IN THE COURT OF APPEALS OF THE STATE OF OREGON

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

Petitioners,

v.

OREGON BUREAU OF LABOR AND INDUSTRIES,

Respondent.

Agency Nos. 44-14, 45-14

CA A159899

SUPPLEMENTAL BRIEF OF *AMICI CURIAE* RACHEL AND LAUREL BOWMAN-CRYER AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae Rachel and Laurel Bowman-Cryer, although not named parties, have a direct, private interest in this case because they were the complainants before Respondent Bureau of Labor and Industries ("BOLI"). They are the same-sex couple to whom Petitioners Melissa and Aaron Klein, dba Sweetcakes by Melissa ("the Kleins"), refused to sell a wedding cake and thereafter attempted to justify their discrimination using language that was profoundly hurtful to both Rachel and Laurel. These events led the Bowman-Cryers to file a complaint with BOLI for sexual orientation discrimination in violation of the Oregon Public Accommodations Law, ORC 659A.400 to ORS 659A.417. Their complaint was determined to be well-founded, and they were awarded compensation for their significant emotional distress. They participate here to help the court assess the Kleins' claims on remand, especially the contention that the damages award reflects bias against the Kleins' religious beliefs rather than the extent of the emotional distress they have suffered.

Amicus curiae Lambda Legal is the nation's oldest and largest legal organization working for full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and people living with HIV through impact litigation, education, and policy advocacy. *See*, *e.g.*, *Obergefell v. Hodges*, 576 US ___, 135 S Ct 2584, 2591-92, 192 L Ed 2d 609 (2015); *Lawrence v. Texas*, 539 US 558, 561, 123 S Ct 2472, 156 L Ed 2d 508 (2003).

Lambda Legal has represented same-sex couples or appeared as *amicus curiae* in many discrimination cases in which religious freedom has been asserted as a justification. *See*, *e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 US ___, 138 S Ct 1719, 201 L Ed 2d 35 (2018); *State v. Arlene's Flowers, Inc.*, 193 Wash 2d 469, 483-85, 441 P 3d 1203 (2019); *North Coast Women's Care Med. Grp., Inc. v. Superior Court*, 44 Cal 4th 1145, 81 Cal Rptr 3d 708, 189 P3d 959 (2008). This brief draws upon Lambda Legal's knowledge of those cases to complement the party briefing here. In addition, Lambda Legal's membership includes approximately 2,500 Oregonians. Because the court's decision is likely to affect not only the Bowman-Cryers but also Lambda Legal's members and many other LGBT people across Oregon, Lambda Legal has a particular interest in assisting the court with the additional information provided in this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Melissa and Aaron Klein, who own and operate Sweetcakes by Melissa, refused to make a wedding cake for Rachel and Laurel Bowman-Cryer because Rachel and Laurel are a lesbian couple. Following full proceedings before BOLI, this court affirmed BOLI's rejection of the Kleins' religion and free speech defenses, and the damages award to Rachel and Laurel for the emotional distress they suffered due to the Kleins' treatment of them. *Klein v. Oregon Bur. of Labor and Indus.*, 289 Or App 507, 410 P3d 1051 (2017). The court specifically held that "the Kleins have

made no showing that the state targeted them for enforcement because of their religious beliefs." *Id.* at 511.

On remand from the United States Supreme Court, the court now is to reconsider the prior decision "in light of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U. S. ____[, 138 S Ct 1719, 201 L Ed 2d 35] (2018)." The Kleins take this opportunity to renew and reframe the arguments fully considered before, this time with reference to *Masterpiece*. In particular, they assert that the damages award is unreasonably large and evidences bias against their religious beliefs by the decision-makers below.

Amici submit this brief to complement BOLI's demonstration, once again, that the record contains no support for the Kleins' claim that they were subjected to bias. *Amici* show from their perspective, as the parties subjected to unlawful discrimination, that the damages award properly compensated them for the emotional distress the Kleins' conduct caused them. Rather than being treated unequally due to bias against their religious beliefs, the Kleins are simply being required to comply with Oregon law on equal terms with other businesses. In other words, the Kleins' actual complaint is that they have not been afforded preferential treatment. But, what they seek is not permissible because it would elevate their religious interests above the interests of other persons, such as the Bowman-Cryers, who are entitled to protection against discrimination. The Establishment Clause

forbids such religious preferences, especially when they would result in harm to third parties.

The Kleins present nothing new warranting a different answer from this court this time. The prior decision should be reaffirmed.

STATEMENT OF THE CASE

Rachel and Laurel Bowman-Cryer are a committed lesbian couple. (BOLI SER 3-4). Both are people of faith. (*Id*. at 6-7). Each was raised in a very conservative faith tradition. Rachel was raised Southern Baptist. (*Id*. at 6). Laurel was raised Catholic. (*Id*. at 7). Both still identify as members of the faith in which they were raised, but both have had to struggle with the anti-gay teachings with which they were raised and with religion-based condemnation by family members. Both also still struggle to manage the negative feelings instilled by those teachings and by family members who have condemned them. They moved from Texas to Oregon in order to find a less hostile social environment. (*Id*. at 3,8).

Rachel's mother, Cheryl McPherson, tells that her entire family in East Texas has "totally written them off because she has two gay children." (Pet ER 9). She held similar antigay views for many years, but her views have changed and she now fully accepts both of her children – Rachel and her son Aaron. (BOLI SER 6).

Although Cheryl is now accepting, Rachel's sister is not (BOLI SER 17), and Rachel remains affected by the religious condemnation she experienced both

growing up and still, and fears that her mother will be upset and feel ashamed when others reject her because of her relationship with Laurel. (BOLI SER 5-6).

Laurel has violently antigay family members. An aunt who has control over the family property disapproves so vehemently that she threatened to "shoot [Laurel] in the face" if Laurel comes to visit the family members who live at that property, which includes Laurel's mother and grandmother. (BOLI SER 16). This is "devastating" to Laurel. *Id*.

Rachel and Laurel met in college in Texas in 2004. (BOLI SER 3). They had been together for 7 years when they first met Melissa Klein at a wedding expo in Portland, where they were shopping for a cake for Cheryl's sixth wedding. *Klein*, 289 Or App at 511-12; Pet ER 8. They supported Cheryl's wedding plans, but were not themselves planning to marry at that time. (BOLI SER 4-5). Melissa provided a welcoming experience with no negative reaction to Rachel and Laurel identifying as a same-sex couple. (Pet ER 8). Melissa then produced a cake for Cheryl that Rachel, Laurel and Cheryl all thought was delicious. (BOLI SER 5).

Laurel had long wished to marry Rachel. (BOLI SER 4, 37). She had asked Rachel to marry her periodically for nine years, hoping Rachel eventually would agree. (*Id*. 37). But Rachel had negative views of marriage and consistently refused. (*Id*. 4, 34).

Rachel and Laurel have two adopted daughters, both of whom have disabilities and one of whom requires full-time care. (*Id*. 4). They fostered the girls

upon the death of the girls' mother, who had been Laurel's best friend. (*Id*.) Embracing her role as a mother, Rachel decided marriage could provide the girls a greater sense of "permanency and commitment." (*Id*.) This was not easy for her because she had to overcome her fears that marriages do not work out. But, having made the decision, she allowed herself to get excited, to begin planning, and to "want[] a wedding that was as 'big and grand' as they could afford." (*Id*. 4-5).

She started with her mother's help, something that would not have been possible in past years due to her mother's prior negative judgments. (*Id*. 5-6). One decision was made at the start: they would purchase the same delicious cake that Rachel and Laurel had bought from Melissa two years earlier. (*Id*. 5).

On January 13, 2013, Rachel and Cheryl approached Melissa's booth at the Portland Bridal Expo and explained that they wanted to order a cake for Rachel and Laurel's wedding. *Klein*, 289 Or App at 511-12. Melissa told them to email her to arrange a tasting because she did not have her appointment book with her. (Pet ER 8) She gave no indication of any restrictions on whom she serves. (*Id*.)

On January 17, 2013, Rachel and Cheryl arrived for the tasting. *Klein*, 289 Or App at 511-12. Cheryl recounted that the shop looked very different from the tasting for her cake. (Pet ER 9). Aaron Klein greeted them and Melissa was not present. *Klein*, 289 Or App at 512. Aaron began by asking the names of the bride and groom. *Id*. Upon hearing that there would be two brides, he announced that they do not create wedding cakes for same-sex couples. *Id*. Rachel was shocked and began

crying. *Id*. In addition to her own humiliation and shame, Rachel feared she had caused her mother also to feel humiliated and ashamed, which increased her dismay. *Id*. She and Cheryl left the shop immediately. *Id*.

As they drove away, Rachel was in tears and inconsolable. *Id*. This prompted Cheryl to decide to return and ask Aaron to reconsider his rejection of their business by trying to reach him with her own story. *Id*. But when she explained how her religious "truth had changed" because of having "two gay children" (BOLI SER 6), Aaron responded by citing the passage in Leviticus that condemns same-sex relationships as an "abomination." *Id*.; *Klein*, 289 Or App at 512.

Cheryl returned to the car and told Rachel that Aaron had not changed his mind, and instead had cited Leviticus. *Id*. Rachel immediately recognized the passage as the one commonly cited to condemn same-sex relationships. She later explained that it had made her "feel like they were saying God made a mistake when he made me, that I wasn't supposed to be, that I wasn't supposed to love or be loved or have a family or live a good life and one day go to heaven." *Id*. She became even more distraught.

When they got home, Rachel retreated to her bed crying. (BOLI SER 6, 35). Cheryl explained the events to Laurel, who immediately recognized the Leviticus reference. *Klein*, 289 Or App at 512-13. She had her own instant understanding of the Biblical passage from her own religious upbringing. To her, it meant Aaron viewed her as "a creature not created by God, not created with a soul; they are

unworthy of holy love; they are not worthy of life." (BOLI SER 7, 38). She was shocked, felt personally attacked, and was deeply hurt. (*Id*.)

Rachel felt "beyond upset" and unable to cope with her feelings of shame and unworthiness. (BOLI SER 6). She remained in bed that evening. (*Id*. 7). Laurel tried but was unable to comfort her. (*Id*. 7, 38). Then, when one of their daughters was distraught and insisted on being soothed by Rachel, Laurel was unable to comfort her daughter either. (*Id*.) In addition to her own feelings of anger, hurt and shame by the Kleins' rejection, being unable to alleviate her loved ones' distress caused Laurel to feel helpless, frustrated, and inadequate in her usual role of protector. (*Id*.) The entire family had been emotionally side-swiped and was reeling.

Rachel sank into depression and the family relationships suffered. (*Id*. 10, 35). The wedding planning continued, but Rachel was anxious about interacting with vendors, fearing further rounds of rejection. (*Id*. 11, 35-36). Laurel was angry, frustrated and ashamed that she could not protect Rachel, and sad that Rachel had become unsure whether she wanted to marry. (*Id*. 11, 38). Instead of joyous, their preparations became tentative, defensive, and stressful. (*Id*.) The innocence and happy excitement of their planning had been destroyed. (*Id*.)

The Kleins admit that they refused to make a cake for the Bowman-Cryers. But, they assert that their refusal was not sexual orientation discrimination contrary to Oregon law, and that their state and federal rights of religious freedom and free speech privileged them to refuse. The agency conducted a six-day hearing, after

which BOLI's "Final Order" set forth detailed credibility determinations and other factual findings, as well as conclusions of law, including that the Kleins had discriminated against Rachel and Laurel based on their sexual orientation, and that their conduct was not a protected exercise of religion or free speech. The Order awarded damages to Rachel and Laurel for their emotional suffering due to the Kleins' treatment of them: $75,000 to Rachel and $60,000 to Laurel. Commissioner Brad Avakian reviewed the Order and affirmed the findings, much of the legal analysis, and the damages amount.

The Kleins appealed, renewing their legal arguments, and also claiming that Commissioner Avakian denied them due process by prejudging the Bowman-Cryers' complaints and their defenses. They claimed in particular that the amount of damages shows bias against them, and they sought reversal of the judgment.

This court reviewed the proceedings and affirmed both that the Kleins' conduct constituted unlawful sexual orientation discrimination by a business, *Klein*, 289 Or App at 523-24, and that their conduct was neither a privileged exercise of religion nor a protected form of expression. *Id*. at 542-43, 550. The court also rejected the Kleins' claim that the agency proceedings were tainted by bias, deciding instead that the damages amount was proper given the emotional impact on the Bowman-Cryers of the Kleins' wrongful conduct. *Id*. at 550-55.

The court also determined that the evidence the Kleins offered of improper bias by Avakian or other BOLI staff showed no such bias when considered in

context. *Id*. at 553-55. Instead, when Avakian's comments were viewed in full, they consisted of appropriate statements of the law given properly by an official with responsibility to educate the public, not improper prejudgments of the merits. *Id*.

The Kleins requested Oregon Supreme Court review, concerning which the Department of Justice took no position on behalf of BOLI. Appearing as *amici* on their own behalf, the Bowman-Cryers opposed the request. When review was denied, the Kleins sought United States Supreme Court review. The Department of Justice opposed that petition on behalf of BOLI. On June 17, 2019, the U.S. Supreme Court granted the Kleins' petition for review, vacated this court's decision, and remanded the case "for further consideration in light of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. ___ (2018)."

The Kleins now reassert their claims that the proceedings below were biased, reframing them as a federal constitutional violation. They also renew their religious free exercise and free speech arguments. BOLI opposes the Kleins' reframed arguments, explaining again how the statements characterized as showing bias actually show no such thing when Commissioner Avakian's complete statements and their context are presented.

ARGUMENT

I. The Court Already Has Considered And Rightly Rejected The Kleins' Unsupported Claim Of Religious Bias Against Them.

In their prior briefing to this Court, the Kleins asserted that their due process rights were violated because Commissioner Avakian and others held actual bias

against them, had prejudged the merits of the case, and had subjected them to differential treatment. This court considered the Kleins' claims under applicable Oregon law, *Klein*, 289 Or App at 551-52, and determined that they were factually unfounded.

The inquiry to be undertaken now is not materially different from what the court did before. In *Masterpiece Cakeshop*, the U.S. Supreme Court considered a baker who had violated state law by refusing equal service to same-sex couples. In that case, however, the Supreme Court determined that the petitioning baker had been treated differently – and worse – than other bakers who had refused service to particular customers. The *Masterpiece* record also contained evidence of public statements by commissioners indicating hostility to the baker's religious beliefs. The comparators and hostile statements together indicated a lack of government neutrality, meaning the nondiscrimination law could not be enforced over the baker's religious objection.

But here, the government did not engage in any differential treatment of business owners. BOLI enforces the civil rights law on behalf of everyone, and against everyone, equally. On the prior appeal and here again, the Kleins offer no evidence that BOLI permitted other businesses to reject customers with impunity. Likewise, previously and here again, the Kleins' quote selectively from Commissioner Avakian's statements, taking them out of context to indicate bias. As the court determined before, however, and as BOLI shows methodically in its

supplemental brief, when the full context is shown, the indications of bias evaporate. *Klein*, 289 Or App at 553-55.

II. The Kleins Describe Not Wrongful Targeting Or Other Unequal Treatment Due To Their Religious Beliefs, But Rather A Proper Denial Of The Special Permission To Discriminate They Request.

A. Application Of The Same Rules Equally To Everyone Is Not Targeting.

In *Masterpiece Cakeshop*, as noted above, the U.S. Supreme Court concluded there was evidence of a lack of proper governmental neutrality toward the baker's religious beliefs (1) because hostile statements made by two commissioners were not disavowed by other commissioners or the Colorado Court of Appeals; and (2) other bakers were not censured when they refused to make cakes because they disagreed with the antigay religious messages their customers requested.

Nothing similar took place in this case. Instead, as explained above, the Kleins offer no examples of other bakers who rejected customers on prohibited grounds and were not punished as the Kleins were. Their main evidence of purported bias is the couple of public statements made by Commissioner Avakian. However, again unlike in *Masterpiece*, the court already has determined that the Kleins selectively edited and misrepresented them. *Klein*, 289 Or App at 511, 550-55. When the full statements are considered in context, it is clear that they are accurate statements of the law made by a public servant carrying out his legal duty to educate the public, not improper prejudgment of this dispute. *Id*.

However sincere or well-intentioned, such inaccurate characterization of Commissioner Avakian's conduct does not demonstrate lack of neutrality by any adjudicator in this case. Rather, the process of examining those statements confirms that Commissioner Avakian acted properly, with an appropriate understanding of the fact that the law must apply equally to all who are subject to its religiously neutral, generally applicable terms.

The Kleins state a desire to be given special permission to violate Oregon law, to the detriment of same-sex couples. The fact that, contrary to their wishes, they were treated equally, does not amount to adjudicatory bias.

B. The Damages Award Is Proper Compensation For Emotional Harm To Vulnerable Individuals, Not Evidence Of Bias.

The BOLI award of $135,000 was reasonable and appropriate for the emotional harm suffered by Rachel and Laurel as a result of the Kleins' discrimination against them. It is settled under Oregon law that "[l]iability attaches when injury from wrongful conduct is foreseeable, even if the amount is not foreseeable. "The basic premise regarding damages is that a defendant 'takes a plaintiff as he finds him," *Fuller v. Merten*, 173 Or App 592, 597-598, 22 P3d 1221 (2001) (citing *Winn v. Fry,* 77 Or App 690, 693, 714 P2d 269, *rev. den.* 301 Or 241, 720 P2d 1280 (1986)). *See also Crismon v. Parks*, 238 Or App 312, 319, 241 P3d 1200 (2010); *Chong v. STL International, Inc.*, Case No. 3:14-cv-244-SI, 101 Fed R Evid Serv 150, 2016 WL 4253959, *8 (Aug. 10, 2016). Thus, when a person injured

by wrongful conduct was especially vulnerable and the injury was greater than others might suffer, the one who caused the injury is responsible for the full extent of the injury. *Fuller*, 173 Or App at 597-98. It also is well settled that discrimination is wrongful conduct, and that there is no civil rights exception to this longstanding liability rule.

Rachel and Laurel were emotionally vulnerable and suffered serious emotional harm due to the Kleins' wrongful conduct. Both were raised religious and grew up with religion-based condemnation from family members. They both were well aware of the condemnatory meaning given to the passage of Leviticus that Aaron Klein cited when explaining the Kleins' refusal to treat same-sex couples as they treat different-sex couples. That religious reference had an especially cutting resonance for both women due to their respective histories and continuing rejection by family members.

In addition, marriage was a sensitive topic between the couple. For years, Laurel had asked Rachel to marry her, only to be turned down because Rachel had negative associations with marriage. She had not envisioned marriage as part of her future with Laurel, regardless of the love and commitment the couple shares. Her decision to marry was driven by her desire to protect their daughters, but it was emotionally complicated for her.

Rachel struggles with depression, shame, anxiety and fear, and with managing all these emotions. Laurel strives to support and protect Rachel, and struggles

emotionally when she is unable to do that. They moved to Oregon for a more welcoming environment than what they had in Texas. Having believed they had found a safer environment in Oregon, they were taken by surprise and hurt by the Kleins' treatment of them. Their sense of greater belonging and ability to participate – to not be on guard at all times – was shattered. For Rachel, depression and anxiety followed. For Laurel, it was frustration and anger.

These emotional effects were greater because the service refusal concerned preparation for their wedding. There is nothing surprising or suspicious about the fact that planning for their wedding was an emotionally intense experience for this couple. The Supreme Court has underscored the social and emotional significance of marriage for many couples, their families and their friends. *Obergefell v. Hodges*, 576 US ___, 135 S Ct 2584, 2594-95, 192 L Ed 2d 609 (2015). It is no secret to those choosing to engage in wedding-related commerce that many customers are emotionally invested in the preparations for their "big day." The importance of weddings to many people is obviously why wedding-related goods and services often are special and command premium prices. Even without a history of emotional vulnerability concerning marriage and religious condemnation of gay people, anyone can experience humiliation and deep hurt when a denial of wedding-related goods or services spoils the excited happiness of wedding planning. As one example, Robert Ingersoll and Curt Freed had planned to invite "[a] hundred plus" guests to celebrate their wedding. *Arlene's Flowers, Inc.*, 193 Wash 2d at 483-85. But, their

florist's religion-based refusal to serve them wrecked their joyous preparations, and the emotional aftermath of the rejection caused them to abandon those plans. In the end, they held a small service with just eleven people in attendance. *Id*.

When persons who are motivated by religious belief wrongfully injure others and then are held responsible for the full extent of the injury they caused, consistently with other damages awards and the usual standards of liability, it is not evidence of anti-religion bias on the part of the tribunal.

III. The Kleins Misinterpret *Masterpiece Cakeshop* As A License To Discriminate Or Otherwise Harm Others.

Tellingly, the Kleins largely ignore or, at best dismiss, the harm they inflicted on Rachel and Laurel. They seem to interpret *Masterpiece Cakeshop* as having recast religious free exercise doctrine as now permitting injury to others. But *Masterpiece* did no such thing. In fact, that case explicitly rejected the notion of a general right of businesses open to the public to discriminate based on the proprietor's religious beliefs, contrary to a public accommodations law. 584 U. S. __, 138 S Ct at 1727. Of particular note is the Court's citation of *Newman v. Piggie Park Enters., Inc.*, 390 US 400, 88 S Ct 964, 19 L Ed 2d 1263 (1968), which enforced the federal Civil Rights Act against a chain of barbeque restaurants and described the business owners' religious freedom defense of racial segregation as "patently frivolous." *Id*. at 402 n 5.

This contemporary invocation of *Piggie Park* is fully consistent with *Employment Division v. Smith*, 494 US 872, 110 S Ct 1595, 108 L Ed 2d 876 (1990),

the governing federal free exercise standard, which *Masterpiece* did not alter and which provides that religiously neutral laws of general applicability must be enforceable or else each person could "become a law unto himself." 494 US at 879 (citation omitted). Explaining why free exercise rights must have limits, *Employment Division* cites *United States v. Lee*, 455 US 252, 102 S Ct 1051, 71 L Ed 2d 127 (1982) (Stevens, J., concurring) (protecting employee rights to Social Security as against employer's religious rights), and *Prince v. Massachusetts,* 321 US 158, 64 S Ct 438, 88 L Ed 645 (1944) (enforcing child labor laws despite parent's religious objection). These and other cited cases stand for the proposition that, while freedom to believe may be absolute, freedom to act is not; conduct can be regulated to protect the rights and interests of third parties. *Employment Division*, 494 US at 879-80. Consequently, "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 *Lee,* 455 US at 263 n 3).

The U.S. Supreme Court reaffirmed recently that impacts on other people are important in free exercise analysis. *Burwell v. Hobby Lobby Stores, Inc.*, 573 US 682, 693, 134 S Ct 2751, 189 L Ed 2d 675 (2014), was decided under the Religious Freedom Restoration Act ("RFRA"), a statute which sets a test much more permissive of religion-based conduct than the federal constitutional standard discussed in *Employment Division*. Still, the Supreme Court has emphasized that,

even under RFRA, the religiously motivated conduct at issue was allowed because its impact on others would be "precisely zero." *Hobby Lobby Stores,* 573 US at 693.

Masterpiece did not negate the role of third party interests in religious free exercise analysis. Rather, the decision reaffirmed it, explicitly distinguishing between the freedom of clergy to decline to solemnize marriages of same-sex couples, and "a long list of persons who provide goods and services for marriages and weddings [who] might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *Id*. at 1727.

In sum, the free exercise clause simply does not mean that religious believers engaged in regulated commercial conduct are free to impose the burdens of their beliefs on others in violation of protective laws.

IV. Given The Harm To Those Against Whom The Kleins Discriminate, The Exemption They Seek Would Violate The Establishment Clause.

The Establishment Clause provides essential protection for religious freedom. It bars official conduct that favors one faith over others, has the primary purpose or primary effect of advancing or endorsing religion, or coerces religious belief or practice. *See, e.g.*, *McCreary Cnty. v. ACLU of Ky.*, 545 US 844, 860, 125 S Ct 2722, 2733, 162 L Ed 2d 729 (2005); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 US 290, 302, 120 S Ct 2266, 2275, 147 L Ed 2d 295 (2000); *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1054 (9th Cir. 2007).

It also prevents government from granting exemptions or accommodations that would have a "detrimental effect on any third party." *Hobby Lobby Stores,* 573 US at 729 n 37; *Cutter v. Wilkerson*, 544 US 709, 720, 125 S Ct 2113, 2121, 161 L Ed 2d 1020 (2005). That is because religious exemptions that burden third parties impermissibly prefer the religion of those who are benefited over the beliefs and interests of those who are not. *See, e.g.*, *Texas Monthly, Inc. v. Bullock*, 489 US 1, 15, 18 n 8, 109 S Ct 890, 899-900, 103 L Ed 2d 1 (1989) (plurality opinion) (invalidating tax exemption for religious publications because it increased taxes on others); *Estate of Thornton v. Caldor*, 472 U.S. 703, 709, 105 S Ct 2914, 2917, 86 L Ed 2d 557 (1985) (invalidating state law requiring employers to accommodate employees Sabbath observances because "the statute t[ook] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath."). Accordingly, in evaluating Establishment Clause challenges, courts must "account [for] the burdens a requested accommodation may impose on nonbeneficiaries" and ensure that the accommodation does not "override other significant interests." *Cutter*, 544 US at 720, 722.

The permission the Kleins seek to screen customers according to their own religious criteria, contrary to the public accommodations law, would violate these constitutional guarantees. It would engage BOLI and other arms of Oregon government in privileging the religious beliefs of the Kleins and those who hold

similar beliefs over the rights and beliefs of Rachel and Laurel, and other same-sex couples. The Establishment Clause would not allow it.

CONCLUSION

The prior proceedings were untainted by bias and the judgment should be affirmed.

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 4,871 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 19th day of September, 2019.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing document with the Appellate Court Administrator on this date.

I further certify that service of a copy of the foregoing document will be accomplished on the following participants in this case, who are registered users of the appellate courts' eFiling system, Tyler D. Smith and Herbert G. Grey, attorneys for petitioners; Ellen F. Rosenblum, Benjamin Gutman, and Carson L. Whitehead, attorneys for respondent; Julia Elizabeth Markley and Courtney Rian Peck, attorney's for *amicus curiae*; P.K. Runkles-Pearson, Alexander Max Naito, Mathew W. dos Santos, Kelly Kathryn Simon, and Jennifer Middleton, attorneys for *amicus curiae*; and Clifford Scott Davidson, attorney for *amicus curiae*, by using the court's electronic filing system.

I further certify that I have upon this date served Adam R. Gustafson, Derek S. Lyons, C. Boyden Gray, Stephanie N. Taaub, and Hiram S. Sasser, III, attorneys for petitioners; and Richard B. Katskee, attorney for *amicus curiae*, who are not being served by the appellate courts' eFiling system, by mailing two copies, with postage prepaid, in an envelope addressed to:

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