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.

BUREAU OF LABOR AND INDUSTRIES OF THE STATE OF OREGON,

Respondent.

Court of Appeals
No. A159899

Bureau of Labor and Industries of the State of Oregon

Agency Case Nos. 44-14 & 45-14

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

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INTRODUCTION

Amicus curiae ACLU Foundation of Oregon, Inc., urges this Court to uphold the constitutionality of ORS 659A.403 and ORS 659A.409 (collectively, Oregon's "Public Accommodations Laws") and the order by the Commissioner of the Bureau of Labor and Industries ("BOLI"). ACLU agrees with BOLI that there was substantial evidence to support the BOLI Commissioner's determination that respondents Aaron and Melissa Klein violated the Public Accommodations Laws by unlawfully denying services based on complainants' sexual orientation. ACLU also agrees that, on these facts, BOLI's order in this case does not violate respondents' freedom of expression or free exercise under the federal Constitution or the Oregon Constitution.

ACLU submits this brief to inform the Court's thinking on two specific issues: (1) how Article I, Section 8, of the Oregon Constitution and the supreme court's framework in *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), apply to this case, and (2) the appropriate analysis for determining whether and how respondents violated ORS 659A.409.

ORS 659A.403 is a *Robertson* Category Three law, subject only to as-applied challenges. It is not unconstitutional as applied to respondents because they were sanctioned not for speech, but for conduct: the refusal to provide equal services by a place of public accommodation. ORS 659A.409 is a *Robertson* Category Two law, focused on a forbidden effect: the provision of unequal services by a place of public accommodation. It is not unconstitutionally overbroad because it narrowly prohibits communications that themselves constitute provision of unequal services. In either case, respondents remain free to express their personal views about marriage. But in their business dealings, as owners of Sweet Cakes, they must follow the law by freely providing services to all.

Because of ORS 659A.409's potential chilling effect on free speech if interpreted too broadly, it is important to interpret ORS 659A.409 to reach only communications that constitute provision of unequal services. In this case, respondents admit that a representative of their business responded to the request for a wedding cake by stating that "we don't do same-sex weddings." That statement alone violates ORS 659A.409. But the Commissioner's order refers to four other statements without specifying whether those statements also constituted violations of ORS 659A.409 or, if so, explaining *how* they violated it by drawing the connection between the statements and the provision of unequal services. These facts, taken as a whole, were sufficient to demonstrate a violation, but clearer analysis is necessary to avoid a chilling effect on free speech in this and future cases.

ARGUMENT

I. The Public Accommodations Laws are constitutional under Article I, Section 8, of the Oregon Constitution.

The framework for analyzing whether a law unconstitutionally violates Article I, Section 8, of the Oregon Constitution is well established. In *Robertson*, 293 Or 402, the Oregon Supreme Court established a three-part framework for analyzing laws challenged under Article I, Section 8:

- Category One encompasses laws that prohibit particular types or subjects of speech or restrict expression itself. *State v. Plowman*, 314 Or 157, 163, 838 P2d 558 (1992). These laws target the content of the speech or expression. Such laws are facially invalid under Article I, Section 8, unless the prohibition falls within a well-established historical exception. *Id.*

- Category Two encompasses laws that focus on proscribing "forbidden effects, but expressly prohibit[] expression used to achieve those effects." *Plowman*, 314 Or at 164. Such laws may be valid if "the actual focus of the enactment is on an effect or harm that may be proscribed, rather than on the substance of the communication itself." *State v. Stoneman*, 323 Or 536, 543, 920 P2d 535 (1996) (emphasis omitted). The court analyzes them for overbreadth. *Plowman*, 314 Or at 164.
- Category Three encompasses laws that "focus[] on forbidden effects, but without referring to expression at all." *Plowman*, 314 Or at 164. Such laws are constitutionally invalid only to the extent that they "impermissibly burden protected expression" as applied to the speaker. *City of Eugene v. Miller*, 318 Or 480, 490, 871 P2d 454 (1994).

A. ORS 659A.403 does not unconstitutionally infringe on respondents' freedom of speech.

ORS 659A.403 is a Category Three law because it does not refer to expression at all. Therefore, respondents may raise only an as-applied challenge. ORS 659A.403 survives that challenge because it does not restrict respondents' ability to express their views and beliefs about marriage.

ORS 659A.403 provides in pertinent 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 * * *."
> ORS 659A.403(1).

> "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."
> ORS 659A.403(3).

ORS 659A.403, by its terms, does not prohibit any person from expressing any opinion regarding marriage between two people of the same sex. It simply prohibits the denial of services in places of public accommodation. ORS 659A.403 is not a *Robertson* Category One law because it is not "written in terms directed to the substance of any opinion or any subject of communication." *City of Eugene*, 318 Or at 489 (internal quotation marks and citations omitted). It is not a Category Two law because it does not refer at all to expressive conduct. It focuses only on "'proscribing the pursuit or accomplishment of forbidden results'" (the unequal provision of services) but does not "refer to expression at all." 318 Or at 490 (quoting *Robertson*, 293 Or at 416-17). It "do[es] not, by [its] terms, purport to proscribe speech or writing as a means to avoid a forbidden effect." *Id.* So it is a Category Three law.

Category Three laws may be challenged only as applied. *State v. Illig-Renn*, 341 Or 228, 234, 142 P3d 62 (2006). In other words, to make a constitutional challenge to ORS 659A.403, respondents must show that their speech was impermissibly restricted. To assess the as-applied constitutionality of a statute, the court asks whether applying the statute impermissibly burdens the speaker's right to free speech as guaranteed by Article I, Section 8.

Here, as BOLI notes in the First Amendment context, its enforcement action did not depend on respondents' use of words or other expressive conduct. It turned on Aaron Klein's denial of services. Discriminatory conduct is not transformed into protected expression when it is accompanied by words. *Cf. Huffman and Wright Logging Co. v. Wade*, 317 Or 445, 458, 857 P2d 101 (1993) ("The message that defendants sought to convey by their [trespass] conduct, the

reason for their conduct, and the spoken and written words accompanying their conduct did not transform defendants' conduct into speech.").

In *Plowman*, the Oregon Supreme Court upheld the criminal intimidation statute against an Article I, Section 8, challenge. The statute made it unlawful for two or more people, acting in concert, to intentionally, knowingly, or recklessly cause physical injury to a victim because of their perception of the victim's protected characteristics, including sexual orientation. The court specifically noted that the statute punished the "forbidden effect: the effect of acting together to cause physical injury to a victim whom the assailants have targeted because of their perception that that victim belongs to a particular group." 314 Or at 165. The court noted that the legislature may constitutionally prevent the special and unique harm caused to society by the targeting of a historically vulnerable group. 314 Or at 166. No words need be used to prove the crime. *Id.* And even if words were used, the words are used as proof of intent to commit the unlawful act, not in order to punish the words themselves. *Id.*

Here, as in *Huffman and Wright* and *Plowman*, it was not the words or expressive conduct that created the statutory violation. It was the denial of services. BOLI did not sanction respondents because Aaron Klein communicated his religious beliefs that homosexuals are an "abomination." Rather, BOLI sanctioned respondents because Aaron Klein, as a representative of a public accommodation, denied complainant services when he refused to make a cake for her wedding. Aaron Klein's words were simply evidence that his actions on behalf of Sweet Cakes were discriminatory. The violation would have occurred even if Aaron Klein had said nothing at all, so long as he refused to provide a wedding cake because of sexual orientation. And Aaron Klein could have expressed his views without sanction outside of providing services to the public, so long as he continued to provide services to everyone without discrimination.

B. ORS 659A.409 does not unconstitutionally infringe on respondents' freedom of speech.

ORS 659A.409 is a *Robertson* Category Two law that focuses on expression used to achieve the forbidden effect of invidious discrimination. Such statutes are analyzed for overbreadth. ORS 659A.409 is not overbroad because it is tailored specifically to the speech that causes the harmful effect: speech that advertises to the public that this business does not provide equal services. In the real world, such messages shame, degrade, and exclude potential customers because of their protected class, just as surely as an actual denial of requested services would do.

ORS 659A.409 provides:

> "[I]t is an unlawful practice for any person acting on behalf of any place of public accommodation * * * to publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of race, color, religion, sex, sexual orientation, national origin, marital status or age * * *."

ORS 659A.409 is a Category Two statute because it expressly prohibits certain expression, but only to prohibit the forbidden effect of invidious discrimination. It is not a Category One statute because it does not make "speaking of the words themselves criminal * * * *even if* no harm was caused or threatened." *State v. Spencer*, 289 Or 225, 229, 611 P2d 1147 (1980) (emphasis added). In *Spencer*, the court, using a Category One analysis, invalidated a statute making it a crime to use abusive or obscene language in a public place, whether or not the language actually "threatened" or caused any harm. *Spencer,* 289 Or at 227. Conversely, in *Robertson* the court applied the Category Two analysis to uphold a

statute making it a crime to use threats or other expressive conduct to compel a person to act against the person's will within the person's legal rights. *Robertson*, 293 Or at 415. The distinction is that in *Robertson* the speech itself was not prohibited, only the result of the speech. In *Spencer*, the statute criminalized the speech without regard for the effect. ORS 659A.409, like the statute at issue in *Robertson*, does not proscribe all communication on a particular subject (animus toward protected groups, including gay people). Instead, it proscribes such communications only when they amount to an (illegal) promise to deny services to a subset of the public based on their status. Thus, the statute focuses only on the speech that amounts to discrimination in the operation of a public accommodation.

There is no question about what "forbidden effect" ORS 659A.409 seeks to prevent. In enacting ORS 659A.403 and 659A.409, the Oregon Legislature intended to stop the harm caused to Oregonians through the discriminatory denial of services. The "relating to" clauses in the bills that led to the original Oregon public accommodation state it clearly: They are laws "relating to discrimination." Senate Bill 169 (1953); House Bill 646 (1957).
ORS 659A.003 states:

> "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 * * * practices of unlawful discrimination of any kind * * *"

The proponents of SB 169, which created Oregon's first public accommodations law, explained to the House Committee on State and Federal Affairs in 1953 that the problem was a discriminatory denial of access:

> "The basic problem has become not where a man shall earn his money, but where he shall spend it. The issue is no longer a local one but is national and international. In [sic] present state of world affairs we may not expect other nations to look to us as leaders toward a free

> way of life as long as we practice discrimination within our own country." Minutes, Committee on State and Federal Affairs, Apr. 7, 1953, at 2.

This is consistent with the purpose behind federal public accommodations laws as well. *See, e.g.*, *Daniel v. Paul*, 395 US 298, 307-08, 89 S Ct 1697, 23 L Ed 2d 318 (1969) (noting that "the overriding purpose" of the federal public accommodations law is "'to move the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public,' H.R.Rep. No. 914, 88th Congress, 1st Sess., 18.").

In 1957, when the language of ORS 659A.409 became part of the Public Accommodations Laws,[1] proponents again cited countless stories of Oregonians' continuing to struggle against discrimination in public commercial spaces before ever getting to the pay counter. *See* Minutes, Public Hearing on HB 646, Mar. 27, 1957, at 1 (testimony of Bernhard Fedde, citing "several instances of discrimination," including "a non-white woman from LaGrande who was refused [the] privilege of trying on clothes before purchase" and the sale of booklets entitling purchasers, excluding "negroes," to privileges at advertised locations).

ORS 659A.409 represents an important and necessary part of the statutory scheme that prevents such discrimination. Without it, a bakery could legally advertise to "whites only" or "straight couples only" as long as the proprietor did not deny a cake to any nonwhite or gay couple who braved the promised humiliation by daring to patronize the shop. Such a system is unlikely to prevent discrimination. In fact, it rewards discrimination by allowing shop owners

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[1] At the time, the statute was codified as ORS 659.307; it was subsequently renumbered.

to bully anyone who would challenge them—using the very weapon (discrimination) that the law seeks to discourage.

As this Court has recognized, discrimination is degrading; this degradation is harmful in and of itself, not only to the victim but to society more broadly; and it is this harm that the Public Accommodations Laws are designed to remedy—whether or not the denial of services actually occurs. For this reason, the Public Accommodations Laws "encompass[] more than the outright denial of service." *King v. Greyhound Lines, Inc.*, 61 Or App 197, 202, 656 P2d 349 (1982). Indeed, conduct "'intended to discourage certain customers'" is "'as common as * * * outright refusals'" of service. *Id.* (quoting *Discrimination in Access to Public Places: A survey of State and Federal Public Accommodations Laws*, 7 NYU Rev L & Soc Change 215, 244 (1978)). "[T]he chief harm resulting from the practice of discrimination by establishments serving the general public is not the monetary loss of a commercial transaction or the inconvenience of limited access but, rather, the greater evil of unequal treatment, which is the injury to an individual's sense of self-worth and personal integrity." *King*, 61 Or App at 203. In *King*, Greyhound did not deny the plaintiff, a black male, the ticket refund services he requested. But during the refund processing, the plaintiff was subjected to racial slurs. The court found that Greyhound's conduct violated the Public Accommodations Laws because it was not a "full and equal" accommodation.

Thus, ORS 659A.409 involves a restriction on speech, but only as a means to prevent impermissible discrimination. As a corollary to ORS 659A.403 (which prohibits *denying equal* services), ORS 659A.409 prohibits *offering unequal* services. Both provisions are aimed at the same harmful effect—discrimination by places of public accommodation.

Under the Category Two analysis, ORS 659A.409 is constitutionally valid if it is not overbroad. This means that it should apply only to statements that,

taken in the entirety of the circumstances and in context, create the legislatively recognized harm of discrimination. To make this assessment, the court must consider whether there is any scenario in which the statute could theoretically infringe on an individual's otherwise protected speech and, if so, whether the statute can be "given a principled interpretation that excludes its application to these and other instances of free expression." *Robertson*, 293 Or at 419.

Such a principled interpretation is readily available here. First, ORS 659A.409 applies to only those cases in which individuals are "publish[ing], circulat[ing], issu[ing] or display[ing]" a message "on behalf of any place of public accommodation." Thus, it does *not* apply to individuals expressing their personal views apart from the public accommodation. Those individuals can, for instance, post signs on a residence, march in protests, and engage in a variety of other expressive activities.

Second, the communication must be "to the effect that [the public accommodation] will be refused, withheld from or denied to, or that any discrimination will be made against, [a member of a listed protected class]." A public accommodation's public acknowledgment that a protected class will be refused services always communicates that that establishment's offering is limited because the public actually includes members of that class.

As the Oregon Supreme Court has recognized, the analysis of a challenged statute must consider the practical reality of applying it. *See State v. Moyer*, 348 Or 220, 230-31, 230 P3d 7 (2010) (the court may consider the context in which the statute is to be applied to determine whether it is focused on harmful effects). ORS 659A.409 focuses only on forbidden effects (discrimination) because when a public accommodation publicly states its intent to discriminate against a protected class, it effectively limits its offer of services to "the public" to exclude the protected class. As the proponents of the Public Accommodations

Laws recognized, that communication effectively denies services to those class members, who are likely to avoid patronizing those places because they know they will face the degradation of discrimination. Such public discrimination against an entire class of people is humiliating and oppressing to everyone in the class, including those who will be deterred from visiting the business. It is also oppressive to the broader society in that it segregates the public into those entitled to services and those in the disfavored group who are excluded. Preventing those effects is just as important a state interest as is preventing the more individually focused dignitary harm that results from an outright denial of services. Accordingly, while the statute prohibits discrimination effectuated via words, it does so only to prevent a forbidden effect, injury to a protected group's "sense of self-worth and personal integrity," i.e., discrimination.

II. There was substantial evidence that respondents violated ORS 659A.409, but the Commissioner's order should be clarified to indicate how the Commissioner evaluated the evidence.

ACLU agrees with respondents that the BOLI Commissioner's order identified substantial evidence in this record to demonstrate that respondents violated ORS 659A.409. As BOLI's brief notes, viewed as a whole, that evidence is sufficient to permit a reasonable person to determine that respondents violated ORS 659A.409 by publishing statements that denied services. But the Commissioner's order is unclear because it does not explain *how* the statements described in the order supported his finding.

The order discusses five sets of speech activity:

- The statement by Aaron Klein to RBC at the bakery that "we don't do same-sex weddings."

- The handwritten sign on the Sweet Cakes door that read: "Closed but still in business. * * * This fight is not over. We will continue to stand strong. * * *."
- The live radio interview in which Mr. Klein described a conversation he had with his wife following the legalization of marriage between people of the same sex in Washington, during which the couple recognized that serving same-sex couples was "going to become an issue" and that they would have to "stand strong."
- The live radio interview in which Mr. Klein described the encounter in the bakery shop, in which he recounted: "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.'"
- The CBN interview in which Mr. Klein stated: "I didn't want to be part of her marriage, which I think is wrong."

The statement "we don't do same-sex weddings," standing alone, is sufficient evidence that respondents denied services because of sexual orientation. It is a clear expression by respondents of their position that Sweet Cakes will refuse to provide bakery services for same-sex weddings. *At the time this statement was made to complainants*, it was both a current denial and a denial that will endure indefinitely into the future (i.e., future intent to discriminate).[2] This is an unlawful and discriminatory policy for a public accommodation. Yet *insofar as that statement is recounted as part of the story of past conduct*, it is not a violation. Respondents should be reasonably allowed to recount what happened in the past,

[2] ORS 659A.409 does not require that notice be made to the general public. Here, there was clearly a "communication," and expressing it to two customers is sufficient "notice" for purposes of the statute.

so long as they make it clear that Sweet Cakes would now and in the future serve same-sex couples. The Commissioner's order should have made this clear.

Similarly, the statements displayed on the locked storefront—"Closed but still in business. * * * The fight is not over. We will continue to stand strong."—could reasonably be interpreted by a potential customer, in that location and in the context of respondents' publicized story, as a posted statement of a discriminatory policy that Sweet Cakes offers wedding cakes only to heterosexual customers. Respondents admitted publicly that they had intentionally denied services to a same-sex couple. They also admitted that Sweet Cakes is still in business online despite having closed its physical location. Using the phrase "stand strong" could be reasonably interpreted to publicly describe respondents' anticipation of this conflict and their firm decision to persist in refusing same-sex couples should one ever request a wedding cake from Sweet Cakes. In other words, there was substantial evidence to support a finding by the Commissioner that "continue to stand strong" meant "continue Sweet Cakes' policy of not baking cakes for same-sex weddings." A lesbian woman walking up to Sweet Cakes in hopes of receiving bakery services for her wedding could reasonably believe that respondents would not serve her, even if she had contacted them online. But BOLI's order should have specified this reasoning. It does not explain why the statement on the Sweet Cakes door constituted a violation. A more clearly stated order could have reasonably made this determination.

The order is confusing because it does not specify how or whether the remaining statements constitute a denial of services. It relies on statements that respondents made during press interviews that the Commissioner characterizes as both a "recounting" of events and an expression of "future intent" to discriminate. The order does not explain whether the violation results from the "recounting" itself or from some kind of restated intent that itself constituted a denial of

services. But statements recounting past events—standing alone—are not violations of ORS 659A.409 unless they somehow demonstrate a continuation of the past discrimination. The order does not explain how or why the "recounting" itself constituted a denial of services.

Finally, the order also quotes respondents' statements of opinion surrounding the events in the context of finding a violation. But respondents' expressed opinion about the moral propriety of marriage between people of the same sex is not properly proscribed under ORS 659A.409 unless it is itself a denial of services. The order does not specify whether it determined that those expressions of opinion were themselves a violation, *how* those expressions constituted a violation, or whether those opinions simply provided context that explains why *other* statements constituted a violation.

This confusion is troubling because it leaves respondents to discern for themselves what they should avoid in the future. This lack of precision risks chilling protected speech by discouraging respondents from telling their story in contexts that do not constitute denial of services on behalf of a public accommodation.

Any concerns about chilled speech can be alleviated by clarifying the order. This Court has previously determined that a statement violates ORS 659A.409 when it could reasonably cause a customer in the same circumstances to conclude that services will be unequal or denied based on the customer's status in a protected group. *See Blachana, LLC v. BOLI*, 273 Or App 806, 818, 359 P3d 574 (2015) (affirming BOLI's order finding a bar owner in violation of ORS 659A.409 for leaving a voicemail on a transgender woman's phone asking that she and her friends stop patronizing his bar); *In re Masepohl, dba The Pub*, 6 BOLI 270, 282-83 (1987) (issuing a cease-and-desist order when it found a violation of ORS 659A.409's predecessor, ORS 659.037, by a bar owner

who posted two racially hostile signs that "discourage[d] access by a protected class"). If the order clearly described which statements meet this standard, and how, that would provide sufficient clarity. *See Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 US 600, 602, 123 S Ct 1829, 155 L Ed 2d 793 (2003) (recognizing that "[e]xacting proof requirements * * * have been held to provide sufficient breathing room for protected speech").

Applying this standard to the present case, ACLU submits that the Commissioner's order could properly find respondents responsible for violating ORS 659A.409.

In short, the Commissioner correctly concluded that respondents violated ORS 659A.409. But the order does not adequately identify which statements are the sources of the violation or why they constitute violations. The Court should clarify the order or, in the alternative, remand and instruct the Commissioner to apply *Blachana*'s reasonable-in-the-circumstances test to each of these statements and explain why each statement is, or is not, a violation. ORS 183.482(8)(a)(A)-(B).

CONCLUSION

The Public Accommodations Laws do not violate Article I, Section 8, because they are crafted to prohibit only discriminatory denials of services or promises to provide services unequally. There was substantial evidence to demonstrate that respondents violated the Public Accommodations Laws by denying services to complainants and making clear that they intended to provide only unequal services in the future. This Court should uphold BOLI's order with

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clarifications necessary to prevent chilling speech that does not itself constitute the provision of unequal services.

DATED this 29th day of August, 2016.

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CERTIFICATE OF COMPLIANCE
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Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b)(ii) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 4,397 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)(g).

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CERTIFICATE OF FILING AND SERVICE

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