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.

Oregon Bureau of Labor and Industries Nos. 4414, 4514

Court of Appeals No. A159899

BRIEF OF AMICUS CURIAE ACLU FOUNDATION OF OREGON, INC.

Petition for Judicial Review of the Final Order of the Oregon Bureau of Labor and Industries

(Counsel listed on next page.)

September 2019

P.K. Runkles-Pearson, OSB #061911
Miller Nash Graham & Dunn LLP
3400 U.S. Bancorp Tower
111 SW Fifth Avenue
Portland, OR 97204
Telephone: (503) 224-5858
Email: p.k.runkles-pearson@millernash.com

Attorneys for Amicus Curiae ACLU Foundation of Oregon, Inc.

Kelly K. Simon, OSB #154213
ACLU of Oregon
P.O. Box 40585
Portland, OR 97240
Telephone: (503) 444-7015
Email: ksimon@aclu-or.org

Attorneys for Amicus Curiae ACLU Foundation of Oregon, Inc.

Benjamin Gutman, OSB # 60599
Carson L. Whitehead, OSB #105404
Leigh A. Salmon, OSB #054202
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301
Telephone: (503) 378-4402
Email: carson.l.whitehead@doj.state.or.us

Attorneys for Respondent

Herbert G. Grey, OSB #810250
4800 SW Griffith Dr., Suite 320
Beaverton, OR 97005
Telephone: (503) 641-4098
Email: herb@greylaw.org

Tyler D. Smith, OSB #075287
Tyler Smith & Associates PC
181 N. Grant Street, Suite 212
Canby, OR 97013
Telephone: (503) 266-5590
Email: tyler@ruralbusinessattorneys.com

C. Boyden Gray*
Adam R.F. Gustafson*
James R. Conde*
Boyden Gray & Associates
801 17th Street, NW, Suite 350
Washington, DC 20006
Telephone: (202) 955-0620
Email: gustafson@boydengrayassociates.com

Kelly J. Shackelford*
Hiram S. Sasser, III*
Kenneth A. Klukowski*
Michael D. Berry*
Stephanie N. Taub*
FIRST LIBERTY INSTITUTE
2001 West Plano Pkwy, Suite 1600
Plano, TX 75075
Telephone: (972) 941-4444
Email: kkluwoski@firstliberty.org

Attorneys for Petitioners
*Admitted *pro hac vice*

Clifford Scott Davidson
OSB #125378
Sussman Shank LLP
1000 SW Broadway, Suite 1400
Portland, OR 97205
Telephone: (503) 243-1653
Email:
cdavidson@sussmanshank.com

Attorneys for Amicus Curiae

Julia Elizabeth Markley
OSB #000791
Courtney Rian Peck, OSB #144012
Perkins Coie LLP
1120 NW Couch, 10th Floor
Portland, OR 97209
Telephone: (503) 727-2259
Email: jmarkley@perkinscoie.com
Email: cpeck@perkinscoie.com

Attorneys for Amicus Curiae

Stefan Johnson, OSB #923480
Lambda Legal
4221 Wilshire Blvd., Suite 280
Los Angeles, CA 90010
Telephone: (213) 382-7600
Email: sjohnson@lambdalegal.org

Attorney for Amicus Curiae

Amicus ACLU Foundation of Oregon agrees with respondent Bureau of Labor and Industries that its actions in this case did not exhibit hostility to religion. As BOLI's brief ably explains, the comments that the Kleins cite as "hostile" were simply statements of existing law. If those statements were inappropriate, then no duly-appointed officer of the law would ever be able to enforce laws that contradict the Kleins' religious beliefs. ACLU strongly supports religious freedom. But in cases where important rights collide, no single right should ever have the untrammeled right-of-way that the Kleins are seeking. ACLU has nothing further to add to BOLI's brief on that issue.

ACLU writes separately here to emphasize an additional point: That *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S Ct 1719, 201 L Ed 2d 35 (2018), did not diminish the continued vitality of Oregon's public accommodations laws. To the contrary, *Masterpiece* reaffirmed the importance of such laws, thus continuing a line of cases that has existed for over a century. This court should again affirm those important laws.

A. In *Masterpiece*, the Supreme Court reaffirmed the well-settled case law on which this court based its original decision.

In its original decision, this court determined that Oregon has a substantial interest in preventing invidious discrimination in the marketplace. *Klein v. BOLI*, 289 Or App 507, 542, 410 P3d 1051 (2017). *Masterpiece* reaffirms that principle as grounded in settled law. Contrary to petitioners' argument that *Masterpiece* somehow requires this court to upend its original analysis, the *Masterpiece* Court strongly affirmed that laws like Oregon's public accommodations laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Masterpiece*, 138 S. Ct. at 1727 (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 US 557, 572, 115 S Ct 2338, 132 L Ed 2d 487 (1995)).

While religious objections receive constitutional protection, "it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and

generally applicable public accommodations law." *Id.* To support this statement, the *Masterpiece* Court cited a footnote in *Newman v. Piggie Park Enterprises, Inc.*, 390 US 400, 402 n 5, 88 S Ct 964, 19 L Ed 2d 1263 (1968). The footnote characterizes as "patently frivolous" the argument that a public accommodation law is "invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of the defendant's religion.'" *Id.*

B. Overturning 140 years of case law would severely undermine the efficacy of our Nation's civil rights laws.

The United States Supreme Court's view on whether a business owner's religious beliefs can excuse a refusal to sell goods or services based on the buyer's protected characteristics remains in line with more than a century of precedent upholding anti-discrimination laws. *Masterpiece*, 138 S Ct at 1727-28.

Even while vacating the Colorado Commission's order, the United States Supreme Court in *Masterpiece* explicitly reaffirmed that religious and philosophical objections do not exempt business owners (and their businesses) from valid, neutral, and generally applicable

public accommodations laws. *See Masterpiece*, 138 S Ct at 1727. This has been the law for 140 years for good reason:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. * * * Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Reynolds v. United States, 98 US 145, 166-67, 25 L Ed 244 (1878). The exemption petitioners seek here would swallow this longstanding rule—and the United States Supreme Court recognized this danger in *Masterpiece*. While noting that a religious exemption may exist for clergy asked to perform marriage rites, the Court acknowledged that such an exemption must be narrowly confined:

> Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings 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.

Masterpiece, 138 S Ct at 1727.[1]

Recent history demonstrates that cakes are not the only wedding-related products being denied for discriminatory reasons, on the basis of religious belief. Florists have asserted this argument. *State v. Arlene's Flowers, Inc.*, 441 P3d 1203, 1217 (2019). Wedding photographers have also refused gay couples on religious grounds. *See Elane Photography, LLC v. Willock*, 309 P3d 53 (NM 2013). Bartenders, caterers, event planners, musicians, DJs, and venue designers could be next. This likelihood concerned the United States Supreme Court enough that it repeated in *Masterpiece* the need to constrain religious exemptions to religious institutions, "lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages,'

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[1] Oregon law already exempts religious institutions from nondiscrimination requirements based on sexual orientation in public accommodations and employment, when those requirements implicate the religious institution's "primary purpose." *See* ORS 59A.006 (3)-(5).

something that would impose a serious stigma on gay persons." *Masterpiece*, 138 S Ct at 1728-29.

There is no principled way to limit this exemption to same-sex couples. The victims here happen to be gay. If petitioners' position were the law of the land, businesses would be free to refuse an interracial couple, a Jewish couple, or couple in which one person is Hindu and the other a Baptist. An owner could simply declare that her religion views such marriages as sinful. History bears this out. *See Loving v. Virginia*, 388 US 1, 11-12, 87 S Ct 1817, 18 L Ed 2d 1010 (1967). That sad history is still continuing today. *See* Allyson Chiu, *A Mississippi wedding venue rejected an interracial couple, citing "Christian belief." Facing a backlash, the owner apologized*. Washington Post, September 3, 2019, *available at* https://www.washingtonpost.com/nation/2019/09/03/mississippi-wedding-venue-rejects-interracial-couple-christian-belief-apologized (last visited September 19, 2019).

Neither is there any principled way to limit a religious exemption to the wedding industry. Like all human beings, gay people need a variety of services to support their marriages and their daily

married lives. These services may include restaurants, bars, coffee shops, beauty salons, grocery stores, medical providers, public and private transportation services, clothing retailers, day care providers, and more. Why must those businesses provide services to support something their religion forbids if wedding cake bakers need not do so? Our country's history is rife with attempts to discriminate for this very reason. Religion was used to justify opposition to the Civil Rights Act of 1964. *See* William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 Ga L Rev 657 (2011). Litigants have invoked religion to defend racially discriminatory admissions policies, *Bob Jones Univ. v. United States*, 461 US 574, 604, 103 S Ct 2017, 76 L Ed 2d 157 (1983); the denial of health insurance benefits to unmarried women-employees, *see EEOC v. Fremont Christian Sch.*, 781 F2d 1362 (9th Cir 1986); housing discrimination against unmarried couples and people of different faiths; *see Smith v. Fair Emp't and Housing Comm'n*, 913 P2d 909 (Cal 1996); and religious discrimination in employment and membership at a health club, *see McClure v. Sports & Health Club, Inc.*, 370 NW2d 844, 847 (Minn 1985).

A uniform history of case law, going back 140 years, holds that one cannot use sincerely held religious belief to evade an otherwise valid and neutral law of general application. Public accommodation laws, particularly those regulating a private commercial enterprise, are one such set of laws. Justice O'Connor explained in *Roberts v. United States Jaycees*, 468 US 609, 634, 104 S Ct 3244, 82 L Ed 2d 462 (1984): "The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State."

The substantive law governing this case has not changed, and the adjudicative conduct here is nothing like the conduct that decided *Masterpiece*. The court should reaffirm its original decision.

DATED this 19th day of September, 2019.

MILLER NASH GRAHAM & DUNN LLP

s/ P.K. Runkles-Pearson
P.K. Runkles-Pearson, OSB No. 061911

ACLU OF OREGON, INC.
Kelly K. Simon, OSB No. 154213

Attorneys for Amicus Curiae
ACLU Foundation of Oregon, Inc.

CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND
TYPE SIZE REQUIREMENTS

In accordance with ORAP 8.15(3), the *amicus* brief shall be subject to the same rules as those governing briefs of parties.

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b)(ii) and (2) the word count of this brief (as described in ORAP 5.05(1)(b)) is 1,441 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(3)(g).

s/ P.K. Runkles-Pearson
P.K. Runkles-Pearson, OSB No. 061911

Of Attorneys for Amicus Curiae
ACLU Foundation of Oregon, Inc.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 19, 2019, I filed the foregoing Brief of Amicus Curiae ACLU Foundation of Oregon, Inc., by causing it to be electronically filed with the APPELLATE COURT ADMINISTRATOR through the appellate courts' eFiling system.

CERTIFICATE OF SERVICE

I certify that on September 19, 2019, service of a copy of this Brief of Amicus Curiae ACLU Foundation of Oregon, Inc., will be accomplished on the following participants in this case, who are registered users of the appellate courts' eFiling system, by the appellate courts' eFiling system at the participants' email addresses as recorded this date in the appellate eFiling system:

Herbert G. Grey
Attorney for Petitioners

Tyler D. Smith
TYLER SMITH & ASSOCIATES PC
Attorney for Petitioners

Carson L. Whitehead
Leigh A. Salmon
OREGON DEPARTMENT OF JUSTICE
Attorneys for Respondent

Clifford Scott Davidson
SUSSMAN SHANK LLP
Attorneys for Amicus Curiae

Julie Elizabeth Markley
Courtney Rian Peck
PERKINS COIE LLP
Attorneys for Amicus Curiae

Stefan Johnson
LAMBDA LEGAL
Attorneys for Amicus Curiae

I further certify that on the 19th day of September, 2019, I directed to be served the foregoing Brief of Amicus Curiae ACLU Foundation of Oregon, Inc., on the following attorneys by mailing two copies, with postage prepaid, in an envelope addressed to:

Adam R.F. Gustafson*
James R. Conde*
C. Boyden Gray*
BOYDEN GRAY & ASSOCIATES
801 17th Street N.W., Suite 350
Washington, DC 20006

Attorneys for Petitioners

Kelly J. Shackleford*
Hiram S. Sasser, III*
Kenneth A. Klukowski*
Michael D. Berry*
Stephanie N. Taub*
FIRST LIBERTY INSTITUTE
2001 West Plano Pkwy, Suite 1600
Plano, TX 75075

Attorneys for Petitioners

* Admitted *pro hac vice*

s/ P.K. Runkles-Pearson
P.K. Runkles-Pearson, OSB No. 061911
Of Attorneys for Amicus Curiae ACLU Foundation of Oregon, Inc.

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