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

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| In the Matter of:<br><br>**MELISSA ELAINE KLEIN, dba SWEETCAKES BY MELISSA,**<br><br>**and**<br><br>**AARON WAYNE KLEIN, dba SWEETCAKES BY MELISSA, and, in the alternative, individually as an aider and abettor under ORS 659A.406,**<br><br>Respondents. | Case Nos. **44-14 & 45-14**<br><br>**INTERIM ORDER – RULING ON RESPONDENTS' RE-FILED MOTION FOR SUMMARY JUDGMENT AND AGENCY'S CROSS-MOTION FOR SUMMARY JUDGMENT** |

**Introduction**

Respondents operate a bakery under the name of Sweetcakes by Melissa.[1] 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.**

[1] 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.

**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 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.[2]

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

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

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).* 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.[3] (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 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

[3] 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.

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:[4] [5]

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

[4] 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.

[5] 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.

**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."[6]

**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 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:[7]

**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

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[6] 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.

[7] *See* footnote 5.

> 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 that this person's; it kind of blows my mind."
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> (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 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[8] 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"; (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.

[8] 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).*

**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.[9] As argued by Respondents in their motion for 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

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[9] 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 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.

> 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 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[10] 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.

[10] The forum uses the term "proposed" because there is no evidence in the record to show whether Complainants were actually ever married.

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.

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 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.[11]

[11] 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,[12] 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.[13]

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

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[12] 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."

[13] 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.

> 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*)

> "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.[14] To arrive at the conclusion sought by the Agency requires drawing an inference of future 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.[15]

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

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[14] 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.

[15] *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).

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 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.[16]

In conclusion, the forum lacks jurisdiction to adjudicate Respondents' counterclaims and may neither grant nor deny them. The only relief available to

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

Respondents through this forum is dismissal of any Charges not proven by the Agency under ORS 659A.850(3).[17]

**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.[18]

**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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[17] *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).

[18] *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).[19]

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.[20]

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

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[19] *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).

[20] 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."

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:

- 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,[21] 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."[22] *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.[23] 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

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[21] *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").

[22] 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.

[23] *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.")

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.[24] The exclusions and 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*[25] 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.

[24] 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 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.

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

## ***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.

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.[26]

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

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[26] 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)

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[27] nor of general applicability[28] and held that "a law burdening religious 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

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

[28] 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.

Respondents' free exercise nor free speech claims are independently viable[29] and the two claims together are not greater than the sum of their parts.[30] 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 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?

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

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

(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 coerción, 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*.[31]

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[31] *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

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.[32] *Illig–Renn,* at 234. The court went on to state that facial challenges

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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").

[32] 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.

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:

> "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*.[33] 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

[33] *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.'")

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,[34] 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

[34] 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."

impact on 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.[35]

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

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[35] 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.

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:

> "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 such 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"[36] 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"[37] in an affirmative

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[36] *Hurley v. Irish-American GLIB*, 515 U.S. 557, 572-73 (1995).
[37] *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006).

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 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**

Entered at Eugene, Oregon, with copies mailed and emailed to:

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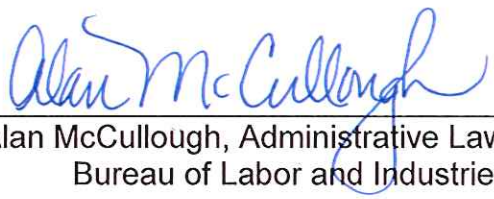
Kari Furnanz, ALJ, BOLI

Dated: January 29, 2015



Alan McCullough, Administrative Law Judge
Bureau of Labor and Industries

*Summary Judgment/Sweetcakes, ##44-14 & 45-14*