BRAD AVAKIAN
COMMISSIONER

CHRISTIE HAMMOND
DEPUTY COMMISSIONER

BUREAU OF LABOR AND INDUSTRIES

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

In the Matter of: **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,** Respondents.	Case Nos. **44-14 & 45-14** FINDINGS OF FACT ULTIMATE FINDINGS OF FACT CONCLUSIONS OF LAW OPINION ORDER

SYNOPSIS

The Agency's Formal Charges alleged that Respondents refused to make a wedding cake for two Complainants based on their sexual orientation and that Respondents published and displayed a communication to that effect, in violation of ORS 659A.403 and ORS 659A.409. In addition, the Formal Charges alleged that Aaron Klein aided and abetted Melissa Klein in the commission of those violations. In this Final Order, the Commissioner concludes that: (1) A. Klein, acting on behalf of Sweetcakes by Melissa, refused to make a wedding cake for Complainants based on their sexual orientation, thereby violating ORS 659A.403; (2) M. Klein did not violate ORS 659A.403; and (3) A. Klein did not aid and abet M. Klein in violation of ORS 659A.406. The Commissioner reversed the ALJ's ruling on summary judgment motions that neither A. nor M. Klein violated ORS 659A.409 and held that both A. and M. Klein violated ORS 659A.409. The Commissioner held that, as partners, A. Klein and M. Klein are jointly and severally liable for all violations. The Commissioner awarded Complainants $75,000 and $60,000, respectively, in damages for emotional and mental suffering resulting from the denial of service.

NOTE: The procedural history of this case is extensive and includes the ALJ's lengthy ruling on Respondents' motion and the Agency's cross-motion for summary judgment. For ease of reading, all procedural facts, pre-hearing motions, and rulings on those motions are included as an Appendix to this Final Order. The Appendix immediately follows the "Order" section of this Final Order that bears the Commissioner's signature.

IMPORTANT: The Judicial Review Notice that customarily follows the "Order" section of Commissioner's Final Orders may be found on the last page of this Final Order.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held at the Office of Administrative Hearings, located at 7995 S. W. Mohawk Street, Entrance B, Tualatin, Oregon. The evidentiary part of the hearing was conducted on March 10-13, and 17, 2015, and closing arguments were made on March 18, 2015.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by BOLI's chief prosecutor, Jenn Gaddis, and Cristin Casey, administrative prosecutor, both employees of the Agency. Paul Thompson, Complainants' attorney, was present throughout the hearing. Complainants Rachel Bowman-Cryer and Laurel Bowman-Cryer were both present throughout the hearing. Respondents Melissa Klein and Aaron Wayne Klein were both present throughout the hearing and were represented by Herbert Grey, Tyler Smith, and Anna Harmon, attorneys at law.

The Agency called the following witnesses: Rachel Bowman-Cryer, Laurel Bowman-Cryer, Cheryl McPherson, Aaron Cryer, Jessica Ponaman, Candice Ericksen, Laura Widener, Aaron Klein, and Melissa Klein.

Respondent called the following witnesses: Aaron Klein, Melissa Klein, and Rachel Bowman-Cryer.

At hearing, the forum received into evidence:

a) Administrative exhibits X1 through X95.

b) Agency exhibits A1 through A12, A23 (pp. 1-4), A25, and A27 through A29 were received. Exhibit A30 was offered but not received.

c) Respondents' exhibits R2 (selected "posts" on pp. 3 and 9), R2 through R5, R6 (pp. 1-2), R7 through R12, R13 (pp. 7-18), R15, R16, R18 through R24, R26, R27, R28 (pp. 1-3, part of p. 4, pp. 14-28), R29, R30, R32, R33 (pp. 5-8), and R34 through R41 were received. Exhibits R1, R14, and R17 were offered but not received.

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact,[1] Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – THE MERITS[2]

1) LBC and RBC are both homosexual females. They met in 2004 while they attended the same college and considered themselves a "couple" for the 11 years preceding the hearing. They lived together in Texas until 2009, when they moved to

[1] The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

[2] Except for Finding of Fact #43 – The Merits, the findings of fact relevant to the forum's determination of whether Respondents violated ORS 659A.403, ORS 659A.406, and ORS 659A.409 are set out in the forum's ruling on Respondents' Renewed Motion for Summary Judgment and the Agency's Cross-Motion for Summary Judgment. *See* Finding of Fact #28 – Procedural, *supra*. They are duplicated in these Findings of Fact – The Merits only to the extent necessary to provide context to Complainants' claim for damages.

Portland, Oregon, and have lived together continuously since moving to Portland. (Testimony of LBC, RBC, McPherson)

2) LBC first asked RBC to marry her soon after they met and was turned down. LBC continued to propose on a regular basis until October 2012, when RBC finally agreed to marry her. (Testimony of RBC, LBC)

3) Before October 2012, RBC did not want to get married because of her personal experience of failed marriages that "tended to do more damage than good." (Testimony of RBC, LBC, McPherson)

4) In November 2011, Complainants became foster parents for "E" and "A,"[3] two disabled children with very high special needs, after the death of their mother, LBC's best friend. At the time, Complainants were already the children's godparents. When they became the children's foster parents, Complainants decided that they wanted to adopt the children. Subsequently, Complainants became involved in a bitter and emotional custody battle for the children with the children's great-grandparents that continued until sometime after December 2013, when Complainants' December 2013 adoption application was formally approved by the state of Oregon.[4] (Testimony of LBC, RBC, McPherson)

5) In October 2012, RBC decided that she and LBC should get married in order to give their foster children "permanency and commitment" by showing them how much she and LBC loved one another and were committed to one another. RBC told LBC that she wanted to get married, which made LBC "extremely happy." After her long-standing matrimonial reticence, RBC then became excited to get married and to

[3] The forum uses the children's first name initials instead of their full names to protect their privacy.

[4] Although it is undisputed that Complainants eventually adopted the children, there is no evidence as to what date the adoptions were finalized.

start planning the wedding, wanting a wedding that was as "big and grand" as they could afford. (Testimony of RBC, LBC)

6) Sometime between October 2012 and January 17, 2013, RBC and Cheryl McPherson ("CM"), RBC's mother, attended a Portland bridal show. MK had a booth at the show to advertise wedding cakes made by Sweetcakes by Melissa ("Sweetcakes"). Two years earlier, Sweetcakes had designed, created, and decorated a wedding cake for CM and RBC that RBC really liked. At the show, RBC and CM visited Sweetcakes's booth and told MK they would like to order a cake from her. After the show, RBC made an appointment via email for a cake tasting at Sweetcakes. (Testimony of RBC, CM, MK; Ex. R16)

7) Complainants were both excited about the cake tasting at Sweetcakes because the cake Respondents had made for CM's wedding had been so good and RBC wanted to order a cake like CM's cake. (Testimony of RBC, A. Cryer)

9) On January 17, 2013, RBC and CM visited Sweetcakes's bakery shop in Gresham, Oregon for their cake tasting appointment, intending to order a cake for RBC's wedding to LBC. (Respondents' Admission; Affidavit of AK; Testimony of RBC, CM, AK)

9) In January 2013, AK and MK were alternately caring for their infant twins at their home. At the time of the tasting, MK was at home and AK conducted the tasting. During the tasting, AK asked for the names of the bride and groom, and RBC told him there would be two brides and their names were "Rachel and Laurel." At that point, AK stated that he was sorry, but that Sweetcakes did not make wedding cakes for same-sex ceremonies because of AK's and MK's religious convictions. In response, RBC began crying. She felt that she had humiliated her mother and was anxious whether CM was ashamed of her, in that CM had believed that being a homosexual was

wrong until only a few years earlier. CM then took RBC by the arm and walked her out of Sweetcakes to their car. On the way out to their car and in the car, RBC became hysterical and kept telling CM "I'm sorry" because she felt that she had humiliated CM. (Respondents' Admission; Affidavit of AK; Testimony of RBC, CM)

10) In the car, CM hugged RBC and assured her they would find someone to make a wedding cake. CM drove a short distance, then returned to Sweetcakes and re-entered Sweetcakes by herself to talk to AK. During their subsequent conversation, CM told AK that she used to think like him, but her "truth had changed" as a result of having "two gay children." AK quoted Leviticus 18:22 to CM, saying "You shall not lie with a male as one lies with a female; it is an abomination." CM then left Sweetcakes and returned to the car. While CM was in Sweetcakes, RBC remained sitting in the car, "holding [her] head in her hands, just bawling." (Affidavit of AK; Testimony of RBC, CM)

11) When CM returned to the car, she told RBC that AK had told her that "her children were an abomination unto God." (Testimony of RBC; CM)

12) When CM told RBC that AK had called her "an abomination," this made RBC cry even more. RBC was raised as a Southern Baptist. The denial of service in this manner made her feel as if God made a mistake when he made her, that she wasn't supposed to be, and that she wasn't supposed to love or be loved, have a family, or go to heaven. (Testimony of RBC)

13) CM and RBC then drove home. RBC was crying when they arrived home and immediately went upstairs to her bedroom, followed by LBC and CM, where she lay in her bed, crying.[5] In the bedroom, LBC asked CM what had happened, and CM told

[5] RBC credibly testified as follows:

> "I was beyond upset. I just wanted everybody to leave me alone. I couldn't face looking at my mom, and I didn't even know if I still wanted to go through with getting married anymore. So I just told everybody to leave me alone as much as possible, and I went to my room."

her that AK had told them that Sweetcakes did "not do same-sex weddings" and that AK had told CM that "your children are an abomination." LBC was "flabbergasted" at AK's statement about same-sex weddings. This upset her and made her very angry. (Testimony of RBC, LBC, CM)

14) LBC, who was raised as a Catholic, recognized Klein's statement as a reference from Leviticus. She was "shocked" to hear that AK had referred to her as an "abomination," and thought CM may have heard wrong. She took the denial of service in this manner to mean "...this is a creature not created by God, not created with a soul; they are unworthy of holy love; they are not worthy of life." She immediately thought that this never would have happened if she had not asked RBC to marry her and felt shame because of it. She also worried that this might negatively impact CM's acceptance of RBC's sexual orientation. (Testimony of LBC)

15) LBC, who had always viewed herself as RBC's protector, got into bed with RBC and tried to soothe her. RBC became even more upset and pushed RBC away. In response, LBC lost her temper and started yelling that she "could not believe this had happened" and that she could "fix" things if RBC would just let her. After LBC left the room, RBC continued crying and spent much of that evening in bed. (Testimony of RBC, LBC, CM)

16) Back downstairs, E, the older of Complainants' foster daughters was extremely agitated from events at school that day. LBC tried to calm her, but she refused to be calmed, repeatedly calling out for RBC, with whom she had a special bond. Eventually, E cried herself to sleep. LBC's inability to calm E was very frustrating to her. She felt overwhelmed because she didn't know how to handle the situation. That night, LBC was very upset, cried a lot, and was hurt and angry. (Testimony LBC, A. Cryer)

17) After CM returned home on January 17, 2013, she telephoned "Lauren" at the West End Ballroom ("WEB"), the venue where Complainants planned to have their commitment ceremony, and told Lauren that Sweetcakes had refused them cake service for their wedding. CM also posted a review on Sweetcakes Facebook wedding page and on another wedding website with a message stating: "If you're a gay couple and having a commitment ceremony or wedding, don't go to this place because they discriminate against gay people." (Testimony of CM; Ex. R22)

18) At 8:22 p.m. on January 17, 2013, Lauren from WEB emailed RBC and LBC to say she had heard from CM and wanted to know the details of the refusal at Sweetcakes. (Testimony of LBC; Ex. R32)

19) At 9:10 p.m. on January 17, 2013, RBC sent a return email to Lauren at WEB in which she stated:

> "Hi Lauren,
>
> "I am sorry to have to bring this to your attention. I want to assure you that we would have gone with Sweet Cakes reguardless (sic) of your recommendation, because we purchased my mother's wedding cake from them and were very happy with the cake. My girlfriend and I purchased my mother's cake as a wedding gift for her. At that time Melissa said nothing about not wanting to work for us because we were gay.
>
> "I even spoke with them at the Portland Wedding Show and made an appointment then for 1pm today. When we showed up for the appointment it was with Melissa's husband. I did not catch his name because the appointment did not last long enough for me to ask. He took us in the office and asked what the bride and groom names were. When we told him that our names were Rachel and Laurel, he quickly said that they don't do gay weddings because they are Christians and don't believe same-sex marriage is right. My mother asked why they had no problem taking my money when I purchased her cake. She told them that we are a christian family as well and that she used to believe like he believed until God blessed her with two gay children.
>
> "I was stunned and crying. This is twice in this wedding process that we have faced this kind of bigotry. It saddens me because we moved from Texas so that my brother and I could be more accepted in the community.

"We wanted to inform you of all of this because you have a right to know so that other same-sex couples don't have to go through this in the future. It surprisingly that both the West End Ballroom and the caterers we chose, Premier Catering, reccommend (sic) Sweet Cakes and yet neither mentioned to us that they don't do gay weddings. I figure that this must be because no one ever speaks up to let you know. I didn't want to let this pass without saying something.

"My fiancé and I have been together for 10 years. We are adopting our two foster children and wanted to get married as a sign of our commitment to each other and the family that we are creating. It saddens me that my children will grow up in a world where people are an abomination because they love each other. It is my responsibility to set an example for them that you should speak up when you see injustice because that is how we make progress.

"Thank you for your fast response to both my mother and I. I realize that you are not responsible for their poor behavior, and thank you for your understanding. If there is anymore info that I can provide for you please let me know.

"Sincerely,
Rachel Cryer & Laurel Bowman"

(Testimony of LBC; Ex. R32)

20) Later that same evening, LBC filled out an "Oregon Department of Justice ("DOJ") Consumer Complaint Form," using her smart phone to access DOJ's website. In hard copy,[6] the complaint was two pages long. On the first page, she provided her name, address, phone number and email address, Sweetcakes's name, address, and phone number. On the first page, immediately above the space where LBC wrote her name, the following text was printed:

"By submitting this complaint, I understand a) this complaint will become part of DOJ's permanent records and is subject to Oregon's Public Records Law; b) this complaint may be released to the business or person about whom I am complaining; c) this complaint may be referred to another governmental agency. By submitting this complaint, I authorize any party to release to the DOJ any information and documentation relative to this complaint."

[6] The record lacks substantial evidence to establish what the digital format for the complaint form looked like, but Ex. R3 is a hard copy of the complaint that Respondents received. The forum relies on that copy in describing the contents and format of the complaint.

This public records disclaimer was not visible on LBC's smart phone view of DOJ's form. On the second page, LBC described the details of her complaint as follows:

> "In november of 2011 my fiance and I purchased a wedding cake from this establishment for her mother's wedding. We spent 250. When we decided to get married ourselves chose to back and purchase a second cake. Today, January 17, 2013, we went for our cake tasting. When asked for a grooms name my soon to be mother in law informed them of my name. The owner then proceeded to say we were abominations unto the lord and refused to make another cake for us despite having already paid 250 once and having done business in the past. We were then informed that our money was not equal, my fiancé reduced to tears. This is absolutely unacceptable."

(Testimony of LBC; Exhibit R3)

21) Aaron Cryer, RBC's brother, also lived with Complainants at this time. Later on the evening of January 17, 2013, he arrived home from school and work and he and Complainants had a 30 minute conversation about what happened at Sweetcakes that day. (Testimony of A. Cryer)

22) On January 18, 2013, RBC felt depressed and questioned whether there was something inherently wrong with the sexual orientation she was born with and if she and LBC deserved to be married like a heterosexual couple. She spent most of her day in her room, trying to sleep. (Testimony of RBC)

23) In the days following January 17, 2013, RBC had difficulty controlling her emotions and cried a lot, and Complainants argued because of RBC's inability to control her emotions. They had not argued previously since moving to Oregon. RBC also became more introverted and distant in her family relationships. She and A. Cryer, have always been very close, and their connection was not as close "for a little bit" after January 17, 2013. RBC questioned whether she had the ability to be a good mother because of the difficulty she was having in controlling her emotions. A week later, RBC still felt "very sad and stressed," felt concerned about still having to plan her wedding, and felt less exuberant about the wedding. Previous to that time, she had been "very

friendly and happy" in her communications with Candice Ericksen, A and E's great aunt, about her wedding. After January 17, 2013, although RBC relied on CM to contact potential wedding vendors, she experienced anxiety over possible rejection because her wedding was a same-sex wedding. (Testimony of RBC, LBC, CM, A. Cryer, Ericksen)

24) In the days following January 17, 2013, LBC experienced extreme anger, outrage, embarrassment, exhaustion, frustration, intense sorrow, and shame as a reaction to AK's refusal to provide a cake. She felt sorrow because she couldn't console E, she could not protect RBC, and because RBC was no longer sure she wanted be married. Her excitement about getting married was also lessened because she was not sure she could protect RBC if any similar incidents occurred. (Testimony of RBC, LBC, Ericksen)

25) After January 17, 2013, CM assumed the responsibility for contacting the vendors who would be needed for Complainants' ceremony. Shortly thereafter, she arranged for a cake tasting at Pastry Girl ("PG"), another local bakery. While making the appointment, CM asked Laura Widener, PG's owner/baker, if she was okay with providing a cake for a same-sex wedding ceremony. Widener assured her that this was not a problem. (Testimony of RBC, CM, Widener; Ex. R4)

26) On January 21, 2013, CM and RBC went to PG and met with Widener. While at PG, CM and RBC were both anxious, and CM did most of the talking, while RBC tried not to cry until they started talking about the design of the cake. At that point, RBC became more animated and was able to explain the design she wanted on the cake. By the end of the meeting, the design they settled on was a cake with three tiers that had a peacock's body on top and the peacock's tail feathers trailing down over tiers to the cake plate. When completed, the peacock and its feathers were hand-created

and hand-painted by Widener. Widener charged Complainants $250 for the cake. (Testimony of Widener, RBC, CM)

27) Respondents would have charged $600 for making and delivering the same cake. (Testimony of AK)

28) On January 28, 2013, DOJ mailed a copy of LBC's Consumer Complaint to Respondents, along with a cover letter. In pertinent part, DOJ's cover letter stated:

> "We have received the enclosed consumer complaint about your business. We understand that there are often two sides to a problem, and we would appreciate your prompt review of this matter.
>
> "We do not represent the complainant. We do, however, review all complaints to determine whether grounds exist to warrant action by us. Your response to the allegations in the complaint would help us to make that determination.
>
> "In the interest of efficiency, we prefer that you respond directly to the complainant and e-mail copy of the response to our office. Please include the file number shown above on the subject line of your e-mail. Alternatively, you may respond to us by regular mail."

On January 29, AK posted a copy of the first page of LBC's DOJ complaint on his Facebook page, prefaced by his comment "[t]his is what happens when you tell gay people you won't do their 'wedding cake.'" At that time, AK only had 17 "friends" on his Facebook page. (Testimony of LBC, AK; Exs. R3, A4)

29) On the same day that AK posted LBC's DOJ complaint, LBC received an email telling her of the posting and that she should look at it. LBC did so, then called Paul Thompson, Complainants' attorney in this proceeding. Later that day, the posting was removed. (Testimony of LBC, AK)

30) On February 1, 2013, LBC went to the emergency room of a local hospital at approximately 8:00 p.m. because of an injury to her shoulder that she had suffered three weeks earlier when lifting one of her foster children above her head when they

were playing. While in the hospital, she became aware that AK's refusal to make their wedding cake was on the news. This made her very upset and she cried when she was examined by a doctor, telling the doctor that she had an "unpleasant interaction with a business owner, and now this information is on the news." (Testimony of LBC; Exs. A6, R7)

31) On February 1, 2013, RBC became aware that the media was aware of AK's refusal to make a wedding cake for Complainants when she received a telephone call from Lars Larson, an American conservative talk radio show host based in Portland, Oregon, who told her that he had spoken with AK and wanted to see what RBC "had to say about the pending case." RBC refused to talk with Larson and called LBC, who was at the hospital having her shoulder examined. (Testimony of RBC, LBC)

32) As soon as they became aware that LBC's DOJ complaint had become public knowledge through the media, both Complainants greatly feared that E and A would be taken away from them by the state of Oregon's foster care system.[7] Earlier,

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[7] The level of Complainants' concern over their foster parent status was vividly illustrated in RBC's and LBC's testimony on direct examination by the Agency:

R. Bowman-Cryer

Q: "So how did you react? How did you react to hearing about your case, I guess, or your situation in the news?"

A: "My first concern was that nobody could know that we had these children and that whatever we did had to be to protect them. We did not want their names in the media. We did not want any information about them or our foster parent status or the status of their case to be public knowledge to anyone."

L. Bowman-Cryer

Q: "Was the fear from that initial media release ever lessened for you?"

A: "No, ma'am. That fear was paramount to everything."

Q: "When you say paramount, was it greater for you than the actual refusal of service?"

A: "At that point in time, yes, ma'am."

Q: "Did you still feel emotional effects from the refusal of service?"

A: "Absolutely, yes, ma'am. My children were still suffering. My wife was still suffering, and that was tearing me apart."

they had been instructed that it was their responsibility to make sure that the girls' information was protected and that the state would "have to readdress placement" of the girls with Complainants if any information was released concerning the girls. (Testimony of RBC, LBC)

33) Based on the media or potential media exposure about the case after February 1, 2013, LBC's headaches increased. She felt intimidated and became fearful. (Testimony of LBC; Ex. A12)

34) At some point after February 1, 2013, one of RBC's Facebook "friends" saw an article about the case in her local Florida paper and posted it on Facebook, adding in her comments that RBC and LBC had children. RBC immediately responded, writing: "Jessica – I know you were trying to defend us, but you released information about our kids. The public doesn't know we have kids; that is the whole point of being silent. Please remove your comment immediately." RBC's "friend" responded and said she removed her comment as soon as she read RBC's response. (Testimony of RBC; Ex. A26)

35) On February 8, 2013, Paul Thompson sent a letter regarding Complainants and their situation to the following media sources: KGW, KOIN, The Oregonian, OPB, KATU, KPTV, the Lars Larson Radio Show, The Wall Street Journal, Willamette Week, and Reuters. The letter read as follows:

> "Members of the Media:
>
> "I would like to begin by thanking each of you for your interest in this story. As you know, I represent the lesbian couple who were denied a wedding cake by Sweet Cakes by Melissa. I ask that their names not be printed in regards to this statement, as they would appreciate privacy in this matter.
>
> "The Press Release reads:

"We are grateful for the outpouring of support we have received from friends, family, members of the LGBT community, and our allies. We are especially thankful that LGBT-supportive companies have graciously offered their services to make our special day perfect.

"At this time, the support of the community and other well-wishers is all we require. We ask that individuals and companies that want to provide support, direct their donations in our name to Pride Northwest, our pride organization in Portland, Oregon. They have accepted our request to direct donations and gifts to further awareness of issues affecting the LGBT community, including marriage equality and families. Interested parties can contact Cory L. Murphy of Pride Northwest with any questions. * * *

"We have decided to accept the gracious offer from Mr. Duff Goldman of Charm City Cakes and the TV show 'Ace of Cakes.' At the time Mr. Goldman made his offer we had already contracted with and paid for another local bakery, Pastrygirl, to make our wedding cake. It is extremely important to us to honor that contract. With that in mind we have humbly asked Mr. Goldman and Charm City Cakes to prepare a Bride's cake for us in place of the traditional Groom's cake. We are grateful to both bakeries for being a part of making our wedding date incredibly special.

"While we are humbled by the support and mindful of people's interest, this matter has placed us in the media spotlight against our wishes. In order to maintain our privacy, we will not be granting interviews and are asking everyone to respect our privacy at this time.

"Please direct any media inquiries to our attorney, Paul Thompson[.]"

(Exs. A7, R28)

36) On February 9, 2013, there was an organized protest outside Respondents' bakery that was reported by KATU.com. The protest was organized by a person or persons who started a Facebook page called "BoycottSweetCakesByMelissaGRESHAM" ("Boycott") on February 6, 2013, and posted a photo from KATU.com that shows "protesters gathered Saturday outside a Gresham bakery that's at the center of a wedding cake controversy." Complainants were not involved in the protest or subsequent boycott. However, on February 10, 2013, both Complainants made comments on Boycott's Facebook page in which they indirectly

identified themselves as the persons who sought the wedding cake and thanked people for their support. (Exs. R9, R13)

37) On February 8, 2013, Herbert Grey, Respondents' lead counsel in this case, sent a letter to DOJ that responded to LBC's January 17, 2013, consumer complaint. In the letter, Grey identified himself as representing Respondents concerning the complaint filed by "Laurel Bowman" and addressed the issues raised in the complaint. Grey also cc'd a copy of his letter to LBC. (Ex. R10)

38) On February 12, 2013, DOJ emailed a copy of LBC's DOJ consumer complaint to a number of media sources, along with a note stating:

> "Hey everyone,
>
> "Please pardon the mob email. But it seems the most efficient and fair thing to do. Attached is the initial Sweet Cakes complaint as well as the newly received response from the bakery owners' lawyer. The other new development is that the complainants have informed the DOJ and BOLI that they plan on filing a complaint with BOLI. That has yet to happen as early this afternoon. But we're told it's the plan. At that point, the DOJ's involvement in the saga will end."

On February 13, 2013, this email was forwarded to Herb Grey, Respondents' attorney, by Tony King, the executive producer of the Lars Larson Show. (Ex. R15)

39) After LBC's DOJ complaint was publicized in the media, Complainants both had negative confrontations from relatives who learned about their complaint against Respondents through the media. In January 2013, LBC had just begun to re-establish a relationship with an aunt who had physically and emotionally abused her as a child and also owned all of the family property. Shortly after LBC's complaint became public, the aunt insisted through social media that LBC drop the complaint. She also called LBC and told her she was not welcome on family property and she would shoot LBC "in the face" if LBC ever set foot on the family's property in Ireland or the United States. This threat "devastated" LBC, as it meant she could not visit her mother or

grandmother, both of whom lived on family property. RBC's sister, who believed that homosexuals should not be allowed to get married, wrote a Facebook message to the Kleins to tell them that she supported them. This was a "crushing blow" to RBC, and it hurt her and made her very angry at her sister. (Testimony of LBC, RBC, CM; Ex. A16)

40) On June 27, 2013, Complainants had a commitment ceremony at the West End Ballroom, a venue located at 1220 S.W. Taylor in downtown Portland. On the day of the ceremony, the words "ROMANCE BY CANDLELIGHT – STARRING RACHEL AND LAUREL – JUNE 27, 2013" were posted on a large billboard on the street-facing wall of the WEB. Only invited guests were allowed to attend the ceremony. Just prior to the ceremony, Duff Goldman's free cake was delivered by an incognito motorcyclist. At the ceremony, Complainants and their guests celebrated with their cakes from Pastry Girl and Goldman. After the ceremony, Complainants considered themselves to be married even though they could not be legally married in the state of Oregon at that time. (Testimony of RBC, LBC, Widener; Exs. R18, R19)

41) On August 8, 2013, RBC filed a verified complaint with BOLI alleged that Sweetcakes by Melissa had discriminated against her by refusing to make her a wedding cake because of her sexual orientation. (Testimony of RBC; Ex. A27)

42) On August 14, 2013, BOLI's Communications Director issued a press release related to RBC's complaint. The first paragraph read: "Portland, OR – A same-sex couple has filed an anti-discrimination complaint with the Oregon Bureau of Labor and Industries (BOLI) against a Gresham bakery, Sweet Cakes by Melissa, for allegedly refusing service based on sexual orientation." (Ex. R20)

43) During the CBN video interview described in Finding of Fact #12 in the ALJ's Summary Judgment Ruling, CBN broadcast a picture of a handwritten note taped on the inside of a front window at Sweetcakes' bakery in Gresham. The note read:

"Closed but still in business. You can reach me by email or facebook. www.sweetcakesweb.com or Sweetcakes by Melissa facebook page. New phone number will be provide on my website and facebook. This fight is not over. We will continue to stand strong. Your religious freedom is becoming not free anymore. This is ridiculous that we cannot practice our faith. The LORD is good and we will continue to serve HIM with all our heart. [heart symbol]"

(Ex. 1-I, Respondents' Motion for Summary Judgment)

44) On November 7, 2013, LBC filed a verified complaint with BOLI alleging that Sweetcakes by Melissa had discriminated against her by refusing to make her a wedding cake because of her sexual orientation. (Testimony of LBC; Ex. A28)

45) On January 17, 2014, BOLI's Communications Director issued a press release that began and ended with the following statements:

"**BOLI finds substantial evidence of unlawful discrimination in bakery civil rights complaint**
Sweet Cakes complaint will now move into conciliation to determine whether settlement can be reached

"Portland, OR – A Gresham bakery violated the civil rights of a same-sex couple when it denied service based on sexual orientation, a Bureau of Labor and Industries (BOLI) investigation has found.

"The couple filed the complaint against Sweetcakes by Melissa under the Oregon Equality Act of 2007, a law that protects the rights of gays, lesbians, bisexual and transgender Oregonians in employment, housing and public places.

"* * * * *

"Copies of the complaint are available upon request. * * *"

(Ex. R24)

46) Complainants were legally married by signing a "legal document of marriage" in 2014, a few days after Oregon's ban on same-sex marriage was struck down in federal court. (Testimony of RBC)

47) From February 1, 2013, until the time of the hearing, many people have made "hate-filled" comments through social media and in the comments sections of

various websites that were supportive of Respondents and critical of or threatening to Complainants. These comments and the media attention caused RBC stress, anger, pain, frustration, suffering, torture, shame, humiliation, degradation, fear that she would be harassed at home because the DOJ complaint with Complainants' home address had been posted on Facebook, and the feeling that her reputation was being destroyed. (Testimony of RBC, LBC, CM; Ex. A24)

48) The publicity from the case and accompanying threats from third parties on social media made RBC "scared" for the lives of A, E, LBC, and herself. (Testimony of RBC)

49) Although AK has been interviewed by the media on a number of occasions about the case, he did not initiate any contacts with the media. Other than posting LBC's DOJ complaint on his Facebook page, there is no evidence that AK gave Complainants' names to the media. Finally, there is no evidence in the record of any untruthful statements that AK or MK made to public media regarding their case.[8] (Testimony of AK; Entire Record)

50) Except for Paul Thompson's February 8, 2013, press release, Complainants have never solicited media attention nor been interviewed by the media with regard to this case. (Testimony of RBC, LBC)

51) Candice Ericksen, Laura Widener, Melissa Klein, Jessica Ponaman, and Aaron Cryer were credible witnesses and the forum has credited their testimony in its entirety. (Testimony of Ericksen, Widener, M. Klein, RBC, Ponaman)

[8] Complainants testified that they were upset by Respondents' repeated untruthful statements about them in the media, but did not testify as to any specific incident in which Respondents made untruthful statements of which they were aware and the Agency presented no other evidence of any such statements.

52) For the most part, CM's testimony was credible, even though her answers frequently strayed from the subject of the questions. However, the forum did not believe her earlier statements to Ponaman that RBC was "throwing up" because she was so nervous and that "for days [RBC] couldn't get out of bed" because RBC did not testify to those facts and because RBC spent 30 minutes talking with LBC and A. Cryer the night of January 17, 2013, and went to a cake tasting at Pastry Girl on January 21, 2013. Due to these exaggerations, the forum has only credited CM's testimony when it was either (a) undisputed, or (b) disputed but corroborated by other credible testimony. (Testimony of CM)

53) AK was a credible witness except for his testimony that he did not realize that LBC's name and address were on the DOJ complaint that he posted on his Facebook page. LBC's name, address, and phone number are conspicuously printed on the complaint immediately above Sweetcakes's name, address, and phone number, and the forum finds it extremely unlikely that AK would have posted the complaint without reading it, particularly since he posted a comment immediately above it that read: "This is what happens when you tell gay people you won't do their 'wedding' cake." Apart from that testimony, the forum has credited AK's testimony in its entirety. (Testimony of AK)

54) RBC was an extremely emotional witness who was in tears or close to tears during most of her testimony. Despite her emotional state, she answered questions directly in a forthright manner. She did not try to minimize the effect of media exposure on her emotional state as compared to how the denial of service affected her. The forum has credited RBC's testimony about her emotional suffering in its entirety. However, the forum has only credited her testimony about media exposure when she testified about specific incidents. (Testimony of RBC)

55) LBC was a very bitter and angry witness who had a strong tendency to exaggerate and over-dramatize events. On cross examination, she argued repeatedly with Respondents' counsel and had to be counseled by the ALJ to answer the questions asked of her instead of editorializing about the denial of service and how it affected her. Her testimony was inconsistent in several respects with more credible evidence. First, she testified that she had a "major blowout" and "really bad fight" with A. Cryer between January 17 and January 21, 2013. In contrast, A. Cryer testified, when asked if he fought with LBC, "I wouldn't say we fought." He also testified that this case did not affect his relationship with LBC. Second, she testified that her blood pressure spiked in the hospital to 210/165 on February 1, 2013, when she learned that her DOJ complaint had hit the media, requiring the immediate attention of a doctor and four nurses. Her treating doctor's report notes that she was upset and crying about her situation hitting the news, but there is no mention of a blood pressure spike. Third, she testified that the media were standing outside her and RBC's apartment on February 1, 2013, when she talked to RBC from the hospital. RBC, who was at the apartment at that time, testified that the media were not outside their apartment at that time. Fourth, LBC testified that RBC stayed in bed the rest of the day after she returned from the cake tasting at Sweetcakes. In contrast, A. Cryer testified that he, LBC, and RBC had a 30 minute conversation that evening. Like RBC, the forum has only credited her testimony about media exposure when she testified about specific incidents. The forum has only credited LBC's testimony when it was either (a) undisputed, or (b) disputed but corroborated by other credible testimony. (Testimony of LBC)

CONCLUSIONS OF LAW

1) At all times material herein, Respondents AK and MK owned and operated a bakery in Gresham, Oregon as a partnership under the assumed business name of Sweetcakes by Melissa.

2) At all times material herein, Sweetcakes by Melissa was a "place of public accommodation" as defined in ORS 659A.400.

3) At all times material herein, AK and MK were individuals and "person[s]" under ORS 659A.010(9), ORS 659A.403, ORS 659A.406, and ORS 659A.409.

4) At all times material herein, Complainants' sexual orientation was homosexual.

5) AK denied the full and equal accommodations, advantages, facilities and privileges of Sweetcakes by Melissa to Complainants based on their sexual orientation, thereby violating ORS 659A.403.

6) AK did not violate ORS 659A.406.

7) AK and MK violated ORS 659A.409.

8) Complainants suffered emotional and mental suffering as a result of AK's violation of ORS 659A.403.

9) As partners, AK and MK are jointly and severally liable for AK's violation of ORS 659A.403 and their joint violations of ORS 659A.409

10) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful practices found. ORS 659A.800 to ORS 659A.865.

11) Pursuant to ORS 659A.850 and ORS 659A.855, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to issue an appropriate cease and desist order. The sum of money awarded

to Complainants and the orders to cease and desist violating ORS 659A.403 and ORS 659A.409 are an appropriate exercise of that authority.

OPINION

Introduction

In his ruling on Respondents' motion and the Agency's cross-motion for summary judgment, the ALJ concluded that Respondents did not violate ORS 659A.409.[9] This final order reverses that decision. The following discussion explains why.

ORS 659A.409 provides, in pertinent part:

> "* * * [I]t is an unlawful practice for any person acting on behalf of any place of public accommodation as defined in ORS 659A.400 to publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of * * * sexual orientation[.]"

The first paragraph in section IV of the Agency's Charges[10] alleges that "Respondents published, issued * * * a communication, notice * * * that its accommodation, advantages * * * would be refused, withheld from or denied to, or that discrimination would be made against, a person on account of his or her sexual orientation." In subparagraphs "a" and "c," the Agency identifies ORS 659A.409 as the statute that was allegedly violated. Earlier in the Charges, the Agency identified statements made by AK that were broadcast on CBN television on September 2, 2013,

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[9] *See* Finding of Fact #28 – Procedural, *infra*. In the ALJ's ruling on the motions for summary judgment, he noted that the Agency did not allege that AK violated ORS 659A.409, but did not consider this paragraph. *See* footnote 26.

[10] Section IV is prefaced by the caption "UNLAWFUL PRACTICE: DISCRIMINATION BY PUBLICATION, CIRCULATION, ISSUANCE, OR DISPLAY OF A COMMUNICATION, NOTICE, ADVERTISEMENT, OR SIGN OF A DENIAL OF ACCOMMODATIONS, ADVANTAGES, FACILITIES, SERVICES OR PRIVILEGES BY A PLACE OF PUBLIC ACCOMMODATION BASED ON SEXUAL ORIENTATION."

and on the radio on February 13, 2014, that allegedly communicated an intent to discriminate based on sexual orientation. The full text of the relevant part of the CBN broadcast is reprinted below:

> **A. Klein**: 'I didn't want to be a part of her marriage, which I think is wrong.'
>
> **M. Klein**: 'I am who I am and I want to live my life the way I want to live my life and, you know, I choose to serve God.'
>
> **A. Klein**: 'It's one of those things where you never want to see something you've put so much work into go belly up, but on the other hand, um, I have faith in the Lord and he's taken care of us up to this point and I'm sure he will in the future.' (***September 2, 2013, CBN interview***)

The Agency's cross-motion for summary judgment also singles out the text on a handwritten sign that was shown taped to the inside of Sweetcakes' front window during the CBN broadcast:

> "Closed but still in business. You can reach me by email or facebook. www.sweetcakesweb.com or Sweetcakes by Melissa facebook page. New phone number will be provided on my website and facebook. This fight is not over. We will continue to stand strong. Your religious freedom is becoming not free anymore. This is ridiculous that we cannot practice our faith. The LORD is good and we will continue to serve HIM with all our heart. [heart symbol]"

The full text of the relevant part of the Perkins' broadcast is reprinted below:

> **Perkins**: '* * * Tell us how this unfolded and your reaction to that.'
>
> **Klein**: 'Well, as far as how it unfolded, it was just, you know, business as usual. We had a bride come in. She wanted to try some wedding cake. Return customer. Came in, sat down. I simply asked the bride and groom's first name and date of the wedding. She kind of giggled and informed me it was two brides. At that point, I apologized. 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." And she got upset, noticeably, and I understand that. Got up, walked out, and you know, that was, I figured the end of it.'
>
> **Perkins**: 'Aaron, let me stop you for a moment. Had you and your wife, had you talked about this before; is this something that you had discussed? Did you think, you know, this might occur and had you thought through how you might respond or did this kind of catch you off guard?'

> **Klein**: 'You know, it was something I had a feeling was going to become an issue and I discussed it with my wife when the state of Washington, which is right across the river from us, legalized same-sex marriage and we watched Masterpiece Bakery going through the same issue that we ended up going through. But, you know, it was one of those situations where we said "well I can see it is going to become an issue but we have to stand firm. It's our belief and we have a right to it, you know." I could totally understand the backlash from the gay and lesbian community. I could see that; what I don't understand is the government sponsorship of religious persecution. That is something that just kind of boggles my mind as to how a government that is under the jurisdiction of the Constitution can decide, you know, that these people's rights overtake these people's rights or even opinion, that this person's opinion is more valid than this person's; it kind of blows my mind.' **(*February 13, 2014, Perkins' interview*)**

The Agency's cross-motion for summary judgment singles out the statements made on those two occasions as proof that Respondents violated ORS 659A.409, along with the note posted on Sweetcakes' front door.

> "ORS 659A.409 provides, in pertinent part:
>
> '* * * it is an unlawful practice for any person acting on behalf of any place of public accommodation as defined in ORS 659A.400 to publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of * * * sexual orientation * * *.'

In their motion for summary judgment, Respondents argue that "ORS 659A.409 by its terms requires a statement of *future intention* that is entirely absent in this instance." Respondents further argue that:

> "A review of the videotape record of the CBN broadcast * * * clearly shows that Aaron Klein spoke only of the reason why he and his wife declined to participate in complainants' ceremony. The same is true of the Perkins radio broadcast. * * * A statement of future intention in either media event is conspicuously absent."

In contrast, the Agency argues that the Klein's statements are a prospective communication:

"Reviewed in context, Respondents communicated quite clearly that same-sex couples would not be provided wedding cake services at their bakery. These are not descriptions of past events as alleged by Respondents. Respondents stated their position in these communications and notify the public that they 'don't do same sex weddings,' they 'stand firm,' are 'still in business' and will 'continue to stay strong.'"

As stated earlier, the Agency asserts that the three incidents described above – the two interviews and the note -- show Respondents' prospective intent to discriminate. Although the Agency did not include the text or specifically allege the existence of the note in its Formal Charges and the Perkins' interview occurred after the Agency had completed its initial investigation of the complaint and issued its Substantial Evidence Determination, this does not preclude the Agency from pursuing those incidents at hearing. The Agency's investigation may continue past its substantial evidence determination and charges may include evidence not discovered by the investigator. *See In the Matter of Sears, Roebuck and Company,* 18 BOLI 47, 78 (1999). The only limitation is that the charges be "reasonably related" to the allegations of the initial complaint. *Id.* The allegations and theories of the specific charges define those to be adjudicated through the hearing, whether or not those allegations and theories are consistent with or even based on those in the administrative determination. *See In the Matter of Jake's Truck Stop,* 7 BOLI 199, 211 (1988). Also, the only limitation on charges is that the complainant must have had standing to raise the issues and those issues must encompass discrimination only like or reasonably related to the allegations in the complaint. *See In the Matter of Sapp's Realty, Inc.,* 4 BOLI 93, 94 (1981).

In the present case, both the note and Perkins interview are not only "reasonably related' but, directly related to the allegations and theories of both the original complaint and charges. Whether corroborating evidence or included as a fact underlying a

specific charge, they may be considered as evidence to determine whether a violation of ORS 659A.409 occurred.

Whatever Respondents' intentions may have been or may still be with regard to providing wedding cake services for same-sex weddings, the Commissioner finds that AK's above-quoted statements, evaluated both for text and context, are properly construed as the recounting of past events that led to the present Charges being filed. In addition, they also constitute notice that discrimination will be made in the future by refusing such services. In the Perkins' interview, AK stated "...We don't do same-sex marriage, same-sex wedding cakes...." He continued that in discussing Washington's same-sex marriage law with MK, "we can see this becoming an issue and we have to stand firm." The note similarly said "...This fight is not over. We will continue to stand strong...." On their face, these statements are not constrained to a singular incident or time. They reference past, present and future conduct. AK did not say only that he would not do complainants' specific marriage and cake but, that respondents "don't do" same-sex marriage and cakes. Respondents' joint statement that they will "continue" to stand strong relates to their denial of service and is prospective in nature. The statements, therefore, indicate Respondents' clear intent to discriminate in the future just as they had done with Complainants.

The Commissioner concludes that, through the communications described above, AK and MK both violated ORS 659A.409.[11] However, the Commissioner awards

[11] *See In the Matter of Blachana, LLC,* 32 BOLI 220 (2013), *appeal pending* (Respondent found to have violated ORS 659A.409 when member of the LLC left a telephone message with the organizer of a group of transgender individuals who had visited the LLC's nightclub regularly on Friday nights during the previous 18 months asking "not to come back on Friday nights."); *In the Matter of The Pub*, 6 BOLI 270, 282-83 (1987)(Respondent found to have violated ORS 659.037, the predecessor of ORS 659A.409, by posting a on front door of pub, immediately under another sign that said "VIVA APARTHEID," a sign that said "NO SHOES, SHIRTS, SERVICE, NIGGERS," and a sign inside the pub, with chain and spikes attached at each end, that read "Discrimination. Webster – to use good judgment" on the front and

no damages to Complainants based on Respondents' unlawful practice because there is no evidence in the record that Complainants experienced any mental, emotional, or physical suffering because of it.

In their Answers to the Formal Charges, Respondents raised the affirmative defenses that ORS 659A.409 is unconstitutional on its face and as applied. Their defense is set out with particularity in Finding of Fact #7 – Procedural. The forum did not address these defenses in the ALJ's Summary Judgment ruling because the ALJ concluded that Respondents did not violate ORS 659A.409. The Commissioner now addresses them without duplicating the extensive analysis in the ALJ's Summary Judgment ruling.

Oregon Constitution -- Article I, Sections 2 and 3

Article I, Sections 2 and 3 of the Oregon Constitution provide:

> "Section 2. Freedom of worship. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.
>
> "Section 3. Freedom of religious opinion. No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions, or interfere with the rights of conscience."

ORS 659A.409, like ORS 659A.403, is a law that is part of a general regulatory scheme, expressly neutral toward religion as such and neutral among religions. Accordingly, it is constitutional on its face. *Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 903 P2d 351 (1995). It is also constitutional as applied in this case because Respondents' statements announcing their clear intent to discriminate in future, just as they had done with Complainants, was not a religious practice but was conduct motivated by their

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"Authentic South African Apartheid Nigger 'Black' Handcuffs Directions Drive Through Wrists and Bend Over Tips" on the back).

religious beliefs. *Id.* at 153. Furthermore, the Oregon Supreme Court has held, in the context of Article I, section 8, that engagement in constitutionally protected expression while engaging in otherwise punishable conduct does not insulate the unlawful conduct from the usual consequences that accompany it. *See, e.g., Hoffman and Wright Logging Co. v. Wade,* 317 Or 445, 452, 857 P2d 101 (1993)("a person's reason for engaging in punishable conduct does not transform conduct into expression under Article I, section 8 [and] speech accompanying punishable conduct does not transform conduct into expression[.]); *State v. Plowman,* 314 Or 157, 165, 838 P2d 558 (1992) ("One may hate members of a specified group all one wishes, but still be punished constitutionally if one acts together with another to cause physical injury to a person because of that person's perceived membership in the hated group"). The same should hold true with regard to the protections afforded by Article I, sections 2 and 3.[12]

United States Constitution – First Amendment: Unlawfully Infringing on Respondents' right of conscience *and* ***right to free exercise of religion***

The Commissioner finds ORS 659A.409 constitutional, both facially and as applied, based on the same reasoning set out in the Summary Judgment ruling with respect to the constitutionality of ORS 659A.403.

Oregon Constitution – Section 8: freedom of speech

Article I, Section 8 of the Oregon Constitution provides:

> "**Section 8. Freedom of speech and press.** No laws shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

[12] This reasoning also applies to the ALJ's analysis of the constitutionality of ORS 659A.403 in the summary judgment ruling.

In *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), the Oregon Supreme Court established a basic framework, with three categories, for determining whether a law violates Article I, Section 8. ORS 659A.409 falls within *Robertson's* second category because it is "directed in terms against the pursuit of a forbidden effect" and "the proscribed means [of causing that effect] include speech or writing." *Id.* at 417-18.[13] Oregon courts examine a statute in the second category for "overbreadth' to determine if 'the terms of [the] law exceed constitutional boundaries, purporting to reach conduct protected by guarantees such as * * * [A]rticle I, section 8. * * * If a statute is overbroad, the court then must determine whether it can be interpreted to avoid such overbreadth." *State v. Babson,* 355 Or 383, 391, 326 P3d 559, 566 (2014).

Respondents assert that ORS 659A.409 prohibits Respondents from "express[ing] their own position" and that ORS 659A.409 amounts to "a speech code." To the contrary, the language of ORS 659A.409 focuses on the discriminatory effect that accompanies certain speech "published, circulated, issued or displayed" **on behalf** of a place of public accommodation. It does not cover expressions of personal opinion, political commentary, or other privileged communications unrelated to the business of a place of public accommodation, and its breadth is narrowly tailored to address the effects of the speech at issue. As such, it is facially constitutional under Article I, Section 8.[14]

[13] In its cross-motion for summary judgment, the Agency concedes that ORS 659A.409 "falls within the second *Robertson* category of laws."

[14] *See also State v. Sutherland*, 329 Or 359, 365, 987 P2d 501, 504 (1999)(for a statute to be facially unconstitutional, it must be unconstitutional in all circumstances, *i.e.*, there can be no reasonably likely circumstances in which application of the statute would pass constitutional muster).

A statute that falls within *Robertson* category two is not subject to an as-applied challenge. *See Leppanen v. Lane Transit Dist.*, 181 Or App 136, 142-43, 45 P3d 501, 504-05 (2002), citing *City of Eugene v. Lee,* 177 Or App 492, 497, 34 P3d 690 (2001).

U.S. Constitution – First Amendment: Unlawfully infringing on Respondents' right to free speech

In pertinent part, the First Amendment to the U.S. Constitution provides "Congress shall make no law * * * abridging the freedom of speech * * *." This applies to the State of Oregon under the Fourteenth Amendment. In his Summary Judgment ruling, the ALJ conducted a "compelled speech" analysis to Respondents' defense that baking a wedding cake for Complainants was "speech" that violated the First Amendment. In contrast, the speech that violated ORS 659A.409 – the CBN interview, the "note" on Sweetcakes's door, and the Perkins' interview – was voluntary on Respondents' part.

ORS 659A.409 is an integral part the anti-discrimination public accommodation laws in ORS chapter 659A. The forum first interpreted this statute nearly 30 years ago, when it was numbered as ORS 659.037, in a case in which the Respondent owned a bar and posted a sign on the front door stating "NO, SHOES, SHIRTS, SERVICE, NIGGERS." *In the Matter of The Pub,* 6 BOLI 270, 278 (1987). In her Final Order, the Commissioner held that this statute, then numbered as ORS 659.037, "does not generally operate to deny [a] Respondent his constitutional guarantees of free speech." Subsequently, in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995), the U. S. Supreme Court held that "modern public accommodations laws are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general

matter, violate the First or Fourteenth Amendments."[15] In conclusion, ORS 659A.409 is constitutional on its face. It is also constitutional as applied because the Commissioner only applies it to Respondents' language that indicate Respondents' clear intent to discriminate in future just as they had done with Complainants.

Damages

This case is not about a wedding cake or a marriage. It is about a business's refusal to serve someone because of their sexual orientation. Under Oregon law, that is illegal.

Free enterprise provides great opportunity for entrepreneurs to take an idea, create a business and achieve whatever success they can. It is a system open to all but, to participate fairly, businesses must follow the laws that apply to each of them equally. A business that disregards the law erodes the free marketplace for both law abiding businesses and patrons alike.

Respondents' claim they are not denying service because of Complainants' sexual orientation but rather because they do not wish to participate in their same sex wedding ceremony. The forum has already found there to be no distinction between the two. Further, to allow Respondents, a for profit business, to deny any services to people because of their protected class, would be tantamount to allowing legal separation of people based on their sexual orientation from at least some portion of the public marketplace. This would clearly be contrary to Oregon law as well as any standard by which people in a free society should choose to treat each other.

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[15] *Cf. Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984)("[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections")

Within Oregon's public accommodations law is the basic principle of human decency that every person, regardless of their sexual orientation, has the freedom to fully participate in society. The ability to enter public places, to shop, to dine, to move about unfettered by bigotry.

When Respondents denied RBC and LBC a wedding cake, their act was more than the denial of the product. It was, and is, a denial of RBC's and LBC's freedom to participate equally. It is the epitome of being told there are places you cannot go, things you cannot do...or be. Respondent's conduct was a clear and direct statement that RBC and LBC lacked an identity worthy of being recognized.

The denial of these basic freedoms to which all are entitled devalues the human condition of the individual, and in doing so, devalues the humanity of us all.

This was clearly reflected in RBC's and LBC's testimony. In addition to other emotional responses, RBC described that being raised a Christian in the Southern Baptist Church, Respondent's denial of service made her feel as if God made a mistake when he made her, that she wasn't supposed to be, and that she wasn't supposed to love or be loved, have a family, or go to heaven. LBC, who was raised Catholic, interpreted the denial to represent that she was not a creature created by god, not created with a soul and unworthy of holy love and life. She felt anger, intense sorrow and shame. These are the reasonable and very real responses to not being allowed to participate in society like everyone else. The personal harm in being subjected to such separation is felt deeply and severely, as the evidence in this case indicated.

The Formal Charges seek damages for emotional, mental and physical suffering in the amount of "at least $75,000" for each Complainant. In addition to any emotional suffering experienced by Complainants as a direct result of Sweetcakes' refusal to bake

them a cake ("denial of service"), the Agency also seeks damages for suffering caused to Complainants by media publicity and social media responses to this case.

In order, the forum considers the extent of Complainants' emotional suffering and the cause of that suffering; and the appropriate amount of damages. Any damages awarded do not constitute a fine or civil penalty, which the Commissioner has no authority to impose in a case such as this. Instead, any damages fairly compensate RBC and LBC for the harm they suffered and which was proven at hearing. This is an important distinction as this order does not punish respondents for their illegal conduct but, rather makes whole those subjected to the harm their conduct caused.

1. Extent and Cause of Complainants' Emotional Suffering

A. R. Bowman-Cryer

a. Emotional suffering from the denial of service

Prior to the cake tasting, LBC had been asking RBC to marry her for nine years. Until October 2012, RBC did not want to be married because of her personal experience of failed marriages. At that time, RBC decided that they should get married to give their foster children a sense of "permanency and commitment." After her long-standing matrimonial reticence, RBC became excited to get married and to start planning the wedding,[16] wanting a wedding that was as "big and grand" as they could afford. Obtaining a cake from Sweetcakes like the one purchased for CM's wedding two years earlier was part of that grand scheme, and both Complainants were excited about the cake tasting at Sweetcakes because of how much they liked the cake Respondents had made for CM's wedding.

[16] The forum acknowledges that Complainants' "wedding" on June 27, 2013, was only a commitment ceremony, not a legal "marriage." *See* footnote 58, *infra.*

RBC's emotional suffering began at the January 17, 2013, cake tasting when AK told RBC and CM that Sweetcakes did not make wedding cakes for same-sex ceremonies. In response, RBC began to cry. She felt that she had humiliated her mother and was concerned that CM, who had believed that homosexuality was wrong until only a few years earlier, was ashamed of her. Walking out to the car and in the car, RBC became hysterical and kept apologizing to CM. When CM returned to the car after talking with AK, RBC was still "bawling" in the car. When CM told her that AK had called her "an abomination," this made RBC cry even more. RBC, who was brought up as a Southern Baptist, interpreted AK's use of the word "abomination" her mean that God made a mistake when he made her, that she wasn't supposed to exist, and that she had no right to love or be loved, have a family, or go to heaven. She continued to cry all the way home and after she arrived at home, where she immediately went upstairs to her bedroom and lay in her bed, crying.

On January 18, 2013, RBC felt depressed and questioned whether there was something inherently wrong with the sexual orientation she was born with and if she and LBC deserved to be married like a heterosexual couple. She spent most of that day in her room, trying to sleep.

In the days following January 17, 2013, RBC had difficulty controlling her emotions and cried a lot, and Complainants argued with each other because of RBC's inability to control her emotions. They had not argued previously since moving to Oregon. In addition, RBC also became more introverted and distant in her family relationships. She and A. Cryer have always been very close, and their connection was not as close "for a little bit" after January 17, 2013. A week later, RBC still felt "very sad and stressed," felt concerned about still having to plan her wedding, and felt less exuberant about the wedding. On January 21, 2013, she experienced anxiety during

her cake tasting at Pastry Girl because of AK's January 17, 2013, refusal and her fear of subsequent refusals. After January 17, 2013, although RBC relied on CM to contact potential wedding vendors, RBC still experienced some anxiety over possible rejection because her wedding was a same-sex wedding. During this same period of time, A. Cryer credibly analogized RBC's demeanor as similar to that of a dog who had been abused.

b. Emotional suffering from publicity about the case

On February 1, 2013, RBC became aware that the media was aware of AK's refusal to make a wedding cake for Complainants when she received a telephone call from Lars Larson, an American conservative talk radio show host based in Portland, Oregon, who told her that he had spoken with AK and wanted to see what RBC "had to say about the pending case." This upset RBC, and she became greatly concerned that E and A would be taken away from them by the foster care system because they had been told that the girls' information had to be protected and that the state would "have to readdress placement" of the girls with Complainants if any information was released concerning the girls. This concern continued until their adoption became final sometime after December 2013.

From February 1, 2013, until the time of the hearing, many people have made "hate-filled" comments through social media and in the comments sections of various websites that were supportive of Respondents and critical of or threatening to Complainants. These comments and the media attention caused RBC stress, anger, pain, frustration, suffering, torture, shame, humiliation, degradation, fear that she would be harassed at home because the DOJ complaint with Complainants' home address had been posted on Facebook, and the feeling that her reputation was being destroyed. The publicity from the case and accompanying threats on social media from third parties

made RBC "scared" for the lives of A, E, LBC, and herself. In addition, RBC was also upset by a confrontation with her sister who learned about the DOJ complaint through the media and posted a comment in support of Respondents on Respondents' Facebook.

Without giving any specific examples, RBC credibly testified that, in a general sense,[17] the denial of service has caused her continued emotional suffering up to the time of hearing.

B. L. Bowman-Cryer

a. Emotional suffering from the denial of service

LBC had been asking RBC to marry her for nine years before RBC finally accepted in October 2012. RBC's acceptance in October 2012 of LBC's marriage proposal made LBC "extremely happy." Both Complainants were excited about the cake tasting at Sweetcakes because of how much they liked the cake Respondents had made for CM's earlier wedding. However, LBC, unlike RBC, did not go to the cake tasting.

When CM and RBC arrived home on January 17, 2013, after their cake tasting at Sweetcakes, CM told LBC that AK had told them that Sweetcakes did "not do same-sex

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[17] The following is RBC's only testimony about her emotional suffering due to the denial of service after the case began to be publicized. It occurred during the Agency's redirect examination:

Q: "You testified earlier about the media attention being sort of a secondary layer of stress, and I believe that that term you used during Mr. Smith's cross examination of you. During my examination of you, you testified at length as to the emotional harm that you suffered directly from the refusal of service alone. Do you still feel that harm from the refusal itself -- the January 17, 2013 refusal?"

"* * * * *

A. "Yes, I still experience that."

Q. "Was the primary harm, the harm that resulted from the refusal of service itself, persistent throughout the times where you experienced media attention?"

"* * * * *

A. "Yes, the harm was still present during the media attention."

weddings" and that AK had told CM that "your children are an abomination." LBC was "flabbergasted" and she became very upset and very angry. LBC, who was raised as a Roman Catholic, recognized AK's statement as a reference from Leviticus. She was "shocked" to hear that AK had referred to her as an "abomination." Based on her religious background, she understood the term "abomination" to mean "this is a creature not created by God, not created with a soul. They are unworthy of holy love. They are not worthy of life." Her immediate thought was that this never would have happened, had she had not asked RBC to marry her. Because of that, she felt shame. Like RBC, she also worried about how it would affect CM's relatively recent acceptance of RBC's sexual orientation.

LBC views herself as RBC's protector. After RBC climbed into bed, crying, LBC got into bed with RBC and tried to soothe her. RBC became even more upset and pushed RBC away. In response, LBC lost her temper because she could not "fix" things.

When LBC went back downstairs, E, the older of Complainants' foster daughters was extremely agitated from events at school that day. LBC tried to calm her, but she refused to be calmed, repeatedly calling out for RBC, with whom she had a special bond. Eventually, E cried herself to sleep. LBC's inability to calm E was very frustrating to her. That night, LBC was very upset, cried a lot, and was hurt and angry. Later that same evening, she filed her DOJ complaint.

In the days immediately following January 17, 2013, LBC experienced anger, outrage, embarrassment, exhaustion, frustration, sorrow, and shame as a reaction to AK's denial of service. She felt sorrow because she couldn't console E, she could not protect RBC, and because RBC was no longer sure she wanted to be married. Her

excitement about getting married was also lessened because she was not sure she could protect RBC if any similar incidents occurred.

b. Emotional suffering from publicity about the case

On February 1, 2013, LBC went to the emergency room of a local hospital because of pain from a shoulder injury that she had suffered three weeks earlier and her concern that she might have a broken shoulder. While in the hospital, she heard that AK's refusal to make their wedding cake was on the news. This made her very upset and she was crying when she was examined by a doctor. Based on the media, potential media exposure, and social media attention related to her DOJ complaint after February 1, 2013, LBC's headaches increased. She also felt intimidated and became fearful.

After LBC's DOJ complaint was publicized in the media, LBC also had an "devastating" confrontation with her aunt who had learned about her DOJ complaint against Respondents through the media and threatened to shoot LBC in the face if she ever set foot on LBC's family's property again.[18]

After February 1, 2013, LBC, like RBC, was also greatly concerned that their foster children would be taken away from them because of media exposure.

LBC testified that she still feels emotional effects from the denial of service because E, A, and RBC "were" still suffering and that "was" tearing me apart.[19]

[18] LBC's intense and visceral display of emotions while testifying about her aunt's behavior made it clear that her aunt's behavior caused her extreme upset.

[19] *See* footnote 7, *supra*. LBC testified in the past tense.

2. Emotional suffering damages based on media and social media attention

In its closing argument, the Agency asked the forum to award Complainants $75,000 each in emotional suffering damages stemming directly from the denial of service, In addition, the Agency asked the forum to award damages to Complainants for emotional suffering they experienced as a result of the media and social media attention generated by the case from January 29, 2013, the date AK posted LBC's DOJ complaint on his Facebook page, up to the date of hearing. The Agency's theory of liability is that since Respondents brought the case to the media's attention and kept it there by repeatedly appearing in public to make statements deriding Complainants, it was foreseeable that this attention would negatively impact Complainants, making Respondents liable for any resultant emotional suffering experienced by Complainants. The Agency also argues that Respondents are liable for negative third party social media directed at Complainants because it was a foreseeable consequence of the media attention.

The Commissioner concludes that complainants' emotional harm related to the denial of service continued throughout the period of media attention and that the facts related solely to emotional harm resulting from media attention do not adequately support an award of damages. No further analysis regarding the media attention as a causative factor is, therefore, necessary.

3. Amount of Damages

There is ample evidence in the record of specific, identifiable types of emotional suffering both Complainants experienced because of the denial of service.

In determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the

vulnerability of the aggrieved persons. The actual amount depends on the facts presented by each aggrieved person. An aggrieved person's testimony, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of C. C. Slaughters, Ltd.,* 26 BOLI 186, 196 (2005). In public accommodation cases, "the duration of the discrimination does not determine either the degree or duration of the effects of discrimination." *In the Matter of Westwind Group of Oregon, Inc.,* 17 BOLI 46, 53 (1998).

In this case, the ALJ proposed that $75,000 and $60,000, are appropriate awards to compensate Complainants RBC and LBC, respectively, for the emotional suffering they experienced from Respondents' denial of service. The proposal for LBC is less because she was not present at the denial and the ALJ found her testimony about the extent and severity of her emotional suffering to be exaggerated in some respects. In this particular case, the demeanor of the witnesses was critical in determining both the sincerity and extent of the harm that was felt by RBC and LBC. As such, the Commissioner defers to the ALJ's perception of the witnesses and evidence presented at hearing and adopts the noneconomic award as proposed, finding also that this noneconomic award is consistent with the forum's prior orders.[20]

[20] See, *In the Matter of Andrew W. Engel, DMD,* 32 BOLI 94 (2012) (Complainant, a Christian, subjected to harassment based on her religious belief including the job requirement of attending Scientology trainings suffered anxiety, stress, insomnia, gastrointestinal problems and weight loss requiring medical treatment awarded $350,000); *In the Matter of From The Wilderness, Inc.,*30 BOLI 227 (2009) (Complainant subjected to verbal and physical sexual harassment for two months before being fired and then retaliated against after termination suffered panic attacks requiring medical treatment awarded $125,000); *In the Matter of Maltby Biocontrol, Inc.,* 33 BOLI 121 (2014) (Complainants subjected to racially hostile environment including assault, threats with a firearm, racial epithets and retaliation for reports to police suffered fear, sleeplessness and physical injuries requiring medical treatment awarded $50,000 and $100,000 each); *In the Matter of Charles Edward Minor*, 31 BOLI 88 (2010) (Complainant subjected to verbal and physical sexual harassment including respondent striking her in the head with his fist suffered anxiety, reclusiveness and fear awarded $50,000).

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(4), and to eliminate the effects of the violation of ORS 659A.403 by **Respondent Aaron Klein,** and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondents Aaron Klein and Melissa Klein** to deliver to the Administrative Prosecution Unit of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in trust for **Complainants Rachel Bowman-Cryer** and **Laurel Bowman-Cryer** in the amount of:

1) ONE HUNDRED THIRTY FIVE THOUSAND DOLLARS ($135,000), representing compensatory damages for emotional, mental and physical suffering, to be apportioned as follows:

Rachel Bowman-Cryer: $75,000

Laurel. Bowman-Cryer: $60,000

plus,

2) Interest at the legal rate on the sum of $135,000 from the date of issuance of the Final Order until Respondents comply with the requirements of the Order herein.

B. NOW, THEREFORE, as authorized by ORS 659A.850(4), and to further eliminate the effect of the violation of ORS 659A.403 by **Respondent Aaron Klein,** the Commissioner of the Bureau of Labor and Industries hereby orders **Respondents Aaron Klein and Melissa Klein** to cease and desist from denying the full and equal accommodations, advantages, facilities and privileges of Sweetcakes by Melissa to any person based on that person's sexual orientation.

C. NOW, THEREFORE, as authorized by ORS 659A.850(4), and to further eliminate the effect of the violations of ORS 659A.409 by **Respondents Aaron Klein and Melissa Klein,** the Commissioner of the Bureau of Labor and Industries hereby

orders **Respondents Aaron Klein and Melissa Klein** to cease and desist from publishing, circulating, issuing or displaying, or causing to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of a place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of sexual orientation.

DATED this 2 day of July, 2015.

Brad Avakian, Commissioner
Bureau of Labor and Industries

Issued ON: July 2, 2015

APPENDIX

FINDINGS OF FACT – PROCEDURAL

1) On August 8, 2013, R. Bowman-Cryer ("RBC") filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging that Aaron Klein and Melissa Klein, dba Sweetcakes by Melissa, refused to make her a wedding cake based on her sexual orientation and published and displayed a communication to that effect, in violation of ORS 659A.403 and ORS 659A.409. RBC's complaint was subsequently amended to name both Kleins as aiders and abettors under ORS 659A.406. (Ex. A-27)

2) On November 7, 2013, L. Bowman-Cryer ("LBC") filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging that Aaron Klein ("AK") and Melissa Klein ("MK"), dba Sweetcakes by Melissa, refused to make her a wedding cake based on her sexual orientation and published and displayed a communication to that effect, in violation of ORS 659A.403 and ORS 659A.409. LBC's complaint was subsequently amended to name AK and MK as aiders and abettors under ORS 659A.406. (Ex. A-28)

3) On January 15, 2014, after investigating RBC's and LBC's complaints, the CRD issued a Notice of Substantial Evidence Determination in each case in which the CRD found substantial evidence of unlawful discrimination in public accommodation against Respondents in violation of ORS 659A.403, ORS 659A.406, and ORS 659A.409 (Ex. A29)

4) On June 4, 2014, the Agency issued two sets of Formal Charges, one alleging unlawful discrimination against RBC (case no. 44-14) and the other alleging unlawful discrimination against LBC (case no. 45-14) that alleged the following:

(a) At all times material, Sweetcakes by Melissa ("Sweetcakes") was an assumed business name of Respondent MK doing business in Gresham, Oregon, that offered goods and services to the public, including wedding cakes;

(b) At all times material, AK was registered with the Oregon Sec. of State Business Registry as the authorized representative of MK, dba Sweetcakes by Melissa;

(c) On January 17, 2013, RBC and her mother went to Sweetcakes for a cake tasting related to RBC's wedding ceremony to LBC;

(d) AK conducted the tasting and asked for the names of a bride and groom. RBC said there would be two brides for her ceremony and gave her name and LBC's name. AK told RBC that Sweetcakes did not do "same-sex couples" because it "goes against our religion";

(e) Complainants were injured by Respondents' refusal to provide them with a wedding cake;

(f) MK discriminated against Complainants based on their sexual orientation, in violation of ORS 659A.403(3) and ORS 659.409;

(g) AK aided or abetted MK as the owner of Sweetcakes in MK's violation of ORS 659A.403(3) and ORS 659.409; thereby violating ORS 659A.406;

(h) Complainants are each entitled to damages for emotional, mental, and physical suffering in the amount of "at least $75,000" and out-of-pocket expenses "to be proven at hearing."

(i) Respondents published or issued a communication, notice that its accommodation, advantages would be refused, withheld from or denied to, or that discrimination would be made against, a person on account of his or her sexual orientation, in violation of ORS 659A.409.

On the same day, BOLI's Contested Case Coordinator issued Notices of Hearing in both cases stating the time and place of the hearing as August 5, 2014, beginning at 9:00 a.m., at BOLI's Portland, Oregon office. (Exs. X2, X4)

4) On June 6, 2014, Respondents filed a motion to postpone the hearing because Respondent's attorney Herbert Grey had "pre-paid non-refundable vacation plans" during the time scheduled for hearing. The forum granted Respondents' motion. (Ex. X5)

5) On June 18, 2014, Respondents, through attorneys Grey, Tyler Smith, and Anna Adams, filed an "Election to Remove to Circuit Court (ORS 659A.870(4)(b))" and "Alternative Motion to Disqualify BOLI Commissioner Brad Avakian" from deciding issues in these cases. Respondents requested oral argument on both issues. On June 25, 2014, the Agency filed objections to Respondents' motions. On June 26, 2014, the ALJ denied Respondents' request for oral argument. (Exs. X8, X11)

6) On June 19, 2014, the ALJ held a prehearing conference and rescheduled the hearing to start on October 6, 2014. The ALJ also consolidated the cases for hearing. (Ex. X7)

7) On June 24, 2014, Respondents timely filed an answer and response to both sets of Formal Charges. Respondent admitted that AK had declined RBC's request to design and provide a cake for Complainants' same-sex ceremony but denied that any unlawful discrimination occurred. Respondents raised numerous affirmative defenses, including:

- The Formal Charges fail to state ultimate facts sufficient to constitute a claim.

- Because the Oregon Constitution did not provide for or recognize same-sex unions in January 2013 and the state of Oregon did not issue marriage licenses to same-sex couples at that time, BOLI lacks "any legitimate authority to compel Respondents to engage in creative expression or otherwise participate in same-sex ceremonies not recognized by the state of Oregon contrary to their fundamental rights, consciences and convictions."

- BOLI is estopped from compelling Respondents to engage in free expression or otherwise participate in same-sex ceremonies not recognized by the state of Oregon contrary to their fundamental rights, consciences and convictions.

- The statutes underlying the Formal Charges are unconstitutional as applied to Respondents to the extent they do not protect the fundamental rights of Respondents and persons similarly situated arising under the First and Fourteenth Amendments to the United States Constitution, as applied to the state of Oregon under the Fourteenth Amendment, in one or more of the following particulars, by unlawfully: (a) infringing on Respondents' right of conscience; (b) infringing on Respondents' right to free exercise of religion; (c) infringing on Respondents' right to free speech; (d) compelling Respondents to engage in expression of a message they do not want to express; (e) denying Respondents' right to due process; and (f) denying Respondents the equal protection of the laws.

- The statutes underlying the Formal Charges, as applied, violate Respondents fundamental rights arising under the Oregon Constitution in one or more of the following particulars, by unlawfully: (a) violating Respondents' freedom of worship and conscience under Article I, §2; (b) violating Respondents' freedom of religious opinion under Article I, §3; (c) violating Respondents' freedom of speech under Article I, §8; (d) compelling Respondents to engage in expression of a message they did not want to express; (e) violating Respondents' privileges and immunities under Article I, §20; and (f) violating Article XV, §3.

- The statutes underlying the Formal Charges are facially unconstitutional in that they violate Respondents' fundamental rights arising under the Oregon Constitution to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated.

Respondents also raised four Counterclaims, including:

- Respondents are entitled to costs and attorney fees if they are determined to be the prevailing party.

- The State of Oregon, acting by and through BOLI, has knowingly and selectively acted under color of state law to deprive Respondents of their fundamental constitutional and statutory rights in the basis of religion without taking similar action against county clerks and other state of Oregon officials similarly denying same-sex couples goods and services related to same-sex unions, disparately impacting Respondents, causing economic damages to Respondents in an amount not less than $100,000. BOLI has knowingly and selectively acted under color of state law to deprive Respondents of their fundamental constitutional and statutory rights in the basis of religion without taking similar action against county

clerks and other state of Oregon officials similarly denying same-sex couples goods and services related to same-sex unions, disparately impacting Respondents and causing economic damages to Respondents in an amount not less than $100,000.

- During the period from February 5, 2013 to the present, BOLI's Commissioner published, circulated, issued, displayed, or cause to be published, circulated, issued, displayed, communications on Facebook and in print media to the effect that its accommodations, advantages, facilities, services or privileges would be refused, withheld from or denied to, or that discrimination would be made against Respondents and other persons similarly situated on the basis of religion in violation of ORS 659A.409.

- Under 42 USC § 1983, BOLI is liable to Respondents for depriving Respondents of their rights and protections guaranteed by the United States Constitution "under color of any statute, ordinance, regulation, custom or usage of any State."

(Ex. X10)

8) On July 2, 2014, the ALJ issued an interim order ruling on Respondents' June 18, 2014, motions. That order is reprinted below in pertinent part.[21]

"**Respondents' Putative Election to Circuit Court**

"Respondents assert that they have a 'unqualified right to have these matters removed to the circuit court of either Clackamas, Marion or Multnomah Counties pursuant to ORS 659A.870(4)(b).' ORS 659A.870(4)(b) provides, in pertinent part:

> '(b) A respondent or complainant named in a complaint filed under ORS 659A.820 or 659A.825 alleging an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law may elect to have the matter heard in circuit court under ORS 659A.885. The election must be made in writing and received by the commissioner within 20 days after service of formal charges under ORS 659A.845. If the respondent or the complainant makes the election, the commissioner shall pursue the matter in court on behalf of the complainant at no cost to the complainant.'

"To establish jurisdiction, the Agency's Formal Charges each allege: (1) both cases originated as verified complaints filed by Complainants Rachel Cryer and Laurel Bowman-Cryer; (2) both Complainants were authorized to file their complaints under the provisions of ORS 659A.820; and (3) that the Agency

[21] Footnotes from this interim order and other interim orders quoted at length in the Proposed Findings of Fact – Procedural that are not critical to an understanding of the order have been deleted. The deletions are indicated by a "^" symbol.

issued a Notice of Substantial Evidence Determination in both cases. Respondents deny that they engaged in discrimination based on sexual orientation or any other grounds set forth in ORS chapter 659A but do not dispute these jurisdictional allegations. Accordingly, the forum concludes that respondents were named in a complaint filed under ORS 659A.820. Under ORS 659A.870(4)(b), if the Formal Charges allege an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law, Respondents are entitled to elect to have the matter heard in circuit court under ORS 659A.885, subject to the requirement that such election must be made in writing within 20 days of service of the Formal Charges.

"ORS 659A.145 is titled '**Discrimination against individual with disability in real property transactions prohibited; advertising discriminatory preference prohibited; allowance for reasonable modification; assisting discriminatory practices prohibited.**' As indicated by its title, the provisions of ORS 659A.145 are exclusively limited to real property transactions involving people with disabilities. ORS 659A.421 is titled '**Discrimination in selling, renting or leasing real property prohibited**' and prohibits discrimination in real property transactions based on the race, color, religion, sex, sexual orientation, national origin, marital status, familial status or source of income of any person.

"In contrast, these cases allege violations of ORS 659A.403(3), ORS 659A.406, and ORS 659A.409. All three of these statutes appear in a section of ORS chapter 659A titled '**ACCESS TO PUBLIC ACCOMMODATIONS**' that includes ORS 659A.400 to ORS 659A.415. Neither of the Formal Charges contains any allegations related to discrimination under federal housing law or discrimination based on real property transactions. Rather, the Formal Charges both identify Respondent Melissa Klein's business as a 'place of public accommodation' and allege that Respondent Melissa Klein's business, as a public accommodation, discriminated against Complainants based on their sexual orientation.

"Since the Formal Charges do not allege an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law, they are not subject to the provisions of ORS 659A.870(4)(b) and Respondents have no statutory right to elect to have the matter heard in circuit court.

"MOTION TO DISQUALIFY BOLI COMMISSIONER AVAKIAN BASED ON AVAKIAN'S ACTUAL BIAS

"Respondents ask that Commissioner Avakian be disqualified from deciding the issues presented in the Formal Charges because he has 'publicly demonstrated actual bias against Respondents and others similarly situated, both as a candidate for re-election and as Commissioner.' Based on that alleged actual bias, Respondents contend that the Commissioner's fulfillment of his statutory role by deciding and issuing a Final Order in these cases will deprive

Respondents of due process and other constitutional rights. Respondents concede that BOLI administrative rules OAR 839-050-000 *et seq* contain no provision related to the disqualification of a BOLI Commissioner deciding and issuing a Final Order. However, both Respondents and the Agency acknowledge that procedural due process requires a decision maker free of actual bias^ and that Respondents have the burden of showing that bias. *See Teledyne Wah Chang v. Energy Facility Siting Council,* 298 Or 240, 262 (1985), *citing Boughan v. Board of Engineering Examiners,* 46 Or App 287, 611 P.2d 670, *rev den* 289 Or 588 (1980).

"To show the Commissioner's actual bias and demonstrate that he has already pre-judged this case, Respondents submitted exhibits containing numerous copies of statements made by Commissioner Avakian to the media, in e-mails sent to Respondents' attorney Herb Grey, or on Facebook posts during the Commissioner's candidacy for re-election and as Commissioner. Summarized, those exhibits include the following statements:

"E-Mails sent to Respondents' attorney Herb Grey by 'Avakian for Labor Commissioner'

- "February 16, 2013, in which the Commissioner identified himself as 'Oregon's chief civil rights enforcer,' and (1) noting his effort to convince the Veterans Affairs Department to grant a waiver to retired Air Force Lt. Col. Linda Campbell and her spouse, Nancy Campbell, making them the 'first same-sex couple to receive equal military burial rights' and endorsing the 'Oregonians United for Marriage * * * campaign to bring full marriage equality to Oregon.'
- "April 4, 2013, again noting the Commissioner's efforts on behalf of Linda Campbell, and quoting the comments made by Campbell on the steps of the U.S. Supreme Court a week earlier during the debate on marriage equality.
- "December 10, 2013, in which Commissioner Avakian urged Grey to co-sign his letter to House Speaker Jon Boehner to bring the Employment Non-Discrimination Act up for a vote.
- "December 19, 2013, in which Commissioner Avakian notes his 'progressive' priorities and states '[t]hat's why I defend public education, take on unlawful discrimination, and stand up for equal rights for every last Oregonian.'
- "January 10, 2014, in which Commissioner Avakian stated '[a]t the Bureau of Labor and Industries, it's my job to protect rights of Oregonians in the workplace * * * and protect everyone's civil rights in housing and public accommodations.'
- "March 4, 2014, in which Commissioner Avakian stated: 'I believe in an Oregon where everyone has the opportunity to get married, raise a family and get ahead. Gay or straight, male or female, white, black, or brown -- everyone deserves an equal shot at making it in Oregon. That's why I will continue to fight for marriage equality, a woman's right to choose, better wages, and robust non-discrimination laws that protect gays and lesbians.'
- "March 12, 2014, in which Commissioner Avakian noted that no one filed to run against him as Labor Commissioner and stated, among other things: 'We built a

coalition of civil rights champions, business leaders, educators, working families and labor leaders, and many, many more. Just think – it wasn't very long ago that right-wing activists were calling for my head because of our strong support for civil rights and equality laws in Oregon.'

- "May 19, 2014, in which Commissioner Avakian stated: 'A few minutes ago, we received word that all Oregonians, including same-sex couples, will now have the freedom to marry the person they love. As many had hoped, our federal court ruled Oregon's ban on same-sex marriage unconstitutional under the United States Constitution. This is an important moment in our state's history. The ruling also reflects what so many others have felt all along -- that Oregonians always eventually open their hearts to equality and freedom. The victory is a testament to the strength and energy of so many who dedicated themselves to making our laws match our highest ideals. Thank you. The win comes after news earlier this month that the Oregon Family Council has abandoned its campaign for a ballot measure to allow corporations to discriminate against loving same-sex couples. As a result, Oregon's law will continue to say that no corporation can deny service, housing or employment based on sexual orientation or gender identity. And as always, I will continue to hold those responsible that violate the rights of Oregonians and enthusiastically support those that go the extra mile for fairness. Here's to two significant victories that expand freedom for Oregonians – and the incredible efforts by friends and neighbors that made today possible. It's been a remarkable journey.'

"Independent Media

- "August 14, 2013, Oregonian article written by Maxine Bernstein entitled 'Lesbian couple refused wedding cake files state discrimination complaint' that contains quotes by Complainant Cryer, Respondent Melissa Klein, and Commissioner Avakian. Commissioner Avakian was quoted as follows:

  - 'We are committed to a fair and thorough investigation to determine whether there is substantial evidence of unlawful discrimination,' said Labor Commissioner Brad Avakian.
  - 'Everybody's entitled to their own beliefs, but that doesn't mean that folks have the right to discriminate,' Avakian said, speaking generally.
  - 'The goal is never to shut down a business. The goal is to rehabilitate,' Avakian said. 'For those who do violate the law, we want them to learn from that experience and have a good, successful business in Oregon.'

"Facebook Posts on Commissioner Avakian's Facebook Page

- "April 26, 2012: 'Today, Basic Rights Oregon honored me with the 2012 Equality Advocate Award. I appreciate this recognition, but I am far more appreciative of all the efforts and accomplishments that BRO has made for Oregon's LGBT community. Thank you for including me in the incredible work that you do.'

- "February 15, 2013, with the same text included in February 16, 2013, e-mail to Herb Grey.
- "February 5, 2013, with a link to 'Ace of Cakes offers free wedding cake for Ore. gay couple www.kgw.com:' 'Everyone has a right to their religious beliefs, but that doesn't mean they can disobey laws already in place. Having one set of rules for everybody assures that people are treated fairly as they go about their daily lives. The Oregon Department of Justice is looking into a complaint that a Gresham bakery refused to make a wedding cake for a same-sex marriage. It started when a mother and daughter showed up at Sweet Cakes by Melissa looking for a wedding cake.'
- "March 13, 2013: 'Tomorrow morning, I'll be testifying before the U.S. Senate about Oregon Lt. Col. Linda Campbell; she made history when she was the first person to ever get approval to bury her same-sex spouse in a national cemetery...'
- "March 22, 2013, with a link to 'Speakers announced for marriage equality rally in D.C.-Breaking News-Wisconsin Gazette – Lesbian www.wisconsingazette.com:' 'Thrilled to see Lt. Col. Linda Campbell among the headliners for next week's rally in front of the U.S. Supreme Court. LIKE this status if you support marriage equality for all loving, caring couples.'
- "March 26, 2013: 'Our country is on a journey of understanding. As more and more people talk to gay and lesbian friends and family about why marriage matters, they're coming to realize that this is not a political issue. This is about love, commitment and family. I'll be joining Oregon United for Marriage for a rally at the Mark O. Hatfield Courthouse in downtown Portland at 5pm. Join us!'
- "June 8, 2013: 'Proud to support Sen. Jeff Merkley's fight for the Non-Discrimination Act in Congress. All Americans deserve a fair shot at a good job and the opportunity for a better life. – at Q Center.'
- "June 26, 2013: 'Huge day for equality across America! In a few minutes, I'm heading to a celebration rally with Oregon United for Marriage at Terry Schrunk Plaza in downtown Portland – see you there?'
- "March 27, 2013: Link to Commissioner Avakian speaking 'on the importance of people gathering in front of the Hatfield Courthouse on the day the Supreme Court heard arguments on Prop. 8.' and statement 'I just got off the phone with Lt. Col. Linda Campbell, who said that the crowd in front of the Supreme Court was awesome and absolutely electric.'
- "May 9, 2013, with a link to 'Victory! Discrimination measure Withdrawn – Oregon United for Marriage:' 'Really great news. It's also a tribute to the fact that Oregonians are fundamentally fair and have little stomach for such a needlessly divisive fight.'
- "March 12, 2014, shared link: 'Conservative Christian group's call for Labor Commissioner Brad Avakian's ouster falls flat. www.oregonlive.com. Oregon Labor Commissioner Brad Avakian, despite criticism of his enforcement action against a Gresham bakery that refused to serve a lesbian wedding, wound up with no opponent in this year's election.'
- "May 19, 2014: 'Today's victory is a testament to the strength and energy of so many who dedicated themselves to making our laws match our highest ideals. If

you've talk to your neighbors, collected signatures, or attended a marriage rally, you've played an important role in Oregon's story. Thank you -- and congratulations!'

"Summarized, these exhibits fall into two categories: (1) the Commissioner's e-mails and Facebook posts generally opposing discrimination against gays and lesbians and advocating the legality of same-sex marriage in Oregon and not addressed to these cases; and (2) remarks specific to the present cases. The vast majority of exhibits fall into the first category. Only two exhibits fall into the second category -- the Commissioner's February 5, 2013, Facebook post and the August 14, 2013, Oregonian article.

"ORS chapter 659A contains Oregon's anti-discrimination laws related to employment, public accommodations, and real property transactions and delegates the enforcement of those laws to BOLI's Commissioner. The Legislature's purpose in adopting the provisions of ORS chapter 659A is set out in ORS 659A.003. In pertinent part, ORS 659A.003 provides that:

> 'The purpose of this chapter is * * * to ensure the human dignity of all people within this state and protect their health, safety and morals from the consequences of intergroup hostility, tensions and practices of unlawful discrimination of any kind based on race, color, religion, sex, sexual orientation, national origin, marital status, age, disability or familial status.'

"ORS 651.030(1) provides that '[t]he Bureau of Labor and Industries shall be under the control of the Commissioner of the Bureau of Labor and Industries * * *.' As such, BOLI's Commissioner has the duty to see that the stated purpose of ORS chapter 659A is carried out. In addition to enforcing the various statutes contained in that chapter through the administrative process created by the Legislature,^[22] the Commissioner's duties include, among other things, initiating programs of 'public education calculated to eliminate attitudes upon which practices of unlawful discrimination because of * * * sexual orientation * * * are based.'^ In short, the Commissioner has been instructed by the Legislature itself to raise public awareness about practices that the Legislature has declared to be unlawful discrimination in ORS chapter 659A. The forum finds that all of the Commissioner's remarks contained in the first category – remarks *generally* opposing discrimination against gays and lesbians and advocating the legality of same-sex marriage in Oregon – fall within the scope of this particular job duty. As more articulately stated by the Agency in its objections, '[n]one of this material is inconsistent with the exercise of the commissioner's statutory obligations as an elected official.'

[22] *See* footnote 21.

"The forum next examines the two exhibits that fall within the second category that contain remarks specific to the present cases – the Commissioner's February 5, 2013, Facebook post and the August 14, 2013, Oregonian article. The Commissioner's February 5, 2013, Facebook post contains the following content, consisting of a link to 'Ace of Cakes offers free wedding cake for Ore. gay couple www.kgw.com' and the following remark by the Commissioner that Respondents contend shows actual bias:

> 'Everyone has a right to their religious beliefs, but that doesn't mean they can disobey laws already in place. Having one set of rules for everybody assures that people are treated fairly as they go about their daily lives. The Oregon Department of Justice is looking into a complaint that a Gresham bakery refused to make a wedding cake for a same-sex marriage. It started when a mother and daughter showed up at Sweet Cakes by Melissa looking for a wedding cake.'

"The Oregonian article, printed six days after the two Complainants filed their complaints with BOLI's CRD, contains two remarks attributed to the Commissioner that Respondents contend demonstrate his actual bias against Respondents. Those remarks are:

- '"Everyone is entitled to their own beliefs, but that doesn't mean that folks have the right to discriminate," Avakian said, speaking generally.'
- '"The goal is never to shut down a business. The goal is to rehabilitate," Avakian said. "For those who do violate the law, we want them to learn from that experience and have a good, successful business in Oregon."'

"In *Samuel v. Board of Chiropractic Examiners*, 77 Or App 53, 712 P2d 132 (1985), Samuel, a chiropractor, had his chiropractor's license suspended and his right to perform minor surgery permanently revoked by the Board of Chiropractic Examiners after he performed a vasectomy on a patient. The issue before the Board was whether Samuels had exceeded the scope of his license by performing 'major' surgery, whereas chiropractors are only allowed to perform 'minor' surgery. In their decision, the Oregon Court of Appeals, after determining that a vasectomy was 'major' surgery, considered whether the Board's decision should be overturned based on the alleged bias of two members of the Board, Bolin and Camerer, who participated in the disciplinary hearing and resulting decision to suspend Samuels. Prior to Samuels's hearing, Bolin opined that a vasectomy was not minor surgery. The Court, citing *Trade Comm'n v. Cement Institute,* 333 U.S. 683 (1948), held that Bolin's expression of opinion, which the Court characterized as 'a preconceived point of view concerning an issue of law' -- was 'not an independent basis for disqualification' of Bolin. Camerer, in contrast, met with four chiropractors at a restaurant, brought the Board's file on Samuels, and allowed the other chiropractors to examine it. Prior to the Board's suspension decision, Samuels sought censure against Camerer and sued Camerer for disclosing the contents of the file. The Court held:

'As a defendant in the lawsuit which arose out of the very matter pending before the Board, Camerer may have harbored some animosity towards [Samuels]. The possibility of personal animosity and the appearance of a substantial basis for bias is sufficient that, under the circumstances, he should have disqualified himself.'

"To show that the Commissioner has prejudged the cases before the Forum, Respondents quote the Commissioner's two 'second category' statements as follows: 'Respondents are "disobey[ing] laws" and need to be "rehabilitated."' However, this 'quote' combines selected portions of remarks made at two different times and misquotes the latter. Respondents seek to create an inference of bias that cannot reasonably be drawn from Respondents' exhibits as a whole. The Forum finds that the accurately quoted 'second category' remarks, while made in the context of Respondents' alleged discriminatory actions and the Complainants' complaints, are remarks reflecting the Commissioner's attitude generally about enforcing Oregon's anti-discrimination laws and, at most, show 'a preconceived point of view concerning an issue of law' that, under *Samuels*, is not a basis for disqualification due to bias.

"RESPONDENTS' ADDITIONAL ARGUMENTS

"In addition to their 'actual bias' argument, Respondents contend that the Commissioner should be disqualified for two other reasons: (1) The Commissioner's participation as a decision maker in these cases would violate the policy expressed in ORS 244.010 regarding ethical standards for public officials because of his conflict of interest; and (2) His participation as a decision maker in these cases would violate Oregon Rules of Professional Conduct (ORPC) 3.6 related to lawyers making public statements about matters in litigation[23] and Oregon's Code of Judicial Ethics.^

"Ethical Standards for Public Officials – ORS chapter 244 & Conflict of Interest

"Respondents contend that the Commissioner's actual bias and conflict of interest demonstrate a partiality towards these cases that requires the Commissioner to disqualify himself from this case. As noted earlier, Respondents have not demonstrated actual bias on the Commissioner's part. Respondents assert that, under ORS chapter 244, 'the state of Oregon and its respective agencies, including BOLI, cannot ethically sit in judgment of Respondents for conduct of which it may be legally culpable,' and cite the

[23] Commissioner Avakian is an attorney and a member of the Oregon State Bar.

following 'multiple conflicts of interest on the part of the Commissioner and BOLI as grounds for disqualification:

> '(1) [T]he Oregon Constitution and ORS 659A.003, *et seq,* not to mention the U.S. Constitution, require BOLI to respect and protect Respondents' constitutionally-protected religion, conscience and speech rights to an even greater degree than it does complainants' statutory rights; and
>
> '(2) [T]he State of Oregon, including BOLI itself, has potential legal liability as a place of public accommodation under ORS 659A.400(1)(b) and (c) because, at the time of the original defense and the filing of complaints by complainants, the state of Oregon itself refused to recognize same sex marriage relationships, just as Respondents have chosen not to participate in complainants' same-sex ceremony.'

"'Conflict of interest'" is defined under ORS chapter 244 in ORS 244.020:

> '(1) "Actual conflict of interest" means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (12) of this section.
>
> '* * * * *
>
> '(12) "Potential conflict of interest" means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated[.]'

"Respondents identify no conflict of interest by the Commissioner based on a pecuniary benefit or detriment that fits within these definitions. As noted by the Agency in its response, the Oregon Government Ethics Commission, not the Administrative Law Judge, is responsible for determining the Commissioner's ethical obligations under ORS chapter 244. ORS 244.250 *et seq.*

"ORPC & Canons of Judicial Ethics

"The Administrative Law Judge does not have the authority to enforce the ORPC or Code of Judicial Ethics. However, I note that Respondents have not shown that any of Commissioner Avakian's remarks contained in Respondents' exhibits 'will have a substantial likelihood of materially prejudicing' this contested case proceeding. *ORPC 3.6.* The Code of Judicial Ethics does not apply to the

Commissioner because he is not 'an officer of a judicial system performing judicial functions.'[24]

"**Conclusion**

"Respondents' motion to disqualify Commissioner Avakian from deciding the issues presented in the Formal Charges and issuing a Final Order is **DENIED**."

(Ex. X12)

9) On August 13, 2014, the ALJ issued an interim order that reset the hearing to begin on October 6, 2013, noting that the Agency and Respondents had both stated in an earlier prehearing conference it might take up to a week to complete the hearing. The same day, the ALJ issued an interim order requiring case summaries and setting a filing deadline of September 22, 2014. (Ex. X14)

10) On August 25, 2014, Respondents moved to postpone the hearing based on Respondents' prescheduled plans to be out of town on October 6, 2014. The Agency did not object and the ALJ reset the hearing to begin on October 7, 2014. (Ex. X17, X18)

11) On September 4, 2014, Respondents filed motions to depose Complainants and Cheryl McPherson and for a discovery order related to the Agency's objections to Respondents' informal discovery request for admissions, interrogatory responses, and documents. The Agency filed timely objections to both motions. (Exs. X20 through X24)

12) On September 11, 2014, the Agency moved for a discovery order for the production of four types of documents. (Ex. X25)

13) On September 15, 2014, Respondents filed a motion for summary judgment "on each or all of the claims asserted against them." (Ex. X26)

14) On September 16, 2014, the Agency moved for a Protective Order regarding Complainants' medical records both informally requested by Respondents and in Respondents' motion for a discovery order. The Agency attached five pages of medical records related to LBC and asked that the forum conduct an *in camera* inspection "to determine what, if any, of the information contained within these records is relevant or calculated to lead to the discovery of admissible evidence and must be turned over to Respondents." After conducting an *in camera* review, the ALJ made

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[24] *See* ORS 1.210 – "Judicial officer defined. A judicial officer is a person authorized to act as a judge in a court of justice." BOLI does not operate a "court of justice," but is an administrative agency whose contested case proceedings are regulated by the Administrative Procedures Act, ORS 183.411 to ORS 183.470.

minor redactions unrelated to LBC's medical diagnosis and released the records to Respondents, accompanied by a Protective Order. (Exs. X27, X44)

15) The ALJ held a prehearing conference on September 18, 2014. After the conference, the ALJ issued an interim order summarizing his oral rulings, including his decision to postpone the hearing to give him time to rule on Respondents' motion for summary judgment before the hearing began. (Ex. X32)

16) On September 24, 2014, the Agency filed Amended Formal Charges in both cases. (Ex. X38)

17) On September 25, 2014, the ALJ issued an interim order ruling on Respondents' motion for a discovery order for documents, interrogatory responses, and admissions. In pertinent part, the ruling read:

> "As an initial matter, the Agency argues that Complainants are not subject to discovery rules under OAR 839-050-0020 because they are not 'parties' and therefore are not 'participants' under OAR 839-050-0200(1). In numerous prior cases with the forum * * * a respondent has been allowed to request a discovery order to obtain documents and information from a complainant through the Agency that are discoverable under OAR 839-050-0020(7). *See In the Matter of Toltec*, 8 BOLI at 152 (noting that although the complainant was not a party, complainant still was 'a compellable witness' and the Agency was ordered to produce evidence over which it had power or authority). *See also In the Matter of Columbia Components, Inc.,* 32 BOLI 257, 259-61 (2013)(requiring complainant to verify that the interrogatory responses were true, and that complainant respond to a specific interrogatory request to which the Agency had objected); *In the Matter of Dr. Andrew Engel, DMD, PC,* 32 BOLI 94, 100 (2012) (requiring the Agency to produce any documents responsive to respondents' requests that appeared reasonably likely to produce information generally relevant to the case, including complainant's tax returns for relevant years).
>
> **A. "Interrogatories**
>
> "Respondents requested an order requiring the Agency to fully respond to four separate interrogatories. To the extent this order requires Complainants, through the Agency, to respond to the interrogatories, Complainants must sign them under oath as required by OAR 839-050-0200(6).
>
> ***"Interrogatory No. 7***
>
> "Respondents requested that the Agency explain in detail the nature of the physical harm Complainants allege in the Formal Charges ('Charges'). The Agency responded that both Complainants experienced 'varying physical manifestations of stress' and that '[a]ny further medical information will be provided pursuant to a protective order.' I agree that Respondents are entitled to

know more specifically what physical damages have been allegedly sustained. I order the Agency to have Complainants, through the Agency, respond to this interrogatory.

"Interrogatory No. 8

"Respondents requested an explanation 'in detail [of] the nature of the mental harm Complainants alleged resulted from the events alleged in the Complaint.' The Agency objected on the grounds that the request was redundant and vague, as it was unclear how the interrogatory differed from the interrogatory asking for information as to emotional harm allegedly suffered by Complainants. In its response to the motion, the Agency 'stipulates' that 'emotional, mental' suffering is any suffering not attributed to physical suffering, and that information was provided in response to Interrogatory No. 6. Based on the Agency's stipulation that 'emotional [and] mental' suffering are the same, the response to this Interrogatory appears to be sufficient and, therefore, I DENY Respondents' request for additional information in response to this interrogatory.

'Interrogatory No. 11

"This interrogatory also relates to damages. With this interrogatory, Respondents requested an explanation as to the actions taken by Complainants to remove their public social media profiles after a complaint was filed with the Department of Justice on January 18, 2013. The Agency objected on the basis of relevancy. Respondents assert that this request is relevant because '[m]uch, if not all of the damage Complainants have alleged to this point revolve around the media attention they received as a result of Complainant Laurel Bowman-Cryer's filing a Complaint with the Department of Justice.' Respondents further assert that Complainants have told Respondents they had to travel out of town because of attention and publicity. Respondents claim that the removal of social media profiles is relevant to the assessment of damages or mitigation of damages. In its response to the motion, the Agency reiterates its objection on the basis of relevance, but does not directly address the arguments made in Respondents' motion as to damages allegedly caused by publicity and media attention. On September 22, 2014, the Agency timely filed a statement addressing this issue. In pertinent part, the Agency stated:

> "Respondents caused substantial harm to Complainants, in part, through their intentional posting of the Department of Justice complaint on their social media website, which included Complainants' home address. This affected Complainants by exposing them to unwanted and, sometimes, unnerving contact from the public. * * * Complainants have had little to no contact with media, except through their attorney Mr. Paul Thompson. * * * The agency's position is that Complainants' damages were a direct result of Respondents intentionally posting the DOJ complaint on the Internet."

Based on the information and representations before me, I am unable to determine at this time if Interrogatory No. 11 is 'reasonably likely to produce information that is generally relevant to the case.' Therefore, the Agency is not required to respond to this interrogatory. If Respondents establish the relevance of this interrogatory in their depositions of Complainants, Respondents may renew their motion for a discovery order regarding this interrogatory.

"Interrogatory No. 12

"Respondents have requested an explanation 'in detail [of] any involvement or communication Complainants had with any group involved in boycotting Respondents' business.' The Agency objected on the basis of relevance, over breadth, and because the requested information is outside the possession or control of the agency. As to relevancy, I view this request as similar to Interrogatory No. 11. Based on the information and representations before me, I am unable to determine at this time if Interrogatory No. 12 is reasonably likely to produce information that is generally relevant to the case. Therefore, the Agency is not required to respond to this interrogatory. If Respondents establish the relevance of this interrogatory in their depositions of Complainants, Respondents may renew their motion for a discovery order regarding this interrogatory.

"B. Production of Documents

"* * * * *

"Request No. 2

"Respondents requested a copy of records 'in the Agency's possession' as to the state policy in January of 2013 for issuing marriage licenses to same sex couples. The Agency objected on the basis of relevance and also states that such documents are not within the possession or control of the Agency. Respondents claim such documents are relevant to show whether the "Agency is aware" that same sex marriage was not recognized in Oregon at the time of the acts in question in this case. I deny Respondents' motion because (1) the Agency's awareness of the status of same sex marriage in Oregon is not likely to lead to relevant evidence^; (2) the same sex marriage laws in Oregon are a matter of public record; and (3) the Agency has indicated it has no such documents in its possession.

"Request No. 7

"This request seeks medical records for any medical visits relating to Complainants' request for emotional, mental or physical damages. Respondents' motion is GRANTED. * * *

"Request No. 9

"Each of these requests for production seeks documentation and photographs of the actual wedding cake served at Complainants' wedding ceremony. The Agency objected to these requests on the basis of relevancy. The fact that a cake was purchased from another cake baker is likely relevant and, thus, I grant this motion only as to a receipt or invoice for showing the purchase of the cake and one photograph of the cake. Any other requested information is overly broad. Furthermore, for the reasons set forth below regarding Request for Production No. 10, the Agency need not produce photographs of Complainants, their families, and the actual wedding ceremony.

"Request No. 10

"In this request, Respondents have asked for photos, videos, or audio recordings of Complainants' wedding ceremony. The Agency has objected on the grounds that the requested documents are irrelevant. The Agency further explains that Complainants are wary of turning over these materials to Respondents because Respondents previously posted Complainants' home address on a social media site. Unless the Agency is intending to offer photos, videos or audio recordings as evidence at the hearing, then I agree with the Agency's objections and DENY the motion as to these documents. If the Agency intends to offer them as evidence at hearing, then the Agency must turn them over to Respondents.

"Request No. 11

"Request No. 11 seeks communications made by Complainants to the media or on social media sites 'relating to Respondents and the events leading to the filing of Formal Charges against Respondents.' I find that this request is reasonably likely to produce information that is generally relevant to the case. * * * Respondents' request is GRANTED.

"Request No. 12

"Request No. 12 seeks '[a]ny social media posts, blog posts, emails, text messages, or other record or communication showing Complainant's involvement with a boycott of Respondents or their business.' Based on the information and representations currently before me, I am unable to determine at this time if this request is reasonably likely to produce information that is generally relevant to the case. Therefore, Respondents' request is DENIED. If Respondents establish the relevance of this request in their depositions of

Complainants, Respondents may renew their motion for a discovery order regarding this request.

"Request No. 16

"Request No. 16 seeks the "names and addresses of any person, media outlet, or other entity with whom Complainants or Cheryl McPherson spoke regarding the events leading to this Complaint or the Complaint filed with the Department of Justice." I find that Respondents' request, with respect to Complainants, is reasonably likely to produce information that is generally relevant to the case, and is GRANTED. Respondents' request with regard to Cheryl McPherson is DENIED.

"Request No. 17

"Request No. 17 seeks the production of '[a]ny receipt, invoice, contract, or other writing memorializing the purchase of the cake by Complainants from Respondent for Cheryl McPherson's wedding.' I find that Respondents' request is not reasonably likely to produce information that is generally relevant to the case. Respondents' request is DENIED.

"Request No. 18

"Request No. 18 seeks the production of '[a]ny photos, videos, or other record of the cake Complainants purchased from Respondent for Cheryl McPherson's wedding.' I find that Respondents' request is not reasonably likely to produce information that is generally relevant to the case. Respondents' request is DENIED.

"Request No. 22

"Request No. 22 seeks '[a]ll posting by Complainants or Cheryl McPherson to any social media website, including but not limited to Facebook, Twitter, LinkedIn, MySpace, Instagram, and SnapChat from January 2013 to the present.' I find that this request, with respect to Complainants, is reasonably likely to produce information that is generally relevant to the case. * * * However, Complainants are only required to provide postings that contain comments about the facts of this case, comments about Respondents, or comments that relate to their alleged damages. Respondents' request with regard to Cheryl McPherson is DENIED.

"Request No. 23

"Request No. 23 seeks '[a]ny recording or documents showing that Complainants ever removed any public social media profiles or caused to be hidden from public view.' Based on the information and representations currently before me, I am unable to determine at this time if this request is reasonably likely to produce information that is generally relevant to the case. Therefore, Respondents' request is DENIED. If Respondents establish the relevance of this request in their depositions of Complainants, Respondents may renew their motion for a discovery order regarding this request.

B. "Requests for Admissions

"* * * * *

"Request No. 4

"Respondents ask the Agency to admit that the State of Oregon did not recognize same sex marriage on or about January 17 and 18, 2013. The Agency objected on the basis of relevancy. For the reasons set forth above in regards to *Request for Production No. 2*, Respondents' request is DENIED.

"Requests Nos. 7 & 8

"Respondents ask the Agency to admit that Complainants Laurel Bowman-Cryer and Rachel Cryer 'did not at any time on or after January 17, 2013, delete or remove her public Facebook profile.' The Agency objects on the basis of relevance. Based on the information and representations currently before me, I am unable to determine at this time if this request is reasonably likely to produce information that is generally relevant to the case. Therefore, Respondents' request is DENIED. If Respondents establish the relevance of this request in their depositions of Complainants, Respondents may renew their motion for a discovery order regarding this request.

"Request No. 9

"Respondents ask the Agency to admit that Complainants were not issued a marriage license between January 17, 2013, and May 18, 2014. The Agency objects for the same reasons it objected to *Request for Production No. 2*, which sought similar information. This request is DENIED for the same reasons set out in my denial to *Request for Production No. 2.*

(Ex. X41)

18) On September 25, 2014, the ALJ issued an interim order ruling on Respondents' motion for a discovery order for depositions. In pertinent part, the ruling read:

> **"Complainants Laurel Bowman-Cryer and Rachel Cryer**
>
> "I agree with the Agency that, given the availability of other discovery methods, the forum typically does not allow for depositions, as well as the fact that the Agency typically produces an investigative file with detailed notes of interviews of witnesses. However, this case poses two unique circumstances. First, based on the information I have received to date from Respondents and the Agency, I have been unable to determine whether or not information and documents sought in response to Interrogatories Nos. 11 and 12 and Requests for Production Nos. 12 and 23 are reasonably likely to produce information that is generally relevant to the case. If so, it may result in the production of evidence that bears a significant relationship to Complainants' alleged damages. Respondents should be able to ascertain this in a deposition and, as stated in my interim order related to those Interrogatories and Requests for the Production, may renew their request for a discovery order if they can show that testimony given during the depositions shows those requests are reasonably likely to produce information is generally relevant to the case. I also note that there appears to be a unique damages claim for reimbursement of expenses for out-of-town trips to Seattle, Tacoma (two trips), and Lincoln City, with expenses for lodging, gas, and food at a number of establishments. As Respondents point out in their motion, they 'would use all of their 25 interrogatories just trying to determine exactly how one or two of these alleged expenses was at all related to Respondents' alleged unlawful conduct.' I am persuaded by Respondents that they have sought informal discovery on the issue of damages through other methods and do not have adequate information as to damages.
>
> "In this unusual set of circumstances, I find that Respondents should be permitted to briefly depose Complainants, with the scope of the depositions limited to Complainants' claim for damages. Unless unexpected circumstances arise that require an ALJ's intervention, the depositions should take no longer than 90 minutes per Complainant. After the scheduled September 29, 2014, prehearing conference in this matter, the forum will issue a subsequent order stating a deadline for when the depositions should be completed. The Agency and Complainants' counsel are instructed to cooperate with Respondents so that the depositions can be conducted by that deadline. Respondents are responsible for any court reporter costs associated with the deposition, and Respondents and the Agency must each pay for their own copy of transcripts if transcripts are prepared.

"**Cheryl McPherson**

"Respondents argue that they are entitled to depose Cheryl McPherson, a material witness in this case, because they:

> "strongly dispute some of the factual claims made by the complainants, Respondents need to know whether Cheryl McPherson will validate complainant's (sic) testimony under oath before the hearing. * * * In this case, multiple parties to the same conversations recall substantially different events, and subtle differences in retelling will substantially affect a credibility determination that Administrative Law Judge must make. Without being able to compare such testimony prior to hearing, the Respondents are substantially prejudiced."

"I do not find that Respondents have demonstrated the need to depose witness Cheryl McPherson. I note that Respondents are typically provided with notes from investigative interviews of witnesses. Neither the Agency nor Respondents have provided information as to whether that occurred in this case. However, unless Respondents did not receive the usual investigative notes of the Agency's interview with Cheryl McPherson or no such notes exist because McPherson was never interviewed, I deny Respondents' request to take her deposition."

(Ex. X42)

19) On September 25, 2014, the ALJ issued a discovery order requiring Respondents to produce documents in three of the four categories sought by the Agency in its September 11, 2014, motion. (Ex. X43)

20) On September 29, 2014, the ALJ held a prehearing conference. During the conference, mutually acceptable new hearing dates, discovery status and a possible alternative to depositions, and filing deadlines were discussed and the ALJ made several rulings, summarized in a September 30, 2014 interim order that stated:

> "(1) Subject to the availability of Respondents and Complainants, the hearing is reset to begin at 9:00 a.m. on Tuesday, March 10, 2015, at the Tualatin Office of Administrative Hearings. If the hearing is not concluded by late afternoon on Friday, March 13, the hearing will reconvene at 9:00 a.m. on Tuesday, March 17, 2015, at the same location. The Agency and Respondents' counsel will let me know this week of the availability of Respondents and Complainants on those dates.
>
> "(2) Respondents have until October 2, 2014, to file answers to the Amended Formal Charges.

"(3) The Discovery ordered in my rulings on the Agency's and Respondents' motions for Discovery Orders must be mailed or hand-delivered no later than October 14, 2014. This does not include Complainants' depositions.

"(4) My order requiring Complainants to submit to depositions by Respondents is 'on hold' for the present.

"(5) As a potential means for avoiding the necessity of depositions, Respondents proposed that they be allowed to serve 30 additional interrogatories to the Agency for Complainants' responses. The Agency objected to 30 but agreed to 25. I agreed and ruled that Respondents could serve 25 additional interrogatories to the Agency for Complainants' response, with the responses due 14 days after the date of service. At the Agency's request, I also ruled that, should they elect to do so, the Agency may also serve up to 25 interrogatories to Respondents' counsel for Respondents' response, noting that the Agency is also entitled to do that under the rules since they have issued no prior interrogatories.

"(6) Case Summaries must be filed no later than February 24, 2015.

"(7) We also discussed the most efficient means of procedure regarding Respondents' motion for summary judgment and the Agency's pending response, considering the fact that the Agency has filed Amended Formal Charges since Respondents filed a motion for summary judgment. Respondents' counsel stated their intention in filing the motion was to resolve both cases in their entirety, if possible. After discussion, I ruled that the Agency did not need to respond to Respondents' pending motion for summary judgment and I will not rule on that motion. Rather, Respondents will file another motion for summary judgment that will incorporate the matters raised in the Amended Formal Charges so that all outstanding issues can be addressed in my ruling on Respondents' motion. It was mutually agreed that Respondents could have until October 24, 2014, to file an amended motion for summary judgment and that the Agency would have until November 21, 2014, to file its written response. Accordingly, I order that Respondents must file their amended motion for summary judgment no later than October 24, 2014, and the Agency must file its response no later than November 21, 2014. Respondents' counsel asked if oral argument would be allowed on the motion and I ruled that it would not.

"(8) The Agency stipulated that it is not seeking reimbursement for the out-of-pocket expenses listed in response to Respondents' Interrogatory #16. In response to my question, the Agency stated that it is not willing to stipulate that those trips are not relevant to the issue of damages."

(Ex. X50)

21) On October 2, 2014, Respondents filed Answers to the Agency's Amended Formal Charges. (Ex. X51)

22) On October 24, 2014, Respondents re-filed their motions for summary judgment. (Ex. X53)

23) On November 21, 2014, the Agency filed a response to Respondents' motion for summary judgment and a cross-motion for partial summary judgment "on the same issues moved upon by Respondents." (Ex. X54)

24) On December 8, 2014, the Agency filed a second motion for a discovery order. On December 15, 2014, Respondents filed a response stating that they had "now provided the Agency with all responsive documents * * * not subject to the attorney-client privilege." On December 18, 2014, the Agency withdrew its motion for a discovery order, stating that Respondents had satisfied the Agency's request for production. (Ex. X57)

25) On December 19, 2014, Respondents filed a response to the Agency's cross-motion for summary judgment. (Ex. X61)

26) On January 15, 2015, the Agency moved for a Protective Order regarding "additional medical documentation from Complainants that is subject to discovery." The Agency attached 13 pages of medical records, dated September 30, 2014, through January 20, 2015, related to LBC and asked that the forum conduct an *in camera* inspection "to determine what, if any, of the information contained within these records is relevant or calculated to lead to the discovery of admissible evidence and must be turned over to Respondents." Before ruling, the ALJ instructed the Agency to tell the forum whether the Agency contended "that Bowman-Cryer continued to experience "emotional, mental, and physical suffering" caused by Respondents' alleged unlawful actions during the period of time covered by these records. (Ex. X64)

27) On January 15, 2014, Respondents renewed their motion to depose Complainants, based on part on Complainant's alleged inadequate responses to Respondents second set of interrogatories. On January 22, 2014, the Agency objected to Respondents' motion. On January 29, 2014, the ALJ issued an interim order instructing Respondents to provide a copy of the interrogatories and the Agency's responses before the ALJ ruled on Respondents' motion. (Exs. X62, X63, X66)

28) On January 29, 2015, the ALJ issued an interim order ruling on Respondents' re-filed motion for summary judgment and the Agency's cross-motion for summary judgment. The interim order is reprinted verbatim below, pursuant to OAR 839-050-0150(4)(b):

"Introduction

"Respondents operate a bakery under the name of Sweetcakes by Melissa.[25] These cases arise from Respondents' refusal to provide a wedding cake for Complainants Rachel Cryer ('Cryer') and Laurel Bowman-Cryer ('Bowman-Cryer') after Respondents Aaron Klein ('A. Klein') and Melissa Klein ('M. Klein') learned that the wedding would be a same-sex wedding.

"As an initial matter, the forum notes Respondents' request for oral argument with regard to their motion. Respondents' request for oral argument is **DENIED.**

"Procedural History

"On June 4, 2014, the Civil Rights Division of the Oregon Bureau of Labor and Industries ('Agency') issued two sets of Formal Charges alleging that M. Klein violated ORS 659A.403(3) by refusing to provide Complainants a wedding cake for their same-sex wedding based on their sexual orientation and that A. Klein aided and abetted M. Klein, thereby violating ORS 659A.406. The Charges further alleged that M. Klein and A. Klein, who was acting on behalf of M. Klein, 'published, circulated, issued or displayed or caused to be published, circulated, issued or displayed, a communication, notice, advertisement or sign to the effect that its accommodations, advantages, facilities, services or privileges would be refused, withheld from or denied to, or that discrimination would be made against, a person on account of his or her sexual orientation,' causing M. Klein to violate ORS 659A.409 and A. Klein to violate ORS 659A.406 by aiding and abetting M. Klein in her violation of ORS 659A.409. The Agency sought $75,000 in damages for 'emotional, mental, and physical suffering' for each Complainant, plus 'out of pocket expenses to be proven at hearing.' On June 19, 2014, the ALJ consolidated the two cases for hearing.

"Respondents, through joint counsel Herbert Grey, Tyler Smith, and Anna Adams (now Anna Harmon), timely filed Answers to both sets of Formal Charges, raising numerous affirmative defenses and four counterclaims.

"On September 15, 2014, Respondents filed a motion for summary judgment with respect to both sets of Charges, based primarily on legal argument supporting the constitutional affirmative defenses raised in their Answers. On September 16, 2014, the Agency moved for an extension of time to respond to Respondents' motion until September 26, 2014. On September 17, 2014, the

[25] At the time of the alleged discrimination, Sweetcakes by Melissa was an inactive assumed business name. On February 1, 2013, Sweetcakes by Melissa was re-registered as an assumed business name with the Oregon Secretary of State Business Registry, with M. Klein listed as the registrant and A. Klein listed as the authorized representative.

ALJ granted the Agency's motion. On September 17, 2014, the ALJ held a prehearing conference in which it became apparent that he had ruled on the Agency's motion before Respondents had seen the motion. Accordingly, the ALJ gave Respondents an opportunity to file objections. On September 18, 2014, Respondents filed objections to Agency's motion for extension. On September 22, 2014, the ALJ issued an interim order that sustained his September 17, 2014, order.

"On September 24, 2014, the Agency amended both sets of Charges to allege that M. Klein and A. Klein both violated ORS 659A.403(3) and that A. Klein, 'in the alternative,' aided and abetted M. Klein in her violation of ORS 659A.403(3), thereby violating ORS 659A.406. Additionally, the Agency alleged that, 'in the alternative,' A. Klein aided and abetted M. Klein's violation of ORS 659A.409.[26]

"On September 29, 2014, the ALJ held a prehearing conference. During the conference, the participants discussed the most efficient means of proceeding regarding Respondents' motion for summary judgment and the Agency's pending response, considering the fact that the Agency had filed Amended Formal Charges ('Charges') since Respondents filed their motion for summary judgment. After discussion, it was agreed that, instead of the Agency filing a response to Respondents' original motion, it would be more efficient for Respondents to file an amended motion for summary judgment that would incorporate the matters raised in the Charges so that all outstanding issues could be addressed in the ALJ's ruling on Respondents' motion. It was mutually agreed that Respondents could have until October 24, 2014, to file an amended motion for summary judgment and that the Agency would have until November 21, 2014, to file its response.

"On October 2, 2014, Respondents filed Amended Answers ('Answers') to the Charges. On October 24, 2014, Respondents timely filed an amended motion for summary judgment. On November 21, 2014, the Agency timely filed a response and cross motion asking that Respondents' motion be denied in its entirety and that the Agency be granted partial summary judgment as to the issues on which Respondents sought summary judgment. On November 25, 2014, the forum granted Respondents' unopposed motion for an extension of time until December 19, 2014, to respond to the Agency's cross motion. Respondents filed a response on December 19, 2014.

"**Summary Judgment Standard**

"A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. *OAR 839-050-0150(4)(B).*

[26] The Agency's amended Charges did not allege that A. Klein violated ORS 659A.409.

The standard for determining if a genuine issue of material fact exists and the evidentiary burden on the participants is as follows:

> '* * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].' ORCP 47C.

The 'record' considered by the forum consists of: (1) the amended Formal Charges and Respondents' amended Answers to those Charges; (2) Respondents' motion, with attached exhibits; (3) the Agency's response and cross-motion to Respondents' motion, with an attached exhibit; and (4) Respondents' response to the Agency's motion.

"Analysis

A. Facts of the Case

"The undisputed material facts of this case relevant to show whether Respondents violated ORS chapter 659A as alleged in the Charges are set out below.

Findings of Fact

1) "Complainants Cryer and Bowman-Cryer are both female persons.[27] (Formal Charges)

2) "In January 2013, Sweetcakes by Melissa ('Sweetcakes') was a business owned and operated as an unregistered assumed business name by Respondents M. Klein and A. Klein. At all material times, Sweetcakes was a place or service that offered custom designed wedding cakes for sale to the public. (Respondents' Admission; Affidavits of A. Klein, M. Klein)

3) "Before and throughout the operation of Sweetcakes, Respondents M. Klein and A. Klein have been jointly committed to live their lives and operate their business according to their Christian religious convictions. Based on specific passages from the Bible, they have a sincerely held belief that that God 'uniquely and purposefully designed the institution of marriage exclusively as the union of one man and one woman' and that 'the Bible forbids us from

[27] The Charges do not identify either Complainant as a female, but the forum infers from their names and the Agency's reference to each Complainant as "her" that Complainants are both female.

proclaiming messages or participating in activities contrary to Biblical principles, including celebrations or ceremonies for uniting same-sex couples.' (Affidavits of A. Klein, M. Klein)

4) "In the operation of Sweetcakes, A. Klein bakes the cakes, cuts the layers, adds filling, and applies a base layer of frosting. M. Klein then does the design and decorating. A. Klein delivers the cake to the wedding or reception site in a vehicle that has 'Sweet Cakes by Melissa' written in large pink letters on the side and assembles the cake as necessary. A. Klein also sets up the cake and finalizes any remaining decorations after final assembly and placement. In that capacity, he often interacts with the couple or other family members and often places cards showing that Sweetcakes created the cake. (Affidavits of A. Klein, M. Klein)

5) "In or around November 2010, Respondents designed, created, and decorated a wedding cake for Cryer's mother, Cheryl McPherson, for which Cryer paid. (Affidavit of M. Klein)

6) "On January 17, 2013, Cryer and McPherson visited Sweetcakes for a previously scheduled cake tasting appointment, intending to order a cake for Cryer's wedding ceremony to Bowman-Cryer. (Respondents' Admission; Affidavit of A. Klein)

7) "A. Klein conducted the cake tasting at Sweetcakes' bakery shop located in Gresham, Oregon. M. Klein was not present during the tasting. During the tasting, A. Klein asked for the names of the bride and groom, and Cryer told him there would be two brides and their names were 'Rachel and Laurel.' (Respondents' Admission; Affidavit of A. Klein)

8) "A. Klein told Cryer that Sweetcakes did not make wedding cakes for same-sex ceremonies because of A. and M. Klein's religious convictions. In response, Cryer and McPherson walked out of Sweetcakes. (Respondents' Admission; Affidavit of A. Klein)

9) "Before driving off, McPherson re-entered Sweetcakes by herself to talk to A. Klein. During their subsequent conversation, McPherson told A. Klein that she used to think like him, but her 'truth had changed' as a result of having 'two gay children.' A. Klein quoted Leviticus 18:22 to McPherson, saying 'You shall not lie with a male as one lies with a female; it is an abomination.' McPherson then left Sweetcakes. (Affidavit of A. Klein)

10) "On February 1, 2013, Sweetcakes by Melissa was registered as an assumed business name with the Oregon Secretary of State, with the 'Registrant/Owner' listed as Melissa Elaine Klein and the 'Authorized Representative' listed as Aaron Wayne Klein. (Exhibit A1, p. 2, Agency

Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment)

11)"On August 8, 2013, both Complainants filed verified written complaints with BOLI's Civil Rights Division ('CRD') alleging unlawful discrimination by Respondents on the basis of sexual orientation. After investigation, the CRD issued a Notice of Substantial Evidence Determination on January 15, 2014, in both cases, and sent copies to Respondents. (Respondents' Admission)

12)"At some time prior to September 2, 2013, A. Klein and M. Klein took part in a video interview with Christian Broadcast Network (CBN) in which A. Klein explained the reasons for declining to provide a wedding cake for Complainants. On September 2, 2013, CBN broadcast a one minute, five seconds long presentation about Complainants' complaints. The broadcast begins and ends with a CBN announcer describing the complaints filed by Cryer and Bowman-Cryer against Respondents while pictures of the bakery are broadcast. A. and M. Klein appear midway in the broadcast, standing together outdoors, and make the following statements:[28] [29]

A. Klein: 'I didn't want to be a part of her marriage, which I think is wrong.'

M. Klein: 'I am who I am and I want to live my life the way I want to live my life and, you know, I choose to serve God.'[30]

A. Klein: 'It's one of those things where you never want to see something you've put so much work into go belly up, but on the other hand, um, I have faith in the Lord and he's taken care of us up to this point and I'm sure he will in the future.'

(Exhibit 1-I, Respondents' Motion for Summary Judgment)

13)"In September 2013, M. and A. Klein closed their bakery shop in Gresham and moved their business to their home, where they continued to offer custom designed wedding cakes for sale to the public. (Affidavits of A. Klein, M. Klein)

14)"On February 13, 2014, A. Klein was interviewed live on a radio show by Tony Perkins called 'Washington Watch.' Perkins's show lasted approximately 15

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[28] There is nothing in the video to show whether these statements were made in response to a question or if it was part of a longer interview.

[29] This transcript was made by the ALJ from a DVD provided to the forum by Respondents. The DVD includes the September 2, 2013, CBN video, and an mp4 recording of a February 13, 2014, interview with Tony Perkins.

[30] M. Klein's statement is only included to provide context, as the Agency did not allege that her statement was a violation of Oregon law.

minutes. In pertinent part, the interview included the following exchange that occurred, starting at four minutes, 30 seconds into the interview and ending at six minutes, twenty-two seconds into the interview:[31]

Perkins: '* * * Tell us how this unfolded and your reaction to that.'

Klein: 'Well, as far as how it unfolded, it was just, you know, business as usual. We had a bride come in. She wanted to try some wedding cake. Return customer. Came in, sat down. I simply asked the bride and groom's first name and date of the wedding. She kind of giggled and informed me it was two brides. At that point, I apologized. 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." And she got upset, noticeably, and I understand that. Got up, walked out, and you know, that was, I figured the end of it.'

Perkins: 'Aaron, let me stop you for a moment. Had you and your wife, had you talked about this before; is this something that you had discussed? Did you think, you know, this might occur and had you thought through how you might respond or did this kind of catch you off guard?'

Klein: 'You know, it was something I had a feeling was going to become an issue and I discussed it with my wife when the state of Washington, which is right across the river from us, legalized same-sex marriage and we watched Masterpiece Bakery going through the same issue that we ended up going through. But, you know, it was one of those situations where we said "well I can see it is going to become an issue but we have to stand firm. It's our belief and we have a right to it, you know." I could totally understand the backlash from the gay and lesbian community. I could see that; what I don't understand is the government sponsorship of religious persecution. That is something that just kind of boggles my mind as to how a government that is under the jurisdiction of the Constitution can decide, you know, that these people's rights overtake these people's rights or even opinion, that this person's opinion is more valid than this person's; it kind of blows my mind.'

(Exhibit 1-I, Respondents' Motion for Summary Judgment)

"B. Analysis of Complainants' Claims on the Merits

"The forum first analyzes whether Respondents' actions violated the applicable public accommodation statutes. If so, the forum moves on to a determination of whether Respondents have established one or more of their affirmative defenses that rely on the Oregon and U. S. Constitution. *See Tanner v. OHSU,* 157 Or App 502, 513 (1998), *rev den* 329 Or 528, citing *Planned*

[31] *See* footnote 29.

Parenthood Assn. v. Dept. of Human Resources, 297 Or 562, 564, 687 P2d 785 (1984); *Young v. Alongi,* 123 Or App 74, 77–78, 858 P2d 1339 (1993). *See also Meltebeke v. Bureau of Labor and Industries,* 322 Or 132, 138-39 (1995)(before considering constitutional issues, court must first consider pertinent subconstitutional issues).

"In its Charges, the Agency alleged that Respondents operated Sweetcakes, a place of public accommodation under ORS 659A.400, and violated ORS 659A.403, 659A.406, and 659A.409 by refusing to provide Complainants a wedding cake based on their sexual orientation, by aiding and abetting that refusal, and by communicating their intent to discriminate based on sexual orientation.

"Although Respondents' affirmative defenses apply to the forum's ultimate disposition of each alleged statutory violation, the forum is able to draw several legal conclusions from the undisputed material facts relevant to the Agency's allegations that are unaffected by those affirmative defenses.

"First, at all times material, A. Klein and M. Klein owned and operated Sweetcakes as a partnership. ORS 67.055 provides, in pertinent part:

> '(1) Except as otherwise provided in subsection (3) of this section, the association of two or more persons to carry on as co-owners a business for profit creates a partnership, whether or not the persons intend to create a partnership.
>
> '* * * * *
>
> '(d) It is a rebuttable presumption that a person who receives a share of the profits of a business is a partner in the business * * *.'

In affidavits dated October 23, 2014, signed by M. Klein and A. Klein and submitted in support of Respondent's motion for summary judgment, they both aver: 'Together we have operated Sweetcakes by Melissa as a business since we opened in 2007. * * * Until recent months, we both worked actively in the business, primarily derived our family income from the operation of the business, and jointly shared the profits of the business.' The Agency does not dispute the factual accuracy of these statements. Accordingly, the forum concludes that M. Klein and A. Klein were joint owners of Sweetcakes and operated it as a partnership and unregistered assumed business name in January 2013, and as a registered assumed business name since February 1, 2013. As such, they are jointly and severally liable for any violations of ORS chapter 659A related to Sweetcakes.

"Second, ORS 659A.403, 659A.406, and 659A.409 all require that discrimination must be made by a 'person' acting on behalf of a 'place of public accommodation.' 'Person' includes '[o]ne or more individuals.' ORS

659A.001(9)(a). The undisputed facts establish that A. Klein and M. Klein are 'individual[s]' and 'person[s].' A 'place of public accommodation' is defined in ORS 659A.400 as '(a) Any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise.' The undisputed facts show that, at all material times, Sweetcakes was a place or service offering goods and services – wedding cakes and the design of those cakes – to the public. Accordingly, the forum concludes that Sweetcakes, at all material times, was a 'place of public accommodation.'

"Third, as germane to this case, ORS 659A.403 and 659A.406 prohibit any 'distinction, discrimination or restriction' based on Complainants' 'sexual orientation.' This requires the forum to determine Complainants' actual or perceived sexual orientation. As used in ORS chapter 659A, 'sexual orientation' is defined as 'an individual's actual or perceived heterosexuality, homosexuality, bisexuality, or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's assigned sex at birth.' OAR 839-005-0003(16). The forum infers[32] that Complainants' sexual orientation is homosexual and that A. Klein perceived they were homosexual from four undisputed facts: (a) Complainants were planning to have a same-sex marriage; (b) A. Klein told Cryer and McPherson that Respondents do not make wedding cakes for same-sex ceremonies; (c) McPherson told A. Klein that she had 'two gay children'; and (d) In response to McPherson's statement, A. Klein quoted a reference from Leviticus related to male homosexual behavior.

"Fourth, A. Klein's verbal statements made in the CBN and Tony Perkins interviews that were publicly broadcast constitute a 'communication' that was 'published' under ORS 659A.409.

"C. Failure to State Ultimate Facts Sufficient to Constitute a Claim

"Before determining the merits of the Agency's ORS 659A.403(3) allegations, the forum first evaluates Respondents' pleading – 'fail[ure] to state ultimate facts sufficient to constitute a claim' -- that Respondents categorize as their first 'affirmative defense.' As a procedural matter, the forum views this defense as a straightforward denial of the allegations in the pleadings rather than as an affirmative defense.[33] As argued by Respondents in their motion for

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[32] Evidence includes inferences. There may be more than one inference to be drawn from the basic fact found; it is the forum's task to decide which inference to draw. *See, e.g., In the Matter of Income Property Management, 31 BOLI 18, 39 (2010).*

[33] In general, an affirmative defense is a defense setting up new matter that provides a defense against the Agency's case, assuming all the facts in the complaint to be true. *See, e.g. Pacificorp v. Union Pacific Railroad,* 118 Or App 712, 717, 848 P2d 1249 (1993). A few examples of affirmative defenses previously recognized by this forum include statute of limitations, claim and issue preclusion, bona fide occupational requirement, undue hardship, laches, and unclean hands. Some other affirmative defenses recognized

summary judgment, this defense goes to two issues. First, whether Bowman-Cryer's absence when A. Klein made his alleged discriminatory statement on January 13, 2013, deprives her of a cause of action under ORS 659A.403 and 659A.406. Second, whether Respondents' refusal to provide a wedding cake for Complainants was on account of their sexual orientation.

"Bowman-Cryer's absence on January 13, 2013 does not deprive her of standing

"It is undisputed is the fact that Complainants sought a wedding cake from Sweetcakes based on Cryer's previous experience in purchasing a wedding cake from Sweetcakes for McPherson's wedding. It is also undisputed that Bowman-Cryer was not present at Sweetcakes on January 13, 2013, when A. Klein told Cryer and McPherson that Sweetcakes would not make a wedding cake for a same-sex wedding.

"Respondents argue as follows:

> 'Additionally, if as it appears on the face of the pleadings, one or more of the complainants were not actually potential customers requesting a wedding cake issue, and they were also not the ones denied services, and their claims must fail as a matter of law. In particular, the record is Laurel Bowman-Cryer was not present for the cake tasting and was never denied services. Therefore, either Rachel Cryer or Cheryl McPherson was the only person who was denied services according to Complainants['] own record. Claims made by anyone else must fail.'

The forum rejects this argument, as it relies on the false premise that a person cannot be discriminated against unless they are physically present to witness an alleged act of discrimination perpetrated against them. In this case, the 'full and equal accommodation' sought by both Complainants was a wedding cake to celebrate their same-sex wedding, an occasion in which they would be joint celebrants. The forum takes judicial notice that a wedding cake has long been considered a customary and important tradition in weddings in the United States. Respondents themselves acknowledge the special significance of wedding cakes in their affidavits, in which A. Klein and M. Klein each aver:

> 'The process of designing, creating and decorating a cake for a wedding goes far beyond the basics of baking a cake and putting frosting on it. Our customary practice involves meeting with customers to determine who

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by Oregon courts include discharge in bankruptcy, duress, fraud, payment, release, statute of frauds, unconstitutionality, and waiver. *ORCP 19B.* In contrast, a defense that admits or denies facts constituting elements of the Agency's prima facie case that are alleged in the Agency's charging document is not an affirmative defense.

> they are, what their personalities are, how they are planning a wedding, finding out what their wishes and expectations concerning size, number of layers, colors, style and other decorative detail, which often includes looking at a variety of design alternatives before conceiving, sketching, and custom crafting a variety of decorating suggestions and ultimately finalizing the design. Our clients expect, and we intend, that each cake will be uniquely crafted to be a statement of each customer's personality, physical tastes, theme and desires, as well as their palate so it is a special part of their holy union.'

Because the wedding cake was intended to equally benefit both Cryer and Bowman-Cryer, the forum finds that Bowman-Cryer has the same cause of action against Respondents under ORS 659A.403 and .406 as Cryer. *Macedonia Church v. Lancaster Hotel Ltd.*, 498 F. Supp 2d 494 (2007), though not binding on this forum, illustrates this point. In *Macedonia*, a group of individuals associated with Macedonia Church, a predominantly African-American congregation, alleged that they were denied accommodations because of their race. Defendants moved to dismiss the complaint as to all but four plaintiffs on the grounds that the only plaintiffs who had standing to pursue the complaint were the four who actually visited defendants' facility. As stated by the court, 'the defendants' argument appears to assume that unless each plaintiff had a first-hand contact with the defendants, he or she could not [have] suffered any "personal and individual" injury.' The court denied defendants' motion, holding:

> 'Whether there was first-hand contact between the individual plaintiffs and the defendants is not material to the question of whether the individual plaintiffs suffered a personal and individual injury. Each of the Non-organizer Plaintiffs alleges that he or she was denied accommodations on the basis of race or color. The fact that the defendants informed the plaintiffs that their refusal to provide them with accommodations by communicating with the Organizers instead of with each of the Non-organizer plaintiffs does not alter the fact that those plaintiffs were denied accommodations. Nor is it material that the plaintiffs were unaware of the discrimination until sometime after it occurred.'

"Nexus between Complainants' sexual orientation and Respondents' refusal to provide a wedding cake for their same-sex wedding

"Respondents argue that there is no evidence of any connection between Complainants' sexual orientation and Respondents' alleged discriminatory action. Respondents' argument is two-pronged. First, Respondents argue that their prior sale of a wedding cake to Cryer for her mother's wedding proves Respondents' lack of animus towards Complainant's sexual orientation. Second, Respondents

attempt to isolate Complainants' sexual orientation from their proposed[34] wedding, arguing that their decision was not on account of Complainants' sexual orientation, but on Respondents' objection to participation in the event for which the cake would be prepared.

"Respondents' first argument fails for the reason that there is no evidence in the record that A. Klein, the person who refused to make a cake for Complainants while acting on Sweetcakes' behalf, had any knowledge of Complainants' sexual orientation in November 2010 when Cryer purchased a cake for her mother's wedding. Even if A. Klein was aware of Cryer's sexual orientation in November 2010, not discriminating on one occasion does not inevitably lead to the conclusion that A. Klein did not discriminate on a subsequent occasion.

"Respondents rely on *Tanner v. OHSU* to support their second argument. In *Tanner,* OHSU, in accordance with State Employees' Benefits Board (SEBB) eligibility criteria, permitted employees to purchase insurance coverage for 'family members.' Under the SEBB criteria, unmarried domestic partners of employees were not 'family members' who were entitled to insurance coverage. Plaintiffs, three lesbian nursing professionals with domestic partners, applied for insurance coverage and were denied on the ground that the domestic partners did not meet the SEBB eligibility criteria. Plaintiffs sued, alleging disparate impact sex discrimination in violation of *then* ORS 659.030(1)(b) in that OHSU's policy had the effect of discriminating against homosexual couples because, unlike heterosexual couples, they could not marry and become eligible for insurance benefits. Significant to this case, the court stated that plaintiffs were a member of a protected class under ORS 659.030 and that they made out a disparate impact claim because 'OHSU's practice of denying insurance benefits to unmarried domestic partners, while facially neutral as to homosexual couples, effectively screens out 100 percent of them from obtaining full coverage for both partners. That is because, under Oregon law, homosexual couples may not marry.' *Id.* at 516. The court then held that OHSU did not violate *then* ORS 659.030(1)(b) because plaintiffs did not prove that OHSU engaged 'in a subterfuge to evade the purposes of this chapter' under *then* ORS 659.028. *Id.* at 517-19. The language that Respondents quote to support their argument is not the holding of the case, but merely a bridge between the court's evaluation of plaintiffs' case based on different treatment and disparate impact theories. Accordingly, *Tanner* does not assist Respondents. Also significant to this case, plaintiffs alleged a violation of Article I, section 20, of the Oregon Constitution. The court found that plaintiffs, as homosexual couples, were members of a 'true class,' and also members of a 'suspect class' based on their sexual orientation. *Id.* at 524.

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[34] The forum uses the term "proposed" because there is no evidence in the record to show whether Complainants were actually ever married. [NOTE: At hearing, evidence was presented that Complainant's were legally married in 2014, a few days after Oregon's ban on same-sex marriage was struck down in federal court. *See* Proposed Finding of Fact #47 -- The Merits, *infra*.

"Respondents' attempt to divorce their refusal to provide a cake for Complainants' same-sex wedding from Complainants' sexual orientation is neither novel nor supported by case law. As the Agency argues in support of its cross-motion, '[t]here is simply no reason to distinguish between services for a wedding ceremony between two persons of the same sex and the sexual orientation of that couple. The conduct, a marriage ceremony, is inextricably linked to a person's sexual orientation.'

"The U. S. Supreme Court has rejected similar attempts to distinguish between a protected status and conduct closely correlated with that status. In *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez,* 561 U.S. 661, 130 S. Ct. 2971 (2010), students at Hastings College of the Law formed a chapter of the Christian Legal Society ('CLS') and sought formal recognition from the school. The CLS required its members to affirm their belief in the divinity of Jesus Christ and to refrain from 'unrepentant homosexual conduct.' *Id.* at 2980. Hastings refused to recognize the organization on the ground that it violated Hastings' nondiscrimination policy, which prohibited exclusion based on religion or sexual orientation. The CLS argued that 'it does not exclude individuals because of sexual orientation, but rather "on the basis of a conjunction of conduct and the belief that the conduct is not wrong."' *Id.* at 2990. The Court rejected this argument, stating:

> 'Our decisions have declined to distinguish between status and conduct in this context. See *Lawrence v. Texas,* 539 U.S. 558, 575, 123 S Ct 2472, 156 L.Ed.2d 508 (2003) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination." (emphasis added)); *id.,* at 583, 123 S.Ct. 2472 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."); cf. *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 270, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").'

In conclusion, the forum holds that when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation. *See Elane Photography, LLC v. Willock,* 309 P3d 53, 62 (2013), *cert den* 134 S. Ct. 1787 (2014). Applied to this case, the forum finds that Respondents' refusal to provide a wedding cake for Complainants because it was for their same-sex wedding was synonymous with refusing to provide a cake because of Complainants' sexual orientation.

"D. Respondent A. Klein violated 659A.403

With regard to its ORS 659A.403 claims, the Agency alleges the following in paragraph III.12 in both sets of Charges:

'12. Respondents discriminated against Complainant because of her sexual orientation.

a. Melissa Elaine Klein denied full and equal accommodations, advantages, facilities and privileges of her business to [Complainant] based on her sexual orientation, in violation of ORS 659A.403(3).

b. Respondent Aaron Wayne Klein, dba Sweetcakes by Melissa denied full and equal accommodations, advantages, facilities and privileges of her [sic] **business to [Complainant] based on her sexual orientation, in violation of ORS 659A.403(3).**

c. **In the alternative,** Respondent Aaron Wayne Klein aided or abetted Melissa Elaine Klein in violating ORS 659A.403(3), in violation of ORS 659A.406.'

(emphasis bolded by Agency in its Amended Formal Charges to show amendments to original Formal Charges)

ORS 659A.403 provides, in pertinent part:

> '(1) Except as provided in subsection (2) of this section, all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older.
>
> '(2) Subsection (1) of this section does not prohibit:
>
> > "(a) The enforcement of laws governing the consumption of alcoholic beverages by minors and the frequenting by minors of places of public accommodation where alcoholic beverages are served; or
> >
> > "(b) The offering of special rates or services to persons 50 years of age or older.
>
> '(3) It is an unlawful practice for any person to deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation in violation of this section.'

"The prima facie elements of the Agency's 659A.403 case are: 1) Complainants were a homosexual couple and were perceived as such by A. Klein and M. Klein; 2) Sweetcakes was a place of public accommodation; 3a) A. Klein, a person acting on behalf of Sweetcakes, denied full and equal accommodations to Complainants; 3b) M. Klein, a person acting on behalf of Sweetcakes, denied full and equal accommodations to Complainants; and 4) the denials were on account of Complainants' sexual orientation. Elements 1, 2, 3a are established by undisputed facts. Element 4 is established in the preceding section's discussion of 'Nexus.' Accordingly, the forum concludes that A. Klein violated ORS 659A.403 and that the Agency is entitled to summary judgment on the merits as to Cryer's and Bowman-Cryer's 659A.403 claims against A. Klein. Since there is no evidence that M. Klein took any action to deny the full and equal accommodations, advantages, facilities and privileges of Sweetcakes to Complainants, the forum concludes that M. Klein did not violate ORS 659A.403. However, M. Klein, as a joint owner of Sweetcakes with A. Klein, is jointly and severally liable for any damages awarded to Complainants stemming from A. Klein's violation.

"E. ORS 659A.406 -- Aiding and Abetting a Violation of ORS 659A.403(3)

"The Agency seeks to hold A. Klein liable as an aider and abettor under ORS 659A.406 for M. Klein's alleged violation of ORS 659A.403(3). Respondents assert that A. Klein cannot be held liable as an aider and abettor under ORS 659A.406 because he is a co-owner of Sweetcakes and, as a matter of law, cannot aid and abet himself. The Agency argues to the contrary, based on the 'plain text' of the statute.

"ORS 659A.406 provides, in pertinent part:

> "Except as otherwise authorized by ORS 659A.403, it is an unlawful practice for any person to aid or abet any place of public accommodation, as defined in ORS 659A.400, or any employee or person acting on behalf of the place of public accommodation to make any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older."

In the previous section, the forum concluded that M. Klein did not violate ORS 659A.403(3) as alleged in paragraph III.12.a and that A. Klein, the joint owner of Sweetcakes, violated ORS 659A.403(3) as alleged in paragraph II.12.b. Since M. Klein did not violate ORS 659A.403, A. Klein cannot be held liable to have aided and abetted her violation.[35]

[35] As pointed out in the previous section, there is a difference between committing a violation and being liable for the consequences of that violation. In this case, M. Klein's liability stems from her partnership status, not from any violation that she committed.

"F. Notice that Discrimination will be made in Place of Public Accommodation – ORS 659A.409

"In section IV of its Charges,[36] the Agency alleges: (a) Respondent M. Klein 'published, issued * * * a communication, notice * * * that its accommodation, advantages * * * would be refused, withheld from or denied to, or that discrimination would be made against, a person on account of his or her sexual orientation, in violation of ORS 659A.409'; (b) Respondent A. Klein, 'dba Sweetcakes by Melissa, denied full and equal accommodations, advantages, facilities and privileges of her business to [Complainant] based on her sexual orientation, in violation of ORS 659A.403(3)'; and (c) In the alternative, Respondent A. Klein 'aided or abetted M. Klein in violating ORS 659A.409, in violation of ORS 659A.406.'

"In its Charges, the Agency alleges in paragraphs II.8 & 9 that A. Klein made statements that were broadcast on television on September 2, 2013, and on the radio on February 13, 2014, that communicate an intent to discriminate based on sexual orientation. The full text of the relevant part of those broadcasts is set out in Findings of Fact ##12 and 14, *supra*. The Agency's cross-motion for summary judgment singles out the statements made on those two occasions as proof that Respondents violated ORS 659A.409.[37]

"ORS 659A.409 provides, in pertinent part:

> '* * * it is an unlawful practice for any person acting on behalf of any place of public accommodation as defined in ORS 659A.400 to publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of * * * sexual orientation * * *.'

The alleged unlawful statements made by A. Klein were:

> 'I didn't want to be a part of her marriage, which I think is wrong.' (*September 2, 2013 CBN interview*)

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[36] Section IV is prefaced by the caption "UNLAWFUL PRACTICE: DISCRIMINATION BY PUBLICATION, CIRCULATION, ISSUANCE, OR DISPLAY OF A COMMUNICATION, NOTICE, ADVERTISEMENT, OR SIGN OF A DENIAL OF ACCOMMODATIONS, ADVANTAGES, FACILITIES, SERVICES OR PRIVILEGES BY A PLACE OF PUBLIC ACCOMMODATION BASED ON SEXUAL ORIENTATION."

[37] The Agency's cross-motion also discusses the sign on Sweetcakes' door after it closed for business, but since the Agency did not allege the existence or contents of the sign as a violation, the forum does not consider it.

> '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." * * * You know, it was something I had a feeling was going to become an issue and I discussed it with my wife when the state of Washington, which is right across the river from us, legalized same-sex marriage and we watched Masterpiece Bakery going through the same issue that we ended up going through. But, you know, it was one of those situations where we said "well I can see it is going to become an issue but we have to stand firm. It's our belief and we have a right to it, you know."' (*February 13, 2014, Tony Perkins interview*)

In their motion for summary judgment, Respondents argue that 'ORS 659A.409 by its terms requires a statement of *future intention* that is entirely absent in this instance.' Respondents further argue that:

> 'A review of the videotape record of the CBN broadcast * * * clearly shows that Aaron Klein spoke only of the reason why he and his wife declined to participate in complainants' ceremony. The same is true of the Perkins radio broadcast. * * * A statement of future intention in either media event is conspicuously absent.'

The Agency does not dispute the correctness of Respondents' argument that ORS 659A.409 is directed towards communications relating a prospective intent to discriminate, but argues that A. Klein's statements are a prospective communication:

> 'Reviewed in context, Respondents communicated quite clearly that same-sex couples would not be provided wedding cake services at their bakery. These are not descriptions of past events as alleged by Respondents. Respondents stated their position in these communications and notify the public that they "don't do same sex weddings," they "stand firm," are "still in business" and will "continue to stay strong."'

Whatever Respondents' post-January 2013 intentions may have been or may still be with regard to providing wedding cake services for same-sex weddings, the forum finds that A. Klein's above-quoted statements, evaluated both for text and context, are properly construed as the recounting of past events that led to the present Charges being filed. In other words, these statements described what occurred on January 17, 2013, and thoughts and discussions the Kleins had before January 2013, not what the Kleins intended to do in the future.[38] To arrive at the conclusion sought by the Agency requires drawing an inference of future

[38] In contrast, had A. Klein told Perkins "I said 'I'm very sorry * * * You know we don't do same-sex marriage, same-sex wedding cakes' *and we take the same stand today*," the forum's ruling would be different, assuming the Agency had plead a violation of ORS 659A.409 by A. Klein.

intent from the Kleins's statements of religious belief that the forum is not willing to draw. Accordingly, the forum concludes that A. Klein's communication did not violate ORS 659A.409.[39]

"In addition, the forum notes that M. Klein cannot be held to have violated ORS 659A.409 because she made no communication. Therefore, the forum finds that A. Klein did not aid or abet M. Klein to commit a violation of that statute and Respondents are entitled to summary judgment on this issue.

"G. Respondents' Counterclaims

"Before addressing Respondents' affirmative defenses, the forum addresses Respondents' counterclaims. First, Respondents allege that BOLI, through its actions in prosecuting this case, has 'knowingly and selectively acted under color of state law to deprive Respondents of their fundamental constitutional and statutory rights on the basis of religion' in violation of ORS 659A.403 and 'deprive[d] the Respondents of fundamental rights and protections guaranteed by the First and Fourteenth amendments to the United States Constitution,' thereby generating liability under 42 USC § 1983. Second, Respondents allege that the BOLI's Commissioner violated ORS 659A.409 by publishing, circulating, issuing, or displaying communications on Facebook and in print media 'to the effect that its accommodations, advantages, facilities, services or privileges would be refused, withheld from or denied to, or the discrimination would be made against Respondents and other persons similarly situated on the basis of religion in violation of ORS 659A.409.' Respondents seek damages in the amount of $100,000 for economic damages, $100,000 for non-economic damages, court costs, and reasonable attorney fees.

"The authority of state agencies is limited to that granted to them by the legislature. *See SAIF Corp. v. Shipley,* 326 Or 557, 561, 955 P2d 244 (1998) ('an agency has only those powers that the legislature grants and cannot exercise authority that it does not have'). ORS 659A.850(4) gives the Commissioner the authority to award compensatory damages to complainants as an element of a cease and desist order within a contested case proceeding. There is no corresponding statute that authorizes the Commissioner to award the damages sought by Respondents in their counterclaims. With regard to attorney

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[39] *Compare In the Matter of Blachana, LLC,* 32 BOLI 220 (2013), *appeal pending* (Respondent found to have violated ORS 659A.409 when member of the LLC left a telephone message with the organizer of a group of transgender individuals who had visited the LLC's nightclub regularly on Friday nights during the previous 18 months asking "not to come back on Friday nights."); *In the Matter of The Pub*, 6 BOLI 270, 282-83 (1987)(Respondent found to have violated ORS 659.037, the predecessor of ORS 659A.409, by posting a on front door of pub, immediately under another sign that said "VIVA APARTHEID," a sign that said "NO SHOES, SHIRTS, SERVICE, NIGGERS," and a sign inside the pub, with chain and spikes attached at each end, that read "Discrimination. Webster – to use good judgment" on the front and "Authentic South African Apartheid Nigger 'Black' Handcuffs Directions Drive Through Wrists and Bend Over Tips" on the back).

fees or court costs, the legislature has only granted authority to the Commissioner to award these in contested case proceedings to interveners in a real property case brought under ORS 659A.145 or ORS 659A.421.[40]

"In conclusion, the forum lacks jurisdiction to adjudicate Respondents' counterclaims and may neither grant nor deny them. The only relief available to Respondents through this forum is dismissal of any Charges not proven by the Agency under ORS 659A.850(3).[41]

"H. Respondents' Affirmative Defenses

"Respondents' affirmative defenses include estoppel and the unconstitutionality of ORS 659A.403, .406, and .409, both facially and as applied. As an initial matter, the forum notes that the Oregon Court of Appeals has held that an Agency has the authority to decide the constitutionality of statutes. *See Eppler v. Board of Tax Service Examiners,* 189 Or App 216, 75 P3d 900 (2003), citing *Cooper v. Eugene Sch. Dist. No. 4J,* 301 Or. 358, 362-65, 723 P.2d 298 (1986) and *Nutbrown v. Munn,* 311 Or. 328, 346, 811 P.2d 131 (1991). In BOLI contested cases, the Commissioner has delegated to the ALJ the authority to rule on motions for summary judgment, with the decision 'set forth in the Proposed Order' and subject to ratification by the Commissioner in the Final Order. OAR 839-050-0150(4). Accordingly, the ALJ has the initial authority to rule on the constitutional issues raised by Respondents in their motion for summary judgment.[42]

"Estoppel

"In their answers, Respondents phrase their estoppel defense as follows:

> "The state of Oregon, including the Bureau of Labor and Industries[,] is estopped from compelling Respondents to engage in creative expression or otherwise participate in same-sex ceremonies not recognized by the state of Oregon contrary to their fundamental rights, consciences and convictions."

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[40] *See* ORS 659A.850(1)(b)(B).

[41] *See, e.g., Wallace v. PERB,* 245 Or App 16, 30, 263 P3d 1010 (2011) (when plaintiff sought compensatory damages in an APA contested case proceeding based on alleged financial loss after PERS placed a limit on how often he could transfer funds he had invested in the Oregon Savings Growth Plan, the court held that, since it had no authority under ORS 183.486(1)(b) to award compensatory damages to plaintiff, plaintiff was also unable to recover those damages in the contested case proceeding).

[42] *Eppler, Cooper,* and *Nutbrown* impliedly overruled the forum's holding in the case of *In the Matter of Doyle's Shoes,* 1 BOLI 295 (1980), a Final Order issued before the *Eppler, Cooper,* and *Nutbrown* decisions in which the forum held that it was beyond the Commissioner's discretion to determine the constitutionality of legislative enactments. The forum now explicitly overrules that holding.

Estoppel is a legal doctrine whereby one party is foreclosed from proceeding against another when one party has made 'a false representation, (1) of which the other party was ignorant, (2) made with the knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it.' *State ex rel. State Offices for Services to Children and Families v. Dennis*, 173 Or App 604, 611, 25 P3d 341 (2001), *citing Keppinger v. Hanson Crushing, Inc.,* 161 Or App 424, 428, 983 P.2d 1084 (1999). In order to establish estoppel against a state agency, a party must have relied on the agency's representations and the party's reliance must have been reasonable. *Id., citing Dept. of Transportation v. Hewett Professional Group,* 321 Or 118, 126, 895 P2d 755 (1995).[43]

"Here, Respondents do not identify any false representation made by BOLI or any other state agency upon which Respondents relied in refusing to provide a wedding cake to Complainants. Although it is undisputed that the Oregon Constitution did not recognize same-sex marriages in January 2013, the affidavits of A. Klein and M. Klein establish that the refusal was because of Respondents' religious convictions stemming from Biblical authority, not on their reliance on Oregon's Constitutional provision rejecting same-sex marriage or their attempt to enforce that provision.[44]

"In conclusion, Respondents present no facts, articulate no legal theory, and cite no case law to support their argument that BOLI should be estopped from litigating this case based on the doctrine of estoppel. The Agency is entitled to summary judgment on this issue.

"Respondents' Constitutional Defenses – Introduction

"Due to the number and complexity of Respondents' constitutional defenses, the forum summarizes them, as plead in Respondents' answers, before analyzing them. They include the following:

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[43] *See also In the Matter of Sunnyside Inn,* 11 BOLI 151, 162 (1993) (Equitable estoppel may exist when one party (1) has made a false representation; (2) the false representation is made with knowledge of the facts; (3) the other party is ignorant of the truth; (4) the false representation is made with the intention that it should be relied upon by the other party; and (5) the other party is induced to act upon it to that party's detriment); *In the Matter of Portland Electric & Plumbing Company,* 4 BOLI 82, 98-99 (1983) (estoppel only protects those who materially change their position in reliance on another's acts or representations).

[44] In A. Klein's affidavit, he states that, after Cryer told him "something to the effect 'Well, there are two brides, and their names are Rachel and Laurel,'" he "indicated we did not create wedding cakes for same-sex ceremonies because of our religious convictions, and they left the shop." In the same paragraph, he states "I believed that I was acting within the bounds of the Oregon Constitution and the laws of the State of Oregon which, at that time, explicitly defined marriage as the union of one man and prohibited recognition of any other type of union as marriage."

- "The statutes underlying the Charges are unconstitutional as applied in that they violate Respondents' fundamental rights arising under the Oregon Constitution by: (a) unlawfully violating Respondents' freedom of worship and conscience under Article I, §2; (b) unlawfully violating Respondents' freedom of religious opinion under Article I, §3; (c) unlawfully violating Respondents' freedom of speech under Article I, §8; (d) unlawfully compelling Respondents to engage expression of a message they did not want to express; (e) unlawfully violating Respondents' privileges and immunities under Article I, §20; and (f) violating Article XV, §5a.

- "The statutes underlying the Charges are facially unconstitutional under the Oregon Constitution in that they violate Respondents' fundamental rights arising under the Oregon Constitution to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated.

- "The statutes underlying the Charges are unconstitutional as applied to Respondents to the extent they do not protect the fundamental rights of Respondents and persons similarly situated arising under the First and Fourteenth Amendments to the United States Constitution, as applied to the State of Oregon under the Fourteenth Amendment, by: (a) unlawfully infringing on Respondents' right of conscience, right to free exercise of religion, and right to free speech; (b) unlawfully compelling Respondents to engage expression of a message they did not want to express; and (c) unlawfully denying Respondents' right to due process and equal protection of the laws.

- "The statutes underlying the Charges are facially unconstitutional to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated arising under the First and Fourteenth Amendments to the United States Constitution, as applied to the State of Oregon under the Fourteenth Amendment.

When both state and federal constitutional claims are raised, Oregon courts first evaluate the state claim. *Sterling v. Cupp,* 290 Or 611, 614, 625 P2d 123 (1981). The forum does likewise. For continuity's sake, the forum follows the analysis of each state claim with an analysis of the parallel federal claim. The forum only addresses the constitutionality of ORS 659A.403, since the forum has already concluded, on a subconstitutional level, that Respondents did not violate ORS 659A.406 and 659A.409.

"Oregon Constitution

"Article I, Sections 2 and 3: Freedom of worship and conscience; Freedom of religious opinion

"The forum addresses these interrelated defenses together. Article I, Sections 2 and 3 of the Oregon Constitution provide:

> '**Section 2. Freedom of worship**. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.'
>
> '**Section 3. Freedom of religious opinion.** No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions, or interfere with the rights of conscience.'

Respondents, who are Christians, have a sincerely held belief that the Bible 'forbids us from proclaiming messages or participating in activities contrary to Biblical principles, including celebrations or ceremonies for uniting same-sex couples.' They argue that Article I, sections 2 and 3 gave them the unfettered right to refuse to provide a cake for Complainants' same-sex wedding ceremony because doing so would have compelled them to act contrary to their sincerely held religious beliefs.

"The forum first analyzes a series of Oregon Supreme Court cases interpreting Article I, sections 2 and 3, then applies them to ORS 659A.403. Beginning with *City of Portland v. Thornton,* 174 Or 508, 149 P2d 972 (1944), the Oregon Supreme Court applied U.S. Supreme Court precedents under the First Amendment to the U.S. Constitution when interpreting Article I, Sections 2 and 3 of the Oregon Constitution. In *Salem College & Academy, Inc. v. Emp. Div.,* 298 Or 471, 486-87, 695 P2d 25 (1985), an inter-denominational Christian school argued that the state's requirement that it pay unemployment tax violated Article I, sections 2 and 3. The court held that 'the state had not infringed upon the school's right to religious freedom when all similarly situated employers in the state were subject to [unemployment tax].' Significant to this case, the *Salem* court interpreted Article I, sections 2 and 3 in light of the text and historical context in which they arose, without reference to U.S. Supreme Court decisions and without reference to its own prior decisions that had relied on federal First Amendment precedent. *Id.* at 484.

"In 1986, in the next case involving the application of Article I, sections 2-7, the Oregon Supreme Court made explicit what was implicit in *Salem* College. In *Cooper* v. *Eugene Sch. Dist. No. 4J*, 301 Or. 358, 369-70, 723 P2d 298, 306-07 (1986), the court stated:

> 'This court sometimes has treated these guarantees and the First Amendment's ban on laws prohibiting the free exercise of religion (footnote omitted) as "identical in meaning," *City of Portland v. Thornton,* 174 Or. 508, 512, 149 P.2d 972 (1942); but identity of 'meaning' or even of text does not imply that the state's laws will not be tested against the state's own constitutional guarantees before reaching the federal constraints imposed by the Fourtenth [sic] Amendment, or that verbal formulas developed by the United States Supreme Court in applying the federal text also govern application of the state's comparable clauses.' (footnote omitted).

Since *Cooper*, the Oregon Supreme Court has decided a trio of cases interpreting Article I, sections 2 and 3 that are relevant to the present case.

"In *Smith v. Employment Div., Dept. of Human Resources,* 301 Or 209, 721 P2d 445 (1986), *vacated on other grounds sub nom., Employment Div. v. Smith,* 485 US 660 (1988), a drug counselor was fired for misconduct based on his ingestion of peyote, a sacrament in the Native American Church, during a Native American Church service and denied unemployment benefits. Smith claimed that the denial of unemployment benefits placed 'a burden on his freedom to worship according to the dictates of his conscience' under the Oregon Constitution, Article I, sections 2 and 3. Citing *Salem College*, the court held that there was no violation of Article I, sections 2 and 3 because the statute and rule defining misconduct were 'completely neutral toward religious motivations for misconduct' and '[claimant] was denied benefits through the operation of a statute that is neutral both on its face and as applied.' *Id.* at 215-16.

"In *Employment Div., Department of Human Resources v. Rogue Valley Youth for Christ,* 307 Or 490, 498-99, 770 P2d 588 (1989), the court rejected a religious organization's claim that payment of unemployment tax would violate its rights under Article I, sections 2 and 3. Relying on *United States v. Lee,* 455 U.S. 252, 256–57, 102 S.Ct. 1051, 1054–55, 71 L.Ed.2d 127, 132 (1982), the court stated:

> 'When governmental action is challenged as a violation of the Free Exercise Clause of the First Amendment it must first be shown that the governmental action imposes a burden on the party's religion. Assuming that imposing unemployment payroll taxes on all religious organizations will burden at least some of those groups, (although not necessarily their freedom of belief or worship), that assumption "is only the beginning, however, and not the end of the inquiry. Not all burdens on religious liberty are unconstitutional. * * * The state may justify a limitation on religion by showing that it is essential to accomplish an overriding governmental interest." In the present case the State of Oregon has two governmental interests which, when taken together, are sufficiently important to support the burden on religion represented by unemployment payroll taxes.

> 'There are few governmental tasks as important as providing for the economic security of its citizens. A strong unemployment compensation system plays a significant role in providing this security. * * * [A]ny state's unemployment tax must, as a practical matter, comply with FUTA's (Federal Unemployment Tax Act) requirements or the state's employers would face a double tax. Such a double tax would, in turn, create a very undesirable business climate in the state. This, combined with Oregon's constitutional interest in treating all religious organizations equally, creates an overriding state interest in applying the unemployment payroll taxes to all religious organizations. Our construction of the coverage of Oregon's unemployment compensation taxation scheme does not offend the First Amendment's Free Exercise Clause or Article I, section 3 of the Oregon Constitution.' (internal citations and footnotes omitted)

Rogue Valley, at 498-99.

"In *Meltebeke v. Bureau of Labor and Industries,* 322 Or 132, 903 P2d 351 (1995), the court considered a constitutional challenge to BOLI's rule that 'verbal or physical conduct of a religious nature' in the workplace was unlawful if it had 'the purpose or effect of unreasonably interfering with the subject's work performance or creating an intimidating, hostile or offensive working environment.' *Id.* at 139. As Respondents note, the court introduced its discussion of Article I, sections 2 and 3, with this sweeping statement:

> 'These provisions are obviously worded more broadly than the federal First Amendment, and are remarkable in the inclusiveness and adamancy with which rights of conscience are to be protected from governmental interference.'

Id. at 146. The court then launched into a brief history of governmental intolerance towards religion enforced by criminal laws in England before summarizing its *Salem College* decision and concluding:

> 'A general scheme prohibiting religious discrimination in employment, including religious harassment, does not conflict with any of the underpinnings of the Oregon constitutional guarantees of religious freedom identified in *Salem College:* It does not infringe on the right of an employer independently to develop or to practice his or her own religious opinions or exercise his or her rights of conscience, short of the employer's imposing them on employees holding other forms of belief or nonbelief; it does not discourage the multiplicity of religious sects; and it applies equally to all employers and thereby does not choose among religions or beliefs.
>
> 'The law prohibiting religious discrimination, including religious harassment, honors the constitutional commitment to religious pluralism

> by ensuring that employees can earn a living regardless of *their* religious beliefs. The statutory prohibition against religious discrimination in employment and, in particular, the BOLI rule at issue, when properly applied, will promote the '[n]atural right' of employees to 'be secure in' their 'worship [of] Almighty God according to the dictates of their own consciences,' Or. Const. Art. I, § 2, and will not be a law controlling religious rights of conscience or their free exercise.'

Meltebeke at 148-49. The court then moved on to a review of *Smith*, stating that *Smith* stood for the principle that '[a] law that is neutral toward religion or nonreligion as such, that is neutral among religions, and that is part of a general regulatory scheme having no purpose to control or interfere with rights of conscience or with religious opinions does not violate the guarantees of religious freedom in Article I, sections 2 and 3.' *Meltebeke* at 149. The court held as follows:

> 'We conclude that, under established principles of state constitutional law concerning freedom of religion, discussed above, BOLI's rule is constitutional on its face. The law prohibiting employment discrimination, including the regulatory prohibition against religious harassment, is a law that is part of a general regulatory scheme, expressly neutral toward religion as such and neutral among religions. Indeed, its purpose is to support the values protected by Article I, sections 2 and 3, not to impede them.'

Id. at 150-51.

"Next, the *Meltebeke* court analyzed whether the BOLI rule, *as applied*, violated Article I, sections 2 and 3. Following *Smith*, the court stated:

> 'Because sections 2 and 3 of Article I are expressly designed to prevent government-created homogeneity of religion, the government may not constitutionally impose sanctions on an employer for engaging in a **religious practice** without knowledge that the practice has a harmful effect on the employees intended to be protected. If the rule were otherwise, fear of unwarranted government punishment would stifle or make insecure the employer's enjoyment and exercise of religion, seriously eroding the very values that the constitution expressly exempts from government control.' (emphasis added)

Id. at 153. Based on facts set out in BOLI's Final Order, the court found that the employer's complained-of conduct constituted a 'religious practice,' that the employer did not know his conduct created an intimidating, hostile, or offensive

working environment,[45] and that the employer had established an affirmative defense under Article I, sections 2 and 3 because BOLI's rule did not require that the employer 'knew in fact that his actions in exercise of his religious practice had an effect forbidden by the rule.'[46] *Id.* In contrast, here Respondents' affidavits establish that their refusal to make a wedding cake for Complainants was not a religious practice, but *conduct* motivated by their religious beliefs.[47] Accordingly, *Meltebeke* does not aid Respondents.

"The general principle that emerges from these cases is that a law that is part of a general regulatory scheme, expressly neutral and neutral among religions, is constitutional under Article I, sections 2 and 3. ORS 659A.403 is such a law. Additionally, there is also "an overriding governmental interest" present, explicitly expressed by Oregon's legislature in ORS 659A.003 in the following words:

> 'The purpose of this chapter is * * * to ensure the human dignity of all people within this state and protect their health, safety and morals from the consequences of intergroup hostility, tensions and practices of unlawful discrimination of any kind based on * * * sexual orientation * * *.'

"Respondents further contend that 'the statutes underlying the Charges are facially unconstitutional under the Oregon Constitution in that they violate Respondents' fundamental rights arising under the Oregon Constitution to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated.' There is no requirement under the Oregon Constitution for such an exemption.[48] The exclusions and

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[45] *See In the Matter of James Meltebeke,* 10 BOLI 102, 105-07 (1992) (BOLI Commissioner's Findings of Fact included detailed findings that employer believed he was commanded to preach his beliefs to others under "any and all circumstances" or "he would be lost").

[46] In a footnote, the court distinguished "a religious practice" from "conduct that may be motivated by one's religious beliefs" in stating: "Conduct that may be motivated by one's religious beliefs is not the same as conduct that constitutes a religious practice. The knowledge standard is considered here only in relation to the latter category. In this case, no distinction between those categories is called into play, because a fair reading of BOLI's revised final order is that BOLI found that all of Employer's religious activity respecting Complainant is part of Employer's religious practice." *Meltebeke* at 153, fn. 19.

[47] *Cf. State v. Beagley,* 257 Or App 220, 226, 305 P3d 147 (2013) ("First, we conclude that, regardless of where the line between religious practice and religiously motivated conduct is drawn, there are some behaviors that fall clearly to one side or the other. A Catholic taking communion at mass is clearly and unambiguously engaging in a religious practice; on the other side of the line, allowing a child to die for lack of life-saving medical care is clearly and unambiguously—and, as a matter of law—conduct that may be motivated by one's religious beliefs.")

[48] The legislature did choose to enact certain exemptions to civil rights laws. Actions by bona fide churches or other religious institutions regarding housing and use of facilities are not unlawful practices if based on a bona fide religious belief about sexual orientation. Actions by bona fide churches or other religious institutions regarding employment are not unlawful practices if based on a bona fide religious belief about sexual orientation if the actions fall under one of three specific circumstances. Preference for

prohibitions in ORS 659A.400(2) and 659A.403(2) do not lead to the conclusion that the law is not neutral. Respondents' reliance on *Hobby Lobby*[49] fails because *Hobby Lobby* was not decided on constitutional grounds, but decided under the Religious Freedom Restoration Act ("RFRA") of 1993 and because the RFRA does not apply to the states. *City of Boerne v. Flores,* 521 US 507 (1997).

"Based on the above, the forum finds ORS 659A.403 to be constitutional with respect to Article I, sections 2 and 3 of the Oregon Constitution. With respect to whether ORS 659A.403 is constitutional 'as applied,' *Meltebeke* does not aid Respondents for the reason that Respondents' refusal to make a wedding cake for Complainants was not a 'religious practice,' but conduct motivated by their 'religious beliefs.' *Meltebeke* at 153.

"United States Constitution

"First Amendment: Unlawfully infringing on Respondents' right of conscience** and **right to free exercise of religion

"Respondents contend that the First Amendment to the U.S. Constitution, as applied to the State of Oregon under the Fourteenth Amendment, prohibits BOLI from enforcing the provisions of ORS 659A.403 against Respondents because that statute, on its face and as applied, unlawfully infringes on Respondents' right of conscience and right to free exercise of religion. In pertinent part, the First Amendment provides: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.'

"Respondents argue that the forum should apply the 'strict scrutiny' test set out by the U.S. Supreme Court in *Sherbert v. Verneer,* 374 US 398 (1963), claiming that *Sherbert* and the U.S. Supreme Court's subsequent decisions in *Wisconsin v. Yoder,* 406 US 205 (1972), *Thomas v. Review Board,* 450 US 707 (1981), *Pacific Gas and Elec. Co. v. Public Utilities Commissioner.,* 475 US 1 (1986), *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 US 520 (1993), *Hosanna-Tabor Ev. Lutheran Church & School v. EEOC,* 132 SCt 694 (2012), *Gonzalez v. O Centro,* 546 US 418 (2006), *Brown v. Entertainment Merchants Assn.,* 131 SCt 2729 (2011), and *Wooley v. Maynard,* 430 US 705 (1977) compel the application of that test.

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employment applicants of a particular religion is not an unlawful practice by a bona fide church or other religious institution if it passes a three part test. The housing, use of facilities and employment exemptions do not apply to commercial or business activities of the church or institution. *See* ORS 659A.006. The existence of this statute, last amended in 2007, does not support Respondents' argument that the public accommodation statutes are unconstitutional because they do not contain such exemptions. Rather, it supports the Agency. If the legislature intended such exemptions be applied to the public accommodation statutes it would have enacted them.

[49] *Burwell v. Hobby Lobby,* 573 US ___, 134 SCt 2751 (June 30, 2014).

"The forum begins its analysis by noting that *Wooley, Pacific Gas, Hosanna-Tabor, Gonzalez,* and *Brown* are inapplicable to Respondents' free exercise claim for the following reasons:

- *"Wooley* and *Pacific Gas* involved religion but were decided exclusively upon free speech grounds.
- *"Hosanna-Tabor* was an employment discrimination suit brought by the EEOC on behalf of a minister challenging the church's decision to fire her as an ADA violation in which the court held only that 'the ministerial exception bars such a suit.' *Hosanna-Tabor* at 710.
- *"Gonzalez,* like *Hobby Lobby*, is inapplicable to this case because it was decided under the RFRA and because the RFRA does not apply to the states.
- *"Brown* was a free speech case that did not involve a free exercise claim.

"In *Sherbert*, a Seventh Day Adventist ('appellant') was denied unemployment benefits because she refused to work on Saturdays based on her religious beliefs. She appealed on the grounds that South Carolina's law violated the free exercise clause of the First Amendment. The court held that the law was constitutionally invalid because it imposed a burden on appellant's free exercise of her religion and there was no 'compelling state interest enforced in the eligibility provisions of the South Carolina statute [that] justifies the substantial infringement of appellant's First Amendment rights.' *Id.* at 404, 406-07.

"In *Wisconsin,* the Supreme Court held that the state of Wisconsin could not compel Amish students to attend school beyond the eighth grade when that requirement conflicted with Amish religious beliefs, stating:

> "[I]n order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."

"Relying on *Sherbert* and *Wisconsin*, the *Thomas* court reversed the denial of unemployment benefits to a Jehovah's Witnesses who quit his job because his job duties changed from working with sheet metal to manufacturing turrets for tanks, a war-related task that he opposed based on his religious beliefs. In upholding appellant's claim, the court stated:

> 'The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious

liberty by showing that it is the least restrictive means of achieving some compelling state interest.'

Thomas, at 718.

"In 1990, the *Smith* case, upon which both the Agency and Respondents rely, came before the court on appeal from the Oregon Supreme Court. The Oregon Supreme Court held that the state's denial of unemployment benefits based on the prohibition of sacramental peyote use was valid under the Oregon Constitution but invalid under the free exercise clause in the First Amendment of the U. S. Constitution based on *Sherbert* and *Thomas*. The U.S. Supreme Court characterized the issue before it as follows:

> "This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use."

Smith at 874. Smith argued that 'prohibiting the free exercise [of religion]' includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires).' *Id.* at 878. The court rejected Smith's argument, holding that the State of Oregon, 'consistent with the free exercise clause,' could deny Smith unemployment benefits when Smith's dismissal resulted from the use of peyote, a use that was constitutionally prohibited under Oregon law. *Id.* at 890. The court specifically declined to apply *Sherbert's* 'compelling interest' test, stating:

> 'Although, as noted earlier, we have sometimes used the *Sherbert* test to analyze free exercise challenges to * * * laws, we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling - permitting him, by virtue of his beliefs, "to become a law unto himself," - contradicts both constitutional tradition and common sense.' (internal citations omitted)

Id. at 884-85. The court concluded that the 'right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."' *Id.* at 879, citing *United*

States v. Lee, 455 U.S. 252, at 263, n. 3. Related to one of Respondents' arguments here, the court also discussed the concept of 'hybrid' cases and concluded that *Smith* was not a 'hybrid' case.[50]

"In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 US 520 (1993), the Church of the Lukumi Babalu Aye, Inc. ('church') and its congregants practiced the Santeria religion, a religion that employed animal sacrifice as one of its principal forms of devotion. During that devotion, animals are killed by cutting their carotid arteries, then cooked and eaten following Santeria rituals. After the church leased land in Hialeah and announced plans to establish a house of worship and other facilities there, the city council held an emergency public session and passed a resolution which noted city residents' 'concern' over religious practices inconsistent with public morals, peace, or safety, and adopted three substantive ordinances addressing the issue of religious animal sacrifice.

Using the *Smith* test, the Supreme Court found that the ordinances were neither neutral[51] nor of general applicability[52] and held that 'a law burdening religious

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[50] With respect to "hybrid claims," the *Smith* court stated: "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell v. Connecticut,* 310 U.S., at 304-307, 60 S.Ct., at 903-905 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick,* 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944) (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), to direct the education of their children, see *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school). Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. *Wooley v. Maynard,* 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (invalidating compulsory flag salute statute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. *Cf. Roberts v. United States Jaycees,* 468 U.S. 609, 622, 104 S.Ct. 3244, 3251-52, 82 L.Ed.2d 462 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed.") (footnotes omitted)

[51] The court examined the history behind the ordinances before concluding:

> "In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These

practice that is not neutral or not of general application' can only survive if there is a 'compelling' governmental interest and the law is 'narrowly tailored in pursuit of those interests.' *Id.* at 546-47.

"Respondents argue that the *Smith* 'neutrality' test should not be applied here for two reasons. First, this is a 'hybrid' case in which the law 'substantially burden[s] multiple rights combining religion and speech' that the *Smith* court distinguished from cases that only involve free exercise claims. This argument fails because neither Respondents' free exercise nor free speech claims are independently viable[53] and the two claims together are not greater than the sum of their parts.[54] Second, Respondents argue that ORS 659A.403 is neither 'neutral' nor of 'general applicability.' Applying the *Smith* test, the forum finds that ORS 659A.403 is a 'valid and neutral law of general applicability.' As such, it is constitutional under the First Amendment's free exercise clause, both facially and as applied.

"Oregon Constitution

"Article I, Section 8: freedom of speech

"Article I, Section 8 of the Oregon Constitution provides:

> '**Section 8. Freedom of speech and press.** No laws shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.'

ORS 659A.403 provides, in pertinent part:

> '(1) Except as provided in subsection (2) of this section, all persons within the jurisdiction of this state are entitled to the full and equal

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ordinances are not neutral, and the court below committed clear error in failing to reach this conclusion." *Lukumi* at 542.

[52] In concluding that Hialeah's ordinances were not of "general applicability," the court found that the ordinances "were drafted with care to forbid few killings but those occasioned by religious sacrifice," that they did not prohibit and approved many kinds of "animal deaths or kills for nonreligious reason," that the city's purported concern for public health resulting from improper disposal of animal carcasses only addressed religious sacrifice and not disposal by restaurants or hunters, that more rigorous standards of inspection were imposed on animals killed for religious sacrifice and eaten than animals killed by hunters or fishermen, and that small commercial slaughterhouses were not subject to similar requirements related to the city's "professed desire to prevent cruelty to animals and preserve the public health." *Id.* at 543-45.

[53] *See* discussion in "free speech" section, *infra.*

[54] *See Elane Photography, LLC v. Willock,* 309 P3d 53 (2013), *cert. den.* ___ US ___ , 134 SCt 1787 (2014).

> accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of * * * sexual orientation * * *.
>
> '* * * * *
>
> '(3) It is an unlawful practice for any person to deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation in violation of this section.'

The issues considered by the forum are:

> (1) Is ORS 659A.403 facially unconstitutional?
>
> (2) If ORS 659A.403 is facially constitutional, is it unconstitutional by requiring Respondents to participate in 'compelled speech' by making and providing a wedding cake for Complainants?

"State v. Robertson, 293 Or 402, 649 P.2d 569 (1982), is the seminal Oregon case in this area. *Robertson* involved an Article I, Section 8 challenge to ORS 163.275, a statute defining the crime of coercion, in which 'speech [was] a statutory element in the definition of the offense.' *Id.* at 415. In *Robertson*, the Oregon Supreme Court established a basic framework, comprised of three categories, for determining whether a law violates Article I, section 8. That framework was most recently described in *State v. Babson*, 355 Or 383, 391, 326 P3d 559, 566 (2014).

> 'Under the first category, the court begins by determining whether a law is "written in terms directed to the substance of any 'opinion' or any 'subject' of communication." If it is, then the law is unconstitutional, unless the scope of the restraint is "wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." If the law survives that inquiry, then the court determines whether the law focuses on forbidden effects and "the proscribed means [of causing those effects] include speech or writing," or whether it is "directed only against causing the forbidden effects." If the law focuses on forbidden effects, and the proscribed means of causing those effects include expression, then the law is analyzed under the second *Robertson* category. Under that category, the court determines whether the law is overbroad, and, if so, whether it is capable of being narrowed. If, on the other hand, the law focuses only on forbidden effects, then the law is in the third *Robertson* category, and an individual can challenge the law as applied to that individual's circumstances.' (internal citations omitted)

"Robertson Category One

"In analyzing a law under *Robertson's* first category, Oregon courts have looked to the text of the law to see whether it expressly regulates expression. *Babson* at 395. In *Babson*, the issue was the constitutionality of a guideline adopted by the Legislation Administration Committee ('LAC') that prohibited all overnight use of the capitol steps, including protests like defendants' vigil. Defendants and the LAC agreed that a person could violate the guideline without engaging in expressive activities, if, for example, a person used the steps as a shortcut while crossing the capitol grounds after 11:00 p.m. when there were no hearings or floor sessions taking place. *Id.* at 396-97. The court held that the guideline was not unconstitutional under *Robertson's* first category because it was not 'written in terms directed to the substance of any "opinion" or any "subject" of communication.' *Id.* ORS 659A.403, like the LAC guideline in *Babson*, is not "written in terms directed to the substance of any 'opinion' or any "subject" of communication." Rather, it is a law focused on proscribing the pursuit or accomplishment of a forbidden result – in this case, discrimination by places of public accommodations against individuals belonging to specifically enumerated protected classes. As such, it is not susceptible to a *Robertson* category one facial challenge.

"Respondents argue that ORS 659A.403 expressly regulates expression because the word 'deny' in section (3) shows that, when properly interpreted, 'the statute prohibits *communication* that services are being denied for a prohibited reason, which implicates both speech and opinion.' (emphasis in original). Under Respondents' expansive interpretation, all laws implicating any form of communication whatsoever would be facially unconstitutional under Article I, Section 8. This is not what the court held in *Robertson* and *Babson*.[55]

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[55] *See State v. Robertson,* 293 Or 402, 416-417, 649 P.2d 569 (1982) ("As stated above, article I, section 8, prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences. * * * It means that laws must focus on proscribing the pursuit or accomplishment of forbidden results rather than on the suppression of speech or writing either as an end in itself or as a means to some other legislative end.") *See also State v. Garcias,* 296 Or 688, 697, 679 P.2d 1354, 1359 (1984) (menacing statute held constitutional under *Robertson* category one analysis even though it prohibited threatening words because "[t]he fact that the harm may be brought about by use of words, even by words unaccompanied by a physical act, does not alter the focus of the statute, which remains directed against attempts to cause an identified harm, rather than prohibiting the use of words as such"); *State v. Moyle,* 299 Or 691, 701, 705 P2d 740 (1985)(statute criminalizing telephonic or written threats held constitutional under *Robertson* category one analysis because "the effect that it proscribes, causing fear of injury to persons or property, merely mirrors a prohibition of words themselves"); *City of Eugene v. Miller,* 318 Or 480, 489, 871 P2d 454 (1994)(defendant, who sold joke books on the city sidewalk, was convicted of violating an ordinance prohibiting vendors from selling merchandise on city sidewalks; ordinance held valid under first category of *Robertson* because it banned the sale of all expressive material on the sidewalk and therefore was content neutral); *State v. Illig-Renn,* 341 Or 228, 237, 142 P3d 62 (2006)("[t]he fact that persons seek to convey a message by their conduct, that words accompany their conduct, or that the very reason for their conduct is expressive, does not transform prohibited conduct into protected expression or assembly").

"Based on the above, the forum concludes that ORS 659A.403 is not subject to a *Robertson* category one Article I, Section 8 facial challenge.

"Robertson Category Two

"A law falls under the second category of *Robertson* if it is 'directed in terms against the pursuit of a forbidden effect' and 'the proscribed means [of causing that effect] include speech or writing.' *Babson* at 397, quoting *Robertson* at 417-18. Oregon courts examine a statute in the second category for 'overbreadth' to determine if 'the terms of [the] law exceed constitutional boundaries, purporting to reach conduct protected by guarantees such as * * * [A]rticle I, section 8. * * * If a statute is overbroad, the court then must determine whether it can be interpreted to avoid such overbreadth.' *Id.* at 397-98, quoting *Robertson* at 410, 412.

"In *State v. Illig Renn,* 341 Or 228 (2006), the defendant challenged as overbroad a statute that made it a crime to '[r]efuse[ ] to obey a lawful order by [a] peace officer' if the person knew that the person giving the order was a peace officer. In addressing the state's argument that the statute was not subject to an overbreadth challenge because it did not 'expressly' restrict expression, the court stated that a statute is subject to a facial challenge under the first or second category of *Robertson* if it 'expressly or obviously proscribes expression,' leaving statutes with '[m]arginal and unforeseen applications to speech and expression' to as-applied challenges under the third category.[56] *Illig–Renn,* at 234. The court went on to state that facial challenges generally would not be permitted 'if the statute's application to protected speech [was] not traceable to the statute's express terms.' *Id.* at 236. Based on that interpretation of Article I, section 8, the court concluded that the defendant could challenge the statute that prohibited interfering with a peace officer only as applied, under the third category of *Robertson,* and not on its face, under the other two categories. *Id.* at 237.

"Respondents' argument resembles defendants' argument in *Babson*, which the court characterized in the following words:

> 'Defendants instead argue that, even if the [law] targets some harm—rather than targeting expression—the [law] has an "obvious and foreseeable" application to speech, and it is overbroad. That is, defendants argue that the text of the statute does not have to refer to expression or include expression as an element to fall under category two, as long as it has an obvious application to expression.'

Babson at 398. The *Babson* court rejected this argument, stating:

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[56] The court referred to this type of statute as a "speech-neutral" statute, one that "doe[s] not by its terms forbid particular forms of expression." *Illig-Renn* at 233-34.

> 'We agree with the state that the statement in *Robertson* on which defendants rely does not extend Article I, section 8, overbreadth analysis to every law that the legislature enacts. When expression is a proscribed means of causing the harm prohibited in a statute, it is apparent that the law will restrict expression in some way because expression is an element of the law. For that type of law, the legislature must narrow the law to eliminate apparent applications to *protected* expression. *See Robertson,* 293 Or. at 417–18, 649 P2d 569 (noting that when a law focused on harmful effects includes expression as a proscribed means of causing those effects, the court must determine whether the law "appears to reach *privileged* communication" (emphasis added)). However, if expression is not a proscribed means of causing harm, and is not described in the terms of the statute, the possible or plausible application of the statute to protected expression is less apparent. That is, in the former situation, every time the statute is enforced, expression will be implicated, leading to the possibility that the law will be considered overbroad; in the latter situation, the statute may never be enforced in a way that implicates expression, even if it is possible, or even apparent, that it *could* be applied to reach protected expression. When a law does not expressly or obviously refer to expression, the legislature is not required to consider all apparent applications of that law to protected expression and narrow the law to eliminate them. The court's statement in *Robertson,* on which defendants rely, does not extend the second category overbreadth analysis to statutes that do not, by their terms, expressly or obviously refer to protected expression.'

Id. at 400. The *Babson* court went on to explain that 'obviously,' as used in the last sentence of the above-quoted statement, did not 'extend Article I, section 8, scrutiny [under the first two *Robertson* categories] to any statute that could have an apparent application to speech; rather, the [*Robertson*] court used the word 'obviously' to make it clear that creative wording that does not refer directly to expression, but which could *only* be applied to expression, would be scrutinized under the first two categories of *Robertson.*' *Id.* at 403. The *Babson* court concluded its *Robertson* category two analysis by stating:

> 'Similarly, here, although the guideline does not directly refer to speech, the guideline does have apparent applications to speech, as defendants contend. A restriction on use of the capitol steps will prevent people like defendants from protesting or otherwise engaging in expressive activities on the capitol steps overnight. That fact alone, however, does not subject the guideline to Article I, section 8, scrutiny under the second category of *Robertson.* The guideline is not simply a mirror of a prohibition on words. The guideline also bars skateboarding, sitting, sleeping, walking, storing equipment, and all other possible uses of the capitol steps during certain hours. Thus, because the guideline does not expressly refer to expression as a means of causing some harm, and it does not "obviously" prohibit

expression within the meaning of *Moyle,* it is not subject to an overbreadth challenge under the second category of *Robertson.'*

Babson at 403-04. This case, like *Babson* and *Illig-Renn*, does not involve a statute that 'obviously' prohibits expression. Rather, it is a 'speech-neutral' statute as described in *Illig-Renn*.[57] Furthermore, the legislature's use of the challenged word 'deny' in ORS 659A.403 is contextually similar to the challenged word 'refuse' in *Illig-Renn*, as both terms prohibit specific actions that may involve expression without specifying a particular form of expression. In conclusion, the forum finds that ORS 659A.403 is not subject to Article I, section 8 overbreadth scrutiny as set out in *Robertson*, category two.

"Robertson Category Three Does Not Apply to Respondents' claim of 'compelled speech.'

"Respondents contend that their Article I, section 8, rights were violated by the Agency's application of ORS 659A.403 because that application, in requiring them to provide a wedding cake to Complainants, 'unlawfully compel[s] Respondents to engage in expression of a message they did not want to express.' The *Robertson* framework was developed in a series of cases involving prohibited speech, and there are no Oregon cases that have come to the forum's attention in which compelled speech was the issue. However, the U.S. Supreme Court has addressed that issue in a line of cases involving the First Amendment and compelled speech. In the absence of Oregon case law, the forum turns to those decisions for guidance.

"As a preliminary matter, the forum addresses Respondents' argument, made in their response to the Agency's cross-motions for summary judgment, that the 'forbidden effect' involved in a *Robertson* category three analysis of the constitutionality of ORS 659A.403 is 'Respondents' choice not to be involved in Complainants' same-sex ceremony, which is alleged to be a denial of services based on sexual orientation.' Respondents argue that their 'choice not to be involved' cannot be a 'forbidden effect' because Article XV, section 5a of the Oregon Constitution expressly prohibited legal recognition of same-sex marriages in January 2013,[58] making it 'clear [that] opposition to same-sex marriage is not a 'forbidden effect.'" Respondents misread *Babson*, *Robertson*, and the statute. The 'forbidden effect' under ORS 659A.403 is not its impact on

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[57] *Cf. State v. Babson*, 355 Or 383, 405, 326 P3d 559, 566 (2014), quoting *Miller* at 489-90 (*Robertson* category two analysis did not apply because contested ordinance "was directed at a harm – street and sidewalk congestion – that the city legitimately could seek to prevent, and did not, 'by [its] terms, purport to proscribe speech or writing as a means to avoid a forbidden effect.'")

[58] In January 2013, Article XV, section 5a, of the Oregon Constitution provided: "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage."

Respondents, but Respondents' denial of services to Complainants based on their sexual orientation. Respondents were not asked to issue a marriage license, perform a wedding ceremony, or in any way legally recognize Complainants' planned same-sex wedding in contravention of Article XV, Section 5a. Furthermore, there is no evidence in the record, as submitted for summary judgment, that they communicated to Respondents where they intended to be married, that they intended to be married in the state of Oregon, or, for that matter, that Complainants were ever married.[59]

"The right to refrain from speaking was established in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943), in which the U. S. Supreme Court held that the State of West Virginia could not constitutionally require students to salute the American flag and recite the Pledge of Allegiance. The Court held that a state could not require 'affirmation of a belief and an attitude of mind,' noting that 'the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.' *Id.* at 633-34.

"In *Miami Herald Publishing Company v. Tornillo,* 418 U.S. 241 (1974), the Court considered whether a Florida statute that required newspapers that 'assailed' the 'personal character or official record' of any political candidate to give that candidate the 'right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges,' and to print the reply 'in as conspicuous a place and in the same kind of type as the charges which prompted the reply.' *Id.* at 243. The Court found the statute was unconstitutional because it deprived the newspaper and its editors of the fundamental right to decide what to print or omit. *Id. at 258.*

"In 1977, the Court was asked to decide whether the State of New Hampshire could constitutionally enforce criminal sanctions against persons who covered the motto 'Live Free or Die' on their passenger vehicle license plates because that motto was repugnant to their moral and religious beliefs. *Wooley v. Maynard,* 430 U.S. 705 (1977). In its discussion of the nature of compelled speech, the Court noted that New Hampshire's statute 'in effect requires that appellees used their private property as a "mobile billboard" for the State's ideological message or suffer a penalty' and that driving an automobile was a 'virtual necessity for most Americans.' *Id.* at 715. The Court found New Hampshire's statute unconstitutional, holding as follows:

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[59] The forum takes judicial notice that a law granting full marriage rights for same-sex couples in the state of Washington, which is immediately adjacent to the State of Oregon and only separated from the City of Portland by the Columbia River, took effect on December 6, 2012. *See* Revised Code of Washington 26.04.010. A. Klein was aware of that on January 17, 2013, as shown by his statement during the Perkins interview, quoted in Finding of Fact #14.

> 'We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.'

Id. at 713.

"In 1986, the Court was asked to decide whether a regulated public utility company that had traditionally distributed a company newsletter in its quarterly billing statements was required to enclose newsletters published by TURN, a group expressing views opposite to the utility, in the same billing statements. *Pacific Gas & Electric Co. v. Public Utilities Commission of California* ("PUC"), 475 U.S. 1 (1986). The Court held that the PUC's requirement unconstitutionally compelled Pacific Gas to accommodate TURN's speech by requiring it to disseminate messages hostile to Pacific's own interests. *Id.* at 20-21.

"*Hurley v. Irish-American GLIB,* 515 U.S. 557 (1995), presented the question of whether private citizens in Massachusetts who organized a St. Patrick's Day parade were required to include GLIB, a group 'celebrat[ing] its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants,' thereby imparting a message that the organizers did not wish to convey among the marchers. *Id.* at 570. The requirement was based on a provision of Massachusetts' public accommodation law that included a prohibition on discrimination on the basis of sexual orientation. The Court found that a parade is a form of expression, stating that a 'parade' indicates 'marchers who are making some sort of collective point, not just to each other but to bystanders along the way. Indeed, a parade's dependence on watchers is so extreme that nowadays, as with Bishop Berkeley's celebrated tree, "if a parade or demonstration receives no media coverage, it may as well not have happened."' *Id.* at 568. The Court also determined that:

> '[GLIB]'s participation as a unit in the parade was equally expressive. GLIB was formed for the very purpose of marching in it, as the trial court found, in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade. The organization distributed a fact sheet describing the members' intentions, and the record otherwise corroborates the expressive nature of GLIB's participation. In 1993, members of GLIB marched behind a shamrock-strewn banner with the simple inscription "Irish American Gay, Lesbian and Bisexual Group of Boston." GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own.' (internal citations omitted)

Id. at 570. The Court further determined that '[s]ince every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade'[60] and held the state's application of the statute unconstitutional because 'this use of the State's 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.

"In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* ('FAIR'), 547 U.S. 47 (2006), a group of law school associations objected to the application of the Solomon Amendment, which required campuses receiving federal funds to provide equal access to military recruiters. The Court held that there was no First Amendment violation, distinguishing *Hurley*, *Tornillo*, and *Pacific Gas* because in those cases 'the complaining speaker's own message was affected by the speech it was forced to accommodate' or 'interfere[d] with a speaker's desired message.' *Id.* at 63-64. The Court noted that '[c]ompelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.' *Id.* at 62. Of additional significance to this case, the Court stated:

> 'Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies. We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy.'

Id. at 65.

"*Wooley* and *Barnette* do not support Respondents because Respondents are under no compulsion to publicly 'speak the government's message'[61] in an affirmative manner that demonstrates their support for same-sex marriage. Unlike the laws at issue in *Wooley* and *Barnette*, ORS 659A.403 does not require Respondents to recite or display any message. It only mandates that if Respondents operate a business as a place of public accommodation, they cannot discriminate against potential clients based on their sexual orientation. *Elane Photography* at 64.

"*Tornillo* and *Pacific Gas* are distinctly different from this case. In both cases, the government commandeered a speaker's means of reaching its

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[60] *Hurley v. Irish-American GLIB,* 515 U.S. 557, 572-73 (1995).

[61] *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006).

audience and required the speaker to disseminate an opposing point of view. Here, the state has not compelled Respondents to publish or distribute anything expressing a view.

"*Hurley* is distinguishable because Respondents' provision of a wedding cake for Complainants was not for a public event, but for a private event. Whatever message the cake conveyed was expressed only to Complainants and the persons they invited to their wedding ceremony, not to the public at large. In addition, the forum notes that, whether or not making a wedding cake may be expressive, the operation of Respondents' bakery, including Respondents' decision not to offer services to a protected class of persons, is not. *Elane Photography* at 68.

"Finally, *Rumsfeld* does not aid Respondents because it rejected the law schools' arguments that they were forced to speak the government's message and that they were required to host the recruiters' speech in a way that violated compelled speech principles. *Rumsfeld* at 64-65.

"For the reasons stated above, the forum concludes that the application of ORS 659A.403 to Respondents so as to require them to provide a wedding cake for Complainants does not constitute compelled speech that violates Article I, section 8 of the Oregon Constitution.

"United States Constitution

"First Amendment: Unlawfully infringing on Respondents' right to free speech.

"Respondents contend that the First Amendment to the U. S. Constitution, as applied to the State of Oregon under the Fourteenth Amendment, prohibits BOLI from enforcing the provisions of ORS 659A.403 against Respondents because that statute unlawfully infringes on Respondents' free speech rights. In pertinent part, the First Amendment provides: 'Congress shall make no law * * * abridging the freedom of speech * * *.'

"Based on the discussion in the previous section, the forum concludes that the requirement in ORS 659A.403 that Respondents bake a wedding cake for Complainants is not 'compelled speech' that violates the free speech clause of the First Amendment to the U. S. Constitution.

"CONCLUSION

"Respondents' motion for summary judgment is **GRANTED** with respect to the Agency's allegations in the Amended Formal Charges that Respondent M. Klein violated ORS 659A.403 by denying full and equal accommodations, advantages, facilities and privileges to Complainants Rachel Cryer and Laurel Bowman-Cryer.

"Respondents' motion for summary judgment is **GRANTED** with respect to the Agency's allegations in the Amended Formal Charges that Respondent A. Klein violated ORS 659A.406.

"Respondents' motion for summary judgment is **GRANTED** with respect to the Agency's allegations in the Amended Formal Charges that Respondents violated ORS 659A.409.

"The Agency's cross-motion for summary judgment is **GRANTED** with respect to the Agency's allegations in the Amended Formal Charges that Respondent A. Klein violated ORS 659A.403 by denying the full and equal accommodations, advantages, facilities and privileges of a place of public accommodation to Complainants Rachel Cryer and Laurel Bowman-Cryer based on their sexual orientation.

"The Agency's cross-motion for summary judgment is **GRANTED** with respect to the Agency's allegations in the Formal Charges that Respondents A. Klein and M. Klein are jointly and severally liable for A. Klein's violation of ORS 659A.403.

"The Agency's cross-motion for summary judgment is **GRANTED** with respect to Respondents' affirmative defenses.

"The Forum has **NO JURISDICTION** to adjudicate the counterclaims raised by Respondents in paragraphs ##31-42 in Respondents' Amended Answers.

"**Case Status**

"The hearing will convene as currently scheduled. The scope of the evidentiary portion of the hearing will be limited to the damages, if any, suffered by Complainants as a result of A. Klein's ORS 659A.403 violation.

IT IS SO ORDERED"

The ALJ's rulings on Respondents' motion for summary judgment and the Agency's cross-motion for summary judgment are **AFFIRMED**, except for the ruling on Respondents' violation of ORS 659A.409, which is **REVERSED** for reasons set out in the Opinion section of this Final Order and as noted in the Conclusions of Law in this Final Order. (Ex. X65)

29) On February 4, 2015, the ALJ granted the Agency's second motion for a protective order. (Ex. X65)

30) On February 5, 2015, the ALJ granted Respondents' renewed motion to depose Complainants. The ALJ's interim order read as follows:

"**Introduction**

"On January 15, 2015, Respondents filed a renewed motion to depose Complainants. On January 22, 2015, the Agency timely filed objections. Respondents' motion is based on part on their assertion that (1) the 25 additional interrogatories they were allowed to serve on the Agency pursuant to my September 29, 2014, interim order that allowed Respondents to serve additional interrogatories as a potential means of eliminating the need for a deposition, (2) coupled with the Agency's responses to Respondents' prior interrogatories and the Agency's answers to the 25 additional interrogatories, (3) are inadequate to address Complainants' damages, leaving Respondents substantially prejudiced as a result.

"On January 22, 2015, the Agency filed objections, arguing that Respondents' have not clearly articulated how they will be substantially prejudiced in the absence of depositions, that Complainants should not be subjected to depositions 'due to Respondents' inability to adequately craft their interrogatories,' and that Respondents' 'discovery tactics are an abuse of process.'

"**Discussion**

"On October 14, 2014, the Agency complied with the forum's September 25, 2014, discovery order requiring the Agency to answer Respondents' August 5, 2014, interrogatory seeking a detailed explanation of Complainants' emotional, physical and mental suffering caused by Respondents' actions. The Agency's interrogatory response listed a total of 88 discrete types of harm suffered by Complainant Cryer and 90 discrete types of harm suffered by Complainant Bowman-Cryer. In support of their motion, Respondents argue that:

> '[The listed symptoms], some of which are inconsistent with each other, raise more questions than they answer. Respondents attempted to address some of these nearly 200 symptoms in their 25 interrogatories, but were unable to even begin to address the questions raised by this exhaustive list of symptoms, much less get clear answers from Complainants.'

Among its objections to Respondents' motion for depositions, the Agency asserts that 'many of the listed symptoms are interrelated to one another and would hardly require Respondents to explore them individually.' The Agency further notes that Respondents will have an adequate opportunity to 'cross-examine Complainants on all symptoms at hearing.'

"To more clearly illustrate the points raised by Respondents and the Agency, the types of harm alleged by each Complainant are reprinted below in their entirety. As will be seen, they permeate all aspects of Complainants' lives.

Complainant Rachel Cryer

'[88 symptoms listed]

Complainant Laurel Bowman-Cryer

'[90 symptoms listed]

OAR 839-050-0200(3) governs depositions in this forum. It provides:

> 'Depositions are strongly disfavored and will be allowed only when the requesting participant demonstrates that other methods of discovery are so inadequate that the participant will be substantially prejudiced by the denial of the motion to depose a particular witness.'

"Since OAR 839-050-0200(3) was adopted, the forum has been extremely reluctant to grant depositions, and has uniformly denied respondents' requests for depositions when respondents have not first sought informal discovery through interrogatories. *See, e.g., In the Matter of Oak Harbor Freight Lines, Inc.*, 33 BOLI 1 (2014), *In the Matter of Columbia Components, Inc.*, 32 BOLI 257 (2013), *In the Matter of Blachana, LLC*, 32 BOLI 220 (2013), *In the Matter of From the Wilderness, Inc.*, 30 BOLI 227 (2009). The only occasion when the forum has allowed a deposition to take place was in the *Columbia Components* case, under the following circumstances:

> 'During the hearing it became clear that Complainant possessed documents either requested by Respondent and/or set out in the [ALJ's] discovery order that Complainant did not provide until Respondent was able to ascertain existence of those documents during Complainant's testimony * * * [and] that Complainant had been less than forthcoming with regard to the existence of those documents.'

"In this case, Respondents have satisfied the forum's requirement of seeking discovery by means of informal request before requesting a deposition. Before initially requesting a deposition, Respondents made informal document discovery requests, requested admissions, and served 25 interrogatories on the Agency, all before Respondents received the Agency's interrogatory answer setting out the alleged 178 types of harm suffered by Complainants as a result of Respondents' actions.

"On September 25, 2014, the forum granted Respondents' motion to depose Complainants, with the scope of the depositions limited to 'Complainants'

claim for damages.' That ruling was predicated on my conclusion that Respondents '[had] sought informal discovery on the issue of damages through other methods and do not have adequate information on damages.'

"At a prehearing conference held on September 29, 2014, discovery was discussed at length. As noted earlier, it was agreed that Respondents would be allowed to serve 25 additional interrogatories on the Agency as a potential means of eliminating the need for a deposition. On October 14, 2014, the Agency sent Respondents its interrogatory response listing the 178 types of alleged harm. In the absence of depositions, that left 25 interrogatories for Respondents to explore those 178 listed harms. On December 31, 2014, Respondents served the interrogatories that were allowed in my September 29, 2014, ruling. The Agency timely responded on January 13, 2015.

"Since Respondents filed their motion on January 15, 2015, the Agency was granted summary judgment as to Respondents' alleged ORS 659A.403 violation. In the interim order granting summary judgment, I ruled that the only evidentiary issue at hearing will be the amount of damages, if any, to which Complainants are entitled. The amount of damages sought on Complainants' behalf is 'at least $75,000' for each Complainant. In addition, it appears from the Agency's February 3, 2015, filing in response to the forum's inquiry regarding a Protective Order sought by the Agency that the Agency may intend to present evidence at hearing that Complainants are entitled to damages for mental and emotional suffering up to the present day, more than two years after the date of discrimination.

"I have reviewed prior BOLI Final Orders in which damages were awarded for emotional and mental suffering and find that this case stands well apart from all its predecessors in the exhaustive list of harms alleged by Complainants for which the Agency seeks damages. No other case comes even remotely close. In defending themselves, Respondents have a right to inquire into each type of harm alleged by Complainants to determine the extent of the harm and whether Complainants' physical, mental, and emotional suffering was caused, at least in part, if not in whole, by events and circumstances that were unrelated to Aaron Klein's ORS 659A.403 violation. Based on the sheer number and variety of types of alleged harm, there is no practical way Respondents can accomplish an effective inquiry using interrogatories. I find that Respondents will be substantially prejudiced if they are not allowed to depose Complainants.

"Based on the above, Respondents' motion to depose Complainants is **GRANTED,** with the following limitations:

'1. Respondents are allowed a maximum of three hours, not counting breaks, to question each Complainant.

'2. The Agency may choose where the depositions are to be conducted and is instructed to cooperate in making Complainants available for deposition as soon as practical, given that the hearing is scheduled to begin next month. If the Agency and Respondents cannot agree on a date, they are instructed to contact me and I will choose a date. I do not intend to postpone this hearing again because of a discovery issue.

'3. Respondents are responsible for any costs associated with conducting the deposition. Respondents and Agency must each pay for their own copy of the transcript if a transcript is prepared.

'4. Respondents and the Agency are ordered to notify me at least seven days in advance of the date and time for the depositions so that I can be available if necessary. As of today, the only dates I will be unavailable between now and March 1 are the afternoon of February 11 and all day February 16.

5. The scope of Respondents' questioning is limited to damages. Respondents may not engage in a fishing expedition by inquiring into matters totally irrelevant to the issue of physical, emotional, and mental suffering.'"

(Ex. X72)

31) On February 11, 2015, "in view of the national attention and attendant publicity these cases have already received and the likelihood that Complainants will be questioned about the protected health information in the records produced under the protective order," the ALJ issued a protective order regarding Complainants' depositions. The order prohibited the deposition transcripts or notes made of the deposition testimony from being made available to "non-qualified" persons or from being used "for any other purpose than the preparation for litigation of [the] proceeding." (Ex. X74)

32) On February 17, 2015, Respondents filed a motion for reconsideration of the ALJ's ruling on summary judgment. The ALJ denied Respondents' motion. (Exs. X73, X75, X79)

33) On February 23, 2015, the Agency issued Second Amended Formal Charges in both cases. Respondents filed answers on February 27, 2015. (Exs. X78, X82)

34) Respondents and Agency timely submitted case summaries. (Exs. X76, 77)

35) On February 26, 2015, Respondents filed a motion for discovery sanctions that was opposed by the Agency. On March 5, 2015, the ALJ ruled on Respondents' motion as follows:

"On February 26, 2015, Respondents filed a motion requesting discovery sanctions related to the Agency's failure to provide discovery subject to my Discovery Order dated September 25, 2014, until February 24, 2015. The Agency filed a response on February 27, 2015, and Respondents supplemented their motion on March 3, 2015.

"The discovery in question relates to my September 25, 2014, Order requiring that the Agency provide Respondents with:

> 'all posting by Complainants to any social media website, including but not limited to Facebook, Twitter, LinkedIn, MySpace, Instagram, and SnapChat from January 2013 to the present that contain comments about the facts of this case, comments about Respondents, or comments that relate to their alleged damages.'

"Specifically, Respondents allege that on February 24, 2015, less than three hours before the Agency filed its case summary, the Agency turned over 109 pages of documents ('subject documents') to Respondents that were subject to my discovery order. Respondents further allege that the 109 pages were included in the Agency's case summary. The Agency does not dispute these allegations, acknowledges it received the subject documents from Complainants in August 2014, and attempts to explain the reason for its late disclosure in its response. After reviewing the subject documents, I conclude that they contain Complainants' social media conversations that fall within the scope of my September 25, 2014, Discovery Order.

"Respondents allege that the Agency's untimely disclosure of these documents establishes bad faith on the part of the Agency and/or Complainants, particularly since the disclosure occurred after Respondents completed their depositions of Complainants, and that Respondents are irreparably prejudiced as a result. Respondents ask that the forum sanction the Agency in a number of different ways.

"In my September 25, 2014, Discovery Order, I ruled as follows:

> 'After the scheduled September 29, 2014, prehearing conference in this matter, the forum will issue a subsequent order stating the Agency's deadline for complying with the terms of this order. The Agency has a continuing obligation, through the close of the hearing, to provide Respondents' counsel with any newly discovered material that responds to the responses and production ordered in this interim order. The

> Agency's failure to comply with this order may result in the sanction described in OAR 839-050-0200(11).'

In the interim order I issued on September 30, 2014, that summarized the September 29, 2014, prehearing conference, I ordered that "[t]he Discovery ordered in my rulings on * * * Respondents' motions for Discovery Orders must be mailed or hand-delivered no later than October 14, 2014." That was not done.

"As a prelude to my ruling, I note that the forum has no authority to impose the vast majority of sanctions sought by Respondents. The forum's authority in this matter is not derived from the ORCP, but from provisions in the Oregon APA, the Oregon Attorney General's Administrative Rules (OAR 137-003-0000 to -0092), and the forum's own rules, OAR 839-050-000 *et seq*. The ALJ's authority to impose sanctions for violations of discovery orders is set out in OAR 839-050-0020(11):^

> 'The administrative law judge may refuse to admit evidence that has not been disclosed in response to a discovery order or subpoena, unless the participant that failed to provide discovery shows good cause for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10)[62]. If the administrative law judge admits evidence that was not disclosed as ordered or subpoenaed, the administrative law judge may grant a continuance to allow an opportunity for the other participant(s) to respond."

In brief, the Agency frankly admits that it 'cannot determine why the [subject records] were not produced [earlier] in discovery, but they were in a location unlikely to be accessed' and characterizes its 'oversight' as an 'inadvertent error.' The Agency also notes, in a supporting declaration by * * * the Agency's Chief Prosecutor, that '[i]t appears that on or about October 3, 2014, in anticipation of discovery, the subject documents were partially redacted. I have no other recollection as to why they were not provided in discovery.'

"OAR 839-050-0020(16) provides:

> '"Good cause" means, unless otherwise specifically stated, that a participant failed to perform a required act due to an excusable mistake or a circumstance over which the participant had no control. "Good cause" does not include a lack of knowledge of the law, including these rules.'

For the reasons stated below, the forum concludes that the Agency's failure to provide the subject records by October 14, 2014, as ordered by the forum, does

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[62] This statutory reference in the current rule is in error. The APA was amended in 2007 and the "full and fair inquiry" requirement was moved to ORS 183.417(8).

not meet the 'good cause' standard. Participants in all cases are responsible for keeping track of documents that constitute potential evidence, particularly documents subject to an existing discovery order. In this case, the subject records were accessed by BOLI's Administrative Prosecutions Unit on October 3, 2014, eight days after a discovery order was issued requiring the production of those records, and only 11 days before their production was due pursuant to the forum's September 30, 2014, order. The Agency's 'oversight' or storage of the documents in a place where they were 'unlikely to be accessed' does not constitute 'an excusable mistake or a circumstance over which the [Agency] had no control.'

"Ordinarily, the forum's sanction for failing to provide documents pursuant to a discovery order would be to prohibit the introduction of the documents as evidence.^ However, Respondents assert that some of the subject records will potentially assist Respondents' defense and explain why in their motion. Based on Respondents' assertion, it appears that a blanket prohibition on the introduction of the subject records may prejudice Respondents and prevent a 'full and fair inquiry' by the forum. The forum's order is crafted with this in mind.

"ORDER

"**1. Sanctions:** (a) The Agency may not offer or otherwise utilize any of the subject documents as evidence until such time as Respondents have offered the subject documents into evidence or otherwise utilized them during the hearing while eliciting testimony in support of their case; (b) Respondents, should they elect to do so, may offer or utilize the subject documents in support of their case.

"**2. Discovery Order**

"To the extent these records have not already been provided, the forum hereby issues a discovery order requiring the Agency to provide responsive documents to items ##1, 5-6, 8, 13-15, and 21 listed on pages 9 and 10 of Respondents' Motion for Discovery Sanctions, with the caveat that the Agency is not required to produce statements made to Ms. Gaddis or Ms. Casey, the Agency's administrative prosecutors in this case, in any response to item #5. The Agency's responsibility to produce any such records begins as soon as this order is issued and continues until the hearing is concluded. The forum will apply OAR 839-050-0020(11) if an issue arises regarding an alleged failure by the Agency to produce such records in a timely manner.

"**3.** Respondents' request that the forum dismiss the Agency's Second Amended Formal Charges is **DENIED**.

"**4.** Respondents may amend their Case Summary witness list and exhibit list. * * *"

"**5.** Respondents' request to 'reopen discovery to allow for depositions of Complainants and other BOLI witnesses with knowledge of these matters' is **DENIED**.

"**6.** Respondents' request that the cases be dismissed or that the Agency's claim for damages of Complainants' behalf be dismissed is **DENIED**.

"**7.** Respondents' request for costs is **DENIED**.

"**8.** Respondents' request for any other sanctions not specifically discussed in this interim order is **DENIED**."

(Exs. X81, X83, X86, X87)

36) The general public was allowed to attend the hearing. Because of this and potential security issues, the ALJ issued guidelines prior to the hearing that, among other things: prohibited the public from bringing backpacks, briefcases, satchels, carrying cases any type, or handbags into the building in which the hearing was held; prohibited the use of audio recorders and cameras, including cell phone cameras and recorders; and required cell phones to be turned off during the hearing. (Ex. X85; Statement of ALJ)

37) At the start of the hearing, the ALJ orally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. (Statement of ALJ)

38) During the hearing, the Agency offered Exhibits A24 and A26. Respondents objected to their admission and the ALJ reserved ruling on their admissibility for the Proposed Order. Respondents objected on the basis of relevancy. Exhibits A24 and A26 are received because they are relevant to show the impact that the media exposure spawned by this case had on Complainants. (Exs. A24, A26)

39) During the hearing, the ALJ stated he would consider LBC's testimony about the "handfasting cord" used in LBC's and RBC's commitment[63] ceremony as an offer of proof and rule on its admissibility in the Proposed Order. That testimony is admitted because it is not evidence that was required to be disclosed by the ALJ's discovery orders and it is relevant to show the extent of Complainants' commitment to their relationship. (Testimony of LBC; Statement of ALJ)

[63] The forum uses the term "commitment" because the handfasting cord was used in Complainants' June 27, 2013, ceremony at the West End Ballroom, when same-sex marriage was not yet permitted in the state of Oregon.

40) On March 16, after the Agency had concluded its case-in-chief, Respondents filed a motion for an order to Dismiss or Reopen Discovery and Keep Record Open. Respondents argued that this was necessary in order:

> "to allow Respondents a full and fair opportunity to reopen discovery concerning possible undisclosed collusion among Complainants, Basic Rights Oregon and/or the Agency in light of the testimony of Agency witness Aaron Cryer elicited at the hearing on Friday, March 13, 2015."

The ALJ allowed Respondents and the Agency to present oral argument on Respondents' motion when the hearing re-convened on March 17, 2015, then denied Respondents' motion. (Ex. X94; Statement of ALJ)

41) Respondents called AK, MK, and RBC as witnesses in support of their case in chief. At the conclusion of RBC's testimony on March 17, 2015, Respondents' counsel Grey made the following statement:

> "That's all of the witnesses that we have to present at this time. However, for purposes of the record I'd like to make it clear that Respondents did not intend to rest their case in chief for the reasons we discussed in connection with the motion that we presented this morning, which the forum denied. So simply for purposes of the record, we are not planning on closing our case in chief."

(Statement of Grey)

42) On May 28, 2015, Respondents filed a motion to Reopen the Contested Case Record. The Agency filed a response on June 2, then supplemented its response on June 5, 2015. On June 22, 2015, the ALJ issued an interim order that denied Respondents' motion. The ALJ's ruling is reprinted in its entirety below:

> "Pursuant to OAR 839-050-0410, Respondents filed a motion to reopen the contested case record on May 29, 2015.
>
> "OAR 839-050-0410 provides:
>
> > 'On the administrative law judge's own motion or on the motion of a participant, the administrative law judge will reopen the record when the administrative law judge determines additional evidence is necessary to fully and fairly adjudicate the case. A participant requesting that the record be reopened to offer additional evidence must show good cause for not having provided the evidence before the record closed.'
>
> "Good cause" means:
>
> > '[U]nless otherwise specifically stated, that a participant failed to perform a required act due to an excusable mistake or a circumstance over which

the participant had no control. "Good cause" does not include a lack of knowledge of the law, including these rules.' OAR 839-050-0020(16).

Respondents' motion, like their earlier motion to Disqualify BOLI Commissioner Brad Avakian, is predicated on their argument that Commissioner Avakian's alleged bias 'has effectively precluded Respondents from receiving due process in this case.'

"In support of their motion, Respondents attached documentation of the following: (1) emails beginning April 11, 2014, and ending January 31, 2015, primarily containing conversations between Charlie Burr, BOLI's Communications Director and Strategy Works NW, LLC, Basic Rights of Oregon ('BRO'), and Senator Jeff Merkley's office, that were forwarded to Respondents' counsel by email by on May 20, 2015, by Kelsey Harkness, a reporter for the Daily Signal, pursuant to a public records request made by Harkness (the 'Harkness records'); (2) testimony of both Rachel and Laurel Bowman-Cryer from their February 17, 2015, depositions; and (3) selected hearing testimony of Aaron Cryer, brother of Complainant Rachel Bowman-Cryer. Respondents contend that the above shows 'hitherto undisclosed collusion between complainants, BOLI and Basic Rights Oregon * * * sufficient to taint the integrity of the proceedings and deny Respondents fundamental due process or a fair hearing" and 'unfairly prejudice Respondents[']' rights herein.

"Specifically, Respondents ask that the record be reopened so that they can:

"(1) Depose Aaron Cryer;

"(2) Request, obtain and review additional documents from BOLI, BRO, and others and to issue interrogatories through *subpoena duces tecum* upon non-participants including but not limited to Commissioner Brad Avakian, the Commissioner's assistant Jesse Bontecou, Charlie Burr, Jeanna Frazzini, Amy Ruiz, Diane Goodwin, Emily McLain, Joe LeBlanc and Maura Roche, all of whom are identified in the emails provided to Respondents by Harkness;

"(3) Depose Avakian, Bontecou, Burr, Frazzini, Ruiz, Goodwin, McLain, LeBlanc and Roche; and

"(4) Depending on the information obtained, renew their motion to disqualify the Commissioner "and other BOLI personnel shown to have been involved in this political agenda from any role in deciding the case."

On June 2, 2015, the Agency timely filed a response to Respondents' motion, then supplemented it with an amended response on June 5, 2015.

"Discussion

"Under OAR 839-050-0410, Respondents have the burden of showing 'good cause' within the meaning of OAR 839-050-0020(16) for reopening the contested case record. To show good cause, Respondents must demonstrate an excusable mistake or a circumstance over which Respondents had no control. The excusable mistake or circumstances over Respondents had no control means 'there must be a superseding or intervening event which prevents timely compliance.' *In the Matter of Ashlanders Senior Foster Care, Inc.,* 14 BOLI 54, 61-62 (1996), *citing In the Matter of City of Umatilla,* 9 BOLI 91 (1990), *affirmed without opinion, City of Umatilla v. Bureau of Labor and Industries,* 110 151, 821 P2d 1134 (1991). The mistaken act or failure to act is excusable if a party mistakenly acts or fails to act due to being misled by facts or circumstances that would mislead a reasonable person under similar circumstances. *Ashlanders, citing In the Matter of 60 Minute Tune,* 9 BOLI 191 (1991), *affirmed without opinion, Nida v. Bureau of Labor and Industries,* 119 Or App 174, 822 P2d 974 (1993). The forum examines the three different types of supporting documentation provided by Respondents against these standards.

A. The Harkness Records

"The emails provided to Respondents by Harkness are dated April 11, 2014, to January 31, 2015, well before the hearing began. Respondents do not assert that BOLI did not cooperate promptly in providing these documents to Harkness when she made her public records request. Respondents' June 18, 2014, motion to disqualify Commissioner Avakian due to bias makes it apparent that Respondents considered the Commissioner's alleged bias to be a relevant issue at least nine months before the hearing began. Despite this, there is no evidence in the record that Respondents made a discovery request or public records request for the records that were provided to Harkness. This is a circumstance that was under Respondents' control, and Respondents provide no explanation for their own failure to make a pre-hearing request for these records that they now claim are relevant and probative of the Commissioner's bias. In addition, Respondents have failed to show a superseding or intervening event that prevented them obtaining the Harkness Records before the hearing or that they were misled by facts or circumstances that would mislead a reasonable person under similar circumstances. Accordingly, the forum concludes that Respondents have not shown good cause for their failure to pursue the Harkness records before the hearing and offer them as evidence at hearing.[64]

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[64] There are no Commissioner's Final Orders interpreting "good cause" in the context of a motion to reopen a contested case proceeding. Besides *Ashlanders, City of Umatilla,* and *60 Minute Tune*, there have been numerous Final Orders interpreting the definition of "good cause" in OAR 839-050-0020(16) in other contexts. None of them support Respondents' claim that their supporting documentation shows "good cause." ***Cf.*** *In the Matter of From the Wilderness, Inc.,* 30 BOLI 227, 240 (2009)(when respondents sought a postponement so they could complete discovery and respondents' previous motion for a postponement had been granted to give respondents' newly

retained attorney time to prepare for the hearing, respondents delayed three months after the forum granted the first postponement before seeking discovery, the agency was not responsible for respondent's delay, and respondents' need for an another postponement could have been obviated if respondents had timely sought discovery, the forum denied respondents' motion, finding that respondents had not shown "good cause"); *In the Matter of Logan International, Ltd.*, 26 BOLI 254, 257-58 (2005)(the ALJ denied respondent's motion to reset the hearing based on the agency's alleged failure to provide complete discovery, stating that respondent had not established "good cause" because it had not shown that the agency had withheld discoverable information nor that respondent was entitled to a deposition of the complainant); *In the Matter of Orion Driftboat and Watercraft Company, LLC,* 26 BOLI 137, 139 (2005)(when respondents moved for a postponement 12 days before the hearing date based on respondents' need to be represented by an attorney and current inability to afford an attorney, because the agency had refused to accept respondents' settlement offers, and because respondents needed more time to file a discovery order, the agency objected on the basis that it had lined up its witnesses and was prepared to proceed, and because respondents had agreed three months earlier to the date set for hearing and the forum denied respondents' motion because respondents had not shown good cause); *In the Matter of Adesina Adeniji,* 25 BOLI 162, 164-65 (2004)(respondent's failure to comply with discovery order because he believed the case would settle and because he had provided some of the documents subject to discovery order exhibits with his answer was not "good cause" and the ALJ sustained the agency's objection to respondent's attempted reliance at hearing on exhibits subject to discovery order that were not provided before hearing); *In the Matter of Barbara Coleman,* 19 BOLI 230, 238-39 (2000)(respondent's attorney's assertion that respondent's medical condition of depression made it difficult for her to gather information did not present good cause for postponement of the hearing when "nothing filed with this forum * * * comes close to establishing that respondent is legally incompetent, and respondent has made no such claim. As the forum stated in [an earlier] order, respondent spoke lucidly and logically during the * * * teleconference, stated that she was able to work at her business several hours each day, and was able to recall details of events that occurred many months ago"); *In the Matter of Sabas Gonzalez,* 19 BOLI 1, 5-6 (1999)(respondent's motion for postponement, based in part on a scheduling conflict of respondent's counsel, was denied based on respondent's failure to show good cause when there was no evidence that the matter on respondent's counsel's schedule that conflicted with the hearing had been set before the notice of hearing issued in this case and respondent's counsel knew of the possible conflict for weeks before filing the motion and did not respond to the attempts the agency made at that time to resolve the conflict); *In the Matter of Troy R. Johnson*, 17 BOLI 285, 287-88 (1999)(respondent's motion to postpone the hearing was denied based on respondent's failure to show good cause when respondent based his motion on assertions that he had not received the notice of hearing until one week before a scheduled hearing date and did not have time to prepare for the hearing, but his delay in receiving the notice of hearing was due to his failure to notify the forum of his change of address; he was out of town on a hunting trip; and he was amazed the case had been set for hearing); *In the Matter of Jewel Schmidt,* 15 BOLI 236, 237 (1997)(when respondent requested a postponement of the hearing because she had an adult care home and could not find a relief person for the date of hearing or successive days, and the agency opposed the request because it was ready to proceed and had subpoenaed witnesses, the ALJ denied the request because respondent had not shown good cause for a postponement, noting that there were over 30 days between the date the notice of hearing was issued and the date of the scheduled hearing, and this should have been ample time to find a relief person for the expected one-day hearing). ***Compare*** *In the Matter of Computer Products Unlimited, Inc.,* 31 BOLI 209, 212-13 (2011) (respondent's motion for postponement granted based on emergency medical treatment required by the wife of respondent's authorized representative that could not be put off); *In the Matter of Spud Cellar Deli, Inc.,* 31 BOLI 106, 111 (2010)(forum granted the agency's motion for a hearing postponement based on the fact that respondent's counsel had been traveling out of state due to a death in her family and was unable to adequately prepare for hearing); *In the Matter of Northwestern Title Loans LLC,* 30 BOLI 1, 3, (2008)(forum granted respondent's motion for postponement based on unavailability of respondent's key witness on the date set for hearing); *In the Matter of Captain Hooks, LLP,* 27 BOLI 211, 213 (2006)(respondent's motion for postponement granted based on respondent's documented emergency medical condition); *In the Matter of SQDL Co.,* 22 BOLI 223, 227-28 (2001)(when respondent retained substitute counsel after its original counsel was suspended from the practice of law and substitute counsel filed a motion for postponement five days before the hearing based on the complexity of the case and his corresponding need for more time to prepare for the hearing, the ALJ concluded that respondent had shown good cause and granted the motion); *In the Matter of Ann L. Swanger,* 19 BOLI 42, 44 (1999)(respondent's motion for postponement, based on the fact that respondent would be having major dental surgery the day before the hearing was set to commence, making it extremely difficult for her to attend or communicate at the hearing, was granted).

B. Complainants' Deposition Testimony

"Respondents allege that Aaron Cryer's testimony and the Harkness records show that Complainants' deposition testimony is not credible regarding their alleged 'collusion' with BOLI 'in using this case against Respondents for a political agenda rather than a good faith claim for recovery of damages to Complainants.' This is merely a repeat of Respondents' March 16, 2015, argument made in their *Motion to Dismiss or Reopen Discovery and Keep Record Open* that the ALJ denied at hearing. The deposition testimony given by Complainants that Respondents now argue justifies reopening the case was given on February 17, 2015, almost a month before the hearing commenced. In their depositions, Complainants were asked questions and gave answers regarding Jeanna Frazzini, Amy Ruiz, BRO, and their involvement with Frazzini, Ruiz, and BRO, as reflected in the attachments to Exhibit X94. Despite that deposition testimony, there is no evidence that Respondents attempted to follow up on the collusion that Respondents now alleges existed between these individuals, Complainants, BRO, and BOLI. Further, Respondents could have questioned Complainants about Cryer's testimony in their case-in-chief, but did not do so. These opportunities were both circumstances that were under Respondents' control. Likewise, Respondents have not shown a superseding or intervening event that prevented them from pursuing further discovery before the hearing based on Complainants' deposition testimony or that they were misled by facts or circumstances that would mislead a reasonable person under similar circumstances. Accordingly, Respondents have not established good cause to support their argument that Complainants' deposition testimony, coupled with Aaron Cryer's hearing testimony and the Harkness records, constitute grounds for reopening the contested case record to pursue the additional discovery that Respondents seek in this motion.

C. Aaron Cryer's Testimony

"Respondents' proffered characterization of Cryer's quoted testimony as '*directly* implicat[ing] BOLI and Complainants in using this case against Respondents for a political agenda rather than a good faith claim for recovery of damages to Complainants' is simply inaccurate. As noted above, Respondents were aware of communications between Complainants, BRO, BOLI, Frazzini, and Ruiz before the hearing, but elected not to pursue the defense they now assert by requesting additional discovery or by calling Complainants as witnesses in their case in chief to explore the alleged political agenda. This was a choice made by Respondents' legal team, not a circumstance beyond Respondents' control, and Respondents have not shown any superseding or intervening event that prevented them seeking additional discovery or that they were misled by facts or circumstances that would mislead a reasonable person

under similar circumstances. Accordingly, Cryer's testimony that Respondents rely on is not good cause within the meaning of OAR 839-050-0410 and OAR 839-050-0020(16).

D. The Additional Evidence Sought by Respondents is Unnecessary to Fully and Fairly Adjudicate This Case

"Notwithstanding the lack of 'good cause,' the forum also concludes that additional evidence on the issues raised in Respondent's motion is unnecessary to fully and fairly adjudicate this case, as the forum has fully and carefully considered and ruled on these matters, which are incorporated herein and made a part hereof by this reference. *See* Ex. X12 (ALJ's July 2, 2014, Interim Order entitled *Ruling on Respondents' Election to Remove Cases to Circuit Court and Alternative Motion to Disqualify BOLI Commissioner Brad Avakian*).[65]

"Furthermore, since these prior rulings the Oregon Court of Appeals issued an opinion in *Columbia Riverkeeper* v. Clatsop County, 267 Or App 578, 341 P3d 790 (2014) that supports those rulings. Respondents' earlier motions sought to disqualify Commissioner Avakian due to 'actual bias.' In *Columbia,* Huhtala, a Clatsop County Commissioner, ran for election on the platform of not allowing a LNG business to be established in Astoria, then voted to deny in a land use decision that denied a pipeline company's application to build an LNG pipeline originating in Astoria. Prior to his election, Huhtala had made many public statements opposing construction of an LNG pipeline. In reversing the Land Use Board of Appeals' (LUBA) decision that Huhtala's bias had deprived the pipeline company of an impartial tribunal, the court stated:

> 'All told, no single case in Oregon establishes what is necessary for a party to prove actual bias by an elected official in quasi-judicial land-use proceedings such as this one. Generally, we can glean the following. The bar for disqualification is high; no published case has concluded that disqualification was required in quasi-judicial land-use proceedings. An elected local official's 'intense involvement in the affairs of the community' or 'political predisposition' is not grounds for disqualification. Involvement with other governmental organizations that may have an interest in the decision does not require disqualification. An elected local official is not expected to have no appearance of having views on matters of community

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[65] *Cf. In the Matter of Mountain Forestry, Inc.,* 29 BOLI 11, 48-50 (2007), *affirmed without opinion, Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009)(when respondents moved to reopen the record to admit a federal audit that purportedly showed the prevalence of records discrepancies throughout the firefighting industry and that the Oregon Department of Forestry did not have specific training requirements prior to 2003, and that purportedly negated certain inferences drawn from witness testimony, the forum found that, notwithstanding respondents' failure to submit an affidavit showing they had no knowledge of the audit prior to its release in March 2006, the audit did not contain any information relevant to the issues in the case or that mitigated respondents' violations and therefore the additional evidence was not necessary to fully and fairly adjudicate the case).

interest when a decision on the matter is to be made by an adjudicatory procedure.

'In addition to those general observations, there are three salient principles from the case law that define and drive our analysis in this case. *First,* the scope of the "matter" and "question at issue" is narrowly limited to the specific decision that is before the tribunal. *Second,* because of the nature of elected local officials making decisions in quasi-judicial proceedings, the bias must be actual, not merely apparent. And *third,* the substantive standard for actual bias is that the decision maker has so prejudged the particular matter as to be incapable of determining its merits on the basis of the evidence and arguments presented.'

Columbia Riverkeeper at 602-03.

"Under this standard, none of the "evidence" that Respondents have proffered previously or in support of their Motion to Reopen the Contested Case Record is probative to show "actual bias" on Commissioner Avakian's part. Therefore, notwithstanding the lack of "good cause" shown for not providing the proffered "evidence" before the record closed, the Motion is denied on the merits.

E. Conclusion

"Respondents' motion to Reopen the Contested Case Record is **DENIED**."

43) On April 24, 2015, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency and Respondents both timely filed exceptions.

44) Respondents' exceptions are **DENIED** in their entirety as lacking merit. The Agency's exceptions as to the alleged violations of ORS 659A.409 are **GRANTED**. Otherwise, the Agency's exceptions are **DENIED**.