

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 11 of 13, Volume 11, pp. AA02056-AA02274

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October 20, 2023

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Fee Exempt (Gov. Code, § 6103)

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By Gina Sala, Deputy

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.

CATHY'S CREATIONS, INC. d/b/a
TASTRIES, a California corporation; and
CATHARINE MILLER,

Defendants.

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

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. 3**

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

Plaintiff Department Fair Employment and Housing (DFEH) submits the following
opposition to Defendants' Motion in Limine No. 3: Exclusion of Evidence or Argument Concerning
Real Parties' Alleged Emotional Distress.

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1 **I. LEGAL ARGUMENT**

2 Although the Unruh Act provides for the trebling of “actual damages,” DFEH has sought
3 only statutory damages, not emotional distress damages, here. DFEH will not be introducing
4 emotional distress evidence in support of damages in this case. However, evidence of the Real
5 Parties’ emotional distress is relevant to other issues to be tried in this case, such as the burden on
6 third parties, such as the Rodriguez-Del Rios, from being denied full and equal services by Tastries
7 as weighed against the burdens on Miller’s free exercise as well as the consideration of third parties’
8 dignity interests involved when balancing constitutional rights to reach a decision as to whether an
9 exemption to antidiscrimination laws is warranted here.

10 In *Smith v. Fair Employment and Housing Commission (Smith)* (1996) 12 Cal.4th 1143, the
11 California Supreme Court balanced the Unruh Act against the landlord’s free exercise rights. Smith
12 owned and leased four rental units in two duplexes located in Chico, California. (*Id.* at p. 1151.)
13 These rental units were operated for business and commercial purposes, and the income generated
14 from the rentals was reported as business income. (*Ibid.*) The business was not classified as
15 religious, charitable or a nonprofit. (*Ibid.*) When a vacancy arose, the unit for rent was advertised in
16 the local newspaper as available to the general public. (*Ibid.*) When prospective tenants inquired
17 about a vacant unit, the landlord told them she prefers married couples because, for religious
18 reasons, she opposes sex outside of marriage. (*Ibid.*) She believed sex outside of marriage is sinful,
19 and that it was a sin for her to rent her units to people who engage in nonmarital sex on her property
20 and that God would judge her to doing so. (*Ibid.*)

21 Two prospective, unmarried tenants filed an Unruh Act violation and Fair Employment and
22 Housing Act (Gov. Code, § 12900, et seq.) (FEHA) complaint (among other claims) against the
23 landlord. (*Smith, supra*, 12 Cal.4th at pp. 1152-1153.) The landlord asserted that requiring her to rent
24 to an unmarried couple over her religious objections would violate the free exercise clauses of the
25 federal and state Constitutions. (*Id.* at p. 1153.) An administrative law judge rejected these
26 arguments and issued a proposed decision in favor of the prospective tenants. (*Ibid.*) The
27 commission then heard the case on the existing record and likewise issued a decision in favor of the
28 prospective tenants, finding that the landlord violated the Unruh Act. (*Ibid.*) The landlord sought

1 review of the commission’s decision by petition for writ of mandate. (*Ibid.*) The Court of Appeal
2 reversed, holding the state could not prevent the landlord from discriminating against unmarried
3 couples in light of the free exercise clauses. (*Id.* at p. 1154.) The California Supreme Court granted
4 review and reversed, holding that (1) the usual and ordinary meaning of FEHA’s prohibition against
5 discrimination based on marital status prohibited the landlord from refusing to rent to prospective
6 tenants because they were unmarried; (2) FEHA’s prohibition against discrimination because of
7 marital status is both generally applied and neutral towards religion and, therefore, does not violate
8 federal free exercise of religion; (3) FEHA’s ban on discrimination against unmarried couples would
9 not substantially burden the landlord’s religious exercise; and (4) requiring the landlord to comply
10 with FEHA would not violate the landlord’s rights under the State Constitution’s free exercise and
11 enjoyment of religion clause so as to exempt the landlord from FEHA. (*Id.* at p. 1143.)

12 In *Smith*, after deciding that the landlord violated FEHA, the California Supreme Court then
13 turned to the question of whether the state is required to exempt the landlord from the law to avoid
14 burdening her exercise of religious freedom. (*Smith, supra*, 12 Cal.4th at p. 1161.) The court held
15 that the right of free exercise does not relieve an individual of the obligation to comply with a “valid
16 and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct
17 that his religion prescribes (or proscribes).” (*Ibid.*, citing *Employment Div. Dept. of Human*
18 *Resources of Oregon v. Smith* (1990) 494 U.S. 872, 879 [quoting *United States v. Lee* (1982) 455
19 U.S. 252, 263, fn. 3 (Stevens, J., concurring)].) “The statutory prohibition against discrimination
20 because of marital status ... is a law both generally applicable and neutral towards religion. The law
21 is generally applicable in that it prohibits all discrimination without reference to motivation. The law
22 is neutral in that its object is to prohibit discrimination irrespective of reason not because it is
23 undertaken for religious reasons.” (*Smith* at pp. 1161-1162.) Therefore, the court held, the Unruh
24 Act does not violate the free exercise clause.

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1 In so finding, the *Smith* court articulated the balancing test in such situations: the court
2 “weighed the burden of religious exercise against the government’s interest in applying the law. If
3 the burden was substantial and outweighed the government’s interest, the government was required
4 to accommodate the religiously motivated conduct by exempting it from the law. If, on the other
5 hand, the government’s interest was of sufficient importance to outweigh the burden on religious
6 exercise and could not be achieved by less restrictive means, no accommodation was required.”
7 (*Smith* at p. 1162-1163.)

8 In weighing the respective rights, the *Smith* court recognized that “the landlord’s request for
9 an accommodation in the case before us has a serious impact on the rights and interests of third
10 parties ... [and] to permit Smith to discriminate would sacrifice the rights of her prospective tenants
11 to have equal access to public accommodations and their legal and dignity interests in freedom from
12 discrimination based on personal characteristics.” (*Id.* at p. 1170.) In so doing, the California
13 Supreme Court recognized that while at work business owners and employees do not practice their
14 religious rights in a vacuum; their religious practices may impair their customers’ rights to freely
15 participate in the free market. And those customers’ rights must not be disregarded when analyzing
16 the burden upon an owner’s or their employees’ religious rights. A business owner earning a living
17 from a for-profit business has options if she does not wish to comply with an antidiscrimination law
18 that conflicts with her religious beliefs. (*Ibid.*; see also, *North Coast Women’s Care Medical Group*
19 *v. Super. Ct. (North Coast)* (2008) 44 Cal.4th 1145, 1159 [California Supreme Court identified at
20 least three options by which a business may comply with the Unruh Act].)

21 Pursuant to *Smith*, this Court must likewise (1) weigh the burden of Miller’s religious
22 exercise against the government’s interest in applying the Unruh Act, and in so doing (2) consider
23 whether granting an exemption will impair the rights and interests of third parties like the
24 Rodriguez-Del Rios. For these reasons, evidence of Real Parties’ emotional distress and their
25 feelings of being excluded from the public marketplace because they are a lesbian couple is highly
26 relevant to the issues to be decided in this case. (Evid. Code, § 210.) The court should deny
27 defendants’ Motion in Limine No. 3 and permit DFEH to introduce evidence of the Real Parties’
28 emotional distress at trial.

1 **II. CONCLUSION**

2 For the foregoing reasons, DFEH respectfully requests that the court deny defendants'
3 Motion in Limine No. 3 and permit evidence of Real Parties' emotional distress and emotional
4 reaction to being denied service and goods by defendants.

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6 Dated: July 18, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

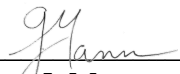
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12 Gregory J. Mann
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Exhibit PP

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Defendants.

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

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. 4**

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

Plaintiff Department Fair Employment and Housing ("DFEH") submits the following opposition
Defendants' Motion in Limine No. 4: To Exclude Contrary Evidence or Argument on Miller's
Referral Practice.

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1 **I. LEGAL ARGUMENT**

2 DFEH does not dispute that Miller believed Tastries had a practice of referring gay and
3 lesbian couples to Gimme Some Sugar when she declined their orders. However, this “referral”
4 practice does not satisfy the Unruh Act’s promise of businesses providing full and equal services to
5 their customers irrespective of sexual orientation. (Civ. Code, § 51.) Full and equal services means
6 that defendants must provide all its customers, regardless of sexual orientation, the same goods and
7 services. (*Ibid.*) DFEH intends to offer evidence that defendants’ “referral” service was to an
8 unaffiliated bakery that was under no obligation to take Miller’s referrals. More importantly, a
9 referral to another bakery owned by others, staffed by others, using different recipes, and operating
10 out of a different facility does not negate any element of an Unruh Act violation. (See CACI 3060.)
11 Therefore, Tastries’ referral process does not defeat DFEH’s Unruh Act claim, and DFEH must be
12 allowed to introduce evidence and argument to counter defendants’ unsupported assertion that it
13 does.

14 The objective of the Unruh Act is to prohibit businesses from making distinctions between
15 their customers that deny goods and services based on sexual orientation. (Civ. Code, § 51; CACI
16 3060.) “The scope of the statute clearly is not limited to exclusionary practices. The Legislature's
17 choice of terms evidences concern not only with access to business establishments, but with equal
18 treatment of patrons in all aspects of the business.” (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24,
19 29.)

20 Courts have repeatedly held that the Unruh Act is applicable where unequal treatment is the
21 result of a business practice. Several early cases found violations of this Act and its
22 predecessor when blacks were allowed to enter business establishments but were restricted to
23 certain portions of the premises. (See, e.g., *Jones v. Kehrlein* (1920) 49 Cal.App. 646, 651
24 [black ticketholders admitted to theatre but restricted to seating in segregated section]; *Suttles*
25 *v. Hollywood Turf Club* (1941) 45 Cal.App.2d 283, 287 [black ticketholders admitted to
26 racetrack but denied clubhouse seating].)

27 (*Koire v. Metro Car Wash, supra*, 40 Cal.3d at 29.)

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1 Civil Code section 51, subdivision (b), provides: “All persons within the jurisdiction of this
2 state are free and equal, and no matter what their ... sexual orientation ... are entitled to the full and
3 equal accommodations, advantages, facilities, privileges, or services in all business establishments
4 of every kind whatsoever.”

5 The Unruh Act’s purpose “is to compel recognition of the equality of all persons in the right
6 to the particular service offered by an organization or entity covered by the act.” (*Curran v. Mount*
7 *Diablo Council of the Boy Scouts* (1983) 147 Cal.App.3d 712, 733.) “Emanating from and modeled
8 upon traditional ‘public accommodations’ legislation, the Unruh Act expanded the reach of such
9 statutes from common carriers and places of public accommodation and recreation, e.g., railroads,
10 hotels, restaurants, theaters and the like, to include ‘all business establishments of every kind
11 whatsoever.’” (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 731.)

12 *Rivera v. Crema Coffee Company LLC* (N.D.Cal.2020) 438 F.Supp.3d 1068 provides
13 guidance here. In *Rivera*, the court held that the existence of another coffeehouse within
14 approximately 350 yards of defendant’s coffeehouse that a customer who relied on wheelchair for
15 mobility was unable to physically access, was not an acceptable alternative means of
16 accommodating the customer or others who required wheelchairs for mobility for purposes of
17 customer’s action against defendant coffeehouse under the Unruh Act and ADA. (*Ibid.*) “The court
18 agrees with Mr. Rivera that the existence of another location, even if accessible, is not an adequate
19 alternative method of access for the facility at issue Defendants did not relocate any *activities* at
20 defendant coffeehouse to an accessible location; rather, they urge relocating *customers in*
21 *wheelchairs* to an allegedly accessible location.” (*Id.* at p. 1076.)

22 The Court declines to endorse the “separate but equal” theory implied in defendants’
23 proposed alternative method of access. The suggestion that disabled customers should be
24 required to go to another location to be served invites comparison to long-discredited views
25 and outcomes that are inherently unfair. *See, e.g., Brown v. Bd. Of Educ. Of Topeka,*
26 *Shawnee Cty., Kan.* (1954) 347 U.S. 483 (“We conclude that in the field of public education
27 the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently
28 unequal.”); *see also Rodriguez v. Barrita, Inc.* (N.D. Cal. 2014) 10 F.Supp.3d 1062, 1085
29 (“[T]he mere existence of a separate La Victoria location does not suffice to make the subject
30 property’s goods and services ‘available through alternative methods.’”); *cf. Molski v. Foley*
31 *Estates Vineyard and Winery, LLC* (2008) 531 F.3d 1043, 1050 (noting the “disadvantage”
32 separate facilities may create for patrons who could be accommodated by readily achievable

1 barrier removal.)

2
3 (*Ibid.*)

4 Relying on *Minton v. Dignity Health* (2019) 39 Cal.App.5th 1155, defendants assert that the
5 referral to another, unaffiliated bakery defeats DFEH’s Unruh Act claim. It does not. In *Minton*, a
6 transgender patient brought an Unruh Act claim based on gender identity against a tax-exempt
7 nonprofit corporation that owned and operated a large network of hospitals, including religiously-
8 affiliated hospitals, after the defendant cancelled a hysterectomy prescribed to treat the patient’s
9 diagnosed gender dysphoria. (*Id.* at pp. 1158-59.) Plaintiff’s doctor scheduled the procedure to take
10 place at a Catholic hospital at which she had privileges. (*Id.* at p. 1159.) Defendant canceled the
11 procedure because, due to the hospital’s Catholic religious affiliation, it did not allow hysterectomies
12 to treat gender dysphoria, but did permit hysterectomies to address other diagnoses. (*Ibid.*) After
13 canceling the procedure, defendant rescheduled it for three days later than originally scheduled and
14 changed the location to another of its hospitals— one that was not affiliated with the Catholic
15 Church. (*Ibid.*) **The court of appeal held that plaintiff alleged sufficient facts to support a**
16 **violation of the Unruh Act based on defendant’s cancelation of the procedure at the Catholic**
17 **hospital.** (*Id.* at p. 1165.) The court found an Unruh Act violation in *Minton*, even though defendant
18 promptly performed the procedure at an *affiliated* hospital.

19 As set forth above, the law does not recognize that a “referral” negates or cures an Unruh Act
20 violation. Indeed, referring customers to unaffiliated businesses does not provide “full and equal
21 services” as contemplated by the Unruh Act. For that reason, DFEH must be permitted to introduce
22 evidence and argument to counter defendants’ unsupported assertion that Tastries’ referral process
23 satisfies its obligation to provide full and equal services irrespective of sexual orientation.

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1 **II. CONCLUSION**

2 For the foregoing reasons, DFEH respectfully requests the court deny defendants' Motion in
3 Limine No. 4 to the extent defendants seek to preclude DFEH from offering evidence that Gimme
4 Some Sugar not affiliated with defendants and from arguing that Miller's practice of "referring" gay
5 couples to Gimme Some Sugar does nothing to defeat the Unruh Act claim in this case.

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7 Dated: July 18, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

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13 Gregory J. Mann
14 Associate Chief Counsel
15 Attorneys for the DFEH
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Exhibit QQ

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Defendants.

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RODRIGUEZ-DEL RIO,

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. 5**

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

Plaintiff Department Fair Employment and Housing (DFEH) submits the following
opposition Defendants' Motion in Limine No. 5: To Exclude Evidence or Argument Concerning
Prior Labor Disputes.

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1 **I. DFEH RESPONSE**

2 On July 13, 2022, counsel for the parties met and conferred on the motions in limine. DFEH
3 stated it would agree to exclude any evidence of prior administrative complaints filed with the Labor
4 Board against Tastries Bakery as requested by defendants in their Motion in Limine No. 5.
5 Defendants replied that if DFEH intended to call certain witnesses, however, defendants may
6 attempt to offer evidence of these labor disputes. Therefore, DFEH requests that the court grant
7 defendants' motion to exclude references to these labor disputes as to both parties or simply deny
8 the motion.

9 **II. CONCLUSION**

10 For the foregoing reasons, DFEH respectfully requests that the court deny defendants'
11 Motion in Limine No. 5 to the extent defendants now seek to introduce evidence of prior
12 administrative complaints filed with the Labor Board against Tastries Bakery.

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14 Dated: July 18, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

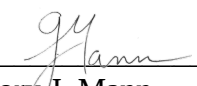
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20 Gregory J. Mann
21 Associate Chief Counsel
22 Attorneys for the DFEH
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Exhibit RR

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Defendants.

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RODRIGUEZ-DEL RIO,

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. 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

Plaintiff Department Fair Employment and Housing (DFEH) submits the following
opposition to Defendants' Motion in Limine No. 6: Exclusion of Questions About Hypothetical
Situations for Which There Is No Presently Existing Policy.

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1 **I. LEGAL ARGUMENT**

2 Defendants’ argument that Miller’s testimony regarding DFEH’s alleged hypothetical
3 questions should be excluded from trial because she lacks personal knowledge fails and is
4 unnecessary. DFEH will not seek testimony regarding situations to which Miller could not respond.

5 During her deposition as an individual, owner, and employee of Tastries as well as the
6 person most qualified (PMQ) to testify on Tastries’ behalf, DFEH posed questions to Miller to
7 understand the scope of defendants’ Design Standards, which include the policy pursuant to which
8 Tastries refused to take the Real Parties’ wedding cakes order. These questions, such as whether
9 defendants will provide pre-ordered baked goods for a gay couple’s anniversary celebration—
10 Tastries will not—are relevant to the issues in the case, inquire about subjects well within Miller’s
11 personal knowledge (Evid. Code, § 702, subd. (a)), and are rationally based on her perception (Evid.
12 Code, § 800, subd. (a)) of Tastries’ policy. “‘Lay witnesses can testify regarding the lay witness’s
13 ‘particularized knowledge ... by virtue of his or her position in a particular business.’” (*Sempra*
14 *Energy v. Marsh USA, Inc.* (C.D. Cal., Oct. 15, 2008, No. CV0705431SJOJCX) 2008 WL
15 11335050, at *13, quoting *American General Life Ins. Co. v. Schoenthal Family, LLC* (N.D. Ga.
16 2008) 248 F.R.D. 298, 305, aff’d (11th Cir. 2009) 555 F.3d 1331.) As the owner, an employee, and
17 PMQ of Tastries, Miller possesses personal knowledge about Tastries’ Design Standards and
18 generally showed no hesitation or difficulty responding to DFEH’s questions.

19 There is no dispute that Miller enforced Tastries’ Design Standard policy to decline the
20 Rodriguez-Del Rio’s wedding cakes order. In her television, print and online interviews, she
21 admitted that Tastries enforced a policy to decline wedding cake orders for gay couples. During
22 discovery, however, defendants revealed that the policy restricted gay couples from ordering many
23 more products beyond just wedding cakes for many more events beyond just weddings. In fact,
24 Miller testified that Tastries would not provide *any baked good ordered in advance for any event*
25 “that celebrates any aspect of the same-sex union.” (Corrected Trissell Decl. ISO Defendants’
26 Motions in Limine, **Exhibit 12**, 2d Miller Depo., 141:14-18.)

27 Defendants’ Design Standards policy states that designs must not “violate fundamental
28 Christian principals [sic]; wedding cakes must not contradict God’s sacrament of marriage between

1 a man and a woman.” (Declaration of Gregory J. Mann in Support of Plaintiff’s Opposition to
2 Defendants’ Motions in Limine [Mann Decl. in Opp.], **Exhibit 23**, Tastries’ Design Standards.) This
3 policy is ambiguous because “fundamental Christian principles” can mean different things to
4 different people. In order to learn about the scope of the policy—whether it applies beyond wedding
5 cakes or gay couples—DFEH asked Miller and other employees whether the policy applies in
6 different situations, e.g., whether defendants would sell any baked goods ordered in advance to a gay
7 couple celebrating their anniversary. Miller did not hesitate to respond with a firm, “No.” (Mann
8 Decl. in Opp., **Exhibit 24**, Feb. 24, 2022 Depo. Trans. of Catharine Miller, 52:18-23.) Miller was
9 clear in her responses that defendants would not provide baked goods that celebrate any aspect of a
10 gay couple’s union, including anniversaries, engagements, bridal showers, bachelor or bachelorette
11 parties, celebrations of a proposal, or civil unions. (Corrected Trissell Decl. ISO Defendants’
12 Motions in Limine, **Exhibit 12**, 2d Miller Depo., 141:14-142:13, 144:23.)

13 DFEH posed a few questions regarding situations Miller was unsure of, such as whether
14 Tastries would provide a baby shower cake for a gay couple celebrating their adoption of a child.
15 (Corrected Trissell Decl. ISO Defendants’ Motions in Limine, **Exhibit 12**, 2d Miller Depo., 144:1-3;
16 144:8-18.) DFEH will seek testimony regarding Tastries’ Design Standards policy competently
17 provided by Miller and other Tastries’ employees. But DFEH will not seek testimony at trial about
18 situations to which Miller and other employees could not competently respond. Thus, Defendants’
19 Motion in Limine No. 6 is unnecessary and moot.

20 **III. CONCLUSION**

21 For the foregoing reasons, DFEH respectfully requests that the court deny Defendants’
22 Motion in Limine No. 6 to the extent they seek to preclude Miller’s testimony on the scope of
23 Tastries’ Design Standards policy.

24 Dated: July 18, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

26 
27 _____
Gregory J. Mann
Associate Chief Counsel
Attorneys for the DFEH

Exhibit SS

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Kern County Superior Court
By Gina Sala, Deputy

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.

CATHY'S CREATIONS, INC. d/b/a
TASTRIES, a California corporation; and
CATHARINE MILLER,

Defendants.

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

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. 7**

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

Plaintiff Department Fair Employment and Housing (DFEH) submits the following
opposition Defendants' Motion in Limine No. 7: Admissibility of Evidence of Non-Neutrality by
Plaintiff DFEH in Violation of the Free Exercise Clause.

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///

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1 **I. LEGAL ARGUMENT**

2 Defendants’ purported Motion in Limine No. 7 should be denied because there is no
3 evidence of non-neutrality. Although styled as a motion in limine, it is actually a legal brief arguing
4 for the admissibility of evidence of DFEH’s alleged non-neutrality and, on that basis alone, should
5 be denied. A “motion in limine” is made to exclude evidence before it is offered at trial on the
6 ground that the evidence is either irrelevant or subject to discretionary exclusion as unduly
7 prejudicial. (*Ceja v. Department of Transp.* (2011) 201 Cal.App.4th 1475, 1480-1481, review
8 denied, (Mar. 14, 2012).)

9 Defendants’ motion is long on law, short on facts and evidence in support of their argument.
10 None of the cases cited by defendants presents a comparable analogy suggesting any animus by
11 DFEH against Miller’s religious beliefs here. Defendants cite *Masterpiece Cakeshop* (2018) 138
12 S.Ct. 1719. The evidence of governmental animus there—biased statements made by commissioners
13 of a neutral adjudicatory body (Def. MIL No. 7, 1:12-3:5)—is not present here. In fact, DFEH
14 neither questions nor disputes that Miller sincerely holds her religious beliefs and has never
15 disparaged her beliefs as “rhetorical” or “insincere.” Indeed, as Judge Lampe found, there is no
16 evidence the DFEH is singling out Christian bakers for prosecution. (Plaintiff incorporates DFEH
17 Motion in Limine No. 3 to Exclude Any Argument That Plaintiff DFEH Is Biased Against
18 Defendants or Failed to Act Neutrally as if fully set forth herein.)

19 During litigation of this case, defendants sought discovery from DFEH regarding their
20 allegations of bias, which DFEH opposed. Judge Lampe entered an order compelling the production
21 of this discovery on August 11, 2020. DFEH filed a petition for writ of mandate. On October 1,
22 2020, the Fifth District Court of Appeal stayed Judge Lampe’s order pending determination of the
23 petition and issued an order that defendants must make a threshold showing of “intentional and
24 invidious discrimination” before they were entitled to obtain the discovery they sought: defendants
25 “are specifically to address (1) why such discovery should be allowed without making a preliminary
26 showing of direct or circumstantial evidence that prosecutorial discretion was exercised with
27 intentional and invidious discrimination (*People v. Montes* (2014) 58 Cal.4th 809, 828–829, citing
28

1 *United States v. Armstrong* (1996) 517 U.S. 456, 464).¹” (See Declaration of Gregory J. Mann in
2 Support of Plaintiff’s Opposition to Defendants’ Motions in Limine [Mann Decl. in Opp.], **Exhibit**
3 **25**, Fifth District Court of Appeal Stay Order).

4 After full briefing, on January 27, 2021, the Court of Appeal held that defendants did not
5 make this threshold showing and vacated the superior court’s discovery order, which had “grant[ed]
6 in part [defendants’] motion to compel responses to interrogatories and production of documents,
7 and leave to depose specific individuals, as **[defendants] have not made a threshold showing of**
8 **invidious discrimination as required under California law to allow for discovery regarding a**
9 **selective prosecution defense** (*People v. Montes* (2014) 58 Cal.4th 809)....” (See Mann Decl. in
10 Opp., **Exhibit 25**, Fifth District Court of Appeal Order).

11 Although defendants argue “this ruling should not be read to prohibit Defendants from
12 putting on the evidence they already have concerning Plaintiff DFEH’s non-neutrality and hostility”
13 (Def. MIL No. 7, 5:9-10), there is no such evidence. Defendants presented their alleged “evidence”
14 and arguments to the Court of Appeal, which held that they did not satisfy a threshold showing to
15 pursue further discovery. They did not possess sufficient evidence to make a threshold showing of
16 DFEH bias, and they do not have sufficient evidence to make a threshold showing of DFEH’s
17 alleged hostility towards defendants or Miller’s religious beliefs. This Court should not allow
18 defendants to attack DFEH with baseless accusations of hostility, animus and/or non-neutrality at
19 trial.

20 Defendants have also alleged that the “DFEH has determined that other cake artists, in a
21 similar situation, do not violate the Unruh Act²...this appears to be simply an individualized
22

23 ¹ “We have held a showing of ‘plausible justification’ requires a defendant to ‘show by direct or
24 circumstantial evidence that prosecutorial discretion was exercised with *intentional and invidious*
25 *discrimination in his case.*’ (*People v. Keenan* (1988) 46 Cal.3d 478, 506.) Similarly, under the
26 federal standard, a defendant must produce ‘ “some evidence” ’ tending to show the existence of both
27 a discriminatory effect and the prosecutor’s discriminatory intent. (*Armstrong, supra*, 517 U.S. at p.
28 468, 116 S.Ct. 1480.)” (*People v. Montes* (2014) 58 Cal.4th 809, 829, as modified on denial of reh’g
(May 21, 2014).)

² During a meet and confer, defendants admitted they had no evidence in support of this claim. (Mann
Decl., **Exhibit 3**, DFEH 4/7/2022 letter, p. 2.)

1 prosecution targeting Defendants for their disfavored religious beliefs.” (Mann Decl., **Exhibit 2**, p.
2 72:18-73:12.) There is no evidence whatsoever in support of this allegation and defendants admit
3 they have no evidence of “disparate treatment” of defendants by DFEH here. (Def. MIL No. 7, 5:24-
4 25.)

5 Yet, defendants request that this Court not “prohibit Defendants from putting on evidence
6 they already have concerning Plaintiff DFEH’s non-neutrality and hostility.” (Def. MIL No. 7:9-10.)
7 But nowhere in defendants’ motion is there evidence of DFEH’s alleged non-neutrality and hostility.
8 Indeed, the alleged “facts” are merely procedural steps in the investigation and subsequent litigation:
9 DFEH’s administrative investigation and issuance of a probable cause determination that defendants
10 violated the Unruh Act. (Def. MIL No. 7, 5:24-6:4). There simply is no evidence to support any
11 argument that DFEH was biased against defendants based upon Miller’s religious beliefs.
12 Defendants should be precluded from making such baseless and inflammatory arguments. (Evid.
13 Code, §§ 210, 350 and 352.)

14 If the court is inclined to permit defendants to argue that DFEH is hostile and biased against
15 defendants based on Miller’s religious beliefs, because of the sensational and prejudicial impact on
16 this case and the State’s enforcement of its antidiscrimination laws, the court should first require a
17 detailed offer of proof from defendants before deciding this motion.

18 **III. CONCLUSION**

19 For the foregoing reasons, and for the reasons set forth in DFEH’s Motion in Limine No. 3,
20 DFEH respectfully requests that the court deny defendants’ Motion in Limine No. 7 and preclude
21 defendants from offering any purported evidence or argument that DFEH was biased or non-neutral
22 during its investigation and litigation of this matter.

24 Dated: July 18, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

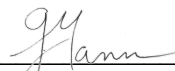
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27 _____
Gregory J. Mann
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Exhibit TT

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IN AND FOR THE COUNTY OF KERN

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Plaintiff,

vs.

CATHY'S CREATIONS, INC. d/b/a
TASTRIES, a California corporation; and
CATHARINE MILLER,

Defendants.

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

Real Parties in Interest.

Case No. BCV-18-102633

**PLAINTIFF DEPARTMENT OF FAIR
EMPLOYMENT AND HOUSING'S
OPPOSITION TO DEFENDANTS'
MOTION IN LIMINE NO. 8**

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

Plaintiff Department Fair Employment and Housing (DFEH) submits the following opposition
to Defendants' Motions in Limine No. 8: Exclusion Prosecutorial Argument that is Improper Under
Masterpiece Cakeshop and *Klein*.

///

///

1 **I. INTRODUCTION**

2 In their Motion in Limine No. 8, defendants request that this Court exclude:

3 [A]rgument that assigns a negative moral value on Defendants'
4 religious beliefs concerning covenantal marriage, including, but not
5 limited to, by describing it as a "prejudice," "rhetorical," "despicable,"
6 "hateful," or "oppressive," or comparing it to racial discrimination.

7 [A]rgument that suggests that Defendants must compromise their
8 religious beliefs and may not act on them if they wish to operate a
9 business in California.

10 [A]ny explicit or implicit argument that Defendants would refuse to
11 serve LGBT customers in any context other than when it implicates
12 their religious beliefs that marriage is solely a covenantal union, i.e., a
13 lifelong union between one man and one woman.

14 (Def. MIL No. 8, 18:11-21.)

15 DFEH has not and has no intention to describe Miller's religious beliefs concerning marriage
16 as "prejudice," "rhetorical," "despicable," "hateful," or "oppressive." DFEH will not limit, and
17 reserves its right, to cite and use precedent, including cases regarding racial or any other forms of
18 discrimination.

19 Nor will DFEH suggest that Miller must compromise her religious beliefs. DFEH seeks an
20 order than defendants comply with the Unruh Act, not that they comply in any particular manner.
21 DFEH reserves its right to cite and argue precedent such as *North Coast Women's Care Medical*
22 *Group v. Super. Ct. (North Coast)* (2008) 44 Cal.4th 1145, *Minton v. Dignity Health (Minton)* (2019)
23 39 Cal.App.5th 1155, *Smith v. Fair Empl. & Hous. Com. (FEHC)* (1996) 12 Cal.4th 1143, and other
24 legal precedent that discuss and analyze application of the Unruh Act and other antidiscrimination
25 laws or are applicable to the issues in this case.

26 Lastly, DFEH does not intend to argue that defendants categorically refuse to serve LGBTQ
27 customers outside the context of Miller's religious beliefs regarding marriage related events. DFEH
28 reserves the right to argue the undisputed fact that defendants refuse to serve LGBTQ customers *any*
baked goods ordered in advance to celebrate *any* events related to the union of gay couples, including
weddings, anniversaries, engagements, bridal showers, bachelor or bachelorette parties, celebrations
of proposals, and civil unions. (Defendants' Motion in Limine Ex. 12, 2d Miller Depo., 141:14-
142:13, 144:23.) Given DFEH's representations, Defendants' Motion in Limine No. 8 is unnecessary

1 and should be denied to the extent it seeks to muzzle DFEH and prohibit it from making legal
2 arguments based on *legal precedent*.

3 **II. LEGAL ARGUMENT**

4 As attorneys, a paramount basis to the practice of law is making arguments based on legal
5 precedent. Here, defendants seek to preclude DFEH from doing just that as they specifically state that
6 DFEH must be “prohibited from making argument” regarding their religious objection in opposition
7 to complying with the Unruh Act. This is improper. Defendants want to ignore longstanding caselaw
8 decided by the California Supreme Court and California Appellate Courts that are directly on point
9 with the issues of this case. (See *North Coast, supra*, 44 Cal.4th at 1150 [holding the rights of
10 religious freedom and free speech, as guaranteed in both the federal and the California Constitutions,
11 do not exempt a medical clinic’s physicians from complying with the Unruh Act’s “prohibition
12 against discrimination based on a person’s sexual orientation.”]; *Minton, supra*, 39 Cal.App.5th at
13 1155 [holding health organization's constitutional rights to religious freedom and freedom of
14 expression did not preclude patient’s Unruh Civil Rights Act discrimination claim.]; see also *FEHC*
15 (1996) 12 Cal.4th 1143, 1170 [Landlord whose religious beliefs motivated her to deny rental housing
16 to non-married couples could avoid conflict between her beliefs and FEHA “by selling her units and
17 redeploying the capital in other investments.”].) Not only do defendants want to ignore this legal
18 precedent, but they seek to preclude DFEH from making any arguments based on these and other
19 cases.

20 Defendants selectively pull quotes from *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights*
21 *Com’n (Masterpiece)* (2018) 138 S.Ct. 1719 to support their argument that religious objections
22 should not compared to racial discrimination. (See Def. MIL No. 8, 17:23-18:4.) However,
23 *Masterpiece* cites to landmark race discrimination case *Newman v. Piggy Park Enterprises, Inc.*
24 (1968) 390 U.S. 400,402, n. 5, to pronounce the general rule that while religious and philosophical
25 objections are protected, “such objections do not allow business owners and other actors in the
26 economy and in society to deny protected persons equal access to goods and services under a neutral
27 and generally applicable public accommodations law.” (*Id.* at 1727, citing *Newman v. Piggy Park*
28 *Enterprises, Inc.* (1968) 390 U.S. 400, 402, n. 5 (per curiam).) In addition, citing *Piggy Park*, Justice

1 Kagan writes in her concurrence:

2 As this Court has long held, and reaffirms today, a vendor cannot
3 escape a public accommodations law because his religion disapproves
4 selling a product to a group of customers, whether defined by sexual
orientation, race, sex, or other protected trait.

5 (*Id.* at 1733, citing to *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402, n. 5 (1968) (per
6 curiam) [holding that a barbeque vendor must provide full and equal services to Black customers
7 even if he perceives such service as vindicating racial equality, in violation of his religious beliefs.])

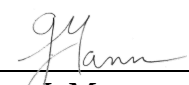
8 Race discrimination cases illustrate that courts have addressed religious objections in
9 opposition to public accommodation and antidiscrimination laws for decades. The arguments
10 presented by today’s exemption seekers are not new. Whether gay customers today, or Black
11 customers in the past (and today), these groups are protected by the same public accommodations
12 laws—the Unruh Act prohibits businesses from making distinctions on the basis of race and sexual
13 orientation, among other characteristics—and these cases remain “good law” that courts must follow.
14 It is illogical to exclude any argument based on legal precedent regarding race discrimination when
15 the U.S. Supreme Court uses those same cases and makes the same arguments DFEH makes here.
16 Therefore, DFEH requests that this Court deny Defendants’ Motion in Limine No. 8.

17 **III. CONCLUSION**

18 For the foregoing reasons, DFEH respectfully requests that the court deny Defendants’
19 Motion in Limine No. 8.

20
21 Dated: July 18, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

22
23
24 By: 

25 Gregory J. Mann
26 Attorneys for the Department of Fair
27 Employment and Housing
28

Exhibit UU

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Plaintiff,

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CATHY'S CREATIONS, INC. d/b/a
TASTRIES, a California corporation; and
CATHARINE MILLER,

Defendants.

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

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. 9**

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

Plaintiff Department of Fair Employment and Housing (DFEH) submits the following
opposition to Defendants' Motion in Limine No. 9: Finding of Judicial Admission Concerning
Defendants' Intent; and Exclusion of Prosecutorial Argument Concerning "Dual Intent" – both
Religious and Discriminatory.

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///

1 **I. INTRODUCTION**

2 By their motion in limine, defendants request that the court prohibit DFEH “from
3 introducing any evidence or making any argument that Defendants intended to discriminate on the
4 basis of sexual orientation.” (Def. MIL No. 9, 27-3:1.) If granted, the court would effectively be
5 dismissing DFEH’s Unruh Act claim.

6 Defendants’ motion in limine is confusing and misleading. Here is the salient request for
7 admission and response at issue:¹

8 **REQUEST FOR ADMISSION NO. 21:**

9 Admit that Miller did not decline the Rodriguez-Del Rios’ cake request because of their
10 same-sex status or other protected characteristics, but instead declined the request because of
the message that the cake would have expressed and the event it would celebrate.

11 **RESPONSE TO REQUEST FOR ADMISSION NO. 21**

12 DFEH is not disputing the sincerity of defendant Miller’s religious beliefs. [Objections
omitted.] To the extent DFEH is able to respond to this request as it is framed, **denied**.

13 **SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 21**

14 [Objections omitted.] **Denied**. Miller declined the Rodriguez-Del Rios and other same-sex
couples’ cake requests when she realized they were same-sex couples.

15 (Corrected Trissell Decl. ISO Defendants’ Motions in Limine [Trissell Decl.], **Exhibit 2**, 18:26-
16 19:17).

17 Although DFEH does not dispute Miller’s religious beliefs, DFEH must be allowed to
18 present evidence about (1) whether under the Unruh Act, Miller “made a distinction” based on
19 sexual orientation, and (2) whether baking, selling, and delivering plain cakes for a gay couple’s
20 wedding sends the baker’s purported message to wedding guests, an issue which bears on
21 defendants’ free exercise and free speech affirmative defenses.

22 **II. LEGAL ARGUMENT**

23 **A. Granting this Motion in Limine Would Improperly Defeat the Unruh Act Claim**

24 This motion in limine is a disguised motion for summary adjudication as to DFEH’s Unruh
25 Act claim. To sustain its Unruh Act claim, DFEH will show that defendants made a distinction
26

27 ¹ All the other references to judicial admissions concern what Miller *says*, *states* or *believes* because
28 DFEH does not question her religious beliefs. But these admissions about what she says, states, or
believes, are not admissions to the legal effect of her beliefs or for the propositions offered by
defendants in their motion in limine.

1 based on sexual orientation when they declined to take the Rodriguez-Del Rios wedding cakes order.
2 Indeed, there is no dispute that, but for Real Parties' sexual orientation, Tastries would have taken
3 their wedding cakes order. The evidence reveals defendants' intent, which need only be willful, not
4 bigoted or motivated by hatred. CACI 3060 only requires that DFEH show:

5 1. That [name of defendant] [made a distinction that denied] full and equal
6 [services] to [name of plaintiff];

7 2. [That a motivating reason for [name of defendant]'s conduct was [its
8 perception of] [name of plaintiff]'s [sexual orientation];]

9 As defendants concede, CACI No. 2507 defines a "substantial motivating reason" as "a
10 reason that actually contributed to the [adverse action] It does not have to be the only reason
11 motivating the [adverse action]." (Def. MIL No. 9, 2:12-14.) No "inappropriate argument" is
12 necessary to prove defendants' intent under the Unruh Act.² The evidence is undisputed that if the
13 Rodriguez Del-Rios were a straight couple, defendants would have taken their order. This clearly
14 shows that defendants made a distinction based on sexual orientation in violation of the Unruh Act.
(See DFEH MIL No. 1.)

15 CACI 3060 is clear. To prove an Unruh Act violation, making a distinction need only be "a
16 motivating reason," not the only reason. Once Miller discovered that the Rodriguez-Del Rios were
17 lesbians ordering wedding cakes, she made a "distinction" and denied their order. But for Miller's
18 perception that her customers were lesbians, she would have taken their order. Yet, she would have
19 taken the very same order of any couple she perceived to be straight. This evidence demonstrates
20 Miller's intent to make a distinction when a marriage-related order involves gay customers. But for
21 the Rodriguez-Del Rios sexual orientation, they would not have been denied service.

22 None of this is new or novel. Many cases have addressed the situation here, where
23 antidiscrimination laws rub up against free exercise and free speech exemption requests: *North*
24 *Coast Women's Care Medical Group v. Super. Ct.* (2008) 44 Cal.4th 1145, 1158 [California
25 Supreme Court held that any burden the Unruh Act places on the exercise of religion is justified by
26 California's compelling interest in ensuring full and equal access to medical services for all
27

28 ² *People v. Ortiz* (1979) 95 Cal.App.3d 926, cited by defendants, is a criminal case that has no
application here.

1 Californians, and that there are no less restrictive means available for the State to achieve its goal];
2 *Smith v. Fair Employment and Housing Commission* (1996) 12 Cal.4th 1143, 1170 [in weighing the
3 respective rights of a landlord’s religious exercise and prospective tenants’ right to be free from
4 discrimination in the marketplace, the California Supreme Court recognized that “the landlord’s
5 request for an accommodation in the case before us has a serious impact on the rights and interests
6 of third parties ... [and] to permit [landlord] to discriminate would sacrifice the rights of her
7 prospective tenants to have equal access to public accommodations and their legal and dignity
8 interests in freedom from discrimination based on personal characteristics.”]; and *Masterpiece*
9 *Cakeshop Ltd. v. Colorado Civil Rights Commission* (2018) 138 S.Ct. 1719, 1727 [“While ...
10 religious and philosophical objections are protected [by the First Amendment], it is a general rule
11 that such objections do not allow business owners and other actors in the economy and in society to
12 deny protected persons equal access to goods and services under a neutral and generally applicable
13 public accommodations law.”].)

14 *Hankins v. El Torito Restaurant’s Inc.* (1989) 63 Cal.App.4th 510 provides guidance here. In
15 *Hankins*, El Torito offered able-bodied customers a restroom up a flight of stairs but denied disabled
16 customers access to another restroom on the first floor. (*Ibid.*) El Torito contended that the judgment
17 against it under the Unruh Act could not be affirmed because it did not intentionally discriminate
18 against plaintiff Hankins. (*Id.* at p. 517.) El Torito argued that Hankins did not plead intentional
19 discrimination, that the trial court did not find intentional discrimination, and that there was
20 insufficient evidence of intentional discrimination. (*Id.* at p. 518.) But the court of appeal held that
21 Hankins had sufficiently pled and proved El Torito intentionally discriminated against him:

22 [W]e note that Hankins expressly alleged that El Torito “wrongfully and
23 unlawfully denied accessible restroom facilities to physically handicapped
24 persons” that it acted with “knowledge of the effect [its conduct] was having on
25 physically disabled persons,” and that Hankins was “discriminated against on the
26 sole basis that he was physically disabled and on crutches.” Thus, the issue of
27 intentional discrimination was before the lower court. Further, although we agree
28 the court’s statement of decision could have been clearer, that decision includes a
finding of intentional discrimination. It expressly states that damages are awarded
for El Torito’s “discriminatory conduct,” and it imposes liability under “Civil
Code § 51 et seq.”

1 (*Ibid.*) Upholding the Unruh Act verdict for plaintiff, the court explained: “El Torito admitted that
2 Hankins was denied access to a restroom pursuant to company policy, but contended the policy was
3 not discriminatory because it applied to all restaurant patrons.” (*Ibid.*) “However, El Torito’s policy
4 was not, as it contends, to deny all patrons access to a restroom [but] [r]ather, a combination of its
5 policy and the physical layout of its premises allowed patrons who were not physically handicapped
6 to use a restroom while dining at the restaurant (the one on the second floor) but denied that same
7 service to physically handicapped patrons even though there was a restroom on the premises (the
8 one behind the kitchen) that a physically disabled person could otherwise use.” (*Ibid.*) The court
9 concluded, “El Torito’s policy thus discriminated against disabled patrons.” (*Ibid.*)

10 Similarly, defendants denied Real Parties wedding cakes because they were a lesbian couple
11 and, in so doing, acted with knowledge of the effect their conduct was having on this couple and
12 other gay couples who sought defendants’ baked goods for any celebratory event related to their
13 marriages. Defendants’ conduct made a distinction on the basis sexual orientation. (See DFEH’s MIL
14 No. 1.) As Miller agreed, “when we’re talking about same-sex marriage, we’re talking about sexual
15 orientation.” (Mann Declaration in Support of Motions in Limine [Mann Decl.], **Exhibit 18**, Depo.
16 Trans. of Catharine Miller, 150:16-19.) Thus, it is undisputed that defendants had the requisite intent
17 to discriminate by making a distinction based on the Rodriguez Del-Rios’ sexual orientation. After
18 inviting the Rodriguez Del-Rios back to Tastries for a tasting and to complete their order, defendants
19 then refused to take their order based on who they were—lesbians getting married.

20 **B. This Evidence Also Relates to Defendants’ Free Speech Affirmative Defense**

21 Defendants’ motion in limine conflates two separate and distinct issues: (1) Miller’s religious
22 beliefs that marriage is between one man and one woman, which is not challenged; and (2) whether
23 Tastries sends a message contrary to that belief by selling cakes or other preordered baked goods
24 that is understood by guests at an event celebrating a gay couples’ marriage.

25 The second issue concerns analysis of defendants’ free speech/expression affirmative
26 defense (not the Unruh Act claim), which requires this Court to resolve legal and factual issues as to
27 whether Tastries’ preordered baked goods send a message that will be understood by guests at an
28 event celebrating the marriage of a same-sex couple. Conduct, such as baking and selling baked

1 goods, may become “sufficiently imbued with elements of communication” to receive free speech
2 protections only where “[a]n intent to convey a particularized message was present, and in the
3 surrounding circumstances the likelihood was great that the message would be understood by those
4 who viewed it.” (*Spence v. Washington* (1974) 418 U.S. 405, 410-11; accord *United States v.*
5 *O’Brien* (1968) 391 U.S. 367, 376 [rejecting “the view that an apparently limitless variety of
6 conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to
7 express an idea”].) For these reasons, nothing precludes DFEH from arguing that, under the law, any
8 message Miller may *believe* she sends is not understood by those who view Tastries’ baked goods.

9 Further, defendants misrepresent DFEH’s response to request for admission no. 21, which
10 asked DFEH to “[a]dmit Miller did not decline the Rodriguez-Del Rios’ cake request because of
11 their same-sex status or other protected characteristics, but instead declined the request because of
12 the messages that the cake would have expressed and the event it would celebrate.” (Trissell Decl.,
13 **Exhibit 2**, 18:26-19:1.) In a supplemental response, DFEH denied this request, stating that “Miller
14 declined the Rodriguez-Del Rios and other same-sex couples’ cake requests when she realized they
15 were same-sex couples.” (Trissell Decl., **Exhibit 2**, 19:13-17). As the court can discern, this
16 response does not admit that Miller would be “sending a message in favor of same-sex marriage,”
17 which is an important factual and legal issue the court must resolve at trial with respect to
18 defendants’ free speech affirmative defense. In short, DFEH is not making an “inappropriate
19 argument” about defendants’ religious beliefs. (See Section IIA.)

20 For these reasons, the court should deny defendants’ request to exclude argument and
21 evidence that “Defendants intended to discriminate on the basis of sexual orientation.” (Def. MIL
22 No. 9, 2:27-3:1.) Indeed, this is an issue for the court to decide in this trial.

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1 **III. CONCLUSION**

2 For the foregoing reasons, DFEH respectfully requests that the court deny Defendants'
3 Motion in Limine No. 9.

4
5 Dated: July 18, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

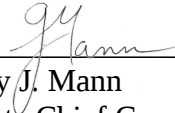
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9 Gregory J. Mann
Associate Chief Counsel
Attorneys for the DFEH

Exhibit VV

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Kern County Superior Court
By Gina Sala, Deputy

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.

CATHY'S CREATIONS, INC. d/b/a
TASTRIES, a California corporation; and
CATHARINE MILLER,

Defendants.

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

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. 10**

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

Plaintiff Department of Fair Employment and Housing (DFEH) submits the following
opposition to Defendants' Motion in Limine No. 10: To Exclude Evidence or Argument Concerning
Defendants' Religious Beliefs Outside the Context of Covenantal Marriage for the Purpose of
Impeaching Defendants.

1 **I. INTRODUCTION**

2 DFEH posed questions to Miller in deposition in an effort to understand the application of
3 Tastries’ Design Standards, which is Tastries’ basis for refusing service for orders that violate
4 “fundamental Christian principals [sic].” (Declaration of Gregory J. Mann in Support of Plaintiff’s
5 Opposition to Defendants’ Motions in Limine [Mann Decl. in Opp.], **Exhibit 23**, Tastries’ Design
6 Standards.) The Design Standards apply to Tastries’ business operations. The deposition questions
7 were about fundamental Christian principles, and asked how Miller would apply—and expects
8 Tastries’ employees to apply—such principles to a variety of baked goods orders. These questions
9 were not posed for the purpose of questioning the sincerity of Miller’s religious beliefs—DFEH
10 does not—or impeaching her. This was a legitimate and essential line of questions as to how Miller
11 applies “fundamental Christian principals [sic]” when deciding whether she will approve or deny a
12 customer’s order, and how she expects her employees to apply Tastries’ Design Standards. This
13 information is relevant to this case. Defendants’ Motion in Limine No. 10 should be denied.

14 **II. LEGAL ARGUMENT**

15 From January 2013 to the present, Tastries has followed its Design Standards:

16 We do not accept requests that do not meet Tastries Standards of
17 Service, including but not limited to designs or an intended purpose
 based on the following:

- 18 • Requests portraying explicit sexual content
19 • Requests promoting marijuana or casual drug use
20 • Requests featuring alcohol products or drunkenness
21 • Requests presenting anything offensive, demeaning or violent
22 • Requests depicting gore, witches, spirits, and satanic or demonic
 content
23 • **Requests that violate fundamental Christian principals [sic];**
 wedding cakes must not contradict God’s sacrament of marriage
 between a man and a woman

24 (Mann Decl. in Opp., **Exhibit 23**, Tastries Design Standards.)

25 Tastries Design Standards, which govern which preordered baked goods Tastries will and
26 will not sell, state that Tastries will not accept requests for baked goods that “violate fundamental
27 Christian principals [sic].” Tastries’ Design Standards are clear on *one* fundamental Christian
28 principle: “wedding cakes must not contradict God’s sacrament of marriage between a man and a

1 woman.” But the Design Standards do not include any other examples of designs or baked goods
2 that violate fundamental Christian principles. Since these Design Standards are Tastries’ business
3 policy and directly affect the products available to its customers, it was reasonable and necessary
4 that DFEH inquire about these fundamental Christian principles to determine the full nature and
5 scope of this policy. This is highly relevant evidence. Indeed, it was in response to these types of
6 questions that Miller testified that the Design Standards’ clause that “wedding cakes must not
7 contradict God’s sacrament of marriage between a man and woman” applies to *all baked goods*, not
8 just wedding cakes, ordered by a gay couple for *any* celebratory event related to their marriage.
9 DFEH did not, as defendants argue, question on collateral matters with “no apparent purpose other
10 than to degrade [Miller].” (Cf. *People v. Ortiz* (1979) 95 Cal.App.3d 926, 934.) And these questions
11 were not made in an attempt to attack or support Miller’s credibility. (See Evid. Code, § 789.)

12 Although a criminal case, *People v. Bautista* (Bautista) (2008) 163 Cal.App.4th 762 is
13 instructive. In *Bautista*, defense counsel moved in limine to preclude questions regarding the
14 religious beliefs or practices of defendant. (*Id.* at p. 784.) The court found that, due to the religious
15 nature of some of the issues in the case, some discussion of religious beliefs would be
16 appropriate. (*Ibid.*) On appeal, defendant claimed the admission of this testimony regarding his
17 religious beliefs deprived him of his First Amendment rights to the free exercise of religion and
18 violated Evidence Code section 789. (*Ibid.*) The Court of Appeal found no such violations. (*Ibid.*)
19 “[T]he Constitution does not erect a *per se* barrier to the admission of evidence concerning one’s
20 beliefs and associations ... simply because those beliefs and associations are protected by the First
21 Amendment.” (*Ibid.* quoting *Dawson v. Delaware* (1992) 503 U.S. 159, 165.) “If the evidence is
22 relevant to the issues being tried, its use does not violate the First Amendment.” (*Ibid.* citing *People*
23 *v. Quartermain* (1997) 16 Cal.4th 600, 629.)

24 Fundamental Christian principles are relevant here to the extent they play a role in Tastries’
25 Design Standards, which exclude “[requests that violate fundamental Christian principals [sic],
26 wedding cakes must not contradict God’s sacrament of marriage between a man and a woman.”
27 Thus, the evidence at issue on this motion in limine concerns the nature and scope of Tastries’
28 Design Standards, which is a central issue in this case. For these reasons, the motion in limine

1 should be denied.

2 **III. CONCLUSION**

3 For the foregoing reasons, DFEH respectfully requests that the court deny defendants'
4 Motion in Limine No. 10.

5
6 Dated: July 18, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

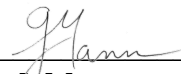
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12 Gregory J. Mann
13 Associate Chief Counsel
14 Attorneys for the DFEH
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Exhibit WW

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Plaintiff,

vs.

CATHY'S CREATIONS, INC. d/b/a
TASTRIES, a California corporation; and
CATHARINE MILLER,

Defendants.

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

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. 11**

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

Plaintiff Department Fair Employment and Housing (DFEH) submits the following
opposition to Defendants' Motion in Limine No. 11: Excluding Evidence or Arguments About
Defendants' Recipes, Ingredients, and Suppliers.

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1 **I. INTRODUCTION**

2 In support of their free speech affirmative defense, defendants argue that any preordered
3 cake from Tastries is a work of art, requiring great artistry in both its recipe and external decorating.
4 Although their artistry argument misunderstands the First Amendment's protection of speech,
5 defendants assert this artistry argument in support of their free speech defense, i.e., preordered cakes
6 are an artistic, tailor-made expression of the baker. In responding to discovery requests, defendants
7 freely admitted that they utilize Pillsbury and Betty Crocker boxed cake mix and Sam's Club
8 buttercream frosting. Defendants never objected to this evidence or sought any confidential or
9 proprietary protections until the filing of this motion in limine. In any event, defendants have no
10 proprietary claim over Pillsbury or Betty Crocker's cake mix or Sam's Club's frosting. Defendants'
11 motion in limine should be denied.

12 **II. LEGAL ARGUMENT**

13 The evidence cited by defendants establishes that some preordered cakes are not made from
14 scratch. (Corrected Trissell Decl. ISO Defendants' Motions in Limine [Trissell Decl.], **Exhibit 11**,
15 1st Miller Depo., 156:2-4.) Miller's husband, who purchased supplies for Tastries, testified that
16 Tastries purchased box cake mix and Sam's Club frosting:

17 10 Q. Do you buy boxed cake mixes for Tastries'
18 11 bakers to use?

12 A. I do.

13 Q. Are there particular brands of boxed cake mixes
14 that you buy?

15 A. Yes.

16 Q. What are those brands?

17 A. For the white, we use Pillsbury, and other
18 flavors we use Betty Crocker.

19 Q. Do you know what those other flavors are that
20 you -- for which you buy Betty Crocker cake mix?

21 A. French vanilla, chocolate, German chocolate,
22 lemon, strawberry, and then spice.

23 Q. Any other flavors for which you buy boxed cake
24 mixes?

25 A. Not that we are currently buying.

26
27 1 There's one other -- we have in the past bought
28 2 carrot, but we're not buying that anymore. We're making
3 that a different way. We have bought red velvet, but

4 we're not buying that currently. And there's one other
5 chocolate, and I'm forgetting the name of it. But,
6 anyway, we're not buying that currently either.
7 Q. You buy buttercream for Tastries' bakers to
8 use?
9 A. Yes.
10 Q. Where do you find buttercream for Tastries'
11 bakers to use?
12 A. At Sam's Club.
13 Q. Any particular brand of buttercream that you
14 buy?
15 A. I don't think it's a brand. It's just the
16 buttercream they offer. It's a Wal-Mart brand, I guess.
17 Q. What flavors of buttercream do you buy at Sam's
18 Club?
19 A. It's labeled as white and chocolate.

(Declaration of Gregory J. Mann in Opposition to Defendants' Motions in Limine [Mann Decl. in Opp.], **Exhibit 26**, Mike Miller 2018 Depo., 52:10-53:19).

Former employee Jessica Criollo, who baked cakes, testified that none of the cakes she worked on at Tastries were made from scratch. (Mann Decl. in Opp., **Exhibit 27**, Criollo Depo., 71:6-9.) Criollo testified that when making carrot cake at Tastries "[y]ou grab the box that's labeled carrot cakes and then you add the eggs, the oil, and the water that's given in directions on the back of the box, mix it, pour it into the pan" (Mann Decl. in Opp., **Exhibit 27**, Criollo Depo., 73:21-74:15.) "The chocolate and white buttercream frosting Tastries used for its wedding cakes was store-bought and used straight out of the container. Most of Tastries' caked flavors were made from store-bought box mixes, often without any additions, like pudding." (Mann Decl. in Opp., **Exhibit 28**, Criollo Decl., ¶6.¹)

Defendants have made these facts relevant to their free speech defense. In response to contention interrogatories, defendants aver:

In support of these affirmative defenses, Defendants state as follows:

Cathy Miller is a creative designer Opened in January 2013, Tastries Bakery is primarily a custom bakery that will collaborate with clients to design custom cakes, cookies and pastries for their event or occasion.

¹ The Criollo declaration was publicly filed in this case on February 20, 2019.

1 Cathy has used her creative talents in many ways over the years With
2 Tastries Bakery, she directs a team of culinary artists who, by creating a
3 vast selection of artistic bakery designs, help enrich her clients' life
celebrations.

4 (Mann Decl., **Exhibit 2**, 5:17-26.)

5 Cathy participates in every part of the custom cake design and creation
6 process. First, she participates in the creation of all recipes used at Tastries
7 Bakery. Some recipes were made by her over many years. Others were
developed after she started the bakery. The development of recipes is both
an art and a science that takes time to master.

8 (Mann Decl., **Exhibit 2**, 8:15-18.) Accordingly, defendants have placed Miller's artistry and the
9 artistry required to create preordered cakes squarely at issue as it relates to defendants' protected
10 speech defense. For this reason, contrary evidence, at least with respect to the ingredients and
11 recipes used in creating preordered cakes, is therefore relevant and not prejudicial.

12 **III. CONCLUSION**

13 For the foregoing reasons, DFEH respectfully requests that the court deny Defendants'
14 Motion in Limine No. 11.

15
16 Dated: July 18, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

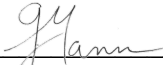
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21 _____
Gregory J. Mann
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Attorneys for the DFEH
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Exhibit XX

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IN AND FOR THE COUNTY OF KERN

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CATHY'S CREATIONS, INC. d/b/a
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CATHARINE MILLER,

Defendants.

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

Real Parties in Interest.

Case No. BCV-18-102633

**PLAINTIFF DEPARTMENT OF FAIR
EMPLOYMENT AND HOUSING'S
OPPOSITION TO DEFENDANTS'
MOTION IN LIMINE NO. 12**

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

Plaintiff Department of Fair Employment and Housing (DFEH) submits the following
opposition to Defendants' Motion in Limine No. 12: for an Order Finding Admissibility of Evidence
of Hate-Mail Received by Defendants.

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1 **I. INTRODUCTION**

2 In their Motion in Limine No. 12, defendants do not ask the court to exclude any specific
3 evidence. Rather, their motion merely serves as an anticipatory opposition to DFEH’s Motion in
4 Limine No. 5, which seeks to exclude evidence or mention of negative social media posts and
5 reviews directed at defendants by members of the public not associated with or directed to act by
6 Real Parties. As stated in DFEH’s Motion in Limine No. 5, defendants present no evidence that the
7 Rodriguez-Del Rios directed multitudes of strangers on the internet to post reviews about defendants
8 via social media or in person. (Evid. Code, §§ 702, subd. (a); 800; 400-403.) Specifically, defendant
9 Miller testified that she did not “have any knowledge if [the Rodriguez-Del Rios] instructed anyone”
10 to make phone calls and send emails to Tastries, or post on Tastries’ social media websites.
11 (Declaration of Gregory J. Mann in Support of Plaintiff’s Motions in Limine [Mann Decl.], **Exhibit**
12 **18**, Depo. Trans. of Catharine Miller, 215:6-21.)

13 Further, social media posts and reviews from after Tastries denied the Rodriguez-Del Rios
14 full and equal services are not relevant to plaintiff’s Unruh Civil Rights Act (Unruh Act) claim or
15 defendants’ First Amendment defenses. (Evid. Code, § 350.) Lastly, such unfounded accusations
16 against the Rodriguez-Del Rios are highly prejudicial and have no probative value. (Evid. Code, §
17 352.) Thus, the court should deny defendants’ Motion in Limine No. 12, grant DFEH’s Motion in
18 Limine No. 5, and preclude defendants from presenting such evidence at trial, whether by oral
19 testimony, documentary evidence, or argument.

20 **II. LEGAL ARGUMENT**

21 **A. Defendants’ Allegations That Real Parties Were Not Bona Fide Patrons Lacks**
22 **Support**

23 The evidence and reasonable inferences therefrom demonstrate that Real Parties were bona
24 fide patrons of Tastries seeking wedding cakes for their wedding reception when they visited
25 Tastries on two occasions. Despite lacking evidence to support their unfounded accusations,
26 defendants continue to allege that Real Parties were not bona fide patrons when they visited Tastries
27 the first time and purchased a tote bag or when they returned—at Tastries’ invitation—for a cake
28 tasting and to complete their wedding cakes order. Rather, according to defendants, “Real Parties’

1 intent was to cause harm to Defendants and obtain media coverage, not be bona fide patrons.” (Def.
2 MIL No. 12, 1:18-19.) Defendants’ argument has no support in fact or law.

3 In support of their accusation that Real Parties were not bona fide patrons, defendants cite to
4 *Thurston v. Omni Hotels Management Corporation* (2021) 69 Cal.App.5th 299, 305. However,
5 plaintiff in *Thurston* failed to provide sufficient evidence that she actually possessed a bona fide
6 intent to sign up for or use defendant’s online services. (*Id.* at p. 307.) Indeed, plaintiff “never
7 attempted to book a room via any travel website, by e-mailing [defendant hotel], or calling the hotel
8 directly, and she never actually booked a room at another hotel,” and thus, was not a bona fide
9 patron. (*Id.* at 305.)

10 In stark contrast to plaintiff in *Thurston*, the facts here demonstrate that the Rodriguez-Del
11 Rios were bona fide patrons of Tastries. There is no dispute that Real Parties sought wedding cakes
12 for their wedding reception and visited other bakeries in pursuit of cakes. On their first visit to
13 Tastries they met with front end associate Rosemary Perez and discussed Tastries’ offerings. They
14 considered ordering their cake that night until Perez invited them to return for a cake tasting.
15 Significantly, they purchased a tote bag from Tastries during that first visit. (Declaration of Gregory
16 J. Mann in Opposition of Defendants’ Motions in Limine [Mann Decl. in Opp.], **Exhibit 29**, Depo.
17 Trans. of Eileen Rodriguez-Del Rio, 45:7-15; **Exhibit 30**, Rodriguez-Del Rio Receipt from Tastries
18 dated August 17, 2017.) They returned a week-and-a-half later for a cake tasting with their mother
19 and close friends. They started discussing their order with Miller until she abruptly stopped the
20 interaction and refused to take their order once she realized they were a gay couple celebrating their
21 marriage. None of the undisputed facts support defendants’ accusation that Real Parties were
22 anything other than bona fide patrons hoping to order their wedding cakes from Tastries.

23 Moreover, the reasonable inferences from the undisputed evidence support that Real Parties
24 were bona fide patrons of Tastries. First, they visited Tastries twice expecting to order their cakes.
25 Second, they visited other bakeries in search of wedding cakes. Lastly, unlike plaintiff in *Thurston*,
26 who never booked a room at another hotel, Real Parties did, in fact, obtain a wedding cake from
27 another baker that they cut and shared at their wedding reception. The reasonable inferences from
28 these facts are that they were bona fide patrons shopping for wedding cakes at Tastries. Thus, any

1 accusations to the contrary should be excluded from trial.

2 **B. Defendants’ Baseless Accusation that Real Parties Led a Defamatory Social**
3 **Media Crusade and Criminal Acts Against Defendants Is Unsupported and**
4 **Irrelevant**

5 This Court should exercise its power to exclude argument and testimony regarding
6 defendants’ unsupported accusations against the Rodrigue-Del Rios and deny defendants’ Motion in
7 Limine No. 12, because such unfounded accusations are unsupported and not relevant to any
8 material issue to be decided at trial. None of defendants’ baseless allegations against the Rodriguez-
9 Del Rios shed any light on DFEH’s Unruh Act claim or defendants’ First Amendment affirmative
10 defenses, and no evidence supports that Real Parties encouraged or directed strangers to make the
11 social media posts and reviews of which defendants complain.

12 Defendants wish to introduce at trial an exhibit containing numerous social media postings
13 and comments from strangers unrelated to the Real Parties in order to conjure an inference that “the
14 online backlash was instigated by the Real Parties by their social media postings, and their careful
15 and specific efforts to cause their posts to go viral.” (Defendants’ Corrected MIL No. 12.)
16 Defendants, however, have no evidence linking any alleged backlash to the Rodriguez-Del Rios.
17 (Mann Decl., **Exhibit 18**, Depo. Trans. of Catharine Miller, 215:6-21.)

18 In their motion in limine, defendants fail to mention a Facebook post from a member of a
19 gay couple, who posted about defendants’ discrimination against him and his partner *before* the Real
20 Parties posted on social media. (Mann Decl., **Exhibit 13**, Ted G. Freitas Facebook Post (August 26,
21 2017 at 12:37 p.m.) Defendants also ignore the increased attention Tastries’ discrimination received
22 when Miller began giving media interviews and later when defendants’ counsel started a series of
23 press releases about the case. Indeed, a reasonable inference can be made that it was, in fact, Miller’s
24 media appearances that fueled strangers’ online comments about and reviews of Tastries.

25 Moreover, although defendants mischaracterize the social media posts surrounding Tastries’
26 Unruh Act violations as negative, the truth is that Tastries received much support from the public
27 and hundreds of positive posts and reviews. (Mann Decl., **Exhibit 12**, CM1081, 1083, 1106, 1119-
28 1121, 1122-1124, 1128, 1195-1196, 1203, 1221-1226, 1229-1230, 1237-1238, 1241-1248, 1253

1 1379-1388, 1400-1401, 1404, 1426, 1428-1431, 1433-1444, 1468, 1473, 1478, 1481, 1491, 1498,
2 1509, 1510, 1514, 1529, 1542, 1558, 1581, 1583, 1600, 1606, 1609, 1612, 1618, 1625-1626, 1654-
3 1659, 1661, 1670, 1672, 1675-1677, 1696-1697, 1701-1703, 1721, 1724-1725, 1732, 1761, 1768,
4 1771, 1785-1790, and many, many more.¹) In particular, Franklin Graham, a famous evangelist
5 pastor and missionary, posted in support of Miller and Tastries' position on his Facebook page and
6 obtained over 68,700 reactions and 10,200 comments to his post! (Mann Decl., Ex. 12, CM1385-
7 1386.) Furthermore, in an interview with *BakersfieldNow*, Miller discussed the support Tastries
8 received after it denied the two gay couples wedding cakes: "emails, and text messages and
9 Facebook messages all the way from Ireland and the east coast and South America its [sic] just been
10 a little bit overwhelming *the support we have had, in a positive way.*" (Mann Decl., Ex. 12, CM1404
11 [emphasis added].) Additionally, Miller's employees testified that orders for baked goods increased
12 after Miller made media appearances regarding this action. (Mann Decl. in Opp., **Exhibit 31**, Depo.
13 Trans. of Taylor Arbolante, 88:3-11; **Exhibit 32**, Depo. Trans. of Rosemary Perez, 129:3-69.)

14 The Facebook posts from Real Parties and their friend, who was with them at Tastries when
15 Miller refused to serve his friends, reveal nothing more than their hurt feelings and emotions about
16 being denied services by Tastries because they are a lesbian couple. Their posts do not direct readers
17 to attack Tastries. The posts do not request or seek free wedding services. The posts do not seek
18 media coverage; they did not tag news outlets and were not posted on any social media pages or
19 websites of news outlets.

20 Defendants cite to *Fulton v. City of Philadelphia* (2021) 141 S.Ct. 1868, 1882, to contend
21 that Real Parties' intent in shopping at Tastries is relevant. First, as demonstrated above, the
22 evidence supports that Real Parties were bona fide patrons of Tastries, which disposes of
23 defendants' argument. Moreover, as defendants themselves point out, in stark contrast to the facts
24 here, "[i]n *Fulton*, specifically, the U.S. Supreme Court noted that no same-sex couple had ever
25 actually been harmed by the faith-based nonprofit." (Defendants' Motion in Limine No. 12, 1:26-

26
27 ¹ It should also be noted that there were several duplicates of the same negative comments which
28 inflated the number of negative reviews and comments as opposed to the positive comments. (For
one of many examples, see CM1792-1793, 1795.) In addition, there were other messages unrelated to
Tastries included in the production, such as CM1745-1758 [relating to comments of a post by a
stranger seeking LGBT friendly vendors].

27.) Unlike “the faith-based nonprofit” in *Fulton*, Tastries is a for-profit public accommodation not affiliated with any religion that has denied full and equal goods and services to several gay couples, including the Rodriguez-Del Rios. *Fulton* neither concerned a public accommodation, like Tastries, nor social media directed at the “faith-based nonprofit.” It is inapposite and does not support that Real Parties’ intent is relevant to any issue here. As such, the court should exclude defendants’ unsupported—in fact, contradicted—accusations that Real Parties had malicious intent in shopping at Tastries. In addition to this accusation lacking evidence, it is not relevant to the Unruh Act claim or defendants’ freedom of speech and/or free exercise of religion affirmative defenses. Therefore, the court should exclude any such evidence at trial.

Next, defendants bizarrely argue that the social media posts of strangers and random people on the internet are relevant under *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com’n* (*Masterpiece*) (2018) 138 S.Ct. 1719, to DFEH’s purported bias against defendants and Miller’s religious beliefs. They contend that DFEH failed to “curb the abuse levelled at Defendants, which in a real measure, has caused through pursuing this litigation [and that] [t]his refusal to take any such action shows Plaintiff DFEH’s religious hostility.” (Defendants’ MIL No. 12, 2:10-13.) Neither DFEH nor Real Parties directed, orchestrated, or even encouraged any social media posts or reviews about Tastries and cannot be held accountable for the actions of others. Throughout this case, DFEH—a civil prosecutor, not a neutral adjudicatory body—pursued its statutory duty to enforce the Unruh Act, as Judge Lampe recognized and acknowledged from the very beginning. This Court should exclude these irrelevant social media posts, whether they support or oppose Tastries’ denial of full and equal services to gay couples. (For further argument regarding DFEH’s alleged religious hostility, see DFEH’s MIL No. 3 and Opposition to Defendant’s MIL No. 8.)

C. Defendants’ Unsupported Arguments Are Highly Prejudicial and Would Necessitate Undue Consumption of Time

Given that defendants’ accusations against the Rodriguez-Del Rios and DFEH are wholly unsupported by the facts and law and are irrelevant, admitting testimony and argument regarding these inflammatory accusations will only serve to prejudice DFEH. In addition, if defendants are empowered to waste time presenting testimony and argument about these social media posts and

1 actions by random strangers on the internet—as they did during depositions—DFEH will be forced
2 to spend considerable time refuting these claims. Multiple witnesses would testify about these posts.
3 Because defendants’ accusations possess no probative value, are irrelevant, and will consume undue
4 time, such argument, evidence, and testimony should be excluded pursuant to Evidence Code
5 section 352.

6 **III. CONCLUSION**

7 Based on the foregoing, DFEH respectfully requests that the court grant DFEH’s Motion in
8 Limine No. 5, deny Defendants’ Motion in Limine No. 12, and exclude all testimony, arguments,
9 and purported evidence that Real Parties were not bona fide patrons of Tastries and “carr[ied] out a
10 defamatory social media crusade” and criminal attacks “against Miller and Tastries Bakery.”
11

12 Dated: July 18, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

13
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16 By:



Gregory J. Mann
Attorneys for the Department of Fair
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Exhibit YY

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By Gina Sala, Deputy

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.

CATHY'S CREATIONS, INC. d/b/a
TASTRIES, a California corporation; and
CATHARINE MILLER,

Defendants.

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

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. 13**

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

Plaintiff Department Fair Employment and Housing (DFEH) submits the following
opposition to Defendants' Motion in Limine No. 13: For a Site Visit of Tastries Bakery.

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1 **I. LEGAL ARGUMENT**

2 DFEH opposes a site visit to Tastries Bakery because it is unnecessary, cumulative of other
3 evidence, and will require the needless expenditure of time better spent in the courtroom.
4 Defendants have offered as trial exhibits fourteen photographs of the store, walls, display cases,
5 kitchen and supply room of the bakery (Def. **Proposed Trial Exhibit 1**), photographs of display
6 cakes in the bakery (Def. **Trial Exhibit 2**), photographs of bakery tools (Def. **Proposed Trial**
7 **Exhibit 7A**), 140 photos of wedding cakes (Def. **Proposed Trial Exhibit 7B**), a series of videos of
8 decorating a cake (Def. **Proposed Trial Exhibit 13**), a second series of videos decorating a cake
9 (Def. **Proposed Trial Exhibit 14**), and fourteen photographs of Christian décor inside the bakery.
10 (Def. **Proposed Trial Exhibit 231**). Given this large amount of other evidence, a site visit would be
11 disruptive, cumulative, and necessitate undue consumption of time. (Evid. Code., § 352.)

12 Moreover, the bakery is not in the same condition as it was in August 2017 when Tastries
13 denied Real Parties full and equal goods and services and, therefore, does not accurately reflect the
14 condition of the bakery at the relevant time. (*People Acting By and Through Dept. of Public Works*
15 *v. Arthofer* (1966) 245 Cal.App.2d 454 [denial of a jury view in a condemnation proceeding was not
16 an abuse of discretion where condition of the property had changed due to prior taking of the
17 property for freeway construction, and where exhibits were introduced into evidence which depicted
18 the subject property in its before condition].) Because of the changed conditions, a site visit is
19 irrelevant (Evid. Code., §§ 210, 350) and misleading. (Evid. Code, § 352.) It would not aid the court,
20 the trier of fact in this case.

21 As a practical matter, the court reporter would have to be present and record the proceedings.
22 (Code Civ. Proc., § 651, subd. (b).) DFEH objects to the taking of testimonial evidence in the form
23 of a “tour” of Tastries narrated by Miller or any other employee, when this testimony should be
24 given in court governed by the strict rules of evidence. The more informal nature of the bakery tour
25 may invite evidentiary error. DFEH agrees with defendants’ proposal that “Defendant Miller and her
26 employees can simply testify in court to what they do, and their process.” (Def. MIL No. 13, 2:1-2.)
27 The court should exercise its discretion to deny a site visit to Tastries Bakery. (*Bause v. Anthony*
28 *Pools, Inc.* (1962) 205 Cal.App.2d 606 [refusal of trial court to visit pool site during trial of action

1 by owner against builder for construction of defective pool was entirely within discretion of court].)

2 **II. CONCLUSION**

3 For the foregoing reasons, DFEH respectfully requests that the court deny Defendants'
4 Motion in Limine No. 13.

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6 Dated: July 18, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

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12 Gregory J. Mann
13 Associate Chief Counsel
14 Attorneys for the DFEH
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Exhibit *ZZ*

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

DEPARTMENT OF FAIR EMPLOYMENT
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Plaintiff,

vs.

CATHY'S CREATIONS, INC. d/b/a
TASTRIES, a California corporation; and
CATHARINE MILLER,

Defendants.

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

Real Parties in Interest.

Case No. BCV-18-102633

**PLAINTIFF DEPARTMENT OF FAIR
EMPLOYMENT AND HOUSING'S
OPPOSITION TO DEFENDANTS'
MOTION IN LIMINE NO. 14**

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

Plaintiff Department of Fair Employment and Housing (DFEH) submits the following in
opposition to Defendants' Motion in Limine No. 14 – Exclusion of Undisclosed Witnesses.

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1 **I. INTRODUCTION**

2 Defendants request the court to exclude the following witnesses from DFEH’s witness list:
3 former Tastries employees Natalie Boatwright aka Natalie Martens, Justin Salinas¹, and Justin
4 Unruh; and a gay couple, whose wedding cake order Tastries declined on August 26, 2017, Ted G.
5 Freitas and Adam Ramos. Natalie Boatwright and Justin Unruh are former Tastries employees
6 identified by defendants in their discovery responses. (Declaration of Gregory J. Mann in Support of
7 Plaintiff’s Opposition to Defendants’ Motions in Limine [Mann Decl. in Opp.], **Exhibit 33**,
8 Defendants’ Responses to DFEH’s FROGs (February 24, 2022) No. 17.1 [“all current and former
9 Tastries’ employees identified in charts dated December 14, 2017 and July 1, 2019... Defendants
10 reserve the right to call any current or former employee.”].) Since defendants identified and reserved
11 the right to call as witnesses “all current and former Tastries’ employees,” they are neither surprised
12 nor prejudiced by DFEH including these former employees as witnesses. Ted G. Freitas and Adam
13 Ramos were the gay couple denied service by defendants on the same day as Real Parties in Interest
14 Eileen and Mireya Rodriguez-Del Rio. Defendants produced screenshots of Ted G. Freitas’
15 Facebook posts in discovery. (Mann Decl., **Exhibit 13**, Ted G. Freitas Facebook Post (August 26,
16 2017 at 12:37 p.m.)) Again, defendants have known of their identity and the fact that defendants
17 refused to make them a wedding cake on August 26, 2017, before DFEH’s investigation even began.

18 Defendants also named to their trial witness list four witnesses not specifically identified in
19 their discovery responses, including two not included at all in their discovery responses or even
20 mentioned during litigation: Missy Massey, Sonja Troncozo, Roger Spradlin, and Shelly Thompson.
21 Aside from Roger Spradlin, Miller’s pastor, whose inclusion on defendants’ witness list surprises
22 DFEH since DFEH does not challenge the sincerity of Miller’s religious beliefs, and Shelly
23 Thompson, the parties have known about these witnesses since before this civil litigation began.
24 DFEH will meet and confer with defense counsel in order to seek their agreement that all the
25 witnesses may testify and work to ensure cumulative testimony is avoided.

26 ///

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¹ For other reasons DFEH has withdrawn Mr. Salinas from its witness list.

1 **II. ARGUMENT**

2 **A. Defendants Were Not Only Aware of These Witnesses, They Identified Them In**
3 **Their Discovery Responses**

4 Defendants have known about Tastries' former employees and the gay couple Tastries
5 refused to serve on August 26, 2017, since before this case began. Defendants admit that DFEH
6 previously identified Natalie Boatwright (aka Martens) and Justin Salinas (who provided a
7 declaration in support of a DFEH motion). (See Def. MIL No. 14, 2:15-17.) In response to DFEH
8 discovery requests defendants identified "former and current Tastries employees identified in charts
9 dated December 14, 2017 and July 1, 2019," which includes Natalie Boatwright (aka Martens),
10 Justin Salinas, Justin Unruh as a former Tastries' employees. (Mann Decl. in Opp., **Exhibit 33**,
11 Defendants' Responses to DFEH's FROGs (February 24, 2022) No. 17.1.) Defendants are neither
12 surprised nor prejudiced by DFEH calling former Tastries' employees identified by *defendants*
13 during discovery.

14 Unlike this situation, the cases relied upon by defendants in their Motion in Limine No. 14
15 concern "unfair surprise." In *Thoren v. Johnston & Washer (Thoren)* (1972) 29 Cal.App.3d 270, the
16 Court of Appeal held that the trial court had power to bar the testimony of a witness *willfully*
17 excluded from an answer to an interrogatory seeking the names of witnesses to an accident. The
18 court was concerned with a party being "unfair[ly] surprise[d] at trial." (*Id.* at p. 274.) Here, there is
19 no "unfair surprise" since defendants have been aware of these witnesses for over four years.
20 Further, in *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, the court noted that *Thoren* does not
21 stand for the proposition that evidence may be excluded based on the mere failure to supplement or
22 amend an answer that was truthful when originally served. *Crompton v. Dickstein* (1978) 82
23 Cal.App.3d 166 concerned two expert witnesses and is inapplicable here. (*Id.* at p. 170.) DFEH did
24 not withhold any potential witnesses. Rather, it objected to defendants' special interrogatory request
25 seeking trial witnesses based on privileges. Defendants' failed to move to compel that response.
26 They cannot now move to exclude witnesses they have known about since this litigation began.
27 (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 334 ["in the absence of a violation of an order
28 compelling further answers, incomplete and evasive answers are themselves an insufficient basis to

1 exclude evidence.”].)

2 As to Defendant’s contention that DFEH willfully omitted Mr. Unruh, they are wrong.
3 Miller’s Special Interrogatory No. 15 requested the identity of each current or former Tastries
4 employee that DFEH or anyone acting on its behalf communicated with about this case. (Corrected
5 Trissell Decl. ISO Defendants’ Motions in Limine, **Exhibit 18**, Plaintiff DFEH Supp. Resp. to
6 Miller SROGS (Feb. 25, 2022) Nos. 15.) Despite this information being protected by the attorney
7 work-product doctrine, official information privilege (Evid. Code, § 1040), informant privilege
8 (Evid. Code, § 1041), and Information Practices Act (Civ. Code, § 1798 et seq.), DFEH stated that
9 Natalie Boatwright may have information relevant to the case based on Rosemary Perez’s
10 investigative deposition testimony that Ms. Boatwright was involved in providing cakes to gay
11 couples when she worked at Tastries. (Mann Decl. in Opp., **Exhibit 32**, Depo. Trans. of Rosemary
12 Perez, 10:2-6, 22:16-19.) Defendants identifying current and former Tastries’ employees in their
13 discovery responses demonstrates they are not unfairly surprised by the inclusion of these witnesses
14 on DFEH’s witness list, and the witnesses should be permitted to testify.

15 Defendants acknowledge their awareness of Mr. Freitas and Mr. Ramos as the “same-sex
16 couple that visited Tastries Bakery on the morning of August 26, 2017—a few hours ahead of the
17 Real Parties.” (Def. MIL No. 14, 3:1-2.) Defendants even used Mr. Freitas’ Facebook post during
18 the depositions of Real Parties. (Mann Decl. in Opp., **Exhibit 34**, Depo. Trans. of Mireya Rodriguez
19 Del Rio, 141:3-4.) Again, defendants are neither surprised nor prejudiced by the inclusion of these
20 witnesses, and DFEH will continue its meet and confer efforts with defense counsel in an attempt to
21 avoid cumulative testimony.

22 **B. Defendants Also Failed to Specifically Disclose Four Witnesses on Their List**

23 Notwithstanding their complaints about DFEH not specifically disclosing witnesses on its list
24 during discovery, defendants failed to specifically disclose during discovery two former employees,
25 and never disclosed Miller’s pastor and a Tastries’ customer. Similar to DFEH’s discovery
26 responses regarding trial witnesses, defendants responded to discovery requests, stating “[i]t is
27 premature at this time to identify which of those current or former employees Defendant plans to
28 call at trial in this case” (Mann Decl. in Opp., **Exhibit 33**, Defendants’ Resp. to DFEH’s FROGS

1 (February 24, 2022) No. 17.1.)

2 Defendants' request to exclude DFEH witnesses they have known about since the case began
3 while allowing witnesses they identify for the first time in their witness list strains credibility,
4 especially since neither of these two witnesses was a former employee or has direct knowledge of
5 Tastries' refusal to serve gay couples. Despite defendants' request for unequal treatment regarding
6 the parties' witness lists, DFEH believes the parties will be able to reach agreement on these
7 witnesses testifying in a manner that avoids irrelevant and cumulative testimony.

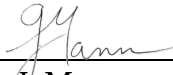
8 **III. CONCLUSION**

9 Based on the foregoing, DFEH respectfully requests that the court deny Defendants' Motion
10 in Limine No. 14 to exclude undisclosed witnesses.

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12 Dated: July 18, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

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16 By:



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Attorneys for the Department of Fair
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Exhibit AAA

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TASTRIES, a California corporation; and
CATHARINE MILLER,

Defendants.

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

Real Parties in Interest.

Case No. BCV-18-102633

**PLAINTIFF DEPARTMENT OF FAIR
EMPLOYMENT AND HOUSING'S
NONOPPOSITION TO DEFENDANTS'
MOTION IN LIMINE NO. 15**

(Plaintiff's Response to Defendants'
Motion in Limine No. 15)

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

Plaintiff Department Fair Employment and Housing (DFEH) submits the following response to
Defendants' Motions in Limine No. 15: Exclusion of Justin Salinas' Testimony.

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1 Plaintiff does not oppose Defendants' Motion in Limine No. 15 seeking to exclude testimony
2 of Justin Salinas. As such, plaintiff will withdraw Justin Salinas from its witness list.

3
4 Dated: July 18, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

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Attorneys for the Department of Fair
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TASTRIES, a California corporation; and
CATHARINE MILLER,

Defendants.

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

Real Parties in Interest.

Case No. BCV-18-102633

**PLAINTIFF DEPARTMENT OF FAIR
EMPLOYMENT AND HOUSING'S
OPPOSITION TO DEFENDANTS'
MOTION IN LIMINE NO. 16**

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

Plaintiff Department Fair Employment and Housing (DFEH) submits the following opposition
to Defendants' Motion in Limine No. 16: Exclude Testimony of Former Employees Relating to Making
Wedding Cakes for Same-Sex Couples.

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1 **I. INTRODUCTION**

2 Defendants seek to exclude testimony of former Tastries employees to preclude DFEH from
3 introducing evidence that defendants can comply with the Unruh Act by allowing willing employees
4 with no religious objections to provide preordered baked goods to gay couples celebrating their
5 marriage and marriage-related events. Defendants' argument assumes these former employees'
6 testimony will be limited to this one subject. This Court should deny defendants' motions in limine
7 because the testimony of former employees is relevant and relates to DFEH's claims and
8 defendants' affirmative defenses.

9 **II. LEGAL ARGUMENT**

10 **A. Testimony of Former Employees Is Relevant to Multiple Issues**

11 The testimony of Natalie Boatwright aka Natalie Martens, Jessica Criollo, Mary Johnson,
12 and Justin Unruh is relevant to DFEH's Unruh Act claim and defendants' affirmative defenses,
13 including defendants' practical ability to provide preordered baked goods to gay couples celebrating
14 events related to their marriage without the participation of Miller. That practical ability is relevant
15 here under the California Supreme Court's opinion in *North Coast Women's Care Medical Group v.*
16 *Super. Ct. (North Coast)* (2008) 44 Cal.4th 1145.) In *North Coast*, the California Supreme Court
17 identified three options by which business establishments can comply with the Unruh Act, including
18 in situations where an employee has a religious objection to same-sex marriage. (*Id.* at p. 1159.) As
19 applied to Tastries, those three options are: (1) provide preordered baked goods for all couples
20 celebrating any marriage-related event; (2) cease providing preordered baked goods for any couples
21 celebrating any marriage-related event; or (3) allow employees without religious objections to same-
22 sex marriage provide preordered baked goods to all couples celebrating any marriage-related event.
23 (*Ibid.* [Physicians with religious objections could "avoid any conflict between their religious beliefs
24 and [the Unruh Act]" by "simply refus[ing] to perform" the fertility treatment at issue to any patients
25 or "by ensuring that every patient requiring IUI receives 'full and equal' access to that medical
26 procedure through a North Coast physician lacking defendants' religious objections."].) Former
27 employees will testify to demonstrate the viability of the third option: they were willing to make,
28 and, in fact, on several occasions made preordered wedding cakes for gay couples' weddings

1 without Miller’s participation.¹

2 Defendants seek to exclude the former employees’ testimony about only one issue, an issue
3 relevant to the claims, defenses, and potential relief here. They do not seek to exclude testimony
4 regarding other issues. For these reasons alone, their motion in limine should be denied.

5 Regarding the single issue of whether Tastries employees have been willing and able to
6 provide full and equal services to gay couples celebrating marriage-related events without Miller’s
7 participation, defendants argue that *Burwell v. Hobby Lobby Stores, Inc. (Hobby Lobby)* and *Fulton*
8 *v. City of Philadelphia (Fulton)*² support their position. Those cases, however, are distinguishable.
9 *Hobby Lobby*, 573 U.S. 682 was decided under the federal Religious Freedom Restoration Act,
10 which does not apply in California or to this case. *Fulton*, 141 S.Ct. 1868 involved a non-profit
11 Catholic organization seeking an exemption to a private contract—not a public accommodations
12 law—that contained an explicit discretionary exemption clause. Tastries is a for-profit business
13 unaffiliated with any religion, and the Unruh Act contains no discretionary exemptions to its
14 requirement to provide full and equal services irrespective of sexual orientation. These cases are
15 inapposite and do not support defendants’ argument.

16 Defendants attempt to distinguish *North Coast*—controlling precedent from the California
17 Supreme Court—and *Minton* by arguing that, as the sole owner of Tastries, Miller may impose her
18 religious objections to same-sex marriage on her employees and customers. Therefore, their
19 argument goes, even employees willing to provide wedding-related services to gay couples may not
20

21 ¹ Certain former employees made wedding cakes for gay couple’s weddings without Miller’s
22 knowledge or participation. DFEH presents this evidence to show the viability of *North Coast*’s third
23 option; DFEH does condone nor suggest that making wedding cakes without Miller’s knowledge was
24 appropriate.

25 ² (Compare *Burwell v. Hobby Lobby Stores, Inc.* (2014) 573 U.S. 682, 708-719 & fn.19-22, 28
26 [because for-profit corporations could assert Free Exercise rights under the First Amendment, they
27 could do likewise under the federal Religious Freedom Restoration Act]; *Fulton v. City of*
28 *Philadelphia* (2021) 141 S.Ct. 1868, 1876 [corporation could assert Free Exercise rights to preclude
any of its employees from certifying same-sex couples as fit to be foster parents] with *North Coast*,
supra, 44 Cal.4th 1145, 1150–1151 [where two doctors in group medical practice objected on
religious grounds to artificial insemination of gay women, practice could comply with Unruh Act by
allowing colleagues with no such religious objection, to perform the procedure]; *Minton v. Dignity*
Health (Minton) (2019) 39 Cal.App.5th 1155, 1159 [where hospital chain operated both Catholic and
Methodist hospitals, and Catholic hospital objected on religious grounds to having its doctors
perform a procedure that the Methodist hospital did not object to, hospital chain should have
scheduled the patient to undergo the procedure at the Methodist hospital.] (Def. MIL No. 16.)

1 do so over Miller's objections. Tastries employs 15 people other than Miller; it is not a one-woman
2 shop as defendants argue.

3 DFEH offers no opinion about, it only seeks an order requiring Tastries to comply with the
4 Unruh Act as provided by the California Supreme Court's guidance in *North Coast*. DFEH will
5 simply and quickly present testimony about Tastries employees having the willingness and ability to
6 avoid violating the Unruh Act³ by providing full and equal services to gay couples celebrating their
7 marriages without Miller's participation, an important issue in this litigation. Thus, this Court should
8 deny defendants' Motion in Limine.

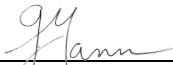
9 **III. CONCLUSION**

10 Based on the foregoing, DFEH respectfully requests that the court deny Defendants' Motion
11 in Limine No. 16.

12
13 Dated: July 18, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

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17 By:



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

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28 ³ Under the Unruh Act, "Whoever denies, *aids* or incites a denial, or makes any ... distinction
contrary to Section 51 ...is liable for each and every offense." (Civ. Code, § 52, subd. (a) [emphasis
added].) By imposing her religious beliefs upon Tastries employees, Miller puts the employees at risk
of violating the Unruh Act simply by following Tastries Design Standards policy.

Exhibit CCC

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Attorneys for the Department
Fee Exempt (Gov. Code, § 6103)

ELECTRONICALLY FILED
7/18/2022 4:38 PM
Kern County Superior Court
By Gina Sala, Deputy

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.

CATHY'S CREATIONS, INC. d/b/a
TASTRIES, a California corporation; and
CATHARINE MILLER,

Defendants.

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

Real Parties in Interest.

Case No. BCV-18-102633

**PLAINTIFF DEPARTMENT OF FAIR
EMPLOYMENT AND HOUSING'S
OPPOSITION TO DEFENDANTS'
MOTION IN LIMINE NO. 17 TO
EXCLUDE CUMULATIVE EVIDENCE
THAT DEFENDANTS WILL NOT
MAKE WEDDING CAKES FOR SAME-
SEX WEDDINGS**

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

Plaintiff Department Fair Employment and Housing (DFEH) submits the following opposition
to Defendants' Motion in Limine No. 17: Exclude Cumulative Evidence That Defendants Will Not
Make Wedding Cakes for Same-Sex Weddings.

///

///

1 **I. INTRODUCTION**

2 As a supplement to their Motion in Limine No. 16 to exclude testimony of former employees
3 relating to making wedding cakes for gay couples, defendants seek to exclude what they allege is
4 cumulative evidence that defendants will not make wedding cakes for gay couples celebrating their
5 weddings. However, each of the witnesses they identify as purportedly cumulative—Natalie
6 Boatwright aka Natalie Martens, Jessica Criollo, Mary Johnson, and Justin Unruh—will testify
7 about more than the single subject identified by defendants. Each has their own perspective on
8 defendants’ policies, not to mention their unique experience while working at Tastries. To the extent
9 their testimonies are cumulative with respect to defendants’ refusal to provide preordered baked
10 goods to gay couples celebrating marriage-related events and other subjects, DFEH will seek
11 stipulations from defendants in order to avoid any undue consumption of time. Thus, DFEH requests
12 that the court deny Defendants Motion in Limine No. 17.

13 **II. LEGAL ARGUMENT**

14 As noted in DFEH’s Opposition to Defendant’s Motion in Limine No. 16, the witnesses
15 identified by defendants will testify to more topics than just defendants’ refusal to provide wedding
16 cakes for same-sex marriages. They will also testify as to the effect upon them of Tastries’ policy
17 and Miller’s imposition of her religious beliefs; their employment with Tastries, including Tastries
18 Bakery operations; Tastries cakes and display cakes that were similar to Real Parties’ actual main
19 wedding cake; and other subjects. (See DFEH’s Opposition to Defendant’s Motion in Limine No.
20 16, 3:19-4:6.) All of this testimony is relevant and necessary to DFEH’s Unruh Act claim or
21 defendants’ affirmative defenses.

22 Moreover, Ted G. Freitas and Adam Ramos will testify as to their experiences attempting to
23 order and being denied a wedding cake by Tastries as well as authenticate and testify about the
24 motivation behind their social media posts regarding Tastries’ refusal to provide them full and equal
25 services. (Declaration of Gregory J. Mann in Support of Plaintiff’s Motions in Limine, **Exhibit 13**,
26 Ted G. Freitas Facebook Post (August 26, 2016 at 12:37 p.m.)) This testimony is necessary to
27 counter defendants’ argument that Real Parties were shopping for a lawsuit and led a social media
28 crusade against defendants. Because the testimony of these witnesses is relevant, the court should

1 deny Defendants' Motion in Limine No. 17.

2 DFEH remains willing to stipulate to certain facts and the admissibility of certain evidence,
3 which would aid in limiting witness testimony. And should defendants refrain from calling certain
4 witnesses and/or making certain cumulative or irrelevant arguments, DFEH will be able to drop
5 some witnesses from its witness list and some subjects from witnesses' testimony. DFEH remains
6 open to take reasonable steps to streamline the trial.

7 **III. CONCLUSION**

8 Based on the foregoing, DFEH respectfully requests that the court deny Defendants' Motion
9 in Limine No. 17 to exclude alleged cumulative evidence.

10
11 Dated: July 18, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

12
13
14
15 By: _____

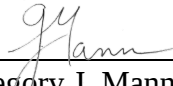

Gregory J. Mann
Attorneys for the Department of Fair
Employment and Housing

Exhibit DDD

NELSON CHAN, Assistant Chief Counsel (#109272)
GREGORY J. MANN, Associate Chief Counsel (#200578)
KENDRA TANACEA, Associate Chief Counsel (#154843)
SOYEON C. MESINAS, Staff Counsel (#324046)
DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING
320 West 4th Street, Suite # 1000, 10th Floor
Los Angeles, California 90013
Telephone: (213) 439-6799
Facsimile: (888) 382-5293

Attorneys for the Department
Fee Exempt (Gov. Code, § 6103)

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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.

CATHY'S CREATIONS, INC. d/b/a
TASTRIES, a California corporation; and
CATHARINE MILLER,

Defendants.

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

Real Parties in Interest.

Case No. BCV-18-102633

**DECLARATION OF GREGORY J.
MANN IN SUPPORT OF PLAINTIFF
DEPARTMENT OF FAIR
EMPLOYMENT AND HOUSING'S
OPPOSITIONS TO DEFENDANTS'
MOTIONS IN LIMINE AND EXHIBITS
THERE TO**

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

I, Gregory J. Mann, declare:

1. I am an attorney at law duly licensed to practice before all the courts of the State of California. I am employed as Associate Chief Counsel with the Department of Fair Employment and Housing (DFEH), and in my official capacity I represent DFEH, plaintiff herein. I have personal knowledge of the facts stated in this declaration and based on my review of the evidence obtained in DFEH's investigation and this litigation, if called as a witness, I could testify competently as to the

1 truth of the matters asserted herein.

2 2. I submit this declaration in support of Plaintiff's Opposition to Defendants' Motions in
3 Limine filed herewith.

4 3. Attached hereto as **Exhibit 23** is a true and correct copy of Tastries' Design Standards.

5 4. Attached hereto as **Exhibit 24** is a true and correct copy of excerpts from the deposition
6 transcript of Catharine Miller taken on February 24, 2022.

7 5. Attached hereto as **Exhibit 25** is a true and correct copy of a Stay Order regarding Petition
8 for Writ of Mandate, Prohibition, or Other Appropriate Relief (Writ) by the Fifth District California
9 Court of Appeal filed on October 1, 2020, and Order regarding Writ by the Fifth District California
10 Court of Appeal filed on January 27, 2021.

11 6. Attached hereto as **Exhibit 26** is a true and correct copy of excerpts from the deposition
12 transcript of Mike Miller taken on September 26, 2018.

13 7. Attached hereto as **Exhibit 27** is a true and correct copy of excerpts from the deposition
14 transcript of Jessica Criollo taken on July 14, 2021.

15 8. Attached hereto as **Exhibit 28** is a true and correct copy of Declaration of Jessica Criollo
16 executed on February 19, 2019.

17 9. Attached hereto as **Exhibit 29** is a true and correct copy of an excerpt from the deposition
18 transcript of Eileen Rodriguez-Del Rio taken on July 29, 2021.

19 10. Attached hereto as **Exhibit 30** is a true and correct copy of Rodriguez-Del Rios' receipt
20 from Tastries dated August 17, 2017.

21 11. Attached hereto as **Exhibit 31** is a true and correct copy of an excerpt from the
22 deposition transcript of Taylor Arbolante taken on February 16, 2022.

23 12. Attached hereto as **Exhibit 32** is a true and correct copy of an excerpt from the
24 deposition transcript of Rosemary Perez taken on September 26, 2018 and February 17, 2022.

25 13. Attached hereto as **Exhibit 33** is a true and correct copy of Defendants', Catharine Miller
26 and Tastries, Responses to DFEH's Form Interrogatory No. 17.1.

27 14. Attached hereto as **Exhibit 34** is a true and correct copy of an excerpt from the
28 deposition transcript of Mireya Rodriguez-Del Rio taken on July 28, 2021.

1 I declare under penalty of perjury under the laws of the State of California that the foregoing
2 is true and correct.

3 Executed on this 18th day of July, 2022, at Los Angeles, California.
4
5

6 DEPARTMENT OF FAIR EMPLOYMENT
7 AND HOUSING

8 By: 
9 Gregory J. Mann
10 Attorneys for the Department of Fair
11 Employment and Housing
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EXHIBIT 23



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*

EXHIBIT 24

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 Q. How about macarons? Any --

2 A. A macaron is -- I'm sorry. Go ahead.

3 Q. Any decoration on macarons?

4 A. Yes.

5 Q. How about cinnamon rolls?

6 A. Yes.

7 Q. Any others, besides the gourmet cookies, that
8 you can think of that do not have decoration?

9 A. My keto cookie. Two out of my four muffins do
10 not have a top decoration. That's all I can think of
11 off the top of my head, going through the case.

12 Q. Okay. Thank you. Would Tastries sell those
13 products you just mentioned that do not have decoration
14 to a couple, same-sex couple, celebrating their
15 anniversary?

16 MR. JONNA: Objection. Incomplete
17 hypothetical. Vague and ambiguous.

18 A. Those would be in my case. I'd sell anything
19 in my case.

20 Q. If somebody ordered it in advance, a same-sex
21 couple to celebrate their anniversary, would Tastries
22 sell them to them?

23 A. No.

24 MR. JONNA: Same objections.

25 Q. Do you consider if a product, say like a

1 courthouse or they'll -- they call, and those are the
2 incidences I'm talking about.

3 Q. Have you noticed if there's any changes in the
4 amount of business Tastries receives when the case is in
5 the media?

6 A. Yes, and it's kind of like a double-edged
7 sword, because we will get people that come in, and
8 they'll buy a dozen cupcakes or cookies and say, "I
9 really want to support you. I believe in your case. I
10 believe in our constitution," but then we'll get brides
11 that will cancel their weddings because they feel
12 differently. Well, a cake is a lot more expensive than
13 a dozen cupcakes. And then on top of that, we get
14 bombarded by email, social media, and phone calls that
15 are just hateful. So there's two sides to that answer.

16 Q. Do you have a sense of what the net effect is
17 on business Tastries has?

18 A. Probably a loss overall, if you're talking
19 financially. If you're talking emotionally, definitely
20 a loss, but it is also wonderful to see the support and
21 the encouragement from a lot of people also.

22 Q. I think you've said that you -- tell me if it's
23 true, that you do not hold any negative views of LGBT
24 people based on their sexual orientation?

25 A. No.

EXHIBIT 25

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

DEPARTMENT OF FAIR
EMPLOYMENT AND HOUSING,

Petitioner,

v.

THE SUPERIOR COURT OF KERN
COUNTY,

Respondent;

CATHY'S CREATIONS, INC. et al.,

Real Parties in Interest.

F081781

(Kern Super. Ct. No. BCV-18-102633)

ORDER

BY THE COURT:*

This court is in receipt of the "Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief," and request for stay, filed by petitioner on September 29, 2020. Having conducted a preliminary review of the matter, the "Ruling on Defendants' Motion to (1) Compel Responses To Interrogatories, (2) Compel Production of Documents, and (3) For Leave to Depose Specific Individuals," issued in Kern County Superior Court case No. BCV-18-102633 on August 11, 2020, is hereby ordered stayed pending determination of the petition in the above entitled action, or until further order of this court.

Real parties in interest, Cathy's Creations, Inc. d/b/a Tastries and Catherine Miller, are directed to file informal supplemental briefing within 30 days of the date of issuance of this order. Real parties in interest are specifically to address (1) why such discovery should be allowed without making a preliminary showing of direct or circumstantial

* Before Detjen, A.P.J., Franson, J. and Smith, J.

evidence that prosecutorial discretion was exercised with intentional and invidious discrimination (*People v. Montes* (2014) 58 Cal.4th 809, 828–829, citing *United States v. Armstrong* (1996) 517 U.S. 456, 464), and (2) why the discovery is not protected by the attorney-client privilege, work product doctrine, or common interest doctrine.

Petitioner is directed to file an informal response on or before 15 days from the date of filing of real parties in interest's informal supplemental briefing.

A handwritten signature in cursive script, appearing to read "Detjen".

Detjen, A.P.J.

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

DEPARTMENT OF FAIR
EMPLOYMENT AND HOUSING,

Petitioner,

v.

THE SUPERIOR COURT OF KERN
COUNTY,

Respondent;

CATHY'S CREATIONS, INC. et al.,

Real Parties in Interest.

F081781

(Kern Super. Ct. No. BCV-18-102633)

ORDER

BY THE COURT:*

Good cause appearing, let an alternative writ issue directing respondent to:

- (a) Vacate its August 11, 2020, order in Kern County Superior Court case No. BCV-18-102633 granting in part real parties in interest's motion to compel responses to interrogatories and production of documents, and leave to depose specific individuals, as real parties in interest have not made a threshold showing of invidious discrimination as required under California law to allow for discovery regarding a selective prosecution defense (*People v. Montes* (2014) 58 Cal.4th 809); or
- (b) Show cause before this court why the requested relief should not issue. If respondent elects to show cause, it must address how the United States Supreme Court's ruling in *Masterpiece Cakeshop, Ltd. v. Colorado Civil*

* Before Franson, A.P.J., Smith, J. and Meehan, J.

Rights Commission (2018) 138 S.Ct. 1719 (*Masterpiece Cakeshop*) addresses discovery issues relevant herein, and specifically why it would supersede or supplant California evidence law. While no California court has addressed this issue, the Washington State Supreme Court’s analysis of this issue is persuasive. (See, e.g., *State v. Arlene’s Flowers, Inc.* (2019) 193 Wn.2d 469, 498–499 (*Arlene’s Flowers*) [rejecting an expansive reading of *Masterpiece Cakeshop*].) “It would take a broad expansion of *Masterpiece Cakeshop* to apply its holding—that the *adjudicatory* body hearing a case must show religious neutrality—to a *party*. ... By arguing that *Masterpiece Cakeshop*’s holding about adjudicatory bodies applies to the attorney general’s enforcement decisions, appellants essentially seek to revive their selective-enforcement claim.” (*Arlene’s Flowers*, at p. 498.) Accordingly, in *Arlene’s Flowers* the Washington Supreme Court declined “to expansively read *Masterpiece Cakeshop* to encompass the ‘very different context’ of executive branch discretion. We do not believe that the Supreme Court intended to silently overturn any of its selective-enforcement precedents or to create a carve-out within that precedent for claims based on the free exercise clause.” (*Arlene’s Flowers*, at p. 499.)

Respondent shall inform this court of its decision within 30 days of the issuance of this order. If respondent elects to show cause, the matter will be stayed and set for briefing and hearing.



Franson, A.P.J.

EXHIBIT 26

1 BEFORE THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING
2 OF THE STATE OF CALIFORNIA

3
4 IN THE MATTER OF THE COMPLAINT OF)
5 EILEEN RODRIGUEZ-DEL RIO,)
6 MIREYA RODRIGUEZ-DEL RIO,)
7 Complainants,)
8 vs.) Case No.:
9 CATHY'S CREATIONS, INC. DBA) 935123-315628
10 TASTRIES DBA TASTRIES BAKERY;)
11 AND CATHY MILLER,)
12 Respondents.)
13

14 DEPOSITION OF
15 MICHAEL ALLEN MILLER
16 LOS ANGELES, CALIFORNIA
17 SEPTEMBER 26, 2018

18
19
20 ATKINSON-BAKER, INC.
21 COURT REPORTERS
22 (800) 288-3376
23 www.depo.com

24 REPORTED BY: DIANA WHITESEL, CSR No. 6287
25 FILE NO.: AC09F34

1 and other employees definitely order them.

2 Q. What is the distinction between buying the
3 ingredients and ordering them?

4 A. Buying means that they're at the store and they
5 physically purchase the item and bring it to the bakery.

6 Ordering it would be -- I don't know the
7 practice they follow to order, but it would be just
8 placing the order while they're at the store, either --
9 by whatever means that is communicated with the vendor.

10 Q. Do you buy boxed cake mixes for Tastries'
11 bakers to use?

12 A. I do.

13 Q. Are there particular brands of boxed cake mixes
14 that you buy?

15 A. Yes.

16 Q. What are those brands?

17 A. For the white, we use Pillsbury, and other
18 flavors we use Betty Crocker.

19 Q. Do you know what those other flavors are that
20 you -- for which you buy Betty Crocker cake mix?

21 A. French vanilla, chocolate, German chocolate,
22 lemon, strawberry, and then spice.

23 Q. Any other flavors for which you buy boxed cake
24 mixes?

25 A. Not that we are currently buying.

1 There's one other -- we have in the past bought
2 carrot, but we're not buying that anymore. We're making
3 that a different way. We have bought red velvet, but
4 we're not buying that currently. And there's one other
5 chocolate, and I'm forgetting the name of it. But,
6 anyway, we're not buying that currently either.

7 Q. You buy buttercream for Tastries' bakers to
8 use?

9 A. Yes.

10 Q. Where do you find buttercream for Tastries'
11 bakers to use?

12 A. At Sam's Club.

13 Q. Any particular brand of buttercream that you
14 buy?

15 A. I don't think it's a brand. It's just the
16 buttercream they offer. It's a Wal-Mart brand, I guess.

17 Q. What flavors of buttercream do you buy at Sam's
18 Club?

19 A. It's labeled as white and chocolate.

20 Q. Sorry, just to clarify for my understanding.
21 Is that one type of buttercream labeled both white and
22 chocolate, or two types?

23 A. No, two types.

24 Q. Are you involved in any way in the actual
25 baking or creation of Tastries cakes?

EXHIBIT 27

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF KERN
METROPOLITAN DIVISION**

CERTIFIED COPY

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

No. BCV-18-102633

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.

DEPOSITION OF JESSICA CRIOLLO

Taken at

**Keleher's Litigation Services
19237 Flightpath Way, Suite 100
Bakersfield, California**

Wednesday, July 14, 2021 at 9:37 A.M.

Reported by:

Jean Keleher, CSR #4136

JOB No. 21-101323A

1 Q. Do you have pictures of those cakes on your
2 Instagram page?

3 A. Not on my Instagram, no, or Facebook.

4 Q. Do you have pictures of them elsewhere?

5 A. Possibly in my Google photos.

6 Q. Okay. Okay. And your testimony is that none
7 of those cakes that you decorated were made from
8 scratch?

9 A. Correct.

10 Q. Okay. And at Tiers of Joy, do you use
11 store-brought frosting or fondant?

12 A. No.

13 Q. Okay. Let's take a look here.

14 You don't remember of ever working on a
15 wedding cake when you were at Tastries, correct?

16 A. I don't remember. And I want to say that
17 because we were still new, she wouldn't let us touch a
18 wedding cake. So I would -- I would be safe to say
19 that I never did.

20 Q. Do you remember there being like a minimum of
21 six months of experience before you could do a wedding
22 cake? Does that sound correct?

23 A. I don't remember the time frame or discussing
24 the time frame, but I know that we weren't because we
25 were new.

11:21:30 1 what we -- what happened is that we would have all the
2 cakes for the week listed on a sheet, like an Excel
3 spreadsheet, and it would just give you for the list of
4 chocolate you need to have two of this size, five of
5 this size, six of this size. So I don't know exactly
6 specifically which cakes I did, but most likely I baked
7 portions of wedding cakes, if not all the wedding
8 cakes.

11:21:43 9 Q. You couldn't be certain -- as you sit here
10 today, you can't be certain that you actually baked a
11 wedding cake, you just think you probably did, but you
12 can't be a hundred percent certain. Is that correct?

11:21:57 13 A. If I spent all of Tuesday or -- if it was all
14 Monday or all Tuesday or all Tuesday and all Wednesday
15 baking, it has a high chance of me baking coming across
16 one of the cakes that I baked.

17 Q. The answer to my question is, you can't be
18 certain but you think there's a high chance that you
19 baked a wedding cake, correct?

11:22:11 20 A. Correct.

21 Q. Okay. How did you make the carrot cakes?

11:22:27 22 A. You grab the box that's labeled carrot cakes
23 and then you add the eggs, the oil, and the water
24 that's given in directions on the back of the box, mix
25 it, pour it into the pan, and then --

1 Q. You don't remember those cakes being made from
2 all scratch, the carrot cakes?

3 A. I'm sorry. Can you --

4 Q. I know it's been a long time, so I understand.

5 Just think about it for a second. Do you
6 remember that the carrot cakes, specifically those were
7 made from scratch? Do you remember that?

8 A. At Tastries?

9 Q. Correct.

10 A. They were not.

11 Q. Okay. Okay. When you were at Tastries, you
12 didn't follow like the box recipe, right? I mean you
13 didn't -- that wasn't part of what you did, it wasn't a
14 recipe from a box?

15 A. It was.

16 Q. Okay. And you say here that twice you helped
17 deliver Tastries cakes to customers' wedding
18 celebrations.

19 Do you see that in paragraph seven?

20 A. Yes.

21 Q. Is that accurate?

22 A. Yes.

23 Q. What do you remember about those events? Why
24 were you asked to do that, do you remember?

25 A. I think I was just the one that was available

EXHIBIT 28

1 JANETTE WIPPER (#275264)
Chief Counsel
2 ANTHONY GRUMBACH (#195107)
Associate Chief Counsel
3 GREGORY J. MANN (#200578)
Senior Staff Counsel
4 TIMOTHY MARTIN (#300269)
Staff Counsel
5 DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING
6 320 4th Street, Suite 1000
Los Angeles, CA 90013
7 Telephone: (213) 439-6799
Facsimile: (888) 382-5293
8
9 Attorneys for Plaintiff, DFEH
(Fee Exempt, Gov. Code, § 6103)

10
11 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **IN AND FOR THE COUNTY OF KERN**

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

16 Plaintiff,

17 vs.

18 CATHY'S CREATIONS, INC. d/b/a
19 TASTRIES, a California corporation; and
CATHARINE MILLER,

20 Defendants.

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

23 Real Parties in Interest.
24

Case No. BCV-18-102633-DRL

**DECLARATION OF JESSICA
CRIOLLO**

EXHIBIT

204



Declaration of Jessica Criollo

I, Jessica Criollo, declare as follows:

1. I have personal knowledge of the matters set forth herein. If called as a witness, I could testify competently as to the truth of the matters asserted herein, except as to those matters asserted upon information and belief, and, as to those matters, I believe them to be true.

2. I worked at Tastries Bakery in Bakersfield, California, between August 2015 and October 2015. Cathy Miller was my boss at Tastries. I was hired as a decorator, but Cathy later changed my position to focus more on baking than on decorating.

3. Tastries kept display cakes in the lobby for the purpose of helping customers decide what they'd like their cakes to look like. Cathy encouraged me to use my extra time to create display cakes by recreating cake designs in a stack of photos printed out from websites such as Pinterest. These were not photos of Tastries cakes. Instead, they were photos of cakes made by other bakers and bakeries. Cathy kept the stack of photos in a back room, which all the Tastries bakers and decorators could access.

4. When working on a pre-ordered "custom" cake, I would consult the completed order form. Some order forms included a drawing showing the requested design. Other order forms included an attached photo showing the requested design. Some of the attached photos were of Tastries display cakes. Many of the attached photos were of cakes made by other bakers or bakeries.

5. Many Tastries cakes, including pre-ordered "custom" cakes, can be used for any number of purposes, not just wedding celebrations.

6. None of the wedding cakes I worked on at Tastries were made from scratch. The chocolate and white buttercream frosting Tastries used for its wedding cakes was store-bought and used straight out of the container. Most of Tastries' cake flavors were made from store-bought box mixes, often without any additions, like pudding.

7. Twice, I helped deliver Tastries cakes to customers' wedding celebrations. No guests asked me questions about the cakes. I believe the delivery times were purposely scheduled earlier than the arrival of guests and the wedding party. I didn't leave Tastries business cards or any other



1 material that identified Tastries by name at the venues. I delivered each wedding cake in a car that
2 wasn't marked with Tastries' name or logo.

3 8. I run my own custom cake business, Tiers of Joy Cake Designs, which I co-founded
4 after leaving Tastries. Tiers of Joy provided a cake for the wedding celebration of Eileen and Mireya
5 Rodriguez-Del Rio after Tastries refused to sell them the cake they requested. When I met with
6 Eileen and Mireya to discuss the cake they wanted, I was surprised by how simple the design was.
7 The cake they wanted, and which we provided, was a simple, white, textured, three-tiered cake.

8 9. Making a cake like the one we provided Eileen and Mireya is quick and easy for an
9 experienced baker and decorator. Even a new baker or decorator in training at Tastries would be
10 expected to be able to make such a simple cake. Adding flowers made of frosting to the cake would
11 be just as simple. Frosting flowers, including rosettes, are very common cake decorations any cake
12 decorator should be able to quickly and easily make by squeezing frosting through a standard piping
13 bag tip.

14 I declare under penalty of perjury under the laws of the State of California that the foregoing
15 is true and correct.

16 Executed on this 19 th day of February, 2019, in Bakersfield, California.

17
18 
19 _____
20 Jessica Criollo
21
22
23
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25
26
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28



EXHIBIT 29

**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

10:08:03 1 is -- it seemed like a reputable place that we were
2 comfortable with. She made us feel that
3 comfortableness to where we trusted her.

4 Q. So you decided that day that you were
10:08:16 5 going to get your wedding cake from Tastries?

6 A. Yes.

7 Q. Okay. When you went in the store that
8 day, did you purchase anything?

9 A. My wife purchased a little tote thingy.

10:08:32 10 Q. Oh, okay. What -- what exactly is that?

11 A. It's -- she's a teacher, so it's a little
12 tote thingy that you can carry stuff in.

13 Q. Okay. Do you remember approximately how
14 much it was?

10:08:49 15 A. Maybe 20 bucks.

16 Q. Okay. When you were in there -- so how
17 many times have you been in Tastries total in your
18 life? I mean, you said there was that one time.
19 How many other times were you there?

10:09:02 20 A. Twice.

21 Q. Twice. Okay.

22 And when you were there the first time,
23 did you notice religious decor and bible verses?

24 A. No.

10:09:11 25 Q. Did you notice there was Christian music

EXHIBIT 30



Tastries Bakery

3665 Rosedale Hwy.
Bakersfield
CA 93308

1-555-48

16.21.29 8/17/2017

1	Miscellaneous	\$20.00
	Subtotal	\$20.00
	Total	\$20.00
	Payment	\$20.00
	Balance	\$0.00

Mastercard 8/17/2017 \$20.00

Ref: 804155202

Approved Auth. 04240Z

Last 4 digits [REDACTED]

Station: Tastries1
Rosemary Perez

661-322-1110
tastriesbakery@gmail.com
www.tastriesbakery.com

Signature



1-555-48

EXHIBIT 31

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KERN

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

Plaintiff,)

vs.)

No. BCV-18-102633-JEB

CATHY'S CREATIONS, INC.,)
d/b/a TASTRIES, a California)
Corporation; and CATHARINE)
MILLER,)

Defendants.)

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

Real Parties in Interest.)

REMOTE DEPOSITION OF
TAYLOR ARBOLANTE
BAKERSFIELD, CALIFORNIA
FEBRUARY 16, 2022

Atkinson-Baker, A Veritext Company
(800) 288-3376

REPORTED BY: JULIE SHAFFER, CSR NO. 8754, RMR
FILE NO.: 5085414

1 Cathy's policy and that she should have a freedom of
2 choice.

3 Q Did you notice any difference in the
4 amount of business that Tastries received after
5 that?

6 MR. JONNA: Objection. Vague and ambiguous.
7 Overbroad.

8 THE WITNESS: Well, I know that -- after every
9 time we appeared in the media, we did get more
10 customers coming in. So we are busier after our
11 media appearances.

12 BY MR. MANN:

13 Q Has anybody ever been -- Cathy done any of
14 those media appearances on behalf of Tastries?

15 A No. Not that I'm aware of.

16 Q Do you know if any employees were
17 interviewed by the media afterwards?

18 A No. Not that I'm aware of.

19 Q Going back to the design standards, did
20 you ever hear any employees that were frustrated or
21 expressed disagreement with not providing orders for
22 same sex weddings?

23 A Just one, yes.

24 Q And who was that?

25 A Her name was Natalie. I don't recall her

EXHIBIT 32

BEFORE THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE COMPLAINT OF)
EILEEN RODRIGUEZ-DEL RIO,)
MIREYA RODRIGUEZ-DEL RIO,)

CERTIFIED COPY

Complainants,)

vs.)

Case No.:
935123-315628

CATHY'S CREATIONS, INC. DBA)
TASTRIES DBA TASTRIES BAKERY;)
AND CATHY MILLER,)

Respondents.)

DEPOSITION OF
ROSEMARY PEREZ
LOS ANGELES, CALIFORNIA
SEPTEMBER 26, 2018

ATKINSON-BAKER, INC.
(800) 288-3376
www.depo.com

REPORTED BY: DIANA WHITESEL, CSR No. 6287

FILE NO.: AC09F34

1 A. Not anymore.

2 Q. So it sounds like before there were people?

3 A. My manager. She's no longer there.

4 Q. Who was that?

5 A. Natalie then. I don't know if she got married
6 but it was Natalie Boatwright.

7 Q. Was there anybody else that did --

8 A. Nicole did. They were co-managers. So she did
9 a little bit too. I don't remember Nicole's last name.

10 Q. She's no longer there either?

11 A. No.

12 Q. And do you have just an estimate about when
13 they left?

14 A. Well, I don't recall exact dates. One became a
15 teacher.

16 Q. Was it like 2018, or this year, or prior to
17 this year?

18 A. No. It was last year.

19 Q. For both of them?

20 A. Yes.

21 Q. And do you have a sense of how many,
22 specifically, wedding cake orders Natalie or Nicole did
23 versus Cathy?

24 A. She always oversaw them so it would be about
25 the same.

1 Q. In what situation was that? Individually or at
2 meetings?

3 A. Before you're getting hired.

4 Q. And is that policy written down anywhere?

5 A. It's in the handbook. Although the handbook
6 that I got -- but now I know there's a new handbook.

7 Q. It sounds like the handbook that you got when
8 you started did not have it written?

9 A. No, it did.

10 Q. It did, too. The new handbook also has it;
11 correct?

12 A. Correct.

13 Q. With the handbook, is that something when you
14 start as an employee you sign?

15 A. Yes. It's like in a packet.

16 Q. Did you ever hear any other employees express
17 that they didn't like the policy of not providing
18 wedding cakes for same-sex weddings?

19 A. One, which was my manager, Natalie.

20 Q. Do you know if she ever told Cathy that she
21 didn't agree with that policy?

22 A. No. She would not tell Cathy a lot of things.
23 To us she would, but not to her.

24 Q. Was -- I think earlier we talked about -- I
25 don't know if we got specific, but there was one

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF KERN

- - -

DEPARTMENT OF FAIR EMPLOYMENT) CASE NO.: BCV-18-102633JEB
AND HOUSING, an agency of the)

State of California,)

Plaintiff,)

v.)

CATHY'S CREATIONS, INC., dba)

TASTRIES, a California)

corporation; and CATHARINE)

MILLER,)

Defendants.)

EILEEN RODRIGUEZ-DEL RIO and)

MIREYA RODRIGUEZ-DEL RIO,)

Real Parties in Interest.)

DEPOSITION OF ROSEMARY PEREZ
VIA ZOOM VIDEOCONFERENCE
FEBRUARY 17, 2022

ATKINSON-BAKER, A VERITEXT COMPANY
(800) 288-3376

BY: TRACY LANTERNIER, CSR No.: 13433
FILE NO. 5085423

1 A Yes. Definitely. The -- the bad phone calls
2 always come with media exposure.

3 Q I'm not -- I'm talking just about orders and
4 business. Did you notice a difference where there would
5 be more or less orders around the media appearances?

6 A Yeah. There would be some -- a boost in orders.

7 Q Have you ever made any media appearances about
8 the design standards on behalf of Tastries?

9 A No.

10 Q Ever been interviewed about it by any media?

11 A No.

12 Q Were there discussions amongst the employees at
13 Tastries about, you know, the messages you referred to as
14 harassing?

15 A Yeah. They were maybe to calm them down.
16 Because some of them were young or can't handle that type,
17 you know, just like it would really rattle them. So,
18 yeah, we would have conversations. I would let them know
19 that -- like, you know, don't take it personal and don't
20 answer the phones, let me answer the phones. People are,
21 you know, just being unkind right now and hopefully, it
22 goes away.

23 Q Did anybody ever have any knowledge or evidence
24 that the Rodriguez-Del Rios were participating in those
25 harassing messages?

EXHIBIT 33

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Paul M. Jonna, SBN 265389
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Jeffrey M. Trissell, SBN 292480
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LiMANDRI & JONNA LLP
P.O. Box 9120
Rancho Santa Fe, California 92067
Telephone: (858) 759-9948
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Thomas Brejcha, *pro hac vice**
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THOMAS MORE SOCIETY
309 W. Washington St., Ste. 1250
Chicago, IL 60606
Tel: (312) 782-1680
*Application forthcoming

*Attorneys for Defendants Cathy's Creations,
Inc. and Catharine Miller*

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF KERN**

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

Plaintiff;

v.

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

**Defendant Catharine Miller's
Objections & Responses to Form
Interrogatories**

[Set Two]

Action Filed: October 17, 2018
Trial Call: July 25, 2022

1 PROPOUNDING PARTIES: Plaintiff DEPARTMENT OF FAIR EMPLOYMENT
2 AND HOUSING

3 RESPONDING PARTIES: Defendant CATHARINE MILLER

4 SET NO.: TWO

5
6 Pursuant to Section 2030.210 of the California Code of Civil Procedure, Defendant Catharine
7 Miller responds and objects to Plaintiff Department of Fair Employment and Housing's ("DFEH")
8 Second Set of Form Interrogatories.

9
10 **GENERAL OBJECTIONS**

11 1. Miller objects to each interrogatory insofar as it seeks information (1) not in Miller's
12 possession, custody, or control; (2) prepared for or in anticipation of litigation, protected by the
13 attorney-client privilege, contains work product, or is otherwise privileged; (3) publicly available or
14 otherwise equally available to the DFEH or equally available from third parties; (4) that does not
15 specifically refer to the events forming the subject matter of this litigation; (5) not relevant to the
16 subject matter of this litigation nor reasonably calculated to lead to the discovery of admissible
17 evidence; and (6) that imposes any requirement or obligation beyond the scope of permissible
18 discovery.

19 2. These responses and objections are made on the basis of information now known to
20 Miller and are made without waiving any further objections to, or admitting the relevancy or
21 materiality of, any of the information requested. Miller's investigation, discovery, and preparation
22 for proceedings are continuing and all answers are given without prejudice to its right to introduce or
23 object to any subsequently discovered documents, facts, or information. Miller likewise does not
24 waive the right to object, on any and all grounds, to (1) the evidentiary use of the information
25 contained in these responses and objections and (2) discovery requests relating to these objections
26 and responses.

27 3. Miller will provide its responses based on terms as they are commonly understood,
28 and consistent with the California Code of Civil Procedure. Miller objects to and will refrain from

1 extending or modifying any words employed in the requests to comport with expanded definitions or
2 instructions.

3 4. Miller objects to the requests to the extent that they seek trade secrets protected by
4 Section 1060 of the California Evidence Code. Miller will only provide information protected by
5 Section 1060 under the terms of an adequate protective order binding on the parties or under
6 equivalent safeguards.

7 Subject to and without waiving the foregoing objections, Miller responds as follows:
8

9 **OBJECTIONS & RESPONSES TO FORM INTERROGATORIES**

10 **FORM INTERROGATORY NO. 17.1:**

11 Is your response to each request for admission served with these interrogatories an
12 unqualified admission? If not, for each response that is not an unqualified admission: (a) state the
13 number of the request; (b) state all facts upon which you base your response; (c) state the names,
14 ADDRESSES, and telephone numbers of all PERSONS who have knowledge of those facts; and (d)
15 identify all DOCUMENTS and other tangible things that support your response and state the name,
16 ADDRESS, and telephone number of the PERSON who has each DOCUMENT or thing.
17

18 **RESPONSE:**

19 **Objections.** Defendant objects to this interrogatory on the basis that it seeks disclosure of
20 information protected under the First Amendment, the attorney-client privilege, the work-product
21 doctrine, privacy rights, or any other applicable privilege or immunity.

22 Defendant further objects to this request as unduly cumulative and duplicative of the DFEH's
23 other written discovery, including its: (1) 41 Administrative Interrogatories; (2) 42 Special
24 Interrogatories propounded on Defendant Tastries; (3) 22 Special Interrogatories propounded on
25 Defendant Miller; (4) 40 Requests for Admission propounded on Defendant Tastries; (5) 32
26 Requests for Admission propounded on Defendant Miller; (6) First Set of Form Interrogatories
27 propounded on Defendant Tastries; and (7) First Set of Form Interrogatories propounded on
28 Defendant Miller.

1 Defendant objects to this request as duplicative and unduly burdensome because it
2 encompasses information readily or more accessible to the DFEH from the DFEH's own files,
3 including, but not limited to, court filings, the discovery during the DFEH's administrative
4 investigation, and other correspondence and other communications to the DFEH. Providing that
5 information again in answering this request would be oppressive and unduly burdensome. (See Code
6 Civ. Proc., § 2030.230.) All of Defendant's factual and legal contentions have already been made
7 clear in the discovery and voluminous briefing and discovery in this case so far, including the multiple
8 appeals and cross-summary judgment briefing.

9 **Response.** Subject to and without waiving the above objections, Defendant responds as
10 follows: Defendant objects that there is literally no purpose to this request except to harass and
11 burden Defendant. (a-b) The bases for Defendant's denial of various Requests for Admission are
12 explained in Defendant's responses to those requests, and incorporated herein by reference.
13 (c) Beyond the witnesses of the Incident, which have previously been identified (Cathy Miller,
14 Rosemary Perez, Eileen and Mireya Rodriguez-Del Rio, Patrick and Sam Grijalva-Salazar, and
15 Margaret Del Rio), all current and former Tastries' employees identified in charts dated December
16 14, 2017 and July 1, 2019—and which is being updated again in response to the present round of
17 written discovery—are witnesses supporting Defendant's affirmative defenses. It is premature at this
18 time to identify which of those current or former employees Defendant plans to call at trial in this
19 case, and Defendant reserves the right to call any current or former employee. (d) Defendant has
20 produced nearly 2,000 pages of documents which are responsive to Plaintiff's written discovery and
21 provide the bases for Defendant's responses to written discovery in this case.

22
23 LiMANDRI & JONNA LLP

24
25 Dated: February 24, 2022

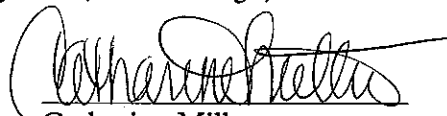
26 By: 
27 Charles S. LiMandri
28 Paul M. Jonna
Jeffrey M. Trissell
Milan L. Brandon II
Attorneys for Defendants

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VERIFICATION

I, Catharine Miller, am a defendant in this action. I have read the document, **Defendant Catharine Miller's Responses to Form Interrogatories [Set Two]** and know its contents. The information supplied in the foregoing document is based on my own personal knowledge or has been supplied by my attorneys or other agents or compiled from available documents and is provided as required by law. The information in the foregoing document is true to the extent of my personal knowledge. As to the information provided by my attorneys or other agents or compiled from available documents, including all contentions and opinions, I do not have personal knowledge but made a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party. Thus, I am informed and believe that the matters stated in the foregoing document are true and on that ground certify or declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 24th day of February 2022, at San Diego, California.


Catharine Miller

Charles S. LiMandri, SBN 110841
cslimandri@limandri.com
Paul M. Jonna, SBN 265389
pjonna@limandri.com
Jeffrey M. Trissell, SBN 292480
jtrissell@limandri.com
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309 W. Washington St., Ste. 1250
Chicago, IL 60606
Tel: (312) 782-1680
*Application forthcoming

*Attorneys for Defendants Cathy's Creations,
Inc. and Catharine Miller*

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF KERN**

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

Plaintiff;

v.

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

**Defendant Cathy's Creations, Inc.
dba Tastries Bakery's Objections and
Responses to Form Interrogatories**

[Set Two]

Action Filed: October 17, 2018
Trial Call: July 25, 2022

1 PROPOUNDING PARTIES: Plaintiff DEPARTMENT OF FAIR EMPLOYMENT
2 AND HOUSING
3 RESPONDING PARTIES: Defendant CATHY'S CREATIONS, INC. dba TASTRIES
4 BAKERY
5 SET NO.: TWO
6

7 Pursuant to Section 2030.210 of the California Code of Civil Procedure, Defendant Cathy's
8 Creations Inc. dba Tastries ("Tastries Bakery") responds and objects to Plaintiff Department of Fair
9 Employment and Housing's ("DFEH") Second Set of Form Interrogatories.

11 GENERAL OBJECTIONS

12 1. Tastries Bakery objects to each interrogatory insofar as it seeks information (1) not in
13 Tastries Bakery's possession, custody, or control; (2) prepared for or in anticipation of litigation,
14 protected by the attorney-client privilege, contains work product, or is otherwise privileged;
15 (3) publicly available or otherwise equally available to the DFEH or equally available from third
16 parties; (4) that does not specifically refer to the events forming the subject matter of this litigation;
17 (5) not relevant to the subject matter of this litigation nor reasonably calculated to lead to the
18 discovery of admissible evidence; and (6) that imposes any requirement or obligation beyond the
19 scope of permissible discovery.

20 2. These responses and objections are made on the basis of information now known to
21 Tastries Bakery and are made without waiving any further objections to, or admitting the relevancy
22 or materiality of, any of the information requested. Tastries Bakery's investigation, discovery, and
23 preparation for proceedings are continuing and all answers are given without prejudice to its right to
24 introduce or object to any subsequently discovered documents, facts, or information. Tastries Bakery
25 likewise does not waive the right to object, on any and all grounds, to (1) the evidentiary use of the
26 information contained in these responses and objections and (2) discovery requests relating to these
27 objections and responses.

28 3. Tastries Bakery will provide its responses based on terms as they are commonly

1 understood, and consistent with the California Code of Civil Procedure. Tastries Bakery objects to
2 and will refrain from extending or modifying any words employed in the requests to comport with
3 expanded definitions or instructions.

4 4. Tastries Bakery objects to the requests to the extent that they seek trade secrets
5 protected by Section 1060 of the California Evidence Code. Tastries Bakery will only provide
6 information protected by Section 1060 under the terms of an adequate protective order binding on
7 the parties or under equivalent safeguards.

8 Subject to and without waiving the foregoing objections, Tastries Bakery responds as follows:
9

10 **OBJECTIONS & RESPONSES TO FORM INTERROGATORIES**

11 **FORM INTERROGATORY NO. 17.1:**

12 Is your response to each request for admission served with these interrogatories an
13 unqualified admission? If not, for each response that is not an unqualified admission: (a) state the
14 number of the request; (b) state all facts upon which you base your response; (c) state the names,
15 ADDRESSES, and telephone numbers of all PERSONS who have knowledge of those facts; and (d)
16 identify all DOCUMENTS and other tangible things that support your response and state the name,
17 ADDRESS, and telephone number of the PERSON who has each DOCUMENT or thing.
18

19 **RESPONSE:**

20 **Objections.** Defendant objects to this interrogatory on the basis that it seeks disclosure of
21 information protected under the First Amendment, the attorney-client privilege, the work-product
22 doctrine, privacy rights, or any other applicable privilege or immunity.

23 Defendant further objects to this request as unduly cumulative and duplicative of the DFEH's
24 other written discovery, including its: (1) 41 Administrative Interrogatories; (2) 42 Special
25 Interrogatories propounded on Defendant Tastries; (3) 22 Special Interrogatories propounded on
26 Defendant Miller; (4) 40 Requests for Admission propounded on Defendant Tastries; (5) 32
27 Requests for Admission propounded on Defendant Miller; (6) First Set of Form Interrogatories
28 propounded on Defendant Tastries; and (7) First Set of Form Interrogatories propounded on

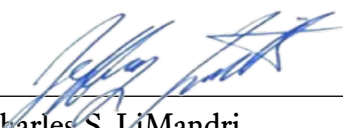
1 Defendant Miller.

2 Defendant objects to this request as duplicative and unduly burdensome because it
3 encompasses information readily or more accessible to the DFEH from the DFEH's own files,
4 including, but not limited to, court filings, the discovery during the DFEH's administrative
5 investigation, and other correspondence and other communications to the DFEH. Providing that
6 information again in answering this request would be oppressive and unduly burdensome. (See Code
7 Civ. Proc., § 2030.230.) All of Defendant's factual and legal contentions have already been made
8 clear in the discovery and voluminous briefing and discovery in this case so far, including the multiple
9 appeals and cross-summary judgment briefing.

10 **Response.** Subject to and without waiving the above objections, Defendant responds as
11 follows: Defendant objects that there is literally no purpose to this request except to harass and
12 burden Defendant. (a-b) The bases for Defendant's denial of various Requests for Admission are
13 explained in Defendant's responses to those requests, and incorporated herein by reference.
14 (c) Beyond the witnesses of the Incident, which have previously been identified (Cathy Miller,
15 Rosemary Perez, Eileen and Mireya Rodriguez-Del Rio, Patrick and Sam Grijalva-Salazar, and
16 Margaret Del Rio), all current and former Tastries' employees identified in charts dated December
17 14, 2017 and July 1, 2019—and which is being updated again in response to the present round of
18 written discovery—are witnesses supporting Defendant's affirmative defenses. It is premature at this
19 time to identify which of those current or former employees Defendant plans to call at trial in this
20 case, and Defendant reserves the right to call any current or former employee. (d) Defendant has
21 produced nearly 2,000 pages of documents which are responsive to Plaintiff's written discovery and
22 provide the bases for Defendant's responses to written discovery in this case.

23 LiMANDRI & JONNA LLP

24
25 Dated: February 24, 2022

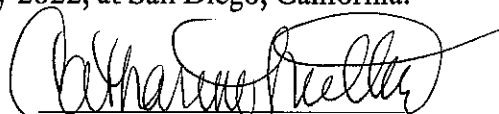
26 By: 
27 Charles S. LiMandri
28 Paul M. Jonna
Jeffrey M. Trissell
Milan L. Brandon II
Attorneys for Defendants

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VERIFICATION

I, Catharine Miller, am the owner of Defendant Cathy's Creations, Inc. dba Tastries, a defendant in this action. I have read the document, **Defendant Cathy's Creations, Inc. dba Tastries Bakery's Responses to Form Interrogatories [Set Two]** and know its contents. I make this verification on behalf of Tastries Bakery. The information supplied in the foregoing document is based on my own personal knowledge or has been supplied by my attorneys or other agents or compiled from available documents and is provided as required by law. The information in the foregoing document is true to the extent of my personal knowledge. As to the information provided by my attorneys or other agents or compiled from available documents, including all contentions and opinions, I do not have personal knowledge but made a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party. Thus, I am informed and believe that the matters stated in the foregoing document are true and on that ground certify or declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 24th day of February 2022, at San Diego, California.



Catharine Miller

EXHIBIT 34

**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 tagged 87 people. Do you think that was part of her
2 thinking?

3 MR. MANN: Objection. Calls for speculation.
4 Assumes facts not in evidence. Lacks foundation.

02:20:50 5 A. I don't know her reasons.

6 (Exhibit 569 previously marked.)

7 Q. (By MR. JONNA) Okay. Let's take a look at
8 569. This is a Facebook page from a gentleman named
9 Ted Freitas.

02:21:13 10 Do you recognize these faces here?

11 A. I can't see anything yet.

12 Q. Oh, I apologize. I forgot to press the
13 button. I'm sorry. Hold on.

14 All right. Ted Freitas. I don't know which
02:21:25 15 one is Ted, but do you recognize either of these
16 people?

17 A. I don't.

18 Q. Well, I guess the same -- on August 26th, they
19 write this long comment about Tastries. Yeah.

02:21:42 20 Tastries Bakery. Basically with a similar story where
21 she's going to transfer the order to Gimme Some Sugar
22 and they say this is discrimination. Love is love.

23 Did you ever see this post before?

24 A. I can't say right now if I did or not.

02:22:08 25 Q. Do you have a vague recollection of hearing

Exhibit EEE

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Attorneys for the Department
Fee Exempt (Gov. Code, § 6103)

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Kern County Superior Court
By Maribel Villalon, Deputy

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.

CATHY'S CREATIONS, INC. d/b/a
TASTRIES, a California corporation; and
CATHARINE MILLER,

Defendants.

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

Real Parties in Interest.

Case No. BCV-18-102633

**PLAINTIFF DEPARTMENT OF FAIR
EMPLOYMENT AND HOUSING'S
TRIAL BRIEF**

Date: July 25, 2022

Time: 9:00 a.m.

Dept.: J

Location: 1215 Truxtun Ave, Bakersfield,
CA 93301

Judge: Hon. J. Eric Bradshaw

Action Filed: October 17, 2018

Trial Date: July 25, 2022

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1 **I. INTRODUCTION**

2 Plaintiff Department of Fair Employment and Housing (DFEH) brings this Unruh Civil
3 Rights Act (Unruh Act) action on behalf of the State of California and Real Parties in Interest Eileen
4 and Mireya Rodriguez-Del Rio (Real Parties) against defendant Cathy’s Creations, Inc. dba Tastries
5 (Tastries) and its owner Cathy Miller (Miller) because Tastries makes an unlawful distinction
6 between its gay and straight customers, who seek preordered baked goods for their marriage-related
7 events. Since it opened in January 2013 as a for-profit commercial bakery in Bakersfield, Tastries has
8 enforced its policy banning the sale of preordered baked goods to gay and lesbian couples celebrating
9 any aspect of their union, including marriage, anniversaries, engagements, bridal showers, bachelor
10 or bachelorette parties, celebrations of a proposal, or civil unions. The Unruh Act prohibits Tastries
11 from making such distinctions between customers based on sexual orientation.

12 Defendants seek to defeat the Unruh Act claim by arguing that (1) defendants do not make
13 distinctions based on their gay customers’ sexual orientation (status), but rather on their conduct of
14 entering into marriage; and (2) that referring gay customers to an unaffiliated bakery satisfies Tastries
15 obligation to provide “full and equal” services under the Unruh Act. There is no legal support for
16 these arguments. The United States and California Supreme Courts have rejected making a
17 distinction between status (sexual orientation) and conduct closely associated with that status
18 (marriage between women). Moreover, sending customers to another bakery, owned and staffed by
19 others, using different recipes and equipment in a different facility does not provide full and equal
20 services. Tastries sells baked goods to celebrate straight couples’ marriage-related events. Refusing to
21 provide the same services to its gay customers is not full and equal services. This Court should find
22 that defendants’ refusal to fulfill Real Parties’ wedding cakes order violated the Unruh Act.

23 Next, defendants assert that Tastries is exempt from the Unruh Act based on Miller’s First
24 Amendment free exercise of religion and free speech rights. Miller holds a sincerely held religious
25 belief that marriage is between a man and a woman. DFEH does not dispute or question her sincerely
26 held religious belief. Freedom of religion is one of our nation’s fundamental values and is protected
27 by the First Amendment, California Constitution, and the Unruh Act. The Unruh Act’s goal to
28 provide customers equal access and participation in the public marketplace is also an essential right.

1 When those rights conflict, the U.S. Supreme Court holds that the First Amendment’s right to the free
2 exercise of religion “does not relieve an individual of the obligation to comply with a ‘valid and
3 neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that
4 his religion prescribes (or proscribes).’” (*Employment Div., Ore. Dept. of Human Res. v. Smith* (1990)
5 494 U.S. 872, 876-877 (*Smith*)). Indeed, “a law that is neutral and of general applicability need not be
6 justified by a compelling governmental interest even if the law has the incidental effect of burdening
7 a particular religious practice.” (*Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993) 508 U.S. 520,
8 531.) *Smith* and *Church of Lukumi* remain good law and are controlling.¹

9 Moreover, in 2008, the California Supreme Court in *North Coast Women’s Care Medical*
10 *Group v. Super. Ct. (North Coast)* (2008) 44 Cal.4th 1145 held that the Unruh Act was a “valid and
11 neutral law of general applicability” requiring business establishments to provide “full and equal”
12 services to all persons notwithstanding their sexual orientation, and that a religious objector had no
13 constitutional right to an exemption on the ground that compliance with the law was contrary to the
14 objector’s religious beliefs or free speech rights. (*Id.* at p. 1155.) *North Coast* controls here. The
15 Unruh Act satisfies deferential review under *Smith* and *North Coast*, and defendants’ free exercise
16 defense fails.

17 Defendants’ free speech defense likewise fails because the Unruh Act satisfies judicial
18 review under the free speech clause of the First Amendment. The refusal to sell the plain cakes the
19 Rodriguez-Del Rios wanted to order was discriminatory conduct, not speech. (*Rumsfeld v. Forum*
20 *for Academic and Institutional Rights, Inc. (FAIR)* (2006) 547 U.S. 47, 66.) A business selling cakes
21 and other baked goods with no written messages in the commercial marketplace sends no message
22 by doing so, nor does such a commercial transaction endorse any event or message of the purchaser.
23 Precedent makes clear that the act of selling cakes is not inherently expressive: the ultimate
24 observers of plain cakes and baked goods receive no message from the baked goods, regardless of
25

26 ¹ Defendants’ reliance on the Supreme Court’s decision in *Fulton v. City of Philadelphia,*
27 *Pennsylvania* (2021) 141 S.Ct. 1868 is misplaced because, among other distinctions, that case did not
28 involve a neutral and generally applicable public accommodations law and the contractual provision
at issue there contained an explicit exemption clause. The Unruh Act is a neutral and generally
applicable public accommodations law and has no exemption provision, explicit or otherwise.

1 whether a baker intends to send a message. (See *ibid.*) But even accepting defendants’ novel
2 assertion that plain cakes are pure speech under the First Amendment, they cannot prevail;
3 application of the Unruh Act here satisfies even strict scrutiny, much less intermediate scrutiny.
4 (*North Coast, supra*, 44 Cal.4th 1145.)

5 Contrary to defendants’ allegation, DFEH does not seek an order forcing Tastries to sell
6 preordered wedding cakes in the retail marketplace to all customers, including gay couples. Rather, as
7 suggested by the California Supreme Court in *North Coast*, Tastries has at least three options to
8 comply with the Unruh Act. (1) Tastries can follow Unruh’s explicit language and sell all its
9 preordered goods and provide its services to all customers. (2) Rather than provide all services to all
10 customers irrespective of sexual orientation, Tastries may choose to cease offering preordered
11 wedding cakes for sale to anyone.² (3) Miller and any employees that share her religious beliefs can
12 step aside from participating in the preparation of preordered baked goods sold to same-sex couples
13 and allow Tastries’ willing employees—there are willing employees—to manage the process. (*North*
14 *Coast, supra*, at p. 1159.) In this way, the Unruh Act is fairly balanced with respect to Miller’s First
15 Amendment rights. Tastries may choose the option it prefers to comply with the Unruh Act.

16 At base, while Miller’s religious views merit respect and careful consideration, Tastries’
17 policy and defendants’ reading of the First Amendment are simply too broad. Were courts to adopt
18 their overbroad approach to the First Amendment, it would impermissibly threaten to both re-
19 entrench the “community-wide stigma” against gay couples (*Masterpiece Cakeshop, Ltd. v. Colorado*
20 *Civil Rights Com’n* (2018) 138 S.Ct. at p. 1727) and vitiate the “general rule” that a business’s
21 objections to same-sex marriage “do not allow business owners ... to deny protected persons equal
22 access to goods and services under a neutral and generally applicable public accommodations law.”
23 (*Ibid.*, citing *Newman v. Piggie Park Enters., Inc.* (1968) 390 U.S. 400, 402, fn. 5.) Indeed, in 1968 in
24 *Piggie Park*, the Supreme Court rejected a restaurant owner’s free exercise and free speech defenses
25 against application of the federal public accommodations law that prohibited him from discriminating

26 _____
27 ² (*North Coast* at p. 1159 [Physicians could “avoid any conflict between their religious beliefs and
28 [Unruh]” by “simply refus[ing] to perform” the fertility treatment at issue to any patients]; see *Smith*
v. Fair Empl. & Hous. Com. (FEHC) (1996) 12 Cal.4th 1143, 1170 [Landlord whose religious beliefs
motivated her to deny rental housing to non-married couples could avoid conflict between her beliefs
and FEHA “by selling her units and redeploying the capital in other investments.”].)

1 on the basis of race. (*Newman v. Piggie Park Enters., Inc.* (1968) 390 U.S. 400, 402, fn. 5.)

2 Defendants' arguments here are no more persuasive when asserted to excuse the distinctions Tastries
3 makes based on sexual orientation.

4 **II. PARTIES AND REPRESENTATION**

5 **A. Plaintiff DFEH and Real Parties in Interest Eileen and Mireya Rodriguez-Del Rio**

6 DFEH is the state agency charged with enforcing the civil rights of all Californians to use any
7 public accommodation without discrimination because of sexual orientation under the Unruh Act.
8 (Gov. Code, § 12948; Civ. Code, § 51, subd. (b).) In the exercise of this power, DFEH is authorized
9 to file civil lawsuits in its name on behalf of aggrieved persons as the Real Parties in Interest. (Gov.
10 Code, § 12930, subd. (f)(2).) Real Parties in Interest Eileen and Mireya Rodriguez-Del Rio (Real
11 Parties), who were denied full and equal services by Tastries, are Bakersfield residents and "persons"
12 that have a homosexual sexual orientation within the meaning of the Unruh Act. (Civil Code, § 51,
13 subd. (e)(7); Gov. Code, § 12926, subd. (s).) DFEH is represented by Gregory J. Mann, Kendra
14 Tanacea, and Soyeon Mesinas.

15 **B. Defendants Cathy's Creations, Inc. and Catharine Miller**

16 Defendant Cathy's Creations, Inc. dba Tastries (Tastries) is an active, for-profit California
17 corporation operating in Bakersfield and is a "business establishment" within the meaning of the
18 Unruh Act. (Civ. Code, § 51, subd. (b).) Defendant Miller is the sole shareholder of Tastries and is
19 individually liable under the Unruh Act for denying Real Parties' order. (Civ. Code, § 52, subd. (a).)
20 Tastries has been open for business to the public from January 2013 through the present. Defendants
21 are represented by Charles S. LiMandri, Paul M. Jonna, and Jeffery M. Trissell.

22 **III. PROCEDURAL BACKGROUND**

23 On August 26, 2017, Tastries refused to take the Rodriguez-Del Rios' wedding cakes³ order
24 once Miller discovered they were a lesbian couple seeking preordered cakes to celebrate their
25 marriage. On October 7, 2017, Real Parties exchanged vows and hosted their wedding reception with
26
27

28 ³ The Rodriguez-Del Rios sought a plain (i.e., no written message), round, three-tiered buttercream frosting main cake and two sheet cakes to serve their wedding reception guests.

1 a main wedding cake that was very similar to the main cake they sought to order from Tastries. (See
2 Exhibit 1, Rodriguez-Del Rio's actual wedding cake.)

3 **A. DFEH's Investigation of Real Parties' Administrative Complaint**

4 On October 18, 2017, Real Parties filed a verified written complaint with DFEH. On October
5 10, 2018, after an investigation, DFEH issued a notice of cause finding. On October 15, 2018, all
6 parties participated in an unsuccessful mandatory mediation.

7 **B. DFEH's Government Code Section 12974 Preliminary Injunction Action**

8 Based on a preliminary investigation, DFEH filed a petition for preliminary relief only
9 pursuant to Government Code section 12974 on December 13, 2017. DFEH's request for a
10 preliminary injunction to stop Tastries' discrimination based on sexual orientation was denied on
11 February 5, 2018, and judgment on the preliminary action was entered on May 10, 2018. Defendants
12 filed a motion to enforce the judgment to stop DFEH's investigation and bar DFEH from filing a civil
13 action. Defendants' motion was granted in part on September 13, 2018, and DFEH filed a Petition for
14 Writ of Mandamus challenging the order. The Fifth Appellate District stayed the superior court order
15 and, after full briefing, granted DFEH's requested relief, vacating the superior court's order, which
16 allowed DFEH to complete its investigation and file this civil action.

17 **C. Civil Action**

18 On October 17, 2018, DFEH filed the complaint, and filed the First Amended Complaint on
19 November 29, 2018. Defendants filed their First Verified Amended Answer on April 22, 2019.

20 During discovery, defendants sought evidence to support their unfounded argument that
21 DFEH is biased against them and Miller's religious beliefs. On November 15, 2019, defendants filed
22 a motion to compel after DFEH objected to their discovery requests. The court granted in part
23 defendants' motion to compel, forcing DFEH to file another petition for writ of mandamus on August
24 11, 2020. On January 27, 2021, the Fifth Appellate District vacated the superior court's discovery
25 order, concluded defendants failed to proffer any threshold evidence of DFEH bias, and held they
26 were not entitled to any discovery on the issue: defendants "have not made a threshold showing of
27
28

1 invidious discrimination as required under California law to allow for discovery regarding a selective
2 prosecution defense (*People v. Montes* (2014) 58 Cal.4th 809)”⁴

3 All parties filed and argued motions for summary adjudication. On January 6, 2022, this Court
4 denied both parties’ motions for summary adjudication (except the claim for punitive damages).

5 **IV. ANALYTICAL FRAMEWORK FOR FACTUAL AND LEGAL QUESTIONS TO BE**
6 **RESOLVED AT TRIAL**

7 Based upon the undisputed evidence, the issues to be decided at trial are legal in nature.

8 **A. Unruh Act Violation**

9 DFEH claims Tastries violated the Unruh Act by making a distinction between their straight
10 customers and Real Parties on the basis of sexual orientation. Plaintiff DFEH bears the burden of
11 proof on this claim:

12 (1) Did Tastries make a distinction that denied full and equal services to Real Parties?

13 (2) Was Tastries’ perception of Real Parties’ sexual orientation a motivating reason for
14 Tastries’ conduct? (CACI No. 3060; CACI Verdict Form (VF) 3030.)

15 Defendants argue that DFEH cannot establish its Unruh Act claim based upon two arguments:

16 (1) that defendants do not make a distinction based on Real Parties’ sexual orientation/status but as to
17 Real Parties’ conduct (marriage between two women); and (2) that defendants’ referral to a different
18 bakery satisfies their Unruh Act obligations to provide the full and equal services irrespective of

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20
21
22 ⁴ There is no evidence that DFEH was biased during the investigation or litigation. (See DFEH’s MIL
23 No. 3; Defendants’ Opposition to DFEH’s MIL No. 3; Defendants’ MILs No. 7 and 8.) As shown by
24 the highlighted exhibits supporting defendants’ arguments of alleged bias, defendants seek to prevent
25 DFEH from citing to relevant precedent and arguing by analogy to other civil rights cases. This is
26 mere legal analysis, not bias. (See Trissell Decl. (Third) ISO of Defendants’ Oppositions to Plaintiff’s
27 Motions in Limine, Ex. 21 [Notice of Filing Discrimination Complaint; Ex. 22C [DFEH legal brief
28 quoting *North Coast*]; Ex. 22D [DFEH legal brief quoting and discussing relevant precedent, *Piggie
Park* and *Hobby Lobby*]; Ex. 22E [legal arguments based on controlling case law]; Ex. 25F [DFEH
counsel arguing analogy to *Piggie Park* during oral argument]; Ex. 23 [DFEH notice of cause finding
and mandatory dispute resolution]; Ex. 24B [DFEH counsel’s oral argument]; Ex. 25A [DFEH legal
brief citing to *Piggie Park* and *North Coast* as precedent]; and Ex. 25B [DFEH legal brief relying
upon *North Coast*]; Ex. 25C [DFEH legal brief citing to *North Coast*]. None of these cited instances
are evidence of bias or non-neutrality. These are legal arguments properly made under existing law. It
is clear that defendants are seeking to exclude DFEH’s legal arguments based on relevant legal
precedent. As the court should rule, this is wholly improper.

sexual orientation. Both arguments fail as a matter of law.⁵ For these reasons, the court should find defendants violated the Unruh Act, then turn to evaluating defendants' affirmative defenses.

B. Free Exercise of Religion Defense

Tastries claims it is exempt from the Unruh Act because it prevents Tastries from operating consistently with Miller's religious beliefs. Tastries bears the burden of proof on this affirmative defense:

(1) Whether Miller's free exercise rights exempt Tastries from baking and selling any preordered baked goods for gay couples celebrating any event related to their marriage?

(a) Is the baking and selling of preordered baked goods for any event celebrating a marriage between women a religious practice?

(b) Does baking and selling preordered baked goods for any event celebrating a gay couple's marriage substantially burden Miller's religious practice?

(c) If the answer to (a) or (b) is "no," apply rational basis review. If the answer to both is "yes," apply strict scrutiny: is the Unruh Act the least restrictive means of achieving California's compelling interest in prohibiting sexual orientation discrimination by business establishments?

C. Free Speech Defense

Tastries claims it is exempt from the Unruh Act because its application here violates Miller's freedom of speech by requiring Tastries to express a message that Miller does not wish to send when Tastries sells preordered baked goods for use in an event celebrating a gay couple's marriage. Tastries bears the burden of proof on this affirmative defense:

(1) Whether Miller's free speech rights exempt Tastries from baking and selling any preordered baked goods for gay couples celebrating any event related to their marriage?

(a) Is the baking and selling of preordered baked goods pure speech? If so, apply strict scrutiny.

⁵ See DFEH's MIL No. 1 (no distinction between status and conduct) and DFEH's Opposition to Defendants' MIL No. 4 (referral to another bakery does not cure an Unruh Act violation).

1 (b) If not, does the baking and selling of preordered baked goods constitute
2 symbolic speech (conduct with expressive elements)?

3 (i) Did Tastries intend to convey a particular message by preparing and
4 selling preordered baked goods for any event related to gay couples' marriages? What was the
5 message and who were the intended recipients?

6 (ii) Considering the surrounding circumstances, was there a great
7 likelihood that Tastries' intended message would be understood by guests who viewed and ate
8 preordered baked goods at events celebrating gay couples' marriages?

9 Unless the answers to both (i) and (ii) are yes, apply intermediate scrutiny. If the answers to
10 both questions are "yes," apply strict scrutiny.

11 V. STATEMENT OF FACTS

12 A. Defendants Violated the Unruh Act by Intentionally Making a Distinction Based on 13 Sexual Orientation

14 1. Cathy's Creations, Inc. dba "Tastries" Is a For-Profit Corporation with No 15 Official Religious Affiliation

16 Cathy's Creations, Inc. does business as "Tastries," a commercial bakery open to the public in
17 Bakersfield. Tastries is a for-profit S Corporation with no official religious affiliation. Miller is the
18 sole shareholder. Tastries is a separate legal entity from Miller, which files its own tax returns,
19 procures insurance for the bakery, holds the bakery's business license and health permits, holds all
20 bank accounts, and leases the bakery space in the Rosedale Mall. Miller admits that there is a legal
21 distinction between her and Tastries. (Miller's Response to RFAs, Set 1, No. 9.) As of 2020, Miller
22 has been a W-2 employee of Tastries, which has approximately sixteen employees. There are front-
23 end employees, who work with customers and handle sales, and bakers and decorators in the back,
24 who produce cakes and other baked goods, including cookies, brownies, donuts, cupcakes,
25 macaroons, eclairs, chocolate covered strawberries, and other treats.

26 Miller also admits that Tastries' business operations are not officially affiliated with any
27 religious organization. (Miller's Response to RFAs, Set 1, No. 29.) Tastries is not incorporated as a
28 religious entity. (Miller's Response to RFAs, Set 1, No. 30.)

1 **2. Tastries’ Design Standards Policy Makes a Facial Distinction Between Gay**
2 **and Straight Couples Purchasing Preordered Baked Goods to Celebrate**
3 **Events Related to Their Marriage**

4 Tastries sells premade baked goods, which are available for immediate purchase from its
5 refrigerated cases. The “case” baked goods include cakes, cupcakes, brownies, cookies, etcetera.
6 Tastries also takes advance orders for all its baked goods. When ordered in advance, Tastries refers to
7 its baked good—even cookies, brownies, etcetera—as “custom,” regardless of the design or artistry
8 required to prepare such goods. An immediately available, non-custom case cake or other baked good
9 purchased from the refrigerated case on a given day becomes a “custom” baked good when ordered
10 in advance.

11 From January 2013 to the present, Tastries has enforced its Design Standards to decline gay
12 couples any preordered baked goods for any celebratory event related to their marriage:
13 bachelor/bachelorette parties, engagement parties, weddings, anniversary parties, housewarming
14 parties, bridal showers, etcetera. These Design Standards apply to all preordered baked goods.
15 Pursuant to the Design Standards:

16 We do not accept requests that do not meet Tastries Standards of Service,
17 including but not limited to designs or an intended purpose based on the following:

- 18 • Requests portraying explicit sexual content
- 19 • Requests promoting marijuana or casual drug use
- 20 • Requests featuring alcohol products or drunkenness
- 21 • Requests presenting anything offensive, demeaning or violent
- 22 • Requests depicting gore, witches, spirits, and satanic or demonic content
- 23 • Requests that violate fundamental Christian principals; wedding cakes must not
24 contradict God’s sacrament of marriage between a man and a woman⁶

25 Miller has enforced, and required Tastries’ employees to follow, Tastries’ policy to deny all
26 preordered baked goods to gay couples celebrating “[a]nything that has to do with the marriage [or]
27 ... [t]he union of a same-sex couple.” Miller confirmed there are no circumstances under which
28 Tastries would knowingly provide a preordered baked good for use in the celebration of a marriage

⁶ It must be noted that the first five bullet points refer to *depictions* on the cake—the design—whereas the last prohibition denies a protected class—gay and lesbian couples—preordered baked goods for any event related to the couples’ marriage. That is, the cake has nothing to do with design, but the intent of the celebratory event.

1 between women or men, even if the preordered cake was identical in shape and design to a premade
2 case cake.

3 Despite the Design Standards policy, other Tastries employees, who do not share Miller's
4 beliefs, have provided preordered wedding cakes to gay couples without Miller's knowledge. These
5 employees have been ready, willing, and able to serve Tastries' gay and lesbian customers in
6 Bakersfield.

7 For any preordered cake, the customer decides the details, often with help from a Tastries
8 employee, filling out a form to select the characteristics of their baked good or cake: size, shape,
9 number of tiers, colors, frosting, filling, and decorations. Customers regularly reference a pre-existing
10 case cake, display cake, or photo of an existing cake when describing the cake-design they want. As
11 Tastries employees have testified, Miller does not participate in the design or preparation of every
12 preordered cake. Moreover, Tastries can deliver, and has delivered, cakes to venues without
13 becoming involved in weddings or other events by dropping off cakes before guests or participants
14 arrive. Miller's husband, Mike Miller, does the vast majority of wedding cake deliveries. When
15 discussing how he tries to keep a low profile when delivering cakes to weddings, Mike Miller
16 testified: "But it's a private event, and I wanted to, you know, honor it as their event, not our event."
17 (M. Miller 2022 Depo., 33:6-8.)

18 **3. Eileen and Mireya Rodriguez-Del Rio Visit Tastries in Search of Wedding** 19 **Cakes and are Invited to Return for a Cake Tasting**

20 In August 2017, after months of planning an exchange of vows and reception to celebrate
21 their December 2016 marriage, the Rodriguez-Del Rios were prepared to order a cake. Eileen and
22 Mireya visited Tastries on August 17, 2017, as prospective customers. Once inside, front-end Tastries
23 associate Rosemary Perez (Perez), who had been trained on and understood Tastries' Design
24 Standards policy, assisted them.

25 Because the Rodriguez-Del Rios wanted a simple cake design for their main cake, they chose
26 a design based on one of Tastries' pre-existing sample display cakes—a cake with three round tiers,
27 frosted with wavy white buttercream frosting, decorated only with a few frosting flowers on the
28 sides—along with two matching sheet cakes. None of the cakes would have any written message or a

1 cake topper. After discussing the details of the cake, the Rodriguez-Del Rios considered ordering
2 their cakes from Tastries on the spot. But Perez invited Eileen and Mireya to return for a tasting and
3 they agreed.⁷

4 **4. Tastries Makes a Distinction Based on Sexual Orientation to Deny Eileen and** 5 **Mireya's Wedding Cakes Order**

6 On August 26, 2017, the Rodriguez-Del Rios, along with their wedding party Patrick Grijalva
7 Salazar and his now-husband Sam Reyes Salazar and Mireya's mother Margaret Del Rio, arrived for
8 the cake tasting appointment at Tastries. Having chosen the design in the prior meeting with Perez,
9 they were there to choose flavors. Perez greeted the wedding party but did not believe she could
10 complete the order. She found Miller, who was preparing to teach a class, and asked Miller to take
11 over the order and tasting. Perez never told Miller that the Rodriguez-Del Rios were a gay couple,
12 and she never told the Rodriguez-Del Rios that Tastries had a policy, based on Miller's religious
13 beliefs, to refuse to bake and sell wedding cakes to gay couples.

14 Miller greeted the Rodriguez-Del Rio party and asked for details about their order. Mireya
15 explained she wanted a three-tiered round cake and two sheet cakes with matching finish. To screen
16 as to whether or not this was a gay or straight couple, Miller asked: "who is the groom," and the
17 wedding party pointed to Eileen and said, "she is." This is how Miller discovered Eileen and Mireya
18 were lesbians who wanted the cakes to celebrate their wedding. At this point, Miller told Eileen and
19 Mireya that Tastries could not take their order and bake the cakes because she did not condone same-
20 sex marriage. Miller then told the Rodriguez-Del Rios that she could refer them to another bakery,
21 Gimme Some Sugar. But the Rodriguez-Del Rios had already sampled Gimme Some Sugar's wares
22 and had decided against ordering from that bakery. Overwhelmed, upset, and frustrated by Miller's
23 refusal to serve them because of who they are, married women hosting their wedding reception, the
24 Rodriguez-Del Rios and their party left the bakery. As a result, Mireya and Eileen suffered
25
26

27 ⁷ On August 22, 2017, Mireya emailed Tastries to sign up for the August 26, 2017 cake tasting. The
28 next day, August 23, 2017, Natalie from Tastries replied that she scheduled the Rodriguez-Del Rios'
tasting at 12:15 p.m. (Ex. 516, 8/23/2017 emails.) This was a second invitation from Tastries to
return, sample the cake flavors, and complete their order.

1 humiliation and emotional distress after being refused service at a bakery open to the public because
2 they were gay.

3 **5. The Rodriguez-Del Rios Exchange Vows and Host Reception with Family and**
4 **Friends**

5 In October 2017, Mireya and Eileen exchanged vows and held a reception at Metro Galleries
6 with a cake similar to the one they wanted to order from Tastries. Any other facts defendants may
7 attempt to introduce after Tastries' denial is irrelevant to any claims or defenses to be tried in this
8 matter. (Evid. Code, § 350.)

9 **VI. LEGAL ARGUMENT**

10 This case requires a two part analysis: (1) was there an Unruh Act violation, yes; (2) do
11 defendants' affirmative defenses exempt them from Unruh Act compliance, no. With respect to (2),
12 all the following legal analysis answers the question, "what level of scrutiny applies to the judicial
13 review of the Unruh Act?" Because the Unruh Act is a neutral and generally applicable public
14 accommodations law being applied neutrally here by DFEH, its application satisfies the required
15 rational basis review under the federal and California free exercise clauses. And because Tastries'
16 baked goods are not pure speech but at most symbolic speech, the Unruh Act satisfies intermediate
17 scrutiny review. (See *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (2006) 547 U.S.
18 47, 66 (*FAIR*).)

19 Unruh's application to defendants' denial of full and equal services survives even strict
20 scrutiny review—which defendants erroneously insist applies here—by being the least restrictive
21 means to accomplish California's compelling interest in eradicating discrimination based on sexual
22 orientation. (*North Coast, supra*, 44 Cal.4th at p. 1158 [Unruh is the least restrictive means to
23 eradicate sexual orientation discrimination].) The California Supreme Court has unequivocally held
24 that the Unruh Act "furthers California's compelling interest in ensuring full and equal access to
25 medical treatment irrespective of sexual orientation" (*Ibid.*) and that eradicating discrimination by
26 business establishments serves the state's compelling interest. (See *Catholic Charities of Sacramento,*
27 *Inc. v. Super. Ct.* (2004) 32 Cal.4th 527, 564 [gender discrimination].) The California Legislature has
28 codified the State's compelling interest in protecting its citizens from sexual orientation

1 discrimination: “California’s robust nondiscrimination laws include protections on the basis of sexual
2 orientation” (Gov. Code, § 11139.8, subd. (a).) And while “[r]eligious freedom is a cornerstone of
3 law and public policy in the United States, and the Legislature strongly supports and affirms this
4 important freedom ..., [t]he exercise of religious freedom should not be a justification for
5 discrimination.” (Gov. Code, § 11139.8, subd. (a)(3) and (4).) Thus, even if this Court accepts all of
6 defendants’ arguments regarding their free exercise and free speech defenses and applies strict
7 scrutiny review, the Unruh Act satisfies such review, and DFEH prevails here.

8 **A. The Evidence Establishes a Violation of the Unruh Act**

9 The Unruh Act prohibits businesses from making distinctions between their customers based
10 on sexual orientation. (Civ. Code, § 51.) Tastries admits it is a business establishment under the
11 Unruh Act. (Tastries Responses to RFAs, Set 1, No. 1.) The primary purpose of the Unruh Civil “is to
12 compel recognition of the equality of all persons in the right to the particular service offered by an
13 organization or entity covered by the act.” (*Curran v. Mount Diablo Council of the Boy Scouts* (1983)
14 147 Cal.App.3d 712, 733.)

15 The California Supreme Court’s decision in *North Coast* controls here, and concerned the
16 same legal and factual issues relevant to this case: an Unruh Act violation based on sexual
17 orientation, a free exercise defense, and a free speech defense. In *North Coast*, a lesbian patient sued
18 a medical group and two of its employee physicians alleging that their refusal to perform artificial
19 insemination for her violated the Unruh Act. (*North Coast, supra*, 44 Cal.4th at pp. 1152–1153.)
20 Defendant doctors, citing their religious beliefs and free speech rights, refused to artificially
21 inseminate the patient because of her sexual orientation. The question before the California Supreme
22 court was whether the physicians’ First Amendment right to free exercise of religion or free speech
23 rights exempted them from conforming their conduct to the Unruh Act’s requirement to provide
24 ““full and equal accommodations, advantages, facilities, privileges, or services[.]”” (*Id. at p. 1154*,
25 citing the Unruh Act.) The court held the rights of religious freedom and free speech, as guaranteed in
26 both the federal and the California Constitutions, do not exempt a medical clinic’s physicians from
27 complying with the Unruh Act’s “prohibition against discrimination based on a person’s sexual
28 orientation.” (*Id. at p. 1150*.)

1 The U.S. Supreme Court, in *Employment Div., Dept. of Human Resources of Oregon v. Smith*
2 (1988) 485 U.S. 660 (*Smith*), held that “a religious objector has *no federal constitutional right* to an
3 exemption from a neutral and valid law of general applicability on the ground that compliance with
4 the law is contrary to the objector’s religious beliefs.” This holding was applied in *Catholic Charities*
5 *of Sacramento v. Superior Court* (2004) 32 Cal.4th 527, where the California Supreme court rejected
6 a defense by an employer affiliated with the Roman Catholic Church that it was exempt from
7 complying with the Women’s Contraceptive Equity Act.

8 *Smith* is controlling. The Unruh Civil Rights Act is a neutral and valid law of general
9 applicability. It requires business establishments to provide “full and equal accommodations,
10 advantages, facilities, privileges, or services” to all persons notwithstanding their sexual orientation.
11 The First Amendment right to the free exercise of religion does not exempt defendants from
12 conforming their conduct to the Unruh Act’s antidiscrimination requirements, even if compliance
13 poses an incidental conflict with their religious beliefs. Businesses may apply their owners’ and
14 employees’ religious beliefs to choose the products and services they offer; but businesses may not
15 apply their owners’ and employees’ religious beliefs to choose their customers.

16 In order to prove a claim under the Unruh Act, DFEH must establish that Tastries made a
17 distinction that denied Real Parties full and equal services and that a motivating⁸ reason for
18 defendant’s conduct was its perception of Real Parties’ sexual orientation. (CACI No. 3060,
19 modified.)⁹ The undisputed evidence of Tastries’ long-standing policy to deny gay couples
20 preordered baked goods when such goods are freely available to straight couples proves an Unruh
21 Act violation.

22
23 ⁸ DFEH need only prove sexual orientation was a *motivating* reason. “Whether the FEHA standard
24 applies under the Unruh Act has not been addressed by the courts.” (CACI No. 3060, Directions for
25 Use). In adjudicating Unruh Act cases before and after *Harris v. City of Santa Monica* (2013) 56
26 Cal.4th 203, courts have articulated that plaintiff must only show that a protected characteristic was
27 only a motivating reason for defendant’s unlawful conduct. (See, *Turner v. Assoc. of Am. Med.*
28 *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).)

⁹ Where no actual damages are sought, “harm is presumed, and elements 3 and 4 may be considered
established” (CACI No. 3060, Directions for Use, citing Civil Code section 52(a); *Koire v. Metro*
Car Wash (1985) 40 Cal.3d 24, 33.) Violators of Unruh are “liable for each and every offense ... in
no case less than four thousand dollars (\$4,000).” (Civ. Code, § 52, subd. (a).)

1 **1. Defendants Intended to Make a Distinction Between Their Gay and Straight**
2 **Customers Seeking Marriage-Related Preordered Baked Goods**

3 In this case, Tastries, by and through its Design Standards policy, willfully denies goods and
4 services to gay couples, thereby making a distinction on account of their sexual orientation. Thus,
5 Tastries has violated the Unruh Act: “a person suffers discrimination under the [Unruh] Act when the
6 person presents himself or herself to a business with an intent to use its services but encounters an
7 exclusionary policy or practice that prevents him or her from using those services.” (*White v. Square,*
8 *Inc.* (2019) 7 Cal.5th 1019, 1023.) It is undisputed that Miller intended to make a distinction based on
9 the Rodriguez Del-Rios’ sexual orientation. Despite being invited back to Tastries to complete their
10 order, Eileen and Mireya encountered Tastries’ exclusionary policy and practice based on who they
11 were—a lesbian couple—which prevented them from obtaining Tastries goods and services.

12 Tastries admits that it will bake and sell preordered baked goods to straight couples
13 celebrating their marriage, but will not sell the very same goods to gay couples celebrating their
14 marriage. In other words, “but for” gay customers’ sexual orientation, Tastries would sell them the
15 products. This shows Tastries’ intent to make a distinction based on sexual orientation. There can be
16 no dispute that Miller has an intent to treat gay couples differently from straight couples. Intent need
17 not be of the criminal kind. Under the Unruh Act it is simply the willful intent to make a distinction
18 based on sexual orientation. Miller admits she has a policy to treat gay couples differently from
19 straight couples.¹⁰

20 **a. There is No Distinction Between Gay Status and Conduct Closely**
21 **Associated with that Status**

22 The U.S. and California Supreme Courts have rejected Tastries’ argument that it was not
23 motivated by the *status* of the Rodriguez-Del Rios as a gay couple, but by their *conduct* in entering a
24 same-sex marriage, to which Miller has religious objections. As a matter of law, however, this
25 purported conduct/status distinction collapses and should not be considered by this Court. (See
26 DFEH’s MIL No. 1.)

27
28 ¹⁰ See Tastries’ Response to RFAs Set 1, No. 5 [Admitted that Tastries did not attempt to refer the
Rodriguez-Del Rios to another bakery until after it learned they were a same-sex couple.]

1 The U.S. Supreme Court explicitly rejected the artificial distinction between *conduct* and
2 *status* defendants assert here. In *Christian Legal Soc. Chapter of the Univ. of California, Hastings*
3 *Coll. of the Law v. Martinez* (2010) 561 U.S. 661, a student religious group applying for official
4 recognition, Christian Legal Society (CLS), challenged a Hastings College of Law requirement that
5 officially recognized student groups must comply with the school’s nondiscrimination policy by
6 accepting all members. (*Id.* at p. 668.) CLS’s bylaws stated “that sexual activity should not occur
7 outside of marriage between a man and a woman,” and in violation of Hastings’s policy, CLS
8 excluded members who engaged in “unrepentant homosexual conduct.” (*Ibid.*) As a result, Hastings
9 rejected CLS’s application. (*Ibid.*) CLS sued, alleging the denial of its application violated its free
10 exercise, expressive association, and free speech rights. (*Id.* at p. 673.) CLS argued that it barred gay
11 students based on their *conduct and beliefs*, not their *status* as gay people. (*Id.* at p. 689.) The U.S.
12 Supreme Court disagreed, stating that “[t]his case itself is instructive in this regard [because] CLS
13 contends that it does not exclude individuals because of sexual orientation, but rather ‘on the basis of
14 a conjunction of conduct and the belief that the conduct is not wrong.’ [Citation.]” (*Id.* at p. 689.) The
15 Court continued, “[o]ur decisions have declined to distinguish between status and conduct in this
16 context.” (*Ibid.*, citing *Lawrence v. Texas* (2003) 539 U.S. 558, 575 [“When homosexual conduct is
17 made criminal by the law of the State, that declaration in and of itself is an invitation to subject
18 homosexual persons to discrimination.”] [*italics original*]; *Lawrence v. Texas*, *supra*, 539 U.S. at p.
19 583 [O’Connor, J., concurring in judgment] [“While it is true that the law applies only to conduct, the
20 conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such
21 circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as
22 a class.”].)

23 Likewise, the California Supreme Court refuses to distinguish between status and conduct
24 when a policy or law, even a purportedly facially neutral policy or law, excludes a class of people.
25 “In arguing that the marriage statutes do not discriminate on the basis of sexual orientation,
26 defendants rely upon the circumstance that these statutes, on their face, do not refer explicitly to
27 sexual orientation and do not prohibit gay individuals from marrying a person of the opposite sex.”
28 (*In re Marriage Cases* (2008) 43 Cal.4th 757, 839–40 [superseded by Constitutional amendment as

1 stated in *Hollingsworth v. Perry* (2013) 570 U.S. 693, 701].) The court continued: “[i]n our view, the
2 statutory provisions restricting marriage to a man and a woman cannot be understood as having
3 merely a disparate impact on gay persons, but instead properly must be viewed as directly classifying
4 and prescribing distinct treatment on the basis of sexual orientation.” (*Ibid.*) Indeed, “[b]y limiting
5 marriage to opposite-sex couples, the marriage statutes, realistically viewed, operate clearly and
6 directly to impose different treatment on gay individuals because of their sexual orientation.” (*Ibid.*;
7 *cf. Johnson Controls, Inc. v. Fair Emp. & Hous. Com.* (1990) 218 Cal.App.3d 517, 533-35 [purported
8 facially neutral safety policy banning conduct—“childbearing capacity”—was discrimination based
9 on gender status; a “‘possibility of pregnancy’ as a basis for refusal to hire should not be treated
10 different than a ‘gender based discrimination.’”]). “This is true even if the denial was pursuant to a
11 facially neutral policy.” (*In re Marriage Cases, supra*, 43 Cal.4th at pp. 839–40 citing *Koebke v.*
12 *Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 854.)

13 **2. Referral to An Unaffiliated Bakery is Not Full and Equal Services**

14 Tastries’ offer to refer the Rodriguez-Del Rios to an unaffiliated bakery—a bakery the couple
15 had already rejected—did not satisfy its obligation to provide full and equal services. (Civ. Code, §
16 51.) Providing full and equal services is a straightforward concept: businesses must provide their full
17 range of goods and services to all their customers irrespective of a customer’s protected
18 characteristic. (See *Masterpiece, supra*, 138 S.Ct. at p. 1727, citing *Piggie Park, supra*, 390 U.S. at p.
19 402, fn. 5.) Tastries’ offer to refer Eileen and Mireya to a different bakery, with different ownership,
20 staffed by different bakers and decorators using different recipes and ingredients, and located in a
21 different facility did not satisfy its obligation to provide full and equal services.

22 Relying on *Minton v. Dignity Health (Minton)* (2019) 39 Cal.App.5th 1155, Tastries asserts
23 that its referral to an unaffiliated bakery cures its Unruh Act violation. It does not. In *Minton*, a
24 transgender patient brought an Unruh Act claim based on gender identity against a tax-exempt
25 nonprofit corporation that owned and operated a large network of hospitals after the defendant
26 cancelled a hysterectomy prescribed to treat the patient’s diagnosed gender dysphoria. (*Id.* at p. 1158-
27 59.) Plaintiff’s doctor scheduled the procedure to take place at a Catholic hospital at which she had
28 privileges. (*Id.* at p. 1159.) Defendant canceled the procedure because, due to the hospital’s Catholic

1 religious affiliation, it did not allow hysterectomies to treat gender dysphoria, even though it
2 permitted hysterectomies to address other diagnoses. (*Ibid.*) After canceling the procedure, defendant
3 rescheduled it for three days later than originally scheduled and changed the location to another of its
4 hospitals—one not affiliated with the Catholic Church. (*Ibid.*)

5 The court of appeal held that plaintiff alleged sufficient facts to support a violation of the
6 Unruh Act based on defendant’s cancelation of the procedure at the Catholic hospital. (*Id.* at p. 1165.)
7 The court found an Unruh Act violation in *Minton*, even though defendant promptly performed the
8 procedure at an *affiliated* hospital. Here, Tastries has no affiliation with Gimme Some Sugar (or any
9 other bakery), which could have had numerous orders and/or calendar conflicts that prevented it from
10 fulfilling the Rodriguez Del-Rios’ order.¹¹ There is no written or oral agreement that Gimme Some
11 Sugar *must* fulfil the order for any gay couple referred by Tastries. In short, there is no affiliation and
12 no guarantee of service, not to mention all the differences between Tastries and other bakeries listed
13 above. Therefore, Tastries does not provide “full and equal” services by offering to refer, or even by
14 referring, gay customers to unaffiliated bakeries lacking Tastries’ religious objections. The
15 Rodriguez-Del Rios wanted Tastries’ cakes, not cakes from Gimme Some Sugar. Tastries would have
16 baked and sold the cakes to a straight couple celebrating their marriage; offering anything less to
17 Eileen and Mireya was not an offer to provide full and equal services.

18 The *Minton* court relied on *North Coast*: “Dignity Health’s arguments were soundly rejected
19 in *North Coast* The Supreme Court, applying a strict scrutiny analysis, held that any burden the
20 [Unruh] Act places on the exercise of religion is justified by California’s compelling interest in
21 ensuring full and equal access to medical treatment for all its residents, and that there are no less
22 restrictive means available for the state to achieve that goal The court also rejected the contention
23 that compelling doctors to perform a procedure on all persons ‘infringes upon their First Amendment
24 rights to free speech and free exercise of religion.’ ...” (*Minton, supra*, 39 Cal.App.5th at p. 625). In
25 short, no California court has suggested that sending gay customers to an unaffiliated business
26
27

28 ¹¹ See Tastries Response to RFAs, Set 1, No. 19 [Admitted that Tastries cannot guarantee that
protentional customers it refers to another bakery will actually be able to obtain a cake from them.]

1 worked by unassociated staff satisfies the Unruh Act’s requirement that a business, such as Tastries,
2 provide full and equal services regardless of sexual orientation.

3 **B. Miller’s First Amendment Rights Do Not Exempt Tastries from Complying with the**
4 **Unruh Act**

5 The following analysis concerns the level of scrutiny to apply to review of the Unruh Act.
6 DFEH argues for rational basis review under *Smith* (free exercise) and intermediate scrutiny review
7 under *FAIR* (free speech). Defendants argue for strict scrutiny under both defenses. The California
8 Supreme Court has not decided the level of scrutiny to apply in these situations. (*North Coast, supra*,
9 44 Cal.4th at p. 1158.)

10 For analytical purposes only, California courts have cut to the chase and applied strict scrutiny
11 review, and conclusively found that the Unruh Act satisfies strict scrutiny as the least restrictive
12 means to achieve California’s compelling interest in prohibiting discrimination based on sexual
13 orientation. (*North Coast, supra*, 44 Cal.4th at p. 1158.) A law prohibiting discrimination is the least
14 restrictive means to prevent discrimination. The Unruh Act does just that. The California Legislature
15 codified the State’s compelling interest in protecting its citizens from sexual orientation
16 discrimination: While “[r]eligious freedom is a cornerstone of law and public policy in the United
17 States, and the Legislature strongly supports and affirms this important freedom..., [t]he exercise of
18 religious freedom should not be a justification for discrimination.” (Gov. Code, § 11139.8, subd. (a).)
19 This Court should follow the guidance provided by the California Supreme Court and Legislature and
20 hold that the Unruh Act meets even strict scrutiny review here, such that defendants are not exempt
21 from their Unruh Act obligations, and Tastries must provide full and equal services regardless of its
22 customers’ sexual orientation.

23 **1. Free Exercise of Religion: the Unruh Act is a Neutral and Generally**
24 **Applicable Public Accommodations Law that Satisfies Deferential Review**
25 **Under *Smith* and California Law**

26 United States Supreme Court “decisions have consistently held that the right of free exercise
27 does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general
28 applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes

1 (or proscribes).” (*Smith, supra*, 494 U.S. at p. 879 [quoting *United States v. Lee* (1982) 455 U.S.
2 252, 263, fn. 3 (Stevens, J., concurring)].) The United States Supreme Court reaffirmed the *Smith* rule
3 in *Masterpiece*, acknowledging that while individuals are free to object to same-sex marriage under
4 the First Amendment’s free exercise clause, “it is a general rule that such objections do not allow
5 business owners and other actors in the economy and in society to deny protected persons equal
6 access to goods and services under a neutral and generally applicable public accommodations law.
7 [Citations.]” (*Masterpiece, supra*, 138 S.Ct. at p. 1727.) Under *Smith*, “a religious objector has no
8 federal constitutional right to an exemption from a neutral and valid law of general applicability on
9 the ground that compliance with that law is contrary to the objector’s religious beliefs.” (*North Coast,*
10 *supra*, 44 Cal.4th at p. 1155 [italics original].) Indeed, the United States Supreme Court rejected a
11 similar free exercise defense over fifty years ago in *Newman v. Piggie Park*, which *Masterpiece*
12 invoked in support of “the general rule” that the objections here “do not allow business owners ... to
13 deny protected persons equal access to goods and services under a neutral and generally applicable
14 law.” (*Masterpiece, supra*, 138 S.Ct. at p. 1727, citing *Piggie Park, supra*, 390 U.S. at p. 402, fn. 5.)

15 The Supreme Court’s decision in *Fulton* did not overrule *Smith* and sheds little light upon this
16 case because *Fulton* specifically distinguished public accommodations laws and is inapposite.
17 (*Fulton v. City of Philadelphia, Pennsylvania* (2021) 141 S.Ct. 1868, 1877.) Indeed, it did not involve
18 a public accommodation, and the subject anti-discrimination provision was not generally applicable.
19 (*Fulton, supra*, 141 S.Ct. at pp. 1880-81.) *Fulton* turned on the existence of a discretionary exception
20 to the contractual anti-discrimination provision that gave the city total discretion to excuse
21 discrimination in any situation. (*Ibid.*) The City of Philadelphia contracted with private entities, such
22 as Catholic Social Services (CSS), to certify and place children with foster families. (*Id.* at p. 1875.)
23 CSS refused to certify same-sex married couples as foster families based on its religious beliefs.
24 (*Ibid.*) When the City learned of this policy, it informed CSS it would no longer refer children nor
25 contract with CSS unless CSS agreed to certify same-sex couples. The City reasoned that CSS’s
26 policy violated a non-discrimination provision in the parties’ *contract* the City’s public
27 accommodation law. (*Ibid.*) Arguing that its free exercise and free speech rights were violated, CSS
28 sought to enjoin the City from freezing referrals to CSS. (*Id.* at p. 1876.)

1 The Supreme Court rejected the City’s defenses. The Court first concluded that its public
2 accommodation law did not support its actions because “foster care agencies do not act as public
3 accommodations in performing certifications.” (*Id.* at p. 1880.) It next found that the non-
4 discrimination provision in the parties’ contract—unlike Unruh—was not generally applicable
5 because it “incorporates a system of individual exemptions, made available ... at the ‘sole discretion’
6 of the commissioner.” (*Id.* at p. 1877-78.) Thus, deferential review under *Smith* did not apply. (*Id.* at
7 p. 1881.)¹²

8 In contrast to the facts in *Fulton*, Tastries is a for-profit business with no official religious
9 affiliation that sells its goods and services in the commercial marketplace—a public accommodation.
10 The Supreme Court specifically distinguished public accommodations; *Fulton* has no bearing on
11 them. (*Id.* at pp. 1880-81.) Next, and crucially, in *Fulton*, the contractual nondiscrimination provision
12 in the parties’ contract lacked general applicability because it permitted *discretionary* exemptions.
13 (*Id.* at p. 1881.) Unlike the parties’ contract in *Fulton*, the Unruh Act provides no discretionary
14 exemptions; DFEH has no power to exempt religious entities or for-profit public accommodations.¹³
15 (Civ. Code, § 51.)

16 In *Fulton*, the Court explicitly declined to overrule *Smith*, which applies deferential review to
17 a neutral and generally applicable public accommodations law like the Unruh Act. (*Fulton, supra*,
18 141 S.Ct. at pp. 1877.) As has been held by the U.S. and California Supreme Courts, the Unruh Act
19 satisfies even strict scrutiny; thus, it easily satisfies deferential review under *Smith*. (*Roberts v. U.S.*
20 *Jaycees* (1984) 468 U.S. 609, 626, 628-29; *North Coast, supra*, 44 Cal.4th at p. 1158.) Defendants’
21

22 ¹² Because the nondiscrimination clause in the parties’ contract permitted discretionary exemptions,
23 the Court applied a reframed strict scrutiny analysis to such situations, stating that it “must
24 ‘scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.’
25 [Citation.]” (*Fulton, supra*, 141 S.Ct. at p. 1881.) CSS asserted that it sought an exemption to allow it
26 to continuing serving children “in a manner consistent with its religious beliefs; it [did] not seek to
27 impose those beliefs on anyone else.” (*Id.* at p. 1882) The Court held that the City’s refusal to
28 contract with CSS did not survive strict scrutiny review because the “City offer[ed] no compelling
reason why it ha[d] a particular interest *in denying an exception to CSS while making them available*
to others.” (*Ibid.* [italics added].)

¹³ The Unruh Act’s limiting language in section (c)—“[t]his section shall not be construed to confer
any right or privilege on a person that is conditioned or limited by law or that is applicable alike to
persons of every [protected class]”—provides no exemptions. Rather, it limits its reach, disallowing
potential claimants from using it to circumvent other laws. Indeed, the language of subsection (c) is
clear: it does not “confer” extra rights upon people that are at odds with existing laws nor does it
exempt certain people in certain circumstances from the application of the Unruh Act.

1 primary argument for subjecting the Unruh Act to strict scrutiny review in the free exercise context
2 fails as a matter of law.

3 California law is consistent with *Smith*. As far back as 1946, well before *Smith*, the California
4 Supreme Court held “that ‘a person is free to hold whatever belief his conscience dictates, but when
5 he translates his belief into action he may be required to conform to reasonable regulations which are
6 applicable to all persons and are designed to accomplish a permissible objective.’” (*Catholic*
7 *Charities, supra*, 32 Cal.4th at p. 561 [quoting *Rescue Army v. Municipal Ct.* (1946) 28 Cal.2d 460,
8 470].) The California Supreme Court has conclusively settled the question of the Unruh Act’s
9 neutrality: “Unruh ... is ‘a valid and neutral law of general applicability.’” (*North Coast, supra*, 44
10 Cal.4th at p. 1156 quoting *Smith, supra*, 494 U.S. at p. 879.) The Unruh Act is neutral; its text does
11 not refer to any religious belief or practice. Indeed, the Unruh Act itself protects religious beliefs.
12 (Civ. Code, § 51, subd. (b).) Therefore, Miller’s free exercise rights “do[] not exempt [defendants]
13 from conforming their conduct to [its] antidiscrimination requirements even if compliance poses an
14 incidental conflict with [Miller’s] religious beliefs.” (*North Coast, supra*, 44 Cal.4th at p. 1156 [citing
15 *Lukumi, supra*, 508 U.S. at p. 531 and *Smith, supra*, 494 U.S. at p. 879.]

16 **a. Substantial Burden Analysis: The Burden Upon Miller’s Religious**
17 **Practice Does Not Outweigh the Burden Upon Tastries’ Customers and**
18 **Employees**

19 Miller’s exercise of religion is not substantially burdened by the Unruh Act because DFEH
20 does not seek an order forcing Tastries to sell preordered wedding cakes in the retail marketplace to
21 all customers, including gay couples. Rather, as in *North Coast* (see *North Coast, supra*, 44 Cal.4th at
22 pp. 1158-59), Tastries has at least three options to comply with the Unruh Act. One, Tastries can
23 follow the Unruh Act’s explicit language and sell all its goods and services to all customers. Two,
24 rather than provide all services to all customers irrespective of sexual orientation, Tastries may
25 choose to cease offering preordered wedding cakes for sale to anyone. Three, Miller and any
26 employees sharing her religious objections to same-sex marriage can step aside from participating in
27 the preparation of any preordered baked goods sold to gay couples and allow her willing employees
28

1 to manage the process. Tastries employees have prepared and delivered cakes to same-sex couples
2 without Miller’s involvement in the past.

3 Should Tastries choose to comply with the Unruh Act by ceasing to sell wedding cakes to any
4 customers, “[i]t is well established that there is no substantial burden placed on an individual’s free
5 exercise of religion where a law or policy regulating secular conduct merely operates so as to make
6 the practice of the individual’s religious beliefs more expensive. [Citations.]” (*Smith v. Fair Empl. &*
7 *Hous. Com. (FEHC)* (1996) 12 Cal.4th 1143, at p. 1172 [internal brackets and quotation marks
8 removed].) Moreover, “[o]ne last factor that is relevant here ... also properly informs the inquiry into
9 whether an asserted burden on religion is substantial[:] whether the granting of an [exemption] would
10 detrimentally affect the rights of third parties.” (*Id.* at p. 1174.) Like the landlord in FEHC, who
11 refused to rent to unmarried couples based on her religious beliefs, “[b]ecause [Miller] is involved in
12 a commercial enterprise, ... to permit [her] to discriminate would sacrifice the rights of [the
13 Rodriguez-Del Rios and] her prospective [customers] to have equal access to public accommodations
14 and their legal and dignity interests in freedom from discrimination based on personal
15 characteristics.” (*Id.* at p. 1170.)

16 The California Supreme Court suggests that option 3 balances Miller’s religious exercise with
17 the Unruh Act’s requirement that businesses provide full and equal services irrespective of sexual
18 orientation. (*North Coast, supra*, 44 Cal.4th at p. 1159.) Tastries may choose the option it prefers for
19 satisfying the Unruh Act.

20 **2. Free Speech: Miller’s Free Speech Rights Do Not Exempt Tastries from** 21 **Complying with the Unruh Act**

22 “The First Amendment’s plain terms protect ‘speech,’ not conduct.” (*State v. Arlene’s*
23 *Flowers, Inc.* (2019) 193 Wash.2d 469, 511 [quoting U.S. Const. amend. I].) As a general matter,
24 prohibiting discrimination does not infringe on free speech rights. (*FAIR, supra*, 547 U.S. at p. 62
25 [“Congress, for example, can prohibit employers from discriminating in hiring on the basis of race.
26 The fact that this will require an employer to take down a sign reading ‘White Applicants Only’
27 hardly means that the law should be analyzed as one regulating the employer’s speech rather than
28 conduct.]”).) Thus, free speech challenges to application of public accommodation and anti-

1 discrimination laws typically fail.¹⁴ This case is no exception: by prohibiting Tastries from denying
2 equal services, the Unruh Act permissibly regulates only what Tastries must do, not what it may or
3 may not say. (Cf. *FAIR*, *supra*, 547 U.S. at p. 60.)

4 Defendants' free speech defense fails. The Unruh Act prohibits discriminatory conduct, i.e.,
5 Tastries' refusal to provide preordered baked goods to the Rodriguez-Del Rios based on their sexual
6 orientation. The Unruh Act does not attempt to regulate Miller's speech. Indeed, Miller has fully
7 exercised her free speech rights in numerous interviews since August of 2017. The preparation and
8 sale of baked goods—especially with no written messages—is not pure speech under the First
9 Amendment. At most it is conduct with expressive elements, subjecting the application of the Unruh
10 Act here to intermediate scrutiny, which is satisfied. (Cf. *FAIR*, *supra*, 547 U.S. at p. 67.) In fact, as
11 shown above, application of the Unruh Act here satisfies even strict scrutiny because it is the least
12 restrictive means to accomplish California's compelling interest in eradicating discrimination. (See
13 *North Coast*, *supra*, 44 Cal.4th at P. 1158.) A plain wedding cake, a brownie, a cookie is not pure
14 speech.

15 **a. The Sale of Baked Goods is at Most Symbolic Expression**

16 Tastries argues that the baking and selling wedding cakes expresses a message: "her custom
17 wedding cakes announce a basic message: this event is a wedding, and the couple's union is a
18 marriage. They also declare an opinion: the couple's marriage should be celebrated Custom cakes
19 reflect the event they are made for—the full meaning clear to the intended audience. If Defendants
20 cannot control the events or purpose of a custom cake then Defendants cannot control their own
21 messages." (Defendants Second Amended Responses to Special Interrogatories, p. 8:8-14.) This
22 response ignores the fact that Tastries' policy extends well beyond wedding cakes and includes any
23 baked good (e.g., cookies, brownies, chocolate covered strawberries) preordered by a gay couple for
24 any event related to their marriage.

27 ¹⁴ See, e.g., *Roberts v. U.S. Jaycees* (1984) 468 U.S. 609, 625-29 (private, commercial association
28 had no free speech right to exclude women from full membership); *Hishon v. King & Spalding*
(1984) 467 U.S. 69, 78 (prohibiting law firm from discriminating on the basis of gender in making
partnership decisions did not violate members' free speech or association rights).

1 **i. Baking and Selling Preordered Baked Goods Is Not Expressive**

2 Conduct is not protected by free speech rights unless it is “inherently expressive.” (*FAIR*,
3 *supra*, 547 U.S. at p. 66.) Conduct becomes “sufficiently imbued with elements of communication”
4 to receive free speech protections only where “[a]n intent to convey a particularized message was
5 present, and in the surrounding circumstances the likelihood was great that the message would be
6 understood by those who viewed it.” (*Spence v. Washington* (1974) 418 U.S. 405, 410-11; accord
7 *United States v. O’Brien* (1968) 391 U.S. 367, 376 [rejecting “the view that an apparently limitless
8 variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends
9 thereby to express an idea”].)

10 Tastries’ denial of equal services to the Rodriguez-Del Rios was not inherently expressive.
11 Without additional speech concerning Miller’s opposition to same-sex marriage, guests observing a
12 Tastries cake at the Rodriguez-Del Rio’s wedding reception would have had no way of knowing that
13 Miller opposes gay marriage—much less why. Indeed, “the fact that a nonsymbolic act is the product
14 of deeply held personal belief—even if the actor would like to convey his deeply held personal
15 belief—does not transform action into First Amendment speech.” (*Nevada Comm’n on Ethics v.*
16 *Carrigan* (2011) 564 U.S. 117, 127 [italics original].) “[I]t is the obligation of the person desiring to
17 engage in assertedly expressive conduct to demonstrate that the First Amendment even applies.”
18 (*Clark v. Cmty. for Creative Non-Violence* (1984) 468 U.S. 288, 293, fn. 5.) “To hold otherwise
19 would be to create a rule that all conduct is presumptively expressive.” (*Ibid.*)

20 **ii. There Is No Message From Tastries**

21 Even assuming artistry, a wedding cake (and certainly not cookies or other baked goods) does
22 not send the baker’s message to anyone. Miller’s strong and sincerely held religious beliefs are not
23 transformed into *expression* because Tastries bakes and sells a baked good. Miller’s husband and
24 Tastries’ employee, Mike Miller, describes that any message is the host’s, not Tastries:

25 10 Yes, I think the host is the principal person
26 11 who’s making a statement. But the cake is the
27 12 centerpiece of the event, so it is a vehicle that allows
28 13 everybody to share in that statement by participating in
 14 the celebration of the cutting of the cake and the
 15 pictures around the cake and everything that goes with
 16 it.

17 So yeah. I'm sorry. I was going to -- the
18 event is selected by the host. I mean, they choose to
19 have the event, whatever it is, and they choose the
20 theme. And while we assist in helping them achieve
21 their design and their vision within certain budgets,
22 they are choosing what elements are going to go into the
23 design of the cake, the way they want it to look.
24 And so it's a collaborative process, but it's
25 directed at what they're wanting, not what Cathy wants
1 or any of our designers think is best. It's about what
2 do they want? What's the image? What's the message?
3 What's the theme? What's the purpose? All of those are
4 factored into the selection of the ultimate design. And
5 that's finally agreed on and set by the person who's the
6 host or who's ordering the cake, which is usually the same.

(Mike Miller 2022 Depo., p. 50-51).

What message is sent by selling a baked good? What is the expression the baked good conveys? Wedding reception attendees do not consider whether the *baker* was sending a message when the guests see and eat the wedding cake. They might think that the cake is beautiful (or not) or delicious (or not), but guests do not muse about what the *baker* might have tried to say through a wedding cake. Defendants' argument becomes even more tenuous when the baked good is a plate of preordered Tastries' cookies at a bridal shower hosted by a gay couple.

Tastries' denial of equal services to the Rodriguez-Del Rios was not inherently expressive. Without additional speech concerning Miller's opposition to same-sex marriage, guests observing the absence of a Tastries cake at the Rodriguez-Del Rio's wedding reception had no way of knowing that no Tastries cake was present—much less why. (Cf. *FAIR, supra*, at p. 66.) Indeed, “the fact that a nonsymbolic act is the product of deeply held personal belief—even if the actor would like to convey his deeply held personal belief—does not transform action into First Amendment speech.” (*Nevada Comm’n on Ethics v. Carrigan* (2011) 564 U.S. 117, 127 [*italics original*].)

b. The Unruh Act Governs Tastries Business Conduct; It Does Not Compel Miller's Speech

The Unruh Act's requirement to provide full and equal services does not compel Miller to speak. Unruh does not require Tastries to sell baked goods to gay couple's celebrating their

1 marriages, nor does it compel Miller to participate in the process should Tastries choose to provide its
2 full range of products too all. (See *North Coast*.)

3 Defendants contends that Tastries’ fulfillment of a baked good order for any event involving a
4 gay couple’s marriage is speech and that being forced to comply with the Unruh Act will compel
5 Miller to speak in violation of the First Amendment. However, the compelled speech doctrine, which
6 requires strict scrutiny review, applies when the *government* forces an individual to speak a specific
7 message, because free speech protections prohibit the *government* from telling people what to say.
8 (See *West Virginia Bd. of Ed. v. Barnette* (1943) 319 U.S. 624, 642 [schoolchildren cannot be
9 required to recite the Pledge of Allegiance and salute the flag]; *Wooley v. Maynard* (1977) 430 U.S.
10 705, 717 [motorists cannot be forced to display the New Hampshire state motto—Live Free or Die—
11 on their license plates].)

12 The Supreme Court rejected a compelled speech challenge to a content neutral regulation—
13 like the Unruh Act—in *FAIR*. (*FAIR, supra*, 547 U.S. at p. 47.) There, the law schools argued that
14 offering equal on-campus access to military recruiters, which included sending e-mails and posting
15 notices on their behalf, compelled the schools to express a message of support for the military. (*Id.* at
16 p. 62.) In denying the challenge, the court concluded the Solomon Amendment did “not dictate the
17 content of the speech,” and only “compelled [speech] if, and to the extent, the school provides such
18 speech for other recruiters.” (*Ibid.*) The court found “the compelled speech ... plainly incidental to
19 the Solomon Amendment’s regulation of conduct,” holding ““it has never been deemed an
20 abridgment of freedom of speech or press to make a course of conduct illegal merely because the
21 conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or
22 printed.” (*Id.*, quoting *Giboney v. Empire Storage & Ice Co.* (1949) 336 U.S. 490, 502.)

23 Application of the Unruh Act here is a quintessential application of a public accommodations
24 law. Tastries is a for-profit business selling its baked products from a storefront in the commercial
25 marketplace. (See *State v. Arlene’s Flowers* (2019) 193 Wash.2d 469, 514.) The Unruh Act does not
26 regulate Tastries’ cakes and baked goods. It applies “to its business operation, and in particular, its
27 business decision not to offer its services to protected classes of people.” (*Elane Photography, LLC v.*
28 *Willock* (2013) 309 P.3d 53, 68.) Providing full and equal services to gay couples celebrating their

1 marriages neither regulates Miller’s speech nor compels her to endorse same-sex marriage. (Cf.
2 *FAIR, supra*, 547 U.S. at p. 64-65.)

3 **C. Where Does It End?**

4 If this Court concludes that Tastries’ refusal to sell any preordered baked good to gay couples
5 celebrating any event related to their marriages does not violate the Unruh Act, or that defendants are
6 exempted from complying with the Unruh Act based on their First Amendment defenses, that
7 decision will impact many other businesses:

- 8 • Wedding photographers;
- 9 • Clothing designers, who design and manufacture wedding dresses and/or tuxedos;
- 10 • Venue proprietors, who uses their talents to create a pleasing and attractive wedding
11 venue;
- 12 • Chefs and caterers, who create menus and tasty food;
- 13 • Makeup artists;
- 14 • Florists, deejays, bartenders, and any vendor offering so-called “expressive services”
15 for wedding-related events;
- 16 • A religious business owner could refuse to serve a customer of a different faith if
17 doing so conflicts with their sincerely held religious beliefs.

18 The Unruh Act exists because Californians agreed we will not allow businesses to turn people
19 away based on their protected status. A ruling for defendants here extinguishes that agreement and
20 empowers business owners to refuse to serve certain customers based on who they are.

21 **VII. RELIEF**

22 Civil Code section 52 provides for the following relief:

23 **A. Actual Damages, Including Emotional Distress Damages**

24 The Rodriguez-Del Rios suffered significant emotional distress.

25 **B. Statutory Damages**

26 Pursuant to Civil Code section 52, the court may award damages “up to a maximum of three
27 times the amount of actual damage but in no case less than four thousand dollars (\$4,000), and any
28

1 attorney's fees that may be determined by the court in addition thereto, suffered by any person denied
2 the rights provided in Section 51”

3 **C. Injunctive Relief**

4 DFEH further requests the following injunctive relief; that defendants:

- 5 • Immediately cease and desist from discriminating against the Rodriguez-Del Rios and other
6 gay people celebrating events related to their marriages;
- 7 • Immediately begin complying with the Unruh Act pursuant to the guidance of the California
8 Supreme Court as expressed in *North Coast*;
- 9 • Maintain a public accommodation and/or business establishment free of discrimination;
- 10 • Within 30 days of entry of judgment, develop (or revise current policies as necessary),
11 implement, and distribute to all current and prospective employees (a) a written policy
12 regarding the eradication and prevention of discrimination on the basis of sexual orientation
13 and all other protected classes consistent with the Unruh Act and FEHA as most recently
14 amended, and (b) specific written procedures by which customers and employees may report
15 incidents of discrimination;
- 16 • Submit an annual report to the DFEH for five years identifying any services defendants deny
17 to customers based on free speech or religious grounds, and summarizing and providing
18 copies of any complaints of discrimination from customers or employees;
- 19 • Conduct or obtain a minimum of two hours of in person training annually for a period of five
20 years on complying with the Unruh Act, including training on the policies and procedures
21 described above;
- 22 • Post, for five years, in a conspicuous place (where employees and patrons congregate) at
23 Tastries the policies and procedures described above;
- 24 • Post, for five years, in a conspicuous place (where employees and patrons congregate) at
25 Tastries the DFEH's Unruh Civil Rights Act Fact Sheets;
- 26 • Provide a copy of the DFEH's Public Access Discrimination and Civil Rights (Unruh Act)
27 brochures to each Tastries employee, within 30 days of the court's order, and also make said
28 brochures available to customers of Tastries within 30 days of entry of judgment;

- Provide written proof to the court and DFEH of the nature and extent of defendants' compliance with all requirements of the court's order within 100 days of the effective date of the court's order.

D. Attorney's Fees

After the court issues a decision, if a violation of the Unruh Act is found, DFEH will petition the court for attorneys' fees pursuant to the Unruh Act and the Fair Employment and Housing Act.

VIII. CONCLUSION

This case is not just about a singular wedding cake ordered by a gay couple for their wedding as in *Masterpiece*. It goes far beyond that and includes any preordered baked goods to be purchased by a gay couple for any event related to their marriage. In 2015, the United States Supreme Court held that gay couples may exercise the fundamental right to marry: "The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws." (*Obergefell v. Hodges, supra*, 576 U.S. at 672). "States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order. There is no difference between same-sex and opposite-sex couples with respect to this principle." (*Id.* at 647).

"Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right." (*Id.* at 672.)

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1 For all the reasons set forth above, plaintiff DFEH (and Real Parties in Interest Eileen and
2 Mireya Rodriguez-Del Rio) respectfully request a judgment in its favor.

3 Dated: July 21, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

By: 

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

EXHIBIT 1



PROOF OF SERVICE BY ELECTRONIC MAIL

I am a citizen of the United States and am employed in Los Angeles County; I am over the age of eighteen (18) years and not a party to the within action; my business address is 320 West 4th Street, Suite # 1000, Los Angeles, California 90013.

My e-mail address is valentina.martinez@dfeh.ca.gov.

On the date below I enclosed a true copy of the:

1. PLAINTIFF DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING'S TRIAL BRIEF

(In the matter of *Department of Fair Employment & Housing vs. Cathy's Creations, Inc., et al. (Eileen Rodriguez-Del Rio, et al., Real Parties in Interest)*; Case Number: BCV-18-102633) in a separate envelope for each of the persons named below, addressed follows:

☒ **By E-Mail** by forwarding a true and correct copy of the above document(s) via e-mail to the person(s) at the e-mail address(es) set forth below.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 21, 2022, at Los Angeles, California.

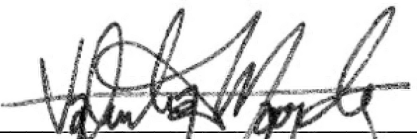

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16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
17 **COUNTY OF KERN**

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.

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CASE NO.: BCV-18-102633

IMAGED FILE

DEFENDANTS' TRIAL BRIEF

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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DEFENDANTS' TRIAL BRIEF

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CACI No. 30602

INTRODUCTION & HISTORY

On Saturday, August 26, 2017, Real Parties in Interest Eileen and Mireya Rodriguez-Del Rio visited Tastries Bakery, allegedly to commission Defendants Cathy Miller and Tastries Bakery to create a custom wedding cake for their forthcoming same-sex wedding ceremony. (Jud. Adm. Doc. 1, FAC ¶¶ 36-38.)¹ Tastries Bakery is a Christian boutique and bakery, 100% owned by Cathy Miller. (*Id.* at ¶ 4.) The Real Parties were already legally married, but stated that they wanted to also host a traditional wedding ceremony. (FAC ¶ 34.) Although Defendants generally provide services to LGBT customers, they object to creating custom cakes that express messages that violate their sincere religious beliefs about marriage; therefore, Defendants instead offered to assist the Real Parties to arrange comparable service from another local bakery, Gimmee Some Sugar, an offer the Real Parties then rejected of their own volition. (FAC ¶¶ 26-30, 41-42.)

After their wedding ceremony, on October 18, 2017, the Real Parties filed an administrative complaint with Plaintiff the Department of Fair Employment & Housing (“DFEH”)—the California agency tasked with enforcing California’s non-discrimination statute, the Unruh Civil Rights Act. (FAC ¶¶ 1, 8.) Plaintiff DFEH then began an administrative investigation, which included a temporary foray into Superior Court (via a petition proceeding) and a denied motion for a preliminary injunction. (See *DFEH v. Miller* (2018) Cal.Super. No. BCV-17-102855, 2018 WL 747835.) On October 17, 2018, having completed its investigation, Plaintiff DFEH brought the present action, alleging one claim: violation of the Unruh Civil Rights Act, and seeking damages and injunctive relief. (FAC ¶¶ 45-54; FAC Prayer ¶¶ 1-14.) Following summary judgment, only statutory damages of \$4,000 for each of the Real Parties has survived, as well as Plaintiff DFEH’s request for broad injunctive relief. Beyond relief for the Real Parties specifically, Plaintiff DFEH seeks an order that Defendants “[i]mmediately cease and desist from selling to anyone any item they are unwilling to sell, on an equal basis, to members of any protected group under the Unruh Act.” (FAC Prayer ¶ 2.)

¹ Judicial Admission Document Nos. 1 and 2, and MIL Exhibit Nos. 1-14 are attached to the first declaration of Jeffrey M. Trissell, dated July 8, 2022. MIL Exhibit Nos. 15-22 are attached to the second declaration of Jeffrey M. Trissell, dated July 11, 2022. MIL Exhibit Nos. 23-30 are attached to the third declaration of Jeffrey M. Trissell, dated July 18, 2022.

1 In this Court’s summary judgment order, the main issue discussed was intent. Specifically,
2 this Court held as follows: “The plaintiff has not demonstrated the requisite intent. The plaintiff bases
3 its motion on unsupported conclusions and what the Court views as a skewed view of the facts such as
4 the nature of the defendant’s business and how to characterize its output.” (MIL Ex. 14, Minute
5 Order (Dec. 15, 2021) p.2.) In this respect, in Plaintiff DFEH’s responses to requests for admission,
6 Plaintiff DFEH stated unequivocally that it “is not disputing the sincerity of defendant Miller’s
7 religious beliefs.” Thus, that issue—the sincere religious motivations of Defendants in this matter—
8 has been conclusively established for purposes of this case. (Code Civ. Proc., § 2033.410(a); see
9 Defendants’ Motions in Limine, Nos. 1, 9 (July 8, 2022).)

10 Per the Court’s comments at the May 24, 2022 hearing, in this trial brief Defendants have
11 endeavored to not repeat the voluminous summary judgment briefing. Where appropriate,
12 Defendants also refer the Court to the parties’ motions in limine. But due to the complexity and
13 importance of the issues, even a summary of the applicable law requires significant briefing.

14 ARGUMENT

15 1. THERE IS NO MERIT TO PLAINTIFF’S CAUSE OF ACTION

16 In relevant part, the Unruh Act states as follows:

17 (b) All persons within the jurisdiction of this state are free and equal, and no
18 matter what their ... sexual orientation ... are entitled to the full and equal
19 accommodations, advantages, facilities, privileges, or services in all business
establishments of every kind whatsoever.

20 (c) This section shall not be construed to confer any right or privilege on a
21 person that is conditioned or limited by law or that is applicable alike to
persons of every ... sexual orientation....

22 (Civ. Code, § 51.)

23 Whoever denies, aids or incites a denial, or makes any discrimination or
24 distinction contrary to Section 51 ... is liable for each and every offense for
25 the actual damages, and any amount that may be determined by a jury, or a
26 court sitting without a jury, up to a maximum of three times the amount of
27 actual damage but in no case less than four thousand dollars (\$4,000), and
any attorney’s fees that may be determined by the court in addition thereto,
suffered by any person denied the rights provided in Section 51....

28 (Civ. Code, § 52(a).)

1 From this, both CACI and BAJI have developed form jury instructions and verdict forms.
2 (CACI No. 3060; BAJI No. 7.92.) The CACI instruction is more streamlined, identifying two
3 relevant elements whereas BAJI identifies three. BAJI also includes an instruction on an affirmative
4 defense that CACI does not include. Although the parties have stipulated to a bench trial,
5 Defendants believe that the jury instructions are helpful in guiding the analysis, and base the below
6 sections on BAJI, with its three elements and affirmative defense. (See Attch., BAJI No. 7.92.)

7 **1.1. Defendants did not intentionally discriminate against the Real Parties**
8 **because Defendants’ religious beliefs regarding marriage, not the Real**
9 **Parties’ sexual orientation, motivated Defendants decision not to supply a**
10 **custom wedding cake.**

11 The second element under BAJI of an Unruh Act claim is that a substantial motivating
12 factor for Defendants’ conduct was the Real Parties’ sexual orientation. (See Attch., BAJI No.
13 7.92(2).) This element is briefed extensively in the parties’ motions in limine, and so Defendants
14 refer the Court to that briefing, and do not repeat it here. (See Defendants’ Opposition to Plaintiff
15 DFEH’s Motion in Limine, No. 1 (July 18, 2022) § III.A, pp.4:4-13:6.)² In summary, the Unruh Act
16 does not “confer any right or privilege on a person that is ... applicable alike to persons of every ...
17 sexual orientation[.]” (Civ. Code, § 51(c).) Thus, to establish an Unruh Act violation, the plaintiff
18 must prove that the Defendant engaged in “intentional discrimination.” (*Cohn v. Corinthian*
19 *Colleges, Inc.* (2008) 169 Cal.App.4th 523, 527 & fn.3 [citing *Bray v. Alexandria Women’s Health*
20 *Clinic* (1993) 506 U.S. 263, 270].)

21 *Cohn* shows that the penultimate issue is whether Defendants *intended* to discriminate against
22 Real Parties *because* of their sexual orientation. Even when the conduct is extremely closely correlated
23 with the protected characteristic, the plaintiff has to show that the discrimination was *because* of the
24 protected characteristic itself. (Cf. *Dobbs v. Jackson Women’s Health Organization* (2022) 142 S.Ct.
25 2228, 2245-2246 & fn.17 [citing *Bray*: “The regulation of a medical procedure that only one sex can
26 undergo does not trigger heightened constitutional scrutiny unless the regulation is a ‘mere pretext[t]
designed to effect an invidious discrimination against members of one sex or the other.’”].)

27 ² See also Memorandum of Points & Authorities ISO Defendants’ Motion for Summary Judgment
28 or Adjudication (Sep. 8, 2021) § 1.2, pp.14:1-15:18 [hereafter “Def. MSJ”].

1 In contrast, Plaintiff DFEH argues that making a distinction based on conduct closely related
2 with a protected characteristic is per se making a distinction based on the protected characteristic.
3 (See Plaintiff DFEH’s Motion in Limine, No. 1 (July 8, 2022) p.4:14 [“A tax on wearing yarmulkes is
4 a tax on Jews.”].) But Plaintiff DFEH’s argument ignores the facts of this case, and relevant case law,
5 because Defendants did not make a distinction based on conduct closely related with a protected
6 characteristic. For example, if Defendants refused to serve LGBT customers, at all, on the basis that
7 they had engaged in homosexual sexual activity or entered into a same-sex marriage, that would
8 presumably be per se evidence of discrimination on the basis of homosexuality.

9 But Plaintiff DFEH’s argument does not apply in the context of refusing to create specific
10 *messages* that people of *all protected characteristics* could favor or not, and could request or not. In other
11 words, it is not discrimination on the basis of sexual orientation to refuse to create any product or
12 provide any service, *for anybody*, that sends a message in favor of the political and philosophical view
13 that marriage can be defined as something other than a conjugal union between one man and one
14 woman. (See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018) 138 S.Ct. 1719,
15 1728 [“*Masterpiece I*”]; *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515
16 U.S. 557, 572; accord *Brush & Nib Studio, LC v. City of Phoenix* (2019) 247 Ariz. 269, 304; *Masterpiece*
17 *Cakeshop Inc. v. Elenis* (D. Colo. 2019) 445 F.Supp.3d 1226, 1241 [“*Masterpiece II*”]; *Lexington-Fayette*
18 *Urban County Human Rights Commission v. Hands On Originals* (Ky. 2019) 592 S.W.3d 291, 298-305
19 [Buckingham, J., concurring]; *Lee v. Ashers Baking Co. Ltd.* [2018] UKSC 49, ¶ 62.)

20 Plaintiff DFEH also argues that it needs to merely prove that Defendants intended to make a
21 distinction that had *the effect* of providing unequal services to LGBT customers. (See Plaintiff
22 DFEH’s Opposition to Motion in Limine, No. 9 (July 18, 2022) pp.2:23-5:19.) Beyond the fact that
23 this argument is squarely foreclosed by the California Supreme Court (see *Koebke v. Bernardo Heights*
24 *Country Club* (2005) 36 Cal.4th 824, 853-854), it is equally unsupported by Plaintiff’s key case:
25 *Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510. Contrary to Plaintiff DFEH’s gloss,
26 *Hankins* does not stand for the proposition that the “intent to discriminate” element of an Unruh Act
27 claim can be established by “intent to engage in certain action.” Rather, *Hankins* stands for the
28 unremarkable proposition that “intent to engage in certain action,” coupled with knowledge of

1 disparate impact, can be *evidence* of “intent to discriminate.” However, at the end of the day, Plaintiff
2 DFEH must prove that Defendants intended to make a distinction on the basis of sexual orientation,
3 *not* that Defendants intended to make any distinction (even one not based around sexual orientation),
4 and that the distinction had the effect of disparate impact for members of the LGBT community.

5 Here, Defendants’ policies are not triggered by any customer’s sexual orientation, or by the
6 customer engaging in conduct closely associated with a homosexual orientation (*i.e.*, that individual
7 having personally entered into a same-sex marriage). Tastries will sell any pre-made case cakes or
8 other baked goods to anyone for any purpose regardless of their sexual orientation or marital status.
9 But Tastries Bakery’s written policies state that “[a]ll custom orders must follow Tastries Design
10 Standards,” which in turn elaborate that custom orders that do not meet Tastries Design Standards
11 include: “Designs that violate fundamental Christian principles; wedding cakes must not *contradict*
12 God’s sacrament of marriage between a man and a woman.” (See Trial Ex. 8, Design Standards.) To
13 “contradict” means “to assert or speak the contrary or opposite of” some proposition.

14 Tastries Bakery’s policy is thus a facially neutral policy concerning sending messages about
15 marriage. It has nothing to do with any individual’s sexual orientation. Defendants’ policy applies to
16 writing political slogans on cakes for political events regarding marital issues (divorce, same-sex
17 marriage, etc.); it applies to engaging in the symbolic speech of creating a traditional wedding cake
18 (white with three or more tiers) for events that would demean and de-sacramentalize marriage (such
19 as ironically using it to announce a divorce); and it applies to engaging in the symbolic speech of
20 creating a traditional wedding cake for use as the celebratory centerpiece at an event that calls itself a
21 wedding yet involves anything other than a lifelong union of one man and one woman. This would
22 include heterosexual unions of three or more people, unions not intended to be lifelong, and unions
23 involving members of the same sex. As applied here, Tastries will not sell any specially made custom
24 cakes, that have to be ordered in advance, for any same-sex wedding related event, *to any person*. This
25 includes a homosexual couple seeking a wedding cake for their own same-sex wedding, or a
26 corporation and its heterosexual agent seeking a wedding cake for a film or play in which there is a
27 same-sex wedding.

28 ///

1 For its Unruh Act claim, Plaintiff DFEH must prove that Defendants declined Real Parties’
2 order *because* of the Real Parties’ sexual orientation, not the message of the cake. In contrast,
3 Defendants will prove that they did not do so, that they have gladly worked with LGBT business
4 owners and served LGBT customers—without regard to their marital status—and merely applied
5 here their neutral policy regarding not sending *messages* contrary to a Biblical view of marriage.

6 **1.2. The Real Parties were not denied full and equal services because providing**
7 **a referral to a competent third party baker satisfies the “Full and Equal”**
8 **services requirement.**³

9 The third element under BAJI of an Unruh Act violation is that Defendants denied “full and
10 equal services” to the Real Parties. (See Attch., BAJI No. 7.92(3).) In *Minton*, the court was tasked
11 with adjudicating whether a Catholic hospital violated the Unruh Act when it declined to perform a
12 hysterectomy on a female-to-male transgender patient. (*Minton v. Dignity Health* (2019) 39
13 Cal.App.5th 1155.) The patient had obtained a diagnosis of gender dysphoria, along with a
14 professional medical opinion that a hysterectomy was necessary to treat the gender dysphoria. As a
15 result, the patient’s doctor scheduled a hysterectomy at the Catholic hospital for August 30, 2016. (*Id.*
16 at 1159.) Due to its religious beliefs, the Catholic hospital performs hysterectomies for diagnoses such
17 as “chronic pelvic pain and uterine fibroids,” but not gender dysphoria. As a result, the hospital
18 cancelled the operation. (*Id.*)

19 According to the patient, in response to the cancellation, there was a “flurry of advocacy on
20 Minton’s behalf,” which led the hospital’s President to suggest that the patient could have the
21 operation done at a nearby Methodist hospital. (*Id.* at 1159-1160.) Following this suggestion, three
22 days later on September 2 at the nearby hospital, the patient had the hysterectomy. (*Id.* at 1159.) The
23 patient then sued under the Unruh Act, contending a denial of “full and equal access to medical care.”
24 (*Id.* at 1158.) The trial court sustained the hospital’s demurrer without leave to amend, holding that
25 the patient cannot contend that “receiving the procedure he desired from the physician he selected to
26 perform that procedure three days later than he had planned and at a different hospital than he desired
27 deprived him of full and equal access to the procedure.” (*Id.* at 1161 [quoting trial court].)

28 ³ See Def. MSJ, § 1.1, pp.12:21-13:28; see also Def. MIL No. 4.

1 The court of appeal saw things different and reversed the trial court. But in sending the case
2 back down, the court state:

3 To be clear, we do not question the observation in *North Coast* that “to avoid any
4 conflict between their religious beliefs and the state Unruh Civil Rights Act’s
5 antidiscrimination provisions, defendant physicians can avoid such a conflict by
6 ensuring that every patient requiring a procedure receives ‘full and equal’ access
7 to that medical procedure through a hospital physician lacking defendants’
8 religious objections.” [citation] But the ... facts alleged in the amended complaint
9 are that Dignity Health *initially* did not ensure that Minton had “full and equal”
10 access to a facility for the hysterectomy.... Dignity Health’s *subsequent* reactive
11 offer to arrange treatment elsewhere was not the implementation of a policy to
provide full and equal care to all.... [I]t cannot constitute full equality under the
Act to cancel his procedure for a discriminatory purpose, wait to see if his doctor
complains, and only then attempt to reschedule the procedure at a different
hospital. “Full and equal” access requires avoiding discrimination, not merely
remedying it after it has occurred.

12 (*Id.* at 1164-1165 [quoting *North Coast Women’s Care Medical Group, Inc. v. Superior Court* (2008) 44
13 Cal.4th 1145, 1159] [“*North Coast*”] [cleaned up; italics added].)

14 In distinguishing *Minton* and *North Coast*, and their holding that the provision of “full and
15 equal” services can be accomplished through a referral to another physician or hospital, Plaintiff
16 DFEH argues that they only concern arranging the provision of services by a non-objector within
17 the same business, *i.e.*, another employee or another bakery owned by Defendants. Anything else,
18 Plaintiff DFEH argues, is simply a reversion to the discredited “separate but equal” views of the
19 early Twentieth Century. (See Plaintiff’s Opposition to Defendants’ Motion in Limine, No. 4 (Jul.
20 18, 2022) pp.3:12-4:23.) However, this rule is not explicit in the cases and makes no logical sense.
21 There is no reason why an actual business agreement for referrals between bakeries is insufficient
22 without the two bakeries being under the same corporate umbrella. Moreover, Plaintiff DFEH’s
23 argument is logically inconsistent as it is not clear how segregating customers within a business
24 would be any less “separate but equal.” If Defendants hired a decorator to make cakes for same-sex
25 weddings, completely independent of Cathy Miller, Plaintiff DFEH could then argue that
26 Defendants’ policy is akin to a restaurant segregating customers based on race. Same-sex couples
27 would not be entitled to a “Cathy Miller” cake, but an inferior and separate “Decorator X” cake.

28 ///

1 In the motion in limine briefing, Plaintiff DFEH also cites *Rivera v. Crema Coffee Company*
2 *LLC* (N.D. Cal. 2020) 438 F.Supp.3d 1068, 1074, for its inflammatory use of the phrase “separate
3 but equal.” *Rivera* was an Unruh Act case, but in the cited section it was not analyzing “full and
4 equal” services. Rather, it was analyzing “alternative methods” of providing services under 42
5 U.S.C. § 12182(b). It also did not involve any constitutional defenses. The disparate context, with
6 disparate lines of precedent, make it irrelevant except as an opportunity for Plaintiff DFEH to again
7 compare Defendants to racists through reference to the odious “separate but equal” doctrine.

8 For its Unruh Act claim, Plaintiff DFEH must prove that Defendants’ offer to connect the
9 Real Parties with the bakery Gimmee Some Sugar was not the provision of full and equal services.
10 In contrast, Defendants intend to prove that they made this offer, which constituted full and equal
11 services, and which was rejected by the Real Parties on their own volition.

12 **1.3. The Real Parties also cannot establish discrimination because they cannot**
13 **establish that theirs was a genuine business inquiry, instead of a “shake**
14 **down” strategy designed to destroy Defendant Miller’s business due to her**
religious beliefs and obtain free wedding services.

15 The first element under BAJI for an Unruh Act claim is that the plaintiff was discriminated
16 against, depriving the plaintiff of the full and equal services in a business establishment. (See Attch.,
17 BAJI No. 7.92(1).) This element is also briefed extensively in the parties’ motions in limine, and so
18 Defendants refer the Court to that briefing. (See Defendants’ Opposition to Plaintiff DFEH’s Motion
19 in Limine, No. 4 (July 18, 2022) § II.A, pp.1:14-3:22; see also Plaintiff’s Opposition to Defendants’
20 Motion in Limine, No. 12 (July 18, 2022) pp.3:3-4:1.) In summary, to be “discriminated against,” a
21 plaintiff must show that he “actually possess[ed] a bona fide intent to sign up for or use [the
22 defendant’s] services.” (*White v. Square, Inc.* (2019) 7 Cal.5th 1019, 1032 [Unruh claim for occupation
23 discrimination].) Thus, in cases where the plaintiff “never intended” to use the defendant’s services,
24 but instead had a “shakedown strategy,” there can be no Unruh Act violation. (*Thurston v. Omni*
25 *Hotels Management Corporation* (2021) 69 Cal.App.5th 299, 305.)

26 For its Unruh Act claim, Plaintiff DFEH must prove that Real Parties actually intended to
27 purchase a wedding cake from Defendants, like any other patron, and were not seeking to instead be
28 denied services and engage in a “shakedown strategy.”

1 **1.4. Defendants’ decision not to provide a custom wedding cake was not arbitrary**
2 **because the decision was motivated by constitutionally protected religious**
3 **beliefs, not by irrational stereotypes or ill will towards LGBT individuals who**
 are in fact regularly served by the bakery.

4 The fourth element of an Unruh Act claim under BAJI is that the discrimination was
5 “arbitrary.” (See Attch., BAJI No. 7.92(4).) Here too, this element is also briefed extensively in the
6 parties’ motions in limine, and so Defendants refer the Court to that briefing. (See Defendants’
7 Opposition to Plaintiff DFEH’s Motion in Limine, No. 1 (July 18, 2022) § III.B, pp.13:7-17:22.)⁴

8 In summary, the operative language of the Unruh Act only prohibits “arbitrary”
9 discrimination. Thus, “a business generally open to the public may not *arbitrarily* exclude a would-
10 be customer from its premises.” (*In re Cox* (1970) 3 Cal.3d 205, 216 & fn.11 [citing Civ. Code,
11 § 51(b)] [*italics added*].) Although the Unruh Act lists certain enumerated protected characteristics,
12 these are merely “illustrative” (*id.*) and “the mere fact that [a characteristic] is listed as a prohibited
13 ground of discrimination does not give it a special ‘arbitrary per se’ status[.]” (*Isbister v. Boys’ Club*
14 *of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 87-90 & fn.20.) Prohibited arbitrary discrimination
15 “‘emphasizes irrelevant differences’ or ‘perpetuates irrational stereotypes.’” (*Georges v. Bank of*
16 *America, N.A.* (9th Cir. 2021) 845 Fed.Appx. 490, 491 [cleaned up].) Discrimination is not arbitrary
17 where supported by “public policy.” (*Sargoy v. Resolution Trust Corp.* (1992) 8 Cal.App.4th 1039,
18 1043.) In the context of the Unruh Act, public policy supports protection of constitutional rights.
19 (*Howe v. Bank of America N.A.* (2009) 179 Cal.App.4th 1443, 1451.)

20 Here, under both the U.S. Constitution and the California Constitution, religion is protected.
21 (U.S. Const., amend. I; Cal. Const., art. I, § 4.) Religion is also protected in numerous California
22 statutes. (Civ. Code, §§ 51(b), 51.5(a); Gov. Code, § 12940(a); Lab. Code, § 511(d).) Religious views
23 on marriage are also protected views. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 854-855; *Obergefell*
24 *v. Hodges* (2015) 576 U.S. 644, 672; *Masterpiece I, supra*, 138 S.Ct. at 1727.) And the view that one can
25 support protecting the rights of LGBT individuals, and support maintaining marriage as solely an
26 institution between one man and one woman, is the explicit view of the California Constitution. (See

27 ⁴ See also Defendants’ Memorandum of Points & Authorities in Opposition to Plaintiff’s Motion
28 for Summary Judgment or Adjudication (Oct. 6, 2021) pp.15:20-16:3.

1 Cal. Const., art. I, § 7.5; *Strauss v. Horton* (2009) 46 Cal.4th 364, 408-411 & fn.8-10.)

2 Defendant Cathy Miller is a devout Christian whose faith requires her to treat marriage as a
3 uniquely important sacrament. It also instructs her that marriage is only the union of one man and
4 one woman. Despite the law discussed above in Sections 1.1 through 1.3, Plaintiff DFEH argues that
5 the facts here establish discrimination on the basis of sexual orientation, and presumably that the
6 Real Parties' sexual orientation was still a "substantial motivating" reason for the denial of service.
7 (See *Department of Corrections & Rehabilitation v. State Personnel Bd.* (2022) 74 Cal.App.5th 908,
8 927-928; CACI No. 2507 [defining a "substantial motivating reason" as "a reason that actually
9 contributed to the [the adverse action]. It must be more than a remote or trivial reason. It does not
10 have to be the only reason motivating the [adverse action]"].)⁵

11 But Defendants will prove that even if the facts of this case constituted sexual orientation
12 "discrimination," the distinction made here by Defendants was not arbitrary because: (1) the view
13 that marriage can only be between one man and one woman is a belief enshrined in the California
14 Constitution and protected by both the California and U.S. Constitutions, and therefore cannot be
15 considered invidious or perpetuating irrational stereotypes; (2) the distinction that Defendants
16 made here was not based upon the Real Parties' sexual orientation, but rather concerned protecting
17 Defendants' own religious rights to support a fundamental tenet of their faith; (3) Defendants' offer
18 to connect the Real Parties with another bakery ensured that they would have actually received
19 services, thus confirming that Defendants made a distinction concerning their reasonable and
20 protected religious beliefs, and not with any intent to harm the Real Parties, and in a manner that
21 would have reasonably protected all parties' rights; and (4) Defendants do serve LGBT customers
22 in other custom order requests and have employed members of the LGBT community.

23 ///

24 ⁵ Plaintiff DFEH continues to dispute whether a "substantial" motivating reason is required. (See
25 Plt. Opp. to MIL No. 2, p.4, fn.1; Plt. Opp. to MIL No. 9, pp.2:24-3:21.) But California cases
26 generally require this, even in Unruh Act cases. (See *Minton, supra*, 39 Cal.App.5th at 1161;
27 *Thurston, supra*, 69 Cal.App.5th at 304, fn.5.) Plaintiff DFEH cites older federal cases that in turn
28 relied on the 2009 version of BAJI No. 7.92. In 2017, BAJI No. 7.92 was amended to add the
"substantial" descriptor. (See Reply Memorandum ISO Defendants' Motion for Summary
Judgment or Adjudication (Oct. 20, 2021) § 1.2, pp.9:1-10:4 & fn.2-3 [hereafter "Def. MSJ Reply"].)

1 **2. DEFENDANTS’ CONSTITUTIONAL RIGHTS OF FREE EXERCISE OF RELIGION**
2 **AND FREE SPEECH REQUIRE THE GOVERNMENT REGULATION OF THEIR**
3 **ACTIVITY TO SATISFY STRICT SCRUTINY, WHICH IT DOES NOT.**

4 Even if the Court determines that there was a technical Unruh Act violation, this Court
5 should also determine that Defendants are protected by their constitutional rights under: (1) the
6 Free Exercise Clause of the California Constitution; (2) the Free Exercise Clause of the U.S.
7 Constitution; and (3) the Free Speech Clause of the U.S. Constitution.

8 With respect to Tastries Bakery itself, a for-profit corporation, whether viewed through the
9 lens “that for-profit corporations possess such rights” themselves, or through the lens that the
10 owners of corporations can exercise their constitutional rights when running their businesses,
11 Tastries Bakery can assert these constitutional defenses. (*Burwell v. Hobby Lobby Stores, Inc.* (2014)
12 573 U.S. 682, 708-719 & fn.19-22, 28 [federal Free Exercise clause]; *Minton, supra*, 39 Cal.App.5th
13 at 1165 [California Free Exercise clause]; *Citizens United v. Federal Election Commission* (2010) 558
14 U.S. 310, 365 [federal Free Speech clause].)

15 This precedent, beyond being reaffirmed by the U.S. Supreme Court in *Burwell*, is
16 longstanding. (See, e.g., *Gallagher v. Crown Kosher Super Market of Mass., Inc.* (1961) 366 U.S. 617,
17 618-619 [corporation managing kosher market challenging Sunday closing laws]; *Braunfeld v. Brown*
18 (1961) 366 U.S. 599, 601 [Jewish “merchants ... engage[d] in the retail sale of clothing and home
19 furnishings” challenging Sunday closing laws]; *U.S. v. Lee* (1982) 455 U.S. 252, 257 [Amish
20 carpenter who argued that “payment and receipt of social security benefits [on behalf of his
21 employees] is forbidden by the Amish faith”].) Although the corporations in *Gallagher*, *Braunfeld*,
22 and *Lee* lost on the merits, the Supreme Court relied on them when it reaffirmed, unequivocally,
23 that “for-profit corporations possess” “free-exercise rights” under the First Amendment. (*Burwell*,
supra, 573 U.S. at 714-715.)

24 In the prior petition proceeding, Judge Lampe unequivocally and rightly found that the Free
25 Speech clause of the First Amendment protected Defendants. (See *DFEH v. Miller* (2018)
26 Cal.Super. No. BCV-17-102855, 2018 WL 747835, at *3-5.) However, Judge Lampe struggled with
27 the Free Exercise analysis, noting that “[i]t is difficult to say what standard of scrutiny the court
28 should use to evaluate the application of the Free Exercise clause to the circumstances of this case

1 after *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108
2 L.Ed.2d 876 (1990).” (*Id.* at *5.) Since that time, however, the law has become much clearer. In the
3 intervening four years, the U.S. Supreme Court has issued its opinions in *Fulton v. City of*
4 *Philadelphia* (2021) 141 S.Ct. 1868, *Tandon v. Newsom* (2021) 141 S.Ct. 1294, and *Masterpiece*
5 *Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018) 138 S.Ct. 1719, each of which applied strict
6 scrutiny, controls this case, and disposes of this case in Defendants’ favor.

7 The division between Free Exercise and Free Speech rights has also recently been revealed
8 by the U.S. Supreme Court as a false one. Those rights were discussed by the High Court in
9 reversing a decision barring a high school football coach from engaging in private prayer during his
10 work duties. As the Supreme Court explained:

11 Both the Free Exercise and Free Speech Clauses of the First Amendment
12 protect expressions like Mr. Kennedy’s. ... The Constitution and the best of our
13 traditions counsel mutual respect and tolerance, not censorship and suppression,
for religious and nonreligious views alike. ...

14 [T]he District’s conduct violated both the Free Exercise and Free Speech
15 Clauses of the First Amendment. These Clauses work in tandem. Where the
16 Free Exercise Clause protects religious exercises, whether communicative or
17 not, the Free Speech Clause provides overlapping protection for expressive
18 religious activities. That the First Amendment doubly protects religious speech
19 is no accident. It is a natural outgrowth of the framers’ distrust of government
attempts to regulate religion and suppress dissent. In Anglo–American history,
government suppression of speech has so commonly been directed precisely at
religious speech that a free-speech clause without religion would be Hamlet
without the prince. ...

20 The [Free Exercise] Clause protects not only the right to harbor religious beliefs
21 inwardly and secretly. It does perhaps its most important work by protecting the
22 ability of those who hold religious beliefs of all kinds to live out their faiths in
daily life through “the performance of (or abstention from) physical acts.”

23 (*Kennedy v. Bremerton School District* (2022) 142 S.Ct. 2407, 2416, 2421 [cleaned up].)

24 For the reasons discussed below, this is quintessentially a case of government overreach
25 where the First Amendment should stop the government in its tracks. The trend in recent religious
26 liberty jurisprudence at the U.S. Supreme Court has been to uniformly restrain the government
27 especially where, as here, the State’s actions “appear[] to reflect not expertise or discretion, but
28 instead insufficient appreciation or consideration of the interests at stake.” (*South Bay United*

1 *Pentecostal Church v. Newsom* (2021) 141 S.Ct. 716, 717 [Roberts, C.J., concurring].)

2 **2.1. The Free Exercise Clause of the California Constitution⁶**

3 For its Free Exercise clause (Cal. Const., art. I, § 4), California uses a pre-1990 federal test.
4 (*Smith v. FEHC* (1996) 12 Cal.4th 1143, 1179 [plur. opn.]; *Valov v. DMV* (2005) 132 Cal.App.4th
5 1113, 1126 & fn.7; see also *Burfitt v. Newsom* (2021) Cal.Super. No. BCV-20-102267, 2021 WL
6 2152961, at *3 [Pulskamp, J.]) Under this standard, there is “a two-fold analysis which calls for a
7 determination of, first, whether the application of the statute imposes any burden upon the free
8 exercise of the defendant’s religion, and second, if it does, whether some compelling state interest
9 justifies the infringement.” (*Montgomery v. Board of Retirement* (1973) 33 Cal.App.3d 447, 451
10 [quoting *People v. Woody* (1964) 61 Cal.2d 716, 719].)

11 **2.1.1. Religious Sincerity is Not Disputed and a Burden on Defendants’**
12 **Religious Beliefs is Imposed Because Defendants Must Choose Between**
13 **Shutting Down their Business or Honoring Their Religious Beliefs.**

14 “The first step ... requires two determinations, *i.e.*, [A] whether the statute imposes any
15 burden upon the free exercise of the ... religious beliefs the defendant asserts he embraces and
16 [B] whether the defendant actually [believes] in good faith in that religion.” (*People v. Mullins* (1975) 50
17 Cal.App.3d 61, 70.) As a general rule, “tort liability ... imposes a[] burden” because “its very purpose
18 is to discourage [the adherent] from putting such belief into practice by subjecting the [adherent] to
19 possible monetary loss for doing so.” (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1117; see *North*
20 *Coast, supra*, 44 Cal.4th at 1158 [applying the Unruh Act constituted a burden]; *Walker v. First*
21 *Orthodox Presbyterian Church of San Francisco* (1980) 22 Fair Empl.Prac.Cas. (BNA) 762, Cal.Super.
22 No. 760-028, 1980 WL 4657, *3 & fn.3 [same as to similar nondiscrimination ordinance]; cf. also
23 *Carson v. Makin* (2022) 142 S.Ct. 1868, 1876 [“The Free Exercise Clause ... protects against ‘indirect
24 coercion or penalties on the free exercise of religion, not just outright prohibitions.’”].)

25 Under the sincerity analysis, “religious beliefs need not be acceptable, logical, consistent, or
26 comprehensible to others in order to merit First Amendment protection.” (*Fulton v. City of*
27 *Philadelphia* (2021) 141 S.Ct. 1868, 1876.) Under the second step, “when the [party] has made a

28 ⁶ See Def. MSJ, § 2.1, pp.15:25-18:18; Def. MSJ Reply, § 2.1, pp.10:23-12:15.

1 sufficient showing to trigger strict scrutiny review, the burden of justification is both demanding and
2 entirely upon the government.” (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 43 [equal
3 protection context]; see also *id.* at 35-38 [discussing strict scrutiny test].) “Government
4 ‘justification[s]’ for interfering with First Amendment rights ‘must be genuine, not hypothesized or
5 invented post hoc in response to litigation.’” (*Kennedy, supra*, 142 S.Ct. at 2432, fn.8.)

6 As noted above, Plaintiff DFEH does not contest the sincerity of Defendants’ religious
7 beliefs. (See Defendants’ Motions in Limine, Nos. 1, 9 (July 8, 2022) [citing Jud. Adm. Doc. 1,
8 DFEH Supp. Responses to RFAs (Feb. 25, 2022) Nos. 8, 9, 13-16].) Still, Plaintiff DFEH opposes
9 Defendants’ first and ninth motions in limine. The opposition is based around Plaintiff DFEH’s
10 fear that granting the motions will inhibit its Free Speech argument. This fear is unfounded. What
11 is at issue in those motions, and what the Court should find as a binding judicial admission,
12 concerns *the sincerity of Defendants’ beliefs*, not how others will perceive those beliefs or perceive
13 Defendants’ actions.

14 Despite the absence of a dispute over sincerity, Plaintiff DFEH argues that under the
15 California Constitution, Defendants’ free exercise rights are not substantially burdened because
16 Defendants could: (1) restructure their business and cease offering wedding cakes for sale to
17 anyone; or (2) have an employee who does not have any contrary moral views on same-sex marriage
18 make the wedding cake. Yet, both of these options would continue to violate Defendants’ religious
19 beliefs and are simply untenable:

20 (1) Defendants’ religious beliefs require them to honor and promote covenantal marriage
21 through their wedding services. Defendants also earnestly believe that shutting down their wedding-
22 related services would make Tastries Bakery insolvent. (See Declaration of Catharine Miller in
23 Support of Defendants’ Motion for Summary Judgment (Sep. 8, 2021) ¶ 52 [hereafter “Miller MSJ
24 Decl.”]; Tastries 2d Amend. Responses to SROGs (Apr. 14, 2022) No. 26.)

25 (2) Tastries Bakery is 100% owned by Cathy Miller such that anything it does is directly
26 using her art, recipes, and talent and is a direct reflection on her. Further, the wedding cake design
27 consultation includes a presentation created by Cathy on the meaning and religious significance of
28 the wedding cake. Thus, it would violate Defendants’ religious beliefs to have Cathy’s art, recipes,

1 and talent used to send a message promoting same-sex marriage. (See Miller MSJ Decl., ¶¶ 1, 25.)

2 **2.1.2. Strict Scrutiny is not Satisfied Because Defendants Offered to Connect**
3 **Real Parties with Another Bakery.**

4 Turning to strict scrutiny, the government has the burden of showing that applying the law is
5 “the least restrictive means of achieving a compelling interest.” (*North Coast, supra*, 44 Cal.4th at
6 1158.) Both the California Supreme Court and the U.S. Supreme Court believe that the
7 government’s interest is in ensuring that the client actually receives “full and equal” services, such
8 that Defendants’ offer to connect the Real Parties with another bakery should satisfy strict scrutiny.
9 (See *Fulton, supra*, 141 S.Ct. at 1882; *North Coast, supra*, 44 Cal.4th at 1159; *Minton, supra*, 39
10 Cal.App.5th at 1164-1165.)

11 Plaintiff DFEH disputes this, contending that either a Tastries Bakery employee must make
12 the cake or Tastries Bakery must cease operations. In this respect, Plaintiff DFEH argues that this
13 principle comes from the California Supreme Court’s application of the Unruh Act in *North Coast*, a
14 case which Plaintiff DFEH accuses Defendants of ignoring. (See Plaintiff’s Opposition to
15 Defendants’ Motion in Limine, No. 8 (July 18, 2022) p.3:7-19 [“Defendants want to ignore
16 longstanding caselaw”]; Plaintiff’s Opposition to Defendants’ Motion in Limine, No. 1 (July 18,
17 2022) p.5:9 [“defendants disregard *North Coast*”].)

18 But *North Coast* says no such thing. There, North Coast Women’s Medical Group, Inc.,
19 located in San Diego County, employed various physicians, some with devout religious faith, others
20 without. Ms. Benitez, a lesbian woman, sought to become pregnant through donated sperm. She
21 was referred to North Coast and was initially treated by Dr. Brody. However, as the treatment
22 progressed, Ms. Benitez ultimately needed to undergo physician-assisted insemination, which Dr.
23 Brody could not do for an unmarried woman because of her religious beliefs. But no other North
24 Coast physician was licensed for the procedure. (*Id.* at 1151-1152.) Ms. Benitez then sued North
25 Coast and Dr. Brody for violation of the Unruh Act. As part of its strict scrutiny analysis, and in that
26 context only, the California Supreme Court looked to the facts and held that holding North Coast
27 Women’s Medical Group liable for a violation of the Unruh Act was the least restrictive means of
28 achieving a compelling government interest. (*Id.* at 1159.)

1 On its relevant facts, and its application of those facts to the law, *North Coast* is very different.
2 It involved the congruence of: (1) a religious objection by a limited number of employees, not the
3 entity itself; (2) where the doctors acted independently of each other, and did not supervise each
4 other; and (3) the special, confidential and fiduciary relationship that exists between a physician and
5 patient, along with the concomitant constitutional privacy interests of a patient seeking to become
6 pregnant. (See *North Coast, supra*, 44 Cal.4th at 1162-1163 [Baxter, J., concurring] [noting unique
7 medical and pregnancy context, and fact of group medical practice, not sole practitioner]; see also
8 *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 63 [Kennard, J., concurring] [“The relationship of
9 doctor to patient is a fiduciary one. A doctor has not only a legal obligation, grounded in the doctor-
10 patient privilege and the constitutional right of privacy, but also a professional obligation to maintain
11 the secrecy of patient confidences.”] [cleaned up].)

12 None of that exists here. This case is more akin to the many cases wherein corporations
13 asserted their own First Amendment rights to justify instructions to their employees that none of
14 them may perform certain activities. The main problem with comparing this case to *North Coast*,
15 and Plaintiff DFEH’s attempt to create a “compromise” position, is that there is no practical
16 difference here between issuing an order saying: (1) Either Defendant Miller has to design and
17 create wedding cakes for same-sex weddings, or Tastries Bakery has to shut down; or (2) Either a
18 Tastries employee has to design and create wedding cakes for same-sex weddings, or Tastries has to
19 shut down. *In both cases, Tastries Bakery shuts down.*

20 Defendant Miller’s religious beliefs are not disputed in this case, they are sincere. They
21 sincerely require her to shut Tastries Bakery down rather than have her, or her employees, make
22 wedding cakes for same-sex weddings. The most significant difference between here and *North*
23 *Coast*, was that the doctors there really were independent professionals, where the North Coast
24 Medical Group itself did not have any religious objections. As part of the strict scrutiny analysis,
25 this is what the Court really has to weigh: Is the Real Parties’ dignitary interests in being free from
26 any hint of discrimination significant enough to require Tastries Bakery to close? No California or
27 U.S. Supreme Court case has held that to be the required result on similar facts, especially when
28 there are full and equal services widely available in the community.

1 Plaintiff DFEH can only make *North Coast* fit this case through stretching it and ignoring
2 parts of it. When *North Coast* is properly analyzed, it supports Defendants’ arguments. (See *North*
3 *Coast, supra*, 44 Cal.4th at 1162-1163 [Baxter, J., concurring] [noting the majority’s opinion only
4 applies in context of a group practice (independent professionals); otherwise, the government’s
5 interest would be satisfied “where the patient could be referred with relative ease and convenience
6 to another practice”]; Oral Argument Transcript at 62:12-64:18, *Masterpiece I, supra*, 138 S.Ct. 1719⁷
7 [Justices Kennedy and Breyer asking why a referral is not sufficient].)

8 Plaintiff DFEH’s purported State interest is also not justifiable on “dignity” grounds. Citing
9 *Smith v. FEHC* (1996) 12 Cal.4th 1143 [plur. opn.], Plaintiff DFEH argues that the protection of
10 Defendants’ Free Exercise rights will harm the Real Parties sufficiently to justify overruling
11 Defendants’ rights. (Plaintiff’s Opposition to Defendants’ Motion in Limine, No. 3 (July 18, 2022)
12 pp.2:10-4:28.) In *FEHC*, a plurality of the California Supreme Court held that an unmarried
13 couple’s “dignity interests in freedom from discrimination based on personal characteristics”
14 justified overruling a religious objection by a Christian landlord to renting to unmarried couples. (*Id.*
15 at 1170 [plur. opn.].) But like Plaintiff DFEH’s appeal to *North Coast*, the different factual contexts
16 of these cases is important. Property is not fungible and widespread housing discrimination can
17 cause real harm. (See *Burks v. Poppy Const. Co.* (1962) 57 Cal.2d 463, 471 [“Discrimination in
18 housing leads to lack of adequate housing for minority groups [citation], and inadequate housing
19 conditions contribute to disease, crime, and immorality.”].)

20 Here, the Real Parties had no difficulty actually obtaining a wedding cake, so their dignitary
21 interests lie solely in forcing Defendants to give up their own constitutionally protected religious
22 beliefs. (*Masterpiece I, supra*, 138 S.Ct. at 1727 [“religious and philosophical objections to gay
23 marriage are protected views”].) In this context, “learning how to tolerate [religious activity] of all
24 kinds is ‘part of learning how to live in a pluralistic society,’ a trait of character essential to ‘a
25 tolerant citizenry.’” (*Kennedy, supra*, 142 S.Ct. at 2430.) Thus, whether Plaintiff DFEH or private

26
27 ⁷ Transcript available at [https://www.supremecourt.gov/oral_arguments/argument_transcripts/](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf)
28 [2017/16-111_f314.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf); see also audio recording at 0:50:29-0:52:35, available at
https://youtu.be/YO5WPCUh_MY?t=3029.

1 individuals “take offense” at such conduct, is not a significantly relevant inquiry. (*Id.*)

2 Further, forcing Tastries Bakery to suspend wedding services (and consequently all business
3 operations) would reduce services to all persons, including to LGBT individuals who are routinely
4 served by Defendants. (See *Fulton*, *supra*, 141 S.Ct. at 1882 [noting that exempting Catholic foster
5 agency from nondiscrimination policy, and allowing it to refuse to certify same-sex couples as foster
6 parents, would have the benefit of “increase[ing], not reduc[ing], the number of available foster
7 parents,” not the opposite].) Thus, Plaintiff DFEH’s legal argument and interests are actually not in
8 line with the State’s interests.

9 Plaintiff DFEH attempts to distinguish *Fulton* because it involved a “faith-based
10 nonprofit.” (Plaintiff’s Opposition to Defendants’ Motion in Limine, No. 12 (July 18, 2022)
11 pp.5:20-6:9.) But faith-based corporations are subject to the Unruh Act like any other. (See *Minton*,
12 *supra*, 39 Cal.App.5th 1155.) And a party’s constitutional rights have never depended on its
13 corporate form. (See *Burwell*, *supra*, 573 U.S. at 709 [rejecting a for-profit/non-profit, distinction].)
14 Plaintiff DFEH also misconstrues Defendants’ motion in limine seeking to exclude evidence of Real
15 Parties’ emotional distress. Defendants argued that Plaintiff DFEH should be judicially estopped
16 from contradicting its own, prior position (asserted in discovery proceedings) that such evidence is
17 irrelevant. Since Plaintiff DFEH thought the evidence was irrelevant before, it should be held to
18 that position. (See Defendants’ Motion in Limine, No. 3 (July 8, 2022).)

19 Defendants will prove that they offered to connect the Real Parties with a comparable bakery
20 and ask this Court to rule that this satisfied strict scrutiny by meeting the State’s interest in ensuring
21 the provision of “full and equal” services.

22 **2.2. The Free Exercise Clause of the U.S. Constitution**

23 When looking at the federal Free Exercise clause (U.S. Const., amend. I), the analysis is
24 similar to the California Free Exercise clause, except that strict scrutiny is only triggered if the law is
25 not “neutral and generally applicable.” (*Fulton*, *supra*, 141 S.Ct. at 1876.) For the same reasons as
26 discussed above, strict scrutiny cannot be satisfied. (See Section 2.1.2.)⁸

27 ⁸ See Def. MSJ, § 2.2, pp.18:18-24:17; Def. MSJ Reply, § 2.2, pp.12:15-15:11. The factual predicates
28 which support Defendants’ arguments in this section on neutrality and general applicability also

1 **2.2.1. The Unruh Act is Not Generally Applicable Per the Non-Arbitrary**
2 **Exemption of Civil Code, § 51(b).**

3 First, “[a] law is not generally applicable if it ‘invite[s]’ the government to consider the
4 particular reasons for a person’s conduct by providing ‘a mechanism for individualized
5 exemptions.’” (*Fulton, supra*, 141 S.Ct. at 1877.) For example, permitting “the government to grant
6 exemptions based on the circumstances underlying each” situation, *i.e.*, a “good cause” exemption,
7 makes the law not generally applicable. (*Id.*) In that context, “where the State has in place a system
8 of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’
9 without compelling reason.” (*Id.*; see also *Dahl v. Board of Trustees of Western Michigan University*
10 (6th Cir. 2021) 15 F.4th 728, 733.) As noted above, California cases have interpreted the text of the
11 Unruh Act (Civil Code, § 51(b)) as only prohibiting “arbitrary” discrimination, regardless of
12 whether an enumerated protected characteristic is implicated. (Section 1.4, *supra* [citing *Cox, supra*,
13 3 Cal.3d at 216-217 & fn.11; *Isbister, supra*, 40 Cal.3d at 87-90 & fn.20].) This is definitionally a
14 “good cause” system of individualized exemptions that triggers strict scrutiny.

15 **2.2.2. The Unruh Act is Not Neutral and Generally Applicable Per the**
16 **Exemption for Other Statutes of Civil Code, § 51(c).**

17 Second, “government regulations are not neutral and generally applicable, and therefore
18 trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular
19 activity more favorably than religious exercise.” (*Tandon v. Newsom* (2021) 141 S.Ct. 1294, 1296
20 [original italics].) Stated differently, “[a] government policy will fail the general applicability
21 requirement if it ‘prohibits religious conduct while permitting secular conduct that undermines the
22 government’s asserted interests in a similar way.’” (*Kennedy, supra*, 142 S.Ct. at 2423 [quoting
23 *Fulton, supra*, 141 S.Ct. at 1877].)

24 Here, the Unruh Act states that it “shall not be construed to confer any right or privilege on
25 a person that is conditioned or limited by law.” (Civ. Code, § 51(c).) This provision essentially
26 support Defendants’ arguments under the federal Due Process and Equal Protection clauses. (See
27 Def. Opp. to MIL Nos. 2, 3.) Defendants wish to preserve those legal arguments for appeal, but
28 present these same facts through the lens of the Free Exercise clause in light of the applicability of
recent Supreme Court precedent.

1 provides that whenever there is a conflict between the Unruh Act and other law, the Unruh Act
2 must necessarily give way. Thus, it writes into the Unruh Act itself an explicit system whereby any
3 activity can be legally exempted at any time, and for any reason. This system, *by itself*, makes the
4 Unruh Act not generally applicable. However, a review of the exemptions that have been passed into
5 law also reinforces that the Unruh Act is not generally applicable.

6 The Unruh Act itself provides explicit exemptions for age discrimination in housing. (Civ.
7 Code, §§ 51.2-51.4, 51.10-51.12.) And subdivision (c) has been interpreted to allow age
8 discrimination in car rentals (see *Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1505 [citing
9 Vehicle Code]), and sex discrimination by international organizations subject to international
10 treaties. (*Martin v. International Olympic Committee* (9th Cir. 1984) 740 F.2d 670, 677.) Beyond the
11 fact that governmental institutions are not “business establishments” under the Unruh Act (see
12 *Brennon B. v. Superior Court of Contra Costa County* (2020) 57 Cal.App.5th 367, 390 [school districts
13 exempted]; *White v. City and County of West Sacramento* (E.D. Cal. 2021) No. 2:20-CV-02383-MCE-
14 AC, 2021 WL 4068009, at *4 [police departments exempted]), cities and counties are per se
15 exempted because their conduct can be ratified through ordinances exempting themselves from the
16 Act. (*Harrison v. City of Rancho Mirage* (2015) 243 Cal.App.4th 162, 176.)

17 California also provides other conscience protections for employees who might otherwise be
18 liable for discrimination (Gov. Code, § 12940(l); Lab. Code, § 511(d); see also Gov. Code, § 12926(q)),
19 including specifically in the healthcare context, where medical personnel might otherwise be liable for
20 sex discrimination. (See Health & Saf. Code, § 123420 [protection against assisting in abortion]; Bus.
21 & Prof. Code, § 733(b)(3) [pharmacist may refuse on religious grounds to dispense a drug so long as
22 employer makes accommodation]; see also Prob. Code §§ 4734, 4736 [medical personnel may decline
23 to effectuate advanced healthcare directives on conscience grounds].) As noted above, with respect to
24 the Unruh Act, the interests of the State are “generally [] preventing arbitrary discrimination.” (See
25 *FEHC, supra*, 12 Cal.4th at 1176, fn.21.) This interest is undermined by any and all secular exemptions
26 to the Unruh Act, regardless of the protected characteristic involved.

27 Plaintiff DFEH responds that these categorical exemptions cannot make the Unruh Act not
28 generally applicable because the California Supreme Court already found that the Act is generally

1 applicable. (See *North Coast*, *supra*, 44 Cal.4th at 1156.) But in *North Coast*, general applicability was
2 not a primary issue. At the trial court level, the defendant relied solely on the hybrid rights doctrine.
3 (*Benitez v. North Coast Women’s Care Medical Group* (2004) Cal.Super. No. GIC770165, 2004 WL
4 5047112.) Before the California Supreme Court the defendant briefly stated that the Unruh Act was
5 not generally applicable, but only cited the provisions allowing senior housing (*i.e.*, age
6 discrimination)—no other categorical exemptions. (See Answer Brief on the Merits, *North Coast*,
7 *supra*, 44 Cal.4th 1145, 2006 WL 4098607 [citing Civ. Code, §§ 51.2, 51.3].) Further, the holding of
8 the California Supreme Court in *North Coast* cannot be squared with the U.S. Supreme Court’s
9 most recent elaboration on general applicability in *Tandon* and *Fulton*.⁹

10 **2.2.3. The DFEH’s Administrative Investigation and Prosecution Has Not**
11 **Been Neutral Due to Disparate Treatment & Hostility**¹⁰

12 Government action is not neutral if it “stem[s] from animosity to religion or distrust of its
13 practices” (*Masterpiece I*, *supra*, 138 S.Ct. at 1731), or when the government acts “in a manner
14 intolerant of religious beliefs.” (*Fulton*, *supra*, 141 S.Ct. at 1877.) This lack of neutrality is apparent
15 where the government “passes judgment upon or presupposes the illegitimacy of religious beliefs
16 and practices” (*Masterpiece I*, *supra*, 138 S.Ct. at 1731), or “assume[s] the worst” about religious
17 motivations for accommodation “but assume[s] the best” about secular ones. (*Tandon*, *supra*, 141
18 S.Ct. at 1297.) This can be shown explicitly, by the government calling religious beliefs
19 “prejudices.” (*Klein v. Oregon BOLI* (2022) 317 Or.App. 138, 161.) It can also be shown implicitly,
20 through “the difference in treatment between [a religious baker’s] case and the cases of other bakers
21 who objected to a requested cake on the basis of conscience and prevailed before the Commission”
22 (*Masterpiece I*, *supra*, 138 S.Ct. at 1730; see *Masterpiece II*, *supra*, 445 F.Supp.3d at 1242), or
23 implicitly through timing and legal positions indicating retaliation for a prior successful legal victory.

24
25 ⁹ The issue of whether the “arbitrary” affirmative defense was an individualized exemption
26 mechanism, thus automatically triggering strict scrutiny, was also not litigated in *North Coast*. This
27 is because the concept that an individualized exemption system triggers strict scrutiny only
28 emerged in 2021 with the U.S. Supreme Court’s holding in *Fulton*.

¹⁰ See also Def. MIL Nos. 7-8.

(*Masterpiece II*, *supra*, 445 F.Supp.3d at 1242.) In cases of religious “hostility,” strict scrutiny does not apply; rather, courts “‘set aside’ such policies without further inquiry.” (*Kennedy*, *supra*, 142 S.Ct. at 2422, fn.1 [quoting *Masterpiece I*, *supra*, 138 S.Ct. at 1732].)

Here, Defendants will prove that Plaintiff DFEH treated Defendants differently from others because: (1) during its administrative investigation, the DFEH was actively partisan, and assumed the worst regarding Defendants’ religious beliefs by applying for a TRO a few days before Defendants’ discovery responses were even due, despite the fact that as an investigator, “[t]he DFEH serves as a neutral fact-finder and represents the state of California rather than the complaining party” (Def. Trial Ex. 21, Notice of Filing of Discrimination Complaint (Oct. 16, 2017) p.1); and (2) Plaintiff DFEH admitted that it cannot and will not apply the Unruh Act to compel speech, and that all business owners could refuse to create a product that they view as offensive (Jud. Adm. Doc. 2, DFEH Supp. Responses to RFAs (Feb. 25, 2022) Nos. 4-7, 22), yet after reviewing Defendants’ declarations and administrative discovery responses, and Judge Lampe’s preliminary injunction order, it still chose to find probable cause to initiate the present misguided litigation. (Def. Trial Ex. 23, Notice of Cause Finding (Oct. 10, 2018) p.1.)

Second, Defendants will prove that Plaintiff DFEH has shown hostility to Defendants because: (1) both during its administrative investigation and the subsequent civil litigation, Plaintiff DFEH has compared Defendants’ sincere religious beliefs to racial discrimination and other forms of invidious and opprobrious hate; and (2) both during its administrative investigation and the subsequent civil litigation, Plaintiff DFEH has argued that Defendants need to change their religious beliefs that no Tastries employee may participate in a same-sex wedding. (See Defendants’ Motions in Limine, Nos. 7, 8 (July 8, 2022); Defendants’ Opposition to Plaintiff’s Motion in Limine, No. 3 (July 18, 2022).)

2.3. The Free Speech Clause of the U.S. Constitution¹¹

Under the Free Speech clause of the U.S. Constitution (U.S. Const., amend. I), all Americans have “the right to speak freely” and “the right to refrain from speaking at all.” (*Wooley v. Maynard*

¹¹ See Def. MSJ, § 2.3, pp.24:18-29:3; Def. MSJ Reply, § 2.3, pp.15:12-16:11.

(1977) 430 U.S. 705, 714.) Any restriction on this must satisfy “strict scrutiny.” (See *Pacific Gas and Elec. Co. v. Public Utilities Com’n of California* (1986) 475 U.S. 1, 19-20 [“PG&E”].) The Free Speech clause of the First Amendment protects both “pure speech” and “expressive conduct.”

For the reasons discussed below, the specific wedding cake that the Real Parties sought was itself artistic expression protected under the First Amendment as both “pure speech” and “expressive conduct.” However, the analysis cannot be limited to just that wedding cake. In addition to prosecuting the Defendants on behalf of the Real Parties, Plaintiff DFEH seeks broader injunctive relief requiring Defendants to treat opposite-sex couples and same-sex couples identically with respect to all aspects of their wedding services. (FAC Prayer ¶ 2.) This implicates other Free Speech concerns, as discussed during the oral argument in *Masterpiece Cakeshop*:

JUSTICE GINSBURG: Would that be true—would that be true if what the message—the message, let’s say Craig and Mullins said we would like to have on this wedding cake of ours these words: “God bless the union of Craig and Mullins.”

MR. COLE [ACLU ATTORNEY]: So if he would not put that message on any other cake, then he doesn’t have to put it on that cake.

JUSTICE GINSBURG: He would put ... that message on a cake that said: God bless the union of Ruth and Marty.

MR. COLE: Right. If he would—if he would say that, then he would have to say God bless the union of Dave and Craig because the only difference between those two cakes, Your Honor, is the identity of the customer who is seeking to purchase it. It is the same cake otherwise.

(Oral Argument Transcript at 75:24-76:19, *Masterpiece I*, *supra*, 138 S.Ct. 1719.¹²)

2.3.1. Compelled Pure Speech

A compelled-speech defense has three elements: (1) speech; (2) that the government compels’ and (3) that the speaker objects to. (See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515 U.S. 557, 572-573.) Elements two and three are conceded: because Defendants make wedding cakes celebrating traditional marriages, Plaintiff seeks to use the Unruh

¹² Transcript available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf; see also audio recording at 1:03:12-1:04:03, available at https://youtu.be/YO5WPCUh_MY?t=3792.

1 Act to compel Defendants to make wedding cakes celebrating same-sex weddings. (FAC, Prayer ¶ 2;
2 MIL Ex. 8, DFEH Supp. Resp. to Tastries SROGs (Feb. 25, 2022) No. 23.) The only question is
3 whether Defendants’ wedding cakes are speech. Most simply, “[a]rt is speech.” (*Chelsey Nelson*
4 *Photography LLC v. Louisville/Jefferson County Metro Government* (W.D. Ky. 2020) 479 F.Supp.3d
5 543, 548; *Hurley, supra*, 515 U.S. at 569.) Neither collaboration between a business and a customer
6 in creating the art, nor the anonymity of the business when the customer later publishes the art, is
7 relevant: the business is still speaking. (See *Brush & Nib Studio, LC v. City of Phoenix* (2019) 247 Ariz.
8 269, 287-291; *Anderson v. City of Hermosa Beach* (9th Cir. 2010) 621 F.3d 1051, 1061-1062.)

9 Here, Defendants will prove that when they create a custom wedding cake, they are engaged
10 in artistic expression. Cake designs can range from simple to elaborate, but all styles require skill and
11 each design portrays an image and message intended by the customer. (See Miller MSJ Decl., ¶¶ 2,
12 7, 12, 25-29, 32 & Exs. B, D.) In this case, the Real Parties wanted to communicate theirs was a
13 “traditional wedding,” so the traditional all white, three-tier cake was chosen. (MIL Ex. 8, DFEH
14 Supp. Resp. to Tastries SROGs (Feb. 25, 2022) No. 14.) This custom cake was art entitled to full
15 First Amendment protection. (See *DFEH v. Miller* (2018) Cal.Super. No. BCV-17-102855, 2018 WL
16 747835, at *3 [“A wedding cake is not just a cake in a Free Speech analysis. It is an artistic
17 expression by the person making it that is to be used traditionally as a centerpiece in the celebration
18 of a marriage.”].)

19 2.3.2. Compelled Expressive Conduct

20 Separate from pure speech, the First Amendment protects “conduct” that is “sufficiently
21 imbued with elements of communication” (*Texas v. Johnson* (1989) 491 U.S. 397, 404), if (1) there is
22 “an intent to convey a particularized message;” and (2) “the likelihood is great that the message will
23 be understood by those who view it.” (*Anderson, supra*, 621 F.3d at 1058 [cleaned up].) As framed by
24 Plaintiff DFEH, the first element is undisputed (Defendant Miller’s intent is sincere), but it will
25 “argu[e] that, under the law, any message Miller may believe she sends is not understood by those
26 who view Tastries’ baked goods.” (Plaintiff’s Opposition to Defendants’ Motion in Limine, No. 9
27 (July 18, 2022) p.6:7-8.) Thus, according to Plaintiff DFEH, “[c]onduct, such as baking and selling
28 baked goods, may become ‘sufficiently imbued with elements of communication’ to receive free

1 speech protections [] where ‘[a]n intent to convey a particularized message was present, and in the
2 surrounding circumstances the likelihood was great that the message would be understood by those
3 who viewed it.’” (*Id.* at pp.5:28-6:4 [quoting *Spence v. Washington* (1974) 418 U.S. 405, 410-411].) But,
4 Plaintiff DFEH contends, this rule does not apply here.

5 This argument is simply absurd. As Judge Lampe held: “A wedding cake is not just a cake in
6 a Free Speech analysis. It is an artistic expression by the person making it that is to be used
7 traditionally as a centerpiece in the celebration of a marriage. There could not be a greater form of
8 expressive conduct.” (*Miller, supra*, 2018 WL 747835, at *3.) The message need not be as
9 complicated as DFEH contends, *i.e.*, “Tastries endorses this union, and so should you.” Although
10 many people would reasonably perceive that message, the primary message sent is simply: “This is
11 a marriage.” As Justice Thomas noted, “[i]f an average person walked into a room and saw a white,
12 multi-tiered cake, he would immediately know that he had stumbled upon a wedding,” and thus,
13 “[f]orcing [a baker] to make custom wedding cakes for same-sex marriages requires him to, at the
14 very least, acknowledge that same-sex weddings are ‘weddings.’” (*Masterpiece I, supra*, 138 S.Ct. at
15 1743-1744 [Thomas, J., concurring].)

16 Plaintiff DFEH essentially seeks an order compelling Defendants to write a sign with the
17 words “This is a marriage” because they will do so for opposite-sex weddings. As Judge Lampe found,
18 this does “violence to the essentials of Free Speech guaranteed under the First Amendment.” (*Miller,*
19 *supra*, 2018 WL 747835, at *1.) Moreover, context matters. It does not matter if there is a current,
20 recent trend (which will shortly reverse, no doubt, as trends do) to use more colorful cakes at
21 weddings, and sometimes use white cakes at baby showers or quinceañeras. When Real Parties would
22 have displayed Defendants’ sign, everybody would have known what it meant. (Compare Trial Ex. 631
23 [Photo of Wedding Cake]; with Trial Ex. 627A [Wedding Day Photos].)

24 Indeed, when Real Parties later commissioned a wedding cake from Tiers of Joy, they
25 purchased cakes shaped as bread loaves to be sliced and have a scoop of frosting added. If they
26 merely wanted to provide dessert to their guests, this would have been sufficient. But they *also*
27 commissioned a three-tier white wedding cake (with the bottom two tiers made of Styrofoam), the
28 traditional symbol of a wedding, so that they could engage in the traditional cake-cutting. Since this

1 three-tier cake was *not* intended for serving guests, it could *only* be for expressing a message
2 through having the image of a traditional wedding cake as a centerpiece of the celebration and
3 participating in the cake cutting ceremony where the cake is used to memorialize their first act as a
4 married couple. (See *Kaahumanu v. Hawaii* (9th Cir. 2012) 682 F.3d 789, 799 [wedding ceremony
5 itself is expressive conduct].) Thus, Defendants will prove that when they design and create custom
6 wedding cakes, they do intend to convey a message, and that their message is likely to be understood
7 by those who view their cakes. (Miller MSJ Decl., ¶¶ 19-23, 28 & Ex. C.)

8 Compelled expressive conduct is only subject to strict scrutiny (as opposed to intermediate
9 scrutiny) if the compulsion is content or viewpoint based. A regulation is content based if it “applies
10 to particular speech because of the topic discussed or the idea or message expressed.” (*Reed v. Town*
11 *of Gilbert* (2015) 576 U.S. 155, 163-165; see *Telescope Media Group v. Lucero* (8th Cir. 2019) 936 F.3d
12 740, 753 [“TMG”] [law regulated based on content by treating wedding videographers’ “choice to
13 talk about one topic—opposite-sex marriages—as a trigger for compelling them to talk about a topic
14 they would rather avoid—same-sex marriages”].)

15 As applied to Defendants, Plaintiff’s interpretation of the Unruh Act compels expressive
16 conduct based on content and viewpoint in three ways: (1) Plaintiff’s interpretation of the Unruh Act
17 would compel Defendants to celebrate same-sex weddings, which changes the content of their desired
18 expressive conduct; (2) Plaintiff’s interpretation of the Unruh Act would require Defendants to create
19 cakes celebrating same-sex weddings *because* they create cakes celebrating opposite-sex weddings. If
20 Defendants only created cakes celebrating quinceañeras, they’d be safe. It is only because Defendants
21 create cakes celebrating traditional marriage that Plaintiff seeks to compel Defendants to also create
22 cakes celebrating same-sex marriage. Thus, the Unruh Act is triggered by the content of Defendants’
23 prior speech, making it content-based; and (3) Applying the Unruh Act here would only permit access
24 to the marketplace based on one’s viewpoint. According to Plaintiff, if Defendants make cakes
25 celebrating weddings, the law does not require them to make cakes on every subject requested of
26 them; rather, according to Plaintiff, the law only requires them to create cakes promoting a specific
27 view—cakes celebrating same-sex weddings. That is a viewpoint-based access requirement that
28 requires Defendants to speak a view with which they disagree.

2.3.3. Strict Scrutiny

As noted above, compelling individuals or businesses to engage in unwanted speech requires satisfaction of strict scrutiny. Further, as explained above, the Real Parties actually got their wedding cake, and they got it for free. Thus, the only interest they have is in compelling Defendants to violate their religious beliefs and endorse the Real Parties' definition of "marriage." This is not a compelling interest. (*Miller, supra*, 2018 WL 747835, at *5.) "[T]he point of all speech protection ... is to shield just those choices of content that in someone's eyes are . . . hurtful." (*Hurley, supra*, 515 U.S. at 574.) Thus, "regulating speech because it is discriminatory or offensive is not a compelling state interest, however hurtful the speech may be." (*TMG, supra*, 936 F.3d at 755.)

CONCLUSION

Applying the Unruh Act to this case is really like trying to fit a square peg into a round hole: there is an imperfect fit. Plaintiff DFEH admits that Defendants' religious beliefs concerning marriage are sincerely held and not pretextual—their intent was pure. Defendants offered to connect the Real Parties with another bakery as part of a good faith effort to accommodate both their own religious beliefs and the Real Parties' interests in obtaining full and equal services. There is no evidence here of animus against the LGBT community, and Defendants have regularly served and employed members of that community. From Defendants' perspective, this case has nothing to do with LGBT individuals—it has everything to do with their own religious beliefs about *marriage*. Those beliefs, in turn, are constitutionally protected and in no way can be considered "arbitrary" or "invidious" under the Unruh Act.

Turning to Defendants' constitutional rights, that Defendants' speech and free exercise rights are being violated, is not meaningfully in dispute. The only question is whether requiring Defendants to make a same-sex wedding cake, instead of connecting the couple with a competitor bakery, would satisfy strict scrutiny. In this respect, the U.S. Supreme Court recently granted certiorari to answer the question "[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment." (*303 Creative LLC v. Elenis* (2022) 142 S.Ct. 1106.) It will undoubtedly answer that question in the affirmative.

///

Thus, for the reasons discussed above, Defendants intend to prove that there was no violation of the Unruh Act, and even if there arguably was, their constitutional rights protect them.

Respectfully submitted,

LiMANDRI & JONNA LLP

Dated: July 21, 2022

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ATTACHMENT

Cal. Jury Instr.--Civ. 7.92

California Civil Jury Instructions (BAJI) | February 2022 Update
West's Committee on California Civil Jury Instructions

Part 7. Intentional Torts

K. Civil Rights Violation

BAJI 7.92 Unruh Act Violation (Spring 2022 Comment Revision)

Authority:

 **Civil Code §§ 51-52a))**

The plaintiff [also] seeks to recover damages based upon a claimed violation of the “Unruh Civil Rights Act.”

The essential elements of this claim are:

1. The plaintiff [was denied] [was discriminated against] [, or] [a distinction was made between plaintiff and others,] [depriving plaintiff of] the full and equal accommodations, advantages, facilities, privileges, or services in a business establishment;
2. Plaintiff's [perceived] _____ was a [substantial] motivating factor for this [denial] [discrimination] [distinction];
3. Defendant [either] [denied or aided or incited a denial to plaintiff] [or] [made any discrimination or distinction which deprived plaintiff] of the full and equal accommodations, advantages, facilities, privileges, or services;
4. The [denial] [discrimination] [distinction] was arbitrary;] and

[4.] [5.] Defendant's wrongful conduct caused plaintiff to suffer injury, damage, loss or harm.

[_____ is a business establishment.]

[A business policy, practice or limitation is not arbitrary if it is reasonably related to a valid business objective. Your determination of whether the action taken was arbitrary, requires an examination of the entire context of the factual situation in which the action was taken or the conduct occurred. The action or conduct alleged to be discriminatory must be considered with respect to the defendant's type of business, and it's legitimate business interests.

[A “substantial motivating factor” exists when an act of discrimination or distinction deprives the plaintiff of the full and equal accommodations, advantages, facilities, privileges, or services of a business establishment and plaintiff's (protected status) is both a motivating and substantial factor in producing the deprivation.]

The plaintiff has the burden of proving by a preponderance of the evidence all of the facts necessary to establish essential elements number 1, 2, 3 and 5. The defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish that the [denial] [discrimination] [distinction] was not arbitrary, but rather was action taken reasonably related to a valid business objective, namely _____.]

USE NOTE

The list of protected statuses as set forth in the statute, are race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, or sexual orientation. Fill in the appropriate status in element #2. Use BAJI 12.08 for definitions for some of these terms. These definitions are equally appropriate for this cause of action.

The legislature in 2015 amended  Civil Code § 51, subdivision (b) by adding to the previously declared protected statuses, “citizenship, primary language, or immigration status”. Subdivision (g) provides that “verification of immigration status and any discrimination based upon verified immigration status, where required by federal law, shall not constitute a violation of this section”. Subdivision (h) also provides that these new protections do not require “the provision of services or documents in a language other than English, beyond that which is otherwise required by law”.

Use BAJI 12.13 for definitions of “disability” and “medical condition”. The Unruh act adopts the definitions of these terms as found in  Government Code § 12926, upon which BAJI 12.13 is based.

“Actions reasonably related to a valid business purpose” appears to be an affirmative defense. (See California Civil Practice, Civil Rights Litigation, § 2:11(3).)

If this contention is not asserted as a defense, delete the bracketed element four, the reference to a fifth element and the last two bracketed paragraphs.

A violation of the right of any individual under the Americans With Disabilities Act of 1990 shall also constitute a violation of  Civil Code § 51(f). In  *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 94 Cal.Rptr.3d 685, 208 P.3d 623, the court held that a plaintiff who establishes a violation of the ADA need not prove intentional discrimination to obtain damages under  Civil Code section 52. However it appears that other alleged violations of the Unruh Act not involving an ADA violation still must be intentional to be actionable.  *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 278 Cal.Rptr. 614, 805 P.2d 873. If the case involves an ADA violation, use BAJI 7.92.1.

Motivating factor is defined in BAJI 12.01.1.

Damages recoverable are governed by  § 52. Since actual damages include general and/or special damages, use BAJI 14.10–14.13 or BAJI 12.88, if only emotional distress damages are sought.

For punitive damages, use BAJI 7.94.

Respondeat superior instruction are found at BAJI 13.00 et seq.

There may be other affirmative defenses, including, but not limited to, public policy, unclean hands, or an exercise of a constitutional right. If so, special instructions will have to be prepared. Presumably the defendant will have the burden of proof on those matters.

BAJI 16.69.2 is a form of special verdict that tracks this instruction.

COMMENT

 Civil Code §§ 51(a)–(f) and  52(a).

8 Witkin, Summary of California Law (11th ed. 2017), Constitutional Law §§ 994, 995.

California Civil Practice, Civil Rights Litigation, §§ 2:1 et seq.

“The Act's language and its history compel the conclusion that the Legislature intended to prohibit all arbitrary discriminations by business establishments,” whether or not the ground of discrimination is expressly set forth in the Act. (🚩 Marina Point, Ltd. v. Wolfson (1982) 30 Cal.3d 721, 732, 180 Cal.Rptr. 496, 503, 640 P.2d 115.)

The identification of particular bases of discrimination added by the 1959 amendments, is illustrative rather than restrictive.

(🚩 In re Cox (1970) 3 Cal.3d 205, 216, 90 Cal.Rptr. 24, 31, 474 P.2d 992.

However, a business establishment may impose reasonable restrictions on customers rationally related to business being conducted or the facilities and services being provided. (🚩 Wynn v. Monterey Club (2d Dist.1980) 111 Cal.App.3d 789, 796, 168 Cal.Rptr. 878, 881.

Age-based preferences based on a strong public policy do not violate the Unruh Act. (🚩 Sargoy v. Resolution Trust Corp. (2d Dist.1992) 8 Cal.App.4th 1039, 10 Cal.Rptr.2d 889.

The Unruh Act does not prohibit economic discrimination that is applied equally to all potential consumers of the public accommodations. It does apply to arbitrary discrimination amongst consumers on the basis of personal characteristics of individuals that bear little or no relationship to their abilities to be responsible consumers of public accommodations. The plaintiff must plead and prove intentional discrimination in public accommodations. A disparate impact analysis or test does not apply to Unruh Act claims. (🚩 Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 278 Cal.Rptr. 614, 805 P.2d 873. The intent requirement is set forth in element number two.

In *Harris v. Capital Growth Investors XIV* (1991) *supra*, the Supreme Court cautioned against further extending the Unruh Civil Right's reach; it fashioned a three step inquiry for considering application of the Act to other forms of “economic” discrimination, namely, (1) the language of the statute, (2) the legitimate business interests of the defendants, and (3) the consequences of allowing the new discrimination claim.

(🚩 Civil Code § 52(b)(2) establishes a separate remedial category of damages that is distinct from the exemplary damages provided for in subdivision (b)(1), and the transportation company is not immune from liability for such damages under Gov. Code § 818. (🚩 Los Angeles County Metropolitan Transportation Authority v. Superior Court (Lyons) (2d Dist.2004) 123 Cal.App.4th 261, 20 Cal.Rptr.3d 92.

Discrimination against registered domestic partners as compared to married couples is a type of discrimination that is actionable under the Unruh Act. (🚩 Koebeke v. Bernardo Heights Country Club (2005) 36 Cal.4th 824, 31 Cal.Rptr.3d 565, 115 P.3d 1212.

Plaintiff need not demonstrate that a request for nondiscriminatory treatment was made and refused in order to state a claim under the Unruh Act. It is sufficient if plaintiff sustained damage as a result of the discriminatory treatment. (🚩 Angelucci v. Century Supper Club (2007) 41 Cal.4th 160, 59 Cal.Rptr.3d 142, 158 P.3d 718.

Arbitrary occupational discrimination is prohibited under the Unruh Act. (🚩 Sisemore v. Master Financial, Inc. (2007) 151 Cal.App.4th 1386, 60 Cal.Rptr.3d 719.

Civil Code section 51.13, adopted in 2009 as an urgency measure, provides: “Any discount or other benefit offered to or conferred on a consumer or prospective consumer by a business because the consumer or prospective consumer has suffered the loss of employment or reduction of wages shall not be considered an arbitrary discrimination in violation of 🚩 section 51.”

Under the Unruh Act, a plaintiff with HIV is disabled as a matter of law. The court held in  *Maureen K. v. Tuschka, M.D.* (2012) 215 Cal.App.4th 519, 155 Cal.Rptr.3d 620, that it was prejudicial error to submit to the jury the issue of whether a plaintiff with HIV was disabled.

This spring 2017 revision adds the word “substantial” before “motivating” in element #2. It appears since  *Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 152 Cal. Rptr. 3d 392, 294 P.3d 49, relating to FEHA employment discrimination, held that in addition to the requirement of intentional discrimination, it is necessary that there be a causal connection between the bias and the discrimination. It has been bracketed inasmuch as no appellate court has so held.

In  *Osborne v. Yasmeh* (2016) 1 Cal. App. 5th 1118, 205 Cal. Rptr. 3d 656, the court held that a hotel visitor and companions had standing to sue hotel owner for Unruh Act violation after the management refused to rent them a room unless they first paid a non-refundable cleaning fee relating to the visitor’s service dog, even though the visitor and companions left the hotel without paying any fee or checking in as guests.

In *Smith v. BP Lubricants USA Inc.* (2021) 64 Cal.App.5th 138, 149-154, 278 Cal.Rptr.3d 587, 596-600, the court observed that the Unruh Act only applies to “business establishments” that are “generally open to the public” [citation], and mandates that those establishments “serve all persons without arbitrary discrimination.” A business remains “generally open to the public,” and continues to be subject to the Unruh Act even when the discrimination occurs at a meeting not open to the public within such a business. The Unruh Act does not stop at the doors of a business establishment generally open to the public simply because its doors are closed to some, but not all of its “clients, patrons or customers.” when discrimination occurs.

West's Key Number Digest

- West's Key Number Digest, Civil Rights  1752

Primary Authority

- See CACI 3020 to 3021, 3026, 3027

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COURT OF THE STATE OF CALIFORNIA KERN COUNTY SUPERIOR COURT - METROPOLITAN DIVISION		FOR COURT USE ONLY
TITLE OF CASE (Abbreviated) Dept. of Fair Employment & Housing v. Cathy's Creations, Inc. dba Tastries		
ATTORNEY(S) NAME AND ADDRESS Charles S. LiMandri, SBN 110841 Paul M. Jonna, SBN 265389 LiMANDRI & JONNA LLP P.O. Box 9120 Rancho Santa Fe, California 92067 Tele: (858) 759-9930; Fax: (858) 759-9938		
ATTORNEY(S) FOR: Defendants CATHY'S CREATIONS, INC. d/b/a TASTRIES, a California Corporation; and CATHY MILLER, an individual	HEARING Dept. 11	CASE NO.: BCV-18-102633 JUDGE: Hon. J. Eric Bradshaw

CERTIFICATE OF SERVICE

I, Kathy Denworth, declare that: I am over the age of 18 years and not a party to the action; I am employed in, or am a resident of the County of San Diego, California; where the mailing occurs; and my business address is P.O. Box 9520, Rancho Santa Fe, CA 92067, Telephone number (858) 759-9948; Facsimile number (858) 759-9938. I further declare that I served the following document(s) on the parties in this action:

• **DEFENDANTS' TRIAL BRIEF.**

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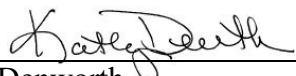
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 X **(BY E-MAIL/ELECTRONIC MAIL)** I caused a copy of the foregoing document(s) to be sent to the persons at the e-mail addresses listed above, this date via internet/electronic mail.

 X **(BY ELECTRONIC FILING/SERVICE)** I caused such document(s) to be Electronically Filed and/or Service through the One Legal System.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 21, 2022.



 Kathy Denworth