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

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns sexual orientation discrimination by a for-profit business and its owners who make money selling baked goods—including wedding cakes—to the general public.

Amici Curiae agree with Respondent Oregon Bureau of Labor and Industries ("BOLI" or "the Bureau") on every key point of the Bureau's brief. In particular, *Amici Curiae* agree that Petitioners Melissa and Aaron Klein ("the Kleins"), co-owners of Sweetcakes by Melissa, violated the rights of Rachel Bowman-Cryer and Laurel Bowman-Cryer ("Rachel and Laurel" or "the Bowman-Cryers"), a same-sex couple, in violation of the Oregon Public Accommodations Law, ORS 659A.400 to ORS 659A.417 ("Oregon Public Accommodations Law"), when they refused to provide the couple with wedding cake services and thereafter attempted to justify their discrimination by referring to the couple using profoundly offensive language. As the Bureau argues, refusing such a public accommodation to a same-sex couple constitutes sexual orientation discrimination, despite the Kleins' free speech and free exercise arguments. The Kleins' constitutional defenses fail because, as the Bureau explains, providing a wedding cake is not inherently expressive activity for First Amendment purposes, and the Kleins waived any free expression claims under the Oregon Constitution (Resp. Br. 20-33). *Amici* further agree that the Kleins' free exercise defense is fatally flawed because the Public

Accommodations Law is a neutral law of general applicability and this case does not implicate "hybrid rights." (Resp. Br. 38-43).

Amici write separately to provide supplemental information regarding the state's strong interest in providing protections against sexual orientation and gender identity discrimination, protections that are not rendered toothless by exemptions allowing discrimination in the name of religion. In particular, this Court should reject the Kleins' claimed religious right to refuse cake services to same-sex couples (in this case, Rachel and Laurel) while providing those same services to different-sex couples. BOLI Final Order, Sweetcakes, ##44-14 & 45-15, at 70, ¶¶ 7-8 (July 2, 2012).

Amici Curiae agree with the Bureau that even if the Kleins' constitutional rights were implicated in this case, the highest level of scrutiny that could apply is the intermediate scrutiny level applicable to free speech violations, *see* Resp. Br. At 33-34, citing *United States v. O'Brien*, 391 US 367, 382 (1968). That said, *Amici Curiae*'s particular emphasis here is to reinforce that under *any* level of scrutiny, the state has a strong (indeed, compelling) interest in requiring the continued protection of lesbian, gay, bisexual and transgender ("LGBT") Oregonians against discrimination.

With a particular emphasis on Oregon-specific data and other evidence of anti-LGBT discrimination, this brief confirms the critical need for public accommodations and other anti-discrimination laws. The brief also addresses how

Oregon's strong interest in enforcing anti-discrimination laws requires rejection of the Kleins' inappropriately broad religious exemption arguments. Such religious exemption claims should not be permitted to undermine the state's critical interests in protecting LGBT individuals and same-sex couples from discrimination, whatever the owners' personal beliefs about same-sex couples.

In its final order issued July 2, 2015, the Bureau considered and properly rejected the Kleins' free speech and free exercise defenses to ORS 659A.403, as well as the Kleins' claim to a general exemption from the public accommodations statute. *Amici Curiae* support Respondent Oregon Bureau of Labor and Industries' request for an order affirming BOLI's final order.

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici Curiae Laurel Bowman-Cryer and Rachel Bowman-Cryer were the original complainants before the Bureau of Labor and Industries in this case. They are a same-sex couple to whom Melissa and Aaron Klein, *dba* Sweetcakes by Melissa, refused to sell a wedding cake. After being denied the public accommodation of the Kleins' business services because of their sexual orientation, Laurel and Rachel suffered significant emotional distress. Although Laurel and Rachel are not named parties in this appeal, as the original victims and complainants in this case, they have been most directly harmed by the Kleins' actions.

Further, since this case began, Laurel and Rachel have been subjected to additional abuse, having received countless harassing messages from supporters of the Kleins who called them evil and "the dumb lesbians who ruined those Christian bakers' lives," for example. Casey Parks, *The Hate Keeps Coming: Pain Lingers for Lesbian Couple Denied in Sweet Cakes Case*, The Oregonian (July 2, 2016), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/07/sweet_cakes_lesbians.html. Laurel and Rachel understand the discrimination they have suffered to be part of the larger reality of anti-LGBT discrimination in Oregon. They have an interest in this case and the repercussions it could have across the state, both directly and as members of the broader LGBT community in Oregon. The experience of the Bowman-Cryers, along with the abuse reported by

many other LGBT Oregonians, illustrates the importance of sexual orientation and gender identity discrimination protections remaining intact and fully enforceable by the state, regardless of the religious or personal beliefs of some business owners.

Amicus Curiae Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization working for full recognition of the civil rights of LGBT people and people living with HIV through impact litigation, education, and policy advocacy. *See, e.g.*, *Obergefell v. Hodges*, 135 S Ct 2584, 2591-92 (2015) (affirming equal right of same-sex couples to marry and to marriage recognition); *Lawrence v. Texas*, 539 US 558, 561 (2003) (invalidating Texas ban on same-sex adult intimacy as unconstitutional denial of liberty).

Lambda Legal has represented same-sex couples or appeared as an *amicus curiae* in numerous discrimination cases in which religious freedom has been asserted as a justification. *See, e.g.*, *Gifford v. McCarthy*, 23 NYS3d 422, 137 AD3d 30 (NY App Div 2016); *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, 370 P3d 272 (Colo App 2015); *North Coast Women's Care Med. Grp., Inc. v. Superior Court*, 44 Cal 4th 1145, 189 P3d 959 (Cal 2008). The issues raised in this appeal are similar to those addressed in those and numerous other cases. Lambda Legal's membership includes approximately 2,500 Oregonians. Because the Court's decision here is likely to affect many thousands of LGBT people across

Oregon, Lambda Legal has a particular interest in assisting the Court to consider the issues with the additional factual, legal and historical context provided in this brief.

STATEMENT OF THE CASE

Amici Curiae join in Respondent Oregon Bureau of Labor and Industries' statement of the case.

ARGUMENT

I. Strict Scrutiny is Not the Applicable Standard in this Case.

Careful consideration of the Kleins' claimed constitutional defenses against compliance with the Oregon Public Accommodations Law requires an assessment of the government's interest in preventing discrimination. As an initial matter, the Kleins misrepresent the applicable level of scrutiny in this case. They describe the holding of *Employment Division v Smith*, 494 US 872, 881-82 (1990), as establishing that laws burdening both free speech rights and another fundamental right (such as religious free exercise) are subject to strict scrutiny.

In fact, this Court has rejected that argument in the past, explaining that:

> Precisely what the Court's dictum [in *Smith*] signifies is difficult to divine. Strictly speaking, the Court did not say that, in any particular class of cases, a neutral, generally applicable law will be subject to strict scrutiny. It simply noted -- without reference to any particular standard -- that, in the past, the Court had struck down neutral, generally applicable laws when a case "involved" both the Free Exercise Clause and some other constitutional protection. The church nevertheless insists that the upshot of *Smith* is that neutral, generally applicable laws will be subject to strict scrutiny in cases in which a free exercise claim is conjoined with a free speech claim. . . .
>
> Why the addition of another constitutional claim would affect the standard of review of a free exercise claim is not immediately obvious. Indeed, if the mere allegation of an additional constitutional

> claim has the effect of altering the standard articulated in *Smith*, then the "hybrid" exception likely would swallow the *Smith* rule; free exercise claims will frequently also pose at least a colorable free speech claim. On the other hand, if the Court meant that strict scrutiny pertains only when an additional constitutional claim is successfully asserted, then the rule of *Smith* becomes mere surplusage, as the church already would win under the alternate constitutional theory.

Church at 295 S. 18th Street, St. Helens v. Employment Dept., 175 Or App 114, 127-28, 28 P3d 1185 (Or App 2001).[1]

Thus, as the Bureau explains, even if the Kleins' free speech rights were infringed in this case, which they are not, the highest applicable level of scrutiny to

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[1] As Justice Souter has pointed out, if a hybrid exception existed, it would have applied in *Smith* itself, where the peyote ritual at issue implicated both speech and associational rights. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 US 520, 567 (1993). Yet *Smith* applied no such exception. Thus, the United States Supreme Court's reference to hybrid claims seems little more than a respectful nod at now-obsolete cases. *See Knight v. Conn. Dep't of Pub. Health*, 275 F3d 157, 167 (2d Cir. 2001) (describing *Smith*'s hybrid reference as "dicta and not binding on this court" and declining to apply such analysis); *Kissinger v. Bd. of Trustees of Ohio State Univ.*, 5 F3d 177 180 (6th Cir. 1993) (describing hybrid exception as "completely illogical" and declining to apply it).

Law review commentators likewise have looked askance at any hybrid exception. *See, e.g.*, Note, William L. Esser IV, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 Notre Dame L. Rev. 211, 242-243 (1998) (concluding that hybrid exception accomplishes little because lower courts find hybrid rights to exist only when the religious litigant would win anyway based on the other asserted constitutional right); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1122 (1990) (concluding that "a legal realist would tell us … that the *Smith* Court's notion of hybrid claims was not intended to be taken seriously").

determine if the infringement were justified would be the intermediate scrutiny level applicable to free speech claims, *see* Resp. Br. at 33-34, citing *United States v. O'Brien*, 391 US 367, 406 (1968).

Applying the actual holding of *Smith*, per *Church at 295 S. 18th Street, St. Helens v. Employment Dept.*, no similar heightened scrutiny applies to the free exercise claim. This is because the Oregon Public Accommodations Law is a neutral law of general applicability. *Smith*, 494 US at 879 ("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)'" (citation omitted).

That said, even if this Court were to apply a heightened form of scrutiny, Respondent Oregon Bureau of Labor and Industries should still prevail. Under *any* level of scrutiny, the state has a compelling interest in enforcing the right of Laurel and Rachel to be protected from public accommodation discrimination notwithstanding the Kleins' religious objections to their same-sex relationship.

II. Oregon's Compelling Interest in Ending Discrimination Against LGBT People Warrants Enforcement of the Oregon Public Accommodations Law Without a New Judicially Created Religious Exemption.

Oregon history is replete with documentation of discrimination against LGBT individuals and same-sex couples, which establishes the critical need to protect these Oregonians from discrimination. LGBT Oregonians have historically

suffered significant discrimination in public accommodations, as well as in other contexts. The state's efforts to prevent that discrimination should not be thwarted by allowing the proposed religious exemption from Oregon's anti-discrimination laws.

To begin with, the facts of the present case illustrate how important it is to protect LGBT Oregonians from discrimination in places of public accommodation. Aaron Klein's egregious discrimination against Laurel and Rachel began when he refused to sell them a wedding cake. The humiliation they suffered was compounded when Rachel's mother (with whom Rachel was only beginning to develop a relationship that included her mother's recent acceptance of her sexual orientation) subsequently returned to the bakery to try to reason with Klein, only to have him call her daughter and future daughter-in-law "abominations." *See* Final Order at 6, ¶11. The Kleins' actions, and their devastating effect on Laurel and Rachel, along with the many threats and harassment they subsequently faced from a number of people supporting the Kleins' discriminatory actions, *id*. at 16-19, are powerful illustrations of the harms that result from anti-LGBT discrimination in places of public accommodation. The state has a strong interest in ensuring that, whether in bakeries or other commercial settings, same-sex couples like Laurel and Rachel are not treated as second-class citizens and denied services because of their sexual orientation.

Laurel and Rachel are but one of many same-sex couples in need of this state's anti-discrimination protections. Oregon's demographic landscape reveals the extent to which protecting LGBT individuals and same-sex couples is a strong state interest. Oregon is home to a significant LGBT population that would be harmed if discrimination against them were allowed to proliferate in the name of religion. According to an analysis of 2010 U.S. Census data by the Williams Institute at the UCLA School of Law, 11,773 same-sex couples make their home in Oregon, with nearly 2,000 of those couples raising children. Gary J. Gates & Abigail M. Cooke, *Oregon Census Snapshot: 2010* at 1, 3 (2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Oregon_v2.pdf.

In addition, there are many other LGBT members of same-sex couples not captured in these figures because they are not sharing one household. *See* Gary J. Gates & Abigail M. Cooke, *United States – Census Snapshot 2010* at 4 (2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf; Gary J. Gates, *Demographics of Married and Unmarried Same-sex Couples: Analyses of the 2013 American Community Survey* (March 2015), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Demographics-Same-Sex-Couples-ACS2013-March-2015.pdf.

Moreover, marriage is something many same-sex couples desire. In 2010, 2,002 of Oregon's same-sex couples already were spouses. Gates & Cooke,

Oregon Census Snapshot at 1. That figure doubtless is much higher today, after the U.S District Court of Oregon in *Geiger v. Kitzhaber*, 994 F Supp 2d 1128 (D Or 2014), held Oregon's ban on marriage for same-sex couples was unconstitutional, and after the right of same-sex couples in every state to marry subsequently was recognized by the Supreme Court. *Obergefell v. Hodges*, 135 S Ct 2584 (2015). *See* Casey Parks, *The Hate Keeps Coming: Pain Lingers for Lesbian Couple Denied in Sweet Cakes Case*, The Oregonian (July 2, 2016), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/07 /sweet_cakes_lesbians.html.

Historically, treatment of same-sex couples and LGBT individuals in Oregon has not been kind. Indeed, Oregon's ballot initiative history from the past few decades involves repeated attempts to *mandate* discrimination against LGBT persons in Oregon. These efforts to use the ballot initiative process to compel discrimination in Oregon are so numerous that they have been estimated to outnumber those in all other states. *See* George T. Nicola, *Oregon Anti-Gay Ballot Measures*, Gay & Lesbian Archives of the Pacific Northwest (April 20, 2013), http://www.glapn.org/6013OregonAntiGayMeasures.html ("Nicola, *Oregon Anti-Gay Ballot Measures*").

Two decades prior to the enactment of the Oregon Equality Act in 2007, which added sexual orientation and gender identity protections to Oregon's public accommodation, employment, and housing anti-discrimination laws, the voters of

Oregon had approved the first anti-LGBT ballot initiative, Ballot Measure 8 (1988). Measure 8 both repealed an executive order banning sexual orientation discrimination in the state's executive branch and also enacted a statute *prohibiting* protections for state employees against sexual orientation discrimination. *See Merrick v. Bd. of Higher Educ.*, 116 Or App 258, 261, 841 P2d 646 (1992). Measure 8 was approved by 626,751 voters on November 8, 1988. *See* Oregon Bluebook, *Initiative, Referendum and Recall: 1988-1995*, http://bluebook.state.or.us/state/elections/elections21.htm ("Oregon Bluebook").

Although this Court subsequently struck down Measure 8 as unconstitutional, *id.*, numerous other anti-LGBT measures have been proposed over the years in Oregon and have received broad public support. For example, Ballot Measure 9 (1992), titled, "Government Cannot Facilitate, Must Discourage Homosexuality, Other 'Behaviors,'" provided:

> All governments in Oregon may not use their monies or properties to promote, encourage or facilitate homosexuality, pedophilia, sadism or masochism. All levels of government, including public education systems, must assist in setting a standard for Oregon's youth which recognizes that these behaviors are abnormal, wrong, unnatural and perverse and they are to be discouraged and avoided.

See Oregon Bluebook.

Measure 9 was described as "part of a burgeoning backlash against homosexuals," and an even more extreme measure than Colorado Amendment 2, which was later the subject of the Supreme Court's condemnation in *Romer v.*

Evans, 517 US 620 (1996). *See* Timothy Egan, *Oregon Measure Asks State to Repress Homosexuality*, N.Y. Times, Aug. 16, 1992, at A34. The Oregon initiative went farther than the Colorado amendment in requiring the state government to actively discourage homosexuality, and even teach that homosexuality is comparable to pedophilia. *Id*. Measure 9 ultimately was defeated, but not before 638,527 voters cast ballots to approve the measure. *See* Oregon Bluebook.

Also in 1992, a town in Oregon, Springfield, by a 55 percent to 45 percent vote, became the first in the nation to include anti-LGBT language in its city charter. Egan, *Oregon Measure Asks State to Repress Homosexuality*. The harassment of LGBT Oregonians in that town increased following the vote. *Id*.

In the aftermath of Measure 9, twenty-nine cities and counties across Oregon considered initiatives prohibiting both sexual orientation civil rights protections and the "promotion of homosexuality" through public expenditures. *See* Nicola, *Oregon Anti-Gay Ballot Measures*. The vast majority of those discriminatory initiatives passed, sometimes by dramatically large margins. *See* Oregon Bluebook.

The Oregon legislature responded in 2007 by enacting ORS 659.165 (renumbered 659.870 in 2001), which provides:

> A political subdivision of the state may not enact or enforce any charter provision, ordinance, resolution or policy granting special rights, privileges or treatment to any citizen or group of citizens on account of sexual orientation, or enact or enforce any charter

> provision, ordinance, resolution or policy that singles out citizens or groups of citizens on account of sexual orientation.

However, even after the enactment of ORS 659.165, the onslaught of ballot initiatives singling out LGBT persons for negative treatment continued.

In 1994, an initiative titled "Measure 13: Amends Constitution: Governments Cannot Approve, Create Classifications Based on, Homosexuality," failed by only a 3.1%, margin. *See* Oregon Bluebook; *see also* Nicola, *Oregon Anti-Gay Ballot Measures*.

In 2000, by an only slightly larger margin, voters rejected another anti-LGBT initiative, a second Measure 9, this one subtitled "Prohibits Public School Instruction Encouraging, Promoting, Sanctioning Homosexual, Bisexual Behaviors." Nicola, *Oregon Anti-Gay Ballot Measures*. In 2004, by a 13% margin, voters approved Measure 36, which banned marriage for same-sex couples in Oregon. *Id*.

By 2013, Oregon had adopted 35 anti-LGBT ballot measures, which, as noted above, has been estimated as being "probably more than any other state in the country." *See* Nicola, *Oregon Anti-Gay Ballot Measures*.

In addition to a referendum history revealing substantial hostility toward LGBT Oregonians, there is plentiful anecdotal evidence of anti-LGBT discrimination in Oregon. Such evidence abounds both in the context of public accommodations and more generally.

In the year preceding the enactment of the Oregon Public Accommodations Law, the Governor's Task Force on Equality in Oregon embarked upon an extensive fact-finding mission across the state gathering evidence to assess the need for sexual orientation and gender identity protections. The report issued by the Task Force emphasized the essential nature of Oregon's public policy goal of "ensur[ing] the human dignity of all people within this state," and that "for many years non-discrimination has been the declared public policy of the state." Governor's Task Force on Equality in Oregon, *Report to Governor* at 9-10, 16 (Dec. 15, 2006) http://archivedwebsites.sos.state.or.us/Governor_Kulongoski_2011/governor.oregon.gov/Gov/pdf/letters/TaskforceOnEquality.pdf. The report documented how LGBT Oregonians continue to be "victimized by prejudice or are today denied rights and benefits available to their fellow citizens because of their sexual orientation." *Id*. at 11. In conclusion, the Task Force recommended enacting both anti-discrimination laws (including the law that is subject of this case) and civil union protections for same-sex couples. *Id*. at 3, 18-26.

In reaching these conclusions, the Task Force compiled extensive accounts from LGBT individuals across the state describing the discrimination they had encountered. The Task Force also compiled statements from businesses explaining the need for uniform anti-discrimination laws to alleviate the confusion of an inconsistent patchwork of laws and to make the state globally competitive. *See id*. at 5-6 and Appx. C; *also* Hearing on Senate Bill (SB) 2 Before the Oregon Senate

Judiciary Committee, Part I (March 12, 2007), http://oregon.granicus.com/MediaPlayer.php?clip_id=15672 via "download audio" link, at 11:55-14:37. In addition, Dr. Delta Ferguson, Women's Resource Center Director at Southern Oregon University, detailed for the Task Force the multitude of legal and financial difficulties faced by same-sex couples in Oregon that different-sex couples do not face. *Id*. at 6, 11-12.

The many personal stories Oregonians across the state shared with the Task Force included "the painful story of [a man who was] excluded from his dying partner's hospital room [after which] that partner's family removed all of his personal effects from the home they had built together." *Id*. The Task Force also compiled examples of same-sex couples' children and aging LGBT individuals being particularly vulnerable to discrimination. *Id*.

The Task Force Report explained that treating LGBT Oregonians with equal respect and offering them protections against discrimination similar to those offered to other groups commonly subject to discrimination is consistent with this state's strong public policy of promoting equality and preventing discrimination. Without strong, uniform statewide protections, the Task Force reported, the existing patchwork of inconsistent local nondiscrimination ordinances failed to satisfactorily protect Oregonians. *Id*. at 17-26. *See also* March 12, 2007, Hearing, Part I at 17:58-18:06.

The 2007 legislative committee hearings on the Oregon Public Accommodations Law and other legislative proposals to extend legal protections to LGBT people also brought extensive testimony about the discrimination LGBT Oregonians were facing, warranting anti-discrimination protections. The March 12, 2007, hearing before the Oregon Senate Judiciary Committee began with a representative of the Governor's Task Force for Equality explaining that the Task Force had concluded after extensive investigations that the legislation was necessary because of the large amount of LGBT people suffering from the "scourge of discrimination" which would continue as long as discrimination remained legal in the contexts of housing, employment, and public accommodations (*Id*. at 7:48-18:35). A minister contributed to those findings by testifying about having heard "pain and fear" from LGBT members of the faith community in Oregon again and again (*Id*. at 21:10-23:55). The Commissioner of BOLI testified about 300 cases of anti-gay discrimination that had been brought in Oregon under local anti-discrimination ordinances (*Id*. at 23:55-26:30).

In addition, numerous others testified about their personal experiences with anti-LGBT discrimination. For example, a college student described having suffered verbal harassment and assault because of her sexual orientation, including having been harassed in front of her children. (Hearing on SB 2 Before the Oregon Senate Judiciary Committee, Part II (March 12, 2007), http://oregon.granicus.com/MediaPlayer.php?clip_id=15672, at 1:13:58-1:15:00).

A high school student with lesbian parents described the discrimination she had faced from teachers, administrators, and other students who had shunned and ridiculed her because of her parents (*Id*. at 1:25:28-1:26:53). A lesbian college student testified about having been called sinful, an abomination, and undeserving of life, and having witnessed her LGBT friends being harassed to the point one was driven to suicide (*Id*. at 1:37:20-1:39:08). A young bisexual man testified about having been called a "fag" and other pejoratives, and having witnessed harmful abuse against his LGBT friends (*Id*. at 1:39:25-1:41:33). A woman described having had her employment threatened, her house shot at, and having received death threats and other verbal harassment because of her perceived sexual orientation (*Id*. at 1:42:00-1:44:05).

During the April 9, 2007, Committee on Elections, Ethics and Rules hearing, a UCC minister similarly shared the story of two of his parishioners, a gay couple, who had needed to install video monitors and cameras in their front yard to try to stop anti-gay vandalism of their home and cars (Hearing on SB 2 and House Bill (HB) 2007 Before the Oregon House of Representatives, Committee on Elections, Ethics and Rules Testimony (April 9, 2007), http://oregon.granicus.com/MediaPlayer.php?clip_id=17530, at 3:25:30-3:26:54). Another college student described abuse based on her perceived sexual orientation as an everyday occurrence, including her car having been vandalized, her life threatened, and other violence and harassment against her (*Id*. at 4:09:40-4:10:36).

A former high school teacher testified about having been fired because of homophobic discrimination after she tried to help protect LGBT students through work with the Gay Straight Alliance (March 12, 2007, Hearing, Part II, at 1:13:18-1:15:50). Similarly, a former high school theater arts director testified about having suffered sexual orientation discrimination, including having been forced to cancel a planned production of The Laramie Project, a play about the brutal hate crime murder of Matthew Shepard (*Id*. at 1:55:53-1:58:19). Another gay man testified about having been fired from his job for being gay, and, when younger, having been harassed at school (*Id*. at 2:36:35-2:37:12). Another man testified about having been fired from a job after a customer complained he was "too gay" (April 9, 2007, Hearing at 2:28:10-2:29:08). A transgender woman with an illustrious military and law enforcement career testified about having lost her job as a deputy sheriff after her gender identity was revealed and the sheriff declared that she was a "freak" who could no longer perform her duties (*id*. at 5:10:45-5:13:38). A state senator shared the story of a constituent, a former high school student whose school principal's response to anti-gay harassment of the student had been to tell him to drop out of school (March 12, 2007, Hearing, Part II, at 3:33:52-3:34:35). A program coordinator for the Human Dignity Coalition, which provides support for LGBT students, described similar callousness by school administrators. She testified that a high school student in central Oregon had recently attempted suicide after experiencing severe sexual orientation

discrimination, including threats to "kill the fags," which had been dismissed by faculty with a casual "boys will be boys" response (April 9, 2007, Hearing at 3:07:30-3:08:30).

Most pertinently, multiple people testified about having been discriminated against in places of public accommodation because of their sexual orientation or gender identity. For example, a transgender woman testified about having been harassed when she was at a restaurant with her partner (March 12, 2007, Hearing, Part II, at 2:36:35-2:37:12). A transgender man spoke about having felt unsafe traveling within the state of Oregon, and about having felt vulnerable to being refused service at hotels and restaurants (*Id*. at 2:32:33-2:34:45). A woman who had suffered discrimination because others perceived her as being too masculine testified about having been verbally harangued and refused access to seats on city busses while bus drivers passively allowed the harassment, until the point she had to stop taking the bus. She also testified about physical and verbal harassment she had experienced on public sidewalks (*Id*. at 2:42:25-2:44:35).

A lesbian state representative testified about having been personally discriminated against by a bank that told her to take her money elsewhere when she tried to open up a joint bank account with her same-sex partner. She also testified about the public accommodations discrimination reported to her by her LGBT constituents, including in the contexts of restaurants and lodging (April 9, 2007 Hearing at 2:18:20-2:18:40).

An Oregon CEO with a gay daughter described how his daughter and her partner had been refused service at an inn. He testified that the two had saved money to celebrate their anniversary and made a reservation in advance, but when they had arrived at their destination after driving for six hours and revealed they were there to celebrate their anniversary, the desk clerk had told them there was no room in the inn after all. This despite their having made a reservation in advance, having a confirmation number, and arriving at the agreed-upon time. "The message could not have been more clear: lesbians were not welcome," the father testified (*Id*. at 2:25:07-2:26:00).

A mother who co-parents her son with her same-sex partner testified about a frightening and traumatic day when her son had suffered a head injury and was rushed to the hospital. After the two mothers had ensured their seriously injured child was admitted to the hospital, only one mother was then allowed to be by his side. The other mother was turned away, and told that "only one mother" was allowed in his hospital room with him (*Id*. at 2:52:18-2:53:50).

These examples are among many others about anti-LGBT discrimination in public accommodations settings across the state presented through testimony to the legislature (*see*, *e.g*, March 12, 2007, Hearing, Part II, at 2:47:05-2:48:18; 3:19:41-:50).

On the other side, those opposed to legal protections for LGBT Oregonians testified for hours, and at times making inflammatory attacks, with their testimony

actually underscoring the need for anti-discrimination protections. Much of the testimony from LGBT-rights opponents revealed deep animus toward LGBT individuals framed in terms of religious doctrine. For example, a former state senator engaged in heated, defamatory smears against LGBT people, arguing that the life expectancy of gay people is forty years and that gay people—who he asserted are "identified only by the sexual practice that they engage in"—will "force their moral values upon the rest of us" and pose a huge cost to the government. (March 12, 2007, Hearing, Part I, at 1:33:15-1:38:40) He concluded that protecting LGBT rights is an assault on Christianity. *Id*. Others testified that legislation protecting the "homosexual lifestyle" will "destroy our young people" (March 12, 2007, Hearing, Part II at 44:18-45:24). One man testified that enacting anti-discrimination protections amounts to "legislat[ing] morality," and "forc[ing] me . . . to take on their lifestyle, and that is absolutely abhorrent to me" (*Id*. at 1:20-1:21:08). A school teacher, implying a false dichotomy between being a Christian child and being an LGBT child, testified inaccurately that Christian children suffer worse harassment than gay children[2] and that child molesters are

[2] In fact, however, recent studies reveal that "[b]ullying and homophobic victimization occur more frequently among LGBT youth in American schools than among students who identify as heterosexual" and that "84.6% of LGBT students reported being verbally harassed [in a 2009 survey]," and "40.1% reported being physically assaulted at school in the past year because of their sexual orientation." *See* Dorothy L. Espelage, *Bullying and the Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Community*, in White House 2011 Conference on Bullying Prevention, http://www.stopbullying.gov/at-risk/groups/lgbt/white_house

more likely to be homosexual than heterosexual[3] (March 12, 2007, Hearing, Part II at 1:48:55-1:52:38).

Some testified from explicit religious perspectives. For example, a self-described former pastor from a Communist country testified that "in Sodom and Gomorrah there was lesbianism and they burned. And I proclaim, God Bless America. America will not burn; you will not pass this bill" (*Id*. at 3:13:00-3:14:30).

A woman with an advocacy group for Roman Catholic activists in Oregon testified similarly, calling legal protections against sexual orientation discrimination tantamount to protecting "every form of sexual expression and behavior, no matter how disordered," and opining that the meaning of "sexual

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_conference_materials.pdf at 65. *See also* GLSEN *School Climate in Oregon 2013 State Snapshot*, https://www.glsen.org/sites/default/files/GLSEN%202013%20Oregon%20State%20Snapshot.pdf at 1 (finding that 70% of LGBT students in Oregon had experienced verbal harassment and 33% had experienced physical bullying due to their sexual orientation in 2013); GLSEN *The 2013 National School Climate Survey*, http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0.pdf at 22-23 (Oregon statistics are in line with national average of 74.1% of LGBT students having been verbally harassed and 32.6 % having been physically harassed due to their sexual orientation).

[3] *But see* Gregory Herek, *Facts About Homosexuality and Child Molestation*, http://facultysites.dss.ucdavis.edu/~gmherek/rainbow/html/facts_molestation.html (debunking incorrect information about gay people being child molesters). *Cf.* American Psychological Association, *APA on Children Raised by Gay and Lesbian Parents* (June 11, 2012), http://www.apa.org/news/press/response/gay-parents.aspx (children fare as well with same-sex parents as with different-sex parents).

orientation" under anti-discrimination bills seemed to her to be "based on what gives a person sexual pleasure, animal, vegetable, or mineral" and on the "subjective world of pleasing one's genitals." She testified that the purpose of LGBT-rights protections under civil rights laws was to "sexually indoctrinate children from the earliest age" by giving LGBT people harmful access to innocent children. (*Id*. at 2:27:32-2:29:40).

Testimony before the Committee on Elections, Ethics and Rules included statements that "Homosexuality is considered normal; the next group they will demand be called normal will be pedophiles. Studies show that pedophiles are more common among homosexuals than heterosexuals. . . . Homosexuality is not normal but is an illness, or perversion of nature" (April 9, 2007, Hearing at 3:01:40-3:02:22) and that gays "prey on our children" and "are going against what the Bible says directly against them" (*Id*. at 3:05:12-3:05:28). Other testimony included that "giving a lifestyle a preferred status" leads to men trying to marry their dogs (*Id*. at 3:36:35-3:37:02).

This testimony evidencing widespread animus and discrimination against LGBT people is just the tip of the iceberg. As discussed, there have been 300 anti-LGBT discrimination cases brought to BOLI (March 12, 2007, Hearing, Part I, at 23:55-26:30). In addition, other cases evidencing Oregon's unfortunate history of anti-LGBT discrimination have worked their way through Oregon courts. This Court itself recognized in *Tanner* that because "homosexuals in our society have

been and continue to be the subject of adverse social and political stereotyping and prejudice," sexual orientation classifications are "suspect." *Tanner v. Or. Health Scis Univ.*, 157 Or App 502, 524, 97 P2d 435 (1998) (holding the university's denial of health care benefits to same-sex partners of employees was unconstitutional).

Tanner, along with other cases in Oregon and across the country,[4] confirm the state's critical interest in the prevention and remediation of discrimination, even in the face of religious objections. Other significant Oregon cases in which this Court recognized the harmful nature of anti-LGBT discrimination have included, for example, *Wheeler v. Marathon Printing, Inc.*, 157 Or App 290, 974 P2d 207 (1998); and *Whelan v. Albertson's*, 129 Or App 501, 879 P2d 888 (1994).

In *Wheeler*, an employee victimized by anti-gay discrimination was subject to frequent obscene gestures and comments, including being called a "zit nose faggot" and a "crazy lunatic faggot." He was driven by the harassment to severe depression with suicidal ideations, and, eventually, lost his job because of it. *Wheeler*, 157 Or App at 293-95. In *Whelan*, a security guard was harassed for being perceived as gay. The harassment included being called a "fucking queer asshole," questioned about his sex life, and physically assaulted. *Whelan*, 129 Or App at 503-04.

[4] Cases from states other than Oregon are discussed in the following section of this brief.

In a public accommodations context specifically, this Court affirmed the importance of protecting LGBT Oregonians against discrimination by a business owner in *Blachana, LLC v. Oregon Bureau of Labor & Industries*, 273 Or App 806, 359 P3d 574 (2015). In *Blachana,* this Court upheld a BOLI order concluding that a bar had unlawfully discriminated against a social group because of the sexual orientation of its members. After the group had a gathering at the bar, the bar asked them not to meet there again because "People think that (a) we're a tranny bar or (b) that we're a gay bar. We are neither. People are not coming in because they just don't want to be there on a Friday night now . . .". *Id.* at 810.

Given the extensive history of discrimination against LGBT Oregonians even through to the present day, there can be little doubt that Oregon's interest in ending anti-LGBT discrimination is compelling. As this court has recognized, discrimination can inflict grave harms, including "psychologically defeating and stigmatizing injuries caused by feelings of inferiority and indignity" that result from negative treatment motivated by bias. *Cortez v. State*, 121 Or. App. 602, 605, 855 P2d 1154 (1993). Such injuries can be debilitating because they can exacerbate the stress from social exclusion and stigma, which can lead to serious mental health problems, including depression, anxiety, substance use disorders, and suicide attempts. *See, e.g.*, Edward J. Alessi, *et al*., *Prejudice Events and Traumatic Stress among Heterosexuals and Lesbians, Gay Men, and Bisexuals*, J. Aggression, Maltreatment & Trauma, Vol. 22, No. 5, 510-526 (2013),

https://www.researchgate.net/publication/259353848_Prejudice-Related_Events_and_Traumatic_Stress_Among_Heterosexuals_and_Lesbians_Gay_Men_and_Bisexuals; Ilan H. Meyer & David M. Frost, *Minority Stress and the Health of Sexual Minorities*, in Handbook of Psychology and Sexual Orientation, Ch. 18, 252-266 (2012, Oxford Univ. Press, Charlotte J. Patterson & Anthony R. D'Augelli, eds.), https://www.researchgate.net/publication/289008046_Minority_Stress_and_the_Health_of_Sexual_Minorities; Ilan Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence,* 129(5) Psychological Bulletin, 674 (2003); Vickie Mays & Susan Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States,* 19 Am. J. Pub. Health 1869-76 (2001).

Religious reinforcement of anti-LGBT bias and discrimination often increases the negative impact on mental health. *See* Ilan H. Meyer, Merilee Teylan & Sharon Schwartz, *The Role of Help-Seeking in Preventing Suicide Attempts among Lesbians, Gay Men, and Bisexuals*, 1-12, Suicide and Life-Threatening Behavior (2014) (journal of The American Association of Suicidology) (research shows anti-gay messages from religious leaders or organizations increases severe mental health reactions), https://www.researchgate.net/publication/262308758_The_Role_of_Help-Seeking_in_Preventing_Suicide_Attempts_among_Lesbians_Gay_Men_and_Bisexuals.

Although, as the government has explained, strict scrutiny does not apply in this case, even if this Court were to conclude that a higher degree of scrutiny did apply, the state's strong (indeed, compelling) interest in ending discrimination, under *any* level of scrutiny, justifies enforcing its antidiscrimination protections and not rendering them toothless by the religious exemption sought in this case.

III. Across Generations of Equality Struggles, Courts Repeatedly Have Confirmed that Religious Objections Do Not Trump Society's Compelling Interest in a Non-discriminatory Marketplace.

In the United States, differing religious beliefs about family life and gender roles often have generated disputes not only in public accommodations, but also in education, employment, medical services, and other arenas. Although some forms of religiously motivated discrimination have receded, history finds successive generations asking anew whether protections for religious liberty provide exemptions from laws protecting others' liberty and right to participate equally in civic life. Courts have provided a consistent answer to that question: Religious beliefs do not entitle any of us to exemptions from generally applicable laws protecting all of us.

The Supreme Court has described free exercise defenses to antidiscrimination law as "so patently frivolous that a denial of counsel fees to the [plaintiffs] would be manifestly inequitable." *Newman v. Piggie Park Enters., Inc.*, 390 US 400, 403 n.5 (1968) (referring to argument that Civil Rights Act of 1964

"constitutes an interference with the 'free exercise of the Defendant's religion'"(internal citation omitted)).

Throughout the ages, however, opponents of civil rights for various groups frequently have invoked religion as a reason to perpetuate discrimination. During the past century's struggles over racial integration, some Christian schools excluded Black applicants based on the view that "mixing of the races is regarded as a violation of God's command." *See Bob Jones Univ. v. United States*, 461 US 574, 580, 583 n.6 (1983). Some restaurant owners refused to serve Black customers, citing religious objections to "integration of the races." *See Newman v. Piggie Park Enters., Inc.*, 256 F Supp 941, 944–45 (DSC 1966), *rev'd* 377 F2d 433 (4th Cir 1967), *aff'd*, 390 US 400 (1968). Religion also was used to justify laws and policies against interracial relationships and marriage. *See Loving v. Virginia*, 388 US 1, 3 (1967) (invalidating state interracial marriage ban where trial judge had opined that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents" and therefore "did not intend for the races to mix"); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F Supp 1363 (SDNY 1975) (holding that free exercise could not excuse church's violation of Civil Rights Act for firing white clerk for her friendship with a black man).

Likewise, as women entered the workplace, some objected on religious grounds and sought exemptions from employment non-discrimination laws.

Despite the longstanding religious traditions on which such claims often were premised, courts recognized that accommodating religious objections would vitiate the antidiscrimination protections on which workers are entitled to depend. *See, e.g.*, *EEOC v. Fremont Christian Sch.*, 781 F2d 1362, 1367–69 (9th Cir 1986) (rejecting religious school's argument that free exercise clause excused offering unequal spousal benefits to female employees).

Similarly, after state and local governments enacted fair housing laws that protected unmarried couples, landlords unsuccessfully sought exemptions on the belief that they themselves commit sin by providing residences in which tenants might commit fornication. *See, e.g.*, *Smith v. Fair Emp't and Hous. Comm'n*, 12 Cal 4th 1143, 913 P2d 909, 928–29 (Cal 1996) (rejecting religion-based defenses because antidiscrimination requirements did not impose substantial burden, as landlord's religion did not require investing in rental apartments); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P2d 274, 279–80 (Alaska 1994) (same).

Thus, across generations, the question already has been asked and answered with reassuring consistency. Courts have consistently over time recognized the public's abiding interests in fair access and peaceful co-existence in the marketplace, which requires protecting all members of society in their access to public accommodations, regardless of discriminatory beliefs any given business owner may have about particular groups of people.

Today, these interests are tested once again as LGBT people seek full participation in American life. While some businesses and their owners have raised religious objections to interacting with LGBT people in the marketplace and argue for religious exemptions, courts have remained true to the principle that the need to prevent discrimination remains a constraint on religiously motivated conduct in commercial contexts. *See, e.g., Gifford v. McCarthy*, 23 NYS3d 422, 137 AD3d 30 (NY App Div 2016) (rejecting free speech and free exercise arguments of event venue owners who refused to rent facility for wedding of same-sex couple); *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, 370 P3d 272 (Colo App 2015) (same for bakery that refused wedding cake requested by same-sex couple); *North Coast Women's Care Med. Grp., Inc. v. Superior Court*, 44 Cal 4th 1145, 189 P3d 959 (Cal 2008) (same for infertility physicians refusing to treat member of lesbian couple); *Hyman v. City of Louisville*, 132 F Supp 2d 528, 539–40 (WD Ky 2001) (rejecting physician's religious justifications for refusing to employ gay people), *vacated on other grounds*, 53 Fed Appx 740 (6th Cir 2002); *see also Bodett v. Coxcom, Inc.*, 366 F3d 736 (9th Cir 2004) (rejecting religious discrimination claim of supervisor terminated for religiously harassing lesbian subordinate); *Peterson v. Hewlett-Packard Co.*, 358 F3d 599 (9th Cir 2004) (rejecting religious discrimination claim of employee terminated for antigay proselytizing intended to provoke coworkers); *Knight v. Conn. Dep't. of Pub. Health*, 275 F.3d 156 (2d Cir 2001) (holding nurse not entitled to proselytize to

homebound AIDS patient); *Erdmann v. Tranquility, Inc*., 155 F Supp 2d 1152 (ND Cal 2001) (holding that gay employee could proceed with harassment claim where supervisor had told the employee he would "go to hell" and pressured the employee to attend workplace prayers).

Perpetuating anti-LGBT discrimination in the context of the denial of public accommodations humiliates and reinforces stigma against same-sex couples. When the Kleins refused to provide its wedding cake services to Laurel and Rachel, despite routinely providing wedding cakes to different-sex couples of all faiths, they imposed precisely the sort of "exclusion that . . . demeans [and] stigmatizes." *Obergefell*, 135 S Ct at 2602. *See also* Douglas Nejaime, Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516, 2574-78 (2015) (discussing how complicity-based conscience claims result in increased dignitary harms to the third parties targeted by such claimed exemptions).

The Kleins' discrimination against Laurel and Rachel is part of a broader pattern of business proprietors in states throughout the country claiming religious rights to deny public accommodations to LGBT customers—including by refusing to provide not just wedding cakes, but also facility rentals, and other wedding services. *See, e.g.*, Bob Brawdy, *State Supreme Court to Hear Arlene's Flowers Case*, Bellingham Herald (Mar. 3, 2016), http://www.bellinghamherald.com/news/state/washington/article63870252.html (flowers); Sharyn Jackson, *Gortz Haus*

Owners File Suit Against Iowa Civil Rights Commission, Des Moines Register (Oct. 8, 2013), http://perma.cc/B9MB-NRN2 (event venue); Douglas Dowty, *Gay Couple: Otisco B&B Refused to Host Wedding; Business: We Don't Discriminate*, Syracuse.com (July 2, 2015), http://www.syracuse.com/crime/index.ssf/2015/07/gay_couple_otisco_bb_refused_to_host_wedding_business_we_dont_discriminate.html (event venue).

Such discrimination did not begin with marriage equality. Same-sex couples have long encountered refusals of services based on proprietors' religious objections in a wide range of settings, ranging from lodging to event venues to medical care. *See, e.g.*, *Hawaii Court Rules for Lesbian Couple Turned Away by Bed and Breakfast*, San Diego Gay & Lesbian News (Apr. 16, 2013), http://sdgln.com/news/2013/04/15/hawaii-court-rules-lesbian-couple-turned -away-bed-n-breakfast (lodging); Vikki Ortiz Healy, *Ruling Sides with Same-Sex Couple Turned away by Bed-and-Breakfast*, Chicago Tribune (Sept. 17, 2015), http://www.chicagotribune.com/news/local/politics/ct-lgbt-business-services-decision-met-20150917-story.html (event venue for civil union); *North Coast*, 189 P3d at 959 (medical care).

Most pertinent is a case with facts that parallel those in this case, *Craig v. Masterpiece Cakeshop*. In that case, as in this one, a bakery refused to provide a wedding cake for a same-sex couple and then claimed a religious exemption from the state's public accommodations laws. *Craig*, 370 P3d at 276-77. As in this

case, the same-sex couple in *Craig* never even got to the point of specifying what the design on their cake would be before being told the bakery would not provide them with a cake for a same-sex wedding reception. *Id*. at 276. As in this case, the bakery owner in *Craig* argued that his refusal to provide a cake to the same-sex couple was because of opposition to same-sex couples marrying, not to the couple's sexual orientation. However, the Court rejected that argument, finding there was not a meaningful difference between same-sex couples marrying and having a same-sex sexual orientation. *Id*. at 279. The Colorado court also rejected another distinction the bakery attempted to make that parallels one of the Kleins' in the instant case: the distinction between discriminating on the basis of status and on the basis of conduct. *Id*. at 280-81. That distinction, the Colorado court pointed out, is one that the United States Supreme Court explicitly rejected in *Christian Legal Society v. Martinez*, 561 US 661, 689 (2010). *Id*.

The *Craig* court's treatment of the asserted constitutional defenses in that case, which parallel those asserted here, can provide guidance to this Court. *Craig* first rejected the claim that baking and selling wedding cakes is expressive conduct within the meaning of constitutional free speech protections. The court explained that "to the extent that the public infers from a Masterpiece wedding cake a message celebrating same-sex marriage, that message is more likely to be attributed to the customer than to Masterpiece" and that "Masterpiece does not convey a message supporting same-sex marriages merely by abiding by the law

and serving its customers equally." *Craig*, 370 P3d at 286. Importantly, the *Craig* court cited *Rumsfeld v. FAIR*, in which the United States Supreme Court explained that observers of the schools' conduct in that case (allowing military recruiters on campus despite the schools' objection to the military's exclusion of gays, lesbians and bisexuals) "can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so." *Craig*, 370 P3d at 286, quoting *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc*., 547 US. 47, 65 (2006). *Craig* also rejected the free exercise defenses raised in that case, because public accommodations laws are neutral laws of general applicability, and cases such as this do not involve "hybrid" rights. *See id.* at 292. The Colorado court further explained, "[a] law need not apply to every individual and entity to be generally applicable; rather, it is generally applicable so long as it does not regulate only religiously motivated conduct." *Id*. at 290-91, citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 US 520, 542-43 (1993). Because the public accommodations anti-discrimination law applied equally to all business establishments without targeting religion-based conduct, it was a neutral law of general applicability. *Id*.

This Court should adopt the highly persuasive reasoning of the Colorado court in *Craig* on all counts.[5]

Additional precedent from the United States Supreme Court further compels rejecting the use of free exercise claims as a sword wielded against discrimination law compliance, and, as a result, against third parties who suffer from the resulting discrimination. Given our nation's history, most Americans have come to recognize that being told "we don't serve your kind here" is discrimination that not only inflicts immediate dignitary harm on those rejected, but also stigmatizes the entire disparaged group and corrodes our civil society. This is true today in the context of LGBT issues as it was last century in the context of race discrimination.

The United States Supreme Court unequivocally has held that non-discrimination laws "serve[] compelling state interests of the highest order." *Roberts v. U.S. Jaycees*, 468 US 609, 624 (1984) (upholding enforcement of Minnesota public accommodations law). In the context of public accommodations, specifically, the Supreme Court also has acknowledged the "moral and social wrong" of discrimination. *Heart of Atlanta Motel v. United States*, 379 US 241, 257 (1964).

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[5] Note that the Kleins appear to be confused in their description of *Craig*, especially in their puzzling citation of footnote 8 of the *Craig* opinion. In that footnote, the Colorado court *distinguished* the same-sex wedding cake case from a case in which a refusal to bake a cake was determined to be justifiable because the customer had requested specific derogatory text of "offensive nature." *Compare* Pet. Br. at 28 with *Craig*, 370 P3d at 282, n.8.

That religion might motivate the discriminatory act does not mitigate the harm. Time and again, as discussed above, religion has been proffered to excuse invidious discrimination. Given the immense demographic diversity and religious pluralism of our nation, the law must remain crystal clear: each person's religious liberty ends where legally prohibited harm to another begins. That well-settled principle of American law must apply equally with regard to invocations of religious belief, whether urged to justify racial, gender, or marital status discrimination or discrimination based on sexual orientation. Religious liberty cannot shield invidious deprivations of another's basic rights. Our shared pledge calling for "liberty and justice *for all*" demands nothing less.

The exemption the Kleins seek here would mark a sea change, opening the door to similar denials of goods and access to services, and to other inequitable treatment of LGBT people, persons living with HIV, and anyone else whose family life or minority status is disfavored by a merchant's asserted religious convictions. Many business owners hold religious and other beliefs that guide their lives. Permitting those engaged in for-profit commerce to apply religion to decide which would-be customers they will serve not only would embolden other businesses to do the same, but would subvert the compelling state interests in equality served by the Oregon Public Accommodations Law. The Kleins offer no limiting principle and, indeed, there is none. Religious critiques of marriage for same-sex couples can be leveled just as easily at interracial and interfaith marriage, at all same-sex

relationships, at heterosexual cohabitation, at divorce, at contraception, sterilization, and infertility care, at unwed motherhood, and at innumerable other personal decisions about family life.

Moreover, the "go elsewhere" approach the Kleins defend will not stay confined to discrimination on the basis of such family relationships or decisions. The notion that the owner of a commercial business sins by engaging in a commercial transaction with a "sinful" customer could apply just as well to transactions concerning any goods or services, medical care, housing, or employment. Acceptance of the Kleins' arguments would eviscerate bedrock doctrine that has been reaffirmed consistently over time. The settled approach permits and encourages a flourishing coexistence of the diverse religious, secular, and other belief systems that animate our nation while ensuring equal opportunity for everyone in the public marketplace. The proposed alternative would transform that marketplace into segregated dominions within which each business owner with religious convictions "become[s] a law unto himself," *Smith*, 494 US at 879, and would force members of minority groups to suffer the harms and indignities of being required to go from shop to shop searching for places where they will not be treated as pariahs.

The Oregon Public Accommodations Law provides critically needed protections against discrimination, including discrimination against same-sex couples by for-profit businesses. Allowing religiously motivated discrimination in

secular commerce would obliterate essential antidiscrimination protections in contexts going well beyond same-sex couples and their weddings.

Oregon enacted its antidiscrimination laws to protect vulnerable members of our diverse society from discrimination in public life regardless of others' religious reasons for wanting to refuse them goods, services, or other benefits offered to everyone else. Despite this country's long history recognizing that religious exemptions to civil rights laws would eviscerate such laws, the Kleins nonetheless ask this Court to let them single out LGBT individuals and same-sex couples for rejection, humiliation, and stigma as they operate their businesses. The answer must be "no."

CONCLUSION

For the foregoing reasons, *Amici Curiae* Laurel and Rachel Bowman-Cryer and Lambda Legal respectfully asks this Court to affirm the July 2, 2015, order of the Oregon Bureau of Labor and Industries.

Dated: August 29, 2016

Respectfully submitted,

By: /s/

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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 8,876 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 29th day of August 2016.

Respectfully submitted,

/s/
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 29, 2016, I filed **BRIEF OF AMICI CURIAE LAUREL BOWMAN-CRYER, RACHEL BOWMAN-CRYER AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF RESPONDENT** with the Appellate Court Administrator, Appellate Records Section by Federal Express overnight delivery, with postage therefor pre-paid.

I further certify that on August 29, 2016, I directed a true copy of the **BRIEF OF AMICUS CURIAE BRIEF OF AMICI CURIAE LAUREL BOWMAN-CRYER, RACHEL BOWMAN-CRYER AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF RESPONDENT** to be served on the following parties by first class mail, with postage pre-paid at the addresses set forth below:

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