

Oregon Christian Bakers Continue to Fight \$135,000 Fine

In 2013, Aaron and Melissa Klein, the Christian owners of Melissa's Sweet Cakes, were serving a previous customer when she asked them to make one of their custom-made cakes for her upcoming same-sex "wedding."

Although they had served this woman in the past, they told her that participating in the event would violate their sincerely held religious beliefs. They declined to design or create the custom cake.

The woman complained that her civil rights had been violated; the state of Oregon's Bureau of Labor and Industries agreed and fined the Kleins \$135,000. They were forced to shut down their business, as well, but to make matters worse, a judge forbid them from speaking about their faith.

That's when First Liberty Institute stepped in, with the help of Boyden Gray, the former White House Counsel to President George H.W. Bush. They have argued to the Oregon Court of Appeals that BOLI had substantially violated the Kleins' constitutionally protected rights under the First Amendment.

Thursday, their attorneys filed a reply brief with the court, which argued that allowing the BOLI ruling to stand would "put a stamp of approval" on the idea that government can "force artists to celebrate causes that violate their conscience." Their case summary states:

This case is, first and foremost, about whether Oregon has commandeered individuals' liberty to compel them—upon pain of crippling financial penalties—to facilitate the multitude of events in which "persons" protected by ORS might

participate. Such events might be weddings, as here, or religious rituals, sex-segregated club initiations or abortions. So the Court must determine: Has Oregon, for example, compelled Catholics to sculpt totems for Wiccan rituals? Feminists to photograph fraternity initiations? Pro-life filmmakers to video abortions? It has not, and that ends the case.

In addition to being correct, limiting ORS 's application to its text—"persons," not events—eliminates any need to resolve multiple constitutional questions that otherwise arise. What is art, and can the state compel its creation or affiliation with others' expression? Can the state coerce people to contribute their time, talent, and resources to others' expression? Can the state compel an expressive group to associate with others' discordant messages? What is "expressive conduct" and can the state compel it? What are hybrid rights? When is a law's application over religious, but not secular, objections unlawful targeting of religious practice?

BOLI gives the wrong answers to each question. Its errors are readily traceable to an insistence on applying ORS beyond its terms, distortions of the record, and repeated misapplications of precedents.

BOLI's statutory interpretation finds no support in any authoritative legal source: text, context, legislative history, or precedent. Persons are not events. And Oregon's legislature did not contemplate, let alone intend, the far-reaching, sometimes unconstitutional, consequences of concluding otherwise.

BOLI's constitutional interpretation fares no better.

The constitutions' Speech Clauses generally prohibit compulsion of pure speech. Because art is pure speech, BOLI tries to argue custom-designed wedding cakes are not art.

Precedent says otherwise. So BOLI speculates that Complainants may have wanted nothing more than an off-the-shelf "sheetcake." AB 22. The record says otherwise: The Kleins created custom-designed wedding cakes (art). That is what Complainants wanted. That is what BOLI punished the Kleins for not creating. That is unconstitutional.

BOLI's other pure speech-related arguments also miss the mark. The Supreme Court has foreclosed its argument that it can compel speakers to accommodate others' expression so long as the risk of misattribution is low. Compelled physical contributions to expression are at least as constitutionally off-limits as their financial counterparts. And small, for-profit businesses possess broad expressive associational rights that protect them from compelled association with incongruent expression.

The constitutions' Speech Clauses also generally prohibit compulsion of expressive conduct. BOLI says it can compel people to create wedding cakes because they do not convey particularized messages to reasonable observers. That is contrary to precedent, the record, and common sense. Wedding cakes' inherent purpose—as BOLI's own expert witness testified—is expression.

BOLI's Final Order also runs afoul of the constitutions' Religion Clauses. The federal Constitution generally prohibits interference with hybrid rights, e.g., Free Exercise rights asserted in conjunction with "colorable" claims based on other constitutional provisions. BOLI says such rights do not exist. The Supreme Court disagrees. In addition, the constitutions prohibit targeting religious exercise for disfavored treatment. BOLI says it has not done this. But BOLI has applied its interpretation of ORS to compel facilitation of events notwithstanding religious objections, while failing to commit to compelling such facilitation notwithstanding secular objections. BOLI's refusal to grant the Kleins an individualized exemption from

ORS , as permitted by Oregon's Constitution, only highlights its impermissible targeting.

BOLI also fails to rehabilitate the Final Order's three additional defects: its violation of Due Process, its unsupported damages award, and its erroneous ORS liability conclusion.

On Due Process, BOLI misapplies precedent and abstracts from context, ignoring that the Commissioner impermissibly made statements about this specific case that prejudged the Kleins' liability.

On damages, BOLI manipulates the standard of review to distract from its failure to account for mitigating evidence, inconsistent legal determinations, and a reliance on materially distinguishable cases for guidance.

Finally, on ORS , BOLI contends that statements admittedly made "in the context of discussing the past," AB 62, conveyed a future intent to discriminate. BOLI thus stretches the statute beyond the breaking point. And BOLI has no material response to the injunction's constitutional defects, premised, as it is, upon constitutionally protected speech.

The First Amendment prohibits government compulsion of art and of speech," Gray, a former ambassador to the European Union, said in a statement following the filing. "We must ensure that freedom of speech and religious expression is preserved for all Americans."