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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

CIVIL RIGHTS DEPARTMENT, FORMERLY THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, AN AGENCY OF THE STATE OF CALIFORNIA,
Plaintiff and Appellant,

v.

CATHY'S CREATIONS, INC., D/B/A TASTRIES, A CALIFORNIA CORPORATION, AND CATHARINE MILLER,
Defendants and Respondents; and

EILEEN RODRIGUEZ-DEL RIO AND MIREYA RODRIGUEZ-DEL RIO,
Real Parties in Interest.

APPEAL FROM KERN COUNTY SUPERIOR COURT
J. ERIC BRADSHAW, JUDGE – CASE NO. BCV-18-102633

PETITION FOR REHEARING

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PETITION FOR REHEARING

INTRODUCTION

This Court should grant rehearing because the opinion omits material facts established at trial and relied upon in the Superior Court's opinion. These facts, when acknowledged, require affirmance.

This Court should also grant rehearing to correct significant errors of California law—specifically, the Opinion's statement that the Unruh Act standard for evaluating whether discrimination has occurred is lower for "unenumerated" protected classes than it is for "enumerated" ones.

ARGUMENT

I. Rehearing is required to address numerous material facts established at trial but not discussed in the Opinion.

The court's published opinion ("Opinion") omits and misstates key facts—facts relied on by the Superior Court below and cited in Respondents' ("Miller") brief and answer to amici. These facts establish that Miller's actions are protected by the U.S. Constitution's Free Speech and Free Exercise Clauses. Rehearing should be granted to address these omitted and misstated facts.

A. The wedding cake the Rodriguez-Del Rios asked Miller to create for them was not "predesigned."

The Opinion states that the Rodriguez-Del Rios requested that Miller sell them a cake that was "predesigned." (Typed opn.3.) However, the Opinion misstates or omits key facts established at trial that support the Superior Court's conclusion that Tastries only provides, and the Rodriguez-Del Rios sought, a custom-designed wedding cake.

- Respondents' Answer to Amicus at p. 16 (RAA) citing 7.RT.1611:20-1612:15: Tastries does not offer any predesigned wedding cakes. All wedding cakes created by Tastries are custom-designed.
- RAA.16 citing 7.RT.1611:20-1612:15: At Tastries, it is standard to have a cake tasting and design consultation for all wedding cake orders.
- RAA.16 citing 8.RT.1815:13-19, 7.RT.1663:17-25: The wedding cake consultation generally takes between 20 and 60 minutes and is led by Miller or another trusted cake designer.

- RAA.17 citing 7.RT.1613:26-1614:7, 7.RT.1595:14-21; 7.RT.1618:8-18; 7.RT.1663:4-16; 6.RT.1335:4-10: During the design consultation, Tastries employees help couples decide which of the hundreds of possible flavor combinations will work best for their wedding. If the cake needs to be designed to accommodate dietary needs, the designer discusses that during the consultation as well.
- RAA.14 citing 5.RT.1060:10-21: Tastries was the third bakery the Rodriguez-Del Rios visited while seeking a custom wedding cake.
- RAA.14 citing 5.RT.1064:23-1065:2, 7.RT.1594:3-1596:11: During their initial visit to Tastries, the Rodriguez-Del Rios pointed to two different display cakes as a starting point for the design.
- RAA.14 citing 5.RT.1064:23-1065:2, 5.RT.1063:10-15; 5.RT.1066:8-15; 6.RT.1335:4-10: During their initial visit to Tastries, the Rodriguez-Del Rios did not settle on a final design for the wedding cake. They scheduled a design consultation to follow up on their initial visit and complete the design process.
- RAA.14-15 citing 5.RT.1061:9-21, 6.RT.1332:17-23: During their initial visit to Tastries, the Rodriguez Del-Rios had not determined how to best accommodate their diabetic family members, even though they both testified that this was a significant factor in their search for a custom wedding cake.
- RAA.15 citing 6.RT.1341:7-1342:8: During their initial visit to Tastries, the Rodriguez Del-Rios did not decide on the flavors or fillings for the custom wedding cake they planned to order.

- RAA.15-16; 6.RT.1361:5-12; 5.RT.1065:3-6: Prior to coming to Tastries, the Rodriguez-Del Rios had purchased their own cake topper that they planned to put on the cake.
- RAA.17 citing 5.RT.1040:12-24: A Tastries employee that the Department called as a witness at trial testified that the kind of wedding cake the Rodriguez-Del Rios were interested in was a form of "[e]dible art" and that cake decorators are "cake artists."
- RAA.15-16 citing 1.Fees.AA.270-272, 280, 285, 288[1]; *id.* at 277-78; 6.RT.1250:6-15: The baker who made the Rodriguez-Del Rios' wedding cake was a former Tastries employee, and she provided the cake free of charge following the publicity surrounding the incident. She stated that the cake she made for them was a beautiful cake of which she was proud, and that she wanted to promote it on Instagram, but that the Rodriguez Del-Rios' counsel advised her not to do so. She also stated that she considered herself a "cake artist."
- RAA.16 citing 7.RT.1594:15-23: Tastries' display case is not capable of holding a three-tier wedding cake like the one sought by the Rodriguez-Del Rios, so the requested wedding cake had to be custom-designed, not taken from the display case.

B. Miller's custom wedding cakes are intended as and do express a message of support for the sacrament of marriage between one man and one woman.

The Opinion states that Miller's wedding cakes serve a "primarily nonexpressive purpose[] … as a dessert to be eaten at

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[1] Citations to "Fees.AA" refer to the Appellant's Appendix filed in the related appeal *California Civil Rights Department v. Cathy's Creations, Inc.*, No. F086083.

a gathering of some sort." (Typed opn.52.) The opinion omits, however, key facts established at trial that support the lower court's conclusion that Miller's cakes are intended as an expression of her support for the sacrament of marriage between one man and one woman.

- Respondents' Brief (RB) 16-17 citing 8.RA.2010: Miller created a Wedding Worksheet explaining the specific role that wedding cakes play in a new couple's life. In the Worksheet, Miller included six different Bible passages about love and marriage, and said:

> Just as you will offer hospitality to friends and family in your new home together, cutting and serving your cake as husband and wife is the first act of hospitality you will perform together. It is a ceremonial representation of the hospitality you will show to others, together as a new family unit.

- RAA.33 citing 13.AA.2556, 8.RA.2009-2011: Miller's cakes are "designed and intended—genuinely and primarily—as an artistic expression of support for a man and a woman uniting in the 'sacrament' of marriage, and a collaboration with them in the celebration of their marriage."

- RB.42 citing 7.RT.1601:9-25: Tastries' Design Standards show that Miller's cakes are imbued with an artistic intent to celebrate biblical ideals.

- RAA.15 citing 6.RT.1243:17-21, 6.RT.1249:8-21: The Rodriguez Del-Rios themselves recognized the symbolic value of the wedding cake. On their initial visit, a Tastries employee offered to attend the wedding and cut the cake for them, which the Rodriguez-Del Rios wanted.

- 5.RT.1066:19-1067:1: Even after the incident, the Rodriguez Del-Rios invited the Tastries employee who assisted them to attend their wedding.
- RAA.15 citing 6.RT.1249:8-21: When they ultimately received their wedding cake—designed and baked by a former Tastries employee—they invited her to, and she did, cut and serve the cake at the wedding.

These facts are material to Miller's free speech claim because they underscore that Miller regarded the finished product at the end of the design process—the custom-designed wedding cake—to be a symbol of the couple's new life together and that she communicated this expressive intent to each couple who requested a custom wedding cake. These facts also demonstrate that the Rodriguez-Del Rios and others understood the symbolic message of the custom wedding cake that they asked Miller to design and bake for them, and that the Rodriguez-Del Rios wanted the baker who made their cake to attend their wedding and support them as a couple.

C. Forcing Miller to design and bake a custom wedding cake intended to celebrate a same-sex wedding burdens her sincere religious beliefs.

The Opinion also omits key facts established at trial and raised in Respondents' briefs that support a finding that Miller's actions were separately protected by the Free Exercise Clause:

- RB.16-17 citing 8.RA.2009-2011: The Wedding Worksheet that Miller created for her design consultations included six different Bible passages about love and marriage.

- RB.17 citing 1.RA.58: Miller uses the Worksheet to encourage the bride and groom to think about the meaning and importance of marriage and the symbolism of their wedding cake.
- RAA.16-17 citing 8.RA.2009-2011, 12.AA.2287; 8.RT.1815:13-19; 7.RT.1663:17-25: At every design consultation, before going through the details of the cake design, Miller takes couples through the Wedding Worksheet.

These facts establish that Miller regarded her personal participation in helping couples to design their wedding cake to be a religious exercise and an opportunity to engage in religious teaching. The Biblical passages and historical notes that Miller selected also reflect her own religious thinking about marriage and the symbolism of the wedding cake. At each design meeting, Miller used the Wedding Worksheet to teach couples about the religious understanding of marriage and the symbolic role of the wedding cake in celebrating their union.

II. Rehearing is required to correct significant errors of California law.

The Opinion asserts that the legal standard for evaluating Unruh Act claims based on "unenumerated protected classes" such as age is weaker than the legal standard for evaluating claims based on enumerated standards such as sex and sexual orientation. (Typed opn.15.) This is a material misstatement of California law that is plainly contradicted by decades of binding California Supreme Court caselaw. These cases establish that the "'listing of possible bases of discrimination has no legal effect, but is merely illustrative,'" and that the "arbitrary discrimination" standard applies to *all* protected categories, whether enumerated

or unenumerated. (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 730, 734.) Indeed, even the BAJI model jury instructions include as a necessary element of an Unruh Act violation that the distinction made "was arbitrary." (8.RT.1893:24-1894:8; 8.RT.1909:18-1910:28; 11.AA.2270.)

Notwithstanding these authorities, the Opinion states that "[p]olicies that make a facial distinction based on an *enumerated* protected characteristic [such as sexual orientation] are unlawful," while "[p]olicies that make a facial distinction based on an *unenumerated* characteristic [such as age] may be found unlawful if the distinction constitutes arbitrary, invidious or unreasonable discrimination." (Typed opn.15, italics added, internal quotation marks omitted].) The Opinion cites four cases to support this novel proposition—*Koire*, *Angelucci*, *Javorsky*, and *Liapes*. (*Ibid.*) Contrary to the Opinion's statement of the law, each of these cited cases apply the same legal standard regardless of whether the protected category is enumerated or unenumerated.

In *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, a case involving the "enumerated protected characteristic" of sex, the California Supreme Court struck down "Ladies' Day" discounts at car washes. In doing so, *Koire* considered at length whether or not offering discounts to women patrons was "arbitrary"—assessing the business' reasons for giving the discounts, and rejecting each of them in turn. (*Id.* at pp. 30-33.) Next, *Koire* considered whether there was any other "compelling social policy" to support "sex-based price differentials," and concluded there

was none. (*Id*. at p. 38.) Finally, the California Supreme Court acknowledged that, in a future case, a different kind of sex-based distinction might survive. (*Ibid.* ["[t]here may also be instances [for example, public restrooms] where public policy warrants differential treatment for men and women"].) In short, *Koire* applied the "arbitrary" discrimination standard in a case involving the enumerated ground of sex.

The Opinion also cites *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160. *Angelucci* is a California Supreme Court case that involved another challenge to sex-based price differentials—in that case, a supper club that charged a lower cover charge to women than to men. *Angelucci* emphasized that the purpose of the Act was to "'banish[]' … *arbitrary, invidious* discrimination." (*Id*. at p. 167, italics added.) It followed *Koire's* analysis about whether sex-based discounts are "arbitrary." (*Id.* at p. 174.) And it cited *Koire* for the proposition that "there might be public policies warranting differential treatment of male and female patrons under *some* circumstances." (*Id.* at p. 175.) Only after conducting both the arbitrariness and the public policy analysis did *Angelucci* conclude that the sex discrimination in that particular case was unlawful, and go on to assess whether the male plaintiffs had standing to sue. (*Ibid.*)

The Opinion also cites *Javorsky v. Western Athletic Clubs, Inc.* (2015) 242 Cal.App.4th 1386 (*Javorsky*). *Javorsky* was a First District case that involved a claim of age discrimination against a gym that offered discounted memberships to patrons aged 18-29. Age is not listed in the Unruh Act, making it an "unenumerated

protected class." The defendant gym argued that, because age was unenumerated, the Unruh Act standard for evaluating age-based distinctions was more "permissive." (*Id.* at p. 1395.)

Javorsky expressly rejected this argument, and held that "[a]ge discrimination, *like discrimination on the basis of the categories expressly set forth in the Act*, is illegal if it is arbitrary, unreasonable or invidious." (*Id.* at p. 1400, italics added.) Under the Act, "the analytical *standard* for age-based discrimination is the same as for other types of discrimination." (*Ibid.*) *Javorsky* ultimately concluded that the age-based discounts in that case were "reasonable and not arbitrary,"—but it said that it did so based on the different "context" and "public policy" that supported age-based distinctions like these, not by applying a different legal standard. (*Id.* at pp. 1400-1401.)

Liapes, another First District case, is equally unavailing. The *Liapes* plaintiff alleged that Facebook discriminated against her on two grounds: sex (enumerated) and age (unenumerated). But the First District applied the same legal standard to both claims and held that neither Facebook's "legitimate business goals" nor any public policy justified its practices.[2] (*Liapes v. Facebook, Inc.* (2023) 95 Cal.App.5th 910, 925 & fn.8.)

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[2] In a later section of the Opinion, this Court distinguishes many of the Unruh Act cases raised by Miller on the grounds that they involve unenumerated grounds of discrimination like age and parental or marital status. (Typed opn.64-65 [citing *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 844-846; *Cohn v. Corinthian Colls., Inc.* (2008) 169 Cal.App.4th 523, 528-530; *Pizarro v. Lamb's Players Theatre* (2006) 135 Cal.App.4th

Each of these cases—*Koire*, *Angelucci, Javorsky,* and *Liapes*—acknowledges that the Unruh Act "protect[s] 'all persons' from any arbitrary discrimination"—whether the protected category they belong to is enumerated or unenumerated. (*Marina,* 30 Cal.3d at p. 730 [extending Unruh Act protection to the unenumerated category of families with children].) This principle is so foundational that even when amending the Unruh Act to add "sex" as an enumerated protected category, lawmakers were careful to emphasize that "[t]he listing of possible bases of discrimination has no legal effect, but is merely illustrative." (*Id.* at p. 734 [quoting the letter transmitting the bill adding "sex" as an enumerated protected class from "the Chairman of the Select Committee on Housing and Urban Affairs" to "the Governor for his signature"].)

1171, 1176 (*Pizarro*); *Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1503-1505; *Sargoy v. Resolution Trust Corp.* (1992) 8 Cal.App.4th 1039, 1048-1049; *Sunrise Country Club Ass'n v. Proud* (1987) 190 Cal.App.3d 377, 382].) But these cases stand for the unremarkable proposition—not contested in this case—that unenumerated grounds for discrimination are subject to "arbitrariness" and "public policy" review. They do not hold that enumerated grounds are *exempt* from arbitrariness review.

To be sure, there is dicta in *Pizarro* that "courts treat age classification differently from categories enumerated in the statute." (*Pizarro*, *supra*, 135 Cal.App.4th at p. 1175.) But *Javorsky* considered this statement from *Pizarro* and concluded that it referred to "the nature and context of age-based discrimination," not to "the analytical *standard* for age-based discrimination." (*Javorsky*, 242 Cal.App.4th at p. 1400 [quoting *Pizarro*, 135 Cal.App.4th at p. 1175].) As explained above, *Javorsky*'s holding on this point is correct.

In short, the Opinion's holding that "unenumerated" protected categories like age are subject to a lesser standard than "enumerated" categories like sex and sexual orientation is a misstatement of California law. Rather, regardless of whether the protected characteristic is enumerated in the Unruh Act itself or not, the distinction made by the defendant must be "arbitrary, invidious or unreasonable" for liability to attach, which a belief in traditional marriage is not. This legal error should be corrected by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing.

Respectfully submitted,

/s/ *Eric C. Rassbach*

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February 26, 2025

CERTIFICATE OF COMPLIANCE

I certify that this petition complies with the length limits permitted by California Rules of Court rule 8.204(c)(5). The petition is 2,579 words. The brief's type size and type face comply with California Rules of Court rule 8.204(b), because it uses a 13-point Century Schoolbook font.

/s/ Eric C. Rassbach
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PROOF OF SERVICE

At the time of service, I was over 18 years old and not a party to this action. My business address is 1919 Pennsylvania Ave. NW, Suite 400, Washington, DC 20006. My electronic service address is mkrauter@becketfund.org. On February 26, 2025, I served true copies of the following documents described as **RESPONDENTS' PETITION FOR REHEARING** on the interested parties in this action as follows:

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Executed on February 26, 2025.

Matthew Krauter

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California Court of Appeal, Fifth Appellate District
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