CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CIVIL RIGHTS DEPARTMENT, Plaintiff and Appellant, v. CATHY'S CREATIONS, INC. et al., Defendants and Respondents; EILEEN RODRIGUEZ-DEL RIO et al., Real Parties in Interest.	F085800 (Kern Super. Ct. No. BCV-18-102633) **ORDER DENYING PETITION FOR REHEARING AND MODIFYING OPINION (NO CHANGE IN JUDGMENT)**

THE COURT:

It is ordered that respondents' petition for rehearing is denied.

It is further ordered that the published opinion filed herein on February 11, 2025, be modified as follows:

1. On page 5, footnote 2 is modified to add the following text at the end of existing footnote 2:

> "Additionally, while Mireya indicated they had separately purchased a wedding topper, she testified they never requested a cake topper from Tastries and the cake they ultimately obtained did not feature a topper. Eileen similarly testified they did not request or discuss a cake topper with the employee of Tastries, nor did they plan to purchase one from Tastries."

2. On page 15, the first full paragraph is deleted in its entirety and replaced with the following paragraph:

> "Generally, policies that make a facial distinction based on an enumerated protected characteristic have been held to be unlawful as arbitrary, invidious or unreasonable discrimination. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 32–33 (*Koire*) [facially discriminatory pricing policies favoring women unlawful under the UCRA]; see also *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175–176 (*Angelucci*) [pricing policies making facial distinction on the basis of sex violate the UCRA; the plaintiffs sufficiently alleged injury when such a policy was applied to them].) Likewise, policies that make a facial distinction based on an unenumerated characteristic may be found unlawful if the distinction constitutes "'arbitrary, invidious or unreasonable discrimination.'"[4] (*Javorsky v. Western Athletic Clubs, Inc.* (2015) 242 Cal.App.4th 1386, 1398; see *Liapes, supra*, 95 Cal.App.5th at p. 926 [program and algorithm that facially excludes women and older people from receiving ads combined with evidence of disparate impact adequately alleged violation of the UCRA]; *Marina Point, supra*, 30 Cal.3d at p. 745 [exclusion of children from an apartment complex unlawful under the UCRA].) Strong public policy based on a compelling societal interest, typically evidenced by statutory enactments, may support as reasonable (and thus not arbitrary) an otherwise prohibited discriminatory distinction, such as, for example, excluding children from bars. (*Koire, supra*, 40 Cal.3d at p. 31; accord, *Marina Point, supra*, at pp. 741–742.)"

3. On page 33, the second full paragraph, beginning with the text "However," is deleted in its entirety and replaced with the following paragraph:

> "However, the decisional authority defendants point to as recognizing lawful distinctions in treatment under the UCRA relate nearly exclusively to unenumerated characteristics *or*, in a singular case, revolve around a distinction based on disability expressly recognized by the Legislature (*Chabner v. United of Omaha Life Ins. Co.* (9th Cir. 2000) 225 F.3d 1042, 1050 [Ins. Code, § 10144 expressly permits life insurance premium rate differential based on actuarial tables]), none of which include any distinction in treatment based on sexual orientation. Narrow

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[4] We are not suggesting the lawfulness of a policy drawing a facial distinction based on a protected characteristic is assessed under a different or less stringent standard because it is unenumerated.

distinctions based on age, for example, have been recognized as lawful where compelling societal interests justify a difference in treatment, which are frequently evidenced by statute. (See *Koire, supra*, 40 Cal.3d at p. 38 [no strong public policy supported sex-based price discounts similar to those recognized on the basis of age].) Defendants point to no compelling societal interests that support a business establishment making a distinction in service based on sexual orientation. Rather, there is strong public policy favoring the elimination of distinctions based on sexual orientation with the UCRA being one such statute evidencing it. (See, e.g., Gov. Code, § 12920 [barring sexual orientation discrimination in employment]; *id.*, § 12955, subd. (a) [barring sexual orientation discrimination in housing]; *id.*, § 11135, subd. (a) [barring sexual orientation discrimination in programs operated by, or that are receiving financial assistance from, the state].)"

4. On page 50, in original footnote 18 (now fn. 19), the following text is added at the end of original footnote 18:

"We make this comment not because the cake the Rodriguez-Del Rios sought was available from the daily display case, but as an observation the design standards would preclude a same-sex couple from preordering a cake for their wedding from the daily display case."

5. On page 55, in the first and only full paragraph, the third sentence beginning with the text "Miller's personal intent," is modified to read as follows:

"Miller's personal intent to send such a message is evidenced by Tastries's design standards, but, as the CRD points out, the cake here bore no evidence of that intent; the cake conveyed no particular message about marriage at all, let alone Miller's intended message—implicating the second element discussed below."

6. On page 58 (in part II.D. of the Discussion, under the heading Conclusion), a new paragraph is inserted between the first and second paragraphs to read as follows:

"To hold otherwise would expand the concept of speech to encompass routine consumer products bearing no indicia of expression, which would drain the First Amendment of meaning in a manner we find unsupported by our nation's high court's jurisprudence. Considered as expressive conduct, the act of preparing and delivering before a wedding celebration this nondescript, multi-purpose cake is unlikely to be understood by a viewer as communicating any message of the baker, let alone a specific message about marriage. And no explanatory conversation

about an intended message, such as through sales standards or a conversation prior to sale, can transform such conduct into symbolic speech. (*FAIR, supra*, 547 U.S. at p. 66.) Given the circumstances here, a contrary conclusion would support an overly broad view that producing and selling a routine consumer product for an event constitutes the symbolic speech of the vendor whenever a message is intended. Logically, this would apply to sales conduct beyond the scope of weddings and sincerely held Christian beliefs about same-sex marriage. We decline to extend the parameters of protected expression to include such a broad variety of marketplace conduct."

Except for the modifications set forth, the opinion previously filed remains unchanged.

This modification does not effect a change in the judgment.

MEEHAN, J.

WE CONCUR:

DETJEN, Acting P. J.

SMITH, J.