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

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

v.

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

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

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

**RESPONDENTS' APPENDIX
File 6 of 8, Volume 6, pp. RA.1243-RA.1529**

**LIMANDRI & JONNA LLP, *special
counsel for* THOMAS MORE
SOCIETY**

CHARLES S. LIMANDRI (BAR No. 110841)
PAUL M. JONNA (BAR No. 265389)
JEFFREY M. TRISSELL (BAR No. 292480)
P.O. Box 9120
RANCHO SANTA FE, CA 92067
858.759.9948 • FAX 858.759.9938
cslimandri@limandri.com

**THE BECKET FUND FOR
RELIGIOUS LIBERTY**

*ERIC C. RASSBACH (BAR No. 288041)
1919 PENNSYLVANIA AVE. NW
SUITE 400
WASHINGTON, DC 20006
202.955.0095 • FAX 202.995.0090
erassbach@becketlaw.org

COUNSEL FOR RESPONDENTS

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1 Charles S. LiMandri, SBN 110841
cslimandri@limandri.com
2 Paul M. Jonna, SBN 265389
pjonna@limandri.com
3 Jeffrey M. Trissell, SBN 292480
jtrissell@limandri.com
4 Milan L. Brandon II, SBN 326953
mbrandon@limandri.com
5 LiMANDRI & JONNA LLP
6 P.O. Box 9120
Rancho Santa Fe, California 92067
7 Telephone: (858) 759-9948
Facsimile: (858) 759-9938

8 Thomas Brejcha, *pro hac vice**
9 tbrejcha@thomasmoresociety.org
Peter Breen, *pro hac vice**
10 pbreen@thomasmoresociety.org
THOMAS MORE SOCIETY
11 309 W. Washington St., Ste. 1250
Chicago, IL 60606
12 Tel: (312) 782-1680
13 *Application forthcoming

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

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

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

20 Plaintiff,

21 v.

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

24 Defendants.

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

CASE NO.: BCV-18-102633

IMAGED FILE

**DEFENDANTS CATHARINE
MILLER AND TASTRIES
BAKERY'S SEPARATE
STATEMENT OF UNDISPUTED
MATERIAL FACTS**

Date: Nov. 4, 2021
Time: 8:30 a.m.
Dept: 11
Judge: Hon. David R. Lampe

Action Filed: Oct. 17, 2018
Trial Date: Dec. 13, 2021

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Defendants Catharine Miller and Tastries Bakery hereby submit this Separate Statement of Undisputed Material Facts, together with references to supporting evidence, in support of their Motion for Summary Judgment or, in the alternative, Summary Adjudication, against Plaintiff Department of Fair Employment & Housing with regard to Plaintiff's Complaint for Violation of the Unruh Civil Rights Act.

ISSUE NO. 1.1: Defendants are entitled to summary adjudication of Plaintiff's Claim for Violation of the Unruh Act because Real Parties in Interest were not denied full and equal services

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTY'S RESPONSE AND SUPPORTING EVIDENCE
<u>Undisputed Material Fact</u> 1. On August 26, 2017, at the same time that Defendants declined to make Real Parties' wedding cake, Defendants offered to connect Real Parties with another bakery that could make their cake. <u>Evidence:</u> - Miller Decl., ¶¶ 18, 33-38, 43 - App. Ex. 1, Compl., 2:27-3:4, 8:19-21, 11:10-11, 11:13-15 - App. Ex. 3, DFEH Resp. to Tastries SROGs No. 24 - App. Ex. 14, Mireya Dep., 64:25-65:12¹ - App. Ex. 15, Samuel Dep., 47:19-49:15, 54:17-55:3	

¹ If the witnesses have the same last name (i.e., Mrs. & Mrs. Rodriguez-Del Rio and Mr. & Mr. Salazar), then their first name is used. No disrespect is intended.

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MOVING PARTY’S UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTY’S RESPONSE AND SUPPORTING EVIDENCE
App. Ex. 16, Patrick Dep., 60:14–62:2	
<u>Undisputed Material Fact</u> 2. If Real Parties had informed Defendants that they rejected the bakery to which they were referred, Defendants would have offered to connect Real Parties with another bakery that could have made their cake. <u>Evidence:</u> - Miller Decl., ¶ 18 - App. Ex. 13, Eileen Dep., 121:14–20 - App. Ex. 18, Johnson Dep., 101:10–13	
<u>Undisputed Material Fact</u> 3. Real Parties actually obtained a wedding cake for their wedding ceremony. <u>Evidence:</u> - App. Ex. 3, DFEH Resp. to Tastries SROGs No. 12 - App. Ex. 4, DFEH Resp. to Tastries RFAs No. 19 - App. Ex. 13, Eileen Dep., 121:5–13, 175:13–176:2 & Ex. 631 - App. Ex. 14, Mireya Dep., 150:19–152:13 & Ex. 631, 153:5–154:1 - App. Ex. 17, Criollo Dep., 17:5–18:23, 20:7–11, 21:19–21, 33:10–34:1	

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ISSUE NO. 1.2: Defendants are entitled to summary adjudication of Plaintiff's Claim for Violation of the Unruh Act because Real Parties' sexual orientation did not motivate the denial of service

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTY'S RESPONSE AND SUPPORTING EVIDENCE
<u>Undisputed Material Fact</u> 4. Defendants object to celebrating any form of marriage other than a marriage between one man and one woman. <u>Evidence</u> • Miller Decl., ¶¶ 10-11, 19-21, 24 & Ex. A • App. Ex. 1, Compl., 2:27-3:4, 8:8-18, 11:10-11, 11:13-15 • App. Ex. 3, DFEH Resp. to Tastries SROGs Nos. 17, 22, 24	
<u>Undisputed Material Fact</u> 5. Defendants' objection to celebrating any form of marriage other than a marriage between one man and one woman was the basis of the denial of service to Real Parties on August 26, 2017. <u>Evidence</u> • Miller Decl., ¶¶ 10-11, 19-21, 24, 43 & Ex. A • App. Ex. 1, Compl., 2:27-3:4, 8:8-18, 11:10-11, 11:13-15 • App. Ex. 3, DFEH Resp. to Tastries SROGs Nos. 17, 22, 24	

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• App. Ex. 7, DFEH Resp. to Miller SROGs No. 16 • App. Ex. 9, DFEH Resp. to Miller RFAs No. 27 • App. Ex. 13, Eileen Dep., 115:12-24 • App. Ex. 15, Samuel Dep., 57:7-10 • App. Ex. 16, Patrick Dep., 65:1-5 • App. Ex. 17, Criollo Dep., 88:11-89:7; Errata 89:2 • App. Ex. 18, Johnson Dep., 19:18-20:10, 29:6-30:3, 30:21-31:2, 32:18-34:1, 92:20-93:6, 94:7-16	
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ISSUE NO. 2.1: Defendants are entitled to summary adjudication of Plaintiff's Claim for Violation of the Unruh Act due to their affirmative defense of the Free Exercise Clause of the California Constitution

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTY'S RESPONSE AND SUPPORTING EVIDENCE
<u>Undisputed Material Fact</u> 6. Defendants have a religious objection to celebrating any form of marriage other than a marriage between one man and one woman. <u>Evidence</u> • Miller Decl., ¶¶ 10-11, 19-21, 24 & Ex. A • App. Ex. 1, Compl., 2:27-3:4, 8:8-18, 11:10-11, 11:13-15 • App. Ex. 4, DFEH Resp. to Tastries' RFA's No. 9 • App. Ex. 9, DFEH Resp. to Millers' RFA's Nos. 8, 9, 13, 14, 15, 16, 17, 21, 22, 23, 24, 25, 26 • App. Ex. 13, Eileen Dep., 72:5-21, 77:4-78:12, 142:5-13 • App. Ex. 14, Mireya Dep., 52:18-53:22 & Ex. 231, 93:8-13, 109:25-110:8, 166:1-7 • App. Ex. 15, Samuel Dep., 47:19-49:15, 98:2-12 • App. Ex. 16, Patrick Dep., 55:14-18, 60:14-62:2, 63:3-12 & Ex. 231	

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• App. Ex. 17, Criollo Dep., 79:6–80:9 • App. Ex. 18, Johnson Dep., 23:20–24:2, 27:11–28:8, 32:18–33:7	
<u>Undisputed Material Fact</u> 7. The revenue from creating wedding cakes is a substantial portion of Defendants’ bakery business. <u>Evidence:</u> • Miller Decl., ¶ 52	
<u>Undisputed Material Fact</u> 8. Without the revenue from making wedding cakes, Defendants’ bakery business is not financially viable. <u>Evidence</u> • Miller Decl., ¶ 52	
<u>Undisputed Material Fact</u> 9. On August 26, 2017, at the same time that Defendants declined to make Real Parties’ wedding cake, Defendants offered to connect Real Parties with another bakery that could make their cake. <u>Evidence:</u> • Miller Decl., ¶¶ 18, 33–38, 43 • App. Ex. 1, Compl., 2:27–3:4, 8:19–21, 11:10–11, 11:13–15 • App. Ex. 3, DFEH Resp. to Tastries SROGs No. 24 • App. Ex. 14, Mireya Dep., 64:25–65:12 • App. Ex. 15, Samuel Dep., 47:19–49:15,	

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54:17-55:3	
App. Ex. 16, Patrick Dep., 60:14-62:2	
<u>Undisputed Material Fact</u> 10. If Real Parties had informed Defendants that they rejected the bakery to which they were referred, Defendants would have offered to connect Real Parties with another bakery that could have made their cake. <u>Evidence:</u> - Miller Decl., ¶ 18 - App. Ex. 13, Eileen Dep., 121:14-20 - App. Ex. 18, Johnson Dep., 101:10-13	
<u>Undisputed Material Fact</u> 11. Real Parties actually obtained a wedding cake for their wedding ceremony. <u>Evidence:</u> - App. Ex. 3, DFEH Resp. to Tastries SROGs No. 12 - App. Ex. 4, DFEH Resp. to Tastries RFAs No. 19 - App. Ex. 13, Eileen Dep., 121:5-13, 175:13-176:2 & Ex. 631 - App. Ex. 14, Mireya Dep., 150:19-152:13 & Ex. 631, 153:5-154:1 - App. Ex. 17, Criollo Dep., 17:5-18:23, 20:7-11, 21:19-21, 33:10-34:1	

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ISSUE NO. 2.2: Defendants are entitled to summary adjudication of Plaintiff's Claim for Violation of the Unruh Act due to their affirmative defense of the Free Exercise Clause of the U.S. Constitution

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTY'S RESPONSE AND SUPPORTING EVIDENCE
<u>Undisputed Material Fact</u> 12. Defendants have a religious objection to celebrating any form of marriage other than a marriage between one man and one woman. <u>Evidence</u> • Miller Decl., ¶¶ 10–11, 19–21, 24 & Ex. A • App. Ex. 1, Compl., 2:27–3:4, 8:8–18, 11:10–11, 11:13–15 • App. Ex. 4, DFEH Resp. to Tastries' RFA's No. 9 • App. Ex. 9, DFEH Resp. to Millers' RFA's Nos. 8, 9, 13, 14, 15, 16, 17, 21, 22, 23, 24, 25, 26 • App. Ex. 13, Eileen Dep., 72:5–21, 77:4–78:12, 142:5–13 • App. Ex. 14, Mireya Dep., 52:18–53:22 & Ex. 231, 93:8–13, 109:25–110:8, 166:1–7 • App. Ex. 15, Samuel Dep., 47:19–49:15, 98:2–12 • App. Ex. 16, Patrick Dep., 55:14–18, 60:14–62:2, 63:3–12 & Ex. 231 • App. Ex. 17, Criollo Dep., 79:6–80:9	

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App. Ex. 18, Johnson Dep., 23:20–24:2, 27:11–28:8, 32:18–33:7	
<u>Undisputed Material Fact</u> 13. If Defendants ceased making all wedding cakes, that would cause a decrease in the bakery’s revenue. <u>Evidence:</u> Miller Decl., ¶ 52	
<u>Undisputed Material Fact</u> 14. During the DFEH’s administrative investigation, and presently, Defendants contended that they objected to sending any message that celebrated any form of marriage except between one man and one woman. <u>Evidence:</u> - Trissell Decl., ¶ 9 - Miller Decl., ¶¶ 10–11, 19–21, 24 & Ex. A	
<u>Undisputed Material Fact</u> 15. The DFEH does not believe that expressive business owners violate the Unruh Act if they decline to create a custom item expressing homophobic or anti-LGBT messages, but still contends that Defendants violated the Unruh Act. <u>Evidence:</u> - App. Ex. 9, DFEH Resp. to Miller RFA’s No. 4, 22 - App. Ex. 6, DFEH Resp. to Miller FROGs No. 14.1	

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Undisputed Material Fact

16. The DFEH does not believe that the Unruh Act requires cake artists create custom cakes that they consider offensive, but still contends that Defendants violated the Unruh Act.

Evidence:

- App. Ex. 9, DFEH Resp. to Miller RFA's No. 5, 22
- App. Ex. 6, DFEH Resp. to Miller FROGs No. 14.1

Undisputed Material Fact

17. The DFEH purports to not use its enforcement authority under the Unruh Act to compel speech, but still contends that Defendants violated the Unruh Act.

Evidence:

- App. Ex. 9, DFEH Resp. to Miller RFA's No. 6, 22
- App. Ex. 6, DFEH Resp. to Miller FROGs No. 14.1

Undisputed Material Fact

18. The DFEH believes that the Unruh Act does not require businesses to create custom cakes that express messages they would not communicate for anyone, but still contends that Defendants violated the Unruh Act.

Evidence:

- App. Ex. 9, DFEH Resp. to Miller RFA's No. 7, 22

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App. Ex. 6, DFEH Resp. to Miller FROGs No. 14.1	
<u>Undisputed Material Fact</u> 19. Defendants responses to the DFEH’s administrative interrogatories were due on December 15, 2017. Nevertheless, without waiting to hear from Defendants, on December 13, 2021, the DFEH initiated a petition for preliminary injunctive relief with Case No. BCV-17-102855. The next day, the DFEH sought a temporary restraining order and an order to show cause re: preliminary injunction. <u>Evidence:</u> Trissell Decl., ¶¶ 2-6	
<u>Undisputed Material Fact</u> 20. The DFEH brought the prior action with Case No. BCV-17-102855 less than 10 days after oral argument in the Supreme Court case <i>Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com’n</i> (2018) 138 S.Ct. 1719 <u>Evidence:</u> Trissell Decl., ¶ 7	
<u>Undisputed Material Fact</u> 21. When the court in the prior action set an OSC re: preliminary injunction for February 2, 2021, as part of its aggressive litigation tactics, on January 10, 2018, the DFEH filed a revised memorandum in support of their motion for a preliminary injunction motion. <u>Evidence:</u>	

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• Trissell Decl., ¶ 8	
<u>Undisputed Material Fact</u> 22. During a discovery hearing in this case, in response to Defendants argument that the Real Parties in Interest may have been primarily looking for a lawsuit, counsel for the DFEH responded with the following statement. “Plaintiffs have looked for cases to push the law forever. Rosa Parks was not just happened to be taking the bus that day. [sic] So whether or not there is knowledge going in there does not change the fact that there was a violation.” <u>Evidence:</u> • Trissell Decl., ¶ 13 & Ex. A	
<u>Undisputed Material Fact</u> 23. On August 26, 2017, at the same time that Defendants declined to make Real Parties’ wedding cake, Defendants offered to connect Real Parties with another bakery that could make their cake. <u>Evidence:</u> • Miller Decl., ¶¶ 18, 33–38, 43 • App. Ex. 1, Compl., 2:27–3:4, 8:19–21, 11:10–11, 11:13–15 • App. Ex. 3, DFEH Resp. to Tastries SROGs No. 24 • App. Ex. 14, Mireya Dep., 64:25–65:12 • App. Ex. 15, Samuel Dep., 47:19–49:15, 54:17–55:3	

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• App. Ex. 16, Patrick Dep., 60:14–62:2	
<u>Undisputed Material Fact</u> 24. If Real Parties had informed Defendants that they rejected the bakery to which they were referred, Defendants would have offered to connect Real Parties with another bakery that could have made their cake. <u>Evidence:</u> • Miller Decl., ¶ 18 • App. Ex. 13, Eileen Dep., 121:14–20 • App. Ex. 18, Johnson Dep., 101:10–13	
<u>Undisputed Material Fact</u> 25. Real Parties actually obtained a wedding cake for their wedding ceremony. <u>Evidence:</u> • App. Ex. 3, DFEH Resp. to Tastries SROGs No. 12 • App. Ex. 4, DFEH Resp. to Tastries RFAs No. 19 • App. Ex. 13, Eileen Dep., 121:5–13, 175:13–176:2 & Ex. 631 • App. Ex. 14, Mireya Dep., 150:19–152:13 & Ex. 631, 153:5–154:1 • App. Ex. 17, Criollo Dep., 17:5–18:23, 20:7–11, 21:19–21, 33:10–34:1	

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ISSUE NO. 2.3: Defendants are entitled to summary adjudication of Plaintiff's Claim for Violation of the Unruh Act due to their affirmative defense of the Free Speech Clause of the U.S. Constitution

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTY'S RESPONSE AND SUPPORTING EVIDENCE
<u>Undisputed Material Fact</u> 26. Defendants object to celebrating any form of marriage other than a marriage between one man and one woman. <u>Evidence</u> • Miller Decl., ¶¶ 10–11, 19–21, 24 & Ex. A • App. Ex. 1, Compl., 2:27–3:4, 8:8–18, 11:10–11, 11:13–15 • App. Ex. 3, DFEH Resp. to Tastries SROGs Nos. 17, 22, 24	
<u>Undisputed Material Fact</u> 27. The DFEH seeks to compel Defendants to provide wedding cakes for same-sex weddings if they do so for traditional, opposite-sex weddings. <u>Evidence</u> • App. Ex. 1, Compl., Prayer ¶ 2 • App. Ex. 3, DFEH Resp. to Tastries SROGs No. 23	
<u>Undisputed Material Fact</u> 28. All preordered wedding cakes made by Defendants are custom cakes.	

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<u>Evidence</u> • Miller Decl., ¶ 25 • App. Ex. 1, Compl., 5:17-18 • App. Ex. 17, Criollo Dep., 64:21-65:6	
<u>Undisputed Material Fact</u> 29. Ordering a custom wedding cake from Defendants involves a collaborative process between Defendants and the client in selecting the number of tiers, the size, the shape, the cake flavors, the filling flavors, the types of frosting, and other options.	
<u>Evidence</u> • Miller Decl., ¶¶ 25-27, 29 & Ex. B • App. Ex. 1, Compl., 5:23-26, 6:20-21	
<u>Undisputed Material Fact</u> 30. The baking aspect of making a wedding cake is artistic.	
<u>Evidence</u> • App. Ex. 18, Johnson Dep., 85:16-86:3	
<u>Undisputed Material Fact</u> 31. The decorating aspect of making a wedding cake is artistic.	
<u>Evidence</u> • Miller Decl., ¶ 25 & Ex. D • App. Ex. 14, Mireya Dep., 175:14-177:24 & Ex. 230 • App. Ex. 18, Johnson Dep., 64:1-9 • App. Ex. 17, Criollo Dep., 47:16-49:7,	

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49:22-50:22, 77:4-78:2, 112:1-18; Errata 49:6-7, 77:8-9, 78:2	
<u>Undisputed Material Fact</u> 32. Even simple, white, three-tiered wedding cakes such as Real Parties had at their wedding are artistic and beautiful. <u>Evidence</u> • App. Ex. 14, Mireya Dep., 153:5-17 • App. Ex. 16, Patrick Dep., 99:7-13 • App. Ex. 17, Criollo Dep., 47:16-49:7, 49:22-50:22, 77:4-78:2, 112:1-18; Errata 49:6-7, 77:8-9, 78:2 • App. Ex. 18, Johnson Dep., 64:1-9 • App. Ex. 631	
<u>Undisputed Material Fact</u> 33. When Defendants design and create custom wedding cakes, they intend to express a message that is celebratory and that identifies the union of two individuals as a marriage. <u>Evidence</u> • Miller Decl., ¶ 19 • App. Ex. 1, Compl., 2:27-3:4, 8:8-18, 11:10-11, 11:13-15	
<u>Undisputed Material Fact</u> 34. The reasonable observer of Defendants' custom wedding cakes would identify them as expressing a message that is celebratory and that identifies the union of two individuals as a marriage.	

Evidence

- Miller Decl., ¶¶ 20–23, 28 & Ex. C
- App. Ex. 1, Compl., 2:27–3:4, 8:8–18, 11:10–11, 11:13–15
- App. Ex. 3, DFEH Resp. to Tastries SROGs No. 14
- App. Ex. 13, Eileen Dep., 90:18–91:7, 171:6–173:9 & Exs. 627A, 627B
- App. Ex. 14, Mireya Dep., 78:2–7:12 & Ex. 527, 99:9–100:16, 147:1–148:17 & Exs. 627A, 627B
- App. Ex. 17, Criollo Dep., 85:5–86:6

Undisputed Material Fact

35. Defendants have a religious objection to celebrating any form of marriage other than a marriage between one man and one woman.

Evidence

- Miller Decl., ¶¶ 10–11, 19–21, 24 & Ex. A
- App. Ex. 1, Compl., 2:27–3:4, 8:8–18, 11:10–11, 11:13–15
- App. Ex. 4, DFEH Resp. to Tastries' RFA's No. 9
- App. Ex. 9, DFEH Resp. to Millers' RFA's Nos. 8, 9, 13, 14, 15, 16, 17, 21, 22, 23, 24, 25, 26
- App. Ex. 13, Eileen Dep., 72:5–21, 77:4–78:12, 142:5–13
- App. Ex. 14, Mireya Dep., 52:18–53:22 & Ex. 231, 93:8–13, 109:25–110:8, 166:1–7

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• App. Ex. 15, Samuel Dep., 47:19–49:15, 98:2–12 • App. Ex. 16, Patrick Dep., 55:14–18, 60:14–62:2, 63:3–12 & Ex. 231 • App. Ex. 17, Criollo Dep., 79:6–80:9 • App. Ex. 18, Johnson Dep., 23:20–24:2, 27:11–28:8, 32:18–33:7	
<u>Undisputed Material Fact</u> 36. On August 26, 2017, at the same time that Defendants declined to make Real Parties’ wedding cake, Defendants offered to connect Real Parties with another bakery that could make their cake. <u>Evidence:</u> • Miller Decl., ¶¶ 18, 33–38, 43 • App. Ex. 1, Compl., 2:27–3:4, 8:19–21, 11:10–11, 11:13–15 • App. Ex. 3, DFEH Resp. to Tastries SROGs No. 24 • App. Ex. 14, Mireya Dep., 64:25–65:12 • App. Ex. 15, Samuel Dep., 47:19–49:15, 54:17–55:3 • App. Ex. 16, Patrick Dep., 60:14–62:2	
<u>Undisputed Material Fact</u> 37. If Real Parties had informed Defendants that they rejected the bakery to which they were referred, Defendants would have offered to connect Real Parties with another bakery that could have made their cake.	

Evidence:

- Miller Decl., ¶ 18
- App. Ex. 13, Eileen Dep., 121:14–20
- App. Ex. 18, Johnson Dep., 101:10–13

Undisputed Material Fact

38. Real Parties actually obtained a wedding cake for their wedding ceremony.

Evidence:

- App. Ex. 3, DFEH Resp. to Tastries SROGs No. 12
- App. Ex. 4, DFEH Resp. to Tastries RFAs No. 19
- App. Ex. 13, Eileen Dep., 121:5–13, 175:13–176:2 & Ex. 631
- App. Ex. 14, Mireya Dep., 150:19–152:13 & Ex. 631, 153:5–154:1
- App. Ex. 17, Criollo Dep., 17:5–18:23, 20:7–11, 21:19–21, 33:10–34:1

ISSUE NO. 3: Defendants are entitled to summary adjudication of Plaintiff's prayer for punitive damages

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTY'S RESPONSE AND SUPPORTING EVIDENCE
<u>Undisputed Material Fact</u> 39. The DFEH is only seeking statutory damages, not punitive damages in this action. <u>Evidence</u> - App. Ex. 2, DFEH Resp. to Tastries FROGs, Nos. 6.1, 6.2, 6.3, 6.4, 6.5, 6.6, 6.7, 9.1, 10.2, 10.3, - App. Ex. 5, DFEH Resp. to Tastries RPDs Nos. 3, 4, 5, 6	
<u>Undisputed Material Fact</u> 40. Defendants have a religious objection to celebrating any form of marriage other than a marriage between one man and one woman. <u>Evidence</u> - Miller Decl., ¶¶ 10-11, 19-21, 24 & Ex. A - App. Ex. 1, Compl., 2:27-3:4, 8:8-18, 11:10-11, 11:13-15 - App. Ex. 4, DFEH Resp. to Tastries' RFA's No. 9 - App. Ex. 9, DFEH Resp. to Millers' RFA's Nos. 8, 9, 13, 14, 15, 16, 17, 21, 22, 23, 24, 25, 26 - App. Ex. 13, Eileen Dep., 72:5-21, 77:4-78:12, 142:5-13	

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• App. Ex. 14, Mireya Dep., 52:18–53:22 & Ex. 231, 93:8–13, 109:25–110:8, 166:1–7 • App. Ex. 15, Samuel Dep., 47:19–49:15, 98:2–12 • App. Ex. 16, Patrick Dep., 55:14–18, 60:14–62:2, 63:3–12 & Ex. 231 • App. Ex. 17, Criollo Dep., 79:6–80:9 • App. Ex. 18, Johnson Dep., 23:20–24:2, 27:11–28:8, 32:18–33:7	
<u>Undisputed Material Fact</u> 41. On August 26, 2017, at the same time that Defendants declined to make Real Parties’ wedding cake, Defendants offered to connect Real Parties with another bakery that could make their cake. <u>Evidence:</u> • Miller Decl., ¶¶ 18, 33–38, 43 • App. Ex. 1, Compl., 2:27–3:4, 8:19–21, 11:10–11, 11:13–15 • App. Ex. 3, DFEH Resp. to Tastries SROGs No. 24 • App. Ex. 14, Mireya Dep., 64:25–65:12 • App. Ex. 15, Samuel Dep., 47:19–49:15, 54:17–55:3 • App. Ex. 16, Patrick Dep., 60:14–62:2	
<u>Undisputed Material Fact</u> 42. If Real Parties had informed Defendants that they rejected the bakery to which they were referred, Defendants would have offered to	

1	connect Real Parties with another	
2	bakery that could have made their cake.	
3	<u>Evidence:</u>	
4	• Miller Decl., ¶ 18	
5	• App. Ex. 13, Eileen Dep., 121:14–20	
6	• App. Ex. 18, Johnson Dep., 101:10–13	
7	<u>Undisputed Material Fact</u>	
8	43. Real Parties actually obtained a wedding	
9	cake for their wedding ceremony.	
10	<u>Evidence:</u>	
11	• App. Ex. 3, DFEH Resp. to Tastries	
12	SROGs No. 12	
13	• App. Ex. 4, DFEH Resp. to Tastries	
14	RFAs No. 19	
15	• App. Ex. 13, Eileen Dep., 121:5–13,	
16	175:13–176:2 & Ex. 631	
17	• App. Ex. 14, Mireya Dep., 150:19–	
18	152:13 & Ex. 631, 153:5–154:1	
19	• App. Ex. 17, Criollo Dep., 17:5–18:23,	
20	20:7–11, 21:19–21, 33:10–34:1	

Dated: September 8, 2021

By:

Respectfully submitted,

LiMANDRI & JONNA LLP

Charles S. LiMandri

Paul M. Jonna

Jeffrey M. Trissell

Milan L. Brandon II

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. d/b/a
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

IMAGED FILE

**[PROPOSED] ORDER GRANTING
SUMMARY JUDGMENT**

Date: Nov. 4, 2021

Time: 8:30 a.m.

Dept: 11

Judge: Hon. David R. Lampe

Action Filed: Oct. 17, 2018

Trial Date: Dec. 13, 2021

1 **[PROPOSED] ORDER**

2 This Court, having considered the parties cross-motions for summary judgment, and good
3 cause having been shown therefore,

4 **IT IS ORDERED** that:

5 (1) Defendants' motion for summary judgment is granted for the following reasons: (1.1)
6 Real Parties were not denied full and equal services; (1.2) Real Parties' sexual orientation did not
7 motivate the denial of service; (2.1) the Free Exercise Clause of the California Constitution
8 represents a dispositive defense; (2.2) the Free Exercise Clause of the U.S. Constitution represents
9 a dispositive defense; and (2.3) the Free Speech Clause of the U.S. Constitution represents a
10 dispositive defense.

11 (2) Plaintiff's motion for summary judgment is denied.

12
13 **IT IS SO ORDERED.**

JUDGE OF THE SUPERIOR COURT

14
15 Dated: _____
16 Hon. David R. Lampe

1 Charles S. LiMandri, SBN 110841
cslimandri@limandri.com
2 Paul M. Jonna, SBN 265389
pjonna@limandri.com
3 Jeffrey M. Trissell, SBN 292480
jtrissell@limandri.com
4 Milan L. Brandon II, SBN 326953
mbrandon@limandri.com
5 LiMANDRI & JONNA LLP
6 P.O. Box 9120
Rancho Santa Fe, California 92067
7 Telephone: (858) 759-9948
Facsimile: (858) 759-9938

8 Thomas Brejcha, *pro hac vice**
9 tbrejcha@thomasmoresociety.org
Peter Breen, *pro hac vice**
10 pbreen@thomasmoresociety.org
THOMAS MORE SOCIETY
11 309 W. Washington St., Ste. 1250
Chicago, IL 60606
12 Tel: (312) 782-1680
13 *Application forthcoming

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

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

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

20 Plaintiff,

21 v.

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

24 Defendants.

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

26 Real Parties in Interest.

CASE NO.: BCV-18-102633

IMAGED FILE

**NOTICE OF MOTION AND
MOTION TO SEAL IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION**

Date: Nov. 4, 2021

Time: 8:30 a.m.

Dept: 11

Judge: Hon. David R. Lampe

Action Filed: Oct. 17, 2018

Trial Date: Dec. 13, 2021

1 **TO: PLAINTIFF DEPARTMENT OF FAIR EMPLOYMENT & HOUSING**

2 **NOTICE IS HEREBY GIVEN** that on November 4, 2021 at 8:30 a.m. or as soon
3 thereafter as the matter may be heard in Department 11 of the above-entitled court located at 1415
4 Truxtun Ave, Bakersfield, CA 93301, Defendants Catharine Miller and Cathy's Creations, Inc.
5 (collectively "Defendants") will and hereby do move the court for an order that Exhibits B and F to
6 the Declaration of Catharine Miller in Support of Defendants' Motion for Summary Judgment or,
7 in the Alternative, Summary Adjudication be filed under seal pursuant to the provisions of Cal.
8 Rules of Court, rules 2.550 and 2.551.

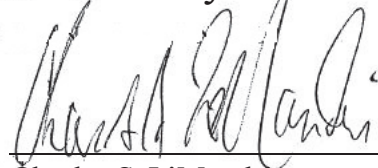
9 The grounds for this Motion to Seal include that Exhibit B contains confidential, proprietary
10 business information and trade secrets and Exhibit F contains extracts of a deposition transcript
11 that reference criminal activity inflicted upon Tastries personnel for which there are legitimate
12 privacy interests.

13 The motion will be based on this notice of motion and motion, on the supporting
14 memorandum attached hereto, on the Declaration of Milan L. Brandon Esq., on the records and files
15 herein, and on such evidence as may be presented at the hearing on the motion.

16
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18
19 Dated: September 8, 2021

By:

LiMANDRI & JONNA LLP



Charles S. LiMandri

Paul M. Jonna

Mark D. Myers

Jeffrey M. Trissell

Robert E. Weisenburger

Milan L. Brandon II

Attorneys for Defendants Cathy's

Creations, Inc. and Catharine Miller

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 FREEDOM OF CONSCIENCE DEFENSE FUND P.O. Box 9520 Rancho Santa Fe, California 92067 Tele: (858) 759-9948; 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. David R. Lampe

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:

- **NOTICE OF MOTION AND MOTION TO SEAL IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION;**
- **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS CATHARINE MILLER AND TASTRIES BAKERY'S MOTION TO SEAL;**
- **DECLARATION OF MILAN L. BRANDON IN SUPPORT OF DEFENDANTS CATHARINE MILLER AND TASTRIES BAKERY'S MOTION TO SEAL; and**
- **[PROPOSED] ORDER ON DEFENDANTS' MOTION TO SEAL.**

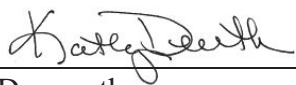
by one or more of the following methods of service to:

Janette Wipper, Chief Counsel
Paula D. Pearlman, Asst. Chief Counsel
Gregory J. Mann - Sr. Staff Counsel
Timothy Martin, Staff Counsel
Department of Fair Employment and Housing
320 4th Street, Suite 1000
Los Angeles, CA 90013
Tel: (213) 439-6799; Fax: (888) 382-5293
E-Mail: Gregory.Mann@dfeh.ca.gov
Attorneys for Plaintiff Department of Fair Employment and Housing

- X **(BY U.S. MAIL)** I caused such document(s) to be sealed in envelopes, and with the correct postage thereon fully prepaid, either deposited in the United States Postal Service or placed for collection and mailing following ordinary business practices.
- 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 September 8, 2021.



 Kathy Denworth

1 Charles S. LiMandri, SBN 110841
cslimandri@limandri.com
2 Paul M. Jonna, SBN 265389
pjonna@limandri.com
3 Jeffrey M. Trissell, SBN 292480
jtrissell@limandri.com
4 Milan L. Brandon II, SBN 326953
mbrandon@limandri.com
5 LiMANDRI & JONNA LLP
6 P.O. Box 9120
Rancho Santa Fe, California 92067
7 Telephone: (858) 759-9948
Facsimile: (858) 759-9938

8 Thomas Brejcha, *pro hac vice**
9 tbrejcha@thomasmoresociety.org
Peter Breen, *pro hac vice**
10 pbreen@thomasmoresociety.org
THOMAS MORE SOCIETY
11 309 W. Washington St., Ste. 1250
Chicago, IL 60606
12 Tel: (312) 782-1680
13 *Application forthcoming

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

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

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

20 Plaintiff,

21 v.

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

24 Defendants.

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

26 Real Parties in Interest.

CASE NO.: BCV-18-102633

IMAGED FILE

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF DEFENDANTS
CATHARINE MILLER AND
TASTRIES BAKERY'S MOTION
TO SEAL**

Date: Nov. 4, 2021

Time: 8:30 a.m.

Dept: 11

Judge: Hon. David R. Lampe

Action Filed: Oct. 17, 2018

Trial Date: Dec. 13, 2021

27
28
MEMORANDUM OF POINTS & AUTHORITIES ISO MOTION TO SEAL RE:
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR ADJUDICATION

RA.1273

Document received by the CA 5th District Court of Appeal.

ELECTRONICALLY FILED
9/8/2021 5:49 PM
Kern County Superior Court
By Gracie Goodson, Deputy

1 **I. Introduction**

2 The records sought to be filed under seal in this action are as follows:

3 1. **Exhibit B** to Declaration of Catharine Miller filed in connection with Defendants
4 Motion for Summary Judgment or, in the Alternative, Summary Adjudication; and

5 2. **Exhibit F** to the Declaration of Catharine Miller filed in connection with Defendants
6 Motion for Summary Judgment or, in the Alternative, Summary Adjudication.

7 The grounds for this Motion to Seal include that Exhibit B contains confidential, proprietary
8 business information and trade secrets and Exhibit F contains extracts of a deposition transcript
9 that reference criminal activity inflicted upon Tastries personnel for which there are legitimate
10 privacy interests.

11 **II. The Court May Order Records Sealed From Public View**

12 “A record must not be filed under seal without a court order. The court must not permit a
13 record to be filed under seal based solely on the agreement or stipulation of the parties.” (Cal. Rules
14 of Court, rule 2.551(a).) Although court records are presumed to be open to the public (*id.* at rule
15 2.550(c)), the Court may order that a record be placed or filed under seal if it expressly finds that:

- 16 (1) There exists an overriding interest that overcomes the right to
17 public access to the record;
18 (2) The overriding interest supports sealing the record;
19 (3) A substantial probability exists that the overriding interest will be
20 prejudiced if the record is not sealed;
21 (4) The proposed sealing is narrowly tailored; and
22 (5) No less restrictive means exist to achieve the overriding interest.

23 (*Id.* at subd. (d).)

24 The Advisory Committee Comment to Cal. Rules of Court, rule 2.550 states in part:

25 This rule and rule 2.551 provide a standard and procedures for courts
26 to use when a request is made to seal a record. The standard is based
27 on *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20
28 Cal.4th 1178. These rules apply to civil and criminal cases. They
recognize the First Amendment right of access to documents used at
trial or as a basis of adjudication. The rules do not apply to records
that courts must keep confidential by law. Examples of confidential
records to which public access is restricted by law are records of the
family conciliation court (Family Code, § 1818(b)) and in forma
pauperis applications (Cal. Rules of Court, Rule 985(h).) The sealed

records rules also do not apply to discovery proceedings, motions, and materials that are not used at trial or submitted to the court as a basis for adjudication.

(Advisory Committee Comment to Cal. Rules of Court, Rule 2.550, ¶ 1.)

NBC Subsidiary provides examples of various interests that courts have acknowledged may constitute “overriding interests.” (See *id.* at p. 1222, fn. 46.) Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute “overriding interests.” The rules do not attempt to define what may constitute “overriding interest,” but leave this to case law.

(*Id.* at ¶ 3.)

The overriding interest in this matter for sealing the subject records is the proprietary business rights of Defendants Catharine Miller and Cathy’s Creations, Inc., and the privacy rights of victims of crime—both Defendant Miller and a third-party. Defendants seek to file the subject records under seal due to California’s interest in protecting trade secrets and encouraging crime victims to seek meaningful redress in the courts by protecting their privacy.

For the reasons discussed below, there is a substantial probability that these overriding interests will be prejudiced if the records are not sealed. This request has been tailored to apply only to the instant record. Sealing of these records will be wholly consistent with the intent and purpose of Rules 2.550 and 2.551 of the California Rules of Court.

III. Sealing Of The Requested Records Is Consistent With Law

It is well recognized in the courts that the protection of trade secrets is an interest that can support sealing records in a civil proceeding. (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298–299 & fn. 3.) “ ‘Trade secret’ means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” (*McGuan v. Endovascular Technologise, Inc.* (2010) 182 Cal.App.4th 974, 290 [quoting Civ. Code, § 3426.1(d).])

In the instant case, Defendants Catharine Miller and Cathy’s Creations, Inc. maintain

1 binder of materials that contains materials consulted by Defendants and their employees when
2 designing and selling wedding cakes. These materials are reproduced in Exhibit B to the Declaration
3 of Catharine Miller. These materials contain a significant amount of proprietary information
4 developed by Defendants for the purpose of operating their business that is not generally known to
5 the public and competitor bakeries. Public disclosure of such information would stand to put
6 Defendants at a significant competitive disadvantage. As such, failure to protect that information
7 will contradict settled public policy that seeks to protect confidential business information.

8 In addition, Under Cal. Const. art. 1, § 1, “[a]ll people are by their nature free and
9 independent and have inalienable rights. Among these are . . . pursuing and obtaining safety,
10 happiness, and privacy.” The privacy interests protected under Cal. Const. art. I, § 1, fall into two
11 categories: “(1) interests in precluding the dissemination or misuse of sensitive and confidential
12 information (called informational privacy) and (2) interests in making intimate personal decisions or
13 conducting personal activities without observation, intrusion, or interference (called autonomy
14 privacy).” (*Hill v. Nat’l Collegiate Athletic Ass’n* (1994) 7 Cal.4th 1, 35.) In addition, the Ninth
15 Circuit has recognized that, “ ‘compelling reasons’ sufficient to outweigh the public’s interest in
16 disclosure and justify sealing court records exist when such ‘court files might have become a vehicle
17 for improper purposes,’ such as the use of records to gratify private spite, promote public scandal
18 circulate libelous statements, or release trade secrets.” (*Kamakana v. City & Cty. of Honolulu* (9th
19 Cir. 2006) 447 F.3d 1172, 1179.)

20 In the instant case, there are strong, overriding interests at stake and compelling reasons to
21 seal the record with respect to the deposition testimony reproduced in Exhibit F to the Declaration
22 of Catharine Miller, which concerns the criminal assault of a Tastries employee. The public release
23 of information about that assault would violate the employee’s constitutional right to privacy.

24 **IV. Moving Party Has Complied With The Procedural Requirements Specified By**
25 **Cal. Rules Of Court, Rule 2.551**

26 “A party requesting that a record be filed under seal must file a motion or an application for
27 an order sealing the record. The motion or application must be accompanied by a memorandum and
28 a declaration containing facts sufficient to justify the sealing.” (Cal. Rules of Court, rule 2.551(b)(1).)

1 Further, “[a] copy of the motion or application must be served on all parties that have appeared in
2 the case. Unless the court orders otherwise, any party that already possesses copies of the records
3 to be placed under seal must be served with a complete, unredacted version of all papers as well as a
4 redacted version.” (*Id.* at subd. (b)(2).)

5 The Declaration of Milan L. Brandon filed herewith shows facts sufficient to justify sealing
6 of the requested records. Further, as set forth in the Declaration of Milan L. Brandon, a copy of the
7 motion has been served on all parties that have appeared in the case, along with redacted and
8 unredacted copies of the record in question.

9 “The party requesting that a record be filed under seal must lodge it with the court under
10 (d) when the motion or application is made, unless good cause exists for not lodging it or the record
11 has previously been lodged. . . . Pending the determination of the motion or application, the lodged
12 record will be conditionally under seal.” (Cal. Rules of Court, rule 2.551(b)(4).) “If necessary to
13 prevent disclosure, any motion or application, any opposition, and any supporting documents must
14 be filed in a public redacted version and lodged in a complete version conditionally under seal.” (*Id.*
15 at subd. (b)(5).) “A record filed publicly in the court must not disclose material contained in a
16 record that is sealed, conditionally under seal, or subject to a pending motion or an application to
17 seal.” (*Id.* at subd. (c).)

18 Moving party has complied with the provisions of Cal. Rules of Court, rule 2.551(b) and Cal.
19 Rules of Court, rule 2.551(c) by lodging the record in question with this Court and by filing both
20 public redacted version and a version under seal.

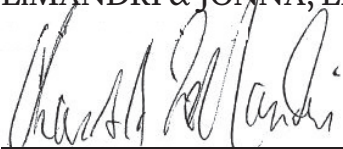
21 V. CONCLUSION

22 For all of the foregoing reasons and supporting facts and authorities, it is respectfully
23 requested that the Court issue an Order pursuant to Cal. Rules of Court, rules 2.550 and 2.551
24 sealing the records identified and duly lodged with this Motion.

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Dated: September 8, 2021

Respectfully submitted,
LiMANDRI & JONNA, LLP

By: 
Charles S. LiMandri
Paul M. Jonna
Mark D. Myers
Jeffrey M. Trissell
Robert E. Weisenburger
Milan L. Brandon II
*Attorneys for Defendants Cathy's
Creations, Inc. and Catharine Miller*

Document received by the CA 5th District Court of Appeal.

**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. d/b/a
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

IMAGED FILE

**[PROPOSED] ORDER ON
DEFENDANTS' MOTION TO SEAL**

Date: Nov. 4, 2021

Time: 8:30 a.m.

Dept: 11

Judge: Hon. David R. Lampe

Action Filed: Oct. 17, 2018

Trial Date: Dec. 13, 2021

[Proposed] Order on Defendants' Motion to Seal

RA.1279

Document received by the CA 5th District Court of Appeal.

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[Proposed] Order

This Court, having considered Defendants Catharine Miller and Cathy’s Creations, Inc.’s Motion to Seal, and good cause having been shown therefore,

IT IS ORDERED that Defendants’ Motion to seal is hereby GRANTED. Accordingly, the following records are ordered to be filed under seal:

- 1. **Exhibit B** to Declaration of Catharine Miller filed in connection with Defendants Motion for Summary Judgment or, in the Alternative, Summary Adjudication; and
- 2. **Exhibit F** to the Declaration of Catharine Miller filed in connection with Defendants Motion for Summary Judgment or, in the Alternative, Summary Adjudication.

IT IS SO ORDERED.

Dated: _____

By: _____
Hon. David R. Lampe
JUDGE OF THE SUPERIOR
COURT

Document received by the CA 5th District Court of Appeal.

1 Charles S. LiMandri, SBN 110841
cslimandri@limandri.com
2 Paul M. Jonna, SBN 265389
pjonna@limandri.com
3 Jeffrey M. Trissell, SBN 292480
jtrissell@limandri.com
4 Milan L. Brandon II, SBN 326953
mbrandon@limandri.com
5 LiMANDRI & JONNA LLP
6 P.O. Box 9120
Rancho Santa Fe, California 92067
7 Telephone: (858) 759-9948
Facsimile: (858) 759-9938

8 Thomas Brejcha, *pro hac vice**
9 tbrejcha@thomasmoresociety.org
Peter Breen, *pro hac vice**
10 pbreen@thomasmoresociety.org
THOMAS MORE SOCIETY
11 309 W. Washington St., Ste. 1250
Chicago, IL 60606
12 Tel: (312) 782-1680
13 *Application forthcoming

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

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

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

20 Plaintiff,

21 v.

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

24 Defendants.

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

26 Real Parties in Interest.

CASE NO.: BCV-18-102633

IMAGED FILE

**DECLARATION OF MILAN L.
BRANDON IN SUPPORT OF
DEFENDANTS CATHARINE
MILLER AND TASTRIES
BAKERY'S MOTION TO SEAL**

Date: Nov. 4, 2021

Time: 8:30 a.m.

Dept: 11

Judge: Hon. David R. Lampe

Action Filed: Oct. 17, 2018

Trial Date: Dec. 13, 2021

27
28
DECLARATION OF MILAN L. BRANDON ISO MOTION TO SEAL RE:
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR ADJUDICATION

RA.1281

Document received by the CA 5th District Court of Appeal.

ELECTRONICALLY FILED
9/8/2021 5:49 PM
Kern County Superior Court
By Gracie Goodson, Deputy

1 I, Milan L. Brandon, declare and state as follows:

2 1. I am an attorney at law duly licensed to practice before all courts in California, both
3 state and federal. I am counsel for Defendants Catharine Miller and Cathy's Creations, Inc. d/b/a
4 Tastries Bakery in this action. As such, I have personal knowledge of the matters set forth below
5 and could and would testify thereto if called upon to do so. This declaration is made in support of
6 Defendants Catharine Miller and Tastries Bakery's Motion to Seal.

7 2. The records sought to be placed/filed under seal in this action are as follows:

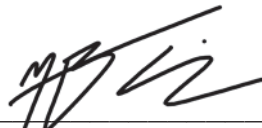
8 A. **Exhibit B** to Declaration of Catharine Miller filed in connection with
9 Defendants' Motion for Summary Judgment or, in the Alternative,
10 Summary Adjudication; and

11 B. **Exhibit F** to the Declaration of Catharine Miller filed in connection with
12 Defendants' Motion for Summary Judgment or, in the Alternative,
13 Summary Adjudication.

14 3. The above-identified records have been lodged with the court in connection with
15 this Motion, pursuant to Cal. Rules of Court, rules 2.551(b)(4) and 2.551(d).

16 4. The grounds for filing said records under seal include that there exists an overriding
17 interest in sealing the records. The overriding interest in this matter for sealing the subject records
18 is the proprietary business rights of Defendants Catharine Miller and Cathy's Creations, Inc., and
19 the privacy rights of victims of crime—both Defendant Miller and a third-party. Defendants seek to
20 file the subject records under seal due to California's interest in protecting trade secrets and
21 encouraging crime victims to seek meaningful redress in the courts by protecting their privacy.
22 Sealing of these records will be wholly consistent with the intent and purpose of Cal. Rules of
23 Court, Rule 2.550 and Cal. Rules of Court, Rule 2.551.

24 I declare under penalty of perjury under the laws of the State of California that the foregoing
25 is true and correct. Executed at Rancho Santa Fe, California this 8th day of September, 2021.

26
27 
28 Milan L. Brandon II

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		ELECTRONICALLY FILED 9/9/2021 8:00 AM Kern County Superior Court By Gracie Goodson, Deputy
ATTORNEY(S) NAME AND ADDRESS Charles S. LiMandri, SBN 110841 Paul M. Jonna, SBN 265389 FREEDOM OF CONSCIENCE DEFENSE FUND P.O. Box 9520 Rancho Santa Fe, California 92067 Tele: (858) 759-9948; 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. David R. Lampe

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 CATHARINE MILLER AND TASTRIES BAKERY'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT;
- MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS CATHARINE MILLER AND TASTRIES BAKERY'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT;
- DEFENDANTS CATHARINE MILLER AND TASTRIES BAKERY'S SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS;
- DECLARATION OF CATHARINE MILLER IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION;
- DECLARATION OF JEFFREY M. TRISSELL, ESQ. IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION;
- APPENDIX OF EXHIBITS, VOLUME I, IN SUPPORT OF DEFENDANTS CATHARINE MILLER AND TASTRIES BAKERY'S MOTION FOR SUMMARY JUDGMENT;
- APPENDIX OF EXHIBITS, VOLUME II, IN SUPPORT OF DEFENDANTS CATHARINE MILLER AND TASTRIES BAKERY'S MOTION FOR SUMMARY JUDGMENT;
- APPENDIX OF EXHIBITS, VOLUME III, IN SUPPORT OF DEFENDANTS CATHARINE MILLER AND TASTRIES BAKERY'S MOTION FOR SUMMARY JUDGMENT;
- APPENDIX OF AUTHORITIES PURSUANT TO CAL. RULES OF COURT, RULE 3.1113(i)1 IN SUPPORT OF DEFENDANTS CATHARINE MILLER AND TASTRIES BAKERY'S MOTION FOR SUMMARY JUDGMENT;
- [PROPOSED] ORDER GRANTING SUMMARY JUDGMENT;
- DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION;
- DECLARATION OF MILAN L. BRANDON II, ESQ. IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR ADJUDICATION;
- [PROPOSED] ORDER GRANTING DEFENDANTS CATHARINE MILLER AND TASTRIES BAKERY'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION.

by one or more of the following methods of service to:

Janette Wipper, Chief Counsel
Paula D. Pearlman, Asst. Chief Counsel
Gregory J. Mann - Sr. Staff Counsel
Timothy Martin, Staff Counsel
Department of Fair Employment and Housing
320 4th Street, Suite 1000
Los Angeles, CA 90013
Tel: (213) 439-6799; Fax: (888) 382-5293
E-Mail: Gregory.Mann@dfeh.ca.gov
Attorneys for Plaintiff Department of Fair Employment and Housing

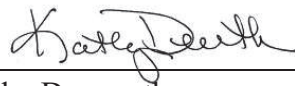
Dept. of Fair Employment & Housing v. Cathy's Creations, Inc. dba Tastries

CERTIFICATE OF SERVICE - CONT'D

- X **(BY U.S. MAIL)** I caused such document(s) to be sealed in envelopes, and with the correct postage thereon fully prepaid, either deposited in the United States Postal Service or placed for collection and mailing following ordinary business practices.
- 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 September 8, 2021.



Kathy Denworth

Document received by the CA 5th District Court of Appeal.

1 Charles S. LiMandri, SBN 110841
cslimandri@limandri.com
2 Paul M. Jonna, SBN 265389
pjonna@limandri.com
3 Jeffrey M. Trissell, SBN 292480
jtrissell@limandri.com
4 Milan L. Brandon II, SBN 326953
mbrandon@limandri.com
5 LiMANDRI & JONNA LLP
6 P.O. Box 9120
Rancho Santa Fe, California 92067
7 Telephone: (858) 759-9948
Facsimile: (858) 759-9938

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9 tbrejcha@thomasmoresociety.org
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10 pbreen@thomasmoresociety.org
THOMAS MORE SOCIETY
11 309 W. Washington St., Ste. 1250
Chicago, IL 60606
12 Tel: (312) 782-1680
13 *Application forthcoming

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

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

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

20 Plaintiff,

21 v.

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

24 Defendants.

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

26 Real Parties in Interest.

CASE NO.: BCV-18-102633

IMAGED FILE

**DEFENDANTS' REQUEST FOR
JUDICIAL NOTICE IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION**

Date: Nov. 4, 2021

Time: 8:30 a.m.

Dept: 11

Judge: Hon. David R. Lampe

Action Filed: Oct. 17, 2018

Trial Date: Dec. 13, 2021

INTRODUCTION

Pursuant to Evidence Code § 452(h), Defendants Catharine Miller and Cathy's Creations, Inc. (collectively "Defendants") respectfully request that this Court take judicial notice of (1) the Judgment entered denying Plaintiff's Petition for Preliminary Injunction in the prior case: *Department of Fair Employment and Housing vs. Cathy's Creations, Inc. et. al.*, Case No. BCV-17-102855, attached as Exhibit A to the Declaration of Milan L. Brandon. In addition, (2) Defendants request that this Court take judicial notice of the proposition that skill, artistry, and personal expression are evident in the wedding cakes made by Tastries Bakery and the wedding cake commissioned by Real Parties for their wedding.

As Defendants establish below, this Court is authorized to take judicial notice of both the existence and legal effect of the prior judgment. Further, the proposition for which Defendants seek judicial notice is a universally known fact, and is therefore properly subject to judicial notice.

ARGUMENT

1. THE JUDGMENT FROM THE PRIOR CASE IS JUDICIALLY NOTICEABLE

The Court "shall" grant a request for judicial notice of "The decisional, constitutional, and public statutory law of this state and of the United States[.]" (Evid. Code, § 451(a); see also Evid. Code, § 452(c).)

In December 2017, under Gov. Code, § 12974, Plaintiff DFEH initiated a petition for preliminary injunction pending final resolution of its administrative investigation in Case No. BCV-17-102855. In February 2018, the petition was denied, and the denial was formalized via judgment in May 2018, which attached and incorporated the preliminary injunction order. Then, in October 2018, under Gov. Code, § 12965, Plaintiff DFEH initiated the present complaint seeking damages and permanent injunctive relief.

Both the Section 12974 preliminary injunction order and the judgment are definitionally "decisional" authority under Evid. Code, § 451(a), and an "official act" within the definition of Evid. Code § 452(c). As such, they are a proper subject of judicial notice. In addition, the orders are manifestly relevant in this matter, as they analyze similar issues based on identical facts advanced by the same parties as to the instant action.

1 The procedural context of subsequent Section 12974 and Section 12965 actions is not unique
2 to California. Under federal law, various agencies bring similar actions and the issues decided in the
3 first action have issue preclusive effect in the second action. (*Walsh v. International Longshoremen's*
4 *Ass'n, AFL-CIO, Local 799* (1st Cir. 1980) 630 F.2d 864, 869 [in an NLRB administrative preliminary
5 injunction proceeding, the issues that the trial court adjudicates are later subject to collateral
6 estoppel].)

7 In a lengthy opinion, the Fifth Appellate District addressed the preclusive effect of the Section
8 12974 judgment on this case, and held that “[o]ur interpretation of section 12974 does not foreclose
9 the possibility that an issue decided in that context could be given issue-preclusive effect in a
10 subsequent section 12965 civil action arising from the same administrative complaint.” (*Department of*
11 *Fair Employment and Housing v. Superior Court of Kern County* (2020) 54 Cal.App.5th 356, 401.) The
12 Fifth District simply held that the issue must simply be presented to the Section 12965 judge, who
13 should rule on the effect of the prior judgment. In that opinion, the Fifth District also noted that issue
14 preclusion principles favor giving the legal conclusions of the prior judgment preclusive effect. (*Id.* at
15 401–402 & fn.12 [noting, “[f]or example, where a demurrer to a claim is sustained without leave to
16 amend, that decision is not subject to reconsideration in summary judgment proceedings merely
17 because a different judge is hearing the matter.”].)

18 Here, Defendants believe that not simply the law enunciated in the Section 12965 judgment
19 should be binding at the summary judgment stage—but the application of that law to the facts. There
20 are simply no new legally relevant facts uncovered by Plaintiff DFEH during the remainder of its
21 administrative investigation or during discovery in this action. But even if this Court disagrees with
22 Defendants’ argument, and finds some (minimally) relevant new facts, the legal principles of the prior
23 judgment should be treated as binding authority.

24 For these reasons, Defendants respectfully request that this Court take judicial notice of the
25 judgment entered in *Department of Fair Employment and Housing vs. Cathy’s Creations, Inc. et. al.*
26 Case No. BCV-17-102855. A true and correct copy of that judgment is attached to the accompanying
27 Declaration of Milan L. Brandon as **Exhibit A**.

28 ///

1 **2. THAT CAKE ARTISTS DEMONSTRATE SKILL, ARTISTRY, AND PERSONAL**
2 **EXPRESSION IN CRAFTING A CAKE IS JUDICIALLY NOTICEABLE**

3 The Court “shall” grant a request for judicial notice of “[f]acts and proposition of
4 generalized knowledge that are so universally known that they cannot reasonably be the subject of
5 dispute.” (Evid. Code, § 451(f).) They Court “may” also grant judicial notice of “[f]acts and
6 propositions that are not reasonably subject to dispute,” even if not universally known, if they “are
7 capable of immediate and accurate determination by resort to sources of reasonably indisputable
8 accuracy.” (Evid. Code, § 452(h).)

9 California courts construe “universal” to mean “reasonably universal.” (See, e.g., *Preserve*
10 *Shorecliff Homeowners v. City of San Clemente* (2008) 158 Cal.App.4th 1427, 1434 [judicially noticing
11 that is “universally known” that the number of eligible voters in any subdivision of the state is only a
12 fraction of the eligible voters in a state].) The scope of this “universality” is elastic to the point that
13 California courts regularly take judicial notice of propositions that are far less obvious than that at
14 issue in *Preserve Shorecliff* and elect to extend notice to propositions that are objects of “practical
15 recognition.” (See, e.g., *Brown v. Smith* (2018) 24 Cal.App.5th 1135, 1142 [taking judicial notice “of
16 the safety and effectiveness of vaccinations in preventing the spread of dangerous communicable
17 diseases”]; *People v MacLaird* (1968) 264 Cal.App.2d 972, 975 [concluding that the “validity and
18 accuracy of radar devices is a proposition of such common and universal knowledge that it must be
19 judicially noticed”].)

20 With their motion for summary judgment papers, Defendants are submitting the declaration
21 of Catharine Miller, which attaches as Exhibit D photographs of numerous wedding cakes she has
22 been commissioned to create. Defendants are also submitting the Deposition of Jessica Criollo, to
23 which was attached a photograph of the wedding cake she was commissioned to create for Real Parties
24 in interest. The deposition and photograph are Exhibits 17 and 631 to the Appendix of Exhibits.

25 As elaborated upon in depth in the declaration and deposition, the proposition that cake
26 artists, specifically Ms. Miller and Ms. Criollo, demonstrate skill, artistry, and personal expression in
27 the crafting of a wedding cake is a proper subject of judicial notice. It is within the practical experience
28 of individuals who undertake the effort to bake a cake that they soon realize that it takes a lot more

1 effort than simply building a sandwich or frying an egg. A person cannot make a visually (and
2 culinarily) appealing centerpiece cake without employing considerable practice, effort, and skill
3 developed over time. If baking and decorating an appealing, extravagant cake were a simple
4 proposition that anyone can do with their own inborn abilities, there would be no need to consult
5 professional bakers for special occasions. Nevertheless, individuals commonly engage professional
6 bakers and come to discover that specific bakers are their favorites because of the individualized,
7 particular way a certain baker crafts their cakes. Nearly everyone has a “favorite bakery” that they
8 patronize for birthdays, weddings, and other events because of the way that certain bakery crafts their
9 cakes.

10 In addition, it is within the common experience of individuals that different cake artists
11 decorate and craft their cakes in different ways, and that different bakers are known for different styles
12 and abilities and are chosen accordingly. Any individual who has requested estimates for wedding
13 cakes knows well the experience of selecting a baker who builds a cake that reflects their preferences,
14 personality, and desired themes, as well as the great diversity of design, taste, and decoration between
15 different bakers. Thus, it is within the practical experience of the average person that a baker or bakery
16 is chosen based on their ability to demonstrate skill, artistry, and personal expression in such a way
17 that it meshes with the customer’s preferences and values, and that each individual baker offers a
18 unique creation.

19 The experience of shopping for a cake baker, and choosing between them based on the
20 individual baker’s skill, artistry, and personal expression, is of far more practical recognition and
21 common experience than individual’s knowledge that “radar guns are accurate,” that “voters are
22 divided into precincts,” or that “vaccines are safe.” Indeed, it is the definition of a universal
23 experience that all individuals who shop for baked goods for special occasions must grapple with at
24 one time or another.

25 The proposition that cake artists demonstrate skill, artistry, and personal expression in crafting
26 a wedding cake is also relevant to this action, as Plaintiffs insist that there is no special skill, artistry, or
27 expression at play in crafting a wedding cake. However, as argued above and in the accompanying
28 Motion for Summary Judgment or Adjudication, crafting a wedding cake arguably falls within the

1 same understanding of art = speech discussed by the Ninth Circuit in *Anderson v. City of Hermosa*
2 *Beach* (9th Cir. 2010) 621 F.3d 1051. There the Ninth Circuit took judicial notice that tattoo artists
3 demonstrate skill and artistry, stating that “[w]e do not profess to understand the work of tattoo
4 artists to the same degree as we know the finely wrought sketches of Leonardo da Vinci or Albrecht
5 Dürer, but we can take judicial notice of the skill, artistry, and care that modern tattooists have
6 demonstrated.” (*Id.* at 1161.) Because tattoo artists enjoy a similarly individualized range of styles,
7 competence, artistry, and expressive intent as bakers do when they create special cakes, this Court
8 is easily justified in judicially noticing a similar conclusion as to bakers.

9 For these reasons, Defendants respectfully request that this Court take judicial notice of the
10 proposition that cake artists demonstrate skill, artistry, and personal expression in crafting a wedding
11 cake.

12 CONCLUSION

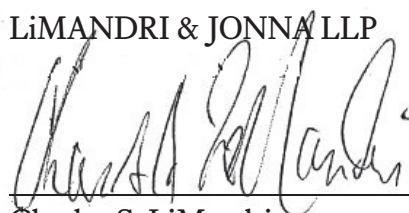
13 For the foregoing reasons, this Court should grant Defendants’ request for judicial notice of
14 (1) the judgment entered in the prior Section 12974 action titled *Department of Fair Employment and*
15 *Housing vs. Cathy’s Creations, Inc. et. al.*, Case No. BCV-17-102855; and (2) the proposition that skill
16 artistry, and personal expression are evident in the wedding cakes made by Tastries Bakery and the
17 wedding cake commissioned by Real Parties for their wedding.

18
19 Respectfully submitted,

20 LiMANDRI & JONNA LLP

21
22 Dated: September 8, 2021

23 By:


24 Charles S. LiMandri

25 Paul M. Jonna

26 Mark D. Myers

27 Jeffrey M. Trissell

28 Robert E. Weisenburger

Milan L. Brandon II

Attorneys for Defendants Cathy’s

Creations, Inc. and Catharine Miller

1 Charles S. LiMandri, SBN 110841
cslimandri@limandri.com
2 Paul M. Jonna, SBN 265389
pjonna@limandri.com
3 Jeffrey M. Trissell, SBN 292480
jtrissell@limandri.com
4 Milan L. Brandon II, SBN 326953
mbrandon@limandri.com
5 LiMANDRI & JONNA LLP
6 P.O. Box 9120
Rancho Santa Fe, California 92067
7 Telephone: (858) 759-9948
Facsimile: (858) 759-9938

8 Thomas Brejcha, *pro hac vice**
9 tbrejcha@thomasmoresociety.org
Peter Breen, *pro hac vice**
10 pbreen@thomasmoresociety.org
THOMAS MORE SOCIETY
11 309 W. Washington St., Ste. 1250
Chicago, IL 60606
12 Tel: (312) 782-1680
13 *Application forthcoming

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

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.
27
28

CASE NO.: BCV-18-102633

IMAGED FILE

**DECLARATION OF MILAN L.
BRANDON II, ESQ. IN SUPPORT
OF REQUEST FOR JUDICIAL
NOTICE RE: DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT OR ADJUDICATION**

Date: Nov. 4, 2021

Time: 8:30 a.m.

Dept: 11

Judge: Hon. David R. Lampe

Action Filed: Oct. 17, 2018

Trial Date: Dec. 13, 2021

DECLARATION OF MILAN L. BRANDON II, ESQ. ISO REQUEST FOR JUDICIAL NOTICE RE:
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR ADJUDICATION

RA.1291

Document received by the CA 5th District Court of Appeal.

ELECTRONICALLY FILED
9/9/2021 8:00 AM
Kern County Superior Court
By Gracie Goodson, Deputy

1 I, Milan L. Brandon II, declare and state as follows:

2 1. I am an attorney admitted to practice before all the courts of the State of California. I
3 am an associate in the firm of LiMandri & Jonna LLP and I am one of the attorneys for Defendants
4 Catharine Miller and Cathy's Creations, Inc. I have personal knowledge of the following facts and, if
5 called upon to testify, I could and would competently testify to these facts.

6 2. Attached hereto as **Exhibit A** is a true and correct copy of the May 1, 2018
7 judgment—attaching and incorporating the February 5, 2018, preliminary injunction order—which
8 was entered in Plaintiff Department of Fair Employment and Housing's Petition for Preliminary
9 Injunction titled *Department of Fair Employment and Housing vs. Cathy's Creations, Inc. et. al.*, Case
10 No. BCV-17-102855.

11 I declare under penalty of perjury under the laws of the State of California that the foregoing
12 is true and correct. Executed at Rancho Santa Fe, California this 8th day of September, 2021.

13
14 
15 Milan L. Brandon II

Document received by the CA 5th District Court of Appeal.

EXHIBIT A

SUPERIOR COURT OF CALIFORNIA COUNTY OF KERN
METROPOLITAN DIVISION
1415 TRUXTUN AVENUE, BAKERSFIELD, CA 93301

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF KERN

MAY 01 2018

TERRE MCNALLY, CLERK
BY: [Signature] DEPUTY

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

Case No.: BCV-17-102855

JUDGMENT

VS.

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

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

Plaintiff the Department of Fair Employment and Housing, on behalf of the State of California, brought this civil action for an injunction under Government Code section 12974 against Defendants Cathy's Creations, Inc. dba Tastries and Catharine Miller, alleging a violation of the Unruh Civil Rights Act, Civil Code section 51, based on the administrative complaint of Real Parties in Interest Eileen Rodriguez-Del Rio and Mireya Rodriguez-Del Rio.

The Court's order dated March 2, 2018, and titled "Order Denying Department of Fair Employment and Housing's Order to Show Cause re: Preliminary Injunction and Orders on Evidentiary Objections" is attached hereto and incorporated by reference.

On Plaintiff the Department of Fair Employment and Housing's civil action:

No Statement of Decision having been requested pursuant to Code of Civil Procedure section 632, and the matter having been tried in less than one day, therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is hereby rendered and to be entered in favor of Defendants Cathy's Creations, Inc. dba Tastries and Catharine Miller, and against Plaintiff Department of Fair Employment and Housing for the reasons stated in the attached Order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants Cathy's Creations, Inc. dba Tastries and Catharine Miller are deemed the prevailing party for purposes of the fight to recover litigation costs as permitted by law.
IT IS SO ORDERED.

DATED: May 1, 2018

[Signature]
DAVID R. LAMBE
JUDGE OF THE SUPERIOR COURT

Document received by the CA 5th District Court of Appeal.

FEB 26 2018

FILED
SUPERIOR COURT of CA, COUNTY OF KERN

MAR 02 2018

TERRY McNALLY, CLERK
BY [Signature] 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,

Petitioner,

vs.

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

Respondents.

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

Complainants.

Case No. BCV-17-102855

[Signature]
~~[PROPOSED]~~ ORDER DENYING
DEPARTMENT OF FAIR
EMPLOYMENT AND HOUSING'S
ORDER TO SHOW CAUSE RE:
PRELIMINARY INJUNCTION AND
ORDERS ON EVIDENTIARY
OBJECTIONS

(Gov. Code, § 12974)

Hearing Date: February 2, 2018
Time: 1:30 p.m.
Dept.: 11
Judge: Hon. David R. Lampe



COURT PAPER
State of California

-1-

Dept. Fair Empl. & Hous. v. Cathy's Creations, Inc., et al. (Rodriguez-Del Rio, et al.)
[Proposed] Order Denying Petition for Preliminary Injunction and Orders on Evidentiary Objections

FILED BY FAX

RA.1295

Document received by the CA 5th District Court of Appeal.
SCANNED

1 Petitioner Department of Fair Employment and Housing's Petition for Preliminary Injunction
2 pursuant to Government Code section 12974 in the above-entitled action came on for hearing on
3 February 2, 2018, at 1:30 p.m. in Department 11 of the Kern County Superior Court, Metropolitan
4 Division, the Honorable David R. Lampe presiding. Petitioner Department of Fair Housing and
5 Employment (DFEH) appeared through its counsel of record, Gregory J. Mann and Timothy Martin.
6 Respondents appeared through their counsel of record, Charles S. LiMandri.

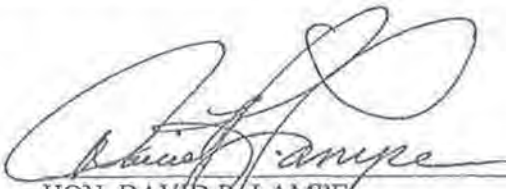
7 Based on the evidence presented, submissions of the parties, the complete file in this matter,
8 the oral argument of the parties, and good cause appearing, it is the order of this Court that
9 Petitioner's Petition for Preliminary Injunction is DENIED. ~~The DFEH brought this civil action~~
10 ~~pursuant to Government Code section 12974, which authorizes "a civil action for appropriate~~
11 ~~temporary or preliminary relief pending final disposition of [a] complaint [filed with the DFEH]."~~
12 ~~Because this Order denies the DFEH temporary or preliminary relief pending the DFEH's final~~
13 ~~disposition of the underlying administrative complaint, no relief remains available to the DFEH in~~
14 ~~this Government Code section 12974 action.~~

15 This Court's reasoning appears in its Minute Order dated February 5, 2018, regarding Nature
16 of Proceedings: Ruling on Order to Show Cause In Re: Preliminary Injunction, and is attached hereto
17 and hereby incorporated by reference.

18 Further, based on the evidence presented, the submissions of the parties, the complete file in
19 this matter, the oral argument of the parties, and good cause appearing, it is the order of this Court
20 that the DFEH's Objections to Evidence Filed In Support of Respondents' Opposition to the OSC Re
21 Preliminary Injunction 8, 13, 15, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 35, 36, 42, 43, and 44 are
22 sustained. Respondents' Objections to the Evidence Filed In Support of OSC Re Preliminary
23 Injunction 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, and 18 are sustained. All other objections by the DFEH
24 and Respondents are overruled.

25 IT IS SO ORDERED.

26 DATED: 3.2.18

27 
28 HON. DAVID R. LAMPE
JUDGE OF THE SUPERIOR COURT



COURT PAPER
State of California



Superior Court of California
County of Kern
Bakersfield Department 11

Date: 02/05/2018

Time: 8:00 AM - 5:00 PM

BCV-17-102855

Courtroom Staff

Honorable: David R. Lampe

Clerk: Veronica D. Lancaster

Court reporter: None

Bailiff: NONE

PARTIES: CATHY MILLER, Defendant, not present CATHY'S CREATIONS, INC. DBA TASTRIES, A CALIFORNIA CORPORATION, Defendant, not present DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, AN AGENCY OF THE STATE OF CALIFORNIA, Plaintiff, not present EILEEN RODRIGUEZ-DEL RIO, Non-Party, not present MIREYA RODRIGUEZ-DEL RIO, Non-Party, not present	 CHARLES LIMANDRI, Attorney, not present CHARLES LIMANDRI, Attorney, not present GREGORY MANN, Attorney, not present
--	---

NATURE OF PROCEEDINGS: RULING ON ORDER TO SHOW CAUSE IN RE: PRELIMINARY INJUNCTION;
FILED BY PLAINTIFF DEPARTMENT OF FAIR HOUSING; HERETOFORE SUBMITTED ON FEBRUARY 2, 2018

Introduction

The State of California brings this action under the Unruh Civil Rights Act, Civil Code section 51, against defendants Cathy's Creations, Inc. and Cathy Miller. Miller refuses to design and create wedding cakes to be used in the celebration of same sex marriages. She believes that such marriages violate her deeply held religious convictions. The State seeks to enjoin this conduct as unlawfully discriminatory. The State brings the action upon the administrative complaint of a same-sex married couple, complainants Rodriguez-Del Rios.

The State cannot succeed on the facts presented as a matter of law. The right to freedom of speech under the First Amendment outweighs the State's interest in ensuring a freely accessible marketplace.

The right of freedom of thought guaranteed by the First Amendment includes the right to speak, and the right to refrain from speaking. Sometimes the most profound protest is silence.

No public commentator in the marketplace of ideas may be forced by law to publish any opinion with which he disagrees in the name of equal access. No person may be forced by the State to stand and recite the Pledge of Allegiance against her will. The law cannot compel anyone to stand for the National Anthem. No persons may be forced to advertise a state-sponsored slogan on license plates against their religious beliefs.

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The State's purpose to ensure an accessible public marketplace free from discrimination is a laudable and necessary public goal. No vendor may refuse to sell their public goods, or services (not fundamentally founded upon speech) based upon their perception of the gender identification of their customer, even upon religious grounds. A retail tire shop may not refuse to sell a tire because the owner does not want to sell tires to same sex couples. There is nothing sacred or expressive about a tire.

No artist, having placed their work for public sale, may refuse to sell for an unlawful discriminatory purpose. No baker may place their wares in a public display case, open their shop, and then refuse to sell because of race, religion, gender, or gender identification.

The difference here is that the cake in question is not yet baked. The State is not petitioning the court to order defendants to sell a cake. The State asks this court to compel Miller to use her talents to design and create a cake she has not yet conceived with the knowledge that her work will be displayed in celebration of a marital union her religion forbids. For this court to force such compliance would do violence to the essentials of Free Speech guaranteed under the First Amendment.

The Unruh Act prohibits discrimination on the basis of religion, as well as sexual orientation. Would this court force a baker who strongly favored GLBT rights to create and design a wedding cake she had refused to a Catholic couple, in her protest of the Catholic Church's proscription against same-sex marriage? The answer is "No." This court has an obligation to protect Free Speech, regardless of whose foot the shoe is on. The court takes judicial notice, not of the content, but of the fact, that before the hearing on this matter there was a gathering in front of the courthouse where both sides of the debate voiced their views. Would this court order one side or the other to be quiet? Such an order would be the stuff of tyranny. Both sides advocate with strong and heartfelt beliefs, and this court has a duty to ensure that all are given the freedom to speak them. The government must remain neutral in the marketplace of ideas.¹

No matter how the court should rule, one side or the other may be visited with some degree of hurt, insult, and indignity. The court finds that any harm here is equal to either complainants or defendant Miller, one way or the other. If anything, the harm to Miller is the greater harm, because it carries significant economic consequences. When one feels injured, insulted, or angered by the words or expressive conduct of others, the harm is many times self-inflicted. The most effective Free Speech in the family of our nation is when we speak and listen with respect. In any case, the court cannot guarantee that no one will be harmed when the law is enforced. Quite the contrary, when the law is enforced, someone necessarily loses. Nevertheless, the court's duty is to the law. Whenever anyone exercises the right of Free Speech, someone else may be angered or hurt. This is the nature of a free society under our Constitution.

Facts

Complainants Eileen and Mireya Rodriguez-Del Rio met in the late 1990's at Bakersfield College, and

¹ *F.C.C. v. Pacifica Found.* (1978) 438 U.S. 726, 745-46, 98 S. Ct. 3026, 3038, 57 L. Ed. 2d 1073.

built a close and strong friendship before becoming a couple in 2015. They married in December 2016, in a ceremony before their immediate family, and set a date of October 7, 2017, for a vow exchange and traditional wedding reception with over 100 guests. They planned to order a wedding cake for their celebration. After tastings at other bakeries, Eileen and Mireya visited Tastries in August 17, 2017 to see sample wedding cakes. A Tastries employee named Rosemary met with the couple, showed them wedding cakes on display in the bakery, and recorded the details of the cake they wanted. Eileen and Mireya selected a design based on a display cake. The couple did not want or request any written words or messages on the cake. They booked a cake tasting at Tastries for August 26, 2017. On August 26, Mireya, Eileen, and others came to Tastries, where the owner, Cathy Miller, after apologizing, told them that she would provide their order to Gimme Some Sugar—a competitor bakery—because she does not condone same-sex marriage.

On October 18, 2017, Rodriguez-Del Rios filed an administrative complaint with the State, alleging that Defendants violated the Unruh Act by denying them full and equal services on the basis of sexual orientation. On the basis of its preliminary investigation, the State concluded that prompt judicial action was necessary, and this action ensued.

Cathy Miller is a creative designer who owns and operates Cathy's Creations, Inc., doing business as "Tastries," a small bakery in Bakersfield, California. As part of its business, Tastries creates specially designed custom cakes, including wedding cakes.

Miller is a practicing Christian and considers herself a woman of deep faith.

Miller is a creative artist and participates in every part of the custom cake design and creation process.

While Miller offers her services and products generally without discrimination, including her pre-made wares, she will not design or create any custom cake that expresses or celebrates matters that she finds offend her heartfelt religious principles. Thus, she refuses to create or design wedding cakes for same-sex marriage celebrations, because of her belief that such unions violate a Biblical command that marriage is only between a man and a woman.

Miller has entered into an agreement to refer same-sex couples to a competitor, Gimme Some Sugar, based upon her understanding that the owner of that bakery does not have any prohibitory policies.

Miller does not deny that she refused to design and create a custom wedding cake for Rodriguez-Del Rio.

Analysis

The right of freedom of thought protected by the First Amendment includes both the right to speak freely and the right to remain mute. (*Wooley v. Maynard* (1977) 430 U.S. 705, 714, 97 S. Ct. 1428, 1435, 51 L. Ed. 2d 752.) The relevant principles are well presented in the Court's *Wooley* decision.

In ruling that no child may be compelled by the educational system to perform the flag salute under

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threat of state discipline, the Court held that such a ceremony so touched upon matters of opinion and political attitude that it could not be imposed under our Constitution, finding that "[t]o enforce those rights today is ... to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." (*W. Virginia State Bd. of Educ. v. Barnette* (1943) 319 U.S. 624, 636, 637, 63 S. Ct. 1178, 1184, 1185, 87 L. Ed. 1628.)

In the case of *Miami Herald Publishing Co. v. Tornillo* (1974) 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730, the Court held a Florida statute unconstitutional which placed an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized. The Court concluded that such a requirement deprived a newspaper of the fundamental right to decide what to print or omit. (See also *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California* (1986) 475 U.S. 1, 106 S. Ct. 903, 89 L. Ed. 2d 1.)

In *Wooley*, the Court held that the State of New Hampshire could not compel residents to display the state motto "Live Free or Die" upon their vehicle license plates against their religious principles.

This case falls well within the reach of the Supreme Court's "compelled speech" doctrine. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), establishes that generally applicable public-accommodation laws violate the Free Speech Clause when applied to compel speech. In *Hurley*, the Supreme Court, by Justice Souter, held that a state courts' application of public accommodation law to essentially require defendants to alter the expressive content of their parade by permitting a group of participants to march behind a GLBT banner violated the First Amendment.

The State here makes two arguments against the application of the "compelled speech" doctrine. The State argues that Unruh Act enforcement here does not compel speech, but only conduct—the baking and selling of a cake, citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, (*FAIR*) (2006) 547 U.S. 47. The State also argues that this is not a compelled speech case because such case are limited to those occasions where government requires a speaker to disseminate another's message and here the State is not compelling any particular design, also principally citing *FAIR*, *Wooley*, and *Tornillo*. The State takes a far too narrow view of both the case law and the circumstances to satisfy constitutional scrutiny. The State does ask the court to limit Miller's design, because the State acknowledges that she cannot create any element of the design that would disparage same-sex marriage, because that design element would be unacceptable to Rodriguez-Del Rios. *FAIR* recognized, in considering *Wooley* and *Tornillo*, that when a speaker is engaged in expression, and the government allows or compels that another may co-opt it, it necessarily affects the speaker's expression. (547 U.S. at 63-64.) *FAIR* is also distinguishable because the law schools in that case did not speak when they hosted interviews and held recruiting receptions. (*Id.* at 64.)

A wedding cake is not just a cake in a Free Speech analysis. It is an artistic expression by the person making it that is to be used traditionally as a centerpiece in the celebration of a marriage. There could not be a greater form of expressive conduct. Here, Rodriguez-Del Rios plan to engage in speech. They plan a celebration to declare the validity of their marital union and their enduring love for one another. The State asks this court to compel Miller against her will and religion to allow her artistic expression in celebration of marriage to be co-opted to promote the message desired by same-sex marital partners,

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and with which Miller disagrees.

Identifying the interests here as implicating First Amendment protections does not end the inquiry. The court must also determine whether the State's countervailing interest is sufficiently compelling to justify the intrusion into a protected right.

The State principally cites *United States v. O'Brien* (1968) 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672, for the proposition that the State's interest in compelling a marketplace free from discrimination outweighs Miller's First Amendment Free Speech interests. In *O'Brien*, the Supreme Court, by Chief Justice Warren, held that because of the government's substantial interest in assuring the continuing availability of issued selective service certificates, because the statute punishing knowing destruction or mutilation of such certificates was an appropriately narrow means of protecting such interest, and condemned only the independent non-communicative impact of conduct within its reach, and because the non-communicative impact of defendant's act of burning his registration certificate frustrated the government's interest, a sufficient governmental interest was shown to justify defendant's conviction, as against defendant's claim that his act was protected "symbolic speech."

Here, Miller is not burning her business license or refusing to display it to protest government regulation of the small bakery industry. She is not refusing to post any government requirement to display the caloric content of her pastries. (See *Beeman v. Anthem Prescription Mgmt., LLC* (2013) 58 Cal. 4th 329, 356.) The application of the Unruh Act in these circumstances requires "strict scrutiny" by the court. Under strict scrutiny, a law cannot be applied in a manner that substantially burdens a constitutional right unless the State shows that the law represents the least restrictive means of achieving a compelling interest. (*N. Coast Women's Care Med. Grp. Inc. v. San Diego Cty. Superior Court* (2008) 44 Cal. 4th 1145, 1158.)

The State cannot meet the test that its interest outweighs the Free Speech right at issue in this particular case, or that the law is being applied by the least restrictive means. The court cannot retreat from protecting the Free Speech right implicated in this case based upon the specter of factual scenarios not before it. Small-minded bigots will find no recourse in committing discriminatory acts, expecting to be sheltered from Unruh Act prohibitions by a false cry of Free Speech. No court evaluates Free Speech rights against the interest of the State in enforcing public access laws in a vacuum, without regard to circumstances, history, culture, social norms, and the application of common sense. Here, Miller's desire to express through her wedding cakes that marriage is a sacramental commitment between a man and a woman that should be celebrated, while she will not express the same sentiment toward same-sex unions, is not trivial, arbitrary, nonsensical, or outrageous. Miller is expressing a belief that is part of the orthodox doctrines of all three world Abrahamic religions, if not also part of the orthodox beliefs of Hinduism and major sects of Buddhism. That Miller's expression of her beliefs is entitled to protection is affirmed in the opinion of Justice Kennedy in *Obergefell v. Hodges* (2015) 135 S. Ct. 2584, 192 L. Ed. 2d 609 wherein the Court established that same-sex marriages are entitled to Equal Protection. Therein, the Court noted: "[f]inally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family

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structure they have long revered." (*Id* at 2607.)

Furthermore, here the State minimizes the fact that Miller has provided for an alternative means for potential customers to receive the product they desire through the services of another talented baker who does not share Miller's belief. Miller is not the only wedding cake creator in Bakersfield.

The fact that Rodriguez-Del Rios feel they will suffer indignity from Miller's choice is not sufficient to deny constitutional protection. *Hurley* established that the State's interest in eliminating dignitary harms is not compelling where, as here, the cause of the harm is another person's decision not to engage in expression. The Court there recognized that "the 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.) An interest in preventing dignitary harms thus is not a compelling basis for infringing free speech. (See *Texas v. Johnson* (1989) 491 U.S. 397, 409; see also *Hustler Magazine, Inc. v. Falwell* (1988) 485 U.S. 46, 56.)

The defendants' argument that the case implicates the Free Exercise of Religion Clause is less clear. In light of the court's discussion above, the court does not reach the question of Free Exercise. In addressing the constitutional protection for free exercise of religion, a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. To determine the object of a law, the court begins with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. The Free Exercise Clause extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality." Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt. (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 533- 534, 113 S. Ct. 2217, 2227, 124 L. Ed. 2d 472.)

It is difficult to say what standard of scrutiny the court should use to evaluate the application of the Free Exercise clause to the circumstances of this case after *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which largely repudiated the method of analyzing free-exercise claims that had been used in cases like *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and which resulted in Congress passing the Religious Freedom Restoration Act of 1993. (See *Burwell v. Hobby Lobby Stores, Inc.* (2014) 134 S. Ct. 2751, 2760, 189 L. Ed. 2d 675.)

The Unruh Act is neutral on its face and does not per se constitute a direct restraint upon religion. In fact, by its terms, the Unruh Act itself protects religious discrimination in the marketplace. By its term it does not constitute an indirect restraint. There is also no evidence before the court that the State is targeting Christian bakers for Unruh Act enforcement under these circumstances. Designing and creating a cake, even a wedding cake, may not in and of itself constitute a religious practice under the Free Exercise clause. It is the use that Miller's design effort will be put to that causes her to object. Whether the application of the Unruh Act in these circumstances violates the Free Exercise clause is an open question, and the court does not address it because the case is sufficiently resolved upon Free Speech grounds.

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Conclusion

For the reasons stated above, the application for preliminary injunction is denied. The State cannot succeed upon the merits, and the balance of hardships does not favor the State.

Ruling Upon Objections

The court rules as follows upon the evidentiary objections presented.

Defendant's Objections:

The court sustains objections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, and 18. The court overrules all other objections.

State's Objections:

The court sustains objections 8, 13, 15, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 35, 36, 42, 43, and 44. The court overrules all other objections.

Moving party shall prepare and order after hearing consistent with this ruling and pursuant to California Rules of Court, Rule 3.1312.

Copy of minute order mailed to all parties as stated on the attached certificate of mailing.

MINUTE ORDER FINALIZED BY: VERONICA LANCASTER

ON: FEBRUARY 05, 2018

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DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING VS CATHY'S
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DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING VS CATHY'S CREATIONS, INC.
BCV-17-102855

CERTIFICATE OF MAILING

The undersigned, of said Kern County, certify: That I am a Deputy Clerk of the Superior Court of the State of California, in and for the County of Kern, that I am a citizen of the United States, over 18 years of age, I reside in or am employed in the County of Kern, and not a party to the within action, that I served the *Minute Order dated February 05, 2018* attached hereto on all interested parties and any respective counsel of record in the within action by depositing true copies thereof, enclosed in a sealed envelope(s) with postage fully prepaid and placed for collection and mailing on this date, following standard Court practices, in the United States mail at Bakersfield California addressed as indicated on the attached mailing list.

Date of Mailing: February 05, 2018

Place of Mailing: Bakersfield, CA

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

Terry McNally
CLERK OF THE SUPERIOR COURT

Date: February 05, 2018

By: _____
Verónica Lancaster, Deputy Clerk

MAILING LIST

GREGORY J MANN
CA DEPT OF FAIR EMPLOYMENT AND HOUSING
320 WEST 4TH STREET 10TH FLOOR
LOS ANGELES CA 90013

CHARLES S LIMANDRI
LAW OFC
PO BOX 9120
RANCHO SANTA FE CA 92067

Certificate of Mailing

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**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. d/b/a
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

IMAGED FILE

**[PROPOSED] ORDER GRANTING
DEFENDANTS CATHARINE MILLER
AND TASTRIES BAKERY'S REQUEST
FOR JUDICIAL NOTICE IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION**

Date: Nov. 4, 2021

Time: 8:30 a.m.

Dept: 11

Judge: Hon. David R. Lampe

Action Filed: Oct. 17, 2018

Trial Date: Dec. 13, 2021

1 **[PROPOSED] ORDER**

2 This Court, having considered the Request for Judicial Notice of Defendants Catharine
3 Miller and Cathy's Creations, Inc., and good cause having been shown therefore,

4 **IT IS ORDERED** that this Court takes judicial notice of:

5 (1) The May 1, 2018 judgment—incorporating and attaching the February 5, 2018
6 preliminary injunction order—entered in Plaintiff Department of Fair Employment and Housing's
7 Petition for Preliminary Injunction titled *Department of Fair Employment and Housing vs. Cathy's*
8 *Creations, Inc. et. al.*, Case No. BCV-17-102855; and

9 (2) The proposition that skill, artistry, and personal expression are evident in the wedding
10 cakes made by Tastries Bakery and the wedding cake commissioned by Real Parties for their
11 wedding.

12
13 **IT IS SO ORDERED.**

14 **JUDGE OF THE SUPERIOR COURT**

15 Dated: _____

Hon. David R. Lampe

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1 fCharles S. LiMandri, SBN 110841
cslimandri@limandri.com
2 Paul M. Jonna, SBN 265389
pjonna@limandri.com
3 Jeffrey M. Trissell, SBN 292480
jtrissell@limandri.com
4 Milan L. Brandon II, SBN 326953
mbrandon@limandri.com
5 LiMANDRI & JONNA LLP
6 P.O. Box 9120
Rancho Santa Fe, California 92067
7 Telephone: (858) 759-9948
Facsimile: (858) 759-9938

8 Thomas Brejcha, *pro hac vice**
9 tbrejcha@thomasmoresociety.org
Peter Breen, *pro hac vice**
10 pbreen@thomasmoresociety.org
THOMAS MORE SOCIETY
11 309 W. Washington St., Ste. 1250
Chicago, IL 60606
12 Tel: (312) 782-1680
13 *Application forthcoming

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

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

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

20 Plaintiff,

21 v.

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

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

CASE NO.: BCV-18-102633

IMAGED FILE

**DEFENDANTS CATHARINE
MILLER AND TASTRIES
BAKERY'S MEMORANDUM IN
OPPOSITION TO PLAINTIFF
DFEH'S MOTION FOR
SUMMARY JUDGMENT OR, IN
THE ALTERNATIVE,
SUMMARY ADJUDICATION**

Date: Nov. 4, 2021
Time: 8:30 a.m.
Dept: 11
Judge: Hon. David R. Lampe
Action Filed: Oct. 17, 2018
Trial Date: Dec. 13, 2021

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INTRODUCTION

Although charged with responsibility to protect the interests of both sexual minorities and religious minorities, Plaintiff DFEH would have this Court believe that there is no common ground where the interests of both groups can be recognized and accommodated. Plaintiff DFEH has chosen sides in this debate and determined that religious beliefs must give way to all conduct associated with sexual orientation. This is not the law. The U.S. Supreme Court in *Fulton*,¹ *Masterpiece I*,² and *Obergefell*³ has made clear that there is room for all, and that government should reconcile the interests of both same-sex couples and those with traditional religious beliefs regarding marriage. As the California Supreme Court stated when it made same-sex marriage the law of the State: “[A]ffording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, *or any other person*. . . . (Cal. Const., art. I, § 4 [italics added].)”⁴

As explained below, Defendants’ actions are protected by both the free speech and free exercise provisions of the First Amendment of the U.S. Constitution and the First Article of the California Constitution. These rights were not waived by participating in the marketplace, but imposed responsibilities, which Defendants sought to fulfill by arranging with other professional bakeries to accommodate same-sex couples seeking wedding related services in a manner that is full and equal. But even with respect to its own burden as a moving Plaintiff, the DFEH fails. The DFEH claims, without evidence, that Defendants’ distinctions were based on the Real Parties’ sexual orientation. This is not supported by the record, and it is rebutted by the many services and employment positions offered by Defendants to members of the LGBT community. Defendants’ actions were clearly directed to ensuring that members of the LGBT community received access to the wedding services they needed, while also allowing Defendants to live out their faith. This is both allowed by the Unruh Act and required by the U.S. and California constitutions.

¹ (*Fulton v. City of Philadelphia, Pennsylvania* (2021) 141 S.Ct. 1868.)

² (*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com’n* (2018) 138 S.Ct. 1719 [“*Masterpiece I*”].)

³ (*Obergefell v. Hodges* (2015) 576 U.S. 644.)

⁴ (*In re Marriage Cases* (2008) 43 Cal.4th 757, 854–855.)

RESPONSE TO THE DFEH'S UNDISPUTED FACTS

While Plaintiff DFEH and Defendants have different views on some minor facts (such as the precise design of the cake Real Parties wanted to order and whether Tastries is seen at a delivery), both sides generally agree on the material facts: including (1) that Real Parties sought to obtain a pre-ordered cake for their same-sex wedding from Defendants (SSUMF No. 20); (2) that Defendants declined based on their sincerely held religious beliefs about marriage (SSUMF Nos. 21a & 21b); (3) that Defendants offered an accommodation through another bakery (SSUMF Nos. 22a & 62c); and (4) that the Real Parties actually obtained a beautiful wedding cake for their event. (SSUMF No. 24a.) These facts are not in dispute and the only question that remains is how these facts relate to the law.

There are numerous minor factual disagreements between the parties that are addressed in the Defendants' separate statement, that will not be addressed here, and that hold little importance to the determination of this case. The only major factual disagreement between the parties is Plaintiff DFEH's characterization of the Tastries design process. Even this disagreement, however, does not preclude the grant of summary judgment for Defendants.

Throughout its briefing and in the separate statement, Plaintiff DFEH skewed several facts to make the custom cakes and desserts prepared by Tastries appear to be very basic, using a check the box selection of options with little direct involvement by Defendant Miller. (See DFEH MSJ, § II.A. pp.3:6-4:2; SSUMF Nos. 3, 4, 67-74.) This could not be further from the truth. For many of the "undisputed facts," Plaintiff DFEH's characterization of the evidence is strained at best. For others by highlighting occasional, happenstance incidents as commonplace and ignoring the vast majority of contrary evidence that presents a different picture (including from Plaintiff DFEH's witnesses), Plaintiff DFEH mischaracterizes Defendant Miller's role and the nature of her business.

Tastries Bakery's custom products are designed to meet customer specifications. The team of designers (led by Defendant Miller) start with the customer's vision and present options to create a final design that fits the theme and budget for each occasion. Cake designs can range from simple to elaborate, but all styles require a skilled decorator, and each design portrays the image or expresses the sentiment intended by the customer. (SSUMF No. 68a.) While Defendant Miller does not necessarily physically participate in every custom cake order, she oversees the design process, is directly involved

1 in the vast majority of wedding orders, and reviews every order to make weekly assignments for
2 baking, decorating and deliveries. As the sole owner and manager, all activities of the bakery are a
3 direct reflection on Defendant Miller. (SSUMF No. 69.)

4 LEGAL STANDARD

5 “[F]rom commencement to conclusion, the party moving for summary judgment bears the
6 burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as
7 a matter of law. That is because of the general principle that a party who seeks a court’s action in his
8 favor bears the burden of persuasion thereon.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826,
9 850.) “[W]hen the evidence is in equipoise on a matter that a party must establish by a preponderance
10 of the evidence, summary judgment will be granted against that party.” (*Id.* at 852, fn.17.)

11 For summary judgment, or summary adjudication of its own claims, a plaintiff meets his
12 burden “if that party has *proved* each element of the cause of action entitling the party to judgment
13 on that cause of action.” (Code Civ. Proc., § 437c(p)(1) [italics added].) “Once the plaintiff . . . has
14 met that burden, the burden shifts to the defendant . . . to show that a triable issue of one or more
15 material facts exists as to that cause of action[.]” (*Id.*) The defendant’s “burden of production [is]
16 *to make a prima facie showing*. A prima facie showing is one that is sufficient to support the position
17 of the party in question. No more is called for.” (*Aguilar, supra*, 25 Cal.4th at 851 [citations
18 omitted].) If the plaintiff fails to meet his initial burden, the burden never shifts to the defendant
19 (*Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1200.)

20 For summary adjudication of affirmative defenses, a plaintiff “must demonstrate a negative,
21 i.e., that there *is no* evidence to support an element of the opponent’s case.” (*Rio Linda Unified School*
22 *Dist. v. Superior Court* (1997) 52 Cal.App.4th 732, 739.) “If a party contends some particular issue of
23 fact has no support . . . , it must set forth all the material evidence on the point and not merely the
24 evidence favorable to it.” (*Id.*)

25 ARGUMENT

26 A. PLAINTIFF DFEH HAS NOT PROVED THE ELEMENTS OF ITS UNRUH CLAIM

27 Section A of Plaintiff DFEH’s memorandum concerns its motion for summary judgment of
28 the entire action, or alternatively, summary adjudication of its Unruh Act claim. (DFEH MSJ, § A

pp.7-9.) As explained in Defendants' motion for summary judgment, because Plaintiff DFEH seeks only statutory damages, there are only two elements at issue here. (Tastries MSJ, § 1, p.12.) Plaintiff DFEH must show that (1) (a) Defendants discriminated or made a distinction (b) that denied full and equal services to Real Parties; and (2) that a substantial motivating reason for Defendant's conduct was their perception of Real Parties' sexual orientation. (*Id.*)

However, in neither its briefing nor the cited undisputed facts, does Plaintiff DFEH address at all (1)(b). (DFEH MSJ, § A, pp.7-9 [citing SSUMF Nos. 5, 20, 21].) The simple fact is that Defendants did provide "full and equal services to Real Parties." (See Tastries MSJ, § 1.1, pp.12-13.) But regardless of the facts, the burden of showing they did not was squarely Plaintiff DFEH's burden. By failing to meet it, the burden in this section has never shifted to Defendants. (See *Continental Ins. Co.*, *supra*, 107 Cal.App.4th at 1200.)

Plaintiff DFEH implies that all the evidence required to support its claim that Defendants violated the Unruh Act is to merely cite to this Court's anti-SLAPP order. (SSUMF Nos. 28 & 29 [citing DFEH-App., Ex. 4, Anti-SLAPP Order].) That is not the case. As explained in the separate statement, court orders are not evidence supporting material facts, they are legal conclusions on the motion under review. (*Andrews Farms v. Calcot, Ltd.* (E.D. Cal. 2010) 693 F.Supp.2d 1154, 1167.) Substantively, the legal principles in that order control, but not the application of those principles to developing facts. (See DFEH-App., Ex. 4, § II.B.1, pp.8:7-13, 9:18-21 [explaining effect of a trial court's prior orders]; Code Civ. Proc., § 1008.) Unlike with its Free Speech analysis, this Court's Unruh Act analysis was limited, considering only minimal arguments from the parties, and warranting new consideration in light of the developing facts. (See DFEH-App., Ex. A, § I, p.5:1-5.) Further, Plaintiff DFEH has now submitted only one of the third-party declarations it submitted in response to the anti-SLAPP motion. (DFEH-App., Ex. 14.) Presumably, following the heavily impeaching depositions, Plaintiff DFEH realized those declarations would not survive objections. (See *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21.)

In this section of its brief, the only truly undisputed facts cited by Plaintiff DFEH are those supporting element (1) (a), that Defendants made a distinction. (See SSUMF Nos. 5, 20, 21.) To substantiate element (2), Plaintiff DFEH relies solely on case law for the proposition that there is no

1 “relevant difference between discriminatory action aimed at same-sex marriage and discriminatory
2 action aimed at the couples’ sexual orientations.” (DFEH MSJ, § IV.2, pp.8–9.) Whereas some non-
3 binding cases from other jurisdictions have held as much, this is not how the Unruh Act works.

4 To establish an Unruh Act violation, a plaintiff must “prove *intentional* discrimination.” (*Cohn*
5 *v. Corinthian Colleges, Inc.* (2008) 169 Cal.App.4th 523, 527 & fn.3 [citing *Harris v. Capital Growth*
6 *Investors XIV* (1991) 52 Cal.3d 1142, 1175].) In *Cohn*, the Los Angeles Angels baseball team had a home
7 game on Mother’s Day. (*Id.* at 526.) To honor “mothers,” Corinthian Colleges gave away a free tote
8 bag to all “females 18 years old and over.” (*Id.*) Mr. Cohn requested a free bag, but was denied, and
9 then sued alleging gender discrimination. (*Id.*) The court of appeal held that there was no claim,
10 because the baseball team *had no discriminatory intent*—its “intent was to honor mothers on Mother’s
11 Day.” (*Id.* at 528 [citing *Bray v. Alexandria Women’s Health Clinic* (1993) 506 U.S. 263, 270].)

12 *Cohn* is relevant in showing that intent is *dispositive*, and intent is *factual*—not legal. The
13 penultimate issue is whether Defendants *intended* to discriminate against Real Parties *because* of their
14 sexual orientation. Even when the conduct is extremely closely correlated with the protected
15 characteristic, the plaintiff has to show that the discrimination was *because* of the protected
16 characteristic itself.⁵ Here, Plaintiff DFEH made no effort to present any evidence that Defendant
17 Miller’s intentions were anything other than to honor her religious beliefs in regard to marriage.

18 *Cohn* is also relevant because it shows that in interpreting the Unruh Act, the Court should
19 look to the reasoning of the U.S. Supreme Court in *Bray v. Alexandria Women’s Health Clinic* (1993)
20 506 U.S. 263. Plaintiff DFEH itself cites *Bray*, but it does not help Plaintiff. (DFEH MSJ, 8:14–17.)
21 There, pro-abortion organizations filed an action under 42 U.S.C. § 1985(3)—alleging conspiracy to
22 violate constitutional rights—seeking to enjoin the activities of pro-life organizations and individuals
23 (*Bray, supra*, 506 U.S. at 266–267.) The theory was that pro-life organizations’ opposition to abortion

24 _____
25 ⁵ (See *Minton v. Dignity Health* (2019) 39 Cal.App.5th 1155, 1162 [holding that Catholic hospital can
26 present evidence after the demurrer stage that it did not refuse hysterectomy to female-to-male
27 transgender patient because of *transgender status*, but because of *religious belief* that “[p]rocedures that
28 induce sterility are [only morally appropriate] when their direct effect is the cure or alleviation of a
present and serious pathology and a simpler treatment is not available,” and belief that best treatment
for gender dysphoria is psychological counseling, not sex-reassignment surgery] [citing *North Coast*
Women’s Care Medical Group, Inc. v. Superior Court (2008) 44 Cal.4th 1145, 1161].)

1 was in reality a conspiracy to discriminate against women, in violation of the equal protection clause,
2 since only women obtain abortions. (*Id.* at 269–270.)

3 The Supreme Court held that when the discrimination is not facially targeted at a group (i.e.,
4 women), but at an “activit[y]” (i.e., abortion) the activity rationale could be held pretextual under
5 § 1985(3) if (1) it is “engaged in exclusively or predominantly by a particular class of people;” and
6 (2) the activity has been traditionally “an irrational object of disfavor.” (*Bray, supra*, 506 U.S. at 270.)
7 Although only women obtain abortions (element 1), and many disfavor it, the Supreme Court held
8 that disfavoring abortion cannot possibly be considered “irrational”: “Whatever one thinks of
9 abortion, it cannot be denied that there are common and respectable reasons for opposing it, other
10 than hatred of, or condescension toward (or indeed any view at all concerning), women as a class—as
11 is evident from the fact that men and women are on both sides of the issue[.]” (*Id.* at 270.)

12 The California Supreme Court and the U.S. Supreme Court have repeatedly asserted that
13 religious adherence to traditional marriage is to be respected and any objection to same-sex marriage is
14 not to be disparaged. (See Introduction, *supra*.) In light of that, the conclusion of *Cohn*, and its citation
15 to *Bray*, can be directly applied to this case as follows: Whatever one thinks of same-sex marriage, it
16 cannot be denied that there are common and respectable reasons for opposing it, other than hatred of
17 or condescension toward (or indeed any view at all concerning), LGBT individuals as a class.

18 Next, Plaintiff DFEH cites cases from the Supreme Court of Washington and New Mexico
19 which held that in the context of their State’s anti-discrimination laws, distinctions based on
20 homosexual marriage are the equivalent of distinctions based on homosexual orientation. (DFEH
21 MSJ, § IV.A, pp.8–9 [citing *State v. Arlene’s Flowers, Inc.* (2019) 193 Wash.2d 469, 503–505; *Elane*
22 *Photography, LLC v. Willock* (2013) 2013-NMSC-040, ¶¶ 16–19].) Ultimately, Defendants simply
23 contend that the Supreme Courts of Washington and New Mexico are wrong, and should not be
24 followed by this Court, and instead point the Court to other Supreme Courts who have come to the
25 exact opposite conclusion. (Tastries MSJ, § 1.2, p.15 [citing *Brush & Nib Studio, LC v. City of Phoenix*
26 (2019) 247 Ariz. 269, 304; *Lee v. Ashers Baking Co. Ltd.* [2018] UKSC 49, ¶ 62].) The logical
27 distinction in the cases appears to track the discussion in *Bray*, where some courts see space
28 between LGBT identity and same-sex marriage, and others view a rejection of same-sex marriage as

1 *ipso facto* evidence of animus against LGBT individuals.

2 Finally, Plaintiff DFEH's most intriguing citation is to *In re Marriage Cases* (2008) 43 Cal.4th
3 757.⁶ (DFEH MSJ, § IV.A., pp. 8–9.) There, the California Supreme Court became the first Supreme
4 Court in the nation to hold that sexual orientation is a suspect classification (*Marriage Cases, supra*, 43
5 Cal.4th at 841), and the second Supreme Court to rule unconstitutional laws that did not extend
6 marriage to same-sex relationships. (*Id.* at 855.) Plaintiff DFEH cites the first holding, where the
7 Court held that laws defining marriage traditionally “properly must be understood as classifying or
8 discriminating on the basis of sexual orientation[.]” (*Id.* at 783–784; see also *id.* at 839–840 & fn.59.)

9 In reaching this conclusion, the California Supreme Court noted psychological and psychiatric
10 definitions of “sexual orientation” which view it as more than sexual *attraction*, and state that it must
11 be defined *relationally*, such that a homosexual person is one who “would choose to marry a person of
12 their own sex or gender.” (*Id.* at 840 & fn.59.⁷) But at the same time as announcing this constitutional
13 equal protection understanding of sexual orientation, the Court made clear that the constitutional
14 violation occurred due to “detrimental effect,” not “invidious intent or purpose.” (*Id.* at 856, fn.73.)
15 The Court made clear that “th[e] belief that the right to marriage did not extend to same sex couples
16 is not “irrational, ignorant or bigoted.” (*Id.* [quoting *Hernandez v. Robles* (2006) 7 N.Y.3d 338, 361].)
17 Thus, the Court accepted that, at least for *intent*, there was some space between discrimination
18 against homosexual persons and belief in favor of traditional marriage. (*Id.*) But for the purposes of the
19 Unruh Act, that intent is key. Without an intent to discriminate against homosexual persons (and no
20 evidence of such intent)—but rather an intent to make a distinction based on religious beliefs
21 regarding marriage—there is no Unruh Act violation. (See *Cohn, supra*, 169 Cal.App.4th at 528.)

22 **B. PLAINTIFF DFEH’S SUMMARY ADJUDICATION ARGUMENTS FAIL**

23 Section B of Plaintiff DFEH’s motion addresses summary adjudication of Defendants
24 affirmative defenses, in three sub-sections. (DFEH MSJ, § B, pp.9–20.) In reverse order, those
25 sections concern (1) an unexplained and ambiguous reference to a “selective enforcement affirmative

26 ⁶ Superseded by constitutional amendment as stated in *Strauss v. Horton* (2009) 46 Cal.4th 364.

27 ⁷ The converse of this, apparently, is that the approximately 20% people who are sexually attracted to
28 the same-sex, but who object to same-sex marriage, are not really homosexual—regardless of their
self-identification. (See SSUMF No. 21c.)

defense” (*id.* at § B.3, pp.19–20), as well as “Defendants’ 10 remaining affirmative defenses” (*id.* at § B.3, p.19, fn.11); (2) the Free Speech clause of the U.S. Constitution (*id.* at § B.2, pp.14–19); and (3) the Free Exercise Clauses of the California Constitution (*id.* at § B.1.b, pp.11–14), and the U.S. Constitution. (*Id.* at § B.1.a, pp.9–11.) Each section is addressed in this reverse order.

1. Plaintiff DFEH has Failed to Carry its Burden of Persuasion and Production as to Numerous Affirmative Defenses

The last section in Plaintiff DFEH’s motion for summary adjudication concerns, essentially, all affirmative defenses except Free Speech and Free Exercise of Religion. (DFEH MSJ, § B.3, pp.19–20.) However, Plaintiff DFEH only briefs the “selective enforcement affirmative defenses” (albeit minimally), and then relegates all others to a footnote, stating that they all “fail as a matter of law.” (DFEH-MSJ, 19, fn.11.) While “defenses 1 and 2” (failure to state a case) were arguably briefed in Section A of the DFEH’s brief, for the rest, the footnote is the totality of the DFEH’s briefing. (But see *Estate of Bonzi* (2013) 216 Cal.App.4th 1085, 1106, fn.6 [“By raising this point in a footnote and failing to develop the argument in their opening brief, we may treat this point as forfeited.”].)

It appears that Plaintiff DFEH believed that it could simply put Defendants to the test, and by raising the defenses, force Defendants to justify them. (See DFEH-MSJ, 5:24–26 [“Unlike former law, it is not plaintiff’s initial burden to disprove affirmative defenses”] [quoting Weil et al., Cal. Practice Guide: Civ. Procedure Before Trial (The Rutter Group 2021) ¶ 10:235].) But this indicates misunderstanding of the difference between summary judgment and summary adjudication, and misunderstanding of the applicable burdens.

In moving for entry of a *judgment* via a summary procedure, the law “no longer requires a plaintiff . . . to disprove any defense asserted by the defendant as well as prove each element of his own cause of action. . . . All that the plaintiff need do is to ‘prove [] each element of the cause of action.’” (*Aguilar, supra*, 25 Cal.4th at 853 [quoting Code Civ. Proc., § 437c(o)(1)].) But in the summary *adjudication* context, the moving party has two burdens. First, the moving party “bears the burden of persuasion that there is no triable issue of material fact[.]” (*Id.* at 850.) Second, where the moving party does not bear the burden of proof at trial (i.e., a plaintiff moving to get rid of an affirmative defense), “[t]he [moving party] must show that the [opposing party] does not possess needed

evidence” and the moving party “must also show that the [opposing party] cannot reasonably obtain needed evidence.” (*Id.*) To support this, the moving party must “present evidence, and not simply point out [in briefing] that the [opposing party] does not possess, and cannot reasonably obtain, needed evidence.” (*Id.*; see also *Continental Ins. Co.*, *supra*, 107 Cal.App.4th at 1200 [applying *Aguilar* to context of a plaintiff moving to get rid of an affirmative defense].)

Here, Plaintiff DFEH’s one footnote is plainly insufficient to meet any burden—whether of persuasion or production—to defeat Defendants’ eight affirmative defenses. Further, in the separate statement (Issues Four through Eleven), Plaintiff DFEH’s “material facts” are nearly uniformly, objectionable legal conclusions. Plaintiff DFEH has not met its burden; the analysis should end here.

However, looking to those affirmative defenses, Plaintiff DFEH’s legal arguments also fail. First, Plaintiff DFEH states that unclean hands (defense 3), abuse of process (defense 4), trespass (defense 5), and estoppel (defense 7) all fail because they are targeted at the conduct of the Real Parties in Interest, and therefore “do not affect this case in which the *DFEH is plaintiff*.” (DFEH-MSJ, 19, fn.11.) The defenses do all focus on the theory that the Real Parties were shopping for a lawsuit more than a wedding cake (DFEH-App., Ex. 3, pp.49–50; SSUMF Nos. 44a, 45a, 49a, & 53a) and defenses aimed at real parties in this context may be disfavored, but they are not impermissible as a matter of law. (*Equal Employment Opportunity Commission v. Rexnord Industries, LLC* (E.D. Wis. 2013) No. 11-CV-777, 2013 WL 12181707, at *3 [cleaned up] [finding “unclean hands” defenses disfavored, but refusing to find it barred as a matter of law] [collecting cases].)

Second, Plaintiff DFEH argued that the defense of justification (defense 6) “is limited to criminal cases.” (DFEH-MSJ, 19, fn.11.) However, the text of the affirmative defense makes clear that it is related to *business* justification, not *criminal* justification. (DFEH-App., Ex. 3, p.50 [Defendants “were fully justified in lawfully exercising their free speech and free exercise rights,” and Defendants actions “were for legitimate, good faith, justified, nondiscriminatory, and non-retaliatory reasons”].) As Defendants explained at the preliminary injunction stage, the Unruh Act does not take away “the right of a business establishment to adopt reasonable restrictions . . . [that] are rationally related to the business being conducted or the facilities and services being provided.” (*Wynn v. Monterey Club* (1980) 111 Cal.App.3d 789, 796 [discussing “legal justification for refusing plaintiff’s wife access”].) Here

1 Defendants have a specific policy to decline orders that celebrate messages offensive to them, but
2 instead offer to connect customers who make such requests with other bakers. (SSUMF No. 52a.)
3 This defense cannot be adjudicated as a matter of law without meaningful briefing or evidence.

4 Third, Plaintiff DFEH states that the “no injury” defense is “moot” because the “DFEH
5 seeks only statutory minimum damages” (defense 8), and “[w]hether punitive damages (defense 9)
6 ... are available ... are questions of law.” (DFEH MSJ, 19, fn.11.) As for the lack of any actual
7 “injury” (defense 8), as explained below, it is relevant to more issues than whether DFEH seeks
8 actual damages in this action. Defendants agree that punitive damages can be adjudicated as a matter
9 of law—but not in Plaintiff DFEH’s favor, with no briefing or evidence. Rather, as explained in their
10 motion for summary judgment, there is insufficient evidence on which to base a punitive damages
11 award. (Tastries MSJ, § 3, p.29.) Therefore, this Court should summarily adjudicate that punitive
12 damages are not available in this action.

13 Fourth, the DFEH states that the defense that “there is no factual basis for” an attorneys’ fees
14 award (defense 10) can be adjudicated because “[w]hether ... attorney’s fees ... are available—(see
15 Gov. Code, § 12965, subd. (b))—are questions of law.” (DFEH-MSJ, 19, fn.11.) The section cited
16 states that “[i]n civil actions brought under this section, the court, *in its discretion, may* award to the
17 prevailing party, including the department, reasonable attorney’s fees and costs.” (Gov. Code
18 § 12965(b) [italics added].) Thus, a fee award is discretionary, and can be denied based on the equities.
19 (See *Bustos v. Global P.E.T., Inc.* (2017) 19 Cal.App.5th 558, 564 [awarding no fees because plaintiff
20 had suffered no actual damages]; *Behne v. Microtouch Systems, Inc.* (N.D. Cal. 1999) 58 F.Supp.2d
21 1096, 1100, aff’d (9th Cir. 2001) 11 Fed.Appx. 856 [similar].) Thus, without actual briefing or factual
22 evidence, there is no basis to adjudicate this affirmative defense as a matter of law.

23 Turning to the actual minimal briefing Plaintiff DFEH provides, Plaintiff DFEH asks this
24 Court to dispose of Defendants’ “selective enforcement affirmative defenses.” (DFEH MSJ, § B.3
25 pp.19–20.) This is confusing because none of the affirmative defenses in Defendants’ answer actually
26 state that they concern “selective enforcement.” (See DFEH-App., Ex. 3.) However, the gravamen of
27 the fourteenth and fifteenth affirmative defenses—Due Process and Equal Protection—appear to be
28 the target of this section by Plaintiff DFEH. (See DFEH-App., Ex. 3, pp.52–53.)

1 Like above, Plaintiff DFEH has absolutely failed as to its burden of production and persuasion.
2 Its separate statement lists solely legal conclusions, citing to this Court's prior orders and statements
3 at hearings. That is not adequate. (See SSUMF Nos. 82-86, 88-91; *Andrews Farms, supra*, 693
4 F.Supp.2d at 1167.) And Plaintiff DFEH's briefing is off the mark and addresses a different legal
5 theory than raised in the defenses. (See DFEH MSJ, § B.3, pp.19-20.)

6 The Due Process affirmative defense contends that "[t]he DFEH has subjected and continues
7 subjecting the defendants to an unfair and biased administrative investigation and enforcement
8 process while giving favorable consideration to the Rodriguez-Del Rios' presentation of the facts."
9 (DFEH-App., Ex. 3, p.52.) The Equal Protection affirmative defense contends that "[t]he DFEH's
10 interpretation and enforcement of the Unruh Act as applied treat Miller's and Tastries' decisions to
11 create speech and exercise their religious beliefs differently from those similarly situated to them."
12 (DFEH-App., Ex. 3, p.53.) In contrast, Plaintiff DFEH contends that there is no evidence to
13 substantiate a *selective enforcement* affirmative defense. Selective enforcement deals with the situation
14 where a defendant alleges that he is being prosecuted due to a constitutionally protected characteristic
15 (race, sex, religion), or that he is being prosecuted in retaliation for his exercise of a constitutionally
16 protected right (speech, exercise of religion). (See *U.S. v. Armstrong* (1996) 517 U.S. 456, 464; *U.S. v.*
17 *Choate* (9th Cir. 1980) 619 F.2d 21, 23.)

18 In contrast, the due process argument contends that during the administrative investigation
19 Plaintiff DFEH violated Defendants' due process rights by (1) affirmatively misleading them as to its
20 neutral role, and then acting not as a neutral, but an advocate for the Real Parties; and (2) not acting as
21 a neutral despite its statutory and regulatory obligation to do so. (See *Wood v. Superior Court of San*
22 *Diego County* (2020) 46 Cal.App.5th 562, 582 [explaining that during its administrative investigation
23 DFEH represents neither complainant or respondent], review denied (Jan. 20, 2021) No. S262303.
24 Despite this allegedly "neutral" role, during the administrative investigation, Plaintiff DFEH very
25 clearly acted as an advocate for the Real Parties by:

- 26 - DFEH predetermined its claim of discrimination by requesting a TRO hearing without
27 hearing from Defendants and just one day before receiving the first interrogatory responses
28 submitted by Defendants. (SSUMF No. 65g.)
- DFEH never visited Tastries' store or observed its business process, even though invited by

1 Miller. (SSUMF No. 86b.)

- 2 - DFEH downplayed the skills and services provided by Tastries to make them appear generic,
3 routine, unoriginal and lacking in artistry. (SSUMF Nos. 4, 12, 15.)
- 4 - DFEH claimed Miller denied service based on sexual orientation, disregarding that Miller has
5 served LGBT customers, hired LGBT employees and worked with an LGBT baker to arrange
6 services for same-sex couples (the same LGBT baker that she offered to employ).(SSUMF
7 Nos. 21b, 65b, 65c, & 65d.)
- 8 - DFEH ignored substantial evidence that Miller's faith and her belief in the sanctity of
9 marriage between one man and one woman is genuine, contending that Miller has acted out of
10 an intent to discriminate on the basis of sexual orientation. (SSUMF No. 21a & 69a.)
- 11 - DFEH ignored that Miller did not just offer a referral, but actively sought to arrange services
12 on behalf of same-sex couples with several bakeries. (SSUMF No. 22a & 62c.)
- 13 - DFEH ignored the precedents for using accommodation to another service provider to resolve
14 a conflict with religious beliefs. (*Minton, supra*, 39 Cal.App.5th at 1164–1165.)

15 These facts show that if there is any discrimination in this case, it is by Plaintiff DFEH against
16 Defendants. Courts have held similar administrative investigations unconstitutional for less. (See
17 *Masterpiece Cakeshop Inc. v. Elenis* (D. Colo. 2019) 445 F.Supp.3d 1226, 1240–1242 [*“Masterpiece II”*]).

18 The equal protection argument focuses on the effect of Plaintiff DFEH's “interpretation and
19 enforcement of the Unruh Act.” (DFEH-App., Ex. 3, p.53.) In essence, by accepting that distinctions
20 made based on an individual's conduct, as opposed to his status, are acceptable for every protected
21 characteristic except sexual orientation, the effect of this is to “single out orthodox Christians—
22 suspect class of marginalized and disfavored people of faith—for adverse treatment.” (*Id.*) Regardless
23 of Plaintiff DFEH's (alleged) lack of mal-intent, Defendants have an equal protection claim based on
24 their disfavored status as devout Christians (who are required to put their faith into practice).

25 **2. Plaintiff DFEH's Request that this Court Reconsider its Free Speech**
26 **Jurisprudence Must Be Denied**

27 Plaintiff DFEH's Free Speech arguments focus on two sub-points: (a) “Tastries' sale of pre-
28 ordered cakes is not inherently expressive” (DFEH MSJ, § IV.2.a), and (b) “Unruh does not compel
speech” as applied here. (DFEH MSJ, § IV.2.b.) Neither of these points are supported by the facts.

On the first point, the DFEH has neither abided by this Court's prior orders or justified
reconsideration of those orders. Both this Court and the Fifth Appellate District made clear the Free

1 Speech analysis in this case was now set, subject only to modification based on intervening facts or
2 binding law. (See *Department of Fair Employment and Housing v. Superior Court of Kern County* (2020)
3 54 Cal.App.5th 356, 401–402 & fn.12; DFEH-App., Ex. 4, Anti-SLAPP Order, §§ II.B.1, II.B.3.)

4 Without the evidence to answer this factual question in its favor, Plaintiff DFEH is trying to
5 relitigate the same speech issues by simply declaring (without evidence) that Tastries wedding cakes
6 are unoriginal and generic. (See SSUMF Nos. 67–80h.) Then, Plaintiff DFEH tries to refute this
7 Court’s legal conclusion that making a wedding cake can be expressive conduct (compare DFEH
8 MSJ, pp. 13:5–17:21; with *Dept. of Fair Employment and Housing v. Miller* (Cal. Super. 2018) 2018 WL
9 747835, at *3–4), and refute this Court’s legal conclusion that making a wedding cake is pure speech
10 (compare DFEH MSJ, pp.17:23–19:13; with *Miller, supra*, 2018 WL 747835, at *2–4), and thereby
11 excuse application of the Unruh Act in this context from strict scrutiny review. Lastly, Plaintiff DFEH
12 argues that even if the creation of custom wedding cakes are confirmed to be speech, strict scrutiny
13 would be satisfied, by citing inapplicable cases from the Free Exercise context. (Compare DFEH MSJ
14 pp. 19:14–16 [citing DFEH MSJ, pp. 13:2–14:15]; with *Miller, supra*, 2018 WL 747835, at *4–5.)

15 Thus, Plaintiff DFEH asks this Court to change the legal standard, but cites *no new cases*. Not
16 only should the Court not accept Plaintiff DFEH’s invitation to reverse course on the law, it is
17 precluded from doing so. (*Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500 [“[A] court acts in
18 excess of jurisdiction when it grants a motion to reconsider that is not based upon new or different
19 facts, circumstances, or law.”] [cleaned up].) Plaintiff DFEH’s motion for summary adjudication of
20 Defendants’ Free Speech defense should be denied, and summary judgment entered for Defendants.

21 To overcome free speech protections, Plaintiff DFEH has sought to mischaracterize custom
22 cakes created by Tastries as “generic products, requiring only the application of routine skill and no
23 special artistry or message” (DFEH MSJ, p.9:15), and argue that “Tastries pre-ordered wedding
24 cakes are not inherently expressive.” (DFEH MSJ, p.16:8.) There are no facts to support these
25 claims—merely unreasonable inferences. Plaintiff DFEH’s motion acknowledges that custom
26 wedding cakes created by Defendants can have many unique characteristics, including: size, shape,
27 number of tiers, colors, filling, buttercream or fondant design, with assorted options for flowers and
28 fondant images. (DFEH MSJ, p.3:11–13.) This is why Defendants’ custom cakes, and the cake

1 obtained by the Real Parties (see DFEH MSJ, p.5:7–12), require the artistry of a professional.⁸

2 As previously stated, custom cakes designed by Defendants vary from simple to elaborate, but
3 all cakes require skill to create and will reflect the image or sentiment that the customer requested.
4 That message can be enhanced by other items added to the cake display at the event, such as pictures,
5 mementos, signs, and a topper, whose presence amplifies the message of the cake that was created by
6 Defendants. Sometimes simplicity may itself be part of the intended message. For example, a simple
7 cake design might express “our union is not based on pretense; we love each other unconditionally
8 with no expectations or extra demands.”⁹ In this case, the Real Parties wanted to express that this was
9 a traditional wedding and hence they requested a very traditional cake. (SSUMF Nos. 67–80h.)

10 Further, context is an important part of a symbolic message. Seeing a man take a knee has little
11 meaning by itself. If he is kneeling in a chapel, he may be praying; if he is surrounded by a little league
12 team, he may be coaching; if he is kneeling beside a grave, he may be remembering. Only by context
13 does the meaning become clear. If the man takes a knee in front of his girlfriend with family and
14 friends gathered around—the meaning of his symbolic act is instantly clear and his intended message
15 is received before he speaks a single word. Likewise, a cake reflects the context of the event and
16 expresses the greatest meaning to its intended audience; this is especially true for a wedding cake with
17 all its tradition and symbolism. It is doubtful that the guests at the Real Parties’ wedding were
18 confused about the purpose or meaning of the cake at the center of the wedding reception. And with
19 the many characteristics available to select, the custom cake will often have a personalized meaning.

20 ⁸ (See *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483 [“We will not [] draw inferences
21 from thin air. Where, as here, the plaintiff seeks to prove an essential element of her case by
22 circumstantial evidence, she cannot recover merely by showing that the inferences she draws from
23 those circumstances are *consistent* with her theory. Instead, she must show that the inferences
24 favorable to her are *more reasonable or probable* than those against her.”]; *Cucuzza v. City of Santa Clara*
25 (2002) 104 Cal.App.4th 1031, 1038 [noting that even though discrimination cases are often proved
26 through circumstantial evidence, “a material triable controversy is not established unless the inference
27 is reasonable.”]; *Booth v. Santa Barbara Biplanes Tours, LLC* (2008) 158 Cal.App.4th 1173, 1177 [“Like
28 the trial court, we must utilize common sense in drawing inferences from the undisputed facts.”].)

26 ⁹ (See *Cohen v. California* (1971) 403 U.S. 15, 25–26 [noting that message conveyed by jacket worn
27 with the words “F*** the draft” was more than just the literal message of the three words: “We
28 cannot sanction the view that the Constitution . . . has little or no regard for that emotive function
which practically speaking, may often be the more important element of the overall message sought to
be communicated.”].)

On the second point in this section, Plaintiff DFEH claims that by “enforcing Unruh, DFEH does not dictate the design of Tastries’ cakes or otherwise dictate the content of defendants’ speech.” (DFEH MSJ, p.18:17-18.) That is simply not true. The issue is that Tastries cannot control the content of the messages it creates when it does not control the context or purpose for which the cake is made. The customer determines the purpose and selects the design. If Tastries is obligated to create a cake for any purpose with no control on how the cake is displayed, then ultimately Tastries will not have control over the messages it produces. (See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515 U.S. 557, 572–573.)

3. Plaintiff DFEH’s Free Exercise Arguments Fail

Lastly, Plaintiff DFEH turns to the Free Exercise clauses of the First Amendment to the U.S. Constitution and the First Article of the California Constitution. (DFEH MSJ, pp.9:19–14:15.) Plaintiff DFEH’s argument as to these defenses largely tracks the argument made in Defendants’ own motion for summary judgment. (See Tastries MSJ, §§ 2.1, 2.2.) Defendants incorporate by reference the argument made in their own motion, which conclusively shows that Plaintiff DFEH’s arguments all fail, and below only rebuts specific erroneous assertions made by Plaintiff DFEH in its motion.

a. Plaintiff DFEH’s California Constitution Arguments Fail

Starting with the California Constitution, Plaintiff DFEH asks this Court to ignore the construction given to it by the California Supreme Court, and instead apply the federal free exercise test to it. (DFEH MSJ, pp.11:22–12:7.) This invitation is foreclosed by binding appellate authority (See *Valov v. Department of Motor Vehicles* (2005) 132 Cal.App.4th 1113, 1126 & fn.7.)

Plaintiff DFEH then argues that under the California Constitution, Defendants’ free exercise rights are not substantially burdened because Defendants could “cease offering pre-ordered wedding cakes for sale to anyone.” (DFEH MSJ, p.12:13–14.)¹⁰ Importantly, as stated in Defendants’ motion, the “substantial burden” cases cited by Plaintiff DFEH at best apply only to the California Constitution’s free exercise clause and do not translate to the federal free exercise clause. (Tastries MSJ, p.17:3–9.) But even as applied to the California Constitution, Plaintiff DFEH cites a non-binding

¹⁰ Of note, the section is confusing because the header under which it appears does not relate to the text of the section. (See DFEH MSJ, § IV.B.1.a.i.)

1 plurality opinion, instead of the California Supreme Court’s later discussion of “substantial burden.”
2 (Compare *Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143, 1170 [plur. opn.]; with
3 *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 563, fn.19.) Further,
4 despite DFEH’s misleading citation to the contrary, *North Coast* held that compliance with the Unruh
5 Act “presumably” did substantially burden religious beliefs. (*North Coast, supra*, 44 Cal.4th at 1158.)
6 In line with *North Coast* and *Catholic Charities*, since Plaintiff DFEH’s proposed method of
7 complying—simply exiting the wedding industry altogether—would force Defendants to shut down,
8 there is obviously a substantial burden. (SSUMF Nos. 62a & 62b.)¹¹

9 Finally, Plaintiff DFEH argues that applying the Unruh Act to Defendants in this context
10 satisfies the strict scrutiny test applicable under the California Constitution. (DFEH MSJ, p.13:1–
11 14:15.) Plaintiff’s argument is that it has a “compelling interest in eradicating invidious
12 discrimination[.]” (DFEJ MSJ, 13:3–4.) “Invidious discrimination” is making a distinction that is
13 “arbitrary, irrational and not reasonably related to a legitimate purpose.” (Black’s Law Dictionary (6th
14 ed. 1990) p.826, col.2.) If anything, Plaintiff DFEH’s simply favoring one protected class (sexual
15 minorities) over another (religious minorities) is itself “invidious discrimination” which does not pass
16 any logical test. In any event, there is no evidence of invidious discrimination by Defendants here—
17 merely adherence to traditional religious beliefs. (SSUMF No. 21a & 21b.)

18 However, presuming that Plaintiff DFEH has a compelling interest in applying the Unruh Act
19 to Defendants here (see *Tastries MSJ*, p.17:24–18:3 [noting California’s loose understanding of what
20 constitutes a compelling interest]), numerous California cases make clear that the “least restrictive
21 means” of achieving those interests is not for Defendants to liquidate their business and go home.
22 (See DFEH MSJ, p.14:11–13.) Rather, the preferred and logical approach is to set up a system whereby
23 customers are referred to other bakers who can provide the needed bakery goods—exactly as
24 Defendants have done. (See *North Coast, supra*, 44 Cal.4th at 1159; *Minton, supra*, 39 Cal.App.5th at
25

26 ¹¹ Plaintiff DFEH also states that “Miller can step aside from participating in the preparation of any
27 pre-ordered cakes sold to same-sex couples and allow her willing employees to manage the process.”
28 (DFEH MSJ, p.12:19–20.) This is not a real option since, as the sole owner and manager, all activities
of the bakery are a direct reflection on Defendant Miller and doing so would still violate Defendants’
religious beliefs. (SSUMF Nos. 69a, 72a & 72b.)

1 1164–1165; SSUMF Nos. 22, 22a & 62c.)

2 **b. Plaintiff DFEH’s U.S. Constitution Arguments Fail**

3 With respect to the Free Exercise clause of the First Amendment, Plaintiff DFEH begins by
4 stating that “[t]he California Supreme Court has conclusively settled the question of Unruh’s
5 neutrality [and general applicability].” (DFEH-MSJ, p.10:15–27 [citing *North Coast, supra*, 44 Cal.4th
6 at 1156].) But the U.S. Supreme Court gets the final say on the First Amendment. (See *Fulton v. City*
7 *of Philadelphia, Pennsylvania* (2021) 141 S.Ct. 1868.) In *Smith*, and more recently in *Fulton*, the High
8 Court explained that “[a] law is not generally applicable if it ‘invite[s]’ the government to consider the
9 particular reasons for a person’s conduct by providing ‘a mechanism for individualized
10 exemptions.’ ” (*Id.* at 1877 [quoting *Employment Division v. Smith* (1990) 494 U.S. 872, 884].)

11 The discretion by Plaintiff DFEH to investigate or bring a prosecution is itself a form of
12 individualized exemption. As an example, cancel culture has led to California citizens being denied
13 services based on personal views without action by Plaintiff DFEH. It is not a question of whether
14 Plaintiff DFEH has acted improperly or with bias, it is sufficient simply to recognize that Plaintiff
15 DFEH has such discretion. “The creation of a formal mechanism for granting exceptions renders a
16 policy not generally applicable, regardless whether any exceptions have been given, because it
17 ‘invite[s]’ the government to decide which reasons for not complying with the policy are worthy of
18 solicitude[.]” (*Id.* at 1879.) Once prosecution is initiated, Plaintiff DFEH also has discretion on how
19 to resolve it. For example, Plaintiff DFEH has offered an individualized exemption here where
20 Defendants may decline requests for custom cakes for weddings that are provided to other events.
21 Without an exemption, a product offered to any customer must be offered to all customers. Tastries
22 Bakery could sell beautiful, multi-tier, white cakes for quinceañeras, and refuse to sell what the DFEH
23 characterizes as the identical cake to LGBT couples celebrating same-sex weddings, so long as
24 Defendants also refuse to sell them to opposite-sex couples celebrating their wedding. (SSUMF No.
25 65k.) Further, California requires the accommodation of workers’ religious beliefs, requiring the
26 “explor[ation of] any available reasonable alternative means of accommodating the religious belief.”
27 (Lab. Code, § 511(d).) Since Plaintiff DFEH also enforces these rights, it has discretion to craft an
28 individualized exemption in this action that accommodates everybody’s rights—but has refused. (See

1 also Tastries MSJ, § 2.2.1.) Each of these triggers strict scrutiny. (*Fulton*, *supra*, 141 S.Ct. at 1877.)

2 Plaintiff DFEH then meanders into a discussion of the U.S. Supreme Court decision
3 *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com’n* (2018) 138 S.Ct. 1719, 1723, 1727
4 (“*Masterpiece I*”), and its citation to *Newman v. Piggie Park Enterprises, Inc.* (1968) 390 U.S. 400, 402,
5 fn.5. (DFEH MSJ, 11:1–21.) This appears to be Plaintiff DFEH’s only argument that strict scrutiny
6 would be satisfied, but as explained below, this meandering discussion establishes no such thing.¹²

7 First, according to Plaintiff DFEH, “[w]hile *Masterpiece* left open the possibility that a ‘special
8 cake,’ for example with ‘religious words or symbols,’ might implicate free exercise interests, the cakes
9 here had no such unique characteristics.” (DFEH MSJ, p.11:1–10 [quoting *Masterpiece I*, *supra*, 138
10 S.Ct. at 1723; SSUMF Nos. 12, 76, 77].) Plaintiff DFEH’s description of both the holding of
11 *Masterpiece I*, and the facts of this case, are false. The language quoted from *Masterpiece I* is general
12 background *about a free speech defense*. (*Masterpiece I*, *supra*, 138 S.Ct. at 1723; see also DFEH-App, Ex.
13 4, Anti-SLAPP Order, pp.12:4–22 [discussing same language as part of the free speech analysis].) The
14 next paragraph in the opinion turns to a free exercise analysis. There the High Court noted that
15 (1) some religious objectors might “refus[e] to put certain religious words or decorations on [a
16 wedding] cake;” (2) others might object to “attend[ing] the wedding to ensure that the cake is cut the
17 right way;” and (3) still others might object “to sell[ing] a cake that has been baked for the public
18 generally but includes certain religious words or symbols” if it is known that it will be used for a same
19 sex wedding—but that the constitutional protection owed to those “endless” possibilities was not an
20 issue to be decided in that opinion. (*Masterpiece I*, *supra*, 138 S.Ct. at 1723.)

21 Plaintiff DFEH’s argument that a free exercise defense could turn on whether the cake is “a
22 special cake” is not supported by *Masterpiece I*. To support it, however, Plaintiff DFEH also points to
23 *Masterpiece I*’s citation to *Piggie Park* for the proposition that “it is a general rule that [religious

24 ¹² To begin, Plaintiff DFEH states that “Tastries’ arguments cannot be meaningfully differentiated
25 from those in *Piggie Park* and must similarly be rejected.” (DFEH MSJ, p.11:20–21.) *Piggie Park*
26 concerned a refusal to serve African-American customers at a BBQ restaurant. (*Piggie Park*, *supra*, 390
27 U.S. at 402.) The U.S. Supreme Court has made very clear that comparing sincere religious beliefs
28 about marriage to racism is unconstitutional and “inappropriate for a Commission charged with the
solemn responsibility of fair and neutral enforcement of [] antidiscrimination law—a law that protects
against discrimination on the basis of religion as well as sexual orientation.” (*Masterpiece I*, *supra*, 138
S.Ct. at 1729.)

1 objections do not allow business owners and other actors in the economy and in society to deny
2 protected persons equal access to goods and services under a neutral and generally applicable public
3 accommodations law.” (*Masterpiece I, supra*, 138 S.Ct. at 1727 [citing *Piggie Park, supra*, 390 U.S. at
4 402, fn.5].) But nothing in this “general rule,” or the Supreme Court’s discussion of it in *Masterpiece I*,
5 actually indicates how the Supreme Court would view a religious objection in any of the three
6 hypotheticals mentioned above (*id.*)—or supports Plaintiff DFEH’s gloss that under *Masterpiece I*
7 only “the possibility that a ‘special cake,’ for example with ‘religious words or symbols,’ might
8 implicate free exercise interests[.]” (DFEH MSJ, p.11:1–10.)

9 Defendants appreciate that under a Free Exercise analysis, the “dignitary interests” are
10 different than under a Free Speech analysis. (Compare *Miller, supra*, 2018 WL 747835, at *5 [“An
11 interest in preventing dignitary harms thus is not a compelling basis for infringing free speech.”]; with
12 *Masterpiece I, supra*, 138 S.Ct. at 1732 [“[T]hese disputes must be resolved . . . without subjecting gay
13 persons to indignities when they seek goods and services in an open market.”].) Under a Free Exercise
14 analysis, when laws protect “gay persons [from suffering] indignities when they seek goods and
15 services in an open market,” those laws must equally not impose “undue disrespect to sincere religious
16 beliefs.” (*Masterpiece I, supra*, 138 S.Ct. at 1732.) In this context, even if Defendants’ cakes did not rise
17 to the level of “pure speech,” Defendants should be protected under the strict scrutiny analysis of the
18 First Amendment’s Free Exercise clause. When same-sex couples come to Tastries, they are treated
19 with dignity and provided support to find the services they require. To any outside observer, they are
20 given the same respect as any other customer. (SSUMF Nos. 2, 4, 21a, 21b, 22a, 24a, 62c, 80a–80h.)

21 Finally, Plaintiff DFEH argues that if Defendants are allowed free exercise of their religious
22 beliefs, there would be an avalanche of wedding vendors refusing to participate in same-sex weddings
23 (DFEH MSJ, p.14:7–11.) Not only does Plaintiff DFEH not cite any evidence to support this, the
24 evidence is the opposite. (SSUMF No. 62c; see also *Fulton, supra*, 141 S.Ct. at 1881–1882 [noting that
25 forcing businesses out of the market would tend to limit services available, not make them more
26 available].) In addition, other vendors would also have to demonstrate a sincere religious foundation
27 and offer an accommodation that provides full and equal service. Not only should Plaintiff DFEH’s
28 motion for summary adjudication be denied, summary judgment should be granted for Defendants.

CONCLUSION

Every lawyer in California swears an oath “to support the Constitution of the United States and the Constitution of the State of California.” (Bus. & Prof. Code, § 6067.) In addition, DFEH attorneys are charged with enforcing California’s statutory prohibitions on discrimination against religion. (See Civ. Code, § 51; *People v. McKale* (1979) 25 Cal.3d 626, 637.)

The DFEH, however, has strayed far from these mandates, treating people of faith as enemies of the state that need to be driven out of business. (See Defs. Ex. 15, Samuel Depo., 94:16–23, 95:6–14; Defs. Ex. 16, 82:2–9, 95:11–16 [acknowledging goal of lawsuit was to force Defendants to shut down].) Thus, California is now doing the bidding of militant activists who despise people of faith, and wish them harm. Instead of affirmatively protecting their conscience rights, the DFEH is not even allowing people of faith equal justice under the law. Instead, under the pretext of enforcing the newly created right to same-sex marriage, the DFEH has transformed itself into the tool of an anti-religious agenda. In doing so, they have unlawfully jettisoned their statutory mandate to protect religious liberty under the Unruh Act. The Court should not allow this unconstitutional and unbridled abuse of government power to continue unchecked.

The fact that Defendants would provide the Real Parties custom products for other events not celebrating a same-sex “marriage,” that they employed LGBT people and arranged for other bakeries to provide services for same-sex wedding requests, is proof positive that their objection was not based on the Real Parties’ sexual orientation; rather, it was based only on Defendants’ sincere religious beliefs concerning marriage—beliefs that are shared by millions of Americans.

The patron saint of lawyers and judges, Sir Thomas More, was martyred for his faith because he would not violate his conscience by supporting the marriage of King Henry VIII to his mistress. More went to the scaffold, after a rigged trial, because he sincerely believed that the marriage violated Biblical precepts and his duty as a Christian. History has vindicated St. Thomas More, who is now widely regarded as a great hero of conscience. Unlike during the trial of More, this time the Court should intervene to stop the State from unjustly persecuting people of faith. It should do so by enforcing our laws that have since been put in place to prevent a repeat of such abuses, and to expressly protect our rights of conscience—whether speech-based or religion-based.

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Respectfully submitted,

LIMANDRI & JONNA LLP

Dated: October 6, 2021

By: 
Charles S. LiMandri
Paul M. Jonna
Mark D. Myers
Jeffrey M. Trissell
Robert E. Weisenburger
Milan L. Brandon II
*Attorneys for Defendants Cathy's
Creations, Inc. and Catharine Miller*

Document received by the CA 5th District Court of Appeal.

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 FREEDOM OF CONSCIENCE DEFENSE FUND P.O. Box 9520 Rancho Santa Fe, California 92067 Tele: (858) 759-9948; 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. David R. Lampe

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 CATHARINE MILLER AND TASTRIES BAKERY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF DFEH'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION;
- DEFENDANTS CATHARINE MILLER AND TASTRIES BAKERY'S SEPARATE STATEMENT IN OPPOSITION TO PLAINTIFF DFEH'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION;
- DEFENDANT CATHARINE MILLER'S DECLARATION IN OPPOSITION TO PLAINTIFF DFEH'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION;
- DECLARATION OF JEFFREY M. TRISSELL, ESQ. IN OPPOSITION TO PLAINTIFF DFEH'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION;
- DEFENDANTS CATHARINE MILLER AND TASTRIES BAKERY'S EVIDENTIARY OBJECTIONS IN OPPOSITION TO PLAINTIFF DFEH'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION; and
- APPENDIX OF EXHIBITS, VOLUME IV, IN OPPOSITION TO PLAINTIFF DFEH'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION.

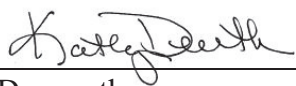
by one or more of the following methods of service to:

Janette Wipper, Chief Counsel
Paula D. Pearlman, Asst. Chief Counsel
Gregory J. Mann - Sr. Staff Counsel
Timothy Martin, Staff Counsel
Department of Fair Employment and Housing
320 4th Street, Suite 1000
Los Angeles, CA 90013
Tel: (213) 439-6799; Fax: (888) 382-5293
E-Mail: Gregory.Mann@dfeh.ca.gov
Attorneys for Plaintiff Department of Fair Employment and Housing

- X **(BY U.S. MAIL)** I caused such document(s) to be sealed in envelopes, and with the correct postage thereon fully prepaid, either deposited in the United States Postal Service or placed for collection and mailing by the following ordinary business practices.
- 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 October 6, 2021.


Kathy Denworth

CERTIFICATE OF SERVICE

RA.1334

Document received by the CA 5th District Court of Appeal

1 Charles S. LiMandri, SBN 110841
cslimandri@limandri.com
2 Paul M. Jonna, SBN 265389
pjonna@limandri.com
3 Jeffrey M. Trissell, SBN 292480
jtrissell@limandri.com
4 Milan L. Brandon II, SBN 326953
mbrandon@limandri.com
5 LiMANDRI & JONNA LLP
6 P.O. Box 9120
Rancho Santa Fe, California 92067
7 Telephone: (858) 759-9948
Facsimile: (858) 759-9938

8 Thomas Brejcha, *pro hac vice**
9 tbrejcha@thomasmoresociety.org
Peter Breen, *pro hac vice**
10 pbreen@thomasmoresociety.org
THOMAS MORE SOCIETY
11 309 W. Washington St., Ste. 1250
Chicago, IL 60606
12 Tel: (312) 782-1680
13 *Application forthcoming

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

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

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

20 Plaintiff,

21 v.

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

23 Defendants.

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

25 Real Parties in Interest.

CASE NO.: BCV-18-102633

IMAGED FILE

**DEFENDANT CATHARINE
MILLER'S DECLARATION IN
OPPOSITION TO PLAINTIFF
DFEH'S MOTION FOR
SUMMARY JUDGMENT OR, IN
THE ALTERNATIVE,
SUMMARY ADJUDICATION**

Date: Nov. 4, 2021

Time: 8:30 a.m.

Dept: 11

Judge: Hon. David R. Lampe

Action Filed: Oct. 17, 2018

Trial Date: Dec. 13, 2021

1 I, Catharine Miller, declare and state as follows:

2 1. I am a named defendant in the above entitled action. Accordingly, I have personal
3 knowledge of the matters set forth below and could and would competently testify thereto if called
4 upon to do so in court.

5 2. I am submitting this declaration to rebut specific points raised by Plaintiff DFEH in
6 its motion for summary judgment or adjudication. This declaration is submitted as a supplement to
7 my prior declaration submitted in support of Defendants' motion for summary judgment or
8 adjudication, dated September 8, 2021. This declaration incorporates that earlier declaration by
9 reference.

10 **SPECIFIC POINTS OF REBUTTAL**

11 3. As explained in my prior declaration, I have been designing elaborate custom cakes
12 for weddings, parties, or other events since I was 18 and have been creating my own recipes. In
13 January 2013, I became the owner and manager of Tastries Bakery. In that role, I am involved with
14 all orders. The bakery is open up to 12 hours a day. There is a staff of designers who work together
15 to design our custom cakes on a daily basis.

16 4. I direct all aspects of the business and make all decisions related to products
17 services and daily operations. While I do not necessarily physically participate in every custom cake
18 order, they are all based on my recipes, I oversee the design process, I am directly involved in the vast
19 majority of wedding orders, and I review every order to make weekly assignments for baking
20 decorating and deliveries. As the sole owner and manager, all activities of the bakery are a direct
21 reflection on me. My time is divided between custom design work, marketing, working the back,
22 recipe development and management of the entire operations.

23 5. Also as explained in my prior declaration, I am a devout Christian and adhere to
24 traditional religious beliefs about marriage, including that it is a covenant ordained by God for the
25 sole union of a single man and a single woman. I am the 100% shareholder of Tastries Bakery.
26 Tastries and I are one. Therefore, Tastries Bakery, as a corporation, itself participates in the design
27 or preparation of all wedding cakes, and objects on both philosophical and religious grounds to its
28 celebrating a marriage that does not adhere to this traditional religious understanding.

1 6. A major theme of Plaintiff DFEH's motion is to denigrate the skill and artistry in
2 Tastries Bakery's custom products. To me this is surprising, in part because I have invited the
3 DFEH lawyers to visit Tastries Bakery and see the our design process for themselves, but the
4 DFEH has never taken me up on that invitation.

5 7. To begin, the DFEH states that at least on one occasion, I "saw a cake ordered for a
6 same-sex wedding reception and did not recognize it as a wedding cake." (SSUMF No. 73 & 74;
7 DFEH MSJ, pp.3:25-4:2.) This is not what happened and not what I testified. I did not see the
8 wedding cake; I saw an order form that did not itself indicate that the cake was for a same-sex
9 wedding.

10 8. As was discussed in my deposition, there was a concerted effort by certain of my
11 employees to make wedding cakes for same-sex weddings and hide those orders from me, and hide
12 things that would bring to my attention what the cakes were for. Attached as **Exhibit G** is a true and
13 correct copy of the portions of my deposition that discuss this, along with the Errata that was
14 omitted from the DFEH's submission.

15 9. When I and Tastries Bakery found out that certain employees were violating our
16 policies and engaging in speech and conduct that violated our philosophical and religious beliefs
17 regarding marriage, we promptly put a stop to that practice. We instead reinstated and reaffirmed
18 our policy of refusing to make cakes that conflict with fundamental Christian principles, and instead
19 refer those cakes to any one of the many other competent bakers and bakeries in Bakersfield. This
20 business practice is both rational, and a good social practice, to make sure all customers are served.

21 10. Next, the DFEH said that "Tastries sells a variety of baked goods, including generic
22 pre-made cakes kept in refrigerated cases offered for immediate sale to anyone for any purpose."
23 (SSSUMF No. 3; DFEH MSJ, p.3:7-9.) The term "generic" is ambiguous. None of our cakes are
24 "generic" in the sense that they are similar to cakes you could obtain elsewhere.

25 11. The cakes being referred to here are called "case cakes" by us because they are
26 made for sale out of the display case using a proprietary design and proprietary flavors determined
27 by Tastries Bakery. These cakes are also by definition, single-tier cakes since a multiple-tier cake
28 could not fit in the case.

12. Next, Plaintiff DFEH states that “[c]ustomers regularly reference a pre-existing case cake, display cake, or photo of an existing cake, when describing to Tastries the cake design they want.” (SSUMF No. 68; DFEH MSJ, p.3:13–15.) While this is partially true, it is incomplete and misleading.

13. When customers reference a pre-existing case cake, display cake, or photo of an existing cake, these are for inspiration only, to help communicate ideas more quickly than words, and oftentimes to identify different concepts and design characteristics from different cakes, since a picture is worth a thousand words. Then, based on the pictures provided, in collaboration with the customers, we often combine the characteristics the customer wants into a hand drawn sketch.

14. Tastries Bakery’s custom products are designed to meet customer specifications. Our team of designers (led by me) start with the customer’s vision and present options to create a final design that fits the theme and budget for each occasion. Cake designs can range from simple to elaborate but, all styles require a skilled decorator, and each design portrays the image or expresses the sentiment intended by the customer.

15. Whether a cake is simple or elaborate (even without words or a topper incorporated) the cake is designed and created by Tastries Bakery to present the image or sentiment intended by the customer. That message can be enhanced by other items added to the cake display at the event, such as pictures, mementos, signs and a topper. While the customer is the one adding these items, their presence amplifies the message of the cake that was created and intended by Tastries Bakery. In this sense, all “pre-ordered” cakes are custom because we always make every effort to tailor the final product to the customer’s needs and event.

16. Next, the DFEH states that “Tastries can deliver, and has delivered, cakes to venues without becoming involved in weddings or other events by dropping off cakes before guests or participants arrive.” (SSUMF Nos. 70; DFEH MSJ, p.3:16–17.) This is rarely the case. The vast majority of all deliveries are made with family and/or guests present. It is unusual to deliver with no one present. If the cake were delivered without guests or participants present, that would be a random happenstance with no means of predicting it.

17. Also, just because Tastries “has delivered” cakes when no guests were present, does

1 not mean Tastries always “can deliver” cakes when no guests are present. Especially with outdoor
2 events, it is common and needed to deliver near the start of the event (to get maximum shade or
3 avoid damage to the cake), and we are often specifically requested to deliver the cake after the start
4 of the event.

5 18. We also leave “thank you” business cards with our cakes. It is common for our
6 customers to share at the event who made the cake and desserts and for the cake to be shown in
7 social media posts of the event.

8 19. Next, the DFEH states that the wedding cake that the Mireya and Eileen Rodriguez-
9 Del Rio ordered from Tiers of Joy “looked just like the cake they tried to order from Tastries”
10 (SSUMF No. 76 & 77; DFEH MSJ, p.5:1-3), and the only differences were 1) real v. frosting
11 flowers, 2) scaly v. smooth frosting, and 3) additional sheet cakes v. additional loaf cakes. (SSUMF
12 Nos. 78 & 79; DFEH MSJ, p.5:3-6.) This is again misleading.

13 20. The two cake orders were in no way similar in size, shape, décor or flavors. As they
14 explained in their deposition, and as shown in the picture, the design the Rodriguez-Del Rios chose
15 from Tiers of Joy was a messy rustic design with flowers. The top tier was real cake and the bottom
16 tiers were fake Styrofoam.

17 21. In contrast, the wedding cake that the Rodriguez-Del Rios wanted from Tastries
18 Bakery was a 3-tiered square cake with a smooth buttercream finish and teal ribbon around the
19 bottom. From an artistic and design perspective, these are two very different cakes. As shown in the
20 pictures attached as Exhibit D to my prior declaration, there is a very significant artistic difference
21 created by square v. round tiers (see CM-0945), by scaly v. smooth frosting (see CM-0943), and
22 through the addition of a blue ribbon (see CM-0949 & CM-1010).

23 22. From Tastries Bakery, the Rodriguez-Del Rios also wanted two sheet cakes with no
24 design to slice in the back kitchen of their reception. But from Tiers of Joy, additional cakes were
25 made in the shape of bread loafs that were sliced and a scoop of frosting was added to the slice of
26 cake. This “cake bar” system is used not merely to supplement the amount of cake, but to increase
27 the number of cake flavors and frosting flavors, and the number of combinations. Although I am
28 aware of this service in the baking industry, Tastries Bakery does not offer this service.

1 23. Finally, the DFEH stated that “[u]nderscoring the arbitrariness of the policy, Miller
2 testified that Tastries would add to a pre-made case cake a *written* congratulatory message to a
3 same-sex couple celebrating their wedding.” (DFEH MSJ, p.19, fn.10 [citing SSUMF No. 71].)
4 Again this is not true and this is not what I testified to at my deposition.

5 24. The line of questioning concerned how I would react if a same-sex couple attempted
6 to set me up for a lawsuit by engaging in an unrealistic hypothetical of purchasing a random pre-
7 made cake from the case, and asking me to write congratulatory words on it concerning their same-
8 sex marriage. Nobody has ever asked me to write a message about a wedding on a case cake because
9 they’re just not that type of cake. Attached hereto as **Exhibit H** is a true and correct copy of photos
10 I took on October 1, 2021 of the case cakes currently for sale.

11 25. I didn’t really know how to answer to such an absurd hypothetical, but in response, I
12 stated that in light of the hate mail and death threats we have received, I would probably write a
13 generic congratulatory message on a single-tier case cake, refuse to accept any money since I am
14 being discriminated against on the basis of my religious beliefs, and tell them that I am praying for
15 them.

16 26. Despite feeling the full weight of both official persecution from the State of
17 California and criminal attacks from third-parties, I would not willingly offend my Lord and Savior
18 by writing a congratulatory message about a same-sex wedding on anything, a cake or otherwise.
19 Attached as **Exhibit I** is a true and correct copy of the portions of my deposition that concern this
20 testimony. As the transcript reflects, these unfair hypothetical questions were objected to by my
21 attorney as calling for speculation on my part.

22 I declare under penalty of perjury under the laws of the United States and the State of
23 California that the foregoing is true and correct. Executed this 5th day of October 2021, at
24 Bakersfield, California.

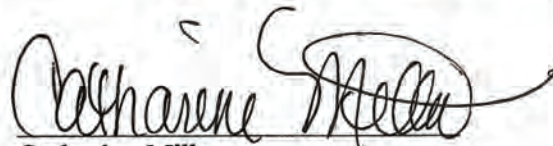
25
26 
27 Catharine Miller
28

EXHIBIT G

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,

Complainants,

vs.

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

Respondents.

ORIGINAL

Case No.:
935123-315628

DEPOSITION OF

CATHARINE MILLER

LOS ANGELES, CALIFORNIA

SEPTEMBER 26, 2018

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

REPORTED BY: DIANA WHITESEL, CSR No. 6287

FILE NO.: AC09F34

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CATHARINE MILLER,
having been first duly sworn, was
examined and testified as follows:

MR. MANN: Good morning.

Can everybody just go around the table and
introduce themselves?

I'm Gregory Mann for the DFEH.

MR. MARTIN: Timothy Martin, also for DFEH.

THE WITNESS: Catharine Miller for Tastris.

MR. LIMANDRI: Her attorney, Charles LiMandri,
with Dan Piedra, P-i-e-d-r-a, from my office.

EXAMINATION

BY MR. MANN:

Q. Catharine -- I'm sorry.

Ms. Miller, can you spell your name for the
record?

A. C-a-t-h-a-r-i-n-e. Miller, M-i-l-l-e-r.

Q. And we're here today for an
interview/deposition under Government Code Section
12963.3.

Ms. Miller, have you ever given testimony under

1 Justin, and, apparently, they were doing things behind
2 my back.

3 Q. Does that mean that your intention would be to
4 participate in some aspect of every wedding cake
5 creation?

6 A. Yes.

7 Q. In your declaration you stated "Whenever I
8 create a custom wedding cake, I am expressing a message
9 about marriage."

10 What do you mean by that?

11 A. Marriage is very sacred. And it's, especially
12 today, I think it has more meaning than it did in the
13 past as many are choosing not to get married.

14 So when somebody makes a decision, regardless
15 of their situation in life, if they've made choices
16 before and now they're wanting to get married, I want to
17 do everything I can to encourage that and bless them.

18 The wedding cake is a culmination of the most
19 important thing, which is the ceremony.

20 Nowadays the reception has become a whole lot
21 different than when I got married. It's, you know, a
22 very big deal. Back when I got married, the ceremony
23 was everything, and then you go to the reception, which
24 was the hall next to the church and you cut cake, and
25 you were gone in a half hour.

1 Now, it's an eight-, ten-hour ordeal and they
2 spend tens of thousands of dollars on it. And the
3 central theme was the cake. And more often than not,
4 our cakes, they put a round table in the center of the
5 room.

6 And I have brides coming in saying, I want a
7 seven-tier cake. I say, oh, you're having 500 people.
8 They say no there is going to be 150, but I want a
9 five-tier or seven-tier cake.

10 It's a central point now. And they go on
11 Pinterest and they spend hours and hours and then come
12 back to me two weeks before the wedding and say I want
13 to change it. I say I haven't done anything with your
14 cake, sure.

15 Do you understand what I'm saying?

16 Even if you take a secular perspective of the
17 wedding cake, it a central message of the union of those
18 two people in marriage.

19 Now, from a Christian perspective, it's far
20 more meaningful than that to me. You're sending a
21 message that God has brought you together for life. And
22 this is a sacred sacrament ordained by God between a man
23 and woman, and I want to bless you.

24 And I want -- I give discounts to weddings
25 versus party cakes, because I am so excited that they

1 are getting married, you know. I think that's precious
2 and I'm excited to be a part of that union. And we have
3 little cards that we give out that say "Thank you for
4 letting us be a part of your sweet celebration," because
5 it's so precious.

6 So, yes, we're sending a message.

7 Q. You used the word "I" in that sentence. Is
8 there a message Tastries is sending as well?

9 A. Yeah. Well, me and Tastries, we're the same.
10 Tastries and I are the same.

11 Q. So you mentioned the situation where you found
12 out, apparently, employees were making cakes behind your
13 back. Do you think that those cakes sent that same
14 message, or how did you feel about them?

15 MR. LIMANDRI: Objection. Calls for
16 speculation.

17 Go ahead.

18 THE WITNESS: I'm very, very hurt by those
19 people that I trusted. Our bakery is run as a family.
20 We pray together. We work together. We stay up late
21 together. We get up early. We work together as a team.
22 And there was a group of individuals who went
23 behind my back -- even though they signed my handbook,
24 my company policy -- and there was a lot of other things
25 they were doing behind my back that I didn't know until

1 this came out. And then I have other employees that
2 were very, very hurt by them too.

3 BY MR. MANN:

4 Q. Do you have any idea how many wedding cakes
5 were done behind your back?

6 A. It could not have been very many because Mike
7 handled most of the deliveries. But Natalie and a
8 couple of others, "Don't worry. I'll deliver that one
9 for you. I will do it."

10 And then they messed up one time, which is this
11 one, your Number 5, because Savannah delivered it
12 because they couldn't leave the front.

13 And Savannah was new, and she delivered it.
14 And she's a little -- goodness, I think she was 17 or
15 18, probably 18 then. And she came back crying, and she
16 said, "We're not supposed to do this. Who sent me on
17 this?"

18 But she was very gracious. They were supposed
19 to bring the topper and they didn't. She got there.
20 The topper was two girls kissing or holding each other
21 or something. She put it on top, and she said, "Enjoy
22 your celebration," and she walked out.

23 There was nothing mean, or anything, but she
24 was crying. And she called me, and she said "Cathy, I
25 just did something I wasn't supposed to do."

1 But they had told her, "you need to take this
2 delivery" because she was brand new.

3 BY MR. MANN:

4 Q. So with that one, how did you feel? Did you
5 think that one sent your usual message or was it
6 different?

7 MR. LIMANDRI: Calls for speculation.
8 Go ahead.

9 THE WITNESS: I have no idea. I have no idea.
10 The fact that the girls wouldn't sign up
11 there -- Rosemary took this, and she was brand new at
12 taking wedding orders. So the fact that she didn't put
13 a groom there for a wedding cake -- we only found out
14 about this because they were on the news. It all
15 happened -- you know. Just a sad situation.

16 I don't know what message got taken. I think
17 the message in Bakersfield after all this broke out, I
18 do know the message there was why would they take
19 advantage of you.

20 BY MR. MANN:

21 Q. My question is not about the message taken.
22 It's about what you feel the message that was sent?

23 MR. LIMANDRI: Objection.

24 THE WITNESS: I can't answer that.

25 MR. LIMANDRI: Calls for speculation.

1 She answered. Go ahead.

2 BY MR. MANN:

3 Q. Since you were not personally involved in any
4 aspect of that order, did you feel there was any message
5 from you personally?

6 MR. LIMANDRI: Same objection. Calls for
7 speculation.

8 THE WITNESS: I said fondant or buttercream. I
9 did see the order. I did approve the order. I approved
10 the order based on it was probably a birthday cake or
11 quince cake going to Stockdale because of the design. I
12 had no idea that it was going to be a wedding cake. We
13 put flowers and toppers on all kinds of birthday cakes
14 and quince cakes and celebration cakes.

15 BY MR. MANN:

16 Q. When you say "quince" I'm assuming you mean
17 quinceanera?

18 A. Quinceanera, yes.

19 This caused me to create this form. And I
20 create new forms probably every year. I probably have
21 seven or eight different forms. Name, name.

22 Q. So that experience through Exhibit 5 led you to
23 create Exhibit 3?

24 A. Exactly.

25 Q. Was Exhibit 3 used just for weddings, or that's

1 all custom?

2 A. That's all, everything, even cookies, treats,
3 everything.

4 Q. Are there times when a wedding cake is ordered
5 but only one of the members of the couple will come in
6 for the design consult?

7 A. Yes.

8 Q. Is the name of the other member of the couple
9 expected to be put on the order?

10 A. Yes. Now.

11 We receive many orders with two men coming in.
12 And it's typically an Indian wedding or Hispanic
13 wedding, and the girls are not involved in choosing the
14 cake. We get probably 30, 40 percent of our brides come
15 in with their cousin, with their sister, with their maid
16 of honor, with their bridesmaids. The groom could care
17 less. He just says "give me a chocolate favor." That
18 happens all of the time.

19 So for me to be very kind or sensitive, I don't
20 ask when two guys show up or two girls show up, are you
21 gay? No, I don't do that. I ask for the bride and
22 groom.

23 Since this has happened -- because we've had
24 high sensitivity. I'm trying to be respectful of both
25 sides. Okay? I've tried to be very sensitive to anyone

1 that would come in. I don't want to cause anybody to be
2 upset. Okay?

3 I've had to be very, very careful, and I think
4 this is a discrete way of just saying, you know, I can't
5 do your wedding cake, but I know somebody who can who
6 does a wonderful job, and I can refer them. And, you
7 know, that's being very respectful and not hurtful.

8 And I always cover it with, I'm happy to do
9 your birthday cake or your cookies and honor you as a
10 person, but I can't be a part of something that goes
11 against God because I'm not going to be held accountable
12 for that.

13 Q. Have you had any referrals of same-sex couples
14 since August 26, 2017?

15 A. I was in a tasting, bridal. No referrals.

16 We've had bridal tastings at hotels where there
17 were two same sex, two lesbian couples. And that wasn't
18 an issue. I think people right now are just waiting to
19 see what you decide and what Judge Lampe decides and --
20 you know.

21 Q. What happened with those two situations you
22 just described?

23 A. They didn't choose -- it was -- we were in one
24 part of the room. It was a thing where we were walking
25 around, and it just never came up. It didn't.

REPORTER'S CERTIFICATE

I, Diana Whitesel, CSR No. 6287, Certified Shorthand
Reporter, certify:

That the foregoing proceedings were taken
before me at the time and place therein set forth, at
which time the witness was put under oath by me;

That the testimony of the witness, the
questions propounded, and all objections and statements
made at the time of the examination were recorded
stenographically by me at the time and were thereafter
transcribed;

That the foregoing is a true and correct
transcript of my shorthand notes so taken.

I further certify that I am not a relative or
employee of any attorney of the parties, nor financially
interested in the action.

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

Dated this 2nd day of October, 2018.


Diana Whitesel, CSR No. 6287

Document received by the CA 5th District Court of Appeal.

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STATE OF California)
COUNTY OF Kern) ss.

I, the undersigned, declare under penalty of perjury:

That I have read the foregoing transcript;

That I have made any corrections, additions, or deletions that I was desirous of making;

That is a true and correct transcript of my testimony contained herein.

EXECUTED this 12 day of October
2018, at Bakersfield California
[City] [State]



CATHARINE MILLER

LETTER TO DEPOSITION OFFICER/ERRATA SHEET

DEPOSITION OF:

DATE OF DEPOSITION:

CASE:

The following are the corrections which I have made to my transcript:

PAGE#	LINE#	CORRECTION	REASON FOR CORRECTION
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SEE ATTACHED ERRATA SHEET

Please sign your name and date it on the below line. As needed, use additional paper to note corrections dating and signing each page. If you have no corrections, please write the word "None" above and sign date, and return this page.

EXECUTED this 12th day of October, 20 18,
at Bakersfield, California,
(City) (State)
Therese Miller
(Signature)

Document received by the CA 5th District Court of Appeal.

LETTER TO DEPOSITION OFFICER/ERRATA SHEET

DEPOSITION OF CATHARINE MILLER

DATE OF DEPOSITION - SEPTEMBER 26, 2018

CASE: IN THE MATTER OF THE COMPLAINT OF EILEEN RODRIGUEZ-DEL RIO, ET AL. v.
CATHY'S CREATIONS, INC., ET AL.

The following are the corrections which I have made to my transcript:

PAGE#	LINE#	FROM	TO
23	20	I was doing an event at Bakersfield Country	It was actually 2013 I was doing an event at Bakersfield Country
37	19-21	These are my fondant specialists, gum base. These are my cookies and my cookie design and icing.	These are my fondant, gum paste and buttercream specialist. These are my cookie, cookie designers and icing specialist.
42	22	Ferris gold	Pharaoh Gold
55	7-8	Like offer, you can do the tasting,	Like, they can offer, "you can do the tasting,"
69	12	Gimme Some Sugar.	Gimme Some Sugar. Sugar Twist.
70	11	the day I'm checking on	the day I'm checking on orders
70	13	managers	assistant managers
73	17	it a central message	it is a central message
77	8	I said	It said
78	24	I'm trying to	I'm trying to be
109	3	I saw her at a sugar -- or sugar event that was in	I saw her at The Sugar Festival an event that was in
109	24	And I offered to set up -- I left a message	An I offered to set them up with Gimme Some Sugar and I left a message
135	25	good	groom

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EXHIBIT H



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EXHIBIT I

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,

Complainants,

vs.

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

Respondents.

ORIGINAL

Case No.:
935123-315628

DEPOSITION OF

CATHARINE MILLER

LOS ANGELES, CALIFORNIA

SEPTEMBER 26, 2018

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

REPORTED BY: DIANA WHITESEL, CSR No. 6287

FILE NO.: AC09F34

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CATHARINE MILLER,

having been first duly sworn, was

examined and testified as follows:

MR. MANN: Good morning.

Can everybody just go around the table and
introduce themselves?

I'm Gregory Mann for the DFEH.

MR. MARTIN: Timothy Martin, also for DFEH.

THE WITNESS: Catharine Miller for Tastris.

MR. LIMANDRI: Her attorney, Charles LiMandri,
with Dan Piedra, P-i-e-d-r-a, from my office.

EXAMINATION

BY MR. MANN:

Q. Catharine -- I'm sorry.

Ms. Miller, can you spell your name for the
record?

A. C-a-t-h-a-r-i-n-e. Miller, M-i-l-l-e-r.

Q. And we're here today for an
interview/deposition under Government Code Section
12963.3.

Ms. Miller, have you ever given testimony under

1 for those case cakes than a custom cake?

2 A. I tell my baker, bake out what we have left of
3 the batter. And I tell my decorators, whoever has time,
4 throw me some case cakes.

5 That's the end of the story.

6 Q. Okay.

7 A. Now, we'll get seasons, and I'll say, add
8 something Fall to these. We have a basic design. Even
9 that changes, but we have basic designs.

10 Call it red velvet, red crumbs around, trim on
11 the top and bottom. But if it's close to Thanksgiving,
12 we might throw a leaf on it or something. I don't know.

13 They are not made for any purpose except just
14 to put in the case, usually for birthday parties. We
15 are next door to John's Incredible, so we get birthday
16 parties all the time.

17 Q. Is it usually one person that does a pre-made
18 cake, or can that also go through the steps of the
19 multiple people participating in the creation?

20 A. A case cake is a no-brainer. Any of my bakers
21 and decorators better know how to do it. So anybody
22 just grabs it and does it.

23 Q. Do you know if clients have ever purchased a
24 pre-made cake for use in a wedding celebration?

25 A. I don't think so. I don't know. Maybe.

1 Q. Has anybody ever come in and asked, can you put
2 happy wedding or happy marriage, some addition to the
3 pre-made cake to where it was pretty clear it was going
4 to be for a wedding?

5 A. I don't think so. They're not that type of
6 cake. They're geared more towards a party, like if you
7 were having your birthday party.

8 Q. I know what you mean.

9 A. Okay.

10 Q. I sometimes wait until the last minute to get
11 the wife's cake.

12 A. Right.

13 Q. So I know what you mean.

14 A. There are cakes that are all white. It could
15 be used for that. But it's the purpose of why we made
16 the cake was to put in the case for a birthday.

17 Q. And it sounds like if somebody came in and
18 wanted to use a pre-made cake for the wedding, you don't
19 care, you're still going to sell it to them?

20 A. Yeah. Yes.

21 Q. If they wanted to add, like, "congratulations"
22 couples' name, and it fit, is that something that
23 Tastries would do?

24 A. I would do that because it is a case item that
25 was not created for the purpose of something. It was

1 created for our case, for the needs of whoever walked in
2 the door.

3 Q. If a same-sex couple came in and wanted to get
4 a pre-made cake and add congratulations, the names,
5 would Tastries sell that to them?

6 MR. LIMANDRI: Object. Incomplete
7 hypothetical. Assumes facts not in evidence. Calls for
8 speculation.

9 Go ahead and answer the question if you can.

10 THE WITNESS: Say the question again.

11 BY MR. MANN:

12 Q. If a same-sex couple came in to purchase a case
13 cake and wanted Tastries to write a message of
14 congratulations for their marriage, would Tastries sell
15 them that cake?

16 MR. LIMANDRI: Same objection.

17 THE WITNESS: I feel that you're trying to put
18 me in a box. I feel that there are several bakeries in
19 town that would be very happy to do a cake for them. If
20 anybody at this point walked into my bakery and asked me
21 to do that, I would look at them and say I'm happy to
22 write that on your cake, because I know that you know
23 what my feelings are, and I want to show you that I care
24 more about you as a person than all this crap that's
25 going on.

1 BY MR. MANN:

2 Q. So it sounds like that's a yes, Tastries would
3 sell it to them and put it on?

4 A. I probably wouldn't sell it to them. I'd
5 probably give it to them. Because I don't want any of
6 their money for that if they're going to do that to me,
7 because that's discrimination against me.

8 Q. So because of everything that has gone on with
9 the case, would you assume that somebody -- they're not
10 doing it for a genuine purpose, it sounds like?

11 A. I have had death threats. I have two binders
12 this full of hate mail. People wanting to kill me and
13 rape me and do it to my employees. I have had six
14 employees that have resigned because of the hate and
15 vindictiveness of the LGBTQ community.

16 But God is bigger than all of this, and I'm not
17 going to stoop to that level. The LGBT will not put me
18 in a box. I'm here to serve everyone. I will not be a
19 part of a ceremony.

20 If they have the desire to still, at this
21 point, come in my bakery and request that I write on a
22 case cake "Congratulations," I will write that because
23 you are telling me I have to.

24 But I will not charge them. I will hand it to
25 them, and I will tell them I am praying for them.

1 That's what will happen in my bakery.

2 Q. Okay. I am sorry to hear about the hate that
3 you're receiving and the threats. Nobody should have to
4 deal with that. That's disturbing to hear.

5 A. I know this is recorded. Does anybody else get
6 to read this?

7 MR. LIMANDRI: My understanding is it's for the
8 purposes of this case only. But if you're about to say
9 something that you don't want publicly disseminated,
10 I'll have to ask counsel to stipulate if he would at
11 least seal this portion of the record. I don't know
12 what you're about to say.

13 If you want to confer with me off the record
14 first, you can. But if not, if you're going to say
15 something that you feel strongly should not be publicly
16 disseminated, particularly if it concerns an employee or
17 something like that and their privacy, then I'd ask
18 counsel to stipulate to seal that part of the record.

19 So stipulated?

20 MR. MANN: Yes.

21 (The following pages 49 through 50 are
22 bound separately pursuant to stipulation.)
23
24
25

REPORTER'S CERTIFICATE

I, Diana Whitesel, CSR No. 6287, Certified Shorthand
Reporter, certify:

That the foregoing proceedings were taken
before me at the time and place therein set forth, at
which time the witness was put under oath by me;

That the testimony of the witness, the
questions propounded, and all objections and statements
made at the time of the examination were recorded
stenographically by me at the time and were thereafter
transcribed;

That the foregoing is a true and correct
transcript of my shorthand notes so taken.

I further certify that I am not a relative or
employee of any attorney of the parties, nor financially
interested in the action.

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

Dated this 2nd day of October, 2018.


Diana Whitesel, CSR No. 6287

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STATE OF California)
COUNTY OF Kern) Ss.

I, the undersigned, declare under penalty of perjury:

That I have read the foregoing transcript;

That I have made any corrections, additions, or deletions that I was desirous of making;

That is a true and correct transcript of my testimony contained herein.

EXECUTED this 12 day of October
20 18, at Bakersfield California
[City] [State]



CATHARINE MILLER

LETTER TO DEPOSITION OFFICER/ERRATA SHEET

DEPOSITION OF:

DATE OF DEPOSITION:

CASE:

The following are the corrections which I have made to my transcript:

PAGE#	LINE#	CORRECTION	REASON FOR CORRECTION
-------	-------	------------	-----------------------

SEE ATTACHED ERRATA SHEET

Please sign your name and date it on the below line. As needed, use additional paper to note corrections dating and signing each page. If you have no corrections, please write the word "None" above and sign date, and return this page.

EXECUTED this 12th day of October, 20 18,
at Bakersfield, California,
(City) (State)
Therese Miller
(Signature)

Document received by the CA 5th District Court of Appeal.

LETTER TO DEPOSITION OFFICER/ERRATA SHEET

DEPOSITION OF CATHARINE MILLER

DATE OF DEPOSITION - SEPTEMBER 26, 2018

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135	25	good	groom

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1 Charles S. LiMandri, SBN 110841
cslimandri@limandri.com
2 Paul M. Jonna, SBN 265389
pjonna@limandri.com
3 Jeffrey M. Trissell, SBN 292480
jtrissell@limandri.com
4 Milan L. Brandon II, SBN 326953
mbrandon@limandri.com
5 LiMANDRI & JONNA LLP
6 P.O. Box 9120
Rancho Santa Fe, California 92067
7 Telephone: (858) 759-9948
Facsimile: (858) 759-9938

8 Thomas Brejcha, *pro hac vice**
tbrejcha@thomasmoresociety.org
9 Peter Breen, *pro hac vice**
pbreen@thomasmoresociety.org
10 THOMAS MORE SOCIETY
11 309 W. Washington St., Ste. 1250
Chicago, IL 60606
12 Tel: (312) 782-1680
13 *Application forthcoming

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

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

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

20 Plaintiff,

21 v.

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

23 Defendants.

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

25 Real Parties in Interest.

CASE NO.: BCV-18-102633

IMAGED FILE

**DECLARATION OF JEFFREY
M. TRISSELL, ESQ. IN
OPPOSITION TO PLAINTIFF
DFEH'S MOTION FOR
SUMMARY JUDGMENT OR,
IN THE ALTERNATIVE,
SUMMARY ADJUDICATION**

Date: Nov. 4, 2021

Time: 8:30 a.m.

Dept: 11

Judge: Hon. David R. Lampe

Action Filed: Oct. 17, 2018

Trial Date: Dec. 13, 2021

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

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

7 2. I am submitting this declaration to rebut specific points raised by Plaintiff DFEH in
8 its motion for summary judgment or adjudication. This declaration is submitted as a supplement to
9 my prior declaration submitted in support of Defendants' motion for summary judgment or
10 adjudication, dated September 8, 2021. This declaration incorporates that earlier declaration by
11 reference.

12 AUTHENTICATION OF EXHIBITS

13 3. Attached to the Appendix of Exhibits as **Exhibit 19** is a true and correct copy of Gary
14 J. Gates, *LGB Families and Relationships: Analysis of the 2013 National Health Interview Survey* (Oct
15 2014) THE WILLIAMS INSTITUTE, <http://perma.cc/W3LK-89H8>.

16 4. Attached to the Appendix of Exhibits as **Exhibit 20** is a true and correct copy of
17 Gregory M. Herek, et al., *Demographic, Psychological, and Social Characteristics of Self-Identified*
18 *Lesbian, Gay, and Bisexual Adults in a US Probability Sample* (2010) 7 SEXUALITY RES. & SOC. POL'Y
19 176, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2927737/pdf/13178_2010_Article_17.pdf.

20 5. Attached to the Appendix of Exhibits as **Exhibit 21** is a true and correct copy of Tom
21 Geoghegan, *The gay people against gay marriage* (Jun. 11, 2013) BBC NEWS
22 <https://www.bbc.com/news/magazine-22758434>.

23 6. Attached to the Appendix of Exhibits as **Exhibit 22** is a true and correct copy of Beth
24 Daley, *Gay rebels: why some older homosexual men don't support same-sex marriage* (Nov. 5, 2017) THE
25 CONVERSATION, [https://theconversation.com/gay-rebels-why-some-older-homosexual-men-dont](https://theconversation.com/gay-rebels-why-some-older-homosexual-men-dont-support-same-sex-marriage-86205)
26 [support-same-sex-marriage-86205](https://theconversation.com/gay-rebels-why-some-older-homosexual-men-dont-support-same-sex-marriage-86205).

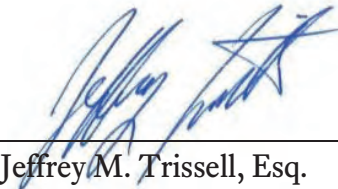
27 ///

28 ///

1 7. Attached to the Appendix of Exhibits as **Exhibit 23** is a true and correct copy of the
2 Declaration of Reina Benitez, dated January 17, 2018, as filed in Kern County Case No. BCV-17-
3 102855.

4 I declare until penalty of perjury under the laws of the United States and the State of
5 California that the foregoing is true and correct. Executed on October 6, 2021.

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Jeffrey M. Trissell, Esq.

1 Charles S. LiMandri, SBN 110841
cslimandri@limandri.com
2 Paul M. Jonna, SBN 265389
pjonna@limandri.com
3 Jeffrey M. Trissell, SBN 292480
jtrissell@limandri.com
4 Milan L. Brandon II, SBN 326953
mbrandon@limandri.com
5 LiMANDRI & JONNA LLP
6 P.O. Box 9120
Rancho Santa Fe, California 92067
7 Telephone: (858) 759-9948
Facsimile: (858) 759-9938

8 Thomas Brejcha, *pro hac vice**
9 tbrejcha@thomasmoresociety.org
Peter Breen, *pro hac vice**
10 pbreen@thomasmoresociety.org
THOMAS MORE SOCIETY
11 309 W. Washington St., Ste. 1250
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12 Tel: (312) 782-1680
13 *Application forthcoming

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

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

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

20 Plaintiff,

21 v.

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

23 Defendants.

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

25 Real Parties in Interest.

CASE NO.: BCV-18-102633

IMAGED FILE

**DEFENDANTS CATHARINE
MILLER AND TASTRIES
BAKERY'S SEPARATE
STATEMENT IN OPPOSITION
TO PLAINTIFF DFEH'S
MOTION FOR SUMMARY
JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION**

Date: Nov. 4, 2021

Time: 8:30 a.m.

Dept: 11

Judge: Hon. David R. Lampe

Action Filed: Oct. 17, 2018

Trial Date: Dec. 13, 2021

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PRELIMINARY STATEMENT & OBJECTIONS

Pursuant to Cal. Rules of Court, rule 3.1350(f)(2), Defendants Catharine Miller and Tastries Bakery hereby submit their response to Plaintiff Department of Fair Employment and Housing's (DFEH) separate statement of undisputed material facts in support of summary judgment or adjudication, together with references to supporting evidence. Further, pursuant to Cal. Rules of Court, rule 3.1350(f)(3), Defendants are submitting additional disputed and undisputed material facts. Defendants' additional facts are interspersed with Plaintiff's facts, with facts that related to each other grouped together. To distinguish them, Defendants' additional facts are lettered. (See SSUMF No. 21 [Plaintiff's Fact]; SSUMF Nos. 21a–21c [Defendants' Additional Facts].)

A separate statement of undisputed material facts should “set forth ‘*plainly and concisely* all *material facts* which the moving party contends are undisputed.’ ” (*Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 105 [original emphasis] [quoting Code Civ. Proc., § 437c(b)(1)]; see also Cal. Rules of Court, rule 3.1350(d)(2) [“The separate statement should include only material facts and not any facts that are not pertinent to the disposition of the motion.”]). “ ‘Material facts’ are facts that relate to the cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion and that could make a difference in the disposition of the motion.” (Cal. Rules of Court, rule 3.1350(a)(2).)

“The separate statement is not designed to pervert the truth, but merely to expedite and clarify the germane facts.” (See *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 438.) Thus, a party's separate statement of undisputed material facts is defective if “[i]nstead of stating clearly those material facts which actually are without substantial controversy, defendant offers a number of obliquely stated ‘facts’ that are material only to the extent they are controverted, and uncontroverted only to the extent they are immaterial.” (*Reeves, supra*, 121 Cal.App.4th at 105; see also *Weiss v. People ex rel. Department of Transportation* (2020) 9 Cal.5th 840, 864 [“These separate statements [are intended to] help the court isolate and identify the facts that are in dispute, which facilitates the court's determination whether trial is necessary.”].)

Further, material facts must be couched “in terms [] of relevant *events*,” not “what a witness has *said* about events.” What a witness “might have said *in deposition* is not, as such,

1 ‘material fact.’ It is of interest only as *evidence* of a material fact[.]” (*Reeves, supra*, 121 Cal.App.4th
2 at 105–106 [original emphasis].) Similarly, “material facts” are *facts*, not legal conclusions. The
3 contents of pleadings and how a court has previously ruled—even this Court—are legal
4 conclusions, not facts. (See *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1271, fn.16
5 [“[T]he determination as to what claim was pleaded by the initial complaint is not a statement of
6 material fact on which summary adjudication, or anything else, turned. It is rather a legal conclusion
7 properly reached based on an examination of the four corners of the pleading”]; *Andrews Farms v.*
8 *Calcot, Ltd.* (E.D. Cal. 2010) 693 F.Supp.2d 1154, 1167 [“Plaintiffs supporting evidence cites to this
9 Court’s MTD Order. . . . Plaintiffs’ statement of ‘fact’ is a legal conclusion that is unsupported by
10 legal authority or analysis”].)

11 “[T]rial courts have the inherent power to strike proposed ‘undisputed facts’ that fail to
12 comply with the statutory requirements and that are formulated so as to impede rather than aid an
13 orderly determination whether the case presents triable material issues of fact. If such an order
14 leaves the required separate statement insufficient to support the motion, the court is justified in
15 denying the motion on that basis.” (*Reeves, supra*, 121 Cal.App.4th at 105–106; see also
16 *Overstock.Com, Inc. v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th 471, 499 [reaffirming
17 power to strike separate statement].) Striking a defective separate statements is appropriate when
18 by failing to comply with the requirements, the “defendant has made [the plaintiff’s] task—and
19 that of the trial court—considerably more burdensome by its failure to comply.” (*Reeves, supra*, 121
20 Cal.App.4th at 105.)

21 Here, numerous of the alleged facts in Plaintiff DFEH’s separate statement of “undisputed
22 material facts” are defective and in violation of the requirements of the Code of Civil Procedure
23 and California Rules of Court. Defendants hereby request that the Court strike each of the “facts”
24 which they identify below as objectionable. All facts objected to are disputed because identifying the
25 substance as undisputed, even if “material fact is objectionable, waives any objection to it. (See
26 *Hurley Construction Co. v. State Farm Fire & Casualty Co.* (1992) 10 Cal.App.4th 533, 540–541; see
27 also *Rio Linda Unified School Dist. v. Superior Court* (1997) 52 Cal.App.4th 732, 741 [“[A]n
28 opponent would not admit to that which cannot be proven by the moving party.”].)

**RESPONSE TO UNDISPUTED MATERIAL FACTS
IN SUPPORT OF SUMMARY JUDGMENT**

**DFEH Is Entitled to Summary Judgment on its Only Cause of Action for Violation of
the Unruh Civil Rights Act (Civ. Code, § 51) Because Each Element of That Cause of
Action Has Been Met and There Is No Defense to the Action**

Moving Party's Undisputed Material Facts & Supporting Evidence	Opposing Party's Response & Supporting Evidence
1. <u>Fact:</u> Cathy's Creations, Inc. dba Tastries ("Tastries") operates a for-profit bakery in Bakersfield, California. <u>Evidence:</u> Declaration of Gregory J. Mann In Support of DFEH's Motion for Summary Judgment or, in the Alternative, Summary Adjudication ("Mann Decl."), ¶ 9, Ex. 7 [Articles of Incorporation of Cathy's Creations, Inc. and Bylaws of Cathy's Creations, Inc.]; Mann Decl., ¶ 10, Ex. 8 [Declaration of Catharine Miller In Support of Opposition to OSC Re Preliminary Injunction ("Miller Decl."), 1:10-12].	<u>Undisputed.</u>
2. <u>Fact:</u> During the relevant time period, Catharine Miller ("Miller") was—and continues to be—the sole owner of Cathy's Creations, Inc. and Tastries. <u>Evidence:</u> Mann Decl., ¶ 10, Ex. 8, p. 1 [Miller Decl., 1:10-12; Ex. A, pp. 1, 16].	<u>Undisputed.</u>
3. <u>Fact:</u> Tastries sells a variety of baked goods, including generic pre-made cakes kept	<u>Disputed.</u> The term "generic" is ambiguous. Defendants dispute that any of their cakes are

	in refrigerated cases offered for immediate sale to anyone for any purpose. <u>Evidence:</u> Mann Decl., ¶ 10, Ex. 8 [Miller Decl. 1:14-16, 2:4-6]; Mann Decl. ¶ 11, Ex. 9 [Deposition of Catharine Miller (“Miller Depo.”), 38:8-10; 38:22-39:2; 43:19-44:5; 44:13-22; 45:1-7; 53:21-54:2].	“generic.” Tastries’ pre-made cakes are called “case cakes” because they are made for sale out of the case using a proprietary design and proprietary flavors determined by Tastries. Case cakes are single tier cakes. (Declaration of Catharine Miller in Opposition to Plaintiff’s Motion for Summary Judgment or Adjudication [3d Miller Decl.], ¶¶ 10–11.) <u>Objection.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) This case is not about Defendants’ “case cakes” generally, and more specifically, the artistry or genericness of those cakes is not an issue in this case.
4.	<u>Fact:</u> Tastries also sells pre-ordered cakes, referring to any cake that is ordered in advance as “custom.” <u>Evidence:</u> Mann Decl., ¶ 11, Ex. 9 [Miller Depo. 38:1-7; 38:22-39:8; 43:4-18]; Mann Decl., ¶ 12, Ex. 10 [Deposition of Rosemary Perez (“Perez Depo.”), 16:22-25].	<u>Objection/Disputed.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) The evidence cited shows that all pre-ordered cakes <i>are</i> custom cakes, not that Defendants “refer” to them as custom. (See <i>Reeves, supra</i>, 121 Cal.App.4th at 105 [fact should state what the evidence is, not what a party testified the evidence is].)
4a.	<u>Defendants’ Additional Undisputed Material Fact</u> Tastries only has three types of cakes: pre-made case cakes, Styrofoam display cakes, and custom orders. Pre-ordered cakes are called “custom” because they are made to the customers specifications for size, shape, number of tiers, cake flavors, filling flavors, colors,	

1	design work, delivery and setup.	
2	<u>Evidence:</u>	
3	• Plt. Ex. 9, Miller Depo., 38:1–39:8; 43:4–18.	
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5	• Declaration of Catharine Miller in Support of Defendants’ Motion for Summary Judgment or, in the alternative, Summary Adjudication [“2d Miller Decl.”], ¶¶ 12, 25–32.	
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9	5.	<u>Disputed.</u>
10	<u>Fact:</u>	The evidence cited shows that Tastries has neutral design standards that identify the content and events served by Tastries. Those standards are neutral as to sexual orientation. One of the many design standards is that Tastries will not create “Designs that violate fundamental Christian principals [sic]; wedding cakes must not contradict God’s sacrament of marriage between a man and a woman.” (Plt. Ex. 8, 1st Miller Decl., Ex. A, p.18; see also Plt. Ex. 8, 1st Miller Decl., 2:26–27 [“I cannot provide custom wedding products and services that celebrate any form of marriage other than the Biblical model of a husband and wife.”]; Plt. Ex. 8, 1st Miller Decl., Ex. A, pp. 2, 5 [focusing on Miller’s religious beliefs, not anybody’s sexual orientation]; 2d Miller Decl., ¶ 12 [“My decisions on whether to design a custom cake or coordinate an event never focus on the client’s identity.”].)
11	Since opening Tastries in 2013, Miller has enforced a policy to deny any and all pre-ordered cakes to same-sex couples celebrating “[a]nything that has to do with the marriage [or] ... [t]he union of a same-sex couple” — whether that be a wedding, anniversary, or bridal shower.	
12	<u>Evidence:</u>	
13	Mann Decl., ¶ 10, Ex. 8 [Miller Decl. 2:26–27; 6:1–2; Ex. A, pp. 2, 5; Ex. A, Ex. A, p. 18 (“Design Standards”)];	
14	Mann Decl., ¶ 11, Ex. 9 [Miller Depo. 99:13–100:3; 101:9–15, 102:7–9]	
15	Mann Decl., ¶ 12, Ex. 10 [Perez Depo., 21:16–20].	
16		One <i>application</i> of this neutral policy is that Defendants cannot provide custom services celebrating a same-sex marriage, including the wedding cake, a bridal shower cake, or a wedding anniversary cake. (Plt. Ex. 8, 1st Miller Decl., 6:1–2; Plt. Ex. 9, Miller Depo., 101:9–15.)
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28		Further, there were no same-sex wedding

1		cake requests until 2016. (2d Miller Decl., ¶ 34.)
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3		Further, Tastries Bakery does not “deny”
4		services, Defendants’ policy is to provide a
5		referral to another professional bakery for any
6		cake it cannot make. Tastries has screened
7		several bakeries to confirm their skill and
8		willingness to accept referrals. Tastries will
9		provide additional referrals if requested. (2d
10		Miller Decl., ¶¶ 12–19, 33–38.)
11	6.	<u>Fact:</u>
12		Tastries has enforced the policy to deny
13		pre-ordered wedding cakes to same-sex
14		couples on multiple occasions and
15		continues to enforce this policy.
16		<u>Evidence:</u>
17		Mann Decl., ¶ 10, Ex. 8 [Miller Decl.
18		4:11-18, 5:1, 6:1-2; Ex. A, pp. 2, 4, 5];
19		Mann Decl., ¶ 11, Ex. 9 [Miller Depo.
20		99:25-100:3, 109:6-21].
21	7.	<u>Fact:</u>
22		Tastries documents its policy in its
23		Design Standards sheet, which is
24		available to customers.
25		<u>Evidence:</u>
26		Mann Decl., ¶ 10, Ex. 8 [Miller Decl.
27		Ex. A, Ex. A, p. 18 (“Design
28		Standards”).
	8.	<u>Fact:</u>
		Miller confirmed there are no
		circumstances under which Tastries
		would knowingly provide a pre-ordered
		cake for use in the celebration of a
		same-sex union, even if the pre-ordered
		cake was identical to a case cake.
		<u>Disputed.</u>
		All of Defendants’ pre-ordered products are
		custom products. Pre-ordered cakes are called
		“custom” because they are made to the
		customers specifications for size, shape,
		number of tiers, cake flavors, filling flavors,
		colors, design work, delivery and setup. (2d

	<u>Evidence:</u> Mann Decl., ¶ 11, Ex. 9 [Miller Depo., 43:4-11; 53:21-54:2; 99:13-100:3; 101:9-15, 102:7-9].	Miller Decl., ¶¶ 12, 25-32.) <u>Objection.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) What Defendants “confirmed” in deposition testimony is not a fact itself, merely evidence of a fact. Further, the evidence cited provides no support for the clause “even if the pre-ordered cake was identical to a case cake.” (See <i>King, supra</i>, 152 Cal.App.4th at 438 [“The separate statement is not designed to pervert the truth, but merely to expedite and clarify the germane facts.”].) All pre-ordered cakes are “tailored for a[] specific purpose.” (2d Miller Decl., ¶ 12.)
9.	<u>Fact:</u> In August 2017, after months of planning an exchange of vows and reception to celebrate their December 2016 wedding with their extended family and friends, the Rodriguez-Del Rios prepared to order a cake. <u>Evidence:</u> Mann Decl., ¶ 14, Ex. 12, [Deposition of Mireya Rodriguez-Del Rio (“Mireya Depo.”), 28:17-19; 30:5-7; 32:18-33:1; 39:24-40:4; 41:15-42:7]; Mann Decl., ¶ 15, Ex. 13 [Deposition of Eileen Rodriguez-Del Rio (“Eileen Depo.”), 34:19-22; 35:20-36:5; 59:7-17]; Declaration of Mireya Rodriguez-Del Rio in support of DFEH’s Motion for Summary Judgment/Adjudication (“Mireya Decl.”), ¶¶ 2-3.	<u>Disputed.</u> Defendants dispute the characterization of the Real Parties second wedding ceremony as “an exchange of vows and reception.” The Real Parties planned and held a traditional wedding ceremony. (Defs. Ex. 1, Compl., 2:6, 10:8 [“vow exchange and traditional wedding reception”]; Defs. Ex. 3, SROG Resp. No. 27, 29:5-7 [“Real Parties had what they considered a traditional wedding ceremony and reception.”]; Defs. Ex. 13, Eileen Dep., 171:6-173:9 & Defs. Exs. 627A, 627B [photos of wedding]; Defs. Ex. 14, Mireya Depo., 99:9-100:16 [confirming SROG Resp.]; Defs. Ex. 14, Mireya Depo., 147:1-148:17 & Defs. Exs. 627A, 627B [photos of wedding].) <u>Objection.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) There is nothing <i>material</i> about this fact. (See <i>Weiss, supra</i>, 9

		Cal.5th at 864 [“These separate statements [are intended to] help the court isolate and identify the facts that are in dispute, which facilitates the court’s determination whether trial is necessary.”].)
10.	<u>Fact:</u> Eileen and Mireya visited Tastries on August 17, 2017 and were assisted by front-end associate Rosemary Perez. <u>Evidence:</u> Mann Decl., ¶ 14, Ex. 12, [Mireya Depo., 26:13-27:23]; Mann Decl., ¶ 15, Ex. 13 [Eileen Depo., 43:6-45:6]; Mann Decl., ¶ 12, Ex. 10 [Perez Depo., 30:4-19].	<u>Objection/Disputed.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) There is nothing <i>material</i> about this fact. (See <i>Weiss, supra</i>, 9 Cal.5th at 864 [“These separate statements [are intended to] help the court isolate and identify the facts that are in dispute, which facilitates the court’s determination whether trial is necessary.”].)
11.	<u>Fact:</u> There were dozens of “display” cakes—decorated cakes made of Styrofoam to provide customers with ideas—exhibited throughout the bakery. <u>Evidence:</u> Mann Decl., ¶ 14, Ex. 12, [Mireya Depo., 27:4-12]; Mann Decl., ¶ 15, Ex. 13, [Eileen Depo., 43:14-44:1; 48:6-14]; Mann Decl., ¶ 11, Ex. 9 [Miller Depo., 39:5-7; 41:17-20]; Mann Decl., ¶ 12, Ex. 10 [Perez Depo., 17:21-24]; Mireya Decl., ¶ 3.	<u>Undisputed.</u>

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12.	<u>Fact:</u> Because the couple wanted a simple cake design, for their main cake they settled on a design just like one of the pre-existing sample display cakes—a cake with three round tiers, frosted with scaly white buttercream frosting, decorated only with a few frosting flowers/rosettes on the sides, and unadorned by any written message. <u>Evidence:</u> Mann Decl., ¶ 14, Ex. 12 [Mireya Depo., 27:4-14; 45:5-11; 83:24-84:10; 84:15-21; 150:19-151:12; 152:14-16; 153:9-22]; Mann Decl., ¶ 15, Ex. 13 [Eileen Depo., 43:20-44:1; 89:15-90:6]; Mann Decl., ¶ 12, Ex. 10, [Perez Depo. Mann Decl., ¶ 16, Ex. 14 [Declaration of Mary Johnson, ¶ 9].	<u>Disputed.</u> Defendants dispute the characterization of the cake that Real Parties wanted as “simple” to the extent that implies that the design did not require skill or artistry and did not express a message. (See Defs. Ex. 14, Mireya Dep., 153:5–17; Defs. Ex. 16, Patrick Dep., 99:7–13; Defs. Ex. 17, Criollo Dep., 47:16–49:7, 49:22–50:22, 77:4–78:2, 112:1–18; Errata 49:6–7, 77:8–9, 78:2; Defs. Ex. 18, Johnson Dep., 64:1–9; Defs. Ex. 631.) Defendants dispute the characterization that the Real Parties “settled on a design.” Ordering a custom wedding cake from Defendants involves a collaborative process between Defendants and the client in selecting the number of tiers, the size, the shape, the cake flavors, the filling flavors, the types of frosting, and other options. No customer can simply “settle” on a design on their own. (2d Miller Decl., ¶¶ 25–27, 29 & Ex. B; Defs. Ex. 1, Compl., 5:23–26, 6:20–21.) Further, the cake the Real Parties wanted from Tastries Bakery was a 3-tiered square cake with a smooth buttercream finish and teal ribbon around the bottom. (3d Miller Decl., ¶ 21; Plt. Ex. 8, 1st Miller Decl., 5:18–19; Plt. Ex. 9, Miller Depo., 131:2–9; Defs. Ex. 14, Mireya Dep., 150:19–151:12; 2d Miller Decl., 10:25–27.) The design the Real Parties chose from Tiers of Joy was a round, messy rustic design with flowers. (Defs. Ex. 14, Mireya Dep., 150:19–152:16 & Defs. Ex. 631.) Whether a cake is simple or elaborate (even without words or toppers incorporated) the cake is designed and created by Tastries Bakery to present the image or sentiment intended by the customer. That message can be enhanced by other items added to the cake display at the event, such as pictures, mementos, signs and a topper. While the customer is the one adding these items, their presence amplifies the message of the cake that
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1		was created by Tastries Bakery. (2d Miller Decl., ¶ 12; 3d Miller Decl., ¶¶ 12–15.)
2		<u>Objection.</u>
3		Defendants object to this “fact” as this
4		statement is defective and in violation of the
5		requirements of California law. (See Cal.
6		Rules of Court, rule 3.1350; <i>Reeves, supra</i> , 121
7		Cal.App.4th at 105.) There is nothing
8		<i>material</i> about this fact. The design
9		differences as to what the Real Parties
10		intended to order from Tastries is not a
11		material fact for this motion. Further, what is
12		material is that the cake would transmit a
13		message, not how it would, i.e., through
14		symbols and art or through writing.
15	13.	<u>Fact:</u>
16		During their discussion with Perez, the
17		Rodriguez-Del Rios selected the details
18		of their main cake—round, three tiers,
19		white buttercream frosting, decorated
20		with frosting rosettes—along with a
21		matching sheet cake.
22		<u>Evidence:</u>
23		Mireya Decl., ¶ 4;
24		Mann Decl., ¶ 14, Ex. 12 [Mireya
25		Depo., 27:4-14; 26:20-27:14; 45:5-11;
26		83:24-84:10; 84:15-21; 150:19-151:12;
27		152:14-16; 153:9-22];
28		Mann Decl., ¶ 15, Ex. 13 [Eileen Depo.,
		43:20-44:1; 50:22-51:3; 89:15-90:6];
		Mann Decl., ¶ 12, Ex. 10 [Perez Depo.,
		31:5-21; 32:4-33:3; 35:7-11; 48:25-49:6];
		Mann Decl., ¶ 11, Ex. 9 [Miller Depo.,
		127:17-20].
		<u>Disputed.</u>
		The meeting between Real Parties and Ms.
		Perez resulted in the Real Parties identifying
		basic elements of the order such as number of
		guests and date of their wedding. They did
		not finish the wedding design consultation
		and collaboration process because Ms. Perez
		was not qualified to complete it. (See Plt. Ex.
		10, Perez Depo., 30:4–31:11, 33:9–16, 35:7–15,
		45:25–49:6; Plt. Ex. 12, Mireya Depo., 26:20–
		25, 27:17–20; Plt. Ex. 13, Eileen Depo., 43:19–
		44:1.)
		Further, the cake the Real Parties wanted
		from Tastries Bakery was a 3-tiered square
		cake with a smooth buttercream finish and
		teal ribbon around the bottom. (3d Miller
		Decl., ¶ 21; Plt. Ex. 8, 1st Miller Decl., 5:18–
		19; Plt. Ex. 9, Miller Depo., 131:2–9; Defs. Ex.
		14, Mireya Depo., 150:19–151:12; 2d Miller
		Decl., 10:25–27.)
	14.	<u>Objection/Disputed.</u>
		<u>Fact:</u>
		None of the cakes would have any
		Defendants object to this “fact” as this

1	written message.	statement is defective and in violation of the
2	<u>Evidence:</u>	requirements of California law. (See Cal.
3	Mireya Decl., ¶ 4.	Rules of Court, rule 3.1350; <i>Reeves, supra</i> , 121
4		Cal.App.4th at 105.) There is nothing
5		<i>material</i> about this fact. What is material is
6		that the cake would transmit a message, not
7		how it would, i.e., through symbols and art or
8		through writing.
9		
10	15.	<u>Disputed.</u>
11	<u>Fact:</u>	Defendants dispute the characterization that
12	After discussing the details of the cakes	Real Parties “considered” ordering a
13	with Perez, the Rodriguez-Del Rios	wedding cake during their first visit. The
14	considered ordering their cakes from	evidence indicates that Real Parties were
15	Tastries on the spot.	overall happy with Tastries and wanted to
16	<u>Evidence:</u>	order a cake from them. (Defs. Ex. 12, Mireya
17	Mann Decl., ¶ 14, Ex. 12 [Mireya	Depo., 71:6–10; Defs. Ex. 13, Eileen Depo.,
18	Depo., 27:13-14; 71:6-10];	44:2–45:6.)
19	Mann Decl., ¶ 15, Ex. 13 [Eileen Depo.,	But Ordering a custom wedding cake from
20	43:14-44:9; 44:18-45:6; 65:21-24];	Defendants involves a collaborative process
21	Mann Decl., ¶ 12, Ex. 10 [Perez Depo.,	between Defendants and the client in
22	31:22-24];	selecting the number of tiers, the size, the
23	Mann Decl., ¶ 11, Ex. 9 [Miller Depo.,	shape, the cake flavors, the filling flavors, the
24	136:21-137:2].	types of frosting, and other options. (2d
25		Miller Decl., ¶¶ 25–27, 29 & Ex. B; Defs. Ex.
26		1, Compl., 5:23–26, 6:20–21.) That process
27		was not completed. (See Plt. Ex. 10, Perez
28		Depo., 35:7–11, 45:25–49:6; Plt. Ex. 12,
		Mireya Depo., 26:20–25, 27:17–20; Plt. Ex.
		13, Eileen Depo., 43:19–44:1.) It could not
		have been completed on the first visit because
		Ms. Perez was not qualified to complete it.
		(Plt. Ex. 10, Perez Depo., 30:4–31:11, 33:9–16,
		35:7–15.)
	16.	<u>Disputed.</u>
	<u>Fact:</u>	Defendants dispute the characterization that
	The Rodriguez-Del Rios agreed to	the Real Parties returned solely for “a cake
	return to Tastries on August 26, 2017,	tasting.” During their first visit, Real Parties
	for a cake tasting.	met with a junior, front-end sales associate
	<u>Evidence:</u>	who could not meaningfully discuss their
	Mann Decl., ¶ 15, Ex. 13 [Eileen Depo.,	desired wedding cake with them. They
	44:10-17; 46:6-17];	returned to finalize the collaborative process,
		including by tasting flavors. (Plt. Ex. 10, Perez

1		Mann Decl., ¶ 14, Ex. 12 [Mireya Depo., 27:13-20];	Depo., 30:4-31:11, 33:9-16, 35:7-15.)
2		Mann Decl., ¶ 12, Ex. 10 [Perez Depo., 30:21-23; 31:3-9; 36:20-22].	
3	17.	<u>Fact:</u>	<u>Disputed.</u>
4		The couple and members of their wedding party returned to Tastries for a cake tasting on August 26, 2017.	Defendants dispute the characterization that the Real Parties returned solely for “a cake tasting.” During their first visit, Real Parties met with a junior, front-end sales associate who could not meaningfully discuss their desired wedding cake with them. They returned to finalize the collaborative process, including by tasting flavors. (Plt. Ex. 10, Perez Depo., 30:4-31:11, 33:9-16, 35:7-15.)
5		<u>Evidence:</u>	
6		Mann Decl., ¶ 14, Ex. 12 [Mireya Depo., 73:9-11; 74:21-24];	
7		Mann Decl., ¶ 15, Ex. 13 [Eileen Depo., 48:20-24].	
8	18.	<u>Fact:</u>	<u>Undisputed.</u>
9		Miller greeted the Rodriguez-Del Rio party and asked for some details about their order.	
10		<u>Evidence:</u>	
11		Mann Decl., ¶ 12, Ex. 10 [Perez Depo., 41:20-24];	
12		Mann Decl., ¶ 10, Ex. 8 [Miller Decl., 5:11-18];	
13		Mann Decl., ¶ 11, Ex. 9 [Miller Depo., 127:9-22].	
14	19.	<u>Fact:</u>	<u>Disputed.</u>
15		Mireya explained she wanted a three-tiered wedding cake and a sheet cake with matching finish.	Real Parties wanted two sheet cakes. (Plt. Ex. 8, 1st Miller Decl., 5:18-19; Plt. Ex. 9, Miller Depo., 131:2-22; 2d Miller Del., 10:25-27.)
16		<u>Evidence:</u>	<u>Objection.</u>
17		Mann Decl., ¶ 14, Ex. 12 [Mireya Depo., 83:24-84:10];	Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i> , 121
18		Mann Decl., ¶ 10, Ex. 8 [Miller Decl.,	

1		5:18-19];	Cal.App.4th at 105.) There is nothing
2		Mann Decl., ¶ 11, Ex. 9 [Miller Depo.,	<i>material</i> about this fact. The design
3		127:17-20; 131:2-9; 131:16-19].	differences as to what the Real Parties
4			intended to order from Tastries is not a
5	20.	<u>Fact:</u>	material fact for this motion.
6		In the course of their conversation,	
7		Miller discovered Eileen and Mireya	
8		wanted the cakes to celebrate their	
9		same-sex wedding.	
10		<u>Evidence:</u>	
11		Mann Decl., ¶ 10, Ex. 8 [Miller Decl.,	
12		5:20-23; 6:1-3];	
13		Mann Decl., ¶ 11, Ex. 9 [Miller Depo.,	
14		128:11-13; 128:22-24; 129:18-21].	
15	21.	<u>Fact:</u>	<u>Undisputed.</u>
16		After she discovered the Rodriguez-Del	
17		Rios wanted cakes to celebrate their	
18		same-sex wedding, Miller declined to	
19		take their order.	
20		<u>Evidence:</u>	
21		Mann Decl., ¶ 10, Ex. 8 [Miller Decl.,	
22		5:20-23; 6:1-3];	
23		Mann Decl., ¶ 11, Ex. 9 [Miller Depo.,	
24		129:18-21];	
25		Mann Decl., ¶ 14, Ex. 12 [Mireya	
26		Depo., 64:12-65:6].	
27	21a	<u>Defendants' Additional Undisputed</u>	<u>Disputed.</u>
28		<u>Material Fact</u>	
		Defendants have a religious objection to	
		celebrating any form of marriage other	
		than a marriage between one man and	
		one woman.	

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	<u>Evidence:</u> • 2d Miller Decl., ¶¶ 10–11, 19–21, 24 & Ex. A • Defs. Ex. 1, Compl., 2:27–3:4, 8:8–18, 11:10–11, 11:13–15 • Defs. Ex. 4, DFEH Resp. to Tastries’ RFA’s No. 9 • Defs. Ex. 9, DFEH Resp. to Millers’ RFA’s Nos. 8, 9, 13, 14, 15, 16, 17, 21, 22, 23, 24, 25, 26 • Defs. Ex. 13, Eileen Dep., 72:5–21, 77:4–78:12, 142:5–13 • Defs. Ex. 14, Mireya Dep., 52:18–53:22 & Ex. 231, 93:8–13, 109:25–110:8, 166:1–7 • Defs. Ex. 15, Samuel Dep., 47:19–49:15, 98:2–12 • Defs. Ex. 16, Patrick Dep., 55:14–18, 60:14–62:2, 63:3–12 & Ex. 231 • Defs. Ex. 17, Criollo Dep., 79:6–80:9 • Defs. Ex. 18, Johnson Dep., 23:20–24:2, 27:11–28:8, 32:18–33:7	
21b.	<u>Defendants’ Additional Undisputed Material Fact</u> Defendants’ objection to celebrating any form of marriage other than a marriage between one man and one woman was the basis of the denial of service to Real Parties on August 26, 2017.	

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	<u>Evidence:</u> • 2d Miller Decl., ¶¶ 10–11, 19–21, 24, 43 & Ex. A • Defs. Ex. 1, Compl., 2:27–3:4, 8:8–18, 11:10–11, 11:13–15 • Defs. Ex. 3, DFEH Resp. to Tastries SROGs Nos. 17, 22, 24 • Defs. Ex. 7, DFEH Resp. to Miller SROGs No. 16 • Defs. Ex. 9, DFEH Resp. to Miller RFAs No. 27 • Defs. Ex. 13, Eileen Dep., 115:12–24 • Defs. Ex. 15, Samuel Dep., 57:7–10 • Defs. Ex. 16, Patrick Dep., 65:1–5 • Defs. Ex. 17, Criollo Dep., 88:11–89:7; Errata 89:2 • Defs. Ex. 18, Johnson Dep., 19:18–20:10, 29:6–30:3, 30:21–31:2, 32:18–34:1, 92:20–93:6, 94:7–16	
21c.	<u>Defendants’ Additional Undisputed Material Fact</u> Approximately 20% people who are sexually attracted to the same-sex object to defining marriage as between people of the same sex. <u>Evidence:</u> • Ex. 19, Gary J. Gates, <i>LGB Families and Relationships: Analysis of the 2013 National Health Interview Survey</i> (Oct.	

	2014) THE WILLIAMS INSTITUTE at 6 [“Among bisexual adults with children, 51% were married with a different-sex spouse, 11% had a different-sex unmarried partner, and 4% had a same-sex spouse or partner. Among adults who identified as gay or lesbian and were raising children, 18% had a different-sex married spouse and 4% had a different-sex unmarried partner.”] • Ex. 20, Gregory M. Herek, et al., <i>Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample</i> (2010) 7 SEXUALITY RES. & SOC. POL’Y 176, 194 [noting that even though 89.1% of homosexual respondents supported civil unions, only between 74.4% and 77.9% supported same-sex marriage] • Ex. 21, Tom Geoghegan, <i>The gay people against gay marriage</i> (Jun. 11, 2013) BBC NEWS • Ex. 22, Beth Daley, <i>Gay rebels: why some older homosexual men don’t support same-sex marriage</i> (Nov. 5, 2017) THE CONVERSATION	
22.	<u>Fact:</u> Miller referred the couple to another bakery, but Eileen had already visited it and decided against ordering from there. <u>Evidence:</u> Mann Decl., ¶ 15, Ex. 13 [Eileen Depo.,	<u>Disputed.</u> As presented, the fact implies that Real Parties rejected Defendants’ effort to connect them with another bakery because they knew that they bakery was one they did not like. This is not the case. (Plt. Ex. 13, Eileen Depo., 51:22–52:5.) It was only later that Real Parties realized that the first bakery to whom Defendants would have referred them was a

1		38:16-40:4; 51:12-52:2; 120:2-4];	bakery they did not like. (Defs. Ex. 1, Compl., 11:18-20.)
2		Mann Decl., ¶ 14, Ex. 12 [Mireya Depo., 42:25-44:11];	
3		Mann Decl., ¶ 10, Ex. 8 [Miller Decl., 6:2-4].	
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5	22a.	<u>Defendants' Additional Undisputed Material Fact</u>	
6		If Real Parties had informed Defendants that they rejected the bakery to which they were referred, Defendants would have offered to connect Real Parties with another bakery that could have made their cake.	
7		<u>Evidence:</u>	
8		• 2d Miller Decl., ¶ 18	
9		• Defs. Ex. 13, Eileen Dep., 121:14-20	
10		• Defs. Ex. 18, Johnson Dep., 101:10-13	
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17	23.	<u>Fact:</u>	<u>Disputed.</u>
18		Overwhelmed, upset, and frustrated by Ms. Miller's refusal to serve them because they wanted to use the Tastries cakes in the celebration of their same-sex wedding, the Rodriguez-Del Rios and their party left.	Whether Real Parties were "overwhelmed, upset, and frustrated" is unknown because Plaintiff has argued that it is irrelevant in this action and so refused to provide discovery regarding it. (Defs. Ex. 5, DFEH Resp. to Tastries RPDs Nos. 3, 4, 5, 6; Defs. Ex. 2, DFEH Resp. to Tastries FROGs, No. 10.2; see also Evid. Obj. No. 1 to Mireya Depo., 21:22-22:5; Evid. Obj. No. 2 to Eileen Depo., 52:6-53:3.)
19		<u>Evidence:</u>	
20		Mann Decl., ¶ 14, Ex. 12 [Mireya Depo., 21:22-22:5; 76:10-12]	
21		Mann Decl., ¶ 15, Ex. 13 [Eileen Depo., 52:6-53:3]	
22		Mann Decl., ¶ 10, Ex. 8 [Miller Decl., 6:6];	
23		Mann Decl., ¶ 12, Ex. 10 [Perez Depo.,	
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	46:6-11].	
24.	<u>Fact:</u> On October 7, 2017, the Rodriguez-Del Rios exchanged vows and celebrated their wedding at a reception with approximately 100 of their family and friends. <u>Evidence:</u> Mireya Decl., ¶ 5; Mann Decl., ¶ 14, Ex. 12 [Mireya Depo., 98:16-25].	<u>Undisputed.</u>
24a.	<u>Defendants' Additional Undisputed Material Fact</u> Real Parties actually obtained a wedding cake for their wedding ceremony. <u>Evidence:</u> • Defs. Ex. 3, DFEH Resp. to Tastries SROGs No. 12 • Defs. Ex. 4, DFEH Resp. to Tastries RFAs No. 19 • Defs. Ex. 13, Eileen Dep., 121:5-13, 175:13-176:2 & Ex. 631	

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**RESPONSE TO UNDISPUTED MATERIAL FACTS
IN SUPPORT OF SUMMARY ADJUDICATION**

Issue One—DFEH Is Entitled to Adjudication that it States a *Prima Facie* Case on its Only Cause of Action for Violation of the Unruh Civil Rights Act (Civ. Code, § 51) Because Each Element of that Cause of Action has been Met

Moving Party's Undisputed Material Facts & Supporting Evidence	Opposing Party's Response & Supporting Evidence
25. Plaintiff incorporates Undisputed Material Fact Nos. 1-24.	See Response to ## 1-24.
25a. Defendants incorporate Undisputed Material Facts Nos. 21a, 21b, 22a, & 24a	
26. <u>Fact:</u> DFEH set forth factual allegations supporting a cause of action against defendants under the Unruh Civil Rights Act (Civ. Code, § 51) in DFEH's civil Complaint, filed on October 17, 2018. <u>Evidence:</u> Mann Decl., ¶ 3, Ex. 1 [DFEH's Civil Complaint]	<u>Objection/Disputed.</u> Defendants object to this "fact" as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) This is not a fact but a legal conclusion and a description of the procedural history of this case. (See <i>Quiroz, supra</i>, 140 Cal.App.4th at 1271, fn.16 ["the determination as to what claim was pleaded by the initial complaint is not a statement of material fact on which summary adjudication, or anything else, turned. It is rather a legal conclusion properly reached based on an examination of the four corners of the pleading"].)
27. <u>Fact:</u> DFEH set forth factual allegations supporting a cause of action against defendants under the Unruh Civil Rights Act (Civ. Code, § 51) in DFEH's First Amended Complaint, filed on November 29, 2018. <u>Evidence:</u> Mann Decl., ¶ 4, Ex. 2 [DFEH's First	<u>Objection/Disputed.</u> Defendants object to this "fact" as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) This is not a fact but a legal conclusion and a description of the procedural history of this case. (See <i>Quiroz, supra</i>, 140 Cal.App.4th at 1271, fn.16 ["the determination as to what claim was pleaded by the initial complaint is not a statement of material fact on which summary adjudication,

	Amended Complaint].	or anything else, turned. It is rather a legal conclusion properly reached based on an examination of the four corners of the pleading”].)
28.	<u>Fact:</u> In denying Defendants Catharine Miller’s and Tastries’ Anti-SLAPP Motion to Strike the Complaint, this Court concluded that the “Department has supplied sufficient admissible evidence in this respect to substantiate a <i>prima facie</i> case if accepted as true” <u>Evidence:</u> Mann Decl., ¶ 6, Ex. 4 [March 27, 2019 Order Denying Defendants Catharine Miller’s and Tastries’ Anti-SLAPP Motion to Strike the Complaint, 12:23-24].	<u>Disputed.</u> As framed, Plaintiff implies that the Court found <i>prima facie</i> evidence of the elements of an Unruh Act violation. The section cited and quoted, however, deals with <i>prima facie</i> evidence to overcome a Free Speech affirmative defense. (Plt. Ex. 4, § II.B.3, p.12:23–24.) <u>Objection.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) This is not a fact but a legal conclusion and a description of the procedural history of this case. (See <i>Andrews Farms v. Calcot, Ltd.</i> (E.D. Cal. 2010) 693 F.Supp.2d 1154, 1167 [“Plaintiffs supporting evidence cites to this Court’s MTD Order. . . . Plaintiffs’ statement of ‘fact’ is a legal conclusion that is unsupported by legal authority or analysis”].)
29.	<u>Fact:</u> In denying Defendants Catharine Miller’s and Tastries’ Anti-SLAPP Motion to Strike the Complaint, this Court concluded that regarding the Free Exercise context, “the Department’s evidence in this regard is sufficient to substantiate a <i>prima facie</i> case to the same extent as discussed above in the Free Speech context.” <u>Evidence:</u> Mann Decl., ¶ 6, Ex. 4 [March 27, 2019 Order Denying Defendants Catharine Miller’s and Tastries’ Anti-SLAPP	<u>Objection/Disputed.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) There is nothing <i>material</i> about this fact. This section—Issue One—concerns a <i>prima facie</i> case for violation of the Unruh Act. The order cited concerns a <i>prima facie</i> case for overcoming a Free Exercise affirmative defense. Further, this is not a fact but a legal conclusion and a description of the procedural history of this case. (See <i>Andrews Farms v. Calcot, Ltd.</i> (E.D. Cal. 2010) 693 F.Supp.2d 1154, 1167

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	Motion to Strike the Complaint, 14:1-3].	[“Plaintiffs supporting evidence cites to this Court’s MTD Order. . . . Plaintiffs’ statement of ‘fact’ is a legal conclusion that is unsupported by legal authority or analysis”].)
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Issue Two—Defendants’ First Affirmative Defense (Failure to State a Claim) fails because it is without merit since DFEH states a prima facie case for violation of the Unruh Civil Rights Act

Moving Party’s Undisputed Material Facts & Supporting Evidence	Opposing Party’s Response & Supporting Evidence
30. Plaintiff incorporates Undisputed Material Fact Nos. 1-24.	See Response to ## 1-24.
30a. Defendants incorporate Undisputed Material Facts Nos. 21a, 21b, 22a, & 24a	
31. <u>Fact:</u> DFEH set forth factual allegations supporting a cause of action against defendants under the Unruh Civil Rights Act (Civ. Code, § 51) in DFEH’s civil Complaint, filed on October 17, 2018. <u>Evidence:</u> Mann Decl., ¶ 3, Ex. 1 [DFEH’s Civil Complaint].	See Response to # 26.
32. <u>Fact:</u> DFEH set forth factual allegations supporting a cause of action against defendants under the Unruh Civil Rights Act (Civ. Code, § 51) in DFEH’s First Amended Complaint, filed on November 29, 2018. <u>Evidence:</u> Mann Decl., ¶ 4, Ex. 2 [DFEH’s First Amended Civil Complaint].	See Response to # 27.
33. <u>Fact:</u> In denying Defendants Catharine Miller’s and Tastries’ Anti-SLAPP Motion to Strike the Complaint, this Court concluded that the “Department	See Response to # 28.

1	has supplied sufficient admissible	
2	evidence in this respect to substantiate	
3	a <i>prima facie</i> case if accepted as true	
4	”	
5	<u>Evidence:</u>	
6	Mann Decl., ¶ 6, Ex. 4 [March 27, 2019	
7	Order Denying Defendants Catharine	
8	Miller’s and Tastries’ Anti-SLAPP	
9	Motion to Strike the Complaint, 12:23-	
10	24].	
11	34. <u>Fact:</u>	See Response to # 29.
12	In denying Defendants Catharine	
13	Miller’s and Tastries’ Anti-SLAPP	
14	Motion to Strike the Complaint, this	
15	Court concluded that regarding the	
16	Free Exercise context, “the	
17	Department’s evidence in this regard is	
18	sufficient to substantiate a <i>prima facie</i>	
19	case to the same extent as discussed	
20	above in the Free Speech context.”	
21	<u>Evidence:</u>	
22	Mann Decl., ¶ 6, Ex. 4 [March 27, 2019	
23	Order Denying Defendants Catharine	
24	Miller’s and Tastries’ Anti-SLAPP	
25	Motion to Strike the Complaint, 14:1-	
26	3].	
27	35. <u>Fact:</u>	<u>Objection/Disputed.</u>
28	This Court previously concluded that	Defendants object to this “fact” as this
	the “nature of the proceedings and	statement is defective and in violation of the
	evidence presented show that the	requirements of California law. (See Cal.
	Department, consistent with its	Rules of Court, rule 3.1350; <i>Reeves, supra</i> , 121
	mandate, has brought the instant	Cal.App.4th at 105.) There is nothing
	complaint to vindicate a legally	<i>material</i> about this fact. This section—Issue
	cognizable right belonging to the real	Two—concerns a <i>prima facie</i> case for
	parties in interest rather than to obtain	violation of the Unruh Act. The order cited
	an economic advantage over	concerns whether the policy justifications of
	Defendants.”	the anti-SLAPP statute apply in this case.
	<u>Evidence:</u>	Further, this is not a fact but a legal
		conclusion and a description of the
		procedural history of this case. (See <i>Andrews</i>

	Mann Decl., ¶ 6, Ex. 4 [March 27, 2019 Order Denying Defendants Catharine Miller’s and Tastries’ Anti-SLAPP Motion to Strike the Complaint, 5:22-25].	<i>Farms v. Calcot, Ltd.</i> (E.D. Cal. 2010) 693 F.Supp.2d 1154, 1167 [“Plaintiffs supporting evidence cites to this Court’s MTD Order. . . . Plaintiffs’ statement of ‘fact’ is a legal conclusion that is unsupported by legal authority or analysis”].)
36.	<u>Fact:</u> Defendants allege that “DFEH’s complaint fails to state any claim upon which relief can be granted against Miller and Tastries.” <u>Evidence:</u> Mann Decl., ¶ 5, Ex. 3 [Defendants’ Verified First Amended Answer to Plaintiff’s First Amended Complaint, 13:1-4].	<u>Objection/Disputed.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) This is not a fact but a legal conclusion and a description of the procedural history of this case. (See <i>Quiroz, supra</i>, 140 Cal.App.4th at 1271, fn.16 [“the determination as to what claim was pleaded by the initial complaint is not a statement of material fact on which summary adjudication, or anything else, turned. It is rather a legal conclusion properly reached based on an examination of the four corners of the pleading”].)

Issue Three—Defendants’ Second Affirmative Defense (Defendants Have Not Violated the Unruh Civil Rights Act) fails because it is without merit since DFEH states a prima facie case for violation of the Unruh Civil Rights Act

Moving Party’s Undisputed Material Facts & Supporting Evidence	Opposing Party’s Response & Supporting Evidence
37. Plaintiff incorporates Undisputed Material Fact Nos. 1-24.	See Response to ## 1-24.
37a. Defendants incorporate Undisputed Material Facts Nos. 21a, 21b, 22a, & 24a	
38. <u>Fact:</u> DFEH set forth factual allegations supporting a cause of action against defendants under the Unruh Civil Rights Act (Civ. Code, § 51) in DFEH’s civil Complaint, filed on October 17, 2018. <u>Evidence:</u> Mann Decl., ¶ 3, Ex. 1 [DFEH’s Civil Complaint].	See Response to # 26.
39. <u>Fact:</u> DFEH set forth factual allegations supporting a cause of action against defendants under the Unruh Civil Rights Act (Civ. Code, § 51) in DFEH’s First Amended Complaint, filed on November 29, 2018. <u>Evidence:</u> Mann Decl., ¶ 4, Ex. 2 [DFEH’s First Amended Civil Complaint].	See Response to # 27.
40. <u>Fact:</u> In denying Defendants Catharine Miller’s and Tastries’ Anti-SLAPP Motion to Strike the Complaint, this Court concluded that the “Department	See Response to # 28.

1	has supplied sufficient admissible	
2	evidence in this respect to substantiate	
3	a <i>prima facie</i> case if accepted as true	
4	”	
5	<u>Evidence:</u>	
6	Mann Decl., ¶ 6, Ex. 4 [March 27, 2019	
7	Order Denying Defendants Catharine	
8	Miller’s and Tastries’ Anti-SLAPP	
9	Motion to Strike the Complaint, 12:23-	
10	24].	
11	41. <u>Fact:</u>	See Response to # 29.
12	In denying Defendants Catharine	
13	Miller’s and Tastries’ Anti-SLAPP	
14	Motion to Strike the Complaint, this	
15	Court concluded that regarding the	
16	Free Exercise context, “the	
17	Department’s evidence in this regard is	
18	sufficient to substantiate a <i>prima facie</i>	
19	case to the same extent as discussed	
20	above in the Free Speech context.”	
21	<u>Evidence:</u>	
22	Mann Decl., ¶ 6, Ex. 4 [March 27, 2019	
23	Order Denying Defendants Catharine	
24	Miller’s and Tastries’ Anti-SLAPP	
25	Motion to Strike the Complaint, 14:1-	
26	3].	
27	42. <u>Fact:</u>	<u>Objection/Disputed.</u>
28	Defendants allege that they “did not	Defendants object to this “fact” as this
	violate the Unruh Civil Rights Act	statement is defective and in violation of the
	(“Unruh Act”) because they never	requirements of California law. (See Cal.
	discriminated against Real Parties in	Rules of Court, rule 3.1350; <i>Reeves, supra</i> , 121
	Interest Eileen and Mireya Rodriguez-	Cal.App.4th at 105.) This is not a fact but a
	Del Rio (the “Rodriguez-Del Rios”) on	legal conclusion and a description of the
	the bases of sexual orientation.”	procedural history of this case. (See <i>Quiroz,</i>
	<u>Evidence:</u>	<i>supra</i> , 140 Cal.App.4th at 1271, fn.16 [“the
	Mann Decl., ¶ 5, Ex. 3 [Defendants’	determination as to what claim was pleaded
	Verified First Amended Answer to	by the initial complaint is not a statement of
	Plaintiff’s First Amended Complaint,	material fact on which summary adjudication,
		or anything else, turned. It is rather a legal
		conclusion properly reached based on an

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	13:5-12].	examination of the four corners of the pleading”].)
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Issue Four—Defendants’ Third Affirmative Defense (Unclean Hands) fails because it is without merit as applied to DFEH

Moving Party’s Undisputed Material Facts & Supporting Evidence	Opposing Party’s Response & Supporting Evidence
43. Plaintiff incorporates Undisputed Material Fact Nos. 1-24.	See Response to ## 1-24.
44. <u>Fact:</u> Defendants allege that “DFEH’s claims are barred based on the equitable doctrine of unclean hands.” <u>Evidence:</u> Mann Decl., ¶ 5, Ex. 3 [Defendants’ Verified First Amended Answer to Plaintiff’s First Amended Complaint, 13:13-21].	<u>Objection/Disputed.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) This is not a fact but a legal conclusion and a description of the procedural history of this case. (See <i>Quiroz, supra</i>, 140 Cal.App.4th at 1271, fn.16 [“the determination as to what claim was pleaded by the initial complaint is not a statement of material fact on which summary adjudication, or anything else, turned. It is rather a legal conclusion properly reached based on an examination of the four corners of the pleading”].)
44a. <u>Defendants’ Additional Disputed Material Fact</u> Real Parties came to this Tastries Bakery on August 26, 2017 primarily in search of a lawsuit. <u>Evidence:</u> • Defs. Ex. 23, Benitez Decl., ¶¶ 2-7 • Plt. Ex. 8, 1st Miller Decl., ¶¶ 16-18	

Issue Five—Defendants’ Fourth Affirmative Defense (Abuse of Process) fails as without merit because defendants do not provide sufficient clear evidence to support the defense

Moving Party’s Undisputed Material Facts & Supporting Evidence	Opposing Party’s Response & Supporting Evidence
45. Plaintiff incorporates Undisputed Material Fact Nos. 1-22 and 82.	See Response to ## 1-22 & 82
45a. Defendants incorporate Disputed Material Fact No. 44a	
46. <u>Fact:</u> This Court previously concluded that “there’s no evidence before the Court that the Department is going around singling out Christian providers.” <u>Evidence:</u> Mann Decl., ¶ 7, Ex. 5 [2/2/18 Reporter’s Transcript of Proceedings, 30:6-16].	<u>Objection/Disputed.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) This is not a fact but a legal conclusion and a description of the procedural history of this case. (See <i>Andrews Farms v. Calcot, Ltd.</i> (E.D. Cal. 2010) 693 F.Supp.2d 1154, 1167 [“Plaintiffs supporting evidence cites to this Court’s MTD Order. . . . Plaintiffs’ statement of ‘fact’ is a legal conclusion that is unsupported by legal authority or analysis”].)
47. <u>Fact:</u> This Court previously concluded that “[t]here is also no evidence before the court that the State is targeting Christian bakers for Unruh Act enforcement” <u>Evidence:</u> Mann Decl., ¶ 8, Ex. 6, p. 6 of 8 [3/2/18 Order Denying DFEH’s Order to Show Cause Re: Preliminary Injunction, attachment].	<u>Objection/Disputed.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) This is not a fact but a legal conclusion and a description of the procedural history of this case. (See <i>Andrews Farms v. Calcot, Ltd.</i> (E.D. Cal. 2010) 693 F.Supp.2d 1154, 1167 [“Plaintiffs supporting evidence cites to this Court’s MTD Order. . . . Plaintiffs’ statement of ‘fact’ is a legal conclusion that is unsupported by legal authority or analysis”].)

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48.	<u>Fact:</u> Defendants allege that “The DFEH is precluded from bringing this lawsuit because it is a blatant abuse of process.” <u>Evidence:</u> Mann Decl., ¶ 5, Ex. 3 [Defendants’ Verified First Amended Answer to Plaintiff’s First Amended Complaint, 13:22-28].	<u>Objection/Disputed.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) This is not a fact but a legal conclusion and a description of the procedural history of this case. (See <i>Quiroz, supra</i>, 140 Cal.App.4th at 1271, fn.16 [“the determination as to what claim was pleaded by the initial complaint is not a statement of material fact on which summary adjudication, or anything else, turned. It is rather a legal conclusion properly reached based on an examination of the four corners of the pleading”].)
48a.	<u>Defendants’ Additional Undisputed Material Fact</u> During a discovery hearing in this case, in response to Defendants argument that the Real Parties in Interest may have been primarily looking for a lawsuit, counsel for the DFEH responded with the following statement. “Plaintiffs have looked for cases to push the law forever. Rosa Parks was not just happened to be taking the bus that day. [sic] So whether or not there is knowledge going in there does not change the fact that there was a violation.” <u>Evidence:</u> Trissell Decl., ¶ 13 & Ex. A	

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Issue Six—Defendants’ Fifth Affirmative Defense (Trespass: Fraudulent Intent to Gain Access) fails because it is without merit as applied to DFEH

Moving Party’s Undisputed Material Facts & Supporting Evidence	Opposing Party’s Response & Supporting Evidence
49. Plaintiff incorporates Undisputed Material Fact Nos. 1-24.	See Response to ## 1-24.
49a. Defendants incorporate Disputed Material Fact No. 44a	
50. <u>Fact:</u> Defendants allege that “The DFEH’s claims are barred because the Rodriguez-Del Rios gained access to Tastries Bakery based on their fraudulent intent to trigger this meritless lawsuit.” <u>Evidence:</u> Mann Decl., ¶ 5, Ex. 3 [Defendants’ Verified First Amended Answer to Plaintiff’s First Amended Complaint, 14:2-8].	<u>Objection/Disputed.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) This is not a fact but a legal conclusion and a description of the procedural history of this case. (See <i>Quiroz, supra</i>, 140 Cal.App.4th at 1271, fn.16 [“the determination as to what claim was pleaded by the initial complaint is not a statement of material fact on which summary adjudication, or anything else, turned. It is rather a legal conclusion properly reached based on an examination of the four corners of the pleading”].)

Issue Seven—Defendants’ Sixth Affirmative Defense (Justification) is without merit and fails because it is not applicable to civil cases or as applied to DFEH

Moving Party’s Undisputed Material Facts & Supporting Evidence	Opposing Party’s Response & Supporting Evidence
51. Plaintiff incorporates Undisputed Material Fact Nos. 1-24.	See Response to ## 1-24.
52. <u>Fact:</u> Defendants allege that “DFEH’s claims are meritless because Miller and Tastries were fully justified in lawfully exercising their free speech and free exercise rights under the First Amendment to the United States Constitution.” <u>Evidence:</u> Mann Decl., ¶ 5, Ex. 3 [Defendants’ Verified First Amended Answer to Plaintiff’s First Amended Complaint, 14:9-14].	<u>Objection/Disputed.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) This is not a fact but a legal conclusion and a description of the procedural history of this case. (See <i>Quiroz, supra</i>, 140 Cal.App.4th at 1271, fn.16 [“the determination as to what claim was pleaded by the initial complaint is not a statement of material fact on which summary adjudication, or anything else, turned. It is rather a legal conclusion properly reached based on an examination of the four corners of the pleading”].)
52a. <u>Defendants’ Additional Disputed Material Fact</u> Defendants’ policy of refusing to make cakes that celebrate messages offensive to them, but instead connecting customers who request such cakes with other bakers, is both rational, and good social practice, to make sure all customers are served. <u>Evidence:</u> • 2d Miller Decl., ¶¶ 14-19 • 3d Miller Decl., ¶ 9	

Issue Eight—Defendants’ Seventh Affirmative Defense (Estoppel) is without merit as applied to DFEH

Moving Party’s Undisputed Material Facts & Supporting Evidence		Opposing Party’s Response & Supporting Evidence
53.	Plaintiff incorporates Undisputed Material Fact Nos. 1-24.	See Response to ## 1-24.
53a.	Defendants incorporate Disputed Material Fact No. 44a	
54.	<u>Fact:</u> Defendants allege that “The DFEH’s claims are estopped because the Rodriguez-Del Rios’ conduct in triggering this lawsuit was fraudulent.” <u>Evidence:</u> Mann Decl., ¶ 5, Ex. 3 [Defendants’ Verified First Amended Answer to Plaintiff’s First Amended Complaint, 14:15-18].	<u>Objection/Disputed.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) This is not a fact but a legal conclusion and a description of the procedural history of this case. (See <i>Quiroz, supra</i>, 140 Cal.App.4th at 1271, fn.16 [“the determination as to what claim was pleaded by the initial complaint is not a statement of material fact on which summary adjudication, or anything else, turned. It is rather a legal conclusion properly reached based on an examination of the four corners of the pleading”].)

Issue Nine—Defendants’ Eighth Affirmative Defense (No Injury) is without merit and fails because the Rodriguez-Del Rios suffered injury and because DFEH seeks only statutory minimum damages

Moving Party’s Undisputed Material Facts & Supporting Evidence	Opposing Party’s Response & Supporting Evidence
55. Plaintiff incorporates Undisputed Material Fact Nos. 1-24.	See Response to ## 1-24.
56. <u>Fact:</u> Defendants allege that “The DFEH’s claims should be dismissed because, unlike Miller and Tastries, the Rodriguez-Del Rios have suffered no actual injury.” <u>Evidence:</u> Mann Decl., ¶ 5, Ex. 3 [Defendants’ Verified First Amended Answer to Plaintiff’s First Amended Complaint, 14:19-22].	<u>Objection/Disputed.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i> , 121 Cal.App.4th at 105.) This is not a fact but a legal conclusion and a description of the procedural history of this case. (See <i>Quiroz, supra</i> , 140 Cal.App.4th at 1271, fn.16 [“the determination as to what claim was pleaded by the initial complaint is not a statement of material fact on which summary adjudication, or anything else, turned. It is rather a legal conclusion properly reached based on an examination of the four corners of the pleading”].)
56a <u>Defendants’ Additional Undisputed Material Fact</u> The DFEH is only seeking statutory damages, not actual or punitive damages, in this action. <u>Evidence</u> • Defs. Ex. 2, DFEH Resp. to Tastries FROGs, Nos. 6.1, 6.2, 6.3, 6.4, 6.5, 6.6, 6.7, 9.1, 10.2, 10.3, • Defs. Ex. 5, DFEH Resp. to Tastries RPDs Nos. 3, 4, 5, 6	

Issue Ten—Defendants’ Ninth Affirmative Defense (Punitive Damages Not Available) is without merit and fails because defendants’ actions were deliberate, willful, and taken in conscious disregard of the rights of the Rodriguez Del Rios

Moving Party’s Undisputed Material Facts & Supporting Evidence		Opposing Party’s Response & Supporting Evidence
57.	Plaintiff incorporates Undisputed Material Fact Nos. 1-24.	See Response to ## 1-24.
57a.	Defendants incorporate Undisputed Material Fact No. 56a	
58.	<u>Fact:</u> Defendants allege that “The DFEH’s complaint fails to state facts sufficient to set forth a cause of action for punitive damages.” <u>Evidence:</u> Mann Decl., ¶ 5, Ex. 3 [Defendants’ Verified First Amended Answer to Plaintiff’s First Amended Complaint, 14:23-26].	<u>Objection/Disputed.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) This is not a fact but a legal conclusion and a description of the procedural history of this case. (See <i>Quiroz, supra</i>, 140 Cal.App.4th at 1271, fn.16 [“the determination as to what claim was pleaded by the initial complaint is not a statement of material fact on which summary adjudication, or anything else, turned. It is rather a legal conclusion properly reached based on an examination of the four corners of the pleading”].)

Issue Eleven—Defendants’ Tenth Affirmative Defense (Attorney’s Fees Not Available) is without merit and fails because attorney’s fees are available to the prevailing party under Government Code section 12965, subdivision (b)

Moving Party’s Undisputed Material Facts & Supporting Evidence	Opposing Party’s Response & Supporting Evidence
59. Plaintiff incorporates Undisputed Material Fact Nos. 1-24.	See Response to ## 1-24.
59a Defendants incorporate Undisputed Material Fact No. 56a	
60. <u>Fact:</u> Defendants allege that “The DFEH’s claims for attorney’s fees should be denied because there is no factual basis for such an award..” <u>Evidence:</u> Mann Decl., ¶ 5, Ex. 3 [Defendants’ Verified First Amended Answer to Plaintiff’s First Amended Complaint, 15:1-4].	<u>Objection/Disputed.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) This is not a fact but a legal conclusion and a description of the procedural history of this case. (See <i>Quiroz, supra</i>, 140 Cal.App.4th at 1271, fn.16 [“the determination as to what claim was pleaded by the initial complaint is not a statement of material fact on which summary adjudication, or anything else, turned. It is rather a legal conclusion properly reached based on an examination of the four corners of the pleading”].)

Issue Twelve—Defendants’ eleventh affirmative defense (State Free Exercise Provision) fails as without merit because the Unruh Civil Rights Act is a neutral and generally applicable public accommodations law

Moving Party’s Undisputed Material Facts & Supporting Evidence	Opposing Party’s Response & Supporting Evidence
61. Plaintiff incorporates Undisputed Material Fact Nos. 1-24 and 69-75.	See Response to ## 1-24 & 69-75.
61a Defendants incorporate Undisputed Material Facts Nos. 21a & 21b	
62. <u>Fact:</u> Miller states that “25-30% of Tastries’ sales revenue comes from designing custom wedding cakes.” <u>Evidence:</u> Mann Decl., ¶ 10, Ex. 8 [Miller Decl., 7:7].	<u>Objection/Disputed.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) The undisputed evidence is that approximately 30% of Defendants’ revenue comes from custom wedding cakes, without which the bakery is not financially viable (Plt. Ex. 8, 1st Miller Decl., 7:7; 2d Miller Decl., ¶ 52), not merely that Defendants have “state[d]” as much. (See <i>Reeves, supra</i>, 121 Cal.App.4th at 105 [fact should state what the evidence is, not what a party testified the evidence is].)
62a. <u>Defendants’ Additional Undisputed Material Fact</u> The revenue from creating wedding cakes is a substantial portion of Defendants’ bakery business. <u>Evidence:</u> 2d Miller Decl., ¶ 52	
62b. <u>Defendants’ Additional Undisputed Material Fact</u> Without the revenue from making wedding cakes, Defendants’ bakery	

1		business is not financially viable.	
2		<u>Evidence</u>	
3		2d Miller Decl., ¶ 52	
4	62c.	<u>Defendants' Additional Undisputed Material Fact</u>	
5		On August 26, 2017, at the same time	
6		that Defendants declined to make Real	
7		Parties' wedding cake, Defendants	
8		offered to connect Real Parties with	
9		another bakery that could make their	
10		cake.	
11		<u>Evidence:</u>	
12		• 2d Miller Decl., ¶¶ 18, 33–38,	
13		43	
14		• Defs. Ex. 1, Compl., 2:27–3:4,	
15		8:19–21, 11:10–11, 11:13–15	
16		• Defs. Ex. 3, DFEH Resp. to	
17		Tastries SROGs No. 24	
18		• Defs. Ex. 14, Mireya Dep.,	
19		64:25–65:12	
20		• Defs. Ex. 15, Samuel Dep.,	
21		47:19–49:15, 54:17–55:3	
22		Defs. Ex. 16, Patrick Dep., 60:14–62:2	
23	62d.	Defendants incorporate Undisputed	
24		Material Facts Nos. 22a & 24a	
25	63.	<u>Fact:</u>	<u>Objection/Disputed.</u>
26		Defendants allege that “DFEH’s	Defendants object to this “fact” as this
27		interpretation and enforcement of the	statement is defective and in violation of the
28		Unruh Act target and discriminate	requirements of California law. (See Cal.
		against Miller and Tastries in violation	Rules of Court, rule 3.1350; <i>Reeves, supra</i> , 121
		of article 1, section 4 of the California	Cal.App.4th at 105.) This is not a fact but a
		Constitution.”	legal conclusion and a description of the
		<u>Evidence:</u>	procedural history of this case. (See <i>Quiroz</i> ,
			<i>supra</i> , 140 Cal.App.4th at 1271, fn.16 [“the

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	Mann Decl., ¶ 5, Ex. 3 [Defendants’ Verified First Amended Answer to Plaintiff’s First Amended Complaint, 15:5-19].	determination as to what claim was pleaded by the initial complaint is not a statement of material fact on which summary adjudication, or anything else, turned. It is rather a legal conclusion properly reached based on an examination of the four corners of the pleading”].)
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Issue Thirteen—Defendants’ twelfth affirmative defense (Federal Free Exercise Clause) fails as without merit because the Unruh Civil Rights Act as applied here is a neutral and generally applicable public accommodations law

Moving Party’s Undisputed Material Facts & Supporting Evidence	Opposing Party’s Response & Supporting Evidence
64. Plaintiff incorporates Undisputed Material Fact Nos. 1-24 and 69-75.	See Response to ## 1-24 & 69-75.
64a. Defendants incorporate Undisputed Material Facts Nos. 21a, 21b, 22a, 24a, 62a, 62b, 62c, & 62d.	
65. <u>Fact:</u> Defendants allege that “DFEH’s interpretation and enforcement of the Unruh Act target and discriminate against Miller and Tastries in violation of the Free Exercise Clause of the First Amendment to the United States Constitution.” <u>Evidence:</u> Mann Decl., ¶ 5, Ex. 3 [Defendants’ Verified First Amended Answer to Plaintiff’s First Amended Complaint, 15:20-16:7].	<u>Objection/Disputed.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) This is not a fact but a legal conclusion and a description of the procedural history of this case. (See <i>Quiroz, supra</i>, 140 Cal.App.4th at 1271, fn.16 [“the determination as to what claim was pleaded by the initial complaint is not a statement of material fact on which summary adjudication, or anything else, turned. It is rather a legal conclusion properly reached based on an examination of the four corners of the pleading”].)
65a <u>Defendants’ Additional Undisputed Material Fact</u> If Defendants ceased making all wedding cakes, that would cause a material decrease in the bakery’s revenue. <u>Evidence:</u> • 2d Miller Decl., ¶ 52	

1	65b	<u>Defendants' Additional Undisputed Material Fact</u>	
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3		During the DFEH's administrative investigation, and presently,	
4		Defendants contended that they objected to sending any message that celebrated any form of marriage except between one man and one woman.	
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6		<u>Evidence:</u>	
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8		• Declaration of Jeffrey M. Trissell, Esq. in Support of Defendants' Motion for Summary Judgment or, in the alternative, Summary Adjudication [1st Trissell Decl.], ¶ 9	
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13		• 2d Miller Decl., ¶¶ 10–11, 19–21, 24 & Ex. A	
14			
15	65c	<u>Defendants' Additional Undisputed Material Fact</u>	
16		The DFEH does not believe that expressive business owners violate the Unruh Act if they decline to create a custom item expressing homophobic or anti-LGBT messages, but still contends that Defendants violated the Unruh Act.	
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20		<u>Evidence:</u>	
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22		• Defs. Ex. 9, DFEH Resp. to Miller RFA's No. 4, 22	
23			
24		• Defs. Ex. 6, DFEH Resp. to Miller FROGs No. 14.1	
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26	65d	<u>Defendants' Additional Undisputed Material Fact</u>	
27		The DFEH does not believe that the Unruh Act requires cake artists create custom cakes that they consider	
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	offensive, but still contends that Defendants violated the Unruh Act. <u>Evidence:</u> • Defs. Ex. 9, DFEH Resp. to Miller RFA’s No. 5, 22 • Defs. Ex. 6, DFEH Resp. to Miller FROGs No. 14.1	
65e	<u>Defendants’ Additional Undisputed Material Fact</u> The DFEH purports to not use its enforcement authority under the Unruh Act to compel speech, but still contends that Defendants violated the Unruh Act. <u>Evidence:</u> • Defs. Ex. 9, DFEH Resp. to Miller RFA’s No. 6, 22 • Defs. Ex. 6, DFEH Resp. to Miller FROGs No. 14.1	
65f	<u>Defendants’ Additional Undisputed Material Fact</u> The DFEH believes that the Unruh Act does not require businesses to create custom cakes that express messages they would not communicate for anyone, but still contends that Defendants violated the Unruh Act. <u>Evidence:</u> • Defs. Ex. 9, DFEH Resp. to Miller RFA’s No. 7, 22 • Defs. Ex. 6, DFEH Resp. to Miller FROGs No. 14.1	

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65g	<u>Defendants’ Additional Undisputed Material Fact</u> Defendants responses to the DFEH’s administrative interrogatories were due on December 15, 2017. Nevertheless, without waiting to hear from Defendants, on December 13, 2021, the DFEH initiated a petition for preliminary injunctive relief with Case No. BCV-17-102855. The next day, the DFEH sought a temporary restraining order and an order to show cause re: preliminary injunction. <u>Evidence:</u> • 1st Trissell Decl., ¶¶ 2–6	
65h	<u>Defendants’ Additional Undisputed Material Fact</u> The DFEH brought the prior action with Case No. BCV-17-102855 less than 10 days after oral argument in the Supreme Court case <i>Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com’n</i> (2018) 138 S.Ct. 1719 <u>Evidence:</u> • 1st Trissell Decl., ¶ 7	
65i	<u>Defendants’ Additional Undisputed Material Fact</u> When the court in the prior action set an OSC re: preliminary injunction for February 2, 2021, as part of its aggressive litigation tactics, on January 10, 2018, the DFEH filed a revised memorandum in support of their motion for a preliminary injunction motion.	

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	<u>Evidence:</u> • 1st Trissell Decl., ¶ 8	
65j	<u>Defendants’ Additional Undisputed Material Fact</u> During a discovery hearing in this case, in response to Defendants argument that the Real Parties in Interest may have been primarily looking for a lawsuit, counsel for the DFEH responded with the following statement. “Plaintiffs have looked for cases to push the law forever. Rosa Parks was not just happened to be taking the bus that day. [sic] So whether or not there is knowledge going in there does not change the fact that there was a violation.” <u>Evidence:</u> • 1st Trissell Decl., ¶ 13 & Ex. A	
65k.	<u>Defendants’ Additional Undisputed Material Fact</u> The DFEH seeks to compel Defendants to provide wedding cakes for same-sex weddings if they do so for traditional, opposite-sex weddings. <u>Evidence:</u> • Defs. Ex. 1, Compl., Prayer ¶ 2 • Defs. Ex. 3, DFEH Resp. to Tastries SROGs No. 23	

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Issue Fourteen—Defendants’ thirteenth affirmative defense (Federal Free Speech Clause) fails as without merit because application of the Unruh Civil Rights Act here was content neutral and did not compel defendants’ speech

Moving Party’s Undisputed Material Facts & Supporting Evidence	Opposing Party’s Response & Supporting Evidence
66. Plaintiff incorporates Undisputed Material Fact Nos. 1-24.	See Response to ## 1-24.
67. <u>Fact:</u> For pre-ordered Tastries cakes, customers decide the details, often with help from a Tastries employee, filling out a form to select the characteristics of their cake: size, shape, number of tiers, colors, frosting, filling, and decorations. <u>Evidence:</u> Mann Decl., ¶ 11, Ex. 9 [Miller Depo., 61:5-12; 61:19-21; 58:11-25, Ex. 3].	<u>Disputed.</u> Ordering a custom wedding cake from Defendants involves a <i>collaborative</i> process between Defendants and the client in selecting the number of tiers, the size, the shape, the cake flavors, the filling flavors, the types of frosting, and other options. (2d Miller Decl., ¶¶ 25-27, 29 & Ex. B; Defs. Ex. 1, Compl., 5:23-26, 6:20-21.)
68. <u>Fact:</u> Customers regularly reference a pre-existing case cake, display cake, or photo of an existing cake, when describing to Tastries the cake design they want. <u>Evidence:</u> Mann Decl., ¶ 11, Ex. 9 [Miller Depo., 41:11-16; 43:4-11; 59:12-22; 61:5-12]; Mann Decl., ¶ 12, Ex. 10 [Perez Depo., 16:6-21; 17:25-18:5].	<u>Undisputed.</u>
68a. <u>Defendants’ Additional Undisputed Material Fact</u> When customers reference a pre-existing case cake, display cake, or photo of an existing cake, these are for inspiration only, to help communicate ideas more quickly than words, and oftentimes to identify different characteristics from different	

1		cakes, since a picture is worth a thousand words. Then, based on the pictures	
2		provided, in collaboration with the	
3		customers, Defendants often combine the	
4		characteristics the customer wants into a	
5		hand drawn sketch.	
6		Tastries Bakery's custom products are	
7		designed to meet customer specifications.	
8		The team of designers (led by Defendant	
9		Miller) start with the customer's vision and	
10		present options to create a final design that	
11		fits the theme and budget for each occasion.	
12		Cake designs can range from simple to	
13		elaborate but, all styles require a skilled	
14		decorator, and each design portrays the	
15		image or expresses the sentiment intended	
16		by the customer.	
17		<u>Evidence:</u>	
18		• 2d Miller Decl., ¶ 29.	
19		• 3d Miller Decl., ¶¶ 12-15	
20	69.	<u>Fact:</u>	<u>Disputed.</u>
21		Miller does not participate in the design or	Miller is the owner and manager of
22		preparation of each and every pre-ordered	Tastries. Through her role, she is involved
23		cake.	with all orders. The bakery is open up to
24		<u>Evidence:</u>	12 hours a day. There is a staff of designers
25		Mann Decl., ¶ 11, Ex. 9 [Miller Depo.,	who work together to design the custom
26		65:7-10; 71:2-5; 71:18-20; 81:15-18];	cakes on a daily basis. Miller directs all
27		Mann Decl., ¶ 12, Ex. 10, [Perez Depo.,	aspects of the business and makes all
28		11:1-4].	decisions related to products, services and
			daily operations. While Defendant Miller
			does not necessarily physically participate
			in every custom cake order, they are all
			based on her recipes, she oversees the
			design process, is directly involved in the
			vast majority of wedding orders, and
			reviews every order to make weekly
			assignments for baking, decorating and
			deliveries. As the sole owner and manager,
			all activities of the bakery are a direct
			reflection on Defendant Miller. Her time is
			divided between custom design work,

		marketing, working the back, recipe development and management of the entire operations. (2d Miller Decl., ¶¶ 2, 25–27.; 3d Miller Decl., ¶¶ 3–5.)
69a.	<u>Defendants’ Additional Undisputed Material Fact</u> Defendant Tastries Bakery, as a corporation, itself participates in the design or preparation of a wedding cake, and objects (including on religious grounds) to its speech being used in a manner that violates its own policies. <u>Evidence:</u> • 2d Miller Decl., ¶¶ 2, 10, 15, 19, 24 • 3d Miller Decl., ¶ 5	
70.	<u>Fact:</u> Tastries can deliver, and has delivered, cakes to venues without becoming involved in weddings or other events by dropping off cakes before guests or participants arrive. <u>Evidence:</u> Mann Decl., ¶ 13, Ex. 11 [Deposition of Mike Miller [“Mike Miller Depo.”], 30:8-10; 20:15-22]; Mann Decl., ¶ 12, Ex. 10 [Perez Depo., 18:19-24; 19:24-20:3].	<u>Disputed.</u> The vast majority of all deliveries are made with family and/or guests present. It is unusual to deliver with no one present. With outdoor events, it is common to deliver near the start of the event (to get maximum shade or avoid damage to the cake). Tastries is occasionally asked to deliver after the start of the event. “Thank you” business cards are left with the cake. It is common for our customers to share at the event who made the cake and desserts and for the cake to be shown in social media posts of the event. If the cake were delivered without guests or participants present, that would be a random happenstance with no means of predicting it. (2d Miller Decl., ¶¶ 30–31; 3d Miller Decl., ¶¶ 16–18.)
71.	<u>Fact:</u> Miller testified that Tastries would sell <i>pre-made</i> case cakes to same-sex couples	<u>Objection.</u> Defendants object to this “fact” as this statement is defective and in violation of

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	celebrating their union and would even add a written congratulatory message to the couple. <u>Evidence:</u> Mann Decl., ¶ 11, Ex. 9 [Miller Depo., 45:17-47:7].	the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105 [fact should state what the evidence is, not what a party testified the evidence is].) <u>Disputed.</u> The evidence cited is objectionable and is objected to. (See Evid. Obj. No. 3 to Miller Depo., 45:17-47:7.) Further the evidence cited shows that the line of questioning concerned how Defendants would react if a same-sex couple attempted to set them up for a lawsuit by engaging in an unrealistic hypothetical of purchasing a random pre-made cake from the case, and asking Miller to write congratulatory words on it concerning their same-sex marriage. In response, Miller stated that she would simply give them the cake for free. The DFEH attorney repeatedly asked whether she would write the message, and in one instance, she failed to correct him otherwise. She would not write the message. (See Plt. Ex. 9, Miller Depo., 46:3-47:7; 3d Miller Decl., ¶¶ 23-26.)
72.	<u>Fact:</u> Tastries employees have provided pre-ordered wedding cakes to same-sex couples without Miller's knowledge on multiple occasions. <u>Evidence:</u> Mann Decl., ¶ 11, Ex. 9 [Miller Depo., 74:11-75:12]; Mann Decl., ¶ 12, Ex. 10 [Perez Depo., 22:24-26:6]; Mann Decl., ¶ 13, Ex. 11, [Mike Miller Depo., 41:4-15; 42:10-17].	<u>Undisputed.</u>

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1	72a	<u>Defendants' Additional Undisputed Material Fact</u>	
2		Defendants object to celebrating any form	
3		of marriage other than a marriage between	
4		one man and one woman.	
5		<u>Evidence</u>	
6		• 2d Miller Decl., ¶¶ 10-11, 19-21,	
7		24 & Ex. A	
8		• Defs. Ex. 1, Compl., 2:27-3:4, 8:8-	
9		18, 11:10-11, 11:13-15	
10		• Defs. Ex. 3, DFEH Resp. to	
11		Tastries SROGs Nos. 17, 22, 24	
12	72b	<u>Defendants' Additional Undisputed Material Fact</u>	
13		When Defendants found out that certain	
14		employees were violating Defendants'	
15		policies and engaging in speech and	
16		conduct that violated Defendants'	
17		philosophical and religious beliefs,	
18		Defendants put a stop to that practice.	
19		<u>Evidence:</u>	
20		• 3d Miller Decl., ¶ 9	
21	73.	<u>Fact:</u>	<u>Disputed.</u>
22		On one occasion, Miller saw a cake	Defendant Miller did not see the wedding
23		ordered for a same-sex wedding reception	cake, she saw an order form that did not
24		and did not recognize it as a wedding cake.	itself indicate that the cake was for a same-
25		<u>Evidence:</u>	sex wedding. (Plt. Ex. 9, Miller Depo.,
26		Mann Decl., ¶ 11, Ex. 9 [Miller Depo.,	77:3-18 & Errata to 77:8 [changing "I
27		77:3-18].	said" to "It said" referring to the order
28			form]; 3d Miller Decl., ¶¶ 7-8.)
	74.	<u>Fact:</u>	<u>Undisputed.</u>
		Thinking the wedding cake was a birthday	
		cake or for a Quinceañera, Miller approved	
		the order for delivery.	

1		<u>Evidence:</u>	
2		Mann Decl., ¶ 11, Ex. 9 [Miller Depo.,	
3		77:3-18].	
4	75.	<u>Fact:</u>	<u>Undisputed.</u>
5		The Rodriguez-Del Rios did not plan to	
6		order a cake topper from Tastries.	
7		<u>Evidence:</u>	
8		Mireya Decl., ¶ 4.	
9	75a	<u>Defendants' Additional Undisputed</u>	
10		<u>Material Fact</u>	
11		Real Parties did order a cake topper with	
12		two women that a Tastries employee	
13		would have been expected to place on their	
14		cake had they chosen to use it.	
15		<u>Evidence:</u>	
16		• Defs. Ex. 13, Eileen Depo., 88:21–	
17		89:2	
18		• Defs. Ex. 14, Mireya Depo.,	
19		153:23–154:1	
20		• Plt. Ex. 9, Miller Depo., 77:3–18	
21		[noting that Tastries employee	
22		placed topper on another	
23		customer's cake]	
24	76.	<u>Fact:</u>	<u>Disputed.</u>
25		The three-tiered cake the Rodriguez-Del	The two cake orders were in no way
26		Rios eventually ordered from another	similar in size, shape, décor or flavors.
27		baker, pictured in Figure 1 of the	
28		Memorandum of Points and Authorities,	The design the Real Parties chose from
		looked just like the cake they tried to order	Tiers of Joy was a messy rustic design with
		from Tastries.	flowers. The top tier was real cake and the
		<u>Evidence:</u>	bottom tiers were fake styrofoam.
		Mireya Decl., ¶ 7, Ex. B.	Additional cakes were made in the shape
			of bread loafs that were sliced and a scoop
			of frosting was added to the slice of cake.
			This was done not merely to supplement

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		the amount of cake, but to supplement the amount of cake flavors and frosting flavors, and the amount of combinations, in a manner not available from Tastries. The cake the Real Parties wanted from Tastries Bakery was a 3-tiered square cake with a smooth buttercream finish and teal ribbon around the bottom. They also wanted two sheet cakes with no design to slice in the back kitchen of their reception. (3d Miller Decl., ¶¶ 19–22; Defs. Ex. 13, Eileen Depo., 175:13–176:22 & Defs. Ex. 631; Defs. Ex. 14, Mireya Depo., 150:19–152:13 & Defs. Ex. 631; Defs. Ex. 15, Samuel Depo., 85:22–86:5; see also Evid. Obj. No. 4 to Mireya Decl., ¶ 7.) <u>Objection.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) There is nothing <i>material</i> about this fact. The design differences as to what the Real Parties intended to order from Tastries is not a material fact for this motion.
77.	<u>Fact:</u> The main cake the Rodriguez-Del Rios had at their wedding reception—that looked just like the cake they wanted to order from Tastries—had no written message. <u>Evidence:</u> Mireya Decl., ¶ 7.	<u>Objection.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) There is nothing <i>material</i> about this fact. The fact that the cake would transmit a message through symbols or art, and not writing, is immaterial. <u>Disputed.</u> The two cake orders were in no way similar in size, shape, décor or flavors.

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	The design the Real Parties chose from Tiers of Joy was a messy rustic design with flowers. The top tier was real cake and the bottom tiers were fake styrofoam. Additional cakes were made in the shape of bread loafs that were sliced and a scoop of frosting was added to the slice of cake. This was done not merely to supplement the amount of cake, but to supplement the amount of cake flavors and frosting flavors, and the amount of combinations, in a manner not available from Tastries. The cake the Real Parties wanted from Tastries Bakery was a 3-tiered square cake with a smooth buttercream finish and teal ribbon around the bottom. They also wanted two sheet cakes with no design to slice in the back kitchen of their reception. (3d Miller Decl., ¶¶19–22; Defs. Ex. 13, Eileen Depo., 175:13–176:22 & Defs. Ex. 631; Defs. Ex. 14, Mireya Depo., 150:19–152:13 & Defs. Ex. 631; Defs. Ex. 15, Samuel Depo., 85:22–86:5; see also Evid. Obj. No. 4 to Mireya Decl., ¶ 7.) Whether a cake is simple or elaborate (even without words or toppers incorporated) the cake is designed and created by Tastries Bakery to present the image or sentiment intended by the customer. That message can be enhanced by other items added to the cake display at the event, such as pictures, mementos, signs and a topper. While the customer is the one adding these items, their presence amplifies the message of the cake that was created by Tastries Bakery. (2d Miller Decl., ¶ 12; 3d Miller Decl., ¶¶ 12–15.) <u>Objection.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves</i>,
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		<i>supra</i> , 121 Cal.App.4th at 105.) There is nothing <i>material</i> about this fact. The design differences as to what the Real Parties intended to order from Tastries is not a material fact for this motion. Further, what is material is that the cake would transmit a message, not how it would, i.e., through symbols and art or through writing.
78.	<u>Fact:</u> The only difference between the main cake the Rodriguez-Del Rios had at their October 2017 wedding reception and the main cake they wanted to order from Tastries was that the main cake they had at their reception was decorated with real flowers, while the cake they wanted to order from Tastries cake would have had frosting-rosettes, and the frosting was more wavy than scaly. <u>Evidence:</u> Mireya Decl., ¶ 7.	<u>Disputed.</u> The two cake orders were in no way similar in size, shape, décor or flavors. The design the Real Parties chose from Tiers of Joy was a messy rustic design with flowers. The top tier was real cake and the bottom tiers were fake styrofoam. Additional cakes were made in the shape of bread loafs that were sliced and a scoop of frosting was added to the slice of cake. This was done not merely to supplement the amount of cake, but to supplement the amount of cake flavors and frosting flavors, and the amount of combinations, in a manner not available from Tastries. The cake the Real Parties wanted from Tastries Bakery was a 3-tiered square cake with a smooth buttercream finish and teal ribbon around the bottom. They also wanted two sheet cakes with no design to slice in the back kitchen of their reception. (3d Miller Decl., ¶¶ 19–22; Defs. Ex. 13, Eileen Depo., 175:13–176:22 & Defs. Ex. 631; Defs. Ex. 14, Mireya Depo., 150:19–152:13 & Defs. Ex. 631; Defs. Ex. 15, Samuel Depo., 85:22–86:5; see also Evid. Obj. No. 4 to Mireya Decl., ¶ 7.) <u>Objection.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See

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		Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i> , 121 Cal.App.4th at 105.) There is nothing <i>material</i> about this fact. The design differences as to what the Real Parties intended to order from Tastries is not a material fact for this motion.
79.	<u>Fact:</u> Instead of the sheet cake the couple tried to order from Tastries, they had loaf cakes at their wedding reception. <u>Evidence:</u> Mireya Decl., ¶ 7.	<u>Disputed.</u> The two cake orders were in no way similar in size, shape, décor or flavors. The design the Real Parties chose from Tiers of Joy was a messy rustic design with flowers. The top tier was real cake and the bottom tiers were fake styrofoam. Additional cakes were made in the shape of bread loafs that were sliced and a scoop of frosting was added to the slice of cake. This was done not merely to supplement the amount of cake, but to supplement the amount of cake flavors and frosting flavors, and the amount of combinations, in a manner not available from Tastries. The cake the Real Parties wanted from Tastries Bakery was a 3-tiered square cake with a smooth buttercream finish and teal ribbon around the bottom. They also wanted two sheet cakes with no design to slice in the back kitchen of their reception. (3d Miller Decl., ¶¶ 19–22; Defs. Ex. 13, Eileen Depo., 175:13–176:22 & Defs. Ex. 631; Defs. Ex. 14, Mireya Depo., 150:19–152:13 & Defs. Ex. 631; Defs. Ex. 15, Samuel Depo., 85:22–86:5; see also Evid. Obj. No. 4 to Mireya Decl., ¶ 7.) <u>Objection.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) There is nothing <i>material</i> about this fact. The

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1		design differences as to what the Real Parties intended to order from Tastries is not a material fact for this motion.
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3	80.	<u>Fact:</u>
4		Defendants allege that “DFEH’s interpretation and enforcement of the Unruh Act as applied violate Miller’s and Tastries’ free speech rights under the Free Speech Clause of the First Amendment to the United States Constitution.”
5		<u>Evidence:</u>
6		Mann Decl., ¶ 5, Ex. 3 [Defendants’ Verified First Amended Answer to Plaintiff’s First Amended Complaint, 16:8-19].
7		<u>Objection/Disputed.</u>
8		Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i> , 121 Cal.App.4th at 105.) This is not a fact but a legal conclusion and a description of the procedural history of this case. (See <i>Quiroz, supra</i> , 140 Cal.App.4th at 1271, fn.16 [“the determination as to what claim was pleaded by the initial complaint is not a statement of material fact on which summary adjudication, or anything else, turned. It is rather a legal conclusion properly reached based on an examination of the four corners of the pleading”].)
9		
10	80a.	<u>Defendants’ Additional Undisputed Material Fact</u>
11		All preordered wedding cakes made by Defendants are custom cakes.
12		<u>Evidence</u>
13		• 2d Miller Decl., ¶ 25 • Defs. Ex. 1, Compl., 5:17-18 • Defs. Ex. 17, Criollo Dep., 64:21-65:6
14		
15	80b.	<u>Defendants’ Additional Undisputed Material Fact</u>
16		Ordering a custom wedding cake from Defendants involves a collaborative process between Defendants and the client in selecting the number of tiers, the size, the shape, the cake flavors, the filling flavors, the types of frosting, and other
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	options. <u>Evidence</u> • 2d Miller Decl., ¶¶ 25–27, 29 & Ex. B • Defs. Ex. 1, Compl., 5:23–26, 6:20–21	
80c.	<u>Defendants’ Additional Undisputed Material Fact</u> The baking aspect of making a wedding cake is artistic. <u>Evidence</u> • Defs. Ex. 18, Johnson Dep., 85:16–86:3	
80d.	<u>Defendants’ Additional Undisputed Material Fact</u> The decorating aspect of making a wedding cake is artistic. <u>Evidence</u> • 2d Miller Decl., ¶ 25 & Ex. D • Defs. Ex. 14, Mireya Dep., 175:14–177:24 & Ex. 230 • Defs. Ex. 18, Johnson Dep., 64:1–9 • Defs. Ex. 17, Criollo Dep., 47:16–49:7, 49:22–50:22, 77:4–78:2, 112:1–18; Errata 49:6–7, 77:8–9, 78:2	
80e.	<u>Defendants’ Additional Undisputed Material Fact</u> Even simple, white, three-tiered wedding cakes such as Real Parties had at their wedding are artistic and beautiful.	

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	<u>Evidence</u> • Defs. Ex. 14, Mireya Dep., 153:5-17 • Defs. Ex. 16, Patrick Dep., 99:7-13 • Defs. Ex. 17, Criollo Dep., 47:16-49:7, 49:22-50:22, 77:4-78:2, 112:1-18; Errata 49:6-7, 77:8-9, 78:2 • Defs. Ex. 18, Johnson Dep., 64:1-9 • Defs. Ex. 631	
80f.	<u>Defendants' Additional Undisputed Material Fact</u> When Defendants design and create custom wedding cakes, they intend to express a message that is celebratory and that identifies the union of two individuals as a marriage. <u>Evidence</u> • 2d Miller Decl., ¶ 19 • Defs. Ex. 1, Compl., 2:27-3:4, 8:8-18, 11:10-11, 11:13-15	
80g.	<u>Defendants' Additional Undisputed Material Fact</u> The reasonable observer of Defendants' custom wedding cakes would identify them as expressing a message that is celebratory and that identifies the union of two individuals as a marriage. <u>Evidence</u> • 2d Miller Decl., ¶¶ 20-23, 28 & Ex. C • Defs. Ex. 1, Compl., 2:27-3:4, 8:8-18, 11:10-11, 11:13-15 • Defs. Ex. 3, DFEH Resp. to	

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	Tastries SROGs No. 14 • Defs. Ex. 13, Eileen Dep., 90:18-91:7, 171:6-173:9 & Exs. 627A, 627B • Defs. Ex. 14, Mireya Dep., 78:2-7:12 & Ex. 527, 99:9-100:16, 147:1-148:17 & Exs. 627A, 627B • Defs. Ex. 17, Criollo Dep., 85:5-86:6	
80h.	Defendants incorporate Undisputed Material Facts Nos. 21a, 21b, 22a, & 24a & 62c.	

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Issue Fifteen—Defendants’ fourteenth affirmative defense (Federal Due Process Clause) fails as without merit because defendants do not provide sufficient clear evidence to support the defense

Moving Party’s Undisputed Material Facts & Supporting Evidence		Opposing Party’s Response & Supporting Evidence
81.	Plaintiff incorporates Undisputed Material Fact Nos. 1-24.	See Response to ## 1-24.
82.	<u>Fact:</u> DFEH routinely investigates administrative complaints filed by complainants alleging violations of the Unruh Civil Rights Act (Civ. Code, § 51) (“Unruh”), and routinely files civil litigation based on alleged violations of Unruh. <u>Evidence:</u> Mann Decl., ¶ 2; Request for Judicial Notice.	<u>Objection/Disputed.</u> See Evid. Obj. No. 5 to Gregory Mann declaration.
83.	<u>Fact:</u> This Court previously concluded that “there’s no evidence before the Court that the Department is going around singling out Christian providers.” <u>Evidence:</u> Mann Decl., ¶ 7, Ex. 5 [2/2/18 Reporter’s Transcript of Proceedings, 30:6-16].	See Response to # 46.
84.	<u>Fact:</u> This Court previously concluded that “[t]here is also no evidence before the court that the State is targeting Christian bakers for Unruh Act enforcement”	See Response to # 47.

1		<u>Evidence:</u>	
2		Mann Decl., ¶ 8, Ex. 6 [3/2/18 Order	
3		Denying DFEH's Order to Show Cause	
4		Re: Preliminary Injunction, attachment,	
		p. 6 of 8].	
5	85.	<u>Fact:</u>	See Response to # 35.
6		This Court previously concluded that	
7		the "nature of the proceedings and	
8		evidence presented show that the	
9		Department, consistent with its	
10		mandate, has brought the instant	
11		complaint to vindicate a legally	
12		cognizable right belonging to the real	
13		parties in interest rather than to obtain	
14		an economic advantage over	
15		Defendants."	
16		<u>Evidence:</u>	
17		Mann Decl., ¶ 6, Ex. 4 [March 27, 2019	
18		Order Denying Defendants Catharine	
19		Miller's and Tastries' Anti-SLAPP	
20		Motion to Strike the Complaint, 5:22-	
21		25].	
22	86.	<u>Fact:</u>	<u>Objection/Disputed.</u>
23		Defendants allege that "DFEH's	Defendants object to this "fact" as this
24		interpretation and enforcement of the	statement is defective and in violation of the
25		Unruh Act infringe Miller's and	requirements of California law. (See Cal.
26		Tastries' rights under the Fourteenth	Rules of Court, rule 3.1350; <i>Reeves, supra</i> , 121
27		Amendment's Due Process Clause."	Cal.App.4th at 105.) This is not a fact but a
28		<u>Evidence:</u>	legal conclusion and a description of the
		Mann Decl., ¶ 5, Ex. 3 [Defendants'	procedural history of this case. (See <i>Quiroz,</i>
		Verified First Amended Answer to	<i>supra</i> , 140 Cal.App.4th at 1271, fn.16 ["the
		Plaintiff's First Amended Complaint,	determination as to what claim was pleaded
		16:20-17:2].	by the initial complaint is not a statement of
			material fact on which summary adjudication,
			or anything else, turned. It is rather a legal
			conclusion properly reached based on an
			examination of the four corners of the
			pleading"].)
	86a.	Defendants incorporate Undisputed	
		Material Facts Nos. 21a, 21b, 22a, 63c,	

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	65b, 65c, 64d, 65g, & 69a	
86b.	<u>Defendants’ Additional Undisputed Material Fact</u> DFEH never visited Tastries store or observed its business process, even though they were invited by Miller. <u>Evidence:</u> • 3d Miller Decl., ¶ 6	

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Issue Sixteen—Defendants’ fifteenth affirmative defense (Federal Equal Protection Clause) fails as without merit because defendants do not provide sufficient clear evidence to support the defense

Moving Party’s Undisputed Material Facts & Supporting Evidence	Opposing Party’s Response & Supporting Evidence
87. Plaintiff incorporates Undisputed Material Fact Nos. 1-24 and 82.	See Response to ## 1-24 & 82
88. <u>Fact:</u> This Court previously concluded that “there’s no evidence before the Court that the Department is going around singling out Christian providers.” <u>Evidence:</u> Mann Decl., ¶ 7, Ex. 5 [2/2/18 Reporter’s Transcript of Proceedings, 30:6-16].	See Response to # 46.
89. <u>Fact:</u> This Court previously concluded that “[t]here is also no evidence before the court that the State is targeting Christian bakers for Unruh Act enforcement” <u>Evidence:</u> Mann Decl., ¶ 8, Ex. 6 [3/2/18 Order Denying DFEH’s Order to Show Cause Re: Preliminary Injunction, attachment, p. 6 of 8].	See Response to # 47.
90. <u>Fact:</u> This Court previously concluded that the “nature of the proceedings and evidence presented show that the Department, consistent with its mandate, has brought the instant complaint to vindicate a legally cognizable right belonging to the real	See Response to # 35.

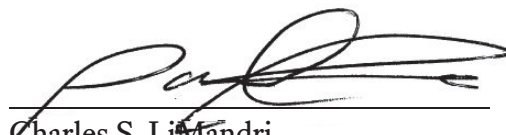
	parties in interest rather than to obtain an economic advantage over Defendants.” <u>Evidence:</u> Mann Decl., ¶ 6, Ex. 4 [March 27, 2019 Order Denying Defendants Catharine Miller’s and Tastries’ Anti-SLAPP Motion to Strike the Complaint, 5:22-25].	
91.	<u>Fact:</u> Defendants allege that “DFEH’s interpretation and enforcement of the Unruh Act as applied treat Miller’s and Tastries’ decisions to create speech and exercise their religious beliefs differently from those similarly situated to them, thereby violating their equal protection rights under the Fourteenth Amendment.” <u>Evidence:</u> Mann Decl., ¶ 5, Ex. 3 [Defendants’ Verified First Amended Answer to Plaintiff’s First Amended Complaint, 17:3-16].	<u>Objection/Disputed.</u> Defendants object to this “fact” as this statement is defective and in violation of the requirements of California law. (See Cal. Rules of Court, rule 3.1350; <i>Reeves, supra</i>, 121 Cal.App.4th at 105.) This is not a fact but a legal conclusion and a description of the procedural history of this case. (See <i>Quiroz, supra</i>, 140 Cal.App.4th at 1271, fn.16 [“the determination as to what claim was pleaded by the initial complaint is not a statement of material fact on which summary adjudication, or anything else, turned. It is rather a legal conclusion properly reached based on an examination of the four corners of the pleading”].)

Respectfully submitted,

LiMANDRI & JONNA LLP

Dated: October 6, 2021

By:


Charles S. LiMandri
Paul M. Jonna
Mark D. Myers
Jeffrey M. Trissell
Robert E. Weisenburger
Milan L. Brandon II
Attorneys for Defendants Cathy’s
Creations, Inc. and Catharine Miller

1 Charles S. LiMandri, SBN 110841
cslimandri@limandri.com
2 Paul M. Jonna, SBN 265389
pjonna@limandri.com
3 Jeffrey M. Trissell, SBN 292480
jtrissell@limandri.com
4 Milan L. Brandon II, SBN 326953
mbrandon@limandri.com
5 LiMANDRI & JONNA LLP
6 P.O. Box 9120
Rancho Santa Fe, California 92067
7 Telephone: (858) 759-9948
Facsimile: (858) 759-9938

8 Thomas Brejcha, *pro hac vice**
9 tbrejcha@thomasmoresociety.org
Peter Breen, *pro hac vice**
10 pbreen@thomasmoresociety.org
THOMAS MORE SOCIETY
11 309 W. Washington St., Ste. 1250
Chicago, IL 60606
12 Tel: (312) 782-1680
13 *Application forthcoming

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

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

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

20 Plaintiff,

21 v.

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

23 Defendants.

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

25 Real Parties in Interest.

CASE NO.: BCV-18-102633

IMAGED FILE

**DEFENDANTS CATHARINE
MILLER AND TASTRIES
BAKERY'S EVIDENTIARY
OBJECTIONS IN OPPOSITION
TO PLAINTIFF DFEH'S
MOTION FOR SUMMARY
JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION**

Date: Nov. 4, 2021

Time: 8:30 a.m.

Dept: 11

Judge: Hon. David R. Lampe

Action Filed: Oct. 17, 2018

Trial Date: Dec. 13, 2021

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DEFENDANTS' EVIDENTIARY OBJECTIONS
IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OR ADJUDICATION

RA.1445

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10/6/2021 4:24 PM
Kern County Superior Court
By Gricelda Evans, Deputy

Defendants Catharine Miller and Tastries Bakery hereby submit the following evidentiary objections to the evidence submitted by Plaintiff Department of Fair Employment and Housing in support of its Motion for Summary Judgment or, in the alternative, Summary Adjudication.

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1.	OBJECTION NO. 1: Mireya Rodriguez-Del Rio Deposition.....	3
2.	OBJECTION NO. 2: Eileen Rodriguez-Del Rio Deposition.....	4
3.	OBJECTION NO. 3: Catharine Miller Deposition	5
4.	OBJECTION NO. 4: Mireya Rodriguez-Del Rio Declaration	6
5.	OBJECTION NO. 5: Gregory J. Mann Declaration.....	8
6.	OBJECTION NO. 6: Mary Johnson Declaration, Para. 6	9
7.	OBJECTION NO. 7: Mary Johnson Declaration, Para. 11.....	10

1 **1. OBJECTION NO. 1: MIREYA RODRIGUEZ-DEL RIO DEPOSITION**

2 **1.1. Material Objected to**

3 Plaintiff Appendix Exhibit 12, Mireya Rodriguez-Del Rio Deposition, 21:22–22:5 (cited in
4 SSUMF No. 23):

5 Q: . . . So has the incident caused you emotional distress at any point
6 in time?

7 A. I would think it's normal to feel the anxiety again, the
8 overwhelming of the emotions, cause of headaches that, you know,
9 sometimes they are more severe than others, that it doesn't happen
10 all the time, that nervous and full of different kinds of emotions.
11 Angry, frustrated, mad, things like that. It's just—it was
12 overwhelming.

11 **1.2. Defendant's Grounds for Objection**

12 **Sham Submission/Estoppel.** “Admissions or concessions made during the course of
13 discovery govern and control over contrary declarations [or other evidentiary submissions] lodged
14 at a hearing on a motion for summary judgment.” (*Visueta v. General Motors Corp.* (1991) 234
15 Cal.App.3d 1609, 1613; see also *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1087
16 [concerning interrogatory responses: “It is well-established that ‘a party cannot create an issue of
17 fact by a declaration which contradicts his prior discovery responses.’ ”].)

18 Further, “[j]udicial estoppel applies where a party takes inconsistent positions that affect
19 the orderly administration of justice. Requirements for application of the rule include a party’s
20 taking two positions in judicial or administrative proceedings, success in the assertion of the first
21 position, inconsistency between the two positions, and a lack of ignorance, fraud, or mistake in
22 asserting the first position. The doctrine requires that the positions be clearly inconsistent so that
23 one necessarily excludes the other.” (*Kitty-Anne Music Co. v. Swan* (2003) 112 Cal.App.4th 30, 35
24 [cleaned up].)

25 Here, whether Real Parties were “overwhelmed, upset, and frustrated” is unknown because
26 Plaintiff has argued that it is irrelevant in this action and so refused to provide discovery regarding
27 it. (Defs. Ex. 5, DFEH Resp. to Tastries RPDs Nos. 3, 4, 5 & 6; see also Defs. Ex. 2, DFEH Resp.
28 to Tastries FROGs, No. 10.2.) Because Plaintiff DFEH contended that the Real Parties’ emotional

state was “not relevant to the subject matter of this action” it cannot now reverse course and argue it is. Alternatively, Plaintiff DFEH should be estopped from doing so.

1.3. Ruling on the Objection

Sustained: _____

Overruled: _____

2. OBJECTION NO. 2: EILEEN RODRIGUEZ-DEL RIO DEPOSITION

2.1. Material Objected to

Plaintiff Appendix Exhibit 13, Eileen Rodriguez-Del Rio Deposition, 52:11–53:3 (cited in SSUMF No. 23):

Q. Was there anything else said that you remember either by you, Mireya, or Patrick, or Sam, any statement stand out in your memory from that—from that visit?

A. After she said that “I don’t condone same sex marriages,” honestly, I do not recall because I was really upset after that when I walked out.

Q. Why were you upset?

A. Because I just got discriminated against because of who I’m married to.

Q. Had you ever experienced anything like that before?

A. Not like that, no. And not with my wife right there that is new—not new, but, like, she—I mean, just the look in her face, no. And my mother.

Q. Okay. And what—we’ll get into that day and what happened after in more detail in a little bit, but I just want to first understand your—your big picture recollection. So what happened after that? What—what happened next?

A. We walked out. I was upset, angry, frustrated. . . .

2.2. Defendant’s Grounds for Objection

Sham Submission/Estoppel. (*Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609 1613; *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1087; *Kitty-Anne Music Co. v.*

1 *Swan* (2003) 112 Cal.App.4th 30, 35.)

2 Here, whether Real Parties were “overwhelmed, upset, and frustrated” is unknown because
3 Plaintiff has argued that it is irrelevant in this action and so refused to provide discovery regarding
4 it. (Defs. Ex. 5, DFEH Resp. to Tastries RPDs Nos. 3, 4, 5 & 6; see also Defs. Ex. 2, DFEH Resp.
5 to Tastries FROGs, No. 10.2.) Because Plaintiff DFEH contended that the Real Parties’ emotional
6 state was “not relevant to the subject matter of this action” it cannot now reverse course and argue
7 it is. Alternatively, Plaintiff DFEH should be estopped from doing so.

8 **2.3. Ruling on the Objection**

9 Sustained: _____

10 Overruled: _____

11
12 **3. OBJECTION NO. 3: CATHARINE MILLER DEPOSITION**

13 **3.1. Material Objected to**

14 Plaintiff Appendix Exhibit 9, Catharine Miller Deposition, 45:17–47:7 (cited in SSUMF
15 No. 71):

16 Q. And it sounds like if somebody came in and wanted to use a pre-
17 made cake for the wedding, you don’t care, you’re still going to sell it
to them?

18 A. Yeah. Yes.

19 Q. If they wanted to add, like, “congratulations” couples’ name, and
20 it fit, is that something that Tastries would do?

21 A. I would do that because it is a case item that was not created for
22 the purpose of something. It was created for our case, for the needs
of whoever walked in the door.

23 Q. If a same-sex couple came in and wanted to get a pre-made cake
24 and add congratulations, the names, would Tastries sell that to them?

25 MR. LIMANDRI: Object. Incomplete hypothetical. Assumes facts
26 not in evidence. Calls for speculation. Go ahead and answer the
question if you can.

27 THE WITNESS: Say the question again.

28 BY MR. MANN:

1 Q. If a same-sex couple came in to purchase a case cake and wanted
2 Tastries to write a message of congratulations for their marriage,
3 would Tastries sell them that cake?

4 MR. LIMANDRI: Same objection.

5 THE WITNESS: I feel that you're trying to put me in a box. I feel
6 that there are several bakeries in town that would be very happy to do
7 a cake for them. If anybody at this point walked into my bakery and
8 asked me to do that, I would look at them and say I'm happy to write
9 that on your cake, because I know that you know what my feelings
10 are, and I want to show you that I care more about you as a person
11 than all this crap that's going on.

12 BY MR. MANN:

13 Q. So it sounds like that's a yes, Tastries would sell it to them and
14 put it on?

15 A. I probably wouldn't sell it to them. I'd probably give it to them.
16 Because I don't want any of their money for that if they're going to
17 do that to me, because that's discrimination against me.

18 3.2. Defendant's Grounds for Objection

19 **Incomplete hypothetical/Assumes facts not in evidence/Calls for speculation.** Here
20 Plaintiff DFEH submitted a wildly incomplete hypothetical based on a series of facts that have
21 never occurred and would never occur. (3d Miller Decl., ¶¶ 23–26 & Exs. H & I.)

22 3.3. Ruling on the Objection

23 Sustained: _____

24 Overruled: _____

25 4. OBJECTION NO. 4: MIREYA RODRIGUEZ-DEL RIO DECLARATION

26 4.1. Material Objected to

27 The Declaration of Mireya Rodriguez Del-Rio in Support of DFEH's Motion for Summary
28 Judgment or, in the Alternative, Summary Adjudication, paragraph 7, sentences 2–4 (cited in
SSUMF Nos. 76–79):

The main cake we had at our reception looked just like the one we
wanted to order from Tastries. The only differences were that the
cake we actually had was decorated with real flowers and the

1 buttercream was more wavy than scaly, while the one we wanted to
2 order from Tastries would have been decorated with frosting
3 rosettes. And instead of a matching sheet cake that we would have
4 ordered from Tastries, we had loaf cakes at our reception.

4.2. Defendant's Grounds for Objection

5 **Sham declaration.** "[W]hen discovery has produced an admission or concession on the
6 part of [a] party" it cannot later be contradicted by a sham declaration. (*D'Amico v. Board of Medical*
7 *Examiners* (1974) 11 Cal.3d 1, 21; see also *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th
8 1510, 1522 ["In a nutshell, the rule bars a party opposing summary judgment from filing a
9 declaration that purports to impeach his or her own prior sworn testimony."]; *Barton v. Elexsys*
10 *Intern., Inc.* (1998) 62 Cal.App.4th 1182, 1191 ["In Barton's declaration submitted in opposition to
11 defendant's motion for summary judgment, he described his conversations with Jonas and
12 Mandarin in slightly different terms from those he used in his deposition. To the extent these
13 descriptions directly contradict his discovery responses, they must be disregarded."].)

14 Here, the statement "[t]he only differences" is false. Eileen acknowledged in her deposition
15 the difference of the use of Styrofoam tiers and a cake bar to obtain far greater number of flavors
16 and flavor combinations. (Defs. Ex. 13, Eileen Depo., 175:13-176:22 & Defs. Ex. 631.) Mireya
17 testified that she wanted a look of fish scales on the cake from Tastries, but ordered instead rustic
18 waves from Tiers of Joy. (Defs. Ex. 14, Mireya Depo., 150:19-152:13 & Defs. Ex. 631.) She also
19 acknowledged the use of Styrofoam tiers and a cake bar to obtain far greater number of flavors and
20 flavor combinations. (*Id.*) Samuel also acknowledged the use of Styrofoam tiers and a cake bar to
21 obtain far greater number of flavors and flavor combinations. (Defs. Ex. 15, Samuel Depo., 85:22-
22 86:5.) These changes are meaningful. (3d Miller Decl., ¶¶ 19-22.)

4.3. Ruling on the Objection

24 Sustained: _____

25 Overruled: _____

1 **5. OBJECTION NO. 5: GREGORY J. MANN DECLARATION**

2 **5.1. Material Objected to**

3 The Declaration of Gregory J. Mann in Support of DFEH's Motion for Summary Judgment
4 or, in the Alternative, Summary Adjudication, paragraph 2 (cited in SSUMF No. 82:

5 DFEH routinely investigates administrative complaints filed by
6 complainants alleging violations of the Unruh Civil Rights Act (Civ.
7 Code, § 51) ("Unruh"), and routinely files civil litigation based on
8 alleged violations of Unruh. Recent and pending civil litigation of
9 alleged Unruh violations includes, but is not limited to:

10 a. *DFEH v. M&N Financing Corporation, et al.*, Los Angeles Superior
11 Court Case No. BC591206;

12 b. *DFEH v. CFG Jamacha, LLC dba Crunch Fitness, et al.*, San Diego
13 Superior Court Case No. 37-2018-00019066-CU-CR-CTL;

14 c. *DFEH v. Vasona Management, Inc., et al.*, Alameda Superior Court
15 Case No. RG20078727;

16 d. *DFEH v. Grisez-Buchanan LLC, et al.*, San Francisco Superior
17 Court Case No. CGC-17-557864; and

18 e. *DFEH v. Law School Admission Council, Inc.*, United States District
19 Court Northern District of California Case No. CV 12-1830-EMC.
20 (See the concurrently filed Plaintiff Department of Fair Employment
21 and Housing's Request for Judicial Notice in support of Motion for
22 Summary Judgment or, in the Alternative, Summary Adjudication.)

23 **5.2. Defendant's Grounds for Objection**

24 **Sham Submission/Estoppel.** (*Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609
25 1613; *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1087; *Kitty-Anne Music Co. v.*
26 *Swan* (2003) 112 Cal.App.4th 30, 35.)

27 Here, whether Plaintiff DFEH "routinely files civil litigation based on alleged violations of
28 Unruh," or files civil litigation for some other reason, is unknown. Plaintiff DFEH has argued that
its own litigation practices are irrelevant and non-discoverable. (See Defs. Ex. 11, Resp. to Miller
RPDs [Set Two]; Defs. Ex. 12, Resp. to Miller RPDs [Set Three].) Because Plaintiff DFEH
contended that its litigation practices were "not relevant to the subject matter of this action" it
cannot now reverse course and argue that they are. Alternatively, Plaintiff DFEH should be

1 estopped from doing so.

2 **Lacks Foundation.** Here, Attorney Mann’s declaration solely states that he is an attorney
3 for the Plaintiff. This is insufficient to lay a foundation for either the text of the paragraph or the
4 complaints described. Indeed, on none of the complaints is Attorney Mann listed as counsel of
5 record. (*San Jose Neurospine v. Aetna Health of California, Inc.* (2020) 45 Cal.App.5th 953, 961–962
6 [“But the declaration of SJN’s counsel did not state sufficient facts to lay a foundation for the
7 admissibility of this appeal letter, and the letter contained hearsay. Counsel indicated that he had
8 personal knowledge about that appeal. But he did not state sufficient foundational facts to
9 authenticate the document other than stating he was SJN’s lawyer. He did not state whether he was
10 familiar with SJN’s operations and procedures, whether he personally knew what treatment S.H.
11 received, whether he had participated in the decision to appeal, or how he would personally know
12 that such an appeal was authorized by SJN.”].)

13 **5.3. Ruling on the Objection**

14 Sustained: _____

15 Overruled: _____

16
17 **6. OBJECTION NO. 6: MARY JOHNSON DECLARATION, PARA. 6**

18 **6.1. Material Objected to**

19 Plaintiff Appendix Exhibit 14: Declaration of Mary Johnson, dated February 19, 2019
20 paragraph 6: “Many Tastries cakes look the same as cakes sold at grocery stores or other bakeries.
21 And many Tastries cakes, including pre-ordered or custom cakes, can be used for any number of
22 purposes, not just wedding celebrations.”

23 **6.2. Defendant’s Grounds for Objection**

24 **Improper Conclusion.** “Declarations must show the declarant’s personal knowledge and
25 competency to testify, *state facts and not just conclusions*, and not include inadmissible hearsay or
26 opinion.” (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761 [italics added]; see also *id.*
27 [“The declarations in support of a motion for summary judgment should be strictly construed
28 while the opposing declarations should be liberally construed.”].) The Court should “ignor[e] mer

conclusions.” (*Baron v. Mare* (1975) 47 Cal.App.3d 304, 309; see also *Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 11 [a submission “will be deemed insufficient when it is essentially conclusionary, argumentative or based on conjecture and speculation.”]; *Krantz v. BT Visual Images, L.L.C.* (2001) 89 Cal.App.4th 164, 173 [“In its motion for summary judgment, BTNA filed with the trial court declarations from three attorneys and a company executive stating that the alter ego and agency allegations of the amended complaint were untrue. Such conclusory statements, of course, are insufficient to furnish a basis for granting summary judgment.”]; *Colby v. Schwartz* (1978) 78 Cal.App.3d 885, 889 [“The declarations are deficient in that they contain in part only conclusions. [citation] The declarations merely assert without supportive factual allegations that defendants met the standard of care required of them.”].)

6.3. Ruling on the Objection

Sustained: _____

Overruled: _____

7. OBJECTION NO. 7: MARY JOHNSON DECLARATION, PARA. 11

7.1. Material Objected to

Plaintiff Appendix Exhibit 14: Declaration of Mary Johnson, dated February 19, 2019 paragraph 11: “Tastries sometimes offered for sale a pre-made case cake that looked similar to the cake pictured in Exhibit 1.”

7.2. Defendant’s Grounds for Objection

Sham declaration. “[W]hen discovery has produced an admission or concession on the part of [a] party” it cannot later be contradicted by a sham declaration. (*D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21; see also *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1522 [“In a nutshell, the rule bars a party opposing summary judgment from filing a declaration that purports to impeach his or her own prior sworn testimony.”].) Here, during her deposition, Mary Johnson admitted that the declaration was written by DFEH Attorney Timothy Martin, not her. (Defs. Ex. 18, Johnson Depo., 44:14–45:3.) She also admitted that Paragraph 11 in her declaration was misleading, if not outright false. She testified that a multiple-tiered cake would

1 not fit in the case, but rather only a single-tiered cake:

2 Q. . . . Looking at that cake from your declaration, the three-tiered
3 simple white-looking cake, was that a cake that was ever on display, a
4 cake like that ever on display at Tastries?

5 A. Similar to that, yes.

6 Q. Would that have been—a cake similar to that, would that have
7 ever been a case cake that somebody could buy?

8 A. Maybe not a three-tiered. But a one-tier design like that, yes, those
9 would be in the case.

10 (Def's. Ex. 18, Johnson Depo., 110:15–24.)

11 **7.3. Ruling on the Objection**

12 Sustained: _____

13 Overruled: _____

14 Respectfully submitted,

15 LiMANDRI & JONNA LLP

16 Dated: October 6, 2021

17 By: _____

18 Charles S. LiMandri

19 Paul M. Jonna

20 Mark D. Myers

21 Jeffrey M. Trissell

22 Robert E. Weisenburger

23 Milan L. Brandon II

24 *Attorneys for Defendants Cathy's*

25 *Creations, Inc. and Catharine Miller*

26 **IT IS SO ORDERED.**

27 **JUDGE OF THE SUPERIOR COURT**

28 Dated: _____

Hon. David R. Lampe

1 Charles S. LiMandri, SBN 110841
cslimandri@limandri.com
2 Paul M. Jonna, SBN 265389
pjonna@limandri.com
3 Jeffrey M. Trissell, SBN 292480
jtrissell@limandri.com
4 Milan L. Brandon II, SBN 326953
mbrandon@limandri.com
5 LiMANDRI & JONNA LLP
6 P.O. Box 9120
Rancho Santa Fe, California 92067
7 Telephone: (858) 759-9948
Facsimile: (858) 759-9938

8 Thomas Brejcha, *pro hac vice**
9 tbrejcha@thomasmoresociety.org
Peter Breen, *pro hac vice**
10 pbreen@thomasmoresociety.org
THOMAS MORE SOCIETY
11 309 W. Washington St., Ste. 1250
Chicago, IL 60606
12 Tel: (312) 782-1680
13 *Application forthcoming

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

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

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

20 Plaintiff,

21 v.

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

23 Defendants.

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

25 Real Parties in Interest.

CASE NO.: BCV-18-102633

IMAGED FILE

**APPENDIX OF EXHIBITS,
VOLUME IV, IN OPPOSITION
TO PLAINTIFF DFEH'S
MOTION FOR SUMMARY
JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION**

Date: Nov. 4, 2021

Time: 8:30 a.m.

Dept: 11

Judge: Hon. David R. Lampe

Action Filed: Oct. 17, 2018

Trial Date: Dec. 13, 2021

APPENDIX OF EXHIBITS

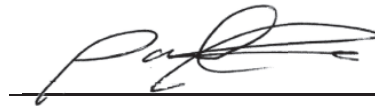
VOLUME IV

Exhibit 19	Article by Gary J. Gates entitled <i>LGB Families and Relationships: Analysis of the 2013 National Health Interview Survey</i> (Oct. 2014) published by THE WILLIAMS INSTITUTE, available online at http://perma.cc/W3LK-89H8 .	3
Exhibit 20	Article by Gregory M. Herek, et al., entitled <i>Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample</i> (2010), published in 7 SEXUALITY RES. & SOC. POL'Y 176, available online at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2927737/pdf/13178_2010_Article_17.pdf	11
Exhibit 21	Article by Tom Geoghegan entitled <i>The gay people against gay marriage</i> (Jun. 11, 2013) published by BBC NEWS, available online at: https://www.bbc.com/news/magazine-22758434 .	37
Exhibit 22	Article by Beth Daley entitled <i>Gay rebels: why some older homosexual men don't support same-sex marriage</i> (Nov. 5, 2017), published in THE CONVERSATION, available online at: https://theconversation.com/gay-rebels-why-some-older-homosexual-men-dont-support-same-sex-marriage-86205 .	42
Exhibit 23	Declaration of Reina Benitez, dated January 17, 2018, as filed in Kern County Case No. BCV-17-102855.	46

Respectfully submitted,

LiMANDRI & JONNA LLP

Dated: October 6, 2021

By: 

Charles S. LiMandri

Paul M. Jonna

Mark D. Myers

Jeffrey M. Trissell

Robert E. Weisenburger

Milan L. Brandon II

Attorneys for Defendants Cathy's

Creations, Inc. and Catharine Miller

EXHIBIT 19

LGB Families and Relationships: Analyses of the 2013 National Health Interview Survey



the
Williams
INSTITUTE

October 2014

by Gary J. Gates

Executive Summary

The addition of a sexual orientation identity measure to the 2013 National Health Interview Survey (NHIS) offers a new data source to consider characteristics of families and explore differences among those led by same-sex and different-sex married and unmarried couples and LGB individuals who are not married or cohabiting. These analyses consider differences and similarities across these groups with regard to demographic characteristics including gender, age, race/ethnicity, educational attainment, geographic location, and child-rearing.

The analyses suggest that there are an estimated 690,000 same-sex couples in the United States. Approximately 18% of whom, or more than 124,000, reported that they were married. If estimates of married same-sex couples are derived only from the portion of 2013 that followed the US Supreme Court ruling in *United States v. Windsor* and are not based on data collected prior to the ruling (which effectively provided for federal recognition of the marriages of same-sex couples), then the estimate of married same-sex couples increases to 130,000.

Other key findings from the analyses include:

- An estimated 4 in 10 LGB adults (40%) reported either being married or in a cohabiting relationship with a partner compared to 6 in 10 non-LGB adults (60%).
 - Among women, more than half who identified as lesbian (51%) were married or in a cohabiting partnership compared to 57% of non-LGB women. Among bisexual women, the comparable figure was 32%.
 - Just over a third of gay and bisexual men (35% and 34%, respectively) were coupled compared to 63% of non-LGB men.
- A higher proportion of same-sex couples lived in the West when compared to different-sex couples (32% v. 23%, respectively) while a lower portion lived in the Midwest (12% v. 23%, respectively). Among those not in a couple, LGB individuals were less likely than their non-LGB counterparts to live in the Midwest (15% v. 22%).
 - Married same-sex couples were much more likely than their different-sex counterparts to live in the Northeast (39% v. 17%, respectively), where marriage for same-sex couples was the most widely available in 2013. An estimated 12% of married same-sex couples lived in the South compared to 38% of their different-sex counterparts.
 - Unmarried same-sex couples were more likely than their unmarried different-sex couple counterparts to live in the West and less likely to live in the Midwest.
- Those in same-sex couples and LGB individuals who were not part of a couple were generally younger than their different-sex coupled and non-LGB counterparts, respectively.
- Same-sex couples were twice as likely as their different-sex counterparts to be inter-racial/ethnic (19% v. 9%, respectively).
- Those in same-sex couples, particularly married same-sex couples, and LGB individuals who were not in a couple were more likely than those in different-sex couples and non-LGB individuals, respectively, to have a college degree. Two-thirds of individuals in married same-sex couples (66%) had a college degree.
- An estimated 19% of same-sex couples and LGB individuals who were not in a couple were raising children under the age of 18 in the home.
 - An estimated 30,000 children under age 18 have married same-sex parents while 170,000 have unmarried same-sex parents.
 - Between 1.1 and 2 million children under age 18 have an LGB parent who is not part of a married or unmarried couple.

Introduction

Substantial demographic research exists focusing on analyses of cohabiting same-sex couples identified in US Census Bureau data (Black et al. 2000; Gates and Ost 2004; Gates and Cooke 2010; Baumle 2013; Kastanis and Wilson 2013). Unfortunately, the Census Bureau data do not provide a very accurate way to identify married same-sex couples (O'Connell and Feliz 2011; Gates and Steinberger 2009; Cohn 2014). Comparisons of demographic and geographic characteristics among those in married and unmarried same-sex couples along with lesbian, gay, or bisexual (LGB) individuals who do not have a spouse or cohabiting partner are relatively rare.

The addition of a sexual orientation identity measure to the 2013 National Health Interview Survey (NHIS) offers a new data source to consider characteristics of families and explore differences among those led by same-sex and different-sex married and unmarried couples and LGB individuals who are not married or cohabiting. These analyses consider differences and similarities across these groups with regard to demographic characteristics including gender, age, race/ethnicity, educational attainment, geographic location, and child-rearing.

Data and methodology

Table 1 presents details of the NHIS data used in these analyses. It is a publically-funded survey conducted by the National Center for Health Statistics (NCHS). The survey samples families in the US and collects information on all members of those families, including their relationship to a reference person identified in each family. It is this information that allows for identification of families led by married and unmarried same-sex or different-sex couples. An adult-only sample (drawn from the family respondents) includes a question that allows respondents to describe their sexual orientation identity.

Analyses include descriptions of family characteristics (e.g., region of residence, child-rearing) and characteristics of individual adults (e.g., age, race/ethnicity, educational attainment, sexual orientation identity). Estimates use weighting procedures provided by the NHIS that allow for population estimates and interpretation of findings to be considered representative of families and the adult population (aged 18 and older) in the US.

In charts and figures that compare estimates between same-sex and different-sex couples or LGB and non-LGB adults, differences that are statistically significant are shown in **boldface** while differences that are not statistically different are shown in *italics*.

Table 1. Survey characteristics.

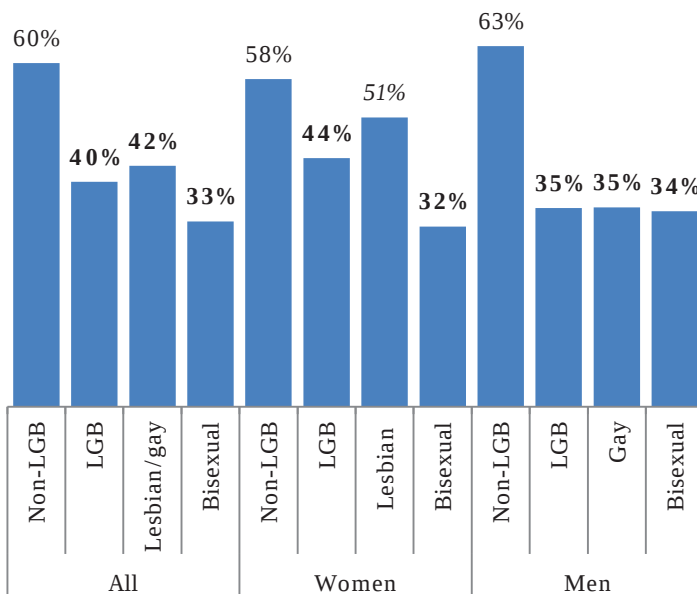
Survey	Survey sponsor	Data collection mode	Sample characteristics	Sexual orientation identity question (asked of adult sample)	Total sample size	LGB and couple sample sizes
National Health Interview Survey (2013)	Centers for Disease Control and Prevention, National Center for Health Statistics	Computer-Assisted Personal Interview conducted in the home. Respondents in the adult sample (aged 18 and older) provide their response to the sexual orientation identity question to an interviewer who then enters the response into a computer.	The NHIS includes three samples: - Representative sample of families residing in the US - Representative sample of the population of the US in those families (all ages) - Representative sample of adults aged 18 and older	Which of the following best represents how you think of yourself? - Lesbian or gay - Straight, that is, not gay - Bisexual - Something else - I don't know the answer	Families: 42,321 Population: 104,520 Adults: 34,577	Individuals: Lesbian/gay: 571 Bisexual: 233 Heterosexual: 32,546 Non-coupled LGB: 548 Couple families: Same-sex unmarried: 179 Same-sex married: 44 Different-sex unmarried: 599 Different-sex married: 19,84

Marriage and cohabitation

The NHIS data allow for identification of the gender composition of couples among those who say that they are legally married or in a cohabiting partnership.

An estimated 4 in 10 LGB adults (40%) reported either being married or in a cohabiting relationship with a partner (see Figure 1) compared to 6 in 10 non-LGB adults (60%). However, coupling patterns differed by sexual orientation and gender.

Figure 1. Percent of adults who are married or in a cohabiting partnership, by sex and sexual orientation identity.



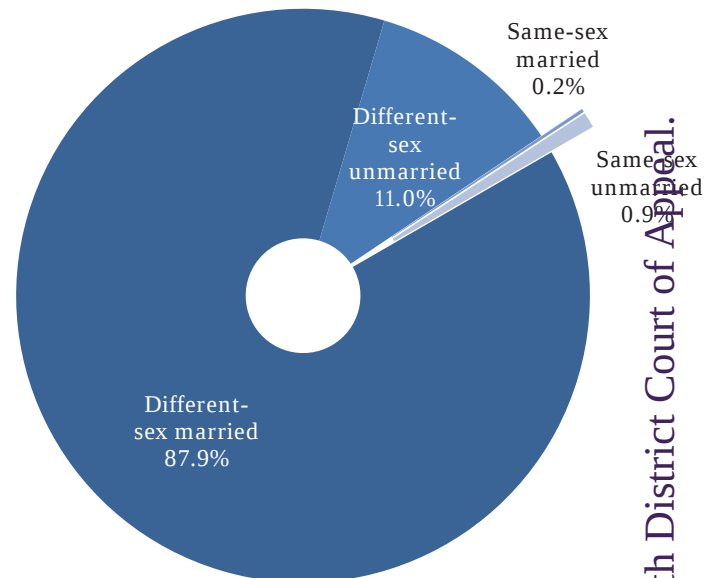
Among women, more than half who identified as lesbian (51%) were married or in a cohabiting partnership compared to 57% of non-LGB women, a difference that was not statistically significant. Among bisexual women, the comparable figure was 32%. Just over a third of gay and bisexual men (35% and 34%, respectively) were coupled compared to 63% of non-LGB men.

Just over half of the families in the US (52%) were led by a co-residential married or unmarried couple. Of families led by a couple, approximately 1.1% of the couples were same-sex (see Figure 2). This implies that there are approximately 64.6 million families in the United States and more than 690,000 same-sex couple families. Figures from Census 2010 showed approximately 650,000 same-sex couples in

the United States at that time (Gates and Cooke 2011).

Of the estimated 690,000 same-sex couples in the United States, approximately 18%, or more than 124,000 same-sex couples, reported that they were married. It is important to note that the NHIS data collection occurred throughout 2013 and in June of that year, the US Supreme Court issued its ruling in *United States v. Windsor* which effectively provided for federal recognition of the marriages of same-sex couples. It is possible that the prospect of federal recognition and the many benefits and protections that accompany that recognition could have prompted many more same-sex couples to marry in the latter part of the year.

Figure 2. Couples in the 2013 NHIS, by gender and relationship status.



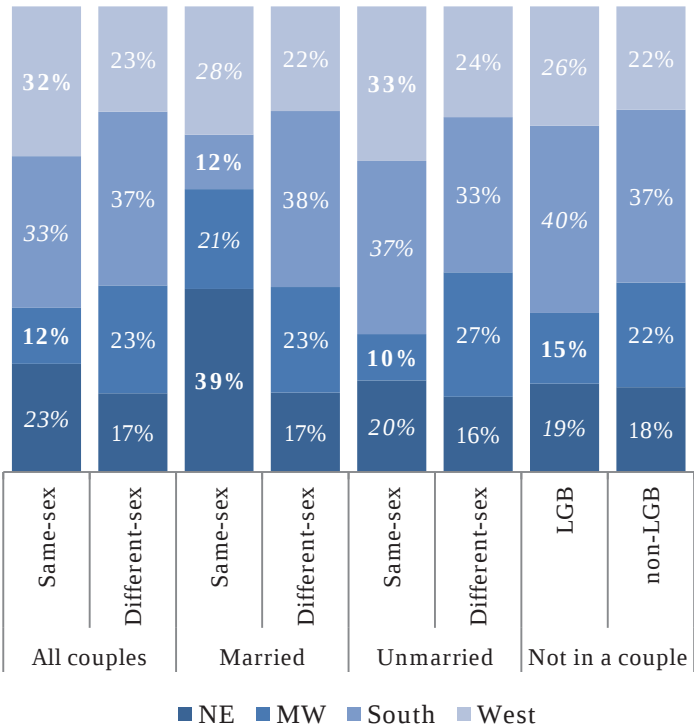
Among respondents who were surveyed prior to the *Windsor* decision (from January through June, 2013), approximately 17% of same-sex couples indicated that they were married. Among respondents who were surveyed in the second half of the year (July through December, 2013), after the Supreme Court ruling, the estimate was 19% of same-sex couples who were married. While the difference in these estimates was not statistically significant, it is notable that the proportion of married couples among different-sex couples (94%) did not vary at all in the two halves of the year.

If the estimate from the latter half of the year represents a more accurate assessment of the portion of same-sex couples who are legally married, then the figure may be closer to 130,000. These estimates would also imply that approximately one in ten (approximately 13,000) married same-sex couples may have gotten married after the *Windsor* decision.

Region of residence

Comparing individuals in same-sex couples to different-sex couples, the analyses suggest differences in the geographic distribution across regions in the US (see Figure 3). A higher proportion of same-sex couples lived in the West when compared to different-sex couples (32% v. 23%, respectively) while a lower portion lived in the Midwest (12% v. 23%, respectively).

Figure 3. Region of residence, by relationship status and sexual orientation.



Differences in this pattern when comparing same-sex and different-sex married and unmarried couples to each other highlight the likely impact of regional variation in laws regarding availability and recognition of marriages for same-sex couples. In

2013, the Northeast was the region of the country where marriage for same-sex couples was the most widely available for the longest period of time. Not surprisingly, married same-sex couples were much more likely than their different-sex counterparts to live in this region (39% v. 17%, respectively). The South represents the region where residents were least likely to live in a state where marriages of same-sex couples were legal. Only 12% of married same-sex couples lived in the South compared to 38% of their different-sex counterparts.

Like same-sex couples more generally, unmarried same-sex couples were more likely than their unmarried different-sex couple counterparts to live in the West and less likely to live in the Midwest. Among those not in a couple, LGB individuals were less likely than their non-LGB counterparts to live in the Midwest (15% v. 22%).

Age, race/ethnicity, and educational attainment

Among those in couples, individuals in same-sex couples were, on average, more than five years younger than those in different-sex couples (see Table 1). However, the difference in average age between individuals in married same-sex and different-sex couples was not statistically significant. Among unmarried couples, those in different-sex couples were nearly five years younger than those in same-sex couples. Among those who were not in a couple, LGB individuals were, on average, more than seven years younger than non-LGB individuals.

The analyses do not show significant differences in the portion of those in same-sex and different-sex married couples who were non-white nor were there significant differences in that characteristic between LGB and non-LGB individuals who were not in a couple. However, among unmarried couples, those in different-sex couples were more likely than their same-sex counterparts to be non-white (37% v. 24%, respectively).

Same-sex couples were more likely to be interracial/ethnic than their different-sex counterparts. Among all couples, same-sex couples were twice as likely as their different-sex counterparts to be interracial/ethnic (19% v. 9%, respectively). When couples were separated by marital status, the differences in the proportion who were interracial/ethnic were not statistically significant for either married or unmarried couples.

Table 1. Age, race/ethnicity, educational attainment, by couple type and relationship status.

	Age		Non-white		Inter-racial/ethnic		College (age 25+)	
	Same-sex	Different-sex	Same-sex	Different-sex	Same-sex	Different-sex	Same-sex	Different-sex
All couples	43.9	49.0	24%	29%	19%	9%	49%	34%
Married	46.5	50.5	23%	28%	13%	8%	66%	36%
Unmarried	43.3	37.2	24%	37%	21%	16%	45%	22%
Not in a couple	LGB	non-LGB	LGB	non-LGB	LGB	non-LGB	LGB	non-LGB
	37.1	44.3	35%	38%	N/A	N/A	40%	26%

Those in same-sex couples and LGB individuals who were not in a couple and were aged 25 and older were more likely than those in different-sex couples and non-LGB individuals, respectively, to have a college degree. This is particularly true among married individuals. Two-thirds of individuals aged 25 and older who were part of a married same-sex couple (66%) had a college degree compared to just over one-third of those in married different-sex couples (36%). Among those not in a couple who were aged 25 and older, 40% of LGB individuals had a college degree compared to 26% of their non-LGB counterparts.

Raising children

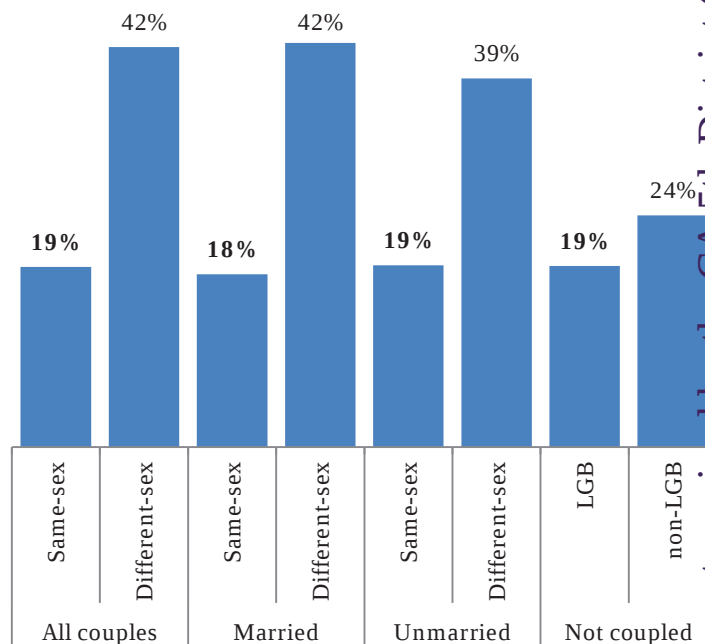
An estimated 19% of same-sex couples observed in the NHIS data were raising children under the age of 18 in the home (see Figure 4)¹, lower than the 42% of different-sex couples who were raising children. The portion of LGB individuals who were not in a couple and reported raising children was also 19%. Among same-sex couples, similar portions of married and unmarried couples were raising children (18% and 19%, respectively).

Assuming the NHIS estimate of 690,000 same-sex couples, these figures imply that approximately 131,000 same-sex couples are raising children in the US. Among same-sex couples with children, there was an average of 1.5 children in the home, suggesting that nearly 200,000 children under the age of 18 are being raised by same-sex couples. Of these children, approximately 30,000 have married parents while 170,000 have unmarried parents.

¹ Analyses of the 2011 American Community Survey found the same estimate for child-rearing among same-sex couples (Gates 2013).

An estimate for the number of LGB individuals who were not in a couple and raising children depends on what figure is used to estimate the overall proportion of LGB adults in the population. The estimate of LGB-identity among adults in the NHIS was 2.2%, which implies approximately 5.2 million LGB individuals (Gates 2014). If, consistent with the NHIS findings, 60% of these LGB individuals are not married or partnered, then the analyses would suggest that nearly 600,000 LGB adults who are not in a couple are raising more than 1.1 million children (on average, this group reported 1.9 children in the home).

Figure 4. % Raising children under the age of 18, by relationship status and LGB-identity.



Data from the Gallup Daily Tracking survey suggest that nearly 4% of adults identify as LGBT, implying that there are an estimated 9.5 million LGBT adults in the US (Gates 2014). Like the NHIS data, the Gallup data also show that about 60% of LGBT identified adults are not part of a married or unmarried couple.² If the NHIS figures regarding relationship status and child-rearing are applied to the Gallup estimate, it would mean that more than a million LGBT adults who are not in a couple are raising approximately 2 million children.

These calculations suggest that the estimated number of adults in the US who are raising children under age 18 and are either in a married or unmarried same-sex couple or are LGB-identified and not in a couple is between 862,000 and 1.26 million. The estimates for the number of children being raised either by a same-sex couple or a non-coupled LGB parent are between 1.3 and 2.2 million.

In considering the total extent of parenting among LGB adults, it is important to consider that some LGB parents are raising children as part of a different-sex couple. This is particularly true for bisexual parents. Among bisexual adults with children, 51% were married with a different-sex spouse, 11% had a different-sex unmarried partner, and 4% had a same-sex spouse or partner. Among adults who identified as gay or lesbian and were raising children, 18% had a different-sex married spouse and 4% had a different-sex unmarried partner.

Among all LGB-identified adults, regardless of relationship status, NHIS analyses suggest that an estimated 23% were raising children under age 18 (20% among lesbians and gay men and 31% among bisexual men and women). Applying that figure to the NHIS and Gallup estimates of the size of the LGB and LGBT populations, respectively, implies that between 1.2 and 2.2 million LGBT adults in the US are raising from 2.0 to 3.7 million children.³

Discussion

The 2013 NHIS data provide a rare opportunity to consider relationship and family status along with sexual orientation identity within the framework of a population-based survey. Many of the findings in

these analyses are consistent with other research. These similarities include estimates of the number of same-sex couples, the proportion of those couples who are raising children, and demographic patterns with regard to age, race/ethnicity, inter-racial and ethnic coupling, and educational attainment.

Because of challenges associated with the measurement of same-sex couples in US Census Bureau data, estimates of the number of married same-sex couples in the US or their geographic distribution are difficult to obtain. Such estimates are further complicated by a legal landscape where the availability of marriage for same-sex couples across states is changing rapidly, as well as likely rapid changes in the number and location of married same-sex couples.

The NHIS data confirm that married same-sex couples live throughout the country, including in many states where their marriages may not be recognized. More than one in ten (12%) reported living in the South, where only Maryland and Washington, DC recognized their marriages.

The estimate of approximately 124,000 married same-sex couples (or the 130,000 estimate derived by using only data from the second half of 2013) offers evidence of substantial change in the last few years.

As of 2010, Badgett and Herman (2011) estimated that about 50,000 same-sex couples had married in the US. A survey conducted in that same year by the Williams Institute suggested that the total number of married same-sex couples in that year (including couples married outside of the US) may have been as high as 80,000. Even under an assumption using the conservative estimate of 124,000 marriages, these figures suggest that the population of married same-sex couples in the US has grown by more than 50% in only three years.

² Author analyses of Gallup Daily Tracking Survey data, Jan-Jun 2014.

³ Unfortunately, neither the NHIS nor Gallup data allow for a separate assessment of parenting among the transgender population.

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About the author

Gary J. Gates, PhD is the Williams Distinguished Scholar and a national expert in the demographic, geographic, and economic characteristics of the LGBT population.

About the Institute

The Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy at UCLA School of Law advances law and public policy through rigorous, independent research and scholarship, and disseminates its work through a variety of education programs and media to judges, legislators, lawyers, other policymakers and the public.

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For more information

The Williams Institute, UCLA School of Law
Box 951476
Los Angeles, CA 90095-1476
(310)267-4382

williamsinstitute@law.ucla.edu www.law.ucla.edu/williamsinstitute

EXHIBIT 20

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

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

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

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

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

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

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

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

G. M. Herek (✉) · A. T. Norton · T. J. Allen · C. L. Sims
Psychology Department, University of California,
One Shields Avenue,
Davis, CA 95616-8686, USA
e-mail: gmherek@ucdavis.edu

A. T. Norton
e-mail: atnorton@ucdavis.edu

T. J. Allen
e-mail: tjallen@ucdavis.edu

tative samples of self-identified gay, lesbian, and bisexual adults.

The need for data describing the gay, lesbian, and bisexual population is not limited to legal proceedings. As Black et al. (2000) have noted, such data are relevant to a wide variety of policy debates in the USA, including those about initiatives designed to prohibit discrimination based on sexual orientation, public policy concerning the provision of benefits to same-sex couples, military policy concerning service by openly gay personnel, and lesbian and gay parental rights. They observed that “informed policy analysis about these issues requires accurate demographic information about the lesbian and gay population” (Black et al. 2000, p. 139).

Population data describing lesbians, gay men, and bisexuals also have important scientific implications insofar as they can inform researchers who study the gay, lesbian, and bisexual population. Examination of demographic, social, and psychological patterns in the population, for example, can highlight gaps in current scientific knowledge and suggest hypotheses for empirical testing. Reliable estimates of the extent to which various characteristics and experiences are present in the sexual-minority population can also assist researchers in interpreting data from nonprobability samples and assessing their likely generalizability.

To date, however, most social science knowledge about people who identify as gay, lesbian, or bisexual has been based on data from nonprobability samples. These samples have been recruited through such venues as clubs, cafes, and commercial establishments catering to gay men, lesbians, and bisexuals; neighborhood and community events; community-based organizations; local and national publications; e-mail lists and web-based communities; and friendship networks (e.g., Bell and Weinberg 1978; Bradford et al. 1994; Herek et al. 1999; Martin and Dean 1990; Riggle et al. 2005; Rothblum et al. 2004; Rothblum and Factor 2001). Researchers have also used public records to recruit specific groups, such as same-sex couples who have married or legally registered their partnership in states where they are allowed to do so (Balsam et al. 2008; Rothblum et al. 2008). Although the data collected from such samples are sources of important information, the extent to which their participants represent the larger population is unknown (Harry 1986; Meyer and Colten 1999; Sell and Petruccio 1996).

It has often been assumed that traditional probability sampling methods—which permit assessment of sampling error and whose results can be generalized beyond a specific sample—are not feasible with lesbians, gay men, and bisexuals because nonheterosexuals constitute only a small proportion of the population and because sexual stigma deters some individuals from disclosing their homosexual or bisexual orientation to researchers. Con-

cerns about the limitations of findings from convenience samples, however, have fostered the development of innovative strategies for obtaining probability samples of gay, lesbian, and bisexual people (Cochran and Mays 2006; Meyer and Wilson 2009). For example, researchers have used various methods to identify nonheterosexuals in large national probability samples (Badgett 1995; Cochran and Mays 2006; Edelman 1993; Harry 1990; Laumann et al. 1994) and have applied probability sampling methods to specific settings or venues where sexual-minority individuals are known to be concentrated (Blair 1999; Diaz et al. 2004; Diaz et al. 1996; Stall and Wiley 1988).

When examining this body of research, it is important to note that sexual orientation is a multifaceted construct that encompasses sexual attraction, sexual behavior, personal identity, romantic relationships, and community membership (Herek 2000; Sell 2007). Most social and behavioral research has operationally defined sexual orientation in terms of attraction, behavior, or identity, or some combination of these constructs. Which of these definitions is most appropriate for a particular study depends on the research goals (Sell and Silenzio 2006). For example, studies of sexually transmitted diseases among men who have sex with men might optimally focus on sexual behavior, whereas research on experiences stemming from one’s status as an openly gay, lesbian, or bisexual individual would, ideally, operationalize sexual orientation in terms of identity.

However, even in studies for which sexual orientation identity is the relevant variable, researchers employing existing data sets based on large probability samples have often had to operationalize sexual orientation in terms of sexual behavior simply because most surveys have not collected data about identity. In many studies of economic discrimination that use national survey data sets, for example, the results have been characterized in terms of disparities between heterosexual workers and their gay or lesbian counterparts (e.g., Badgett 1995; Berg and Lien 2002; Blandford 2003). Although the terms “heterosexual,” “gay,” and “lesbian” suggest a focus on identity, limitations of the available data dictated that the operational definitions of sexual orientation be based on self-reported sexual behavior, from which the researchers inferred respondents’ sexual orientation identity.

Although unavoidable, such use of sexual behavior as a proxy for identity and community membership is limiting for several reasons (see Herek et al. 2007). For example, it inevitably excludes gay, lesbian, and bisexual individuals who were not sexually active during the specified time period (e.g., Carpenter 2005). Moreover, the population of individuals who have experienced same-sex attractions or engaged in same-sex sexual behavior includes many people who do not identify as lesbian, gay, or bisexual (e.g., Cochran and Mays 2006; Laumann et al. 1994). Insofar as

much of the stigma directed at gay, lesbian, and bisexual people finds behavioral expression when others become aware of their sexual orientation identity (e.g., Herek 2009b), the experiences of self-identified gay, lesbian, and bisexual people are likely to differ in important respects from, say, self-identified heterosexuals with incidental same-sex attractions or sexual behavior.

Some studies with probability samples have operationalized sexual orientation in terms of identity, but they have been limited by small sample sizes.¹ For example, the National Health and Social Life Survey collected data about respondents' sexual behavior, attractions, and sexual orientation identity. However, the sample ultimately included only 24 women who identified as lesbian or bisexual and only 39 men who identified as gay or bisexual (Laumann et al. 1994). Similarly, the National Survey of Midlife Development in the United States asked respondents to label their sexual orientation as heterosexual, homosexual, or bisexual. Of the approximately 3,000 respondents in this national probability sample, only 41 identified as homosexual and only 32 as bisexual (Mays and Cochran 2001). Such small numbers clearly preclude extensive analysis of self-identified lesbians, gay men, and bisexuals.

Other studies using probability samples have obtained larger numbers of self-identified lesbian, gay, and bisexual respondents, but the samples have been restricted to specific US states (Carpenter 2005) or cities (Blair 1999; Sell et al. 2007) or to gay neighborhoods or venues in specific cities (Diaz et al. 1996; Stall and Wiley 1988). These studies have yielded invaluable data, but their findings may not be generalizable beyond those settings.

Another important limitation is that the data from probability samples have generally not permitted separate analyses of self-identified lesbians, gay men, bisexual women, and bisexual men. As noted previously, some studies that directly assessed sexual orientation identity have yielded samples that were simply too small to permit separate analyses of subgroups (e.g., Laumann et al. 1994; Mays and Cochran 2001). In other studies, the sexual orientation question was not framed in a manner that permitted differentiation between bisexual and homosexual respondents. For example, exit polls conducted in conjunction with national elections have asked respondents to indicate

whether they are gay, lesbian, or bisexual without differentiating among these groups (Edelman 1993; Hertzog 1996).

Yet, empirical research with nonprobability samples suggests that important differences may exist among sexual-minority subgroups. For example, lesbians may differ from gay men in their likelihood of being involved in an intimate relationship (Peplau and Fingerhut 2007), bisexuals may differ from lesbians and gay men in the extent to which they are open about their sexual orientation and feel connected to a sexual-minority community (Balsam and Mohr 2007), and lesbians and bisexual women may differ from gay and bisexual men in the extent to which they manifest self-directed stigma (Balsam and Mohr 2007; Herek et al. 2009). Whether or not these findings can be generalized beyond the specific samples in which they were initially observed is as yet unknown, but they highlight the value of collecting data from probability samples that are sufficiently large to permit comparisons among gender and sexual orientation subgroups.

This article uses data from a national probability sample of self-identified gay, lesbian, and bisexual adults to estimate population parameters on a variety of demographic, psychological, and social variables. Recognizing that sexual orientation subgroups may differ, we also compare and contrast gay men, lesbians, bisexual men, and bisexual women on each variable. Rather than testing specific hypotheses, our central goal is to report basic descriptive data about self-identified gay, lesbian, and bisexual adults. Although an overwhelming number of questions about potentially interesting and important characteristics of the sexual-minority population could be generated, practical considerations limited the number of variables that could be assessed. Guided mainly by our review of policy studies and amicus briefs from scientific and professional organizations that have addressed topics for which data about the US population of self-identified gay, lesbian, and bisexual adults would be relevant (e.g., American Psychological Association 1986, 2003, 2007; Belkin 2008; Black et al. 2000; Egan and Sherrill 2005; Herek 2006; Schaffner and Senic 2006), we focused on variables in four categories.

First, we examined the basic demographic characteristics of this population, including age, educational background, and race and ethnicity. We also examined key variables identified by Black et al. (2000) as warranting description, including geographical distribution, household structure, and military veteran status.

Second, consistent with the present study's focus on adults who identify as gay, lesbian, or bisexual, we report descriptive data about key aspects of sexual orientation identity. These include the extent to which respondents used various identity labels in describing themselves; felt committed to their sexual orientation identity; had disclosed their sexual orientation to others; and were involved with

¹ The problem of small sample size is not restricted to studies that have focused on sexual orientation identity. For example, an analysis of data from male respondents in the third National Health and Nutrition Examination Survey Studies ($N=3,648$) yielded a weighted total of 79 men who reported any same-sex sexual behavior during their lifetime (Cochran and Mays 2000). A 1985 ABC News–*Washington Post* poll recruited a national probability sample of men and included a question about sexual attraction. Of the 663 respondents, 16 reported that they were attracted to members of their same sex and another five volunteered that they were attracted to both men and women (Harry 1990).

the gay, lesbian, and bisexual community. We also assessed the extent to which respondents perceived they had chosen their sexual orientation, an issue that has often been raised in policy debates and in legal discussions of gay, lesbian, and bisexual rights (see, for example, the 2003 APA amicus brief quoted at the beginning of this article; see also Herman 1997).

Third, recognizing the importance of religious and political institutions in shaping contemporary policy and public opinion affecting gay, lesbian, and bisexual people, we assessed several aspects of respondents' religious and political involvement. Although it is widely recognized that the condemnation of homosexuality that characterizes many religious denominations often creates conflicts and challenges for gay, lesbian, and bisexual people, there has been relatively little examination of the role that religion plays in the lives of sexual-minority individuals (Rodriguez and Ouellette 2000). We obtained descriptive data concerning respondents' affiliation with a religious denomination, their participation in religious services, and the importance of religion in their daily lives. In the realm of political involvement, national exit poll data have suggested that lesbian, gay, and bisexual voters tend to be liberal and identify with the Democratic Party (e.g., Edelman 1993; Hertzog 1996). We assessed the extent to which these attributes characterize the larger lesbian, gay, and bisexual population.

Finally, relevant to ongoing national debates about marriage equality and lesbian and gay parenting (e.g., Herek 2006), we collected data concerning respondents' current relationship and parental status, as well as their future aspirations related to marrying. We also asked respondents about their general attitudes toward civil unions and marriage rights for same-sex couples.²

Method

The study employed a probability sample of English-speaking, self-identified lesbian, gay, and bisexual adults residing in the USA. The sample was drawn from the Knowledge Networks (KN) panel, a large (approximately 40,000 households at the time of data collection) probability sample of English-speaking US residents who were recruited through random digit dialing (RDD) methods. Upon initially joining the KN panel, respondents agreed to participate regularly in on-line surveys and were provided with free Internet access and equipment if they did not already have it. Thus, in contrast to Internet studies with volunteer samples recruited via the Web, the KN panel includes individuals who would not otherwise have Internet access because of their

financial or social situation. Reflecting this fact, KN samples more closely match the US population than do other Internet samples. Indeed, they are demographically similar to the RDD samples used in traditional telephone surveys (Chang and Krosnick 2009; see also Berrens et al. 2003) and have been used extensively in academic research (for examples, see Knowledge Networks 2009).

Sample and Procedure

All KN panel members routinely answer a battery of background questions, including one about their sexual orientation ("Are you yourself gay, lesbian, or bisexual?"). A probability sample of 902 English-speaking adults (≥ 18 years of age) was drawn from the subset of all panel members who had previously responded affirmatively to this question. Following standard KN procedures, they each received an e-mail invitation to complete the survey at their convenience. A follow-up e-mail was sent to nonresponders after approximately 1 week. Neither invitation mentioned sexual orientation. As with all KN surveys, panel members were free to decline to participate.

A total of 775 individuals (86%) accessed the questionnaire between September 13 and October 7, 2005. In response to an initial screening question (described subsequently), six respondents declined to state their sexual orientation, and 50 indicated they were heterosexual.³ They were thanked for their assistance, and their survey was terminated. This

³ We hypothesized that these individuals were heterosexual respondents who had incorrectly characterized their sexual orientation on the original screening questionnaire (e.g., due to misunderstanding the question). However, we also recognized that some may have been gay, lesbian, or bisexual but reluctant to disclose this fact in the current questionnaire (e.g., out of concern that their responses might be seen by a household member who was unaware of their sexual orientation). We compared the personal characteristics of these respondents with those of the self-identified sexual-minority adults in the current sample. On most variables (including marital status, race and ethnicity, current employment status, residence in a metropolitan area, presence of children under 18 in their household, Internet access independent of KN, political party affiliation, and self-described political ideology), the 50 respondents who reported they were heterosexual differed from the self-identified sexual-minority sample. Although we cannot draw definitive conclusions, these patterns are consistent with the hypothesis that most of the 50 respondents were indeed heterosexual. Moreover, insofar as educational level is correlated with general questionnaire response validity (e.g., Krosnick 1991), the fact that these respondents had less formal education than others (42% had not attended college) is consistent with the hypothesis that many of them had misunderstood the original KN screening question. These analyses suggest that simply asking respondents whether they are "gay, lesbian, or bisexual"—with response options of "yes" and "no"—may not be an optimal strategy for ascertaining sexual orientation identity in national probability samples. The question on the current survey, which presented the different sexual orientations along a continuum and included the familiar term "straight" as a synonym for "heterosexual," may have been easier to comprehend and answer accurately.

² Data about hate crime victimization and related experiences among members of this sample are reported elsewhere (Herek 2009a).

screening process left 719 self-identified lesbian, gay, and bisexual respondents who completed the questionnaire. Within that group, 56 households were represented by multiple respondents. In these cases, one respondent was randomly selected from the household for inclusion in the data set, yielding a final sample of 662. Taking into account all attrition in the KN panel since the earliest stage of RDD recruitment, the response rate for the present study was 30% (American Association for Public Opinion Research 2006 [Formula 3]). This rate is relatively high for contemporary commercial surveys (Holbrook et al. 2008).

Measures

The variables included in the questionnaire are described here, and the wording of most questions is reported in the tables. When appropriate, the question wording was tailored to respondents' sexual orientation (bisexual vs homosexual) and gender.

Basic Demographic Characteristics and Other Background Variables Information about respondents' age, race and ethnicity, residence, location, and household composition had been routinely collected by Knowledge Networks in prior questionnaires. The present survey included a question asking whether the respondent was currently on active military duty, a member of the Military Reserves or National Guard, or a military veteran.

Sexual Orientation Identity As noted previously, all respondents had reported they were gay, lesbian, or bisexual on a previously administered KN questionnaire. The present survey began with a screening question that asked respondents "Which of the following best describes your sexual orientation?" and provided five options arrayed on a continuum from homosexual to heterosexual. For male respondents, the options were (a) gay or homosexual; (b) bisexual, mostly attracted to men; (c) bisexual, equally attracted to men and women; (d) bisexual, mostly attracted to women; (e) heterosexual or straight. For females, the first response option was lesbian, gay, or homosexual, and options (b) and (d) were transposed. Respondents were asked how often they use various identity terms to describe themselves ("Gay," "Lesbian" [women only], "Bisexual," "Queer," "Dyke" [women only], "Homosexual"). They were then asked to indicate their preferred term for characterizing their own sexual orientation (e.g., "Gay," "Lesbian," "Bisexual," "Queer," "Homosexual"). This label was subsequently inserted into questions that referred to the respondent's sexual orientation or identity. This individualized item wording is indicated throughout the present article as [L/G/B/Q/H].

We used two measures to assess the strength of respondents' commitment to their sexual orientation identity and to

the larger gay, lesbian, and bisexual community. First, three items assessing commitment to a sexual-minority identity were taken from the Internalized Homophobia Scale, or IHP (Herek et al. 1998; Herek et al. 2009): (1) "In general, I'm glad to be [L/G/B/Q/H]"; (2) "If someone offered me the chance to be completely heterosexual ('straight'), I would accept the chance"; and (3) "I wish I weren't [L/G/B/Q/H]." Second, two items assessing community identification were adapted from the Importance to Identity subscale of the Collective Self-Esteem scale (Herek and Glunt 1995; Luhtanen and Crocker 1992): (1) "My membership in the [L/G/B/Q/H] community is an important reflection of who I am" and (2) "Overall, my membership in the [L/G/B/Q/H] community has very little to do with how I feel about myself." All of these items were presented with 5-point Likert-type response formats ranging from "strongly agree" to "strongly disagree," with each respondent's preferred identity label substituted for [L/G/B/Q/H].

Perceived choice about one's sexual orientation was assessed with the question, "How much choice do you feel you had about being [L/G/B/Q/H]?" The response options were "no choice at all," "a small amount of choice," "a fair amount of choice," and "a great deal of choice."

Respondents were asked their age when they first knew about their sexual orientation ("How old were you when you first knew or decided you were [gay/lesbian/bisexual]?") and when they first disclosed it to another person ("How old were you the first time you told someone else that you are [gay/lesbian/bisexual]?"). They were subsequently asked whether their mother or father knew about their sexual orientation and, if applicable, how many of their sisters and brothers knew about it. In addition, using a scale that ranged from 0 (*not at all out to any of them*) to 7 (*completely out to all of them*), respondents reported the extent to which they were "out of the closet (openly [L/G/B/Q/H])" to six additional groups: (1) "other relatives—not your immediate family," (2) "your current heterosexual ('straight') friends," (3) "your casual acquaintances who are heterosexual ('straight')," (4) "heterosexual ('straight') friends whom you knew before you came out," (5) "your boss and other supervisors at work," and (6) "the people you work with on a daily basis (other than your boss or supervisors)." A "doesn't apply to me" response option was included for each group.

Community involvement was assessed by asking respondents to "rate how important each of the following activities is to you these days. By important, we mean that you would feel differently about life and about yourself if you couldn't do this activity." The list of activities was adapted from a scale developed by Herek and Glunt (1995) and consisted of the following: (1) "Knowing what is going on in the local [L/G/B/Q/H] community," (2) "Doing volunteer work in the [L/G/B/Q/H] community," (3) "Giving money to [L/G/B/Q/H] organizations," (4) "Being politically active in the

[L/G/B/Q/H] community,” and (5) “Reading community newspapers and magazines for news about the [L/G/B/Q/H] community.” Each activity was rated on a 4-point scale (Not at all important, Somewhat important, Fairly important, Very important).

Respondents also were asked whether they had ever engaged in a variety of activities related to lesbian, gay, or bisexual issues, including public expressions of opinion (“Wore a button, posted a sign, or displayed a bumper sticker”); participating in a rally, march, or demonstration; contacting a government official; and contributing money to a lesbian, gay, or bisexual organization or cause. For comparison purposes, this series of questions was followed by a parallel set of items that asked whether the respondent had participated in the same activities for “a *non-gay* issue or cause—that is, something *not* related mainly to gay men, lesbians, or bisexuals.”

Political and Religious Involvement Information about respondents’ political party affiliation and ideology (liberal, moderate, conservative) had been previously collected by Knowledge Networks. For the present study, respondents were asked whether they had voted in the most recent (2004) presidential election and, if so, for which candidate. They were also asked for information about their religious denomination, frequency of attendance at religious services during the previous 12 months, how much guidance religion provides in their day-to-day living, and (for respondents who reported affiliation with a religious denomination and any attendance at religious services) the extent to which their congregation includes lesbian, gay, and bisexual members.

Relationships, Marriage, and Family Respondents were asked their current relationship status, their legal marital status, and how many children they have (including adopted children and stepchildren). Respondents currently in a relationship (including those who were married) were asked the gender of their partner. Those who were in a relationship but not married were asked whether they were cohabiting and the likelihood they would marry their partner if their state were to allow same-sex marriages (this conditional clause was omitted for respondents in Massachusetts, the only state where marrying a same-sex partner was legal at the time of data collection). Those who were not currently in a relationship were asked whether they would like to marry someday. Respondents’ attitudes toward marriage rights for same-sex couples were assessed with three items. Using a 5-point Likert-type response format ranging from “strongly agree” to “strongly disagree,” they indicated the extent to which they agreed or disagreed with each of the following statements: (1) “The law should allow two people of the same sex to marry each other.” (2) “There is really no need to legalize same-sex marriage in the United States.” (3) “The U.S. public *isn’t* ready for a debate about gay marriage.” In

addition, respondents were asked whether they strongly supported, somewhat supported, somewhat opposed, or strongly opposed state laws to create civil unions. An accompanying note explained that “civil unions are not marriage, but give a same-sex couple some legal protection in their home state in areas such as inheritance, health insurance, and hospital visits.”

Data Analysis

Tables 1, 2, 3, 4, 5, 6, 7, and 8 report population parameter estimates with 95% confidence intervals (CIs). The CIs facilitate comparisons among the four gender and sexual orientation subgroups and are preferable to *p* values because they indicate whether group differences are statistically significant while also providing additional information about effect size (Cumming 2008; Wilkinson and Task Force on Statistical Inference 1999).

As reported subsequently, the four subgroups differed significantly in age, race, and educational level. We conducted analyses to assess whether these demographic patterns might account for the group differences in the outcome variables reported in Tables 3, 4, 5, 6, 7, and 8. For each outcome variable, therefore, we conducted two linear regression analyses (for continuous and ordinal outcome variables) or two logistic regression analyses (for categorical outcome variables). In the first equation, sexual orientation (homosexual vs bisexual), gender, and their multiplicative interaction term were entered. In the second equation, age, educational level, and race (dichotomized as Black vs non-Black) were added as statistical controls. Except where noted in the subsequent text, inclusion of the control variables did not alter the patterns of significant differences among subgroups shown in the tables.

Weighting

The KN panel’s original RDD design yielded a simple random sample with equal probability of selection for all US households with a landline telephone. However, the actual probability of selection for individual respondents was affected by multiple factors (e.g., differences in household size, number of telephone lines). Design weights were assigned to each case to adjust for unequal probability of selection (e.g., Kish 1965).⁴ Because the use of weighted

⁴ Design weights were computed to account for (a) variations in the number of adults and telephone lines in the household; (b) oversampling of Blacks and Hispanics, households with prior Internet access, and, early in the life of the KN panel, residents of California, New York, Florida, Texas, and Central regional states; (c) undersampling of telephone numbers for which matching addresses were unavailable and of households in areas without MSN-WebTV coverage; and (d) slight overrepresentation of Chicago and Los Angeles during KN’s early pilot testing.

data necessitates special analytic techniques to correct standard errors (Lee and Forthofer 2006), analyses were conducted using STATA and SPSS Complex Samples, which permit such correction.

Results

The sample consisted of 311 women (152 lesbians, 159 bisexuals) and 351 men (241 gay men, 110 bisexuals). Applying design weights, the weighted sample was 34.8% gay male, 14.6% lesbian, 26.9% bisexual male, and 23.7% bisexual female (Table 1).⁵ Unless otherwise indicated, the weighted data are used hereafter.

Representativeness Check

One challenge associated with evaluating the representativeness of a lesbian, gay, and bisexual probability sample is the general lack of comparison data from the population of self-identified sexual minorities. Even though the US Census does not collect information about individuals' sexual orientation, however, Census data are available for a subset of the sexual-minority population, namely, adults who report they are members of a cohabiting same-sex couple. Taking advantage of the fact that such individuals were able to identify themselves in the 2000 Census, we assessed the present sample's representativeness by comparing its members who were cohabiting with a same-sex partner to their counterparts in the Census data.

These comparisons are shown in Table 2, with the 2000 Census data corrected for misclassifications of some heterosexual couples due to miscodings of the partners' gender (Black et al. 2007).⁶ Except for mean age, the two groups do not differ significantly, as indicated by the overlapping 95% CIs. These findings are consistent with the conclusion that, apart from being slightly older, the current sample was generally representative of self-identified lesbian, gay, and bisexual adults in the USA.

⁵ Among bisexuals, 27% (40 men, 33 women) reported they were mainly attracted to people of their same sex, 39% (34 men, 71 women) were mainly attracted to the other sex, and 34% (36 men, 55 women) were attracted equally to both sexes. Because of the large margin of error associated with groups of such small size, these three categories were combined for the analyses presented subsequently.

⁶ We are grateful to Dr. Gary Gates (UCLA Williams Institute) for his kind assistance in this regard.

Age, Race, Ethnicity, and Education

As shown in Table 1, the mean age of respondents was 39,⁷ approximately two thirds were non-Hispanic White, and roughly one third had earned a college degree. Significant differences were observed in these variables among the sexual orientation and gender groups. Gay men ($M=45$ years) were significantly older than all other groups, and lesbians ($M=40$ years) were significantly older than bisexual women ($M=32$ years). Only 43% of bisexual men were non-Hispanic White, compared with more than 70% of other respondents (21% of bisexual men were Hispanic and 29% were non-Hispanic Black). More homosexuals than bisexuals had earned a bachelor's degree: 46% of gay men and 41% of lesbians reported having a degree, compared with only 16% of bisexual men and 28% of bisexual women.

According to Census data from approximately the same time period, the mean age of US adults (18 and older) was 45, about 75% were non-Hispanic White, and 24% had earned a college degree.⁸ Thus, the present sample was younger than the US adult population, was less likely to be non-Hispanic White, and had a higher level of formal education. However, these patterns were not uniform across subgroups within the sample. Gay men's mean age was not significantly different from that of US adult men, whereas the other sexual orientation groups were significantly younger. Patterns of race and ethnicity among gay men and lesbians did not differ from the US population, but bisexual men were less likely to be non-Hispanic White, and bisexual women were less likely to be Hispanic or non-Hispanic Black.⁹ Finally, whereas gay men and lesbians were significantly more likely than the US adult population to have earned a college degree, bisexual men and women did not differ significantly from the population in this regard.

⁷ Approximately one third of the respondents (34%) were under 30, 33% were 30–44 years old, and 33% were 45 or older. Gay men were underrepresented in the 18–29 age category, compared with bisexual men and women; bisexual men were underrepresented in the 30–44 category, compared with gay men and lesbians; and bisexual women were underrepresented in the 45 and older category, compared with gay men and lesbians. However, because of the small number of respondents in some subcategories, these comparisons across sexual orientation subgroups must be considered tentative.

⁸ Comparisons were made with data from the US Census Bureau's American Community Surveys 2000–2003, using the UC Berkeley SDA interface (<http://sda.berkeley.edu/archive.htm>).

⁹ These patterns describe respondents who identified with a single racial or ethnic group. Our data do not permit intensive analyses of respondents reporting mixed race ancestry.

Table 1 Demographic characteristics of sample

Variable	Gay men	Lesbians	Bisexual men	Bisexual women	Total
Unweighted <i>N</i>	241	152	110	159	662
Weighted %	34.8	14.6	26.9	23.7	100
CI	28.9–41.2	11.7–18.2	19.1–36.4	18.8–29.3	
Age					
Range	23–89	18–79	18–40	18–76	18–89
Mean	45.3 a	40.1 b	36.6 bc	31.8 c	39.0
CI	43.0–47.5	37.7–42.6	32.0–41.1	29.3–34.3	37.1–40.9
Race/Ethnicity					
Non-Hispanic White	70.5% ab	74.4% a	43.0% b	77.5% a	65.4%
CI	59.6–79.5	62.6–83.5	25.8–62.1	65.9–86.0	56.5–73.2
Non-Hispanic Black	14.0%	12.8%	28.6%	5.2%	15.6%
CI	7.6–24.3	6.1–24.9	10.9–56.8	2.4–10.9	9.1–25.5
Hispanic	11.3%	10.5%	20.6%	6.2%	12.5%
CI	6.1–20.0	5.0–20.6	7.2–46.6	2.7–13.6	7.4–20.2
Other, mixed race	4.2%	2.3%	7.8%	11.1%	6.5%
CI	1.0–16.1	0.8–6.6	3.2–17.7	4.8–23.5	3.8–11.0
Education (highest level)					
Less than high school	5.6%	7.8%	8.0%	8.9%	7.3%
CI	2.2–13.5	3.1–18.4	3.1–19.4	3.6–20.2	4.6–11.6
High school diploma	19.5%	17.5%	47.2%	26.8%	28.4%
CI	12.6–29.1	9.8–29.3	27.1–68.3	16.5–40.4	20.7–37.6
Some college (<4 years)	28.5%	33.8%	28.9%	36.8%	31.4%
CI	21.4–36.9	25.3–43.5	15.1–48.2	27.1–47.8	25.6–37.7
Bachelor's degree or higher	46.4% a	40.9% ac	15.9% b	27.5% bc	32.9%
CI	37.5–55.4	31.9–50.6	9.1–26.1	19.3–37.4	27.5–38.8
Military service					
Currently serving or veteran	15.1% a	10.6% a	20.8% a	0.7% b	12.6%
CI	9.8–22.5	5.5–19.4	11.4–34.8	0.1–5.1	9.3–16.8
Never served	84.9% a	89.4% a	79.2% a	99.3% b	87.4%
CI	77.5–90.2	80.6–94.5	65.2–88.6	94.9–99.9	83.2–90.7
Census region					
Northeast	21.9%	17.8%	27.6%	18.5%	22.0%
CI	15.5–30.1	10.7–28.0	12.4–50.5	12.3–27.0	16.3–29.0
South	37.7%	36.2%	40.6%	35.1%	37.7%
CI	29.4–46.8	26.8–46.8	21.3–63.4	23.9–48.2	30.4–45.5

Table 1 (continued)

Variable	Gay men	Lesbians	Bisexual men	Bisexual women	Total
Midwest	11.9%	22.9%	17.1%	16.5%	16.0%
CI	7.8–17.8	16.2–31.3	8.8–30.4	11.0–24.1	12.5–20.2
West	28.4%	23.2%	14.7%	29.9%	24.3%
CI	20.4–38.2	16.3–31.9	7.6–26.6	20.7–41.0	19.5–29.9
Type of residence area					
Large city	56.1%	40.8%	43.3%	38.0%	46.1%
CI	47.1–64.7	31.1–51.2	24.1–64.7	27.7–49.5	39.0–53.5
Small city	18.1%	27.1%	21.8%	27.0%	22.5%
CI	12.7–25.0	19.0–37.2	9.7–41.9	18.4–37.6	17.4–28.5
Suburban	17.5%	16.7%	22.2%	18.6%	18.9%
CI	11.7–25.2	10.8–25.0	8.5–46.6	9.8–32.4	13.3–26.2
Rural or small town	8.4%	15.4%	12.7%	16.4%	12.5%
CI	4.7–14.7	9.9–23.1	6.7–22.7	10.1–25.7	9.5–16.3
Housing					
Homeowner	56.4% a	60.9% a	30.8% b	40.3% ab	46.4%
CI	46.9–65.4	50.2–70.7	18.2–47.0	30.0–51.6	39.5–53.3
Renter	38.9% a	34.1% a	67.6% b	52.8% ab	49.2%
CI	29.9–48.7	24.5–45.1	51.0–80.8	41.4–64.0	42.0–56.5
Doesn't pay for housing	4.8%	5.0%	1.6%	6.8%	4.4%
CI	2.3–9.7	2.2–11.1	0.4–5.7	2.4–17.9	2.7–7.3
Household composition					
1 adult (18 years or older)	55.4% a	28.7% b	30.1% ab	21.8% b	36.7%
CI	46.4–64.1	21.0–37.8	17.2–47.1	15.0–30.5	30.7–43.2
2 adults	32.3% a	54.0% b	44.6% ab	55.3% b	44.2%
CI	25.0–40.5	44.0–63.8	24.6–66.6	43.6–66.5	37.0–51.8
3+ Adults	12.3%	17.3%	25.2%	22.9%	19.0%
CI	7.2–20.3	10.5–27.2	12.4–44.7	13.1–37.0	13.9–25.5
% with any children (<18 years)	4.8% a	16.6% a	25.6% ab	49.3% b	22.7%
CI	2.0–10.9	9.8–26.8	10.0–51.5	38.0–60.8	16.3–30.6

Within rows, values with different lowercase letters differ significantly, as indicated by nonoverlapping confidence intervals

Table 2 Demographic characteristics of cohabiting same-sex couples: 2000 US Census data and current sample

Variable	US Census	Current sample
Gender (% female)	49.3% (48.8–49.9)	48% (39.1–56.9)
Race/ethnicity (% non-Hispanic White)	77.4% (77.0–77.9)	74.1% (63.7–82.4)
Mean age (years)	40.1 (40.0–40.3)	43.8 (41.7–45.9)
Education (% with college degree or higher)	41.9% (41.3–42.4)	48% (39.2–56.9)
Employment status (% employed)	79.2% (78.7–79.6)	79.2% (70.7–85.7)
Housing (% homeowner)	61.8% (61.2–62.3)	69.1% (59.5–77.2)
Military service (% veteran)	12.0% (11.7–12.4)	11.8% (6.9–19.4)

Table displays population parameter estimates and 95% confidence intervals (CIs) for same-sex cohabiting couples in 2000 US Census and current sample. Census data are drawn from a combined sample of the 1% and 5% Public Use Micro Samples of the 2000 US Census by G. Gates (May 3, 2007, personal communication), based on Black et al. (2003)

Residence Variables

In terms of residence patterns, the sample generally matched the US population except that a disproportionately small number of respondents lived in the Midwest. Within the sample, the sexual orientation groups did not differ significantly in their geographic distribution or the extent to which they resided in urban, suburban, or rural settings (Table 1). Women were more likely than men to live in a household with another adult. Although higher proportions of homosexuals reported owning their home and more bisexuals reported renting, this difference was not significant when age, education, and race were statistically controlled.

Military Service

Approximately 15% of gay men and 11% of lesbians had a history of military service. Compared with the US adult population, gay men were significantly less likely to have served, compared with all adult males (approximately 25% of whom had served), whereas lesbians were significantly more likely to have a history of military service, compared with all adult females (approximately 2% of whom had

served). By contrast, bisexual men and women did not differ significantly from the US population in their pattern of military service.

Sexual Orientation Identity

Identity Labels Table 3 reports the proportions of respondents in each subgroup who said they used various identity labels for themselves “all the time,” “often,” or “sometimes” (vs respondents who reported using the labels “rarely” or “never”). Nearly all homosexual men (93%) called themselves “Gay” at least sometimes, as did 76% of lesbians, 19% of bisexual men, and 10% of bisexual women. The proportions of lesbians (73%) and bisexual women (11%) who used “Lesbian” as an identity label was about the same as the proportions using “Gay.” Among bisexuals, 71% of men and 60% of women labeled themselves “Bisexual” at least sometimes. By contrast, “Bisexual” was rarely used as an identity label by gay men (2%) or lesbians (8%). “Queer” was used by relatively few respondents (12% overall), and “Dyke” was used as a self-label by only 10% of women. “Homosexual” was used at least sometimes by more than one third of the gay men and lesbians, but by relatively few bisexuals. Only 4% of respondents reported never using any of the labels.

Identity Commitment and Community Identification IHP scores were computed by summing responses to the items and dividing by 3 (responses to the “glad to be [L/G/B/Q/H]” item were reversed). This procedure yielded a scale score ($\alpha=0.82$) that could range from 1 to 5, with higher scores indicating more negative attitudes toward or greater psychological distancing from one’s sexual-minority identity (Herek et al. 2009).¹⁰ As indicated by the relatively low overall IHP mean score (Table 3), respondents generally expressed positive feelings about their sexual orientation identity. Indeed, only 6% of respondents manifested a general pattern of agreement with statements expressing negative feelings about one’s sexual orientation (i.e., scored 4 or greater). The greatest degree of identity distancing was observed among bisexual men, who scored significantly higher than lesbians but whose mean score was nevertheless below the hypothetical midpoint of the scale.¹¹ The two items assessing community identification were not significantly intercorrelated ($r=-0.09$) and thus were analyzed separately. As shown in Table 3, a majority of respondents agreed that their membership in the sexual-minority

¹⁰ Coefficient *alpha* was computed with unweighted data for all scales reported in this article.

¹¹ Because IHP scores were highly skewed, analyses were also conducted with a log-transformation of the scale scores. The pattern of results did not differ from the raw scores. Table 3 reports the more easily interpreted raw scores.

Table 3 Identity characteristics

Variable	Gay men	Lesbians	Bisexual men	Bisexual women	Total
Self-labeling (% using label “all the time,” “often,” or “sometimes”)					
“Gay”	93.0% a	75.9% b	18.7% c	9.5% c	50.7%
CI	87.7–96.1	66.3–83.5	10.2–31.6	5.9–14.9	43.5–58.0
“Lesbian”	N/A	73.4% a	N/A	11.2% b	34.9%
CI		64.2–80.9		7.0–17.5	28.3–42.3
“Bisexual”	2.4% a	7.6% a	71.3% b	60.3% b	35.4%
CI	1.0–5.3	3.7–14.9	54.9–83.5	49.0–70.7	27.7–44.0
“Queer”	16.8%	16.4%	8.5%	7.2%	12.2%
CI	11.8–23.2	10.4–24.8	3.7–18.2	2.7–17.5	9.2–16.0
“Homosexual”	38.7% a	35.9% a	10.8% b	3.7% b	22.5%
CI	30.4–47.7	27.0–45.9	5.0–21.8	1.8–7.4	18.1–27.6
“Dyke”	N/A	16.9%	N/A	6.0%	10.1%
CI		11.2–24.8		1.9–17.0	6.3–16.1
Identity distancing (mean IHP; higher score = greater distancing)	1.97 ab	1.65 a	2.62 b	1.84 ab	2.07
CI	1.77–2.16	1.49–1.82	1.88–3.36	1.63–2.06	1.81–2.32
Community identification (% strongly agree or agree somewhat)					
“My membership in the [L/G/B/Q/H] community is an important reflection of who I am.”	44.6% a	43.1% a	15.6% b	24.7% ab	32.0%
CI	35.8–53.8	33.6–53.0	8.4–27.0	15.0–38.0	26.4–38.2
“Overall, my membership in the [L/G/B/Q/H] community has very little to do with how I feel about myself.”	55.1%	51.3%	60.2%	68.1%	59.0%
CI	46.1–63.9	41.2–61.4	37.8–78.9	57.9–76.8	51.6–66.0
Perceived choice about sexual orientation					
No choice at all	88.0% a	68.4% b	38.3% bc	40.6% c	60.6%
CI	80.6–92.8	57.8–77.4	21.8–57.9	30.1–52.0	52.6–68.1
Small amount	6.9%	15.2%	22.4%	15.2%	14.2%
CI	3.2–14.1	9.6–23.3	8.6–46.9	9.6–23.1	9.2–21.3
Fair amount/Great deal	5.2% a	16.4% ab	39.3% bc	44.3% c	25.2%
CI	2.6–9.9	9.3–27.3	20.6–61.9	32.9–56.3	18.4–33.5

Within rows, values with different lowercase letters differ significantly, as indicated by nonoverlapping confidence intervals. N/A=question not asked

Table 4 Openness about sexual orientation

Variable	Gay men	Lesbians	Bisexual men	Bisexual women	Total
Mean age of self-identification	15.1 a	18.0 b	17.5 ab	19.9 b	17.3
CI	14.0–16.1	16.5–19.5	14.6–20.4	18.5–21.4	16.4–18.3
Mean age of first disclosure	20.2	21.1	21.5	21.0	20.9
CI	19.2–21.2	19.7–22.4	18.6–24.4	19.7–22.4	20.0–21.7
Out to:					
Mother	73.8% a	81.4% a	25.0% b	35.4% b	52.7%
CI	65.5–80.6	73.0–87.7	12.2–44.5	25.9–46.2	45.3–60.0
Father	60.1% a	58.0% a	19.5% b	22.2% b	39.8%
CI	50.7–68.9	47.6–67.8	8.3–39.4	15.2–31.2	33.2–46.5
Sister(s) (out to one or more)	82.3% ab	87.4% a	56.8% bc	50.4% cd	69.1%
CI	73.3–88.7	78.2–93.0	34.4–76.7	36.8–63.9	61.7–75.7
Brother(s) (out to one or more)	84.8% a	81.5% a	58.9% ab	39.1% b	66.3%
CI	77.1–90.3	70.7–89.0	35.1–79.2	27.4–52.2	58.3–73.6
Out to at least one:					
Distant family member	80.3% a	83.2% a	27.6% b	53.3% c	60.3%
CI	80.3–86.9	83.2–89.3	27.6–47.8	53.3–64.6	60.3–68.0
Current heterosexual friend	86.4% ab	94.2% a	69.2% b	84.1% ab	82.6%
CI	79.3–91.4	86.7–97.6	51.6–82.6	73.1–91.1	77.4–86.7
Casual heterosexual friend	81.6% a	85.6% a	49.9% b	69.1% ab	70.9%
CI	74.1–87.3	77.4–91.1	29.2–70.7	58.2–78.3	63.0–77.7
Prior heterosexual friend	83.5% a	89.5% a	39.8% b	79.8% a	71.2%
CI	75.9–89.0	81.3–94.3	22.7–59.8	68.8–87.6	61.9–79.0
Coworker	80.8% a	77.4% ab	18.1% c	56.0% b	57.8%
CI	72.8–86.8	67.5–85.0	9.5–31.6	43.7–67.5	49.3–65.8
Boss or supervisor	72.8% a	71.2% ab	13.8% c	50.3% b	50.9%
CI	63.7–80.4	60.9–79.7	7.0–25.4	38.0–62.6	43.0–58.8
Mean Summary Score. Extent of outness to:					
Extended family, heterosexual friends, and acquaintances	5.40 ac	5.73 a	2.52 b	4.45 c	4.46
CI	4.94–5.86	5.29–6.17	2.12–2.92	3.81–5.08	4.10–4.83
Coworkers and supervisors	5.20 a	4.98 a	1.78 b	3.36 c	3.80
CI	4.64–5.76	4.37–5.58	1.23–2.33	2.52–4.20	3.33–4.27

Within rows, values with different lowercase letters differ significantly, as indicated by nonoverlapping confidence intervals. Questions about outness to parents were worded to reflect whether each parent was living or deceased. Questions about outness to siblings were asked only if respondents reported that they had one or more sisters or brothers

Table 5 Community involvement and activism

Variable	Gay men	Lesbians	Bisexual men	Bisexual women	Total
Importance of community involvement (% responding “very important” or “fairly important”)					
Knowing what is going on	57.4% a	47.3% a	29.0% ab	15.7% b	38.4%
CI	48.2–66.1	37.4–57.4	12.1–54.8	9.4–25.3	31.4–45.9
Doing community volunteer work	29.4% a	29.0% a	10.7% ab	12.2% b	20.3%
CI	22.0–38.0	20.8–38.8	4.8–22.1	7.2–20.0	16.1–25.2
Giving money to organizations	43.1% a	33.9% a	6.5% b	7.8% b	23.5%
CI	34.3–52.3	25.2–43.8	3.0–13.6	4.5–13.0	19.0–28.6
Being politically active	33.4% a	36.2% a	8.4% b	13.4% b	22.3%
CI	25.5–42.4	27.2–46.3	3.8–17.4	8.1–21.5	18.0–27.4
Reading newspapers and magazines	56.0% a	51.6% a	31.3% ab	19.4% b	40.0%
CI	46.5–65.0	41.5–61.6	13.9–56.2	12.1–29.6	33.1–47.4
Community activism (% reporting having ever done this related to a sexual minority issue)					
Button, sign, bumper sticker	43.6% ab	58.1% a	23.5% b	41.7% ab	39.9%
CI	35.0–52.7	47.6–67.9	11.2–42.8	30.6–53.7	33.4–46.7
Rally, march, or demonstration	49.4% a	44.4% ab	25.3% ab	27.9% b	37.0%
CI	40.3–58.5	34.8–54.4	12.5–44.6	19.7–38.1	30.9–43.7
Contacting a government official	42.3% a	39.1% a	24.7% ab	20.2% b	31.9%
CI	33.8–51.3	30.3–48.7	11.7–44.8	13.2–29.7	26.1–38.3
Contributing money	65.3% a	53.3% ab	28.0% bc	24.6% c	43.9%
CI	56.1–73.5	43.0–63.4	14.6–47.0	16.8–34.5	37.1–50.8

Within rows, values with different lowercase letters differ significantly, as indicated by nonoverlapping confidence intervals

community had little to do with how they felt about themselves, and fewer than half considered their community membership to be an important reflection of themselves. These patterns were different across subgroups, however, with lesbians and gay men indicating stronger identification with the sexual-minority community than bisexuals (Table 3).

Choice about Sexual Orientation Overall, respondents reported that they did not experience their sexual orientation as a choice. This pattern varied somewhat, however, according to gender and sexual orientation. The vast majority of gay men (88%) and roughly two thirds of lesbians (68%) reported having had no choice at all about their sexual orientation. Combining respondents who said they’d had a small amount of choice with those reporting

no choice, 95% of gay men and 84% of lesbians could be characterized as perceiving that they had little or no choice about their sexual orientation. More bisexuals than homosexuals reported having had a fair amount or great deal of choice about their sexual orientation. Nevertheless, fewer than half of the bisexuals (39% of men, 44% of women) endorsed either of the latter response options.

Disclosure of Sexual Orientation On average, respondents reported having first recognized their own sexual orientation when they were 17 years old (Table 4). Gay men said they first knew or decided they were gay at age 15, which was significantly younger than for lesbians (18 years) or bisexual women (20 years). Bisexual men reported that they recognized their bisexuality at 17.5 years. On average, all groups

Table 6 Religious characteristics of sample

Variable	Gay men	Lesbians	Bisexual men	Bisexual women	Total
Religious denomination					
Protestant/other Christian: not Born Again CI	31.6% (23.5–41.0)	36.6% (27.6–46.6)	29.9% (15.5–49.8)	22.6% (15.7–31.4)	29.7% (24.0–36.2)
Born Again Christian CI	15.9% (10.6–23.1)	14.8% (8.2–25.3)	22.1% (6.6–53.3)	16.3% (7.6–31.5)	17.5% (11.1–26.3)
Catholic CI	21.8% (15.3–30.2)	16.4% (9.9–25.9)	26.3% (11.1–50.5)	11.2% (6.3–19.3)	19.7% (14.0–26.8)
Jewish CI	0.4% (0.1–3.0)	1.9% (0.8–4.9)	0.5% (0.1–2.3)	2.4% (0.8–6.8)	1.2% (0.6–2.2)
Wiccan, pagan CI	1.5% (0.4–5.3)	4.5% (2.1–9.4)	1.5% (0.4–5.2)	6.6% (3.4–12.4)	3.1% (2.0–5.0)
Buddhist CI	0.4% (0.1–2.6)	1.1% (0.3–3.8)	3.4% (0.5–20.8)	5.8% (2.3–13.7)	2.6% (1.1–5.9)
Atheist, agnostic, none CI	26.7% (19.4–35.7)	21.4% (14.2–31.1)	16.3% (8.2–29.9)	30.7% (21.0–42.5)	24.2% (19.3–29.8)
Attendance at religious services (past 12 months)					
Weekly or more CI	7.2% (4.0–12.6)	8.9% (4.9–15.6)	24.0% (8.3–52.6)	7.5% (3.4–15.8)	12.0% (6.5–21.2)
Less than weekly but at least monthly CI	13.9% (8.1–22.7)	7.9% (4.2–14.4)	12.7% (4.0–33.8)	7.9% (4.1–14.5)	11.3% (7.3–16.9)
Once or a few times CI	39.3% (30.9–48.4)	48.6% (38.7–58.6)	30.8% (14.9–53.1)	44.1% (32.8–56.0)	39.5% (32.8–46.7)
Never CI	39.7% (31.1–48.9)	34.6% (25.0–45.6)	32.5% (18.8–50.1)	40.5% (30.1–51.8)	37.2% (31.1–43.8)
Type of congregation					
All or mostly heterosexual CI	35.2% (27.0–44.3)	36.5% (27.9–46.2)	43.9% (24.9–64.8)	30.8% (22.1–41.2)	36.7% (30.0–44.0)
At least half sexual minority CI	12.0% (6.7–20.5)	16.5% (10.1–25.8)	19.3% (4.9–52.4)	12.3% (4.5–29.1)	14.7% (8.6–24.0)
Not applicable CI	52.8% (43.6–61.8)	47.0% (37.0–57.2)	36.9% (21.7–55.1)	56.9% (45.0–68.0)	48.6% (41.5–55.8)

Table 6 (continued)

Variable	Gay men	Lesbians	Bisexual men	Bisexual women	Total
Amount of daily guidance from religion					
None at all	33.4%	26.7%	16.7%	35.0%	28.3%
CI	(25.5–42.4)	(18.3–37.1)	(9.0–28.9)	(25.1–46.2)	(23.2–34.1)
Some	44.5%	42.1%	44.9%	42.8%	43.9%
CI	(35.6–53.9)	(32.7–52.1)	(25.8–65.7)	(32.1–54.1)	(36.8–51.1)
Quite a bit	15.0%	14.1%	17.6%	12.7%	15.0%
CI	10.0–21.7	8.7–22.0	8.7–32.3	5.1–28.3	11.0–20.2
A great deal	7.1%	17.1%	20.8%	9.5%	12.8%
CI	3.9–12.4	10.3–27.1	6.0–51.8	5.3–16.5	7.2–21.7
Mean score	1.96	2.22	2.42	1.97	2.12
CI	1.8–2.1	2.0–2.4	1.9–2.9	1.8–2.2	2.0–2.3

reported having first told someone else about their sexual orientation when they were in their early 20s (Table 4). However, the regression analysis revealed differences among the subgroups. With age, education, and race entered in the equation, the effect of age was significant ($b=0.26$ [CI=0.18, 0.34], $t(643)=6.50$, $p < 0.001$), and the parameter estimates became significant for both sexual orientation ($b=2.40$ [CI=0.69, 4.10], $t(643)=2.76$, $p < 0.01$) and gender ($b=-2.30$ [CI=-3.93, -0.66], $t(643)=-2.76$, $p < 0.01$). Thus, older respondents were likely to have first disclosed their sexual orientation at a later age than younger respondents. When this generational difference was statistically controlled, bisexuals and women tended to have first disclosed at a later age than, respectively, homosexuals and men.

Regarding respondents' outness within their immediate families, Table 4 indicates that their fathers were the least likely to know about their sexual orientation, whereas their sisters were the most likely to know. Gay men and lesbians were substantially more open about their sexual orientation with their parents and siblings than were bisexuals. For example, they were about three times as likely as bisexual men, and at least twice as likely as bisexual women, to be out to their mother.

Similar patterns were observed for outness to relatives outside one's immediate family, heterosexual friends and acquaintances, and workplace contacts (Table 4). The four items assessing openness to distant family members and heterosexual friends and acquaintances were recoded as a continuum ranging from 1 to 8, summed, and divided by the number of items. The resulting scale scores ($\alpha = 0.91$) can range from 1 (*not at all out*) to 8 (*completely out*). The same

procedure was followed with the two items about outness in the workplace ($\alpha = 0.95$). On average, respondents scored at the midpoint for outness to extended family and heterosexual friends and acquaintances, and slightly lower for outness to coworkers and supervisors. Comparisons of summary scores revealed that lesbians and gay men were more out to their relatives and heterosexual acquaintances and in the workplace than were bisexuals, especially bisexual men.

With the demographic control variables included in the regression equation, the unstandardized parameter estimates for workplace outness remained significant for sexual orientation but not for gender. Instead, the parameter for race became significant ($b = 1.10$ [CI=0.28, 1.92], $t(568) = 2.63$, $p < 0.001$), indicating that Black respondents were less open about their sexual orientation in the workplace than were others. With this effect statistically controlled, bisexual men were still significantly less open in the workplace than other groups, as indicated by the significant parameter estimate for the gender $\times$ sexual orientation interaction ($b=-1.52$ [CI=-2.84, -0.19], $t(568)=-2.25$, $p < 0.05$).

Community Involvement and Activism As shown in Table 5, fewer than half of the respondents attached a high level of importance to any of the aspects of community involvement included in the questionnaire. The greatest importance was accorded to obtaining information about the community ("knowing what is going on" and "reading newspapers or magazines"). Gay men and lesbians placed more importance on each of the five types of community involvement than did bisexual men and women. By summing responses and dividing by the total number of items, scale scores were

Table 7 Political characteristics of sample

Variable	Gay men	Lesbians	Bisexual men	Bisexual women	Total
Party affiliation					
Democrat	82.0%	81.7%	60.5%	76.0%	74.7%
CI	(74.6–87.6)	(71.3–88.9)	(38.1–79.3)	(65.5–84.0)	(66.7–81.3)
Republican	13.1%	16.7%	29.8%	17.3%	19.2%
CI	(8.7–19.3)	(9.8–27.1)	(12.8–55.2)	(10.4–27.5)	(13.0–27.4)
Other	4.9%	1.6%	9.6%	6.7%	6.1%
CI	(2.0–11.3)	(0.3–7.1)	(3.5–23.8)	(3.4–12.6)	(3.7–10.0)
Political ideology					
Liberal	62.9%	66.0%	45.3%	53.0%	56.4%
CI	53.1–71.8	55.4–75.2	25.7–66.4	41.1–64.5	48.6–63.8
Moderate	27.4%	24.5%	27.5%	33.4%	28.4%
CI	19.2–37.5	16.8–34.3	13.6–47.6	22.5–46.5	22.4–35.4
Conservative	9.7%	9.5%	27.2%	13.6%	15.2%
CI	5.7–15.9	4.4–19.3	10.1–55.6	7.5–23.6	9.1–24.3
% Voted in 2004	88.8%	83.6%	86.1%	83.4%	86.2%
CI	(79.9–94.1)	(71.3–91.2)	(71.4–93.9)	(71.9–90.8)	(80.8–90.2)
Candidate voted for					
John Kerry	86.2%	91.5%	81.9%	79.6%	84.4%
CI	(79.5–91.0)	(84.5–95.5)	(66.5–91.1)	(69.9–86.8)	(79.6–88.3)
George W. Bush	11.7%	7.6%	9.9%	15.0%	11.2%
CI	(7.4–18.0)	(3.9–14.3)	(5.0–18.6)	(9.4–23.1)	(8.4–14.8)
Ralph Nader	1.4% a	0 b	7.1% a	2.9% a	3.2%
CI	(0.3–5.9)		(1.9–23.4)	(0.7–11.2)	(1.3–7.6)

Within rows, values with different lowercase letters differ significantly, as indicated by nonoverlapping confidence intervals

computed that indicate overall perceived importance of involvement in the sexual-minority community. Scores can range from 1 to 4, with higher scores indicating greater importance attached to community involvement ($\alpha = 0.91$). Gay men and lesbians scored significantly higher on this measure than bisexuals: Mean scores were 2.4 for gay men ($CI = 2.25$ – 2.57), 2.25 for lesbians (2.06 – 2.45), 1.65 for bisexual men (1.44 – 1.86), and 1.68 for bisexual women (1.54 – 1.82). Consistent with that pattern, lesbians and gay men reported higher levels of past activism in all areas, compared with bisexuals (see Table 5). The four sexual-minority activism items were summed to form an index ranging from 0 (did not engage in any of the activities) to 4

(engaged in all activities; not shown in Table 5). Gay men reported community activism in significantly more areas ($M = 1.97$, $CI = 1.71$ – 2.29) than did bisexual men ($M = 1.01$, $CI = 0.38$ – 1.65) or bisexual women ($M = 1.13$, $CI = 0.83$ – 1.44). Lesbians also reported activism in more areas ($M = 1.94$, $CI = 1.63$ – 2.26) than bisexuals, but their CI slightly overlapped with that of bisexual men. When the parallel questions about activism that was unrelated to sexual-minority issues were combined to create a summary score, a similar pattern emerged. As with sexual-minority activism, bisexuals reported a lower level of general activism than gay men and lesbians, although only the difference between gay men ($M = 2.13$, $CI = 1.86$ – 2.40)

Table 8 Relationship and family characteristics

Variable	Gay men	Lesbians	Bisexual men	Bisexual women ^a	Total
Current relationship status					
In a same-sex relationship					
Married, civil union, domestic partner	4.1% a	16.1% b	0.2% c	1.5% ac	4.2%
CI	2.3–7.4	9.8–25.2	0–1.7	0.5–4.3	2.9–6.1
Cohabiting ^b	24.9% a	45.3% b	3.0% c	3.3% c	16.9%
CI	18.5–32.6	35.5–55.4	0.9–9.5	1.3–8.2	13.5–21.0
Not cohabiting	10.7% ab	14.5% a	2.1% ab	2.8% b	7.1%
CI	6.7–16.6	8.1–24.7	0.5–8.8	1.1–7.2	5.0–10.0
In a different-sex relationship					
Currently married	0.3% a	0 a	29.2% b	45.2% b	18.6%
CI	0.1–1.1		13.8–51.5	34.3–56.6	13.2–25.7
Cohabiting, not married	0 a	0 a	0.8% b	16.3% c	4.1%
CI			0.2–3.7	7.7–31.2	1.9–8.6
Not cohabiting	0 a	0 a	7.9% b	7.0% b	3.8%
CI			3.2–18.3	3.3–14.4	2.1–6.7
Not in a committed relationship ^c	60.0% a	24.2% b	56.7% a	23.3% b	45.2%
CI	51.3–68.1	16.9–33.2	36.2–75.2	15.3–33.8	37.9–52.7
Would like to marry someday? (respondents not currently in a relationship)					
Yes	33.8%	46.0%	43.0%	40.9%	38.1%
CI	22.9–46.8	27.8–65.3	23.9–64.5	20.9–64.4	29.4–47.6
No	22.6%	8.3%	25.9%	8.3%	20.1%
CI	13.5–35.5	3.3–19.5	12.7–45.8	3.3–19.0	13.8–28.4
Not sure	43.5%	45.7%	31.0%	50.9%	41.8%
CI	30.5–57.5	27.4–65.1	14.5–54.5	29.4–72.0	32.5–51.7
How likely would marry current same-sex partner, if legal? ^d (Respondents currently in a same-sex relationship) ^e					
Not at all likely	21.6%	11.5%	*	*	
CI	13.3–33.2	5.9–21.1			
Somewhat likely	37.7% a	12.2% b	*	*	
CI	26.3–50.6	6.8–20.8			
Fairly likely or very likely	40.7% a	76.4% b	*	*	
CI	29.8–52.5	65.6–84.5			

Table 8 (continued)

Variable	Gay men	Lesbians	Bisexual men	Bisexual women ^a	Total
Parental status					
No children	91.6% a	65.1% b	63.5% bc	32.8% c	66.2%
CI	87.1–94.6	54.9–74.1	42.1–80.7	23.6–43.5	59.1–72.7
1 child	3.3% a	15.7% b	8.4% ab	27.5% b	12.2%
CI	1.5–7.1	10.2–23.3	3.6–18.5	17.2–40.8	8.7–16.9
2+ children	5.1% a	19.3% b	28.0% bc	39.7% c	21.5%
CI	3.0–8.5	12.0–29.4	12.8–50.9	29.4–51.1	15.9–28.4

Within rows, values with different lowercase letters differ significantly, as indicated by nonoverlapping confidence intervals. * = results not reported because of the small number of bisexuals in a same-sex relationship

^a Two bisexual women reported that they were cohabiting but did not report the gender of their partner; they are excluded from the “Relationship Status” section of the table

^b Includes four lesbians and four gay men who reported they were in a cohabiting relationship but did not report the gender of their partner, as well as one lesbian and one bisexual woman who characterized their cohabiting partner as transgender

^c Includes two lesbians and three gay men who did not report their current relationship status but reported elsewhere in the questionnaire that they were legally single or divorced

^d For Massachusetts residents, the clause “if same-sex marriages were legally recognized in your state” was not included in the question

^e Because of the small number of bisexual men and women in a same-sex relationship, responses are reported only for gay men and lesbians

and bisexual women ($M = 1.46$, $CI = 1.11$ – 1.82) was reliable. Lesbians ($M = 1.93$, $CI = 1.62$ – 2.25) scored between the two, and bisexual men scored the lowest, albeit with the largest CI ($M = 1.34$, $CI = 0.64$ – 2.05).

Religious and Political Characteristics

As shown in Table 6, more than half of the respondents belonged to a Christian denomination, and most of these were Catholics (20%) or Protestants who reported they were not born again Christians (30%). However, slightly more than one respondent in six reported being born again. Roughly 3% reported they were Wiccan or pagan, and about the same proportion were Buddhist. About 1% were Jewish. Nearly one respondent in four was an atheist or agnostic or reported having no religion.

Across sexual orientation subgroups, the distributions among religious denominations, attendance at religious services, and proportion of sexual-minority members in one’s congregation did not differ significantly. However, with age, education, and race statistically controlled, lesbians and bisexual men reported receiving significantly more daily guidance from their religion, compared with gay men and bisexual women. With religious guidance expressed as a score on a 4-point scale (1 = *none at all*, 4 = *a great deal of guidance*), lesbians’ and bisexual men’s mean scores were 2.22 and 2.42, respectively, compared with 1.96 for gay men and 1.97 for bisexual women (Table 6). Examination

of the frequencies within each response category suggests that lesbians and bisexual men were somewhat more likely to report that religion offers them a great deal of guidance, whereas gay men and bisexual women were more likely to report receiving no guidance from religion.

However, in response to a follow-up question (“How important is spirituality in your life?”), roughly two thirds of the respondents who said they received no daily guidance from religion nevertheless assigned at least some importance to spirituality (not shown in Table 6). When these responses were combined with ratings of the importance of religion, the aforementioned group differences were eliminated. Only 10.6% of the sample reported both that they received no guidance from religion and that spirituality was “not at all important” to them ($CI=7.6$ – 14.7). A majority (51.8%, $CI=44.6$ – 59.0) reported either that they received “some” guidance from religion or that spirituality was “not too important.” Another 21.4% ($CI=16.7$ – 26.9) received “quite a bit” of guidance or considered spirituality to be “somewhat important,” and 16.2% ($CI=10.4$ – 24.5) received “a great deal” of guidance or considered spirituality to be “very important.”

As reported in Table 7, the sample largely identified as Democratic, tended to be politically liberal, and overwhelmingly reported having voted for John Kerry in the 2004 presidential election. These patterns are consistent with findings from previous studies that gay, lesbian, and bisexual voters are less conservative than the general voting

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

Relationship and Family Characteristics

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

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

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

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

Discussion

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

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

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

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

labeling: Perhaps younger people are more likely than their older counterparts to view their own sexuality in fluid terms and thus to identify as bisexual rather than exclusively homosexual or heterosexual. Alternatively, it could reflect developmental differences insofar as some younger respondents who currently self-identify as bisexual might later identify as gay or heterosexual (indeed, roughly one fifth of bisexual men and one tenth of bisexual women said they label themselves Gay or Lesbian at least some of the time). These accounts are not mutually exclusive. Younger adults may be more open to a bisexual identity today than was the case a generation ago, and bisexuality may constitute a transitional identity for some individuals who will ultimately define their sexuality in terms of exclusive attraction to men or women. Indeed, the findings of the present study suggest that bisexuals may constitute a more heterogeneous population than gay men and lesbians, one that includes not only individuals who publicly identify as bisexual but also those who privately acknowledge same-sex attractions while currently maintaining a heterosexual relationship, and still others who are in the process of defining their sexuality. It is possible that comparisons of self-identified bisexual men and women according to their self-reported attraction patterns (i.e., mainly attracted to men, mainly attracted to women, equally attracted to both sexes) would yield useful insights in this regard. However, the present sample was not large enough to permit such analyses.

Compared with bisexual men and women, gay men and lesbians were more strongly committed to a minority sexual identity, identified more strongly with a sexual-minority community, were more likely to consider their community membership to be a reflection of themselves, and were generally more open about their sexual orientation. Overall, gay men and lesbians tended to attach greater importance than bisexuals to community involvement and were more likely to engage in such behaviors as attending rallies and demonstrations or donating money to community organizations. Here again, the present data suggest that the population of individuals who label themselves bisexual may be a more diverse group than those who self-identify as lesbian or gay and may include many women and men for whom being bisexual is not a primary basis for a personal identity or community involvement. These patterns may also reflect, in part, bisexuals' sometimes marginal status in established gay and lesbian communities, along with the relative lack of visible bisexual communities, owing to bisexuality's recent emergence as a public identity linked to a social movement (Herdt 2001; Udis-Kessler 1995).

Related to this point, substantial minorities of the bisexual respondents said they never (4.6% of bisexual women, 8.1% of bisexual men) or rarely (34.9% and 20.7%, respectively) used Bisexual as a self-descriptor. By

contrast, men who indicated they were homosexual overwhelmingly reported using the term Gay to describe themselves at least some of the time. Similarly, about three fourths of homosexual women used Lesbian as a self-label, and roughly the same proportion employed Gay as a self-descriptor. The latter finding is somewhat surprising because Gay has often been assumed to be primarily a male-oriented identity label (e.g., Kulick 2000).

Other patterns of self-labeling also warrant comment. The term Queer was used by only a small minority of respondents, as was the case for Dyke among female respondents. Considerably more respondents (more than one third of gay men and lesbians) used Homosexual as a self-descriptor at least some of the time. Notably, gay male and lesbian respondents were much more likely to say they never used Queer as a self-descriptor (58.9% of gay men, 65% of lesbians) than to say they never used Homosexual (32% and 34.1%, respectively). Bisexuals, by contrast, were about equally likely to say they never used either term. Among bisexual men, 71.7% never used Homosexual and 77.9% never used Queer; for bisexual women, the proportions were 88.8% and 87.3%, respectively. Thus, although Queer has sometimes been suggested as an inclusive label for sexual minorities (e.g., Jacobs 1998), it appears that a majority of US gay, lesbian, and bisexual adults never used it to describe themselves at the time the survey was conducted.

Some recent court cases addressing rights for gay, lesbian, and bisexual people have considered questions related to the origins of sexual orientation and its mutability (e.g., *In re Marriage Cases* 2008; *Varnum v. Brien* 2009). Moreover, some opponents of equal rights for sexual minorities have asserted that homosexuality represents a willful choice of a sinful way of life (Herman 1997).¹² In this context, it is noteworthy that most respondents in the present study—including bisexual men and women—reported that they experienced little or no choice about their sexual orientation. The question of exactly what is meant by “choice” in this realm warrants further discussion and research (see, for example, Whisman 1996), but if one's sexual orientation were experienced as a choice, it seems reasonable to expect that large numbers of gay, lesbian, and bisexual people would report this perception in response to a survey question.

We believe that the responses to this question may also provide a useful insight for interpreting the often observed correlation between heterosexuals' levels of sexual prejudice and their beliefs about whether homosexuality is a choice (e.g., Haider-Markel and Joslyn 2008; Hegarty

¹² At least one conservative Christian organization has broken with this position, stating on its website that “[w]e do not believe anyone chooses his or her same-sex attractions” (Love Won Out 2008).

2002). If, as the present data indicate, gay, lesbian, and bisexual people experience little or no choice about their sexual orientation, they probably communicate this fact to their heterosexual friends and relatives. Given the consistently high correlations observed between heterosexuals' attitudes toward sexual minorities and the extent of their personal relationships with nonheterosexual individuals (Herek and Capitanio 1996; Lewis 2008; Pettigrew and Tropp 2006), the correlation that is reliably observed between origin beliefs and attitudes may result at least in part from both variables' association with personal contact.

Related to this point, the data reveal notable differences in disclosure and outness between gay men and lesbians, on the one hand, and bisexuals, on the other. The parents and siblings of gay men and lesbians are substantially more likely to know about the latter's sexual orientation than is the case for the families of bisexual men and women. A similar pattern was also observed in most categories of friends, other family, and coworkers: Compared with lesbians and gay men, significantly fewer bisexuals—especially men—reported they were out of the closet to even one member of these groups. Coming out as bisexual may differ in important respects from coming out as a gay or lesbian person (McLean 2007). Nevertheless, insofar as heterosexuals' levels of sexual prejudice are reduced by having personal relationships with nonheterosexuals (Herek and Capitanio 1996; Lewis 2008; Pettigrew and Tropp 2006), these patterns could have important implications for societal attitudes toward bisexual men and women.

The data indicate that self-identified gay, lesbian, and bisexual adults tend to be less religious and more politically liberal than the US population. Although most respondents reported that religion or spirituality provides some guidance in their daily lives, the sample overall reported a fairly low level of religious commitment. Slightly more than one fourth stated that they receive “quite a bit” or “a great deal” of guidance from religion in their daily lives, and this proportion increased to approximately 38% when the question was expanded to include spirituality as well as formal religion. By comparison, in the 2004 American National Election Survey (ANES), 35% of US adults reported that religion provides a great deal of guidance in their day-to-day lives, and another 24% said it provides quite a bit of guidance.¹³ Whereas about one fourth of the present sample reported at least monthly attendance at religious services, a 2008 Pew survey found that 39% of Americans reported at least weekly attendance at religious

worship services (Pew Forum on Religion and Public Life 2008).

The data corroborate previous findings that sexual minorities constitute a politically progressive constituency (e.g., Edelman 1993; Hertzog 1996; Schaffner and Senic 2006). A majority of respondents described themselves as liberal, and the sample was overwhelmingly Democratic in party affiliation and voting patterns. By comparison, 25% of the 2004 ANES respondents said they were liberal, and 32% identified as Democrats, whereas a plurality (about 41%) described themselves as conservative and 29% identified as Republicans.

Consistent with findings from previous research with convenience samples (Peplau and Fingerhut 2007), sexual-minority women were substantially more likely than sexual-minority men to report that they were currently in a committed relationship. Whereas virtually all coupled gay men and lesbians had a same-sex partner, the vast majority of coupled bisexuals were in a heterosexual relationship. This disproportionate number of different-sex couples among bisexual adults probably has multiple explanations. In part, it may simply reflect the fact that most adults are heterosexual, and thus, bisexuals have many more opportunities to form a different-sex intimate relationship than a same-sex relationship. In addition, same-sex relationships are stigmatized and lack widespread legal recognition in the USA, whereas different-sex relationships enjoy social approval and many tangible benefits (Herek 2006). These factors may facilitate different-sex relationships among those bisexuals who are attracted to the other sex at least as much as to their own sex (roughly three fourths of the bisexual respondents in the present sample).

Among respondents who were not currently in a committed relationship, relatively few said they would *not* want to marry someday. A plurality, however, indicated uncertainty about the desirability of marrying. Among the homosexual respondents currently in a relationship, lesbians were substantially more likely than gay men to say they would be “very likely” or “fairly likely” to marry their current partner if they could legally do so (76% vs 41%). This pattern is consistent with the available data concerning patterns of marriage and registrations of civil unions and domestic partnerships, which reveal that female couples are considerably more likely than male couples to formally register their relationship when the law allows them to do so (Korber and Calvan 2008; Rothblum et al. 2008). It is also consistent with the present finding that lesbians are significantly more likely than gay men to live in a household with at least one other adult. Lesbians' greater tendency to seek legal recognition of their relationships may be explained in part by the fact that they are about four times more likely than gay men to have one or more

¹³ The figures are based on our analysis of the 2004 National Election Study pre-election interview data, using the UC Berkeley SDA interface (<http://sda.berkeley.edu/archive.htm>).

children or to report that they have children younger than 18 years residing in their home. Seeking legal protections and benefits for children may be an important motivator for marrying (Herek 2006).

The data obtained in any survey are subject to possible error due to sampling, telephone noncoverage, and problems with question wording. In addition to these sources of error, we note several important limitations of the present study that should be kept in mind when interpreting the results. Our operationalization of sexual orientation in terms of identity means that the findings reported here should not be generalized to the population of US adults who experience same-sex attractions or have engaged in same-sex sexual behavior but do not identify as lesbian, gay, or bisexual. The sample was restricted to English-speaking adults in households with a telephone; thus, it is potentially problematic to generalize from these results to non-English speakers, nonadults, and individuals without a telephone.

In addition, it is likely that some lesbian, gay, and bisexual adults in the full KN panel did not report their true sexual orientation in response to the original screening question and thus had no opportunity of being included in the present sample. Insofar as self-administered Internet questionnaires appear to elicit greater disclosure of sensitive and potentially stigmatizing information than telephone and face-to-face interviews (e.g., Kreuter et al. 2008), such underreporting may be less common in the KN panel than in surveys using other modes of data collection. Without minimizing the possibility of problems created by such nonreporting in the present study, we note that many respondents who had not disclosed their sexual orientation to their family or friends nevertheless reported it in the questionnaire.

Another potential limitation results from the fact that the data are derived from self-reports. As in any survey study, some respondents may have provided inaccurate responses to questions, either intentionally (e.g., because of social desirability concerns) or because of problems with comprehension or recall (Tourangeau et al. 2000). Yet another potential concern is whether the survey responses obtained from experienced Internet panel members might differ from those of naïve or “fresh” respondents. To date, the minimal research that has addressed this issue suggests that the response patterns of the two groups probably do not differ substantially (Toepoel et al. 2009). Finally, as with all surveys, the data represent a snapshot of the population at the time the study was fielded. Additional research with comparable probability samples will be needed to develop a more definitive portrait of sexual-minority adults in the USA. Such research will be useful not only in assessing the extent to which the findings of the present study can be reliably replicated but also might permit more detailed analyses of key subgroups within the sexual-minority

population. It would be illuminating, for example, to compare lesbian, gay, and bisexual adults in different race and ethnic groups on many of the variables discussed previously. In the present sample, these subgroups are too small for reliable analyses.

Throughout the present article, we have noted the importance of having accurate data about gay, lesbian, and bisexual people for legal and policy debates. Such information will also be highly useful for informing behavioral and social science research on sexual orientation and sexual minorities in a variety of ways. In particular, the present findings highlight the importance for researchers of distinguishing among lesbian, gay, bisexual female, and bisexual male individuals, rather than combining them into an undifferentiated “LGB” group. For example, the data indicate that sexual orientation groups differ in their levels of identity commitment, community involvement, and outness. Future research might profitably examine whether the meanings attached to these and related variables—and, indeed, the very concept of community membership—might differ among sexual orientation subgroups.

Moreover, because these variables may play important roles in moderating the effects of sexual stigma on psychological well-being (Herek and Garnets 2007; Meyer 2003), studies of sexual-minority mental health should include separate analyses of bisexuals and homosexuals, as well as of men and women. A similar analytic strategy should be followed in studies of intimate relationships among sexual minorities because, as shown here, sexual orientation and gender groups differ significantly in their relationship patterns. More broadly, the present study demonstrates the need for researchers to conceive of gay men, lesbians, bisexual men, and bisexual women not only as a cultural minority united by the common experience of sexual stigma but also as distinct groups whose members have different experiences, beliefs, and needs.

As society confronts a widening array of policy issues that uniquely affect sexual minorities, accurate scientific information about the lesbian, gay, and bisexual population will continue to be needed by government officials, the courts, and legislative bodies. Social and behavioral researchers working in this area have long recognized the value of data collected through probability sampling methods and have used a variety of creative strategies during the past two decades to obtain such data. In reporting what is perhaps the most extensive description to date of a national probability sample of self-identified lesbian, gay, and bisexual adults in the USA, the present article extends these efforts. We hope it will be useful not only for informing policy but also for generating hypotheses that can be tested in future studies with ever more sophisticated samples.

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EXHIBIT 21

The gay people against gay marriage

By Tom Geoghegan
BBC News, Washington

🕒 11 June 2013



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

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

Document received by the CA 5th District Court of Appeal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Countries which allow gay marriage



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

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

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

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

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

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

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

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

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

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

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EXHIBIT 22

Document received by the CA 5th District Court of Appeal.

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

November 5, 2017 2:18pm EST

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

Author



Peter Robinson
Senior lecturer in History and Sociology,
Swinburne University of Technology

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

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

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

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

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

Rebels with a cause

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

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

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

North American sociologist Martha Fowlkes called these gay rebels "marriage non-conformists".

Others argued that the push for same-sex marriage is having a "mainstreaming" effect on gays and lesbians, that is, that they are being turned into "pseudo straights".

The appeal of marriage

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

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

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

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

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

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

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

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

Listening to older gay men

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

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

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

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

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

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

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



Homosexuality Marriage Gay marriage Same-sex marriage LGBT
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Beth Daley
Editor and General Manager



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EXHIBIT 23

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

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

v.

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

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

Real Parties in Interest.

Action Filed: December 13, 2017

1 I, REINA BENITEZ, declare as follows:

2 1. I am not a party to this lawsuit. I have personal knowledge of the facts set forth in
3 this declaration and, if called upon as a witness, I could and would testify competently to them.

4 2. I am the owner of Party Palace, an event venue rental hall in Bakersfield, California.
5 Party Palace regularly hosts wedding receptions, as well as other events, such as Quinceañeras,
6 Sweet Sixteens, Baptisms, and Bridal and Baby Showers.

7 3. I have read several news reports regarding Mireya and Eileen Rodriguez-Del Rio's
8 visit to Tastries Bakery on Saturday, August 26, 2017, and Cathy Miller's decision not to design
9 and create a wedding cake for their same-sex wedding celebration. I have also read the description
10 of that encounter in their declarations filed in support of the Department of Fair Employment and
11 Housing's petition for a preliminary injunction.

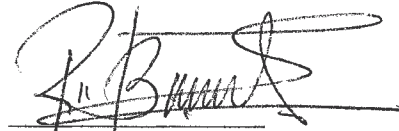
12 4. During the week before that Saturday, the Rodriguez-Del Rios visited Party Palace
13 and met with me. One of them brought out a cell phone to video- or audio-record our conversation.
14 I told them that Party Palace was already booked for the date of their wedding reception. One of
15 them then asked whether I had any objection to renting out Party Palace for same-sex weddings. I
16 truthfully told them that I had no such objection. They asked to see my calendar, and I showed it to
17 them. My calendar showed that Party Palace was indeed already booked for the date of their
18 wedding reception. Mireya and Eileen Rodriguez-Del Rio then stopped recording our conversation
19 and left. I found the recording odd, but initially of no concern.

20 5. After I read online news reports regarding the Rodriguez-Del Rios and Tastries
21 Bakery, however, I became concerned. In those online news reports, the Rodriguez-Del Rios
22 describe how shocked they were that a wedding professional might have a religious objection to
23 facilitating a same-sex wedding. This statement that they were shocked also appears in their
24 declarations filed in support of the Department of Fair Employment and Housing's petition for a
25 preliminary injunction.

26 6. It does not, however, make sense to me that the Rodriguez-Del Rios would be
27 shocked and suffer emotional distress after their visit to Tastries because the Rodriguez-Del Rios
28 specifically asked me whether I had any objection to renting Party Palace for a same-sex wedding.

1 7. Based on my experience with the Rodriguez-Del Rios, and their descriptions of their
2 visit to Tastries Bakery, I believe that they recorded my conversation with them and asked to see
3 my calendar because they were looking for a lawsuit.

4 I declare under penalty of perjury under the laws of the State of California that the foregoing
5 is true and correct. Executed this 17 day of January, 2018, at Bakersfield, California.

6
7
8 
Reina Benitez

Document received by the CA 5th District Court of Appeal.

1 Charles S. LiMandri, SBN 110841
cslimandri@limandri.com
2 Paul M. Jonna, SBN 265389
pjonna@limandri.com
3 Jeffrey M. Trissell, SBN 292480
jtrissell@limandri.com
4 Milan L. Brandon II, SBN 326953
mbrandon@limandri.com
5 LiMANDRI & JONNA LLP
6 P.O. Box 9120
Rancho Santa Fe, California 92067
7 Telephone: (858) 759-9948
Facsimile: (858) 759-9938

8 Thomas Brejcha, *pro hac vice**
9 tbrejcha@thomasmoresociety.org
Peter Breen, *pro hac vice**
10 pbreen@thomasmoresociety.org
THOMAS MORE SOCIETY
11 309 W. Washington St., Ste. 1250
Chicago, IL 60606
12 Tel: (312) 782-1680
13 *Application forthcoming

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

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

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

20 Plaintiff,

21 v.

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

24 Defendants.

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

26 Real Parties in Interest.

CASE NO.: BCV-18-102633

IMAGED FILE

**REPLY MEMORANDUM IN
SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION**

Date: Nov. 4, 2021

Time: 8:30 a.m.

Dept: 11

Judge: Hon. David R. Lampe

Action Filed: Oct. 17, 2018

Trial Date: Dec. 13, 2021

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INTRODUCTION

A particularly odd feature of this case concerns how, in the past four years, Plaintiff DFEH's version of the facts has narrowed. In response to Defendants' anti-SLAPP motion, Plaintiff DFEH submitted the declarations of two of Defendants' former employees—Jessica Criollo and Mary Johnson—to support its argument that Defendants' free speech defense was pretextual, and that in reality, “Defendants had a policy of refusing to supply wedding cakes for same-sex couples regardless of whether or not those cakes were custom[.]” (Anti-SLAPP Order (Mar. 27, 2019) p.12:16–22.)

But when Ms. Criollo was asked why she put “custom” in quotes in her declaration, she repudiated it, blaming the DFEH: “I didn’t type this,” “I wouldn’t have put [] quotes.” (Defs. Ex. 17, Criollo Dep., 64:21–65:6; see also *id.* at 13:8–22, 45:20–46:2.) For Ms. Johnson, her declaration stated that “Tastries sometimes offered for sale a pre-made case cake that looked similar to” the Real Parties’ wedding cake. (Plt. Ex. 14, Johnson Decl., ¶ 11.) If true—the suggestion that anybody could purchase a three-tiered white cake out of the refrigerated case—that would be a particularly damaging fact. But of course, Ms. Johnson’s deposition revealed that it too was not true—that the DFEH had simply manufactured evidence. (Defs. Ex. 18, Johnson Dep., 110:15–24; see also *id.* at 44:14–45:3.)

Yet, Plaintiff DFEH continues to raise its discredited theory that this case is solely about a refusal to provide *goods*, i.e., “blank, generic wedding cakes,” not a refusal to design a custom centerpiece for an event celebratory of same-sex marriage. (DFEH MSJ Opp., pp.1:2–3, 2:7–10, 3:10–4:14, 18:13–21.) But in response to Defendants’ undisputed material fact that all of Defendants’ wedding cakes are, *in fact*, custom-designed cakes, Plaintiff DFEH can cite no rebuttal evidence. (See DSS ##28, 29 [citing 2d Miller Decl., ¶ 25].) All Plaintiff DFEH can do is point to the Real Parties’ actual wedding cake, and pejoratively label it as “blank” and “generic,” ignoring that even Ms. Criollo and Ms. Johnson viewed the cake to be a work of “art” requiring skill to create (DSS #32 [citing Defs. Ex. 17, Criollo Dep., 112:1–6; Defs. Ex. 18, Johnson Dep., 64:1–9]), and ignoring its own admission that even “blank, generic” cakes have at least six design elements: “a cake with [1] three [2] round tiers, [3] frosted with scaly [4] white [5] buttercream frosting, [6] decorated only with a few frosting flowers/rosettes on the sides[.]” (DFEH MSJ, p.4:10–11.) This Court should grant summary judgment for Defendants and end this unconstitutional prosecution.

REPLY ARGUMENT¹

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

1.1. Real Parties were not Denied Full and Equal Services

As this Court explained earlier, “the State minimizes the fact that Miller has provided for an alternative means for potential customers to receive the product they desire through the services of another talented baker who does not share Miller’s belief. Miller is not the only wedding cake creator in Bakersfield.” (*Dept. of Fair Employment and Housing v. Miller* (Cal. Super. 2018) 2018 WL 747835, at *5.) In distinguishing Defendants’ cases (*Minton* and *North Coast*), Plaintiff DFEH states that they only concern arranging the provision of services by a non-objector within the same business, i.e., another employee or another bakery owned by Defendants. (DFEH MSJ Opp., pp.4:19–6:3 & fn.4.) This rule is not explicit in the cases and makes no logical sense. There is no reason why an actual business relationship between bakeries is insufficient without the two bakeries being under the same corporate umbrella. The issue is whether referring a customer to someone else is pretextual or has a legitimate justification. (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 38 [discussing legitimate justification for “sex-segregated . . . restrooms”].) Referral to a third party is a common business practice when a business is not able to provide a requested service.

Minton stands for the proposition that another such legitimate justification is freedom of religion. Indeed, Defendants conduct is protected by the Unruh Act. (Civ. Code, §§ 51(e)(4), 51.5(a) see also *infra*, fn.3.) Where there is a clash under the Unruh Act of the rights of two protected groups, an accommodation that protects both their rights is needed. This is precisely what Defendants provided. There is no Unruh Act violation here. (See DSS ##1–3 [all undisputed]; *Minton v. Dignity Health* (2019) 39 Cal.App.5th 1155, 1164–1165, *North Coast Women’s Care Medical Group, Inc. v. Superior Court* (2008) 44 Cal.4th 1145, 1159.)

¹ The evidence supporting Plaintiff DFEH’s opposition papers is simply a smaller subset of the evidence supporting its moving papers—no additional evidence was submitted. Thus, instead of new objections, Defendants incorporate by reference the objections that apply to the opposition evidence: Nos 6 & 7 to the Johnson declaration. (See *Forest Lawn Memorial-Park Association v. Superior Court of Riverside County* (2021) __ Cal.App.5th __, 2021 WL 4618080, at *4 [a disavowed declaration is inadmissible on summary judgment].) Further, Plaintiff DFEH does not oppose Defendants’ request for summary adjudication of the prayer for punitive damages. Thus, this Court should dispose of it.

1 **1.2. Real Parties' Sexual Orientation Did Not Motivate the Denial of Service**

2 Plaintiff DFEH begins by disputing CACI's recitation of the elements of an Unruh Act claim,
3 stating that Real Parties' sexual orientation need only be "a motivating reason" for Defendants'
4 distinction, not a "substantial motivating reason." (Compare Tastris MSJ, p.12:3-20 [citing CACI
5 3060]; with DFEH MSJ Opp., pp.3:19-4:10 & fn.3.) A "substantial motivating reason" is "a reason
6 that actually contributed to the [act]. It must be more than a remote or trivial reason. It does not have
7 to be the only reason motivating the [act]." (CACI No. 2507.)

8 Defendants agree that no court has engaged in a substantive analysis of this distinction (even
9 the cases that Plaintiff DFEH cites), but many courts implicitly accept CACI's pronouncement that a
10 "substantial motivating reason" is the proper interpretation. (See *Minton, supra*, 39 Cal.App.5th at
11 1161 [quoting trial court holding that plaintiff failed to allege "that Dignity Health's refusal to have the
12 procedure performed at [Mercy] was substantially motivated by Mr. Minton's gender identity."];
13 *Thurston v. Omni Hotels Management Corporation* (2021) __ Cal.App.5th __, 2021 WL 4315811, at *2
14 fn.5 [quoting CACI 3060 and its "substantial motivating reason" standard].)²

15 Looking to Plaintiff DFEH's cases, in one, the court simply used the term "motivating
16 reason," but also stressed the need for "intentional[] discriminat[ion]" as essentially a separate
17 element. (*Turner v. Association of American Medical Colleges* (2008) 167 Cal.App.4th 1401, 1411.)³ As
18 explained in Defendants' opposition brief, that *intent* requirement is a real requirement that is absent

19 ² (See also *James v. US Bancorp* (C.D. Cal., June 4, 2021) No. 5:18-cv-01762-FLA (SPx), 2021 WL
20 4582105, at *6; *L.J. by and through Jones v. Poway Unified School District* (S.D. Cal., Dec. 2, 2020) No.
21 20CV1569-GPC(MDD), 2020 WL 7056283, at *15; *T.P. v. Walt Disney Parks And Resorts U.S., Inc.*
22 (C.D. Cal., May 24, 2019) No. CV 15-5346-R, 2019 WL 11753648, at *3; *Elliott v. Versa CIC, L.P.*
23 (S.D. Cal., Feb. 1, 2019) No. 16-CV-0288-BAS-AGS, 2019 WL 414499, at *15; *Martinez v. Optimus*
24 *Props, LLC* (C.D. Cal., June 6, 2018), No. 2:17-cv-03581-SVW-MRW, 2018 WL 6039875, at *21; *Stewart v. American Association of Physician Specialists, Inc.* (C.D. Cal., Nov. 30, 2015) No. 5:13-cv-
01670-ODW (DTBx), 2015 WL 7722349, at *6.)

25 ³ As for the federal cases cited, they quote the 2009 version of BAJI No. 7.92. (See *Wilkins-Jones v.*
26 *County of Alameda* (N.D. Cal. 2012) 859 F.Supp.2d 1039, 1048; *Gutierrez v. Gonzalez* (C.D. Cal., Apr.
27 26, 2017) No. 2:17-cv-01906-CAS(Ex), 2017 WL 1520419, at *5.) But BAJI No. 7.92 was later
28 amended, such that "[t]his spring 2017 revision adds the word 'substantial' before 'motivating' in
element #2." (BAJI No. 7.92 (2017) Comment.) This appears to have been done to capture the
"intentional discrimination" element of Unruh. (See *id.*; see also CACI No. 3060 (2021) Directions
for Use ["The intent requirement is encompassed within the motivating-reason element."].)

here. (See Tastries MSJ Opp., § A, pp.11:4–12:17, 13:2–21; see also *Thurston, supra*, 2021 WL 4315811, at *3–5 [noting that the plaintiff must “possess a *bona fide intent* to sign up for or use its services” for there to be intentional discrimination]; *Totes-Isotoner Corp. v. U.S.* (Fed. Cir. 2010) 594 F.3d 1346, 1358 [taxing only men’s gloves is insufficient evidence of intent to discriminate against men].)

Plaintiff DFEH then engages in a lengthy recitation of the facts of *Christian Legal Society v. Martinez* (2010) 561 U.S. 661, as well as *In re Marriage Cases* (2008) 43 Cal.4th 757. (See DFEH MSJ Opp., p.6:18–8:6) The applicability of either to the present case suffers from the fact that they were not Unruh Act cases such that “intentional discrimination” was not required. (See Tastries MSJ, § A, p.13:2–21.) Further, turning to the facts of *Christian Legal Society*, although it does hold (with hardly any analysis) that discrimination on the basis of homosexual *sexual conduct* is discrimination on the basis of homosexual *status* (*Christian Legal Society, supra*, 561 U.S. at 689), this analysis does not translate to the context of same-sex marriage, since people of all sexual orientations can favor or disfavor same-sex marriage, or marriage generally, for a myriad of reasons. (See *Brush & Nib Studios, LC v. City of Phoenix* (2019) 247 Ariz. 269, 290 [distinguishing *Christian Legal Society* on this basis].)

Black letter Unruh Act jurisprudence is that “[t]he Unruh Act does not prohibit discrimination against persons based upon their conduct, but only prohibits that discrimination resulting from the individual’s membership in a particular class of persons.” (*Cloutier v. Prudential Ins. Co. of America* (N.D. Cal. 1997) 964 F.Supp. 299, 304; see Civ. Code, § 51(c).)⁴ There is conceptual space here. Defendants did not refuse to make the Real Parties’ wedding cake based on their sexual orientation, but rather based on Defendants’ traditional beliefs regarding marriage. (See DSS ## 4–5 [all undisputed]; SSUMF No. 5.) In this context, there is no Unruh Act claim.

2. THERE IS A COMPLETE DEFENSE TO PLAINTIFF’S CAUSE OF ACTION

2.1. The Free Exercise Clause of the California Constitution

Here, Plaintiff DFEH begins by trying to convince the Court to reject the pre-*Smith* strict scrutiny standard applied by the California Supreme Court in its last three cases that addressed the

⁴ The one exception to this in the statute is discrimination on the basis of “religion” since the statute defines religion to “include[] all aspects of religious belief, observance, and practice.” (Civ. Code § 51(e)(4).) “Sexual orientation” is merely defined as “heterosexuality, homosexuality, and bisexuality” without further elaboration. (Civ. Code, § 51(e)(7); Gov. Code, § 12926(s).)

1 Free Exercise clause of the California Constitution—and instead apply the post-*Smith* standard
2 applicable to the Free Exercise clause of the First Amendment. (DFEH MSJ Opp., § II.B.2(a),
3 pp.14:10–15:11.) This is not an option available to the Court. Since the California Supreme Court
4 started applying a pre-*Smith* strict scrutiny (while technically not resolving the appropriate test), *every*
5 appellate opinion has followed the California Supreme Court’s lead and done so as well.⁵

6 Plaintiff DFEH next argues that there is no substantial burden on Defendants’ Free Exercise
7 rights, and so those rights are not triggered at all. (DFEH MSJ Opp., § II.B.2(b), pp.15:13–17:7.)
8 Notably, all of Defendants’ material facts regarding their California Constitution Free Exercise
9 defense are undisputed except Defendants’ statement that “Without the revenue from making
10 wedding cakes, Defendants’ bakery business is not financially viable. (See DSS #8 [disputed]; DSS
11 ##6–7, 9–11 [undisputed].) However, the only evidence cited by Plaintiff DFEH to rebut this is
12 Defendant Miller’s own declaration. (See PAUMF No. 56 [citing 2d Miller Decl., ¶ 52].) According to
13 Plaintiff, a loss of *at least* 30% of revenue is immaterial, regardless of Defendant Miller’s testimony that
14 it would drive the bakery out of business (DSS #8), because Defendants sell non-wedding related
15 goods too (PAUMF No. 56.) (Plaintiff DFEH also ignores that many non-wedding sales are related to
16 a customer relationship that started with a wedding.) There is no dispute here, just speculation by
17 Plaintiff DFEH. (See *Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1289 [“It is not
18 enough in opposing summary judgment to surmise reasons or make unfounded allegations: a party
19 cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but
20 instead must produce admissible evidence raising a triable issue of fact.”] [cleaned up].)

21 Turning to Plaintiff DFEH’s description of the law of “substantial burden,” it suffers from
22 two key defects. First, the “substantial burden” analysis of *FEHC* is completely non-binding. *FEHC*
23 was a fractured opinion with three justices drafting the plurality opinion, Justice Mosk concurring in

24 _____
25 ⁵ (See *Valov v. Department of Motor Vehicles* (2005) 132 Cal.App.4th 1113, 1126 & fn.7 [applying
26 strict scrutiny standard and noting that trial court erred in not doing so]; see also *Brown v. Smith*
27 (2018) 24 Cal.App.5th 1135, 1145 [applying strict scrutiny test]; *Jonathan L. v. Superior Court* (2008)
28 165 Cal.App.4th 1074, 1102 & fn.32 [in light of ambiguity from California Supreme Court, applying
strict scrutiny]; *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th
417, 438 [following lead of California Supreme Court and applying strict scrutiny]; *DiLoreto v.*
Board of Education (1999) 74 Cal.App.4th 267, 279 [applying strict scrutiny].)

1 everything *except the substantial burden analysis*, and three justices dissenting. (See *Smith v. Fair*
2 *Employment & Housing Com.* (1996) 12 Cal.4th 1143, 1189–1192 [Mosk, J., concurring].) Justice Mosk
3 contended that the “substantial burden” analysis employed by the plurality in *FEHC* was itself
4 unconstitutional because it required courts to pass on religious questions (*Id.* [Mosk, J., concurring].)

5 Eight years later, when the California Supreme Court addressed the California Free Exercise
6 clause again, Justice Mosk’s concerns made their way into the majority opinion, which noted that
7 “[t]he need to ask questions such as these” to answer the substantial burden question “places a court
8 in an uncomfortable position.” (*Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32
9 Cal.4th 527, 563.) As a result, the Court “[a]ssum[ed] for the sake of argument the WCEA
10 substantially burdens a religious belief or practice[.]” (*Id.* at 564.) Since then, every California court
11 has accepted the objector’s assertion of a substantial burden. (See *North Coast, supra*, 44 Cal.4th at
12 1158; see *infra*, fn.4.) This Court should do likewise. Forcing Defendants out business must be a
13 substantial burden (DSS ##7–8), thus triggering strict scrutiny, which cannot be satisfied. (Compare
14 DSS ##6–11; with *North Coast, supra*, 44 Cal.4th at 1159; *Minton, supra*, 39 Cal.App.5th at 1164–1165.)

15 2.2. The Free Exercise Clause of the U.S. Constitution

16 Plaintiff DFEH’s argument as to neutrality and the general applicability of the Unruh Act
17 boils down to a citation to *North Coast* without any other analysis. (DFEH MSJ Opp., p.9:20–22.)
18 While the California Supreme Court is obviously due significant respect, its analysis in *North Coast*
19 was extremely truncated, and relied primarily on a citation to *Catholic Charities*. But in the 13 and 14
20 years since *North Coast* and *Catholic Charities* were decided, respectively, the U.S. Supreme Court has
21 spoken far more on neutrality and general applicability.

22 **First**, Plaintiff DFEH tries to distinguish *Fulton v. City of Philadelphia, Pennsylvania* (2021) 144
23 S.Ct. 1868 (DFEH MSJ Opp., § II.B.1(a)), by arguing that *Fulton* does not apply to public
24 accommodations. (DFEH MSJ Opp., pp.10:3–22.) That is simply not true. Nowhere does the Court
25 in *Fulton* say that its Free Exercise holding does not apply to public accommodations. (*Fulton, supra*
26 141 S.Ct. 1876–1882.) For different reasons, the Court found that Catholic Social Services was not a
27 public accommodation under Pennsylvania’s non-discrimination statute (*id.* at 1880–1881), but
28 subsequent cases have not narrowly confined *Fulton* to its factual setting. (*Dahl v. Board of Trustees of*

1 *Western Michigan University* (6th Cir. 2021) __ F.4th __, 2021 WL 4618519, at *2.)

2 Turning to the substance of *Fulton*, Plaintiff DFEH states, without analysis or citation, that
3 “Unruh provides no discretionary exemptions; DFEH has no power to exempt religious entities or
4 for-profit public accommodations.” (DFEH MSJ Opp., p.11:6–7.) Plaintiff DFEH relegates the
5 substance of its argument to a footnote, stating that Unruh’s “limiting language” does not create
6 “individualized exemptions.” (DFEH MSJ Opp., p.11, fn.6 [citing Civ. Code, § 51(c)].) But it’s hard
7 to read subdivision (c) any other way: it is “a formal mechanism for granting exceptions” if California
8 thinks the exception is important enough. (*Fulton, supra*, 141 S.Ct. at 1879; see also *Tastries MSJ*,
9 pp.20:17–21:13.) This is despite the fact that “government regulations are not neutral and generally
10 applicable . . . whenever they treat *any* comparable secular activity more favorably than religious
11 exercise.” (*Tandon v. Newsom* (2021) 141 S.Ct. 1294, 1296 [original emphasis].) The Unruh Act is
12 aimed at eradicating invidious discrimination, yet under subdivision (c) California has deemed it fit to
13 exempt itself.⁶ So secular governmental discrimination is treated “more favorably” than religiously
14 based discrimination, both triggering and failing strict scrutiny. (*Tandon, supra*, 141 S.Ct. at 1296; *A. v.*
15 *Hochul* (N.D.N.Y. 2021) __ F.Supp.3d __, 2021 WL 4734404, at *9.)

16 Plaintiff DFEH also has its own discretion. It decides whether the target of its attention is
17 engaging in speech, or whether it is applying a neutral policy. (See *Tastries MSJ*, pp.21:14–22:2.) It
18 decides whether a religious accommodation is possible, or not. (See *Tastries MSJ Opp.*, pp.23:18–
19 24:1; Gov. Code, § 12940, Cal. Code Regs. tit. 2, § 11062.) But even if Defendants’ wedding cakes are
20 not speech, the fact that there is a speech exemption (DSS #17), requires a religious exemption
21 (*Tandon, supra*, 141 S.Ct. at 1296), even if Plaintiff DFEH’s speech exemption had never actually been
22 granted. (*Fulton, supra*, 141 S.Ct. at 1879.)

23 **Second**, Plaintiff DFEH states that Defendants do not have a “truly message-based justification”
24 for denying services, and so Plaintiff DFEH’s rejection of it is not evidence of non-neutrality. (DFEH

25 ⁶ Municipalities are not covered by the Unruh Act (*Harrison v. City of Rancho Mirage* (2015) 243
26 Cal.App.4th 162, 176), nor are school districts (*Brennon B. v. Superior Court of Contra Costa County*
27 (2020) 57 Cal.App.5th 367, 390), or police departments (*White v. City and County of West Sacramento*
28 (E.D. Cal., Sept. 7, 2021) No. 2:20-CV-02383-MCE-AC, 2021 WL 4068009, at *4), or the Olympic
Games—since they “are organized and conducted under the terms of an international agreement.”
(*Martin v. International Olympic Committee* (9th Cir. 1984) 740 F.2d 670, 677.)

MSJ Opp., pp.11:15–12:15.) Apparently, according to Plaintiff DFEH, if a “message-based justification” for declining services has the *effect* of “exclud[ing] only gay people,” then the justification is irrelevant. (DFEH MSJ Opp., p.12:1–4.) Thus, a policy that “wedding cakes must not contradict God’s sacrament of marriage between a man and a woman” (2d Miller Decl., Ex. A) would be illegal for allegedly “exclud[ing] a protected class of people.” (DFEH MSJ Opp., p.12:10.) Regardless of the fact that there is space between homosexual status and same-sex marriage (see § 1.2, *supra*), Plaintiff DFEH cannot merely re-characterize speech as conduct because it does not like the speech. (See *National Institute of Family and Life Advocates v. Becerra* (2018) 138 S.Ct. 2361, 2373–2374.)⁷

Plaintiff DFEH also argues that Defendants refused to sell the Real Parties “blank, generic” cakes (DFEH MSJ Opp., pp.1:2-3, 2:7-10) and “blank cakes [that] . . . were not inherently expressive.” (DFEH MSJ Opp., p.18:20–21.) But as explained in the introduction, these statements (and many more like them) distort the facts to imply that Defendants’ cakes are unoriginal and lacking in artistry or skill to create. Defendants are primarily a *custom* bakery where all of their pre-ordered products are tailored. Defendants’ custom cakes range from simple to elaborate, but all require skill to create. (DSS ##28–29, 33, 45.) Plaintiff DFEH does not provide any professional or objective basis for its assessment of the generic or expressive qualities of Defendants’ cakes, yet presents these as statements of fact based on its “investigation.” This sort of biased manipulation of the facts evidences a lack of neutrality. (*Masterpiece Cakeshop Incorporated v. Elenis* (D. Colo. 2019) 445 F.Supp.3d 1226, 1241 [“*Masterpiece II*”]; see also *Ashaheed v. Currington* (10th Cir. 2021) 7 F.4th 1236, 1243–1246 & fn.3 [disparate treatment alone is sufficient; invidious religious animus not required].)

Third, Plaintiff DFEH dismisses Defendants’ suspicious timing argument, as insufficient because “[s]uspicious . . . are not evidence.” (DFEH MSJ Opp., pp.12:16–13:8.) Reasonable inferences, however, are evidence. (*Masterpiece II*, *supra*, 445 F.Supp.3d at 1242; see also DSS ##19–22.) The question, then, is whether “[a] jury *could* infer” that the suspicious timing evidenced either invidious animus, or at least an intent to treat Defendants differently than others. (*Ashaheed*, *supra*, 7 F.4th at 1243.)

⁷ This is also a constitutionally dangerous rule that even Plaintiff DFEH does not enforce uniformly (Compare DFEH MSJ Opp., p.12:4–8 [baker can refuse to make case “depicting . . . witches”]; with *Benz v. Rogers Memorial Hosp., Inc.* (E.D. Wis., Feb. 9, 2006) No. 04-C-1079, 2006 WL 314407, at *3 [Wiccan is a recognized religion protected against discrimination].)

1 & fn.3 [italics added].) Defendants reject that no reasonable person could make such an inference.

2 **Fourth**, Plaintiff DFEH dismisses Defendants’ assertion of the Hybrid Rights doctrine.
3 (DFEH MSJ Opp., pp.13:9–14:2.) While the doctrine has been severely criticized by many courts, this
4 just shows how deep the split is, as many other courts fully embrace it. (See, e.g., *Telescope Media*
5 *Group v. Lucero* (8th Cir. 2019) 936 F.3d 740, 759–760; see also *Fulton*, *supra*, 141 S.Ct. at 1918 [Alito,
6 J., concurring] [collecting cases on each side of a three-way split].) With Defendants raising both
7 serious speech and religion concerns in this case, the Hybrid Rights doctrine fully applies. (See *Axson-*
8 *Flynn v. Johnson* (10th Cir. 2004) 356 F.3d 1277, 1297.)

9 Under each of the above four arguments, the Unruh Act as applied by Plaintiff DFEH to
10 Defendants is not neutral and generally applicable (DSS ##12–22), thus triggering strict scrutiny,
11 which cannot be satisfied. (Compare DSS ##23–25; with *Fulton*, *supra*, 141 S.Ct. at 1875, 1882.)

12 **2.3. The Free Speech Clause of the U.S. Constitution**

13 The main deficiency in Plaintiff DFEH’s argument is its failure to accept this Court’s prior
14 holding that Defendants’ wedding cakes are speech, subjecting their restriction to strict scrutiny: “A
15 wedding cake is not just a cake in a Free Speech analysis. It is an artistic expression by the person
16 making it that is to be used traditionally as a centerpiece in the celebration of a marriage.” (*Miller*
17 *supra*, 2018 WL 747835, at *3–5.) Instead, Plaintiff DFEH simply cites a case concerning a florist from
18 the Washington Supreme Court for the proposition that this Court should reverse itself, and not view
19 Defendants’ wedding cakes as speech. (DFEH MSJ Opp., p.17:9–11.) Of course, floral arrangements
20 and wedding cakes are very different; the latter is “an instructive example . . . of the proposition that
21 the application of constitutional freedoms in new contexts can deepen our understanding of their
22 meaning.” (*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com’n* (2018) 138 S.Ct. 1719, 1724
23 [“*Masterpiece I*”].) But in any event, since Washington state courts do not provide authority binding
24 on this Court, it is not a basis to reverse itself. (See Tastries MSJ Opp., § B.2.)⁸

25 Under the lesser “expressive conduct” analysis, Plaintiff DFEH concedes that Defendants
26 (1) “intend to convey a message when they sell wedding cakes” (DFEH MSJ Opp., p.18:12–13; DSS

27 ⁸ Also, it is irrelevant that the Unruh Act does not target speech on its face. (DFEH MSJ Opp.
28 pp.17:27–18:1.) Applying it to Defendants’ speech is unconstitutional. (*Hurley v. Irish-American Gay*
Lesbian and Bisexual Group of Boston (1995) 515 U.S. 557, 572.)

#33), but disputes that (2) any reasonable observer would understand that message. (DFEH MSJ Opp., p.18:15–21; DSS #34.) In disputing this, however, Plaintiff DFEH does not offer its own evidence; it simply contends that it is a matter of law and “it is unsupported by the evidence cited.” (DSS #34.) Defendants agree that this is a matter of law that needs no evidence because, unlike flowers, “a wedding cake needs no particular design or written words to communicate the basic message that a wedding is occurring, a marriage has begun, and the couple should be celebrated.” (*Masterpiece I, supra*, 138 S.Ct. at 1743 & fn.2 & 3 [Thomas, J., concurring].) Defendants, however, disagree that the evidence submitted is insufficient. (See DSS #34 [citing 2d Miller Decl., ¶¶ 22–23; Defs. Ex. 17, Jessica Criollo Dep., 85:5–86:6].) Further, in this context, where the Unruh Act as applied is a content-based regulation, strict scrutiny is applicable—not just intermediate scrutiny. (*Masterpiece I, supra*, 138 S.Ct. at 1746 [Thomas, J., concurring] [citing *Texas v. Johnson* (1989) 491 U.S. 397, 412].)

CONCLUSION

Plaintiff DFEH’s opposition boils down to the argument that this Court should broaden the scope of the Unruh Act to help the State in “eradicating” religious conduct that Plaintiff DFEH considers invidious discrimination. (DFEH MSJ Opp., p.20:5–14.) To support this, the DFEH raises the alarm that a flood-gate of religious objectors will lead to actual hardship to the LGBT community (DFEH MSJ Opp., p.2:19–26.) But there is no evidence to support this claim, and even under the rule of this case, religious objectors will have the responsibility to offer an accommodation that ensures full and equal services. (Tastries MSJ Opp., pp.25:21–28; *Fulton, supra*, 141 S.Ct. at 1881–1882.)

Thus, relying on principle alone, Plaintiff DFEH notes that California’s official position is that whenever the rights of sexual minorities and religious minorities clash, the latter must lose (Gov. Code, § 11139.8(a)(4))—never mind that Plaintiff DFEH’s position would have the Court dictate from the bench that “the orthodox doctrines of all three world Abrahamic religions, if not also part of the orthodox beliefs of Hinduism and major sects of Buddhism” (*Miller, supra*, 2018 WL 747835, at *4), have been rooted in bigotry for thousands of years. Such a pronouncement would fly in the face of the U.S. Supreme Court’s holdings in *Obergefell*, and more recently in *Fulton*. (See *id.*) As those cases explain, it is especially when the official policy of California is to discriminate against people of faith that their constitutional rights need to be vigorously protected by the judiciary.

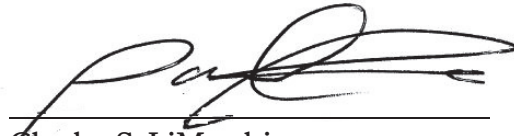
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Respectfully submitted,

LiMANDRI & JONNA LLP

Dated: October 20, 2021

By:



Charles S. LiMandri

Paul M. Jonna

Mark D. Myers

Jeffrey M. Trissell

Robert E. Weisenburger

Milan L. Brandon II

Attorneys for Defendants Cathy's

Creations, Inc. and Catharine Miller

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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 FREEDOM OF CONSCIENCE DEFENSE FUND P.O. Box 9520 Rancho Santa Fe, California 92067 Tele: (858) 759-9948; 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. David R. Lampe

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:

- **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION;**
- **DEFENDANTS CATHARINE MILLER AND TASTRIES BAKERY'S SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS & RESPONSE TO PLAINTIFF'S ADDITIONAL MATERIAL FACTS.**

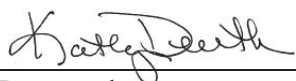
by one or more of the following methods of service to:

Janette Wipper, Chief Counsel
Paula D. Pearlman, Asst. Chief Counsel
Gregory J. Mann - Sr. Staff Counsel
Timothy Martin, Staff Counsel
Department of Fair Employment and Housing
320 4th Street, Suite 1000
Los Angeles, CA 90013
Tel: (213) 439-6799; Fax: (888) 382-5293
E-Mail: Gregory.Mann@dfeh.ca.gov
Attorneys for Plaintiff Department of Fair Employment and Housing

- X **(BY U.S. MAIL)** I caused such document(s) to be sealed in envelopes, and with the correct postage thereon fully prepaid, either deposited in the United States Postal Service or placed for collection and mailing following ordinary business practices.
- 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 October 20, 2021.



 Kathy Denworth

DANIELLE L. GOLDSTEIN, Assistant Chief Counsel (#257486)
GREGORY J. MANN, Associate Chief Counsel (#200578)
TIFFANY TEJADA-RODRIGUEZ, Staff Counsel (#298941)
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)

**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-DRL

**PLAINTIFF DEPARTMENT OF FAIR
EMPLOYMENT AND HOUSING'S
OBJECTIONS TO EVIDENCE FILED
IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION**

Date: Nov. 4, 2021
Time: 8:30 a.m.
Department 11
Judge: David R. Lampe

Action Filed: October 17, 2018
Trial Date: December 13, 2021

Plaintiff Department of Fair Employment and Housing (DFEH) hereby presents its objections
to evidence submitted by defendants Catharine Miller and Tastries in support of their Motion for
Summary Judgment or, in the Alternative, Summary Adjudication.

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**OBJECTIONS TO DECLARATION OF CATHARINE MILLER IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (MILLER DECLARATION)**

Material Objected to:	Grounds for Objection:	Ruling on the Objection:
1. <u>Miller Declaration</u> , ¶ 12: "My decisions on whether to design a custom cake or coordinate an event never focus on the client's identity. Rather, they focus on what the custom cake or event will express or celebrate."	Improper legal conclusion (Evid. Code § 310); Hearsay (Evid. Code, § 1200).	Sustained: _____ Overruled: _____
2. <u>Miller Declaration</u> , ¶ 13: "A potential customer's identity or characteristic simply has no bearing on whether I accept a custom cake order."	Improper legal conclusion (Evid. Code § 310); Hearsay (Evid. Code, § 1200).	Sustained: _____ Overruled: _____
3. <u>Miller Declaration</u> , ¶ 15: "In the baking profession, my policy is not unusual: it is standard industry practice for cake artists to decline to create custom cakes expressing messages or celebrating events that would conflict with their beliefs or worldview."	Lacks foundation (Evid. Code, ¶¶ 403, 702, 800); Lacks personal knowledge (Evid. Code, §§ 403(a)(2), 702); Hearsay (Evid. Code, § 1200).	Sustained: _____ Overruled: _____
4. <u>Miller Declaration</u> , ¶ 18: "I know that there are many other competent store-front bakeries in Bakersfield, and hundreds of "cottage" bakers who make wedding cakes out of their home as allowed under California law. Through my calls to other bakeries, I know that Tastries Bakery is the only bakery that does not provide custom products for same-sex weddings."	Lacks foundation (Evid. Code, ¶¶ 403, 702, 800); Lacks personal knowledge (Evid. Code, §§ 403(a)(2), 702); Hearsay (Evid. Code, § 1200).	Sustained: _____ Overruled: _____
5. <u>Miller Declaration</u> , ¶ 19: "[M]y custom wedding cakes are no exception. They are my artistic expression because, through them, I and my business communicate a message of profound importance. For example, my custom wedding	Improper legal conclusion (Evid. Code § 310); Hearsay (Evid. Code, § 1200).	Sustained: _____ Overruled: _____



1 2 3 4 5 6 7	cakes announce a basic message: this event is a wedding, and the couple's union is a marriage. They also declare an opinion: the couple's marriage should be celebrated. These expressions have a lasting value through pictures presenting the wedding cake as a centerpiece of their wedding celebration. Therefore, whenever I create a custom wedding cake, I am expressing a message about marriage.		
8 9 10 11 12 13 14 15 16 17 18	6. <u>Miller Declaration</u> , ¶ 22: “Even from a secular perspective—absent any religious undertone—the wedding cake has been a symbol of a marital union dating back to the 1700’s. The wedding cake is the centerpiece of the wedding reception and a focal point for pictures and ceremony during the reception. Cutting the cake together is a tradition signifying the first act as man and wife, providing hospitality to their guests as a new family. Feeding each other the first bite of their wedding cake is another ritual reflecting the vows the couple made to each other only moments before to provide for each other.”	Improper legal conclusion (Evid. Code § 310); Lacks foundation (Evid. Code, ¶¶ 403, 702, 800); Lacks personal knowledge (Evid. Code, §§ 403(a)(2), 702); Speculative (Evid. Code §§ 702, 800); Hearsay (Evid. Code, § 1200).	Sustained: _____ Overruled: _____
19 20 21 22 23 24 25 26 27 28	7. <u>Miller Declaration</u> ¶ 23: “In the past, the wedding ceremony was the primary focus and the reception was a short event held in the hall at the church. Even then, the wedding cake was the centerpiece of the reception. Today, the reception has become a much bigger part of the wedding. Now, couples put much more focus on their reception and organize a full day event, but through the years and changing customs, the wedding cake continues to be the traditional centerpiece of the marriage celebration.”	Improper legal conclusion (Evid. Code § 310); Lacks foundation (Evid. Code, ¶¶ 403, 702, 800); Lacks personal knowledge (Evid. Code, §§ 403(a)(2), 702); Speculative (Evid. Code §§ 702, 800); Hearsay (Evid. Code, § 1200).	Sustained: _____ Overruled: _____





1 2 3 4 5 6	8. <u>Miller Declaration</u> , ¶ 25: “Although no professional bakery produces all products entirely from scratch, we go above and beyond most bakeries to produce custom flavors and products with carefully selected ingredients validated through our testing and by customer reviews.”	Lacks foundation (Evid. Code, ¶¶ 403, 702, 800); Lacks personal knowledge (Evid. Code, §§ 403(a)(2), 702); Speculative (Evid. Code §§ 702, 800); Hearsay (Evid. Code, § 1200).	Sustained: _____ Overruled: _____
7 8 9 10	9. <u>Miller Declaration</u> , ¶ 30: “[T]hey [Tastries staff] oftentimes interact with guests as they’re placing the cake, adding flowers or setting up a dessert bar.”	Lacks foundation (Evid. Code, ¶¶ 403, 702, 800); Lacks personal knowledge (Evid. Code, §§ 403(a)(2), 702); Speculative (Evid. Code §§ 702, 800); Hearsay (Evid. Code, § 1200).	Sustained: _____ Overruled: _____
11 12 13 14 15	10. <u>Miller Declaration</u> , ¶ 31: “They know that their custom wedding cake will stand as the iconic centerpiece of the wedding celebration and that some of their friends will want to know who designed it.”	Lacks foundation (Evid. Code, ¶¶ 403, 702, 800); Lacks personal knowledge (Evid. Code, §§ 403(a)(2), 702); Speculative (Evid. Code §§ 702, 800); Hearsay (Evid. Code, § 1200).	Sustained: _____ Overruled: _____
16 17 18	11. <u>Miller Declaration</u> , ¶ 32: “[A]rtistry that goes into each and every wedding cake that we design and create”	Improper legal conclusion (Evid. Code § 310); Hearsay (Evid. Code, § 1200).	Sustained: _____ Overruled: _____
19 20 21 22 23	12. <u>Miller Declaration</u> , ¶ 38: “[N]ew owner (Jennifer) has agreed to accept referrals for same-sex wedding orders. All other bakeries in Bakersfield would do the same, so there are several options for referrals based on the style of cake and how busy each bakery may be.”	Lacks foundation (Evid. Code, ¶¶ 403, 702, 800); Lacks personal knowledge (Evid. Code, §§ 403(a)(2), 702); Speculative (Evid. Code §§ 702, 800); Hearsay (Evid. Code, § 1200).	Sustained: _____ Overruled: _____
24 25 26 27 28	13. <u>Miller Declaration</u> , ¶ 52: “Tastries will suffer significant harm if the Court issues an order that requires Tastries to either accept same-sex wedding cake orders or to stop taking wedding cake orders altogether. Wedding services account for 25–30% of Tastries’ sales revenue with many	Improper legal conclusion (Evid. Code § 310); Lacks foundation (Evid. Code § 403): insufficient foundation laid to opine Tastries would become insolvent;	Sustained: _____ Overruled: _____

customer relationships that follow-on from the initial wedding order (baby showers, birthdays, anniversaries, etc.). Should Tastries stop selling wedding cakes, it would likely become insolvent and be forced to close.”	Speculative (Evid. Code, §§ 800, 803); Hearsay (Evid. Code, § 1200).	
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OBJECTIONS TO DECLARATION OF JEFFREY M. TRISSEL IN SUPPORT OF DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT (TRISSEL DECLARATION)

14. <u>Trissel Declaration</u> , ¶ 4: “Despite this extension, and without waiting to hear from my clients, on December 13, 2017, the DFEH rushed into court and filed a petition for preliminary injunctive relief under Gov. Code, § 12974.”	Lacks foundation (Evid. Code § 403); Lacks personal knowledge (Evid. Code, §§ 403(a)(2), 702); Speculative (Evid. Code, §§ 800, 803); Hearsay (Evid. Code, § 1200).	Sustained: _____ Overruled: _____
15. <u>Trissel Declaration</u> , ¶ 5: “The next day, December 14, 2017, the DFEH tried to obtain a temporary restraining order and order to show cause re: preliminary injunction against my clients making custom wedding cakes for opposite-sex weddings unless they made custom wedding cakes for same-sex weddings.”	Lacks foundation (Evid. Code, §§ 403, 702, 800); Lacks personal knowledge (Evid. Code, §§ 403(a)(2), 702); Hearsay (Evid. Code, § 1200); Irrelevant (Evid. Code, §§ 210, 350); Prejudicial (Evid. Code, § 352).	Sustained: _____ Overruled: _____
16. <u>Trissel Declaration</u> , ¶ 7: “The timing of the DFEH’s decision to initiate a petition for preliminary injunctive relief under Gov. Code, § 12974 has always been strange. The DFEH’s timing was two days before Defendants planned to respond to the DFEH’s interrogatories. However, it was also 10 days after the Supreme Court heard oral argument in <i>Masterpiece Cakeshop, Ltd v. Colorado Civil Rights Comm’n</i> , No. 16-111, and so it could be inferred that the filing was in response to that oral	Lacks foundation (Evid. Code, §§ 403, 702, 800); Lacks personal knowledge (Evid. Code, §§ 403(a)(2), 702); Hearsay (Evid. Code, § 1200); Irrelevant (Evid. Code, §§ 210, 350); Prejudicial (Evid. Code, § 352).	Sustained: _____ Overruled: _____



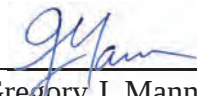


1	argument which favored Defendants' constitutional rights."		
2	17. <u>Trissel Declaration</u> , ¶ 8:	Lacks foundation (Evid. Code, ¶¶ 403, 702, 800);	Sustained: _____
3	"As part of its aggressive litigation tactics, on January 10, 2018, the		Overruled: _____
4	DFEH filed a renewed motion	Lacks personal knowledge (Evid. Code, §§ 403(a)(2), 702);	
5	seeking a preliminary injunction that	Hearsay (Evid. Code, § 1200);	
6	would force Defendants to either	Irrelevant (Evid. Code, §§ 210, 350);	
7	create custom cakes expressing	Prejudicial (Evid. Code, § 352).	
8	messages that violate her faith or		
9	none whatsoever."		
10	18. <u>Trissel Declaration</u> , ¶ 9:	Hearsay (Evid. Code, § 1200);	Sustained: _____
11	"In response to the DFEH's motion	Irrelevant (Evid. Code, §§ 210, 350);	Overruled: _____
12	for a preliminary injunction, my		
13	office and Defendants argued that	Improper legal conclusion (Evid. Code § 310).	
14	Defendants did not make any		
15	distinction on the basis of sexual		
16	orientation, but rather their		
17	objection is simply to sending a		
18	message celebrating any form of		
19	marriage except between one man		
20	and one woman. Defendants do not		
21	wish to send such a message for any		
22	person, regardless of their sexual		
23	orientation. That remains		
24	Defendants' position."		
25	19. <u>Trissel Declaration</u> , ¶ 12:	Hearsay (Evid. Code, § 1200);	Sustained: _____
26	"The DFEH did not appeal the court's	Irrelevant (Evid. Code, §§ 210, 350);	Overruled: _____
27	ruling. Instead, the agency waited for	Improper legal conclusion (Evid. Code § 310).	
28	months, then continued its fruitless		
	investigation of Defendants. On		
	October 17, 2018, the DFEH filed this		
	instant civil action, containing no new		
	material facts."		
	20. <u>Trissel Declaration</u> , ¶ 13:	Hearsay (Evid. Code, § 1200);	Sustained: _____
	"During a discovery hearing in this	Irrelevant (Evid. Code, §§ 210, 350);	Overruled: _____
	case, in response to Defendants		
	argument that the Real Parties in	Lacks foundation (Evid. Code, ¶¶ 403, 702, 800). Defense counsel did	
	Interest may have been primarily	not include the full quote. The next	
	looking for a lawsuit, counsel for the	line reads: "But, again, there is no	
	DFEH responded with the following	evidence of that here, and it doesn't	
	statement. "Plaintiffs have looked for	change anything." (Trissel	
	cases to push the law forever.	Declaration, Ex. A, p. 20:10-11.)	
	Rosa Parks was not just happened to		
	be taking the bus that day. [sic] So		

1 whether or not there is knowledge
2 going in there does not change the
3 fact that there was a violation."

4 Dated: October 6, 2021

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

6 By: 

7 Gregory J. Mann
8 Associate Chief Counsel
9 Attorneys for the Department of Fair
10 Employment and Housing
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