IN THE SUPREME COURT OF THE STATE OF OREGON

MELISSA ELAINE KLEIN, dba Sweetcakes by Melissa; and **AARON WAYNE KLEIN**, dba Sweetcakes by Melissa, Petitioners, Petitioners on Review v. **OREGON BUREAU OF LABOR AND INDUSTRIES**, Respondent, Respondent on Review	CA A159899 Bureau of Labor and Industries Agency Nos. 44-14, 45-14 Supreme Court No. S065744

RESPONSE OF *AMICI CURIAE* LAUREL BOWMAN-CRYER, RACHEL BOWMAN-CRYER, AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. TO PETITION FOR REVIEW

Opinion Filed: December 28, 2017
Author of Opinion: Garrett, Judge
Before: DeVore, Presiding Judge, Garrett, Judge, and James, Judge

If Petition for Review is granted, amici intend to file a brief on the merits.

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SUMMARY OF THE RESPONSE

Petitioners in this case have failed to establish grounds under ORAP 9.07 for the Supreme Court to exercise discretionary review of the Court of Appeals' careful, thorough decision in this case. Although the case has addressed a type of dispute that generates headlines, the petition identifies neither inconsistencies between the decision's analysis and governing law, nor other errors warranting review. Instead, the numerous criteria for discretionary review set forth by ORAP 9.07 make clear why discretionary review is not needed.

Rule 9.07(9), for example, would weigh in favor of review if there were significant conflicts within the relevant case law. However, the Court of Appeals' decision below was entirely consistent with applicable federal and state case law. Similarly, Petitioners' contention that a supposed inconsistency among damage awards in discrimination cases justifies review under ORAP 9.07(10) is unsupported by any specific supporting evidence.

What *is* inconsistent, however, is Petitioners' own presentation. For example, on the one hand, Petitioners claim there is no factual dispute remaining that might preclude review under Rule 907(7). But on the other hand, they themselves rely on factual disputes in their argument, in essence asking this Court to revisit a factual dispute already decided below, as to whether they did or did not discriminate against a same-sex couple because of their sexual orientation. Petitioners are also inconsistent in asserting that this

case is primarily about state law, and yet their legal arguments are dominated by federal case law, which weighs against further review under Rule 9.07(4).

In addition, the primary issues in this case are neither issues of first impression for the Supreme Court, which might warrant review under Rule 9.07(5), nor, at present, issues that arise often enough to warrant review under Rule 9.07(2). That said, if this Court were to carve out the new exemptions from well-established law that Petitioners request, it likely would invite a deluge of claims by businesses similarly trying to exempt themselves from the law, interjecting confusion and instability into the law. Moreover, Rule 9.07(3) considers the degree to which a decision by this Court would affect others. If this Court were to accept review and agree to create new exemptions from anti-discrimination laws, rather than leaving the Court of Appeals decision intact, a great number of people would be affected indeed – and detrimentally so.

In another conclusory argument, Petitioners reference the 62-page length of the Court of Appeals opinion as itself justifying review under ORAP 9.07(11). But, if anything, the thorough analysis of the decision reflects the court's thoughtfulness and careful adherence to well-established law. Finally, although charging that the Court of Appeals erred, Petitioners fail to articulate any specific "error [that] results in a serious or irreversible injustice or in a distortion or misapplication of a legal principle." ORAP 9.07(14)(a).

Instead, the petition for review amounts to a regurgitation of the same arguments extensively addressed by the Court of Appeals. Given the criteria set forth in ORAP 9.07, there is nothing warranting this Court's reconsideration of those matters already properly decided by the Court of Appeals.

RESPONSE ARGUMENT

I. The Law at Issue is Not Inconsistent, but Petitioners' Own Arguments Are, Rendering Review Unwarranted Under ORAP 9.07(4), (7), (9) and (10).

When there is a split of authority about an important point of law, it would be perfectly appropriate for the Court to exercise its discretion to review a case, under the discretionary review criteria of ORAP 9.07(9) ("Whether present case law is inconsistent"). This is not such a case.

Petitioners fallaciously contend that "Court of Appeals cases are inconsistent with regard to the proper interpretation of the phrase 'because of * * * sexual orientation,'" Pet. For Review at 9, but no such line of inconsistent cases exists. As to the Court of Appeals' decision itself, the analyses and conclusions are entirely consistent with settled case law. The court's interpretation of ORS 659A.403(1)'s language prohibiting discrimination "on

account of" sexual orientation[1] as prohibiting discrimination "because of" or "causally connected to" sexual orientation, was grounded in a straightforward plain reading of the statutory text coupled with reliance on Oregon precedent. *See Klein v. Oregon Bureau of Labor & Indus.*, 289 Or App 507, 519, 410 P3d 1051 (2017)[at Pet. for Review ER-13], quoting *Hopper v. SAIF*, 265 Or App 465, 470, 336 P3d 530 (2014) and *Elk Creek Mgmt. Co. v. Gilbert*, 353 Or 565, 580-81, 303 P3d 929 (2013). Indeed, Petitioners do not dispute that the case law applied is good law. Rather, they cite other Court of Appeals cases that describe the law in terms of a "but-for" causation standard, and then accuse the Court of Appeals of having "silently abandoned the longstanding 'but-for' causation standard in favor of a much more malleable 'causally connected' standard." Pet. for Review at 21.

Petitioners' contention makes little sense. Not only is there no conflict between the cases cited by the Court of Appeals and by Petitioners, but accusing the Court of Appeals of "silently" abandoning a standard demonstrates Petitioners' lack of argument about what the Court of Appeals actually said, which included no abandonment of any governing legal precedents. Since the

[1] ORS 659A.403(1) provides in relevant part: "[A]ll 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 of age, as described in this section, or older."

Court of Appeals properly and explicitly grounded its analysis in applicable law, this Court should not reward Petitioners' strained assertion of a "silent" abandonment that created an unidentified inconsistency in law.

Petitioners similarly fail to point to any specific examples or evidence for their assertion that "BOLI is inconsistent in the magnitude of its damages awards to complainants who allege discrimination because of sexual orientation and those who allege discrimination because of membership in other protected classes." Pet. for Review at 9, citing ORAP 9.07(10) ("Whether it appears that trial courts or administrative agencies are inconsistent or confused in ruling on the issue that the case presents"). Petitioners' unsubstantiated allegations that sexual orientation claims result in greater damage awards than other types of claims cannot be seriously considered as grounds for review, when their assertion of inconsistent damage awards is accompanied by not one specific point of comparison to support that argument. Instead, Petitioners merely make the conclusory charge that such inconsistency is "evident" in the shocking and disproportionate magnitude of the $135,000 damage award." Pet. for Review at 17. Without any evidence of discrepancies, however, such inconsistency is not "evident" at all.

Notably, while Petitioners base their request for review on unsupported claims about inconsistency in case law and damage awards, they themselves are internally inconsistent in their arguments.

For example, they claim that there is no factual dispute remaining, which might preclude review under ORAP 907(7) ("* * * whether the case is free from factual disputes or procedural obstacles that might prevent the Supreme Court from reaching the legal issue"). Their own petition, however, relies in part on a core factual dispute: Petitioners take issue with the Court of Appeals' affirmance of BOLI's finding that the refusal to provide a wedding cake to Rachel and Laurel Bowman-Cryer in this case was because of the same-sex couple's sexual orientation. Pet. for Review at 20. As indicated by ORAP 907(7), it would be inappropriate to waste this Court's resources rehashing this basic core factual finding.

In addition, the internal inconsistency of first arguing that review is appropriate because there is no factual dispute, but then, eleven pages later, raising exactly such a factual dispute, reflects the pattern of inconsistent and groundless argument that permeates the petition.

As another example, Petitioners are inconsistent in asserting that this case is primarily about state law, a pertinent inquiry under Rule 9.07(4) ("Whether the legal issue is an issue of state law."). Yet, one need only look at Petitioners' Opening Brief to the Court of Appeals (Case No. CA 159899) (filed April 25, 2016) ("Pet. Opening Br.") to see that they rely primarily on federal case law rather than state case law. Pages 30-46 of their opening brief focus on federal free speech claims, while the brief's subsection addressing state law amounted

to less than *one page*, at 46-47. Similarly, while pages 47-53 of their opening brief are devoted to the federal free exercise constitutional argument, fewer than two pages, on pages 54-56, address comparable state constitutional law.

Indeed, the Court of Appeals astutely noted Petitioners' emphasis on federal rather than state law, observing, "In this case * * * the Kleins draw almost entirely on well-developed federal constitutional principles, and they do not meaningfully develop any independent state constitutional theories." *Klein*, 289 Or App at 524-25 [at Pet. for Review ER-18 to ER-19] and "the Kleins do not offer any separate analysis under the state constitution." *Id*. at 543 [at Pet. for Review ER-37].

Thus, while the law applied in this case is not inconsistent, Petitioners' own arguments are, rendering discretionary review inadvisable under ORAP 9.07(4), (7), (9) and (10).

II. The Issues in This Case Are Neither a Matter of First Impression nor Issues That Arise With Frequency, Rendering Review Inappropriate Under ORAP 9.07(2) and (5)

In their discussion of ORAP 9.07(5) ("Whether the issue is one of first impression for the Supreme Court"), Petitioners claim that this is a case of first impression, basing that argument on the Court of Appeals' statement, "It appears that the Supreme Court has never decided a free-speech challenge to the application of a public accommodations law to a retail establishment selling highly customized, creative goods and services that arguably are in the nature of

art or other expression."). Pet. for Review at 1, 8, quoting *Klein*, 289 Or App at 533 [at Pet. for Review ER-27]. However, as an initial matter, Petitioners are quoting the Court of Appeals out of context. Had they quoted the passage in its entirety, it would be clear that the Court of Appeals was not referring to the Oregon Supreme Court, but rather to the U.S. Supreme Court: "That fact is also what makes this case difficult to compare to other public accommodations cases that the *United States* Supreme Court has decided. It appears that the Supreme Court has never decided * * *." *Id*. (emphasis added).

Furthermore, even if the Court of Appeals had in fact been referring to this Court, Petitioners are wrong to imply that the Court of Appeals' statement describing the somewhat novel *facts* of this case establishes that this is a case raising a *legal issue* of first impression. The application of well-established law to a new set of facts does not a "case of first impression" make. For example, this Court has described a case of first impression as being one in which a statute is being construed for the first time, *Wickman v. Hous. Auth. of Portland*, 196 Or 100, 116, 246 P2d 630 (1952), as opposed to a legal issue that can be informed by precedential case law already in place, *see Lowe v. Philip Morris USA, Inc*., 344 Or 403, 415, 183 P3d 181 (2008).

This case involves the Oregon Public Accommodations Law, ORS 659A.400 to ORS 659A.417 ("Oregon Public Accommodations Law"), which has been interpreted in numerous cases over the decades, as well as federal and

state constitutional provisions that have been interpreted through generations of solid constitutional jurisprudence.

The case law relied on by the Court of Appeals in this case includes decisions establishing, for example, that discrimination framed in terms of opposition to LGBT people's conduct, rather than to their identity, is still actionable discrimination, *see Klein*, 289 Or App at 522-24 [at Pet. for Review ER-16 to ER-18], citing *Christian Legal Soc. v. Martinez*, 561 US 661, 689, 130 S Ct 2971, 177 L Ed 2d 838 (2010); *Lawrence v. Texas*, 539 US 558, 123 S Ct 2472, 156 L Ed 2d 508 (2003).

The court also relied on a solid body of constitutional jurisprudence establishing the reach of the First Amendment's[2] protections in a commercial setting and in contexts involving expressive activities, claims of compelled speech, and public accommodations, *see Klein*, 289 Or App at 525-543 [at Pet. for Review ER-19 to ER-37], citing, *e.g., Sorrell v. IMS Health Inc*., 564 US 552, 567, 131 S Ct 2653, 180 L Ed 2d 544 (2011); *Arcara v. Cloud Books, Inc*.,

[2] The Court of Appeals based its free speech analysis solely on federal constitutional case law because, it noted, the Kleins' state constitutional free expression argument was "limited to the observation that Article I, section 8, has been held to establish broader protection for speech than the First Amendment, a premise from which they conclude that, 'since BOLI's Final Order violates the federal Constitution's Speech Clause, it also violates the Oregon Constitution's broader counterpart *a fortiori*.'" *Klein v. Oregon Bureau of Labor & Indus*., 289 Or App 507, 543 (2017) [at Pet. for Review ER-37]. The Court of Appeals continued, "We have rejected the First Amendment predicate for that derivative argument, *and the Kleins do not offer any separate analysis under the state constitution*. Accordingly, we reject their argument under Article I, section 8, without further discussion." *Id*. (citations omitted) (emphasis added).

478 US 697, 705-06, 106 S Ct 3172, 92 L Ed 2d 568 (1986); *Heart of Atlanta Motel v. United States*, 379 US 241, 260-61, 85 S Ct 348, 13 L Ed 2d 258 (1964); *Roberts v. U.S. Jaycees*, 468 US 609, 625-29, 104 S Ct 3244, 82 L Ed 2d 462 (1984); *Hishon v. King & Spalding*, 467 US 69, 78, 104 S Ct 2229, 81 L Ed 2d 59 (1984); *Runyon v. McCrary*, 427 US 160, 175-76, 96 S Ct 2586, 49 L Ed 2d 415 (1976); *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston, Inc*., 515 US 557, 572-73, 115 S Ct 2338, 132 L Ed 2d 487 (1995); *Boy Scouts of Am. v. Dale*, 530 US 640, 656-57, 120 S Ct 2446, 147 L Ed 2d 554 (2000); *Rumsfeld v. Forum for Acad. & Inst.'l Rights, Inc*., 547 US 47, 62, 126 S Ct 1297, 164 L Ed 2d 156 (2006); *R.A.V. v. City of St. Paul*, 505 US 377, 385, 112 S Ct 2538, 120 L Ed 2d 305 (1992); *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 US 781, 795-98, 108 S Ct 2667, 101 L Ed 2d 669 (1988); *Ward v. Rock Against Racism*, 491 US 781, 790, 109 S Ct 2746, 105 L Ed 2d 661 (1989); *Schad v. Mount Ephraim*, 452 US 61, 65, 101 S Ct 2176, 68 L Ed 2d 671 (1981); *Brown v. Entm't Merchs. Ass'n*, 564 US 786, 790, 131 S Ct 2729, 180 L Ed 2d 708 (2011); *Kaplan v. California*, 413 US 115, 119-20, 93 S Ct 2680, 37 L Ed 2d 492 (1973); *Texas v. Johnson*, 491 US 397, 405, 109 S Ct 2533, 105 L Ed 2d 342 (1989); *United States v. O'Brien*, 391 US 367, 375, 88 S Ct 1673, 20 L Ed 2d 672 (1968); *Spence v. Washington*, 418 US 405, 409, 94 S Ct 2727, 41 L Ed 2d 842 (1974); *Nevada Comm'n on Ethics v. Carrigan*, 564 US 117, 127, 131 S Ct 2343, 180 L Ed 2d 150 (2011); *Clark v. Cmty. for*

Creative Non-Violence, 468 US 288, 293 n 5, 104 S Ct 3065, 82 L Ed 2d 221 (1984).

As to the free exercise issues related to religious exemptions from neutral laws of general applicability, the court below similarly relied on a substantial body of precedent, including *Emp't Div., Oregon Dep't of Human Res. v. Smith*, 494 US 872, 110 S Ct 1595, 108 L Ed 2d 876 (1990); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531, 546-47, 113 S Ct 2217, 124 L Ed 2d 472 (1993); *United States v. Lee*, 455 US 252, 257-58, 113 S Ct 2217, 124 L Ed 2d 472 (1982); *Church at 295 S. 18th St. v. Emp't Dep't.*, 175 Or App 114, 28 P3d 1185, *rev den*, 333 Or 73 (2001); and *State v. Hickman/Hickman*, 358 Or 1, 15-16, 358 P3d 987 (2015). The court's analyses of the secondary issues in this appeal were similarly grounded in extensive precedent.

In light of the solid body of precedent which the Court of Appeals reviewed and properly applied, the factual context of the present case being different from those in previous cases addressing parallel issues does not make this a case of first impression as a matter of law.

Petitioners also contend that if the Court of Appeals ruling is not reversed, "[S]imilar issue[s will] arise often," Pet. for Review at 8, citing ORAP 9.07(2) ("Whether the issue or a similar issue arises often"), but the opposite is true. Federal and state law governing the issues in this case is clear in establishing that public accommodations anti-discrimination laws apply to

businesses such as bakeries, and that there is no constitutional right to carve out exemptions from the laws as Petitioners request to allow them to turn away customers because of their sexual orientation. However, if, rather than leaving the Court of Appeals decision undisturbed, this Court were to accept review and then issue a ruling that alters well-established law through the judicial creation of new exemptions to the Oregon Public Accommodations Law, that *would* open the floodgates, as more businesses would seek to thwart the law and then ask the courts for similar exemptions from the law. The result would be uncertainty and confusion about what are and have been settled areas of law.

In addition, judicially carving out such new exemptions from the Oregon Public Accommodations Law for those seeking to deny service to same-sex couples and other lesbian, gay, bisexual or transgender ("LGBT") individuals would result in troubling unequal treatment of LGBT people. Doing so despite the anti-discrimination protections of the Oregon Public Accommodations Law would allow the type of denial of equal legal protections that Oregon historically has found to be improper and intolerable. *See, e.g., Tanner v. Oregon Health Scis. Univ.*, 157 Or App 502, 514-26, 971 P2d 435 (1998), *rev den* 329 Or 528 (1999).

If this Court were to grant review and reverse the Court of Appeals decision, ORAP 9.07(3) ("Whether many people are affected by the decision in the case. Whether the consequence of the decision is important to the public * *

*") would also be implicated, but in a dangerous way. Under the law as it currently stands, there are no special exemptions allowing for discrimination specifically against LGBT people despite the protections of the Oregon Public Accommodations Law. A ruling creating such new exemptions could affect tens of thousands of LGBT people[3] across Oregon in harmful ways.

This Court should be wary of Petitioners' request to review this case and revise the law both because such a change would invite many new cases seeking permission to discriminate and because that result would endanger the well-being of LGBT people across Oregon.

III. Neither the Length nor Substance of the Court of Appeals Opinion Warrants Review Under ORAP 9.07(11) or (14).

Finally, the length of the Court of Appeals opinion in this case reflects the thoroughness of the court's decision, rather than establishing independent grounds for review, as suggested by Petitioners. Pet. for Review at 11, citing ORAP 9.07(11) ("Whether the Court of Appeals published a written opinion."). While Petitioners seem to argue that the 62-page length of the Court of Appeals decision is why the state supreme court should review it, the reverse is actually the case. The thoroughness and soundness of the Court of Appeals decision

[3] According to data from the most recent Census in 2010, 11,773 same-sex couples live in Oregon. Gary J. Gates & Abigail M. Cooke, *Oregon Census Snapshot: 2010*, Williams Institute (2010), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Oregon_v2.pdf. This number does not even include the many other LGBT people in Oregon who were not counted as being in same-sex couples in the Census.

grounded in well-established legal precedents is a good reason for this Court to exercise its discretion to *decline* review of the Court of Appeals decision. Nothing about ORAP 9.07(11) indicates that a comprehensive opinion is somehow inherently suspect, warranting review, any more than a shorter opinion might be.

As for the substance of the Court of Appeals decision, the petition for review lists among the reasons for review a blanket charge that the Court of Appeals erred in its decision below. Pet. for Review at 9-10. But, Petitioners' actual argument does not identify a single "error [that] results in a serious or irreversible injustice or in a distortion or misapplication of a legal principle." ORAP 9.07(14)(a). Instead, Petitioners' free speech and free exercise arguments, made under the heading, "The Kleins' Custom Wedding Cakes Are Fully Protected by the Free Speech Clauses of the United States and Oregon Constitutions" Pet. for Review at 10-14, and "This Court Should Grant a Religious Exemption Under the Oregon Constitution's Free Exercise Clause and *Smith*," *id*. at 14-16, amount to merely a regurgitation of the same arguments properly considered and decided by the Court of Appeals. The same is true of their arguments that the court's rulings related to the application of the Oregon Public Accommodations Law, and to due process and bias, were erroneous. Rather than identify any specific error below "[that] results in a serious or irreversible injustice or in a distortion or misapplication of a legal

principle," ORAP 9.07(14)(a), Petitioners merely repackage the same arguments they have already presented many times over. They would have this Court repeat the same analysis already conducted consistently, correctly, and in accordance with established law, by BOLI and the Oregon Court of Appeals. This Court need not waste its time on such an endeavor.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Laurel and Rachel Bowman-Cryer and Lambda Legal respectfully ask this Court to deny review of this case.

Dated: March 15, 2018

Respectfully submitted,

By: /s/ Stefan C. Johnson*

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 3682 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

DATED this 15th day of March 2018.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

Certificate of Filing

I certify that on March 15, 2018, I caused the RESPONSE OF *AMICI CURIAE* LAUREL BOWMAN-CRYER, RACHEL BOWMAN-CRYER, AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. TO PETITION FOR REVIEW to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the electronic filing (eFiling) system.

Certificate of Service

I certify that on March 15, 2018, I served the RESPONSE OF *AMICI CURIAE* LAUREL BOWMAN-CRYER, RACHEL BOWMAN-CRYER, AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. TO PETITION FOR REVIEW, to the following via the appellate courts' eFiling system at the participant's email address:

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