive association do not survive strict scrutiny. *Id*. at 657-59.

Both elements of the freedom of expressive association are satisfied here. Sweet Cakes was an entity engaged in expression. *See supra* pages 30-47. The record shows that Sweet Cakes used its creations to express a message about the sacredness of the union between man and woman in marriage. ER.373-76, 365-66. And *Dale* establishes forcing Sweet Cakes to provide cakes for same-sex weddings significantly alters—indeed, obliterates—its message. In *Dale*, the Court held that a gay man's mere "presence in the Boy Scouts would, at the very least," unconstitutionally "force [it] to send a message . . . that [it] accepts homosexual conduct as a legitimate form of behavior." *Dale*, 530 US at 653. In

the same vein, the presence of Sweet Cakes' products at same-sex weddings unlawfully compels a message that Sweet Cakes accepts same-sex marriages as celebration-worthy events.

The constitutional violation in this case is even sharper than in *Dale*. The The state's action more directly and substantially affects Sweet Cakes' message and the state's interest is more attenuated. Forcing entities that do not believe same-sex marriages are celebration-worthy events to facilitate celebrations of those unions (this case) places a far more serious burden on expression than merely forcing groups opposed to gay sexual conduct to simply accept gay members into their ranks—irrespective of their conduct (*Dale*). At the same time, the state's interest in protecting citizens from denials of goods and services because of who they are (*Dale*) is far stronger than protecting them from such denials based on what they propose to do with them (this case).

This same violation of the freedom of expressive association would occur, for example, if the state forced a florist that used its arrangements to convey messages of sexual equality to provide arrangements for Catholic Masses, which are conducted exclusively by men. *Dale* would not permit the florist to shun customers merely because they are Catholic; such sales place minimal burdens on the florist's sexual-equality message and directly further the state's interest in ensuring equal access to florist services. But those

considerations' relative weight reverses for arrangements used at Masses. Those sales directly undermine the florist's message, while furthering only the state's attenuated interest in ensuring the presence of flower arrangements at religious ceremonies.

In sum, *Dale* resolves this case in favor of the Kleins. The state may not apply its public accommodations law in "peculiar way[s]," as it has here, to force people who have joined together to express certain beliefs to associate with people hosting expressive events that convey messages contrary to those beliefs. *Dale*, 530 US at 658-59. Doing so violates the First Amendment.

5. The Final Order Violates The Right Against Compelled Contributions To Support Others' Speech.

The First Amendment prohibits state action that compels people to "contribute" to "expressive activities [that] conflict with [their] 'freedom of belief.'" *United States v United Foods*, 533 US 405, 413 (2001).

In *United Foods*, the Supreme Court addressed a law requiring mushroom producers to contribute funds to further a message promoting non-branded mushrooms. 533 US at 411. Even applying intermediate scrutiny for commercial speech, the Court concluded that the First Amendment prohibited compelling contributions from objecting producers. *Id.* at 410. It did not matter that the producer could disclaim the message. *Id*. at 411-12. And it was

sufficient to violate the Constitution that the contribution was coerced. *Id.* at 413.

Here, BOLI's Final Order violates the right against compelled contributions to speech by requiring the Kleins to devote their time, resources, and artistic talent to create custom-designed wedding cakes that promote the messages same-sex weddings express. Wedding cakes contribute significantly that message, ER.431-54, Tr.579-602, though even a minimal contribution would suffice. *See United Foods*, 533 US at 423 (Breyer, J., dissenting) (characterizing the forced contribution as "trivial"). Just as the mushroom producer's financial contributions would have facilitated promotional speech in *United Foods*, the Kleins' custom-designed wedding cakes would facilitate the expressive messages of same-sex weddings, *Kaahumanu*, 682 F3d at 799.

United Foods is not distinguishable because it involved financial contributions. Every facet of *United Foods* addressed First Amendment concerns far less important than those involved here. *United Foods* involved commercial speech. *United Foods*, 533 US at 409-10. This case involves religious speech, which lies at the core of the First Amendment. *Capitol Square Rev & Advisory Bd v Pinette*, 515 US 753, 760 (1995). *United Foods* involved a government effort to commandeer an advertising budget. This case involves a government effort to commandeer the time, effort, and artistic vision of two

ordinary citizens. *United Foods* involved contributions to speech that the public could not readily trace to the complaining contributor. Here, the Kleins' contribution to same-sex weddings is readily traceable to them. And *United Foods* involved "trivial" speech about the quality of non-branded mushrooms that, unlike the speech here, was "incapable of 'engendering any crisis of conscience.'" *United Foods*, 533 US at 423 (Breyer, J., dissenting) (quoting *Glickman v Wileman Bros & Elliott, Inc*, 521 US 457, 472 (1997)).

BOLI's Final Order compels the Kleins to contribute their time, resources, and artistic talent to the expression of same-sex weddings. Binding Supreme Court precedent precludes this application of the state's public accommodations law.

6. The Final Order Violates The Right Against Compelled Expressive Conduct.

Custom-designed wedding cakes, like other works of art, are pure speech. *See supra* pages 30-33. But the Final Order violates the First Amendment, even if custom-designed cakes are considered as mere expressive conduct.

The First Amendment protects from government interference expressive conduct that conveys a message to a reasonable observer. *See Texas v Johnson*, 491 US 397, 406 (1989); *Spence v Washington*, 418 US 405, 409-11 (1974) (per curiam); *Holloman ex Rel Holloman v Harland*, 370 F3d 1252, 1270 (11th

Cir 2004) (conduct must send "some sort of message" but not necessarily a "specific message" to receive constitutional protection (emphasis omitted)).

Compulsions of expressive conduct are analyzed like compelled speech. It is true that restrictions on expressive conduct are lawful if narrowly tailored to further a substantial government interest. *United States v O'Brien*, 391 US 367, 377 (1968). But *O'Brien* is "inapplicable" when laws "directly and immediately affect[t]" First Amendment rights, like those implicated here against being compelled to speak at all or to carry, contribute to, or affiliate with somebody else's speech. *Dale*, 530 US at 659. As other courts have recognized, compelling expressive conduct violates the Constitution no less than compelled speech. *Cressman*, 798 F3d at 950-51, 963-64 (applying *Wooley* to a claim of compelled expressive conduct); *id.* at 967 (McHugh, J., concurring) (noting that "the Supreme Court" has not "recognized any lesser intrusion caused by compelled" expressive conduct "that would justify lesser restraint than on compelled pure speech"). Indeed, the Supreme Court has held that the compelled expressive conduct of a "flag salute involve[s] a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate." *Wooley*, 430 US at 715.

Even if the Court concludes that creating custom-designed cakes is not pure speech, it is at least expressive conduct. Custom-designed wedding cakes

are "sufficiently imbued with elements of communication" so that they send a message to a reasonable observer. *Spence*, 418 US at 409; *Kaahumanu*, 682 F3d at 799. Thus, the Final Order fails as a compulsion of expressive conduct for the same reasons it fails as a regulation of pure speech. Indeed, it fails even under *O'Brien*, since the admittedly weighty interests underlying state public accommodations laws cannot overcome the right against being forced to accommodate or associate with objected-to expression. *Dale*, 530 US at 658-59 (citing *Hurley*, 515 US at 580).

C. The Final Order Violates The Free Speech Clause Of The Oregon Constitution.

Article I, Section 8 of the Oregon Constitution provides that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever." This clause grants even "broader" protection for expression than the federal Constitution. *State v Henry*, 302 Or 510, 515, 732 P2d 9 (1987). It covers "any expression of opinion, including verbal and *nonverbal* expressions contained in films, pictures, paintings, *sculpture and the like*." *Id.* (emphases added); *State v Ciancanelli*, 339 Or 282, 311, 121 P3d 613 (2005) ("Article I, [S]ection 8 . . . broadly" prohibits "*any laws* directed at restraining verbal or nonverbal expression of ideas of *any kind*." (emphases added)). The Court has said that the clause protects "nonverbal 'artistic' forms of expression" that "convey

something about the communicator's world view." *Ciancanelli*, 339 Or at 293; *see also State v Robertson*, 293 Or 402, 649 P2d 569 (1982).

Oregon courts do not appear to have addressed the Oregon Constitution's application to compelled speech. *See* Op 101. But since BOLI's Final Order violates the federal Constitution's Speech Clause, it also violates the Oregon Constitution's broader counterpart *a fortiori*.

D. The Final Order Violates The Free Exercise Clause Of The United States Constitution.

The Free Exercise Clause protects against laws "prohibiting the free exercise [of religion]." US Const, amend I. BOLI has not argued that application of ORS 659A.403 to the Kleins' conduct in this case burdens their exercise of religion. *See* ER.313-14. Thus, the only questions are whether strict scrutiny applies and, if so, whether the Final Order's application of ORS 659A.403 is narrowly tailored to advance a compelling government interest. *Church of Lukumi Babalu Aye v City of Hialeah*, 508 US 520, 546 (1993).[8]

The Final Order violates the Free Exercise Clause. It is subject to strict scrutiny both because it infringes on the Kleins' hybrid rights and because it

[8] In any event, assessing $135,000 in penalties for refusing to engage in conduct that violates their religious beliefs places a substantial burden on the Kleins' exercise of religion. *See Sherbert v Verner*, 374 US 398, 404 (1963); *Holt v Hobbs*, 135 S Ct 853, 862 (2015).

targets religious practice for disfavored treatment. *See Emp't Div v Smith*, 494 US 872, 881-82 (1990) (hybrid rights); *Lukumi*, 508 US at 546 (targeting). And binding Supreme Court precedent dictates that public accommodations laws like ORS 659A.403 do not satisfy strict scrutiny when they burden First Amendment rights. *See Dale*, 530 US at 659; *Lukumi*, 508 US at 546.

1. The Final Order Burdens Hybrid Rights.

Hybrid rights are implicated when the application of a law burdens both the free exercise of religion and another constitutional right. Laws that implicate hybrid rights are unconstitutional unless they satisfy strict scrutiny. *See Smith*, 494 US at 881-82.

This is a hybrid-rights case. BOLI's Final Order burdens both the Kleins' exercise of their religion as well as their rights to free speech and free association. Indeed, cases involving compelled expression are quintessential hybrid-rights case. *Id.* at 882 (citing *Wooley* and *Barnette* as examples of hybrid-rights cases).

BOLI failed to recognize this as a hybrid-rights case based on its conclusion that litigants in such cases must establish that their Free Exercise claim and the other constitutional claim are "independently viable." Op 96 (citing *Elane Photography*, 309 P3d at 75-76). That is not the test. If it were, the hybrid-rights doctrine would be an empty vessel, as litigants with independently

viable constitutional arguments would never need to invoke it. *Axson-Flynn v Johnson*, 356 F3d 1277, 1296-97 (10th Cir 2004). Supreme Court precedent is not so easily nullified.

Contrary to BOLI's conclusion, hybrid-rights claims require a litigant only to make a "colorable" argument that the law being applied infringes a constitutional right protected by a clause other than the Free Exercise Clause. *Id.* at 1295-96; *see also Thomas v Anchorage Equal Rights Comm'n*, 165 F3d 692, 705-06 (9th Cir 1999), *vacated on other grounds* 220 F3d 1134 (9th Cir 2000) (en banc). A claim is colorable when there is a "fair probability or a likelihood, but not a certitude, of success on the merits." *Axson-Flynn*, 356 F3d at 1295. Thus, a hybrid-rights case exists where, as here, the application of a law raises difficult constitutional questions under another provision of the Constitution.

As shown above, *supra* pages 30-46, BOLI's Final Order violates the First Amendment's Speech Clause several times over. At the very least, it raises serious questions under the Free Speech Clause. Accordingly, clear Supreme Court precedent dictates that the Court evaluate the compatibility of the Final Order with the Free Exercise Clause using strict scrutiny.

2. The Final Order Targets Religious Conduct For Disfavored Treatment.

Strict scrutiny also applies to the Final Order because it targets religion for disparate treatment. *Lukumi*, 508 US at 546 (Applications of laws that uniquely burden religious practice "must undergo the most rigorous of scrutiny.").

Without a single sentence of analysis, BOLI wrongly concluded that its application of ORS 659A.403 was neutral and generally applicable and therefore did not target religious conduct. Op 96. The lack of support is unsurprising since BOLI has applied ORS 659A.403 in a way that targets religious practice. Its Final Order compels people who object to same-sex marriage to provide goods and services to facilitate celebrations of those unions. As the Supreme Court has recognized, such objections are often grounded on "decent and honorable religious or philosophical premises." *Obergefell*, 135 S Ct at 2602. BOLI accomplished this result through a novel expansion of ORS 659A.403 that if not foreclosed outright, *see supra* pages 23-29, is certainly not compelled. It follows that BOLI's expansion was, at best, discretionary and done *for the specific purpose* of forcing business owners with moral reservations about same-sex marriage to either violate their consciences or go out of business. That is impermissible targeting. *Lukumi*, 508 US at 532, 546.

Further, BOLI has given no indication it would apply its novel interpretation of ORS 659A.403 beyond situations like those here that are intimately linked with religion. There is no suggestion, for example, that BOLI would apply ORS 659A.403 to compel feminist photographers to take pictures of Catholic Masses or all-male fraternity initiation ceremonies (religion and sex-based discrimination), Israeli delicatessen owners to cater parties celebrating Iran's Revolution Day holiday (national origin-based discrimination), or pacifist graphic designers to create posters for Black Panthers' rallies (race-based discrimination). If BOLI is not willing to bind itself to those outcomes, then its Final Order is simply a contortion of ORS 659A.403 to empower it to compel people with religious beliefs about same-sex marriage to facilitate same-sex weddings. Such "selective, discretionary application" of an ordinance against people with religious beliefs violates *Lukumi*'s neutrality principle, and strict scrutiny applies. *Tenafly Eruv Ass'n v Borough of Tenafly*, 309 F3d 144, 168 (3d Cir 2002).

3. The Final Order Fails Strict Scrutiny.

BOLI's Final Order cannot withstand strict scrutiny either as an infringement of hybrid rights or an impermissible targeting of religious practice. Under the hybrid-rights analysis, BOLI must put forth evidence that exempting Oregon businesses from an obligation to provide goods and services to same-

sex weddings "will unduly interfere with fulfillment of" its interest in deterring sexual orientation-based discrimination. *United States v Lee*, 455 US 252, 259 (1982); *see also Gonzales v O Centro Espirita Beneficente Uniao do Vegetal*, 546 US 418, 437 (2006); *Wisconsin v Yoder*, 406 US 205 (1972); *Sherbert v Verner*, 374 US 398 (1963). Under the targeting analysis, laws may not be "underinclusive to a substantial extent" with respect to the state's asserted interest such that "it is only conduct motivated by religious conviction that bears the weight" of BOLI's application of ORS 659A.403. *Lukumi*, 508 US at 547.

There is no evidence in the record that allowing businesses to decline to provide goods and services to same-sex weddings will undermine its ability to pursue its interest in deterring sexual orientation-based discrimination. That ends the matter. *O Centro*, 546 US at 437. In any event, the Supreme Court has held that states cannot impose a "serious burden" on other constitutional rights even to prevent indisputable sexual-orientation based discrimination. *See Dale*, 530 US at 658-59. The state's interest here is even more attenuated than in *Dale*. There, the Boy Scouts excluded people from its ranks simply because of their sexual orientation, directly implicating the state's interest in protecting gay people from discrimination in public accommodations. By contrast, the Kleins are willing to sell their goods to gay people and object only to facilitating

celebrations that violate their religious beliefs. No court has ever held that the state has a compelling interest in ensuring that people hosting wedding celebrations have access to their vendors of choice, particularly when adequate substitutes are readily available. *Cf. Yoder*, 406 US at 234 (state must not only show compelling interest in public education generally but specifically in compelling Amish children to attend one more year of public schooling)

Additionally, applying laws like ORS659A.403 to "targe[t] religious conduct" and "advanc[e] legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Lukumi*, 508 US at 546. That is because, such applications cannot "be regarded as protecting an interest 'of the highest order'" when they leave "appreciable damage to that supposedly vital interest unprohibited." *Id.* at 547.

The Final Order is not one of the rare cases that survives strict scrutiny. BOLI's novel interpretation of ORS 659A.403 reveals that it is seeking to stamp out dissent to a new social orthodoxy that embraces same-sex weddings rather than seeking to deter all invidious discrimination in business transactions. Were it otherwise, BOLI would extend its equivalence between conduct and status to other characteristics protected by ORS 659A.403. Failing that, however, the Final Order applies ORS 659A.403 in a way that fails strict scrutiny under *Lukumi*, 508 US at 547.

E. The Final Order Should Have Exempted The Kleins From ORS 659A.403, As Permitted By The Oregon Constitution's Worship And Conscience Clauses.

The Oregon Constitution's Worship and Conscience Clauses "secure" the "Natural right[] to worship Almighty God according to the dictates" of one's own "conscienc[e]" and prohibit 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, §§ 2-3. The scope of the Clauses is similar to that of the federal Free Exercise Clause. *State v Hickman*, 358 Or 1, 15, 358 P3d 987 (2015). While the Oregon Supreme Court has never determined whether the Clauses protect hybrid rights, it has said that applications of laws targeting religious beliefs must satisfy exacting scrutiny. *Id.* The Clauses also empower courts to create exemptions to generally applicable and neutral laws that must survive only rational basis review to be constitutional. *See id.* at 16 (noting that courts must consider whether to "grant 'an individual claim to exemption on religious grounds'" when applying generally applicable and neutral laws (quoting *Cooper v Eugene Sch Dist*, 301 Or 358, 368-69, 723 P2d 298 (1986))).

For the reasons explained above, BOLI has applied ORS 659A.403 in a way that targets religious practice and that cannot survive exacting scrutiny. *Supra* pages 50-53.

In any event, the Court should use its authority to exempt the Kleins and others with sincere religious objections to same-sex marriage from being forced to facilitate same-sex weddings. BOLI rejected the Kleins' plea for an exemption on the ground that there "is no requirement under the Oregon Constitution for such an exemption." Op 91. That is a red herring. The question is whether a judicially created exemption would further the goals of Oregon's Worship and Conscience Clauses without unduly interfering with the goals of Oregon's validly enacted laws. *See Hickman*, 358 Or at 16.

In this case, the answer is yes. Oregon's broadly-worded Worship and Conscience Clauses reflect respect and tolerance for people of different beliefs. *See State v Van Brumwell*, 350 Or 93, 108 n.16, 249 P3d 965 (2011). The principles animating the state's constitutional protections for worship and conscience counsel strongly in favor of an exemption for people whose faith forbids them from celebrating same-sex marriages. Here the sincerity of the Kleins' religious beliefs and the magnitude of the burden the Final Order places on those beliefs are undisputed. ER.313-14. An exemption in this context impairs the state's ability to deter discrimination minimally, if at all, while providing much needed space in commercial society for the many people who have "decent and honorable religious or philosophical" objections to same-sex

marriage, reassuring people that their Constitution protects their livelihoods, irrespective of their faith. *Obergefell*, 135 S Ct at 2602.

SECOND ASSIGNMENT OF ERROR: THE COMMISSIONER'S FAILURE TO RECUSE VIOLATED THE KLEINS' DUE PROCESS RIGHTS

I. Assignment And Preservation Of Error

BOLI erred by failing to disqualify the Commissioner from adjudicating this case. Op 48-56 (incorporating ER.383-92). The Kleins preserved this assignment in their motion to disqualify, ER.398-409, and exceptions to the PFO, ER.131-32, 155.

II. Standard Of Review

The standard of review is the same standard as the First Assignment of Error.

III. Argument

BOLI's Commissioner, the ultimate decisionmaker in this case, violated the Kleins' Due Process rights by failing to recuse himself despite numerous public comments revealing his intent to rule against them. All parties agree that the Kleins have a "procedural due process" right to "a decision maker free of actual bias." Op 49. Indeed, it is beyond dispute that Due Process is denied where the adjudicator "has prejudged, or reasonably appears to have prejudged, an issue." *Kenneally v Lungren*, 967 F2d 329, 333 (9th Cir 1992). That is true

even in administrative adjudications like this one. *Withrow v Larkin*, 421 US 35, 46 (1975).

Here, several pre-hearing public comments demonstrate the Commissioner's actual bias against the Kleins. For example, in a Facebook post that specifically referenced this case, the Commissioner wrote that "religious beliefs" do not "mean that [people] can disobey laws already in place." Op 50-53. In an interview about the Kleins, he stated that there is "one set of rules for everybody," *i.e.*, no exceptions. *Id.* In a televised interview, the Commissioner opined that the Kleins "likely" violated the law because "regardless of one's religious belief, if you open up a store, and you open it up to the public to sell goods, you cannot discriminate in Oregon." ER.412. The Commissioner also said that "folks" in Oregon do not have a "right to discriminate" and stated that those who use their "beliefs" to justify discrimination need to be "rehabilitate[d]." Op 53; ER.416.

This Court addressed the standard for disqualification in administrative adjudications in *Samuel v Board of Chiropractic Examiners*, 77 Or App 53, 712 P2d 132 (1985). At issue there was a determination by the Oregon Board of Chiropractic Examiners that vasectomies constituted major rather than minor surgery. Before the Board made that determination, one of its members opined publicly that vasectomies were major surgery. This Court rejected an argument

that the member's expression of a "preconceived point of view concerning an issue of law" required disqualification. *Id.* at 60 (citing *FTC v Cement Inst*, 333 US 683 (1948)).

BOLI's conclusion that Due Process did not require the Commissioner's recusal rests on a misapplication of *Samuel*. *See* Op 53-54. In contrast to the adjudicator in *Samuel*, the Commissioner did far more than announce a preconceived view of the law. His statements that the Kleins had "disobey[ed]" Oregon law and needed to be "rehabilitate[d]," for example, reflect determinations about the merits of the Kleins' constitutional defenses. And his statements about the need for "one set of rules" and the need for businesses to sell their goods and services to everybody "regardless of [their] religious belief" demonstrate determinations not to exercise his authority under the Worship and Conscience Clauses of the Oregon Constitution to exempt the Kleins from ORS 659A.403. *See Hickman*, 358 Or at 15-16 (expressly allowing for exemptions).

In any event, *Samuel* did not state the correct test for disqualification in this context. In most administrative adjudications, disqualification is required when "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Cinderella Career & Finishing Schs, Inc v FTC*, 425 F2d 583, 591 (DC Cir 1970); *see also Stivers v Pierce*, 71 F3d 732, 741, 747 (9th Cir 1995)

(applying *Cinderella*). *Cement Institute* required a different test because the allegedly disqualifying statements at issue were made in reports and testimony required by Congress. 333 US at 701-02. Allowing such statements to disqualify adjudicators would frustrate congressional purposes. *Id.* Such concerns were absent in *Samuel* and they are absent here. *See also Knutson Towboat Co v Bd of Maritime Pilots*, 131 Or App 364, 377, 885 P2d 746 (1994), *rev den* 321 Or 94 (1995) (bias shown where decisionmakers made up their minds about facts before hearing).

The Commissioner's statements satisfy the correct standard for disqualification set forth in *Cinderella* and *Knutson Towboat*. They reveal that before the Kleins had any opportunity to create a factual record or argue their view of the law, the Commissioner had already decided that the Kleins had denied service to the Complainants, that the denial violated ORS 659A.403, that it was not protected by either the Oregon or United States constitutions, and that no exemption should be granted. Due Process entitles the Kleins to a hearing before somebody who waits to hear the facts and arguments before reaching those conclusions.

THIRD ASSIGNMENT OF ERROR: THE DAMAGES AWARD IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE OR REASON

I. Assignment And Preservation Of Error

BOLI erred by awarding damages not supported by substantial evidence or reason. Op 32-41. The Kleins preserved this assignment at the damages hearing, ER.418-19, Tr.20-21; Doc 228, pp.804:3-832:5, and in their exceptions to the PFO, ER.132-35, 143-46, 150-55.

II. Standard Of Review

The standard of review is the same standard as the First Assignment of Error.

III. Argument

BOLI's award of $135,000 in damages is unsupported by substantial evidence and reason. *City of Roseburg v Roseburg City Firefighters*, 292 Or 266, 271-72, 639 P2d 90 (1981) (holding that final orders must be supported by substantial evidence and reason); *Springfield Educ Ass'n v Sch Dist*, 290 Or. 217, 226-28, 621 P2d 547 (1980) (same). The award ignores BOLI's own credibility determinations, mitigating causation evidence, and Complainants' discovery abuses; it is internally contradictory; and it bears no relation to awards in allegedly comparable cases. In other words, in several respects, the damages award lacks evidentiary support and fails to exhibit a "rational

connection between the facts and the legal conclusions it draws from them." *Ross v Springfield Sch Dist No 19*, 294 Or 357, 370, 657 P2d 188 (1982). Accordingly, it must be vacated and remanded.

For each Complainant, BOLI sought $75,000 to remedy mental and emotional suffering the Kleins' conduct allegedly caused. ER.259, 251. The Final Order determined that the Kleins' denial of service *and* McPherson's misreporting that Aaron Klein had called them "abomination[s]" caused complainants to feel "shame," "stres[s]," "anxiety," "frustration," "exhaustion," "sorrow," and "anger," and experience some discord within their family and unspecified sleep-related problems. Op 30-40; *id*. at 35 (The misreporting of the abomination statement made Cryer feel like "a mistake" that "had no right to love or be loved" or "go to heaven."); *id*. at 38 ("Because of [the misreported abomination statement, Bowman] felt shame.").

Like the ALJ, the Final Order determined that "emotional harm resulting from media attention [did] not adequately support an award of damages." Op 40. Nevertheless, the Final Order awarded damages for suffering that allegedly lasted twenty-six months, from the encounter at Sweet Cakes on January 17, 2013, "throughout the period of media attention," until the ALJ's damages hearing in March 2015. *Id*. BOLI awarded $75,000 to one Complainant and $60,000 to the other explaining the difference was because the latter had not

been "present at the denial" and had "in some respects" given "exaggerated" testimony "about the extent and severity of her emotional suffering." Op 41.

A. The Damages Award Lacks Substantial Evidence And Reason Because It Fails To Account For BOLI's Own Credibility Determinations, Material Evidence, And Complainants' Discovery Abuses.

BOLI's damages award is inconsistent with its credibility determinations. BOLI awarded damages to Complainants for harm attributable to being called "abomination[s]." Op 35, 38. But the Final Order contains no finding that the Kleins called Complainants by that name. Its only findings are (i) Aaron Klein explained his religious opposition to same-sex weddings *to McPherson*, *after the denial occurred*, by quoting a Bible verse stating that "it is an abomination" for a man to "lie with a male as one lies with a female" and (ii) McPherson subsequently misreported the conversation to Cryer, telling her that Klein "had called her 'an abomination.'" Op 3 n.2; *id*. at 6; ER.160 & n.48. It is error for BOLI to hold the Kleins liable for harms attributable to a statement it found the Kleins did not make to McPherson, let alone to one of the Complainants. *Petro v Dep't of Human Res*, 32 Or App 17, 23-24, 573 P2d 1250 (1978) (remanding order that deviates from credibility determination).

The Final Order further does not account for evidence, often undisputed, that tended to discredit Complainants' damages case. For example, it was undisputed that during the relevant time period, Complainants were enduring a

bitter custody battle regarding their foster children. Op 4. The Kleins also introduced evidence that the entire case was not about remedying emotional suffering, rather it was about Complainants and a gay-rights advocacy group's desire for political change. ER.455-56, Tr.637:21-638:19 ("[T]he whole reason of pursuing this case is . . . to change . . . these behaviors."); ER.457. An order based on substantial reason would either have accounted for this evidence, explained why it was not material, or dismissed it as incredible or overcome by other evidence. The Final Order, however, does none of these things. *PUC v Emp't Dep't*, 267 Or App 68, 69, 340 P3d 136 (2014) (remanding due to lack of substantial evidence); *In re ARG Enterprises*, 19 BOLI 116, 139-41 (1999) (awarding reduced damages due to other sources of mental distress not caused by respondent).

The Final Order also fails to account for Complainants' discovery abuses that stymied the Kleins' efforts to discover the true extent of their alleged emotional harm. For example, Complainants violated the ALJ's discovery order by failing to produce or undertake reasonable efforts to search for discoverable material and by deleting discoverable material notwithstanding a reasonable anticipation of litigation. ER.2-6 (discoverable material the Kleins independently located); ER.204-07; ER.423-29, Tr.108:12-114:20 (testimony regarding deleting emails); Doc 143, p.530 (acknowledging deleting emails).

An order based on substantial reason would have either accounted for these discovery abuses or explained why they did not prejudice the Kleins. The Final Order, however, is silent about Complainants' gamesmanship. *See Ross*, 294 Or at 370.

B. The Damages Award Lacks Substantial Evidence and Substantial Reason Because It Is Internally Contradictory.

First, the Final Order determined that Complainants cannot recover for harm attributable to media exposure, yet awarded damages for harm lasting over twenty-six months, "throughout the period of media attention." Op 40; *see also* ER.167, 175-76. That is a contradiction, unless there is substantial evidence of harm in the weeks, months, *and years* following the service denial attributable to anything other than media exposure. But both the PFO and Final Order note a near total lack of any such evidence. Op 37-40 & nn.17, 19; ER.175-76. The award covering twenty-six months is thus not supported by substantial evidence.

Second, the Formal Charges sought $150,000 in *total* damages based on alleged emotional suffering stemming from the denial of service *and* subsequent media exposure. The Final Order's determination that Complainants cannot recover for media-related harms at least implies that their damages awards should be reduced from their prayers for relief. But the Final Order neither reflects such reductions nor justifies their absence. *See* Op 32-41.

These internal contradictions require vacatur and remand. *Furnish v Montavilla Lumber Co*, 124 Or App 622, 625, 863 P2d 524, 526 (1993); *see also Cole/Dinsmore v DMV*, 336 Or 565, 584, 87 P3d 1120 (2004).

C. The Damages Award Lacks Substantial Reason Because It Is Out Of Line With Comparable Cases.

BOLI cites four precedents in determining that the "award is consistent with [its] prior orders." Op 41 & n.20. In each of those cases, however, the Complainants suffered *ongoing* harassment. Here, all claimed emotional suffering relates to a single, discrete incident. In all but one of the cases, the emotional suffering was so severe that it required medical treatment. *See id*. The record here reflects no such treatment. Two of the cases are particularly instructive. In one, a complainant was awarded $50,000 after being repeatedly assaulted and threatened with a firearm. *In re Maltby Biocontrol, Inc*, 33 BOLI 121, 133-34, 159 (2014). In another, a complainant who had been punched in the head and sexually harassed was awarded $50,000. *In re Charles Edward Minor*, 31 BOLI 88, 104-05 (2010). Both awards in this case are much larger, even though there was no physical contact, let alone a physical attack or assault with a deadly weapon. In short, BOLI has failed to offer any substantial reason that connects the harms alleged in this case to the damages award. Vacatur and remand are required. *See In re Montgomery Ward & Co*, 42 Or App 159, 163, 600 P2d 452 (1979).

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

I. Assignment And Preservation Of Error

BOLI erred in concluding the Kleins violated ORS 659A.409, including rejecting their state and federal constitutional speech-and religion-based defenses. Op 23-32. The Kleins preserved this assignment in their answers, ER.221-24, 234-37, opposition to summary judgment on liability, ER.293-98, 301-08, and motion for summary judgment on liability, ER.330-361. They prevailed on this issue before the ALJ. Op 81-83 (incorporating Doc 56, pp.1425-1427).

II. Standard Of Review

The standard of review is the same standard as the First Assignment of Error.

III. Argument

BOLI erroneously determined that the Kleins violated ORS 659A.409, which makes it unlawful to make any communication to the effect that a public accommodation will deny its services to any person on account of, among other things, sexual orientation. To "further eliminate the effect" of the Kleins' alleged violation, BOLI enjoined future violations of ORS 659A.409. Op 42.

BOLI's incorrect determination is based on statements that relate only to providing goods and services to facilitate same-sex weddings, which are not—

and cannot be—prohibited by ORS 659A.403. Op 27; *supra* pages 23-56. Therefore, statements regarding such refusals are also not—and cannot be—prohibited by ORS 659A.409.

In any event, BOLI concedes that a statement of future intent to unlawfully discriminate is an indispensable element of an ORS 659A.409 violation. Op 82. As the ALJ correctly determined, the Kleins' allegedly actionable statements do not convey any such intent. Op 82-83. They simply describe the facts of this case, their view of the law, and their intent to vindicate that view.

The first statement is from an interview in which Aaron Klein told the host "[w]e don't do same-sex marriage, same-sex wedding cakes." Op 24-25, 27. But it is clear from context that Klein was not describing Sweet Cakes' future or even current stance, but rather the events that gave rise to this case: "Well, as far as how it unfolded . . . She kind of giggled and informed me it was two brides. At that point, . . . I said 'I'm very sorry, I feel like you may have wasted your time. You know we don't do same-sex marriage, same-sex wedding cakes.'" Op 24.

The second statement comes from the same interview in which Klein told the host that when Washington legalized same-sex marriage—long before the events of this case—he and his wife could "see this becoming an issue" for

them and expressed to each other an intent to "stand firm." Op 25-27. This simply describes a private conversation between spouses. Its public retelling described how this case arose and is not a statement about the Kleins' future intent.

Finally, BOLI cites a note the Kleins posted on Sweet Cakes' door after going out of business stating that "[t]his fight is not over" vowing to "continue to stand strong." Op 24. Those words only declare the Kleins' intent to vindicate their view of the law.

Remarkably, BOLI supported its conclusion by analogizing to cases involving statements far more explicit and egregious than those involved here. One addressed a voicemail asking transgendered persons "not to come back" to a bar. Op 27 n.11 (citing *In re Blachana LLC*, 32 BOLI 220 (2013)). The other involved a sign that said "NO . . . NI***RS." *Id.* (citing *In re The Pub*, 6 BOLI 270 (1987) (omissions added)). These are the very same cases the ALJ used to show that the Kleins' statements *did not* violate ORS 659A.409.

BOLI's conclusion that the Kleins violated ORS 659A.409 is erroneous. Even if the Kleins' statements discussed unlawful discrimination—and they do not—they do not convey any future discriminatory intent. The injunction BOLI issued to "remedy" these non-existent violations must be vacated and judgment entered for the Kleins.

In any event, the injunction must be vacated to ensure consistency with the Speech Clauses of the Oregon and United States constitutions. BOLI may enjoin people from threatening to discriminate on the basis of sexual orientation. *See FAIR*, 547 US at 62 (noting that Congress may require employers to "take down a sign reading 'White Applicants Only'"). But BOLI's injunction is premised on statements that are within the core of the First Amendment right "to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v Alabama*, 310 US 88, 101-02 (1940). The Kleins are entitled to speak about this case, their view of the law, and their intent to vindicate that view, even if their comments lead some to seek out other bakers. The injunction therefore restricts more speech than necessary to achieve any legitimate objectives and threatens a "chilling effect" that could result in self-censorship of protected speech. *Wash State Grange v Wash State Republican Party*, 552 US 442, 449 & n.6 (2008); *Virginia v Hicks*, 539 US 113, 118-19 (2003); *see also Grayned v City of Rockford*, 408 US 104, 114 (1972) ("A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct."). It must be invalidated.

CONCLUSION

BOLI's Final Order must be vacated. The Kleins did not violate ORS 659A.403 or ORS 659A.409. In any event, applying ORS 659A.403 to the conduct at issue here would violate the Speech and Religion Clauses of the constitutions of both Oregon and the United States. At a minimum, the Final Order must be vacated and remanded and the injunction entered to remedy violations of ORS 659A.409 must be reformed. BOLI violated the Kleins' Due Process rights, rendered a damages award unsupported by substantial reason, and issued an overbroad injunction that chills protected First Amendment expression.

DATED this 25th day of April, 2016.

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CERTIFICATE OF COMPLIANCE

On April 12, 2016, the Court issued an Order Granting Extended Brief. The Court's Order extended the word limit for Petitioners' opening brief to 15,000 words and the page limit for the combined excerpt of record and appendix to 700 pages.

I hereby certify that this brief complies with the Court's April 12, 2016 Order. The word count of this brief as described in ORAP 5.05(2)(a) is 14,921 words. The page count of the combined excerpt of record and appendix is 527 pages.

DATED this 25th day of April, 2016.

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CERTIFICATE OF FILING AND SERVICE

I certify that on April 25, 2016, I directed Appellants' OPENING BRIEF AND COMBINED EXCERPT OF RECORD AND APPENDIX to be electronically filed with the Appellate Court Administrator, Appellate Records Section.

I further certify that on April 25, 2016, I directed a true copy of the Appellants' OPENING BRIEF AND COMBINED EXCERPT OF RECORD AND APPENDIX to be served on the following parties at the addresses set forth below:

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Service was made by eFiling.

DATED this 25th day of April, 2016.

/s/ TYLER SMITH
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