

No. F085800

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, ET AL.

Defendants and Respondents;

EILEEN RODRIGUEZ-DEL RIO AND MIREYA RODRIGUEZ-DEL
RIO,

Real Parties in Interest.

Kern County Superior Court, Case No. BCV-18-102633
Honorable J. Eric Bradshaw, Judge (Division J)

APPELLANT'S APPENDIX

File 10 of 13, Volume 10, pp. AA01762-AA02055

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October 20, 2023

AA01762

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13 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **IN AND FOR THE COUNTY OF KERN**

15 DEPARTMENT OF FAIR EMPLOYMENT
16 AND HOUSING, an agency of the State of
17 California,
18
19 Plaintiff,

20 vs.

21 CATHY'S CREATIONS, INC. d/b/a
22 TASTRIES, a California corporation; and
23 CATHARINE MILLER,
24
25 Defendants.

26 EILEEN RODRIGUEZ-DEL RIO and MIREYA
27 RODRIGUEZ-DEL RIO,
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29 Real Parties in Interest.

Case No. BCV-18-102633

**PLAINTIFF DEPARTMENT OF FAIR
EMPLOYMENT AND HOUSING'S
MOTION IN LIMINE NO. 6 TO
EXCLUDE IRRELEVANT AND
PREJUDICIAL EVIDENCE RELATED
TO WITNESSES**

(Plaintiff's Motion in Limine No. 6)

Date: July 25, 2022

Time: 9:00 a.m.

Dept.: J

Judge: Hon. J. Eric Bradshaw

Action Filed: October 17, 2018

Trial Date: July 25, 2022

30 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

31 **PLEASE TAKE NOTICE THAT ON** July 25, 2022, at 9:00 a.m., or as soon as thereafter as the
32 matter can be heard, in Department J of the above-entitled court, located at 1215 Truxtun Ave,
33 Bakersfield, CA 93301, plaintiff Department of Fair Employment and Housing (DFEH) will, and
34 hereby does, move in limine for an Order precluding defendants from presenting any evidence or
35 argument at trial, including by way of oral testimony or documentary evidence or argument, that

1 (1) Real Party in Interest Mireya Rodriguez-Del Rio used the “n-word” in a private text message;
2 and (2) that witness Samuel Salazar was arrested for misdemeanor petty theft in 2005 and, a couple
3 years later, was arrested for not paying the fine related to the misdemeanor, which he then paid; and
4 (3) that he was stopped for drinking intoxicated in 2008 but no charges were brought against him
5 and no DUI was issued.

6 This Motion is made pursuant to Evidence Code sections 350 and 351 on the grounds that
7 only relevant evidence is admissible and Evidence Code section 352 that the admission of this
8 evidence is not probative but prejudicial.

9 Dated: July 8, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

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11 By: 
12 Gregory J. Mann
13 Attorneys for the Department of Fair
14 Employment and Housing
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff DFEH moves, in limine, to exclude Real Party in Interest Mireya Rodriguez-Del Rio’s use of the “n-word” in a private text message; (2) that witness Samuel Salazar was arrested for misdemeanor petty theft in 2005, and a couple years later was arrested for not paying the fine related to the misdemeanor, which he then paid; and (3) that he was stopped for drinking intoxicated in 2008, but there were no charges brought against him.

II. LEGAL ARGUMENT

A. Said Evidence is Irrelevant to Any Issue to be Tried in this Case

“No evidence is admissible except relevant evidence.” (Evid. Code, § 350.) Relevant evidence is defined as “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210; see *People v. Kelly* (1992) 1 Cal.4th 495, 523 [only relevant evidence is admissible].) Evidence is properly excluded where not relevant to matters at issue. (See *Castaline v. City of Los Angeles* (1975) 47 Cal.App.3d 580, 592.)

The evidence cited above does not bear on any issue in this case and should be excluded. If defendants seek to introduce the text message for another, relevant purpose, plaintiff requests that the “n-word” be redacted.

C. Said Evidence Should Be Excluded Under Evidence Code section 352

Permitting the above-cited testimony and documentary evidence (text message) is highly prejudicial and not probative. It would only serve to embarrass these witnesses. Moreover, with respect to Mr. Salazar, the events are so remote in time that there is no probative value even with respect to credibility. (Evid. Code, § 352; see *People v. Cardenas* (1982) 31 Cal.3d 897, 904 [if the prejudicial effect of the disputed evidence outweighs the probative value, the trial court should exclude the evidence].)

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1 **III. CONCLUSION**

2 Based on the foregoing, DFEH respectfully requests that the court grant this motion in limine
3 and exclude all testimony and arguments as set forth above.

4 Dated: July 8, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

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By:  _____

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Gregory J. Mann
Attorneys for the Department of Fair
Employment and Housing

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15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF KERN

17 DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING, an agency of the State of
18 California,

19 Plaintiff,

20 v.

21 CATHY'S CREATIONS, INC. d/b/a
TASTRIES, a California Corporation; and
22 CATHARINE MILLER, an individual,

23 Defendants.

24 EILEEN RODRIGUEZ-DEL RIO and
MIREYA RODRIGUEZ-DEL RIO,
25 Real Parties in Interest.

CASE NO.: BCV-18-102633

IMAGED FILE

**DEFENDANTS' OPPOSITION TO
PLAINTIFF DFEH'S MOTION IN
LIMINE TO EXCLUDE EVIDENCE OR
ARGUMENT THAT "STATUS" IS
SEPARATE FROM "CONDUCT"**

[No. 1 of 6]

Date: July 25, 2022
Time: 9:00 a.m.
Dept: J
Judge: Hon. J. Eric Bradshaw

Action Filed: Oct. 17, 2018

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. LEGAL STANDARD 1

III. ARGUMENT 3

 A. The Real Parties’ Sexual Orientation Did Not Motivate Defendants..... 4

 B. Affirmative Defense: The Distinction Was Not Arbitrary 13

IV. CONCLUSION..... 17

1 **TABLE OF AUTHORITIES**

2 ***United State Supreme Court Cases:***

3 *Bray v. Alexandria Women’s Health Clinic* 5, 6, 7
4 (1993) 506 U.S. 263

5 *Carson v. Makin* 15
6 (2022) 142 S.Ct. 1987

7 *Christian Legal Society v. Martinez* 5, 6
8 (2010) 561 U.S. 661

9 *Dobbs v. Jackson Women’s Health Organization* 6, 10
10 (2022) 142 S.Ct. 2228

11 *Fulton v. City of Philadelphia* 16
12 (2021) 141 S.Ct. 1868

13 *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*11, 12
14 (1995) 515 U.S. 557

15 *Lawrence v. Texas* 5, 6, 10
16 (2003) 539 U.S. 558

17 *Malinski v. New York* 10
18 (1945) 324 U.S. 401

19 *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com’n* 9, 10, 16
20 (2018) 138 S.Ct. 1719

21 *Obergefell v. Hodges* 6, 12, 16, 17
22 (2015) 576 U.S. 644

23 *Rast v. Van Deman & Lewis Co.* 10
24 (1916) 240 U.S. 342

25 *U.S. v. Windsor*6
26 (2013) 570 U.S. 744

27 ***California Cases:***

28 *Amtower v. Photon Dynamics, Inc.*2
(2008) 158 Cal.App.4th 1582

Candelore v. Tinder, Inc. 13
(2018) 19 Cal.App.5th 1138

TABLE OF AUTHORITIES—CONTINUED

California Cases:

Cohn v. Corinthian Colleges, Inc.7, 14
 (2008) 169 Cal.App.4th 523

Eng v. Brown2
 (2018) 21 Cal.App.5th 675

Howe v. Bank of America N.A.14
 (2009) 179 Cal.App.4th 1443

In re Cox 13
 (1970) 3 Cal.3d 205

In re Marriage Cases..... 6, 7, 15, 16
 (2008) 43 Cal.4th 757

Isbister v. Boys’ Club of Santa Cruz, Inc. 13
 (1985) 40 Cal.3d 72

Javorsky v. Western Athletic Clubs, Inc.14
 (2015) 242 Cal.App.4th 1386

Johnson v. Chiu 2
 (2011) 199 Cal.App.4th 775

Kelly v. New West Federal Savings1, 3, 17
 (1996) 49 Cal.App.4th 659

Kinda v. Carpenter3
 (2016) 247 Cal.App.4th 1268

Koebke v. Bernardo Heights Country Club4, 5, 6, 7, 8
 (2005) 36 Cal.4th 824

Pantoja v. Anton2, 3
 (5th Dist. 2011) 198 Cal.App.4th 87

Pizarro v. Lamb’s Players Theatre 13
 (2006) 135 Cal.App.4th 1171

R & B Auto Center, Inc. v. Farmers Group, Inc. 2
 (2006) 140 Cal.App.4th 327

Sargoy v. Resolution Trust Corp. 13, 14
 (1992) 8 Cal.App.4th 1039

TABLE OF AUTHORITIES—CONTINUED

California Cases:

Semler v. General Electric Capital Corp. 4
 (2011) 196 Cal.App.4th 1380

Strauss v. Horton 15
 (2009) 46 Cal.4th 364

Turner v. Association of American Medical Colleges 4, 8
 (2008) 167 Cal.App.4th 1401

Non-Precedential California Orders:

DFEH v. Arrowhead Motel 14
 (1992) FEHC Dec. No. 92-12, 1992 WL 423842

DFEH v. Miller 17
 (2018) Cal.Super. No. BCV-17-102855, 2018 WL 747835

Other Federal Cases:

Cloutier v. Prudential Ins. Co. of America 4, 5
 (N.D. Cal. 1997) 964 F.Supp. 299

Georges v. Bank of America, N.A. 14
 (9th Cir. 2021) 845 Fed.Appx. 490

Martin v. International Olympic Committee 14
 (9th Cir. 1984) 740 F.2d 670

Masterpiece Cakeshop Inc. v. Elenis 9
 (D. Colo. 2019) 445 F.Supp.3d 1226

Other State Cases:

Brush & Nib Studio, LC v. City of Phoenix 10, 11
 (2019) 247 Ariz. 269

Elane Photography, LLC v. Willock 12
 (N.M. 2013) 309 P.3d 53

Lexington-Fayette Urban County Human Rights Commission v. Hands On Originals 10
 (Ky. 2019) 592 S.W.3d 291

State v. Arlene’s Flowers, Inc. 12
 (2019) 193 Wash.2d 469

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TABLE OF AUTHORITIES—CONTINUED

International Cases:

Lee v. Ashers Baking Co. Ltd.10
[2018] UKSC 49

Constitutional Provisions:

Cal. Const., art. I, § 4.....14, 15
Cal. Const., art. I, § 7.5 15
U.S. Const., amend. I..... 14

California Statutes:

Civ. Code, § 514
Civ. Code, § 51(b).....13, 14
Civ. Code, § 51(c).....4
Civ. Code, § 51(e)(4) 5, 15
Civ. Code, § 51.5(a) 15
Code Civ. Proc., § 437c.....3
Gov. Code, § 12926(q) 15
Gov. Code, § 12940(a)..... 15
Lab. Code, § 511(d) 15

Other Authorities:

Arbitrary, Black’s Law Dictionary (11th ed. 2019)..... 13
BAJI No. 7.92 4, 13
CACI No. 30604
Maura Irene Strassberg, *Can We Still Criminalize Polygamy: Strict Scrutiny of Polygamy Laws Under State Religious Freedom Restoration Acts After Hobby Lobby* (2016) 2016 U. Ill. L. Rev. 1605.....8

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I. INTRODUCTION

Through its first motion in limine, Plaintiff DFEH seeks an order precluding Defendants “from presenting any evidence or argument that defendants did not decline to take the Rodriguez-Del Rios’ wedding cakes order on the basis on their homosexual status but, rather, declined to take their order based on *their conduct of being in a gay marriage.*” (Plt. MIL No. 1, Prop. Order [italics added].) Plaintiff DFEH’s basis for its motion is: (1) a request that the Court declare the contours of existing law; and (2) an argument from relevance.

As explained below, Plaintiff DFEH’s motion should be denied because it is a misleading caricature of Defendants’ actual argument in this case. Plaintiff DFEH seeks to frame the issues around the Real Parties in Interests’ “conduct of being in [or entering into] a gay marriage” where the issues are properly framed, not around the Real Parties, but around *Defendants* and *their own views* on marriage. When properly framed, Defendants argument is both supported by relevant case law and the facts, and thus all argument and evidence in support is admissible.

II. LEGAL STANDARD

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An improper motion in limine is one which “would not provide any meaningful guidance for the parties or witnesses.” (*Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 670-671 [reversing judgment due to improper motion in limine].) This includes a motion in limine that “would merely be declaratory of existing law,” untethered to “factual support or argument” of the specific evidence sought to be excluded. (*Id.*) For example, a motion in limine seeking “to limit the opinions of plaintiffs experts to those ‘rendered at deposition and in written reports,’” without reference to “what opinions had been rendered at the depositions,” is improper. (*Id.*) Similarly, a motion in limine seeking to “preclud[e] plaintiffs from calling any witnesses ‘not previously identified in plaintiffs’ discovery responses,’” without reference to which trial witnesses were listed by a party, but omitted from discovery responses, is improper. (*Id.*)

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“[M]otions in limine deal with *evidence*. May this particular document be admitted? May an expert witness testify to certain facts or conclusions? An in limine motion that seeks to exclude all evidence pertaining to part or all of a cause of action based on an argument that plaintiff lacks evidence to support part or all of the cause of action is but a disguised motion for summary

1 adjudication.” (*Pantoja v. Anton* (5th Dist. 2011) 198 Cal.App.4th 87, 123 [reversing judgment due to
2 improper motion in limine] [quoting *R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140
3 Cal.App.4th 327, 372 [conc. opn. of Rylaarsdam, J.]]) “The same goes for a motion in limine that
4 claims only that a plaintiff cannot prove her case with a specified item of evidence, as opposed to
5 claiming the item of evidence is inadmissible. Presented only with the argument that [the plaintiff] did
6 not have enough evidence to establish that cause of action—not that the evidence [the plaintiff] had
7 was irrelevant or otherwise inadmissible—the court should have denied the motion.” (*Id.*)

8 “No matter how logical a moving party’s motion may sound, a judge generally should not be
9 weighing the evidence on a motion in limine. A judge is in the ticklish situation of needing to be
10 efficient, on the one hand, while needing, on the other hand, to give the parties their day in court
11 and let the [factfinder] weigh the evidence. While it may be tempting to look at a case in the macro
12 sense, the devil is in the details. The moving party’s concerns that the other party may be trying to
13 use evidence for an improper purpose or in a way that may be unduly prejudicial can be addressed
14 by limiting instructions, without taking away the other party’s hallowed right to a [] trial.” (*R & B
15 Auto Center, supra*, 140 Cal.App.4th at 333 [reversing judgment due to improper motion in limine].)

16 “A motion in limine is properly made to exclude evidence before the evidence is offered at
17 trial, on grounds that would be sufficient to object to or move to strike the evidence. The purpose of a
18 motion in limine is to avoid the obviously futile attempt to ‘unring the bell’ in the event a motion to
19 strike is granted in the proceedings before the jury. What in limine motions are *not* designed to do is to
20 replace the dispositive motions prescribed by the Code of Civil Procedure.” (*Johnson v. Chiu* (2011)
21 199 Cal.App.4th 775, 780 [cleaned up] [reversing judgment due to improper motion in limine].)

22 Some courts have held that—although strongly discouraged—trial courts can use motions in
23 limine as pseudo-motions for summary judgment or motions for directed verdict, under their
24 “inherent power.” (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1593-1595.) But
25 in doing so, they caution that “these irregular procedures can result in unnecessary reversals”
26 because “all inferences and conflicts in the evidence be resolved in favor of the losing party and
27 *against* the judgment.” (*Id.*; *Eng v. Brown* (2018) 21 Cal.App.5th 675, 698-699 [applying same with
28 respect to a motion in limine that was, in effect, a “partial directed verdict”].) Thus, in ruling on a

1 motion in limine “used to foreclose a cause of action, the court must apply the restrictive standard
2 of a nonsuit, interpreting the evidence most favorably to plaintiffs’ case and resolving all
3 presumptions, inferences and doubts in favor of plaintiffs.” (*Kinda v. Carpenter* (2016) 247
4 Cal.App.4th 1268, 1285-1286.)

5 Despite this, the Fifth Appellate District has taken a stricter line. Even if “[t]he excluded
6 evidence might not have been sufficient to establish that cause of action,” and the case could have
7 been decided if the moving party took “the opportunity to seek summary adjudication in the
8 procedurally appropriate manner (i.e., by filing a motion conforming to the requirements of Code Civ.
9 Proc., § 437c) *before* trial,” by waiting and “chos[ing] to make the request at trial,” the motion could
10 not be granted because “the question of the weight of the evidence was for the jury” and only after it
11 is admitted may the court rule on a motion for nonsuit or directed verdict. (*Pantoja v. Anton* (5th Dist.
12 2011) 198 Cal.App.4th 87, 124 [reversing Lampe, J].)

13 III. ARGUMENT

14 The main defect with Plaintiff DFEH’s first motion in limine is that granting it would fail to
15 “provide any meaningful guidance” to the parties. (*Kelly, supra*, 49 Cal.App.4th at 670-671.) It is
16 not even an improper pseudo-dispositive motion (*Pantoja, supra*, 198 Cal.App.4th at 124), because it
17 does not accurately frame Defendants’ position. Both the Court and Plaintiff DFEH can rest assured
18 that Defendants will not argue that they referred the Real Parties to Gimmee Some Sugar because of
19 “their conduct of being in a gay marriage.” (Plt. MIL No. 1, Prop. Order.) Rather, Defendants
20 referred the Real Parties to Gimmee Some Sugar because of Defendants’ objection to sending a
21 message in support of same-sex marriage, which either (A) does not violate the Unruh Act, or
22 (B) would not constitute arbitrary discrimination—an affirmative defense to the Unruh Act.
23 Defendants would not send a message in support of same-sex marriage for anybody, of any sexual
24 orientation, sex, race, or creed; nor would they do so for a corporation. And Defendants have and
25 are more than willing to serve and employ members of the LGBT community, designing them
26 custom birthday and holiday cakes, or other custom baked goods.

27 To the extent that Plaintiff DFEH’s motion is actually intended as a motion for directed
28 verdict as to Defendants’ actual two arguments on this point, it should not be entertained at this

1 time. Rather, it should be deferred to the appropriate time, once all the evidence is in, in light of the
2 disfavored nature of using motions in limine in this unorthodox manner, and the Fifth Appellate
3 District’s all-but complete bar on doing so.

4 **A. The Real Parties’ Sexual Orientation Did Not Motivate Defendants**

5 The Unruh Act provides that “(b) All persons within the jurisdiction of this state are free
6 and equal, and no matter what their ... sexual orientation ... are entitled to the full and equal ...
7 services in all business establishments of every kind whatsoever.” However, “(c) This section shall
8 not be construed to confer any right or privilege on a person that is conditioned or limited by law or
9 that is applicable alike to persons of every ... sexual orientation....” (Civ. Code, § 51.) Flowing from
10 these sections, both CACI and BAJI have developed form jury instructions and verdict forms.
11 (CACI No. 3060; BAJI No. 7.92.) Below, and in their trial brief, Defendants use BAJI because it
12 captures all of the elements that are in dispute.

13 The second element under BAJI of an Unruh Act claim is that a substantial motivating
14 factor for Defendants’ conduct was the Real Parties’ sexual orientation. (BAJI No. 7.92(2).) Because
15 the Unruh Act does not “confer any right or privilege on a person that is ... applicable alike to
16 persons of every ... sexual orientation” (Civ. Code, § 51(c)), “[t]he Unruh Act does not prohibit
17 discrimination against persons based upon their conduct, but only prohibits that discrimination
18 resulting from the individual’s membership in a particular class of persons.” (*Cloutier v. Prudential*
19 *Ins. Co. of America* (N.D. Cal. 1997) 964 F.Supp. 299, 304.) One example of this would be that the
20 status of being a “felon” is not covered by the Unruh Act. (*Semler v. General Electric Capital Corp.*
21 (2011) 196 Cal.App.4th 1380, 1395.)

22 Also flowing from these principles is the rule that “[a] policy that is neutral on its face is not
23 actionable under the Unruh Act, even when it has a disproportionate impact on a protected class.”
24 Such a policy is only actionable if the defendant “applie[s] its facially neutral policy in an
25 intentionally discriminatory manner” or where the “neutral policy was used as a pretext to
26 discriminate against a protected class of individuals.” (*Turner v. Association of American Medical*
27 *Colleges* (2008) 167 Cal.App.4th 1401, 1408-1411.) Thus, in *Koebke*, the California Supreme Court
28 addressed the situation where a country club restricted access to its facilities to its members and

1 their spouses. Because same-sex marriage was not yet legal in California, this had a significant
2 disparate impact on homosexual members and their partners. The court ultimately held that the
3 marriage-related policy was facially neutral, and therefore nonactionable in the absence of evidence
4 that it was adopted as a pretext with the intent “to accomplish discrimination on the basis of sexual
5 orientation.” (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 853-854.)

6 As Plaintiff DFEH notes, the “conduct” vs. “status” distinction is not as clean cut as the
7 quote from *Cloutier* above would imply. Some “conduct” is per se part of the “status,” such that
8 discrimination on the basis of “conduct” is discrimination on the basis of “status.” (See Civ. Code,
9 § 51(e)(4) [religion for purposes of the Act includes “all aspects of religious belief, observance, and
10 practice.”]; cf. *Bray v. Alexandria Women’s Health Clinic* (1993) 506 U.S. 263, 270 [because only
11 Jews wear them, “[a] tax on wearing yarmulkes is a tax on Jews.”].) But how this principle applies to
12 sexual orientation, and how this principle applies in this case, requires factual development. It
13 cannot be determined as a matter of law.

14 To begin, Plaintiff DFEH notes that the U.S. Supreme Court has held, in application of an
15 anti-discrimination provision, that discrimination on the basis of homosexual intimate activity
16 (“conduct”) is discrimination on the basis of homosexuality (“status”). (*Christian Legal Society v.*
17 *Martinez* (2010) 561 U.S. 661, 668; see also *Lawrence v. Texas* (2003) 539 U.S. 558, 575.) But that is
18 not what Defendants did here. For example, if a business refused to serve a felon *at all*—saying that
19 person could not come onto the premises, could not purchase any goods, and could not use any
20 services—that would arguably *not* violate the Unruh Act because the discrimination was based
21 around the individual’s (poor prior) “conduct.”

22 If, however, a business did likewise with the LGBT community, saying that it will not serve
23 *at all*, a member of that community who had engaged in homosexual intimate relations, that would
24 violate the Unruh Act because the conduct is per se part of the protected characteristic. Thus, in
25 *Christian Legal Society*, the U.S. Supreme Court held that there was discrimination on the basis of
26 homosexuality where the group excluded from membership, *at all*, “anyone who engages in
27 ‘unrepentant homosexual conduct’” (*Christian Legal Society, supra*, 561 U.S. at 672), and likewise in
28 *Lawrence*, by criminalizing intimate homosexual conduct, Texas would have excluded, *at all*,

1 homosexuals from civil society. (*Lawrence, supra*, 539 U.S. at 575.) In contrast, here, there is no
2 evidence in the record regarding Real Parties’ sexual activity, and Defendants (of course) did not
3 inquire about it or based their actions on it.

4 Plaintiff DFEH then tries to extend the reasoning of *Christian Legal Society* and *Lawrence* to
5 the context of same-sex marriage, citing *In re Marriage Cases* (2008) 43 Cal.4th 757. There, the
6 California Supreme Court held that laws defining marriage traditionally “properly must be
7 understood as classifying or discriminating on the basis of sexual orientation,” because sexual
8 orientation must be defined *relationally*, such that a homosexual person is one who “would choose
9 to marry a person of their own sex or gender.” (*Id.* at 783-784, 839-840 & fn.59.) But, again,
10 *Marriage Cases* is not on all fours with the present case. Taking the above example of a felon, a
11 business could refuse to offer services to that person *at all*, asserting that it is wary of his prior
12 “conduct” and how that could influence his future “conduct.” But if a business held that it would
13 refuse to serve, *at all*, any member of the LGBT community that had entered into a same-sex
14 marriage—and that only unmarried homosexual individuals were welcome—that could arguably be
15 discrimination under the Unruh Act. This is because the distinction made (if factually undisputed)
16 would be based entirely around homosexual “conduct” that is per se part of homosexual “status.”
17 (Cf. also *Obergefell v. Hodges* (2015) 576 U.S. 644, 672; *U.S. v. Windsor* (2013) 570 U.S. 744, 770.)
18 But, again, that is not what happened here.

19 This case is more nuanced. Both the California and U.S. Supreme Courts recognize that
20 certain “conduct” can misleadingly appear closely related to a protected characteristic, but actually
21 be facially neutral. For example, in *Dobbs*, the U.S. Supreme Court re-emphasized its longstanding
22 holding that although only women obtain abortions, many women are pro-life, and so the equal
23 protection clause is not implicated. (*Dobbs v. Jackson Women’s Health Organization* (2022) 142 S.Ct.
24 2228, 2245-2246 & fn.17 [citing *Bray, supra*, 506 U.S. at 273-274].) In *Koebke*, the argument boiled
25 down to the fact that, because same-sex marriage was not yet legal in California, being unmarried
26 was conduct closely related to homosexuality such that marital status discrimination (when coupled
27 with knowledge of the patron’s sexual orientation) was per se sexual orientation discrimination. The
28 California Supreme Court rejected this argument. (*Koebke, supra*, 36 Cal.4th at 853-854.)

1 *Koebke* and *Marriage Cases* are reconcilable through noting the primacy of “intent” in an
2 Unruh Act violation, and the irrelevance of “intent” in the constitutional analysis. Under the
3 Unruh Act, the plaintiff must “prove *intentional* discrimination.” (*Cohn v. Corinthian Colleges, Inc.*
4 (2008) 169 Cal.App.4th 523, 527 & fn.3 [citing *Bray, supra*, 506 U.S. at 270].) In *Cohn*, the Los
5 Angeles Angels baseball team had a home game on Mother’s Day. (*Id.* at 526.) To honor “mothers,”
6 Corinthian Colleges gave away a free tote bag to all “females 18 years old and over.” (*Id.*) Mr. Cohn
7 requested a free bag, but was denied, and then sued alleging gender discrimination. (*Id.*) The court of
8 appeal held that there was no claim, because the baseball team *had no discriminatory intent*—its “intent
9 was to honor mothers on Mother’s Day.” (*Id.* at 528.)

10 In contrast, in *Marriage Cases*, the California Supreme Court became the first Supreme Court
11 in the nation to hold that sexual orientation is a suspect classification (*Marriage Cases, supra*, 43
12 Cal.4th at 841), and the second Supreme Court to rule unconstitutional laws that did not extend
13 marriage to same-sex relationships. (*Id.* at 855.) But at the same time as announcing this constitutional
14 equal protection understanding of sexual orientation, the Court made clear that the constitutional
15 violation occurred due to “detrimental effect,” not “invidious intent or purpose” (*id.* at 856, fn.73),
16 because “th[e] belief that the right to marriage did not extend to same sex couples” is not “irrational,
17 ignorant or bigoted.” (*Id.*)

18 Here, as noted above, Plaintiff DFEH seeks an order precluding Defendants “from
19 presenting any evidence or argument that defendants did not decline to take the Rodriguez-Del
20 Rios’ wedding cakes order on the basis on [sic] their homosexual status but, rather, declined to take
21 their order based on their conduct of being in a gay marriage.” (Plt. MIL No. 1, Prop. Order.)
22 Unsurprisingly, Plaintiff DFEH does not cite any evidence to show that this is actually *why*
23 Defendants attempted to provide full and equal services to the Real Parties by connecting them with
24 a competitive bakery—because it is *not why*.

25 Instead, Defendants policies are not triggered by any customer’s sexual orientation, or by
26 the customer engaging in conduct closely associated with a homosexual orientation (*i.e.*, that
27 individual having engaged in homosexual intimate activity or having personally entered into a same-
28 sex marriage). Rather, Tastries Bakery’s written policies state that “[a]ll custom orders must follow

1 Tastries Design Standards,” which in turn elaborate that custom orders that do not meet Tastries
2 Design Standards include: “Designs that violate fundamental Christian principles; wedding cakes
3 must not contradict God’s sacrament of marriage between a man and a woman.” To “contradict”
4 means “to assert or speak the contrary or opposite of” some proposition. (See Summary Judgment
5 Declaration of Catharine Miller (Sep. 8, 2021) ¶¶ 11-24 & Ex. A [hereafter “Miller MSJ Decl.”];
6 see Def. Trial Ex. 8, Design Standards.)

7 Thus, Tastries Bakery’s policy is a facially neutral policy about *Defendants sending messages*
8 *about marriage*. It has nothing to do with any individual’s sexual orientation—whether viewed
9 through the lens of status or conduct. It applies to writing political slogans on cakes for political
10 events regarding marital issues (divorce, same-sex marriage, etc.); it applies to engaging in the
11 symbolic speech of creating a traditional wedding cake (white with three or more tiers) for events
12 that would demean and de-sacramentalize marriage (such as ironically using it to announce a
13 divorce); and it applies to engaging in the symbolic speech of creating a traditional wedding cake for
14 use as the celebratory centerpiece at an event that calls itself a wedding yet involves anything other
15 than a lifelong union of one man and one woman. This would include unions of three or more
16 people, unions not intended to be lifelong, and unions involving members of the same sex. If a
17 heterosexual person came in seeking to purchase a wedding cake for a same-sex wedding,
18 Defendants equally could not design the cake. In a real sense, Defendants’ policies are about
19 Defendants’ beliefs about marriage, not about customers’ conduct or status.

20 In this context, Defendants’ policies on marriage are facially neutral for purposes of the
21 Unruh Act, and only actionable if a *pretext* for discrimination on the basis of some protected
22 characteristic. (See *Koebke, supra*, 36 Cal.4th at 853-854; *Turner, supra*, 167 Cal.App.4th at 1408-
23 1411.) Plaintiff DFEH argues that they are a pretext for discrimination on the basis of sexual
24 orientation, but they could just as easily be construed as a pretext for discrimination on the basis of
25 religion. (See Maura Irene Strassberg, *Can We Still Criminalize Polygamy: Strict Scrutiny of Polygamy*
26 *Laws Under State Religious Freedom Restoration Acts After Hobby Lobby* (2016) 2016 U. Ill. L. Rev.
27 1605 [discussing examples of modern polyamory, including Mormon Fundamentalism].) The
28 facially neutral nature of the policies are open to both inferences.

1 Despite Plaintiff DFEH’s protestations to the contrary, there is space between a party’s
2 beliefs about marriage and his beliefs about sexual orientation—analogueous to how there is space
3 between a party’s beliefs about abortion and his beliefs about sex. This was specifically endorsed by
4 the U.S. Supreme Court in *Masterpiece Cakeshop*:

5 [T]here is some force to the argument that the baker was not unreasonable in
6 deeming it lawful to decline to take an action that he understood to be an
7 expression of support for the[] validity [of same-sex marriages] when that
8 expression was contrary to his sincerely held religious beliefs, at least insofar as
his refusal was limited to refusing to *create and express a message in support of gay
marriage...*

9 (*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com’n* (2018) 138 S.Ct. 1719, 1728 [“*Masterpiece I*”]
10 [emphasis added]; see also *Masterpiece Cakeshop Inc. v. Elenis* (D. Colo. 2019) 445 F.Supp.3d 1226, 1241
11 [“*Masterpiece II*”] [“Phillips does claim he would have declined the specific cake Scardina
12 requested—a cake designed to celebrate the anniversary of a gender transition—no matter who
13 requested it.”].) It flows necessarily from prior Supreme Court precedents:

14 This distinction turns entirely on the facts. Was Defendants’ intent “to refus[e] to create and
15 express a message in support of gay marriage,” or was Defendants’ intent to discriminate on the basis
16 of sexual orientation. For example, in *Hands On Originals*, a Kentucky analog to the DFEH brought
17 litigation against a t-shirt printer who refused to print shirts for a gay pride parade. The case was
18 dismissed by the Kentucky Supreme Court on the basis that the non-profit corporation operating the
19 gay pride parade did not itself have a sexual orientation. And in concurrence, Justice Buckingham
20 explained why the case should equally fail on the merits:

21 The record discloses three essential facts, which are conceded by the
22 Commission: First, Hands On has an established practice of declining orders
23 because of what Hands On perceives to be their morally-objectionable
24 messages, no matter who requested them. In the two years preceding the
25 hearing in this case, Hands On declined thirteen orders on the basis that it
26 believed the designs to be offensive or inappropriate, including refusal to print
27 shirts promoting adult entertainment establishments, pens promoting a
28 sexually explicit video, and shirts containing a violence-related message. Second, Hands On accepted and completed an order from a lesbian singer who performed at the 2012 Pride Festival. Third, at no time did Hands On inquire or know the sexual orientation or gender identity of the persons with whom it dealt on behalf of GLSO. These facts indicate that Hands On was in good faith objecting to *the message it was being asked to disseminate.*

1 (*Lexington-Fayette Urban County Human Rights Commission v. Hands On Originals* (Ky. 2019) 592
2 S.W.3d 291, 303 [emphasis added].)

3 Similarly, in *Ashers Baking Co.*, a gay man decided to bring a cake to a party hosted by an
4 LGBT activism group campaigning for same-sex marriage in Northern Ireland. He attempted to
5 purchase from a bakery a cake decorated with “a coloured picture of cartoon-like characters ‘Bert and
6 Ernie’, the QueerSpace logo, and the headline ‘Support Gay Marriage.’” (*Lee v. Ashers Baking Co. Ltd.*
7 [2018] UKSC 49, ¶¶ 10-12 [appeal taken from N. Ir.]) Upon declining the order, the bakery was
8 charged by the Northern Ireland analog to the DFEH with discrimination on the basis of sexual
9 orientation or, alternatively, discrimination on the basis of association with homosexual persons, and
10 found liable. (*Id.* at ¶¶ 13-15.) The U.K. Supreme Court ultimately reversed the judgment:

11 The important message from the *Masterpiece Bakery* case is that there is a clear
12 distinction between refusing to *produce a cake conveying a particular message*, for
13 any customer who wants such a cake, and refusing to produce a cake for the
14 particular customer who wants it because of that customer’s characteristics.
15 One can debate which side of the line particular factual scenarios fall. But in
16 our case there can be no doubt. The bakery would have refused to supply this
17 particular cake to anyone, whatever their personal characteristics. So there was
18 no discrimination on grounds of sexual orientation.

19 (*Lee v. Ashers Baking Co. Ltd.* [2018] UKSC 49, ¶ 62 [appeal taken from N. Ir.] [emphasis added]¹.)

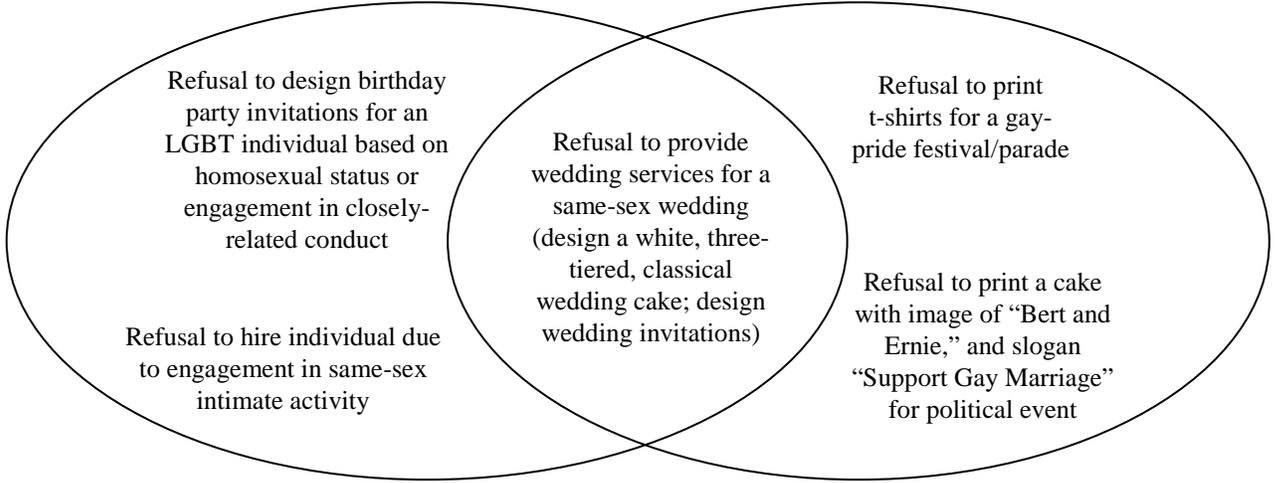
20 The reasoning from *Masterpiece*, as applied in *Hands On Originals* and *Ashers Baking Co.*,
21 finally came full circle when it was applied by the Arizona Supreme Court in *Brush & Nib Studio*, a
22 case about a party invitation calligrapher who could only in good conscience design invitations for
23 traditional marriages, not same-sex marriages. The analysis was ultimately an intensely fact-based one.
24 The fact that the calligrapher refused to make wedding invitations for a same-sex wedding was in the
25 middle of the Venn-diagram, and could be explained both: (1) an intent to discriminate against
26 homosexual persons; and (2) by a refusal to send messages in favor of same-sex marriage.

27 ¹ A printout of this case was supplied with Defendants’ Appendix of Authorities in Support of their
28 Motion for Summary Judgment, dated September 8, 2021. With respect to human rights and
constitutional issues, courts understand that the issues are often universal. Thus, the U.K. Supreme
Court in *Ashers Baking Co.* cited the U.S. Supreme Court in *Masterpiece*. The reverse is also true,
with U.S. courts often citing international courts. (See, e.g., *Dobbs v. Jackson Women’s Health
Organization* (2022) 142 S.Ct. 2228, 2270; *Lawrence v. Texas* (2003) 539 U.S. 558, 576; *Malinski v.
New York* (1945) 324 U.S. 401, 413; *Rast v. Van Deman & Lewis Co.* (1916) 240 U.S. 342, 366.)

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DISCRIMINATION ON
BASIS OF
HOMOSEXUALITY

REFUSAL TO “CONTRADICT GOD’S
SACRAMENT OF MARRIAGE BETWEEN
A MAN AND A WOMAN”



When all the evidence supported the second conclusion, the lower courts’ refusal to consider it and instead assume the first conclusion, was improper.

Our decision today is limited ... and the protection afforded ... is based solely on the *celebratory messages Plaintiffs convey (or refuse to convey)*, not the race, gender or sexual orientation of the customer. [citation] Indeed, Plaintiffs have never asserted that their faith precludes them from serving same-sex couples, or that it requires them to refuse service to a customer based on their sexual orientation. Rather, as noted above, Plaintiffs consistently testified that they are willing to serve all customers, regardless of their status. But what they refuse to do is violate their religious convictions by creating a message for anyone that celebrates same-sex marriage.

(*Brush & Nib Studio, LC v. City of Phoenix* (2019) 247 Ariz. 269, 304 [emphasis added.]) To be sure, as Plaintiff DFEH has noted, full exclusion of a patron is not required to establish an Unruh Act claim. Offering an individual inferior services (*i.e.*, not “full and equal”) on the *basis* of a protected characteristic is a violation. (See Plt. MIL No. 1, pp.3:8-9, 7:22-24, 8:10-18.) But where a defendant would provide “full and equal” services to an LGBT customer in every context except marriage, that is strong persuasive evidence that the distinction made was not on the *basis* of sexual orientation.

This is not a novel argument, but flows directly from prior Supreme Court precedents. Thus, in *Hurley*, although the High Court decided the case on the basic federal law principle that the government could never compel speech, it expressed its doubt as to the state-law conclusion that there had been discrimination on the basis of sexual orientation where “Petitioners disclaim any intent to

1 exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from
2 parading as a member of any group that the Council has approved to march,” and “[i]nstead, the
3 disagreement goes to the admission of GLIB as its own parade unit carrying its own banner.” (*Hurley*
4 *v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515 U.S. 557, 572.)

5 This argument is also supported by reality—Americans of all sexual orientations actually make
6 a distinction between views on marriage and views on sexual orientation. When same-sex marriage
7 was being debated in the various States, data revealed that only between 74.4% and 77.9% of LGBT
8 individuals supported same-sex marriage, but 89.1% supported civil unions. (MIL Ex. 23, Gregory M.
9 Herek, et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay,*
10 *and Bisexual Adults in a US Probability Sample* (2010) 7 *Sexuality Res. & Soc. Pol’y* 176, 194.) There
11 were also various anecdotal reports by the media of LGBT opposition to same-sex marriage. (See,
12 e.g., MIL Ex. 24, Tom Geoghegan, *The gay people against gay marriage*, BBC News (Jun. 11, 2013),
13 <https://bbc.in/3zgYYYu>; MIL Ex. 25, Beth Daley, *Gay rebels: why some older homosexual men don’t*
14 *support same-sex marriage*, *The Conversation* (Nov. 5, 2017), <https://bit.ly/3cofvR3>.)

15 This reality continues today. A recent Gallup poll shows that the percentages of LGBT
16 individuals entering into same-sex marriages has been largely unaffected by the discovery of a right
17 to same-sex marriage in the U.S. Constitution. Prior to *Obergefell*, 7.9% of LGBT individuals were in
18 same-sex marriages; after *Obergefell*, this has increased to only 9.6%. Also noteworthy, a similar
19 number of LGBT individuals have chosen a same-sex domestic partnership over a marriage (7.1%),
20 and for bisexual individuals, only 1.0% percent have entered into same-sex marriages, compared to
21 17.2% who have entered into opposite-sex marriages. (MIL Ex. 26, Jeffrey M. Jones, *One in 10*
22 *LGBT Americans Married to Same-Sex Spouse*, Gallup (Feb. 24, 2021), <https://bit.ly/3uVIwKk>.)
23 Americans of all sexual orientations have differing views on marriage, both same-sex and opposite-
24 sex, that are independent of their views on sexual orientation.

25 In support of its contrary argument, Plaintiff DFEH cites cases from the Supreme Courts of
26 New Mexico and Washington concerning a photographer and florist. (See Plt. DFEH MIL No. 1,
27 p.10, fn.3 [citing *Elane Photography, LLC v. Willock* (N.M. 2013) 309 P.3d 53, 61 [¶16]; *State v.*
28 *Arlene’s Flowers, Inc.* (2019) 193 Wash.2d 469, 503-505 [¶¶ 54-55]].) But both cases dealt with solely

1 a pure “conduct” v. “status” argument—which Plaintiff DFEH raises as a straw man—not the
2 actually applicable argument regarding sending a message in favor of same-sex marriage.

3 This case falls squarely within the middle of the Venn-diagram shown above, concerning
4 protected speech rather than status or conduct. Defendants’ pure intent is undisputed, and thus
5 there can be no Unruh Act claim. (See Def. MIL Nos. 1, 9.) But at the very least, Defendants should
6 be able to put forth the evidence supporting their argument.

7 **B. Affirmative Defense: The Distinction Was Not Arbitrary**

8 Plaintiff DFEH’s motion in limine also implicates an affirmative defense under the Unruh
9 Act, that is codified in the fourth element of BAJI: that the discrimination was not “arbitrary.”
10 (BAJI No. 7.92(4).) The operative language of the Unruh Act is that “[a]ll persons within the
11 jurisdiction of this state are free and equal” and “are entitled to the full and equal accommodations
12 ... or services in all business establishments of every kind whatsoever.” (Civ. Code, § 51(b).)
13 Through this language, “a business generally open to the public may not *arbitrarily* exclude a would-
14 be customer from its premises.” (*In re Cox* (1970) 3 Cal.3d 205, 216 & fn.11 [italics added].)
15 Although the Unruh Act lists certain enumerated protected characteristics, these are merely
16 “illustrative” (*id.*) and “the mere fact that [a characteristic] is listed as a prohibited ground of
17 discrimination does not give it a special ‘arbitrary per se’ status[.]” (*Isbister v. Boys’ Club of Santa*
18 *Cruz, Inc.* (1985) 40 Cal.3d 72, 87-90 & fn.20.)

19 Thus, under the Unruh Act, “not all discrimination is prohibited.” (*Candelore v. Tinder, Inc.*
20 (2018) 19 Cal.App.5th 1138, 1145.) “Neither the language of Unruh itself nor the interpretation of the
21 Unruh Civil Rights Act by the California courts have held that *all* distinctions based on [protected
22 characteristics] are unlawful.” (*Sargoy v. Resolution Trust Corp.* (1992) 8 Cal.App.4th 1039, 1043 [citing
23 *Cox, supra*, 3 Cal.3d at 216-217].) Rather, the Unruh Act only prohibits “arbitrary” discrimination.
24 (*Id.*) A distinction is “arbitrary” if it is “founded on prejudice or preference rather than on reason or
25 fact,” or if it is “made without consideration of or regard for facts, circumstances, fixed rules, or
26 procedures.” (*Arbitrary*, Black’s Law Dictionary (11th ed. 2019).) Thus, under the Unruh Act,
27 prohibited “arbitrary” discrimination is understood as either “invidious or unreasonable
28 discrimination.” (*Sargoy, supra*, 8 Cal.App.4th at 1043; see also *Pizarro v. Lamb’s Players Theatre*

1 (2006) 135 Cal.App.4th 1171, 1174 [“The objective of the Act is to prohibit businesses from
2 engaging in unreasonable, arbitrary or invidious discrimination.”].)

3 Prohibited unreasonable or invidious discrimination “‘emphasizes irrelevant differences’ or
4 ‘perpetuates irrational stereotypes.’” (*Georges v. Bank of America, N.A.* (9th Cir. 2021) 845
5 Fed.Appx. 490, 491 [cleaned up].) “This is consistent with the ‘fundamental purpose’ of the Unruh
6 Act, which is ‘the elimination of antisocial discriminatory practices—not the elimination of socially
7 beneficial ones.’” (*Id.* at 491 [quoting *Sargoy, supra*, 8 Cal.App.4th at 1049].) “[T]he Unruh Act
8 protects against intentional discrimination that is unreasonable, arbitrary, or invidious. This
9 important piece of legislation provides a safeguard against the many real harms that so often
10 accompany discrimination. For this reason, it is imperative we not denigrate its power and efficacy
11 by applying it to manufactured injuries.” (*Cohn, supra*, 169 Cal.App.4th at 526.)

12 As an “affirmative defense,” “[a] discriminatory policy or practice may be justified by a
13 showing that it is reasonable and not arbitrary, and is thus lawful under the Unruh Act.” (*DFEH v.*
14 *Arrowhead Motel* (1992) FEHC Dec. No. 92-12, 1992 WL 423842, *5.)² To determine whether the
15 distinction made is reasonable and non-invidious, “California courts have uniformly found
16 discriminatory treatment to be reasonable, and thus nonarbitrary, *where a strong public policy exists in*
17 *favor of such treatment.*” (*Sargoy, supra*, 8 Cal.App.4th at 1043.) In the context of the Unruh Act, public
18 policy supports protection of constitutional rights. (*Howe v. Bank of America N.A.* (2009) 179
19 Cal.App.4th 1443, 1451 [discrimination “may be justified by the constitutional right to personal
20 privacy”]; see also *Javorsky v. Western Athletic Clubs, Inc.* (2015) 242 Cal.App.4th 1386, 1399
21 [“legislative enactments are sufficient, but unnecessary, to evince the public policy.”]; *Martin v.*
22 *International Olympic Committee* (9th Cir. 1984) 740 F.2d 670, 677 [finding that Olympic committee’s
23 process for adding new events, even though it discriminated against women, “does not operate as a
24 blanket exclusion of any class of persons and is therefore not ‘arbitrary discrimination.’”].)

25 Under both the U.S. Constitution and the California Constitution, religion is protected.
26 (U.S. Const., amend. I; Cal. Const., art. I, § 4.) In light of these constitutional guarantees, the

27 _____
28 ² Prior to 2013, the DFEH litigated cases such as the present one before the administrative agency,
the Fair Employment & Housing Commission, which published its own opinions.

1 Unruh Act prohibits businesses from discriminating against customers (Civ. Code, § 51(b)) or other
2 businesses (Civ. Code, § 51.5(a)), on the basis of their religion, which is defined to include “all
3 aspects of religious belief, observance, and practice.” (*Id.* at subd. (e)(4).) Similarly, it is an unlawful
4 employment practice for an employer to discriminate against an employee on the basis of “religious
5 creed.” (Gov. Code, § 12940(a).) It is equally unlawful for an employer to make any distinction
6 among employees based on “religious belief or observance,” if it could accommodate such “belief
7 or observance” without undue hardship. (*Id.* at subd. (l); see also Lab. Code, § 511(d).) Both
8 “religious creed” and “religious observance” are defined to “include all aspects of religious belief,
9 observance, and practice.” (Gov. Code, § 12926(q); cf. *Carson v. Makin* (2022) 142 S.Ct. 1987, 2001
10 [“the prohibition on status-based discrimination under the Free Exercise Clause is not a permission
11 to engage in use-based discrimination”].)

12 Further, when the California Supreme Court required that same-sex marriage be permitted
13 throughout the State, it held that “affording same-sex couples the opportunity to obtain the
14 designation of marriage will not impinge upon the religious freedom of any religious organization,
15 official, *or any other person*” (*Marriage Cases, supra*, 43 Cal.4th at 854–855 [italics added] [citing Cal.
16 Const., art. I, § 4]), and emphasized that “th[e] belief that the right to marriage did not extend to
17 same sex couples” is not “irrational, ignorant or bigoted” or based on “invidious intent or purpose.”
18 (*Id.* at 856, fn.73.)

19 In response, Californians partially overruled *Marriage Cases* through a constitutional
20 amendment. Viewing a distinction between them, Californians left intact the holding that sexual
21 orientation is a protected characteristic under the Equal Protection Clause, and left intact sexual
22 minorities’ privacy rights under the Due Process Clause, *while at the same time* inserting a provision
23 that “[o]nly marriage between a man and a woman is valid or recognized in California.” (Cal.
24 Const., art. I, § 7.5.) The California Supreme Court then recognized this distinction made by a
25 majority of Californians. In line with the demographic data discussed above, the court
26 acknowledged that there can be space between the concepts of sexual orientation and same-sex
27 marriage, because Californians had enshrined this view in their Constitution. (See *Strauss v. Horton*
28 (2009) 46 Cal.4th 364, 408-411 & fn.8-10 [noting that the new constitutional provision “does not

1 purport to alter or affect the more general holding in the *Marriage Cases* that same-sex couples, as
2 well as opposite-sex couples, enjoy the constitutional right, under the privacy and due process
3 clauses of the California Constitution, to establish an officially recognized family relationship”].)

4 The will of a majority of the Californians and 31 States was then overruled by the U.S.
5 Supreme Court, when it held that same-sex marriage must be permitted throughout the entire
6 nation. But like the California Supreme Court, the U.S. Supreme Court made clear that “[m]any
7 who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable
8 religious or philosophical premises, and neither they nor their beliefs are disparaged here.”
9 (*Obergefell v. Hodges* (2015) 576 U.S. 644, 672.) Later, the U.S. Supreme Court reiterated this,
10 stating that “religious and philosophical objections to gay marriage are protected views and in some
11 instances protected forms of expression.” (*Masterpiece I, supra*, 138 S.Ct. at 1727.) And most
12 recently, the U.S. Supreme Court unanimously ruled that a Catholic organization’s offer to refer
13 same-sex couples to other agencies to be certified as foster parents was proper, and rejected that a
14 “non-discrimination polic[y] can brook no departure[.]” for a religious objector when the departure
15 does not lead to “gay persons and gay couples ... be[ing] treated as social outcasts or as inferior in
16 dignity and worth.” (See *Fulton v. City of Philadelphia* (2021) 141 S.Ct. 1868, 1882.)

17 Here, Defendant Cathy Miller is a devout Christian whose faith requires her to treat
18 marriage as a uniquely important sacrament. It also instructs her that marriage is only the union of
19 one man and one woman. (See Miller MSJ Decl., ¶¶ 20-24.) Defendants intend to prove that even if
20 the facts of this case constituted sexual orientation “discrimination,” the distinction made here by
21 Defendants was not arbitrary because:

22 (1) the view that marriage can only be between one man and one woman is a belief enshrined
23 in the California Constitution and protected by both the California and U.S. Constitutions, and
24 therefore cannot be considered invidious or perpetuating irrational stereotypes;

25 (2) the distinction that Defendants made here was not based upon the Real Parties’ sexual
26 orientation, but rather concerned protecting Defendants’ own religious rights to support a
27 fundamental tenet of their faith;

28

1 (3) Defendants’ offer to connect the Real Parties with another bakery ensured that they
2 would have actually received full and equal services services, thus confirming that Defendants made
3 a distinction concerning their reasonable and protected religious beliefs, and not with any intent to
4 harm the Real Parties, and in a manner that would have reasonably protected all parties’ rights; and

5 (4) Defendants do serve LGBT customers in other custom order requests and have
6 employed members of the LGBT community.

7 Defendants’ argument is also supported by Judge Lampe’s preliminary injunction ruling,
8 issued in the prior action in February 2018:

9 Here, Miller’s desire to express through her wedding cakes that marriage is a
10 sacramental commitment between a man and a woman that should be
11 celebrated, while she will not express the same sentiment toward same-sex
12 unions, is not trivial, arbitrary, nonsensical, or outrageous. Miller is
13 expressing a belief that is part of the orthodox doctrines of all three world
14 Abrahamic religions, if not also part of the orthodox beliefs of Hinduism and
15 major sects of Buddhism. That Miller’s expression of her beliefs is entitled
16 to protection is affirmed in the opinion of Justice Kennedy in *Obergefell v.*
17 *Hodges* (2015) 135 S. Ct. 2584, 192 L. Ed. 2d 609 wherein the Court
18 established that same-sex marriages are entitled to Equal Protection.
19 Therein, the Court noted: “[f]inally, it must be emphasized that religions,
and those who adhere to religious doctrines, may continue to advocate with
utmost, sincere conviction that, by divine precepts, same-sex marriage
should not be condoned. The First Amendment ensures that religious
organizations and persons are given proper protection as they seek to teach
the principles that are so fulfilling and so central to their lives and faiths, and
to their own deep aspirations to continue the family structure they have long
revered.” (*Id* at 2607.)

20 (*DFEH v. Miller* (2018) Cal.Super. No. BCV-17-102855, 2018 WL 747835, at *4.)

21 Defendants’ right to put forth this argument is fully supported by the above legal authorities
22 and the facts of this case. Thus, Plaintiff DFEH’s motion in limine should be denied.

23 IV. CONCLUSION

24 Through this motion in limine, Plaintiff DFEH is raising a straw man argument with the
25 hopes of undercutting and frustrating Defendants’ ability to put forth evidence to support their
26 actual arguments. Thus, Plaintiff DFEH’s motion no. 1 would not “provide any meaningful
27 guidance” to the parties (*Kelly, supra*, 49 Cal.App.4th at 670-671), and should be denied on that
28 basis.

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Respectfully submitted,
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Dated: July 18, 2022

By:



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15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF KERN

17 DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING, an agency of the State of
18 California,

19 Plaintiff,

20 v.

21 CATHY'S CREATIONS, INC. d/b/a
TASTRIES, a California Corporation; and
22 CATHARINE MILLER, an individual,
Defendants.

23 EILEEN RODRIGUEZ-DEL RIO and
24 MIREYA RODRIGUEZ-DEL RIO,
25 Real Parties in Interest.

CASE NO.: BCV-18-102633

IMAGED FILE

**DEFENDANTS' OPPOSITION TO
PLAINTIFF DFEH'S MOTION IN
LIMINE TO EXCLUDE EVIDENCE OR
ARGUMENT IN SUPPORT OF
AFFIRMATIVE DEFENSES NOS. 1, 3-
5, 7, 8, 10, 14, 15**

[No. 2 of 6]

Date: July 25, 2022
Time: 9:00 a.m.
Dept: J
Judge: Hon. J. Eric Bradshaw

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I. INTRODUCTION

Through its second motion in limine, Plaintiff DFEH seeks an order precluding Defendants “from presenting any evidence or argument at trial, including by way of oral testimony or documentary evidence or argument, that defendants are entitled to relief on their 1st (failure to state a claim), 3rd (unclean hands), 4th (abuse of process), 5th (trespass), 7th (estoppel), 8th (no injury), 10th (no attorneys fees), 14th (federal due process/DFEH is ‘unfair’ and ‘unbiased’), and 15th (federal equal protection clause/DFEH “single[d] out orthodox Christians ... for adverse treatment) affirmative defenses.” (Plt. MIL No. 2, Prop. Order.) Plaintiff DFEH’s sole basis for its motion is: (1) a request that the Court declare the contours of existing law; and (2) an argument from relevance.

As stated in the “Legal Standard” section of Defendants’ opposition to Plaintiff DFEH’s first motion in limine, it is improper to use a motion in limine as a pseudo-motion for summary adjudication. (*R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 333; *Johnson v. Chiu* (2011) 199 Cal.App.4th 775, 780; *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1593-1595; *Eng v. Brown* (2018) 21 Cal.App.5th 675, 698-699.) The Fifth Appellate District particularly disfavors such motions, stating that even if the arguments could have been properly raised on summary judgment, if the moving party had taken “the opportunity to seek summary adjudication in the procedurally appropriate manner (i.e., by filing a motion conforming to the requirements of Code Civ. Proc., § 437c) before trial,” by waiting and “chos[ing] to make the request at trial,” the motion cannot be granted. (*Pantoja v. Anton* (5th Dist. 2011) 198 Cal.App.4th 87, 124 [reversing Lampe, J].)

Here, this motion is a direct re-tread of Defendants’ failed motion for summary adjudication on these same affirmative defenses, where the Court ruled: “The plaintiff has failed to meet its burden as to the defendants’ affirmative defenses, has failed to, for example, show that the defendant do not possess evidence to support their defenses and that they cannot reasonably obtain the needed evidence.” (1st Trissell Decl., MIL Ex. 14, p.2.) Just like before, Plaintiff’s motion fails on the merits for failing to meaningfully address Defendants’ actual arguments. “[T]he general principle [is] that a party who seeks a court’s action in his favor bears the burden of persuasion thereon.” (*Aguilar v.*

1 *Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Plaintiff DFEH fails to meet its burden of
2 persuasion, so whether it is denied as procedurally improper, or it is denied on the merits, Plaintiff
3 DFEH’s second motion in limine should be denied.

4 II. ARGUMENT

5 A. First (Failure to State a Claim) & Eighth (No Injury) Affirmative Defenses

6 To begin, Plaintiff DFEH states that Defendants should be precluded from putting on any
7 evidence to support their argument that the complaint fails to state a claim. (Plt. MIL No. 2,
8 § II.A.1.) But—completely independent from their constitutional affirmative defenses—Defendants
9 have ample argument and evidence that supports that Plaintiff’s Unruh Act claim is deficient. (See
10 Def. Opp. to MIL No. 1.) If they did not, presumably the Court would have granted Plaintiff
11 DFEH’s motion for summary judgment, but it did not. (MIL Ex. 14.) This motion is nonsensical
12 and should thus be denied.

13 Relating to the Unruh Act claim, Plaintiff DFEH also argues that Defendants should be
14 precluded from submitting evidence that the Real Parties suffered “no injury” because actual
15 damages are not required to recover statutory damages, and the Real Parties have testified to their
16 emotional distress. (Plt. MIL No. 2, § II.A.5.) But this is putting the cart before the horse. As
17 Defendants explain in opposition to Plaintiff’s motion in limine no. 4, if Real Parties were not “bona
18 fide” patrons, there can be no injury and no standing, and the Unruh claim necessarily fails.
19 (*Thurston v. Omni Hotels Management Corporation* (2021) 69 Cal.App.5th 299, 305.) Thus, Plaintiff
20 DFEH is actually asking the Court to preclude Defendants from putting forth any contrary evidence
21 after Plaintiff DFEH attempts to meet its burden. All evidence on this point is relevant and should
22 not be excluded.

23 B. Third (Unclean Hands), Fourth (Abuse of Process), Fifth (Trespass), & 24 Seventh (Estoppel) Affirmative Defenses

25 Defendants’ third, fourth, fifth, and seventh affirmative defenses all deal with the same
26 nucleus of fact: the Real Parties’ false intent. (See Plt. MIL No. 2, §§ II.A.2-4.) As a result, in some
27 respects, aspects of this motion in limine are redundant of Plaintiff DFEH’s motion in limine nos. 4
28 and 5. For example, Plaintiff DFEH states that there is insufficient evidence to argue that the Real

1 Parties had a false intent. (Plt. MIL No. 2, p.5:6-17 & fn.2, p.6:8-22.) Defendants’ response to this
2 argument is laid out in opposition to Plaintiff DFEH’s motions in limine nos. 4 and 5.

3 Turning to Plaintiff DFEH’s legal arguments, it first argues that Unclean Hands and
4 Estoppel cannot apply as a matter of law because no “equitable principle may be invoked against a
5 governmental body where it would operate to defeat the effective operation of a policy adopted to
6 protect the public.” (*Westly v. California Public Employees’ Retirement System Bd. of Administration*
7 (2003) 105 Cal.App.4th 1095, 1118.) But Plaintiff DFEH cannot have it both ways. By bringing
8 claims on behalf of the Real Parties, Plaintiff DFEH can receive no more relief than the Real Parties
9 could, and thus becomes subject to equitable defenses. In the analogous EEOC context, “the
10 charging party’s conduct may have the effect of limiting the relief that the EEOC may obtain in court.
11 If, for example, he had failed to mitigate his damages, or had accepted a monetary settlement, any
12 recovery by the EEOC would be limited accordingly,” and so affirmative defenses aimed at the
13 complaining party are appropriate (even if disfavored). (*E.E.O.C. v. Rexnord Industries, LLC* (E.D. Wis.
14 2013) No. 11-CV-777, 2013 WL 12181707, at *3 [cleaned up] [finding “unclean hands” defense
15 disfavored, but refusing to find it barred as a matter of law] [collecting cases and quoting *E.E.O.C. v.*
16 *Waffle House, Inc.* (2002) 534 U.S. 279, 296].)

17 Plaintiff DFEH next argues that these claims fail because equitable claims cannot be applied to
18 “wholly defeat” statutory anti-discrimination claims, merely to reduce the remedies. (*Salas v. Sierra*
19 *Chemical Co.* (2014) 59 Cal.4th 407, 432; see *Armendariz v. Foundation Health Psychcare Services, Inc.*
20 (2000) 24 Cal.4th 83, 100.) Here, of course, Plaintiff DFEH seeks solely statutory damages. But
21 Plaintiff DFEH’s motion is premature. Although it is only seeking statutory damages, it is also seeking
22 injunctive relief and attorneys’ fees. How the trial evidence affects these remedies should be
23 addressed via post-trial briefing. (*Ohio House, LLC v. City of Costa Mesa* (C.D. Cal. 2021) 2021 WL
24 3557814, at *9 [“the Court finds that the [] unclean hands defense is not futile. While an unclean
25 hands defense may not be a complete bar to [the] claims, these defenses may be applicable in
26 determining the particular remedies available and are therefore ‘better addressed after a conclusive
27 determination has been reached as to liability.’”].)

1 Further, the relevance of the factual evidence undergirding these defenses is also relevant to
2 Plaintiff DFEH’s own claim for violation of the Unruh Act. (See Def. Opp. to MIL Nos. 4, 5.) In that
3 context, where the evidence is admissible anyway, this motion should be denied as irrelevant.
4 (*Petrosyan v. Hustedt* (C.D. Cal. 2015) 2015 WL 13917735, at *2 [“While the doctrine of unclean hands
5 will not act as a complete defense to housing discrimination and civil rights claims, Defendants will be
6 permitted to present evidence that certain Plaintiffs engaged in witness intimidation because that
7 bears on credibility.”].)

8 Plaintiff DFEH next argues that there can be no trespass defense because “[]where there is a
9 consensual entry, there is no tort, because lack of consent is an element of the wrong.” (Plt. MIL
10 No. 2, p.6:23-26.) But, of course, misrepresentation vitiates consent. (See *Food Lion Inc. v Capital*
11 *Cities/ABC, Inc.* (4th Cir. 1990) 194 F.3d 505, 518-519 [consent to entry invalid where defendants
12 posing as employees secretly filmed in nonpublic areas with intent to harm employer]; *Planned*
13 *Parenthood Federation of America, Inc. v. Center for Medical Progress* (9th Cir. 2018) 735 Fed.Appx. 241,
14 247 [“a consent [to entry] may be ineffective if gained by fraudulent misrepresentations”];
15 Restatement (Second) of Torts § 173 (1965) [“A conscious misrepresentation as to the purpose for
16 which admittance to the land is sought, may be a fraudulent misrepresentation of a material fact”].)

17 Plaintiff DFEH finally argues that Defendants’ abuse of process defense fails because “simply
18 filing or maintaining a lawsuit, even for an improper purpose, does not itself give rise to the abuse of
19 process tort or affirmative defense” because “any ulterior purpose must manifest itself in some
20 ‘willful act’ in the use of the process not proper in the regular conduct of the proceeding.” (Plt. MIL
21 No. 2, p.5:18-23.) But, of course, this action has the unique procedural aspect that Real Parties are not
22 merely litigating their own lawsuit knowing they cannot meet the elements of their claim (*i.e.*, lack of a
23 bona fide intent), but have coopted the California government to litigate such a claim on their behalf.

24 **C. Fourteenth (Due Process) & Fifteenth (Equal Protection) Affirmative Defenses**

25 Next, Plaintiff DFEH asks the Court to preclude Defendants from submitting evidence in
26 support of defenses under the Due Process and Equal Protection clauses of the U.S. Constitution.
27 (Plt. MIL No. 2, §§ II.A.7-8.) Like above, this motion is moot and pointless in that the evidence
28

1 supporting these defenses is the same evidence supporting Defendants' argument of non-neutrality
2 under the Free Exercise clause. (See Def. Opp. to MIL No. 3.)

3 **D. Tenth (No Attorneys' Fees)**

4 Lastly, Plaintiff DFEH argues that the Court should preclude Defendants from submitting
5 evidence regarding their defense that attorneys' fees should not be awarded. (Plt. MIL No. 2,
6 §§ II.A.6.) Plaintiff DFEH's sole argument is that an Unruh Act claim permits an award of
7 attorneys' fees to the prevailing plaintiff. (See Civ. Code, § 52(a).) In addition, the Court may award
8 fees to the DFEH in any action brought by it. (Gov. Code, § 12965(b).)

9 But, as Defendants noted when this issue came up on summary judgment, an award of
10 attorneys' fees is discretionary. (See *Bustos v. Global P.E.T., Inc.* (2017) 19 Cal.App.5th 558, 564
11 [awarding no fees because plaintiff had suffered no actual damages]; *Behne v. Microtouch Systems, Inc.*
12 (N.D. Cal. 1999) 58 F.Supp.2d 1096, 1100, aff'd (9th Cir. 2001) 11 Fed.Appx. 856 [similar].) This
13 motion is also premature. After the trial, after liability or lack of liability has been determined, the
14 Court at that time should entertain all evidence and argument in support of the propriety of an award
15 of fees to either party.

16 **III. CONCLUSION**

17 Plaintiff DFEH's second motion in limine is both procedurally and substantively defective,
18 and would provide no meaningful guidance to either the parties or the Court because the implicated
19 evidence is all relevant and admissible under other legal theories. Thus, Defendants respectfully
20 request that the Court deny the motion.

21 Respectfully submitted,

22 LIMANDRI & JONNA LLP

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24 Dated: July 18, 2022

25 By:

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27 Paul M. Jonna

28 Jeffrey M. Trissell

Attorneys for Defendants Cathy's

Creations, Inc. and Catharine Miller

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17 DEPARTMENT OF FAIR EMPLOYMENT
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21 CATHY'S CREATIONS, INC. d/b/a
TASTRIES, a California Corporation; and
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23 Defendants.

24 EILEEN RODRIGUEZ-DEL RIO and
MIREYA RODRIGUEZ-DEL RIO,
25 Real Parties in Interest.

CASE NO.: BCV-18-102633

IMAGED FILE

**DEFENDANTS' OPPOSITION TO
PLAINTIFF DFEH'S MOTION IN
LIMINE TO EXCLUDE EVIDENCE
THAT PLAINTIFF DFEH IS BIASED
OR FAILED TO ACT NEUTRALLY**

[No. 3 of 6]

Date: July 25, 2022
Time: 9:00 a.m.
Dept: J
Judge: Hon. J. Eric Bradshaw

Action Filed: Oct. 17, 2018

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I. INTRODUCTION

Through its third motion in limine, Plaintiff DFEH seeks an order precluding Defendants “from presenting any evidence or argument at trial, including by way of oral testimony or documentary evidence or argument, that DFEH was not neutral in its investigation and enforcement of the Unruh Civil Rights Act or that DFEH singled ‘out orthodox Christians ... for adverse treatment,’ or that DFEH has unclean hands or animus towards defendants based on Catharine Miller’s Christian religion and/or discriminated against defendants in any manner whatsoever.” (Plt. MIL No. 3, Prop. Order.) Plaintiff DFEH argues that (1) Defendants’ evidence as revealed during summary judgment and discovery is insufficient to actually show bias or animus; and (2) such evidence is irrelevant as a matter of law, or more prejudicial than probative.

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II. LEGAL STANDARD

“[M]otions in limine deal with *evidence*. May this particular document be admitted? May an expert witness testify to certain facts or conclusions? An in limine motion that seeks to exclude all evidence pertaining to part or all of a cause of action based on an argument that plaintiff lacks evidence to support part or all of the cause of action is but a disguised motion for summary adjudication.” (*Pantoja v. Anton* (5th Dist. 2011) 198 Cal.App.4th 87, 123 [reversing judgment due to improper grant of motion in limine] [quoting *R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 372 [conc. opn. of Rylaarsdam, J.]]) “The same goes for a motion in limine that claims only that a plaintiff cannot prove her case with a specified item of evidence, as opposed to claiming the item of evidence is inadmissible. Presented only with the argument that [the plaintiff] did not have enough evidence to establish that cause of action—not that the evidence [the plaintiff] had was irrelevant or otherwise inadmissible—the court should have denied the motion.” (*Id.*) “No matter how logical a moving party’s motion may sound, a judge generally should not be weighing the evidence on a motion in limine.” (*R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 333 [reversing judgment due to improper grant of motion in limine].)

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1 **III. ARGUMENT**

2 Plaintiff DFEH essentially asks the Court to grant a directed verdict on Defendants’
3 argument that Plaintiff DFEH’s prosecution is unconstitutional due to governmental hostility to
4 religion, under the Free Exercise clauses of the U.S. Constitution and California Constitution, and
5 the Due Process and Equal Protection clauses of the U.S. Constitution. This argument appears
6 within Defendants’ 11th, 12th, 14th, and 15th affirmative defenses.¹

7 Defendants anticipated Plaintiff DFEH’s argument and briefed it in their own motions in
8 limine nos. 7 and 8. Defendants’ motions in limine primarily address the relevance of the evidence,
9 and thus adequately respond to Plaintiff DFEH’s argument as to irrelevance. (See Plt. MIL No. 3,
10 §§ III.C, III.D, pp.8:14-9:28.) To avoid unnecessary repetition, Defendants refer the Court to that
11 briefing and its cited supporting evidence, and only here address matters that do not appear in that
12 briefing.

13 **A. Plaintiff DFEH’s Motion is Procedurally and Substantively Defective**

14 First, as noted above, the Fifth Appellate District has been clear that “a motion in limine that
15 claims only that a plaintiff cannot prove her case with a specified item of evidence, as opposed to
16 claiming the item of evidence is inadmissible” is improper and should be denied. (*Pantoja v. Anton*
17 (5th Dist. 2011) 198 Cal.App.4th 87, 123-124 [reversing Lampe, J.].) At trial, “the question of the
18 weight of the evidence was for the jury” and only after it is admitted may the court rule on a motion
19 for nonsuit or directed verdict. (*Id.*) Thus, Plaintiff DFEH’s motion—which asks the Court to weigh
20 Defendants’ evidence and grant a directed verdict—is per se improper and should be denied. (See Plt.
21 MIL No. 3, § III.B, p.7:19-8:13; see *id.* at § II.A, pp.4:3-5:4 [summarizing evidence supplied at
22 summary judgment]; *id.* at § II.B, p.5:5-6:18 [summarizing evidence supplied in discovery responses];
23 see also Def. MIL No. 8 [summarizing additional evidence].)

24 In any event, Defendants’ evidence is more than sufficient. “[T]he law generally makes no
25 distinction between circumstantial and direct evidence absent some affirmative indication in a statute

26 _____
27 ¹ Plaintiff DFEH’s motion references the Unclean Hands affirmative defense, but this is based
28 around the Real Parties’ conduct, not the DFEH’s conduct. (See Def. Opp. to MIL No. 2, § II.B;
Mann Decl., Ex. 1, Verified Answer, p.13:13-21.)

1 and that both types of evidence can be persuasive in discrimination cases”—including discrimination
2 by the government. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232.) Defendants’ MIL
3 Nos. 7-8 and Plaintiff’s MIL No. 3 capture almost all of the relevant evidence. But Defendants will
4 also highlight two more instances of circumstantially mischievous evidence:

5 (1) In response to evidence that Real Parties were testers, Mireya Rodriguez-Del Rio texted
6 that a DFEH lawyer “basically” informed her that Defendants “[we]re grasping at straws” because
7 “[t]hey’re scared of the blue wave that came in and washed a bunch of those Republican, hypocrites
8 out of office.” (3d Trissell Decl., Def. Trial Ex. 671.)

9 (2) Plaintiff DFEH’s and the Real Parties’ production of text messages was very limited,
10 producing only four pages of messages exchanged between the Real Parties and their friends Patrick
11 Grijalva and Samuel Salazar. (3d Trissell Decl., Def. Trial Ex. 31.) To obtain those text messages,
12 Defendants subpoenaed Patrick and Sam instead and obtained hundreds of pages from each of them.
13 Through those subpoenas, it became clear why Plaintiff DFEH had withheld the messages: the Real
14 Parties’ frequent and liberal use of the “N” word. (3d Trissell Decl., Def. Trial Ex. 32.) Comparing
15 the two productions also revealed that Patrick engaged in self-help by redacting references to the “N”
16 word through carefully taken screen-shots. (Compare Def. Trial Ex. 32; with Def. Trial Ex. 33.)

17 All prosecutors generally turn over communications with victims to the accused. (See, e.g.,
18 *Brady v. Maryland* (1963) 373 U.S. 83, 88; *People v. Superior Court* (2015) 61 Cal.4th 696, 711.) The
19 duty of the government to turn over exculpatory information also applies in civil prosecutions. (See
20 *E.E.O.C. v. Los Alamos Constructors, Inc.* (D.N.M. 1974) 382 F.Supp. 1373, 1383 & fn.5; see also *Sperry*
21 *& Hutchinson Co. v. F.T.C.* (S.D.N.Y. 1966) 256 F.Supp. 136, 142 [“In civil actions, also, the ultimate
22 objective is not that the Government ‘shall win a case, but that justice shall be done.’”].) Yet, despite
23 evidence that the Real Parties were hiding information—which goes directly to intent (see Def. Opp.
24 to MIL No. 4)—Plaintiff DFEH withheld this information.

25 **B. Plaintiff DFEH Misconstrues the Equal Protection Defense**

26 Second, Plaintiff DFEH misleadingly quotes Defendants’ Answer, asking the Court to
27 exclude any evidence or argument “that DFEH singled ‘our orthodox Christians ... for adverse
28 treatment.’” (Plt. MIL No. 3, p.2:2-3; see also *id.* at p.7:1-9 [“DFEH has not singled out Tastries for

1 Unruh Act enforcement.”].) Plaintiff DFEH merely cites this language because it is language that
2 Judge Lampe used in comments at a hearing and in his preliminary injunction order. (Plt. MIL No.
3 3, pp.3:3-4, 7:1-6 [“there’s no evidence before the Court that the Department [of Fair Employment
4 and Housing] is going around singling out Christian providers.”].)

5 Defendants’ Answer actually says, in its Fifteenth Affirmative Defense under the Equal
6 Protection Clause:

7 The DFEH’s interpretation and enforcement of the Unruh Act as applied
8 treat Miller’s and Tastries’ decisions to create speech and exercise their
9 religious beliefs differently from those similarly situated to them, thereby
10 violating their equal protection rights under the Fourteenth Amendment.
11 Specifically, the DFEH’s discriminatory interpretation and enforcement of
12 the Unruh Act infringes on Miller’s and Tastries’ fundamental rights,
13 including their free exercise, free speech, and due process rights. The
14 DFEH’s discriminatory interpretation and enforcement of the Unruh Act
15 single out orthodox Christians—a suspect class of marginalized and
16 disfavored people of faith—for adverse treatment. By infringing on Miller
and Tastries’ equal protection rights, the DFEH does not further any
compelling, or even legitimate, government interest in a narrowly tailored
way. Accordingly, the DFEH’s interpretation and enforcement of the Unruh
Act violate Miller’s and Tastries’ equal protection rights. Likewise, any
judgment in favor of the DFEH and the Rodriguez-Del Rios would violate
the defendants’ equal protection rights.

17 (Mann Decl., Ex. 1, Defendants’ Answer, p.17.)

18 Thus, through this Equal Protection affirmative defense, Defendants are not arguing that
19 Plaintiff DFEH is singling out “Orthodox Christians” or Tastries Bakery itself, but rather that the
20 legal interpretation that Plaintiff DFEH (erroneously) applies to the Unruh Act has the *effect* of
21 creating *disparate treatment* for people of faith. In this sense, the argument is very akin to
22 Defendants’ argument as to the non-neutrality of the Unruh Act under the Free Exercise clause for
23 exempting comparable conduct from its reach. (See Trial Brief, §§ 2.2.1, 2.2.2.) Thus, there is no
24 practical reason to grant Plaintiff DFEH’s motion in limine, as such evidence is relevant and
25 admissible to multiple arguments.

26 **C. Plaintiff DFEH Misconstrues the Due Process Defense**

27 Third, in terms of intentional disparate treatment, Plaintiff DFEH’s arguments are again
28 misleading. Defendants’ Due Process argument matches its argument that Plaintiff DFEH’s

1 investigation and prosecution has not been neutral under *Masterpiece Cakeshop*, thereby triggering
2 strict scrutiny under both the California and federal Free Exercise provisions. (See Trial Brief,
3 § 2.2.3.) Much of Defendants’ evidence is laid out in their motions in limine nos. 7-8, and that
4 briefing is not repeated here, but incorporated by reference.

5 Here, with respect to its “bias” argument, Plaintiff DFEH states:

6 Tastries states that the “DFEH has determined that other cake artists, in a
7 similar situation, do not violate the Unruh Act [and] this appears to be
8 simply an individualized prosecution targeting Defendants for their
9 disfavored religious beliefs.” (Mann Decl., **Exhibit 2**, 72:18-73:12.) ¶ Despite
10 all these mischaracterizations of the facts and unfounded accusations, during
11 a meet and confer, defendants admitted they had no evidence in support of
12 their DFEH bias assertion. (Mann Decl., Exhibit 3, DFEH 4/7/2022 letter,
13 p. 2 [“Finally, regarding Special Interrogatory Nos. 32 and 34 (facts
14 supporting contention that DFEH has been unfair/biased and/or that DFEH
has treated other defendants differently), DFEH requested more specifics
(i.e., whether defendant intends to offer evidence that other “cake artists, in
a similar situation” were treated differently by DFEH). You stated that
defendants had no such evidence and, therefore, DFEH requests that
defendants amend this response accordingly.”])

15 (Plt. MIL No. 3, p.6:7-18.)

16 Plaintiff’s Exhibit, 2 attached to the declaration of Mr. Mann, is Defendants’ Special
17 Interrogatory responses. Those responses, beyond incorporating by reference the other bias
18 evidence (as laid out in Def. MIL Nos. 7-8), stated:

19 The Unruh Act states, “[t]his section shall not be construed to confer any
20 right or privilege on a person that ... is applicable alike to persons [regardless
21 of protected characteristic].” (Civ. Code, § 51(c).) Plaintiff DFEH
22 understands this, thus, it generally “does not use its enforcement authority
23 under the Unruh Civil Rights Act to compel speech,” and Plaintiff DFEH
24 denies that “cake artists violate the Unruh Act by declining to create custom
25 cakes that express messages they would not communicate for anyone.” (See
DFEH Resp. to Miller RFA’s Nos. 6, 7, 22; DFEH Resp. to Miller FROGs
No. 14.1.) But this provides an avenue for an unwritten gerrymander—one
that the DFEH has exploited.

26 In other words, Plaintiff DFEH admitted—in its binding responses to requests for
27 admission—that this is the one and only case it has pursued under the Unruh Act to compel speech.
28 (Code Civ. Proc., § 2033.410(a) [“Any matter admitted in response to a request for admission is

1 conclusively established against the party making the admission in the pending action”]; *Murillo v.*
2 *Superior Court* (2006) 143 Cal.App.4th 730, 735–736.)

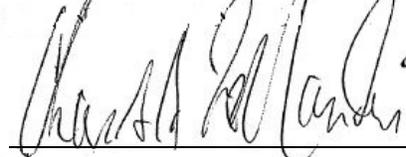
3 Plaintiff DFEH’s citation to one piece of evidence, that it does not find compelling, is
4 insufficient as a matter of law to dispose of Defendants’ affirmative defenses.²

5 **IV. CONCLUSION**

6 In sum, Plaintiff DFEH’s third motion in limine is improper for seeking a directed verdict
7 on a contested issue before Defendants have the opportunity to put forth their case. As the Fifth
8 Appellate District unequivocally instructed, such a motion is improper and should be denied.
9 (*Pantoja v. Anton* (5th Dist. 2011) 198 Cal.App.4th 87, 123.) Moreover, even on the merits, such a
10 motion should fail because Defendants have raised more than enough evidence to warrant full
11 consideration of their defense. (See Def. MILs Nos. 7-8.)

12
13 Respectfully submitted,

14 LiMANDRI & JONNA LLP

15
16 

17 Dated: July 18, 2022

18 By:

19 Charles S. LiMandri
20 Paul M. Jonna
21 Mark D. Myers
22 Jeffrey M. Trissell
23 Robert E. Weisenburger
24 Milan L. Brandon II
25 *Attorneys for Defendants Cathy’s*
26 *Creations, Inc. and Catharine Miller*

27 _____
28 ² Plaintiff DFEH also cites Judge Lampe’s order denying Defendants’ anti-SLAPP motion. But that language is wholly inapposite as it dealt with the anti-SLAPP statute. (Plt. MIL No. 3, p.6:24-7:1.)

Exhibit II

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14
15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF KERN

17 DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING, an agency of the State of
18 California,

19 Plaintiff,

20 v.

21 CATHY'S CREATIONS, INC. d/b/a
TASTRIES, a California Corporation; and
22 CATHARINE MILLER, an individual,

23 Defendants.

24 EILEEN RODRIGUEZ-DEL RIO and MIREYA
RODRIGUEZ-DEL RIO,

25 Real Parties in Interest.

CASE NO.: BCV-18-102633

IMAGED FILE

**DEFENDANTS' OPPOSITION TO
PLAINTIFF DFEH'S MOTION IN
LIMINE TO EXCLUDE EVIDENCE
THAT REAL PARTIES' WERE
SHOPPING FOR A LAWSUIT, HAD
A VINDICTIVE DESIRE TO SHUT
DEFENDANTS DOWN, AND
SUFFERED NO EMOTIONAL
DISTRESS**

[No. 4 of 6]

Date: July 25, 2022

Time: 9:00 a.m.

Dept: J

Judge: Hon. J. Eric Bradshaw

Action Filed: Oct. 17, 2018

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I. INTRODUCTION

Through its fourth motion in limine, Plaintiff DFEH seeks an order precluding Defendants “from presenting any evidence or argument at trial, including by way of oral testimony or documentary evidence or argument, that [1] Real Parties in Interest were ‘shopping for a lawsuit,’ [2] wanted to see Tastries Bakery shut down and Cathy go bankrupt, [3] sought to obtain media attention thereby causing numerous bigoted activists to begin attacking Cathy and Tastries Bakery over their Christian beliefs, and [4] suffered no shock or emotional distress when defendants refused them service.” (Plt. MIL No. 4, Prop. Order [numbers added].)

Plaintiff DFEH’s basis for its motion is: (1) an argument that the Real Parties’ motives are not relevant, or evidence concerning it is more prejudicial than probative; and (2) an argument that Defendant Miller and third-party Benitez’s testimony is improper lay opinion that is speculative and without foundation.

II. ARGUMENT

A. The Real Parties’ Intent and Motive is at Issue in this Case

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The main defect with Plaintiff DFEH’s fourth motion in limine is that the Real Parties’ motive is *directly relevant* in this case; indeed it is an element that Plaintiff DFEH must prove. The first element under BAJI for an Unruh Act claim is that the plaintiff was discriminated against, depriving the plaintiff of the full and equal services in a business establishment. (BAJI No. 7.92(1).) To be “discriminated against,” a plaintiff must show that he “actually possess[ed] a bona fide intent to sign up for or use [the defendant’s] services.” (*White v. Square, Inc.* (2019) 7 Cal.5th 1019, 1032.) Stated differently, in order to establish “injury,” the plaintiff must show that he was an actual “patron[] of a business establishment.” (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 170.) Thus, in cases where the plaintiff “never intended” to use the defendant’s services, but instead had a “shakedown strategy,” there can be no Unruh Act violation. (*Thurston v. Omni Hotels Management Corporation* (2021) 69 Cal.App.5th 299, 305 [discussing element at length]; see also *Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1224 [“standing ... is established where a disabled plaintiff can show he or she actually presented himself or herself to a business or public place with

1 the intent of purchasing its products or utilizing its services in the manner in which those products
2 and/or services are typically offered to the public”].)

3 Thus, for its Unruh Act claim, Plaintiff DFEH must prove that Real Parties actually intended
4 to purchase a wedding cake from Defendants, like any other patron, and were not seeking to instead be
5 denied services and engage in a “shakedown strategy.” All evidence concerning Real Parties’ motive is
6 thus directly relevant.

7 With respect to [1], whether Real Parties were “shopping for a lawsuit,” evidence of the Real
8 Parties’ visit to Party Palace and interaction with Ms. Benitez is relevant to their “intent” in this case.
9 (See Evid. Code, § 1101(b) [“Nothing in this section prohibits the admission of evidence that a person
10 committed a ... other act when relevant to prove some fact [] such as ... intent”]; *People v. Yeoman*
11 (2003) 31 Cal.4th 93, 121 [“To be admissible to show intent, however, the prior conduct and the
12 charged offense need only be sufficiently similar to support the inference that defendant probably
13 harbored the same intent in each instance.”]; *Wright v. Rogers* (1959) 172 Cal.App.2d 349, 363
14 [“Where fraud is charged, evidence of other frauds of fraudulent representations of like character,
15 committed by the same parties at or near the same time is admissible to prove intent.”].)

16 Similarly relevant to intent is Real Parties’ odd (aggressive) demeanor at the time of the
17 incident and inability or refusal to answer simple questions about their wedding plans. (*People v.*
18 *Rodriguez* (2014) 58 Cal.4th 587, 629-631 [evidence of a party’s demeanor is relevant to establish
19 intent]; *People v. Covarrubias* (2011) 202 Cal.App.4th 1, 22 [the party’s “claim ... was implausible
20 since he was unable to provide either the name of the person who had hired him or the location”
21 and he “made a number of illogical, inconsistent, and inculpatory statements”].)

22 With respect to [2], that Real Parties wanted to see Defendants go bankrupt, Plaintiff DFEH
23 solely cites Defendants’ interrogatory responses, where they summarize the deposition testimony.
24 (See Mann Decl., Ex. 2, p.14:4-14.) This is relevant both to intent and impeachment. With four key
25 individuals present at the cake tasting and planning for the Real Parties’ wedding (Eileen, Mireya,
26 Patrick, and Samuel), they have regularly been unable to keep their stories straight. Thus, in their
27 depositions, Eileen and Mireya both testified that they had no desire to see Tastries shut down, but
28 this was contradicted by both Sam and Patrick. Sam testified that they told him: “Basically that the

1 goal is for the bakery to close, to not be in business,” and testified “Yes,” that Eileen and Mireya
2 “said ... that they should be closed, they should be shut down.” (3d Trissell Decl., MIL Ex. 27,
3 Samuel Depo., 94:16-95:14.) Patrick similarly said “Both of them” told him that “in this case they
4 want to see Cathy’s bakery shut down.” (MIL Ex. 28, Patrick Depo., 82:2-9.)

5 Turning to [3], that the Real Parties and Patrick and Sam sought media attention, this is
6 again directly relevant to whether they were engaged in a “shakedown strategy.” Through the media
7 attention, the Real Parties both placed enormous pressure on Defendants and obtained valuable,
8 free wedding services. (*People v. Rivera* (2019) 7 Cal.5th 306, 332 [“subsequent conduct may
9 constitute circumstantial evidence of intent at the time of the offense”].) This is also relevant to
10 impeachment, as Defendants were able to establish that some of the Real Parties’ public comments
11 were false (MIL Ex. 29, Eileen Depo., pp.77:4-78:12), and to force the Real Parties to admit that they
12 authored other public comments that they denied authoring in verified discovery responses. (MIL
13 Ex. 29, Eileen Depo., pp.84:7-87:19.)

14 Finally, [4], Plaintiff DFEH’s argument regarding the Real Parties’ emotional distress is
15 confused. Defendants have never argued that the Real Parties did not suffer emotional distress, as
16 Defendants have no personal knowledge as to that (and Plaintiff DFEH cites to nothing).
17 Defendant Miller did testify that during the incident, the Real Parties were aggressive. (Mann
18 Decl., Ex. 10, Miller MSJ Decl., ¶ 16.) Ms. Benitez also opined that the allegation that the Real
19 Parties suffered emotional distress did not “make sense” to her in light of their testing activities at
20 her wedding venue. (Mann Decl., Ex. 9, Benitez Decl., ¶ 4.) Defendants do not intend to argue that
21 Real Parties *did not* suffer emotional distress, they simply seek a motion in limine precluding them
22 from arguing that they *did* suffer emotional distress. (See Def. MIL No. 3.)

23 **B. Defendants’ Testimony is Not Speculative**

24 Plaintiff DFEH next argues that Defendant Miller’s and Ms. Benitez’s testimony would be
25 entirely speculative and thus inadmissible. But Plaintiff DFEH fails to provide meaningful specifics.
26 Some of the testimony that Plaintiff DFEH cites—from Defendants’ special interrogatory responses
27 summarizing the Real Parties’ depositions—will be elicited from the Real Parties themselves. In that
28 vein, the Real Parties’ themselves testified to their own motives. To the extent that Plaintiff DFEH

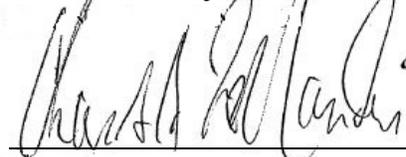
1 solely contends that Defendant Miller and Ms. Benitez cannot testify to Real Parties' demeanor, and
2 their conclusions flowing from that demeanor, this is simply incorrect. (*Rodriguez, supra*, 58 Cal.4th at
3 629-631 [a witness can testify to another's demeanor based on personal knowledge of the interaction;
4 testimony is not speculative].) To be sure, some answers could be speculative, but descriptions of an
5 individual's demeanor is not speculative, but based on personal knowledge and perception. (*Id.*) Thus,
6 Plaintiff DFEH's motion ultimately boils down to a request that the Court issue a declaration
7 regarding existing law (i.e., speculative testimony is inadmissible), untethered to concrete evidence,
8 which is improper and should be denied.

9 **III. CONCLUSION**

10 Through this motion in limine, Plaintiff DFEH appears to have seriously misconstrued the
11 law, forgetting a key element of its own claim: Real Parties' intent. Once it is made clear that Real
12 Parties' intent is at issue in this case, evidence relating to intent is relevant and should not be
13 excluded.

14
15 Respectfully submitted,

16 LIMANDRI & JONNA LLP

17 

18 Dated: July 18, 2022

19 By:

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21 Paul M. Jonna
22 Mark D. Myers
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15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF KERN

17 DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING, an agency of the State of
18 California,

19 Plaintiff,

20 v.

21 CATHY'S CREATIONS, INC. d/b/a
TASTRIES, a California Corporation; and
22 CATHARINE MILLER, an individual,
Defendants.

23 EILEEN RODRIGUEZ-DEL RIO and MIREYA
24 RODRIGUEZ-DEL RIO,
25 Real Parties in Interest.

CASE NO.: BCV-18-102633

IMAGED FILE

**DEFENDANTS' OPPOSITION TO
PLAINTIFF DFEH'S MOTION IN
LIMINE TO EXCLUDE EVIDENCE
OF SOCIAL MEDIA HARASSMENT
AND CRIMINAL ACTIVITY THAT
RESULTED FROM REAL PARTIES'
PUBLIC STATEMENTS**

[No. 5 of 6]

Date: July 25, 2022
Time: 9:00 a.m.
Dept: J
Judge: Hon. J. Eric Bradshaw
Action Filed: Oct. 17, 2018

1 **I. INTRODUCTION**

2 Through its fifth motion in limine, Plaintiff DFEH seeks an order precluding Defendants
3 “from presenting any evidence or argument at trial, including by way of oral testimony or
4 documentary evidence or argument regarding the alleged defamatory social media crusade and
5 criminal acts committed against defendants after they refused to take the wedding cakes order of
6 Real Parties in Interest Eileen and Mireya Rodriguez-Del Rio based on their sexual orientation.”
7 (Plt. MIL No. 4, Prop. Order.)

8 Plaintiff DFEH’s basis for its motion is: (1) that the online and real-world backlash that
9 Defendants suffered is not relevant, or more prejudicial than probative; and (2) that “there is no
10 evidence that the Rodriguez-Del Rios caused or directed multitudes of strangers on the internet to
11 attack defendants via social media or in person.” (Plt. MIL No. 5, p.3:9-11.)

12 **II. ARGUMENT**

13 This motion in limine is analogous to Defendants’ own motion in limine no. 12. Thus,
14 Defendants refer the Court to that briefing and only add here additional material not addressed
15 therein. As stated in other briefing, the Real Parties’ intent is directly relevant to the Unruh Act
16 claim in this action. (See Def. Opp. to MIL No. 4; Def. MIL No. 12.) Further Plaintiff DFEH’s
17 intent is directly relevant to the government neutrality aspect of Defendants’ Free Exercise defense.
18 (See Def. MIL Nos. 7, 12.) And Real Parties’ intent, and all surrounding circumstances including
19 the actual crimes that Defendants and their employees suffered, are directly relevant to the strict
20 scrutiny analysis under the First Amendment. (See Def. MIL No. 12.)

21 The real issue then is whether the evidence Defendants seek to introduce is sufficiently tied
22 to the Real Parties. As stated by Plaintiff DFEH, “Defendants’ accusations against Real Parties are
23 based on a conspiracy theory without any supporting evidence.” (Plt. MIL No. 5, p.6:9-10.) What
24 Plaintiff DFEH means is that it does not find Defendants’ evidence compelling. But this is not
25 sufficient for the grant of a motion in limine, for “[a]s a general rule, a conspiracy can only be
26 established by circumstantial evidence.” (*People v. Steccone* (1950) 36 Cal.2d 234, 237-238.) In ruling
27 on this motion, meant to foreclose an affirmative defense, “the court must apply the restrictive
28 standard of a nonsuit, interpreting the evidence most favorably to [Defendants’] case and resolving

1 all presumptions, inferences and doubts in favor of [Defendants].” (*Kinda v. Carpenter* (2016) 247
2 Cal.App.4th 1268, 1285-1286.)

3 And beyond analyzing mere relevance, the court needs to rule “with an appreciation of the
4 offering party’s need for evidentiary richness and narrative integrity in presenting a case” because
5 “[e]vidence [] has force beyond any linear scheme of reasoning, and as its pieces come together a
6 narrative gains momentum, with power not only to support conclusions but to sustain the
7 willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest
8 verdict.” (*Old Chief v. U.S.* (1997) 519 U.S. 172, 183, 187.) “A convincing tale can be told with
9 economy, but when economy becomes a break in the natural sequence of narrative evidence, an
10 assurance that the missing link is really there is never more than second best.” (*Id.*; see also *U.S. v.*
11 *Klock* (9th Cir. 2001) 8 F.App’x 620, 622 [finding no prejudice in admitting testimony about the
12 “firearms and a general militaristic atmosphere” of an anti-government group at a seminar
13 defendant attended to explain the background of the witness’s actions].)

14 Here, Defendants intend to argue that Real Parties’ motive and intent—relevant both to the
15 Unruh Act claim, the strict scrutiny analysis under the First Amendment, and Plaintiff DFEH’s
16 neutrality (through ratification)—can be shown through the evidence of Real Parties’ efforts to stir
17 up a media storm, the resulting media storm, and the resulting criminal conduct taken against
18 Defendants. This will be done through a careful piecing together of both direct and circumstantial
19 evidence.

- 20 • Defendants have received requests for same-sex weddings very infrequently, less
21 than one per year, and yet received two requests for same-sex weddings on August
22 26, 2017.
- 23 • Real Parties stated that they rejected prior bakeries because they did not like the taste
24 of their cakes, but did not taste Tastries sample cupcakes before allegedly coming to
25 the conclusion that they wanted to purchase a Tastries wedding cake.
- 26 • Real Parties’ demeanor on August 26, 2017, when they visited Tastries Bakery, was
27 extremely odd and confusing to Defendant Miller, and then became very aggressive
28 and hostile.

- 1 • Early in the afternoon on August 26, 2017, both couples immediately posted
2 disparaging comments online. (See 2d Trissell Decl., MIL Ex. 20 [post by Ted G.
3 Freitas].) Eileen, Mireya, and their friend Samuel all posted online. (3d Trissell
4 Decl., Def. Trial Ex. 553 [Eileen post]; Ex. 554 [Mireya post]; Ex. 555 [Eileen
5 review]; Ex. 550 [Samuel post].)
- 6 • Real Parties also immediately contacted LGBT activists to inform them of the
7 incident, including local activist Whitney Weddell. (Def. Trial Ex. 557-09.)
- 8 • Real Parties tagged dozens of people in their social media posts, causing the posts to
9 go viral. (Def. Trial Ex. 568.) Samuel Salazar believes that it is a reasonable
10 conclusion that Eileen tagged so many people for the purpose of seeking public
11 attention. (3d Trissell Decl., MIL Ex. 27, Samuel Depo., 83:13-84:7.)
- 12 • Eileen later admitted that her social media posts contained inaccurate statements.
13 (MIL Ex. 29, Eileen Depo., pp.77:4-78:12.)
- 14 • Eileen also later admitted that the DFEH’s verified discovery response, where it
15 denied that she made a specific online post, was false. (MIL Ex. 29, Eileen Depo.,
16 pp.84:7-87:19.)
- 17 • Very quickly after the Real Parties left Tastries Bakery, in the afternoon of August
18 26, 2017, there were already media stories being published, including media vans in
19 the Tastries’ parking lot interviewing customers by 4:30 p.m.
- 20 • Patrick texted Mireya: “Cathy f’ed up big time and she will learn the hard way.
21 Karma will come to get her ass.” (Def. Trial Ex. 559.) Samuel agreed that this was an
22 appropriate sentiment. (MIL Ex. 27, Samuel Depo., 71:12-19.) Eileen didn’t disagree
23 with this sentiment. (MIL Ex. 29, Eileen Depo., pp.188:6-10.)
- 24 • Eileen “liked” various negative Facebook comments, threatening physical harm to
25 Defendants, including threats to “whoop her ass” and statements that Defendants
26 “need a blasting.” (MIL Ex. 29, Eileen Depo., pp.78:13-84:1, 125:23-127:12.)¹

27 ¹ (See *Bland v. Roberts* (4th Cir. 2013), 730 F.3d 368, 386 [“clicking on the ‘like’ button literally
28 causes to be published the statement that the User ‘likes’ something, which is itself a substantive

- 1 • When shown similar negative online reviews and hateful comments, Samuel
2 admitted to knowing several of the authors (MIL Ex. 27, Samuel Depo., pp.74:2-
3 76:25, 79:5-80:3, 81:16-82:4), as did Patrick. (MIL Ex. 28, Patrick Depo., 84:16-
4 85:24.)
- 5 • Samuel also agreed that some of those comments would be inciting violence. (MIL
6 Ex. 27, Samuel Depo., 77:13-17.)
- 7 • When shown those same negative online reviews and hateful comments, Mireya
8 refused to condemn them, repeatedly saying “I don’t agree or disagree.” (MIL Ex.
9 30, Mireya Depo., pp.127:1-131:21.)
- 10 • Patrick says that he has seen stuff like the above negative online comments in his
11 personal community in response to perceived opposition to LGBT rights. (MIL Ex.
12 28, Patrick Depo., 87:14-18.)
- 13 • Defendants and their employees ultimately were the victims of several crimes,
14 including a horrific assault of an employee, vandalism directed at Defendant Miller’s
15 car, and other harassment of Tastries’ employees.

16 Circumstantial evidence, like the above, can be highly persuasive when presented all
17 together. Thus, in *Kinda*, the Court of Appeal reversed the judgment upon concluding that the trial
18 court had improperly granted a motion in limine by not drawing all available inferences from
19 circumstantial evidence in the opposing party’s favor. (*Kinda v. Carpenter* (2016) 247 Cal.App.4th
20 1268, 1285-1286.) There, in a commercial landlord-tenant dispute, the tenant obtained an injunction
21 against the landlord evicting him. Shortly thereafter, negative online Yelp reviews appeared
22 concerning the tenant’s business. The Court of Appeal held that a jury could have inferred that the
23 landlord was the author from five pieces of evidence that were all circumstantial:

24 _____
25 statement.... That a user may use a single mouse click to produce that message ... instead of typing
26 the same message with several individual key strokes is of no constitutional significance.”]; *Rainsy v.*
27 *Facebook, Inc.* (N.D. Cal. 2018) 311 F.Supp.3d 1101, 1114-1115 & fn.2 [“Here, given that a ‘like’ or
28 ‘liking’ a Facebook page is speech that communicates approval, a ‘like’ or ‘liking’ constitutes
‘content’ as information concerning the meaning of a communication. The communication
conveyed by ‘liking’ a Facebook page is approval.”.]

1 (1) the date and fact of the issuance of the June 1, 2011 temporary restraining
2 order; (2) the Yelp reviews posted on June 1, June 2, and June 3, 2011; (3)
3 Ms. Kinda's testimony regarding her efforts to verify the jobs described and
4 determine which customers, if any, posted the reviews; (4) the subpoenas
5 served on Yelp, Comcast, and AT&T, and the responsive records; and (5)
6 Mr. Herardian's expert testimony regarding IP addresses....

7 (*Id.* at 1290.)

8 Here, Real Parties, or their companions Patrick and Sam, admitted to stoking an aggressive
9 media and public backlash against Defendants. They admitted that they had seen similar negative
10 comments from their own community previously. Whether this shows a purely individualized
11 "shakedown strategy" to obtain free wedding services, or a more general "shakedown strategy" to
12 push forward supposed LGBT rights, it calls into question whether they had a "bona fide" intent to
13 purchase Tastries' services. (See *People v. Bivert* (2011) 52 Cal.4th 96, 117 [evidence that defendant
14 was a racist was relevant to intent and therefore admissible].)

15 Further, Real Parties admitted that this kind of hostility and backlash was familiar to them in
16 their community (at least their own, personal bubble), and when presented with it, they did not
17 condemn it. Thus, other evidence of conduct by that community is relevant to showing Real Parties'
18 intent. (See *U.S. v. Skillman* (9th Cir. 1990) 922 F.2d 1370, 1373 [no error in admitting evidence
19 relating to Skinheads where "[t]here was no evidence that [defendant] was a member of the
20 skinheads" but merely showed alliance with the beliefs of such groups]; *U.S. v. Santiago* (9th Cir.
21 1995) 46 F.3d 885, 890 [finding sufficient foundation to discuss Mexican mafia where the defendant
22 had "associated with gang members on several occasions, including the night before the murder."].)

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III. CONCLUSION

Through this motion in limine, Plaintiff DFEH seeks to whitewash this prosecution, stripping the Court of the actual story. Although the most important legal aspects of this case are discussed in Plaintiff's motion in limine no. 1, and Defendants' opposition thereto, this motion in limine concerns another very important aspect of this case. Plaintiff DFEH's wish that it would just go away, that all of the hate and crimes that Defendants suffered could be swept under the rug, is simply more evidence of Plaintiff DFEH's lack of neutrality. The motion should be denied.

Respectfully submitted,
LiMANDRI & JONNA LLP



Dated: July 19, 2022

By: _____
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Exhibit KK

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17 DEPARTMENT OF FAIR EMPLOYMENT
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TASTRIES, a California Corporation; and
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23 Defendants.

24 EILEEN RODRIGUEZ-DEL RIO and MIREYA
RODRIGUEZ-DEL RIO,

25 Real Parties in Interest.

CASE NO.: BCV-18-102633

IMAGED FILE

**DEFENDANTS' OPPOSITION TO
PLAINTIFF DFEH'S MOTION IN
LIMINE TO EXCLUDE THREE
PIECES OF IRRELEVANT AND
PREJUDICIAL EVIDENCE RELATED
TO WITNESSES**

[No. 6 of 6]

Date: July 25, 2022

Time: 9:00 a.m.

Dept: J

Judge: Hon. J. Eric Bradshaw

Action Filed: Oct. 17, 2018

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I. INTRODUCTION

Through its sixth motion in limine, Plaintiff DFEH seeks an order precluding Defendants “from presenting any evidence or argument at trial, including by way of oral testimony or documentary evidence or argument, that (1) Real Party in Interest Mireya Rodriguez-Del Rio used the ‘n-word’ in a private text message; and (2) that witness Samuel Salazar was arrested for misdemeanor petty theft in 2005 and, a couple years later, was arrested for not paying the fine related to the misdemeanor, which he then paid; and (3) that he was stopped for drinking intoxicated in 2008 but no charges were brought against him and no DUI was issued.” (Plt. MIL No. 4, Prop. Order.) Plaintiff DFEH’s basis for its motion is the evidence is irrelevant or more prejudicial than probative.

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II. ARGUMENT

A. Samuel Salazar’s Criminal History

As stated in Mr. Salazar’s deposition, he has had a few interactions with law enforcement. (3d Trissell Dec., Ex. 27, Samuel Depo., pp.20:4-22:9.) With respect to his drinking incident, Defendants do not intend to ask Mr. Salazar about it because he was not charged with any offence and let off with a warning after spending a night in jail. (See *People v. Forster* (1994) 29 Cal.App.4th 1746, 1757 [finding felony DUI conviction to be crime of moral turpitude, but not misdemeanor DUI].)

However, with regard to the theft incident, Mr. Salazar stole approximately \$1,000 from his retail employer through a fake return scheme. (MIL Ex. 27, Samuel Depo., p.21:3-15.) “[P]etty theft [is] a crime involving moral turpitude.” (*In re Honoroff* (1975) 15 Cal.3d 755, 758; see *People v. Waldecker* (1987) 195 Cal.App.3d 1152, 1156 [“The burglary, petty theft and receiving stolen property convictions necessarily involved moral turpitude for impeachment purposes.”]; *Kirby v. Alcoholic Beverage Control Appeals Bd.* (5th Dist. 1969) 270 Cal.App.2d 535, 538 [“Unquestionably, this crime [of petty theft] involved moral turpitude”].) Further, theft from an employer—to whom an employee owes a duty of loyalty—doubly makes the crime one of moral turpitude. (See *People v. Burnett* (2003) 110 Cal.App.4th 868, 881-882 [noting that trial court had found that “theft of a van and tools belonging to defendant’s employer, Pacific Bell,” was a crime of moral turpitude].)

1 Defendants believe they should be allowed to impeach Mr. Salazar through his conviction
2 for theft from his employer, and later arrest for failing to pay the resulting fine. This evidence goes
3 directly to Mr. Salazar’s honesty and credibility.

4 **B. Real Parties’ Use of the “N” Word**

5 Plaintiff DFEH says it seeks to exclude Real Party Mireya Rodriguez-Del Rio’s use of the
6 “N” word “in *a private text message.*” (Plt. MIL No. 6, pp.2:1, 3:4 [italics added].) As phrased, it is
7 unclear whether the motion in limine seeks to exclude all of Real Parties’ uses of the “N” word in
8 text messages, including the two times by Mireya (Def. Trial Ex. 32 [SAM007, SAM0121]), and the
9 three times by Eileen. (Def. Trial Ex. 32 [SAM0082, SAM0104, SAM0244-45].)

10 Defendants oppose scrubbing the Real Parties’ text messages of their use of the “N” word
11 for several reasons. *First*, Plaintiff DFEH refused to produce these text messages between Eileen,
12 Mireya, Patrick, and Sam. Plaintiff DFEH and Real Parties only produced very few, self-serving
13 pages of text messages with those four individuals. (Def. Trial Ex. 31 [DFEH00289-294].) Thus, to
14 obtain the text messages, Defendants had to subpoena Patrick and Sam themselves.

15 *Second*, when Patrick and Sam produced their documents, there were no references to the
16 “N” word in Patrick’s production. Both third-parties took screenshots of their text message strings
17 and then printed them out. Comparing the productions made clear that Patrick had been more
18 careful in his screenshots to omit references to the “N” word. (Compare Def. Trial Ex. 32
19 [SAM0244-45]; with Def. Trial Ex. 33 [PAT0018].) It remains unclear whether the five references
20 that slipped through in Sam’s production were mere mistakes, with more references also
21 surreptitiously redacted.

22 Thus, Real Parties’ use of the “N” word is directly relevant to impeach both Plaintiff DFEH
23 and Patrick/Sam, through their attempts to hide embarrassing evidence. As noted in Defendants’
24 opposition to Plaintiff’s motion in limine nos. 3 and 4, both the DFEH’s and the Real Parties’ intent
25 is directly relevant in this action, making very relevant evidence that they, their companions, and
26 Plaintiff DFEH, have hid evidence. (See *E.E.O.C. v. Los Alamos Constructors, Inc.* (D.N.M. 1974)
27 382 F.Supp. 1373, 1383 & fn.5 [noting that government has to turn over exculpatory evidence even in
28 civil prosecutions]; *Sperry & Hutchinson Co. v. F.T.C.* (S.D.N.Y. 1966) 256 F.Supp. 136, 142 [“In civil

1 actions, also, the ultimate objective is not that the Government ‘shall win a case, but that justice
2 shall be done.’”].)

3 *Third*, this evidence is relevant to the “narrative integrity” of Defendants’ case. (*Old Chief v.*
4 *U.S.* (1997) 519 U.S. 172, 183, 187.) There is something deeply ironic about Plaintiff DFEH—the
5 government agency tasked with standing up for the little guy and defending civil rights—bringing an
6 Unruh Act claim against a Christian baker and her small bakery on behalf of two individuals with a
7 habit of engaging in casual racism.

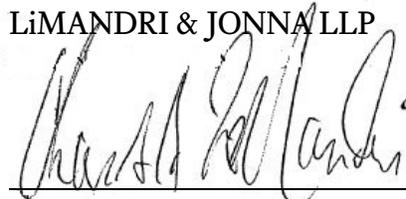
8 III. CONCLUSION

9 For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiff
10 DFEH’s motion in limine with respect to Mr. Salazar’s history of theft from an employer and Real
11 Parties’ use of the “N” word.

12
13 Respectfully submitted,

14 LIMANDRI & JONNA LLP

15
16 Dated: July 18, 2022

17 By: 

18 Charles S. LiMandri

19 Paul M. Jonna

20 Mark D. Myers

21 Jeffrey M. Trissell

22 Robert E. Weisenburger

23 Milan L. Brandon II

24 *Attorneys for Defendants Cathy’s*

25 *Creations, Inc. and Catharine Miller*

Exhibit LL

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16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
17 COUNTY OF KERN

18 DEPARTMENT OF FAIR EMPLOYMENT
19 AND HOUSING, an agency of the State of
California,

20 Plaintiff,

21 v.

22 CATHY'S CREATIONS, INC. d/b/a
TASTRIES, a California Corporation; and
23 CATHARINE MILLER, an individual,

24 Defendants.

25 EILEEN RODRIGUEZ-DEL RIO and MIREYA
RODRIGUEZ-DEL RIO,

26 Real Parties in Interest.

CASE NO.: BCV-18-102633

IMAGED FILE

**DECLARATION OF JEFFREY M.
TRISSELL, ESQ. (THIRD) IN
SUPPORT OF DEFENDANTS'
OPPOSITIONS TO PLAINTIFF'S
MOTIONS IN LIMINE**

Date: July 25, 2022

Time: 9:00 a.m.

Dept: J

Judge: Hon. J. Eric Bradshaw

Action Filed: Oct. 17, 2018

27
28
DECLARATION OF JEFFREY M. TRISSELL, ESQ. (THIRD) ISO
DEFENDANTS' OPPOSITIONS TO PLAINTIFF'S MOTIONS IN LIMINE

ELECTRONICALLY FILED
7/18/2022 4:39 PM
Kern County Superior Court
By Gina Sala, Deputy

AA01828

1 I, Jeffrey M. Trissell, Esq., declare and state as follows:

2 1. I am an attorney duly admitted to practice before all the courts of California, both
3 State and Federal. I am one of the attorneys for Defendants Catharine Miller and Cathy's
4 Creations, Inc. dba Tastries Bakery (collectively "Defendants"). As such, I have personal
5 knowledge of the following facts and, if called upon to testify, I could and would competently testify
6 to these facts.

7 2. Attached to my first declaration, dated July 8, 2022, are Defendants' Judicial
8 Admission Document Nos. 1 and 2, and Defendants' Motion in Limine Exhibit Nos. 1-14. Attached
9 to my second declaration, dated July 11, 2022, are Defendants' Motion in Limine Exhibit Nos. 15-
10 22. Attached hereto, are Defendants' Motion in Limine Exhibit Nos. 23-30, as well as all of
11 Defendants' Trial Exhibits cited in Defendants' motions in limine or opposition briefs.

12 3. Attached hereto as **Motion in Limine Exhibit 23** is a true and correct copy of the
13 journal article Gregory M. Herek, et al., *Demographic, Psychological, and Social Characteristics of Self-*
14 *Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample* (2010) 7 Sexuality Res. &
15 Soc. Pol'y 176, 194, with relevant portions highlighted.

16 4. Attached hereto as **Motion in Limine Exhibit 24** is a true and correct copy of the
17 news article, Tom Geoghegan, *The gay people against gay marriage*, BBC News, dated June 11, 2013.

18 5. Attached hereto as **Motion in Limine Exhibit 25** is a true and correct copy of the
19 news article, Beth Daley, *Gay rebels: why some older homosexual men don't support same-sex marriage*,
20 The Conversation, dated November 5, 2017.

21 6. Attached hereto as **Motion in Limine Exhibit 26** is a true and correct copy of the
22 article, Jeffrey M. Jones, *One in 10 LGBT Americans Married to Same-Sex Spouse*, Gallup, dated
23 February 24, 2021.

24 7. Attached hereto as **Motion in Limine Exhibit 27** is a true and correct copy of the
25 relevant pages of the deposition of Samuel Salazar, taken in this action on July 30, 2021, including
26 only the pages cited in Defendants' oppositions to Plaintiff's motions in limine.

27 ///

28 ///

1 8. Attached hereto as **Motion in Limine Exhibit 28** is a true and correct copy of the
2 relevant pages of the deposition of Patrick Grijalva, taken in this action on July 30, 2021, including
3 only the pages cited in Defendants’ oppositions to Plaintiff’s motions in limine.

4 9. Attached hereto as **Motion in Limine Exhibit 29** is a true and correct copy of the
5 relevant pages of the deposition of Eileen Rodriguez-Del Rio, taken in this action on July 29, 2021,
6 including only the pages cited in Defendants’ oppositions to Plaintiff’s motions in limine.

7 10. Attached hereto as **Motion in Limine Exhibit 30** is a true and correct copy of the
8 relevant pages of the deposition of Mireya Rodriguez-Del Rio, taken in this action on July 28, 2021,
9 including only the pages cited in Defendants’ oppositions to Plaintiff’s motions in limine.

10 11. Attached hereto is a true and correct copy of Defendants’ **Trial Exhibit 8**, the
11 Tastries Bakery “Standards of Service” or “Design Standards.”

12 12. Attached hereto is a true and correct copy of Defendants’ **Trial Exhibit 21**, the
13 DFEH’s Notice of Filing of Discrimination Complaint, sent to Tastries Bakery, and dated October
14 26, 2017.

15 13. Attached hereto is a true and correct copy of Defendants’ **Trial Exhibit 22C**,
16 relevant portions only, with highlighting, the Department of Fair Employment and Housing’s
17 Memorandum of Points and Authorities in Support of Petition and Ex Parte Application for
18 Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction, filed December
19 13, 2017, in Case No. BCV-17-102855.

20 14. Attached hereto is a true and correct copy of Defendants’ **Trial Exhibit 22D**,
21 relevant portions only, with highlighting, Petitioner Department of Fair Employment and
22 Housing’s Memorandum of Points and Authorities in Support of Motion for Preliminary
23 Injunction, filed January 10, 2018, in Case No. BCV-17-102855.

24 15. Attached hereto is a true and correct copy of Defendants’ **Trial Exhibit 22E**,
25 relevant portions only, with highlighting, Petitioner Department of Fair Employment and
26 Housing’s Reply in Support of Motion for Preliminary Injunction, filed January 26, 2018, in Case
27 No. BCV-17-102855.

28 ///

1 16. Attached hereto is a true and correct copy of Defendants' **Trial Exhibit 22F**,
2 relevant portions only, with highlighting, the Certified Transcript of February 2, 2018 Hearing re
3 Preliminary Injunction.

4 17. Attached hereto is a true and correct copy of Defendants' **Trial Exhibit 23**, a letter
5 from Department of Fair Employment and Housing to Charles LiMandri Re Notice of Cause
6 Finding and Mandatory Dispute Resolution, dated October 10, 2018.

7 18. Attached hereto is a true and correct copy of Defendants' **Trial Exhibit 24A**, the
8 Declaration of Reina Benitez, dated January 17, 2018, in Case No. BCV-17-102855.

9 19. Attached hereto is a true and correct copy of Defendants' **Trial Exhibit 24B**,
10 relevant portions only, with highlighting, the Certified Transcript of June 5, 2020 Hearing re
11 attorney-client privilege with respect to discovery motions.

12 20. Attached hereto is a true and correct copy of Defendants' **Trial Exhibit 25A**,
13 relevant portions only, with highlighting, Plaintiff Department of Fair Employment and Housing's
14 Memorandum of Points and Authorities in Support of Motion for Summary Judgment or, in the
15 Alternative, Summary Adjudication, filed September 8, 2021.

16 21. Attached hereto is a true and correct copy of Defendants' **Trial Exhibit 25B**,
17 relevant portions only, with highlighting, Plaintiff Department of Fair Employment and Housing's
18 Memorandum of Points and Authorities in Opposition to Defendants Catharine Miller and Tastries
19 Bakery's Motion for Summary Judgment or, in the Alternative, Summary Adjudication, filed
20 October 6, 2021.

21 22. Attached hereto is a true and correct copy of Defendants' **Trial Exhibit 25C**,
22 relevant portions only, with highlighting, Plaintiff Department of Fair Employment and Housing's
23 Reply in Support of its Motion for Summary Judgment or, in the Alternative, Summary
24 Adjudication, filed October 20, 2021.

25 23. Attached hereto is a true and correct copy of Defendants' **Trial Exhibit 26B**,
26 relevant portions only, with highlighting, the Deposition of Defendant Catharine Miller, dated
27 February 24, 2022.

28 ///

1 24. Attached hereto is a true and correct copy of Defendants' **Trial Exhibit 31**, Text
2 message string between Patrick Grijalva and Mireya Rodriguez-Del Rio, DFEH00289-294.

3 25. Attached hereto is a true and correct copy of Defendants' **Trial Exhibit 32**, Text
4 message string between Real Parties, Patrick Grijalva, and Samuel Salazar, SAM0007, SAM0082,
5 SAM0104, SAM0121, SAM0244-45.

6 26. Attached hereto is a true and correct copy of Defendants' **Trial Exhibit 33**, Text
7 message string between Real Parties, Patrick Grijalva, and Samuel Salazar, PAT0018.

8 27. Attached hereto is a true and correct copy of Defendants' **Trial Exhibit 550**,
9 Printout of Sam Salazar's social media post regarding Tastries Bakery dated August 26, 2017; posts
10 with offers on social media to Salazar for free wedding services and inquiry from journalist, dated
11 August 26, 2017 through August 28, 2017, bates numbered CM1897-CM1899.

12 28. Attached hereto is a true and correct copy of Defendants' **Trial Exhibit 553A**,
13 Eileen Rodriguez-Del Rio's Facebook Post regarding Tastries Bakery, dated August 26, 2017, bates
14 numbered DFEH00235.

15 29. Attached hereto is a true and correct copy of Defendants' **Trial Exhibit 553B**,
16 Eileen Rodriguez-Del Rio's Facebook Post regarding Tastries Bakery with timestamp, dated
17 August 26, 2017 at 1:13pm.

18 30. Attached hereto is a true and correct copy of Defendants' **Trial Exhibit 554**, "Wen
19 Rod" [Mireya Rodriguez-Del Rio] social media post regarding Tastries, dated August 26, 2017,
20 bates numbered DFEH00236.

21 31. Attached hereto is a true and correct copy of Defendants' **Trial Exhibit 555A**,
22 Eileen Rodriguez-Del Rio's Facebook Review of Tastries, dated August 26, 2017, bates numbered
23 CM1903.

24 32. Attached hereto is a true and correct copy of Defendants' **Trial Exhibit 555B**,
25 Eileen Rodriguez-Del Rio Facebook Page, screenshot on March 3, 2021.

26 33. Attached hereto is a true and correct copy of Defendants' **Trial Exhibit 557**, Text
27 messages between Sam Salazar, Eileen & Mireya Rodriguez-Del Rio regarding the incident, dated
28 August 26, 2017, bates numbered PAT0007-PAT0015.

MIL EXHIBIT 23

Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample

Gregory M. Herek · Aaron T. Norton ·
Thomas J. Allen · Charles L. Sims

Published online: 3 March 2010

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Abstract Using data from a US national probability sample of self-identified lesbian, gay, and bisexual adults ($N=662$), this article reports population parameter estimates for a variety of demographic, psychological, and social variables. Special emphasis is given to information with relevance to public policy and law. Compared with the US adult population, respondents were younger, more highly educated, and less likely to be non-Hispanic White, but differences were observed between gender and sexual orientation groups on all of these variables. Overall, respondents tended to be politically liberal, not highly religious, and supportive of marriage equality for same-sex couples. Women were more likely than men to be in a committed relationship. Virtually all coupled gay men and lesbians had a same-sex partner, whereas the vast majority of coupled bisexuals were in a heterosexual relationship. Compared with bisexuals, gay men and lesbians reported stronger commitment to a sexual-minority identity, greater community identification and involvement, and more extensive disclosure of their sexual orientation to others. Most respondents reported experiencing little or no choice about their sexual orientation. The importance of distinguishing among lesbians, gay men, bisexual women, and bisexual men in behavioral and social research is discussed.

Keywords Lesbians · Gay men · Bisexuals · Public policy · Sampling · Survey research · Committed relationships · Politics and religion · Identity, community, and disclosure

“Empirical studies using nonrepresentative samples of gay men and lesbians show that the vast majority of participants have been involved in a committed relationship at some point in their lives [and] that large proportions are currently involved in such a relationship....” (American Psychological Association 2007, pp. 14–15)

“...[D]ata are not available to indicate the exact number of lesbian and gay parents in the United States....” (American Psychological Association 2007, p. 25)

“Most or many gay men and lesbians experience little or no choice about their sexual orientation.” (American Psychological Association 2003, p. 8)

These three passages, all excerpted from amicus briefs submitted jointly by the American Psychological Association (APA) and other professional organizations in court cases involving gay rights, illustrate some of the ways in which descriptive data about the lesbian, gay, and bisexual population are relevant to policy debates. In each instance, the APA and its co-amici summarized current knowledge about an aspect of the US gay, lesbian, and bisexual population that was relevant to a question being considered by the court—respectively, how many gay men and lesbians are involved in a committed relationship, how many are parents, and how many experience their sexual orientation as a choice. Yet, in each instance, the briefs could not provide definitive population estimates because relevant data were not available from nationally represen-

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public (e.g., Edelman 1993; Hertzog 1996). Except for the fact that no lesbians reported having voted for Ralph Nader, the subgroups did not differ significantly on these variables.

Relationship and Family Characteristics

Women were significantly more likely than men to report they were currently in a committed relationship, either heterosexual or homosexual. As shown in Table 8, 60% of gay men and 57% of bisexual men were *not* in a committed relationship, compared with fewer than one fourth of lesbians and bisexual women. Another notable difference was observed between homosexual and bisexual respondents: Whereas all coupled lesbians and virtually all coupled gay men reported that their partner was someone of their same sex, the vast majority of coupled bisexual men (88%) and women (90%) had a different-sex partner.

Most uncoupled respondents either stated they would like to marry someday or indicated uncertainty about it; overall, only 20% expressed no interest in ever marrying. Among respondents who were currently in a same-sex relationship, significantly more lesbians than gay men said they were “very likely” or “fairly likely” to marry their partner (76% and 41%, respectively), whereas more gay men than lesbians said they were “somewhat likely” to marry (38% and 12%, respectively). In all, nearly 90% of lesbians and 80% of gay men indicated some likelihood of marrying their current partner. (Because so few bisexuals were in a same-sex relationship, their responses to this question are not reported.)

Overall, approximately one third of respondents reported having one or more children, including adopted and stepchildren. Gay men were the least likely to have a child (8%), whereas approximately two thirds of bisexual women reported having one or more children. About one third of lesbians and bisexual men reported having children.

Respondents overwhelmingly supported legal recognition for same-sex couples. Although bisexual males were somewhat less supportive than others, the overlapping confidence intervals across groups indicate that these differences were not reliable. Overall, 77.9% of respondents (CI=69.7–84.4) agreed that “The law should allow two people of the same sex to marry each other,” whereas 74.4% (CI=66.4–81.1) *disagreed* with the assertion that “There is really no need to legalize same-sex marriage in the United States.” Similarly, 89.1% (CI=81.2–93.9) supported civil unions. The sample was divided in its response to the statement “The U.S. public *isn't* ready for a debate about gay marriage.” A plurality (42%, CI = 35.1–49.2) *disagreed*, but 28.1% (CI = 23.0–33.9) *agreed*, and 29.9% (CI = 22.9–38.1) placed themselves “in the middle” between agreement and disagreement.

Discussion

The data presented here offer a wealth of information about the general characteristics of self-identified gay, lesbian, and bisexual adults in the USA while highlighting important commonalities and differences among sexual orientation subgroups. Without recapitulating all of the results, we comment here on some key findings.

To begin, the composition of the sample is noteworthy. With design weights applied to account for aspects of the sampling procedures that might have affected respondents' likelihood of inclusion in the KN panel, fully half of the participants identified as bisexual, indicating that bisexuals constitute a substantial portion of the self-identified sexual-minority population. In addition, gay men outnumbered lesbians at a ratio of approximately 2.4:1. This finding is consistent with data from other national probability samples (Black et al. 2000; Laumann et al. 1994) and suggests that self-identified gay men may outnumber self-identified lesbians in the US adult population. Among self-identified bisexuals, by contrast, the weighted proportions of women and men did not differ significantly. Within genders, the weighted sample included more gay than bisexual men and more bisexual women than lesbians, but the difference was reliable only among the women respondents. Of course, any inferences from these patterns about the composition of the sexual-minority population must be considered tentative until more data are obtained from other probability samples.

Sexual orientation and gender subgroups within the sample differed on key demographic variables, with bisexuals tending to be younger than homosexuals, and bisexual men the least likely to be non-Hispanic White or to have a college degree. Comparisons to the US adult population using contemporaneous Census data suggest that lesbians and bisexuals (but not gay men) may be younger, on average, than the US adult population; that bisexual men (but not lesbians, gay men, or bisexual women) may be less likely to be non-Hispanic White; and that lesbians and gay men (but not bisexuals) may be more highly educated. These patterns are consistent with previous findings from nonprobability samples indicating that lesbians and gay men tend to be highly educated (e.g., Herek et al. 1999; Rostosky et al. 2009; Rothblum and Factor 2001). They are also consistent with past observations that bisexual behavior is more common among African American and Latino men than among non-Hispanic White males (e.g., Millett et al. 2005; O'Leary et al. 2007; Rust 2000).

Bisexual men and women were not only younger than the US adult population, they were also significantly younger than lesbians and gay men. This age difference might reflect generational differences in patterns of identity

MIL EXHIBIT 24

The gay people against gay marriage

By Tom Geoghegan
BBC News, Washington

© 11 June 2013



After France's first same-sex marriage, and a vote in the UK Parliament which puts England and Wales on course for gay weddings next summer, two US Supreme Court rulings expected soon could hasten the advance of same-sex marriage across the Atlantic. But some gay people remain opposed. Why?

"It's demonstrably not the same as heterosexual marriage - the religious and social significance of a gay wedding ceremony simply isn't the same."

Jonathan Soroff lives in liberal Massachusetts with his male partner, Sam. He doesn't fit the common stereotype of an opponent of gay marriage.

But like half of his friends, he does not believe that couples of the same gender should marry.

"We're not going to procreate as a couple and while the desire to demonstrate commitment might be laudable, the religious traditions that have accommodated same-sex couples have had to do some fairly major contortions," says Soroff.

Until the federal government recognises and codifies the same rights for same-sex couples as straight ones, equality is the goal so why get hung up on a word, he asks.

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"I'm not going to walk down the aisle to Mendelssohn wearing white in a church and throw a bouquet and do the first dance," adds Soroff, columnist for the *Improper Boston*.

"I've been to some lovely gay weddings but aping the traditional heterosexual wedding is weird and I don't understand why anyone wants to do that.

"I'm not saying that people who want that shouldn't have it but for me, all that matters is the legal stuff."

The legal situation could be about to change within days, as the nine Supreme Court judges are considering whether a federal law that does not recognise same-sex marriage - and therefore denies them benefits - is unconstitutional. A second ruling will be made on the legality of California's gay marriage ban.

But while favourable rulings will spark celebrations among pro-marriage supporters across the US, some gay men and women will instead see it as a victory for a patriarchal institution that bears no historical relevance to them.

Some lesbians are opposed to marriage on feminist grounds, says Claudia Card, a professor of philosophy at the University of Wisconsin-Madison, because they see it as an institution that serves the interests of men more than women. It is also, in her view "heteronormative", embodying the view that heterosexuality is the preferred and normal sexuality.

"It's undeniable that marriage has historically also discriminated against same-sex couples," Card says.

As a result, she thinks the issue of marriage is a distraction.

"Gay activists should instead put their energies into environmental issues like climate change, because there's a chance to make a morally more defensible and more urgent difference."

Others in the "No" camp oppose marriage more broadly because, they say, it denies benefits to people who are unmarried, or because they say it simply doesn't work.

Legba Carrefour, who describes himself as "radical queer", calls it a "destructive way of life" that produces broken families.

"We are only one or two generations away from children coming from gay marriage that are also from broken homes," he says.

He believes a more important priority for the gay community is the **rise in violence against transgendered people**.

"I'm not concerned about whether I can get married but whether I will die in the street at the hands of homophobes."

Support for gay marriage among Americans in general has risen **above 50% according to Gallup**, but what the figure is among gay people is harder to quantify. Neither Pew Research Center nor Gallup has conducted any such polling.

A community made up of millions of people is bound to hold a range of views on any subject, but it will surprise many that some of the people who on the face of it stand to gain the most from gay marriage should oppose it. And these contrary views are not often heard.

In the UK, Daily Mail columnist Andrew Pierce says that for speaking out against gay marriage in the past, he has been attacked as a homophobe and Uncle Tom, despite a long history of championing gay rights.

He strongly believes that civil partnerships - introduced in 2005 to give same-sex couples equal legal rights - are enough.

"We've got marriage, it's called a civil partnership and I rejoice in the fact that people like me who are different from straight people can do something they can't. I relish that."

He thinks there are more gay people in agreement with him than people may think - at a dinner party he hosted for 11 gay friends, only one was in favour of marriage, one was undecided and the rest were against, he says.

Countries which allow gay marriage

■ Countries which allow gay marriage
 ■ Some states allow gay marriage



In France, gay men and women joined the protests that preceded and followed this year's introduction of same-sex marriage. A website called Homovox

featured **12 gay men and women** opposed to it, with some of them citing a belief that children benefit most from opposite-sex parents.

For many years, the conservative institution of marriage was never on the gay campaign agenda, says activist Yasmin Nair, who co-founded a group provocatively named Against Equality. But it became an objective in the early 1990s - regretfully, in her view - when the movement emerged from the seismic shock of the Aids epidemic, depleted of political energy.

But gay people who are in favour of same-sex marriage believe anything short of marriage is not equality.

You rarely hear arguments against it by gay people themselves, says Stamppp Corbin, publisher of magazine LGBT Weekly, who sees strong parallels with the civil rights movement.

"I'm African American and there were many things society stopped us from doing. When we were slaves we couldn't marry, we couldn't marry outside our race and most notably, we couldn't share facilities with white people.

"So when I hear LGBT people saying the same thing: 'I don't think gay and lesbian people should get married', is it different from slaves saying: 'I don't think slaves should have the ability to get married'?

"It is internalised hatred, bred by oppression. Why would you want to deny someone of your own sexual orientation the ability to get married? No one [will be] forcing you to get married."

Civil partnerships do not provide equality, says Corbin, who was the National Co-Chair of the LGBT Leadership Council during the 2008 Obama presidential campaign. And in the US, the notion of "separate but equal" rekindles memories of segregation and the creation of second-class facilities.

With so many different points of view on a subject that has long divided America, perhaps the debate just underlines the obvious - gay people are like everyone else.

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MIL EXHIBIT 25

THE CONVERSATION

Academic rigor, journalistic flair

Gay rebels: why some older homosexual men don't support same-sex marriage

November 5, 2017 2.18pm EST

Members of the original 1978 Sydney Mardi Gras in 2008. Older gays and lesbians grew up in more radical times, and some don't support same-sex marriage. AAP Image/Jane Dempster

Author



Peter Robinson

Senior lecturer in History and Sociology,
Swinburne University of Technology

I ... don't for the life of me understand why the gay community has decided to emulate an institution that doesn't work for even straight people ... It is laughable

This is what a 59-year-old black gay activist in Los Angeles told me of his [views on same-sex marriage](#). He is typical of many older gay men who are bemused by the younger generation's desire for marriage, reflecting the radically different experiences of those who grew up in far more restrictive and intolerant decades.

We know that generally [older Australians](#) are less supportive of same-sex marriage. In 2013, I interviewed a small international sample of men as part of my research on sexuality and ageing. Most of the men over 50 were dubious, if not opposed, to gay marriage, while most of those under 30 were supportive. While these results may not apply directly to Australia in 2017, they are indicative of a generational divide between young and old gay men.

These older men have largely remained silent in the [current same-sex marriage debate](#). I suspect this is because they do not want to be accused of betraying their own kind or exhibiting "internalised homophobia", which for decades has been the accusation hurled at gay people who do not conform to the prescribed norms of the sub-culture.

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It is vital that we listen to their perspectives, because older gay men are an already marginalised group, experiencing greater financial and social insecurity than younger men. We must ensure that same-sex marriage should it be legalised does not further sideline their experiences.

Rebels with a cause

One aspect of same-sex marriage that could confuse older gay men, and possibly also lesbians, is that it is at odds with beliefs they might have formed when they were young. In the early 1970s, feminists and gay liberationists asked their followers to think about how to liberate their own needs from the constraints of family, and experiment with alternative forms of intimate relationships, very different to the idea of nuclear family: heterosexual married parents with biological children.

In the early days, these relationships were as simple as two men regarding themselves as an item. The acknowledgement of friends, and sometimes siblings and parents, was enough public acceptance. Often these men would live separately but share a bed, kitchen and living room when it suited, a relationship that sociologists call "living apart together".

By the late 1990s, these relationships had developed to include informal "families" that could include former boyfriends or girlfriends, supportive siblings and children from former heterosexual relationships. Children from surrogacy or informal insemination between gays and lesbians became more common in the early 2000s.

North American sociologist [Martha Fowlkes](#) called these gay rebels "marriage non-conformists". Others argued that the push for [same-sex marriage](#) is having a "mainstreaming" effect on gays and lesbians, that is, that they are being turned into "pseudo straights".

The appeal of marriage

Gay marriage would suit propertied gays and social conservatives who want the security of marriage for their relationships. It would also suit gay religious observers who want to make peace with their church and vicar or synagogue and Rabbi and be accepted by them. Maintaining gay relationships without church or state sanction takes courage and perseverance.

Marriage and children may appeal to young gay men because the alternative is to place their trust in community organisations and the social practices of the gay world. These are not always uniform or supportive. For example, I have argued that [bars and clubs are the only safe space](#) for gay men to congregate and socialise in large numbers. Many of the young men I spoke to, however, complained of the impoverished relationships gay men formed there.

Parental approval can matter as much for young gays as it does for young straights and anecdotal evidence I heard while interviewing gay men of all ages suggested that for some young gay men marriage would ensure their parents' approval. 22-year-old Zane (pseudonym) from Melbourne wanted to mimic his parents' successful marriage of 30 years:

I want to have a really hetero life and ... have children and ... build a family and those kind of things with my partner and look forward to doing that ... and I'd love to ... grow old with someone.

He justified his views as a more wholesome lifestyle than he had observed in clubs and bars where in his view drug taking and casual sex were commonplace.

Others spoke of benefits relating to property and estate planning. Garth (psuedonym) a 23-year-old university student from Melbourne, told me,

I can see like the benefits for like tax purposes and division of estate and stuff if someone dies so that makes it completely understandable as to why you would want to [get married].

Other research shows that young gay men under 30 almost uniformly support gay marriage as a right or because, like their straight brothers and sisters, they want to mark and celebrate the success of their relationship achievement.

Listening to older gay men

It is not clear what effect same-sex marriage would have on gay people and the gay world. My suspicion is that its effect would be conservative. This could explain why it has the support of some religious figures and conservative commentators. Prime minister Malcolm Turnbull said many people would vote for same-sex marriage because "they believe the right to marry is a conservative ideal as much as any other conservative principle".

Should same-sex marriage be approved, the fear among radical queers is that it would become the gold standard for same-sex relationships and other relationship styles would be regarded as less worthy.

This is about more than marriage. My latest research shows that gay men aged 60 and over had a strong propensity not to stop working after retirement and to have poorly planned superannuation. These men told me they used work to keep retirement boredom at bay. Poorly-planned super is also a feature of Baby Boomers and of some men living with HIV.

I interviewed four older men living with HIV. Two had made careful plans for their old age while the other two had not, saying that because of their HIV they had not expected to live to old age. In contrast, many young gay men knew about and were interested in old-age planning.

Because gay social spaces and practices valorize youthfulness, they can serve to propagate ageist beliefs. Some young gay men I interviewed said that older gays were only permitted to share their social spaces if they were youthful. Some also said gay men of the Baby Boomer generation had brought HIV/AIDS on themselves.

Others however lamented the absence of non-sexualised social settings where different generations could socialise and exchange experiences.

If more young gay men embrace a "pseudo straight" identity through marriage and children, it is likely older men will continue to be marginalised along with their views and beliefs about relationships and family. It is refreshing to know, however, that some young gays have a real interest in speaking to and learning from older gays and their lived experience.

 [Homosexuality](#) [Marriage](#) [Gay marriage](#) [Same-sex marriage](#) [LGBT](#)
[Same-sex marriage plebiscite](#)

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Every article you read here is written by university scholars and researchers with deep expertise in their subjects, sharing their knowledge in their own words. We don't oversimplify complicated issues, but we do explain and clarify. We believe bringing the voices of experts into the public discourse is good for democracy.

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Beth Daley
Editor and General Manager



You might also like

MIL EXHIBIT 26

FEBRUARY 24, 2021

One in 10 LGBT Americans Married to Same-Sex Spouse

BY JEFFREY M. JONES



STORY HIGHLIGHTS

- 9.6% of LGBT adults in the U.S. are married to a same-sex spouse
- Number of same-sex marriages have increased since 2016
- Opposite-sex marriages, partnerships more common among bisexual adults

WASHINGTON, D.C. -- About one in 10 LGBT adults in the U.S. (9.6%) are married to a same-sex spouse, with a slightly smaller proportion (7.1%) living with a same-sex domestic partner. Half of LGBT adults have never been married, while 11.4% are married to an opposite-sex spouse and 9.5% are either divorced or separated.

Overall, less than 1% of U.S. adults are married to a same-sex spouse. The greatest percentage of Americans, 47.7%, are married to an opposite-sex spouse.

U.S. Adults' and LGBT Adults' Marital Status

	U.S. adults	LGBT adults
	%	%
Married to opposite-sex spouse	47.7	11.4
Married to same-sex spouse	0.6	9.6
Living with opposite-sex domestic partner	8.1	9.2
Living with same-sex domestic partner	0.4	7.1
Single/Never married	22.9	50.5
Separated	2.4	2.0
Divorced	9.5	7.5
Widowed	5.9	2.5
No opinion	2.6	0.4

Based on aggregated data from 2020 Gallup polls

GALLUP

These results are based on aggregated data from 2020 Gallup surveys, encompassing interviews with more than 15,000 U.S. adults. According to Gallup's latest estimate, 5.6% of U.S. adults identify as lesbian, gay, bisexual or transgender, with over half of them saying they are bisexual. LGBT identification is most prevalent among young adults, explaining the high proportion of the subgroup that has never been married.

The percentage of LGBT adults in same-sex marriages appears to have leveled off after increasing following the Supreme Court's 2015 *Obergefell v. Hodges* decision that legalized same-sex marriages nationwide. In the six-month period before the *Obergefell* ruling, Gallup found that 7.9% of LGBT adults were in same-sex marriages. That percentage increased to 9.6% in the first year after the decision (through June 2016) and is the same in the 2020 average.

However, because of the growth in LGBT identification in recent years, coupled with the growth in the U.S. population more generally, the number of same-sex marriages has likely increased significantly. In the pre-*Obergefell* decision period, Gallup estimated that 0.3% of U.S. adults overall were married to a same-sex spouse. In the first year after that ruling, the proportion of U.S. adults in same-sex marriages was 0.4%, and is 0.6% today.

Extrapolating those percentages to the U.S. population suggests that an estimated 1.5 million U.S. adults are married to a same-sex spouse, which would translate to about 750,000 same-sex marriages. Previously, Gallup estimated there were 368,000 same-sex marriages before the *Obergefell* decision and 491,000 in the first 12 months after it.

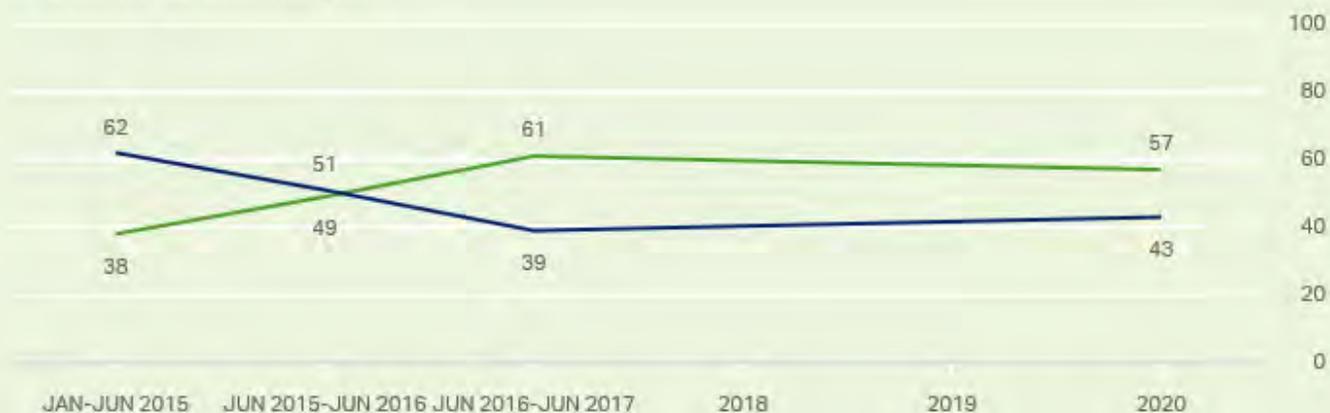
Same-sex marriage rates are similar among most demographic subgroups of U.S. adults, although the percentage does exceed 1% among higher-socioeconomic-status Americans -- those in upper-income households (annual incomes of \$100,000 or more) and those with education beyond a four-year college degree. The percentage of people married to a same-sex spouse also exceeds 1% among political liberals, Democrats and those with no religious affiliation.

Additionally, Gallup trends show that same-sex cohabiting couples are increasingly opting for marriage rather than domestic partnership. In the months leading up to the nationwide legalization of same-sex marriage in 2015, many more LGBT Americans in same-sex cohabiting couples were living together but not married (62%) as opposed to being married (38%). In the first 12 months after same-sex marriages were legalized, the split was roughly even, with 49% being married and 51% not married. Since then, about six in 10 same-sex couples have been married, including 57% in the 2020 data.

Percentages of Same-Sex Cohabiting Couples Who Are Married vs. Living With a Domestic Partner

Among LGBT adults

— % Married — % Domestic partner



Figures are the percentages of LGBT adults who are married vs. living with a same-sex partner, based on those in either relationship.

JAN-JUN 2015 represents data collected Jan. 28-June 26, 2015, before same-sex marriage was legal nationwide.

JUN 2015-JUN 2016 represents data collected June 27, 2015-June 19, 2016, the first full year after same-sex marriage was legal nationwide.

JUN 2016-JUN 2017 represents data collected June 20, 2016-June 19, 2017, the second year after same-sex marriage was legal nationwide.

Gallup did not measure same-sex marriage in 2018 or 2019.

GALLUP

Same-Sex Committed Relationships Uncommon for Bisexual Adults

Notably, same-sex marriages are largely confined to gay, lesbian or transgender adults. Only 1.0% of bisexual adults -- who comprise the largest segment of the LGBT population -- report being married to a same-sex spouse. Meanwhile, 17.2% of bisexual adults are married to a spouse of the opposite sex, which explains why LGBT adults overall are somewhat more likely to be married to an opposite-sex spouse than to someone of the same gender.

Bisexual adults are also much less likely to have a same-sex domestic partner (2.7%) than to have an opposite-sex domestic partner (13.3%), which also leads to more LGBT adults in opposite-sex than same-sex domestic partnerships.

As might be expected, the patterns are different among gay and lesbian adults, who are much more likely to be in same-sex marriages and domestic partnerships than to be married to or in domestic partnerships with members of the opposite sex. Still, close to half of gay and lesbian adults identify their marital status as single.

Marital Status Among U.S. Adults Who Identify as Bisexual vs. Gay or Lesbian

	Bisexual adults	Gay/Lesbian adults
	%	%
Married to opposite-sex spouse	17.2	0.3
Married to same-sex spouse	1.0	23.9
Living with opposite-sex domestic partner	13.3	1.6
Living with same-sex domestic partner	2.7	15.9
Single/Never married	55.5	47.8
Separated	1.0	1.3
Divorced	8.0	6.1
Widowed	1.4	1.9
No opinion	0.0	1.0

Based on aggregated data from 2020 Gallup polls; Gallup does not have sufficient data to report reliable, separate estimates for gay vs. lesbian adults, or for transgender adults.

GALLUP

Gallup does not have sufficient data for transgender adults to yield reliable estimates of marital status among that group.

Bottom Line

Same-sex marriages are not common in the U.S., or even very common among LGBT adults. But they are becoming more prevalent in the U.S. because of the increase in the LGBT population more generally and because more same-sex cohabiting couples are opting to marry rather than be unmarried partners.

What is unclear is how marital rates among LGBT adults will change as the population grows older and many reach the age when they would want to be in a committed relationship. Though it has been more than five years since same-sex marriage became legal, LGBT adults aged 30 and older are much more likely than non-LGBT adults in the same age group to describe their marital status as single (27.5% vs. 10.9%, respectively).

But decisions about entering committed relationships will be coming at a time when societal trends and attitudes are moving away from marriage. The 48% of Americans who reported being married in 2020 is down from 55% less than a generation ago, in 2006. Additionally, fewer Americans today than in the recent past believe it is important that people be married if they have children together, or if they want to spend the rest of their lives together.

It is unclear what those attitudes are among LGBT Americans, but young adults, nonreligious people, Democrats and political liberals -- the subgroups most likely to be LGBT -- are among the least likely subgroups to see marriage as being relevant.

And while many LGBT adults may decide not to get married, Americans increasingly support their right to marry a same-sex partner if they choose to do so.

Learn more about how the [Gallup Poll Social Series](#) works.

SURVEY METHODS



Results for this Gallup poll are based on telephone interviews conducted in 2020 with a random sample of 15,349 adults, aged 18 and older, living in all 50 U.S. states and the District of Columbia. For results based on the total sample of national adults, the margin

of sampling error is ± 1 percentage point at the 95% confidence level.

For results based on the sample of 692 LGBT adults, the margin of sampling error is ± 5 percentage points at the 95% confidence level.

For results based on the total sample of 312 bisexual adults, the margin of sampling error is ± 7 percentage points at the 95% confidence level.

For results based on the total sample of 330 gay or lesbian adults, the margin of sampling error is ± 7 percentage points at the 95% confidence level.

All reported margins of sampling error include computed design effects for weighting.

Each sample of national adults includes a minimum quota of 70% cellphone respondents and 30% landline respondents, with additional minimum quotas by time zone within region. Landline and cellular telephone numbers are selected using random-digit-dial methods.

RELEASE DATE: February 24, 2021

SOURCE: Gallup <https://news.gallup.com/poll/329975/one-lgbt-americans-married-sex-spouse.aspx>

CONTACT: Gallup World Headquarters, 901 F Street, Washington, D.C., 20001, U.S.A

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MIL EXHIBIT 27

1 SUPERIOR COURT OF CALIFORNIA, COUNTY OF KERN

2 METROPOLITAN DIVISION

3 _____
4 **CERTIFIED COPY**

5 DEPARTMENT OF FAIR
6 EMPLOYMENT AND HOUSING,
7 an agency of the State
8 of California,

No. BCV-18-102633

9 Plaintiff,

10 vs.

11 CATHY'S CREATIONS, INC.
12 dba TASTRIES, a California
13 corporation; and CATHARINE
14 MILLER, an individual,

15 Defendants.

16 _____
17 EILEEN RODRIGUEZ-DEL RIO and
18 MIREYA RODRIGUEZ-DEL RIO,

19 Real Parties in Interest.
20 _____

21 DEPOSITION OF SAMUEL REYES SALAZAR, JR.

22 Taken at

23 Keleher's Litigation Services
24 19237 Flightpath Way, Suite 100
25 Bakersfield, California

Friday, July 30, 2021 at 9:37 A.M.

Reported by:

Jean Keleher, CSR #4136

JOB No. 21-101478A

1 A. Bakersfield College.

2 Q. Did you ever obtain a degree?

3 A. No.

4 Q. Okay. I have to ask this because I ask it of
09:53:39 5 every witness. Have you ever been convicted of a
6 felony?

7 A. No.

8 Q. Have you ever been arrested?

9 A. Yes.

09:53:43 10 Q. For what?

11 A. 2005, I believe it was, a petty theft.

12 Q. Were you charged with a crime?

13 A. Misdemeanor. I think it was on there as petty
14 theft. And then --

09:54:07 15 Q. Sorry. Go ahead.

16 A. And then a couple of years later I was
17 arrested for not paying that fine.

18 Q. Not paying the misdemeanor fine?

19 A. Correct.

09:54:18 20 Q. Did you serve jail time?

21 A. I spent one night. I was bailed out.

22 Q. How large was the fine? What was the amount?

23 A. Oh, I -- it wasn't very much. At that time it
24 seemed like a lot. But probably about a thousand
09:54:33 25 dollars, somewhere in that range.

1 Q. Did you end up paying it later?

2 A. Yes.

3 Q. What was the nature of the petty theft? Where
4 did that occur?

5 A. At my employer.

6 Q. Which employer?

7 A. Famous Footwear.

8 Q. What did you steal?

9 A. Basically I did a false return for cash.

10 Q. How much cash?

11 A. I don't recall. I think it was somewhere in
12 line with the fine. Probably like a thousand dollars.

13 Q. Okay. Sorry, you probably told me what year
14 that was. 2005?

15 A. I think it was about 2005.

16 Q. Have you been arrested at any other time other
17 than those occasions?

18 A. There was one incident, I don't know if it's
19 on my record as an arrest, but I did get stopped for
20 driving intoxicated, but there were no charges, no DUI.
21 I spent a night in the drunk tank, basically, and they
22 let me out the next morning.

23 Q. Wow. How did you pull that off?

24 A. I do not know. But I never drank and drove
25 after that, so --

1 Q. Wow. What year was that, would you say?

2 A. That was in the same time frame, probably

3 around two thousand -- yeah, 2008.

4 Q. Do you remember what your blood alcohol levels
5 were?

6 A. I don't think they even checked that.

7 Q. Okay. Were you under the influence of drugs
8 or alcohol or both?

9 A. Alcohol.

10 Q. Okay. Were you involved in a collision?

11 A. No.

12 Q. Okay. Any other occasions where you've been
13 arrested other than those that you've mentioned?

14 A. No.

15 Q. Have you ever been a party to a lawsuit?

16 A. No.

17 Q. Have you testified in court?

18 A. No.

19 Q. Have you ever made -- have you ever been a
20 claimant in a personal-injury claim?

21 A. No.

22 Q. Workers' compensation claim?

23 A. No.

24 Q. Okay. Why don't you briefly summarize your
25 employment history, starting with after high school.

1 you just venting at the moment that you were kind of
2 upset?

3 A. I was upset, it was a little bit of a venting
4 session, and I think for the most part it was more just
11:12:08 5 letting people know. You know, as part of the gay
6 community I know I'm somewhat aware of where I spend my
7 money and don't spend my money, and so it was more in
8 regards to that. You know, knowing that I had -- have
9 a lot of friends on my social media that are part of
11:12:24 10 the community, just kind of, you know, making them
11 aware of this.

12 Q. Also Patrick said at one point to Mireya that
13 she, being Cathy, "F'd up big time and she will learn
14 the hard way. Karma will come and get her ass."

11:12:45 15 Do you remember Patrick making statements like
16 that at the time?

17 A. I don't specifically recall.

18 Q. Do you agree with that statement?

19 A. I do.

11:12:53 20 Q. And why is that?

21 A. I think the -- for me, personally, the
22 insulting part of the situation was when she went on
23 the news later that evening and basically admitted to
24 what she had done. That was like a little bit of a
11:13:17 25 jab, I guess.

1 Q. Why was that? Why was this a jab?

2 A. Because it kind of felt like she was proud of
3 what she did.

4 Q. Okay. I'm going to show you that thread.

11:13:33 5 This is -- the Bates stamp is PAT 83. This is that
6 statement where he said she F'd up big time, she will
7 learn the hard way, karma will come to get her. And
8 then after that Mireya and Patrick are joking around.
9 This is -- by the way, this is August 26th at 7:06 P.M.

11:14:01 10 He says, "Sammy is taking all of the attention
11 for you guys." Do you see that?

12 A. Yes.

13 Q. Were you guys looking for attention?

14 A. No.

11:14:19 15 Q. Were you happy that you received some
16 attention?

17 A. Definitely not.

18 Q. Says here, "Whitney told us not to comment any
19 more." Do you see that?

11:14:32 20 A. Yes.

21 Q. Were you part of that discussion with Whitney,
22 too?

23 A. I don't recall.

11:14:42 24 Q. And then later it says, "It's okay. He's
25 being an attention whore." Do you see that?

1 A. Yes.

2 Q. Is that a joke, do you think, or you think you
3 were actually seeking out attention at the time?

4 A. It's a joke. He'll tell me that joke daily.

11:14:53 5 Q. Okay. I'm going to show you another exhibit,
6 561. This is also a thread that you're on. And I
7 think -- let's see here. This is August 27, 2017,
8 9:16 A.M. And you posted something or you shared
9 something from Kyle O'Connor. Who's that, do you
10 remember?

11:16:00 11 A. I recognize the name as someone who I have on
12 Facebook. I don't know him personally, but I could put
13 a face to the name just off of social media.

14 Q. Do you know Ted Freitas and Adam Ramos?

11:17:02 15 A. No.

16 Q. Let me show you Exhibit 564. These are some
17 Yelp reviews.

18 Do you know this lady, Serenity H.?

19 A. Doesn't sound familiar.

11:17:43 20 Q. Okay. She says, "You pretty much F'd
21 yourselves --" this is August 26, 2017 at 3:26 P.M.,
22 Bates stamped CM1112, and she says, "You pretty much
23 F'd yourselves by being Nazi bigots." Do you see that?

24 A. Yes.

11:18:22 25 Q. You think that's a fair statement?

1 A. I feel that might be a bit extreme.

2 Q. Do you know someone named Mary Tibbetts?

3 A. I do.

4 Q. Who is she?

11:18:37 5 A. She is a friend of my sister's. They used to
6 work together years ago.

7 Q. Does she live in Bakersfield?

8 A. She lives in Santa Maria.

9 Q. Do you know roughly how old she is?

11:18:54 10 A. She's got to be in her, I would say, late 50s,
11 maybe early 60s.

12 Q. Is she part of the LGBT community?

13 A. No.

14 Q. Well, you guys had a little exchange here.

11:19:11 15 "Big mistake, huge ass hats."

16 And then you said, "Exactly, Mary, because my
17 fat ass eats a lot of pastries. She could have made a
18 killing off me." Do you see that?

19 A. I do.

11:19:21 20 Q. Do you remember this post?

21 A. Sounds like something I would say. I don't
22 remember the post, though.

23 Q. I'm sorry. Could you say that again?

11:19:32 24 A. I don't specifically remember the post, but
25 that's something that I would say.

1 Q. And then she says, "That woman has a stick up
2 her ass, anyway. Bad career move. I think you need to
3 get the word out. Everyone post it on Facebook. Sorry
4 that happened and sorry some people suck." Do you see
5 that?

6 A. Yes.

7 Q. Do you remember this exchange now?

8 A. Not specifically.

9 Q. Did you take her advice and try to get the
10 word out further after she said that?

11 A. I don't know if I necessarily did anything
12 additional to get the word out further because that
13 initial post kind of got the word out.

14 Q. This is on CM1135, I should say.

15 Do you know a gentleman named Matthew
16 Sullivan?

17 A. I do.

18 Q. Who is he?

19 A. He's a friend of mine.

20 Q. Are you guys currently friends?

21 A. Yes.

22 Q. He says, "F them. They're about to feel the
23 wrath." Do you see that?

24 A. Yes.

25 Q. Did you talk to him about that after he posted

1 that?

2 A. I don't remember having a conversation with
3 him after that.

4 Q. What do you think he meant when he said,
5 "They're about to feel the wrath"?

6 A. That they're --

7 MR. MANN: Calls for speculation.

8 A. That they're going to get some backlash.

9 Q. (By Mr. Jonna) Do you think that that was an
10 appropriate response?

11 A. To the situation?

12 Q. Yes.

13 A. Yes.

14 Q. You think that potentially could incite
15 violence?

16 A. No.

17 Q. Why is that?

18 A. It's really more about a backlash to the
19 business than any sort of violence.

20 Q. But it doesn't say that, though, right?

21 A. It also doesn't say anything about violence.

22 Q. Do you know if there was any violence directed
23 towards the business or the employees or the owner
24 after the incident?

25 A. Not that I'm aware of.

1 Q. Do you know someone named Ankel Brintrup?

2 A. That name does not sound familiar.

3 Q. I'm going to show you something else. Someone
4 named Kourtney posted this, "hope you get your ass beat
11:22:09 5 are being a rude judgmental bitch. See where your God
6 is then." Do you see that?

7 A. Yes.

8 Q. That's August 31st, 2017.

9 Do you know who this lady is?

10 A. Without seeing a last name, I'm not sure, but
11:22:18 11 it doesn't sound familiar. The spelling of the first
12 name doesn't look familiar.

13 Q. Do you think that that's an appropriate
14 response?

15 A. No.

16 Q. You think that's inciting violence?

17 A. I agree that that would be inciting violence.

18 Q. Did you see statements like this around the
19 time after the incident when it was all going viral on
11:22:46 20 social media?

21 A. Not that I really paid attention to or recall.

22 Q. Were statements like that what led you to
23 earlier say, you know, don't respond to comments on
24 Facebook, they can get out of hand? Remember we talked
11:22:58 25 about that?

1 A. Somewhat. But also, you know, kind of making
2 these kind of comments on our end, you know, like
3 someone pushing us to the point of saying something
4 extreme like this.

11:23:10 5 Q. Do you know someone named Jim Blair?

6 A. That name doesn't sound familiar.

7 Q. How about Cody Hatfield?

8 A. Doesn't sound familiar.

9 Q. He said, "Burn this F'ing bakery to the
11:23:46 10 ground. Bigots don't deserve to feel safe." Do you
11 see that?

12 A. Yes.

13 Q. Do you think that's appropriate?

14 A. No, I do not.

11:23:52 15 Q. That's on CM1420.

16 CM1527, another statement from Cody Hatfield,
17 "Bigoted scum like you do not deserve to feel safe.
18 Bricks through the window can serve as excellent
19 reminders that you are not welcome in our modern
11:24:45 20 society." Do you see that?

21 A. I do.

22 Q. Do you agree with that statement?

23 A. No, I do not.

24 Q. Do you know someone named Matt, the last name
11:24:58 25 is B-j-o-r-k?

1 A. No. I don't think so.

2 Q. Does it sound somewhat familiar?

3 A. Like I probably maybe have him on social
4 media, but I don't know him.

11:25:11 5 Q. He said, "I bet you like stuff like this up
6 your ass. You're going to get gang raped."

7 This looks like someone who's a friend of
8 yours on social media?

9 A. Possibly.

11:25:26 10 MR. MANN: Objection, lack of foundation,
11 assumes facts not in evidence.

12 Q. (By Mr. Jonna) Obviously that's completely
13 inappropriate, you would agree, right?

14 A. Yes.

11:25:37 15 Q. And then, again, "Those look disgusting. I
16 hope you get raped in the a-s-s." You see that?

17 A. Yes.

18 Q. That should not be posted in response to this
19 incident, you agree, correct?

11:25:48 20 A. I agree.

21 Q. He also goes on to say, on CM1540, "I hope you
22 get raped by multiple men." Do you see that?

23 A. I do.

24 Q. Do you know if -- you think that's
11:26:12 25 inappropriate, correct?

1 A. I do.

2 Q. That people should not be talking like that,
3 right?

4 A. Correct.

11:26:17 5 Q. You see how the initial posts that were
6 suggesting that Cathy Miller hates gays and lesbians,
7 do you see how that can lead to stuff like this?

8 MR. MANN: Objection, calls for speculation,
9 lack of foundation, assumes facts not in evidence.

11:26:32 10 A. I think that's -- you know, these people
11 making these posts, that's their opinion.

12 Q. (By Mr. Jonna) Right. But don't you think
13 that you guys contributed to this climate of animosity
14 by saying that she hates gays and lesbians when, in
11:26:47 15 fact, you had no basis whatsoever to conclude that?

16 MR. MANN: Objection, mischaracterizes prior
17 testimony, lack of foundation, assumes facts not in
18 evidence, argumentative, vague, calls for speculation.

19 A. I don't know that I can like fairly answer
11:27:03 20 that. I mean --

21 Q. (By Mr. Jonna) Do you think that in light of
22 seeing some of these hateful, despicable posts that
23 maybe you guys should have toned down the rhetoric
24 early on?

11:27:17 25 MR. MANN: Objection, calls for speculation,

1 lack of foundation.

2 A. I don't think so, because that wasn't the
3 purpose of those posts, at least for me. What people
4 choose to do with what they see, I don't have any
11:27:33 5 control over that.

6 Q. (By Mr. Jonna) Right. And I'm not suggesting
7 that you intended for people to make these posts, but
8 now that you've seen some of the hateful, despicable
9 things that people have said, do you think it would
10 have been prudent, looking back with the benefit of
11 hindsight, to tone down the rhetoric a little bit?

12 MR. MANN: Same objections from the previous
13 question.

14 A. Seeing these comments does make me regret even
11:28:01 15 making any post at all.

16 Q. (By Mr. Jonna) Are you aware that a Tastries
17 employee, a former Tastries employee, has claimed that
18 she was raped by someone who made specific reference to
19 this case while this case was in the news? Did you
11:28:20 20 know that?

21 A. That I had not heard.

22 Q. What's your reaction to hearing that?

23 A. I think that is horrible.

24 Q. The same gentleman, Matt, also said, "I hope
11:28:34 25 someone violently rapes you." That's on CM1545. Do

1 you see that?

2 A. Yes.

3 Q. What's your reaction to seeing that?

4 A. I think that is a horrible statement.

11:28:49 5 Q. Just one last one on this exhibit and we'll
6 move on.

7 CM1876, do you know a Jonathan Caplan?

8 A. That doesn't sound familiar.

9 Q. Okay. Take a look at what he wrote and tell
11:29:19 10 me when you're done.

11 A. I'm finished.

12 Q. This is on CM1876.

13 What's your reaction to reading that
14 statement?

11:29:53 15 A. I think that is a horrible statement, also.

16 Q. Did you know that there were statements like
17 this being sent to Tastries?

18 A. No.

19 Q. Are you aware that Cathy Miller's car was
11:30:08 20 broken into while this case was in the news one day?

21 A. I wasn't aware of that.

22 Q. Exhibit 565 shows pictures of her broken
23 window with the Tastries logo on the side.

24 Is this the first that you've heard that her
11:30:32 25 car was broken into?

1 A. From what I recall, this is the first I've
2 heard of this.

3 Q. What's your reaction to hearing that?

4 A. I think that is very unfortunate, also.

11:30:43 5 Q. I'm going to show you Exhibit 568. This is
6 Eileen sharing on Facebook publicly the bakersfield.com
7 article and tagging 87 people.

8 I think you're on here, right here, Sam. Do
9 you see that?

11:31:22 10 A. Yes.

11 Q. Do you know why she tagged all these people?

12 A. I don't know why.

13 Q. Did she want this story to go viral?

14 A. I don't know.

11:31:36 15 MR. MANN: Objection, calls for speculation.

16 A. I don't know if that was her intention with
17 tagging those people.

18 Q. (By Mr. Jonna) Do you think that's a
19 reasonable conclusion based on knowing her?

11:31:47 20 MR. MANN: Objection, calls for speculation.

21 A. I don't know if knowing her would make me
22 believe she would or wouldn't.

23 I know that they're pretty far in this, you
24 know, and I think that it would obviously be beneficial
11:32:05 25 to like really put it out there, so I'm sure it's

1 reasonable to assume that, you know, she wanted

2 attention brought to the post.

3 Q. (By Mr. Jonna) This was August 31st, just a

4 few days after, but you think it's she wanted to bring

5 public awareness and attention to their story?

6 MR. MANN: Objection, calls for speculation.

7 A. I think that might be a fair statement.

8 Q. (By Mr. Jonna) Are you aware that multiple

9 Tastries employees quit shortly after the story became

10 public because they were bombarded with hate calls and

11 emails and pornographic images at the bakery?

12 A. I wasn't aware of that.

13 Q. Are you -- do you know -- did you ever send

14 any pornographic images to Tastries Bakery?

15 A. No.

16 Q. Do you know anyone that did?

17 A. No.

18 Q. Is that the first time you've heard that that

19 happened?

20 A. Yes.

21 Q. Do you know anyone who called Tastries Bakery

22 to make threats of violent rape and murder?

23 A. I do not.

24 Q. Do you know anyone who called Tastries Bakery

25 making threats of violence?

1 Q. Okay. All right. Do you have any memory of
2 discussing the case with anyone else besides Eileen and
3 Mireya? I know it's a broad question, but do you
4 remember any specific conversations about this lawsuit
11:57:38 5 with anyone else other than the two women at issue?

6 A. Just a couple of close friends. My family,
7 I'm sure.

8 Q. Any of those discussions stand out in your
9 memory in terms of what was said or what was discussed?

10 A. No. Just people asking, you know, what
11 happened.

12 Q. Do you remember anyone asking about the
13 expected outcome of the case and what you thought the
14 outcome of the case would be?

15 A. No.

16 Q. Do you know if Eileen or Mireya ever told you
17 that they wanted to take Tastries down and make sure
18 they were shut down?

19 A. I don't know if it was ever said to me in
11:58:32 20 those words, you know.

21 Q. But they said something along those lines,
22 that they should be closed, they should be shut down?

23 A. Yes.

24 MR. MANN: Objection, misstates prior
11:58:43 25 testimony, lack of foundation, assumes facts not in

1 evidence.

2 Q. (By Mr. Jonna) Did they ever tell you that
3 they wanted to get compensation for emotional distress
4 from Tastries?

5 A. No.

6 Q. What do you remember them telling you about
7 what they were looking for in this case?

8 A. Basically that the goal is for the bakery to
9 close, to not be in business.

10 Q. Okay. Do you know if that was Eileen or
11 Mireya or both?

12 A. I don't remember specifically. I kind of feel
13 like both, you know. At least implied from both of
14 them.

15 Q. Is there anything else that you want to tell
16 me today while you're here under oath about this case
17 or any other relevant information you think you want to
18 share?

19 A. No.

20 MR. JONNA: Okay, I don't have any other
21 questions for you at this time. I thank you for your
22 time today.

23 MR. MANN: I do.

24 MR. JONNA: There you go.

25 MR. MANN: It won't be very long, Sam.

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REPORTER'S CERTIFICATION

I, Jean Keleher, a Certified Shorthand Reporter in and for the State of California, holding Certificate No. 4136, do hereby certify:

That the foregoing witness was by me duly sworn; that the deposition was then taken before me at the time and place herein set forth; that the testimony and proceedings were reported stenographically by me and later transcribed into typewritten form under my direction; that the foregoing is a true record of the testimony and proceedings taken at that time.

I further certify that I am neither counsel for, nor in any way related to any party to said action, nor in any way interested in the result or outcome thereof.

IN WITNESS WHEREOF, I have subscribed my name on August 4, 2021.



Jean Keleher, CSR #4136

MIL EXHIBIT 28

1 SUPERIOR COURT OF CALIFORNIA, COUNTY OF KERN

2 METROPOLITAN DIVISION

3 _____
4 **CERTIFIED COPY**

5 DEPARTMENT OF FAIR
6 EMPLOYMENT AND HOUSING,
7 an agency of the State
8 of California,

No. BCV-18-102633

9 Plaintiff,

10 vs.

11 CATHY'S CREATIONS, INC.
12 dba TASTRIES, a California
13 corporation; and CATHARINE
14 MILLER, an individual,

15 Defendants.

16 _____
17 EILEEN RODRIGUEZ-DEL RIO and
18 MIREYA RODRIGUEZ-DEL RIO,

19 Real Parties in Interest.
20 _____

21 DEPOSITION OF PATRICK GRIJALVA SALAZAR

22 Taken at

23 Keleher's Litigation Services
24 19237 Flightpath Way, Suite 100
25 Bakersfield, California

Friday, July 30, 2021 at 1:31 P.M.

Reported by:

Jean Keleher, CSR #4136

JOB No. 21-101478B

1 you know, may have consequences.

2 Q. I think Sam said that Eileen and Mireya, in
3 this case they want to see Cathy's bakery shut down.
4 Is that your understanding, too?

15:32:47 5 A. Yes.

6 Q. Did they both tell you that or just one of
7 them?

8 MR. MANN: Objection, assumes facts.

9 A. Both of them.

15:33:03 10 Q. (By Mr. Jonna) Here it says -- if you scroll
11 down on PAT 84, it says here, "Sammy's taking all of
12 the attention for you guys. He's being an attention
13 whore."

14 Do you see that?

15:33:22 15 A. Yes.

16 Q. What did you mean when you were saying that?

17 A. It was just a joke that, you know, I always
18 make fun of him and tell him, you know, that you love
19 attention. So it was just kind of a joke.

15:33:36 20 Q. I'm sorry. Just give me one minute. All
21 right. Sorry about that.

22 Do you know a couple or two gentlemen named
23 Ted Freitas and Adam Ramos?

24 A. No, I do not.

15:35:28 25 Q. Did you ever hear about another same-sex

1 couple that had a similar experience at Tastries Bakery
2 besides Eileen and Mireya?

3 A. No, not to my knowledge.

4 Q. I should say claimed to have a similar
5 experience.

6 All right, I'm going to show you Exhibit 564.

7 You're aware, Patrick, I'm sure, that after
8 this incident there was a lot of nasty comments and

9 hate mail and all kinds of terrible things on the

10 internet about Tastries Bakery. I'm sure you remember
11 some of that?

12 A. Yes.

13 Q. Before we look at some examples, what do you
14 remember? What stands out in your memory, just
15 generally?

16 A. Just a lot of that she's a bigot and she, you
17 know, doesn't like gay people and, you know, don't
18 go -- don't go to that bakery anymore. You know,
19 people saying I'm not going to give them my money
20 anymore. Just some of those kinds of things.

21 Q. Okay. Do you know someone named Serenity?
22 Before we talk about this, do you know someone named
23 Serenity?

24 A. No, I do not.

25 Q. So she posted this on Yelp, just the first

1 line, "You pretty much F'd yourselves by being Nazi
2 bigots."

3 Do you see that?

4 A. Yes.

15:37:19 5 Q. Had you seen this post before?

6 A. No.

7 Q. Do you agree with this statement?

8 A. I don't agree with the Nazi piece.

9 Q. Okay. Do you know someone named Mary Tibbits?

15:37:52 10 A. I know of her. I don't really know her.

11 Q. What do you know about her?

12 A. If it's the same person I'm thinking it is,
13 it's a family friend of Sam's.

14 Q. All right. So that first message was actually
15:38:17 15 CM1112.

16 The one from Mary Tibbetts is right here, it's
17 on CM1135. I'm going to make this a little smaller so
18 you can see the whole thing.

19 Just take a look at that little exchange right
15:38:37 20 there and tell me when you're done.

21 A. Okay.

22 Q. Is this the same Mary Tibbetts you were
23 thinking of?

24 A. Yes, I believe so.

15:38:56 25 Q. Do you agree with her comment here that

1 everybody -- "You need to get the word out. Everyone
2 post it on Facebook"?

3 A. Yes.

4 Q. That's kind of the same thinking that Eileen
5 and Mireya had at the time. Wouldn't you agree?

6 A. Yes.

7 Q. Do you know a Matthew Sullivan?

8 A. Yes.

9 Q. Who is he?

10 A. He's a friend.

11 Q. Is he also LGBT?

12 A. No.

13 Q. He wrote, "F them. They're about to feel the
14 wrath." Do you see that?

15 A. Yes.

16 Q. What does that mean to you when you read that,
17 "They're about to feel the wrath"?

18 A. I think it's -- it's similar to Mary's
19 statement about posting it, you know, on social media.

20 Q. You think that's an appropriate statement to
21 make publicly?

22 MR. MANN: Objection, vague.

23 A. I mean, that's his social media. I mean, he
24 can post what he wants.

25 Q. (By Mr. Jonna) Do you know someone named

1 Ankel Brintrup? B-r-i-n-t-r-u-p. Ankel, A-n-k-e-l.

2 A. No.

3 Q. Do you know someone named Kourtney who spells
4 her name with a K?

15:40:52 5 A. I don't believe so.

6 Q. Here on CM1302 it says, "Hi, Cathy Miller,
7 hope you get your ass beat for being a rude, judgmental
8 bitch." Do you see that?

9 A. Yes.

15:41:04 10 Q. Do you remember reading this comment ever?

11 A. No, I don't.

12 Q. Do you think that's a fair statement to make?

13 A. I don't -- I don't condone any violence
14 against anybody.

15:41:21 15 Q. Do you think statements like Eileen's earlier
16 that Cathy hates gays and lesbians, do you think that
17 would contribute to people reacting violently like
18 this?

19 A. I don't believe so.

15:41:42 20 Q. Do you know someone named Jim Blair?

21 A. No, I don't.

22 Q. Do you know someone named Cody Hatfield?

23 A. It does not sound familiar.

15:42:30 24 Q. He wrote, "Burn this F'ing bakery to the
25 ground. Bigots don't deserve to feel safe." You see

1 that?

2 A. Yes.

3 Q. Have you read that comment before?

4 A. No.

15:42:39 5 Q. Do you agree with that statement?

6 A. No.

7 Q. He also said, "Bricks through the window can

8 serve as excellent reminders that you are not welcome

9 in our modern society." Have you seen that comment

10 before?

11 A. No.

12 Q. Do you agree with that statement?

13 A. No.

14 Q. Are you used to seeing reactions like this

15:43:26 15 from people in the LGBT community when they don't like

16 someone who claims to be a religious person and not in

17 favor of same-sex marriage?

18 A. I have seen stuff like that, yes.

19 Q. In light of that, do you think maybe people

15:43:45 20 should be more careful about what they say on social

21 media because it could incite all these people with

22 crazy, hateful thoughts?

23 MR. MANN: Objection, vague, calls for

24 speculation.

15:43:56 25 A. I don't believe so.

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REPORTER'S CERTIFICATION

I, Jean Keleher, a Certified Shorthand Reporter in and for the State of California, holding Certificate No. 4136, do hereby certify:

That the foregoing witness was by me duly sworn; that the deposition was then taken before me at the time and place herein set forth; that the testimony and proceedings were reported stenographically by me and later transcribed into typewritten form under my direction; that the foregoing is a true record of the testimony and proceedings taken at that time.

I further certify that I am neither counsel for, nor in any way related to any party to said action, nor in any way interested in the result or outcome thereof.

IN WITNESS WHEREOF, I have subscribed my name on August 4, 2021.



Jean Keleher, CSR #4136

MIL EXHIBIT 29

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF KERN - METRO DIVISION

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING, an agency of the
State of California,

Case No.
BCV-18-102633

Plaintiff,

CERTIFIED COPY

vs.

CATHY'S CREATIONS, INC. dba
TASTRIES, a California
Corporation; and CATHARINE
MILLER, an individuals,

Defendants.

EILEEN RODRIGUEZ-DEL RIO and
MIREYA RODRIGUEZ-DEL RIO,

Real Parties in Interest.

VIDEOTAPED DEPOSITION OF EILEEN RODRIGUEZ-DEL RIO

Taken remotely via Zoom Videoconferencing
Keleher's Court Reporters
19237 Flightpath Way, Suite 100
Bakersfield, California
Thursday, July 29, 2021, at 9:08 a.m.

Reported by:

Shelly A. Davis, CSR #8947, RPR

JOB No. 21-101796

10:54:38

1 BY MR. JONNA:

2 Q. I'm just asking if you know.

3 A. I don't.

4 (Whereupon, Exhibit 553B was marked

10:54:41

5 for referenced.)

6 BY MR. JONNA:

7 Q. Okay. Take a look at Exhibit 553B. There

8 were a number of comments to your Facebook post, I'm

9 sure you remember. It was -- correct?

10:55:00

10 A. Can you repeat that? You cut out.

11 Q. There were a number of comments posted in

12 response to your post; is that right?

13 A. I believe so, yes.

14 Q. All right. So we went through the

10:55:15

15 comments, and I just want to ask you if you remember

16 some of these. I'm going to make it a little

17 bigger. I went through, and I looked at the ones

18 that you -- that you actually "liked." Sorry, give

19 me a second.

10:55:42

20 I'm going to go Whitney Weddell, Whitney

21 Weddell, you're commenting -- that's the same lady

22 we talked about earlier, right?

23 A. Yes, sir.

24 Q. Did -- and it says here -- you say, "She

10:56:04

25 took over the process and told us she does not

10:56:07

1 support the gays in any way." Do you see that?

2 A. Yep.

3 Q. Is that -- is that what she told you?

4 A. That's how I felt at the time.

10:56:16

5 Q. But she never said she doesn't support the
6 gays in any way, right? You felt that way, but she
7 didn't say that?

8 A. She told us she don't condone same sex
9 marriages.

10:56:27

10 Q. But she didn't say she doesn't support the
11 gays in any way, correct?

12 A. Correct.

13 Q. Okay. Here -- here someone else says,
14 "Don't make me fly from Maryland and whoop her ass,
15 too." Do you see that?

10:56:40

16 A. Uh-huh.

17 Q. And you actually "liked" that comment?

18 A. Yes.

19 Q. Do you think that someone should have
20 whooped her ass as a result of what happened to you?

10:56:51

21 A. No. Again, I was angry at the time.

22 Q. So do you think that's a comment that you
23 should have not endorsed?

24 A. Possibly. However, at that time, at that
25 moment, I was heated, so I "liked" the comment. I

10:57:19

10:57:25

1 can't take that back.

2 Q. Here on page 13 of the PDF, there's

3 another comment that says, "I hope they lose more

4 business for not working with you." Do you see

10:57:56

5 that?

6 A. Yes.

7 Q. You "liked" that comment, too, right?

8 A. I "liked" a lot of comments that day. It

9 doesn't mean that I agree with everybody that

10:58:07

10 commented what they commented, I just "liked" them

11 because I felt that the people on my Facebook were

12 supporting the fact that I was discriminated

13 against.

14 Q. How do you decide whether to "like" a

10:58:19

15 comment or not "like" a comment?

16 MR. MANN: Objection. Vague.

17 BY MR. JONNA:

18 Q. In general on Facebook, I mean, what's

19 your -- what's your criteria for whether you "like"

10:58:31

20 something or not "like" something?

21 A. Honestly, if somebody comments, I pretty

22 much "like" a comment. It doesn't have any

23 specificities.

24 Q. What if she -- what if someone said that

10:58:42

25 want -- they were planning to murder and rape

10:58:44

1 someone, would you "like" a comment like that?

2 A. No.

3 Q. Why not?

4 A. Why would I not "like" something for

10:58:55

5 murder and rape?

6 Q. Yes.

7 A. Because that's just not me. These people

8 were upset and feeling my pain, but no one was going

9 to go out to murder anybody. They just made

10:59:23

10 comments that they wanted to put on there.

11 Q. Well, there was someone that said they

12 wanted to fly out and whooped their ass, though, and

13 you "liked" that comment, right?

14 A. That was --

10:59:37

15 MR. MANN: Objection. Asked and answered.

16 It's argumentative.

17 BY MR. JONNA:

18 Q. Well, what's the difference between the

19 murder and rape one and whooping her ass? Is it

10:59:47

20 just because they might not kill her if they whoop

21 her ass?

22 A. The difference is I knew she wasn't coming

23 out here to whoop her ass.

24 Q. How do you know that?

11:00:02

25 A. Because I know the person that wrote it.

11:00:06

1 Q. Do you know if anyone actually came out
2 and caused violence to the folks at Tastries?

3 A. No, not to my knowledge.

11:00:18

4 Q. Did you ever hear that someone actually
5 claims to have been raped in response to what
6 happened after the publicity in this case -- an
7 employee of Tastries?

8 A. No.

11:00:29

9 Q. How does that make you feel -- hearing
10 that?

11 A. That somebody was raped?

12 Q. That someone was raped and that the claim
13 from the victim was that the person who raped her
14 made specific reference to this case.

11:00:42

15 A. Well, that's upsetting, but that's not
16 what -- the reason why I posted. I can't control
17 what other people do.

18 Q. Well, you can control whether you "like"
19 the comments, right?

11:00:54

20 MR. MANN: Objection. Argumentative.

21 BY MR. JONNA:

22 Q. How about this other comment here that
23 says, "They need a blasting." You "liked" that one,
24 too. What do you -- what do you mean -- what do you
25 think they mean when she say, "They need a

11:01:05

11:01:08

1 blasting"?

2 MR. MANN: Objection.

3 BY MR. JONNA:

4 Q. This is -- this is your name right here.

11:01:14

5 MR. MANN: Can you go back to the full post?

6 BY MR. JONNA:

7 Q. "They need a blasting. Who is she to

8 judge? You don't let that ruin your special day."

9 So my question is: What -- what do you understand

11:01:27

10 when you read that? What does it mean, "They need a

11 blasting"?

12 A. I "liked" it because they said, "Don't let

13 that ruin your day." Your reading what you want to

14 read into it, but the reality is I "liked" it

11:01:37

15 because my cousin said, "Don't let that ruin your

16 special day."

17 Q. What do you think she meant when she

18 said -- what did it mean to you when you read, "They

19 need a blasting"? What does that mean to you?

11:01:50

20 A. It doesn't mean anything because I didn't

21 even pay attention to that part.

22 Q. Okay. Well, now that you're looking at

23 it, what do you think that means?

24 A. I still don't have no thoughts as to it

11:02:01

25 meaning anything.

11:02:06

1 Q. Well, I mean, what -- it has to mean
2 something. When you read it, how do you interpret
3 it?

11:02:13

4 A. You would have to ask that person. I
5 don't --

6 Q. Right.

7 A. I don't interpret it in any way.

11:02:20

8 Q. I'm not asking you to tell me what she
9 meant, I'm asking you to tell me what you understand
10 that to mean as a -- as an intelligent person
11 reading it.

12 MR. MANN: Asked and answered.

13 BY MR. JONNA:

14 Q. You can answer the question.

11:02:33

15 A. Again, I didn't take it into any context.

16 Q. What does the word "blasting" mean to you?
17 Do you -- do you have an understanding of what that
18 word means?

11:02:46

19 A. It depends on how somebody is saying it.
20 Blasting could be talking to somebody and saying
21 something. Blasting could be blowing up. It's how
22 one interprets.

23 Q. You don't have an interpretation of it?

24 A. No, sir.

11:03:00

25 Q. In this context?

11:03:03

1 A. No, sir.

2 Q. Okay. How about people who were saying
3 here, "I hate wacko ignorant Christians"? Is that
4 you what consider Cathy Miller to be, a wacko
5 ignorant Christian?

11:03:46

6 A. No.

7 (Whereupon, Exhibit 555A was marked
8 for referenced.)

9 BY MR. JONNA:

11:03:56

10 Q. Let's take a look at Exhibit 555A. This
11 is a review of Tastries Bakery, one star, that you
12 provided on August 26, 2017, which says, "Because
13 the owner is a bigot and hates lesbians and gays and
14 refuses service to them, apparently gay and lesbian
15 money looks different and spends different. She
16 must be a Trump supporter." Did I read that
17 correctly?

11:04:31

18 A. Yes.

19 Q. Is that your review of Tastries on
20 August 26th, 2017?

11:04:40

21 A. I believe so.

22 Q. And why is it that you wrote down
23 understand that she -- "the owner is a bigot and
24 hates lesbian and gays"?

11:04:53

25 A. Again, it's the same day that it happened,

11:04:56

1 and that's how I felt. That's how she made me feel.

2 Q. She -- do you believe as you sit here

3 today that she hates lesbians and gays?

4 A. I have no idea. You would have to ask

11:05:08

5 her.

6 Q. Well, I'm asking what you believe, because

7 you wrote, "She hates lesbian and gays." You said

8 that was how you felt that day. I'm asking how you

9 feel about it now.

11:05:17

10 MR. MANN: Objection. Asked and answered.

11 You can go ahead and answer, Eileen.

12 THE WITNESS: Okay.

13 Yeah, to this day, I still think she does

14 not care for the LGBT community.

11:05:48

15 BY MR. JONNA:

16 Q. Do you think that you shouldn't have

17 written down on this -- on this public page that she

18 hates lesbians and gays? Do you regret writing

19 that?

11:05:59

20 A. No.

21 Q. Do you stand by that?

22 A. It's how I felt at the time and how I feel

23 now.

24 Q. In discovery in this case, you signed a --

11:06:17

25 or you -- you -- the DFEH served responses saying

11:06:23

1 that you never posted this review. I don't want to
2 pull up your discovery responses right now, but I
3 think this clarifies that that was not correct, you,
4 in fact, did post this review on August 26, 2017; is

11:06:35

5 that right?
6 A. I do not recall. This is the first time
7 I've seen it since 2017.

8 Q. Do you still -- do you still have a
9 Facebook page?

11:06:50

10 A. A Facebook?

11 Q. Yes.

12 A. Uh-huh.

13 Q. Is that a yes?

14 A. Yes.

11:06:54

15 (Whereupon, Exhibit 555B was marked
16 for referenced.)

17 BY MR. JONNA:

18 Q. Okay. Let's take a look at Exhibit 555B.
19 Is this your Facebook page -- or was it at one point
20 in time?

11:07:11

21 A. It still is.

22 Q. Okay. At the very bottom of the Facebook
23 page, there's this reference to a review that you
24 made of Tastries August 26, 2017. Does that refresh

11:07:29

25 your recollection that you, in fact, did post that

11:07:32

1 review which still shows on your profile to this

2 day?

3 A. I don't look at my profile.

4 Q. Well, if you were to look at it today and

11:07:40

5 see this, I think that would confirm that you did

6 make this post on August 26, 2017; would you agree?

7 A. If I did look at it today, but, again, I

8 don't -- I don't daily or yearly or weekly look at

9 my profile.

11:07:57

10 Q. Do you have any reason to believe that you

11 didn't write that post on August 26, 2017, the

12 review of Tastries?

13 A. Can you repeat the question?

14 Q. Do you have any reason to believe that you

11:08:09

15 did not write that review of Tastries that we looked

16 at earlier?

17 A. No, if it's on any Facebook. I just don't

18 recall writing it. Again, if it was written, it was

19 in the heat of the moment at that time.

11:08:35

20 Q. Do you know someone named Mia Velacima?

21 A. Not to my knowledge.

22 MR. JONNA: Let's take a five-minute break, if

23 that's okay.

24 THE VIDEO OPERATOR: Going off the record. The

11:09:14

25 time is 11:09.

12:10:18

1 THE WITNESS: Again --

2 MR. MANN: Vague.

3 THE WITNESS: -- I was -- go ahead, Greg.

4 Sorry.

12:10:22

5 MR. MANN: Objection. Vague.

6 Go ahead, Mireya. I'm sorry, go ahead,

7 Eileen.

8 THE WITNESS: Again, at the time I was angry

9 and upset and hurt, so I was not thinking of the

12:10:38

10 comments that were going to take place.

11 BY MR. JONNA:

12 Q. Right. And I'm not asking about at the

13 time, I'm asking about -- it's July 29th, 2021,

14 you're looking at all this with a fresh set of eyes

12:10:49

15 now. Looking back, do you -- do you regret the way

16 you phrased those early posts?

17 MR. MANN: Objection. Vague.

18 THE WITNESS: I don't regret posting it. I do

19 regret not being able to possibly turn off the

12:11:07

20 comments to not have the mass comments that took

21 place.

22 BY MR. JONNA:

23 Q. Do you regret "liking" some of those

24 comments that were, you know, saying they want to

12:11:21

25 whoop her ass and things like that? Do you -- do

12:11:23

1 you think that was something you would have done

2 differently now?

3 MR. MANN: Objection. Vague.

4 BY THE WITNESS:

12:11:33

5 Q. I don't mean to distract you while looking

6 at this. I'm sorry, I can stop the share. Go

7 ahead. I'm sorry.

8 A. I'm all just like --

9 Q. I know. I know. It's not --

12:11:44

10 A. Sorry.

11 Q. No, it's my fault. Go ahead.

12 A. So you're asking me today -- can you ask

13 the question again?

14 Q. Like, do you -- looking back, do you

12:11:53

15 regret liking some of those more hateful comments

16 that were, you know, kind of expressing some desire

17 to have violence occur? Do you think maybe, looking

18 back, you shouldn't have done that?

19 MR. MANN: Objection. Lack of foundation.

12:12:09

20 States prior testimony. Vague.

21 THE WITNESS: Honestly, today, still I -- I

22 still feel the hurt, and-- four years down the road,

23 I'm still affected by what she did. It --

24 BY MR. JONNA:

12:12:25

25 Q. So you --

12:12:26

1 A. It doesn't go away on how I feel, how she
2 made me feel.

3 Q. So you -- even looking back today, like,
4 you -- you don't regret "liking" the comment that

12:12:35

5 said I -- "She needs to get her ass whooped"? You
6 think that was fine to do?

7 MR. MANN: Objection. Hold on. Hold on.

8 Objection. Misstates prior testimony. Lack of
9 foundation. Vague.

12:12:46

10 Go ahead.

11 THE WITNESS: I don't regret "liking" it. Do I
12 want her to get her ass whooped? No.

13 BY MR. JONNA:

12:12:55

14 Q. What do you want to happen to her? Do you
15 want her to be -- do you want an order from a judge
16 saying you have to make same-sex wedding cakes or --
17 or don't make cakes? Is that what you want?

18 A. I want her --

19 MR. MANN: Objection.

12:13:03

20 THE WITNESS: -- to follow the law.

21 BY MR. JONNA:

12:13:12

22 Q. Right. Well, you're going to tell the
23 judge what you think the law is -- or your lawyer
24 will, but what do you want her to do? Do you have a
25 specific -- if you could write down the order

02:27:40

1 A. He violated the company's -- give me a
2 second to think of what the words were. He violated
3 the -- the -- my manager stated he violated the
4 company's breach of confidentiality about our
5 company to our client.

02:28:14

6 Q. In one of the messages from Patrick to
7 Mireya, Patrick says that "Cathy f'ed up big time
8 and she will learn the hard way. Karma will come to
9 get her ass." Do you agree with that statement?

02:28:44

10 A. I don't agree or disagree.

11 Q. Do you remember seeing comments that ask
12 people that -- to "burn this f'ing bakery to the
13 ground, bigots don't deserve to feel safe"? Do you
14 remember seeing that?

02:29:23

15 A. I don't recall.

16 Q. How about "Pray for her soul. It is
17 rotted"? Do you remember seeing that? "This is the
18 face of a rotten soul."

19 A. I don't recall.

02:29:41

20 Q. How about, "I think she just signed her
21 death sentence"? Do you remember seeing something
22 like that?

23 A. I don't recall.

02:29:54

24 Q. Do you remember seeing comments that were
25 comparing the cake that she made on their Facebook

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REPORTER'S CERTIFICATION

I, Shelly A. Davis, a Certified Shorthand Reporter in and for the State of California, holding Certificate No. 8947, do hereby certify:

That the foregoing witness was by me duly sworn; that the deposition was then taken before me at the time and place herein set forth; that the testimony and proceedings were reported stenographically by me and later transcribed into typewritten form under my direction; that the foregoing is a true record of the testimony and proceedings taken at that time.

I further certify that I am neither counsel for, nor in any way related to any party to said action, nor in any way interested in the outcome thereof.

IN WITNESS WHEREOF, I have subscribed my name on August 5, 2021.

Shelly A. Davis

Shelly A. Davis, CSR #8947, RPR

MIL EXHIBIT 30

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF KERN - METRO DIVISION

DEPARTMENT OF FAIR EMPLOYMENT)
AND HOUSING, an agency of the)
State of California,)
)
Plaintiff,)
)
vs.)
)
CATHY'S CREATIONS, INC. dba)
TASTRIES, a California)
Corporation; and CATHARINE)
MILLER, an individual,)
)
Defendants.)
)
)
EILEEN RODRIGUEZ-DEL RIO and)
MIREYA RODRIGUEZ-DEL RIO,)
)
Real Parties in Interest.)
)

Case No. BCV-18-102633

CERTIFIED COPY

VIDEOTAPED DEPOSITION OF
MIREYA RODRIGUEZ-DEL RIO

Taken Via Zoom Videoconference

Wednesday, July 28, 2021 at 9:55 a.m.

Reported by: Jennifer E. Hennagin, CSR #13559

JOB No. 21-101794

1 (Exhibit 564 previously marked.)

2 Q. (By MR. JONNA) Okay. I'm going to show you

3 Exhibit 564. This is Bates stamped CM1112. And it

4 says, "You pretty much F'd yourselves by being Nazi

5 bigots. Not in my town you don't. Turn away gay

6 couples who are ready and willing to give you their

7 hard-earned money. Then I see you take down your

8 Facebook page instead of handling it head on. Cowardly

9 and bigoted. Soon out of business."

10 Do you see that?

11 A. I see it. Yes.

12 Q. Do you think that Cathy Miller and Tastries

13 should be out of business?

14 A. No.

15 Q. Do you think they should be out of business if

16 they choose not to do things that they say violates

17 their sincere religious beliefs?

18 MR. MANN: Objection. Vague. Lack of

19 foundation.

20 A. It doesn't have to do anything with me. So

21 it's her choice, if that's what she wants to do.

22 Q. (By MR. JONNA) This was posted at 3:26 p.m.,

23 the same day that you guys were at Tastries; is that

24 right?

25 A. That's what it says on the post, on the paper.

1 Q. Do you agree with the first sentence here?

2 "You pretty much F'd yourselves by being Nazi bigots."

3 A. I don't agree or disagree.

4 Q. When you guys started seeing comments like

5 this, did you ever take any action to calm people down,

6 sort of lower the temperature a little bit?

7 MR. MANN: Objection. Assumes facts. Lack of
8 foundation.

9 A. I tried not to comment. I don't believe I

10 made any comments.

11 Q. (By MR. JONNA) Okay. If you go down a little

12 bit further, there's another comment by some guy

13 named -- oh, by the way, I should ask. Do you know who

14 around Arnaldo -- sorry.

15 Do you know who Serenity H is that wrote that

16 other comment?

17 A. Serenity. No. The name doesn't sound

18 familiar.

19 Q. Okay. How about do you know someone named

20 Matthew Sullivan?

21 A. No.

22 Q. He says here, "F them. They're about to feel

23 the wrath."

24 Do you see that?

25 A. I see it. Yes.

1 Q. And do you agree with that statement?

2 A. I don't agree or disagree with it. That's
3 what he thinks.

4 Q. Okay. Let's go down to the Bates stamp 1302.

02:00:54 5 Kourtney. She says here, "Hi, Cathy Miller. I hope
6 you get your ass beat for being a rude, judgmental
7 bitch."

8 Do you see that?

9 A. Yes.

02:01:03 10 Q. Do you know who this person is, Kourtney?

11 A. No.

12 Q. Do you agree with that statement?

13 A. I don't agree or disagree. That's her --
14 that's Kourtney saying that, not me.

02:01:17 15 Q. So you don't disagree that she should get her
16 ass beat?

17 MR. MANN: Objection. Misstates --

18 A. I don't agree or disagree.

19 MR. MANN: Misstates prior testimony.

02:01:25 20 Mischaracterizes prior testimony.

21 Go ahead, Mireya.

22 A. I don't agree or disagree. That's her
23 opinion.

02:01:37 24 Q. (By MR. JONNA) Okay. Do you know someone
25 named Jim Blair?

1 A. No.

2 Q. He says here, "What Christian values you have.

3 Not. You're hateful, deplorable, fake Christians.

4 There are places in hell for people like the people

5 that own this bakery."

6 Do you see that?

7 A. Yes.

8 Q. Do you think that -- do you agree with this

9 statement, too?

10 A. I don't agree or disagree with it.

11 Q. How about someone named Cody Hatfield? Do you

12 know who that is?

13 A. No.

14 Q. Cody said, "Burn this F-ing bakery to the

15 ground. Bigots don't deserve to feel safe. Here's

16 hoping you get run out of business and out of town soon

17 enough."

18 Do you agree with that statement?

19 A. I don't -- like I said, I don't agree or

20 disagree. That's what they want to say. I didn't tell

21 them to say that.

22 Q. But you did -- you and Eileen -- I should say

23 Eileen did tell them that they hate gays and lesbians.

24 Didn't she say that?

25 A. That's what she put on her Facebook.

1 Q. Right. You don't think that contributes to
2 this attitude of violence and hate?

3 MR. MANN: Objection. Calls for speculation.
4 Lack of foundation. Lack of evidence.

02:03:40 5 Q. (By MR. JONNA) Are you going to answer the
6 question?

7 A. Everyone can interpret things however they
8 want. That's all.

9 Q. You should be free to say whatever you want.

02:03:55 10 And if someone acts violently in response, that's their
11 own problem?

12 MR. MANN: Objection. Misstates prior
13 testimony. Lack of foundation.

02:04:06 14 Q. (By MR. JONNA) How about this statement from
15 Cody Hatfield? "Bigoted scum like you do not deserve
16 to feel safe. Bricks through the window can serve as
17 excellent reminders that you are not welcome in our
18 modern society."

19 Do you agree with that?

02:04:18 20 A. I don't agree that they should do any of that,
21 but I can't control what they say or do.

22 Q. Do you know a gentleman named Matt Bjork or
23 Jork? B-j-o-r-k.

24 A. No.

02:04:39 25 Q. He says, "You're going to get gang raped."

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REPORTER'S CERTIFICATION

I, Jennifer E. Hennagin, a Certified Shorthand Reporter in and for the State of California, holding Certificate No. 13559, do hereby certify:

That the foregoing witness was by me duly sworn; that the deposition was then taken before me at the time and place herein set forth; that the testimony and proceedings were reported stenographically by me and later transcribed into typewritten form under my direction; that the foregoing is a true record of the testimony and proceedings taken at that time.

I further certify that I am neither counsel for, nor in any way related to any party to said action, nor in any way interested in the result or outcome thereof.

IN WITNESS WHEREOF, I have subscribed my name on August 3, 2021.



Jennifer E. Hennagin, CSR #13559

TRIAL EXHIBIT 8



Standards of Service

Is it lovely, praiseworthy, or of good report?

Tastries provides custom designs that are

Creative, Uplifting, Inspirational and Affirming

prepared especially for you as a

Centerpiece to your Celebration

All custom orders must follow Tastries Standards of Service:

- Look as good as it tastes, and taste as good as it looks 😊
- Beautiful and balanced: size is proportional to design
- Complimentary colors: color palettes are compatible; work with the design
- Appropriate design suited to the celebration theme
- Themes that are positive, meaningful and in line with the purpose
- We prefer to make cakes that would be rated G or PG

We do not accept requests that do **not** meet Tastries Standards of Service, including but not limited to designs or an intended purpose based on the following:

- Requests portraying explicit sexual content
- Requests promoting marijuana or casual drug use
- Requests featuring alcohol products or drunkenness
- Requests presenting anything offensive, demeaning or violent
- Requests depicting gore, witches, spirits, and satanic or demonic content
- Requests that violate fundamental Christian principals; wedding cakes must not contradict God's sacrament of marriage between a man and a woman

**Our designers are ready to help you explore
the many design options that we can offer at Tastries!**

*"... whatever is true, whatever is noble, whatever is right,
whatever is pure, whatever is lovely, whatever is of good report,
if anything is virtuous or praiseworthy, think about these things." Phil 4:8*



Design Standards

Is it lovely, praiseworthy, or of good report?

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Creative, Uplifting, Inspirational and Affirming
prepared especially for you as a
Centerpiece to your Celebration

All custom orders must follow Tastries Design Standards:

- Look as good as it tastes, and taste as good as it looks 😊
- Beautiful and balanced: size is proportional to design
- Complimentary colors: color palettes are compatible; work with the design
- Appropriate design suited to the celebration theme
- Themes that are positive, meaningful and in line with the purpose
- We prefer to make cakes that would be rated PG or G

Order requests that do **not** meet Tastries Design Standards and we do not offer:

- Designs promoting marijuana or casual drug use
- Designs featuring alcohol products or drunkenness
- Designs presenting explicit sexual content
- Designs portraying anything offensive, demeaning or violent
- Designs depicting gore, witches, spirits, and satanic or demonic content
- Designs that violate fundamental Christian principals; wedding cakes must not contradict God's sacrament of marriage between a man and a woman

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the many design options that we can offer at Tastries!**

*"... whatever is true, whatever is noble, whatever is right,
whatever is pure, whatever is lovely, whatever is of good report,
if anything is virtuous or praiseworthy, think about these things." Phil 4:8*

Tastries

bakery · boutique · events

Design Standards

Is it lovely, praiseworthy, or of good report?

Is this design based on godly themes such as the idea of peace, freedom, kindness, love, respect, happiness, joy, goodness or does the design bring to mind feelings of fear, obsession, sadness, and bondage? Our cakes are a reflection of our business and speak volumes when sitting center stage.

All cakes have to meet the Tastries Design Standards:

- Look as good as it tastes, and taste as good as it looks ☺
- Beautiful and balanced: size is proportional to design
- Complimentary colors: color palettes are complimentary; work with design
- Appropriate design complimenting theme of celebration
- Themes that are positive, uplifting and in line with the intent of a celebration of someone or something.
- We prefer to make cakes that would be rated PG or G

Cakes that will **not** meet Tastries Design Standards:

- No cake or cookies depicting marijuana or any other drugs with the exception of nurse or doctor appreciation or medical field related gifts.
- No cake or cookies depicting alcohol or drunkenness.
- No cake or cookies depicting anything derogatory.
- No cake or cookies depicting witches, ghosts, satanic or demonic representations or gore.
- Wedding cakes must not contradict God's sacrament of marriage between a man and a woman.

Our designers are happy to work with you to design a custom cake that meets our criteria for what we are able to offer at Tastries!

Philippians 4:8 says, "... whatsoever things are true, whatsoever things are honest, whatsoever things are just, whatsoever things are pure, whatsoever things are lovely, whatsoever things are of good report; if there be any virtue, and if there be any praise, think on these things."

Thank you,
Cathy

PS. If we are unable to meet your design needs, we can refer you to several other bakers and bakeries in town.



Tastries

bakery · boutique · events

Design Standards

Is it lovely, praiseworthy, or of good report?

Tastries provides custom designs that are
Creative, Uplifting, Inspirational and Affirming
prepared especially for you as a
Centerpiece to your Celebration

All custom orders must follow Tastries Design Standards:

- Look as good as it tastes, and taste as good as it looks ☺
- Beautiful and balanced: size is proportional to design
- Complimentary colors: color palettes are compatible; work with the design
- Appropriate design suited to the celebration theme
- Themes that are positive, meaningful and in line with the purpose
- We prefer to make cakes that would be rated PG or G

Order requests that do **not** meet Tastries Design Standards and we do not offer:

- Designs promoting marijuana or casual drug use
- Designs featuring alcohol products or drunkenness
- Designs presenting explicit sexual content
- Designs portraying anything offensive, demeaning or violent
- Designs depicting gore, witches, spirits, and satanic or demonic content
- Designs that violate fundamental Christian principals; wedding cakes must not contradict God's sacrament of marriage between a man and a woman



**Our designers are ready to help you explore
the many design options that we can offer at Tastries!**

*"... whatever is true, whatever is noble, whatever is right,
whatever is pure, whatever is lovely, whatever is of good report,
if anything is virtuous or praiseworthy, think about these things." Phil 4:8*

TRIAL EXHIBIT 21



DEPARTMENT OF FAIR EMPLOYMENT & HOUSING

2218 Kausen Drive, Suite 100 | Elk Grove | CA | 95758
800-884-1684 | TDD 800-700-2320
www.dfeh.ca.gov | email: contact.center@dfeh.ca.gov

DIRECTOR KEVIN KISH

October 26, 2017

Catharine M. Miller
Agent for Service for Cathy's Creations, Inc. dba Tastries
3665 Rosedale Highway
Bakersfield, CA 93308

Respondent:

Cathy Miller, Cathy's Creations, Inc. dba Tastries

RE: Notice of Filing of Discrimination Complaint - Response Requested

DFEH Number: 935123-315628

Rodriguez-Del Rio / Cathy's Creations, Inc. dba Tastries

To All Listed Respondent(s):

Enclosed is a copy of a complaint filed with the Department of Fair Employment and Housing (DFEH). The enclosed complaint, in which you have been named a Respondent or Co-Respondent, alleges unlawful discrimination pursuant to Civil Code section 51.

The DFEH serves as a neutral fact-finder and represents the state of California rather than the complaining party. The merits of this complaint have not been determined. It was, however, subjected to a screening process, and the allegations, if proven, could support a finding of discrimination.

You must submit a response to the questions below including the supplemental questions, within thirty (30) days of the date of this letter.

1. State the legal name of your business and any other name(s) under which you do or have done business in California.
2. State your business address. Please note that you are required to notify the DFEH in writing of any change of address and the effective date of such change while the complaint is under investigation and throughout any administrative adjudication. (California Code of Regulations, title 2, sections 7403 and 7411).
3. State type of legal business entity you are, i.e., corporation, partnership, limited partnership, sole proprietorship.
4. Does your company have a current contract(s) for the provisions of goods, services or public works with the State of California or receive federal funds? If so, name the awarding agency(ies).

Notice of Filing of Discrimination Complaint – Response Requested

October 26, 2017

Page 2

Your response and filing of your address can be submitted by mail. In all mailed correspondence, please include your matter number **935123-315628** and mail it to DFEH, 2218 Kausen Drive, Suite 100, Elk Grove, CA 95758.

If you are interested in discussing a possible settlement of this complaint, please contact me immediately. This will avoid unnecessary delay and limit any potential liability. All settlement discussions are confidential, and not subject to disclosure. All discussions referring to evidence or information which has a bearing on determining the merits of this complaint will not be considered part of a settlement discussion unless confidentiality is acknowledged by the DFEH. If a settlement is reached which is mutually acceptable to the parties, submission of the requested information may not be necessary.

If you have any questions, please contact me.

Sincerely,



Clara Hernandez
Consultant III-Spec.
661.395.2973
clara.hernandez@dfeh.ca.gov

Enclosure
CERTIFIED MAIL: 70170660000107888650

AA01918

SUPPLEMENTAL QUESTIONS

Complainant: Eileen Rodriguez-Del Rio

Co-Complainant: Mireya Rodriguez-Del Rio

Respondent: Cathy Miller, Cathy's Creations, Inc. dba Tastries

1. Provide a statement of your position with regard to the allegations contained in the complaint:

On 8/26/2017, Cathy Miller, owner of Tastries, stated she would not make our wedding cake because she did not condone same sex marriages. She refused to provide us service, and steered us to another bakery.

2. Why did you refuse to make a wedding cake for the complainants?
3. What are the specific religious bases for your refusal to make or sell wedding cakes for same-sex wedding celebrations?
4. Have you made or sold cakes for same-sex wedding celebrations? If so, for each cake please state when the cake was made or sold, list the names and contact information of the customers, and state why you did not refuse to make or sell the cake for the same reasons you refused to make a wedding cake for the complainants.
5. Have you refused, on religious grounds, to make or sell cakes for other types of occasions, celebrations or events? If yes, please describe the types of occasions, celebrations or events for which you have refused for religious reasons to make or sell cakes.
6. Have you made or sold cakes to be used in wedding celebrations between a couple, at least one of whom had been divorced? If yes, why?
7. Have you made or sold cakes to be used in wedding celebrations between a couple, at least one of whom had children out of wedlock? If yes, why?
8. Have you refused to make or sell a wedding cake for an opposite-sex couple based on religious reasons? If so, for each occasion please state when and why you refused, and list the names and contact information of the potential customers.
9. Since January 1, 2014, have you refused to make or sell cakes to a potential customer(s) for any reason? If yes, why? For each person denied service, state

the individual's name, the date of denied service, the individual's contact information, and the reason service was denied.

10. For the period of January 1, 2014 to the present, provide a list of all potential customers you have denied service to due to their sexual orientation. For each individual listed state their name, the date of denied service, and the individual's contact information.
11. Describe all communications between Catharine Miller and Gimme Some Sugar and/or Stephanie Caughell-Fisher regarding referral of potential Tastries customers to Gimme Some Sugar.
12. Describe any agreement between Catharine Miller and Gimme Some Sugar and/or Stephanie Caughell-Fisher regarding referral of potential Tastries customers to Gimme Some Sugar.
13. For each potential Tastries customer referred to Gimme Some Sugar, please list the name(s) and contact information.
14. How many wedding cakes has Tastries sold in the last two years? Please provide your best estimate.
15. How many wedding cakes has Tastries custom designed in the last two years? Please provide your best estimate.
16. How many pre-designed or non-custom wedding cakes has Tastries sold in the last two years? Please provide your best estimate.
17. What percentage of the total number of cakes produced by Tastries in the last two years were wedding cakes? Please provide your best estimate.
18. Do Tastries wedding cakes typically have writing on them? If yes, what is the typical written message?
19. Describe the design process for creating a Tastries wedding cake.
20. Describe Catharine Miller's role in the wedding cake design process. Does her role differ for cakes other than wedding cakes?
21. What percentage of Tastries cakes did Catharine Miller design in the last two years?
22. Describe Catharine Miller's role in baking, sculpting, decorating, frosting, or otherwise assembling cakes (i.e., Catharine Miller's role aside from the design process of the cakes).

23. What percentage of Tastries cakes did Catharine Miller bake, sculpt, decorate, frost, or otherwise assemble in the last three years? What is the percentage for wedding cakes?
24. Does Catharine Miller deliver cakes to wedding celebrations personally? If yes, what percentage of wedding cakes does Ms. Miller personally deliver to wedding celebrations? What is the decision-making process that leads to Ms. Miller personally delivering cakes to wedding celebrations?
25. Have Catharine Miller or other Tastries employees or independent contractors participated in wedding celebrations at which Tastries cakes are involved? If yes, please describe such participation.
26. Have Tastries employees or independent contractors been disciplined for their participation in wedding celebrations at which Tastries cakes were involved?
27. Have Tastries wedding cakes been delivered or displayed in such a manner that attendees at a wedding celebration knew the cake was a Tastries cake?
28. Describe all steps, if any, you take to ensure that a Tastries cake is used by the customer(s) to whom it is sold, rather than transferred to a third party.
29. How many employees do you employ? If this number has changed since January 1, 2014, please describe the changes, including when the changes occurred.
30. How many independent contractors work with you? If this number has changed since January 1, 2014, please describe the changes, including when the changes occurred.
31. Describe the job duties of each Tastries employee and independent contractor.
32. Describe the duties associated with each job title at Tastries. Please provide duty statements for each job title at Tastries.
33. Provide a list of all employees who have worked at Tastries for the period of January 1, 2014 to the present. For each individual listed state their name, date of hire, employment status, and last known contact information.
34. Provide a list of all independent contractors who have worked with Tastries for the period of January 1, 2014 to the present. For each individual listed state their name, date of hire, employment status, and last known contact information.
35. Provide a description of your policies on harassment. Provide a copy of each written policy, and explain what steps have been taken to implement it.

36. Provide a description of your policies on discrimination. Provide a copy of each written policy, and explain what steps have been taken to implement it.
37. Describe your policies and procedures for handling customer and employee or independent contractor complaints. Provide a copy of each written policy, and explain what steps have been taken to implement it.
38. Describe all complaints of harassment or discrimination made by an employee or independent contractor from January 1, 2014 to the present. Provide a copy of each written complaint of harassment or discrimination made by an employee or independent contractor since January 1, 2014.
39. Describe all complaints of harassment or discrimination made by a potential customer(s) against Ms. Miller since January 1, 2014. Provide any written complaints.
40. Describe all complaints of harassment or discrimination made by a potential customer(s) against any Tastries employee or independent contractor since January 1, 2014. Provide any written complaints.
41. Identify all owners of Cathy's Creations, Inc.

**COMPLAINT OF DISCRIMINATION
BEFORE THE STATE OF CALIFORNIA
DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING
Under the California Unruh Civil Rights Act
(Civ. Code, § 51)**

Complaint of
Eileen Rodriguez-Del Rio, Complainant.
Mireya Rodriguez-Del Rio, Co-Complainant
6200 Lou Court
Bakersfield, California 93313

DFEH No. 935123-315628

vs.

Cathy Miller; Cathy's Creations, Inc. dba Tastries
dba Tastries Bakery, Respondents.
3665 Rosedale Highway
Bakersfield, California 93308

THE PARTICULARS ARE:

1. **Eileen Rodriguez-Del Rio** and **Mireya Rodriguez-Del Rio**, allege that respondents took the following adverse actions against complainants. Complainants were denied full or equal accommodations, advantages, facilities, privileges, or services by a business establishment, including both private and public entities because of one or more Fair Employment and Housing Act (which incorporates Civil Code section 51) protected basis: **Sexual Orientation**.
2. Our belief is based on the following: On 8/26/2017, Cathy Miller, owner of Tastries, stated she would not make our wedding cake because she did not condone same sex marriages. She refused to provide us service, and steered us to another bakery.
3. We initially visited Tastries on August 17, 2017, to inquire about ordering a wedding cake. A Tastries employee assisted us. She provided a quote for the simple wedding cake we chose, and suggested we return for a cake tasting on August 26, 2017. We were pleased with the service the employee provided us, and after looking at cakes at other bakeries, we expected to order our cake from Tastries assuming all went well at the tasting.

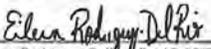
4. We did not taste cakes during our August 26, 2017, visit to Tastries. We arrived for our appointment, met Eileen's mother and our two friends, and were greeted by the employee, who helped us previously. She then informed us her boss would assist us. Her boss, Cathy Miller, introduced herself and told us she was taking over. Ms. Miller asked us what we were looking for, and we informed her we had already provided details about the wedding cake we wanted. She responded that the cake would cost \$230, and that she was sending the order to another bakery because she does not condone nor work on same-sex weddings. Ms. Miller said she always sends orders for same-sex wedding cakes to another bakery. We were shocked. Since Tastries refused to bake our wedding cake, we saw no point in tasting its cakes, so we left.

5. Complainants **Eileen Rodriguez-Del Rio** and **Mireya Rodriguez-Del Rio** reside in the City of **Bakersfield**, State of **California**.

VERIFICATION

I, Eileen Rodriguez-Del Rio, am a complainant in the above complaint. I have read the above complaint and know its contents. I declare under penalty of perjury under the laws of the State of California that the above is true and correct of my own knowledge, except as to those matters alleged on information and belief, which I also believe to be true.

Signature of Complainant or Complainant's Legal Representative: Date:

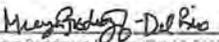

Eileen Rodriguez-Del Rio
Eileen Rodriguez-Del Rio (Oct 18, 2017)

Oct 18, 2017

VERIFICATION

I, Mireya Rodriguez-Del Rio, am a complainant in the above complaint. I have read the above complaint and know its contents. I declare under penalty of perjury under the laws of the State of California that the above is true and correct of my own knowledge, except as to those matters alleged on information and belief, which I also believe to be true.

Signature of Complainant or Complainant's Legal Representative: Date:


Mireya Rodriguez-Del Rio
Mireya Rodriguez-Del Rio (Oct 18, 2017)

Oct 18, 2017

TRIAL EXHIBIT 22C

1 burdens a religious belief or practice, and, if so, whether the law is the least restrictive means to
2 achieve a compelling government interest. (*Id.* at p. 1158.) Under both of those prongs, the Unruh
3 Act passes muster here.

4 Miller cannot credibly claim that the Unruh Act substantially burdens her beliefs by requiring
5 her to make wedding cakes. She could cease making wedding cakes for anyone, remaining in
6 compliance both with the law and her religious beliefs. (See *North Coast, supra*, 44 Cal.4th at p.
7 1159 [“To avoid any conflict between their religious beliefs and the state Unruh Civil Rights Act’s
8 anti-discrimination provisions, defendant physicians can simply refuse to perform the IUI medical
9 procedure at issue here for any patient of North Coast, the physicians’ employer.”] Alternatively,
10 Miller could ensure that gay and lesbian customers receive equal access to wedding cakes through
11 Tastries employees who do not share her religious objections. (See *ibid.* [“[D]efendant physicians
12 can avoid such a conflict [with the Unruh Act] by ensuring that every patient requiring IUI receives
13 ‘full and equal’ access to that medical procedure through a North Coast physician lacking defendants’
14 religious objections.”] But even if compliance with the Unruh Act did burden a religious practice, it
15 would remain enforceable against Tastries as the least restrictive means to achieve California’s
16 compelling interest in eradicating discrimination. (See *Ibid.*; see also *Smith v. Fair Empl. & Hous.*
17 *Com.* (1996) 12 Cal.4th 1143, 1175 [prospective customers have a “dignity interest,” which is
18 impaired if referred to a different business].) The California Constitution, therefore, provides no
19 defense even if the court adopts a strict scrutiny standard.

20 **B. THERE IS A REBUTTABLE PRESUMPTION THAT THE POTENTIAL HARM TO**
21 **THE PUBLIC CAUSED BY DISCRIMINATION OUTWEIGHS ANY POTENTIAL**
22 **HARM TO TASTRIES SUCH THAT AN INJUNCTION SHOULD ISSUE**

23 As the California Supreme Court held, “[w]here a governmental entity seeking to enjoin the
24 alleged violation of an ordinance which specifically provides for injunctive relief establishes that it is
25 reasonably probable it will prevail on the merits, a rebuttable presumption arises that the potential
26 harm to the public outweighs the potential harm to the defendant.” (*IT Corp. v. County of Imperial,*
27 *supra*, 35 Cal.3d at p. 72, fn. omitted.) “If the defendant shows that it would suffer grave or
28 irreparable harm from the issuance of the preliminary injunction, the court must then examine the
relative actual harms to the parties.” (*Ibid.*) As demonstrated above, the DFEH is likely to prevail on



1 the merits. Thus, this Court must presume “that the potential harm to the public outweighs the
2 potential harm to [Tastries].” (*Ibid.*)

3 Tastries cannot establish it would suffer “grave or irreparable harm from the issuance of the
4 preliminary injunction,” thus the court need not “examine the relative actual harms to the parties.”
5 (*Id.* at p. 72; accord *People ex rel. Brown v. Black Hawk Tobacco, Inc.* (2011) 197 Cal.App.4th
6 1561, 1571; *Water Replenishment District of Southern California v. City of Cerritos* (2013) 220
7 Cal.App.4th 1450, 1461-64.) The Unruh Act compels no speech nor infringes on Tastries’ religious
8 beliefs. Thus, Tastries cannot demonstrate any harm flowing from the issuance of a preliminary
9 injunction enjoining its discrimination, and this Court need not balance the potential harms.

10 **IV. CONCLUSION**

11 Based on the record and Miller’s admission that she intends to continue discriminating
12 against same-sex couples, “prompt judicial action is necessary to carry out the purpose of [FEHA].”
13 (Gov. Code, § 12974.) As demonstrated above, the DFEH is likely to prevail on the merits, and
14 Tastries can show no irreparable harm from the issuance of the requested injunction. Thus, pursuant
15 to Section 12974, the DFEH respectfully requests that this Court enjoin Tastries from enforcing its
16 policy of refusing to sell wedding cakes to same-sex couples.

17 Dated: December 13, 2017

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

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21
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9
10 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **IN AND FOR THE COUNTY OF KERN**

12 DEPARTMENT OF FAIR EMPLOYMENT)
13 AND HOUSING, an agency of the State of)
California,)
14)
Petitioner,)
15)
vs.)
16)
17 CATHY'S CREATIONS, INC. d/b/a)
TASTRIES, a California corporation; and)
18 CATHY MILLER,)
Respondents.)

19)
20 EILEEN RODRIGUEZ-DEL RIO and MIREYA)
RODRIGUEZ-DEL RIO,)
21)
Complainants.)
22)
23)

Case No. BCV-17-102855

**PETITIONER DEPARTMENT OF FAIR
EMPLOYMENT AND HOUSING'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

(Gov. Code, § 12974)

Date: February 2, 2018
Time: 1:30 p.m.
Dept.: 11
Judge: Hon. David R. Lampe

24 The Department of Fair Employment and Housing (DFEH) respectfully submits the following
25 Memorandum of Points and Authorities in Support of its Motion for Preliminary Injunction.
26
27

28 ¹ The DFEH thanks Jenna Kingkade, DFEH Graduate Legal Assistant, for her invaluable assistance.



1 objector’s religious beliefs.” (*North Coast Women’s Care Medical Group, Inc. v. San Diego County*
2 *Sup. Ct., supra*, (2008) 44 Cal.4th 1145, 1155, describing holding of *Employment Div. v. Smith*
3 (1990) 494 U.S. 872, 879.) The Unruh Act is a valid and neutral law of general applicability within
4 the meaning of the “*Smith test*.” (*Id.* at p. 1156.) Accordingly, Tastries’ and Miller’s federal free
5 exercise rights cannot exempt them “from conforming their conduct to the Act’s antidiscrimination
6 requirements even if compliance poses an incidental conflict with [their] religious beliefs.” (*Ibid.*)

7 Indeed, the United States Supreme Court itself rejected a similar free exercise defense over
8 forty years ago in the case of *Newman v. Piggie Park Enters., Inc.* (1968) 390 U.S. 400. *Piggie Park*
9 concerned the question whether Title II of the Civil Rights Act of 1964 could be applied to prohibit
10 racial discrimination even where the owner of a business asserted a religious rationale for refusing to
11 serve African-American customers. (See *Newman v. Piggie Park Enters., Inc.* (D.S.C. 1966) 256
12 F.Supp. 941.) The owner of *Piggie Park* asserted that “his religious beliefs compel[led] him to
13 oppose any integration of the races whatever.” (*Id.* at 944.) The district court held it was not
14 “impressed by [the] defendant[’s] contention that the judicial enforcement of the public
15 accommodations provisions of the Civil Rights Act of 1964 . . . violates the free exercise of his
16 religious beliefs in contravention of the First Amendment to the Constitution.” (*Id.* at 945.) The
17 court observed that while all persons are entitled to the free exercise of religion, that exercise “is
18 subject to regulation when religious acts require accommodation to society.” (*Ibid.*) Likewise, the
19 United States Supreme Court was not persuaded by defendant’s arguments, relegating them to a mere
20 footnote in its decision affirming an award of attorneys’ fees against *Piggie Park*. (See *Piggie Park*,
21 *supra*, 390 U.S. at p. 402, n.5.) The Court held it was “not even a borderline case,” and that
22 defendants’ contention that the Civil Rights Act “was invalid because it ‘contravenes the will of God’
23 and constitutes an interference with the ‘free exercise of the Defendant’s religion,’” was “so patently
24 frivolous that a denial of counsel fees to the petitioners would be manifestly inequitable.” (*Ibid.*)
25 Similarly, in the even earlier case of *Katzenbach v. McClung* (1964) 379 U.S. 294, 298 fn. 1, the
26 Supreme Court rejected a restaurant’s claims that its “personal convictions” and “choice of
27 associates” permitted it to deny African-American customers equal service under the Fifth, Ninth,
28 Tenth, or Thirteenth Amendments. (See *Katzenbach* Brief for Appellees, No. 543, 1964 WL 81100,



1 at *32–33 (U.S. Oct. 2, 1964)]. Tastries arguments cannot be meaningfully differentiated from those
2 presented in *Piggie Park* and *Katzenbach*, and they must similarly be rejected.

3 **ii. California’s free exercise clause does not exempt Tastries from complying**
4 **with the Unruh Act because the Act’s application satisfies strict scrutiny.**

5 The California Supreme Court has not determined the standard applicable to free exercise
6 challenges under the California Constitution. Strict scrutiny, however, is the most demanding
7 standard the court has contemplated. (*North Coast, supra*, 44 Cal.4th at pp. 1159–60.) Moreover,
8 there are reasons to expect that the court would adopt the federal *Smith* test in keeping with its
9 historical practice of interpreting California’s free exercise clause in tandem with its federal
10 counterpart. (See *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527,
11 561–62.)³ The Unruh Act survives either test.

12 “Under strict scrutiny, a law could not be applied in a manner that substantially burdens a
13 religious belief or practice unless the state shows that the law represents the least restrictive means of
14 achieving a compelling interest. [Citation].” (*North Coast, supra*, 44 Cal.4th at p. 1158 [internal
15 quotation marks and brackets omitted].) The Unruh Act and other laws ensuring equal access to
16 public accommodations, however, “plainly serve compelling state interests of the highest order.
17 [Citation].” (*Bd. of Directors of Rotary Intern. v. Rotary Club of Duarte* (1987) 481 U.S. 537, 549
18 [internal brackets omitted] [Unruh Act serves California’s compelling interest in ensuring women
19 equal access to “the acquisition of leadership skills and business contacts as well as tangible goods
20 and services”]; *North Coast, supra*, 44 Cal.4th at p. 1158 [the Unruh Act “furthers California’s
21 compelling interest in ensuring full and equal access to medical treatment irrespective of sexual
22 orientation”].) Moreover, the Unruh Act and other antidiscrimination laws are the least restrictive
23 means of achieving the compelling interests they serve. (See *North Coast, supra*, 44 Cal.4th at p.
24 1158 [Physicians seeking to deny fertility treatment to same-sex couples were not entitled to state-
25 law free exercise exemption, even if strict scrutiny applied and despite a presumably substantial
26 burden on the physicians’ religious beliefs, because the Unruh Act is the least restrictive means for
27 the state to achieve its goal of “ensuring full and equal access to medical treatment irrespective of

28 ³ Or the Court may adopt the *Smith* test because its own early free exercise cases used an approach “much like” the *Smith*
test. (See *Smith v. Fair Employment & Housing Com. (FEHC)* (1996) 12 Cal.4th 1143, 1178–79.)

1 sexual orientation”]; *Roberts v. U.S. Jaycees* (1984) 468 U.S. 609, 626, 628–29 [Minnesota
2 “advanced [its] interests through the least restrictive means” by applying its public accommodations
3 law to prohibit a civic organization from excluding women]; cf. *Burwell v. Hobby Lobby Stores, Inc.*
4 (2014) 134 S.Ct. 2751, 2783 [acknowledging that “prohibitions on racial discrimination [in
5 employment] are precisely tailored” to further the compelling state interest in “providing an equal
6 opportunity to participate in the workforce without regard to race...”].)

7 Strict scrutiny is also satisfied because the DFEH is not asking this Court to apply the Unruh
8 Act in a manner that substantially burdens a religious belief or practice. Selling wedding cakes to
9 same-sex couples is not the only manner in which Tastries may comply with the Act. Tastries may
10 choose to cease offering wedding cakes for sale to the general public. (See *North Coast, supra*, 44
11 Cal.4th at p. 1159 [Physicians could “avoid any conflict” between the Unruh Act and their religious
12 beliefs by simply refusing to provide the fertility treatment at issue to any patients.]; *Smith v. Fair*
13 *Empl. & Hous. Com. (FEHC)* (1996) 12 Cal.4th 1143, 1170 [Landlord whose religious beliefs
14 motivated her to deny rental housing to non-married couples could avoid conflict between her beliefs
15 and FEHA “by selling her units and redeploying the capital in other investments.”].) The fact that
16 Miller’s religious beliefs may motivate Tastries to choose the latter method of compliance does not
17 mean the Unruh Act substantially burdens her beliefs, even if the latter method of compliance would
18 require Tastries to restructure its business or repurpose its assets to maintain the same level of profits.
19 (*FEHC, supra*, 12 Cal.4th at p. 1172–73 [Landlord’s option of “shifting her capital from rental units
20 to another investment” was a relevant factor in assessing FEHA’s burden on her religious beliefs
21 because “[a]n economic cost ... does not equate to a substantial burden for purposes of the free
22 exercise clause.”]; *Easebe Enterprises, Inc. v. Alcoholic Bev. etc. Appeals Bd.* (1983) 141 Cal.App.3d
23 981, 987 [“An entrepreneur’s discriminatory practice based upon ostensible rational economic self-
24 interest still violates public policy as codified in Civil Code section 51.”].) Under the order proposed
25 by the DFEH, the choice of how to comply with the Unruh Act is Tastries’ decision. Tastries can
26 choose to provide full and equal services, including wedding cake services, to all customers. Or it
27 could choose to stop selling wedding cakes altogether yet continue selling a full component of
28 pastries, cupcakes, cookies, pies, and acai bowls as well as continue providing its event rental



1 *Hawk Tobacco, Inc.* (2011) 197 Cal.App.4th 1561, 1571.) Here, Tastries cannot show grave or
2 irreparable harm. As demonstrated above, compliance with the Unruh Act will not infringe Tastries’
3 free speech or free exercise rights. Moreover, even an incidental infringement would not necessarily
4 constitute irreparable harm. (*Sundance Saloon, Inc. v. City of San Diego* (1989) 213 Cal.App.3d 807,
5 817–18 [enforcement of content-neutral law requiring venues to close during certain hours of the day
6 would not cause irreparable harm despite causing “slight deprivation” of First Amendment rights].)

7 Even if the court finds a possibility of grave or irreparable harm, it should issue the requested
8 injunction because any harm to Tastries is outweighed by the harm of continued discrimination. The
9 exemption to the Unruh Act Tastries seeks can be granted only by completely sacrificing the rights of
10 prospective customers to be granted equal access to public accommodations irrespective of sexual
11 orientation. (See *FEHC, supra*, 12 Cal.4th at p. 1175.) The denial of equal access harms dignitary
12 interests underlying the fundamental purposes of civil rights laws. (See *id.* at p. 1170, citing *Heart of*
13 *Atlanta Motel, Inc. v. U.S.* (1964) 379 U.S. 241, 250.) These interests are harmed by even a single
14 business’s denial of equal access, regardless of the availability of service elsewhere. (See *id.* at p.
15 1175) Moreover, Tastries’ continued discrimination inflicts emotional harm not only on prospective
16 customers, but also its own employees who want to serve customers equally. (See Salinas Decl., ¶ 3.)

17 **IV. CONCLUSION**

18 For the reasons stated above, this Court should issue a preliminary injunction, effective for
19 sixty (60) days, prohibiting Respondents from selling to anyone any item they are unwilling to sell,
20 on an equal basis, to members of any protected group under the Unruh Act.

21 Dated: January 10, 2018

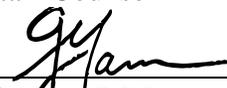
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9
 10 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 11 **IN AND FOR THE COUNTY OF KERN**

12 DEPARTMENT OF FAIR EMPLOYMENT)	Case No. BCV-17-102855
13 AND HOUSING, an agency of the State of)	
14 California,)	
15)	PETITIONER DEPARTMENT OF FAIR
16)	EMPLOYMENT AND HOUSING'S
17)	REPLY IN SUPPORT OF MOTION
18)	FOR PRELIMINARY INJUNCTION
19)	
20)	
21)	
22)	
23)	
24)	
25)	
26)	
27)	
28)	

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, an agency of the State of California,
 Petitioner,
 vs.
 CATHY'S CREATIONS, INC. d/b/a TASTRIES, a California corporation; and CATHY MILLER,
 Respondents.

 EILEEN RODRIGUEZ-DEL RIO and MIREYA RODRIGUEZ-DEL RIO,
 Complainants.

24 The Department of Fair Employment and Housing (DFEH) respectfully submits the following
 25 Reply brief in support of its Motion for Preliminary Injunction
 26
 27

28 ¹ The DFEH thanks Jenna Kingkade, DFEH Graduate Legal Assistant, for her invaluable assistance.

1 **I. INTRODUCTION**

2 The Department of Fair Employment and Housing (DFEH) seeks a preliminary injunction
3 under Government Code section 12974 (Section 12974) prohibiting respondents Cathy’s Creations,
4 Inc. and Cathy Miller (collectively “Tastries”) from selling to anyone any item they are unwilling to
5 sell, on an equal basis, to members of any protected group under the Unruh Civil Rights Act (Unruh
6 Act or Act), Civil Code section 51. The injunction is prohibitive, not mandatory—it does not force
7 Tastries to sell wedding cakes to same-sex couples—and leaves the choice of how to comply with the
8 Unruh Act to Miller. Neither does it restrict Miller’s exercise of her religious beliefs nor compel her
9 expression, for the Unruh Act regulates conduct, not speech.

10 Miller admits Tastries enforces a policy denying full and equal services to same-sex couples
11 wishing to celebrate their weddings. Respondents ask this Court to deny the injunction, thereby
12 authorizing Tastries—a business licensed by the State and open to the public—to ignore the Unruh
13 Act, and continue denying full and equal services to same-sex couples. **What respondents request is a**
14 **return to the days when certain individuals could be turned away from businesses based on their**
15 **innate characteristics (i.e., sex or race) or religious beliefs.** In the alternative, respondents request
16 that this action be stayed—permitting Tastries to continue denying equal services—for five months in
17 hopes the United States Supreme Court determines the issues involved here in a decision on the
18 merits in the *Masterpiece Cakeshop* case.

19 Because Tastries continues to deny full and equal services to members of the public, delaying
20 a decision or denying the injunction condemns Californians to suffer the indignity of discrimination.
21 This Court should reject respondents’ requests, and grant the preliminary injunction, thereby
22 upholding the Unruh Act and affirming the right of all Californians access to full and equal services
23 in all California businesses.

24 **II. LEGAL STANDARD**

25 Immediately stopping ongoing violations of California civil rights statutes is essential to
26 preserving the civil rights of Californians. This urgency is reflected by Section 12974, which
27 empowers the DFEH to seek a preliminary injunction pending completion of an investigation. The
28 DFEH requests a preliminary injunction to prevent Tastries from further discriminating against same-



1 business interest in creating a family-friendly environment could not justify country club’s denial of
2 spousal benefit to a member’s same-sex domestic partner under the Unruh Act]; *Easebe Enterprises,*
3 *Inc. v. Alcoholic Bev. etc. Appeals Bd.* (1983) 141 Cal.App.3d 981, 987 [“rational economic self-
4 interest” does not prevent discriminatory practice from violating public policy codified in the Act].)

5 **2. Neither California nor Federal Free Speech or Free Exercise Assertions Provide**
6 **Tastries a Defense Here.**

7 **a. The Federal Constitution’s Free Exercise Clause Does Not Exempt**
8 **Tastries from Compliance with the Unruh Act.**

9 Acknowledging the Unruh Act withstands First Amendment scrutiny as a valid and neutral
10 law of general applicability, respondents do not attack it directly. Rather, they assert—without any
11 evidence—the DFEH’s use of Section 12974 in this case is an “irregular procedure[]” revealing its
12 “anti-religious animus.” (Opp. 7:23, 28.) Tastries’ assertion is both groundless and incorrect. The
13 Legislature granted the DFEH Section 12974 authority, which the DFEH has utilized on multiple
14 occasions to prevent harm to Californians.² Here, too, the DFEH seeks an injunction against more
15 than mere “hypothetical harm[s].” (See *infra* Section B.) Tastries—a public accommodation
16 licensed by the State—enforces a policy denying full and equal services to same-sex couples who
17 want to purchase wedding cakes, in violation of the Unruh Act. This policy harms the dignity of all
18 Californians, and threatens specific ongoing harm to gay and lesbian residents.

19 **b. California’s Free Exercise Clause Does Not Exempt Tastries from**
20 **Complying with the Unruh Act Because the Act’s Application Satisfies**
21 **Strict Scrutiny.**

22 Because the Unruh Act is the least restrictive means of achieving a compelling state interest,
23 it satisfies strict scrutiny, the most demanding standard that *may* apply under California’s free
24 exercise clause.³ (See *North Coast Women’s Care Med. Grp., Inc. v. San Diego Cnty.* (2008) 44
25 Cal.4th 1145, 1158 [the Unruh Act is the least restrictive means for the state to achieve its goal of

26 ² The mission of the DFEH is to protect the people of California from unlawful discrimination in employment, housing,
27 and public accommodations, and from hate violence and human trafficking.

28 ³ Additionally, as argued in the DFEH’s opening brief, strict scrutiny is satisfied because the DFEH is not asking this
Court to apply the Unruh Act in a manner that substantially burdens a religious belief or practice. Tastries asserts the
cases cited by the DFEH on the “substantial burden” issue are necessarily invalid to the extent they are inconsistent with
Burwell v. Hobby Lobby Stores, Inc. (2014) 134 S.Ct. 2751. (Opp. 10:37.) But *Hobby Lobby* was decided under the
federal Religious Freedom Restoration Act (RFRA), which the Supreme Court acknowledged imposes a stricter standard
than its pre-*Smith* free exercise cases. (*Hobby Lobby, supra*, 134 S.Ct. at pp. 2759, 2761 fn. 3.) Courts need not interpret
the California Constitution as *Hobby Lobby* interpreted RFRA.



1 “ensuring full and equal access to medical treatment irrespective of sexual orientation”]; *Roberts v.*
2 *U.S. Jaycees* (1984) 468 U.S. 609, 626, 628–29 [Minnesota “advanced [its] interests through the least
3 restrictive means” by applying its public accommodations law to prohibit a civic organization from
4 excluding women]; cf. *Hobby Lobby, supra*, 134 S.Ct. at p. 2783 [acknowledging that employment
5 discrimination laws are “precisely tailored” to further the compelling state interest in “providing an
6 equal opportunity to participate in the workforce without regard to race....”].) When rejecting
7 physicians’ California free exercise challenge to the Unruh Act in *North Coast*, the California
8 Supreme Court held that the Act serves a compelling interest in “ensuring full and equal access.”⁴
9 (See *North Coast, supra*, 44 Cal.4th at p. 1158; cf. *Law School Admission Council, Inc. v. State*
10 (2014) 222 Cal.App.4th 1265, 1294 [citing *North Coast* as support for California’s compelling
11 interest in ensuring prospective law students equal opportunity to compete for admission regardless
12 of disability].) And the United States Supreme Court has recognized that the Unruh Act serves the
13 even broader compelling interest of ensuring women equal access to “the acquisition of leadership
14 skills and business contacts as well as tangible goods and services.” (*Bd. of Directors of Rotary*
15 *Intern. v. Rotary Club of Duarte* (1987) 481 U.S. 537, 549.) The requested injunction, too, would
16 serve a compelling state interest in ensuring residents equal access to tangible goods and services
17 irrespective of sexual orientation.

18 Tastries’ requested exemption allowing it to “refer” same-sex couples to another bakery
19 would both impose burdens on same-sex couples and prevent the State from achieving these
20 compelling interests. Even under RFRA, the “least restrictive means” analysis must be informed by
21 adequate consideration of “the burdens a requested accommodation may impose on
22 nonbeneficiaries.”⁵ (See *Hobby Lobby, supra*, 134 S.Ct. at 2781 fn. 37.) Here, Tastries’ use of its
23

24 _____
25 ⁴ Contrary to Tastries’ characterization of the compelling interest the DFEH must show, the *North Coast* court did not
26 refer to an interest in “forcing [physicians] who otherwise serve homosexual [patients] to violate their consciences by
27 [providing a particular fertility procedure to patients] that [want to conceive a child with a same-sex partner].” (Cf. Opp.
28 10:33-11:1.) Respondents further misrepresent *North Coast* by selectively quoting Justice Baxter’s self-identified
“question” about a hypothetical sole practitioner to make it seem like a definitive statement, and by attributing these
quotes to “*North Coast*” in the text, incorrectly implying that they are quotes from the majority opinion. (Opp. 11:14-17;
North Coast, supra, 44 Cal.4th at p. 1158, 1163 [Baxter, J., concurring] [“These issues are not before us here, however,
and the majority does not express any views on them.”].)

⁵ The Court’s narrow tailoring holding in *Hobby Lobby* relied on a pre-existing alternative with “precisely zero” effect on
third parties. (*Hobby Lobby, supra*, 134 S.Ct. at 2760, 2781 fn. 37.)



1 requested exemption will burden same-sex couples with the need to seek service elsewhere or forego
2 it altogether.⁶ The notion that a disfavored class of residents should simply “go elsewhere” is no
3 more an acceptable policy for public accommodations in 2018 than it was when the Supreme Court
4 decided *Heart of Atlanta* in 1964. (See *FEHC, supra*, 12 Cal.4th at p. 1170, citing *Heart of Atlanta*
5 *Motel, Inc. v. U.S.* (1964) 379 U.S. 241, 250.)

6 **c. The Unruh Act Does Not Compel Speech nor Otherwise Violate**
7 **Respondents’ Free Speech Rights.**

8 Respondents’ muddling of various strands of free speech jurisprudence and attempts to
9 obfuscate the DFEH’s arguments provide no defense to Tastries’ unlawful discrimination.

10 **i. The Unruh Act does not impermissibly compel or prohibit**
11 **expressive conduct because granting or denying equal services to**
12 **same-sex couples is not expressive conduct.**

13 Respondents assert—without support—“[t]hird party perceptions are not necessary to
14 establish a compelled speech claim under the federal constitution.” (Opp. 9:30–31.) But where the
15 asserted speech is *conduct*, there can be no compelled speech unless the conduct in question is
16 inherently expressive. (*Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)* (2006)
17 547 U.S. 47, 64–66.) “An intent to convey a particularized message” must be present, and “the
18 likelihood [must be] great that the message would be understood by those who viewed it. [Citation].”
19 (*Texas v. Johnson* (1989) 491 U.S. 397, 404.) Reasonable observers can distinguish between
20 Tastries’ own views and the legal requirement that it provide equal services to protected classes. (See
21 *FAIR, supra*, 547 U.S. at pp. 64–65; *North Coast, supra*, 44 Cal.4th at p. 1157.)

22 **ii. The Unruh Act does not compel speech because it does not dictate**
23 **the design of a cake.**

24 Compelled speech occurs where the government requires a speaker to disseminate its or
25 another’s message. (See *FAIR, supra*, 547 U.S. at p. 63; *Wooley v. Maynard* (1977) 403 U.S. 705
26 [government’s message]; *Miami Herald Publ’g Co. v. Tornillo* (1974) 418 U.S. 241 [third-party
27 message].) Neither situation applies here: the Unruh Act does not require Tastries to disseminate any
28 message, it does not dictate the design of Tastries’ wedding cakes, and Tastries retains complete

⁶ Informing customers of Gimme Some Sugar’s services may do little or nothing to lighten this burden—for instance, the Rodriguez-Del Rios had already tasted Gimme Some Sugar’s cake and decided not to purchase their cake there.



1 **C. This Court Should Protect the Public from Tastries’ Continuing Discrimination By**
2 **Immediately Issuing the Preliminary Injunction.**

3 This Court should not stay these proceedings pending the United States Supreme Court’s
4 opinion in the *Masterpiece Cakeshop* case. Respondents’ assertion the decision in *Masterpiece*
5 *Cakeshop* “will settle” the issues involved here and change “the entire landscape of this case” is
6 conjecture. Neither respondents nor the DFEH know what the Supreme Court will decide, or even
7 whether it will reach the merits of the defenses Tastries asserts here. There are other potential
8 grounds for resolution, including remand. While staying a case may be acceptable where the delay is
9 “not oppressive in its consequences” (*Landis v. North American Co.* (1936) 299 U.S. 248, 256),
10 subjecting an entire population to the continuing indignity of discrimination in a public
11 accommodation is oppressive in its consequences.

12 Respondents are not seeking to stay a case where the same individual is involved in two cases
13 in two different states (see *Thompson v. Continental Ins. Co.* (1967) 66 Cal.2d 738), or two
14 companies sue to enjoin the enforcement of a statute. (*Landis, supra*, 299 U.S. 248.) Rather, this is a
15 case seeking to enforce the right of all individuals, regardless of sexual orientation, to enjoy full and
16 equal services in a business open to the public. Staying the DFEH’s request for an injunction for
17 some five months will permit Tastries to continue discriminating against members of the public. The
18 stay would have more than a “fair possibility ... [to] work damage to someone else.” (*Ibid.*)

19 **IV. CONCLUSION**

20 For the reasons stated above, this Court should issue a preliminary injunction, effective for
21 sixty (60) days, prohibiting respondents from selling to anyone any item they are unwilling to sell,
22 on an equal basis, to members of any protected group under the Unruh Act.

23 Dated: January 26, 2018

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

PAULA PEARLMAN
Assistant Chief Counsel

GREGORY J. MANN
Senior Staff Counsel

TIMOTHY MARTIN
Staff Counsel

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By: _____

Gregory J. Mann
Attorneys for the Department



TRIAL EXHIBIT 22F

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

METROPOLITAN DIVISION

HON. DAVID R. LAMPE, JUDGE, DEPARTMENT 11

--o0o--

**CERTIFIED
TRANSCRIPT**

DEPARTMENT OF FAIR EMPLOYMENT)
AND HOUSING,)
Plaintiff(s),)
vs.)
CATHY MILLER, et al.,)
Defendant(s).)

Pages 1-51
Case No. BCV-17-102855
Bakersfield, California
FEBRUARY 2, 2018

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For the Plaintiff: Department of Fair Employment & Housing
By: MR. GREGORY MANN, ESQ.
and
By: MR. TIMOTHY MARTIN, ESQ.
2218 Kausen Drive, Suite 100
Elk Grove, California 95758
For the Defendant: Freedom of Conscience Defense Fund
By: MR. CHARLES LIMANDRI, ESQ.
P.O. Box 9520
Rancho Santa Fe, California 92067

Reported By: Melissa K. Gum, CSR No. 7438
Official Reporter, RDR, CRR, CRC

1 State of California. I mean, I'm a constitutional officer
2 of the State, so you're asking me for an order. You're
3 asking the State to compel the defendant to do something.
4 And isn't -- if the cake is expressive conduct, you're
5 asking this court to compel that that speech be co-opted
6 into the speech of the complaining parties in the interests
7 of the public accommodation law, the Unruh Act, are you not?

8 MR. MANN: I'm having trouble understanding.
9 Again, we're focused on conduct here, about who Taastries
10 serves, and we're not trying to compel them to do anything.
11 The choice is theirs. They can serve everybody or they can
12 serve nobody in terms of wedding cakes.

13 THE COURT: Well, not if I act, the choice isn't
14 theirs, unless they want to be in contempt of court.

15 MR. MANN: No. The preliminary injunction that
16 we're seeking would not force them to bake cakes for
17 same-sex couples.

18 THE COURT: It would just force them to go out of
19 business.

20 MR. MANN: It wouldn't force them to go out of
21 business either. It would leave them the choice to go out
22 of the wedding cake business, but that's 25 to 30 percent of
23 their business, not their entire business.

24 THE COURT: But you do also agree that they serve
25 the homosexual community or the same-sex community in the
26 sense that they sell their public wares to everyone who
27 walks in the door without discrimination. It's the design
28 of the wedding cake that's at issue here.

1 MR. MANN: That's what they say. In Piggie Park,
2 it wasn't a complete exclusion of African-Americans. The
3 restaurant was willing to serve African-Americans. They
4 just wouldn't serve them the entire menu, and they said, "If
5 you want to be served, you have to go around back." So
6 whether or not it's just wedding cakes or everything,
7 there's a long history of courts saying full and equal
8 services means full and equal services.

9 THE COURT: Well, it wasn't in the evidence that
10 Tastries actually gives knives and forks and plates to
11 people to actually eat their wares on the premises. The
12 service is at issue here. Once again, I come back to it's
13 not selling a cake. It's design. It's requiring the owner
14 to use her creative thought processes to design and create a
15 beautiful thing, a beautiful cake.

16 MR. MANN: But it's not telling her how to design
17 it. It's not telling her what to design. And it's content
18 neutral.

19 THE COURT: Again, I come back to the point -- and
20 I'm sorry to belabor this -- but if she chose to design it
21 with a sign on it that says, "Marriage shall only be between
22 a man and a woman," and said, "Here you go," would you still
23 be back here?

24 MR. MANN: Well, I mean, she's a business. If
25 she's going to serve somebody, she needs to work with them
26 on their design. She's not -- I don't think anybody would
27 go to her if she was just going to come up with her own
28 design and give it to them.

1 THE COURT: But that's the point I'm trying to make
2 or trying to, I guess, put you in, is that you are asking me
3 to compel a certain design, a certain content, because she's
4 not 100 percent free to put whatever she wants into the
5 design.

6 MR. MANN: She's not 100 percent free to put
7 whatever she wants into any design. That's just simple
8 contract. If I go into a business and I want something and
9 I'm working with you on it, I don't say, "Just give me
10 whatever you want." I mean, but you work with the customers
11 and you design it for them.

12 THE COURT: Well, I presume from your arguments she
13 would be free to do that. It's her choice whether it limits
14 her clientele or not.

15 MR. MANN: When you say "that" --

16 THE COURT: "That" being put messages on her cakes
17 that may severely limit the number of customers that she
18 receives.

19 MR. MANN: Any cake she's willing to make for
20 anybody, as long as she makes it for everybody, that's fine.

21 THE COURT: Okay. Any other -- I'll let you have
22 the last word, but any other issues that you want me to
23 focus on?

24 MR. MANN: I think it's just important to just
25 always keep the FAIR case in mind, because it's right on
26 point, and it deals with pure speech, expressive
27 association, and expressive conduct. And if you just
28 replace Tastries for the law schools, then it's right on

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STATE OF CALIFORNIA)
COUNTY OF KERN) ss:
)

I, Melissa K. Gum, Official Certified Shorthand Reporter of the State of California, County of Kern, do hereby certify that the foregoing transcript, pages 1 through 51, inclusive, is a complete, true, and correct transcription of the stenographic notes as taken by me in the above-entitled matter.

Dated this 20th day of February, 2018.

Melissa K. Gum

MELISSA K. GUM, CSR, RDR, CRR, CRC
Certificate No. 7438

TRIAL EXHIBIT 23



DEPARTMENT OF FAIR EMPLOYMENT & HOUSING

DIRECTOR KEVIN KISH

320 West 4th Street, Suite 1000 | Los Angeles | CA | 90013
800-884-1684 (voice) | 800-700-2320 (TTY) | California's Relay Service at 711
www.dfeh.ca.gov | email: contact.center@dfeh.ca.gov

Via U.S. Mail and E-mail

October 10, 2018

Charles LiMandri
Freedom of Conscience Defense Fund
P.O. Box 9520
Rancho Santa Fe, CA 92067

Re: Notice of Cause Finding and Mandatory Dispute Resolution

DFEH Case No. 935123-315628

Rodriguez-Del Rio, et al. / Cathy's Creations, Inc., et al.

Dear Mr. LiMandri:

The Department of Fair Employment and Housing (DFEH or Department) has completed its investigation of the referenced complaint. Based on the evidence adduced, the DFEH intends to file a civil complaint in superior court.

Before the Department files a civil action, Government Code sections 12965 and 12981 require all parties to participate in cost-free mandatory dispute resolution conducted by the DFEH's Dispute Resolution Division. The Department provides a neutral and confidential dispute resolution process, insures that settlement discussions are conducted behind a firewall, and achieves a consistently high settlement rate by its experienced in-house mediators.

As a result, this matter is directed to mandatory dispute resolution. We hope that you will timely take advantage of the opportunity to resolve this dispute without litigation. A mediator will be contacting you shortly to schedule mandatory dispute resolution.

Please feel free to contact me should you have any questions.

Sincerely,

Gregory J. Mann
Senior Staff Counsel

TRIAL EXHIBIT 24A

1 Charles S. LiMandri, SBN 110841
Paul M. Jonna, SBN 265389
2 Teresa L. Mendoza, SBN 185820
Jeffrey M. Trissell, SBN 292480
3 FREEDOM OF CONSCIENCE DEFENSE FUND
P.O. Box 9520
4 Rancho Santa Fe, California 92067
Telephone: (858) 759-9940
5 Facsimile: (858) 759-9938

6 Attorneys for Defendants CATHY'S
7 CREATIONS, INC. d/b/a TASTRIES,
a California Corporation; and CATHY
8 MILLER, an individual.

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF KERN

12 DEPARTMENT OF FAIR EMPLOYMENT)
13 AND HOUSING, an agency of the State of)
California,)

14)
15 Plaintiff,)

16 v.)

17 CATHY'S CREATIONS, INC. d/b/a)
18 TASTRIES, a California Corporation; and)
CATHY MILLER, an individual,)

19 Defendants.)
20)

21 EILEEN RODRIGUEZ-DEL RIO and)
22 MIREYA RODRIGUEZ-DEL RIO,)

23 Real Parties in Interest.)
24)
25)
26)
27)
28)

CASE NO.: BCV-17-102855

IMAGED FILE

DECLARATION OF REINA BENITEZ

Action Filed: December 13, 2017

1 I, REINA BENITEZ, declare as follows:

2 1. I am not a party to this lawsuit. I have personal knowledge of the facts set forth in
3 this declaration and, if called upon as a witness, I could and would testify competently to them.

4 2. I am the owner of Party Palace, an event venue rental hall in Bakersfield, California.
5 Party Palace regularly hosts wedding receptions, as well as other events, such as Quinceañeras,
6 Sweet Sixteens, Baptisms, and Bridal and Baby Showers.

7 3. I have read several news reports regarding Mireya and Eileen Rodriguez-Del Rio's
8 visit to Tastries Bakery on Saturday, August 26, 2017, and Cathy Miller's decision not to design
9 and create a wedding cake for their same-sex wedding celebration. I have also read the description
10 of that encounter in their declarations filed in support of the Department of Fair Employment and
11 Housing's petition for a preliminary injunction.

12 4. During the week before that Saturday, the Rodriguez-Del Rios visited Party Palace
13 and met with me. One of them brought out a cell phone to video- or audio-record our conversation.
14 I told them that Party Palace was already booked for the date of their wedding reception. One of
15 them then asked whether I had any objection to renting out Party Palace for same-sex weddings. I
16 truthfully told them that I had no such objection. They asked to see my calendar, and I showed it to
17 them. My calendar showed that Party Palace was indeed already booked for the date of their
18 wedding reception. Mireya and Eileen Rodriguez-Del Rio then stopped recording our conversation
19 and left. I found the recording odd, but initially of no concern.

20 5. After I read online news reports regarding the Rodriguez-Del Rios and Tastries
21 Bakery, however, I became concerned. In those online news reports, the Rodriguez-Del Rios
22 describe how shocked they were that a wedding professional might have a religious objection to
23 facilitating a same-sex wedding. This statement that they were shocked also appears in their
24 declarations filed in support of the Department of Fair Employment and Housing's petition for a
25 preliminary injunction.

26 6. It does not, however, make sense to me that the Rodriguez-Del Rios would be
27 shocked and suffer emotional distress after their visit to Tastries because the Rodriguez-Del Rios
28 specifically asked me whether I had any objection to renting Party Palace for a same-sex wedding.

TRIAL EXHIBIT 24B

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF KERN
METROPOLITAN DIVISION
HON. DAVID LAMPE, JUDGE, DEPARTMENT 13

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**CERTIFIED
TRANSCRIPT**

DEPARTMENT OF FAIR)	
EMPLOYMENT AND HOUSING,)	Pages 1 - 31
)	Case No. BCV-18-102633
Plaintiff,)	
)	Bakersfield, California
vs.)	
)	June 5, 2020
)	
CATHY'S CREATIONS, INC.,)	
DBA TASTRIES, A)	
CALIFORNIA CORPORATION;)	
CATHY MILLER,)	
)	
Defendant.)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For the Plaintiff	Department of Fair Employment & Housing
DEPARTMENT OF FAIR	By: Gregory Mann, Esq.
EMPLOYMENT AND	Nelson Chan, Esq.
HOUSING:	320 4th Street, Suite 1000
	Los Angeles, California 90013
For the Defendant	Freedom of Conscience Defense Fund
CATHY'S CREATIONS,	By: Jeffrey Trissell, Esq.
INC., DBA	P.O. Box 9520
TASTRIES, A	Rancho Santa Fe, California 92067
CALIFORNIA	
CORPORATION; CATHY	
MILLER:	
Reported By:	Virginia A. Greene, CSR 12270
	Official Court Reporter

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SESSIONS

PAGE

**FRIDAY, JUNE 5, 2020
AFTERNOON SESSION**

3

Motion

3

1 BAKERSFIELD, CA; FRIDAY, JUNE 5, 2020

2 AFTERNOON SESSION

3 DEPARTMENT 13 HON. DAVID LAMPE, JUDGE

4 --o0o--

5 THE COURT: We're in session. We're on the
6 record. This is Judge David Lampe, Department 11 of the
7 Kern County Superior Court. We're physically present in
8 Department 13, but this is still officially Department
9 11 for the record.

10 And I'll call the case of Department of Fair
11 Employment and Housing versus Cathy's Creations. I have
12 on-the-line appearances. I have Mr. Mann.

13 MR. MANN: Good afternoon, Your Honor, good to
14 hear from you.

15 THE COURT: I believe I have Ms. Miller, party
16 although represented is also on the line.

17 MS. MILLER: Yes, Your Honor, I'm on the line.

18 THE COURT: I have Mr. Trissell.

19 MR. TRISSELL: Yes, Your Honor.

20 THE COURT: And I have Mr. Chan or Attorney
21 Chan.

22 MR. CHAN: Good afternoon, Your Honor, Nelson
23 Chan also for the Department of Fair Employment and
24 Housing with my colleague Mr. Gregory Mann who will be
25 presenting our argument.

26 THE COURT: Very good. In this case I
27 reopened this matter. I made a tentative ruling on the
28 discovery motions that the defendants had made. I had

1 the Evidence code and we look at the privilege for
2 attorney-client privilege purposes only.

3 We're not looking at it to see if there is
4 traditional representation, if there is a contract, you
5 know, retainer agreement, if there are fiduciary duties
6 between the attorneys and the clients. That's separate.
7 We're just looking under the Evidence Code for
8 attorney-client purposes only.

9 So if you find that the attorney-client
10 privilege here exists, you know, that covers our
11 communications with third parties in interest through
12 912(d) and 952. It does not mean that we represent them
13 or that we have a retainer agreement or that they speak
14 on behalf of the DFEH.

15 So your concern about real parties, actions,
16 you know, they're not agents of the DFEH. So what they
17 do or what they say does not reflect on the DFEH in the
18 way that you mentioned.

19 And I think that's -- that would be the same
20 as Ms. Miller was making statements, that's not going to
21 necessarily reflect on Mr. Limandri or his firm or vice
22 versa. And I don't think -- well, and whatever real
23 parties do does not reflect on the DFEH here. Again,
24 because we're looking at the attorney-client privilege
25 just for attorney-client privilege purposes only.

26 THE COURT: Okay. I understand that.

27 MR. MANN: Okay.

28 THE COURT: I mean, I understand your

1 argument.

2 MR. MANN: Right. And the first point, it's
3 not -- I don't know that it's as important. But
4 plaintiffs have been -- I don't even want to go there.
5 Let's skip all of that.

6 Plaintiffs have looked for cases to push the
7 law forever. Rosa Parks was not just happened to be
8 taking the bus that day. So whether or not there is
9 knowledge going in there does not change the fact that
10 there was a violation. But, again, there is no evidence
11 of that here, and it doesn't change anything.

12 And just, you know, one -- well, I think I've
13 hit it. The People v. Gionis case which we've cited
14 talks about the attorney-client privilege not requiring
15 that the attorney actually be retained. So, again, we
16 just look at the attorney-client privilege for --
17 through the Evidence Code for those purposes.

18 I think that's what I have on the DFEH
19 attorney-client privilege extending to cover our
20 communications with real parties in interest through
21 912(d) and 952.

22 The common interest argument is very similar.
23 And it's -- a lot of the cases refer back to those same
24 two Evidence Code sections.

25 But let me -- I did forget. This is what I
26 wanted to address. You questioned whether the DFEH and
27 real parties have a common interest. And I think it's
28 very clear they do. Even though DFEH is the plaintiff,

1 the real parties in interest are the real parties.
2 They're the ones that own the substantive claim. If
3 this case results in us getting an award, the money goes
4 to the real parties in interest. You know, real parties
5 under the FEHA, they have the right to intervene in the
6 case.

7 And so it's to me very clear that there is a
8 common interest here between DFEH and real parties.
9 We're both seeking the same outcome, which is that there
10 be a -- that the Court or jury find the violation of the
11 Unruh Act. So I don't know how we could not have a
12 common interest because we wouldn't be here if it were
13 not for the real parties being discriminated against.

14 THE COURT: All right.

15 MR. MANN: And as you know, if there is a
16 common interest shared and there are privileges and
17 there are privileges here, the DFEH has its work product
18 and attorney-client. Our PI's have their
19 attorney-client and their attorney has their work
20 product. So because the privilege is protecting all the
21 information exchanged through the common interest
22 agreement or common interest doctrine, none of those
23 privileges are waived.

24 Given your clarification on the order, I don't
25 know that I need to say much about work product. And
26 what -- most of what defendants are requesting is
27 absolute work product. We haven't talked about the
28 official information privilege. I'd simply like to

1 THE COURT: Who just spoke?

2 MR. MANN: I'm sorry, Mr. Mann from DFEH.

3 THE COURT: Yeah, put that in your brief. Put
4 that request in your brief and then the defendant can
5 respond to it in their brief. Even though it's a
6 simultaneous submission, you know it's going to be in
7 their brief, and you can respond to that request.

8 Okay. Very good. Thank you.

9 MR. MANN: Thank you, Your Honor.

10 MR. TRISSELL: Thank you Your Honor.

11 MR. CHAN: Thank you, Your Honor.

12 (Whereupon no further proceedings were heard
13 in this matter on this date.)

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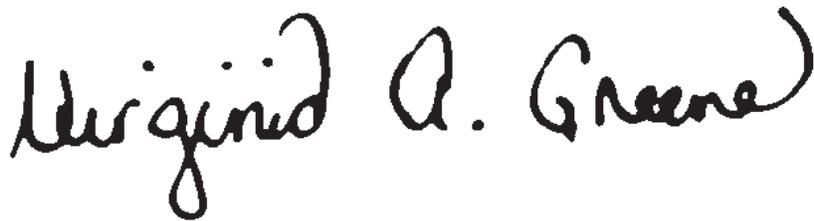
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28

1 STATE OF CALIFORNIA)
) SS.
2 COUNTY OF KERN)
3
4
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6 I, Virginia A. Greene, CSR No. 12270, Official
7 Certified Shorthand Reporter of the State of California,
8 Kern County Superior Court, do hereby certify that the
9 foregoing transcript in the matter of DFEH vs. CATHY'S
10 CREATIONS, INC., DBA TASTRIES, A CALIFORNIA CORPORATION;
11 CATHY MILLER, Case No. BCV-18-102633, June 5, 2020,
12 consisting of pages numbered 1 through 31, inclusive, is
13 a complete, true, and correct transcription of the
14 stenographic notes as taken by me in the above-entitled
15 matter.

16 Dated this 15th day of June, 2020.
17
18

19 
20
21

22 _____
23 Virginia A. Greene, CSR
24 Certified Shorthand Reporter No. 12270
25
26
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28

TRIAL EXHIBIT 25A

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8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF KERN**

10 DEPARTMENT OF FAIR EMPLOYMENT
11 AND HOUSING, an agency of the State of
12 California,

13 Plaintiff,

14 vs.

15 CATHY’S CREATIONS, INC. d/b/a
TASTRIES, a California corporation; and
16 CATHARINE MILLER,

17 Defendants.

18 EILEEN RODRIGUEZ-DEL RIO and
19 MIREYA RODRIGUEZ-DEL RIO,

20 Real Party in Interest.

Case No.: **BCV-18-102633-DRL**

**PLAINTIFF DEPARTMENT OF FAIR
EMPLOYMENT AND HOUSING’S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
OR, IN THE ALTERNATIVE,
SUMMARY ADJUDICATION**

Date: November 4, 2021
Time: 8:30 a.m.
Dept.: 11
Judge: David R. Lampe

Action Filed: October 17, 2018
Trial Date: December 13, 2021

[Concurrently filed with DFEH’s Notice of Motion and Motion for Summary Judgment/ Adjudication; Separate Statement; Request for Judicial Notice; Declaration of Gregory J. Mann; and Declaration of Mireya Rodriguez-Del Rio]

1 fails because Unruh prohibits discriminatory conduct, i.e., the refusal to sell goods and services based
2 on sexual orientation, without targeting religion. In fact, religion is a protected characteristic under
3 Unruh. As a neutral, generally applicable law of public accommodation, application of Unruh here
4 satisfies free exercise review under the First Amendment and California Constitution. (See *Employment*
5 *Div. Dept. of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, 879.)

6 Unruh likewise satisfies free speech review under the First Amendment. The refusal to sell the
7 plain cakes the Rodriguez-Del Rios wanted to order was discriminatory conduct, not speech. (Cf. *FAIR*,
8 *supra*, 547 U.S. at p. 66.) A business selling generic cakes with no written messages in the commercial
9 marketplace sends no message by doing so, nor does such a commercial transaction endorse any
10 message of the purchaser. Precedent makes clear that the act of selling cakes is not inherently
11 expressive: the ultimate observers of plain cakes receive no message about the cakes, regardless of
12 whether a baker intends to send a message. (See *ibid.*) But even if defendants are correct in their
13 alternative assertions, they cannot prevail; application of Unruh here satisfies even strict scrutiny, much
14 less intermediate scrutiny.

15 At base, while the religious views at issue here merit respect and careful consideration, the
16 policy defendants chose to implement those views and their reading of the First Amendment are simply
17 too broad. Application of their overbroad approach to the First Amendment impermissibly threatens to
18 both re-entrench the “community-wide stigma” against same-sex couples, (*Masterpiece, supra*, 138
19 S.Ct. at p. 1727), and vitiate the “general rule” that a business’s objections to same-sex marriage “do
20 not allow business owners ... to deny protected persons equal access to goods and services under a
21 neutral and generally applicable public accommodations law.” (*Ibid.*, citing *Newman v. Piggie Park*
22 *Enters., Inc.* (1968) 390 U.S. 400, 402, fn. 5.). **Indeed, in 1968 in *Piggie Park*, the Supreme Court**
23 **rejected arguments identical to those Tastries asserts here as “patently frivolous” when a restaurant**
24 **owner asserted the same free exercise and free speech defenses against application of the federal public**
25 **accommodations law that prohibited him from discriminating on the basis of race. (*Piggie Park, supra*,**
26 **at p. 402, fn. 5.) Defendants’ arguments here are no more persuasive when asserted to excuse their**
27 **discrimination based on sexual orientation.**

1 Because DFEH establishes Tastries’ prima facie violation of Unruh and defendants cannot meet
2 their burden to prove their affirmative defenses, DFEH’s motion for summary judgment/adjudication
3 should be granted.

4 **A. Summary Judgment Should Be Granted Because Tastries Violated Unruh By
5 Discriminating Against the Rodriguez-Del Rios Based on Their Sexual Orientation.**

6 Unruh provides that “[a]ll persons within the jurisdiction of this state are free and equal, and no
7 matter what their ... sexual orientation ... are entitled to the full and equal accommodations,
8 advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”
9 (Civ. Code, § 51.) Business establishments have a duty to “serve all persons without arbitrary
10 discrimination.” (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 167.) “The [Unruh] Act is
11 to be given a liberal construction with a view to effectuating its purposes.” (*Koire v. Metro Car Wash*
12 (1985) 40 Cal.3d 24, 28.) By refusing to take the order of a same-sex couple for cakes it would have
13 prepared for opposite-sex couples, Tastries violated Unruh on the basis of sexual orientation.²

14 **1. The undisputed facts establish a prima facie case of defendants’ violation of Unruh.**

15 As found by this Court in denying defendants’ anti-SLAPP motions, there is no factual dispute
16 that Tastries’ refusal to take the Rodriguez-Del Rio’s cake order establishes a prima facie Unruh
17 violation. A plaintiff “must plead and prove intentional discrimination in public accommodations” to
18 establish an Unruh violation. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1175
19 [superseded by statute on other grounds].) DFEH establishes a prima facie Unruh violation here.

20 Tastries is a for-profit bakery and, therefore, a business establishment under Unruh, which this
21 Court may determine as a matter of law.³ (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178
22 Cal.App.3d 1035, 1050-1055.) Tastries has a facially discriminatory policy to deny same-sex couples
23 any and all pre-ordered cakes to celebrate their unions, and Miller admits that she “declined the
24 opportunity to create the requested custom cakes.” (SSUMF Nos. 5, 21.) Based on this direct evidence

25 ² Where, as here, the facts are undisputed, violations of Unruh are properly determined on summary
26 judgment/adjudication. (See *Wilson v. Haria and Gogri Corp.* (E.D.Cal. 2007) 479 F.Supp.2d 1127,
27 1141 [summary judgment granted on liability]; *Hubbard v Twin Oaks Health & Rehabilitation Center*
28 (E.D.Cal. 2004) 408 F.Supp.2d 923, 932 [same].)

³ As the creator and enforcer of Tastries’ discriminatory policy to deny same-sex couples pre-ordered
cakes to celebrate their unions, Miller is also individually liable because “liability under [Unruh] ...
extends beyond the business establishment itself to the business establishment’s employees responsible
for the discriminatory conduct.” (*North Coast, supra*, 44 Cal.4th at p. 1154.)

1 of Tastries’ intentional discrimination under its facially discriminatory policy, DFEH establishes a
2 prima facie Unruh violation here. (See *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 736-37.)

3 Violations of Unruh are “*per se* injurious.” (*Koire, supra*, 40 Cal.3d at p. 33.) Violators of
4 Unruh are “liable for each and every offense ... in no case less than four thousand dollars (\$4,000).”
5 (Civ. Code, § 52, subd. (a).) DFEH seeks only statutory minimum damages here, which are properly
6 awarded upon summary judgment.⁴

7 **2. Tastries declined the Rodriguez-Del Rios’ order because of their sexual orientation.**

8 Unable to create a factual dispute as to Tastries’ intentional discrimination, Tastries attempts to
9 create a legal dispute, arguing that there is a relevant difference between discriminatory action aimed at
10 *same-sex marriage* and discriminatory action aimed at the couples’ sexual orientations. She is
11 mistaken: Discrimination is not excused because it is aimed at an individual’s *demonstration* of their
12 protected status; such a narrow view of the law would offer little protection. And courts have uniformly
13 rejected this argument, refusing to distinguish between people’s status (i.e., sexual orientation) and
14 their conduct (i.e., entering into a same-sex marriage) when the conduct is “engaged in exclusively or
15 predominately by a particular class of people, [since] an intent to disfavor that class can readily be
16 presumed.” (*Bray v. Alexandria Women’s Health Clinic* (1993) 506 U.S. 263, 270 [“A tax on wearing
17 yarmulkes is a tax on Jews.”].) Indeed, even the U.S. Supreme Court’s “decisions have declined to
18 distinguish between status and conduct in [the] context” of discrimination on the basis of sexual
19 orientation. (*Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings College of Law v. Martinez*
20 (2010) 561 U.S. 661, 689 citing *Lawrence v. Texas* (2003) 539 U.S. 558, 575 [criminalizing conduct
21 typically undertaken by gay people is discrimination against gay people].) The California Supreme
22 Court also recognized that this distinction is meaningless: California’s former laws prohibiting same-
23 sex marriage “properly must be understood as classifying or discriminating on the basis of sexual

24 _____
25 ⁴ It is reversible error to require proof of harm in an Unruh case where only statutory damages are
26 sought. (*Rotary Club of Duarte, supra*, 178 Cal.App.3d at p. 1061 [affd. *sub nom. Bd. of Directors of*
27 *Rotary Internat. v. Rotary Club of Duarte* (1987) 481 U.S. 537] [holding that upon proof of an Unruh
28 violation, injunctive relief is available and “damages are presumed”].) If the court is inclined to resolve
the statutory damages at this stage, as it may do, DFEH seeks minimum statutory penalties of \$4,000 for
Tastries’ violation as to each of the Rodriguez-Del Rios. (See, e.g., *Wilson, supra*, 479 F.Supp.2d at p.
1141 [awarding \$52,000 on summary judgment based on 13 violations of Unruh]; *Feezor v. Del Taco*
(S.D.Cal. 2005) 431 F.Supp.2d 1088, 1091 [awarding \$12,000 on summary judgment for 3 violations].)

1 orientation” (*In re Marriage Cases* (2008) 43 Cal.4th 757, 783-84, superseded by Constitutional
2 amendment as stated in *Hollingsworth v. Perry* (2013) 570 U.S. 693, 701.) There is no basis to construe
3 Unruh differently, especially given its “liberal construction.” (*Koire, supra*, 40 Cal.3d at p. 28.)

4 Discrimination against individuals celebrating same-sex marriages violates Unruh’s prohibition
5 against discrimination based on sexual orientation. (See *Romer v. Evans* (1996) 517 U.S. 620, 641
6 [Scalia, J. dissenting] [“After all, there can hardly be more palpable discrimination against a class than
7 making the conduct that defines the class criminal.”]; see also *State v. Arlene’s Flowers* (2019) 193
8 Wash.2d 469, 503-05; see also *Elane Photography, LLC v. Willock* (2013) 309 P.3d 53, 68.) And there
9 is no dispute that Miller discriminated against the Rodriguez-Del Rios’ based on their celebration of a
10 same-sex marriage. (SSUMF Nos. 20, 21.)

11 **B. Neither Free Exercise nor Free Speech Rights Provide Tastries a Defense.⁵**

12 The only real dispute regarding defendants’ affirmative defenses centers on whether application
13 of Tastries’ discriminatory policy is protected by federal and state free exercise or free speech law. The
14 First Amendment and the California Constitution both recognize and protect the dignity and importance
15 of sincere religious beliefs. But neither empowers a bakery operating in the commercial marketplace to
16 deny generic products, requiring only the application of routine skill and no special artistry or message,
17 to same-sex couples.

18 **1. The free exercise clauses of the federal and state constitutions do not permit the
19 discrimination here.**

20 United States Supreme Court “decisions have consistently held that the right of free exercise
21 does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general
22 applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes
23 (or proscribes).’” (*Employment Div. Dept. of Human Resources of Oregon v. Smith* (1990) 494 U.S.
24 872, 879 [“*Smith*”] [quoting *United States v. Lee* (1982) 455 U.S. 252, 263, fn. 3 (Stevens, J.,
25 concurring)].) The Supreme Court recently reaffirmed the *Smith* rule in *Masterpiece*, acknowledging
26 that while individuals are free to object to same-sex marriage under the First Amendment’s free
27 exercise clause, “it is a general rule that such objections do not allow business owners and other actors

28 ⁵ Although defendants assert 15 affirmative defenses, the real dispute here concerns their free exercise
and free speech defenses. DFEH addresses the remaining defenses, below.

1 Defendants attempt to rely on *Masterpiece*, but *Masterpiece* dooms their free exercise claim.
2 While *Masterpiece* left open the possibility that a “special cake,” for example with “religious words or
3 symbols,” might implicate free exercise interests, the cakes here had no such unique characteristics.
4 (*Masterpiece, supra*, 138 S.Ct. at p. 1723; SSUMF Nos. 12, 76, 77.) Instead, Tastries has a blanket
5 policy against providing *any* pre-ordered cake, no matter how basic or generic, for same-sex marriage
6 celebrations. (SSUMF Nos. 5 - 8). In other words, the Rodriguez-Del Rios faced a policy akin to an
7 unprotected “refusal to sell any cake at all”; the refusal was based on a blanket policy targeting the
8 identity of the couple, not the nature of the product. (*Ibid.*) *Masterpiece* makes clear that such a policy
9 is unprotected “and is subject to a neutrally applied and generally applicable public accommodations
10 law.” (*Id.* at p. 1728.)

11 Indeed, the Supreme Court rejected a similar free exercise defense over fifty years ago in
12 *Newman v. Piggie Park Enters., Inc.*, which *Masterpiece* invokes in support of “the general rule” that
13 the objections here “do not allow business owners ... to deny protected persons equal access to goods
14 and services under a neutral and generally applicable law.” (*Id.* at p. 1727 citing *Piggie Park, supra*,
15 390 U.S. at p. 402, fn. 5.) *Piggie Park* concerned whether Title II of the Civil Rights Act of 1964
16 prohibited racial discrimination where the owner of a restaurant asserted a free exercise defense.
17 (*Piggie Park, supra*, 390 U.S. at p. 402, fn. 5.) The Court concluded it was “not even a borderline
18 case,” and that defendant’s contention that the Civil Rights Act “was invalid because it ‘contravenes the
19 will of God’ and constitutes an interference with the ‘free exercise of [his] religion,’” was “patently
20 frivolous ...” (*Ibid.*) As *Masterpiece* makes clear, Tastries’ arguments cannot be meaningfully
21 differentiated from those in *Piggie Park* and must similarly be rejected.

22 **b. Application of Unruh here likewise satisfies review under the California
23 Constitution’s free exercise clause.**

24 Despite California courts’ historical practice of interpreting California’s free exercise clause in
25 tandem with its federal counterpart (*Catholic Charities of Sacramento, Inc. v. Super. Ct.* (2004) 32
26 Cal.4th 527, 561-62), Tastries contends California should ignore *Smith* and instead apply strict scrutiny
27 review to application of Unruh here. However, as far back as 1946, well before *Smith*, the State’s high
28 court concluded “that ‘a person is free to hold whatever belief his conscience dictates, but when he
translates his belief into action he may be required to conform to reasonable regulations which are

1 applicable to all persons and are designed to accomplish a permissible objective.” (*Catholic Charities*,
2 *supra*, 32 Cal.4th at p. 561 [quoting *Rescue Army v. Municipal Ct.* (1946) 28 Cal.2d 460, 470].)

3 **i. California courts should remain consistent with federal law and apply *Smith*.**

4 Although *Smith* does not automatically apply here “[b]ecause construing a state constitution is a
5 matter left exclusively to the states,” (*North Coast, supra*, 44 Cal.4th at p. 1158), this Court should
6 apply the *Smith* test. This is especially true here where Unruh’s application only incidentally burdens
7 Miller’s religious practices.

8 Miller’s exercise of religion is not substantially burdened by Unruh because DFEH does not
9 seek an order forcing Tastries to sell pre-ordered wedding cakes in the retail marketplace to all
10 customers, including same-sex couples. Rather, as in *North Coast* (see *id.* at pp. 1158-59), Tastries has
11 at least three options to comply with Unruh. One, Tastries can follow Unruh’s explicit language and
12 sell all its goods and services to all customers. Two, rather than provide all services to all customers
13 irrespective of sexual orientation, Tastries may choose to cease offering pre-ordered wedding cakes for
14 sale to anyone.⁶ (See *North Coast, supra*, 44 Cal.4th at p. 1159 [Physicians could “avoid any conflict
15 between their religious beliefs and [Unruh]” by “simply refus[ing] to perform” the fertility treatment at
16 issue to any patients]; see *Smith v. Fair Empl. & Hous. Com. (FEHC)* (1996) 12 Cal.4th 1143, 1170
17 [Landlord whose religious beliefs motivated her to deny rental housing to non-married couples could
18 avoid conflict between her beliefs and FEHA “by selling her units and redeploying the capital in other
19 investments.”].) **Three, Miller can step aside from participating in the preparation of any pre-ordered**
20 **cakes sold to same-sex couples and allow her willing employees to manage the process.** (See *North*
21 *Coast, supra*, 44 Cal.4th at p. 1159.) Tastries employees have prepared and delivered cakes to same-sex
22 couples without Miller’s involvement in the past. (SSUMF No. 72.) Unruh does not substantially
23 burden Miller’s religious beliefs, and its application here satisfies review under the *Smith* test.

24 ⁶ **The fact that Miller’s religious beliefs may motivate Tastries to stop selling pre-ordered wedding cakes**
25 **altogether does not mean Unruh substantially burdens her beliefs, even if it led to Tastries restructuring**
26 **its business.** (*Smith v. Fair Empl. & Hous. Com.* (1996) 12 Cal.4th 1143, 1172–73 [Landlord’s option of
27 “shifting her capital from rental units to another investment” was a relevant factor in assessing FEHA’s
28 burden on her religious beliefs because “[a]n economic cost ... does not equate to a substantial burden
for purposes of the free exercise clause.”]; *Easebe Enterprises, Inc. v. Alcoholic Bev. etc. Appeals Bd.*
(1983) 141 Cal.App.3d 981, 987 [“An entrepreneur’s discriminatory practice based upon ostensible
rational economic self-interest still violates public policy as codified in Civil Code section 51.”].)

1 have taken great pains to explain that the standard is a demanding one.” (*Id.* at p. 463.) Defendants do
2 not meet it.

3 As a public prosecutor pursuing litigation under Unruh, as incorporated into the Fair
4 Employment and Housing Act (Gov. Code, § 12948; *State Personnel Bd. v. Fair Empl. & Hous. Com’n*
5 (1985) 39 Cal.3d 422, 444), DFEH is presumed to have properly exercised its authority and courts
6 accord it broad discretion to do so. (*Armstrong, supra*, 517 U.S. at p. 464.) Such presumption is
7 overcome only by “‘clear evidence to the contrary.’ [Citation.]” (*Id.* at p. 465.)

8 Defendants can present no evidence, much less clear evidence, of selective enforcement here.
9 They cannot prove discriminatory effect because they lack evidence that they have been treated
10 differently from others similarly situated. Nor can they establish discriminatory purpose because they
11 lack evidence that DFEH pursues this action based on Miller’s religious beliefs. This Court has
12 repeatedly rejected Tastries’ baseless assertions: “there’s no evidence before the Court that the
13 Department is going around singling out Christian providers.” (Mann Decl., Ex. 2 [2/2/18 Reporter’s
14 Transcript of Proceedings on OSC re preliminary injunction, 30:6-16]; *id.* Ex. 3 [3/2/18 Order Denying
15 DFEH’s Order to Show Cause Re: Preliminary Injunction, attachment, p. 6 of 8 “[t]here is also no
16 evidence before the court that the State is targeting Christian bakers for Unruh Act enforcement”].)

17 **V. CONCLUSION**

18 California and U.S. Supreme Court precedent compel the conclusion that Tastries’ refusal to sell
19 generic cakes to the Rodriguez-Del Rios for use in the celebration of their same-sex wedding violates
20 Unruh. Because Tastries cannot carry its burden to establish any affirmative defense, DFEH’s Motion
21 for Summary Judgment or, in the Alternative, Adjudication should be granted and an order indicating
22 its entitlement to injunctive and monetary relief should be entered.

23
24 Dated: September 8, 2021

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

25
26 
27 _____
Gregory J. Mann
28 Attorneys for the DFEH

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13 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **IN AND FOR THE COUNTY OF KERN**

15 DEPARTMENT OF FAIR EMPLOYMENT
16 AND HOUSING, an agency of the State of
17 California,

18 Plaintiff,

19 vs.

20 CATHY'S CREATIONS, INC. d/b/a
21 TASTRIES, a California corporation; and
22 CATHARINE MILLER,

23 Defendants.

24 EILEEN RODRIGUEZ-DEL RIO and MIREYA
25 RODRIGUEZ-DEL RIO,

26 Real Parties in Interest.

27 **Case No.: BCV-18-102633-DRL**

28 **PLAINTIFF DEPARTMENT OF FAIR
EMPLOYMENT AND HOUSING'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
DEFENDANTS CATHARINE MILLER
AND TASTRIES BAKERY'S MOTION
FOR SUMMARY JUDGMENT OR, IN
THE ALTERNATIVE, SUMMARY
ADJUDICATION**

Date: Nov. 4, 2021

Time: 8:30 a.m.

Department 11

Judge: David R. Lampe

Action Filed: October 17, 2018

Trial Date: December 13, 2021

1 In *Minton*, a transgender patient brought an Unruh claim based on gender identity against a tax-
2 exempt nonprofit corporation that owned and operated a large network of hospitals after the defendant
3 cancelled a hysterectomy prescribed to treat the patient’s diagnosed gender dysphoria. (*Id.* at p. 1158-
4 59.) Plaintiff’s doctor scheduled the procedure to take place at a Catholic hospital at which she had
5 privileges. (*Id.* at 1159.) Defendant canceled the procedure because, due to the hospital’s Catholic
6 religious affiliation, it did not allow hysterectomies to treat gender dysphoria, but did permit
7 hysterectomies to address other diagnoses. (*Ibid.*) After canceling the procedure, defendant rescheduled
8 it for three days later than originally scheduled and changed the location to another of its hospitals—
9 one that was not affiliated with the Catholic Church. (*Ibid.*) The court of appeal held that plaintiff
10 alleged sufficient facts to support a violation of Unruh based on defendant’s cancelation of the
11 procedure at the Catholic hospital. (*Id.* at p. 1165.)

12 The similarities of this case to *Minton* reveal that defendants’ refusal to provide the Rodriguez-
13 Del Rios service while attempting to send them to an unaffiliated bakery constituted an Unruh
14 violation. Indeed, similar to defendants here, the defendants in *Minton* arranged for the plaintiff to
15 obtain services elsewhere. The plaintiff ultimately underwent the procedure, which was performed by
16 his own doctor in a comparable hospital owned and operated by defendant. (*Id.* at p. 1164.) Yet the
17 court of appeal still held that defendant failed to provide full and equal services. (*Id.* at p. 1165-66.)

18 Here, defendants offered far less and did nothing in comparison to defendant in *Minton*. After
19 refusing to take the Rodriguez-Del Rios’ order, defendants attempted to send them to an unaffiliated
20 bakery with different designers, bakers, and decorators that was owned and operated by another baker.
21 Moreover, the Rodriguez-Del Rios had already rejected the bakery to which Miller offered to send their
22 order. (PAUMF No. 51; PSSUMF No. 22.) And unlike defendant in *Minton*, a tax-exempt non-profit
23 corporation operating the subject Catholic Church affiliated hospital, Tastries is a for-profit business
24 selling its goods and services in the commercial marketplace with no official church affiliation.

25 In short, after Tastries’ refusal to take the Rodriguez-Del Rios’ cake order, Miller’s offer to send
26 them elsewhere did not satisfy Unruh’s requirement that businesses provide full and equal services. The
27 *Minton* court relied on the California Supreme Court’s *North Coast* decision, which suggested defendant
28 medical group in that case could avoid violating Unruh by having *one of its doctors* that lacked a

1 religious objection perform the subject procedure.⁴ But no California court has suggested that sending
2 gay customers to an unaffiliated business worked by unassociated staff satisfies Unruh’s requirement
3 that businesses provide full and equal services irrespective of sexual orientation. Not only does *Minton*
4 not support defendants’ argument, but their reading of it is fundamentally inconsistent with California
5 Supreme Court precedent. (*Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143, 1175
6 [rejecting landlord’s request for an exemption from Unruh to deny rental to unmarried couples, court
7 ruled that “[t]o say [prospective tenants] may rent elsewhere is also to deny them the right to be treated
8 equally by commercial enterprises.”]) *Minton* confirms that defendants’ refusal to accept the Rodriguez-
9 Del Rios’ cake order constituted a failure to provide full and equal services in violation of Unruh.

10 **2. Under Unruh, Defendants’ Denial of Full and Equal Services was Motivated Solely
11 by the Rodriguez-Del Rios’ Sexual Orientation.**

12 As a matter of law, the United States and California Supreme Courts have flatly rejected
13 defendants’ argument that Miller was not motivated by the Rodriguez-Del Rios’ sexual orientation
14 when she declined to take their cake order. Miller refused to take their order once she learned they were
15 a gay couple. (PAUMF Nos. 48-49; PSSUMF No. 21.) Ignoring this fact, defendants argue that Miller
16 based her refusal on the Rodriguez-Del Rios’ *conduct*—celebrating their same-sex marriage—not their
17 *status* as gay people. (Defendants’ Memo, 15:16-18.) But the conduct of being in and celebrating a
18 same-sex marriage is inseparable from the sexual orientation of the people in that marriage.

19 The U.S. and California Supreme Courts have explicitly rejected the artificial distinction
20 between conduct and status defendants assert here. In *Martinez*, a student religious group applying for
21 official recognition, Christian Legal Society (“CLS”), challenged a Hastings College of Law
22 requirement that officially recognized student groups must comply with the school’s nondiscrimination
23 policy by accepting all members. (*Christian Legal Soc. Chapter of the Univ. of California, Hastings
24 Coll. of the L. v. Martinez* (2010) 561 U.S. 661, 668 [*“Martinez”*].) CLS’s bylaws stated “that sexual
25 activity should not occur outside of marriage between a man and a woman,” and in violation of
26 Hasting’s policy, CLS excluded members who engaged in “unrepentant homosexual conduct.” (*Ibid.*)

27 ⁴ *North Coast, supra*, 44 Cal.4th at p. 1159 suggests that by allowing employees lacking Miller’s
28 objections to same-sex marriage to prepare cakes for same-sex couples, Tastries can harmonize Miller’s
beliefs and its obligations as a business—but Tastries has rejected this very reasonable alternative.
Tastries’ employees have prepared pre-ordered wedding cakes for same-sex couples in the past without
Miller’s involvement. (PAUMF No. 53; PSSUMF Nos. 72-73.)

1 Unruh does not substantially burden Miller’s religious practice for several reasons. First, Tastries
2 is a for-profit public accommodation selling goods and services in the commercial marketplace, not a
3 religious entity. (PAUMF No. 52, PSSUMF No. 1.) Second, Miller’s religion does not require her to
4 operate a bakery or sell wedding cakes. (See *Id.* at pp. 1171-72, 1175.) Third, selling wedding cakes is
5 not Tastries only source of income (PAUMF No. 56). (*Ibid.*) Fourth, Miller can avoid the conflict
6 between Unruh and her religious beliefs by allowing Tastries’ employees lacking her religious objection
7 to prepare wedding cakes for same-sex couples (PAUMF Nos. 53-54, PSSUMF No. 72). (See *North*
8 *Coast, supra*, 44 Cal.4th at p. 1159.) Fifth, even if Miller chooses to comply with Unruh by ceasing to
9 sell wedding cakes to any customers (*ibid.*), “[i]t is well established that there is no substantial burden
10 placed on an individual’s free exercise of religion where a law or policy regulating secular conduct
11 merely operates so as to make the practice of the individual’s religious beliefs more expensive.
12 [Citations.]” (*FEHC, supra*, 12 Cal.4th at p. 1172 [internal brackets and quotation marks removed].)

13 “One last factor that is relevant here ... also properly informs the inquiry into whether an
14 asserted burden on religion is substantial.... whether the granting of an [exemption] would detrimentally
15 affect the rights of third parties.” (*Id.* at p. 1174.) Like the landlord in *FEHC*, who refused to rent to
16 unmarried couples based on religion, “[b]ecause [Miller] is involved in a commercial enterprise, ... to
17 permit [her] to discriminate would sacrifice the rights of [the Rodriguez-Del Rios and] her prospective
18 [customers] to have equal access to public accommodations and their legal and dignity interests in
19 freedom from discrimination based on personal characteristics.” (*FEHC, supra*, 12 Cal.4th at p. 1170.)

20 The California Supreme Court acknowledged the significance that neither of the exemptions
21 granted by the Supreme Court in *Sherbert v. Verner* (1963) 374 U.S. 398 or *Wisconsin v. Yoder* (1972)
22 406 U.S. 205 involved a “comparable impairment of the rights of third parties” (*FEHC, supra*, 12
23 Cal.4th at p. 1171.) Indeed, the “exemption” from Unruh that Miller “seeks can be granted only by
24 completely sacrificing the rights of the [Rodriguez-Del Rios] not to be discriminated against by her in
25 [public] accommodations on account of [sexual orientation].” (*Ibid.*) To attempt to send the Rodriguez-
26 Del Rios “elsewhere is to deny them the full choice of available [public] accommodations enjoyed by
27 others in the [] market.” (*Ibid.*) “To say they may [shop] elsewhere is also to deny them the right to be
28 treated equally by commercial enterprises.” (*Ibid.*) The Rodriguez-Del Rios’ “dignity interest is

1 Supreme Court has repeatedly upheld public accommodations laws in particular as “well within the
2 State’s usual power to enact when a legislature has reason to believe that a given group is the target of
3 discrimination.” (*Masterpiece, supra*, 138 S.Ct. at p. 1287, citing *Hurley v. Irish-American Gay,
4 Lesbian and Bisexual Group of Boston* (1995) 515 U.S. 557, 572.)

5 The California Supreme Court has unequivocally held that Unruh “furthers California’s
6 compelling interest in ensuring full and equal access to medical treatment irrespective of sexual
7 orientation” (*North Coast, supra*, 44 Cal.4th at p. 1158) and that eradicating discrimination by business
8 establishments serves the state’s compelling interest. (See *Catholic Charities, supra*, 32 Cal.4th at p.
9 564 [gender discrimination].) The California Legislature has codified the State’s compelling interest in
10 protecting its citizens from sexual orientation discrimination: “California’s robust nondiscrimination
11 laws include protections on the basis of sexual orientation ...” (Gov. Code, § 11139.8, subd. (a).) And
12 while “[r]eligious freedom is a cornerstone of law and public policy in the United States, and the
13 Legislature strongly supports and affirms this important freedom ..., [t]he exercise of religious freedom
14 should not be a justification for discrimination.” (*Id.* [italics added].)

15 In upholding Unruh against free exercise and free speech challenges, the California Supreme
16 Court held “there are no less restrictive means” for California to accomplish its compelling interest in
17 eradicating invidious discrimination. (*North Coast, supra*, 44 Cal.4th at p. 1158.) Likewise, the U.S.
18 Supreme Court has held that public accommodations laws like Unruh “advance[] [state] interests
19 through the least restrictive means of achieving [their] ends.” (*Roberts, supra*, 468 U.S. at p. 626, 628-
20 29.) Exemptions to Unruh, such as defendants seek, would increase the number of gay persons affected
21 by discrimination in the provision of goods and services. (See *Catholic Charities, supra*, 32 Cal.4th at
22 p. 565.) “Our society has come to the recognition that gay persons and gay couples cannot be treated as
23 social outcasts or as inferior in dignity and worth.” (*Masterpiece, supra*, 138 S.Ct. at p. 1727.)
24 Additionally, Unruh provides Tastries at least three options to comply with its discrimination
25 prohibitions—i.e., allow Tastries employees lacking Miller’s religious objections to prepare cakes for
26 same-sex couples without Miller’s participation; sell wedding cakes to all couples; or sell no wedding
27 cakes at all (see *North Coast, supra*, 44 Cal.4th at pp. 1158-59)—further demonstrating it is the least
28 restrictive means of achieving California’s compelling interest to eradicate discrimination.

1 Defendants rely on *Fulton* to argue that the U.S. Supreme Court has rejected the California
2 Supreme Court’s expression of its compelling interest to eradicate invidious discrimination.
3 (Defendants’ Memo, 23:28-24:3.) But the strict scrutiny applied in *Fulton* does not apply here because,
4 unlike the contractual nondiscrimination clause there, Unruh contains no explicit, discretionary
5 exemption provision. Moreover, even “scrutiniz[ing] the asserted harm of granting specific exemptions
6 to [a] particular religious claimant[.]” like Miller demonstrates that California’s interest is compelling.
7 (*Id.* at p. 1881.) As discussed above, granting Tastries an exemption to Unruh here “would not affect
8 [Miller] alone, but would necessarily impair the rights and interests of third parties” like the Rodriguez-
9 Del Rios and other same-sex couples. (See *FEHC, supra*, 12 Cal.4th at p. 1176.) That was not the case
10 in *Fulton*, where the “City offer[ed] no compelling reason why it ha[d] a particular interest in denying
11 an exception to CSS while making them available to others.” (*Fulton, supra*, 141 S.Ct. at p. 1882.)

12 Here, California has a compelling interest in denying an exception to Miller: granting an
13 exception would empower Tastries—and no doubt numerous other businesses soon to seek such
14 exceptions to Unruh—to discriminate in the commercial marketplace on the basis of sexual orientation
15 in direct opposition to California’s compelling interest in eradicating invidious discrimination. Unruh
16 provides defendants options to comply with no conflict between Unruh and Miller’s religious beliefs,
17 while exempting Tastries from complying with Unruh would deprive the Rodriguez-Del Rios and
18 numerous others of their rights to equal access to public accommodations and their dignity interests in
19 being free from discrimination. As the least restrictive means to accomplish California’s compelling
20 interest in eradicating invidious discrimination, application of Unruh here satisfies strict scrutiny.

21 **III. CONCLUSION**

22 For the foregoing reasons, DFEH respectfully requests that the court deny defendants’ motion
23 for summary judgment or, in the alternative, summary adjudication.

24 Dated: October 6, 2021

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

25 
26 _____
27 Gregory J. Mann
28 Associate Chief Counsel
Attorneys for the DFEH

TRIAL EXHIBIT 25C

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13 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **IN AND FOR THE COUNTY OF KERN**

15 DEPARTMENT OF FAIR EMPLOYMENT
16 AND HOUSING, an agency of the State of
17 California,

18 Plaintiff,

19 vs.

20 CATHY'S CREATIONS, INC. d/b/a
21 TASTRIES, a California corporation; and
22 CATHARINE MILLER,

23 Defendants.

24 EILEEN RODRIGUEZ-DEL RIO and MIREYA
25 RODRIGUEZ-DEL RIO,

26 Real Parties in Interest.

Case No.: BCV-18-102633-DRL

**PLAINTIFF DEPARTMENT OF FAIR
EMPLOYMENT AND HOUSING'S
REPLY IN SUPPORT OF ITS MOTION
FOR SUMMARY JUDGMENT OR, IN
THE ALTERNATIVE, SUMMARY
ADJUDICATION**

Date: Nov. 4, 2021
Time: 8:30 a.m.
Department 11
Judge: David R. Lampe

Action Filed: October 17, 2018
Trial Date: February 28, 2022

1 I. INTRODUCTION

2 Contrary to defendants’ assertion in their opposition, the Department of Fair Employment and
3 Housing (DFEH) does not want “defendants to liquidate their business and go home.” (Opposition,
4 22:21.) DFEH is the only party who has consistently sought common ground in this matter. It has
5 identified several options to harmonize Ms. Miller’s religious beliefs with the requirement that Tastries
6 complies with the Unruh Civil Rights Act (Civ. Code, § 51 [Unruh]). (See *North Coast Women’s Care*
7 *Medical Group, Inc. v. Super. Ct.* (2008) 44 Cal.4th 1145, 1159.) Defendants are free to choose from
8 those options or suggest others, so long as they provide full and equal services to same-sex couples. But
9 defendants have declined to do so, choosing instead to press meritless arguments about the scope of
10 Unruh, the First Amendment, and the California Constitution.

11 DFEH’s motion for summary judgment/adjudication meets its burden. Undisputed material
12 facts support DFEH’s prima facie case that defendants denied full and equal services to the Rodriguez-
13 Del Rios because of their sexual orientation. Defendants’ opposition attempts to distract from this with
14 baseless accusations of bias and targeting rather than making the required showings in support of their
15 affirmative defenses. (Code Civ. Proc., § 437c, subd. (p)(1).) Defendants’ quibbles with DFEH’s
16 undisputed material facts—e.g., “Defendants dispute the characterization” of certain facts, but not the
17 underlying facts themselves (see Defendants’ Separate Statement in Opposition, Nos. 9, 12, 15, 16,
18 17)—are not genuine disputes. Their brief is rife with mischaracterizations of DFEH’s arguments. It is
19 also chock full of misleading citations to inapposite precedent in support of defendants’ unsupported
20 legal arguments. And throughout their opposition, defendants attempt to distract from the merits by
21 discussing general cake design and hypothetical cakes rather than the plain, blank cakes at issue here.

22 One thing defendants get right is that the parties “generally agree on the material facts”
23 (Opposition, 8:4), and that “the only question that remains is how these facts relate to the law.” (*Id.* at
24 8:9.) As a matter of law, defendants’ purported referral of the Rodriguez-Del Rios to an unaffiliated
25 bakery did not satisfy their obligation to provide full and equal services. Similarly, discrimination based
26 on conduct (i.e., entering and celebrating same-sex marriage) closely associated with the couple’s
27 protected status (i.e., sexual orientation) constitutes discrimination motivated by sexual orientation as a
28 matter of law.

1 exemptions” based on a commissioner’s “sole discretion.” (*Id.* at p. 1881.) Unruh has no such
2 discretionary exemption clause nor does DFEH have discretion to exempt certain violators from Unruh.
3 (Civ. Code, § 51.) Therefore, *Smith* applies, and Unruh’s application here satisfies rational basis review.

4 **b. California courts should review Unruh’s application here under *Smith*’s rational
5 basis review, which Unruh satisfies.**

6 California courts are not “foreclosed by binding appellate authority” from applying *Smith*’s
7 rational basis review to Unruh’s application here. (Opposition, 21:17-20 [citing *Vavlov v. Department of*
8 *Motor Vehicles* (2005) 132 Cal.App.4th 1113, 1126, fn. 7].) The court in *Vavlov* simply followed the
9 California Supreme Court’s guidance from *Catholic Charities of Sacramento, Inc. v. Super. Ct.* (2004)
10 32 Cal.4th 527, 561-62, “assume[d] that the conflict between” plaintiff’s religion and the subject
11 Vehicle Code “requirement substantially burdened Vavlov’s religious beliefs,” applied strict scrutiny,
12 and determined that the neutral, generally applicable Vehicle code provision “serves a compelling state
13 interest and is narrowly tailored to achieve that interest.” (*Vavlov, supra*, 132 Cal.App.4th at p. 1126-27
14 [italics added].) The court in *Vavlov* did not find, but merely *assumed* for analytical purposes, that
15 plaintiff’s religious exercise was substantially burdened. *Vavlov* changed nothing.³

16 The California Supreme Court has yet to articulate that *Smith* states the applicable review
17 standard for neutral, generally applicable laws like Unruh on religious grounds because all the
18 challenges thus far failed even under strict scrutiny review. (*Catholic Charities, supra*, 32 Cal.4th at p.
19 562.) Defendants’ challenge here fails under strict scrutiny as well. (See DFEH’s Opposition to
20 Defendants’ Motion for Summary Judgment, §§ II.B.1. and II.B.4, incorporated herein by reference.)
21 But if this Court were to hold application of Unruh here does not survive strict scrutiny, it must first
22 determine what level of review is appropriate. Because California has a history of “declining to exempt
23 religiously motivated conduct from neutral, generally applicable laws” and review under the State’s free
24

25 ³ Although defendants argue DFEH attempts to force them to “cease offering pre-ordered wedding cakes
26 for sale to anyone” (Opposition 21:22-23; 22:21) to show the purported substantial burden upon Miller’s
27 religious exercise, DFEH has identified *at least three recognized options* to comply with Unruh, two of
28 which increase revenues: (1) sale wedding cakes to all or (2) allow Tastries employees with no religious
objections to prepare wedding cakes for same-sex couples (while this option seems to be the logical
compromise given that Tastries’ employees have done so in the past without Miller’s involvement
[SSUMF Nos. 69, 72], the choice is defendants’). (See *North Coast, supra*, 44 Cal.4th at p. 1159.)

1 Dated: October 20, 2021

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

2
3 

4 _____
Gregory J. Mann
Associate Chief Counsel
Attorneys for the DFEH

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TRIAL EXHIBIT 26B

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF KERN

DEPARTMENT OF FAIR EMPLOYMENT)
AND HOUSING, an agency of the)
State of California,)
Plaintiff,)
vs.) Case No.)
) BCV-18-102633-JEB
CATHY'S CREATIONS, INC. d/b/a)
TASTRIES, a California)
corporation; and CATHY MILLER,)
Defendants.)
_____)
EILEEN RODRIGUEZ-DEL RIO and)
MIREYA RODRIGUEZ-DEL RIO,)
Real Parties in Interest.)
_____)

REMOTE DEPOSITION OF CATHY'S CREATIONS, INC.,
BY AND THROUGH ITS DESIGNATED REPRESENTATIVE
CATHARINE MILLER
AND IN HER INDIVIDUAL CAPACITY
February 24, 2022

Witness Location: Rancho Santa Fe, California

Atkinson-Baker,
a Veritext Company
(800) 288-3376

Reported by: Lisa O'Sullivan, CA CSR No. 7822,
AZ CR No. 50952, RMR, CRR
File No: 5085432

1 buy a cake and have that written on a cake, except for
2 my bakery, and I will refer them to all of those places,
3 which is accommodating them.

4 Q. When Black people in the south, before the
5 civil rights laws in the '60s, went to a restaurant, and
6 they were denied, there were lots of other restaurants
7 they could go to, right?

8 MR. JONNA: Objection. Calls for speculation.
9 Argumentative. Incomplete hypothetical.

10 A. God never said not to serve a Black man, a
11 Hispanic man, a Jewish man. God says in his word, and
12 I'm pointing to my Bible right now, not to be involved
13 with homosexuality. I will not be involved with a
14 homosexual relationship at all.

15 God loves Black people. He loves White people.
16 He loves Jews. He loves gentiles. He loves the Greek.
17 He loves everyone. But certain individuals have made a
18 lifestyle choice that directly goes against God's word.
19 And I love my Lord and savior, and I'm going to obey
20 him. So being Black or White or Hispanic has absolutely
21 nothing to do with this case.

22 Q. Do you think that God loves gay people?

23 A. I think he loves them, yes. He's hurting for
24 them because they've made a decision that is not -- does
25 not have a good outcome, and I can give you Bible

1 references if you want me to read them, or you can look
2 them up yourself.

3 Q. I'd love to put them in the discovery
4 responses. If we have time at the end of this, we can
5 do that, but in the discovery responses, I'd love to be
6 able to see what the verses are.

7 A. Okay.

8 Q. Are you aware that the business owner --
9 certain business owners in the south did say that their
10 beliefs were that God did not want Black people and
11 White people associating together?

12 A. They should have read their Bible.

13 MR. JONNA: Objection. Argumentative.
14 Incomplete hypothetical.

15 Q. So you just disagree and don't believe that
16 their beliefs were legitimate Christian beliefs?

17 MR. JONNA: Objection. Argumentative. Vague
18 and ambiguous.

19 A. They just need to read their Bible. There's
20 nowhere in the Bible that says that.

21 Q. So that's a distinction you'll make between
22 other forms of discrimination? They're not supported by
23 the Bible?

24 MR. JONNA: Objection. Misstates the witness's
25 testimony. Argumentative.

1 A. My whole case or whatever you call this is
2 based on my love for my Lord, and my guidelines -- my
3 life centers around the scriptures of the Bible, which
4 our country was founded on. So I'm sorry if there were
5 people back in the '60s or '50s that were discriminatory
6 towards Black people. They should not have been at all.
7 But they should have done their research then and shown,
8 "Hey, where in the Bible does it say that?"

9 Q. So just to be clear, the distinction between
10 your actions are based on the Bible, their actions were
11 not based on the Bible?

12 A. My actions --

13 MR. JONNA: Objection. Overbroad.

14 A. My actions are based on the Bible and the
15 constitution of the United States of America and what
16 they were founded on. As far as what you are proposing
17 back in the '50s or 60s, I don't know. I wasn't there.
18 I wasn't born yet.

19 Q. Do you try to follow everything that the Bible
20 says?

21 A. I do my best, but I'm a sinner, but I do my
22 best.

23 Q. Do you follow some of the eating practices from
24 the Old Testament --

25 MR. JONNA: Objection.

1 We talked about you refer folks to other
2 bakeries. Was there any other means of complying with
3 the Unruh Act that you considered other than referring?

4 A. No.

5 Q. Have you ever tried to think about any other
6 possibilities?

7 A. My husband and I discussed many possibilities,
8 but that's the only one we could come up with.

9 Q. Can you tell me about some of the other ones
10 you considered or talked to Mike about?

11 A. We just talked about the situation and how we
12 would deal with it. And the other one was, "Just say
13 no," and I didn't feel good about that either. I don't
14 want to hurt anybody, so.

15 Q. The California Supreme Court in a case
16 suggested that a business owner or an employee -- one
17 way that the business could comply with Unruh was by
18 allowing any of the employees who did not want to
19 participate because of their religious beliefs -- that
20 that employee could stay out of the process, but the
21 business could still provide the service.

22 Have you heard about that case?

23 A. I've heard about a scenario like that, yeah.

24 Yes.

25 Q. Was that an option that you considered at all

1 for complying with Unruh and yet being able to follow
2 your religious beliefs?

3 A. I'm not an employee. I'm the owner.

4 Q. I thought you were an employee now too.

5 A. I'm both.

6 Q. Well, either way, the idea would be that you
7 did not have to participate in the process, but Tastries
8 could provide the product or service. Is that an option
9 that you considered with Unruh and balancing your
10 religious beliefs?

11 A. No.

12 Q. Do you see that as a way that would balance
13 your religious beliefs under Unruh?

14 A. No. I think you need to refer back to the
15 question earlier this morning when you said that -- we
16 talked about how Tastries and I are kind of one and one,
17 especially now. And Tastries is my bakery and a part of
18 me, and we will not be able to participate in same-sex
19 weddings or events surrounding same-sex weddings.

20 Q. We also talked about Cathy's Creations, Inc.
21 being an entity separate from you, right?

22 A. That's the corporate, yes. That's -- yes.

23 Q. But that's not a distinction that you make in
24 terms of the situation we're talking about? Let me
25 strike the question. I'm sorry.

1 Even though Cathy's Creations, Inc., which does
2 business as Tastries, is a separate entity, you believe
3 that you are so closely tied with it that this option we
4 discussed with you not participating in the process
5 would not work for you?

6 A. Correct, yes.

7 Q. When you talked with Stephanie from Gimme Some
8 Sugar, did you talk about the Unruh Act at all?

9 A. No, I don't believe we did. It was more about
10 trying to help each other out, and she was very happy to
11 help me at the same time. It was an emotional
12 conversation that we had, more about her mother felt the
13 same way I did, and she totally understood, and this
14 would be a good way to help each other.

15 Q. Was there any conversation around the fact that
16 you wanted to refer people to her in order to comply
17 with Unruh and because you felt you wanted to help
18 people by referring them?

19 A. I just answered that.

20 Q. I'm talking about was there any conversation
21 with Stephanie about that.

22 A. Oh, I got that's what you just asked. That's
23 what I'm talking about. The conversation she and I had
24 was about helping each other and that her mother felt
25 the same way that I feel, and she said she's a Christian

REPORTER'S CERTIFICATE

I, the undersigned Certified Court Reporter licensed in the States of California and Arizona, do hereby certify:

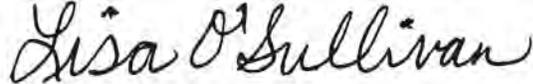
That the foregoing deposition of Catharine Miller was taken remotely before me at the date and time therein set forth, at which time the witness was put under oath or affirmation by me;

That the testimony of the witness, the questions propounded, and all objections and statements on the record made at the time of the examination were recorded stenographically by me and were thereafter transcribed;

That the foregoing is a true and correct transcript of my shorthand notes so taken.

I further certify that I am not related to nor employed by any of the parties hereto and have no interest in the outcome of the action.

In witness whereof, I have subscribed my name this date: March 14, 2022.



Lisa O'Sullivan

CA Certified Shorthand Reporter No. 7822

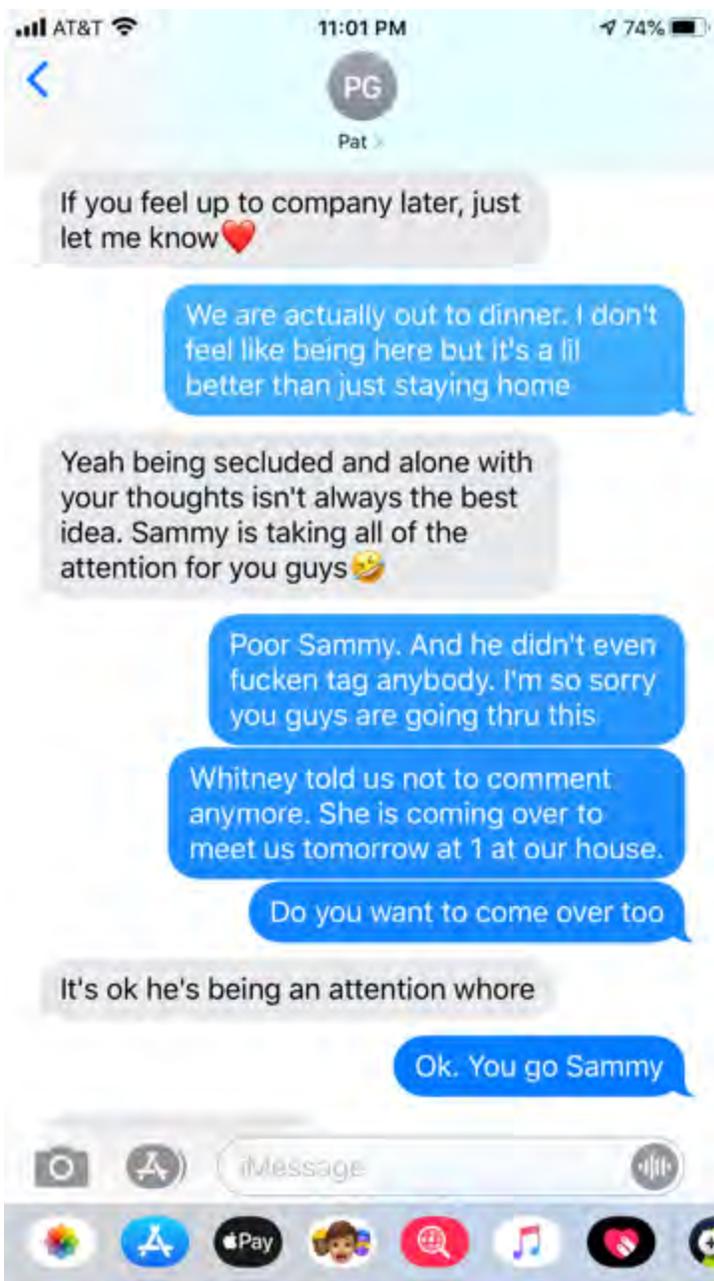
AZ Certified Reporter No. 50952

Registered Merit Reporter

Certified Realtime Reporter

TRIAL EXHIBIT 31





If you feel up to company later, just let me know ❤️

We are actually out to dinner. I don't feel like being here but it's a lil better than just staying home

Yeah being secluded and alone with your thoughts isn't always the best idea. Sammy is taking all of the attention for you guys 😊

Poor Sammy. And he didn't even fucken tag anybody. I'm so sorry you guys are going thru this

Whitney told us not to comment anymore. She is coming over to meet us tomorrow at 1 at our house.

Do you want to come over too

It's ok he's being an attention whore

Ok. You go Sammy

AT&T 11:01 PM 74%

< PG Pat >

Ok. You go Sammy

Yeah we'll go over

Ok. See you tomorrow

Ok

I'll txt if anything

Yes just let me know

Ok





Aug 29, 2017, 1:06 PM

Hey friend. Have you written your statement and send to Whitney?

Aug 29, 2017, 2:13 PM

Hi Chickenbutt! I've been away at a conference in LA. I'm going to try and do it tonight.

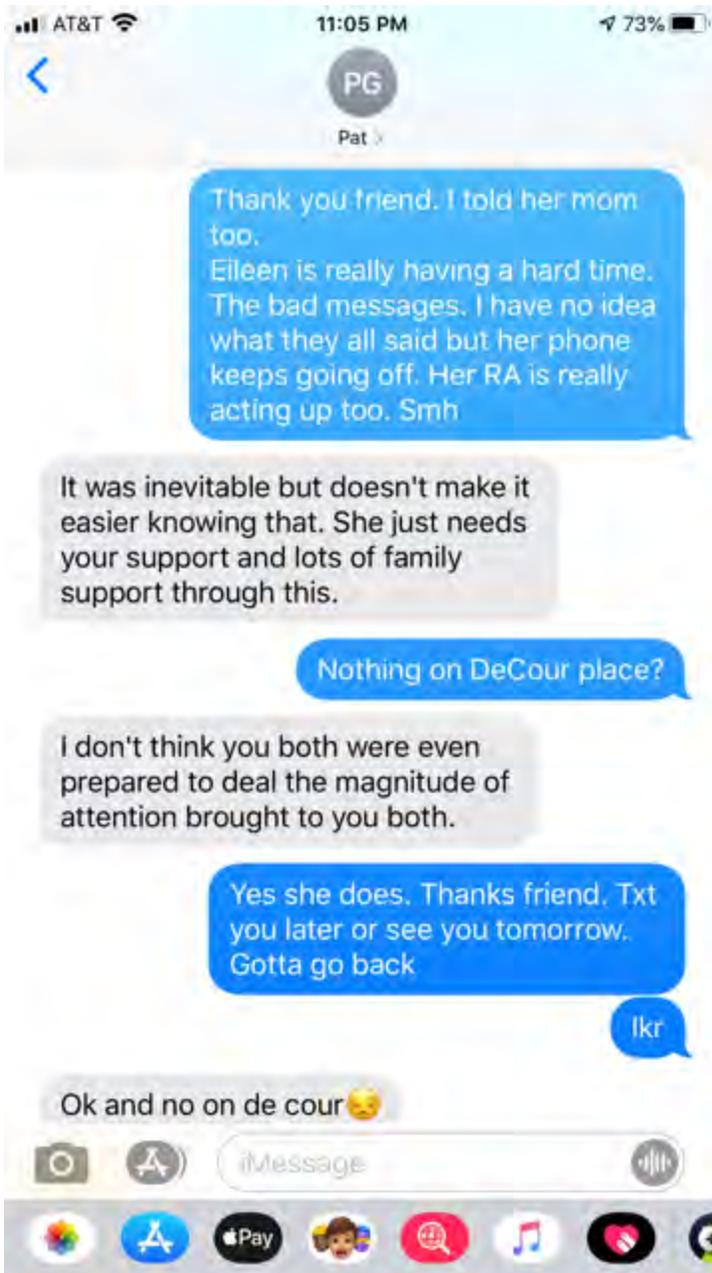
Aug 29, 2017, 3:41 PM

Oh yes. You told me. Ok. And when you do it, just email or txt it to Whitney

Yes, I will

Thank you friend. I told her mom too. Eileen is really having a hard time. The bad messages. I have no idea what they all said but her phone keeps going off. Her RA is really acting up too. Smh







Mireya
Sent from my iPhone

TRIAL EXHIBIT 32

We're here

Mireya Rodriguez

Ok. They should have Both your names.

I already selected your cake

You don't need to come

Mireya Rodriguez

This nigga



To: Patrick Salazar, Mireya Rodriguez

Mireya Rodriguez

This nigga

MR Can you pay for it too

Sure

Patrick Salazar

He will

Do they take food stamps



To: Patrick Salazar & 2 more...

For the wedding?

I'm not going

Eileen Del Rio

Duh

ED This bitch

I don't believe in any kind of marriage

It's against my how beliefs

Hoe beliefs

Eileen Del Rio

Nigga please

ED That's what my wife said

Lmao

That I'm a hoe?

Eileen Del Rio



To: Patrick Salazar & 2 more...

That I'm a hoe?

Eileen Del Rio

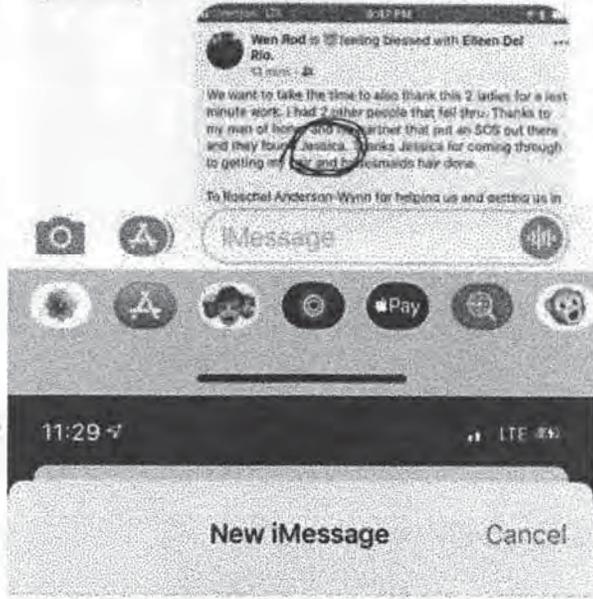
ED Yes

Duh

Eileen Del Rio

ED She said Hoes have feelings too 🤔

ED Lmao
Mireya Rodriguez
lkr
MR I deprived sleep
Eileen Del Rio
ED Nigga



To: Patrick Salazar & 2 more...

my man or not and the carner later put an SUV bus there and they found Jessica. Thanks Jessica for coming through to getting my hair and bridesmaids hair done.
To Roschel Anderson-Wynn for helping us and getting us in touch with Diana from Glam 'D Beauty. Thank you Diana for coming thru and getting my make up done for my wedding

Eileen Del Rio
ED Lmao
Mireya Rodriguez
MR I edit it

Oct 9, 2017, 7:38 AM



Eileen Del Rio



Jan 28, 2018, 5:04 PM

This bitch said, everyone have a blessed day 🙏

Mireya Rodriguez

Who did nigga?

Kathy

Mireya Rodriguez

When

On what?

Oh half the show was her on the fucking stage going on and



11:35 ↵

LTE 🔋

New iMessage

Cancel

To: Patrick Salazar & 2 more...

the fucking stage going on and on about fucking cakes.

Mireya Rodríguez

Oh at the bridal thingy. Lmao

Eileen Del Rio

It's NOT about cake Sammy 🙏



Patrick Salazar

Lead they're bigoted flavor

11:23 7 LTE 86
New iMessage Cancel

To: Patrick Salazar & 2 more...

[Redacted]

Sammy said now this is a Mireya song 🎵

Eileen Del Rio

That is her jam we need to dance. Lmao.

Mireya Rodriguez

That's right

Patrick Salazar

I thought I'd lighten her spirits with those 😊

Eileen Del Rio

Awe thanks

Mireya Rodriguez

Thanks

Eileen Del Rio

Did y'all see the 11pm news.



11:23 7 LTE 86
New iMessage Cancel

To: Patrick Salazar & 2 more...

ED Did y'all see the 11pm news.

No what was it?

Eileen Del Rio

This guy wants to do our photography for wedding free as a token of kindness

Dangp

And free mcdoubles too?

Eileen Del Rio

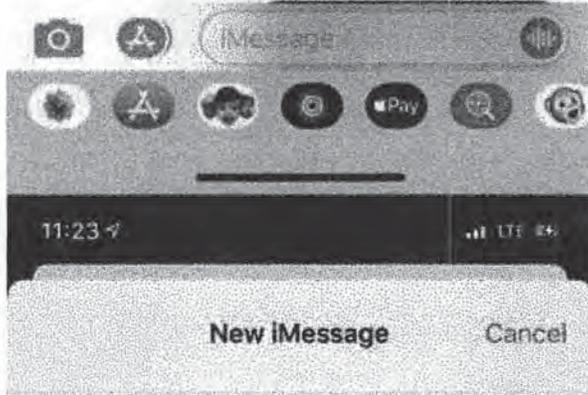
Brandon Rose from Moments photography

Nigga you didn't get yo steak.
Lmao

ED You hangry

I'm hungry again

Aug 27, 2017, 9:18 AM



To: Patrick Salazar & 2 more...

I'm hungry again

Aug 27, 2017, 9:18 AM



Kyle O'Connor
facebook.com

That is so crazy. There were 2
in 1 day.

Aug 27, 2017, 10:24 AM

Mireya Rodriguez

MR Wow

Eileen Del Rio

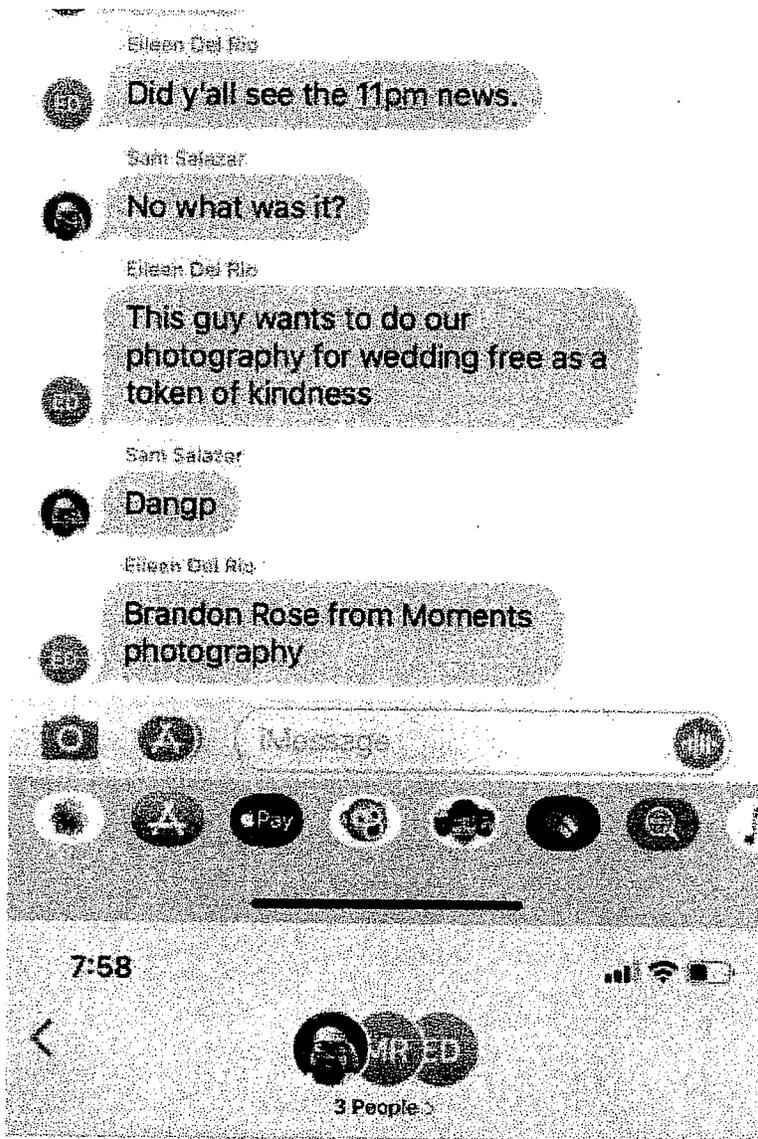
Did y'all see we made it to



To: Patrick Salazar & 2 more...

Did y'all see we made it to

TRIAL EXHIBIT 33



Eileen Del Rio

Did y'all see the 11pm news.

Sam Salazar

No what was it?

Eileen Del Rio

This guy wants to do our photography for wedding free as a token of kindness

Sam Salazar

Dangp

Eileen Del Rio

Brandon Rose from Moments photography

7:58

Aug 27, 2017, 9:16 AM

Sam Salazar

Kyle O'Connor
facebook.com

That is so crazy. There were 2 in 1 day.

Aug 27, 2017, 10:24 AM

Mirya Rodriguez

Wow

Eileen Del Rio

Did y'all see we made it to LGBT nation

No I didn't

Eileen Del Rio



TRIAL EXHIBIT 550



Sam Salazar

August 28 at 1:04pm · Bakersfield · 🌐

Tastries Bakery... so we just went with some friends to do a cake tasting for a wedding cake and we were referred to another bakery. Apparently they don't "believe" in same sex marriage, so they refused to make the cake. I'm not even sure how to react or feel right now. So just be aware if you choose to spend your money there.

👍 Like 💬 Comment ➦ Share

👤 👥 151

108 shares

View previous comments

4 of 99



Justin Lucas The real story here isn't this woman and her antiquated ideologies, her backwards bigotry and hatred disguised with scripture and faith. It's the overwhelming response of those who refuse to stand on the sidelines and let hate overshadow love. This sto... See More

Like · Reply · 🌐 2 · August 28 at 12:03pm · Edited



Loretta Hayes Go somewhere else. Because someone doesn't support same sex marriage does not make them a bigot or a hater.

Like · Reply · 🌐 2 · August 28 at 2:58pm

👤 Emjay Hooper replied · 5 Replies · 11 hrs



Nina Huddle Wow, this is just ridiculous... it's 2017. Wish you the best on your wedding. I see a lot of people/business reaching out to offer their services... this is like a blessing in disguise. But, so sorry you were refused a wedding cake. I'm sure since your experience/story is being shared, their business is going to drop. Karma.

Like · Reply · Yesterday at 8:20am



Linda Johnson Brooks So sorry this happened to you Best wishes for the perfect wedding

Like · Reply · 19 hrs

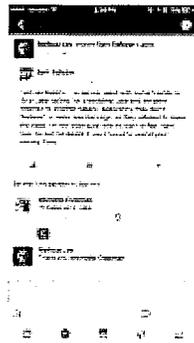


Write a comment...





Melissa Lee Sam Salazar



Like · Reply · 2 · August 26 at 3:35pm



Sam Salazar Awe that is so sweet! We are not the couple getting married, we were there to support very close friends. They are still looking for a baker to do their cake though. Mind if I share this with them?

Like · Reply · August 26 at 4:36pm · Edited



Melissa Lee Sam Salazar be my guest!!! She makes amazing cakes!!!!

Michelle Coleman

Like · Reply · 1 · August 26 at 3:38pm



Jessica Perez



Like · Reply · 5 · August 26 at 4:06pm



Sam Salazar Eileen Del Rio

Like · Reply · 1 · August 26 at 4:15pm



Jessica Perez Sam Salazar



Like · Reply · August 26 at 4:26pm



Raen Payne Also, are you getting married???

Like · Reply · August 26 at 4:31pm



Sam Salazar No. We were helping two of our closest friends pick their wedding cake.

Like · Reply · August 26 at 4:32pm



Raen Payne Sam Salazar ohhhhh that's cute! And also, free cake! 😊 except there, they can shut down now.

Like · Reply · August 26 at 4:33pm



Danny Hill If you need a DJ... let me know!}

Like · Reply · 8 · August 27 at 8:08am



Candie Cruz Hello, I would like to offer my services at no cost. I'm a makeup artist and hair stylist. I can be reached at ~~651.489.1188~~ please call or text me for the date and time of event. If I'm available I'll do makeup and hair at no cost for up to 3 people.

Like · Reply · 5 · August 27 at 8:43am · Edited



Carla Phillips Hi Candie! I'd love to help as well!

Like · Reply · 2 · August 27 at 9:52am



Candie Cruz That's awesome, thanks a bunch doll. I should be hearing from them sometime today. I'll definitely keep you updated.

Like · Reply · 1 · August 27 at 9:53am



Cindy Arp Veiner If you don't have a photographer, Abbys Photography would love to help you out!

We are very sorry to hear that this has happen to you!

Give us a call ... See More

Like · Reply · 3 · August 27 at 9:13am · Edited



Martin Bojorquez Cathy Miller is hating her choice right now her fb page is open and soon people will stop derating the restaurant and attacking her personally it's too bad!! They will be deeply sued n forced out of business damn I liked it too but ohhwell buh bye!!

Like · Reply · August 27 at 9:31pm



Michelle Robertson Hi Sam, I'm a producer with the San Francisco Chronicle's news site, SFGATE, and I'd like to interview you for a story. Please send me an email at mrobertson@sfgate.com

Like · Reply · 1 · August 28 at 11:42am

TRIAL EXHIBIT 553A

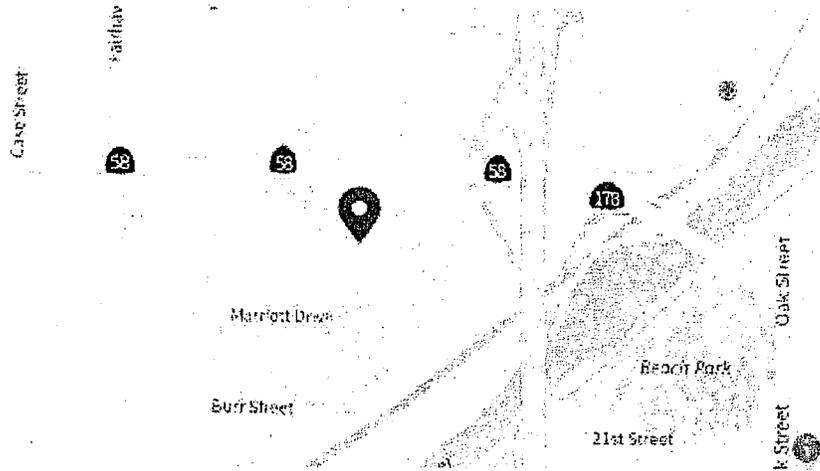


Eileen Rodriguez-Del Rio is with Jessica Camacho and 42 others
at Tastries Bakery, Bakersfield.

August 26, 2017 · Bakersfield, CA · 🌐

So we go to this bakery a week ago to sign up for tasting and choose our wedding cake. The owner met with us today to set up the process. Well this rude ass person says I will make your order but I don't condone same sex marriages and will have no part in this process. Oh but you want to take my order and give it another bakery so that bakery can do it. The rude person is also the owner of the place. She don't condone same sex marriages so refused to make our wedding cake and set up our order. She wanted all our information to send to another bakery so they could make it.

#discrimination#mustbeadonaldtrumpsupporter#rude!



Tastries Bakery, Bakersfield

Bakery · Bakersfield, CA
2,776 people checked in here

Save

👤👤👤 66

53 Comments 8 Shares

TRIAL EXHIBIT 553B



Eileen Rodriguez-Del Rio is with Jessica Camacho and 42 others at Tastries Bakery, Bakersfield.

August 26, 2017 · Bakersfield, CA ·

Saturday, August 26, 2017 at 1:13 PM

... go to sign up for tasting and choose our wedding cake. The [redacted] up the process. Well this rude ass person says I will make your order but I don't condone same sex marriages and will have no part in this process. Oh but you want to take my order and give it another bakery so that bakery can do it. The rude person is also the owner of the place. She don't condone same sex marriages so refused to make our wedding cake and set up our order. She wanted all our information to send to another bakery so they could make it. #discrimination#mustbeadonaldtrumpsupporter#rude!



BAKERY
Tastries Bakery, Bakersfield

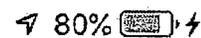
65

53 Comments 8 Shares

TRIAL EXHIBIT 554



10:42 PM

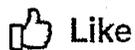


Wen Rod

August 26, 2017 ·



I just don't know how to feel right now. It's like a mixture of all kinds of emotions. Discriminated against, angry, hurt, sad, whatever else that's on that spectrum. All we were doing was to taste some cake and making the decision of what we were doing for our wedding cake. I have never experienced being discriminated for loving a person of the same sex. On to a different place that will take the same money that straight, gay, white, Mexican, male or female, human being would have spent. No business for Tastries Bakery



Like



Comment



Share

Eileen Rodriguez-Del Rio and 21 others

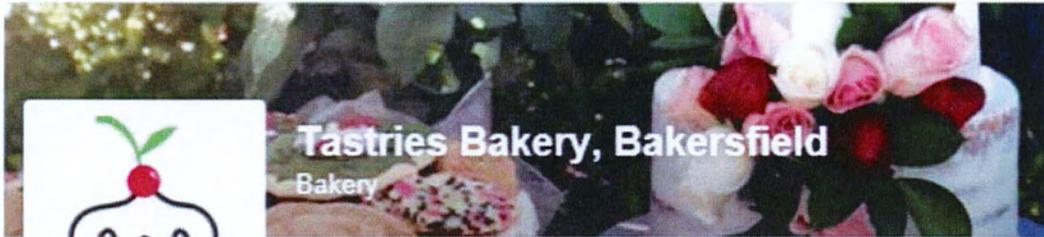
TRIAL EXHIBIT 555A



Eileen Del Rio reviewed Tastries Bakery, Bakersfield — 1★

August 26, 2017

Because the owner is a bigot and hates lesbian and gays and refuses service to them. Apparently gay and lesbian money looks different and spends different. She must be a Trump supporter!



Tastries Bakery, Bakersfield
Bakery

7,875 Likes
381 talking about this



8

1 Comment

TRIAL EXHIBIT 555B



Eileen Rodriguez-Del Rio

Don't you know I'm LOCA!

Posts

About

Friends

More

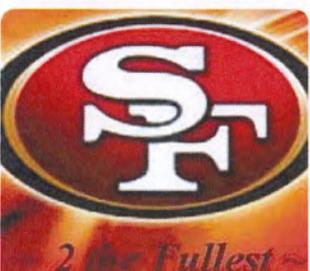
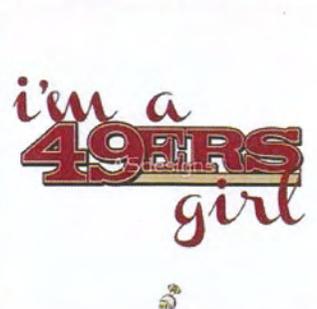
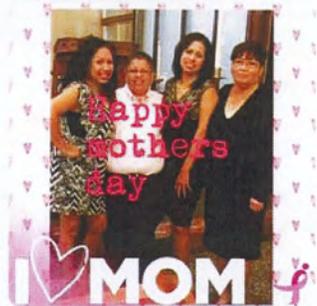
Message

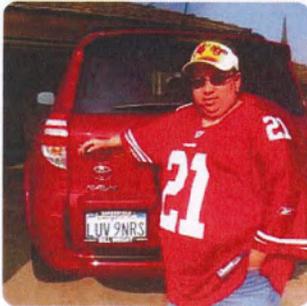
Photos

Eileen's Photos

Albums







Videos

Eileen's Videos



Check-Ins

Recent

https://www.facebook.com/eileen.delrio/photos_all



Tastries Bakery, Bakersfield

Bakersfield, California
Visited on August 26, 2017



Black Angus Steakhouse Bakersfield

Bakersfield, California
Visited on May 13, 2012



Mi Casa Hayward Ca

Hayward, California
Visited on December 16, 2011

Reviews

All Reviews

Places



1st Amendment Tattoo Bakersfield

Amazing place. Jennifer Strand does amazing work. She took what I sent her and made it a perfect tat for me and my wife. ❤️



Tastries Bakery, Bakersfield

Because the owner is a bigot and hates lesbian and gays and refuses service to them. Apparently gay and lesbian money looks different and spends different. She must be a Trump supporter!



Halloween Horror Nights - Hollywood



Coyote Ugly Saloon - Las Vegas

Amazing 💎. A must when in Vegas. The atmosphere is energetic and watching everyone was a blast. The coyote ugly ladies keep you energized.

TRIAL EXHIBIT 557

Aug 28, 2017, 2:20 AM

Sam Salazar



Discriminatory owners, pure and simple.

Today, the owners of this bakery turned away a gay couple seeking a cake for their upcoming wedding. This is against State and Federal law, but it's also just a disgusting, cruel, and immoral way to treat anyone in our community. Tastries is going to have a massive legal problem on their hands due to their backward and discriminatory practices (don't believe me? Check out the \$135,000 fine Sweet Cakes by Melissa just had to pay for similar bigotry).

Our community is better than this and I refuse to give my money to anyone who treats my friends and neighbors so poorly. Bakersfield is a city where we stand together against bigotry like on display here.

While I've spent quite a bit on odds and ends at Tastries in the past (even relatively large orders for special events), I can't in good conscience do it again. . . and either should you. I love fresh vanilla bean anything, but not at the cost of the dignity of my neighbors and friends. We have other more inclusive options here in Bakersfield-- time to skip bigots like

My friend just saw this. You have a whiteness.

You should call an attorney. For reals

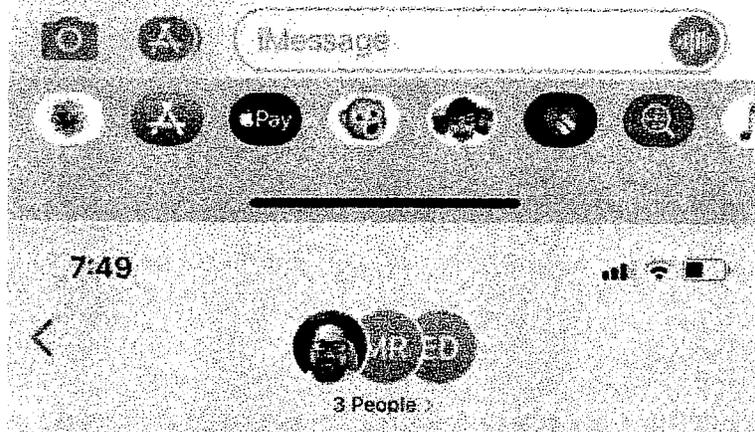


All kidding aside.

Eileen Del Rio



Whitney is getting me one



Sam Salazar



Good

Eileen Del Rio



She is working on it now

Sam Salazar

I feel I pained and suffered too

Eileen Del Rio

Because yo ass didn't taste no cupcakes 🍰🍰🍰

Sam Salazar

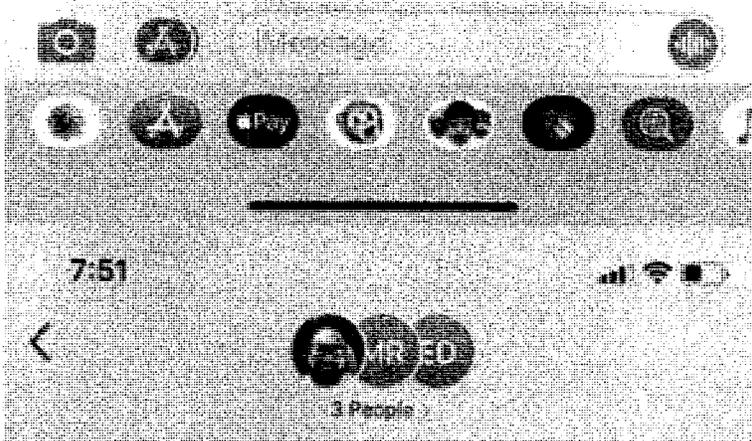
Exactly

Now I'm pain and suffered because that's all I'm gonna hear today from him 🤔

Sam Salazar



Eileen Del Rio



Eileen Del Rio

I love your two. I truly do ❤️❤️❤️
❤️❤️❤️❤️

We love you both to the moon and back 🌕

I will always have my girl's backs especially my Chickenbut

Sam Salazar

And family sticks together, even if we're 5 times removed.

KGET Just messaged me

Eileen Del Rio

Shut up

Sam Salazar



Mary Kate Paquette Kget

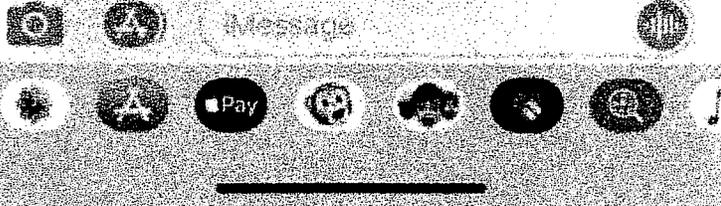
You and Mary Kate Paquette Kget aren't connected on Facebook

Add them so they can message you, and so you can send and receive money, make voice calls and video chats, and more in your conversation.

ADD ON MESSENGER

7:51 PM

Hi Sam. My name is Mary Kate Paquette, I work for Channel 17. We saw you post about Tastries and were wondering if you would want to



7:51



3 People >

Sam Salazar



Mary Kate Paquette Kget

You and Mary Kate Paquette Kget aren't connected on Facebook

Add them so they can message you, and so you can send and receive money, make voice calls and video chats, and more in your conversation.

ADD ON MESSENGER

7:52 PM

Hi Sam. My name is Mary Kate Paquette, I work for Channel 17. We saw you post about Tastries and were wondering if you would want to talk with us?



You and Mary Kate Paquette Kget aren't connected on Facebook

It would be open to you. Our brands were featured on your shopping. I am sure they would be interested in you to their



They want to talk to you

Eileen Del Rio



Ok

PAT0009

AA02030



Sam Salazar

Ok

Wow. Thanks a lot

Sam Salazar

My messenger is blowing up

Eileen Del Rio

Whitney says I should hold off on the press

Mirya Rodriguez

Wow. Thank you guys. I love you/We love you

Eileen Del Rio

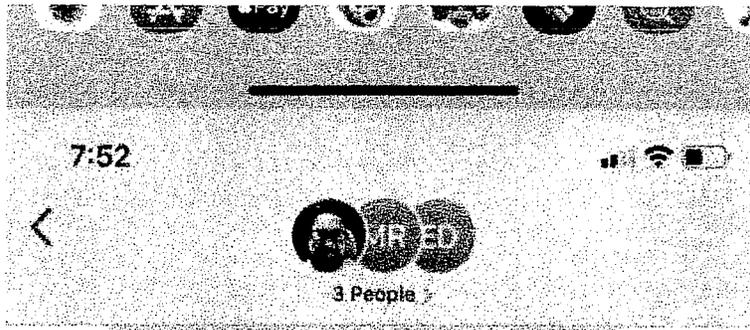
The lady called me and was like wanting to get us on today but I contacted my advocate advisor and she said it would be giving the bakery free press

She said there will be time for that down the road on the law suit journey

The lady supposed to call me back

Thanks again guys for standing by us. Pat my wife needs you more now than ever. It finally has it her.





Thanks again guys for standing by us. Pat my wife needs you more now than ever. It finally has it her. She is breaking down. Don't tell her I told you tho



I will call her (or her family) if I want to anyway.

Eileen Del Rio

Give her a few. Her nose is bleeding bad right now

Now it's both of them



Ugh

Oh no!

Eileen Del Rio



Yep

Let me know if she's gonna be ok

Eileen Del Rio

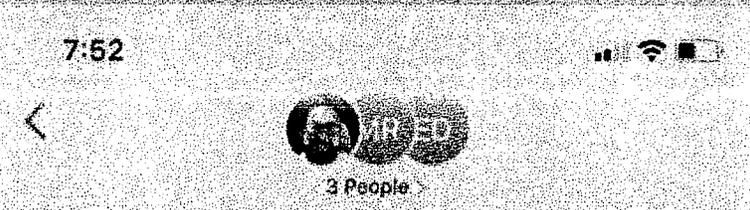
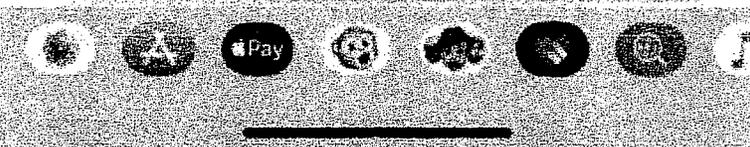
Trying to stop the bleeding



I will

Sam Salazar

Patrick if you feel you need to go (or if you feel he does, eileen) ditch the



Patrick if you feel you need to go (or if you feel he does, eileen) ditch the birthday party. I can't not go, but you can. Maybe after we can meetup.

Eileen Del Rio

Don't miss the party she wouldn't want that. I will let you know when she is better in a few we are at target right now in car

Yes I'd like to meet up later if she's feeling better that is. Thank you Eileen for keeping me in the loop.

Eileen Del Rio

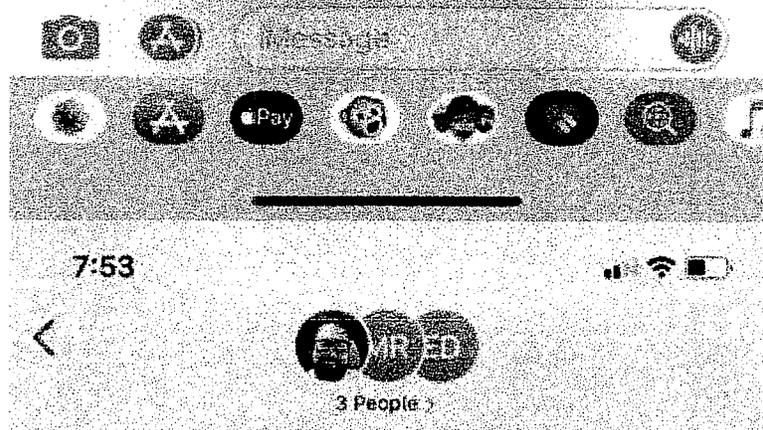
No problem.

Sam Salazar

Hi there. There were two couples. We were one, but not the couple buying the cake. We were there to help our friends decide on a flavor.

Gotcha. Did you know the couple buying the cake?

Yes, they are very dear friends. I can give them your contact info if you'd like. I think everything finally hit them a while ago and they're pretty



Sam Salazar

Hi there. There were two couples. We were one, but not the couple buying the cake. We were there to help our friends decide on a flavor.

Gotcha. Did you know the couple buying the cake?

like I think everything finally hit them a while ago and they're pretty upset right now. I know they aren't in the mindset to talk to anyone just yet.

Okay, thank you! I'd appreciate it if you did, the owner is talking to us tonight so we want to try to talk to both sides. You can reach me here, or you can call the newsroom at

661-637-2320

She's going to talk to the news. You may want to also put your side out there. Just passing on the info.



Eileen Del Rio



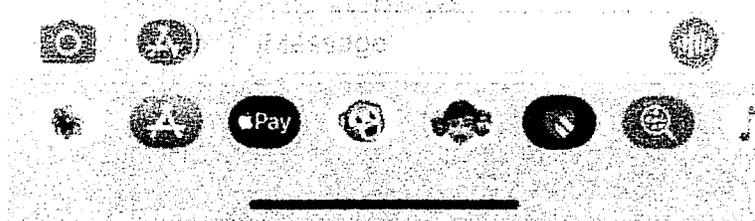
Which news is that

Sam Salazar



23

It was just on the news



7:54



3 People

It was just on the news

But only informational, no interviews.



Eileen Del Rio

What was said ugh we missed it

Which channel



Which channel

Sam Salazar



23

Eileen Del Rio



What did it say

Sam Salazar

PAT0013

AA02034

we're refused their cake". Lol.
Patrick said it was 17, not 23. My
bad.

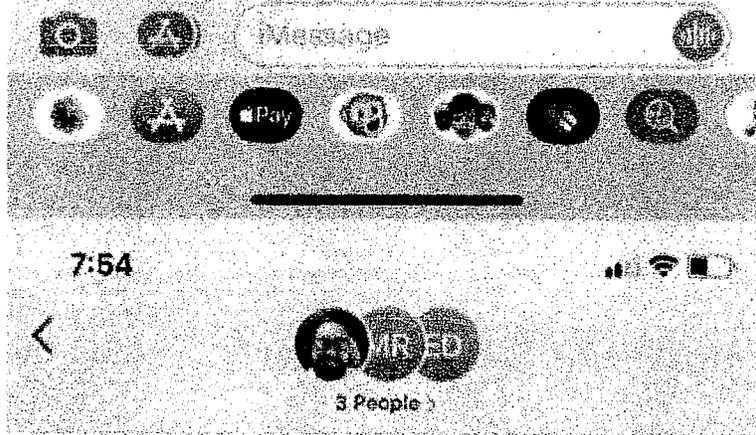
The news just posted Sammy's fb
post with picture 📷

On their page that is

Sam Salazar

Fuck

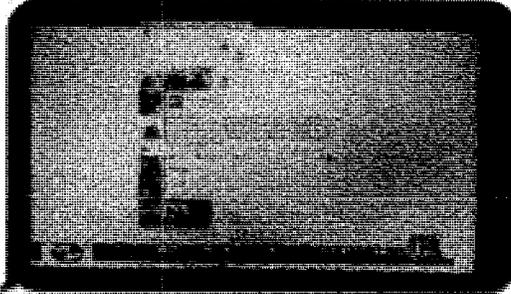
Eileen Del Rio



Eileen Del Rio

Which one

Sam Salazar



Eileen Del Rio

Was it at the beginning

Sam Salazar

I think so

Yeah it was just after 5:00

Eileen Del Rio

We missed it

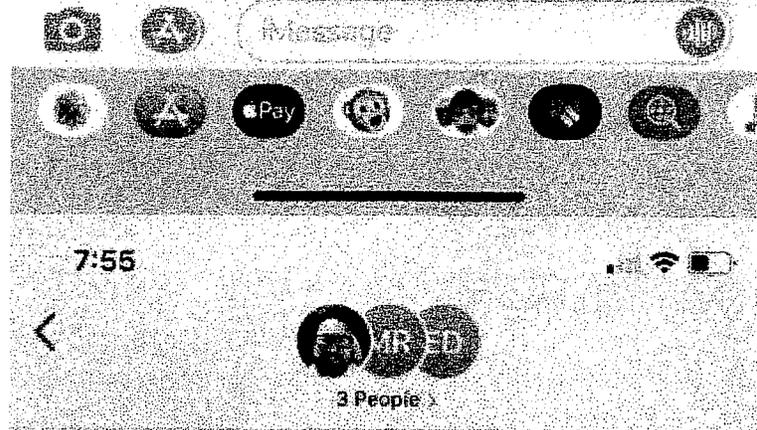
Dang it

Sam Salazar

They said more coming

That's what nat said

Idk why they're putting him out there. It didn't happen to him.



Eileen Del Rio

Yep I'm sorry

Sam Salazar

A little personal advice... if you plan on a legal persuit, don't be responding to people's comments on Facebook. It won't help your case.

I already told patrick just to leave it be

It's on 23's page and there are already a bunch of stupid ass comments.

Eileen Del Rio

Yes I agree

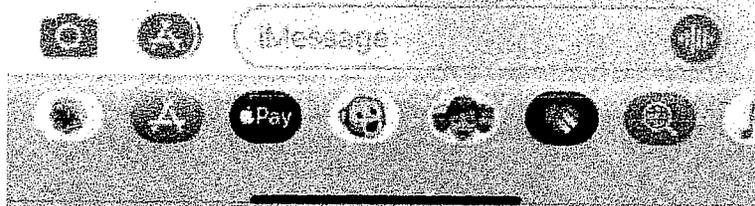
Sam Salazar

She's gonna play the sweet little old Christian card and win over sympathy from all the bakersfield conservatives.

Eileen Del Rio

That's ok we have Whitney and she don't let shit like this go

And neither will Audrey



PAT0015

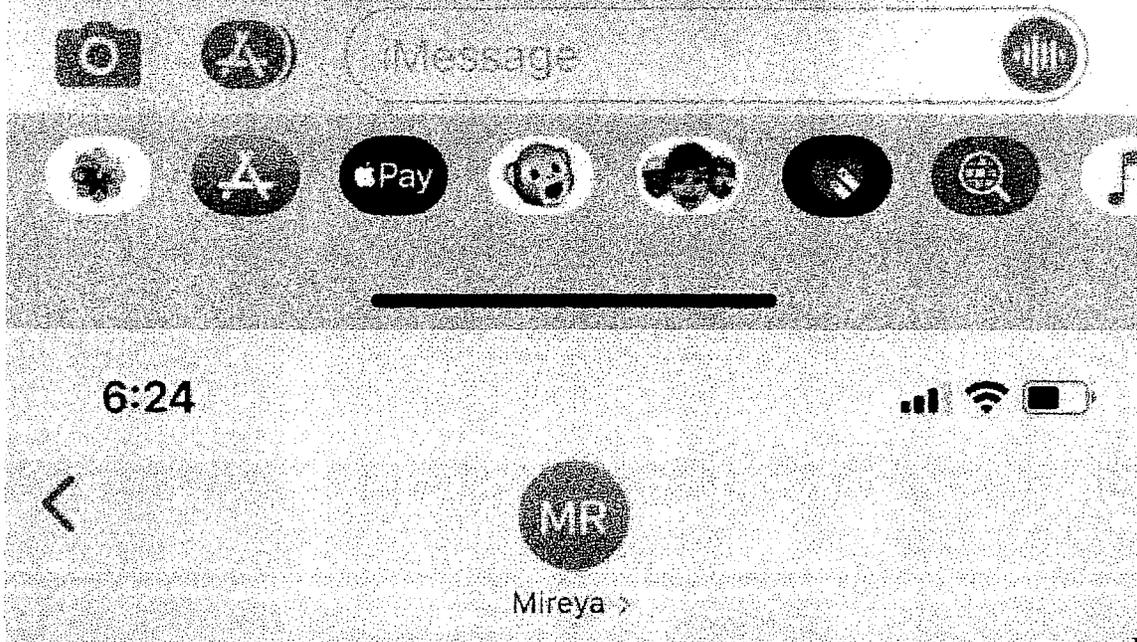
AA02036

TRIAL EXHIBIT 559

Aug 26, 2017, 7:06 PM

I know you are hurting badly right now. I won't tell you not to feel that way because you have every right. What I will say is don't let this take away from your joyous day. So many people have come forward to offer their support AND their services. There are good people in this world and she won't win. She fucked up big time and she will learn the hard way. Karma WILL come to get her ass. You are such a strong person and I know you you will get through this. I am here for you Chickenbutt. I love you very much! 🍷 🍷

Oh but of course my friend. I know. She won't. It's the moment. I'm not asking for anything. I know karma



PAT0083

AA02038

Oh but of course my friend. I know.
She won't. It's the moment. I'm not
asking for anything. I know karma
does it thing and God will too. I love
you my friend.

If you feel up to company later, just
let me know 🍷

We are actually out to dinner. I don't
feel like being here but it's a lil
better than just staying home

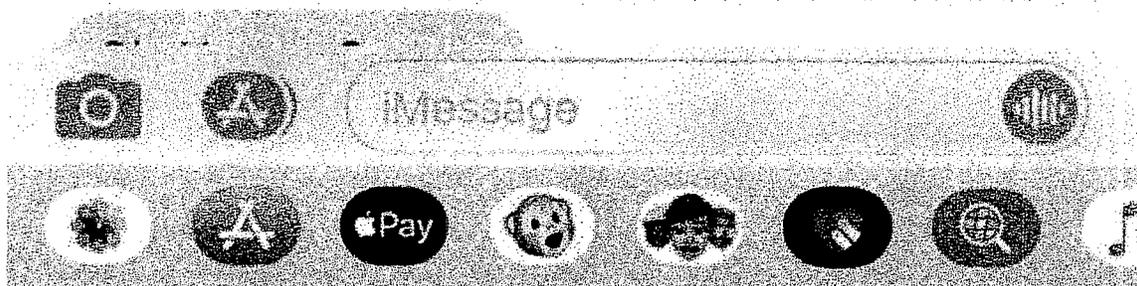
Yeah being secluded and alone with
your thoughts isn't always the best
idea. Sammy is taking all of the
attention for you guys 🍷

Poor Sammy. And he didn't even
fucken tag anybody. I'm so sorry
you guys are going thru this

Whitney told us not to comment
anymore. She is coming over to
meet us tomorrow at 1 at our house.

Do you want to come over too

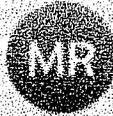
It's ok he's being an attention whore



PAT0084

AA02039

6:24



Mireya >

Yeah being secluded and alone with your thoughts isn't always the best idea. Sammy is taking all of the attention for you guys 😊

Poor Sammy. And he didn't even fucken tag anybody. I'm so sorry you guys are going thru this

Whitney told us not to comment anymore. She is coming over to meet us tomorrow at 1 at our house.

Do you want to come over too

It's ok he's being an attention whore

Ok. You go Sammy

Yeah we'll go over

Ok. See you tomorrow

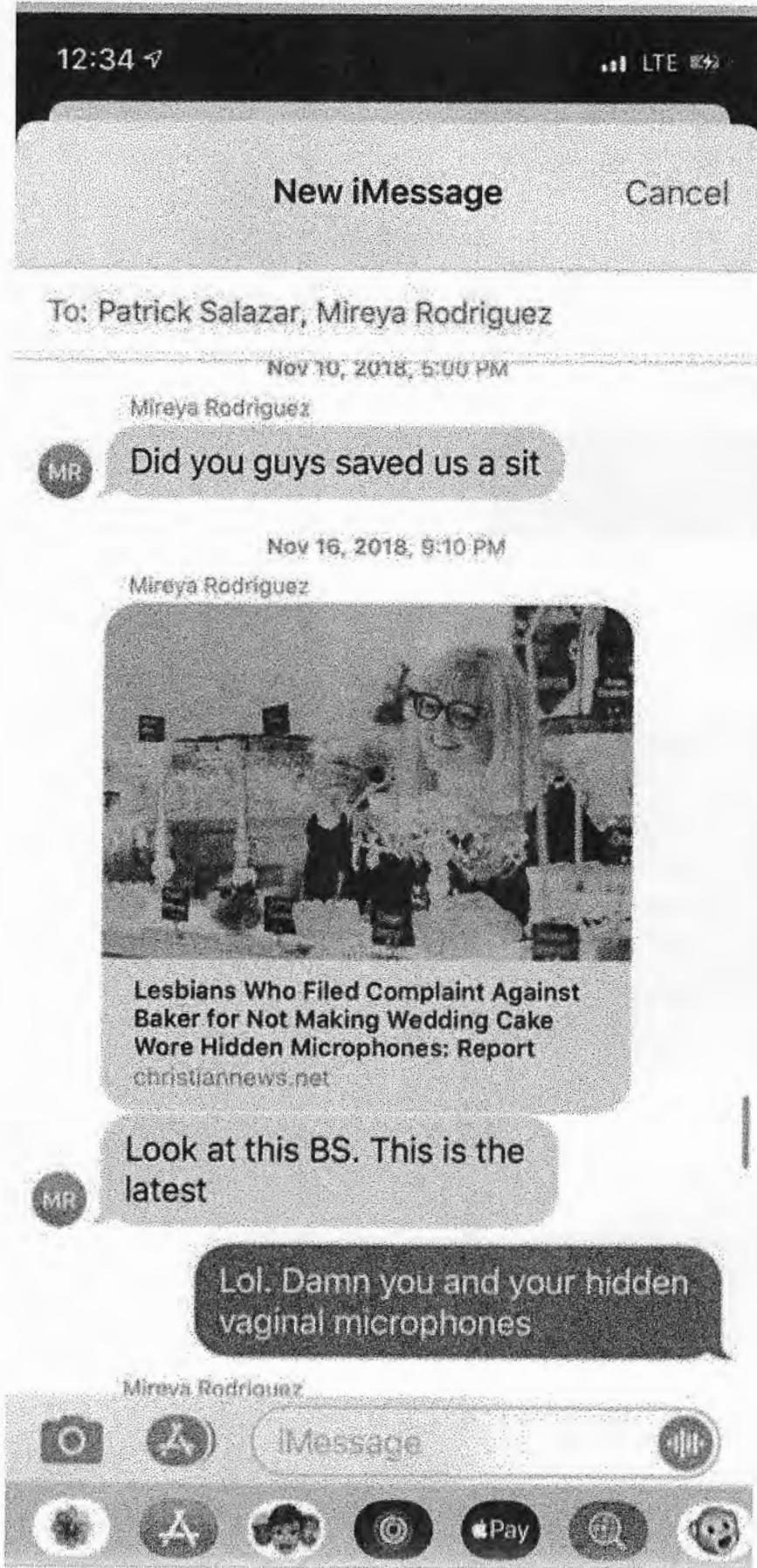
Ok

I'll txt if anything

PAT0085

AA02040

TRIAL EXHIBIT 671



12:34

LTE

New iMessage

Cancel

To: Patrick Salazar, Mireya Rodriguez

Lol. Damn you and your hidden vaginal microphones

Mireya Rodriguez

MR

Lol. They are so stupid

Patrick Salazar

It's Christian news so of course that's how outlandish and exaggerated it sounds. They're scared of the blue wave that came in and washed a bunch of those Republican, hypocrites out of office. They're grasping at straws.

Nov 17, 2018, 6:57 AM

Mireya Rodriguez

MR

Yup. That's basically what the lawyer from DFEH said

Jan 1, 2019, 12:10 AM

Mireya Rodriguez

MR

Happy New Year



iMessage



Exhibit MM

1 NELSON CHAN, Assistant Chief Counsel (#109272)
2 GREGORY J. MANN, Associate Chief Counsel (#200578)
3 KENDRA TANACEA, Associate Chief Counsel (#154843)
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12 Fee Exempt (Gov. Code, § 6103)

ELECTRONICALLY FILED
7/18/2022 4:38 PM
Kern County Superior Court
By Gina Sala, Deputy

13 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **IN AND FOR THE COUNTY OF KERN**

15 DEPARTMENT OF FAIR EMPLOYMENT
16 AND HOUSING, an agency of the State of
17 California,

18 Plaintiff,

19 vs.

20 CATHY'S CREATIONS, INC. d/b/a
21 TASTRIES, a California corporation; and
22 CATHARINE MILLER,

23 Defendants.

24 EILEEN RODRIGUEZ-DEL RIO and MIREYA
25 RODRIGUEZ-DEL RIO,

26 Real Parties in Interest.

Case No. BCV-18-102633

**PLAINTIFF DEPARTMENT OF FAIR
EMPLOYMENT AND HOUSING'S
OPPOSITION TO DEFENDANTS'
MOTION IN LIMINE NO. 1**

Date: July 25, 2022

Time: 9:00 a.m.

Dept.: J

Judge: Hon. J. Eric Bradshaw

Action Filed: October 17, 2018

Trial Date: July 25, 2022

27 Plaintiff Department Fair Employment and Housing (DFEH) submits the following
28 opposition Defendants' Motion in Limine No. 1: Finding of Judicial Admission on Sincerity of
29 Defendants' Religious Beliefs; Exclusion of Contrary Evidence or Argument.

30 ///

31 ///

32 ///

1 **I. INTRODUCTION**

2 Defendants seek an order that “Plaintiff DFEH may not challenge the sincerity of
3 Defendants’ religious beliefs in any manner whatsoever, including but not limited to:

4 (1) Defendants’ religious beliefs concerning marriage; and

5 (2) Defendants’ religious beliefs about how they cannot participate in or promote an event
6 that is contrary to their faith, and what constitutes such participation or promotion.” (Def.
7 MIL No. 1, 3:23-25).

8 Throughout four-and-a-half years of litigation, DFEH has never challenged, and will not
9 challenge at trial, the sincerity of defendant Miller’s religious beliefs.

10 However, defendants’ attempt to exclude DFEH from introducing evidence and argument as
11 to “what constitutes such participation [in] or promotion [of an event]” goes too far. What
12 constitutes “participation in” or “promotion of an event” is a key question of law and fact
13 concerning defendants’ free speech affirmative defense as well as defendants’ ability to comply with
14 the Unruh Act pursuant to *North Coast Women’s Care Medical Group v. Super. Ct.* (“*North Coast*”)
15 (2008) 44 Cal.4th 1145. DFEH must be allowed to introduce evidence and argument on these legal
16 and factual issues at trial.

17 **II. LEGAL ARGUMENT**

18 **A. DFEH Has Admitted the Sincerity of Miller’s Religious Beliefs**

19 DFEH has never questioned the sincerity of Miller’s religious beliefs and has stated the
20 following: “DFEH is not disputing the sincerity of defendant Miller’s religious beliefs.” (See
21 Corrected Trissell Decl. ISO Defendants’ Motions in Limine, **Exhibit 2**, DFEH’s Supplemental
22 Responses to Defendant Catharine Miller’s Requests for Admission dated February 25, 2022, Nos.
23 8, 9, 13, 14, 15, and 16.) These discovery responses also state, after objections, that “DFEH has
24 insufficient information to admit or deny” the corresponding request.

25 Defendants’ argument that DFEH must be bound by their request and not DFEH’s response
26 is unsupported in fact and law. Under the Discovery Act, in lieu of admitting or denying a request
27 for admission, a party may respond by claiming inability (lack of sufficient information) to admit or
28 deny the matter stated in the request. (Code Civ. Proc., § 2033.220, subd. (c).) This is DFEH’s

1 response to RFAs No. 8, 9, 13, 14, 16 and 16. Any quibble defendants may have had with DFEH's
2 objections and responses should have, but were not, raised on a motion to compel. Where responses
3 have been timely served but deemed deficient by requesting parties because of objections or evasive
4 responses, that party may move for an order compelling a further response. (Code Civ. Proc., §
5 2033.290; see *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 636 [requesting party not
6 entitled to shifting of costs and expenses of proof for responding party's objections to RFA because
7 requesting party made no motion to compel further response].) Thus, these responses stand and
8 DFEH admits nothing more than that it does not dispute the sincerity of Miller's religious beliefs.

9 **B. Defendants' Attempt to Stop DFEH from Addressing a Key Legal and Factual**
10 **Issue Must Fail**

11 By this motion in limine, defendants attempt to stop DFEH from introducing evidence and
12 argument on a contested issue of law and fact. They must not be allowed to do so. Defendants'
13 primary argument in support of their free speech affirmative defense is that when Tastries' sells pre-
14 ordered baked goods to its customers, defendants participate in and promote the customers' events: a
15 message they do not wish to send. This argument is unsupported by the facts or the law. But
16 defendants persist in making the argument; thus, DFEH must be permitted to address it.

17 In *Masterpiece Cakeshop* (2018) 138 S.Ct. 1719, 1723, the United States Supreme Court
18 explained the legal and factual issues at issue here:

19 The case presents difficult questions as to the proper reconciliation of at least two
20 principles. The first is the authority of a State and its governmental entities to
21 protect the rights and dignity of gay persons who are, or wish to be, married but
22 who face discrimination when they seek goods or services. The second is the right
of all persons to exercise fundamental freedoms under the First Amendment, as
applied to the States through the Fourteenth Amendment.

23 The freedoms asserted here are both the freedom of speech and the free exercise of
24 religion. The free speech aspect of this case is difficult. For few persons who have
25 seen a beautiful wedding cake might have thought of its creation as an exercise of
26 protected speech. This is an instructive example however of the proposition that
the application of constitutional freedoms in new contexts can deepen our
understanding of their meaning.

27 One of the difficulties in this case is that the parties disagree as to the extent of the
28 baker's refusal to provide service. If a baker refused to design a special cake with

1 words or images celebrating the marriage, for example a cake showing words with
2 religious meaning, that might be different from a refusal to sell any cake at all. In
3 defining whether a baker’s creation can be protected, these details might make a
4 difference.

4 Thus, the details—namely the specific facts of this case—make a difference here with respect to
5 whether or not defendants are participating in or promoting an event contrary to their faith under a
6 free speech analysis. Defendants’ request to exclude DFEH from introducing evidence and argument
7 as to “what constitutes [defendants’] participation or promotion” of an “event that is contrary to their
8 faith” is an attempt to stop DFEH from addressing a key question of defendants’ free speech
9 affirmative defense. To this extent, the motion in limine should be denied.

10 This motion also bears on DFEH’s Unruh Act claim. The California Supreme Court in *North*
11 *Coast* has suggested at least three ways that businesses employing people with religious objections
12 to same-sex marriage can comply with the Unruh Act: (1) Defendants can follow the Unruh Act’s
13 explicit language and sell all its goods and provide its services to all customers. (2) Rather than
14 provide all services to all customers irrespective of sexual orientation, defendants may choose to
15 cease offering pre-ordered wedding cakes for sale to anyone. (*North Coast* at p. 1159 [Physicians
16 could “avoid any conflict between their religious beliefs and [Unruh]” by “simply refus[ing] to
17 perform” the fertility treatment at issue to any patients]; see *Smith v. Fair Empl. & Hous. Com.*
18 (*FEHC*) (1996) 12 Cal.4th 1143, 1170 [Landlord whose religious beliefs motivated her to deny
19 rental housing to non-married couples could avoid conflict between her beliefs and FEHA “by
20 selling her units and redeploying the capital in other investments.”].) (3) Miller and any employees
21 that share her religious beliefs can step aside from participating in the preparation of any pre-ordered
22 cakes and baked goods ordered by gay and lesbian couples and allow defendants’ willing
23 employees—Miller testified there are willing Tastries employees—to manage the process. (*North*
24 *Coast* at p. 1159.) These are the legal and factual issues that need to be decided in this case.

25 ///
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28 ///

1 Despite the California Supreme Court’s clear guidance, defendants argue that none of those
2 alternatives work for Miller; and defendants will not provide any pre-ordered baked goods or
3 services to gay couples celebrating their marriages, not even if Miller and other employee’s sharing
4 her religious objection to same-sex marriage do not participate in the creation or delivery of such
5 goods. Defendants identify no means by which they are willing to comply with their Unruh Act
6 obligations. Rather, defendants offer simply to refer gay couples to other bakeries and argue—with
7 no support in fact, law, or American experience—that such referrals somehow satisfy their
8 obligation to provide full and equal services irrespective of sexual orientation.

9 Not only do defendants disregard *North Coast*, but they attempt by this motion in limine to
10 restrict DFEH from introducing argument and evidence on the guidance provided in *North Coast* by
11 seeking to exclude argument and evidence about “what constitutes [defendants’] participation or
12 promotion” of an event contrary to Miller’s faith. Defendants must not be allowed to prevent DFEH
13 from addressing this critical issue.

14 **C. Any Ruling on This Motion Should Apply to All Parties**

15 For the same reasons defendants seek an exclusion of evidence or argument on the issue of
16 the sincerity of Miller’s religious beliefs, there is concomitantly no need for any defense testimony
17 or evidence *in support* of Miller’s religious beliefs, the sincerity of which has been admitted. To the
18 extent this motion in limine is granted, it should apply bilaterally with respect to the sincerity of
19 Miller’s religious beliefs. All evidence on this topic should be excluded, including any testimony
20 from her pastor Roger Spradlin or others as well as Defendants’ Proposed Exhibits 12A through 12D
21 (Southern Baptist Convention’s Resolutions and “Nashville Statement” from a Coalition for Biblical
22 Sexuality signed by Christian theologians and leaders regarding Christian stance on same sex
23 marriage.) (Evid. Code, §§ 210, 350, 352 and 1200.)

24 **III. CONCLUSION**

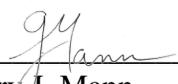
25 For the foregoing reasons, DFEH respectfully requests that the court exclude *all* evidence
26 offered by any party concerning the sincerity of Miller’s religious beliefs, such as testimony from
27 her pastor or others, and deny this motion in limine with respect to the defendants’ motion to
28 exclude any evidence “about how they [defendants] cannot participate in or promote an event that is

1 contrary to their faith, and what constitutes such participation or promotion.”

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Dated: July 18, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING



Gregory J. Mann
Associate Chief Counsel
Attorneys for the DFEH

Exhibit NN

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13 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **IN AND FOR THE COUNTY OF KERN**

15 DEPARTMENT OF FAIR EMPLOYMENT
16 AND HOUSING, an agency of the State of
17 California,

18 Plaintiff,

19 vs.

20 CATHY'S CREATIONS, INC. d/b/a
21 TASTRIES, a California corporation; and
22 CATHARINE MILLER,

23 Defendants.

24 EILEEN RODRIGUEZ-DEL RIO and MIREYA
25 RODRIGUEZ-DEL RIO,

26 Real Parties in Interest.

Case No. BCV-18-102633-JEB

**PLAINTIFF DEPARTMENT OF
FAIR EMPLOYMENT AND
HOUSING'S OPPOSITION TO
DEFENDANTS' MOTION IN
LIMINE NO. 2**

Date: July 25, 2022

Time: 9:00 a.m.

Dept.: J

Judge: Hon. J. Eric Bradshaw

Action Filed: October 17, 2018

Trial Date: July 25, 2022

27 Plaintiff Department Fair Employment and Housing (DFEH) submits the following
28 opposition to Defendants' Motion in Limine No. 2: Finding of Judicial Admission on Sexual
Orientation "Discrimination" Outside the Context of Same-Sex Marriage; and Exclusion of Contrary
Evidence or Argument.

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1 **I. LEGAL ARGUMENT**

2 Defendants seek an order precluding “Plaintiff DFEH from making any argument, implicitly
3 or explicitly, that Defendants generally discriminate against individuals based on sexual orientation,
4 untethered to Defendants’ religious beliefs regarding marriage.” While DFEH does not intend to
5 introduce evidence or argument that defendants make a distinction based on sexual orientation to
6 deny all their products to gay individuals and couples, it is unclear what defendants mean by
7 “untethered to Defendants’ religious beliefs regarding marriage” and, on that basis, DFEH opposes
8 this motion in limine.

9 As defendants state, DFEH admitted in a supplemental response to a request for admission
10 that “it is aware of Defendants denying full and equal services on the basis of sexual orientation in
11 relation to same-sex wedding celebrations, and pursuant to Tastries’ Design Standards, Defendants
12 will deny full and equal services to same-sex couples celebrating any event related to their same-sex
13 union.” (See Corrected Declaration of Jeffrey M. Trissell ISO Defendants’ Motions in Limine,
14 **Exhibit 2**, DFEH’s Supplemental Responses to Defendant Catharine Miller’s Requests for
15 Admission dated February 25, 2022, No. 27.) This includes, as Miller testified, anniversaries, civil
16 unions, and all other celebratory events that in any way involve a gay couple:

17 14 Q. In the previous one, you talked about the last
18 15 design standard meant that Tastries would not make a
19 16 cake that celebrates any aspect of the same-sex union.

20 17 Is that correct?

21 18 A. Correct, yes.

22 19 Q. So I just wanted to figure out the range. So
23 20 that obviously is not weddings, correct?

24 21 A. Correct.

25 22 Q. Not anniversaries?

26 23 A. Correct.

27 24 Q. Not engagements?

28 25 A. Correct.

1 Q. Not bridal showers?

2 A. Correct.

3 Q. Not bachelor or bachelorette parties?

4 A. Correct.

5 Q. I don't know if anybody ever -- or are there

6 any other events that come to mind that Tastries would

7 not do based on its connection with the same-sex

1 8 marriage?
2 9 A. The proposal.
3 10 Q. Proposal.
4 11 A. "Will you marry me?"
5 12 Q. That's the only other one you can think of?
6 13 A. At this time, yes.

7 (Corrected Trissell Decl. ISO Defendants' Motions in Limine, **Exhibit 12**, 2d Miller Depo., 144:24-
8 145:13.)

9 24 Q. Would Tastries make a cake for a same-sex
10 25 couple that's not married, not in a civil union, but
11 they wanted to celebrate that they'd been dating for a
12 2 year?
13 3 A. No, we wouldn't.
14 4 Q. Would Tastries make a cake for a same-sex
15 5 couple that was having a housewarming because they were
16 6 moving in together?
17 7 MR. JONNA: Objection. Incomplete
18 8 hypothetical.
19 9 A. I have never had anybody ask any of these
20 10 questions.
21 11 Q. Can I get a yes or no for that last one, a
22 12 housewarming cake for a same-sex couple?
23 13 A. No. No.

24 (Corrected Trissell Decl. ISO Defendants' Motions in Limine, **Exhibit 12**, 2d Miller Depo., 144:24-
25 145:13)

26 Defendants' motion in limine is so broad that it arguably would exclude relevant evidence of
27 defendants' admitted policy to deny preordered cakes and other baked goods to gay and lesbian
28 couples for events other than a wedding reception. On that basis, DFEH opposes this motion in
limine.

The Unruh Act provides that "[w]hoever denies, *aids or incites a denial*, or makes any
discrimination or distinction contrary to Section 51 ... is liable for each and every offense...." (Civ.
Code, § 52(a), emphasis added.) To prove a claim under the Unruh Act, DFEH must establish that (1)
defendants denied or discriminated or *made a distinction that denied* Real Parties in Interest the full
and equal accommodations, advantages, facilities, privileges, or services of a business establishment

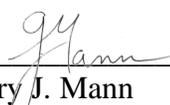
1 doing business in California, and (2) a [substantial¹] motivating reason for defendant’s conduct was
2 defendant’s perception of Real Parties in Interest’s Unruh Act protected class (here, sexual
3 orientation). (See CACI No. 3060, modified.)² The evidence of defendants’ long standing policy to
4 deny gay couples pre-ordered cakes and baked goods when such goods and services are freely
5 available to straight couples, is sufficient to prove an Unruh Act violation, and the court must allow
6 such evidence to be introduced at trial. Moreover, these denials are not limited to same-sex wedding
7 celebrations but include any event that remotely touches on the celebratory lives of gay couples.

8 **II. CONCLUSION**

9 For the foregoing reasons, DFEH respectfully requests that the court deny defendants’
10 Motion in Limine No. 2 to the extent it requests the preclusion of any evidence or argument that
11 defendants discriminate against gay and lesbian couples beyond the context of a wedding reception.

12
13 Dated: July 18, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

14
15
16 
17 _____
Gregory J. Mann
Associate Chief Counsel
Attorneys for the DFEH
18
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21 ¹ Plaintiff only has to prove it was a *motivating* reason. “Whether the FEHA standard applies under
22 the Unruh Act has not been addressed by the courts.” (CACI No. 3060, Directions for Use). In
23 adjudicating Unruh Act cases before and after *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203,
24 courts have articulated that plaintiff must only show a protected characteristic was only a motivating
reason for defendant’s unlawful conduct. (See, *Turner v. Assoc. of Am. Med. Colleges* (2008) 167
Cal.App.4th 1401, 1411; *Wilkins-Jones v. County of Alameda* (N.D. Cal. 2012) 859 F.Supp.2d 1039,
1048; *Gutierrez v. Gonzalez* (C.D. Cal. Apr. 26, 2017, No. 2:17-cv-01906-CAS(Ex)) 2017 WL
1520419, at p. 5).

25 ² Where, as here, no actual damages are sought, “harm is presumed, and elements 3 and 4 may be
26 considered established...” (CACI No. 3060, Directions for Use, citing Civil Code, § 52(a); *Koire v.*
27 *Metro Car Wash* (1985) 40 Cal.3d 24, 33.) Violators of Unruh are “liable for each and every offense
28 ... in no case less than four thousand dollars (\$4,000).” (Civ. Code, § 52, subd. (a).) DFEH seeks
only statutory minimum damages for each Real Party in Interest.